

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Etherton
[2008] EWHC 1715 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL
19/03/2009

Before:

**LADY JUSTICE ARDEN
LORD JUSTICE RICHARDS
and
LORD JUSTICE RIMER**

Between:

JENNIFER MARGARET CHOPRA	Appellant
- and -	
ANGELA BINDRA	Respondent

Ms Josephine Hayes (instructed by Hugh Cartwright & Amin) for the Appellant, Jennifer Margaret Chopra
Mr Mark Warwick (instructed by Rochman Landau) for the Respondent, Angela Bindra
Hearing date: 27 February 2009

Lord Justice Rimer :

Introduction

1. This appeal raises a question of construction arising under a declaration of trust made on 19 August 1988. The declaration was one by which the joint owners of a house, held by them upon an express trust for sale, declared their respective beneficial interests as tenants in common in the proceeds of sale. The question of construction is whether, by clause 1, (i) each acquired an absolute interest in his proportion of such proceeds; or (ii) each only acquired a joint lives interest in such proportion, being however an interest destined to be enlarged into an absolute interest upon a sale of the house during their joint lives. The question arises because clause 4 provided that upon the death before sale of either co-owner (as happened), the survivor became entitled to the entirety of the proceeds of sale absolutely. If the clause 1 question is to be answered in the sense of alternative (i), it is agreed that clause 4 operates as a conditional limitation in favour of the survivor that is void as repugnant to the absolute nature of the deceased's clause 1 interest. If, however, it is to be answered in the sense of alternative (ii), then (subject to a further argument that it is a void testamentary disposition), clause 4 operates as a valid remainder to the survivor.

2. That question, together with others with which we are not concerned, came for decision before Etherton J on the trial of a claim brought by the respondent, Angela Bindra (“Angela”), against the appellant, Jennifer Chopra (“Jennifer”). He regarded the declaration of trust as “on any footing, a most unusual and unhappily drafted document” but held that the clause 1 question was to be answered in the sense of alternative (ii) and that clause 4 was a valid remainder. Jennifer has appealed, with the judge’s permission, against that conclusion.

The facts

3. The first marriage of the late Dr Akash Chopra (“Akash”) ended in divorce in 1986. In 1988 Akash and his sister, Angela, bought a house at 80 Ridge Lane, Watford, Hertfordshire for Akash’s occupation. The price was £231,000, to which Akash and Angela made cash contributions of £72,169 and £2,108 respectively. The balance was borrowed from a bank on the security of a charge of the house. Completion of the purchase took place on 19 August 1988, when the house was transferred to Akash and Angela “TO HOLD unto themselves as tenants in common upon the trusts declared by a deed” made on the same day. Akash and Angela were registered at HM Land Registry as joint proprietors of the house in September 1988.
4. That deed (“the deed”) was the declaration of trust. It recited the transfer of the house to Akash and Angela, the legal charge and their respective cash contributions to the purchase. After then reciting that:

“It has been agreed by Akash and Angela that they shall hold the property jointly as trustees for sale with power to postpone sale and that they shall hold the proceeds of such sale upon trust for themselves as tenants in common.”

the operative parts provided as follows (clauses 1 and 5 include italicised words that it is agreed that the original omitted but have to be read in):

“1. Akash and Angela shall hold the property on trust to sell the same with power to postpone sale unless and until one or both of the parties hereto or persons claiming under him or her or them shall deliver such notice as is hereinafter provided *AND upon the sale of the property* they shall hold the net proceeds of sale (after deducting thereout the balance of any money due under the said legal charge and the costs incurred in selling the property) on trust for themselves as tenants in common in the proportions hereinafter mentioned.

2. Akash shall be entitled to £72,169.00 of the said net proceeds of sale and Angela shall be entitled to £2,108.00 of the net proceeds of sale.

3. Out of the remaining balance of the net proceeds of sale Akash shall be entitled to [75%] and Angela shall be entitled to the remaining [25%].

4. Upon the death before sale of either Akash or Angela the trustees shall hold the property upon trust for the survivor of Akash or Angela who shall thereupon be entitled to the whole proceeds of sale absolutely.

5. Any party hereto or those claiming under him or *her or* them may give to the trustees notice in writing requiring the trustees to sell the said property and thereupon the trustees shall use their best endeavours to effect a sale of the said property as soon as circumstances admit.

6. The trustees for the time being of this deed shall have full power to sell mortgage charge lease or otherwise dispose of the property or any part thereof with all the powers in that behalf of an absolute owner.”

5. Following the purchase, Akash moved into the house and lived there. He later met Jennifer, who moved in with him in 1995. They married in September 2001. Akash made his last will in July

2004, naming Jennifer as his executrix and sole beneficiary. He died in September 2004. Jennifer obtained probate of his will in August 2007. The house was unsold at his death. It was still their matrimonial home.

6. The house was sold with vacant possession in February 2008 and the net proceeds of £341,846.22 were paid into an interest bearing account pending the outcome of the issues raised by the claim that Angela had commenced against Jennifer in March 2005. Her claim and Jennifer's counterclaim were tried over five days in June 2008 by Etherton J. Angela's claim was that, as the house was unsold at Akash's death, she became absolutely entitled to it and its proceeds of sale under clause 4 of the deed. Jennifer's primary answer was that clause 4 was void as repugnant to the absolute interest in the proceeds given to Akash by clause 1 and that Akash's interest in such proceeds devolved on her under his will. Subject to the repayment to her and Angela respectively of the original cash contributions, she claimed to be entitled to 75% of the balance of the proceeds of sale and accepted that Angela was entitled to the remaining 25%. Etherton J preferred Angela's argument and made a declaration as sought by her.

The judgment below

7. Etherton J said that his immediate impression was that (subject to the repayment of their respective cash contributions) clause 1 gave Akash and Angela absolute entitlements to the proceeds of sale of the house in the proportions 75/25. If that was right, clause 4 – which purported to shift Akash's absolute interest to Angela – was repugnant to the rights that were incident to that interest and so void. The judge referred to *In re Dugdale, Dugdale v. Dugdale* (1888) 38 Ch.D. 176, in which Kay J said, at 182:

"I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person."

8. In coming to his conclusion that that principle did not enable Jennifer to knock out clause 4, the judge had regard also to the well-established principle under which courts should attempt to give an instrument an interpretation that will validate rather than destroy its provisions. Clause 4 was deliberately included in the deed and the court should therefore be slow to favour an interpretation that involves its rejection. The judge referred in that context to the observations of Lord Brougham LC in *Langston v. Langston* (1834) Cl. & Fin. 194, at 243/244; and also to *The Interpretation of Contracts*, Lewison, 2007 (para. 7.15), which includes a reference to an observation by Lord Hoffmann in *Bank of Credit and Commerce International SA v. Ali* [2002] 1 AC 251. Lord Hoffmann was discussing the extent to which the background to a document is admissible for the purpose of its interpretation and said (at 269):

"It is not, for example, confined to the factual background but can include the state of the law (*as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective*)" (Emphasis supplied)

9. Etherton J's conclusion was that it was possible to, and that he should, interpret the deed in a manner that gave effect to rather than rejected clause 4. He held that the answer lay in interpreting clause 1 as giving Akash and Angela interests in the house and its income during their joint lives or until its earlier sale. Whilst nothing in clause 1 said that expressly, that interpretation was not inconsistent with what it did say expressly. On that basis, clause 4 provided conventionally for cross-remainders after the termination of a life interest and there was no question of its being repugnant to clause 1. The judge rejected Jennifer's alternative argument that clause 4 was a purported testamentary disposition that was void for want of compliance with section 9 of the Wills Act 1837.

The appeal

10. Ms Josephine Hayes, for Jennifer, advanced a cogent argument to us in support of the view that clause 1 of the deed gave Akash an absolute interest in his share of the house and its proceeds and that clause 4 should be rejected as repugnant to that disposition. She pointed out that section 3 of the Trusts for Land and Appointment of Trustees Act 1996 abolished the doctrine of conversion, including in relation to a trust for sale created by instruments such as the deed that pre-dated the Act. But the interpretation of the beneficial trusts created by the deed must be ascertained as at the time of its creation in 1988, when the doctrine of conversion was alive and well, and the 1996 Act could not have had the effect of retrospectively changing those trusts. Under the doctrine of conversion, the house was deemed to be sold at the moment the trust for sale arose – regardless of when it was actually sold – and the trusts created by the deed were trusts of its proceeds of sale. That was recognised by clause 4, which described the survivor as “entitled to the whole net proceeds of sale absolutely” in a context in which the house was known to be unsold.
11. That background was, Ms Hayes submitted, relevant to the interpretation of the deed. Since the house was, from the outset, notionally proceeds of sale, there was no sound basis for an interpretation of clause 1 that gave Akash and Angela mere joint lives interests in the proceeds until an actual sale, but gave them absolute interests upon such a sale. The point of the doctrine of conversion was to avoid the arising of capricious results that would or might arise if the precise moment of sale dictated whether the rights of the beneficiaries were in realty or personalty and where an omission to effect a sale might be attributable to a default by the trustees: *In re Richerson, Scales v. Heyhoe* [1892] 1 Ch 379, at 383, Chitty J. The judge’s decision in the present case was that an *actual* sale during the joint lives of the tenants in common enlarged their life interests to absolute interests. As appears from my quotation of clause 1, the deed as executed omitted the words that explain when, on the judge’s interpretation, the absolute interests arise. As I have said, there is no dispute that the italicised words are the right ones, and we had no argument to the effect that anything turned on their omission in the original. But Ms Hayes did ask a legitimate rhetorical question: namely, precisely *when* is the life interest enlarged into an absolute interest? Is it (i) when a clause 5 sale notice is served; (ii) when a contract for sale is entered into; or (iii) when the sale is completed? I would not regard alternative (i) as a serious contender, but the contest between alternatives (ii) and (iii) is closer. Whatever the answer, one consequence of the judge’s interpretation is that the enlargement of the life interests into absolute interests could be frustrated, or at least delayed, by the refusal of one trustee to co-operate in a sale. It was inherent in Ms Hayes’s submission that that would be an odd result: it would lead to the sort of capriciousness that the doctrine of conversion was directed at avoiding.
12. More generally, Ms Hayes submitted that there is nothing in clause 1 to indicate that, down to the point of sale during the joint lives, the co-owners were merely to have enlargeable joint lives interests. Clause 1 is in fact silent as to the trusts of the net rents and profits of the house until sale. Of course in practice the house was going to be occupied by Akash as his home and there would be unlikely to be any such rents and profits. But if the parties’ intentions were that their beneficial interests in the house and its proceeds of sale *before* an actual sale were to be of a nature different from those arising *upon* an actual sale, clause 1 might be expected to say so. The natural interpretation of clause 1 is, Ms Hayes submitted, that the co-owners had the like absolute interests in the proceeds before an actual sale as upon such a sale. If there is a void in clause 1 by its omission to identify the beneficial interests in the house and its proceeds pending an actual sale, there would be a resulting trust of such interests in favour of Akash and Angela as the purchasers, being one under which by inference they would take absolute interests. There might perhaps be a question as to the proportions of their respective interests, but Ms Hayes suggested that it would be 75/25.
13. Approaching the deed on that basis, Ms Hayes submitted that the judge was wrong to interpret clause 1 as giving Akash and Angela joint lives interests in the house and its proceeds until sale. He should have held that it gave each an absolute interest, with the consequence that the

limitation in clause 4 that purported to shift to Angela, and so defeat, Akash's interest in the event of his death before a sale was void as repugnant to that interest.

14. Ms Hayes's alternative submission was that clause 4 was a purported testamentary disposition by Akash to Angela of his absolute interest, but one that was void for want of compliance with section 9 of the Wills Act 1937 (the execution of the deed had only one witness). If Ms Hayes is right that clause 1 gave Akash an absolute interest, then since clause 4 was admittedly void she did not need to invoke this further argument and there is no need to consider it.
15. If, however, the judge was right to hold that clause 1 gave Akash and Angela mere joint lives interests until an actual sale and that clause 4 operated as a remainder to the survivor, that remainder cannot, I consider, be regarded as a testamentary disposition. It is the essence of a testamentary disposition that it is only intended to take effect after the testator's death and is revocable during the testator's lifetime. The deed in the present case disposed of the proceeds of the unsold house with immediate effect and was irrevocable. Ms Hayes nevertheless maintained her alternative submission as an answer to the judge's upholding of clause 4 as a valid remainder.
16. Ms Hayes sought to make good her submission by reference to authority. She relied on two cases in particular. Neither supported her submission and, with respect, both appeared to me to illustrate its error. *Re Pfrimmer*[1936] 2 DLR 460 was a decision of the Manitoba Court of Appeal. Mr Pfrimmer made a will in 1930 which disposed of a house on various trusts. Following his death, the will was admitted to probate when the question arose as to whether the carrying into effect of the testamentary trusts was prevented by two documents (one called a "Declaration of Trust") that he had executed five years before he made his will. The documents related to the same house and, if they created a valid trust in respect of it, the provisions in the will could not take effect. The question was whether they did create such a trust, or whether they took effect only as a testamentary disposition. The court's conclusion was that the documents showed that the land subject to them was to remain in Mr Pfrimmer's disposition to do with what he liked and that it was not until his death that they were intended to become operative; and that they were intended to take the place of a testamentary disposition in order to avoid probate expense and succession duties "and not to create an irrevocable trust by a binding transfer of the properties." Trueman J.A., giving the judgment of the court, said (464):

"The law is clear that to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such interest beyond his own reach. ... Whatever may be the form of an instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon the death for its vigour and effect, it is not a trust.

Thus, in *Malim v. Keighley*, 2 Ves. Jun. 333, at p. 335, 30 E.R. 659, the Master of the Rolls said:— 'I will lay down the rule as broad as this; wherever any person gives property, and points out the object, the property and the way in which it shall go, that does create a trust, unless he shews clearly, that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it.'"

In the present case, if the judge's interpretation of the deed was correct, Akash's execution of it disposed of his interest in the unsold house; and upon its execution, it was beyond his power to recall that disposition. Clause 4 was not a disposition intended to take effect only upon Akash's death. It took effect immediately and irrevocably gave Angela a contingent remainder in his interest in the house so long as it remained unsold.

17. Ms Hayes also relied on *Re White* (1987) 38 DLR (4th) 631, a decision of the Ontario High Court. Three sisters, Charlotte, Frances and Sarah, executed a deed with two schedules. Schedule 1 listed property jointly owned by Charlotte and Frances; and Schedule 2 listed property jointly owned by Charlotte and Sarah. The deed provided for the income of all listed properties to be payable to Charlotte and Sarah during their joint lives and the life of the survivor; and on the

death of the survivor, the scheduled properties were to become the property of Frances. The trusts were akin to the joint lives interests and cross-remainders that the judge derived from the deed in the present case save for the (I consider) irrelevant distinction that, whereas Frances's interest in remainder was vested, the cross-remainders were contingent.

18. There was no suggestion in *White* that the ultimate gift in favour of Frances was a testamentary disposition, although it was one that Frances was only to enjoy upon the death of Charlotte and Sarah. That suggestion arose only in relation to a further provision in the deed by which, upon Charlotte's death, any property that was *unlisted* in either Schedule and was jointly owned by Charlotte and Frances was to be sold and its proceeds distributed in a particular way. The deed did not identify any such properties, it imposed no trusts in relation to them during Charlotte's lifetime and such properties could (as it was claimed they did) include after-acquired properties. The court's conclusion was that (i) as the properties to which this provision applied could not be identified until Charlotte's death, and (ii) they were not the subject of any dispositive provision by the deed save for the purported gift of capital after Charlotte's death, (iii) this further provision was therefore intended to operate only after Charlotte's death and so was a testamentary disposition, and (iv) it was revoked by Charlotte's later will.
19. There is no need to labour the obvious distinction between *White* and the present case. *White* would only be in point if, for example, there had been a further provision in the deed whereby Akash purported to give to Angela upon his death an interest he had in other property. That might well have been a purported testamentary disposition. Clause 4, however, was nothing of the sort. It is either void for repugnancy or else was a valid disposition in remainder of Akash's interest in the unsold house. It is not an invalid testamentary disposition.
20. In my judgment, therefore, the only point in Jennifer's appeal is Ms Hayes's primary one, namely as to the alleged repugnancy of clause 4 to the clause 1 disposition. Angela's argument in response to that, advanced with matching cogency by Mr Warwick, was that Ms Hayes's submission focused on clause 1 in isolation whereas the correct approach is to interpret clause 1 in the context of the deed as a whole. The heart of his submission was that, in so interpreting the deed, the court should strive to give effect to all of it and be slow to reject or negative a provision in it which the parties plainly intended to govern their arrangements. On this basis, the court should interpret clause 1 by having regard also to its relationship with clause 4. The parties are not lightly to have attributed to them an intention that clause 4 should be rejected as repugnant. They obviously intended it to have operative force. The sense of their arrangements reflected in the deed was that (i) if the house was actually sold during the joint lives of Akash and Angela, they should (by clause 1) each have absolute interests in the proceeds; but (ii) that if it was not so sold, then on the death of one of them it was (by clause 4) to become the sole property of the survivor. There is no sensible way in which that intention can be effected save by recognising that clause 1 did no more than implicitly create interests in the house and its proceeds during the co-owners' joint lives or until an actual sale. On that basis clause 4 was not repugnant to Akash's interest.

Discussion and conclusion

21. I admit to having been initially attracted by Ms Hayes's argument that the natural interpretation of clause 1 requires the conclusion that it gave Akash and Angela absolute interests in their proportionate share of the net proceeds of sale of the house from the outset. I am not convinced that, even if (as I am prepared to assume) an understanding of the doctrine of conversion is to be attributed to the parties, it advances the argument very far. I do, however, have an instinctive difficulty with the (so it seems to me) somewhat artificial notion that the language of clause 1 creates mere joint lives interests in the unsold house, being interests that are enlarged to absolute interests upon the sale of the house following the giving of a clause 5 sale notice. I find instinctively more compelling that clause 1 is doing no more than reflecting the practical background against which the deed came to be executed. That background was one in which Akash and Angela each made contributions to the purchase (his being very much larger) but the

house was to be occupied by him as his home and so was unlikely pending its sale to yield any income for either of them. In practice, during their joint lives neither would receive any cash benefit from the house except upon sale; and the primary purpose of clause 1 was to explain how each was entitled to insist upon a sale, whereupon the proceeds would be divided between them in the prescribed proportions. None of that lends any support to the notion that clause 1 creates limited interests until sale with cross-remainders in respect of the unsold house to the surviving co-owner.

22. The problem, however, with that approach is that it fails to interpret clause 1 in the context of the deed as a whole. In particular, it fails to factor clause 4 into the interpretation exercise save as a provision that must be rejected as repugnant to the absolute interests that clause 1 is assumed to create. In my judgment, however, as the judge held and as Mr Warwick submitted, that is to adopt the wrong approach. Clause 4 is a provision that the parties deliberately included and it provides that if the house is *unsold* at the death of the first tenant in common to die, it shall belong to the survivor absolutely. There is no difficulty in understanding that; and the inference is that it reflects what Akash and Angela both intended. Yet Ms Hayes asks the court to reject clause 4 as repugnant and void.
23. It is, in my judgment, obvious that the parties did not intend that it should be rejected. Drawing on what Lord Hoffmann said in *Ali*'s case, in interpreting the deed the court can have regard to the fact that it is unlikely that the parties intended clause 4 to be ineffective; on the contrary, they plainly intended it to be effective. If the house was not sold during their joint lives, they intended that it should belong to both during their joint lives and to the survivor absolutely upon the death of the first to die. That is the only way in which full effect can be given to clauses 1 and 4 when read together as part of the deed as a whole. That is the interpretation that the judge placed upon the deed. In my judgment he was right.
24. I would dismiss the appeal.

Lord Justice Richards :

25. I agree.

Lady Justice Arden :

26. I also agree.