Neutral Citation Number: [2014] EWCA Civ 1314

Case No: A3/2013/3691

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mrs Justice Asplin
[2013] EWHC 4400 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2014

Before :

LORD JUSTICE LEWISON
LORD JUSTICE CHRISTOPHER CLARKE
and
SIR COLIN RIMER

- -

Between :

THE WOODLAND TRUST	**Appellant**
- and -	
(1) BARRIE MICHAEL LORING **(2) TERRY DESMOND LORING** **(3) DEBBIE DENISE LORING** **(4) OLIVER TERENCE LORING** **(5) ALEXANDER EDWARD LORING**	**Respondents**

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Ms Penelope Reed QC (instructed by **Wilsons Solicitors LLP**) for the **Appellant**
Mr Richard Wilson (instructed by **Clifton Ingram LLP**) for the **Respondents**

Hearing date: 28 July 2014

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Judgment

Sir Colin Rimer :

Introduction

1. This appeal is against the order dated 28 November 2013 made by Asplin J in the Chancery Division by which she answered a question raised by Barrie and Terry Loring, the executors of the will of the late Valerie Smith, as to the correct construction of clause 5 of her will.

2. Clause 5 disposes of the testatrix's residuary estate, of whom the beneficiaries are (i) the two executors and Debbie, Oliver and Alexander Loring, and (ii) the Woodland Trust, a charity that, as one might guess, is concerned with the conservation of woodland. The issue is as to the shares of the residuary estate to which the Lorings and the Trust are respectively entitled. The judge found in favour of the Lorings. The Trust asserts on this appeal that she fell into error in so deciding. Ms Reed QC and Mr Wilson represented the Trust and the Lorings respectively, both before us and below.

The will

3. The will is a professionally drawn, one and a half page document that was executed by the testatrix on 2 February 2001. Clause 1 appoints the executors, the two sons of the testatrix. Clause 2 declares her wish to be cremated. Clause 3 gives her personal effects to her two sons. Clause 4 provides that, subject as aforesaid and to the payment of her debts, her residuary estate is to be disposed of in accordance with clause 5. Clause 5 provides materially:

   > 'MY TRUSTEES shall set aside out of my residuary estate assets or cash of an aggregate value equal to such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax and … hold the same for such of the following as shall survive me and in the case of the grandchildren attain 23 and if more than one in equal shares absolutely.'

   Clause 5 then lists the five Loring beneficiaries I have described in [2] above, of whom three are children and two are grandchildren of the testatrix and all of whom survived her. Clause 5 makes substitutional gifts in favour of the children of any of them who should predecease her, a provision that did not take effect. Clause 6 provides that, subject as aforesaid, the executors are to hold the remainder of the testatrix's estate for the Trust.

The facts

4. The testatrix died on 1 September 2011. The executors proved her will on 13 December 2011. The net value of the estate is £680,805.

5. At the date of the testatrix's death, the amount of her single unused nil-rate for inheritance tax purposes was that set out in Schedule 1 to the Inheritance Tax Act 1984, namely £325,000 (it had been £234,000 at the date of the will). But for the change in the law introduced by the Finance Act 2008, of which the executors took advantage, there is no doubt that the effect of clauses 5 and 6 of the will would have been to give £325,000 of the residuary estate to the Lorings in equal shares and the

balance of £355,805 to the Trust. The will would thus have been 100% inheritance tax efficient: the £325,000 would have borne tax at the nil-rate, and the balance payable to the Trust, a charity, would have been exempt.

6. The difficulty arose as a result of the introduction by the Finance Act 2008 of the new section 8A into the Inheritance Tax Act 1984. That provides materially:

'8A Transfer of unused nil-rate band between spouses and partners

(1) This section applies where –

(a) immediately before the death of a person (a "deceased person"), the deceased person had a spouse or civil partner ("the survivor"), and

(b) the deceased person had unused nil-rate band on death.

(2) A person has unused nil-rate band on death if –

$$M > VT$$

where –

M is the maximum amount that could be transferred by a chargeable transfer made (under section 4 above) on the person's death if it were to be wholly chargeable to tax at the rate of nil per cent. (assuming, if necessary, that the value of the person's estate were sufficient but otherwise having regard to the circumstances of the person); and

VT is the value actually transferred by the chargeable transfer so made (or nil if no chargeable transfer is so made).

(3) Where a claim is made under this section, the nil-rate band maximum at the time of the survivor's death is to be treated for the purposes of the charge to tax on the death of the survivor as increased by the percentage specified in subsection (4) below (but subject to subsection (5) and section 8C below)….'

7. The testatrix's husband predeceased her on 4 April 1984 with a nil-rate band that was unused. That meant that the executors were entitled, within two years of the death of the testatrix, to make a claim under section 8A. They did so and there is no dispute that its effect was to *increase* the testatrix's unused nil-rate band from £325,000 to £650,000. I have emphasised the word 'increase' since it is relevant that it is agreed that this is the true effect of a valid claim under section 8A (note the language of subsection (3); and counsel agreed that the heading to the section does not accurately summarise its effect). There is no dispute that the executors made a valid claim in the present case that so increased the testatrix's nil-rate band.

8. That is enough to introduce the contest that thus arose between the Lorings and the Trust. The Lorings claim that as the effect of the section 8A claim was to increase the testatrix's unused nil-rate band from £325,000 to £650,000, that was the amount of the clause 5 residuary gift to them, so that all that goes to the Trust under clause 6 is £30,805. The Trust, by contrast, claims that the effect of the claim was not to increase

the clause 5 gift to the Lorings above £325,000; and it claims an entitlement to the balance of the residuary estate.

The judge's judgment

9. The only question before the judge with which the appeal is concerned was what, as a matter of construction, was the meaning of the words in clause 5 of the will reading '… such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax …'. The Lorings' case was as simple as they come, namely that the consequence of the section 8A claim was that, upon its making, the clause 5 'sum' was retrospectively increased from £325,000 to £650,000: see section 8A(3). By contrast, the Trust's case was that at the date of the testatrix's death the amount of her unused nil-rate band was £325,000 and that the executors' claim under section 8A of the Inheritance Tax Act 1984 could not alter that. The Trust contended that the testator's use of the word 'my' in clause 5 in conjunction with its reference to the date of her death was a clear indication that relevant legacy was limited to £325,000; and that the effect of a valid section 8A claim was merely to increase the nil-rate band maximum 'for the purposes of the charge to tax on the death of the' surviving spouse. Whilst, therefore, the claim increased the applicable nil-rate band to £650,000 for the purposes of determining the estate's liability to inheritance tax, it did not have the effect of varying the amount of the clause 5 legacy from the amount that would have applied had no claim been made.

10. The judge accepted the Lorings' case. She regarded the natural meaning of the key words in clause 5 as including an increase in the testatrix's unused nil-rate band arising as a result of the claim, and retrospective increase, under section 8A: that was because the section made it clear that the result of a claim was retrospective and that its effect was to increase the nil-rate band. She noted that there was no question of there being any transfer to the testatrix of her late spouse's unused nil-rate band, nor was there any question of the increase taking effect other than as at the date of the testatrix's death. The judge was unimpressed that the reference in clause 5 to 'my nil rate band' meant that the increase achieved by the claim was not included. On the contrary, she regarded the 'my' as supporting her conclusion: it was the testatrix's nil-rate band maximum that was increased from the date of her death and no-one else's.

11. The judge was also unimpressed by the Trust's point that all that a valid section 8A claim was directed to was the way in which the nil-rate band maximum was to be treated for the purposes of the charge to tax on the death of the surviving spouse. The judge accepted that section 8A was focussed on the charge to inheritance tax. But so was clause 5: it described the relevant gift as the amount 'of my unused nil rate band for Inheritance Tax …', and so was also concerned with the extent of the nil-rate band for the purposes of the charge to tax. The judge concluded that clause 5 of the will should be construed to mean that the legacy in favour of the Lorings was £650,000, being the amount of the testatrix's unused nil-rate balance for inheritance tax purposes at the date of her death.

The appeal

12. The appeal is brought with the judge's permission. There was no dispute as to the approach to the construction of clause 5 of the will that the court should adopt. The question is as to the meaning of the words of clause 5 read in the context of the will as

a whole, and taking account of any relevant background circumstances that inform the meaning of the words used: see *Royal Society for the Prevention of Cruelty to Animals v. Sharp and others* [2010] EWCA Civ 1474; [2011] 1 WLR 980, at [19] to [21], per Patten LJ. I would not, however, regard the will as a whole as providing a context that sheds any relevant illumination on the question before the court. Nor do I consider that there are any background circumstances that can be said to inform the meaning of the language of the will. It was well known, at the time the will was made, that the Chancellor was proposing, over future years, to increase the amount of the nil-rate band. What the testatrix herself knew about this is not known, but the clear inference from the language of clause 5 is that she at least knew that its amount at the date of her death would or might be different from what it was at the date of the will. That is because she must be taken to have understand the purpose and effect of clause 5 of the will was to give to the Lorings a legacy equal to the amount of the nil-rate band; and the fact that she defined that band by reference to its amount at the date of her death reflects a recognition that its then amount would or might be different from what it was at the date of the will – and probably larger.

13. Ms Reed, for the Trust, advanced to us essentially the same arguments that she had advanced to the judge. She said that the words 'at the date of my death' in clause 5 pointed away from any enhancement in the amount of the testatrix's then nil-rate band by reason of a claim that was subsequently made by the executors, an indication underlined by the testatrix's possessive language in 'my unused nil rate band'. Moreover, the 'unused' indicated that she was referring only to the nil-rate band available to her and could not be regarded as including any addition to that band for which her executors might make a claim after her death. All this pointed to an indication that the intention of clause 5 was to bequeath to the Lorings no more than £325,000.

14. This conclusion was not, it was said, undermined by the making by the executors of the section 8A claim. The purpose and effect of such a claim is merely to identify the amount of the nil-rate band for the purposes of the charge to tax on the death of the surviving spouse or partner: that is, its purpose and effect are directed to the calculation of the tax chargeable on the estate. The judge's point that the words 'my unused nil rate band for Inheritance Tax' in clause 5 were also referable to the nil-rate band for the purposes of calculating the tax charge was wrong. The words 'for Inheritance Tax' were merely descriptive of what the nil-rate band was and were not a reference to the nil-rate band for the purposes of calculating the charge to inheritance tax on the testatrix's death.

15. In addition, the effect of the judge's conclusion was that the amount of the legacy to the Lorings was dependent on whether or not the executors chose to make the section 8A claim. Ms Reed said the testatrix could not have intended the amount of her legacy to the Lorings to depend on the exercise by her executors of a discretion to make, or not to make, such a claim.

Discussion and conclusion

16. I have not found the question raised by this appeal entirely easy. First, Ms Reed's point that the testatrix could not have intended the amount of her legacy to the Lorings to vary according to the exercise of a discretion by her executors (who were also beneficiaries) appeared to me to be compelling, a point underlined by the fact

that the testatrix could not have had in mind the exercise of any such discretion when she made her will. Second, I also regarded as persuasive Ms Reed's point that the language of clause 5 appeared to show that all that the testatrix had in mind was the nil-rate band available to her, which can well be said to point to £325,000 as being the intended limit of her bounty in clause 5. If so, it is not difficult to go the further step of concluding that all that the section 8A claim achieved was to increase to £650,000 the nil-rate band for the purposes of calculating the charge to inheritance tax on the testatrix's estate. It did not, however, also increase the clause 5 legacy.

17. I was for some time attracted by these arguments towards a conclusion that the judge had arrived at the wrong answer. I have, however, on further consideration decided that the judge was correct in her interpretation of clause 5. As I have said, when the testatrix made her will she plainly did not have in mind a specific amount that she intended to pass to the Lorings by way of a legacy under clause 5. She intended that gift to be equal to the amount of her then 'unused nil rate band for Inheritance Tax'. At the date of her death, that amount was £325,000, that being the level to which post-will legislation had increased the nil-rate band. But when the section 8A claim was later made, the statutory consequence imposed by section 8A(3) was to *increase* the testatrix's nil-rate band from the £325,000 at which it stood at her death to £650,000, and moreover to do so retrospectively. It is true that the testatrix may not have contemplated at the date of her will that a change of such a nature could, would or might have been brought about by the exercise by her executors of a discretion to make such a claim. But it remains the case that the consequence of the claim they in fact made was to achieve the retrospective increase of the testatrix's nil-rate band as at her death to £650,000.

18. In these circumstances, I have difficulty in concluding how, in the events that have happened, the words in clause 5 reading 'such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax' do not mean the sum of £650,000. The only remaining point advanced by Trust is that the sole effect of the section 8A claim was that it went to the calculation of inheritance tax on the estate and that it could not have any impact upon the interpretation of clause 5. The first part of that is correct, but I do not consider that it follows that so also is the second part. The language of section 8A(3) does make clear that the effect of a claim is that 'the nil-rate band maximum at the time of the survivor's death is to be treated for the purposes of the charge to tax on the death of the survivor as increased etc.' But clause 5 also refers to 'my unused nil rate band for Inheritance Tax', and I agree with the judge that the sense of that is similarly to refer to the nil-rate band for the purposes of the charge to inheritance tax on the estate.

19. In the result, I would uphold the judge's decision and dismiss the appeal.

Lord Justice Christopher Clarke :

20. Like my Lord, Sir Colin Rimer, I have not found the resolution of this appeal entirely straightforward, sharing, as I did, the same doubts as are expressed by him in paragraphs 16 and 17. In particular there is much to be said for regarding "*such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax*" as meaning the amount which, at the moment of death, is attributable to the testatrix alone without regard to any increase in that amount which results from any subsequent decision by her executors to make a claim under section 8A(3) of the

Inheritance Tax Act 1984. I am, however, persuaded that the effect of such a claim is that the nil rate band maximum *at the time of the survivor's death* is to be treated as increased by, in the present case, 100%, with the result that the sum which is at the date of the testatrix's death "*the amount of my unused nil rate band for Inheritance Tax*" is to be treated as increased to the same extent. To hold that such sum was limited to the testatrix's unincreased nil rate band would not be the treatment prescribed by the statute. Accordingly, I, also, would dismiss the appeal.

Lord Justice Lewison :

21. Although a will takes effect only on the death of the testatrix, in ascertaining her intention we must look at the circumstances at the date when she executed it. In the words of James LJ in *Boyes v Cook* (1880) 14 Ch D 53, 56:

> "In *In re Ruding's Settlement* the Vice-Chancellor held that the surrounding circumstances could be looked at in construing the will. But when it is said that surrounding circumstances may be looked at, that only means that the circumstances existing at the time when the testator made his will may be looked at. You may place yourself, so to speak, in his arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention."

22. The metaphor of the testator's armchair has been repeated countless times over the years. In *Marley v Rawlings* [2014] UKSC 2; [2014] 2 WLR 213 the Supreme Court held that the principles applicable to the interpretation of contracts were equally applicable to the interpretation of wills. Among the relevant factors that Lord Neuberger listed at [19] was:

> "the facts known or assumed by the parties at the time that the document was executed"

23. In the case of a contract the relevant background includes not only the factual background but also the legal background. Again, in the context of contractual interpretation the courts have developed an approach to interpretation when there are changes in the law (particularly statutory changes) following execution of the contract. In *Debenhams Retail plc v Sun Alliance and London Assurance Co Ltd* [2005] EWCA Civ 868; [2006] 1 P & CR 8 a lease was granted at a rent based on turnover. At the time when it was granted purchase tax was in force. But by the time of the relevant rent review, purchase tax had been replaced by VAT. The question was whether "gross amount of total sales" included VAT. This court held that it did. Mance LJ said at [27]:

> "Even if we were judicial archaeologists, we would find in the wording of the lease negotiated in 1965 no actual or buried intention regarding VAT, since it was introduced in April 1973, and the regime in force in 1965 was the different purchase tax regime. But no-one suggests that the lease cannot or should not apply in the changed circumstances. We have to promote the purposes and values which are expressed or implicit in its wording, and to reach an interpretation which applies the lease

> wording to the changed circumstances in the manner most consistent with them."

24. The Supreme Court applied this principle to changes in accounting practices in *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3; [2013] 1 WLR 366.

25. I start, therefore, by considering the circumstances surrounding the making of the will on 2 February 2001. The testatrix was Mrs Smith, described in the will as a widow. We can infer, therefore, that she had been married and that her husband had died. From this we can also infer that she had no surviving spouse to whom she could have made a testamentary gift exempt from inheritance tax (IHT). She appointed her sons Barrie and Terry Loring as her executors and trustees. We can infer, therefore, from the difference in surnames that her marriage to Mr Smith was a second marriage.

26. Clause 5 contained the gift with which we are concerned. It is a gift to members of Mrs Smith's close family of "such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax". Clause 6 contains a gift of her residuary estate to the Woodland Trust.

27. At the date when the will was made the legislation in force was the Inheritance Act 1984. That Act imposed a charge to tax on transfers of value. A transfer of value made during a person's lifetime (if made to an individual or limited forms of trust) was a potentially exempt transfer: section 3A. A potentially exempt transfer made seven years or more before the death of the transferor was an exempt transfer, but any other potentially exempt transfer was a chargeable transfer: section 3A (4). Section 3A (5) provided that:

> "During the period beginning on the date of a potentially exempt transfer and ending immediately before—
>
> (a) the seventh anniversary of that date, or
>
> (b) if it is earlier, the death of the transferor,
>
> it shall be assumed for the purposes of this Act that the transfer will prove to be an exempt transfer."

28. That sub-section remains in force. If a potentially exempt transfer fails to become an exempt transfer (because the transferor dies within the seven year period) then his or her personal representatives are liable to pay any IHT due on those transfers: section 199(2).

29. Section 4 introduced the charge to tax on death. On the death of any person tax was charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death. The deceased person's personal representatives are liable for the IHT due: section 200.

30. Section 7 dealt with the rates of tax. In the case of a potentially exempt transfer made within three years of death, IHT was chargeable at the full rate. For other such transfers there was a sliding scale of rates, usually known as taper relief. The rates of

tax were given in Schedule 1 to the Act. For transfers of value up to £215,000 the rate was nil, and for transfers which, in aggregate, exceeded that value tax was charged at 40 per cent. In principle, under section 8 the rate bands were increased annually in line with inflation.

31. The Act also provided for certain kinds of transfer to be exempt. These included transfers between spouses (section 18) and gifts to charities (section 21).

32. Thus at the date of the will Mrs Smith disposed of her estate in a simple but tax efficient manner. The exemption for transfers between spouses was not available. She gave as much as she could to her close family without incurring IHT and gave the rest to charity. Thus the Exchequer would take nothing. She could also have expected that the size of the gift to her family would rise at least in line with inflation. Thus at the date of her will she could have no expectation that the residuary beneficiary would receive any particular amount. Indeed if the Chancellor were to increase the nil-rate band by more than inflation (as had happened historically from time to time), the residuary gift might diminish or even fall away entirely.

33. By the time of her death in 2011 the law had changed. The Finance Act 2010 had frozen the nil-rate band for 2011 and the three subsequent years. By that time the nil-rate band was £325,000. In addition section 8A of the Act (introduced by the Finance Act 2008) had enabled an increase in the nil-rate band applicable on death where the deceased person was the survivor of a spouse or civil partner who had "unused nil-rate band" on death. Section 8A (3) provides:

> "Where a claim is made under this section, the nil-rate band maximum at the time of the survivor's death is to be treated for the purposes of the charge to tax on the death of the survivor as increased by the percentage specified in subsection (4) below (but subject to subsection (5) and section 8C below)."

34. A claim under section 8A may be made by the survivor's personal representatives within two years from the end of the month within which the survivor dies, although HMRC have a discretion to extend this period.

35. Mrs Smith's executors made a claim under section 8A in respect of Mr Smith's unused nil-rate band. This had the effect of increasing the nil-rate band applicable to Mrs Smith's estate from £325,000 to £650,000.

36. As was common ground both before the judge and before us, the way that section 8A works (despite the heading to the section) is not to transfer a deceased spouse's unused nil-rate band to the surviving spouse, but by increasing the nil-rate band available to the estate of the surviving spouse. It does so by treating "the nil-rate band maximum" at the date of the latter death as having been increased for the purposes of IHT chargeable on that death. This, as it seems to me, produces the same effect as if the Chancellor of the Exchequer had simply decided to increase the nil-rate band maximum for the purposes of the charge to IHT on death for everyone. If the Chancellor had decided to increase the nil-rate band maximum across the board, Ms Reed accepts that the size of the gift encompassed within clause 5 of the will would have been correspondingly increased. So from this perspective everything turns on the mechanism by which the increase is effected.

37. It is plain that the precise circumstances that have arisen cannot have been expressly contemplated by anyone at the date when the will was executed, because the ability to increase a person's nil-rate band did not exist. But the existence of circumstances unforeseen at the date of a written instrument (whether a contract or a will) is often the cause of a dispute about its interpretation. No one suggests that clause 5 is inapplicable. So we must find an interpretation that applies clause 5 to the changed circumstances in the manner most consistent with its purposes and values.

38. The first point Ms Reed takes is that the will ties the nil-rate band to the amount unused "at the date of my death". But the effect of a successful election is that the nil-rate band *is* increased with effect from the date of Mrs Smith's death. The section says in terms that the nil-rate band maximum is treated as increased "at the time of the survivor's death". So this part of clause 5 is certainly not inconsistent with the judge's conclusion. It would, in my judgment, be an unduly literal interpretation of the will to say that "at the date of my death" excludes the legal position which has effect as at the date of the death, even though it depends on a later election by the personal representatives. The next point is that the clause refers to "my" unused nil-rate band. But as the judge pointed out, the effect of the election is that Mrs Smith's nil-rate band is treated as increased: there was no transfer of anyone else's nil-rate band. Perhaps more technically there is no such thing as a personal nil-rate band: there is only a nil-rate band ("the nil-rate band maximum"), which, in the case of Mrs Smith, was treated as having been increased by the amount of her late husband's unused nil-rate band. The third point is that clause 5 refers to my "unused" nil-rate band. Here, the argument goes, Mrs Smith could not personally have used any enhanced nil-rate band after her death (for obvious reasons) and could not have used it during her lifetime, because section 8A only allows the enhancement to be used for the purposes of IHT on death. Thus the only "unused" nil-rate band to which clause 5 could have referred is that to which Mrs Smith was entitled without the enhancement. This point was not explored during the hearing in any great depth. But it seems to me that since in the case of potentially exempt transfers, it must be assumed during a person's lifetime that they will prove to be exempt, it could not have been said at any particular point in Mrs Smith's lifetime that she had "used" part of her nil-rate band. There may be more specialised gifts (such as gifts into settlements) that could attract an immediate charge to tax, but they are outside the ordinary course of events. Since according to my understanding Mrs Smith's personal representatives are liable for paying the IHT due in respect of any failed potentially exempt transfers, it is they who would be concerned to establish what was left of Mrs Smith's nil-rate band. Moreover, section 8A itself uses the expression "unused nil-rate band" to include that part of the nil-rate band of a deceased spouse that remains after paying the IHT payable on his or her death. I see no impediment to interpreting "unused" nil rate band in the will to include that part of a deceased spouse's unused nil-rate band as augments the nil-rate band applicable on the death of the survivor. The fourth point is that section 8A only applies for the purposes of the charge to IHT on the survivor's death. It does not apply to the interpretation of wills. But I agree with the judge that clause 5 refers to the nil rate band "for Inheritance Tax" (which must mean "for the purposes of Inheritance Tax"), and that expression is, in my judgment, wide enough to encompass the application of the charge to IHT on Mrs Smith's death.

39. The final point is that if the judge is right, then the executors have the power to alter the size of beneficial interests taken under the will according to whether they do or do

not make an election. The will does not give them a direction to exercise it. Mrs Smith would have no control over their decision. Whether they exercised the election or not would not alter the amount of IHT payable, because none would be payable in any event. Ms Reed postulated the example of a will drafted in similar terms which left "my unused nil rate band" to the children of a first marriage with the residue going to a surviving spouse. It would be surprising if in those circumstances a testator intended that the scale of provision made for a surviving spouse could depend on the choice of the executors or trustees, unless the will made it clear that they had that choice. Moreover the correct interpretation of clause 5 should not depend on the identity of the residuary beneficiary. So if an anomalous result would be produced in the circumstances that Ms Reed postulated, an equally anomalous result would be produced on the facts of our case. This does not appear to have been an argument advanced before the judge.

40. I have found this the most powerful of Ms Reed's points. Of course it is possible to empower trustees, in a practical sense, to affect the extent of a testator's or settlor's bounty. An express discretionary trust is an obvious example, but so too, as Mr Wilson submitted, are powers of maintenance and advancement. Where, as here, the testatrix appointed her two sons as executors and trustees I think that we can infer that she trusted their judgment. Where too they and their close relatives are the beneficiaries of the gift conferred by clause 5 one could expect them to exercise the power to elect. Ms Reed objects that this is all speculation about what Mrs Smith might have intended if the point had been explained to her. We do not know how keen a supporter of the Woodland Trust she was. Nor do we know anything about the financial circumstances of her close family. There is, I acknowledge, force in that argument. But since the clause is silent about elections (not surprisingly) there is no direction either way.

41. We were referred to a number of specimen clauses drafted by HMRC and to their comments on which were effective to pass the enhanced nil-rate band, and which were not. I did not find this exercise helpful.

42. In my judgment Ms Reed's interpretation either attributes to Mrs Smith an unlikely and sophisticated appreciation of the intricacies of IHT; or else it attributes to her an eccentric intention dependent on the precise mechanics of increasing the nil-rate band available to calculate the IHT (if any) payable on her death.

43. So we have to look to the "the purposes and values which are expressed or implicit in [the] wording" of the will in order to find the answer. In my judgment the implicit purpose of the will was to give as much as possible to Mrs Smith's family without incurring IHT and to give the rest to charity. As Lord Neuberger explained in *RSPCA v Sharp* [2010] EWCA Civ 1474; [2011] 1 WLR 980 at [44] the purpose of using the nil-rate band is usually to avoid paying IHT. That was one of the reasons that led the court to prefer an interpretation that resulted in the beneficiaries under clause 3 of the will "receiving the maximum amount possible without giving rise to liability" to IHT. In my judgment that was also the implicit purpose of this will.

44. Accordingly for these reasons, as well as those given by Sir Colin Rimer with which I agree, I too would dismiss the appeal.