Neutral Citation Number: [2023] EWHC 1053 (Ch)

Claim No: PT-2021-LDS-000179

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

In the matter of the estate of James Robson Garbutt deceased
And in the matter of the Inheritance (Provision for Family and Dependants) Act 1975

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 11/05/2023

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

MARGARET GARBUTT	**Claimant**
- and -	
TIMOTHY ROBSON GARBUTT	**Defendant**

- -
- -

Sarah Harrison (instructed by **Ramsden Solicitors LLP**) for the **Claimant**
The Defendant in person

Hearing dates: 26-27 April 2023

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE KLEIN

HH Judge Klein:

1. The Claimant ("Mrs Garbutt") is 79 years old. She has two adult daughters from her first marriage; Angela and Tracey. Relevant to the claim, Angela has disabilities and uses a wheelchair, and Tracey lives in Leeds. Mrs Garbutt was James Garbutt's ("Mr Garbutt's") secretary for many years. They began a long-term relationship in 1991 and Mr Garbutt moved into a council flat rented by Mrs Garbutt, where they lived together until October 1995. Mr Garbutt also had adult children; Timothy, the Defendant ("Timothy"), Matthew, and Joanne.[1] Mr Garbutt bought 85 Bridlington Street, Hunmanby, Filey, North Yorkshire ("the Property") in October 1995. Mr and Mrs Garbutt then lived there until Mr Garbutt died. Mr Garbutt bought the Property with the aid of a loan from his business, Covee Tools Ltd., to which he granted a first legal charge over the Property, and with the aid of a loan of £28,000 from Mrs Garbutt, to whom he granted a second legal charge ("the mortgage") over the Property as security for the loan's repayment. By the mortgage, the £28,000 loan has been repayable on demand. The mortgage has also provided that, in the event of a sale of the Property at a price exceeding £53,500, Mrs Garbutt would also be paid 50% of the excess. Mrs Garbutt's loan has not been repaid. Mr Garbutt apparently made a will in 1997 by which he left his personal chattels and a life interest in the Property to Mrs Garbutt and by which he left the remainder interest in the Property and his residuary estate to his children. He apparently made a similar will on 24 November 2006. On 1 December 2006, the Property was registered in the joint names of Mr and Mrs Garbutt and, from about then, they held it as tenants in common in equal shares. The charge to Mr Garbutt's business was discharged but the mortgage continued (and continues) to be registered on the title to the Property. Mr Garbutt made a further will on 12 February 2007 the terms of which were apparently similar to the 2006 will. Mr and Mrs Garbutt married on 8 May 2008 (a marriage which Timothy described, at the hearing, as a love match) and, the marriage having revoked Mr Garbutt's 2007 will, he made a new will on 12 May 2008 ("the Will"). Mr Garbutt sadly died on 9 July 2020 (after what Timothy described as a thirty year "good and loving relationship" with Mrs Garbutt). Probate was granted to Mrs Garbutt and Matthew on 5 July 2021, and, on 22 December 2021, Mrs Garbutt began a claim against Mr Garbutt's children.

2. By the claim, Mrs Garbutt asks the court (i) to determine that the mortgage continues to be valid and effective, (ii) to construe clause 4 of the Will which disposes of Mr Garbutt's one-half beneficial interest in the Property (although purporting to dispose of the whole), and, in particular, to determine whether that clause gives Mrs Garbutt a life, or a lesser, interest in (one-half of) the Property and (iii) to determine whether, on the true construction of the Will, there is a partial intestacy of Mr Garbutt's residuary estate. Mrs Garbutt also makes a claim (further or alternatively) as a surviving spouse under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") on the ground that, she contends, the Will does not make reasonable financial provision for her.

3. On 18 October 2022, the court made a Tomlin order, to which Timothy was not a party, which settled the claim between Mrs Garbutt, on the one hand, and Matthew and Joanne, on the other hand, following a mediation in which Timothy did not participate. By the principal terms of the settlement recorded in the schedule to the

[1] I intend no disrespect by referring to Mr Garbutt's children by their first names. I only do so for ease of reference.

Tomlin order ("the settlement"), Matthew and Joanne gave up their rights to one-third of the half share of the Property which Mr Garbutt was able to dispose of by the Will (so, effectively, their one-sixth interests in the Property) to Mrs Garbutt.

4. At the time the Tomlin order was made, it was yet to be determined whether Mrs Garbutt had any property interest in Mr Garbutt's one-half beneficial interest in the Property and it was also yet to be determined whether the Property (and Mr Garbutt's beneficial interest, in particular) were subject to the mortgage.

5. Mrs Garbutt, on the one hand, and Timothy and Joanne, on the other hand, also agreed, as part of the settlement, that Mr Garbutt's estate would be administered on the basis that, even if there was later found to be a partial intestacy of Mr Garbutt's residuary estate, Matthew and Joanne each have inherited a one-third share of the residuary estate. Additionally, although not provided for in terms in the Tomlin order, the executors of Mr Garbutt's estate, Mrs Garbutt and Matthew, authorised the distribution of £20,000 each to Matthew and Joanne out of Mr Garbutt's residuary estate ("the £20,000 payments"), reflecting the settlement.

6. At the 18 October 2022 hearing, the court also gave case management directions. On that occasion, the Deputy District Judge provided Timothy with the following information, as recited in the directions order:

> "The issues are:
>
> (a) the construction of…the Will as to the nature of the provision left to the Claimant in relation to the Deceased's share in the property he co-owned with the Claimant
>
> (b) the construction of the Will as to whether the residuary estate of the Deceased was undisposed of and passed on a partial intestacy
>
> (c) whether the Charge dated 7th October 1995 in favour of the Claimant and secured on the Property is valid and effective…
>
> The court explained to the…Defendant that his evidence should address the four issues outlined above, particularly taking into account the following:
>
> …(b) the…Defendant persistently referred to his entitlement to cash out of the estate. The court explained that part of the Claimant's claim is that the Will does not dispose of the cash and that it passes to her under the intestacy rules, and that the…Defendant will have to look carefully at the Will and address this argument (this is issue (b) above)
>
> (c) the Claimant and [Matthew] confirmed that the charge is registered. The court explained that the…Defendant will have to address why he says the charge is not valid (this is issue (c) above)

> (d) the Defendant confirmed he is aware of the Act, albeit he made clear that he does not agree with it. The court explained that the Act applies and that the…Defendant will have to address the factors set out in it (this is issue (d) above)."

7. This is the judgment following the final hearing of the claim. Mrs Garbutt was represented by Sarah Harrison of counsel and Timothy acted in person. Although Timothy had had the benefit of the very helpful explanation from the Deputy District Judge at the case management conference, which she set out in writing too, the almost-exclusive focus of his submissions and of his cross-examination of the Mrs Garbutt at the final hearing was on (i) his belief that Mrs Garbutt's claim was born out of greed (ii) procured by her lawyers, not acting in her best interests, but because they wished to profit from legal fees that might be paid to them. These sentiments, for which there is no foundation whatever on any of the material to which I was referred and which are inconsistent with my assessment of Mrs Garbutt as a witness and her conduct at the hearing, were also expressed in his written materials. For example, he said, in his first witness statement: "The claim is essentially vexatious nonsense with minimal if any substance – and merely designed as a brazen 100% cash grab." In his skeleton argument, he said: "It's a grubby and flimsy cash-grab. The court should not hesitate to throw the whole mess out of the courtroom door and waste not a further second on it." I explained to Timothy more than once at the hearing that these allegations, which, as I have just said, were not corroborated by any evidence I was referred to, although put calmly and articulately by him, are irrelevant to the issues I have had to decide, in particular as to the proper construction of the Will, and were unhelpful, because they risked diverting attention from those issues. Indeed, despite my explanation to him, the following, almost verbatim, record of a point made by Timothy in his closing submissions, reflected those submissions and most of his submissions during the hearing:

> "I am extremely angry and concerned about the deceptive way in which the case has been brought to court and the unnecessarily aggressive manner in which the case has been brought. The claim is an abusive use of the court. I blame Mrs Garbutt's lawyers for this."

8. I do not propose to comment on these allegations in detail now, because they, and this, and similar, comments themselves, may need to be considered at a costs and consequentials hearing. To be clear, however, as I have already said, so far I have seen and heard, there is nothing which corroborates any of Timothy's very serious allegations.

9. Because Timothy focused on his conduct complaints during cross-examination (having focused on these issues in his witness materials) and because he cannot say much which is relevant to the proper construction of the Will, there is little relevant witness evidence.

The Will

10. The Will is poorly drafted. It provides as follows, so far as is relevant:

> "…4. (a) IN THIS clause:

(i) "Dwelling" means a freehold or leasehold house bungalow maisonette flat or flatlet in the United Kingdom and any grounds belonging to it

(ii) "my House" means my house known as 85 Bridlington Street Hunmanby aforesaid together with its grounds and other the Dwelling which I may own (or hold under a lease) as my principal residence at my death

(iii) "the Beneficiary" means my said dear wife Margaret Garbutt

(iv) "the Trust Period" means the period between my death and the death of the beneficiary

(b) If the Beneficiary survives me for twenty eight days I GIVE my house (free of tax and free of any money charged or otherwise secured on it which shall be paid free of tax out of my residuary estate as shall the cost of discharging any security and any interest falling due before discharge) to my Trustees ON TRUST for sale (with full power to postpone the sale without being liable for loss) and to pay any income from the property in which the proceeds are currently invested and any income from my House until sale to the Beneficiary during the Trust Period

(c) During the Trust Period my Trustees shall not (subject to the Beneficiary's reasonable compliance with the terms of (e) below) exercise the trust for sale except with the Beneficiary's written consent but they shall exercise it at the Beneficiary's written request

(d) For so long during the Trust Period as my House remains unsold my Trustees shall allow the Beneficiary to reside in my House (subject to any lease or tenancy agreement relating thereto and subsisting at the date of my death)

(e) The Beneficiary shall pay all outgoings in respect of my House (and observe and perform all covenants and conditions contained in any lease under which it may be held) and keep it in good repair and shall keep it insured comprehensively and to its full reinstatement or replacement value with insurers approved by my Trustees in the joint names of the beneficiary and them

(f) Any money held by my Trustees under this clause may be invested in the acquisition of a Dwelling or in any other manner authorised by this Will in addition to all other powers for the investment of trust money (or partly in one way and partly in the other) and investments may at any time be transposed AND

> in deciding how to exercise these investment powers my Trustees shall have regard to the wishes of the Beneficiary
>
> (g) The Trusts powers and provisions in the foregoing sub-clause shall apply in relation to any Dwelling acquired under the provisions of sub-clause (f) in the same way as they apply in relation to my House
>
> (h) When the Trust Period ends my Trustees shall hold any property then the subject of this clause in equal shares for my sons the said Matthew Robson Garbutt Timothy Robson Garbutt and my daughter Joanne Marie Garbutt in equal shares PROVIDED ALWAYS that if any of my said children shall not survive me to inherit under this Clause leaving a child or children living at the date of the death of the survival *(sic)* of myself and the Beneficiary who attain the age of twenty one years then such child or children shall take and if more than one in equal shares the share *(sic)* this devise that his her or their parents would have taken had he or she survived to inherit…
>
> 7. I DECLARE that notwithstanding the trust for sale hereinbefore contained my trustees may appropriate any real or personal property forming part of my residuary estate to or towards the share whether settled or not of any person or persons in the proceeds of sale thereof under the trusts hereinbefore contained…
>
> 8. THE provisions of Section 11 of the Trusts of Land and Appointment of Trustees Act 1996 shall not apply to the trusts created by this my Will or any codicil hereto
>
> …10. MONIES comprised in my residuary estate may be invested or applied in the purchase of or at interest upon the security of such stocks funds shares securities insurance policies bonds or other investments or property of whatsoever nature and wheresoever situate and whether producing income or not as my trustees may in their absolute discretion think fit…"

11. I can usefully make two points here. First, I have set out above the only two express references in the Will to Mr Garbutt's residuary estate. Secondly, by excluding section 11 of the Trusts of Land and Appointment of Trustees Act 1996, Mr Garbutt was excluding the following statutory obligation on trustees of land:

> "The trustees of land shall in the exercise of any function relating to land subject to the trust –
>
> (a) so far as practicable, consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land, and

> (b) so far as consistent with the general interest of the trust, give effect to the wishes of those beneficiaries, or (in case of dispute) of the majority (according to the value of their combined interests)."

Mr Garbutt's estate

12. Mr Garbutt's estate is modest, comprising his one-half beneficial interest in the Property (which is, or may be, subject to the mortgage) and cash. The Property has recently been put on the open market for sale. It was advertised for sale at £325,000 and an in-principle offer of £295,000 has recently been accepted. Timothy disputes the Property's value, contending that it is worth £425,000. There is no evidence to corroborate this contention. By the contention, he accepts that the Property is worth at least £295,000, and I will proceed on that basis. Mr Garbutt's one-half beneficial interest in the Property is therefore worth £147,500 (possibly subject to the mortgage, as I have noted).

13. The effect of the settlement is that Mrs Garbutt is now to be treated as solely beneficially interested in five-sixths of the Property. Depending on what I decide about the proper construction of clause 4 of the Will, she may also have been given a life interest in the remaining one-sixth beneficial interest in the Property, with the remainder being given to Timothy.

14. At the hearing, Miss Harrison proceeded on the basis that any sums which are due to be paid under the mortgage, assuming it to be valid and effective, will be paid out of the sale proceeds of the Property. I will proceed on the same basis. At the hearing, I calculated that, assuming that Mrs Garbutt succeeds in establishing that the mortgage is valid and effective, she can expect to receive out of the proceeds of the Property's sale about £266,250 and she may also be entitled to a life interest in about £24,000 (one-sixth of the net sale proceeds after accounting for the mortgage). No-one disputed my calculations.

15. The cash position requires a bit more explanation. Prior to the £20,000 payments and an additional payment of £40,000 to Mrs Garbutt in accordance with the settlement (as interim distributions), Mr Garbutt's estate comprised about £246,000 cash which was not already committed to discharging administration expenses. By the settlement, Mrs Garbutt and Matthew and Joanne have agreed that Mr Garbutt's estate will be administered on the basis that one-third of his residuary estate was given to each of Matthew and Joanne, as I have said. Further, by the interim distributions to which I have referred, the ready cash in Mr Garbutt's estate has been reduced to about £166,000.

16. It follows, from the settlement, that Mrs Garbutt contends that there is (or has been) available about £80,000 cash in Mr Garbutt's estate available for the purposes of the 1975 Act claim, representing one-third of the residuary estate (not ring-fenced by the settlement for Matthew or Joanne), assuming that there has not been a partial intestacy of the residuary estate.

17. Timothy's case (as Matthew's and Joanne's cases were) is that Mr Garbutt's three children are each entitled to one-third of the residuary estate. Timothy contends therefore that he is entitled to one-third of the residuary estate (valued at £80,000 as I

have explained), which would therefore be available for the purposes of the 1975 Act claim.

18. However, in the context of the 1975 Act claim, for the purpose of considering whether Mr Garbutt made reasonable financial provision for Mrs Garbutt and, if he did not, what is reasonable financial provision for Mrs Garbutt, I must proceed on the basis (i) that Mr Garbutt's residuary estate has comprised £246,000, (ii) if I decide that there is a partial intestacy of the residuary estate, that Mrs Garbutt's means notionally have included the whole of the residuary estate (because Timothy ought not to be penalised because Matthew and Joanne have settled Mrs Garbutt's claim) and (iii) (because Mrs Garbutt equally ought not to be penalised for having settled with Matthew and Joanne) that, by the Will, Mr Garbutt only gave Mrs Garbutt a life interest (or something less) in one-half of the beneficial interest in the Property. I say, at (ii), that Mrs Garbutt's means notionally have included, rather than do include, the whole of the residuary estate, because the £40,000 payment (interim distribution) she received has had to be used to discharge legal fees and living expenses and so is not available to her now (which is a further matter which ought to be taken into account in the determination of the 1975 Act claim).

Mrs Garbutt

19. Mrs Garbutt is a charming 79-year-old lady who gave oral evidence thoughtfully and in a way which, in the face of Timothy's criticisms of the claim, was commendably moderate and fair. A striking example was Mrs Garbutt's evidence in cross-examination:

> "I don't deserve 100% of Jim's estate. He wanted the children to get something. The children should get something – some money and keepsakes."

The fact that Mrs Garbutt may feel that, whatever her entitlement to Mr Garbutt's estate and whatever her needs, Mr Garbutt's children should receive part of Mr Garbutt's estate, to respect Mr Garbutt's wishes it seems to me, provides a complete answer to Timothy's suggestion that the claim is born of greed.

20. Although there were some matters which Mrs Garbutt could not remember on cross-examination (which may have been because she may have been in some physical discomfort, particularly towards the end of her oral evidence), she struck me as a witness who was trying to help me and trying to answer everything asked of her truthfully.

21. It was clear to me, when Mrs Garbutt gave oral evidence, that she is frail. Her medical records corroborate the fact that she is in poor physical health. An entry in her medical records for 25 June 2020 records:

> "Patient articulate - has temporal lobe epilepsy, poor eyesight, incontinent, thrombocytopenia, insulin dependent diabetic, has lumbar degeneration, rheumatoid arthritis. Husband has cancer, son lives close by. Requires help with washing and dressing. Husband is helping but finding it a struggle."

An entry in her medical records for 22 February 2021 records:

> "Frequent falls, injures herself, unknown cause. Falls backwards, no change in vision or dizziness prior to falls, reports no recent hypos. Usually mobilises in wheelchair due to pain - neuropathy, lumbar disc degeneration & fibromyalgia, Unclear why walking sometimes but is struggling with wheelchair due to arthritis…Hx of agoraphobia but reports cause is mobility and pain as above, can leave house in wheelchair but isn't, unclear of cause. Also declining vision, has audiobooks but unable to do hobbies like baking, sewing due to neuropathy in hands…"

22. At points during the hearing, Timothy suggested that Mrs Garbutt's health was good for an elderly lady (she was in "rude" health, he said) (which I reject, in the light of all the strong evidence to the contrary), even though he had said, in his second witness statement: "[Mrs Garbutt's] health…has been poorly for some 30 years(!)" (having said, in his first witness statement, that Mrs Garbutt "seems to be dramatising the severity for the courts and her cash grab", which contentions I also reject in the light of the strong evidence to the contrary).

23. Mrs Garbutt lives very modestly. Timothy contended that she has a "lavish lifestyle". I reject that. All the available material suggests otherwise. Even though Mrs Garbutt lives modestly, her liabilities and expenditure exceed her current assets and income. On Mr Garbutt's death, Mrs Garbutt became solely entitled to the credit balance in a joint bank account which then stood at £13,000. I have also mentioned that she has received a £40,000 payment from the ready cash in Mr Garbutt's estate. Save for a £3,000 credit balance in a bank account, Mrs Garbutt now has no savings. (Although Timothy said that he was "pretty certain" that Mrs Garbutt has greater savings, there is no material which corroborates his belief, and I am satisfied that Mrs Garbutt's evidence on this point was true). She has spent the rest of the sums she has had, which I have just mentioned, on essential living expenses and legal costs.

24. I have limited additional information about Mrs Garbutt's finances. The up-to-date material suggests that her current income is £1,922.52 a month and her current expenditure is £2,726.12 a month, a deficit of about £800 a month. This does not take into account about £200 a month for expenditure in relation to the Property, which will continue until its proposed sale is completed. Mrs Garbutt also apparently has a liability to Leeds City Council of £5,120 for a loan for care costs.

25. As the Leeds City Council loan indicates, Mrs Garbutt has moved from the Property. She is currently living in a rented flat in Leeds, close to Tracey, in order that Tracey can provide support; Angela apparently being too unwell to provide Mrs Garbutt with support in Hunmanby.

26. Mrs Garbutt would like to buy a home near where she is currently living. She has researched property prices on estate agents' websites and estimates that a suitable property might be bought for about £270,000.

27. In addition to support from Tracey, Mrs Garbutt receives domiciliary care. She is liable to pay for it herself at present and her finances limit her to four thirty-minute

visits a day. She said, in examination in chief, that she would benefit from further care and would welcome having sufficient support so that she is able to leave her home (where she is currently largely confined), to go swimming (which would be therapeutic) and do other activities. I have no doubt that all this is true. Such documentary evidence as there is corroborates her care cost calculations and her liability to pay those costs and little intensive support can be provided by thirty-minute visits. In any event, as I have said, Mrs Garbutt tried to answer truthfully what was asked of her in oral evidence.

28. She gave the following further evidence in her witness statements about her circumstances:

> "During our relationship the Deceased paid all of the household bills including utility bills and groceries. He would pay monies into our joint account which then met our outgoings. The Deceased also paid for all repairs to the Property and he paid for the construction of a large extension to it. I did not work after we started to live together and I was completely financially dependent on the Deceased. I had developed poor health quite soon after we started to live together and, over the years, the Deceased provided me with more and more care until he became my full time carer. Whilst the Deceased was alive, he was able to provide me with the care which I needed and we did not need to use private carers. I have been in a wheelchair for the last 15 years and in the last 5 years my condition has deteriorated such that I am mostly now bedbound.
>
> …I can only transfer from my bed to a commode or to my wheelchair…I have suffered a number of falls recently…"

29. She also said that, at the time the Property was registered in her name jointly with Mr Garbutt, for which transaction solicitors were instructed, there was no agreement between her and Mr Garbutt that the mortgage would cease to have effect.

Timothy

30. Timothy gave little relevant evidence. In relation to the 1975 Act claim, he said, in his first witness statement:

> "I am on a minimum wage job at the moment…while illness from Covid and furlough take their toll and the effects of the 2005 Tube bomb where I still wake hearing screams and smelling people burn."

He said, in his second witness statement, that he has been ill in "the last months" with stress mainly from the proceedings, but again he provides hardly any particulars about his ill-health.

31. He confirmed that Mr Garbutt paid all Mrs Garbutt's expenses during their relationship. He described Mrs Garbutt as "a stay-at-home housewife", adding that, during Mr Garbutt's lifetime, Mrs Garbutt "lived well from a sedentary position".

32. He speculated that Mr Garbutt had lent Mrs Garbutt the amount which she then, in turn, loaned to Mr Garbutt to buy the Property and in respect of which she took the mortgage. There is no foundation for such speculation. No good (or, indeed, any) reason for such an arrangement has been suggested. The arrangement is therefore inherently improbable. In any event, Timothy did not explain how such an arrangement might call into question the validity or effectiveness of the mortgage.

The mortgage

33. The first issue I must determine is whether the mortgage is "valid and effective" (which is the formula used in the claim form), or whether it has been discharged, or otherwise somehow come to an end, and is no longer a security over the Property.

34. As I have said, the mortgage continues to be registered on the title to the Property and Mrs Garbutt's evidence was that there was no agreement, at the time title to the Property was transferred into joint names, that the mortgage would cease to have effect. I should add that there is no evidence that Mrs Garbutt intended then, or at any other time, that, without payment of any sums due, the mortgage would, or had, come to an end. Indeed, it ought to be inferred, from Mrs Garbutt's evidence, that at the time title to the Property was transferred into joint names, she did not intend that the mortgage would come to an end, and, in the absence of any suggestion that the mortgage was considered at any other time after it was created, it ought also to be inferred that at no other time has Mrs Garbutt intended that the mortgage would come to an end without payment of any sums due.

35. What Timothy's case is as to the validity and effectiveness of the mortgage is unclear. I have already rejected his speculation that the original source of Mrs Garbutt's loan to Mr Garbutt was Mr Garbutt himself. Timothy further submitted in closing that, whilst the mortgage continues to exist, the amount due under it should not be discharged, I presume by Mrs Garbutt as legal owner, on a sale, out of the sale proceeds of the Property. Quite what Timothy thought the source of the sums to discharge the mortgage should be is not clear to me.

36. Because the mortgage continues to be registered on the title to the Property, because, it is not disputed, the loan it has secured has not been repaid, and because, before now, Mrs Garbutt has not intended that the mortgage would come to an end, the only conclusion I can reach, in the light of the parties' cases, is that the mortgage continues to be valid and effective.

37. By way of further explanation, the purport of Mrs Garbutt's evidence is that she has never released the mortgage in writing, as I have said. There is no reason for me to doubt that evidence.

38. Further, although no-one made submissions about any of them, I have considered the ways in which a mortgage can be brought to an end informally, without a written release being made. I am satisfied, as I have indicated, that the mortgage has not been brought to an end in any of those ways.

39. Those informal ways for bringing a mortgage to an end, before the sums due under it have been paid, depend on it being established that, at the very least, the mortgagee (Mrs Garbutt) intended that their mortgage would come to an end. Fisher &

Lightwood's Law of Mortgage (15th ed) identifies informal release and merger as ways, amongst others, that a mortgage can informally be brought to an end. The authors explain:

> "49.2 …To be binding a release of a debt must generally be made for consideration, or by deed. While an alleged release or forgiveness of the debt cannot be established merely by showing that the creditor had expressed an intention to release the debt yet where the creditor has so acted that the debtor has done acts by which his position has been altered, the creditor will not be allowed to enforce his security…
>
> 49.3 It has been seen that on payment of the mortgage moneys, a mortgage term becomes a satisfied term and, so it seems, a legal charge is discharged…
>
> 51.2 Analogous to the merger of estates at law was the extinguishment, or merger in equity of a charge on land where the absolute ownership of the charge and the land were united in the same person. In an appropriate case the charge would be regarded as merged for the benefit of the land.
>
> In equity the test for merger was not the mere union of interests, but the intention of the owner and the equitable rule now prevails. The usual circumstance in which an owner acquires the benefit of a charge is by paying off the sums due to the mortgagee. The question in such a case is whether the charge was paid off for the benefit of the land, or whether the owner intended to preserve the charge against the land for his benefit. Only in the former case will there be a merger. The owner's intention might be actual, evidenced by declaration, or by circumstances at the time of the union of interests or subsequently during his life. If there is no evidence of actual intention, the court will presume that the owner intends merger or not according to whether it is for his benefit. When there is no advantage to him in the subsistence of the charge, then the prima facie rule operates and the charge is extinguished…"

(I should note, for completeness (although this is not a case where the ownership of the Property and the mortgage have become wholly united in Mrs Garbutt), that there clearly has been an advantage to Mrs Garbutt in the continuation of the mortgage, because it secures her a greater share in the sale proceeds than her one-half beneficial interest alone does).

40. As I have said, Mrs Garbutt has not had the intention that the mortgage would come to an end and so, on this ground alone, the mortgage cannot have informally been brought to an end. Instead, as I have also said, the mortgage continues to be valid and effective.

<u>Construction of wills generally</u>

41. Miss Harrison helpfully drew to my attention extracts from Theobald on Wills (19th ed), which summarise the court's approach to the construction of wills. I set out those extracts here in full, principally for Timothy's benefit:

> "18-001 In construing a will, the object of the court is to ascertain the intention of the testator as expressed in their will when it is read as a whole in the light of any extrinsic evidence admissible for the purpose of its construction. As was explained in *Re Knight*, "[m]atters of construction must in the end of all depend upon the impression made upon the reader's mind by the words that have been used. Such, indeed, is the purpose of language". The approach to construction is unquestionably an intentional one, rather than a literal one. This was established by the House of Lords in *Perrin v. Morgan*, and after some rebellion put beyond doubt by s.21 of the Administration of Justice Act 1982. As Viscount Simon LC put it in *Perrin v. Morgan*:
>
> > "The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case - what are the 'expressed intentions' of the testator."
>
> 18-002 The interpretation (or construction) of wills follows the same approach as the interpretation of contracts and other documents. This was first confirmed by the Court of Appeal in *RSPCA v. Sharp* and has since been restated by the Supreme Court in *Marley v. Rawlings*. As Lord Neuberger put it in the latter case, "[w]hether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context". To that, one should add the relevant legal background…
>
> 18-003 Applying this approach to construction, the court will proceed, in broad terms, by asking what the testator must have meant by the relevant word or phrase in the light of all the admissible evidence. In answering that question, the court is concerned with the objective meaning of the words in which the testator expressed their intention, not what the testator internally intended…
>
> …the interpretation of wills often entails consideration of the terms of previous (now revoked) wills…
>
> 18-005 …[W]hen construing a will, the court is concerned to ascertain the expressed intention of the testator, i.e. the

intention which the will itself declares either expressly or by necessary implication. However, in *Perrin v. Morgan*, Viscount Simon LC emphasised that "[t]he question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case"…There are therefore limits to the intentional approach to construction. A court exercising its power of construction is confined to the provisions of the will, and the available admissible evidence of intention. It will not indulge in mere speculation as to what the testator would have provided for had he thought about it…

18-006 If the will simply does not deal with the situation, then the court cannot supply a provision, however clear the extrinsic evidence of the testator's intention. Apart from its powers under the Inheritance (Provision for Family and Dependants) Act 1975, and its power to rectify a will under the Administration of Justice Act 1982, the court has no power to rewrite a will for a testator after his death in order to achieve a more sensible result or to give effect to what the testator would have wished had he not been under a misapprehension. The function of a court of construction is to construe the testator's will, not to make a new will. To quote Jenkins LJ in *Re Bailey*:

> "it is impossible for this court to repair the imperfections which the events that actually happened have disclosed in the disposition of this testatrix's residuary estate. But it is not the function of a court of construction to improve upon or perfect testamentary dispositions. The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implication from the language of the will applied to the surrounding circumstances of the case."

18-046 Where it is clear on the face of a will that the testator has not accurately or completely expressed their meaning by the words used, and it is also clear what are the words which they have omitted, those words may be supplied in order to effectuate the intention, as collected from the context. But, in order to avoid speculation as to what words were omitted:

> "the reading of words into a will as a matter of necessary implication is a measure which any court of construction should apply with the greatest caution. Many wills contain slips and omissions and fail to provide for contingencies which, to anyone reading the will, might appear contingencies for which any testator would obviously wish to provide. The court cannot rewrite the testamentary provisions in wills which come before it for construction. This type of treatment of an imperfect will is only legitimate when the court can collect from the four corners of the

> document that something has been omitted and, further, collect with sufficient precision the nature of the omission."
>
> It is not necessary that the precise words omitted should be obvious from the will but the substance of the omission must be clear…"

42. As the authors of Theobald make clear, the function of a court construing a will is to interpret the actual words of the will, against the admissible background evidence (which may include previous wills). As they also explain, the court, in interpreting the actual words of the will against that background, may, with a degree of caution, supply words where it is clear, from the words actually in the will, that words, which should have been in the will to reflect the testator's intention, have been omitted and where it is clear what the substance of the omitted words are. It is not the function of a court construing a will to add words, or, indeed, whole gifts, where, for example, it is not clear from the words used in the will (as interpreted against the admissible factual background) what are the missing words or gifts the testator is said to have intended to include in their will.

43. To similar effect, Williams on Wills (11th ed) explains:

> "57.10 No evidence can be given in a court of construction in order to complete an incomplete will, or to add to, vary or contradict the terms of the will, or generally to prove any testamentary intentions of the testator not found in the will. Such evidence is not admissible to reconcile two contradictory clauses, and declare which of the two was the testator's real intention. No evidence is admissible to prove any intention or wish of the testator not contained in a duly executed instrument…"

44. Section 21 of the Administration of Justice Act 1982 ("the 1982 Act"), which Theobald refers to, and Timothy may have done, does not take matters further in this case. The 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."

Significantly, in this case there is no evidence from the drafter of the Will, and their Will file no longer exists, and there is no evidence of Mr Garbutt's actual intention at the time the Will was made.

Clause 4 of the Will

45. In agreement with Miss Harrison, I have concluded that, by clause 4 of the Will, Mr Garbutt bequeathed his one-half beneficial interest in the Property on trust for Mrs Garbutt for life. Applying the principles of will construction I have set out, I have reached this conclusion for the following reasons:

    i) clause 4(b) speaks of the trustees paying income to Mrs Garbutt during the whole of the Trust Period, which is her life;

    ii) if it was intended that Mrs Garbutt was only to have a right to reside in the Property, there would be no need for the Will to refer to the payment of income to her;

    iii) clause 4(c) is not inconsistent with Mrs Garbutt being given a life interest. Nor is clause 4(d). Although similar words are used in will trusts where a named individual is given no more than a right to reside in a property pending sale, in that case they are often qualified by specifying that that right ends on sale. The rights contained in clauses 4(c) and 4(d) are not expressed to end on sale. Clauses 4(c) and 4(d) are capable of having been included because, generally, the operation of section 11 of the Trusts of Land and Appointment of Trustees Act 1996 has been excluded in the Will;

    iv) if it was not intended that Mrs Garbutt was to have a life interest, the inclusion of clause 4(f) would be odd. Clause 4(f), which requires the trustees to have regard to Mrs Garbutt's wishes as to the investment of sale proceeds of the Property, is most consistent with an intention that she should have a life interest;

    v) the remainder interest of Mr Garbutt's children is expressed, in clause 4(h), only to fall into possession on Mrs Garbutt's death, and not before. It is improbable that a testator would dispose of property so that a lacuna arises between the ending of one interest or right in possession and the beginning of the next. (Miss Harrison explained that, under the terms of the Will, if Mrs Garbutt does not have a life interest, because the interest of Mr Garbutt's children only falls into possession on Mrs Garbutt's death, in the meantime any income arising after a sale of the Property would fall into residue. Some of that income at least would pass to Mrs Garbutt because I have concluded, as I explain below, that there is a partial intestacy of Mr Garbutt's residuary estate).

46. Williams may provide further support for my conclusion, explaining:

> "82.1 A testator gives such interest as he thinks fit, consistently with the law, and there is no presumption that he means to give one quantity of interest rather than another. The subject, being mere bounty, can be known only from the words in which it is

> given. If an intention of bounty towards a particular donee is apparent on the face of the will, and the will is ambiguous as to the manner in which the gift is to take effect with regard to the property given, or the interest created therein, the court, in absence of all other means of ascertaining the intention leans to the construction which is most favourable to the donee…"

47. Further, if I can take into account Mr Garbutt's earlier wills in construing clause 4 of the Will, my conclusion is reinforced, because, by them all, apparently Mr Garbutt gave, or purported to give, a life interest in the Property to Mrs Garbutt.

Mr Garbutt's residuary estate

48. As far as I understand Timothy's case, it is that (1) under the 1982 Act, a court can make any order which is reasonable and (2) (a) it is reasonable to read in to the Will a gift of Mr Garbutt's residuary estate to his three children because (b) such a gift was contained in previous wills. I remind myself, however, that there is no claim to rectify the Will. The only claim is for the construction of the Will.

49. I have set out above the Will provisions which refer to Mr Garbutt's residuary estate (see clauses 7 and 10 of the Will). They assume that, by some other provision in the Will, Mr Garbutt has disposed of his residuary estate. There is nothing, however, on the face of the Will (that is, from its words) from which such a disposal of residue can be discerned and, even more so, there is nothing on the face of the Will from which the terms of any such disposal can be discerned.

50. It may be that Mr Garbutt's previous wills provide an indication of how he meant to dispose of his residuary estate in the Will had he turned his mind to the question, although I am doubtful about that, because his marriage to Mrs Garbutt shortly before the Will was made may amount to a change in circumstances. However, they do not assist me in the construction exercise I have to carry out, where there are no words in the Will which can amount to a gift of Mr Garbutt's residuary estate and because the previous wills are not evidence of Mr Garbutt's intention at the time the Will was made.

51. It is sometimes said that there is a presumption against intestacy – a point which Timothy did not raise, but which I consider in any event – but that presumption can only operate if there are words in the will in question, even if only by necessary implication, unlike in this case, from which an effective gift of residue can be derived. As Williams explains:

> "51.1 A testator may well intend to die partly intestate; and, when he makes a will, he is testate only so far as he has expressed himself in his will. Where, however, the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either totally or partly intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion. In pursuance of an intention to avoid intestacy found in a will, or in pursuance of this presumption, the court does not give an unnatural meaning to a word or construe plain words otherwise than according to their

> plain meaning. The application of the presumption is dependent on the context and the circumstances.
>
> …51.3…It is not enough to satisfy the court that intestacy was not intended. To oust the title of the persons claiming on intestacy it must be distinctly shown that there are words in the will sufficient to constitute a gift of property in question, expressly or by implication to some particular donee, and the burden of proof is on the alleged donee to that extent. It is a rule of law and not merely a rule of construction that those entitled on intestacy are not to be deprived of their statutory rights otherwise than by express words or necessary implication in the will. That is to say, the will must clearly and unambiguously show the intention of the testator to leave his property to someone else and in such a way that there is certainty both in the subjects and objects of the gifts, and in the manner in which the gift takes effect…"

52. For all these reasons, I have concluded that Mr Garbutt died partially intestate, having not disposed of his residuary estate by the Will.

53. The consequence of my conclusion is that Mrs Garbutt has been entitled to all of Mr Garbutt's net estate other than his one-half beneficial interest in the Property (the disposal of which is governed by clause 4 of the Will), that is the ready cash (about £246,000), under the intestacy rules, because, under those rules, there being a partial intestacy of Mr Garbutt's residuary estate, Mrs Garbutt has been entitled at least to a fixed net sum of up to £270,000 (see sections 46, 49 of the Administration of Estates Act 1925 and paragraph 2 of The Administration of Estates Act 1925 (Fixed Net Sum) Order 2020).

The 1975 Act claim

54. Because of the conclusions I have already reached and because of the settlement, Mrs Garbutt now owns five-sixths of the Property, has been given a life interest in the remaining one-sixth beneficial interest in the Property and is entitled, on intestacy, to the ready cash in Mr Garbutt's estate. The only property which can be the subject of an order in the 1975 Act claim is Timothy's remainder interest in the remaining one-sixth beneficial interest in the Property. In the light of what I have already said, that interest may be thought of as a remainder interest in about £24,000 in money terms.

55. On instructions, Miss Harrison informed me that, if I reached the conclusions I have reached so far, I do not need to determine the 1975 Act claim. In the circumstances, I need say no more about it, other than to make the following point. That Mrs Garbutt has taken such a pragmatic approach adds further weight to my rejection of Timothy's criticism that the claim is born of greed.

Disposal

56. I therefore declare that:

    i) the mortgage is valid and effective;

ii) on the true construction of the Will, Mr Garbutt's one-half beneficial interest in the Property was bequeathed on trust for Mrs Garbutt for life (although it is now partially subject to the settlement);

iii) Mr Garbutt's residuary estate is undisposed of by the Will and has passed on a partial intestacy to Mrs Garbutt.