IN THE HIGH COURT OF JUSTICE
IN THE CHANCERY DIVISION

No. HC 0002105

Royal Courts of Justice

Monday 2nd April, 2001

B e f o r e:

MR JUSTICE FERRIS

- - - - - - -

LAYTON
AND ANOTHER

- v -

NEWCOMBE
AND OTHERS

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MR DANIEL LIGHTMAN, instructed by Messrs Coles Miller (Poole), appeared for the Claimants.

MR MICHAEL TEMPLEMAN, instructed by Messrs Harold G. Walker & Co. (Dorset), appeared for the First and Second Defendants.

MR ALISTAIR CRAIG, instructed by Messrs Rickerby Watterson (Cheltenham), appeared for the Fourth Defendant.

The Third Defendant appeared in person.

J U D G M E N T

(As Approved)

MR JUSTICE FERRIS: On this application, which is made under Part 8 of the Civil Procedure Rules, the claimants, Mr and Mrs Layton seek the determination of a number of points which arise on the dispositions made by the will and codicil of Mrs Phyllis Mary Bliss in relation to a property owned by her and known as 32 York Road, Broadstone, Dorset.

Mrs Bliss was formerly Mrs Inman and she lived at 32 York Road for very many years until a few months before her death in 1998. The property was originally owned by her first husband and she inherited it from him when he died in October 1974. She continued to live there, but she decided to divide the property into two flats, and for that purpose she engaged the services of builders, one of whom was Mr Layton, the first claimant. Mr Layton did most or all of the work involved in converting the property from a single dwellinghouse into two separate flats and, when that work was finished, he and his wife asked Mrs Inman if they could take a tenancy of one of the flats because she intended herself only to occupy the first-floor flat. Mrs Inman (as she was then) agreed and granted the Laytons a tenancy of the ground floor flat at the low rent of £45 and some odd pence per month. The Laytons moved in sometime at about the end of 1974 and they have lived in the ground floor flat ever since.

The Laytons and Mrs Inman got on very well. The Laytons did much useful work about the property, improving, so it seems, not only their own flat, but the property as a whole and providing a lot of everyday services for Mrs Inman, including such things as the maintenance of the garden and odd jobs around the property. When Mrs Inman fell ill, they looked after her.

In August 1997 when Mrs Inman was about to marry again, her future husband being the Rev. Rupert Geoffrey Bliss, she made a will. This will was expressed to be in contemplation of that marriage, which duly took place shortly afterwards. Having appointed executors, Mrs Inman (as I shall continue to call her until after her re-marriage) gave her residuary estate in equal shares amongst five nephews and nieces, three of them - Andrew David William Stevens, Donald Gregory Stevens and Thomas Leslie Stevens - being the sons of her sister, and two of them - Helen Mary Newman and Margaret Louise Benn - being nieces of her first husband, Mr Inman. In clause 5(2)

of her will, Mrs Inman made special dispositions in respect of No. 32 York Road. I think I must read in full the provisions of clause 5(2) and 5(3). They are as follows: " (2) For some years the ground floor flat No. 32 York Road, Broadstone, has been let by me to a Mr and Mrs Roy Layton. They provided some of the materials towards an extension to both flats and have also provided me with certain services. In consideration of this I have left the rent payable by them at a low level for some years. It is my wish that in realising my estate my trustees shall endeavour to do so in a manner which will not deprive Mr and Mrs Layton of their home and I give to my trustees full and free discretion to deal with the property in such manner as they think fit in order to achieve this object without my trustees being responsible to any beneficiary hereunder or to any other person for any consequent loss or any consequent reduction in the realised value of my estate.

(3) If my death shall occur after my marriage to Rupert Geoffrey Bliss (hereinafter referred to as 'my husband') my trustees shall permit my husband to reside in my flat at 32 York Road and have the use of my furniture and chattels therein so long as he shall wish to live there and shall not sell the same until they are satisfied in their absolute discretion that he no longer requires to live there and has vacated the said premises and handed back the said furnishings and chattels provided that (a) this direction shall only apply so long as my husband shall keep the said property at 32 York Road in good repair and condition and insured to the full value thereof and shall pay all rates and taxes in respect thereof provided that my trustees shall contribute to such outgoings from the net income from the ground floor flat", and then paragraph (b) is a provision protecting her trustees against adverse claims by beneficiaries, which I need not read.

As I said earlier, Mrs Inman married the Rev. Bliss shortly after the date of that will, and they lived together in the first floor flat. In 1997 Mrs Bliss moved into a care home, originally in order to provide some respite for Mr and Mrs Layton, who took a holiday. While she was in the home she suffered a fall and she never in fact came back to 32 York Road. Shortly before her death, she moved from the home into which she had gone in August 1997 and she died in the new home on the 5th March 1998.

Shortly before moving into the first of the homes, Mrs Bliss (as from now on I shall refer to her) executed a codicil to her will. Clause 1 of the codicil is not material for present purposes. Clause 2 provides as follows: "In extension of clause 5(2) of my said will I revoke the discretionary power given to my trustees in that sub-clause and I direct that my trustees shall offer to Mr and Mrs Roy Layton the option to buy the house, No. 32 York Road, Broadstone, or if Mr and Mrs Layton prefer to only buy one of the two flats in the house, then to give them the option to do so, in either case at 80 per cent of the full market price, such market price to be assessed by a valuer to be appointed by my trustees and whose decision shall be final and binding. My trustees shall not dispose in any way of the property No. 32 York Road, Broadstone, unless and until written notice has been given to Mr and Mrs Layton of the option to purchase and Mr and Mrs Layton have either not signified their consent within the following 30 days or have signified their refusal. If Mr and Mrs Layton or one of them signifies consent to purchase, then the transaction shall proceed by private treaty incorporating the Law Society's Standard Conditions for Sale latest edition at the time. The option to purchase shall be subject to the provisions of clause 5(3) of my said will, subject to a contribution being arranged for my residuary estate in substitution for the net income of the ground floor flat if the property or part is sold to Mr and Mrs Layton".

After the death of Mrs Bliss, her will and the codicil were proved in June 1998 by Ian Michael Newcombe and Malcolm Richard Baker, who are, I believe, two solicitors in the firm which succeeded Mrs Bliss's solicitors at the time when she made her will, and Andrew David William Stevens, one of the residuary legatees.

The Rev. Bliss continued to live in the first floor flat at 32 York Road for a few months after his wife's death, but he moved out into a nursing home - he was then 93 or 94 years of age - in June 1998, and on the 24th September 1998 the executors received notice from the Rev. Bliss or those who were acting on his behalf, indicating that he would not be returning to the property. I do not know whether he still survives, but there has been no question of him returning to the property.

The Laytons have, as I have said, remained residing in the ground

floor flat, and I am told that they have continued to look after the property to the best of their ability at their own expense - something which has given rise to some criticism because it is suggested that the executors ought to have borne the upkeep of the property.

In January 2000, two of the executors - that is to say the first and second defendants - by their solicitors submitted to Mr and Mrs Layton through their solicitors a form of option which, if executed by them and assuming it is binding on all three executors, would have given the Laytons a 30-day option to take either or both of the two flats. I will not go into that, because it is agreed that this purported grant of an option (if that is what it was) was of no legal effect, notably because it did not state a price at which the property as a whole or either of the flats was to be acquired by the Laytons.

The position therefore as it stands today is that the executors have not formally offered an option to Mr and Mrs Layton as required by the will and the codicil. A number of difficulties and disputes have arisen which, until they are resolved, will result in the executors not being able to formulate the option which it is common ground that the Laytons remain entitled to have.

A number of points have been argued before me. The first one which requires consideration is whether in the events which have happened the executors are required to offer two separate options to the Laytons, one in respect of the ground floor flat and the other in respect of the first floor flat. The suggestion that there should be two separate options arises from the fact that for some six months or more after the death of the deceased the Rev. Bliss was entitled to remain in the first floor flat and he did in fact remain there for some three of those six months. What is said by Mr Craig on behalf of the fourth defendant, Mrs Newman, one of the residuary legatees, is that it cannot have been supposed by the testatrix that the Laytons were to purchase or even to be able to purchase the first floor flat subject to the rights of occupation of the Rev. Bliss, and that it follows that, although they were entitled in due course of administration to have granted to them an option to purchase the ground floor flat which they occupied, they had no right to have granted to them an option to purchase

the first floor flat until a reasonable time after the death of the Rev. Bliss. This view of the matter is said to be supported by the fact that in clause 5(3) of the will Mrs Bliss had said that her trustees should not sell the first floor flat until they were satisfied that the Rev. Bliss no longer required to live there and had vacated the flat. If the executors were to grant an option to acquire the first floor flat at the same time as they granted an option to acquire the ground floor flat, that would, it is submitted, be in conflict with that provision and hence the disposition made by the codicil takes effect as a requirement in substance that there should be two separate options with slightly different consequences in each case.

I am unable to accept that proposition. The terms of the codicil show, in my judgment, that what was to be offered to the Laytons was a single option which was to be in respect of the entire house and was to give Mr and Mrs Layton the right to purchase either the entirety or the ground floor flat in which they lived or the first floor flat in which the Rev. Bliss had rights of occupation. It seems to me that the codicil contemplates that the Laytons might purchase at a time when the Rev. Bliss still had subsisting rights of occupation, otherwise it would not have been necessary for the codicil to provide, as it does, that the option should be subject to the provisions of clause 5(3) of the will and that in the event of the Laytons purchasing the ground floor flat the Rev. Bliss should have a contribution from the residuary estate to make good the income which he would lose by no longer receiving the rent of the ground floor flat. It is true that the codicil does not expressly contemplate the possibility that the Laytons would acquire the first floor flat subject to the Rev. Bliss's rights of occupation, but it seems to me that that is the inevitable implication. Linguistically it may be said, and indeed is said, that there is a conflict between that and the provision in the will that the first floor flat should not be sold so long as the Rev. Bliss desired to remain in occupation, but in reality I do not think there is any true conflict. It seems clear that what the provision of the will was intended to achieve in prohibiting a sale so long as the Rev. Bliss desired to remain in occupation was to prevent the executors selling over the head of the Rev. Bliss to a purchaser who would be given

vacant possession. I do not think that the provision was aimed at preventing a sale to Mr and Mrs Layton pursuant to the option but subject to the Rev. Bliss's continued right of occupation. If there is a conflict between the language of the will and the codicil, then the will must yield to the codicil which, being the later document, should be taken to express the final wishes of Mrs Bliss.

Accordingly I hold that the executors are obliged to offer or confer on Mr and Mrs Layton a single option to the effect provided by the codicil, which can be exercised by them either by purchasing the entirety or by purchasing the ground floor flat or by purchasing the first floor flat as they decide.

The next question which arises is when this offer has to be made. In my judgment, there can be only one answer to that, namely that it ought to have been made as soon as possible after the death of Mrs Bliss in the due course of administration of her estate. That point, I think, is not seriously in dispute between the parties once the argument of Mr Craig - that there are really two separate options - is disposed of as I have disposed of it.

The next question relates to valuation. It is common ground between the parties that the option when conferred must specify the price at which the Laytons are to be entitled to acquire either the entirety or the separate parts of the property. That price is to be ascertained in accordance with a valuation made as provided by the codicil, that is to say it is to be 80 per cent of the full market price of whatever the property in question is, that is to say the entirety of the property or the ground floor flat as a separate entity or the first floor flat as a separate entity.

A question has been raised as to the date at which that valuation is to be made. The answer to that question, in my judgment, is clearly that it must be made as at the date of the death of Mrs Bliss, that is to say March 1998, and that remains the case even though in the events which have happened the valuation will not in fact be made until sometime this year. During the course of argument the possibility has been canvassed that the probate valuation which was obtained after the death of Mrs Bliss will suffice for the purposes of the option. In theory, the open market value which is

applicable for inheritance tax purposes is the same basis that should be applicable for the purpose of a valuation under the option, although I am not wholly confident that that represents the way in which valuers approach probate valuations. However that may be, it seems to me that the probate value is not appropriate to be taken in this case, because the incidents which will have to be taken into account for the purposes of the option valuation are not precisely the same as those which have to be taken into account for the purposes of the probate valuation. This point will, I hope, become clearer in a moment or two. But the essence of it is that, whereas the probate valuation made cannot, as I see it, have made any allowance for the Rev. Bliss's rights of occupation under the will, the option valuation should do. I will refer to certain authority on this point in a moment.

The next question is the extent, if at all, to which the valuation should take account of events which have happened since the death of Mrs Bliss. In particular, should the valuation take account of the fact that in September 1998 the Rev. Bliss gave up his rights of occupation; or should it merely proceed on the basis that the Rev. Bliss had rights of occupation which he might or might not decide to give up. On this question, it seems to me that the answer must be that the valuation is to be made as at the date of the death - that is to say March 1998 - and that it should take account only of those facts which were actually known at that time. Thus it should take account of such facts as that the Rev. Bliss was a gentleman of a certain age, that he was in a particular state of health, that he had rights of occupation under the will for so long as he wished to exercise them, but that he could nevertheless give up those rights. It will take into account also the fact that his rights of occupation were not unconditional but were subject to the requirement that he should maintain the property and pay the outgoings. All those represent facts known as at the date of the testatrix's death. What should not be taken into account, in my judgment, are facts which were not then known, in particular that the Rev. Bliss was going to give up his rights of occupation in September 1998.

That conclusion is, I think, not only logical but is in accordance with authority. I was referred to two decided cases in this area. The first is Talbot v. Talbot [1968] Ch.1. In that case, a testator by his will directed

that on the death of his wife, who in fact predeceased him, two of his sons should have the option of purchasing certain farms and certain farmland at a reasonable valuation. The main dispute was as to what was meant by "a reasonable valuation", but the case, which came originally before Vice-Chancellor Burgess in the Chancery Palatine Court of Lancaster, dealt also with the question of the date of valuation and what factors it should take into account. On appeal, the first judgment was given by Lord Justice Harman, who said at page 13 of the report:

> "The valuation is to be made, according to the order appealed from, as at the death of the testator. There is no appeal about that, and it is justified, I feel, because the right to have the land by the exercise of the option accrued at that date. But that does not mean, or it will not mean, when valuation comes, that the valuers are to draw blinkers over their eyes or to shut their eyes to the fact that some time has passed since the testator's death and very likely the lands have very much increased in value since, they are entitled to say what, tody, knowing what they do, and discounting back for the three years, is the proper market value of these farms. That being so, I am of opinion that Burgess V.-C. arrived at the right conclusion".

The second member of the court, Lord Justice Davies, agreed with Lord Justice Harman and, although he added some words of his own, they were on a different point. The third member of the court, Lord Justice Russell, said at page 16:

> "Finally, it seems to me to be proper to value as at death, although it is admitted by counsel that knowledge of subsequent developments affecting value should be imputed to the person notionally valuing as at the death, on the lines, I suppose, of the Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd. v. Pontypridd Waterworks Co. case [1903] AC 426. So, if I may conclude my view: First, the option might be exercised 'blind' before the formula of 'reasonable valuation' is worked out but, in my judgment, need not be

> exercised until the formula is worked out. Secondly, 'reasonable value' is the same as 'fair value' or 'fair price', and this formula would not be too uncertain, even in an inter vivos contract. Thirdly, if there be not agreement on the figure, the court may and should determine it. It is not a question of the machinery provided breaking down, when the court may not substitute another machinery. No machinery was provided - merely a formula, which the court can construe and apply. Fourthly, the date for valuation is the death. The will, I think, is to be construed as offering the property with effect from the death. But it is admitted that subsequent developments may be considered in that valuation. Lastly, the option must be exercised, I take it, within a reasonable time after the formula is worked out".

That case standing alone is thus an authority for the relevant date of valuation being the date of death, but so far as the matters to be taken into account, it seems to give support to the view that the valuer should take account not only of facts which existed at the date of the death but of facts which had come into existence since that time. A somewhat different view was taken by Sir Robert Lowry, Lord Chief Justice of Northern Ireland, in the case of McKay v. McSparran (1974 Northern Ireland Law Reports Chancery Division 136). In that case, a testator by his will directed his executors to offer part of his land for sale to the plaintiff at a valuation to be agreed by a professional valuer. On a question as to the relevant date for valuing the property and as to whether the valuer should be appointed by the executor alone or by agreement with the plaintiff, held

> "that the date of the valuation should be the date of the testator's death. When the value of the property has to be assessed by reference to a date in the past one looks for the market value as between a willing seller and buyer and negotiating at that date and aware of the trend of the market and the potentialities of the market".

So far as the date of valuation is concerned, Sir Robert Lowry followed the case of Talbot, which I mentioned earlier. He said at page

139 of the report, line 25:

> "By reference to authority and on the ground of practical certainty and convenience, the answer to that question" -

that is to say, what should be the date of the valuation -

> "is the date of the testator's death. Talbot v. Talbot . . . provides clear authority for taking the date of the death as the time for valuation, and on no accepted principle can any other date be proposed as a credible alternative".

On the question of what should be taken into account by the valuer, Sir Robert Lowry took a rather different view to that which had been expressed in Talbot. He referred to the judgments in Talbot v. Talbot, quoting the passages which I have quoted, and continued at page 140:

> "I can find nothing in the report of the hearing at first instance . . . to indicate that the Bwllfa case was mentioned or that the learned Vice-Chancellor said anything about having agreed to events subsequent to the testator's death in making a valuation.
>
> In reality, whatever concession counsel made, the Bwllfa case is, in regard to sales, an authority against jogging forward. In that case, as Lord Halsbury, L. C. pointed out . . . the question for debate was accurately stated by Phillimore J. when he said that 'the true inquiry here is not what is the value of the coal field or of the coal, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it'".

Then he cited a long passage from the speech of the Lord Chancellor in the Bwllfa case, culminating in a sentence which reads as follows:

> "'It seems to me that the whole fallacy of the contention that we may not look to the facts that have occurred rests upon a false analogy of a sale'" -

Sir Robert Lowry then analysed further speeches in the Bwllfa case, and at page 142 said:

> "The Bwllfa principle is analogous to that which permits the

judge or jury assessing damages under the Fatal Accidents Acts (which is done as at the date of the death) to have regard to what has actually happened between that date and the date of trial" -

and he refers to certain authorities -

"and does not impinge on the principle that, when the value of property has to be assessed by reference to a date in the past, one looks for the market value as between a willing seller and buyer negotiating at that date and aware of the trend of the market and the potentialities of the property. It would be wrong, in my opinion, to substitute hindsight for inference and thereby to depress or, more usually, enhance the value in such a case. The Bwllfa principle is properly used to achieve accuracy in the assessment of compensation and in other fields by substituting knowledge for guesswork, but it should not be used in order to substitute for actual market value on 26 April 1970 a different figure representing what would have been the market value if the parties had known facts not in existence on that date. Of course, in the nature of things, someone who is valuing in retrospect cannot help knowing that the inferences as to the future which he attributes to the hypothetical vendor and purchaser have been justified by events, and inevitably the uncertainties which usually affect the mind, and hence the value, tend to be resolved. For this reason contemporaneous comparable valuations and, where possible, a contemporaneous valuation of the subject are the truest guide to its value".

The view of Sir Robert Lowry, accordingly, was that it was not permissible for the valuer to look at events which had occurred after the valuation date.

In my judgment, that view is to be preferred to the view expressed in Talbot v. Talbot, which in any event, as Sir Robert Lowry demonstrated, seems to have been based on a concession made by counsel rather than the determination of the court. Accordingly, I hold that in making the valuation as at the date of the death of Mrs Bliss the valuer should have regard only

to matters known at that time.

So far as particular incidents are concerned, it seems to me that the valuer must, at any rate in relation to the ground floor flat, have regard to the Laytons' own rights of occupation. As to those, there seems to be no continuing dispute between the parties. The Laytons had a tenancy at the low rent of £45 per month, but it was not a protected tenancy and the rent was one which was capable of being increased in accordance with the usual provisions.

So far as security of tenure is concerned, as the tenancy was not protected there was only very limited security, but it is common ground between the parties that, under some rather complicated provisions of the Rent Act 1977 to which I was taken, it would not have been practicable or indeed legal at the date of the death of Mrs Bliss to obtain a possession against the Laytons earlier than two years from the date of the death of Mrs Bliss. Accordingly, the valuer should take into account the fact that the Laytons were protected in their rights of possession for two years, but there was a potential for increasing their rent in the meantime. I should add, I think, that the reason why the Laytons' tenancy was not a protected tenancy was that Mrs Bliss, while she herself remained in possession of the first floor flat, was a resident landlord; and even after she had gone into the nursing home, she fell to be treated as a resident landlord by reason of section 30 of the Family Law Reform Act 1996.

The next incident which the valuer will need to take account of is the Rev. Bliss's rights of occupation. Those are the rights given to him by the will, that is to say a right to remain in occupation of the first floor flat on the terms set out in the will so long as he wished to remain. As I indicated earlier, it seems to me that it would be appropriate for the valuer to take into account the age of the Rev. Bliss, the fact that his rights were purely personal to himself, his state of health if known, and the fact that there existed a possibility always that, by reason of his age and state of health, he might feel obliged to give up his rights of occupation, as in the event happened quite soon after his wife's death.

The next matter which has been canvassed is the extent to which the valuer should take into account development potential. In my judgment,

he should take into account the development potential as it existed at the date of the valuation - that is to say at the date of Mrs Bliss's death - but not anything which has happened since then. Thus for example, if he considers that there was a probability or a reasonable prospect of planning permission being obtained for development and that that possibility existed at Mrs Bliss's death, he should take it into account. But if it be the case, for example, that any development potential has arisen only by reason of changes in the planning situation which have occurred since March 1998, then that is not something which, in my judgment, should be taken into account in making a valuation as at March 1998.

Finally, there is the question of repairs. As I take the view that the option in effect was an immediate gift made by the will and one which fell to be implemented during the course of administration of the estate, it seems to me that no allowance can be made one way or the other for any liability to maintain the property in the meantime. Hence the estate cannot be made to pay or allow anything for the fact, if it be the fact, that the property has fallen into disrepair since the death, nor can the Laytons receive any allowance in respect of their own expenditure on the property since that date. The valuer should take account of the property in the state in which it was at the date of the testatrix's death, and events which have happened since should be disregarded.

That I think is enough to determine all the points which have been argued before me. No doubt the decision which I have given will need to be reduced into a rather carefully expressed order, and for that purpose I shall invite Mr Lightman to prepare a minute of order and to agree it with the other counsel, and in due course lodge it with the associate.
