

Where there's a will, there's a way

(Lecture P1190 – 14.22 minutes)

The First-Tier Tribunal case of *Vincent v HMRC* (2019) examines an interesting point, which crops up with a reasonable degree of regularity, about the possibility of the wording in a deceased individual's will creating an interest in possession for IHT purposes.

The main issue was whether the drafting of the will of Mrs Vincent's mother (Mrs Hadden) conferred a life interest in Mrs Hadden's share of the family home on her brother, Mr Thom, following Mrs Hadden's death in October 2001.

The circumstances of the dispute between the taxpayer (Mrs Vincent) and HMRC go back many years. In 1985, Mrs Hadden and her husband decided to sell their house on the occasion of their retirement, as did Mr Thom. It was determined that the three of them would jointly purchase a property known as 'Hopefield' and that, after the necessary alterations had been carried out, they would live there together for the rest of their lives. The sale proceeds of Mr Thom's house were greater than those from the sale of Mr and Mrs Hadden's property and so it was agreed by a declaration of trust dated 31 August 1985 that Hopefield should be owned by the three of them as tenants in common on the basis of:

- a five-eighths share for Mr Thom; and
- a three-eighths share for Mr and Mrs Hadden held by them as joint tenants.

Mr Hadden died in June 2001. As a result, Mrs Hadden became entitled to the Hopefield share by survivorship and to the remainder of his estate under the terms of his will. Mrs Hadden then died some four months later. Because the assets which she would have inherited from her late husband were diverted to their daughter, Mrs Vincent, by a deed of variation to Mr Hadden's will for IHT planning reasons, there was no IHT payable on her estate. However, Mrs Hadden had left the three-eighths share in Hopefield in trust to Mr Thom 'to reside therein for so long as he shall desire free of rent but he being responsible for general rates, water rates, insurance and maintenance repairs of an income nature'.

Subject thereto, the property interest was bequeathed to Mrs Vincent. Mr Thom carried on living in Hopefield until his death in 2013. His will, which had been executed a year earlier, left his interest in Hopefield to his niece, Mrs Vincent, absolutely.

HMRC argued that the words in Mrs Hadden's will conferred an interest in possession in the three-eighths share of the property on Mr Thom so that, on his death, it formed part of his estate for IHT purposes. It should be borne in mind that the deceased already owned the remaining five-eighths of the property. Accordingly, the entire value of Hopefield was chargeable to tax in 2013, with Mrs Vincent being liable for IHT at the estate rate on the trust's three-eighths share.

The case report contains the following paragraph about Mrs Vincent's views:

'Mrs Vincent submits that HMRC's interpretation of Mrs Hadden's will (which was first advanced some 13 years after her death) is inconceivable and was never considered by the family. Mrs Hadden's executor carried out her wishes in accordance with her intention that Mrs Vincent should inherit her parents' share in Hopefield, subject to allowing Mr Thom to live there for the remainder of his life.

There was no intention to create the draconian rights of an interest in possession. Mrs Vincent submits that case law highlights the need for the First-Tier Tribunal to take a flexible approach when considering the provisions in a will.'

Later on, we read:

'Mrs Vincent argues that the intention of Mrs Hadden was that Mr Thom should be given no more than permission to reside at Hopefield as he had before her death and that the will should be interpreted to give effect to this intention rather than stretched to create the life interest postulated by HMRC.'

Everyone nowadays should be familiar with the relevant test from the Pearson case of 40 years ago that an interest in possession entails having a present right of present enjoyment of the settled property. These words would generally be accepted as conferring such an interest on Mr Thom – and therefore an interest in possession – except that, in this case, Mr Thom owned five-eighths of the property in his own name and so he already had a present right of present enjoyment – he did not need the other three-eighths to give him that right.

Nevertheless, the First-Tier Tribunal decided that the words in Mrs Hadden's will did create an interest in possession in Mr Thom's favour on the ground that they must have been intended to protect Mr Thom from a forced sale instigated by the residuary beneficiary, Mrs Vincent.

This is all very understandable, but, with respect to the two judges, they would appear to have overlooked the terms of S11 Trusts Of Land And Appointment Of Trustees Act 1976. Before any sale can take place (where there is joint involvement), this provision requires the relevant beneficiaries to be consulted and for effect to be given to the wishes of the majority by value. Accordingly, Mrs Vincent could not have forced a sale of the property without the consent of Mr Thom.

There is no indication in the judgment that this point was raised by either side, but clearly the legislation referred to would seem to undermine the whole basis for the decision. One's particular sympathies are with Mrs Vincent, given that, as the residuary beneficiary, she will have had effectively to bear the resulting IHT on the three-eighths share (which liability would otherwise not have arisen).

Contributed by Robert Jamieson