Neutral Citation Number: [2022] EWHC 1319 (Ch)

Case No: PT-2020-000561
Appeal Ref: CH-2021-000258

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**CHANCERY APPEALS LIST**

**On appeal from the Property Trusts and Probate List (ChD)**
**Decisions of Chief Master Shuman dated 5 February, 17 August and 9 November 2021**
**In the Estate of Audrey Thelma Anita Arkell (Deceased)**

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 30/05/2022

**Before** :

**SIR ANTHONY MANN**

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**Between :**

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|---|---|
| **John Wayland Beasant (in his personal capacity and as Personal Representative of Audrey Anita Arkell (Deceased)** | **Appellant/First Defendant** |
| **- and -** | |
| **(1) ROYAL COMMONWEALTH SOCIETY FOR THE BLIND (also known as Sightsavers International, registered charity number 207544)** | **Respondent/ Claimant** |
| **(2) Benjamin Huw Davies (as Personal Representative of Audrey Anita Arkell (Deceased))** | **Second Defendant** |
| **and** | |
| **(3) ALLETSONS LIMITED** | **Defendant for the purposes of costs** |

**Howard Smith** (instructed by **Risdon Hosegood Solicitors**) for the **Appellant/First Defendant**
**Mark Baxter** (instructed by **Withers LLP**) for the **Respondent/Claimant**

Hearing date: Friday, 20th May 2022

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# Approved Judgment

**This Judgment was handed down remotely by email distribution to the parties and publication on the National Archives and other websites.**

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SIR ANTHONY MANN

**Sir Anthony Mann :**

## Introductory

1. This is an appeal from what were in substance 2 orders of Chief Master Shuman. The first was made on 5th February 2021, though not drawn up. It was made, or is treated as made, pursuant to an oral judgment dated 5th February in which the Master determined that she would not admit extrinsic evidence of the intention of a testatrix (Audrey Thelma Anita Arkell) under section 21 of the Administration of Justice Act 1982 in a will construction dispute. The second order was made on 17th August 2021 after further argument on 5th February; this order formally determined the correct construction of the will in favour of the claimant beneficiary and against the first defendant, Mr Beasant. The Chief Master's first judgment is a transcribed judgment dated 5th February 2021 ([2021] EWHC 3910); the second is in a reserved judgment dated 17th August 2021 ([2021] EWHC 2315 (Ch)). I shall call these the "February judgment" and the "August judgment" respectively. Permission to appeal was granted by Marcus Smith J on 31st January 2022 in relation to both orders/judgments and in also relation to the costs order made in the action.

2. The position of the appellant on this appeal is that the fate of the main appeal turns on the fate of the February judgment. Mr Howard Smith, who appears for the appellant (but who did not appear below), takes the stance that if the February judgment stands, so that the extrinsic evidence of intention sought to be introduced is not admitted, then he does not challenge the decision in the August judgment. If the February judgment is overturned so that the evidence is submitted, then he says that the will should then be construed in his client's favour but he accepts (as does Mr Mark Baxter for the claimant/respondent) that that question would have to go back to the Master for decision because cross-examination would or might be necessary.

3. It would therefore seem appropriate to concentrate on the February judgment and order, though as will appear it becomes necessary to take a view on the true construction of the disputed provision in that context too.

## The will

4. The will was drafted by Mr Vučićević, a chartered legal executive in the solicitors firm Alletsons, having taken instructions from the deceased. Its material provisions were as follows:

(i) Mr Beasant and the second defendant, together with a Mr Keen were appointed executors and trustees. (The first two of those proved; Mr Keen did not.)

(ii) Clause 4, which is the all-important clause for present purposes, provided as follows:

"4. I GIVE the Nil-Rate Sum to my trustees on trust for my said friend John Wayland Beasant

4.1 In this clause the 'Nil-Rate Sum' means the largest sum of cash which could be given on the trusts of this clause without any inheritance tax becoming due in respect of the transfer of the value of my estate which I am deemed to make immediately before my death"

(iii) Paragraph 5 gives to Mr Beasant "all such property as may be my only or main residence at my death", that gift being expressed to be "free of inheritance tax and free of any mortgage or charge".

(iv) Clause 6 gives to Mr Beasant "free of inheritance tax" all the deceased's shares in Imperial Brands plc or in any different company or stock which represented the holding of Imperial Brands plc.

(v) Clause 7 gives to Mr Beasant "free of inheritance tax absolutely" all the deceased's personal chattels.

(vi) Clause 8 gives various pecuniary legacies totalling £45,000 to 6 different people, each of them being expressed to be "free of tax".

(vii) clause 9 gives the residue of the estate "subject to the payment of my debts and funeral and testamentary expenses and inheritance tax" to the trustees to divide it between 21 organisations, all of which are expressed to have charity numbers. It has transpired since the death that 20 of them are charities but one in fact was not, according to HMRC.

## The dispute and the decisions below

5. At the time of the testatrix's death the nil-rate band for inheritance tax purposes was £325,000. The claimant and respondent in this case is one of the residuary beneficiaries. The dispute of construction is as between the residuary beneficiaries on the one hand and Mr Beasant on the other as to the effect of clause 4. The value of the assets within the non-charitable gifts in clauses 5 to 8 significantly exceeds the nil-rate inheritance tax band (£325,000). The claimant, on behalf of the residuary beneficiaries, maintains that clause 4 does not, in the circumstances, confer any valuable benefit on Mr Beasant. The claimant maintains that clause 4 only entitles Mr Beasant to any such sum as is an available part of the nil-rate sum which has not been "used up" by the other chargeable gifts. Since that amount has already been used up (because those gifts

exceed £325,000), Mr Beasant effectively gets nothing. Mr Beasant's case is that on the true construction of the will (especially in the light of the admissible extrinsic evidence as to intention) the gift should be construed as a gift of the nil-rate sum of £320,000 free of tax.

6. For a gift with a similar effect to the claimant's construction of clause 4, see *RSPCA v Sharpe* [2011] 1 WLR 980; and for an identically worded gift in a different construction context see *Reading v Reading* [2015] EWHC 946 (Ch). Such gifts work in a tax efficient way where the bulk of the estate goes to tax exempt beneficiaries and it is desired to gain a tax advantage by giving the nil-rate sum to a given non-exempt beneficiary.

7. When the matter became subject to litigation Mr Beasant sought to introduce evidence of extrinsic circumstances going to the question of construction. It took the form of a witness statement from Mr Vučićević, the draftsman of the will at the solicitors Alletsons. In circumstances described in the February judgment, that witness statement had various iterations and problems with signing, which were resolved by a common approach as to which version should be used, and it was used. I am therefore not troubled with that part of the dispute.

8. That witness statement had two sorts of evidence. The first was evidence which was, or was said to go be, extrinsic evidence of the kind which the court will normally receive as being part of the objective background against which wills are regularly construed. That sort of evidence was also relied on as being evidence which gave rise to an ambiguity within section 21(1)(c) and which opened the gates of that subsection to evidence of intention. The second sort of evidence was of the latter kind – it was said to be evidence going to the subjective intention of the testatrix and admissible under section 21.

9. At the end of her February judgment the Chief Master referred to the fact that the lateness of the witness statement meant that it could only be admitted if Mr Beasant got relief from sanctions. She recorded her view that her decision on the non-admissibility of evidence in relation to intention meant that she did not have to determine whether to grant relief from sanctions, but had it been necessary she would have granted relief. In fact it appears that the witness statement had de facto already been admitted because the debate as to whether extrinsic circumstances generated an ambiguity, which had taken place in January, had considered some of the non-intention evidence in that witness statement (or at least evidence said to be non-intention evidence) and the Chief Master records in her judgment that she had considered the evidence. In the end, apart from a modest amount of confusion on the appeal before me, this oddity did not generate any difficulty and counsel proceeded on the footing that Mr Smith for Mr Beasant could rely on the witness statement insofar as it was said to contain evidence of "testator's armchair" extrinsic circumstances for the purposes of the debate as to admissibility of intention evidence under section 21. In effect, the debate about the Chief Master's determination not to admit "the evidence of the will drafter" (her

wording of her decision) assumed that this ruling applied to those parts of it which sought to introduce the sort of evidence which can only come in under section 21.

## Section 21 and the Chief Master's judgments

10. The disputed extrinsic evidence comes in the witness statement of Mr Vučićević which inter alia gives evidence of previous instructions to draft wills and of the instructions to draft the present will and its surrounding circumstances. If it is to be admitted for present purposes it needs to come in via section 21 of the 1982 Act. That section provides:

> "(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) in 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."

11. The February decision records that the appellant sought to show that there was ambiguity within both paragraphs (b) and (c). Paragraphs 7 and 8 record the competing contentions of the parties as to the meaning and effect of clause 4. Paragraphs 21 and 22 of the judgment record that Mr Christopher Jones, then counsel for Mr Beasant, submitted that there was ambiguity within clause 4 itself, without identifying the arguments put forward (which, it seems, were put forward only orally and not foreshadowed in his skeleton argument). In relation to the argument that there was ambiguity on the face of the will the Master simply says:

> "Mr Jones has not shown that here." (paragraph 23).

She goes on, in paragraph 24, after referring to *Re Williams* [1985] 1 WLR 905:

> "24. So one can aptly see from this example an illustration of how a word or a phrase used in the will is capable of two interpretations. That is plainly not the case in clause 4 of the will

> that is before me and this gateway [ie section 21(1)(b)] does not assist Mr Jones."

There is no more reasoning, and no more record of the argument, than that.

12. Then the Master turned to the gateway in section 21(1)(c), which she acknowledged to be a stronger argument. She recorded Mr Jones' core point as being that the deceased and the will drafter (Mr Vučićević) were mistaken as to the fiscal consequences of the will and that this point formed part of the surrounding circumstances (para 26). Then she refers to a couple of authorities relied on before turning to the "material attendance notes" on which Mr Jones relied (which were said to demonstrate a misunderstanding of tax consequences), the position of bequests in the will, and the known value of assets; all of which were said to demonstrate a "plain ambiguity" (paragraph 39). Having considered the evidence she concluded that there was no ambiguity arising out of the extrinsic evidence to which she referred:

> "46. If I step back and look at the evidence before me and what is suggested by Mr Jones, it is clear to me that the desire for IHT efficiency was subordinated to the deceased's desire to gift shares and the flat to the first defendant. That does not mean that the legacy in clause 4 is in any way ambiguous. What it does reveal is that the deceased understood the IHT position and the value of her assets, and that the drafting of clause 4 is consistent with that so that no ambiguity arises that would enable Mr Jones to pass through gateway (c), and I do not admit the evidence of the will drafter in this case."

13. Thus the Chief Master considered the competing constructions, and decided that the will itself was not ambiguous and that no ambiguity was introduced by reference to extrinsic circumstances. I would have thought that that ought to have meant that what became the next phase of the exercise was not necessary because the Chief Master had already decided on the unambiguous meaning of the will. However, as pointed out above, there was a further phase in the operation on 5th February when the construction point was argued again. In the August judgment (which resulted from this further argument) the Chief Master recorded Mr Jones's primary position as being that she should simply disregard sub clause 4.1 on the footing that it was unnecessary, following what was said to be the approach in *In re Huntley (decd)* [2014] EWHC 547 (Ch) (paragraph 38). She recorded and rejected the submission of Mr Jones that it cannot have been the intention of the deceased to pass nothing to the first defendant under clause 4, because otherwise why else include it (paragraph 39). Having considered further arguments advanced based just on the will itself (apart from a reference to the age of the deceased when she made the will – 90) she concluded in paragraph 43 that Mr Jones' construction would do considerable violence to the language of the will and she rejected it.

## The grounds of appeal

14. The grounds of appeal are that the Master erred in refusing to admit the witness statement of Mr Vučićević on the basis that the gateways in section 21 were not satisfied, and that she ought to have held that the will was ambiguous in the light of the surrounding circumstances or on its face. As a result of that the Chief Master erred in holding that on the proper construction of clause 4, in the light of the evidence in the witness statement, the gift to the appellant Mr Beasant was nil. At the hearing Mr Smith persisted in his submission that the will was ambiguous on its face even though that submission seemed to me to be somewhat inconsistent with his position that if he did not get his extrinsic evidence of intention admitted then he would not dispute the Chief Master's decision on construction.

15. In the light of that the questions on this appeal are as follows:

(a) Is the will ambiguous on its face;

(b) If not, is it ambiguous in the light of the surrounding circumstances – was the Master correct in holding that it was not?

## Whether the will is ambiguous on its face

16. Mr Smith invited me to apply the apparent meaning of the word "ambiguous" derived from *Re Williams* [1985] 1 WLR 905 in a broad manner as propounded by Mr David Donaldson QC (sitting as a deputy High Court judge) in *Re Huntley* [2014] EWHC 547 (Ch). In *Re Williams* Nicholls J seems to have proceeded on the footing that a will was ambiguous as its wording was capable of more than one meaning – see p 911H. In *Re Huntley* the judge was faced with a will whose provisions did not seem to work consistently with each other, and he concluded:

> "16. … This is a case where, after considering "armchair" evidence of matters known to all in the contemplation of the testator, one is left with uncertainty as to what was intended by the wording of the will. Though that might not be accepted as ambiguity in linguistic philosophy or analysis, I can see no reason why the concept in section 21 should be so constrained. On the contrary, it is in my view both desirable and appropriate that the concept of ambiguity in Section 21 of the 1982 Act should be broadly interpreted."

It does not seem to me that the concept relied on by Nicholls J is really any different from that considered by Mr Donaldson in *Huntley*. There is ambiguity when words in the will are capable of having two or more meanings.

17. I asked Mr Smith which words he said were ambiguous in this will. He said there was no ambiguity in the use of words; there was an ambiguity in the effect of the words used. He submitted that the words used in clause 4 were capable of having the meaning attributed to them by the Master, or they were capable of referring to the sum of £325,000 (being the nil-rate inheritance tax sum as at the date of the death). The words used in the definition in clause 4.1 were capable of defining the occasion of the charge rather than as giving rise to the computation of the sum passing under the clause.

18. This ambiguity was said to be created or amplified by looking at the order of the gifts in the clause. If that is done then clause 4 is a gift of the nil-rate band sum (£325,000). That uses up the band. The following gifts then proceeded from that in that it was said they would pass "free of tax", with the burden of the tax falling on residue because the nil-rate band had already been used up. Mr Smith pointed to the reasoning of Peter Smith J in his judgment (paragraphs 17 and 18) in *RSPCA v Sharp* set out in the Court of Appeal judgment in that case as reported at [2011] 1 WLR 980 para 13.

19. In addition, Mr Smith sought to equate the provision in this case with the provision in *Sharp* and then relied on what was said by Lord Neuberger in that case as to how his view on interpretation varied from an initial view that he had taken. That, submitted Mr Smith, demonstrated that the clause in that case was ambiguous, and therefore so was this one.

20. I am content to regard the definition of ambiguous in this context as being that propounded by Mr Smith – the will is ambiguous if its wording is capable of bearing more than one meaning. The sort of internal inconsistency that was faced in *Huntley* is capable of falling within that concept. But one still has to identify the words which are ambiguous, even in the wide sense. This part of Mr Smith's submissions mean that one has to identify an ambiguity <u>on the face of the language of the will</u> under section 21(1)(b) (reordering the words slightly). One is not looking outside that language under this head.

21. Mr Smith's case under this head fails because he has not demonstrated any language in the will, and particularly in clause 4, which is ambiguous. The words of the gift make sense as a matter of English, and have only one meaning in themselves and in a fiscal context. When placed in the context of the rest of the will they still have only one

meaning – they do not, of themselves, bear an alternative one. Mr Smith's case depends on what is meant by "Nil-Rate Sum", as he himself said. The problem for him is that that sum is clearly defined in the will. If one looks at that definition it is clear enough, and unambiguous. Mr Smith's submissions involve replacing that definition with another one; they are not a pathway towards demonstrating any ambiguity in the words actually used. The words in the definition cannot be taken to describe the occasion of charge rather than setting out a computation. They are not ambiguous in this respect; they simply cannot bear that meaning, on their face. The words "in respect of the transfer of value … which I am deemed to make" describe a process, not a date, occasion or event. I do not see how they can even arguably be taken in the latter sense.

22. That position is not altered by the position of the clause in the will. The following gifts do not make the earlier words potentially bear a second meaning. They do not cast doubt on the apparently single meaning of the earlier words, either linguistically or because of their relative positions; and in any case, as Lord Neuberger pointed out in *Sharp*, one normally gives gifts equal effect unless there is something in the will which indicates otherwise – see paragraph 37.

23. One further aspect of Mr Smith's case on ambiguity demonstrates how it cannot work under section 21(1)(b). He acknowledges that his case involves the gift under clause 4 as being a gift of the inheritance tax nil-rate band free of tax. I cannot see how the language of the will is ambiguous in such a way as to allow that to be any form of admissible interpretation.

24. Nor does *Sharp* help Mr Smith. First, and most significantly, the case was about a different will and a different clause (albeit one which probably shared a similar underlying drafting purpose). That is a vital distinction. Second, Peter Smith J's judgment was overturned on the appeal, so one has to be very careful about what one takes from that and I do not consider that anything in it survives which helps Mr Smith.

25. Third, I do not consider that what Lord Neuberger said in that case about his clause means that the present clause is, on its face, ambiguous. This is despite what is said by him in paragraphs 33 and 34:

> "33. Accordingly I have no real doubt but that the testator, the late George Mason, who executed the will, and indeed the solicitor who drafted it, though that the effect of clauses 3 and 4 was clear. Unfortunately what appeared clear from their perspective at the time is far from clear to subsequent readers of the document.

> 34. While the point appears to me to be far from easy, and while my ultimate view does not accord with initial impression, I have reached the same conclusion as Patten LJ …"

26. Various points should be made about this judgment. The first is that this view is not the majority view. Black LJ agreed with Patten LJ. Patten LJ's judgment considers the language of the clause, and does not seem to choose between two tenable constructions. It seems to decide that only one construction is possible. This is particularly apparent from paragraph 25:

> "25. The language of clause 3 does not therefore disclose a misunderstanding of IHT nor does it permit the clause to be construed as Mr Gordon contends. His construction (which the judge adopted) would involve, in my view, a complete re-drafting of clause 3…. There is nothing in clause 3 which indicates that this is what the draughtsman and, through him, the testator intended."

That is not the language of choosing between two potentially viable constructions. That is language in which one construction is rejected because it is simply not a viable construction, so there is no ambiguity. In my view that is the view of the majority.

27. Lord Neuberger does not express himself in the same way. However, in my view his final view seems to have been in line with that of Patten LJ. He does not actually identify any ambiguity. What he does is indicate his original view of the clause in question, without reference to whether it could be sustained at all on the language of the clause. His original view apparently flowed from a view that the will's clauses ought to be taken sequentially – see paragraph 35. However, he then rejected that process of construction because he considered it was simply not right to read them sequentially. Once that process was rejected then it would seem to me that, as a matter of logic (albeit not fully articulated in Lord Neuberger's judgment, because it did not have to be) Lord Neuberger was forced to the only view which could then be taken of the clause. In other words, there was no ambiguity. The fact that a construction propounded by counsel was rejected does not mean that there was, before the rejection, ambiguity. In my view a clause is not ambiguous merely because clever lawyers can look at it for long enough to be able to claim to extract more than one potential meaning of the will. More is required than that; otherwise the door to extrinsic evidence of intention would be opened much wider than section 21 can have intended.

28. Accordingly *Sharp* does not assist Mr Smith and his appeal in relation to paragraph (b) fails.

## Ambiguity in the light of surrounding circumstances

29. Mr Smith had an alternative case under section 21(1)(c) based on adding in surrounding circumstances, and those circumstances, as already indicated, appeared in the witness statement of Mr Vučićević. The Master summarised the evidence, or some of it, in paragraphs 41 to 45 of her judgment.

30. In order to be able to understand clearly which parts of the witness statement and attendance notes were relied on for the purposes of section 21(1)(c) I asked Mr Smith to identify them in the hearing before me. This was important both in order to identify the evidence relied on, and to make sure one excluded any parts pointed to by Mr Smith which plainly went only to the question of direct evidence of intention, which only comes in at the final stage of the section 21 exercise. It turned out that that latter part of the exercise had to be performed because Mr Smith sought to rely on evidence which went beyond admissible surrounding circumstances and trespassed into areas of subjective intention.

31. Excluding those inadmissible parts, the evidence can be summarised as follows:

(i) Mr Vučićević said to the testatrix that she could give £325,000 to Mr Beasant free of tax and that this nil-rate sum could be increased in line with any increases in the nil rate band over time.

(ii) Mr Vučićević reminded his client that due to the nature and size of the legacies it was "kind of likely" that there would be some tax on assets over £325,000.

(iii) The deceased was advised by Mr Vučićević that his rough assessment was that £180,000 to £190,000 IHT would be chargeable on just the gifts to Mr Beasant, and the deceased said she did not mind that this would be borne by the charities. He provided the basis of his calculation – Mr Baxter satisfied me that this evidence was inadmissible at this stage of the pathway through section 21. The relevant attendance note records that Mr Vučićević noted that this was a significant departure from a previous will.

(iv) Mr Vučićević looked for a template for what came to be clause 4 and believes he must have used a template from Lexis Nexis. He did not believe he had used such a template before.

(v) An attendance note of 27th June 2016 records that the testatrix said that Mr Beasant was very prominent in her life and she wished to provide for him.

32. Most of this evidence was summarised by the Master in the paragraphs which I have identified, and she also referred to a passage in an attendance note which referred to instructions to give the Imperial Tobacco shares, "nil rate to the point of £325,000" to Mr Beasant.

33. It is impossible to see from that evidence how it gives rise to any ambiguity in the wording of clause 4, whatever else it might show. Mr Smith submitted that the evidence showed a misunderstanding as to how inheritance tax works. In order to do that he demonstrated that on the interpretation of the charities in this case between £68,000 and £80,000 IHT is payable. The calculation of Mr Vučićević (£180,000-190,000) indicates that he was working on a different calculation, that is to say one in which Mr Beasant got £325,000 as a tax free gift first, so this was not intended to be the sort of tax efficient will which the charities' case would say it was. I do not see how this gives rise to any ambiguity in clause 4. At most, and if one accepts the unarticulated reasoning which got Mr Vučićević to £180,000-£190,000, it would show error, but not an error which gives rise to ambiguity. That sort of point might assist in a rectification claim, but no such claim has been made here. What Mr Smith needs is a definition of Nil-Rate Sum which is a complete substitute for the definition provided in clause 4.1. Only rectification can achieve that.

34. It follows that the gateway provided by section 21(1)(c) is not available to Mr Beasant either.

## Conclusion

35. The result of this is that the Chief Master's analysis and decision were correct, and the appeal should be dismissed. No separate consideration needs to be given to an appeal on the costs order which has formally been made.