Neutral Citation Number: [2024] EWCA Civ 49

Case No: CA-2023-000898

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT SUSSEX - BRIGHTON
Decision of His Honour Judge Farquhar handed down on 6 February 2023
BV15D10077

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 1 February 2024

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PHILLIPS
and
LORD JUSTICE SNOWDEN

- -

Between :

FRANK SAVAGE	**Appellant**
- and –	
RAYMOND SAVAGE	**Respondent**

- -

William Moffett and Amber Turner (instructed by **Cripps LLP**) for the **Appellant**
Simon Sinnatt and Mark Sheppard (instructed by **ODT Solicitors**) for the **Respondent**

Hearing date : 5 October 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on Thursday 1 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This appeal raises a question of interpretation of section 15(3) of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"). The question is whether that section means that a court which is considering an application for an order under section 14 of TOLATA where there is a dispute between the beneficiaries of a trust of land, can only have regard to the circumstances and wishes of the majority of those beneficiaries (according to the value of their combined interests), and is not entitled to have regard to the circumstances and wishes of the minority.

2. So far as material, sections 14 and 15 of TOLATA provide as follows,

> "Section 14 – applications for order
>
> (1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section
>
> (2) On an application for an order under this section the court may make any such order—
>
> (a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or
>
> (b) declaring the nature or extent of a person's interest in property subject to the trust,
>
> as the court thinks fit.
>
> Section 15 – matters relevant in determining applications
>
> (1) The matters to which the court is to have regard in determining an application for an order under section 14 include -
>
> (a) the intentions of the person or persons (if any) who created the trust,
>
> (b) the purposes for which the property subject to the trust is held,
>
> (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
>
> (d) the interests of any secured creditor of any beneficiary.
>
> (2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13 the matters to which the court is to have regard also

> include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.
>
> (3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests).
>
> (4) This section does not apply to an application if section 335A of the Insolvency Act 1986 (which … relates to applications by a trustee of a bankrupt) applies to it."

Background

3. The appeal is brought by Frank Savage (aged 27 at the time of the judgment of the District Judge referred to below) against a decision of HHJ Farquhar ("the Judge") which was given in a reserved written judgment dated 17 October 2022 ("the Judgment") and formally handed down when the Judge made an order giving effect to it on 6 February 2023 ("the Order"). The Order was made in financial remedy proceedings between Raymond Savage (aged 72) and his ex-wife, Vanessa Savage. Without intending any disrespect, I shall refer to the various members of the extended Savage family by their first names.

4. The Order concerned the method of sale of three parcels of land at Pleasant Rise and Pleasant Rise Farm, Cuckmere Road, Alfriston, East Sussex ("the Properties"). The Properties include land upon which Frank runs a business involving a campsite, a tennis court and other facilities. The Properties are held upon certain trusts for Raymond and the children of his late brother, Roy, namely Elizabeth, Charlie, Frank and Harry ("the siblings"). Raymond has a two-thirds interest in the largest parcel of land, a three-quarters interest in the second largest parcel of land, and a one-half interest in the smallest parcel of land. The remaining interests are held by the siblings.

5. The sale was sought at the instigation of Vanessa, but the beneficiaries could not agree between themselves how a sale should take place. After a two-day trial, which included expert evidence as to value and method of sale, on 23 February 2022 District Judge Owen ("the District Judge") made an order that gave Frank a right to buy out Raymond's interest in the Properties before they were offered for sale on the open market, at a price of £666,150 (less certain costs of the trial that Raymond was ordered to pay to Frank).

6. The judgment of the District Judge indicated that in deciding to make that order, he took account of the circumstances and wishes of Raymond, as majority beneficiary by value, whom he recorded also owned a piece of neighbouring land and wished to see the Properties sold as a whole and "move on with his life": see paragraph [50].

7. The District Judge also held, at [51], for reasons that he set out at [36]-[41], that he was not prevented by section 15(3) of TOLATA from having regard to the circumstances and wishes of the siblings, as minority beneficiaries. He recorded that the siblings supported Frank being given a right of pre-emption over the land from which he conducted his business. The District Judge further accepted, at [52], that although Frank could buy land elsewhere with his share of the proceeds of sale of the Properties, that was "not the same as continuing a business in the same location, and in particular a location-sensitive business such as camping close to a national park".

8. Earlier in his judgment at [33], the District Judge had accepted the expert evidence of Mr. Andrew Samuel, an experienced valuer with knowledge of the Properties who had originally been proposed as an expert by Raymond. Crucially, Mr. Samuel's opinion was that the sale of the Properties in separate lots was feasible and, while it might cause practical problems, would have a limited effect of the overall value and would not substantially detrimentally affect the amount of money realised. The price set out in the District Judge's order for exercise of the right of pre-emption over Raymond's interest in the relevant land reflected Mr. Samuel's evidence.

9. The core of the District Judge's reasoning in relation to section 15(3) TOLATA was that the main discretion was conferred by section 14, and section 15 included only a non-exhaustive list of factors. He said that this indicated that although the court was obliged to take into account the factors in section 15, it was not to be governed by them alone. In this regard, the District Judge referred to the observations of Briggs LJ (as he then was) in Bagum v Hafiz [2016] Ch 241 at [21] and [23]-[25],

> "21. … by [section 14(2)] the court is given the widest discretion to make orders relating to the exercise by the trustees of any of their functions, having regard in particular to the non-exclusive list of the matters to which the court is to have regard, set out in section 15(1)(3)…
>
> …
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> 23. More generally, I consider that the clear object and effect of sections 14 and 15 is to confer on the court a substantially wider discretion, exercised on the basis of wider considerations, than might be enjoyed by the trustees themselves, acting without either the consent of their beneficiaries or an order of the court … this departs from the general rule of equity which requires the trustees single-mindedly to advance the interests of the beneficiaries as a class, without preferring some of them over others.
>
> 24. None of this means, of course, that the court will act unfairly, unjustly or capriciously as between beneficiaries in giving directions to trustees under section 14(2). It simply demonstrates that, in exercising its powers in circumstances where, necessarily, the beneficiaries will be in dispute with each other about what should be done with the trust property, the court is not rigidly constrained by those rules of equity which may, pursuant to section 6(6), constrain the trustees themselves.

> 25. This is not surprising. In general the use and disposal of land held on a trust of land (which applies to all kinds of co-ownership) will be determined by the unanimous consent and direction of the beneficiaries. This has been the position for many years: see Saunders v Vautier (1841) 4 Beav 115, which established that beneficiaries of full age and sound mind acting unanimously may direct how the trust property is to be dealt with. The court's powers are there to enable the property to be dealt with justly and effectively when that basis of consent breaks down. That is why section 14(2) permits the court to relieve the trustees from obtaining consents, and why section 15(3) requires the court to have regard to (but not to be bound by) the wishes of a majority of the beneficiaries in the event of a dispute between them."
>
> (my emphases)

10. On appeal, the Judge disagreed with the District Judge's legal analysis in relation to section 15(3), but upheld his conclusions on the expert valuation evidence.

11. On the meaning of section 15(3), the Judge held that because there was a dispute between the beneficiaries, section 15(3) precluded the court from having any regard to the circumstances and wishes of the siblings (as minority beneficiaries), and the only wishes and circumstances that could be taken into account were those of Raymond, as the majority beneficiary by value.

12. The core of the Judge's reasoning was as follows,

> "27. The principal rule in statutory interpretation is a presumption that the grammatical meaning of an enactment is the meaning that was intended by the legislator. In considering s.15(3) it set out two apparently separate options : "the wishes of any beneficiaries… or (in the case of dispute) of the majority." It does not state that the Court can take into account both the views of the minority and the majority as could have easily have been stated. It also does not state that the Court should weigh the views of one up against the other.
>
> 28. The wording of this particular sub-section can only make grammatical sense if the Court can only take one of the considerations into account. If that was not to be the case then what would be the purpose of the words "or (in case of dispute) of the majority."? As suggested by Mr. Sinnatt on behalf of [Raymond] these words would simply be otiose and that cannot have been the intention of those drafting the Act.
>
> 29. This is akin to the maxim "*Expressio unius est exclusio alterius*" which means that the express mention of one thing excludes all others. It is made clear within s.15(1) that the Court is to have regard to particular matters (the intention of the creators of the trust, welfare of minors etc) which specifically

> permits the Court to take into account other factors. However, once a particular factor is expressly stated that it should not be taken into account, then it is not a reasonable interpretation to state that such a factor could then be included within the factors that may be considered. I am satisfied that the wording of s.15(3) must mean that once the parties are in dispute then the only wishes and circumstances that can be taken into account are those of the majority beneficiary and those of the minor beneficiaries cannot be considered 'through the back door' of taking them into account as one of the other factors."

13. The Judge thus set aside the order of the District Judge and made an order for sale of the Trust Properties on the open market without Frank having any right of pre-emption.

14. Frank was given permission for a second appeal against the Judge's legal conclusions in relation to section 15(3) by Lady Justice King. Frank is supported by his siblings and Vanessa, but they did not play any active role in the appeal. The appeal is opposed by Raymond. There is no cross-appeal against the Judge's decision in relation to the valuation evidence.

Statutory interpretation

15. The role of the courts in interpreting a statute was described by Lord Nicholls in R v Secretary of State for the Environment etc, *ex parte* Spath Holme Limited [2001] 2 AC 349 ("Spath Holme") at 396,

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration."

16. The Judge was correct that in carrying out this exercise, there is a presumption – or, more accurately, a starting point - that Parliament intended the words used to have their grammatical meaning. As Lord Nicholls put it in Spath Holme at 397,

> "an appropriate starting point is that the language is to be taken to bear its ordinary meaning in the general context of the statute".

17. However, as Lord Nicholls' dictum itself indicates, even when considering the grammatical meaning of words, the words should not be considered in isolation. As a matter of pure linguistics, it is possible that words can have more than one "ordinary" meaning depending on the way that they are used (so-called "semantic" or "syntactical" ambiguity). But it is also possible that the words can have more than one "ordinary" meaning depending on the context in which they are used ("contextual" ambiguity). Accordingly, when deciding the ordinary meaning of the words used and, in particular, when determining which of any linguistically available meanings is the meaning that Parliament intended, the court must have regard not only to the way in which the words are used in the statutory provision in issue, but also to the relevant context in which they are used.

18. In this exercise, the relevant context naturally includes the structure and contents of the part of the statute in which the relevant provision appears, as well as the statute as a whole. However, it is not limited to such matters. The relevant context can also include the historical background against which the statute came to be passed, and its legislative purpose. Those matters may be apparent from the wording of the remainder of the statute itself, which must be the primary focus. In addition, but subject to some limitations, reference can also be made to secondary materials such as Law Commission reports and Explanatory Notes.

19. These principles, and the relationship between giving effect to the words of a statute and reference to secondary materials, were explained by Lord Hodge giving the judgment of the majority in R v Secretary of State for the Home Department *ex parte* O [2022] UKSC 3. At [29]-[30], after quoting Lord Nicholls' dictum from Spath Holme at 396, Lord Hodge continued,

> 29. … Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, 397:
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> > "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

20. As regards the use of so-called "canons of interpretation", such as the "*expressio unius*" maxim, it is important to bear in mind that such canons are merely interpretative tools

that reflect the use of language generally, and hence should not be applied rigidly: see e.g. *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed) ("*Bennion*") at [20.1] citing Cusack v Harrow LBC [2013] UKSC 40 at [58]-[60] *per* Lord Neuberger.

21. As regards the *expressio unius* maxim itself, it is clear that this is not an absolute rule and should not be applied where there is some reason, other than the intention to exclude certain things, for mentioning some but not others. So if it appears that particular items were singled out for mention merely as examples, there is no room for the maxim to apply: see *Bennion* at [23.13].

Analysis

22. Applying these principles, the obvious starting point must be the provisions of section 14 TOLATA, under which the court is given a broad discretion to make whatever order in relation to the two matters mentioned in section 14(2) "as the court thinks fit". This language reflects the fact, as was common ground between the parties, and was explained by Briggs LJ in Bagum v Hafiz, that TOLATA was intended fundamentally to change the regime in relation to trusts of land and to give the court wider powers and discretion in relation to such trusts than had previously existed.

23. In that context, and as Briggs LJ indicated in Bagum v Hafiz at [21], section 15(1) then sets out a list of factors to which the court *must* have regard when considering the exercise of its discretion under section 14, but the list is not intended to be exhaustive. That is the ordinary and natural meaning of the opening words in section 15(1),

> "The matters to which the court is to have regard in determining an application for an order under section 14 *include* …"
>
> (my emphasis)

24. Moreover, and as Briggs LJ observed in in Bagum v Hafiz at [25], the relevant requirement in section 15(1) is that the court must "have regard" to the listed factors. That reinforces the non-exhaustive nature of section 15. Even though the court is directed to have regard to a listed matter, it is not bound to give effect to it, or to prioritise it over any of the other listed factors.

25. If section 15(1) is not exhaustive, even if a factor is not listed in section 15(1) as one to which the court *must* have regard, then both as a matter of linguistics and also having regard to the context provided by section 14, it must be *permissible* for the court to take it into account if it thinks fit, unless it is otherwise excluded by express words or necessary implication. As Moylan LJ observed in argument, section 15(1) does not say,

> "The matters to which the court is to have regard in determining an application for an order under section 14 include *to the exclusion of any others* …"

26. So far as relevant to the instant case, section 15(3) adopts the same approach, simply adding a matter to the list set out in section 15(1) in two identified cases, namely (i) where there is no dispute, and (ii) where there is a dispute,

> " … the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests)."

27. As a matter of linguistics, this subsection therefore simply identifies some additional matters to those listed in section 15(1) that the court *must* take into account ("*is* to have regard") in the two specified cases. But like section 15(1), there is no indication that these additional matters are intended in any way to be exhaustive or to bind the court in the exercise of its discretion. Like section 15(1), section 15(3) simply uses the words "include" and "have regard". It does not say, for example, "also include *to the exclusion of any others*".

28. Hence, section 15(3) means that where there is no dispute, in addition to the factors listed in section 15(1), the court *must* take into account the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust. Section 15(3) also means that where there is a dispute, in addition to the factors listed in section 15(1), the court *must* take into account the circumstances and wishes of the majority by value. The difference which section 15(3) makes is that in the case of a dispute, there is no *obligation* upon the court to have regard to the circumstances and wishes of the minority.

29. However, consistently with the structure of section 15 as a whole, there is nothing in the wording or structure of section 15(3) that expressly or by implication prevents the court from taking factors other than those listed into account. The structure and purpose of section 15 is to set out the factors to which the court is *obliged* to have regard: it is not intended to limit other factors that the court is *permitted* to take into account. The court is not prevented from having regard to the circumstances and wishes of the minority by value.

30. As such, I do not agree with the Judge's view in [28] that as a matter of linguistics the only meaning of section 15(3) that makes grammatical sense is if, in the case of a dispute, the court "can only take" one of the matters into account. Nor do I agree with the Judge's comments in [29] that "once a particular factor is expressly stated that it should not be taken into account, then it is not a reasonable interpretation to state that such a factor could then be included within the factors that may be considered". Section 15(3) does not expressly, or by implication, *exclude* the circumstances and wishes of the minority of beneficiaries by value from being taken into account by the court. It simply does not *include* these matters in the list of matters that *must* be considered.

31. Likewise, the Judge was wrong to conclude, in [29], that having been excluded through the front door by section 15(3), "the [wishes and circumstances] … of the minor[ity] beneficiaries cannot be considered 'through the back door' of taking them into account as one of the other factors". That is not what section 15(3) is designed to do.

32. Nor was the Judge's recourse to the linguistic canon of *expressio unius* correct. I accept that the maxim can be applied to section 15(3) so that in a case where there is a dispute, the express direction that the court is *obliged* to have regard to the circumstances and wishes of the majority by value, must mean that it is not *obliged* to have regard to the circumstances and wishes of the minority by value. However, and contrary to the

Judge's approach, since the purpose of section 15 was not to set out an exhaustive list of factors that the court is *permitted* to take into account, the maxim cannot operate to exclude any items not specifically mentioned from those that the court is permitted to take into account.

33. Those conclusions, reached entirely by reference to the primary reference point of the statute itself, are supported and put beyond doubt when consideration is given to the secondary materials.

34. The introduction of sections 14 and 15 TOLATA followed the work of the Law Commission in its 1985 Working Paper (No.94) entitled "Trusts of Land" and its 1989 Report (No. 181) entitled "Transfer of Land, Trusts of Land".

35. One of the proposals upon which the Law Commission consulted in its Working Paper was to create a new trust of land to replace the trust for sale, which would give the trustees a power to sell and a power to retain. The Law Commission recognised that this proposal would require the court to have a wider set of powers than had existed hitherto: see paragraph 10.8 of the Working Paper.

36. The Law Commission then continued, at paragraph 10.9,

> "10.9 There is one further aspect of s.30 [of the Law of Property Act 1925] which should be considered. At present, there are no statutory guidelines as to how the court should exercise its discretion. The guidance to be derived from the cases is based on the assumption that there is a duty to sell. If the court's powers are made wider, then it may seem advisable to give some guidance as to how the discretion should be exercised. Such guidance would assist in encouraging settlements out of court. Without it, litigation will have to take place before it is known how the courts will exercise their wider powers. What guidelines might be appropriate? …"

37. After considering a number of issues, paragraphs 10.9 and 10.10 continued,

> "10.9 … Where there are concurrent interests, it seems sensible that, although the court should have regard to the circumstances referred to above, *in the absence of special considerations*, the wishes of the majority in value should prevail.
>
> 10.10 To sum up, we are suggesting that the court should have regard to the following matters:-
>
> (i) the purpose for which the property was purchased, so that if that purpose no longer exists, the property should normally be sold;
>
> (ii) where the property is occupied by co-owners as a family home, the welfare of any children who occupy and who are the children of any person entitled to occupy under the trust;

> (iii) the wishes of the tenant for life;
>
> (iv) the wishes of the majority in value of those holding interests in possession in the property.
>
> *Having considered all these factors, the court should still be able to take into account other relevant considerations.*
>
> (my emphasis)

38. In its Report, following feedback on the Working Paper, the Law Commission recommended the adoption of a new trust of land to replace the trust for sale, giving trustees a power to retain and a power to sell. Under the heading "Powers of the Court" the Report made recommendations as regards the powers of the court to settle disputes concerning trusts of land under the new system. The recommendations included the following,

> 12.5 Our recommendations in relation to section 30 should be viewed in the context of the proposed new system as a whole. *It is our view that a restructuring of the trust powers, and in particular the elimination of the duty to sell, should clear the way for a genuinely broad and flexible approach.* The courts will not be required to give preference to sale, and, in making orders, will not be restricted to making ones which are simply ancillary to sale.
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> …
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> 12.7 *As with the question of trust powers generally, our aim is to express the courts' powers by way of a broad provision rather than by drawing up an inventory.* This may not give the courts many more powers than they currently exercise in relation to trusts for sale; our recommendations as to the making of applications and orders may be of greater importance in securing added flexibility. Similarly, if the trustees have more powers, then the courts' overall 'capacity' will be increased accordingly.
>
> …
>
> 12.9 As regards the exercise of these powers, it is our view that the court's discretion should be developed along the same lines as the current 'primary purpose' doctrine. This approach was moulded to practical requirements, and we consider that it gets the balance more or less right. *Nevertheless, we recommend that section 30 should set out some guidelines for the exercise of the court's discretion, the aim being to consolidate and rationalise the current approach.* The criteria which the courts have evolved for settling disputes over trusts for sale are ones which will continue to have validity in the context of the new system. One function of the guidelines will be to put these criteria on a statutory footing …

> 12.10 Aside from the welfare of children, the court is directed to have regard to five other factors: the intentions of the settlor; the purpose for which the land was acquired; the wishes of any adults entitled to interests in possession; the interests of any creditor who has obtained a charging order under the Charging Orders Act 1979 against any person for whose benefit trust land is held; and any other matters which appear to the court to be relevant. *These guidelines are not designed to restrict the exercise of judicial discretion by either narrowing it in breadth or giving certain interests formal priority over certain others. They are simply designed to indicate some of the more important factors to which the courts should have regard.*"
>
> (my emphasis)

39. The Report also contained a draft Bill and Explanatory Notes to give effect to its recommendations. The draft Explanatory Notes stated that what became section 14 of TOLATA was designed to ensure that the court's powers were sufficiently broad to enable it to make such order as it thinks fit for the settlement of any dispute concerning the trust or trust land. As regards what became section 15 of TOLATA, the draft Explanatory Notes simply stated,

> "This subsection sets out factors to which the court must have regard in considering whether to order sale of trust land."

40. When taken as a whole, it can thus be seen that the intention of the Law Commission was not to restrict the exercise of the court's discretion by setting out an exhaustive list of factors that it was permissible to take into account. Its purpose was merely to set out, by way of guidance, a list of "some of the more important factors to which the courts should have regard".

41. The conclusions that I have reached as to the meaning of section 15(3) can also be tested by a practical example. Take a case in which the beneficial interest under a trust of land is divided equally between two people, A and B, who take different views as to what should happen to the land. Since there is a dispute, on the Judge's interpretation of section 15(3), the court would be prevented from taking the circumstances and wishes of either A or B into account. Neither of them has the majority interest by value, and (according to the Judge) the circumstances and wishes of anyone else are necessarily excluded from being taken into account. That would be absurd. The correct interpretation is that the court would not be *obliged* to take the circumstances and wishes of A or B into account or give one priority over the other; but it would be *permitted* to take the circumstances and wishes of both into account and give each such weight as it considered appropriate. Indeed, if it did not, the court might well be ignoring a material factor.

42. That was the conclusion reached by Arden LJ (as she then was, and with whom Bodey J agreed) in White v White [2003] EWCA Civ 924 at [25]-[26]. The case concerned a family dispute where the beneficial interests in a property were held equally by a father and a mother who did not agree about the future of the property. The children of the couple were being cared for by the father, who resisted an application that the property be sold made by the mother, who had left the family home and who wished funds to be

released by the sale to buy a home for herself. The judge at first instance made an order for sale, and the father appealed.

43. At [25], Arden LJ recorded the submission of counsel for the father that where there were two beneficiaries who had an equal interest in the property and who did not agree about the future of the property, section 15(3) meant that the court could not have regard to the circumstances or wishes of either of them. Counsel submitted that the judge at first instance had therefore been wrong to have regard to the fact that the mother wished to have funds released from the property for the provision of a home for herself.

44. After referring to section 14(2), Arden LJ continued, at [26],

> " … Accordingly, the court has a discretion as to the order which it makes under section 14. Section 15(1) goes on to provide that there are certain matters to which the court must have regard. Thus, section 15(1) … provides that the matters to which the court is to have regard are the specified matters. [Counsel's] argument is that where a matter arises which is of the kind to which section 15(3) refers, the judge could have regard to it but he could not give it the same weight as the matters set out in section 15(1). For my part, I do not consider that that submission is correct. *The judge must have regard to certain specified factors as set out in section 15(1). The Act does not say what weight is to be given to those factors. Nor does it say that the specified factors are exhaustive of all the circumstances which the judge must consider. It was open to the judge, in my judgment, to have regard to the wishes of the mother and to her circumstances, and to give that factor such weight as he thought fit*."
>
> (my emphasis)

The third member of the Court, Thorpe LJ, dealt with the point much more succinctly, simply stating at [11] that he did not find the father's submission either easy to follow or persuasive.

45. On the facts of White v White, the Court of Appeal dismissed the father's appeal, holding that the first instance judge had given sufficient consideration to the rival considerations advanced by the father and the mother: see [18] *per* Thorpe LJ.

46. In the instant case, there was some debate about whether the decision in White v White was binding upon us. Mr. Sinnatt argued that it was not, because it only applied to a case where there was an equal division of interests, and Mr. Moffett seemed inclined to accept that. However, it seems to me quite clear from the passage that I have highlighted in Arden LJ's judgment, that the Court of Appeal in White v White took the same view of the non-exhaustive nature of section 15 that I have set out above, and I do not consider that Arden LJ's reasoning either depended upon the fact that there was an equal division of interests, or indicated that some special interpretation should be given to section 15(3) in such cases.

47. For completeness, I should record that we were also referred to the decision of Edwin Johnson QC (as he then was) in Baxter v Stancomb [2018] EWHC 2529 (Ch) at [68], [91] and [95]. The passages quoted were short references in the course of a long judgment in which the judge appeared to have some regard to the wishes of the beneficiary holding the minority interest, but stated that section 15(3) meant that the contrary circumstances and wishes of the majority owner had to prevail over them (at [91] and [95]). I did not find those references particularly helpful.

Disposal

48. For the reasons I have given, I would allow the appeal against the Judge's order on the basis that he misinterpreted section 15(3) TOLATA and misapplied it to the facts of the instant case. Since that was the only basis upon which the Judge differed from the decision of the District Judge, and there was no cross-appeal, I would simply restore the order made by the District Judge. The District Judge took into account all the relevant circumstances and reached a decision which appears to me to be both sensible and well within the reasonable ambit of his discretion under section 14.

Lord Justice Phillips:

49. I agree.

Lord Justice Moylan:

50. I also agree.