

Neutral Citation Number: [2023] EWHC 3268 (Ch)

Case No: CH-2022-MAN-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER

Manchester Civil Justice Centre
1 Bridge Street West
Manchester, M60 9DJ

Date: 18 October 2023

Before:

HIS HONOUR JUDGE HALLIWELL

Between:

TERENCE JOHN KEEGAN

Applicant

- and -

PATRICIA ANN KEEGAN

Respondent

THE APPLICANT appeared in person
MR JAMES FRYER-SPEDDING for the **Respondent**

APPROVED JUDGMENT

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HIS HONOUR JUDGE HALLIWELL :

1. This is an appeal from the judgment of Deputy District Judge Hassall, following trial, in relation to the interpretation of the Will dated 27 May 2009 (“**the Will**”) of the late Mrs Sheila Mary Keegan (“**the Deceased**”) who died as long ago as 14 May 2013.
2. Deputy District Judge Hassall’s judgment was given on 21 July 2022. Permission to appeal was given by his Honour Judge Stephen Davies on 27 July 2023 in relation to one issue only, namely whether the gift of a derelict house on the deceased’s farm (“**the Farm**”) in Glossop, Derbyshire, was limited to the building itself or included adjoining land.
3. Two of the deceased’s four children, namely Mr Terence John Keegan (“**Terence**”) and Miss Patricia Ann Keegan (“**Patricia**”), are parties to the Appeal. Terence is Appellant and Patricia is Respondent. Before me, Mr James Fryer-Spedding appeared on behalf of Patricia and Terence attended in person as, indeed, they did at trial before the Deputy District Judge.
4. The Will was in simple terms. After appointing Terence and Patricia as her Executors and Trustees, the Deceased made a gift to Terence of the land and farm buildings denoted as “the land and farm buildings belonging to Kings Clough Head Farm, Back Rowarth, Glossop, Derbyshire”. She gave the farmhouse to Terence and her other daughters, namely Rita Carmel Keegan and Marie Ann Keegan, and she gave a derelict house known as Heath Cottage to Patricia and her grandson, Peter Terence Keegan. Her residuary Estate was left to her four children.
5. Peter Terence Keegan was Patricia’s son. He passed away at a young age but I am advised the Deceased predeceased him. Once her Estate has been fully distributed,

his share in Heath Cottage will form part of Peter's own estate. Patricia represents Peter's estate.

6. Before Deputy District Judge Hassall there was an issue as to whether the gift of Heath Cottage encompassed a vehicular right of way over a track on the Farm. After a trial of some four days, including a site visit and oral evidence of all four of the deceased's children, Judge Hassell adjudged that the gift did include a vehicular right of way to Heath Cottage. On this issue, Terence does not have permission to appeal.
7. However, Judge Hassall also adjudged that the gift of Heath Cottage encompassed adjoining land, denoted as field 84 ("**Field 84**"). This is the part of his judgment now under appeal. It was based on the Judge's interpretation of the Will in the light of the evidence he had heard about the surrounding circumstances when the Will was made and direct evidence of the deceased's intentions as Testatrix under *Section 21* of the *Administration of Justice Act 1982*.
8. The surrounding circumstances have always been admissible as a guide to the intentions of a Testatrix under the so-called armchair principle. In *Perrin v Morgan* [1943] AC 399, it was authoritatively established that, although the gifts of a Will speak from death, evidence of the surrounding circumstances at the time of execution is admissible as a guide to construction of the subject matter of the gift.
9. This is not dissimilar from the modern approach to interpretation of conveyances. The courts are enjoined to consider the physical features of the site when interpreting the parcels, see for example *Pennock v Hodgson* [2010] EWCA Civ 873. However, *Section 21* of the *Administration of Justice Act 1982* has taken the principle one step further in the case of a disputed Will. If the Will is ambiguous on its face or in the

light of the surrounding circumstances, direct evidence of the Testatrix's intention is now admissible.

10. In the present case the Judge can be taken to have recognised and invoked his jurisdiction to admit such evidence since, in paragraph 45 of his judgment, he confirmed that he had reached his conclusions by applying the principles of *Marley v Rawlings* [2015] AC 129 and the provisions of *Section 21* of the *1982 Act*.
11. As I mentioned earlier, the Will itself contained a gift of the farm and farm buildings to Terence, a gift of the farmhouse to Rita, Marie, and Terence, and a gift of Heath Cottage to Patricia. As testatrix, the Deceased appears to have recognised that the farmhouse and Heath Cottage were part of the Farm since she described her gifts of each respectively as a gift of the farmhouse and a gift of the property known as Heath Cottage, each "*belonging* to Kings Clough Farm". Of course, it is incorrect to state that one property *belongs* to another property. The reference to "belonging" suggests simply that the farmhouse and Heath Cottage were each comprised in the Deceased's Title to Kings Clough Head Farm. No plan was appended to the Will to assist in identifying Heath Cottage. The reference to Heath Cottage can thus be taken to have comprehended the feature or features on the land that the Deceased regarded, or can be taken to have regarded, as Heath Cottage.
12. If the gifts of the farm and Heath Cottage are inconsistent on the basis that the Farm itself incorporated Heath Cottage, it is not suggested the ambiguity should be resolved by applying the ancient presumption that where two clauses in a Will are irreconcilable, the later one prevails.
13. In his submissions before me, Terence observed that the gift to himself personally of the land and farm buildings at Kings Clough Head Farm included, as part of the

description in the Will, a reference to the County Parish Holding number for the Rural Payments Agency. The CPH number was 09/150/0082. He then drew my attention to the records of the Rural Land Register on 22 August 2009 and 22 September 2014 showing that seven parcels of land, on the Farm, were eligible for subsidy under the single payment scheme, including 2.03 hectares in respect of a parcel of land denoted as 7308. This included, together with other land, Field 84. However, the footprint of the derelict building at Heath Cottage, together with a small area of land to the side of the building, were not included in the relevant parcel, nor were they included in any other parcels eligible for subsidy as part of Kings Clough Head Farm. On this basis, Terence submitted that Heath Cottage was not to be regarded as part of the Farm at the time the deceased made her Will, and, if you take the Rural Land Register plan as your reference point, there can be no room for ambiguity in relation to the gift of Heath Cottage. The gift included the area carved out at parcel 7308 in respect of the derelict building or buildings at Heath Cottage and some land immediately to the side of the building.

14. Ingeniously as Terence presented his submissions on this issue, I am not persuaded that the Will can safely be construed free from ambiguity on this basis. It is by no means clear his case was presented in precisely this way when it came before the Deputy District Judge. If so, this isn't fully reflected in the judgment itself. Be that as it may, it amounts only to one of several potential interpretations. The Will incorporated the CPH number in the Deceased's description of the gift of the farm. However, it did not incorporate, by reference, the CPH plan. Nor was the gift of Heath Cottage defined with reference to the CPH plan. Moreover, as Mr Fryer-Spedding observed, the CPH plan cannot be said to have comprehensively defined the gift to Terence since land that was ineligible for subsidy, such as a pond, was also

excluded notwithstanding that it was undeniably intended to form part of the subject matter of the gift to him.

15. Mr Fryer-Spedding also submitted that, to the extent they were admitted in evidence, the CPH plans post-dated the gift and thus cannot have been in the Deceased's contemplation when she made the Will. No doubt this is correct. In my judgment, it does not fully dispose of the issue since there is no reason to believe the records presented prior to the Will were materially different from the records presented before me. However, Terence's construction amounts to only one of several ways of interpreting the Will and Mr Fryer-Spedding's submissions on the issue are certainly indicative of uncertainty, in the evidence submitted before the Judge, about the extent of the land historically associated for one purpose or another with Heath Cottage. In any event, although the CPH number was adopted, in the Will, as part of the description of the gift of the farmland to Terence, the CPH plan is not in any sense a Title document. As Mr Fryer-Spedding observed, the plan was drawn up for entirely different purposes in connection with the provision for rural payments subsidy. More likely than not, the CPH numbers were taken simply as a convenient point of reference rather than with the intention that, once construed with the CPH plans, they would conclusively delineate the boundaries of the gifts.
16. To identify the land intended for inclusion in the Deceased's gift of Heath Cottage, extrinsic evidence was admissible before the District Judge as part of the surrounding circumstances. Under the so-called "armchair principle", this includes evidence of such circumstances as the Deceased can be taken to have been aware when she made her will. This would have included pertinent documentation such as the CPH pan. However, it would also have included evidence to identify the building or buildings

known as Heath Cottage, the land on which the building or buildings stood, the land with which they were associated and any land the testatrix might have considered to form part of the historical curtilage of the buildings although significant caution would obviously have to be exercised in view of the fact that, by the time the Deceased made the Will, use of the building had ceased many years ago.

17. In his submissions in support of the appeal, Terence reminded me that the court cannot re-write a will. Patricia has never applied for an order rectifying the Will under *Section 20* of the *1980 Act* on the basis it did not properly reflect the deceased's intentions. Her case is not based on the proposition she intended to make a gift of the land denoted as Field 84 but, as a result of an error or failure to understand her instructions, the Will did not properly reflect her intentions. Rather, her case is based on the proposition that the gift of Heath Cottage included the relevant land and is to be construed as such.
18. Nevertheless, once the Judge admitted evidence of the surrounding circumstances, there was plainly sufficient ambiguity if, indeed, there was not already sufficient ambiguity to warrant admission of direct evidence about the Deceased's intentions under *Section 21(1)(c)* of the *Administration of Justice Act 1981*. The issues of ambiguity arose from the absence of any comprehensive plan or description in the will itself together with the topography of the land, the absence of boundary features, the nature of the relevant buildings and the historic cessation of use.
19. In the present case the Deceased and her late husband, also called Terence, bought the Farm in 1970. It was conveyed to them by Elsie May Robinson and Dorothy Eileen Woodhead in a conveyance dated 4 August 1970. By then Heath Cottage was no longer in use as a house. However, Patricia gave evidence, which the Judge can be

taken to have accepted that, in the earlier years, it was in significantly better condition than later, although it is unclear whether by then it had already ceased to be habitable. During his submissions before me, Terence stated that Heath Cottage once formed two residential units. However, he was not under oath when he made his submissions and the point is not directly relevant. More significantly, the building or buildings at Heath Cottage had ceased in residential use by the time the Deceased and her late husband first acquired the Farm in 1970.

20. In the 1970 conveyance plan, Field 84 was shown as a separate field. However, the conveyance plan was based on an ordnance survey plan dating back to the 1920s. It is common ground that by 1970 the boundary wall between Field 84 and an adjoining field, historically known as field 85, had ceased to present a continuous physical boundary. This is reflected in the Ordnance Survey plan revised in October 1967. Be that as it may, it is maintained on behalf of Patricia that the historic alignment of the field boundary can still be ascertained from remnants of the boundary wall and the topography of the land.
21. In addition to the plans, the Judge had the benefit of a site visit. At paragraph 48 of his judgment he stated that Field 84 “plainly follows a wedge-type shape which is clear from historic maps. It seems clear to the court that the wall line starts where the remnants of brick are at the point of the boundary 81. This can be verified simply, one would have thought, with a simulation of the plot and cross-checked against the recorded acreage in historic maps”.
22. The Judge did not draw a specific distinction between the admission of evidence of the surrounding circumstances and direct evidence of the Deceased’s intentions. However, it is plain from his judgment that he considered, when viewed as a whole,

such evidence to be overwhelmingly suggestive of an intention to make a gift to Patricia of the derelict buildings and Field 84 as a whole.

23. Patricia gave evidence at trial that it was always her “understanding that the land or garden area of Heath Cottage included [F]ield 84”. This appears from paragraph 3 of her fourth witness statement in which she stated that “there was always a clear line on the ground between [F]ield 84 and field 85”. She also gave evidence that she was for many years an active horsewoman and she used land adjoining Heath Cottage as a paddock for her horses. This can be taken to include Field 84. By then there was, of course, no boundary with field 85, so it is inherently unlikely that the horses were confined to the area denoted as Field 84. It was at least implicit in her evidence that the Deceased can be taken to have been aware of each of these matters. There is certainly no convincing evidence to the contrary.

24. Although Heath Cottage had become derelict, Patricia maintained that the Deceased earmarked Heath Cottage as a house for her. She also gave evidence that the Deceased envisaged that the adjoining land would be given to her with the Cottage. To this end, she says Terence was asked to carry out renovation work. In paragraph 27 of her second witness statement, Patricia stated in terms that:

“It was not my mother’s intention to give Heath Cottage to me without the attached land at field 84.”.

25. And consistently with this she stated in paragraph 4 of her witness statement that:

“I always had horses when I was growing up and so it is my understanding that my mother’s intention was for me to have Heath Cottage with field 84 as a paddock for horses.”.

26. She also stated that:

“There is not enough room for me to keep horses in the garden area of Heath Cottage which has separated to the west of field 84 by the wall

built by the first defendant. Further, my mother cannot have intended to gift me land in her Will without access by car and with no real surrounding garden as I have a young child so need accessibility by car.”

27. It is plain from his judgment that the Deputy Judge considered Patricia to be a convincing witness and generally accepted her evidence. In doing so, it was of course important for him to bear in mind the distinction between section 21 of the *1982 Act* which allowed him to admit extrinsic evidence to assist him in connection with matters of interpretation, and *section 20* which provides for a Will to be rectified so as to align with the deceased’s intentions.
28. Patricia relied on *section 21*, not *section 20*. Her case was based on the proposition that the gift of Heath Cottage was apt to include Field 84 and intended to do so not that the omission to refer to Field 84 was an error capable of rectification. In some ways, this is an elusive distinction and there is no doubt some of Patricia’s evidence was designed to show that the Deceased intended to make a gift of the field independently of the association between the field and Heath Cottage.
29. However, the Judge was plainly alive to the fact that he was being invited to apply section 21, not section 20. Not only did he state in paragraph 45 that he was applying section 21, he also prefaced his analysis in paragraph 42 of the judgment by stating that “overwhelmingly, Patricia makes out her claim that Heath Cottage comprises field 84”. It is implicit the Deceased understood and intended the gift of Heath Cottage to include Field 84.” In addition to Patricia’s evidence about the Deceased’s own perceptions which the Judge can be taken to have accepted, this is consistent with the historic conveyance plans showing Heath Cottage to be joined to Field 84 by a field tie, a proposition accepted by Terence in cross-examination, and Patricia’s own perceptions that the land or garden area of Heath Cottage included Field 84.

30. At paragraph 30 of his judgment, the Deputy Judge was astute to observe that Terence accepted that, as at 2009, when the Deceased made her Will, there were no features present which separated Heath Cottage and Field 84 to the south and west. Terence subsequently built walls around the cottage but these were not present when the Deceased made her Will.
31. It is true that having stated, in paragraph 42, that Patricia had made out her claim Heath Cottage comprised Field 84, the Deputy Judge referred to aspects of the factual background that did not have an obvious bearing on the association between Heath Cottage and the field, including her recollection of playing there as a child, driving vehicles, and horse riding. It is also true that there was no continuous physical boundary between fields 84 and 85 for the whole time that it was in the ownership of the deceased and her late husband.
32. However, if the gift of Heath Cottage did not include Field 84, no single interpretation of the gift is without its difficulty. It is inherently unlikely that the Deceased intended to limit the gift to the footprint of the building itself. She can be taken to have been aware of the practical difficulties to which this would have exposed the owners of the cottage in connection with matters of management and maintenance. By 1970 the building was derelict. It also had an open aspect to Field 84 on at least two sides. This poses significant difficulty to any assessment of the overall curtilage of the property based on the physical features. Whilst the curtilage of the property in the past may be ascertainable from some of the historic plans, it would again be somewhat contrived to base an assessment on plans which ceased to reflect the physical features once the property had become derelict. Moreover, the curtilage, as shown on the plans, has shifted over time. Terence sought to rely on the CPH plan

but this does not reflect the Ordnance Survey or conveyance plans and was drawn up for entirely different purposes in connection with the payment of agricultural subsidy.

33. In any event, this is not a re-hearing. It is not for me to carry out my own assessment of the evidence and consider whether, in the light of such an assessment, the gift of Heath Cottage included Field 84. The question for me is whether, having correctly identified the question for determination, there was evidence before the Judge upon which he could reasonably reach the conclusion he did.

34. Terence's task was to persuade me that there was no evidence or no substantial evidence before the Judge upon which he could reasonably have reached his conclusion. He has failed to do so. Based on the evidence before the Judge including the Will itself, the Title documents, the plans and aerial photographs, it was plainly open to him to admit direct evidence of the Deceased's intentions under the provisions of *Section 21* of the *1982 Act*. Having visited the site, admitted the documentary evidence as a whole and accepted Patricia's evidence, it was also open to him to conclude that the Deceased's gift of Heath Cottage was intended to include Field 84. I am not persuaded there was no evidence on which the Judge could reasonably have reached his conclusions or that he has somehow made a significant error of law. His judgment was careful and thorough. It was also delivered orally. Whilst Terence has successfully identified some errors of a typographical nature in relation to matters such as dates, these are not material to the Judge's conclusions. The Appeal must be dismissed.