[2024] UKPC 25
Privy Council Appeal No 0056 of 2023

JUDGMENT

Audrey Sheila Flowers (formerly Audrey Sheila Scavella) and another (Respondents) *v* Bria Scavella and 2 others (Appellants) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
1 August 2024

Heard on 8 July 2024

Appellants
Krystal D Rolle KC
Darron B Cash
(Instructed by Rolle and Rolle)

Respondents
Marco M Turnquest
Clinton C Clarke
(Instructed by C3 Chambers)

LORD BRIGGS AND LORD RICHARDS:

1. This appeal from the Court of Appeal of The Bahamas raises a question of construction (or perhaps application) of section 65 of the Probate and Administration of Estates Act 2011 ("the 2011 Act") which, under the heading "Charges on property of deceased to be out of property charged" provides as follows:

> "Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will, deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof."

2. The question for decision is whether this provision applies to real property held by two beneficial joint tenants, one of whom dies and, as a result, the survivor becomes the sole owner of the property. It happens that in this case the first to die was intestate, which raises the additional question whether section 65 has any application to the administration of an intestate estate. For reasons which will appear, the Board has not found it necessary to decide the additional question.

3. The question which we do have to decide is a pure question of law, and it has been treated by the parties and the courts below as determinative of this litigation. The answer to the question is not at all fact-sensitive, so the facts can be shortly described.

4. William Graham Scavella ("William") died intestate on 19 November 2012, leaving his former wife Gina Scavella ("Gina"), their two children Bria and Erin, and his second wife Audrey Flowers, formerly Scavella ("Audrey"). Under the statutory trusts governing the devolution of property of intestate deceased persons in The Bahamas, Audrey was entitled to half his net estate after payment of all debts and expenses, while Bria and Erin were entitled between them to the other half.

5. Prior to his death, William and Audrey lived together in a house known as No 1. Harold Heights, New Providence, Bahamas ("the Property") which they owned as beneficial joint tenants. In September 2011 William and Audrey borrowed $540,000 from the Finance Corporation of The Bahamas Ltd ("FCB") secured upon the Property.

It was an instalment mortgage but the capital amount was almost entirely outstanding when William died.

6. Audrey obtained a grant of administration to William's estate in May 2013. Since as surviving beneficial joint tenant Audrey became the sole beneficial owner of the Property by survivorship upon William's death, no part of the Property passed into his estate. Apart from some chattels and a modest credit in a bank account, the main asset in his estate was a life insurance policy which was eventually realised in August 2013 by Audrey, acting as his personal representative, for $165,000. The life insurance policy was a benefit accruing to William from his employment. It had no connection with the mortgage loan and was not charged to FCB as security for its repayment.

7. Audrey paid a substantial part of the proceeds of the policy to FCB in reduction of the mortgage debt. In October 2017 Bria, Erin (by her mother Gina as next friend) and Gina in her own right began proceedings against Audrey in the Supreme Court of The Bahamas seeking an account of her administration of William's estate. By the time of trial the main issue between the parties (and the only issue on appeal) was whether section 65 required the Property (or Audrey's interest in it) to be primarily liable for the mortgage to FCB, in exoneration of the estate, so that Audrey had been wrong to use the proceeds of the policy, or any other assets of the estate, for the reduction of the mortgage debt.

8. Following trial in October 2018 Keith Thompson J found in favour of Gina and her children, in a reserved judgment given in January 2019. On Audrey's appeal the Court of Appeal (Sir Michael Barnett P, Evans and Bethell JJA) reversed the trial judge, in a reserved judgment given in May 2022. In the opinion of the Court of Appeal section 65 had no application as between the beneficiaries in the estate of the first to die and the survivor of two beneficial joint tenants of any real property. Further the court decided that section 65 had no application to an intestate estate. Gina and her children have appealed to the Privy Council, arguing that both those conclusions of the Court of Appeal were wrong.

9. It was frankly acknowledged by Ms Krystal Rolle KC for the appellants that, if either of the conclusions of the Court of Appeal was correct, then the appeal must necessarily fail. The Board has reached a clear conclusion that the Court of Appeal was right in its answer to the first ("joint tenancy") question. It is therefore unnecessary for the Board to answer the second, more difficult, ("intestacy") question.

10. Section 65 reproduces section 35 of the Administration of Estates Act 1925 (UK) ("the 1925 Act"), save for the omission of an immaterial reference to entailed estates. In a helpful and well-researched piece of legal historical scholarship Ms Rolle demonstrated that the origin of section 35, and hence of section 65, lay in section 1 of

the Real Estate Charges Act 1854 (17 & 18 Vict, c 113) ("the 1854 Act"), which provided that:

> "When any Person shall, after the Thirty-first of December One thousand eight hundred and fifty-four, die seised of or entitled to any Estate or Interest in any Land or other Hereditaments which shall at the Time of his Death be charged with the Payment of any Sum or Sums of Money by way of Mortgage, and such Person shall not, by his Will or Deed or other Document, have signified any contrary or other Intention, the Heir or Devisee to whom such Land or Hereditaments shall descend or be devised shall not be entitled to have the Mortgage Debt discharged or satisfied out of the Personal Estate or any other Real Estate of such Person, but the Land or Hereditaments so charged shall, as between the different Persons claiming through or under the deceased Person, be primarily liable to the Payment of all Mortgage Debts with which the same shall be charged, every Part thereof, according to its Value, bearing a proportionate Part of the Mortgage Debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any Right of the Mortgagee on such Lands or Hereditaments to obtain full Payment or Satisfaction of his Mortgage Debt… "

11. By reference to the speech of Lord St Leonards, introducing the Bill in the House of Lords, Ms Rolle demonstrated that its purpose had been to ameliorate an injustice caused by the rules as to primogeniture (the attempted repeal of which had earlier been defeated) which applied on intestacy whereby the mortgage debts incurred by the owner of real estate were thrown upon those beneficiaries entitled to personalty, in exoneration of the successor to the realty. In short, the eldest son had the mortgages on his father's landed estate (which he inherited) discharged at the expense of his siblings, who only stood to inherit personalty.

12. It is apparent from the replacement of section 1 of the 1854 Act by section 35 of the 1925 Act that, besides a modernisation of the language, the provision for charges on property to be paid primarily out of the property charged was extended to cover all forms of property. The rules of primogeniture were belatedly abolished by the 1925 Act, and section 35 is a provision that has a life of its own, separate from its original purpose in the amelioration of the injustices of primogeniture. Ms Rolle fairly observed that its purpose should still be understood as the alleviation of injustice arising from casting the burden of property charges elsewhere than upon the charged property concerned, but the precise identification of the scope and extent of that purpose has to be gathered from the statutory language, read in its context.

13. The immediate context for the construction of section 65 of the 2011 Act is not of course English public policy or English law, but the policy and law of The Bahamas. Furthermore, there is no body of binding (or other) authority upon section 35 of the 1925 Act that could lead simply to its adoption as governing the meaning of section 65, on the basis of the use of identical statutory language. There is no Bahamian statutory predecessor to section 65, but the policy context is not materially different, because The Bahamas did not, at least by 2011, include primogeniture as part of its law.

14. Of primary importance in getting to the answer to the joint tenancy question is the concurrence between English and Bahamian law as to the nature and meaning of co-ownership of property as beneficial joint tenants. It was common ground between counsel that there is such a concurrence. As will appear there are also telling indicators in Bahamian legislation about the succession to property upon death that this is so.

15. As is well-known, at least by lawyers, the survivor of two beneficial joint tenants of property becomes the sole beneficial owner of the property upon the death of the first to die, by what is generally known as survivorship. This is not because the interest of the first to die is somehow transferred to the survivor. Rather it is because it is inherent in the nature of beneficial joint tenancy that the interest of the first co-owner to die is simply extinguished, leaving the survivor as the sole beneficial owner, with an interest that then (because it is no longer a joint co-ownership interest) outlasts the survivor's death. On the survivor's death, the property will form part of his or her estate. In sharp contrast the interest of the first to die never becomes part of his or her estate.

16. All this is what Lord Diplock would have called hornbook law (*R v Merriman* [1973] AC 584 at 606), and dates back at least to the 17th century. It was recently reaffirmed by the UK Supreme Court in *Solihull Metropolitan Borough Council v Hickin* [2012] UKSC 39, [2012] 1 WLR 2295. The central concept that the interest of the first to die is extinguished rather than transferred upon death is expressly acknowledged in section 61(3) of the 2011 Act, which provides this text for the purposes of interpretation of Part IX (headed Devolution of Real Estate):

> "The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death."

Section 59(1) of the 2011 Act provides that:

> "Real estate to which a deceased person was entitled for an interest not ceasing on his death, shall, on his death and notwithstanding any testamentary disposition thereof, devolve on the personal representative of the deceased."

17. The combined effect of those two provisions is that the interest in jointly owned real property of the first co-owner to die is extinguished and does not pass into his estate. Ms Rolle prayed in aid section 20 of the Inheritance Act 2002 (Bahamas), which provides that:

> "Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, the deceased's share in the property shall upon his death pass automatically to the surviving joint tenant or tenants and shall not be treated for the purposes of this Part as part of the net estate of the deceased."

18. Section 20 is within Part III of the Inheritance Act, which is concerned with the provision which the court may make for dependants of the deceased when his or her will fails to make reasonable financial provision for their maintenance. Provision is to be made out of the net estate of the deceased: see section 13. The purpose of section 20 is to make it clear that the net estate does not include the share of jointly owned property of the first to die of two or more joint tenants. It is not concerned with to whom or how that share passes by survivorship. It cannot in the Board's view override the clear impression gained for example from section 61(3) of the 2011 Act that Bahamian law recognises like English law that, although the deceased's interest is sometimes colloquially described as "passing" by survivorship, in law it is simply extinguished, leaving the survivor as the sole beneficial owner.

19. Furthermore, section 20 recognises that such a share is properly described as owned by a person immediately prior to his death, but not on his death. This is consistent with the reference in section 61(3) to a deceased's interest under a joint tenancy ceasing on his death, where there is a surviving joint tenant. By contrast, section 65 refers to a person who "dies possessed of, or entitled to… an interest in property" and to property being charged "at the time of his death". Ms Rolle valiantly sought to submit that, in order to fulfil the purpose behind section 65, those phrases should be read as "immediately prior to" the deceased's death, so as to include any share in jointly owned property. For reasons which will become apparent, the Board did not feel able to follow her down that adventurous path.

20. The question whether section 65 applies to property which a surviving joint co-owner enjoys by survivorship needs to be addressed by reference to the effect of section 65, read as a whole. It is concerned, exclusively in the Board's view, with the priority, for use in payment of the estate's debts, of different parts of the property comprised in the estate. Thus, if a particular interest in property is charged with the payment of money, then that interest in property is primarily answerable to meet that payment, rather than (or in exoneration of) any other interest in property forming part of the estate which is not charged with payment of that debt. If that is what section 65 is all about,

then it is manifestly clear that it has no application to property not forming part of the estate. It can neither appropriate that interest in property towards payment of the estate's debts nor exonerate that interest in property by providing that some other interest in property (within or without the estate) should primarily be answerable for payment.

21. There are several aspects of the language of section 65 that make it clear that its purpose and effect is limited in this way. It begins by requiring the identification of an interest in property of which the deceased dies possessed, or to which he is entitled, when he dies, or over which he has a general power of appointment by will. The latter is inapplicable to the present case. Then it requires that interest in property to be charged with the payment of money at the time of his death. None of those enabling requirements, which may be described as gateways into section 65, can apply to the interest in jointly owned property of the first to die. It is extinguished upon his death. It cannot be an interest of the deceased which is charged with the payment of money, because that interest has been extinguished.

22. Section 65 then speaks of being displaced by contrary intention, by will, deed or other document. That must be an intention, contrary to section 65, that relevant charged property should not be answerable for meeting the debts for which it stands as security. The only potentially relevant interest in jointly owned property is, by the time it becomes necessary to pay the estate's debts, the (by then) sole beneficial interest of the survivor. But how could the deceased have any relevant governing intention about whether property not forming part of the estate should or should not be answerable for the estate's debts?

23. Finally, section 65 speaks of operating to regulate priority of interests in property for payment of debts "as between the different persons claiming through the deceased". This means beneficiaries in the estate, not the beneficial owners of interests in property not forming part of the estate. The survivor of joint owners does not claim his or her interest in the (formerly) jointly owned property through the deceased co-owner. The deceased's share has been extinguished upon death.

24. It so happens that Audrey, the surviving co-owner of the Property, is also a beneficiary in William's intestate estate. But that is mere happenstance. Her interest in the Property is not held or claimed through the deceased, nor is it comprised within the estate. Her interest in the estate has nothing to do with her interest in the Property. But if section 65 were thereby to apply merely because she is a beneficiary, that would produce capricious results which cannot have been intended and would extend the reach of section 65 beyond the property in the estate in a way which equally cannot have been intended. The example was given during oral argument of two brothers as joint owners of property. The surviving brother was not a beneficiary in the estate and not therefore within the confines of the persons between whom section 65 was meant to operate. But suppose that he had been left a family Bible by the deceased's will and was therefore a

beneficiary in the estate. Would that bring his interest as survivor in the formerly jointly owned property within the purview of section 65? Surely not.

25. The Board was referred to two authorities on differently worded versions of statutory provisions similar to section 65. The first was *Syer v Gladstone* (1885) 30 Ch D 614. That was a decision of Pearson J about section 1 of the 1854 Act. The differences in language, purpose and effect between that provision and its modern successors have already been noted, and in any event the case concerned a gift of real property under a will, not a joint tenancy held by the deceased and a survivor. The second was *Official Assignee v Crooks* [1986] 2 NZLR 322, an illuminating decision by Henry J about the New Zealand version of section 65 which, critically, expressly applied to interests upon survivorship between joint tenants. Section 149(1) of the (New Zealand) Property Law Act 1952 contained language very similar to section 65(1) of the 2011 Act. Henry J had the greatest difficulty in understanding how that language could possibly extend to the interest of a survivor of the deceased in jointly owned property. In the end he decided the case on the basis that, however it was meant to work, there was a sufficient contrary intention.

26. The result is that neither of those authorities, nor any other authority, added much to the Board's understanding about the scope and range of application of section 65. Nonetheless, for the reasons given, the Board is entirely satisfied that it does not bring within its purview an interest in jointly owned property of the survivor of a deceased co-owner, whether or not she happens to be a beneficiary in the deceased's estate.

27. That is not to say that the law is silent about the respective liabilities, as between the survivor and the estate of the first to die, for payment of debts secured on the formerly jointly owned property. The flexible principles of equity may well require one to contribute to or indemnify the other in respect of payment of a debt for which (as here) they may both be liable to the creditor at law. But no issues of that kind have been pleaded or raised for determination at any stage in these proceedings, so the Board says nothing further about them, save merely to note their existence.

28. The Board will therefore humbly advise His Majesty that this appeal should be dismissed.