Succession

Scarfe v Matthews

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This article considers the judgment in this case, which includes a rare examination of the doctrine of election, provides an example of how the courts apply the principles governing the construction of contracts to wills and demonstrates the impact of forced heirship on a testator's wishes for his cross-border estate.

Most of us will recognise the name Bernard Matthews, though fewer of us will be so familiar with the doctrine of election, arguments over which recently arose in a dispute relating to the late Mr Matthews' estate. The judgment[1] in this matter raises awareness of both the doctrine of election and the impact of forced heirship. It also highlights the courts' use of the principles governing contract law in construing wills.

A dispute had arisen with regard to the English estate as a result of three of Mr Matthews' four children (the 3rd to 5th defendants) enforcing their heirship rights over his French estate to the detriment of his long-term partner. An application was made by the executors of Mr Matthews' estate, who asked the court to determine whether the doctrine of election applied.

Background

Mr Matthews died in November 2010, having lived with the 2nd defendant in this case, Odile Marteyn, for around 20 years. He had remained married to his wife, Joyce, and together they had adopted three children. Mr Matthews also left a natural son, George Matthews.

Mr Matthews wished to leave Ms Marteyn his villa in the south of France (Villa Bolinha) and set out this desire in a French will intending to dispose of his immoveable French property. His English will left a £1 million legacy to Ms Marteyn, free of tax, with the residuary estate (estimated at a value of £40 million) passing to George Matthews.

Clauses 4 and 5 of the English will set out that the English estate was to bear the worldwide tax. Mr Matthews' adopted children were left nothing (though they had received assets by way of lifetime gifts).

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[1] *Scarfe v Matthews* [2012] EWHC 3071 (Ch); [2012] All E.R. (D.) 25 (Sep).

Mr Matthews left a letter explaining his decision of the gift of Villa Bolinha to Ms Marteyn, clearly hoping that his children would make this possible by waiving their rights over the French estate.

French heirship rules

Although Mr Matthews' French will left Villa Bolinha to Ms Marteyn, this was subject to French succession law, which stipulates that a certain proportion (*la réserve héréditaire*) is earmarked for the deceased's descendants.

In this case, Mr Matthews' four children would have been entitled to claim 75 per cent of Villa Bolinha and would each have been liable to pay French inheritance tax at approximately 40 per cent on their respective share. The other 25 per cent would remain with Ms Marteyn, who would have had a liability for French inheritance tax at 60 per cent. At the time of Mr Matthews' death, Villa Bolinha was valued at €15 million.

The dispute

Mr Matthews' three adopted children chose to claim their reserved portion of Villa Bolinha to the detriment of Ms Marteyn and against their father's wishes. Furthermore, they sought to have the French inheritance tax for which they were each liable paid out of the English estate. They claimed that cll.4 and 5 of the English will provided for the English estate to pay their share of the French tax:

> "4.2 Out of my ready money and the clear monies to arise aforesaid … my Trustees shall pay my debts funeral testamentary and administration expenses the Tax as defined by clause 5 (if any) payable and any legacies hereby or by any Codicil hereto given."

> "5. In clause 4 above the expression 'the Tax' shall mean any probate succession estate or other duties or fees or any tax upon capital income or wealth or any other tax of whatever nature and wherever arising which becomes payable in any part of the world (including France) as a consequence of my death (and whether or not such payment shall be capable of being enforced by law) AND I DECLARE that no person interested under this my Will shall be entitled to make any claim against my Trustees in respect of my Trustees making such payment."

The doctrine of election

The parties all contended that cll.4 and 5 of the English will operated to give a legacy of the inheritance tax payable on Villa Bolinha. The English will and French will were to be read as one instrument, which brought into play the applicability of the doctrine of election.

In *Codrington v Codrington*[2] the principle of the doctrine of election was summarised to be:

> "[A]n implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions and renouncing every right inconsistent with it."

Where a testator purports to gift by their will property that is not theirs to gift, and the true owner of such property is also to benefit from the will, that true owner must elect to either:

1. accept the will by giving up their own property in accordance with the will and taking the benefit due to them under the will;

[2] *Codrington v Codrington* (1874–75) L.R. 7 H.L. 854.

2. take against the will by keeping their own property and taking the benefit due to them under the will but compensating the disappointed beneficiary for their loss by paying to them a sum equal to the lesser of the value of the true owner's property or the value of the benefit they have received under the will; or
3. disclaim.

The deputy judge hearing the matter, Mr N. Strauss QC, noted that historically the basis of the doctrine had been the presumed intention of the testator. Over time, this had changed, and it is clear that the basis is now based on broader equitable principles. In *Cooper v Cooper*[3] the doctrine was described as being based "on the highest principles of equity".

Application of the doctrine of election to the case

Mr Matthews had purported to give away 100 per cent of Villa Bolinha to Ms Marteyn, but due to French forced heirship rules, only 25 per cent was his to give freely as he pleased, *la quotité disponible*. In his English will he provided for the French inheritance tax to be paid from his English estate. Therefore, the issue arose as to whether the adopted children could take against the French will by enforcing their succession rights, whilst at the same time still taking the benefit of the legacy of inheritance tax under the English will.

Counsel for Ms Marteyn argued this was a clear case where the doctrine of election should apply and that the adopted children should be compelled to compensate Ms Marteyn for her loss of their share of Villa Bolinha up to the amount of the "legacy" they were to receive under the English will, i.e. their French tax liability. Counsel for Ms Marteyn relied on *Re Ogilvie*,[4] a case involving forced heirship in Paraguay.

By contrast, counsel for the adopted children argued that this was not a case where the doctrine of election came into operation. It was argued that the children did not have a choice: if they gave up their forced heirship rights in favour of Ms Marteyn, then no tax liability would fall on them and therefore they could not be said to have received the "legacy" of the French tax. Significantly, the deputy judge found that the doctrine operates to oblige a beneficiary to compensate even if no election is possible.

Further, counsel for the adopted children submitted that if the doctrine did apply and the children were compelled to give up their "legacy" of the French tax, the legacy should fall into residue, rather than be paid to Ms Marteyn. This was because, in accordance with the doctrine of election, the adopted children must have received some property with which to compensate the disappointed beneficiary. Clauses 4 and 5 of the English will direct the executors to make payments to discharge the tax due, and it was argued the executors had no right to use the money for any other purpose, including compensating Ms Marteyn. Counsel for George Matthews did not seek to argue this point.

The deputy judge rejected this argument on the basis that the children would clearly receive a benefit under the English will, whether this was a reimbursement of tax paid or tax being paid to the French government on their behalf. The children could use this benefit to compensate Ms Marteyn, even though they could not hand over assets *in specie*.

It was also noted that the principle of compensation applied in two ways; first, to limit the doctrine of election so that someone taking under the will is only bound to compensate the disappointed beneficiary up to the value they take under the will. Secondly, to extend the doctrine of election to circumstances requiring compensation to be paid by a beneficiary of a will who has no power of election, but who nevertheless takes a benefit under the will, as in the case of the adopted children.

George Matthews from the outset recognised that Ms Marteyn had to be compensated to the value of his reserved share in the French property and the tax payable thereon.

[3] *Cooper v Cooper* (1874–75) L.R. 7 H.L. 53.
[4] *Re Ogilvie* [1918] 1 Ch. 492.

The relevance of mistake

In contrast to most cases involving the doctrine of election, Mr Matthews was aware of the succession rights of his children. Therefore by gifting Villa Bolinha to Ms Marteyn, he knew he was disposing of property that was not his to dispose of (or of which he did not have the power to dispose in its entirety by will). Usually, the doctrine of election operates where the testator is mistaken as to the ownership of the property in question.

The deputy judge concluded that Mr Matthews' knowledge was in fact a reason for equity to intervene. He gave weight to Mr Matthews' knowledge that his children would be entitled to Villa Bolinha and his express wish that they should forfeit their rights. The deputy judge noted that "what Mr Matthews intended, and what he would have wanted, are plain, and can be taken into account: this too strengthens the case for equity to intervene".[5] He further stated that the children "cannot in good conscience keep the benefit to which they are entitled but must use it to compensate Odile".

Although the doctrine is to operate on the basis of equitable principles rather than presumed intention, in these circumstances the intention of Mr Matthews was a decisive factor. Further, given Mr Matthews' knowledge of the rights of his children and his wishes, the fact that the doctrine imposes a result that is least favourable to the children is perhaps equitable.

Construction

Despite discussion of the doctrine of election, the deputy judge concluded that on the basis of construction of the English will, the adopted children did not have the right to have the French tax paid and so really there was no need to consider the doctrine.

In determining this, the deputy judge considered that after the words "payable … in consequence of my death" in cl.5, should be added "by the executors or by any beneficiary under the testator's wills".

This was in contrast to the parties' interpretation of cll.4 and 5, which was that these clauses operated as a legacy of the inheritance tax payable on Villa Bolinha. The parties had considered that this would therefore include the tax payable by the adopted children, despite them not being named as beneficiaries under the will.

In finding otherwise, the deputy judge applied the principles governing the construction of contracts to the construction of wills, concluding that:

> "[A] term is implied where, having regard to the terms of the contract and the evidence as to its background, the court is sure that this is what the parties would have provided expressly if they had thought the issue through."[6]

First, referring to *Chartbrook Ltd v Persimmon Homes Ltd*,[7] the deputy judge considered that it was permissible to use evidence of negotiations between parties to a contract for the purpose of establishing what was known to the parties at the time of entering into the contract. He took into account that Mr Matthews had benefitted his adopted children during his lifetime and that he was aware of the inheritance rights his children had in France, which were insurmountable.

Secondly, the deputy judge highlighted that consideration of whether terms should be implied into a contract was integral to construing a contract. Referring to *Mediterranean Salvage & Towage v Seamar Trading & Commerce Inc*,[8] he went on to say that the test of implying a term was whether it could be read against the express terms of the contract and its background and constitute the one and only answer consistent with the rest of the contract.

[5] *Scarfe v Matthews* [2012] EWHC 3071 (Ch) at [58].
[6] *Scarfe v Matthews* [2012] EWHC 3071 (Ch) at [24].
[7] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101.
[8] *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531; [2010] 1 All E.R. (Comm) 1.

The deputy judge refers a couple of times to what the parties would have determined had they "thought through" the matter. Presumably the deputy judge assumed that had Mr Matthews, or his will drafters, thought through the issue with Villa Bolinha, they would have drafted the will differently.

The deputy judge found that Mr Matthews could not have intended his children to have their French tax liability paid from the English estate, as this liability would only be incurred by the children acting contrary to his wishes, by exercising their rights in France.

Conclusion

Scarfe v Matthews demonstrates that it is not advisable to rely on the doctrine of election in such cases, as the court may decide that a will should be construed differently to the parties' interpretation of the testamentary document. It is also clear that individuals with cross-border estates should take specialist advice in this area to ensure that their wishes are followed after their death.