

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
CHANCERY DIVISION, LEEDS DISTRICT REGISTRY
HIS HONOUR JUDGE BEHRENS, sitting as a judge of the High Court
Lower Court No: 7L531401**

Royal Courts of Justice
Strand, London, WC2A 2LL
02/12/2008

B e f o r e :

**THE RIGHT HON SIR ANDREW MORRITT, THE CHANCELLOR
LORD JUSTICE HOOPER
and
LORD JUSTICE WILSON**

Between:

ROY FREAR

Appellant

- and -

DAVID FREAR and

**JULIE NICHOLSON (the personal
representatives of MARY FREAR, deceased) Respondents**

**MR TIMOTHY HIRST (instructed by Atkinson and Firth, Shipley) for the Appellant
MR JONATHAN WALKER-KANE (instructed by Turners, Cross Hills) for the Respondents
Hearing date: 6 November 2008**

Lord Justice Wilson:

Section A: Introduction

1. The claimant appeals from the dismissal of his claim against the two personal representatives of the estate of his deceased mother (“the mother”) by His Honour Judge Behrens, sitting as a judge of the High Court, Chancery Division, Leeds District Registry, on 17 January 2008.
2. The mother died on 19 December 2005. By her last Will, made on 7 March 2005 and duly admitted to probate, she made specific legacies in relation to all her chattels and devised and bequeathed her residuary estate as to 50% to the claimant and as to the other 50% to her other four children (“the siblings”), who include her two executors, in equal shares.
3. The only asset falling into the mother’s residuary estate is an unencumbered freehold interest in 75 Goulbourne Street, Keighley, West Yorkshire, “(the property)”, which had become vested in her sole name. It is no longer in issue that at the date of her death she held at least part of the beneficial interest in the property: but whether she held the entire beneficial interest in it or only

one half of it remains in issue. The evidence before the judge was that the property had a value of £85,000. Today it is on the market for sale at £95,000. The estate has no debts other than in relation to its costs of these proceedings.

4. Since the mother's death the claimant has resided alone at the property.
5. Before the judge the claimant put forward two alternative arguments:
 - (a) that at the date of her death the mother held the legal interest in the property on trust for himself absolutely, with the result that no part of the beneficial interest in the property fell into her estate and he was entitled to the transfer of the legal interest to himself absolutely; or
 - (b) that at the date of her death the mother held the legal interest in the property on trust as to one half for himself and as to the other half for herself, with the result that one half of the beneficial interest in it fell into her estate and that, in the light of the provision by her Will that he should receive one half of her estate, he became entitled, in all, to three quarters of the beneficial interest in the property.
6. The judge rejected both of the claimant's arguments. In accordance with the contentions of the executors he held that at the date of her death the mother held the property absolutely in equity as well as in law; that, however, she had been under an obligation to the claimant to bequeath to him one half of the beneficial interest in it; and that, by bequeathing to him one half of her estate, she had in effect discharged it.
7. So the judge made an order for sale of the property on the basis that the executors would distribute its entire net proceeds in accordance with the Will, i.e. that they would in effect pay only one half of them to the claimant.
8. By his appeal the claimant pursues only his second argument set out at [5(b)] above.
9. The judge made certain findings of fact inconsistent with the account given to him by the claimant. Wisely the claimant does not seek to challenge them. His argument is that, even on the basis of them, his second argument should have prevailed. The facts which the judge found and upon which we thus proceed are few and simple.

Section B: The Facts

10. In 1966, when he was about aged 17 and was living with his parents and siblings in rented accommodation, the claimant unfortunately suffered an injury. In about 1972 he received about £5000 by way of compensation for it. He decided to apply part of it as a deposit for the purchase of a home to which the family would move.
11. Thus in 1972 a property at 360 Skipton Road, Keighley, ("the original property"), was bought. It was vested in the claimant's sole name. The purchase price was £3600. Out of his compensation the claimant contributed £2000 by way of the deposit. The balance of £1600 was borrowed on mortgage.
12. Between 1972 and 1982 the claimant, his father ("the father") and the mother lived at the original property. So also, for parts of that decade, did some or all of the siblings.
13. The judge found that, although the mortgage on the original property had been taken in the claimant's name, the father had paid all the instalments under it. It was a repayment mortgage so the debt of £1600 was reduced as time went on.
14. In 1982 the family decided to move to smaller accommodation: so the original property was sold and the property was purchased.

15. The price for which the original property was sold was £18,500. After redemption of the mortgage, the amount of which had been reduced to £823, and after deduction of incidental costs of sale, its net proceeds amounted to £17,062.
16. The price for which the property was purchased, inclusive of incidental costs of purchase, was £14,272. No mortgage was taken out on it. The price was entirely paid out of the net proceeds of the original property. The balance of its net proceeds, namely £2790, was paid to the claimant.
17. But the property was vested in the name not of the claimant but of the mother and father as joint tenants. The judge accepted that, although the father had discharged all the mortgage instalments on the original property and although the balance of its net proceeds had been paid entirely to the claimant, the latter had probably contributed rather more than one half of the purchase price of the property. But the judge's findings were as follows:
 - (a) that there were discussions between the claimant and the parents, including in the presence of the solicitors who had conduct of the purchase, as to the person or persons in whom the property should be vested;
 - (b) that the vesting of the property in the name of the parents was a deliberate decision on the part of the claimant as well as on their part;
 - (c) that in that regard the claimant wished to provide security for them during their lives;
 - (d) that his discussions with them also related to the ownership of the property following their deaths; and
 - (e) that in the end they and the claimant agreed that "he would be entitled to half of the property when they died".
18. Between 1982 and 1988 both the parents lived in the property. From 1988, when the father died, the mother continued to live in the property until her death in 2005. On the father's death she had become its sole legal owner. Between 1982 and 2005 the claimant also lived in the property albeit not continuously. Following the father's death there were arguments between him and the mother and there were periods, in particular from 1990 until 1995, when he did not live there.
19. At one stage prior to his death the father raised the idea that the property should be sold and that the claimant should be given what the father described as "his half".
20. During her arguments with him in subsequent years the mother said in terms, according to evidence, accepted by the judge, which was given by some of the siblings who witnessed them, that the claimant was entitled not to the whole property but only to one half of it.
21. Surveying the matter more broadly than by reference to particular conversations, the judge expressed himself "wholly satisfied", in the light of the evidence of the siblings, that "both [the parents] believed that [the claimant] only had a half share in the property".

Section C: The Judge's conclusions

22. The judge set out his conclusions in the following paragraphs:

"33. It seems that a proper interpretation of what happened here is that the two parents did indeed get the full beneficial interest in [the property] but that they had an obligation to leave to [the claimant] one half of the property on death. That was certainly a moral obligation, but it seems to me that had it not been honoured in the will, it would have been open to [the claimant] to claim it either by way of constructive trust or by way of proprietary estoppel.

34. In this case, of course, [the mother] has honoured that obligation because she has indeed left him one half in the will. In my judgment that is all that he was entitled to and he is not entitled to any more.

35. Mr Hirst [on behalf of the claimant] submitted that if I was against him on [his first] argument I should effectively allow him three-quarters of the estate because he had a beneficial half share in the estate, so that that meant that [the mother's] interest was only a half of which half was left to [the claimant]. I see the force of that submission, but for the reasons that I have just given I do not accept it. In my view [the mother] did have the whole of the beneficial interest but it was subject to the obligation that I have indicated. She has honoured that obligation and there is no further claim by [the claimant]. In other words I do not accept Mr Hirst's submission that it was the common intention of the parties that [the claimant] should have a half share in the property apart from any entitlement he might have to the property after his parents' death."

Section D: The rival contentions on this appeal

23. The contentions of Mr Hirst on behalf of the claimant may be summarised as follows:

(a) the judge was wrong to hold that, in relation to the property, the claimant had no more than a right that the survivor of his parents would bequeath to him one half of the beneficial interest in it;

(b) instead the judge should have held that, following its purchase in 1982, the parents (and thus the survivor of them) held the legal interest in the property in trust as to one half for the claimant and as to the other half for themselves;

(c) it follows that it was open to the mother, by her Will, to dispose only of one half of the beneficial interest in the property;

(d) contrary to the conclusion of the judge, the mother did not purport, by her Will, to dispose of more than one half of the beneficial interest in the property; in this regard it is significant that, by her Will, she provided, subject to the minor specific legacies, for the disposition of the "remainder of [her] real and personal property" rather than, for example, of "[her] property known as 75 Goulbourne Street";

(e) in disposing of her one half of the beneficial interest in the property the mother chose to bequeath one half of it to the claimant;

(f) thus the claimant is now entitled, in all, to three quarters of the beneficial interest in the property;

(g) the equitable doctrine of election (as to which see [24(i)] below) does not require the claimant to be put to an election because:

(i) the mother did not purport by her Will to dispose of the claimant's one half of the beneficial interest in the property; and, alternatively, if she did purport to do so,

(ii) her purported bequest of his interest was to himself, rather than to another person, and so falls outside the ambit of the doctrine.

24. The contentions of Mr Walker-Kane on behalf of the executors (partly included in a Respondent's Notice so that, in defending the judge's conclusion, he might nevertheless depart from some of his analysis) may be summarised as follows:

(a) the judge was correct to hold that, in relation to the property, the claimant had no more than a right that the survivor of his parents would bequeath to him one half of the beneficial interest in it;

(b) the claimant's right arose under a contract to that effect made with the parents at the time of the purchase of the property in 1982;

(c) the judge was wrong to hold that the claimant's right could have been enforced by way of constructive trust or proprietary estoppel;

(d) it follows that it fell to the mother, by her Will, to dispose of the whole of the beneficial interest in the property subject to the fact that, in doing so, she had to discharge her contractual duty to the claimant;

(e) the mother correctly purported, by her Will, to dispose of the whole of the beneficial interest in the property and, by bequeathing one half of it to the claimant, she discharged her contractual duty to him (and thus no issue arises as to the enforceability of the contract in the absence of writing under s.40(1) of the Law of Property Act 1925);

(f) it follows that, as the judge held, the claimant is now entitled to no more than one half of the beneficial interest in the property;

(g) if, alternatively to (a) and (b), the claimant has since 1982 been the owner of one half of the beneficial interest in the property, it would indeed follow that it was open to the mother, by her Will, to dispose only of the other half of it;

(h) in that event, alternatively to (e), the mother would have been incorrect in purporting, by her Will, (as she did) to dispose of the whole of the beneficial interest in the property;

(i) but, in that same event, the equitable doctrine of election would require the claimant to be put to an election: in that the mother, unaware that he already held one half of the beneficial interest in the property, intended, by her Will, that he should receive one half (and not three quarters) of the beneficial interest in the property, equity would put the claimant to an election whether to keep his existing beneficial interest and to renounce his bequest or to accept his bequest and to compensate the estate by ceding to it his existing beneficial interest or its notional value. Whichever his election, the result would be that he would keep or receive only one half of the beneficial interest in the property.

25. The doctrine of election was not raised in argument before the judge. It was this court, which, on the day prior to the hearing, first raised it with counsel as being arguably relevant. It will be seen that Mr Walker-Kane now relies on it and that, in answer, Mr Hirst contends that it does not apply. In the circumstances we did not require Mr Walker-Kane to amend his Respondent's Notice in order to rely on the doctrine.

26. The rival contentions fall neatly into two parts.

Section E: Contract or beneficial interest?

27. In my view the judge's conclusion that at the date of the mother's death the claimant did not hold one half of the beneficial interest in the property but had only a right that one half of it would be bequeathed to him was against the weight of the evidence.

28. In this respect the starting-point seems to me to be the original property, out of the proceeds of sale of which the property was bought. The original property was vested in the claimant's sole name and there is no doubt that he had a substantial beneficial interest in it. Mr Hirst suggests that the words of the judgment which I have quoted at [21] above represented a finding that the

parents believed that the claimant had a beneficial interest in one half of the *original* property. From its context it is clear to me that, albeit arguably inconsistently with his ultimate conclusion, the judge was at that stage referring to the property. It matters not: for on any view the claimant had a substantial beneficial interest – in my view it amounted *at least* to one half of it but it is convenient to treat it as one half – in the original property.

29. What then was the evidence to support the conclusion that, at the time of the purchase of the property, the claimant forewent acquisition of a beneficial interest reflective of his one half interest in the money deployed in its purchase? The only arguably relevant evidence in this respect was that the claimant wished to provide security for his parents during their lives. Such clearly informed the decision to vest in them the legal interest in it. But it did not follow that the claimant was to forego the beneficial interest in the property which would otherwise have been his. At one stage it crossed my mind that the legal framework best reflective of what was agreed was that the claimant indeed retained one half of the beneficial interest in the property but in reversion and subject to a life interest in each of the parents. But such is a hypothesis canvassed neither by counsel nor by the judge; and on reflection it introduces a complexity unnecessary for the service of the mutual intention to provide the parents with security in the property during their lives. For, even if his beneficial interest was in possession rather than in reversion, any application made by the claimant during the life of the parents or the survivor of them for an order that they or the survivor should sell the property and account to him would, even prior to the introduction of ss 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996, have been likely to fail in the light of the trust's purpose.
30. In my view therefore there is no evidence to justify a conclusion that the claimant forewent the beneficial interest in the property which would ordinarily have arisen in his favour. On the contrary the father's reference to giving to the claimant "his half"; the mother's statement or statements in the course of arguments with him that he "was entitled" not to the whole property but nevertheless to half of it; and the belief of both parents that he "only had" a half share in it: all these three features clearly point to a mutual recognition that, even prior to both their deaths, he was, as to half, an owner of the property. The only primary factual finding of the judge which seems to run counter to this conclusion was that at the time of purchase the claimant and the parents agreed that "he would be entitled to half of the property when they died". In my view that finding is not sufficiently significant to displace the weighty evidence which runs the other way; and it is perhaps best interpreted, with only a little strain, as being that the claimant would be able to realise his half interest in the property once they had died.
31. I hold that Mr Hirst is right to contend that the claimant held one half of the beneficial interest in the property from the time of its purchase and that therefore the judge's conclusion that instead there was only an obligation on the part of the parents to bequeath such an interest to him cannot stand. Indeed the judge's own comment that, had the obligation not been honoured, the claimant could have asserted rights under a constructive trust seems to me to be entirely inconsistent with his conclusion.

Section F: Should the claimant be put to an election?

32. In *Brown v. Gregson* [1920] AC 860, at 868, Viscount Haldane explained the doctrine of election as follows:

"The doctrine of election ... is a principle which the Courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. It is not merely the language used to which the Court looks. A testator may, for instance, have obviously failed to realise that any question could arise. But the Court will none the less hold that a beneficiary who is given a share under the will in assets, the total amount of which depends on the inclusion of property belonging to the beneficiary himself which the testator has ineffectively sought to include, ought not to be allowed to have a share in the assets effectively disposed of, excepting on terms. He must co-operate to the extent requisite to

provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share to which he is prima facie entitled, to an extent equivalent to the value of his own property if withheld by him from the common stock.”

33. Thus the doctrine does not apply to the present case unless, when she made her Will, the mother considered that she owned the entire beneficial interest in the property and thus purported thereby to dispose not only of her half interest, but also of the claimant’s half interest, in it.
34. Albeit of course that it was reached by an entirely different route, Mr Walker-Kane has a finding of the judge in his favour in this regard. Inherent in the judge’s conclusions that the mother was obliged to bequeath to the claimant one half of the beneficial interest in the property and that, by her Will, she discharged her obligation was a finding that the mother considered that, by her Will, she was disposing of the whole of the beneficial interest in the property. Indeed, although Mr Hirst stresses that in her Will she did not expressly refer to the property and that, had she done so, the ambit of her intended disposition would probably have been clearer in one way or the other, her disposition of chattels by specific legacies and her lack of other assets rendered the property the only subject of her residuary estate; and there was no piece of evidence before the judge which gave credence to the suggestion that, by her Will, she intended that the claimant should end up with three quarters of the beneficial interest in it or otherwise ran counter to the judge’s conclusion that she was purporting to dispose of the whole of the beneficial interest in it.
35. But the matter is confirmed beyond doubt by fresh evidence which we allowed Mr Walker-Kane to adduce in this appeal. It is an attendance note which was made by the solicitor who drew the mother’s Will and is dated eight days prior to her execution of it. It relates to his attendance made on her on that day, in the presence of one of the proposed executors, in order to take her instructions in relation to it. In his note the solicitor recorded:

“[The claimant] does not work being disabled after a road accident. He still lives at home ... *The principal asset in the estate is the house*. It is believed that [the claimant] would not want to stay in the house after his mother’s death. [The proposed executor] said the rest of the family would not throw him out and he would be given time to sort out his affairs.” *Emphasis supplied*.

36. Following our decision to admit the solicitor’s note into evidence, made without significant opposition from Mr Hirst and certainly without dissent from the suggestion that the note seemed to bear a substantial relevance, Mr Hirst has sought – both at a later stage of the hearing and by a subsequent written submission – to fight a rearguard action against its admissibility. Since, as I have explained, it was inherent in the judge’s own conclusion that the mother was purporting to dispose by Will of the whole of the beneficial interest in the property and since Mr Hirst never submitted to him – still less has complained to us – that it was not open to the judge to survey every part of the evidence upon which his conclusion was based, the solicitor’s note is only confirmatory of a finding already properly made. Nevertheless I should note Mr Hirst’s objection, which is squarely based on the proposition in Snell’s Equity, 31st ed., at 6 – 31(2) (being within the section on the doctrine of election), as follows:

“Parol evidence is not admissible to show that the testator intended to include property which he wrongly thought to be his own in a general devise or bequest.”

37. There is no doubt that the law adopts a strong presumption that a testator will have purported to dispose only of property of which he was free to dispose: *Wintour v. Clifton* (1856) 8 De G M & G 641. There is no doubt also that the quoted proposition in Snell’s Equity correctly reflects the law’s ancient rejection of parol evidence in rebuttal of the presumption where, as in the case of a general devise or bequest, the terms of the Will themselves raise no doubts about the ambit of the testator’s intended disposition. Thus, for example, in *Clementson v. Gandy* (1836) 1 Keen 309 Lord Langdale MR, in rejecting an attempt to invoke the doctrine of election, said, at 317:

“But parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood.”

In *Maxwell v. Maxwell* (1852) 2 De G M & G 705 the court applied the same principle, albeit with undisguised concern that the result might have met with the testator’s disapproval. But in *Cooper v. Cooper* (1874) LR VII HL 53, at 74 and 75, Lord O’Hagan appeared to consider it sufficient that the evidence in rebuttal of the presumption, whatever its nature, should be clear. And in *Pickersgill v. Rodger* (1876) 5 Ch D 163, at 171, (as the editor of Snell’s Equity observes in a footnote to the quoted proposition) Sir George Jessel MR expressly observed *obiter* that even parol evidence was admissible in rebuttal of it.

38. At all events my view is that the proposition in Snell’s Equity should now be read subject to s.21 of the Administration of Justice Act 1982, which provides as follows:

“21 Interpretation of wills – general rules as to evidence

(1) This section applies to a will –

(a) in so far as any part of it is meaningless;

(b) in so far as the language used in any part of it is ambiguous on the face of it;

(c) in so far as evidence, other than evidence of the testator’s intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator’s intention, may be admitted to assist in its interpretation.”

We have not received argument from counsel upon the ambit of s.21(1)(c) so my view that it is engaged in the present case deserves to be treated with circumspection. The evidence which yields the conclusion that at the date of her death the mother held only one half of the beneficial interest in the property legally vested in her seems, at any rate to me, to qualify as evidence – and on any view it is evidence other than of her intention – which shows that the language of her disposition of her residuary estate is ambiguous not patently but latently, namely *in the light of surrounding circumstances*.

39. I turn to consider Mr Hirst’s alternative objection to the contention that the claimant be put to an election. Again he finds it convenient to use Snell’s Equity, 31st ed., as his foundation. The editor’s treatment of the doctrine of election is introduced, at 6 – 16, as follows:

“Election in equity arises where there is a duality of gifts or of purported gifts in the same instrument, one gift being of the donor’s own property to E, and the other being of E’s property to X. In such cases an intention is implied that the gift to E shall take effect only if E elects to permit the gift to X also to take effect.”

40. Mr Hirst submits that the second element is lacking. True, he says, there was a valid bequest of the mother’s own property to the claimant. But, he contends, her purported and invalid bequest of his property was to himself rather than to anyone else: for what he owned was one half of the beneficial interest in the property and such was precisely what in effect she purported to bequeath to him. Counsel has had very little time in which to prepare argument on this point; but, with respect, the invalidity of this contention is within easy reach. The mother’s purported disposition of the claimant’s half of the beneficial interest in the property took the form of her purported placement of it into her residuary estate, which she directed should be held as to one half for him and to the other half for the siblings. So, in relation to one half of the claimant’s existing beneficial interest in the property (equal to one quarter of the whole of the beneficial interest in

it), the mother's purported disposition was to the siblings. Equity thereupon directs the claimant to elect between, on the one hand, keeping both his existing quarters of the beneficial interest but renouncing his right to a further quarter under the Will and, on the other hand, ceding to the siblings one of his two existing quarters but asserting his right to one quarter under the Will.

41. The facts of the present case are identical to those in *Grissell v. Swinhoe* (1869) LR 7 Eq. 291 in all material respects save one. The testator was entitled only to one half of a fund of rupees; Mrs S was entitled to the other half. The testator, however, purported to dispose of the whole fund; and his purported bequest was of one half of it to Mr S, being Mrs S's husband, and of the other half of it to Mrs G. After the testator's death Mrs S died and Mr S became entitled to her half of the fund. Sir William James, Vice-Chancellor, declined to put Mr S to an election only because, at the time of the testator's death, Mr S had not been the owner of that other half of the fund. It was only by reference to that feature, absent in the present case, that Mr S was held to have, in all, an entitlement to three quarters of the fund.

Section G: Conclusion

42. Albeit by a process of reasoning far removed from that adopted by the judge, I consider that the appeal against his order should be dismissed. The precise terms of our order should reflect the nature of the claimant's election, inconsequential though that would appear to be in every respect.

Lord Justice Hooper:

43. I agree.

Sir Andrew Morritt, The Chancellor:

44. I also agree.