Neutral Citation Number: [2020] EWHC 1409 (Ch)

Case No: PT-2019-000487

IN THE HIGH COURT OF JUSTICE

BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY TRUSTS AND PROBATE LIST (Ch)

IN THE ESTATE OF EDNA MAY PHOENIX DECEASED

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/06/2020

Before :

Deputy Master Linwood

- -

Between :

Philip John Phoenix	**Claimant**
- and –	
(1) David Alan Phoenix	
(2) Colin David Wright	**Defendants**

- -
- -

Mr Jonathan Fowles (instructed by **Birketts LLP**) for the **Claimant**
Mr Simon Redmayne (instructed by **Leathes Prior**) for the **First Defendant**
The Second Defendant neither appeared nor was represented

Hearing: 18th and 19th May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Deputy Master Linwood:

1. This is my judgment in a dispute between two brothers. They fell out years ago and their mother tried in her will to provide for them as she felt best. Unfortunately, her best intentions have led to a further dispute, which I can only assume was exactly what she did not want to happen. The brothers now oppose each other in court over what appears to be a small matter; the service of a notice by one brother on the other. What I decide does however have serious financial consequences for the loser; land worth about £780,000 in net terms to either party could be lost or gained.

2. This claim is brought by Philip John Phoenix as executor of the estate of his late mother, Edna May Phoenix, and in his personal capacity, against his brother, David Alan Phoenix who is sued as executor of their late mother's estate and in his personal capacity. The Second Defendant, Colin David Wright, is a solicitor and is sued as the professional executor of the estate of Edna May Phoenix. He has, as to be expected, remained neutral and so has not appeared nor was he represented at trial. I will refer to the brothers by their first names with no disrespect intended.

3. Below I set out the essence of the dispute, the facts, the issues I am to decide, then the law and my decisions for each issue. First I wish to mention the way this trial was heard.

Remote hearings

4. The Chancery Masters' Directions for remote hearings and trials emphasise the need for the parties to co-operate to a far greater degree than was previously expected. This is due to the difficulties and limitations in working remotely with, often, all the evidence, authorities and skeleton arguments on one screen, plus the parties appearing by video. This requires greater concentration for all concerned. It takes longer and the natural flow of an in person hearing is absent.

5. Accordingly it is expected that documents will be reduced by agreement to just those essential to the hearing with a single agreed bundle of authorities. The parties must agree a joint statement of issues, a joint reading list and where applicable/possible agreed facts, chronology and so on. Here I wish to acknowledge how these requirements were met by the parties' solicitors and counsel; this made the trial far easier and quicker to hear. The skeleton arguments of both counsel were especially clear and helpful, and oral submissions focused and succinct.

The dispute in essence.

6. By her will Mrs Edna Phoenix ("the Deceased" or "mother") granted each of Philip and David an option to purchase, at a substantial discount, separate pieces of farmland. David exercised his option successfully but says that Philip has failed to

properly exercise his option. Philip has brought these proceedings to enforce what he says, namely that he did properly exercise his option. David asks for a declaration that the option was not validly exercised, and an order for sale of the property and division of the proceeds equally between them.

The facts

7. The parties have agreed a Case Summary from which I take most of the key facts. The Deceased died on 27th September 2014. Her will, dated 13th June 2013, ("the Will") was drafted by Colin Wright, the family solicitor, who also was one of the witnesses. He, with Philip and David, was appointed as executors and trustees and they took joint probate of the Will on 5th May 2016.

8. Clause 1.1 of the Will provides:

> "I appoint my Sons David Alan Phoenix **("David")** and Philip John Phoenix **("Philip")** and my Solicitor Colin David Wright of "The Pines" 50 Connaught Road Attleborough Norfolk NR17 2BP to be the Executors and Trustees of this my Will."

9. "The Pines" was at the time the Will was prepared and executed and has been at all material times since solely the address of the firm of solicitors where Colin Wright practised, and was a partner, then known as Greenland Houchen & Co, renamed in 2013 Spire Solicitors LLP.

10. Clause 2.1 provides:

> **"I DECLARE** that in this my Will and any Codicil hereto the expression **"my Trustees"** shall include the person or persons proving this my Will and the survivors or survivor of them or other the executors or executor or trustees or trustee for the time being hereof."

11. The Will then provides for gifts of cash to each of the brothers and their sister, Marian, and also to Michael, Charlene and Ryan McGlynn. There are certain bequests of chattels and then Clause 5.3 provides:

> "I give to David and Philip as tenants in common in equal shares all the remainder of my freehold farmhouse and land known as Walnut Tree Farm Deopham and
>
> I DECLARE that Philip shall have the option (such option to be exercised by notice in writing to my Trustees within three months of the date of my death) to purchase David's share of Walnut Tree Farm Deopham at a price Twenty five per centum (25%) below the 19th June 2006 Valuation by Irelands of Nine hundred and ninety two thousand five hundred pounds (£992,500.00.) the 19th June Valuation by Irelands (sic) and such purchase to be paid for over a period of ten years by equal annual payments with interest thereon at Barclays Bank plc base rate for the time being in force."

12. At Clause 5.2 was a similar option by which David could purchase a small part of Walnut Tree Farm known as the "Dispersal Area" which he occupied then and still does now at a like discount of 25% below Ireland's valuation of £35,000. David is a sheep farmer and also repairs farm machinery from the Dispersal Area. He previously used buildings on that land for an engineering business. Philip started working on the farm in about 1978 with his late father and mother and joined the family farm partnership in 1997. He continues to farm the whole of Walnut Tree Farm, save the Dispersal Area.

13. Philip says his mother told him she was concerned over rising land values so deliberately left the land values low at the historic values Irelands advised in 2006, meaning he could purchase at an even more substantial discount, so he could continue to farm the whole of Walnut Tree Farm. Irelands for probate purposes in December 2014 valued Walnut Tree Farm in its entirety at £2,404,132.

14. The price payable by Philip to David if Philip exercised his option validly is £372,187.50 (£992,500 divided by 2 x 75%). However, if David is correct and the option notice was not properly given, then the gross value of the half of the farm David would receive (on the basis the Dispersal Area was excluded from the valuation) would be in the region of £1,150,000, and there would be no 25% discount. In other words, if the probate valuation as of the date of death of the Deceased was used as the current valuation, and Philip wished to buy David out of his share, he would pay approximately £1,150,000.

15. David, as appears from his Amended Counterclaim, asks for an order for sale, so he could sell elsewhere, splitting the farm as currently operated by Philip. If I find the option was validly exercised, Philip can purchase David's half (and David would have no choice but to sell to him) for £372,187.50; but if it were not, the extra cost to Philip (if David agreed to sell to him) would be approximately £780,000.

16. On 30th October 2014 Philip personally delivered to Colin Wright at The Pines (and only there) his notice ("the Notice") intended to exercise his option. The Notice is addressed to "Greenland Houchen Pomeroy" at The Pines and says:

> "To the Trustees of Edna Phoenix,
>
> I Philip John Phoenix wish to exercise my option to purchase Walnut Tree Farm, Deopham from David Phoenix, at the price declared in the last Will and Testament of Edna Phoenix."

17. It is signed by Philip, provides his home address and is dated 29th October 2014. No issue is taken as to the form of the Notice, but David was not at any time before 27th December 2014 (when the option expired) provided with the Notice or a copy of it. David did ask Philip when they were both on the farm at some point (the brothers differ as to the exact date but it matters not) before the option expired as to whether he had "done" his option and Philip replied yes. But David neither received nor asked for a copy of it.

18. Communications between solicitors instructed by Philip and David regarding the estate started in about early 2015. Over one and a half years later, by letter dated 18th September 2016, David's solicitors unequivocally contended for the first time that the

Notice had not been validly served. Philip accepts that service on Colin Wright in his capacity as his solicitor is not sufficient, and that notice to one trustee is not notice to all.

19. What Philip says is that Clause 1.1 of the Will provides an "address for service" so that his delivery of the Notice to the Pines was service upon his co-trustees.

20. The single issue as to whether Philip validly exercised the option is: did Clause 1.1 of the Will ascribe to the three trustees a single address for service? If I find it did, then I must determine David's counterclaim for further interest. If I find it did not, then I must address his request for an order for sale.

The Agreed Issues

21. These are:

(a) Whether, upon a true construction of the Deceased's Will dated 13 June 2013, Philip validly exercised the option set out in clause 5.3 of the Will by personally attending The Pines, 50 Connaught Road Attleborough, Norfolk NR17 2BP on 30 October 2014 and there handing to Colin Wright the Notice dated 29 October 2014?

In the event that the Court determines that the said option was validly exercised and subject to the discretion of the Master at the hearing:

(b) For the purposes of the performance of the option, the following issues arising out of David's claims, at paragraph 3(6) of his Amended Brief Details of Counterclaim, for orders for the payment of monies and interest by Philip to David:

(1) The due date and the amount of each instalment, including accrued interest, due and payable pursuant to clause 5.3 of the Will;

(2) Where any such instalment has not been paid by its due date:

(a) whether interest continues to be payable in respect of any such unpaid instalment under the terms of clause 5.3 of the Will only; or alternatively,

(b) whether it is legitimate and appropriate for interest to be awarded upon any such unpaid instalment pursuant to s.35A Senior Courts Act 1981; and,

(c) if (2)(b) applies, at what rate(s) and for what period(s) such statutory interest is payable upon each such unpaid instalment.

Issue (a): the Law

22. The exercise of any option must be performed strictly in accordance with its terms: *In re Gray Deceased* [2005] 1 WLR (Ch) at [25-26]. When considering whether the option was validly exercised I must ascertain as a matter of construction what the Will required: *Dawson v Dawson* 1837 8 Sim 346.

23. To interpret the Will, as with a contract, I must identify the Deceased's intentions by reference to the use of the words in several contexts; documentary, factual and commercial, and ignore subjective evidence of the intentions of the Deceased. The approach was set out by Lord Neuberger PSC in *Marley v Rawlings* [2015] AC 129 at [17-23] and summarised at [19] (replacing "the parties" with "the testatrix") in that the court:

> "...does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by [the testatrix] at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of [the testatrix'] intentions."

24. Mr Fowles submits the answer to what he describes as the sole and highly technical objection by David to Philip's Notice is that on a proper construction of the Will, in its context, written notice to "the Trustees" means delivery of the Notice to The Pines. In the alternative, delivery of the Notice to The Pines was sufficient service by virtue of s196(3) and (5) of the Law of Property Act 1925.

25. Mr Redmayne submits that on a proper view of those five elements in *Marley* at [23] above it is plain that Clause 1.1 cannot be construed as stipulating a single address – The Pines – for service on all three Trustees, as the purpose of clause 1.1 is to set out the appointment of Philip, David and Colin Wright as trustees and executors; it is not a clause to provide for service of any notices.

26. As to Mr Fowles' alternative submission of good service pursuant to s196, Mr Redmayne reiterates that The Pines was not an address for service on David, he was not handed the Notice nor is he deemed to receive it in accordance with s196(3) or (4).

27. Mr Fowles also referred me to *Wood v Capita Insurance Services* [2017] 2 WLR 1095 at [10-13], which I respectfully summarise for the construction exercise I must undertake for this Will as follows. First, the court must ascertain the objective meaning of the language used by the parties which is not a literalist exercise focused on the clause in question but requires consideration of the Will as a whole and, depending on the nature, formality and quality of the drafting, giving more or less weight to elements of the wider context. The factual background is relevant as at the date of preparation of the Will. In other words, the court must put itself in the shoes of the Deceased - [10].

28. Interpretation is a unitary exercise and where there are rival meanings the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. In striking that balance the quality of the drafting must be considered - [11].

29. This unitary exercise involves an iterative process by which suggested interpretations are checked against the clauses of the Will and the commercial consequences are investigated. The court must balance in its detailed analysis indications arising from the factual background and the implications of rival constructions, with a close examination of the relevant language in the Will. It does not matter in which order this is done - [12].

30. Textualism and contextualism are not conflicting paradigms but can be used as tools to ascertain the objective meaning of the language in the Will. Textual analysis may assist successful interpretation of sophisticated and complex contracts; for others it may be achieved by a greater emphasis on the factual matrix, due to informality,

brevity or lack of skilled professional drafting. The iterative process assists in ascertaining the objective meaning of disputed clauses - [13].

31. I raised with counsel the absence of the Will file in the evidence; Mr Redmayne submitted that the parties agreed s21 of the Administration of Justice Act 1982 should not be utilised here and so I am confined to the text and context, and it is not the context of hindsight but looking forward at the time of the making of the Will.

32. Mr Fowles accepts that the words in clause 5.3 "...by notice in writing to my Trustees..." by themselves suggest receipt by all of them of a written notice. Further, save as context, statute or contractual provision might otherwise require, it means actual receipt: *UKI (Kingsway) v Westminster City Council* [2019] 1 WLR 104 as per Lord Carnwarth JSC at [15].

33. In *Blunden v Frogmore Investments Ltd* [2003] Robert Walker LJ at [26] said that as to context an instrument's provisions may lead to the position that valid notice has been given even where the intended recipient is unaware of the notice. Therefore, Mr Fowles submits, as to the context of this Notice, on a proper construction of the Will valid notice has been given notwithstanding that the intended recipient is unaware of the Notice.

34. Mr Fowles further submits that if in clause 1.1 three separate addresses were set out it would be very difficult to argue that they were not relevant to service; however here there is just the one address – which the Deceased knew was that of her solicitor. Mr Redmayne submits the address was inserted in that clause to identify Colin Wright and not as an address for service; Mr Fowles says not so, as the fact the Deceased knew his address does not inform me as to the purpose for its inclusion.

35. Further, the Deceased knew Colin Wright as he was the long-standing family solicitor to her, her late husband and the wider family, and accordingly she expected him to take the lead in the administration of the estate. He, as a neutral person and a solicitor, was clearly to her the person most suitable to take probate. In addition, if Mr Wright's address was not one for service why were other addresses not set out?

36. Mr Fowles submits that there is nothing which limits the scope of "The Pines" - that address could not be anything other than an address for all three of them. As to what appears as an obvious omission namely the inclusion of "all" before "...of "The Pines"..." or an express provision as to service he submits that would be a counsel of perfection, emphasising there is nothing in clause 1.1 which tells against it being the address for service on the executors/trustees.

37. In addition, the second "and" Mr Fowles submits does not separate out the two brothers and the solicitor. Further, no addresses are set out in the Will for any of the family members who are beneficiaries, which would be expected if identification was based on or connected to an address. Mr Fowles submits that this Will does not go into great detail; accordingly, it is to be expected that "all" would not be included.

38. Mr Redmayne emphasised the importance of ignoring subjective evidence of a party's intentions; the task of the court is to ascertain the objective meaning of the language by which the Deceased expressed her testamentary intent. In particular, the criteria in

Marley at [12] are to be observed for interpretative construction but each section is not a separate entity.

39. Further, Mr Redmayne submits that the Claimant's case is a triumph of contextualism over textualism in that Mr Fowles set out what the Will ought to say but not what it actually does say; we must come back to the ordinary meaning of the words. In his submission, there is no lack of clarity in the language and the meaning to be ascribed to it.

40. In his skeleton argument Mr Redmayne sets out a helpful submission as to what he considers is the correct approach to the five considerations in *Marley,* which I have taken into account in my identification of the meaning of the words used in the Will.

41. The "natural and ordinary meaning of the words" in clause 1.1 suggests that all three of the trustees must receive written notice. However, as I set out at [33] above, in the overall context of the instrument notice can be given without physical receipt. This clause alone is just an appointment clause, but it must be considered in the context of the other clauses and not as a stand-alone provision. I therefore do not accept the somewhat literalist approach urged upon me by Mr Redmayne that these words are just to identify the trustees as I must look at the Will in the round on the basis of all the considerations in *Marley.*

42. The words "service" or "address for service" are not used. Nor are all three of the trustees said to be "all" of The Pines. If either or all these formulations had been used, the matter would have been put beyond doubt. But that does not in my judgment exclude the construction Mr Fowles contends for, and I accept as he submits that the key point is the intention of the Deceased in the words used. I accept his submission that the fact there is no provision as to service save clause 1.1. indicates it was intended to identify the place for service. Further, clause 1.1 is to be read with clause 5.3 as no address for any of the trustees is in that subclause.

43. The *"overall purpose of the document"* was for the Deceased to set out her testamentary dispositions as to assets and who she intended to benefit. It was no doubt intended to be a self-contained code – as otherwise there would have been reference to other documents, such as a letter of wishes. In particular, it was to administer and provide for the future of the farmland, to which I will refer further below. Each recipient knew what he had to do and how.

44. As to *"any other provisions of the document"* there are no other addresses for any of the other beneficiaries; including the brothers' sister Marian there are seven in all. Three are stated to be grandchildren and the other three are not identified by family connection or address. That indicates on the balance of probabilities Colin Wright knew them all as did David and Philip.

45. I consider the purpose of the Will as to the farmland can be seen in certain clauses which are self-contained and detailed for the proper administration of the estate, to avoid argument. Clause 5.2 besides describing the Dispersal Area has the somewhat unusual (for a will) inclusion of a plan and sets out certain rights for the brothers or David if he exercises his option and refers to it:

> "for identification edged red on the attached plan together with the buildings thereon and also with a right of way to the Dispersal Area and with a right to drain into the septic tank of the adjoining meadow and a right of access for the purposes of emptying repairing and maintaining the septic tank…"

46. Likewise Philip by clause 5.4 is to receive all his mother's:

> "…share and interest in the business of A R Phoenix Farming Partnership carried on by me in partnership [with Philip] at the date of my death..."

47. The overall intention is for the brothers, should they so wish, to continue their respective farming businesses, and to that end they must exercise their options by giving notice as part of the scheme in total.

48. I now turn to *"…the facts and circumstances known or assumed by the testatrix at the time the document was executed".* The Deceased was in a farming partnership and she wanted both sons to be able to continue their respective operations if they so wished as I have set out above. She was aware of the substantial disparity in their respective operations. She knew the addresses of all of her children and that The Pines was not the address of any of them. She knew it was the address of her solicitor and that her sons knew it to be so.

49. Finally, *"common sense".* The addresses of her sons were not needed for identification – as with the other beneficiaries. She wanted an efficient disposal of her assets with the continuation of the businesses of her sons, should they so wish, with a substantial advantage to Philip over David. As both are trustees/executors it would be unnecessary for them to give themselves notice. In particular, unlike many appointment clauses, separate addresses are not provided and were not needed.

50. The only address is of the sole independent person. He is a professional executor and is identified as such namely "my solicitor". The Deceased knowing of the enmity between her sons wished to avoid conflict and expected her solicitor to administer her estate and deal with all matters arising in the light of his knowledge of her wishes, the wider family and the specific businesses being carried on.

51. There was detail as to matters that could cause difficulty so as to resolve disputes, such as the right to drain, the Will being a self-contained document. The address is part of all that, in circumstances where service is not required on the other brother but on the Trustees. That would have been easier to draft but conflict could have arisen.

Decision – Issue (a)

52. In my judgment Philip validly exercised the option at clause 5.3 of the Will by personally handing the Notice to Colin Wright at The Pines for these reasons, which collectively amount to business common sense:

    i) There is no other provision which facilitates service or provides for the same save clause 1.1 which provides the sole address for service on the Trustees.

ii) It was logical and common sense in all the above circumstances for one address of the sole independent professional executor, known to the Deceased and her sons, to be set out.

iii) The Will is a self-contained resolution of testamentary intention for the brothers to continue farming the parts they were at the time the Will was made, and to enable them – by the discounts in Clauses 5.2 and 5.3 – to continue to do so. Accordingly, in the context of what is known to the Deceased, The Pines is the only address in the whole Will and where the Deceased expected service to be made.

iv) I specifically do not accept that the address was provided to identify Colin Wright as there may be other solicitors of that name. The circumstances were that he was known to all concerned over the years and described as "my solicitor".

v) This construction is necessary to give effect to clause 5.3 without which the position is uncertain in circumstances where it appears the Deceased resolved all the possible loose ends.

vi) The brothers knew Colin Wright's address; it was provided to avoid any dispute and as a natural address for service.

vii) The alternative construction would mean a brother giving notice to himself, which I do not think can be a common-sense construction.

viii) To have addresses other than or in addition to The Pines could lead to uncertainty and conflict.

ix) Notice is to be to the Trustees, not the other brother, in the context that it would be of no surprise to each brother that the other one wanted to exercise their option.

x) An independent trusted individual was required by the Deceased, who knew her sons, the land and the history, to assume the responsibility of receiving notices by way of service, acting upon them and carrying them into effect.

S196

53. In view of my above finding it is unnecessary to determine the alternative argument as to s.196 as it will not overturn or affect it. I therefore turn to the next issue.

Issue (b): interest

54. As to interest on instalments due and payable on the validly exercised option Mr Fowles sets out in his skeleton argument at [18] the following points which are uncontroversial:

i) the relevant purchase price under clause 5.3 is £372,187.50;

ii) the first of its 10 equal, annual instalments became payable on 30 October 2015 (one year after the option was exercised);

iii) each payment is to include the interest accrued in the relevant year leading up to payment;

iv) the interest rate specified in clause 5.3 is applicable to the option price as a whole (i.e. the whole sum outstanding at the date of each payment);

v) the relevant interest rate applicable to instalments due and payable under clause 5.3 is set out in paragraph 11 of the Case Summary;

vi) the interest rate is applied as a rate per annum.

55. The agreed interest rates in the Case Summary at [11] are:

30.11.14 to 03.08.16: 0.5%

04.08.16 to 01.11.17: 0.25%

02.11.17 to 01.08.18: 0.5%

02.08.18 to 10.03.20: 0.75%

11.03.20 to 18.03.20: 0.25%

19.03.20 and continuing: 0.1%

56. The dispute is over the five instalments due for payment on 30th October 2015-2019 inclusive that are unpaid and overdue. David counterclaims for interest additional upon the unpaid monies of both each annual instalment and interest upon it pursuant to the equitable jurisdiction of the Court and/or s.35A of the Senior Courts Act 1981, to be assessed. Mr Redmayne submits that an appropriate rate of interest would be 6% per annum; and so David claims to the date of this trial £29,397.95, less interest payable by him on the exercise of his option calculated on a like basis of £1,003.21.

57. Mr Fowles submits that interest has been running on the instalments during the period to date which displaces the Court's discretionary power under s.35A and relies on subs-s.4 in support of his submission that the Court can only enforce the testamentary obligation. He does accept that accrued interest which would otherwise be due with each instalment is not part of the option price and is in principle susceptible to a s.35A award of interest.

58. Mr Redmayne disputes Mr Fowles' submission that this claim amounts to double recovery as it is interest upon interest, so that the only interest due is that pursuant to the Will. In oral submissions, Mr Fowles accepted that interest could run on the interest but submitted the Court should exercise its discretion against David as the delay in payment was his mistaken refusal to accept Philip had validly exercised his option. In the final alternative, if the court does make an award of interest then it should be an investment rate of about 1% above base.

Issue (b): The Law

59. S.35A(4) of the Senior Courts Act 1981 provides

> "Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs"

60. In *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 2863 (Comm) Mr Justice Blair at [46] said the court's

> "…statutory power does not override the contractual position, so that it cannot fix a different interest rate…"

61. Mr Fowles cites Mr Justice Teare at [59] in *Sawiris v Marwan* [2010] EWHC 89 (Comm) as authority that a relevant factor when determining interest payable in the discretion of the Court pursuant to s.35A is whether payment of the money is sought promptly, so that failure to prosecute a claim may result in the court not awarding interest – and here he submits Philip has been willing to pay.

62. If I conclude that interest should be due on each separate debt then I must consider the appropriate rate. In *Carrasco v Johnson* [2018] EWCA Civ 87 at [17] Lord Justice Hamblen said:

> "1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
>
> (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.
>
> (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
>
> (4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.
>
> (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

Discussion and decision: Issue (b)

63. I do not accept as Mr Fowles submits that s35A is inapplicable by reason of s.35A(4). Whilst clause 5.3 sets out the calculation of each instalment by reference to the

amount of interest on the whole sum outstanding it does not make provision for interest to run on any unpaid instalment and so s35A(4) does not in my judgment prevent such a separate claim in respect of any outstanding instalment being made. As Mr Redmayne submits, each unpaid instalment comprises a separate debt, due and payable on its due date.

64. David has a right to enforce payment of the unpaid instalments as a debt and so in the absence of the sub-s.(4) bar interest can be claimed by s35A. The favourable terms (payment over 10 years) and low interest rate stipulated by Clause 5.3 do not have to apply in circumstances not provided by the Will namely unpaid instalments following service of a valid notice.

65. I therefore must consider the exercise of my discretion in circumstances where David has refused to accept payment. In my judgment it would be inequitable not to award interest in these circumstances as David did, for not improper reasons, no doubt on legal advice, refuse payment. This can be distinguished from situations where the interest claimant has done nothing for a substantial time but seeks to be compensated for that inaction, whether deliberate or not.

66. Interest should also run on each unpaid instalment being the total of the proportionate part of the option price plus the testamentary ie Clause 5.3 interest, as they are both unpaid. As to rate, David is not a commercial claimant and the principal is due by the Will. This is not a compensation claim but I accept he has not received what he should have done; and his own actions have played a part in that.

67. To create an equitable balance between David and Philip in the above circumstances the rate must not advantage either unjustly so as to amount to a benefit that they otherwise would not receive. It must be relatively neutral. No evidence of rates was put to me for, say, a savings account, but Mr Fowles suggested if he was otherwise unsuccessful an investment rate of base rate plus 1% would be appropriate. Having regard to the rates in [55] above, the historically low rates for individual savers and the circumstances here I think that is fair and reasonable. Each brother will therefore pay interest at 1% over base rate for the periods in question to the other.

68. I expect counsel can agree a Minute of Order for my approval, and so avoid attendance on the remote hand down of this judgment.

Deputy Master Linwood 18th June 2020