SARGEANT AND ANOTHER v. NATIONAL WESTMINSTER BANK PLC AND ANOTHER

COURT OF APPEAL (Nourse and Bingham L.JJ. and Sir George Waller): May 4, 1990

Appeal by National Westminster Bank plc and Kathleen Mary Sargeant against a decision of Hoffmann J. (see (1990) 59 P. & C.R. 182) given in the Chancery Division of the High Court in favour of the respondents Joseph Sargeant and Hilda Joyce Reece. The facts are stated in the judgment of Nourse L.J.

Ian Romer for the appellants (defendants).

David M. Burton for the respondents (plaintiffs).

NOURSE L.J. The rule that a trustee must not profit from his trust holds that prevention is better than cure. While it invariably requires that a profit shall be yielded up, it prefers to intervene beforehand by dissolving the connection out of which the profit may be made. At that stage the rule is expressed by saying that a trustee must not put himself in a position where his interest and duty conflict. But to express it in that way is to acknowledge that if he is put there, not by himself, but by the testator or settlor under whose dispositions his trust arises, the rule does not apply.

In this case two of the testator's children, as the trustees of his will, are the legal owners and trustees for sale of his three freehold farms. Under the terms of the will, each of them is absolutely entitled to one third of the net proceeds of sale and the net rents and profits until sale. They are also the tenants of the farms under tenancies which the testator originally granted to them and a deceased child during his life-time. The owners of the remaining third of the beneficial interest, subject to the tenancies, are the personal representatives of the deceased child.

The will contains an express power for a trustee to purchase the trust property. The two trustees now wish to purchase the freehold of the largest farm and to sell the two smaller ones for development. The personal representatives of the deceased child, relying on the rule that a trustee must not put himself in a position where his interest and duty conflict, asked Hoffmann J. to declare that the trustees are not entitled to sell the farms, either to themselves or to a third party, so long as their tenancies subsist. The learned judge declined to do so and made a declaration in the contrary sense.[(1)] The personal representatives of the deceased child have now appealed to this court.

The testator was Henry Charles Sargeant. He was both a butcher and a farmer. fie owned three freehold farms in Northamptonshire: Grafton Lodge Farm, Grafton Regis, of about 514 acres; Maple Farm, Collingtree of about 137 acres; and Stockwell Farm, Milton, of about 41 acres. I believe that the testator and his wife, Ethel Louisa, lived in the farmhouse

at Milton Farm. They had three children, Joseph Sargeant, Charles Henry Sargeant and Hilda Joyce Reece.

In about 1950 the testator took Joseph and Charles into partnership in the farming of the three farms. In 1960 the testator retired from farming and Hilda was admitted to the partnership in his place, each partner being entitled to a third share of the profits and assets. By three tenancy agreements dated December 22, 1960, the testator let the farms to his three children on tenancies from year to year. The tenancies became assets of the partnership between them.

By his will dated October 21, 1966, the testator appointed his wife and his three children, whom he defined as "my Trustees," to be the executors and trustees thereof. After making certain specific and pecuniary bequests, he gave his residuary real and personal estate, including the three farms, to his trustees on the usual trusts for sale and conversion (with power to postpone sale), for payment of funeral and testamentary expenses, debts and legacies and for investment of the residue. By clauses 9 and 10 he directed the income of his net residuary estate to be paid to his wife during her life, and, subject thereto and to payment of certain deferred pecuniary legacies on her death, he directed the capital to be held in trust for such of his children as should be living at his death, if more than one in equal shares absolutely.

By clause 11(iv) of his will, the testator directed and declared:

Any of the Trustees of this my Will shall have power to buy any portion of my estate real or personal either by private treaty or public auction including the right to bid at any public auction notwithstanding that he or she is a Trustee of this my Will and in the event of a sale by private treaty

the price shall be such as shall be agreed upon between the Trustee so buying and my other Trustees and in default of such agreement then at a price to be determined by the valuation of two different persons (one to be nominated by each party) or by an Umpire to be chosen by the two valuers.

The testator died on May 12, 1969, and his will was duly proved by his three children, power being reserved to his widow, who died on August 27, 1973. On March 3, 1974, the testator's son Charles died in an air crash intestate. He left a widow, Kathleen Mary Sargeant, and three children. His widow and National Westminster Bank plc ("the administrators") are the administrators of his estate.

After Charles' death Joseph and Hilda ("the trustees") exercised the option conferred on them by the partnership deed to acquire his share in the partnership, including his share in the tenancies. For their part, the administrators requested that the full open market rent for the farms should be ascertained and paid. That request was duly complied with b the trustees, who have continued to farm the farms in partnership together at a rent revised every three years and duly paid into the testator's estate and thence, as to one third, to the administrators.

It appears that for some 10 years after Charles' death the administrators did not question the validity of the trustees' tenancies. However, in 1984 they began to do so and by a letter dated November 1, 1985, their solicitors claimed that in the distribution of the testator's residuary estate Charles' estate was entitled either to a one third share of the vacant possession value of the farms or to land of an equivalent value. In due course the trustees were advised that they must seek the directions of the court and on March 12, 1987, they issued the originating summons in these proceedings with the administrators as the defendants thereto. It was not until December of that year that the administrators abandoned their claim that

the tenancies were invalid. Since then they have claimed that the trustees are not entitled to sell the farms so long as their tenancies subsist.

As to that claim, Hoffmann J. said:[(2)]

As tenants, they are under no duty to move out, whatever they may be offered and whether that would be reasonable or not. As landlords and trustees they can only sell what they have, which is the freehold interest subject to the tenancies. Consequently, the plaintiffs are, in my judgment, entitled to sell the freehold subject to the agricultural tenancy, and are under no duty because they happen themselves to be the tenants to co-operate in its sale in any other way.

The judge made declarations to the effect (1) that the tenancies were still valid and subsisting, (2) that the administrators were not entitled to receive in the distribution of the residuary estate of the testator either a one third share of the value of the farms as with vacant possession or land to the equivalent value and (3) that the trustees were entitled to sell the farms, either to themselves or to a third party, without previously securing the determination of the tenancies. He ordered the administrators to pay the trustees' costs of the proceedings.

The first and second declarations have not been challenged in this court. The administrators' attack on the third declaration has raised two new points. Through Mr. Romer they argue, first, that before the trustees make any sale subject to the tenancies, either to themselves or to a third party,

they must appoint at least one other person to act as a trustee, either jointly with or in place of themselves; secondly, that the trustees should not sell to themselves so long as their tenancies subsist; thirdly, that the power to purchase the trust property conferred by clause 11(iv) of the will only authorises a purchase by one trustee and not by two trustees jointly. The first and third of these arguments are new. Although Mr. Burton, who appears for the trustees, rightly said that they ought to have been advanced in the court below, he very sensibly did not object to their being advanced for the first time before us. It must certainly be in the interests of both sides that occasions for further disputes should so far as possible be eliminated.

Although the points were argued in a different order, the convenient course is to deal first with the construction of clause 11(iv) of the will. It would be natural to assume that it was only the testator's wife and children who were to be given the right to purchase the trust property under this provision. But that assumption is not consistent with the words which the testator has used. His wife and children are defined as "my Trustees," whereas clause 11(iv) refers to "any of the Trustees of this my Will," which includes any trustees for the time being. It is true that it is later provided that the price on a sale by private treaty shall be agreed between "the Trustees so buying and *my other Trustees*," which might mean "the others of my Trustees." However, I do not think that that is by itself sufficient either to restrict possible purchasers to the four named trustees or to make it necessary that one of their number should be a vendor and not at the same time a purchaser. On that footing clause 11(iv) is an entirely general provision allowing any trustee for the time being to purchase the trust property, irrespective of the identity of himself or the vendors or vendor. Once it is viewed in that way the provision must apply to two trustees who purchase jointly just as it applies to one who purchases on his own. That, I think, necessarily follows from the entirely general nature of the provision, although I should record that Mr. Burton also relied on section 61(c) of the Law of Property Act 1925, which provides that in certain instruments, including wills, unless the context otherwise requires the singular includes the plural and vice versa.

I am therefore of the opinion that the effect of clause 11(iv) of the will is to exclude a purchase by the trustees jointly from the operation of the analogous rule which absolutely disables a trustee from purchasing the trust property. Moreover, it is unnecessary for a new trustee to be appointed in order to make title. It is now established that two persons may convey land to themselves under section 72(3) of the Law of Property Act 1925.(3) I should add that Mr. Burton, who has advised the trustees throughout, has always accepted that if the trustees were to sell any of the land to themselves by private treaty, an additional trustee would be necessary, since without his presence there would be no way in which the price could be agreed upon in the manner required by clause 11(iv). On the other hand, he maintains that the trustees could sell to themselves by public auction without appointing a new trustee, because in that case the price would be determined by the market and not by agreement. Although there might still be a difficulty in regard to the fixing of reserves, that was not a point which was debated in argument and I therefore express no view on it.

I now come to the first and second arguments which were advanced by Mr. Romer on behalf of the administrators. Although he sought to keep them separate, they were both founded on the rule that a trustee must not put himself in a position where his interest and duty conflict. Mr. Romer relied on the following passage in the judgment of Lord Herschell in *Bray v. Ford* (4) which was described by Lord Upjohn in *Phipps v. Boardman* as the best statement of the rule (5):

It is an inflexible rule of a Court of Equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such

circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.

Mr. Romer submitted that the trustees' duty is to obtain the best price for the freeholds of the farms, which admittedly can only be obtained by a sale with vacant possession, whereas their interest is to preserve their tenancies and to sell subject to them, in which event the best price will not be obtained. Mr. Romer therefore submitted that if the trustees go ahead and sell subject to the tenancies, either to themselves or to a third party, they will be putting themselves in a position where their interest and duty conflict.

These submissions make it necessary for the origins of the trustees' various rights and duties to be closely considered. In 1960 the testator granted his three children tenancies of the farms. In 1966 he appointed them to be executors and trustees of his will. He also gave them equal shares in the beneficial interest in the farms. Between the death of the testator in 1969 and the death of Charles in 1974 each child was tenant, trustee and beneficiary in common with the others. Although each had the duties of a trustee, he or she also had the rights of a tenant and a beneficiary. None of them could have complained of the assertion of those rights by either of the others.

What then happened on the death of Charles? He necessarily ceased to be a trustee of the will. His estate retained his beneficial interest in the farms, subject to the tenancies. The arrangements between the children might have been such that his estate retained his interest in the tenancies as well. No doubt for a short period it did. But under the provisions of the partnership deed, to which Charles himself had been a party, the trustees acquired his share in the partnership, including his share in the tenancies.

Thenceforth each of the trustees continued to have the rights of a tenant and a beneficiary. But Charles' estate only had the rights of a beneficiary.

It cannot be doubted that the trustees have ever since been in a position where their interests as tenants *may* conflict with their duties as trustees to the estate of Charles. But the conclusive objection to the application of the absolute rule on which Mr. Romer relies is that it is not they who have put themselves in that position. They have been put there mainly by the testator's grant of the tenancies and by the provisions of his will and partly by contractual arrangements to which Charles himself was a party and of which his representatives cannot complain. The administrators cannot therefore complain of the trustees' continued assertion of their rights as tenants.

Since the absolute rule on which Mr. Romer relies does not apply, there is no absolute requirement that the trustees should appoint a new trustee before making any sale subject to the tenancies. Nor is there any absolute bar to their selling to themselves so long as the tenancies subsist. On the other hand, they must continue to discharge their fiduciary duties to Charles' estate in regard to the freeholds, in particular by obtaining the best price for them subject to the tenancies. In the end, the basis for Mr. Romer's arguments was seen to be a fear or a suspicion that the trustees will not properly discharge that duty. But there is no evidence either that they have failed to discharge their duties in the past or that they will fail to do so in the future. Without such evidence, it is wholly inappropriate for the court to interfere.

Mr. Romer relied on *Passingham v. Sherborn* where Lord Langdale M.R. removed a trustee who, under an express power conferred by the will, had taken a lease of the trust property. Mr. Romer submitted that that decision is authority for the proposition that the court will intervene to prevent a trustee from occupying a position where his interest and duty conflict,

even if he has been allowed to occupy it by the testator himself. But on a view of the case as a whole, in particular of the later judgment of the Master of the Rolls on the question of costs,[(6)] I think it clear that the trustee was removed because there was a suggestion, and probably some evidence, that he had committed breaches of his covenants as lessee. In other words, the court was on notice that he might already have acted in such a way that he could not properly perform his trust. That is not the position here.

Although that is enough to dispose of this appeal in favour of the trustees, it may be helpful if I comment briefly on the proposals which they have made. The trustees accept that the freeholds of all three farms must be sold, that being the only way in which the administrators' interest in them can be realised. We were informed by Mr. Burton that the proposals are as follows. The trustees wish to purchase Grafton Regis Farm, which is not believed to have any development value, at a price determined on the same basis as a sale by a landlord to a sitting tenant . They say that a sale by auction would not obtain the best price, because outside purchasers would. either not attend or would not bid up if it were known that the sitting tenants wished to purchase themselves. Further, although they would be prepared to appoint a new trustee either to agree the price or to instruct a valuer, they fear that no satisfactory individual will be willing to accept the appointment if he knows that he will be at risk of legal proceedings with the administrators. If no new trustee is appointed, the trustees will, in default of agreement, seek the approval of the court to the proposed sale under R.S.C., Ord. 85, r. 2(3)(d).

As regards Maple Farm and Stockwell Farm, planning permission has been obtained for the development of a farmyard of about one acre and negotiations are actively in progress for the disposal of the remainder of both farms for development as a golf course. If these negotiations are successful, the trustees propose to sell the land with vacant possession. If they are unsuccessful, the trustees will still go ahead and sell, but first they will surrender their tenancies in return for a premium, which, unless

agreed by the administrators. will again be approved by the court under R.S.C., Ord. 85, r. 2(3)(d).

In the light of the views which I have expressed as to the questions argued on this appeal, I see no objection to the trustees' proposals. Clearly it will be in the best interests both of themselves and of the administrators for any questions as to price or premium to be determined by agreement. But if that is not possible, the trustees will act entirely correctly and will be entirely protected by applying to the court under R.S.C., Ord. 85, r. 2(3)(d).

In my view Hoffman J.'s decision of the questions which were submitted to him was correct in every respect. The new arguments which have been advanced on behalf of the administrators in this court do not require the judge's declarations to be varied. I would therefore dismiss this appeal, and add such counter- declarations as may be appropriate.

BINGHAM L.J. I have had the benefit of reading in draft the judgment of Nourse L.J. I agree with it and with the order he proposes.

SIR GEORGE WALLER. I also agree.

Appeal dismissed with Costs.

1. (1990) 5 9 P. & C. R. 182.

2. (1990) 59 P. & C. R. 182 at p. 184.

3. *Rye v. Rye* [1962] A.C. 496 at p.505, per Viscount Simonds.

4. [1896] A.C. 44 at p.51.

5. [1967] 2 A.C. 46 at p.123.

6. (1846) 9 Beav. 424 at pp.423-436.

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