[2018] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 65/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**SYLVIA GAYLE-HENRY**	**APPELLANT**
AND	**LLOYD GAYLE**	**1ST RESPONDENT**
AND	**CEDRIC GAYLE**	**2ND RESPONDENT**

Michael D Palmer instructed by Palmer, Smart & Company for the appellant

Mikhail H R Williams instructed by Taylor, Deacon and James for the respondent

30 March 2017 and 9 February 2018

PHILLIPS JA

[1] I have read in draft the judgment of Edwards JA (AG) and I agree with her reasoning and conclusions.

F WILLIAMS JA

[2] I too agree and have nothing further to add.

EDWARDS JA (AG)

Introduction

[3] In this appeal, the appellant challenges the decision made by Sykes J (the judge) in favour of the respondent, on 7 June 2013. The case concerns the interpretation of certain provisions in the last will and testament of Mr Clifford Gayle (the testator) dated 16 April 1969. In that will, the testator bequeathed property to the appellant, who was his wife, and to his sons, including the respondents. The dispute really concerns 22 acres of land which the testator bequeathed as follows:

> "I GIVE AND BEQUEATH to my wife Sylvia Gayle all that portion of land part of Mount Ricketts approximately (22 acres) Twenty-two acres to receive fifty (50%) percent of all proceeds after expenses are cleared during her lifetime.
>
> She is to take care of my mother and pay her funeral expenses. At the death of my wife the said Twenty-two acres (22 Acres) of land is to be given to my sons Franklin, Bernel, Lloyd and Keith."

[4] The relevant background to this case may be found in paragraphs 1, 2 and 3 of the judge's reasons as follows:

> "[1] Messieurs Lloyd Gayle and Cedric Gayle are brothers, two of ten children produced by the testator Mr Clifford Gayle. Both gentlemen have filed an application asking the court to interpret the will of Mr Clifford Gayle. Mr Clifford Gayle was a farmer and butcher who acquired a fair amount of real estate in his life time. At the time of his death in April 1969, he was married to the defendant, Mrs Sylvia Gayle, now Mrs Henry. Mrs Henry was appointed one of the executors and she was also named as a beneficiary. Mr Lloyd Gayle has died since the application was filed… (Mrs A) his widow, was substituted for him.

> [2] Mrs Henry has formed the view that under the terms of the will, twenty two acres of land at Mount Ricketts were hers absolutely, that is to say, she had an estate in fee simple absolute which had no other rights attached to it. Messieurs Lloyd Gayle and Cedric Gayle did not agree. They believed that she has only a life interest, and after her death, they and other named beneficiaries would inherit the estate in fee simple in respect of the twenty two acres. Mr Lloyd Gayle had lodged a caveat against the title on June 16, 2008. The caveat lapsed and the land was transferred to Starline Construction and Realty Limited (Starline) under an agreement for sale between Starline and Mrs Henry.
>
> [3] This state of affairs led Mr Lloyd Gayle and his brother to launch this application in which they are asking the court to declare the interests of the all [sic] beneficiaries, including Mrs Henry, under the will of Mr Clifford Gayle ..."

[5] Having heard the application brought by the respondents, the judge found that on a proper interpretation of the relevant provisions, the testator intended to pass to the appellant, a life interest in the 22 acres of land and that on her death the said property was to pass to Franklyn, Bernel, Lloyd and Keith, the sons of the testator. The appellant being dissatisfied with that interpretation, filed notice and grounds of appeal in this court.

[6] In the fixed date claim form filed by the respondents in the court below, they sought declarations relating to the entitlements of the appellant and the children of the deceased under the will in relation to the 22 acres of land. In addition, according to the affidavit evidence of Lloyd Gayle, since his father's will had been probated on 20 March, 1970, the appellant had not accounted to him or the other beneficiaries in respect of his father's estate. As a result, they also sought a number of orders relating to the appellant's continued management of the estate. However, those latter orders were not

pursued before the judge and are not the subject of any appeal before this court. Like the judge did in the court below, I will confine myself to the only real issue on appeal, which is, whether the judge was correct in holding that the testator intended to pass a life interest to the appellant, with remainder to the respondents and their brothers, based on the interpretation he placed on the of the provisions in the will.

The judge's reasons for decision

[7] The judge, in his written judgment, correctly identified the issue to be determined as:

> "...whether Mrs Henry took a fee simple absolute (and consequently full rights of disposition) or a life interest in respect of the twenty two acres of land at Mount Ricketts."

[8] In determining that issue, the judge considered the relevant provisions in the will as well as the submissions made by counsel for the parties. He also considered two authorities, the first being **Gravenor v Watkins** (1871) LR 6 CP 500 and the other being **DaCosta v Warburton and Kenny** (1971)12 JLR 520. In dealing with the submissions of counsel, the judge made the following statement at paragraph 13 of his judgment:

> "In looking at the rival submission [sic] advanced before this court, one has to bear in mind the warning of Bovell CJ in **Gravenor v Watkins** (1871) LR 6 CP 500. His Lordship said that, 'It is extremely difficult to construe one will by the light of decisions upon other wills framed in different language. The Court must in each case endeavour to ascertain the meaning of the testator from the language he has used' (p 504). This principle was restated by Smith JA in **DaCosta**. Smith JA emphasised that it 'is unwise to base a decision on a previous case in which no principle of law is established,

> but which is based purely on questions of fact or on the construction of a particular document' (525 C). The principle outlined by **DaCosta** is applicable but as Smith JA and Bovell CJ said, the key is the wording of the will and not so much the principle itself which is clear enough."

[9] The judge also determined that the provisions in the will made by the testator in the case before him were different from that in **DaCosta v Warburton.** Speaking of the provisions in the will in that case, the judge went on to state at paragraph 16 that:

> "It is important to note that the gift to Josephine Lucille was stated in clear and absolute terms. No words of limitation appeared in the same sentence or even several sentences afterwards. It was only at the end when the testator spoke of what should happen in the event of a sale that any suggestion of words of limitation on the extent of the estate given to Josephine Lucille arose."

[10] The judge then held that the actual words used in the will were the most decisive factor and that on the proper construction of the words in the will in **DaCosta v Warburton** an absolute interest was devised. He went on to consider the relevant provisions in the will of the testator in the instant case, and said at paragraph 27:

> "The meaning of this sentence, despite its inelegance, [is] clear enough. A limitation has in fact been placed on the gift. The testator is saying that Mrs Henry has the right, during her life time [sic], to enjoy fifty percent of proceeds (meaning net revenue) after expenses are cleared. It would not make sense to interpret this to mean, Mrs Henry received an absolute gift but during her lifetime she could only use fifty percent of the net revenue. This is inconsistent with an absolute gift. One of the characteristics of an absolute gift is that the beneficiary has full rights of free disposition of [sic] gift and proceeds from [sic] gift. The words are read as a whole and interpreted in their context."

[11] The judge took into account the fact that the testator had made provision for his mother to be taken care of by the appellant and for her to pay his mother's funeral expenses. The judge also gave his opinion of what he thought was to be done with the remaining 50% of the net proceeds from the land and further considered the devise to the sons after the death of the appellant and said:

> " [31] It seems to this court that the testator has made provision for the use of the proceeds, the use of the land and what should happen to the land after his wife's death.
>
> …
>
> [32] What is clear is that the testator did not intend that Mrs Sylvia Henry should have a fee simple absolute. She was given the land to enjoy fifty percent of the net profit for herself. The will did not specifically state what should become of the other fifty percent of the net profit but presumably, from the context, that was the portion to be used to look after the testator's mother as requested in the will.
>
> [33] Therefore, on a proper interpretation of the will, this court holds that Mrs Sylvia Henry has a life interest in the twenty two acres contained in volume 1409 folio 630 of the Registrar Book of Titles with the fee simple absolute, on her death, passing to Franklyn, Bernel, Lloyd and Keith."

The grounds of appeal

[12] The grounds of appeal filed by the appellant were as follows:

> "(a) The trial judge erred in considering the words of the testator 'To receive fifty percent (50%) of all proceeds after expenses are cleared during her lifetime' as a qualification and restrictions rather than as repugnant to the absolute gift.
>
> (b) The trial judge erred in finding that the testator intended that the other fifty percent (50%) of [proceeds] from the

property other [than] that mentioned in the will is to take care of the testator's mother and to pay for her funeral.

(c) The trial judge erred in interpreting the fifty percent (50%) proceeds from land as income or revenue from the land without any evidence to indicate that the land was or would be able generate [sic] an income or earning.

(d) The trial judge erred in failing to apply the principle that when a will admits to more than one construction and operate [sic] as complete disposition of the whole interest and the other leave a gap [sic] [the] court should be inclined to the disposition of the whole as the alternative will create a repugnant gift which is void.

(e) The trial judge did not apply section 23 of Wills Act and erred in regarding the later disposition of the same interest as restriction or limitation of/or [sic] contrary intention which is inconsistent with an absolute gift.

(f) The trial judge fail [sic] to consider the significance of the power given to the applicant to collect the balance of money owed to [sic] testator from recent sale and to give titles to these buyers.

(g) The applicant prays the court's leave to argue supplemental grounds of appeal."

[13] This court will only reverse the judge's decision if convinced that the judge had got it wrong by taking the wrong approach, in the sense that he failed to apply a relevant principle of law; or if he wrongly applied a relevant principle of law or formed the wrong opinion from relevant issues of fact.

The issues before this court

[14] The determination of this appeal will depend largely on what this court considers to be the true interpretation of the provisions in the will that refer to the devise of the 22 acres of land in Mount Ricketts.

[15] In considering the grounds filed in this matter and the arguments for and against the judge's decision, it appears to me that the arguments in this appeal surround three questions. These are:

i) Whether the judge failed to apply section 23 of the Wills Act to this case and failed to consider the significance of the power to collect the outstanding sums owed to the testator; which takes care of grounds (e) and (f);

ii) Whether the judge failed to apply the proper principles of construction in construing the will and failed to properly apply the doctrine of repugnancy; which takes care of ground (a); and

iii) Whether the judge's treatment of the fifty percent of the net proceeds from the land not mentioned in the will, was correct; and that takes care of grounds (b), (c) and (d).

[16] It is convenient to consider these questions in the order in which I have listed them.

Did the trial judge fail to apply section 23 of The Wills Act and fail to consider the significance of the power to collect in the outstanding money owed to the testator? - Grounds (e) and (f).

[17] Counsel, Mr Palmer, submitted on behalf of the appellant that the decision in **Warburton v DaCosta** [1971] 12 JLR 520 is authority for the proposition that where a will devised real estate to any person without any words of limitation, prima facie, by

virtue of section 23 of the Wills Act, the devise effected an absolute gift of the fee simple, unless a contrary intention appears in the will.

[18] Counsel argued that the trial judge, in the instant case, did not apply section 23 of the Wills Act and erred in regarding the later disposition of the same interest as a restriction or limitation on the absolute gift to the appellant and as showing a contrary intention which is inconsistent with the absolute gift.

[19] Counsel argued further, that the words 'I GIVE AND BEQUEATH' which appear earlier in the will, are clear and unambiguous and created an absolute gift to the appellant, unless a contrary intention appears or there are words of limitation which restricts the beneficiary's freedom of action in regards to the enjoyment, disposition and management of the property. Counsel submitted that no such restriction or contrary intention exists in the testator's will to defeat the absolute gift created by the earlier words in the will.

[20] Counsel also submitted that the powers given to the appellant in the will to collect the balance of monies from and give titles to the purchasers of the lands sold by the testator prior to his death, showed that the testator intended the appellant to have the fee simple absolute. The testator, he said, notably did not give these powers to the other executor. Counsel argued that this was because the power to give the titles was reserved for the proprietor in fee simple of the said property and not merely to the executors. Counsel argued that the judge erred when he failed to consider the significance of that power given to the appellant and not to the other executor.

[21] Counsel submitted further, that it was reasonable to conclude from this, that the intention of the testator was to give the appellant the fee simple absolute so that she could conclude the sale of the other part of the said land, which involved sub-dividing the property.

[22] Counsel, Mr Williams, submitted on behalf of the respondents, that **DaCosta v Warburton** was not applicable to this case. Furthermore, he argued, the judge had adequately dealt with that authority in his judgment. Counsel pointed out that the judge had correctly found that the words used in the will in that case were different from those in the instant case and that the judge emphasized that one must look at the actual words used in the will.

[23] Counsel submitted further that the judge did not apply section 23 and contended that section 23 has no relevance to this case, as there was no absolute gift to the appellant.

[24] Counsel argued also that the appellant's arguments were flawed as they were based on the false premise that there was no later disposition in the will of the interest in the 22 acres and that the only words of restriction was the 50% interest in the net proceeds from the land. Counsel submitted that the provisions relating to the 22 acres was one complete thought and left no gaps. Counsel pointed to the fact that there was a clear continuation from the first paragraph of the will into the second paragraph because the second paragraph began with the pronoun 'she' and was thus clearly a reference to the appellant once more. Counsel asked this court to accept, as did the

judge below, that this was a continuing thought that qualified the provision that preceded it.

[25] Counsel further submitted that the testator had an obligation to transfer title to the purchasers of the portion of land sold before his death (which counsel said amounted to 44 acres) pursuant to the sale. Counsel pointed out that there were no technical terms contained in those provisions which gave the appellant the power, which would take it outside of the plain and ordinary meaning that the appellant was to collect the outstanding sums and ensure the purchasers received their titles. Nothing in those terms, counsel argued, could be interpreted to mean the appellant was to get a fee simple absolute interest in the remaining 22 acres.

Analysis

[26] Section 23 of The Wills Act states:

> "**Where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple**, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, **unless a contrary intention shall appear by the will**." (Emphasis added)

[27] Section 23 is in pari materia to section 28 of the UK Wills Act 1837. Section 23 reverses the old common law rule which held that, in the absence of words of limitation, the devise was to be construed as only passing a life interest. As a result of section 23, words of limitation considered necessary at common law to pass the fee simple, are no longer required and real estate devised in a will, without words of limitation, will pass the fee simple, unless the contrary intention is shown in the will.

[28] Therefore, at common law, a devise to X of real estate had to be followed by the formal words of limitation such as "and his heirs" or "and the heirs of his body". Only if these words were present would the fee simple pass to X and he would take an estate which he could pass on to his heirs. Without those words of limitation, X would only take a life interest. Section 23 was meant to reverse that position.

[29] Therefore, the section is applicable whenever there is a devise, in a will, of real estate to any person and the testator has not used any formal words of limitation. Such a devise is to be construed to pass the fee simple estate or any other interest the testator may have over which he has the power of disposition, unless a contrary intention is shown in the will itself. A contrary intention may appear in other provisions in the will which are inconsistent with a gift or devise of the entire estate or interest held by the testator.

[30] In construing the will in the instant case, therefore, the judge was obliged to consider, in the absence of any formal words of limitation, what the intention of the testator was at the time he made his will. This would require the judge to examine the words used in the will and whether they placed any restriction on the extent of the interest which was bequeathed to the appellant.

[31] In the instant case the testator's will in its entirety reads as follows:

> "THIS IS THE LAST WILL and Testament of me Clifford A. Gayle of Cave P.O. Westmoreland in the County of Cornwall.
>
> I HEREBY revoke all wills and testamentary instruments heretofore by me made. I appoint Franklin Gayle of

> Mearnsville Westmoreland and Sylvia Gayle of Cave, Cave P.O. Westmoreland to be the Executors of this my Will. I direct my Executors to pay my just debts and funeral and Testamentary Expenses.
>
> **I GIVE AND BEQUEATH to my wife Sylvia Gayle all that portion of land of Mount Ricketts approximately (22 acres) Twenty-two acres to receive Fifty Per cent (50%) of all proceeds after expenses are cleared during her life time.**
>
> **She is to take care of my mother and pay her funeral expenses. At the death of my wife and said Twenty-two acres (22 Acres) of land is to be given to my sons Franklin, Bernel, Lloyd and Keith. All balance of money owed to me on the portion of Mount Ricketts sold recently is to be paid to my wife Sylvia Gayle and she is to give titles to the recent buyers.** I give and bequeath to my son Keith and my daughter Babeth Joy all that portion of land at Mearnsville (1 ½ acres). One and a half acres more or less and a dwelling house. This land and house must not be sold at all. I give and bequeath all that portion of land called Thompson land (part of Lindores) 6 acres more or less to my sons Franklin, Bernel and Lloyd and daughters Hazel, Pearline, Vivian to be equally divided.
>
> I further agree and give my wife Sylvia Gayle authority to give to my step daughter (Ruby) Mrs. Iris Powell) the sum of Fifty Pounds (£50) as soon as it is available.
>
> I give to my executors the said Franklin Gayle and Sylvia Gayle the sum of Twenty-five Pounds.
>
> Witness my hand this Sixteenth day of April 1969." (Emphasis added)

[32] In the testator's will, the gift to the appellant of the 22 acres contains none of the usual formal words of limitation and prima facie, therefore, it invokes the provisions of section 23 of the Wills Act. The judge was obliged to construe the devise to the appellant as passing the fee simple absolute in the 22 acres, unless a contrary intention to do so appears in the will. In the light of the inconsistent devises in the will to the

appellant and to the sons of the testator, of the same property, the question for the judge was what was the nature and extent of the estate given to the appellant under the will. This could only be ascertained by considering the intention of the testator when he made his will by the words he used.

[33] The objective of construing a will is to give effect to the intention of the testator. The testator's intention is to be gleaned from a reading of the entire will and not only from those provisions which have given rise to a dispute. See Theobald on Wills, 15th edition, Sweet & Maxwell, 1993 at 199 and **Perrin v Morgan** [1943] AC 399 at 406.

[34] In **Re Potter's Will Trust** [1944] Ch 70 at 77 Lord Greene stated that:

> "It is a fundamental rule in the interpretation of wills that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected ..."

[35] In **Grey v Pearson** [1843]-60] All ER Rep 21 at 36, Lord Wensleydale, who preferred the literal approach to construing wills, stated what came to be known as the "golden rule" when he said that;

> '…[In] construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further."

[36] In **Charles v Barzey** [2002] UKPC 68 the Board was hearing an appeal from Dominica involving section 29 of the Dominican Wills Act (which is also in pari materia to section 23) and the validity of a provision in a will devising a fee simple estate, subject to a life interest in part of the property. Lord Hoffman said;

> "[6] The interpretation of a will is in principle no different from that of any other communication. The question is what a reasonable person, possessed of all the background knowledge which the testatrix might reasonably have been expected to have, would have understood the testatrix to have meant by the words she used..."

[37] If the testator uses words or expressions which are unambiguous and which when read into the will as a whole, creates no difficulty or ambiguity in construction, those words are to be given their ordinary meaning. Words in the will are to be read in their ordinary grammatical sense unless it leads to an absurdity, repugnance or inconsistency with the clear intentions of the testator as gleaned from reading the entire will.

[38] In determining the intention of the testator from the words used in the will, the court is not bound by precedent except to the extent that the decision is based on some principle of law. In **Grey v Pearson** Lord Wensleydale opined at page 37 that the court is only bound by decided cases for the purpose of securing, as far as possible, a degree of certainty in the administration of the law. However, where the determination of the whole matter is not based upon a rule or principle of law but simply on the meaning of the words in one will, which are entirely different from those used in another, the words

used in the one, will seldom be any guide to the construction of the words used in the other. In **Gravenor v Watkins**, which considered words used by a testator to show a contrary intention that the fee simple should pass other than in remainder, Bovel CJ was of a similar view. That case was affirmed on appeal. These statements appear to me to make good sense.

[39] In construing the will in the instant case, the judge correctly stated that precedents are unhelpful except in so far as they state a principle of law. In this regard, the judge was correct in finding that the case of **DaCosta v Warburton**, on which the appellant relied, was of little assistance in interpreting the will in the instant case, as the words used in that will were entirely different.

[40] Having considered the words used in the will in the instant case, I agree with counsel for the respondents that the words are clear and unambiguous and, in and of themselves, present no difficulties. Indeed, in this case, the judge below found no difficulties with the words used by the testator.

[41] The judge did not specifically mention that he was applying section 23 of the Wills Act in his judgment. However, in paragraphs 19-22 of his decision, the judge thoroughly examined the passages in **DaCosta v Warburton** which dealt with the applicability of section 23.

[42] In **DaCosta v Warburton** this is how Smith JA explained the effect or operation of section 23 at 526 C:

> "In my opinion, the contrary intention referred to in s 23 is not so much a disposition or direction which shows an intention that some person other than the original devisee should benefit, as one from which it can reasonably be inferred that the testator did not intend that the devisee should take the whole estate or interest in the real estate devised which he had power to dispose of by will. Such an inference can only be drawn, in my view, if it can be ascertained with certainty that a recognisable estate or interest, inconsistent with the estate or interest previously devised, has been created in favour of some other person."

[43] Further on at F he said:

> "I hold that the conditions under which the grandchildren are to benefit are too uncertain to amount to a contrary intention such as can validly displace or cut down the *prima facie* fee simple estate created by s. 23 in favour of the widow. The widow, therefore, takes the fee simple free from the conditions, which now become repugnant."

[44] After thoroughly examining that decision, the judge said at paragraph 24:

> "From what has been said, there can be no doubt that the actual wording of the will is, quite literally, the most decisive factor."

[45] It is clear, therefore, that although the judge did not expressly refer to section 23 implicit in his analysis was a consideration of the requirements of the section. The judge looked at the words used by the testator in the will in order to determine whether there was a contrary intention that the appellant was to take a fee simple absolute. The judge found that the gift of the 50% proceeds from the property and the gift over to the sons after the death of the appellant, meant that the testator intended the appellant to have only a life interest and did not intend the appellant to have a fee simple absolute. In doing so, he was doing what section 23 requires to be done, that is,

ascertain whether there were words of limitation and, if not, determine whether there was a contrary intention that an absolute gift was intended by the testator.

[46] In this case, the words used in the will by the testator with regard to the 22 acres, indicate two clear intentions on his part. The first intent is to benefit the appellant, and the second intent is to benefit his sons. The expressed bequest to the appellant would, therefore, have stood as a devise in fee simple absolute, if there was not a later inconsistent devise to the sons. This later devise to the sons shows the testator's intention that the appellant should take, not the fee simple which would result in the sons getting nothing, but a life interest, which means the sons take the fee simple absolute in remainder.

[47] It appears to me, in looking at the plain and unambiguous words used by the testator, and in reading the will as a whole, that the judge was correct to find that on a proper construction of the will, the words employed giving the appellant 50% of the proceeds during her lifetime and after her death the property to go to his sons, showed the extent of the interest he intended the appellant to have. Those words created a life interest for the appellant with the remainder in favour of the sons. Not only does this interpretation satisfy all the rules of construction of wills, it also gives effect to the testator's intention without invoking or offending the principle of repugnancy (of which more will be said later on in this judgment), in the sense defined by Smith JA in **DaCosta v Warburton** and explained by the Privy Council in **Charles v Barzey**.

[48] With respect to the complaint in ground (e) that the judge failed to consider the significance of the power to collect the outstanding sums from the purchasers of the 44 acres and to give titles to those purchasers; it is difficult to see how that power shows any intention for the appellant to take the 22 acres absolutely. There is nothing in those words giving the appellant that power, either by themselves or when read in the context of the entire will, which would lead inevitably to the conclusion that it meant that the testator intended the appellant to take the 22 acres absolutely.

[49] Although the testator gives the appellant the power to collect in the proceeds of the sale of the portion of lands sold before his death, there is no mention of what is to be done with the proceeds of the sale thereafter, other than she is to give title to the purchasers. It is not spelt out and is therefore subject to speculation. That portion of land previously sold has no further connection to the 22 acres, except that it is the larger portion to be subdivided from the smaller 22 acres remaining after the sale. I cannot see what significance it could have with regards to the nature of the interest in the 22 acres given to the appellant by the devise in the will.

[50] The judge, therefore, made no error in not attaching any significance to those powers given to the appellant when he sought to determine the intention of the testator with respect to the 22 acres of land.

Did the judge err in considering the devise of the fifty percent of the net proceeds from the property to the appellant during her lifetime as a qualification and a restriction rather than as being repugnant to the absolute gift?-ground (a)

[51] Counsel Mr Palmer submitted that the judge erred in considering the words of the testator "to receive fifty percent (50%) of all proceeds after expenses are cleared during her lifetime" as a qualification and a restriction on the absolute gift to the appellant rather than viewing it as repugnant to the absolute gift. Counsel argued that those words could not qualify or restrict the absolute gift to the appellant and must be repugnant to that prior gift, as it creates a clear ambiguity. Counsel also argued that clear words were not to be controlled by subsequent ambiguous words and that a prior absolute gift is not distorted by a later gift in the same or subsequent testamentary instrument.

[52] Counsel also relied on the proposition made by Fox JA in **DaCosta v Warburton** at 523 that, where there is a devise in fee simple, a subsequent condition which purports to alter the normal process of devolution by creating a gift over at the moment of devolution was repugnant to the absolute estate previously given and was, therefore, void. Counsel submitted that as a result of the application of this principle, the subsequent conditions in the will in relation to the 22 acres after it was devised to the appellant, altered the normal process of devolution and were therefore void. Further he argued, if those conditions were upheld it would create at one and the same time, an absolute gift, a gift of a life interest, and a 50% gift of proceeds, with the remaining 50% in intestacy. He argued that this would create a gap in the interest and this

inconsistency would make the gift void for repugnancy. Therefore, counsel argued, the former absolute gift should take precedence.

[53] In concluding, counsel submitted that the proper interpretation of the will of Clifford Gayle is that the appellant was given an absolute interest in the fee simple and power to dispose of the property. Further, that the other provisions which state that the appellant is to receive 50% of the income and that after her death the 22 acres are to go to his children are void for repugnancy. Counsel stated that, in any event, the gift of 50% of the proceeds would be void for repugnancy as the property did not generate income so that there was no income for the appellant to receive.

[54] Counsel Mr Williams argued that the appellant's entire arguments were 'inherently fallible' and flawed as they were based on the 'debunked' premise that there was an absolute gift. Counsel submitted that the plain, ordinary sense and meaning of the "complete words and thought" in the will showed that there was no absolute gift to the appellant and that she was intended to take only a life interest. Counsel asserted that it would follow from that that there was no repugnancy and the judge was correct to so find.

[55] Counsel contended further, that the words in the will had to be given their natural and ordinary meaning. He submitted that the provisions in the will had to be read as a whole and not in isolation of each other. When so read, counsel argued, the words are clear and unambiguous and were not in conflict with any other provision in the will. It meant therefore, counsel submitted, that there was no repugnancy. Counsel

relied on Lord Wensleydale's statements in **Grey v Pearson** and this court's decision in **Special Sergeant Steven Watson v The Attorney General et al** [2013] JMCA Civ 6 at paragraph [20] where this court applied Lord Wensleydale's 'golden rule' of construction.

Analysis

[56] In looking at this ground of appeal, this court must consider whether the judge erred in not applying the doctrine of repugnancy to find that the words used by the testator to limit or qualify the gift of the fee simple to the appellant were repugnant to that gift and therefore the gift over to the sons was void.

[57] The doctrine of repugnancy is only applicable where it is first found that the fee simple estate has been devised to one beneficiary but the testator goes on to make provision for a gift over of the same property which is inconsistent with or impinges upon the rights of the beneficiary to the fee simple estate, in a manner which the law will not allow or cannot recognise. Such a provision does not affect the nature of the interest given but only infringes the rights of the beneficiary in the use or enjoyment of the property in a manner which is void in law.

[58] This was how Smith JA in **DaCosta v Warburton** dealt with the application of the doctrine of repugnancy at pages 525 I to 526 :

> "…One has to be careful here of arguing in a circle. It seems to me that any direction in a will which has the effect of cutting down a *prima facie* fee simple estate created by s. 23 can properly be said to be repugnant to that estate. But such a direction is not necessarily void for repugnancy. Take

> a case where a testator says: 'I give my property at Billy Dunn to my wife.' This is followed by other bequests and devises. Then the will says: 'on the death of my wife my property at Billy Dunn shall go to my son John and his heirs'. Surely, this last devise is repugnant to the *prima facie* fee simple created by s. 23 in the wife's favour! But it nevertheless shows a contrary intention and the wife gets a life interest only. It could not, *ex hypothesi*, be said that the devise to the son is void for repugnancy therefore the wife takes the fee simple. **In other words, it must first be established that an absolute interest has been created before the question of repugnant conditions can arise."** (Emphasis added)

[59] Fox JA, in his judgment, took the view that the direction in the will in **DaCosta v Warburton** for the wife, who was given the fee simple, to give a part of the proceeds to the grandchildren in the event she sold the property before her death, failed, as it was incompatible with the incidents of ownership. He took the view that the doctrine of repugnancy defeated any intention to benefit the grandchildren.

[60] Graham-Perkins JA, the third member of the court in **Dacosta v Warburton**, in explaining the doctrine said at 529 F:

> " …Firstly, it is beyond debate that where a testator seeks to attach to an absolute gift a condition or qualification that may be characterised as repugnant, such condition or qualification will not be allowed to take effect notwithstanding that in the result the intention of the testator will be defeated…"

[61] In **Charles v Barzey** Lord Hoffmann, giving the judgment of the Board, declined to express any view as to whether the decision in **DaCosta v Warburton** was right but went on to explain the meaning of the doctrine of repugnancy as it was discussed in that case and said at paragraphs 11 and 12:

> "[11] the second argument relies upon the doctrine of repugnant conditions, as discussed by the Court of Appeal in daCosta v Warburton [sic] (1971) 17 WIR 334. This doctrine is based upon the proposition that there are certain forms of disposition which the law will not allow. For example a gift which might vest more than twenty-one years after the death of a life in being was void at common law because it was considered contrary to public policy to allow gifts to take effect at remote dates in the future. A provision for the divesting of property on bankruptcy is void because it is contrary to the policy of the bankruptcy law. **Then there are dispositions which the law of property similarly cannot accommodate. There are limited number of interests which can exists as interests in property, and attempts to create interests unknown to the law are ineffectual. Thus a gift of land in fee simple subject to a condition that it shall not be alienated passes an unconditional fee simple. The condition is void because the law does not recognize such an interest as an inalienable fee simple. Another way of making the same point is to say that such a condition is repugnant to the nature of a fee simple.**
>
> [12] These rules, of which many other examples could be given, are not rules of construction. They are substantive rules of public policy which prohibit certain kinds of dispositions, or the imposition of certain kinds of conditions. In principle, the application of these rules of public policy comes after the question of construction. One first ascertains the intention of the testator and then decides whether it can be given effect. But nowadays the existence of the rules of public policy may influence the question of construction. If the testator's words can be construed in two different ways, one of which would be valid and the other void, then unless the testator obviously did not intend to make the kind of gift which is valid, the court will usually be inclined to construe his will in that sense…" (Emphasis added)

[62] The question for the court in **DaCosta v Warburton** was whether the law of property could give effect to the testator's intention to make a gift over to his grandchildren in the manner in which it was devised in the will. The issue with the gift

over in that case was that it did not conform to any recognisable interests in the law of real property. The devise to the grandchildren was inconsistent with the testator's wife taking a fee simple, as they too would take a fee simple at the same time. As Lord Hoffmann said, it was not possible under the law of real property to have two fee simples in the same house; and that was only one of the problems with the devise in **DaCosta v Warburton**. Lord Hoffmann referred to the others at paragraph 15 of his judgment, which it is not strictly necessary for me to enumerate here.

[63] The judge in the instant case addressed the issue of repugnancy in this way:

> "In interpreting wills the Court of Appeal set out the steps and the way in which the doctrine of repugnancy operates. Fox JA made the important point that while it is true to say that the doctrine of repugnancy (which is the principle relied on by Mr Palmer) applies to the construction of wills the starting point is always to decide 'the extent and nature of the estate intended to be given to the wife' (page 523 F)."

[64] The judge then correctly went on to look at the words used by the testator in the will to ascertain the 'extent and nature of the estate intended' for the appellant.

[65] It is clear from the provisions in the will relating to the 22 acres of land that the testator intended the appellant, his wife, to benefit. However, the issue, as it was in **DaCosta v Warburton**, is what was the extent and nature of the estate that was being given to her. When all the provisions relating to the 22 acres of land are examined, it is clear that the judge was correct to hold that only a life interest had been intended and that was the nature and extent of the devise to the appellant. This is because the words used by the testator, including where he said that "[at] the death of

my wife the said Twenty-two acres (22 Acres) of land is to be given to my sons Franklin, Bernel, Lloyd and Keith", were inconsistent with the prior gift of the 22 acres of land to the appellant and showed an intention that she was to take the gift of a life interest only. This had the effect of creating 'a recognisable estate or interest' and the doctrine of repugnancy was therefore not applicable.

[66] Therefore, although the words, 'I GIVE AND BEQUEATH 22 acres of land to my wife', would normally operate, by virtue of section 23 of The Wills Act, to pass to the appellant the fee simple absolute, there are provisions in the will, when read as a whole, which show that the intention of the testator was for the appellant to take a lesser estate.

[67] It is true that the devise by the testator of the 50% net proceeds is prima facie repugnant to the grant of a fee simple absolute. The judge recognised this to be so, when he said;

> "It would not make sense to interpret this to mean, Mrs Henry received an absolute gift but during her lifetime she could only use fifty percent of the net revenue. This is inconsistent with an absolute gift. One of the characteristics of an absolute gift is that the beneficiary has full rights of free disposition of gift and proceeds from gift."

[68] It is also true that the gift over to the sons is inconsistent with the prior gift to the appellant. However, as recognised in **DaCosta v Warburton**, the fact that the gift over is inconsistent or even, to use the term loosely, repugnant, does not necessarily make it void for repugnancy. It depends on the words used by the testator and his

intention at the time the words were used. As the judge stated, "the words are read as a whole and interpreted in their context".

[69] Despite the suggestion by the appellant's counsel that the judge was wrong to construe the 50% proceeds as a limitation on the absolute gift rather than as being repugnant to it, it is difficult to see how the judge could have construed those words other than as a limitation on the absolute gift. A person who has the fee simple estate has the right of enjoyment of the income and capital from that estate. There can be no such prohibition on that right placed on the owner of the fee simple estate. However, the limitation placed on the enjoyment of such a right seen from the words used by the testator, along with the other provisions in the will relating to the gift over to the sons which are inconsistent with the fee, can provide evidence that a fee simple estate was not intended. It was therefore, proper and correct for the judge to view that provision regarding the 50% proceeds, as inconsistent with an absolute gift, along with those other provisions in the will, which made it clear that it was not the intention of the testator to give the appellant the fee simple absolute estate in the 22 acres.

[70] When taken as a whole, the words used in the will in this case, that the land is to go to the testator's sons after the death of the appellant, which follow the grant to the appellant of the right to the 50% of the net income from the estate during her lifetime, makes it clear that the testator intended the appellant to benefit from a life interest and did not intend to pass the fee simple absolute to her. Although giving the fee simple absolute to the sons in remainder may appear inconsistent with the gift to the appellant

that she would otherwise have taken by virtue of section 23 of the Wills Act, it is not void for repugnancy. This is because not only does it show a contrary intention that the appellant should take the fee simple but it is a common form of disposition known to the law of property and regularly accommodated by it.

[71] In fact, the example used by Smith JA in **DaCosta v Warburton** at paragraph 525, which has been quoted at paragraph [54] above, is a similar fact pattern to the instant case. Lord Hoffmann in **Charles v Barzey** referred to Smith JA's statement at 525 as a warning (not heeded by the Court of Appeal of Dominica). Lord Hoffmann also referred to the common form of the gift over of a fee simple after a prior life interest when he said at paragraph [17]:

> "…A gift of fee simple in remainder subject to a prior life interest in the whole or part of the property in favour of someone else, is an extremely common form of disposition. In their Lordship' s opinion, the Court of Appeal did not heed the warning of Smith JA in daCosta's [sic] case".

[72] As stated earlier, a fee simple in remainder after a prior life interest, being one which is recognizable in law and one which the laws of conveyance can accommodate, the doctrine of repugnant conditions would not be applicable to the provisions in the will in this instant case.

Did the judge err in his treatment of the other 50% of the proceeds from the property not mentioned in the will-grounds (b), (c) and (d).

[73] Counsel Mr Palmer argued that the judge erred in finding that the testator intended that the other 50% was to take care of his mother and pay her funeral expenses, as there was no such expressed intention by the testator in the will. By doing

this, counsel argued, the judge was filling a gap and he is not allowed to do this. Counsel submitted that the condition regarding the balance of the 50% was too uncertain to amount to a contrary intention to displace the absolute gift of the fee simple.

[74] Counsel also argued that an interpretation that disposed of the entire interest should be preferred over one that leaves a gap, as in the instant case, where, according to him, there is no provision in the will regarding the remaining fifty percent of the profits or earnings after expenses from the property. Counsel argued further, that where on one interpretation there is a complete disposition of the whole interest and on another interpretation it leaves a gap in the interest, the court should be inclined to the disposition of the whole as intended.

[75] Counsel also submitted that the trial judge's findings with regard to the 50% proceeds from the land had no evidential basis as there was no evidence that the property generated any income. This he said would support the view that this part of the gift is void for repugnancy.

[76] Counsel's attention was then drawn by this court to a document at page 161 of the record titled "ESTATE CLIFFORD GAYLE-RECEIPTS AND PAYMENTS" regarding an accounting of the receipts and payments in relation to the testator's estates for income from pimento sales, lumber sales, lime sales and other crops. Counsel pointed out that the document related to some other property, but declined to state which property that was. He went on to submit further that in any event, the judge did not indicate that this

document was the basis for his finding regarding the 50% of the proceeds from the property.

[77] Counsel Mr Williams argued for the respondent that these grounds of appeal were 'inherently fallible' as they propose that some provisions in the will should be read disjunctively from the whole document. Counsel noted that the testator clearly intended to provide for both the appellant and his mother from the proceeds of the estate. Counsel also argued that the clear words of the will meant that: (a) the appellant was to retain 50% of the income from the property; (b) she was to use the other 50% to take care of the testator's mother and to pay her funeral expenses; and (c) this was to continue as long as the appellant was alive.

[78] Counsel argued further, that in any event, even if this construction was wrong, the fact that there was no expressed residuary clause meant that the normal laws of intestacy would apply to the remaining fifty percent.

[79] Counsel submitted that the judge did not require any extrinsic evidence to construe the plain meaning of the words used in the will. Counsel also noted that the appellant had not provided any proof that the testator knew that the property was not generating income when he made the provision in the will. Counsel argued further that the 22 acres of land generated income and referred to an Auditor's Report of the estate of Clifford Gayle dated 22 February 2011. However, this also was not considered by the judge, in his judgment.

[80] Counsel submitted nevertheless, that the provisions in the will clearly create a life interest in the land and in the net revenue and that the judge was correct in giving effect to the natural and ordinary meaning of the words used. Counsel further submitted that when the entire will is read, there is no absurdity or repugnance created by the provision, which would require any extrinsic evidence to clarify it.

Analysis

[81] As said previously, in construing a will, the court's duty is to ascertain the intention of the testator as expressed in the words used in the will. The court is therefore concerned with determining first, the intention of the testator from the words used and what the testator meant by those words, looking at them not only in isolation but also in light of the whole will. There is to be no conjecture. In **Doe v Hiscocks** (1839) 5 M. & W. 363 at 367 Lord Abinger said;

> "…The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words…"

[82] Conjecture as to the intention of a testator is to be avoided. See **Abbott v Middleton** (1858)11 ER 28, per Lord Wensleydale, who in giving his speech at the House of Lords said at page 117 that:

> "We may conjecture that the testator meant to have written the additional words 'without issue', and omitted them by mistake. But that is a mere conjecture, and we have no right to give effect to that conjecture. It is clear that the testator has not so written; and all we can do is to explain what is written. We must construe the will as we find it…"

[83] A court will correct mistakes in a will where to do so accords with the testator's intention. If the words used by the testator bear a clear meaning, the court will lean to that meaning but the court will not and cannot import a provision into a will which the testator did not make.

[84] It is also possible for the court to import words into a will where there has been an omission by implication but the nature of that omission must be undoubtedly clear. In Re **Whitrick** [1957] 1 WLR 884 Jenkins LJ said at page 887:

> "…The reading of words into a will as a matter of necessary implication is a measure which any court of construction should apply with the greatest caution. Many wills contain slips and omissions and fail to provide for contingencies which, to anyone reading the will, might appear contingencies for which any testator would obviously wish to provide. The court cannot rewrite the testamentary provisions in wills which come before it for construction. This type of treatment of an imperfect will is only legitimate where the court can collect from the four corners of the document that something has been omitted and, further, collect with sufficient precision the nature of the omission…"

[85] The arguments surrounding the remaining 50% of the proceeds from the land not mentioned in the will in the instant case, really raises three questions. The first question is whether the judge was correct to determine that the remaining 50% was to be used to take care of the testator's mother and pay her funeral expenses. The second is whether the judge was wrong not to have leaned towards a disposition of the whole interest because the bequest of the 50% net proceeds left a gap. The third is whether the judge was wrong to arrive at his conclusion on the 50% proceeds from the property

without extrinsic evidence that the property generated any income. These three questions will be answered in short order.

[86] In regard to the first question, it is impossible to state in any positive sense that the testator intended that after the appellant had taken her 50% the balance was to be used to take care of his mother and pay for her funeral expenses. For one thing, the will did not say so; for another, it could also be said he intended the appellant to take care of his mother from the 50% that was devised to her. That, in my view, could also be an interpretation from the provisions in the will. There is no obvious implication from the will as to what was intended to be done with the balance. It could also be that the testator intended his mother to be taken care of from the proceeds of the previous sale. The gift to Ruby of £50.00, when it becomes "available", for instance, does not clearly indicate from where the £50.00 would become available. It could be from the proceeds of the 22 acres or from the proceeds of the prior sale of land. To my mind, this shows the obvious danger in attempting to determine what the testator intended from mere conjecture.

[87] It is also not possible to say with any certainty whether the testator simply forgot about the other 50% of the proceeds from the land or deliberately did not provide for it. But the court cannot presume what he intended to do with it. It is also not, in my view, an obvious implication from the will that, the other 50% was to take care of the mother and pay her funeral expenses. As an example of what could be an obvious implication is if the testator had said the appellant was to get the income from the land,

but she was to use 50% of the income for the mother's care and her funeral expenses, without mentioning the specific share to the appellant; then perhaps it would be possible to say that the obvious implication is that the testator intended the appellant to get the remaining 50%.

[88] Be that as it may, in my view, the judge cannot be taken to have made any positive finding regarding the other 50% not mentioned in the will. What he did do was to speculate on what he presumed the testator may have intended the other 50% to be used for. This does not affect, nor could it affect, the judge's finding that the testator only intended the appellant to have a life interest in the property.

[89] Counsel for the respondents is correct however, that in so far as the remaining 50% is not disposed of in the will, there being no expressed residual clause, it would fall to be disposed of based on the laws of intestacy. Whilst the court will lean towards an interpretation that avoids the testator's property falling into intestacy (see **Turner v Hellard** (1885) 30 Ch D 390 and **Fell v Fell** (1922) 31 CLR 268), it should also avoid misinterpreting the language of the will in order to avoid intestacy.

[90] As regards the arguments surrounding the second question, whether there was a gap created by the failure to dispose of the balance in the bequest of the 50% net proceeds from the property and therefore the court should lean towards an interpretation which disposes of the whole interest, it has already been determined that the clear words used by the testator in the will showed that there was no intention to give the appellant an absolute gift of the 22 acres but only a life interest. The gift of the

50% net income from the proceeds of the property would only affect the life interest to the appellant. Therefore, there being no intention to grant the fee simple estate to the appellant, any gap in the bequest of the 50% proceeds from the land could not affect the gift over to the sons.

[91] Despite the attempt by counsel for the appellant to argue otherwise, the failure by the testator to indicate specifically what was to be done with the balance of the net proceeds from the property, did not provide such a gap in the dispositions under the will, sufficient to affect the ability of the court to construe the will in a manner which would give effect to the clear intentions of the testator to give a life interest to the appellant, with the remainder to his sons.

[92] The third argument surrounds the question whether it was necessary for the trial judge to have extrinsic evidence that the property generated income. It is unclear whether any evidence of income from the property was before the judge as no reference was made in the decision of the judge to any such evidence. However, in my view, no such evidence was required in order to determine the issues in this case. The words used by the testator were clear and unambiguous. He, better than anyone else, ought to have known whether there was income being generated from his property or not. If there was no income, then the gift of the 50% proceeds would simply fail; but whether such income existed or not would not affect the true construction of the will as a whole, in this case.

[93] Counsel for the appellant submitted that the trial judge was wrong to consider the words "to receive fifty percent (50%) of all proceeds after expenses are cleared during her lifetime" as a qualification and a restriction rather than as repugnant to the absolute gift to the appellant. However, those were not the only words the judge considered. The judge also considered that the words "at the death of my wife the said Twenty-two acres (22 acres) of land is to be given to my sons Franklin, Bernel, Lloyd and Keith" demonstrated that the testator did not intend to pass the fee simple to the appellant.

Conclusion

[94] For the reasons stated above, I have concluded that the judge was correct to find that the words used in the will by the testator showed a contrary intention that the appellant should take an absolute estate in the 22 acres. Section 23 of the Wills Act is applicable and the nature of the estate that the appellant was given, on a true construction of the words of the testator as used in the will, was a life interest only.

[95] Although the gift of the 50% net proceeds from the land to the appellant along with the gift over to the sons of the testator was inconsistent with the prior gift of the same land to the appellant, it was not void for repugnancy, but showed a contrary intention that the appellant should take the fee simple estate.

[96] A life tenancy is an interest in land recognized by the law of property and which is derived from an estate or interest in land known to property law as a life estate. This estate usually comes to an end at the death of the grantee or life tenant or some other

person whose life determines the estate. The fee simple is not given neither is it exhausted by such a devise. At the death of the life tenant, the fee simple goes to the remainder man.

[97] The provisions in the will of the testator make it clear that he intended for the appellant to get a life interest and, after her death for the remainder, the fee simple estate, to go to his children named in the will.

[98] The fact that the testator did not state what was to become of the remaining 50% of the net proceeds from the land, did not create such a gap which required the court to lean towards an interpretation which would dispose of the absolute interest to the appellant. The gap in the dispositions in the will created by the failure to dispose of the remaining 50% net proceeds from the property could not affect the courts ability to construe the will in a manner which would give effect to the testator's intention. Any property which was not disposed of in the testator's will would fall to be disposed of under the laws of intestacy.

[99] I would hold therefore, that there is no basis upon which this court ought to disturb the judge's findings.

PHILLIPS JA

ORDER

The appeal is dismissed with costs to the respondent to be agreed or taxed.