



[2019] UKFTT 657 (TC)

**TC07432**

*INHERITANCE TAX – whether the drafting in a will created an interest in possession – yes  
– was the interest disclaimed - no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/00766**

**BETWEEN**

**MARGARET VINCENT**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE VICTORIA NICHOLL  
MR CHRISTOPHER JENKINS**

**Sitting in public at Taylor House on 3 and 4 June 2019**

**Further written submissions received by the Tribunal members on 15 July 2019 and 6 August 2019**

**The Appellant appeared in person**

**Mr Brian Horton, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This appeal concerns the question of whether the drafting in the will of the Appellant's mother, Mary Hadden, conferred a life interest in her share of the family home on her brother Ian Thom. The decision considers the relevant law and circumstances, including the evidence available to construe the will under section 21 Administration of Justice Act 1982 ("AJA"). The decision concludes that that the family home was settled property within section 43 Inheritance Tax Act 1984 ("IHTA") and that Ian Thom held an interest in possession within section 49(1) IHTA that formed part of his estate on death.

### FINDINGS OF FACT

2. We made the following findings of fact from the evidence provided in the Tribunal's bundles and at the hearing, including the clear and considered witness evidence of the Appellant, Mrs Vincent, and her husband, Mr Vincent:

#### **The Purchase of Hopefield**

(1) In early 1985 the Appellant's parents, Mary and Derek Hadden, and Mary Hadden's brother, Ian Thom, decided to sell their respective homes following retirement from their careers and to buy a house together. They looked at a number of properties and decided to buy the property known as "Hopefield" ("Hopefield") in Somerset. The property was purchased for £125,000 on 30 August 1985 by Mr and Mrs Hadden and Mr Thom (the "three purchasers"). The three purchasers intended to live at Hopefield for the remainder of their lives.

(2) The purchase of Hopefield and the consequent works was a 'great undertaking' for the three purchasers. They engaged an architect and obtained planning approval for "the carrying out of alterations" to allow Mr and Mrs Hadden and Mr Thom to share occupation of Hopefield. As part of these arrangements they agreed an informal allocation of rooms for joint use and rooms for private use.

(3) The plans of Hopefield following the completion of these works show that there is a single entrance door, hall and corridor leading to a shared living room. The corridor leads to shared dining, kitchen and utility rooms. The corridor from the hall in the other direction passes into a room identified as Mr Hadden's study, and then into Mrs Hadden's sewing room, before reaching Mr Thom's music room. Mr Thom accessed his music room by walking through the study and sewing rooms. Mrs Vincent's son used the music room designated for Mr Thom during his uncle's lifetime. The staircase from the hall leads to an upstairs landing from which one door leads to Mr and Mrs Hadden's bedroom and bathroom, another door to Mr Thom's bedroom and bathroom, and two more doors to the two guestrooms. The doors to these upper bedroom areas could have been locked, but were not in practice. We find that the building was not divided into two households. The shared kitchen, dining and living areas created a single shared household. The private bedrooms and bathrooms, and the rooms identified for personal use, reflect the size of the house and the occupants rather than two independent households.

(4) The three purchasers sought the advice of a firm of solicitors to set out the terms of their joint purchase. The costs of the Hopefield building works and furnishings were added to the cost of the house, and the total was used to determine the total cost of the 'great undertaking' and their respective financial contributions. The sale proceeds of Mr Thom's house were greater than those from the sale of Mr and Mrs Hadden's house and so he provided a larger financial contribution to the project, and this was reflected in their agreement. By declaration of trust dated 31 August 1985 (the day following the

purchase of Hopefield) Mr and Mrs Hadden and Mr Thom executed a declaration of trust that included the following provisions in clause 3:

“THE parties hereto are desirous of setting out by way of declaration the trusts upon which they hold the said property.

NOW IT IS HEREBY DECLARED by the parties hereto that as from the date of the said conveyance they will hold the said property upon trust to sell the same and will hold the net proceeds of sale and net income until sale in trust for themselves as Tenants in Common as to a five eighths share for Mr. Thom and the remaining three eighths share for Mr. & Mrs. Hadden but as between Mr. & Mrs. Hadden the three eights share to be held as Beneficial Joint Tenants.”

(5) The total of the square metres of the areas identified as being for Mr and Mrs Hadden’s use or Mr Thom’s use as noted in paragraph (3) above do not reflect their three-eighths: five-eighths interests in Hopefield. The total of the areas identified for Mr and Mrs Hadden’s personal use exceed those identified for Mr Thom’s personal use.

### **The Wills**

(6) As part of the arrangements for the purchase of Hopefield in August 1985, the three purchasers instructed the same firm of solicitors to prepare new wills that reflected their agreement with regard to the purchase and occupation of Hopefield. The building works were completed some six months after the purchase and they moved into Hopefield in 1986, but they had agreed the proposed lay-out of the house and the arrangements by the time that they executed their wills.

(7) On 27 August 1985 Mr and Mrs Hadden executed mirror wills. In each case the will appointed Bruce and Roderick Anthony Cowles as executors and trustees and provided that the estate be held on trust for sale with the net proceeds of sale after payment of debts, funeral and testamentary expenses, and any property unsold being held for the other spouse absolutely provided he or she survived for 30 days. If the spouse failed to attain a vested interest, then under clause 3 of their wills the following provisions were to have effect:

“(a) I GIVE (free of all duties and Capital Transfer Tax) all my share and interest in the property “Hopefield” aforesaid to my Trustees upon trust to permit IAN ROBERT MULLANE THOM of that address to reside therein for so long as he shall desire free of rent but he being responsible for general rates, water rates, insurance and maintenance repairs of an income nature

(b) Subject thereto I give the remainder of my estate as hereinbefore defined to my daughter MARGARET ANNE VINCENT absolutely provided that should she predecease me then for such of her children as shall be living at my death and if more than one in equal shares.”

(8) On 2 February 1993 both Mr and Mrs Hadden executed identical codicils by which they revoked the original appointment of executors and appointed a local Somerset solicitor as sole executor and trustee.

(9) On 27 August 1985 Mr Thom executed a will. Clause 3 of his will reads:

“I GIVE (free of all duties and Capital Transfer Tax) all my share and interest in the property “Hopefield” aforesaid together with all my personal chattels as defined by Section 55 (i) (x) of the Administration of Estates Act 1925 to my sister MARY AGNES HADDEN and her husband DEREK NORMAN HADDEN jointly or to the survivor should either predecease me failing which then to my niece MARGARET ANNE VINCENT provided that should she

predecease me then for such of her children as shall be living at my death and if more than one in equal shares.”

Mr Thom executed a new will in 2012 that reflected the death of his sister and brother-in-law. The new will left his share and interest in Hopefield to Mrs Vincent absolutely, but if Mrs Vincent predeceased him, then for Mrs Vincent’s son, James Vincent, absolutely.

### **The 2001 Probates**

(10) Mr Hadden died on 11 June 2001. The family’s solicitor in Somerset took out a grant of probate on 30 October 2001. Mrs Hadden became entitled to Hopefield by survivorship and to the remainder of his estate under the terms of his will.

(11) In July 2001 the solicitor suggested in a letter to Mrs Hadden that the family may wish to vary the will of Mr Hadden to mitigate inheritance tax later. He suggested that one of the ways would be to declare that “your Husband’s share in “Hopefield” could be held upon trust for your lifetime and then passing to your daughter on your death.”

(12) The solicitor was then provided with the declaration of trust and noted that Mr Hadden’s share would pass to his joint tenant, Mrs Hadden, by survivorship. A deed of variation of Mr Hadden’s will was executed on 4 April 2002 to give Mr Hadden’s remaining estate to Mrs Vincent rather than to Mrs Hadden.

(13) Mrs Hadden died on 21 October 2001. The solicitor noted in February 2002 that Mrs Hadden’s estate “stands possessed of the whole of the share in “Hopefield” subject to the trust in your mother’s will that your uncle Mr Thom resides there for the rest of his days.” The solicitor took out a grant of probate of Mrs Hadden’s will on 9 July 2002. There was no IHT payable on the estate and there is no IHT return to review.

(14) On 14 November 2002, the solicitor, as personal representative of Mrs Hadden executed a Land Registry Assent form (AS1) by which he purported to vest the three-eighths share of Hopefield in Mrs Vincent. The form of assent is not ticked to indicate how the recipient is to hold the interest, but the provisions of the declaration of trust and clause 3 of the wills of Mr and Mrs Hadden are set out under “Additional Provisions”.

### **2001 – 2013**

(15) Mr Thom remained in occupation of Hopefield after his sister’s death in 2001 and until his death in 2013. He enjoyed travelling to India, where he stayed for periods of weeks at a time. His limited funds restricted the number of his journeys abroad and so Mrs Vincent considers that capital expenditure on Hopefield was “not on his agenda”.

(16) Mr Thom paid all utility bills and insured Hopefield after Mrs Hadden’s death. He also paid for essential capital works, such as essential repairs and Hopefield’s share of the cost of repair of a party garden wall that had collapsed. The stone garden wall had been over six feet high, but it was agreed that it should be stabilised at a lower height in order to save the costs of reconstructing the wall to its original height. Mrs Vincent assisted Mr Thom to save money by reviewing utility bills with him and discussing repairs. She considers that she contributed to costs by advising Mr Thom in this way and by agreeing to minimise or defer some spending.

(17) Mrs Vincent stayed in her parents’ bedroom at Hopefield about once or twice a month on average between 2001 and 2013. She stayed there when Mr Thom was abroad to check the house, and on her way to visit her son at university. Apart from these occasional visits Mrs Vincent remained resident at her marital home in Hampshire until after Mr Thom’s death. Mrs Vincent did not take out insurance for her items of furniture

at Hopefield and her name was not noted on the buildings and contents insurance policy paid for by Mr Thom. Mrs Vincent did not consider taking the furniture to her marital home.

(18) We accept that Mrs Vincent advised Mr Thom on how to save costs, but she has not established that she contributed to either the income or capital costs of Hopefield between 2001 and 2013. Indeed, she reported a conversation with Mr Thom in which he said that all the costs of Hopefield would be her problem after his death. Mr Vincent is a qualified structural engineer. He commented that the family was minimising capital expenditure on Hopefield, but that he and Mrs Vincent would have insisted that Mr Thom carried out structural repairs if they had thought that Mr Thom was responsible.

(19) Mrs Vincent said that they realised the extent of the structural repairs required when they took possession of Hopefield in 2014. Mrs Vincent engaged a surveyor who reported that “[it] would appear for many years minimal capital expenditure has been made to the property and it would now benefit from refurbishment and improvement.” This work has been carried out at Mrs Vincent’s cost.

(20) On 3 October 2013 an IHT 400, Inheritance Tax account and IHT 421 were sent to HMRC in respect of Mr Thom’s estate by Chubb Bulleid as agents for his legal personal representatives.

#### **HMRC check and determination**

(21) On 14 January 2014 HMRC opened a check into Mr Thom’s IHT account.

(22) On 29 January 2014 HMRC asked Mrs Vincent’s agent to complete an IHT404 as there were jointly owned assets that had not been returned.

(23) On 13 February 2014 a completed IHT 404 was returned to HMRC.

(24) On 7 December 2016 HMRC issued a Notice of Determination under section 221 IHTA 1984 to Mrs Vincent.

(25) On 4 January 2017 Mrs Vincent appealed to HMRC.

(26) On 4 September 2017 Mrs Vincent requested HMRC to conduct a review and on 4 December 2017 HMRC issued their review conclusion letter upholding the determination.

(27) On 29 December 2017 Mrs Vincent appealed to the Tribunal.

#### **RELEVANT LAW**

3. We were referred to the following statutory provisions and cases that are referred to in context in this decision:

#### **Statutory provisions**

(1) Section 53(1)(c) Law of Property Act 1925 (“LPA”): Instruments required to be in writing:

“a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.”

(2) Section 21 Administration of Justice Act 1982 on the 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) 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."

(3) The following provisions in Inheritance Tax Act 1984("IHTA")

Section 4(1) – Transfers on death

"On the death of any person tax shall be 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."

Section 5(1) – Meaning of Estate

"For the purposes of this Act a person's estate is the aggregate of all the property to which he is beneficially entitled..."

Section 43 – Settlement and related expressions

"(2) "Settlement" means any disposition or dispositions of property, whether effected by instrument, by parol or by operation of law, or partly in one way and partly in another, whereby the property is for the time being –

(a) held in trust for persons in succession or for any person subject to a contingency, or

..."

Section 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."

Section 50(5) – 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 that or those of the other or others."

Section 93 Disclaimers

"Where a person becomes entitled to an interest in settled property but disclaims the interest, then, if the disclaimer is not made for a consideration in money or money's worth, this Act shall apply as if he had not become entitled to the interest."

Section 221 Notices of determination

"(1) Where it appears to the Board that a transfer of value has been made or where a claim under this Act is made to the Board in connection with a transfer of value, the Board may give notice in writing to any person who appears to the Board to be the transferor or the claimant or to be liable for any of the tax chargeable on the value transferred, stating that they have determined the matters specified in the notice."

(4) We were also referred to HM Land Registry’s “Practice guide 24: private trusts of land”.

### Case law

We were referred to the following case law that is cited in context below:

- (1) *Bull v Bull* [1955] 1 QB 234 (“*Bull v Bull*”)
- (2) *Pearson and other v Inland Revenue Commissioners* [1980] STC 318 (“*Pearson*”)
- (3) *Inland Revenue Commissioners v Lloyds Private Banking Ltd (as trustee of Irene Evans, decd)* [1998] STC 559 (“*Lloyds*”)
- (4) *Woodhall (personal representative of Woodhall, deceased) v Inland Revenue Commissioners* [2000] STC (SCD) 558 (“*Woodhall*”)
- (5) *Faulkner (Trustee of Adams, deceased) v Inland Revenue Commissioners* [2001] STC (SCD) 112 (“*Faulkner*”)
- (6) *Judge & another (personal representatives of Walden, deceased) v HMRC* [2005] STC (SCD) 863 (“*Judge*”)
- (7) *Chartbrook Ltd v Persimmon Homes Limited and Others* [2009] 3 WLR 267 (“*Chartbrook*”)
- (8) *Brooke and others v Purton and others* [2014] EWHC 547 (“*Brooke*”)
- (9) *Marley v Rawlings and another* [2014] UKSC 2 (“*Marley*”)
- (10) *The Queen on the application of Ralph Hely-Hutchinson* [2015] EWHC 3261 (Admin) (“*Hely-Hutchinson*”).
- (11) *Cook and another (executors of Watkins, deceased) v Inland Revenue Commissioners* [2002] STC (SCD) 318 (“*Cook*”)

### SUBMISSIONS

4. Mrs Vincent submits that HMRC’s interpretation of Mrs Hadden’s will, some 13 years after her death, is inconceivable and was never considered by the family. Mrs Hadden’s executor carried out her wishes in accordance with her intention that Margaret Vincent should inherit her parents’ share in Hopefield, subject to allowing Mr Thom to live there for the remainder of his life. There was no intention to create the draconian rights of an interest in possession. Mrs Vincent submits that recent caselaw highlights the need for the Tribunal to take a flexible approach when considering the provisions in a will.

5. HMRC submit that the three-eighths share in Hopefield was settled property in which Mr Thom was beneficially entitled to an interest in possession that fell to be included as part of his estate on death. Mrs Vincent, as the person in whom the property then vested beneficially, is liable for inheritance tax on the value transferred by the chargeable transfer made on Mr Tom’s death.

### DISCUSSION

6. This appeal concerns the question of whether Mr Thom held an interest in possession in the three-eighths share in Hopefield immediately before his death. If he was beneficially entitled to an interest in possession in settled property, HMRC may charge IHT on his estate on the basis that it includes the value of the three-eighths share of Hopefield. This is because the IHTA provides as follows:

Section 4(1)

“On the death of any person tax shall be 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.”

Section 5(1)

“For the purposes of this Act a person’s estate is the aggregate of all of the property to which he is beneficially entitled,”

Section 49(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.”

7. Mrs Vincent does not dispute the interpretation of these provisions in the IHTA, but argues that Mr Thom was not entitled to an interest in possession in the three-eighths share of Hopefield on his death. Mrs Vincent argues that the intention of Mrs Hadden was that Mr Thom should be given no more than permission to reside at Hopefield as he had before her death, and that the will should be interpreted to give effect to this intention rather than stretched to create the life interest postulated by HMRC.

8. In order to address the question of whether Mr Thom held an interest in possession in the three-eighths share in Hopefield on his death, we first note a number of key findings of fact and law concerning the property interests that put the provisions in Mrs Hadden’s will in context, and then consider the evidence of intention, before concluding on the legal effect of the provisions in the will.

### **The property interests**

9. The first point to note is that Mr Thom held his five-eighths share in Hopefield under the terms of the declaration of trust that remained unchanged to the date of his death. A tenant in common’s enjoyment is not restricted to the percentage share held in the property. As Lord Denning stated in *Bull v Bull*:

“[when] there are two equitable tenants in common, then, until the property is sold, each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner; and that neither of them is entitled to evict the other.”

“The question may be asked: what is to happen when the two disagree, as they have done here? The answer is that the house must then be sold and the proceeds divided...”

10. The practical effect of these rights was explained by Lightman J in *Lloyds* in the following terms:

“a tenant in common under a trust for sale has the right to occupy the whole property without payment of rent, but subject to an obligation to contribute proportionally to the costs of holding the property.”

Applying this guidance to the facts of this case at the time of Mrs Hadden’s death, Mr Thom was entitled to enjoyment of the entirety of Hopefield without payment as the beneficial owner of the five-eighths share. His obligation was limited to five-eighths of the costs of holding the property. Both he and the beneficial holder of the three-eighths at that time, Mrs Hadden, could seek to sell or seek a Court order for sale if the other did not consent. The second point to note is that HM Land Registry registers the legal owner(s) of property. Section 78 of the Land Registration Act 2002 states that “[the] registrar shall not be affected with notice of a trust.” The solicitor’s invoice for the administration of Mrs Hadden’s estate records “[advising] in relation to the legal title of “Hopefield” which passed under the will and by act of law to the estate of Mrs Hadden and which had to be vested formally into the name of Mrs Vincent.” Mrs



Vincent was entered in the register as the legal owner of the three-eighths share pursuant to the assent dated 14 November 2002, but this does not determine whether or not she was the beneficial holder of the three-eighths share.

11. The third point is that Hopefield is a single legal estate in land. Its beneficial ownership was shared on the terms set out in the declaration of trust. Its occupation was similarly shared by the three purchasers, but it was not separated into two households as a matter of fact for the reasons set out in paragraph 2(3) above.

### **Evidence of intention**

12. Mrs Vincent's grounds for disputing HMRC's interpretation of Mrs Hadden's will include her submission that such an interpretation was not intended. She submits that section 21 of the Administration of Justice Act 1982 ("the 1982 Act") is in point.

13. We have considered the drafting of clause 3 of the will and do not find that it is meaningless or ambiguous within section 21(1)(a) or (b). The words on the face of the will make clear that Mr Thom is to be allowed to continue to live at Hopefield for the remainder of his life and, subject to this, the interest in Hopefield is to pass to her daughter Mrs Vincent.

14. In considering whether section 21(1)(c) is engaged, we note the confirmation in *Brooke* that it is "both desirable and appropriate that the concept of ambiguity in s21 of the 1982 Act should be broadly interpreted". Our conclusion is that section 21(1)(c) of the 1982 Act is engaged because it is arguable that 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". This is because of the following accepted facts: (1) Mr Thom was already entitled to occupy Hopefield as the beneficial owner of a five-eighths share when he was given permission to occupy under the will; (2) there was no change in Mr Thom's use of Hopefield after Mrs Hadden's death; and (3) Mrs Vincent was not excluded from using Hopefield as she had done before Mrs Hadden's death. We have therefore considered external evidence in accordance with section 21(2) of the 1982 Act in order to assist in interpretation of the will.

15. In this respect we have applied the guidance on interpreting wills in the decision of Lord Neuberger in the Supreme Court in *Marley*, including the following passages (at paragraphs 19, 20 and 38) that highlight the need to identify the context and the facts known or assumed by the parties at the time;

"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

"When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context..."

"Lord Hoffman took that approach a little further in [*Chartbrook*], ...he said:

"There is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.""

16. Mr and Mrs Vincent were not present when the three purchasers instructed the solicitor to prepare the declaration of the terms on which they purchased Hopefield or when they gave their instructions for their wills. Mr and Mrs Vincent's subjective evidence of their understanding is noted below insofar as it concerns the matters listed by Lord Neuberger in paragraph 16 under heading (a) above.

17. Mrs Vincent told the Tribunal that her family and neighbours were all fully aware that her parents intended to allow Mr Thom to continue living at Hopefield after their death and that Mrs Vincent would inherit the house. Mrs Vincent points to certain facts as evidence that Mr Thom's occupation of Hopefield was not intended to change as a result of the will and that it was intended that occupation should continue to be shared. These include the facts that she inherited her parents' furniture in Hopefield and that this confirms that her parents intended her to leave it there to occupy their part of Hopefield. Mrs Vincent notes that she stayed in her parents' bedroom at Hopefield as she wished and that she was allowed to keep her key to Hopefield after her parents' death. There was no suggestion that she needed to ask Mr Thom's permission to enjoy what she considered to be her second home.

18. We have considered what instructions could have been given to the solicitor drafting the will and what was known by the solicitor and his clients at that time. The same firm of solicitors drafted the declaration of trust and the three wills, and so the solicitor drafting the wills would have known that Mr Thom's right to occupy Hopefield would not be affected if his sister and brother in law predeceased him. Further, the wills were drafted after the decision of the Court of Appeal in *Bull v Bull* and the later decision of the House of Lords in *Pearson*. This 1980 decision considered the meaning of an 'interest in possession' in the context of the capital transfer tax charge introduced by the Finance Act 1975 when a person is beneficially entitled to an interest in possession that comes to an end. Viscount Dilhorne and Lord Keith of Kinkel made the following statements respectively:

"In my opinion the words 'interest in possession' in Sch5 should be given their ordinary natural meaning which I take to be a present right of present enjoyment".

"These provisions appear to me to contemplate that the entitlement to income which is spoken of is an entitlement which, for the time being at least, is absolute."

19. As we noted from the facts cited in paragraphs 2(10-14) and 10 above, it is not clear what the solicitor who dealt with Mr and Mrs Hadden's probates advised on the legal, trust and tax effect of the provisions in clause 3 of their wills. He used the word "trust" and referred to registering the "legal title", but he also suggested that Hopefield should be held upon trust for Mrs Hadden's lifetime. There is no evidence to suggest that the tax effect of the creation of an interest in possession was discussed with Mrs Hadden.

20. We have considered this external evidence against the background of the property interests considered above, and our findings on Mr and Mrs Vincent's evidence more generally. We have concluded that Mrs Hadden's intention was that Mr Thom could live at Hopefield for remainder of his life undisturbed, meaning that there should be no risk of having to sell, move out or to pay for the right to live there. The evidence of the Mrs Vincent's inheritance of the furniture and of her leaving it *in situ* fulfils the three purchasers' intention that Hopefield should provide a family home for their generation and the next. The evidence of Mrs Vincent's visits is that they enhanced rather than detracted from Mr Thom's enjoyment of Hopefield.

21. Before considering the legal effect of the drafting it is relevant to note two further points on intention.

22. First, the solicitor who drafted the new wills for the three purchasers in 1985 included different provisions in clause 3 of Mr Thom's will, but the wills of all three purchasers protected the other of them ahead of the gift of their share of Hopefield to Mrs Vincent. Mrs Vincent explained that Mr Thom was the youngest and was expected to be the survivor of the three. If clause 3 of Mr and Mrs Hadden's wills had instead reflected the expected effect of Mr Thom's will, to make an unconditional gift of their jointly held share to Mrs Vincent if they predeceased Mr Thom (see paragraph 2(9) above), this would have ensured that Mrs Vincent inherited their three-eighths in Hopefield after her parents' death and Mr Thom could have continued to live there as a tenant in common beneficially entitled to five-eighths. While we accept that it is inconceivable to Mrs Vincent that she might have done this, this would have left Mr Thom at risk of her calling for a sale of Hopefield or disturbing his enjoyment at any time.

23. Second, Mrs Vincent moved to Hopefield following the death of Mr Thom in 2013 and now lives there as owner of Hopefield. The three purchasers' intention that Hopefield should be the family home for their generation and the next generation, Mrs Vincent, has been realised in accordance with the provisions in clause 3 (a) and (b) of Mrs Hadden's will.

### **Legal effect of the provisions in the declaration of trust and the will of Mrs Hadden**

24. The will of Mrs Hadden disposed of the three-eighths share in Hopefield that she owned at the date of her death. It did not, and indeed could not, deal with the five-eighths share owned by Mr Thom. As noted in paragraphs 9 and 10 above, Mr Thom's right to enjoy his five-eighths share remained subject to the terms of the declaration of trust, and the decision in *Bull v Bull* makes clear that Mr Thom was entitled to enjoy occupation of the entirety of Hopefield as a tenant in common. So what could the provisions in Mrs Hadden's will have been intended to add to Mr Thom's right to enjoyment of Hopefield as the beneficial owner of the five-eighths share, and why were they drafted in this way?

25. Mrs Vincent submits that if one were to sit metaphysically "in the armchair of the testator", as suggested in *Brooke*, it is apparent that Mrs Hadden's intention was that she should inherit her parents' share in Hopefield and that she should be trusted to allow Mr Thom to live at Hopefield for the remainder of his days. Mrs Vincent referred us to HMRC guidance TSEM6035. This states that using the words 'trustee' and 'trust' in the opening words of a will, "I appoint XXXX to be my executor and trustee. I give and bequeath all my goods and possessions to the said XXXX upon trust", does not create a trust but rather trusts the executor to discharge its duties.

26. The difficulty in accepting Mrs Vincent's interpretation is that it does not give the provisions any legal effect. As noted in paragraph 22 above, if the Haddens' wills had made an outright gift to Mrs Vincent, the position would have been as submitted by Mrs Vincent as she would have been the beneficial holder of the three-eighths share as tenant in common with Mr Thom from 2001, and she could have been trusted not to seek a sale of Hopefield during Mr Thom's life. But this situation would have been "precarious" (to the use the language of Lightman J in *Lloyds*) because of the risk of a sale in the event of a disagreement as explained in *Bull v Bull* (see paragraph 9 above). The drafting therefore goes beyond such a request to allow Mr Thom to live at Hopefield and instead permits Mr Thom to occupy Hopefield for "so long as he shall desire" subject to his being responsible for 100% of the income outgoings.

27. HMRC referred us to the decisions in *Woodhall*, *Faulkner* and *Lloyds*. The facts of *Lloyds* are similar to this case as it concerns the will of Mrs Evans who owned the property concerned as tenant in common with her husband. It was decided that provisions in Mrs Evans's will that restricted her trustee from "making any objection to" the continued occupation of the family home by her surviving spouse was sufficient to create a life interest. Lightman J referred to the decision in *Bull v Bull* and went on to comment that:

“Accordingly, if the will had not included the provisions made in cl 3(1) or if such provisions are without legal effect, the legal position was or would have been that after the death of Mrs Evans both Mr Evans and the daughter were equally entitled to occupy the whole property each paying one-half of the outgoings and to share the profits and each was entitled to apply for an order for sale; and accordingly not only would Mr Evans’s occupation be non-exclusive, but it would also be precarious, depending on no successful application being made by the daughter for an order for sale,”

“In my view, though the drafting and language of cl3(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.”

28. In *Woodhall* the will gave the house to the trustees, with a direction that no sale of the house should be effected during such period as any of his daughter and two sons “shall desire to reside there” upon condition that the occupant(s) discharged outgoings. One of the sons moved in and the daughter died. *Woodhall* concerned the question of whether the son who moved in had an interest in possession. It was held that the will created an interest in possession in favour of all three children. It was also decided that the fact that the other son did not exercise his right to occupy did not affect his determinable life interest.

29. In *Faulkner* the will gave directions to the trustees that a married couple “may live in the house and have the use of the furniture as long as he she or they so wish” and that neither the house nor the furniture should be sold without their consent. The drafting was held to create an interest in possession.

30. This drafting in *Woodhall*, *Faulkner* and *Lloyds* can be contrasted with the drafting in the will considered in *Judge*. In *Judge* a property was left on discretionary trusts that gave the trustees an absolute discretion to allow the widow to occupy. It was held that this was not sufficient to create a life interest, notwithstanding that the widow also had a power of veto over a sale of the property. These cases illustrate that the drafting may be expressed as a right to occupy or in terms of restrictions on the trustee, but the question of its construction should focus on whether the substance creates a present right to the present enjoyment of the property as described in *Pearson* (see paragraph 19 above).

31. Mrs Vincent submits in this context that the *Lloyds* case can be distinguished because the concern there was to give Mr Evans exclusive occupation. This point is made because Lightman J noted that if the will had not been drafted in this way Mr Evan’s occupation would have been non-exclusive (see paragraph 27 above). In this case Mr Thom was not expected to, and did not enjoy exclusive occupation. He did not occupy Mr and Mrs Hadden’s bedroom and bathroom after their death and these were available for Mrs Vincent’s shared use. We accept this evidence, but as it was held in *Woodhall*, that the fact that a beneficiary chooses not to occupy a house, notwithstanding his right to do so in accordance with a dispositive provision in a will trust, does not affect his interest in possession in the house. Applying this to the fact that Mr Thom may not have been expected to occupy part of Hopefield and that he allowed his niece to use those parts when she visited, did not affect his right to occupy the whole property. His occupation reflected his practical requirements and his intentions, not necessarily those of Mrs Hadden.

32. If the drafting in clause 3 of Mrs Hadden’s will is considered in the light of the guidance in *Marley* and the case-law, facts and context noted above, it must be read as creating an interest in possession in the three-eighths share of Hopefield for Mr Thom. The drafting, like the provisions in *Lloyds*, is a direction to the trustees to permit Mr Thom to occupy Hopefield, subject to paying all the income expenses, and the substance is therefore to confer a right on Mr Thom “for so long as he shall desire”. The drafting is not simply a request that Mrs Vincent

should permit Mr Thom to reside, nor it is a discretion for the trustees to permit Mr Thom to reside. The right to reside could only be secured by the creation of an interest in possession and, to adopt the language of Lightman J in *Lloyds*, “the alternative approach of regarding cl 3(1) as administrative only would deprive cl 3(1) of any effect: it could be totally ignored by the daughter.”

33. The qualification that Mr Thom should be responsible for all the rates, insurance and maintenance repairs “of an income nature”, as opposed to all maintenance repairs, is indicative of the recognition of the creation of separate interests in the income and capital in the three-eighths share. It is noted for completeness in this context the findings set out in paragraph 2(18) above. There is evidence that Mr Thom did not undertake structural repairs that have since had to be undertaken by Mrs Vincent, but he paid the utility bills, insurance and maintenance repairs of an income nature as required. His actions are indicative of his knowledge and compliance with the provisions of Mrs Hadden’s will.

34. In conclusion, the drafting in clause 3 of Mrs Hadden’s will protected Mr Thom right to reside from the ‘what ifs’. It gave him a life interest in the three-eighths share so that his tenant in common could not disturb his occupation or seek to enforce a sale of Hopefield. The risk may well have been minimal if the drafting had instead been an outright gift to Mrs Vincent (as noted in paragraph 22 above), but this would not have protected Mr Thom from events such as a forced sale because of a breakdown in family relations, financial problems or Mrs Vincent and her son predeceasing Mr Thom. The fact that, happily, these events did not occur cannot change the interpretation of the will and its tax effect. As set out in HMRC’s determination dated 7 December 2016, the three-eighths share was settled property having regard to section 43 IHTA, in which Mr Thom was beneficially entitled to an interest in possession to which section 49(1) IHTA applied, and it fell to be included in his estate on death.

#### **Did Mr Thom disclaim his interest?**

35. Mrs Vincent’s closing submission was that if Mr Thom had an interest in possession under the will of Mrs Hadden, he disclaimed it by his conduct or ignorance of its existence, and so section 93 IHTA provides that the IHTA “shall apply as if he had not become entitled to the interest.”

36. Mrs Vincent submits that the following evidence supports her claim of a disclaimer:

(1) Mr Thom was never aware of the possibility of the existence of the rights to complete control of the whole property that an interest in possession would have granted.

(2) Mr Thom continued to “enjoy exactly the same areas of the property as he had enjoyed before Mary’s death” and he did not interfere with Mrs Vincent’s enjoyment of the areas of Hopefield formerly enjoyed by her parents. Mr and Mrs Hadden’s furniture and belongings were left *in situ*.

(3) The executor of Mrs Hadden’s will did not identify any additional rights granted by Mrs Hadden’s will that Mr Thom needed to be informed of.

37. HMRC referred us to the case of *Cook* in which Mrs Cook left her husband an interest in possession of the flat that they had lived in. Following his wife’s death Mr Cook chose to live with his daughter and only visited the flat on a few occasions after her death. Dr John Avery Jones CBE held (at paragraph 11) that this conduct was not sufficient to disclaim the gift, explaining that:

“I do not think there is any dispute on the law that disclaimer can be by informal acts but will not be readily presumed where it is to the advantage of the person to retain the gift (Williams on Wills (8th edn, 2002) ch 46), nor that the presumption is that a person will accept a legacy unless the contrary is

proved (see the cases cited in *Re Strattons Disclaimer, Stratton v IRC* [1958] Ch 42 at 50–51, [1957] 2 All ER 594 at 597).”

38. HMRC’s review letter stated that a surrender of the equitable interest in property would have had to be in writing to have effect under section 53 (1)(c) LPA, but this point was not made in HMRC’s further submissions. The written submission included a passage from Halsbury’s (cited in paragraph 37 below) that refers to disclaimers by informal means. We agree with Mrs Vincent that a disclaimer may be affected by informal means, even though the gift conferred a legal estate in property.

39. Mrs Vincent notes that section 93 IHTA does not include a time limit, but HMRC submit that a disclaimer is effectively time limited as it operated as a non-acceptance of the gift. We were referred to the following passage from Halsbury’s Laws of England, S151, para 3(2), Vol 102 (2016):

“a disclaimer does not operate as a disposition of property but as non-acceptance of it. A disclaimer accordingly operates so as not to divest but to prevent it from vesting and may, therefore, be effected by informal means as well as by record or deed, even if the gift confers a legal estate in property. Since acceptance of a gift or any part of it is inconsistent with an intention to renounce or disclaim it, it is not permissible to disclaim part only of a single gift, and the right to disclaim it is altogether extinguished as soon as any benefit has been received under it.”

40. We have considered Mrs Vincent’s submissions and the Tribunal finds by a majority that, applying the guidance set out above to the facts in paragraph 2 above, it has not been established that there was a disclaimer by Mr Thom at any time. The arrangement to allow him to live out his life at Hopefield undisturbed had been agreed with his sister and brother in law at the time of the ‘great undertaking’ in 1985. Mrs Vincent said that Mr Thom wished to spend his available funds on his travels to India, yet he used his money to pay 100% of the utility bills and insurance, as well as the capital costs of the essential repairs as noted in paragraphs 2(15-18) above. His actions demonstrate his knowledge and acceptance of the conditions in the will, and his acceptance of the gift. The facts that he allowed Mrs Vincent to leave her parents’ furniture at Hopefield and that he allowed her to visit and use her parents’ room, especially when he was abroad, enhanced rather than disclaimed his enjoyment of the gift. A disclaimer cannot be presumed in these circumstances.

41. It is concluded that Mr Thom did not disclaim the interest in possession created by Mrs Hadden’s will.

#### **Legitimate expectation or Rectification?**

42. As a result of the inclusion of the three-eighths share of Hopefield in Mr Thom’s estate, HMRC included the value of 100% of Hopefield in the determination without a discount for shared ownership under section 50(5) IHTA.

43. Mrs Vincent referred us to the following extract that she had placed reliance on because it was on HMRC’s webpage [www.gov.uk/valuing-estate-of-someone-who-died](http://www.gov.uk/valuing-estate-of-someone-who-died)

“For property or land shared with others ... You can then take 10% off the share of the person who died.”

Mrs Vincent submits that, as a result of this public statement, together with the public statement on HMRC’s web page TSEM9120 that the legal owners of a property are those persons whose names are registered in the Land Registry, a legitimate expectation was established that this discount would be applied as both she and Mr Thom’s names were entered on the register at the date of his death.

44. Mrs Vincent referred us to *Hely-Hutchinson* in support of her claim for the 10% discount to be applied, and more generally, that she had a legitimate expectation that an interest in possession did not exist because HMRC did not raise their interpretation until thirteen years after Mrs Hadden's death. It was also suggested that if HMRC's interpretation of the drafting is correct, the will could be rectified by construing it to represent Mrs Hadden's intention (as expressed by Mrs Vincent).

45. HMRC have responded that the determination and valuation reflect the legal effect of the provisions in the declaration of trust and Mrs Hadden's will that made Mr Thom the beneficial holder of the five-eighths and the three-eighths shares. HMRC conclude that even if Mrs Vincent had valid grounds, this Tribunal does not have jurisdiction to consider a claim of legitimate expectation or to rectify a will.

46. We agree that this Tribunal does not have jurisdiction to consider a claim for judicial review on the grounds of legitimate expectation and there is no jurisdiction to rectify the will.

### **Majority decision**

47. Mr Jenkins considers that Mr Thom disclaimed any interest in the three-eighths share by his conduct or ignorance of its existence. Mr Jenkins has reached this decision on the basis that he considers that Mr Thom was only entitled to occupy five-eighths of Hopefield, and that there was no change in his use of Hopefield following the death of his sister Mary Hadden. Mr Jenkins concludes that as Mr Thom did not use the three-eighths share, it was owned by Mrs Vincent. There is no disagreement between the Tribunal panel members in relation to the findings of fact set out in paragraph 2 or the evidence of intention set out in paragraphs 12 to 23. The Tribunal Judge has exercised her discretion to use her casting vote in accordance with the provisions of The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 as the disagreement relates to the application of the law to these facts.

### **Decision**

48. For the reasons set out above the appeal is refused.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

49. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**VICTORIA NICHOLL  
TRIBUNAL JUDGE**

**RELEASE DATE: 30 OCTOBER 2019**