

INHERITANCE TAX - settled property - testator devised his house on trust for sale and directed that the sale should be postponed so long as each or any of his three children desired to reside there - one son did reside there until his death - that son was survived by another son - whether the deceased son was beneficially entitled to an interest in possession in the house - whether the interest in possession was in the whole or half of the house - appeal allowed in part - IHTA 1984 s 49(1) and 50(5)

THE SPECIAL COMMISSIONERS

ERIC WOODHALL

(THE PERSONAL REPRESENTATIVE OF

ALAN WOODHALL DECEASED) Appellant

Appellant: use right arrow to move to starting point after this box Appellant

- and -

THE COMMISSIONERS OF INLAND REVENUE

Respondent

s

SPECIAL COMMISSIONER : DR A N BRICE

Sitting in London on 1 August 2000

Mr Piers Hill of Counsel, instructed by Messrs C J Greaves Solicitors, for the Appellants

Mr Peter Twiddy, Assistant Director, Capital Taxes Office, for the Respondents

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DECISION

The appeal

1. Mr Eric Woodhall, as the personal representative of Mr Alan Woodhall deceased, appeals against a Notice of Determination dated 20 March 2000. The Determination was subsequently amended and the revised Determination reads:

"The Commissioners of Inland Revenue have determined -

In relation to

a) the trusts of the will dated 29 December 1953 ("the Will Trust") of George William Woodhall, who died on 18 December 1957, probate of which was granted at the Principal Probate Registry on 31 January 1958,

b) the deemed transfer for the purposes of inheritance tax on the death on 21 April 1997 of Alan Woodhall ("the Deceased"), residing at 5 High Terrace, Rothwell, Leeds ("the Property").

That, having regard to the Deceased's interest in the Property under the terms of the Will Trust and his continued occupation of the Property, he was at the date of his death a person beneficially entitled to a whole interest in the Property as settled property."

2. Section 224(5) of the Inheritance Tax Act 1994 (the 1994 Act) provides:

"(5) The Special Commissioners shall on an appeal to them confirm the determination appealed against unless they are satisfied that the determination ought to be varied or quashed."

The evidence

3 A bundle of documents was produced at the hearing which contained a statement of agreed facts.

The facts

4. From the evidence before me I find the following facts.

5. On 29 December 1953 Mr George William Woodhall (the testator) made his will. In clause 2 he appointed his sons Mr Alan Woodhall (Alan) and Mr Eric Woodhall (Eric) to be his executors and trustees. In clause 3 he gave all his estate to his trustees on trust for sale with power to postpone the sale at their discretion. Clause 4 and the relevant part of clause 5 provided:

"4. I DECLARE that no sale shall be effected of the house and land known as Number 5 Haigh Terrace Wood Lane Rothwell aforesaid during such period as my Daughter Annie Elizabeth Bulmer or my sons Alan Woodhall and Eric Woodhall or each or any of them shall desire to reside there and that until the sale thereof my Trustees shall permit the said Annie Elizabeth Bulmer Alan Woodhall and Eric Woodhall or each or either of them to occupy the same upon condition that the occupant or occupants shall discharge all rates and other outgoings shall insure the said dwellinghouse and keep it in good and tenantable repair and shall pay to the Trustees the sum of Ten Shillings per week by way of rent.

5. MY TRUSTEES shall (after the payment thereof of all my just debts funeral and testamentary expenses) divide the net proceeds of the said sale and conversion and my ready money between my said Daughter & Sons Annie Elizabeth Bulmer, Ronald Woodhall, Alan Woodhall and Eric Woodhall in equal shares absolutely ...".

6 The testator died on 18 December 1957 and on 31 January 1958 probate of his will was granted to Alan and Eric.

7. Eric resided at 5 Haigh Terrace (the house) until an unknown date in 1957 which was most probably before the date of the death of the testator. Mrs Annie Elizabeth Bulmer (Mrs Bulmer) resided at the house until she married in April 1958. She died in 1971. Alan had resided at the house since 1932 and, after the death of the testator, he continued to reside there until he died on 21 April 1997.

8. Neither Eric nor Alan nor Mrs Bulmer paid the rent referred to in clause 4 of the testator's will. Alan alone paid the other outgoings in respect of the house.

9. Alan died in 1997 and Eric is his personal representative.

The legislation

10. Section 4 of the 1984 Act provides that, on the death of any person, tax is charged as if, immediately before his death, he had made a transfer of value and the value transferred was equal to the value of his estate. Section 5(1) provides that a person's estate is the aggregate of all the property to which he is beneficially entitled. Part III (sections 43 to 93) of the 1984 Act contains provisions relating to settled property. Chapter II of Part III (sections 49 to 57A) contains provisions relating to interests in possession and reversionary interests. The relevant parts of section 49 provide:

"49 Treatment of interests in possession

(1) A person beneficially entitled to an interest in possession in settled property shall be treated for the purposes of this Act as beneficially entitled to the property in which the interest subsists."

11. The relevant parts of section 50 provide:

"50 Interests in part etc

(5) Where the person referred to in section 49(1) above is not entitled to any income of the property but is entitled, jointly or in common with one or more other persons, to the use and enjoyment of the property, his interest shall be taken to subsist in such part of the property as corresponds to the proportion which the annual value of his interest bears to the aggregate of the annual values of his interest and those of the other or others."

The issues

12. The Appellant accepted that the house was settled property under the testator's will. However, he argued that at his death Alan was not beneficially entitled to an interest in possession in the house within the meaning of section 49(1). Alternatively, he argued that, if Alan were beneficially entitled to an interest in possession in the house, then that interest subsisted in one half only of the house under the provisions of section 50(5) as Eric was beneficially entitled to the other half.

13. Thus the issues for determination in the appeal were:

(1) whether Alan was, at the date of his death, beneficially entitled to an interest in possession in the house within the meaning of section 49(1) and; if so

(2) whether Alan's interest subsisted in one half only of the house within the meaning of section 50(5).

The arguments of the Appellant

14. For the Appellant Mr Hill argued that, at the date of his death, Alan was not entitled to an interest in possession in the house. Under the terms of the

testator's will the trustees had a discretion as to which of Eric or Alan or Mrs Bulmer should occupy the house and they could have excluded all but one even if they had all wished to live there. If the trustees had given one of the three a right to occupy then that right only lasted until the discretion was exercised in favour of another or others. He cited *Pearson and Others v Inland Revenue Commissioners* [1981] AC 753 as authority for the view that an interest in possession was one which gave a present right to present enjoyment (at 772g) and there was no such right if the trustees had a discretion whether to confer the interest or not. Alan therefore could not be said to have had a right to occupy the property. He cited *Inland Revenue Commissioners v Lloyds Private Banking Ltd* [1998] STC 559 where it was held that a clause similar to clause 4 in the will was not intended to give an exclusive right to occupy the property. In the present appeal none of Alan, Eric and Mrs Bulmer had any exclusive right to occupy and the rights were left to the discretion of the trustees. He argued that the postponement of the sale was administrative only and not dispositive. After the death of Mrs Bulmer the trustees could still have exercised their discretion to allow Eric to reside at the house.

15. Alternatively, Mr Hill argued that, if Alan were entitled to an interest in possession in the house, his interest could not be greater than that of Eric and so was limited to one half.

The arguments for the Respondents.

16 For the Respondents Mr Twiddy argued that an interest in possession existed if a person had a present right to present enjoyment and he cited Pearson at page 774d. He referred to *Lloyd's Private Banking* at page 566s and argued that clause 4 of the will did not give the trustees any power to choose which of Alan, Eric or Mrs Bulmer resided at the house; each of those three had the power to require the trustees to permit them to occupy the house. Alan could not be excluded so he had a present right to present enjoyment and that was an interest in possession. The fact that the interest was defeasible if Eric or Mrs Bulmer or both wished to occupy the house meant that Alan had a defeasible interest in possession although it was not in fact terminated and continued until Eric's death.

Reasons for decision

17. In considering the arguments of the parties I start with the terms of clause 4 of the will. Clause 4 is in two parts. The first part makes it clear that no sale of the house is to be effected during the time that any one or more of Mrs Bulmer, Alan and Eric wishes to reside at the house. The second part provides that the trustees "shall permit" each or any of Mrs Bulmer, Alan and Eric to occupy the house. (Although the words "each or either" are used in the second part of clause 4, Mr Hill for the Appellant accepted that the phrase should be "each or any"). The second part of clause 4 cannot be read in isolation from the first part which refers to "each or any" of the three who desire to reside there. Thus, in my view, the second part of clause 4 clearly expresses the intention that the house is to be available for such of the three as wish to reside in it. The use of the word and and not or in the phrase "Annie Elizabeth Bulmer Alan Woodhall and Eric Woodhall" which appears in both the first part and the second part of clause 4 leads, in my view, to the conclusion that it was the wishes of the testator that, if more than one wished to occupy the house, then that should be a joint occupation with any other or others who also wished to occupy. The three were brothers and sister and they jointly occupied the house with the testator at the date of the will. Although Eric probably moved out shortly before the testator's death, Mrs Bulmer (then Miss Woodhall) and Alan occupied the house jointly with the testator at the

date of his death. The will contains no express provision for the trustees to choose between competing interests so as to give only one of the three exclusive occupation if any other or others also desired to occupy. In my view the will does not give the trustees a dispositive power to decide who should occupy the house alone if more than one wished to do so; rather it gives the trustees administrative powers to permit such of the three as desire to occupy the house to do so and, if more than one, jointly with the other or others.

18. With that conclusion in mind I turn to consider the authorities cited to me. Pearson (1981) concerned a settlement made in 1964 which provided that the trustees were to hold the trust fund for such of a class of persons as the trustees should appoint within a defined period. Pending such appointment the income was to be accumulated and, subject thereto, the fund held on trust for such of the settlor's children as should attain 21 or marry under that age. The settlor had three children all of whom were 21 in February 1974. In 1976 the trustees appointed the sum of £16,000 be held on trust for one daughter during her life. The issue was whether that daughter already had an interest in possession or whether she became entitled to an interest in possession on the 1976 appointment. In holding that she did not already have an interest in possession Viscount Dilhorne at page 773E referred to the following words of Lord Reid in *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 607 :

""In possession" must mean that the interest enables you to claim now whatever may be the subject of the interest. For instance, if it is the current income from a certain fund your claim may yield nothing if there is no income, but your claim is a valid claim, and if there is any income you are entitled to get it. But a right to require trustees to consider whether they will pay you something does not enable you to claim anything. If the trustees do decide to pay you something, you do not get it by reason of having the right to have your case considered: you get it only because the trustees have decided to give it to you.."

19. Viscount Dilhorne continued:

"That case concerned a discretionary trust where payment was made to the beneficiaries at the discretion of the trustees. Here the three sisters' entitlement to income was subject to the trustees' power to accumulate. On reaching 21 they had no valid claim to anything; if there was any income from the settled property they were not entitled to it. Their right to anything depended on what the trustees did or did not do and the receipt of income by them appears to me to have been just as much at the discretion of the trustees as was the receipt of income in the *Gartside* case."

20. Applying those principles to the facts of the present appeal I find that at the date of the death of Alan both he and Eric had the right to claim to occupy the house jointly with the other. (The fact that Eric did not exercise the right does not affect the fact that he had it. His claim, if he had exercised it, would have been a valid claim and he was entitled to reside in the house jointly with Alan.). The right of both Eric and Alan was not a right to ask the trustees to consider whether they would permit occupation. In my view, the trustees had no discretion as either or both of Eric or Alan were entitled to occupy the house; their right did not depend on what the trustees did or did not do.

21. That would lead to the conclusion that, at the date of death of Alan, both he and Eric had the present right to the present enjoyment of the house and so they each had an interest in possession.

22. Lloyd's Private Banking Ltd (1998) concerned a matrimonial home which had been conveyed to the spouses as tenants in common. The wife by her will bequeathed her half share on trusts for sale but with the proviso that the trustees should not enforce the trust for sale if her husband desired to reside in the house. The wife died in 1989 after which the husband lived at the house until he died in 1993. The issue in the appeal was whether, at the date of his death, the husband had an interest in possession in the half share of the house which had previously belonged to his wife. Lightman J held that he had and said at page 566a:

"In my view, though the drafting and language of cl 3(1) of the will is in terms of placing restrictions on Lloyds as trustee, its purpose and effect is to confer upon Mr Evans a life interest in the half-share. His own rights as tenant-in-common were not enough to entitle him to exclusive occupation of the property for the rest of his life: he required for this purpose during this period also the rights attaching to the half-share, and it was intended he should enjoy these rights though the draftsman of the will for one reason or another chose not to spell this out. In short cl 3(1) is dispositive and confers upon Mr Evans a determinable life interest in the half-share though it is dressed up as a set of administrative directions. What is decisive, however, is the substance of the provision and not the clothes or label which it wears."

23. In this appeal also the drafting and language of the will is in terms of placing restrictions on the trustees but its purpose and effect is to confer on both Alan and Eric (and before her death Mrs Bulmer) a determinable life interest which, at the date of death of Alan, was one half each for Alan and Eric.

Decision

24. Accordingly, my decisions on the issues for determination in the appeal are:

(1) that Alan was, at the date of his death, beneficially entitled to an interest in possession in the house within the meaning of section 49(1); and

(2) that Alan's interest subsisted in one half only of the house within the meaning of section 50(5).

25. The appeal is, therefore, allowed in part.

26. In accordance with section 224(5) of the 1984 Act the Determination appealed against is varied by the deletion in the last paragraph of the word "whole" and the insertion of the word "half".

DR AN BRICE

SPECIAL COMMISSIONER

Date of Release: 10<sup>th</sup> October 2000

SC 3045/2000