

18, 1948

In the Privy Council.

No. 87 of 1946.

UNIVERSITY OF LONDON  
W.C.1.

12 NOV 1956

INSTITUTE OF ADVANCED  
LEGAL STUDIES

45230

CASE FOR THE APPELLANT

ON APPEAL

FROM THE SUPREME COURT OF GIBRALTAR  
AS A COURT OF FIRST INSTANCE

IN THE MATTER of the ESTATE of ANGEL COSTA deceased

BETWEEN

PETER COSQUIERI - - - - - Appellant

AND

10 MAGDALENA FORMENTO (Spinster), MAGDELENA  
SCULLARD (Married Woman), ANGEL FORMENTO,  
VICTORIA FORMENTO (Spinster), VIRGINIA  
LATIN (Spinster), EDUARDO LABRADOR, JUAN  
DANINO LOURDES RUIZ (Married Woman)  
and JOSEPH FERNANDEZ - - - - - Respondents.

Case for the Appellant.

1. This is an Appeal, brought by leave of the Supreme Court of Gibraltar by Order dated the 18th day of September 1946 by Peter Cosquieri (hereinafter called "the Appellant") from an Order of the same Court dated the 1st day of August 1946 whereby it was declared that according to the true construction of the Will of Angel Costa (hereinafter called "the Testator") the Testator meant and intended to bequeath to the firm of Cosquieri & Co. as constituted at the time of his death a conditional gift namely, an option for a lease of the premises referred to in the said Will being R. No. 574 in the General Plan of the Garrison of Gibraltar for the term of fourteen years computed from the 1st day of October 1945 subject to the payment of rent as reserved by an Indenture of Lease of the 18th day of June 1927 and subject to and with the benefit of such Lessees' and Lessors' covenants provisions and conditions in all respects as are contained in the said Indenture of Lease And it was ordered that the time within which the said option was to be exercised should be one month from the date thereof.

RECORD.

p. 37.

p. 28.

2. The proceedings were instituted by Originating Summons dated the 26th day of June 1946, issued upon the application of George Michael Gonzalez of No. 263 Main Street Gibraltar, Trader, and Ernest Joseph Guetta of No. 2 Cannon Lane Gibraltar, Insurance Agent (Plaintiffs) who together with the Appellant are the executors and trustees of the

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Will of the Testator for the determination of the questions whether according to the true construction of the said Will the Plaintiffs (in the action) had power and ought to grant a lease to the Appellant and his sons of the house occupied by him mentioned in the said Will, and if so, what are the conditions under which such lease should be granted and for what term, or for such other direction as the case might require.

3. By his Will in the Spanish language dated the 21st August 1944 after appointing the said George Michael Gonzalez, Ernest Joseph Guetta and the Appellant Peter Cosquieri to be his executors the Testator gave a direction, the true translation of which is in the words following :— 10

10, 1. 39.

“ I direct that the rent of the house which Mr. Peter Cosquieri occupies be not increased nor his rent be increased in any manner nor notice to quit be given to him so long as he shall pay punctually the rents stipulated in the contract. When rents revert to normal this will be as stipulated £30 per month and payment by him of the Rates and Water according to the contract, with option to its renewal if he so desires on equal circumstances and the house shall not be ceded to anyone and let he and his sons have the right to occupy the house and shop.”

4. The Testator died on the 29th day of August 1945 at Gibraltar 20 without having revoked or altered his said Will which was on the 23rd day of October 1945 duly proved by the executors therein named in the Supreme Court of Gibraltar.

5. The house referred to by the Testator in the passage of his Will quoted above is No. 127 Main Street Gibraltar (being the premises R. No. 574 in the General Plan of the Garrison of Gibraltar referred to in the said Order dated the 1st day of August 1946) and consists of a ground floor occupied by Cosquieri & Co. for business purposes and a first floor occupied as dwellings by the Appellant and his family and such house forms part of the Testator's residuary estate. 30

6. The Appellant and the Respondent Joseph Fernandez were at the death of the Testator carrying on business in partnership together under the name Cosquieri & Co. pursuant to the terms of a Deed of Partnership dated the 11th June 1927 and made between the said Joseph Fernandez of the one part and the Appellant of the other part.

7. The Appellant gave to the said Respondent Notice in writing dated the 27th day of December 1945 determining the partnership of Cosquieri & Co. on the 30th June 1946.

8. By an Indenture dated the 18th June 1927 and made between the Testator of the one part and the said Joseph Fernandez and the Appellant trading under the firm name of “ Cosquieri & Co.” of the other part (therein called “ the Lessees ”) the said house was demised by the Testator to the Lessees from the 1st day of June 1927 for the term of 14 years at the monthly rent of £30. 40

9. The firm of Cosquiere & Co. had been tenants of the said house from the 1st day of June 1927 until after the death of the Testator and during his life the Testator from time to time gave receipts for rent payable in respect of the said house made out to any one of the following names :—

Messrs. Cosquiere & Co.  
 Messrs. P. Cosquiere & Co.  
 Mr. P. Cosquiere  
 Mr. Cosquiere  
 Sres. P. Cosquiere Cia.  
 Sres. Pedro Cosquiere y Cia  
 Sres. Cosquiere y Cia.

p. 5.

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10. The first floor of the said house was occupied by the Appellant as a sub-tenant of the said firm of Cosquiere & Co. at a rental of £5 per month.

p. 5.

11. The Order (with reasons) of the Chief Justice dated the 1st day of August 1946 opens with the statement that “ three main questions arise in construing the material passage of the Will of Angel Costa ; first, “ is it void for uncertainty ; secondly, if not, who is or are the conditional donee or donees ; thirdly, if there is a conditional gift, of what does it “ consist ? ”

p. 29.

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12. The said Order then stated (1) the Plaintiff’s contention that there was a conditional gift to the Appellant, namely an option to call for a 14-year lease of the said house from the 1st October 1945 (being the date when according to the law of Gibraltar rents reverted to normal) on the terms and conditions of the 1927 Lease ; (2) The Appellants’ contention which is hereinafter more particularly set out ; (3) The contention of the next of kin of the Testator that the relevant passage is void for uncertainty ; and (4) The contention of the Respondent Joseph Fernandez that the firm of Cosquiere & Co. was entitled to a 14-year lease from the date of the Testator’s death upon the terms and conditions of the 1927 Lease.

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13. After rejecting the contention of the next of kin that the passage is void for uncertainty and stating that in view of the fact that the Testator’s description of the premises consists of the words “ the house “ which Mr. Peter Cosquiere occupies ” extrinsic evidence as appearing in paragraphs 8 and 9 of the affidavit of G. M. Gonzalez dated 27th June 1946 and paragraphs 1 to 5 inclusive of the affidavit of Joseph Fernandez dated 28th July 1946 must be admitted the Chief Justice in the said Order states “ The facts as to the premises and their occupants appear “ therein. The Testator must have known these facts, as appears from “ the Will itself except that he seems to have overlooked the fact that the “ original lease had already expired at the date of his Will and that the “ said firm were by then in occupation as tenants holding over. The “ receipts exhibited to the last-mentioned affidavit show that whenever “ he himself signed a receipt, he made it in favour of the firm, both before “ and after the making of his Will.”

p. 29, l. 44.

p. 30, l. 2.

p. 30, l. 11.

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p. 30, l. 20.

14. The Chief Justice then holds—correctly, as the Appellant respectfully contends—that the words “the house which Mr. Peter Cosquiere occupies must be treated as an expressive description of the subject of the gift or, more strictly, descriptive of the premises an option on which is the subject of the gift—in other words, the whole property R. No. 574.”

p. 30, l. 45.

15. After examining the relevant passage of the Will in some detail in support of the above finding and to show that the Plaintiffs' contentions could not be upheld the Chief Justice states: “The crux of the matter is now reached. Is the passage as a whole to be treated as providing for a gift in favour of Peter Cosquiere personally (and perhaps also of his sons) or of the then tenants of the premises?”

“In my opinion the testator undoubtedly desired to benefit Peter Cosquiere, elsewhere referred to in the Will as ‘my friend Cosquiere,’ but the manner in which he intended to go about effecting that object was by the rational and obvious method of preserving the status quo, as regards the premises in question, long after the expiration of the original lease if Peter Cosquiere so desired it. He knew that Peter Cosquiere had both his business and his home in the premises (see the exhibited receipts which differentiated between the two, according to the law then in force) and his basic and main intention was to provide for the continuation, on reasonable terms, of that state of affairs. Continuity is the keynote of the whole passage.”

“That view is, I think, strongly reinforced by the use of the expressions ‘ner notice to quit be given’ and ‘with option to its renewal.’ Neither phrase would be consistent with an intention that the firm should be dissolved (a matter in any event beyond the testator's power) and that Peter Cosquiere should be left in sole occupation of the premises. Indeed the ousting of the firm from their tenancy might well, so far from assisting the testator's intention to benefit his friend, have the reverse effect, a factor which the testator as a man of property must be taken to have appreciated.”

“The use of the third person singular, in the various expressions to which I have referred, must, I think, be regarded as not merely the natural grammatical sequence but as references to Peter Cosquiere in his capacity as the member of the firm who was foremost in the testator's mind and as agent for the firm in the matter of dealings with the testator. The over-riding consideration remains: the element of continuity undisturbed. The testator was facilitating, though it was beyond his power to assure, his friend's prolonged enjoyment of an established place of business and of a home for himself and his sons.”

“The expression ‘with option to its renewal’ invited examination of the original Will. I have done so, and observe that the translation is precisely accurate. The testator did not say ‘a renewal’ but ‘its renewal,’ thus indicating a new lease similar in all respects to the old one.”

“Continuity is again emphasised by the clause ‘The house shall not be ceded to anyone.’ If ‘house’ here means, as the Plaintiffs

“ would have me hold, the upper storey only, the clause is meaningless ;  
 “ for the testator had no power, as he well knew, over the dealings between  
 “ Cosquieri & Co. as sub-lessors and Peter Cosquieri as sub-lessee.

“ Incidentally it should be mentioned that the original text does  
 “ not contain the word ‘and’ preceding the last-mentioned clause.  
 “ Moreover, the original text corresponding to that clause commences  
 “ with a capital letter, though the full-stop is omitted before it. Plainly  
 “ a fresh sentence was intended to commence at that point. As to the  
 10 “ effect of this sentence as a whole, in my view it can only be treated as  
 “ a final flourish, so to speak—an announcement, however, far from the  
 “ testator’s much clearer expression of his main intention in the earlier  
 “ parts of the passage, of his pious hope that the Cosquieri family should  
 “ be permitted by his executors to live and work where they were. The  
 “ words are incapable of literal application in any event, in view of the  
 “ then existing facts.”

16. It is submitted that, since the Testator well knew that the house  
 was occupied by the firm of Cosquieri & Co. if he had really meant the gift  
 to be for the benefit of the firm, he would surely have said so in his Will.  
 It seems plain that the Testator wished to benefit the Appellant personally  
 20 and his family. The words “ I direct that the rent of the house which  
 “ Mr. Peter Cosquieri occupies be not increased nor his rent increased in  
 “ any manner nor notice to quit be given him so long as he shall pay  
 “ punctually the rents stipulated in the contract . . . ” are, it is submitted,  
 consistent with the view that the Testator realised that the original lease  
 had expired, that Cosquieri & Co. were tenants holding over on the terms  
 so far as applicable of that Lease, and that the Testator wished “ his friend  
 “ Cosquieri ” (not the firm of Cosquieri & Co.) to continue in possession of  
 the house. It is particularly to be noticed that throughout this passage,  
 neither the firm, nor the Respondent Fernandez is once mentioned, and  
 30 that the whole passage is in the third person singular—relating unquestionably  
 to the Appellant personally. This passage, it is submitted,  
 undoubtedly gives the Appellant a conditional life interest in the property,  
 “ so long as he shall pay punctually the rents stipulated in the contract ”  
 i.e. in the original lease of the 18th June 1927.

17. It is further submitted that no part of what follows in the  
 relevant passage of the Will can cut down this gift. It is submitted that  
 the expression “ renewal ” in the Will means that if the Appellant desires  
 a lease he can have one but, if not, he can live there, and his sons after  
 him, as tenants for life in succession : ambiguous words following on clear  
 40 language cannot control or modify its effect. In this Will it is submitted  
 that the words “ the contract ” and “ renewal ” are ambiguous while the  
 last fourteen words of the relevant passage are clear. “ Plain and distinct  
 “ words are only to be controlled by words equally plain and distinct.”  
*Goodwin v. Finlayson* (1858), 25 Beav. p. 65.

18. It is further submitted that the general intention, apparent  
 from the Will, is to benefit the Appellant personally and his sons, and not  
 anyone else, such as e.g. any partner of the Appellant, and that the  
 construction of a Will should be in accordance with its *apparent* general  
 intention.

19. The final words "and the house shall not be ceded to anyone "and let he and his sons have the right to occupy the house and shop" it is submitted, indicate that the right to continue in the occupancy of the house and shop is a right personal to the Appellant and his sons, and emphasises that this right is a continuing one (i.e. not limited to 14 years) and is to continue during the lives of the Appellant and the survivor of his sons. The Court leans to the construction most favourable to the donee, as regards the term or interest given. "Being a grant, a devise must be "taken most strongly against the grantor"—per Pollock C.B. in *Cooper v. Woolfitt* (1857), 2 H. & N. 122 at page 125. 10

20. It is respectfully submitted that the Learned Chief Justice was wrong in suggesting as he seems to have done in the said Order that the status quo could be preserved and continuity provided for only if the gift were to be construed as a gift to the firm. It would be a simple matter for the Appellant (if his contention were to be upheld) to grant a lease or licence to the firm in which he was a partner if he desired so to do.

The Appellant submits that the Order of the Supreme Court of Gibraltar should be annulled, and in lieu thereof an Order should be made declaring that the Appellant is the donee of a tenancy for life conditional on his performing all the tenant's obligations and covenants contained in the said Lease dated June the 18th 1927 so far as not inconsistent with a life tenancy and that on the death of the Appellant, his sons, if both survive him can opt to become joint tenants for life, or if only one survives, he alone can opt to become tenant for life upon the same conditions, for the following, among other 20

### REASONS

- (1) BECAUSE the Testator clearly intended to benefit "his friend Cosquiere," the Appellant personally, and not the firm of Cosquiere & Co.
- (2) BECAUSE the Testator by the words used intended that the benefit should continue during the lifetime of the Appellant and not for a limited period of 14 years. 30
- (3) BECAUSE the Testator intended the sons of the Appellant to be included in the gift, from the expression used, viz. : "he and his sons have the right to occupy the house and shop."
- (4) BECAUSE the Court leans to the construction most favourable to the donee as regards the term or interest given.
- (5) BECAUSE neither the expression "Cosquiere & Co." nor the name of the Respondent Fernandez are mentioned or appear in the said Will. 40
- (6) BECAUSE throughout the material passage in the said Will, all references to the donee are expressed in the singular and relate to the Appellant, except where his sons are referred to near the end.

- (7) BECAUSE apparent general intention of the Will was to benefit the Appellant and his sons and no one else.
- (8) BECAUSE the Order of the Chief Justice is erroneous and ought to be reversed or varied.

JOHN BOWYER.

**In the Privy Council.**

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**ON APPEAL**

*from the Supreme Court of Gibraltar, sitting  
as a Court of First Instance.*

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**IN THE MATTER of the ESTATE of ANGEL  
COSTA deceased**

**BETWEEN**

**PETER COSQUIERI - - Appellant**

**AND**

**JOSEPH FERNANDEZ and**

**Others - - - Respondents.**

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**Case for the Appellant.**

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**J. N. NABARRO & SONS,**

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