Neutral Citation: [2023] UKFTT 00032 (TC)

Case Number: TC08691

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video

Appeal reference: TC/2021/01666

*IHT – whether an Interest in Possession arose in an estate where the assets apart from the house in question were not sufficient to pay the inheritance tax*

**Heard on:** 4 and 5 July 2022, additional submissions September and October 2022
**Judgment date:** 10 January 2023

**Before**

**TRIBUNAL JUDGE SARAH ALLATT**

**Between**

**NICHOLAS JOHN HALL AND CHRISTOPHER VALENTINE LOPEZ AS TRUSTEES OF THE CAROLINA RABONI ESTATE**

**Appellant**

**and**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Ms Kate Selway, QC

For the Respondents: Dr Jeremy Schryber, litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video), with all parties attending remotely on the Tribunal Video Hearing System. A face to face hearing was not held because at the time of the listing, work from home guidance was in existence. The documents to which I was referred are the main bundle of 158 pages, an authorities bundle of 131 pages and each party's skeleton argument.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. After the hearing I then asked for further submissions and these were received in the form of submissions from the Appellants, HMRC's response to those submissions, and a further response from the Appellant. Additional authorities were also received.

### BACKGROUND

4. The factual background is largely uncontested, and is set out briefly below:

5. Mrs Raboni was a widow living alone at 51 Fortis Green ("the house") in East Finchley,London.

6. Mr Lazarro Boggia, following his divorce, went to live with his sister Rita Silva, a few doors away on Fortis Green. Mr Boggia had known Mrs Raboni and her late husband for many years. Mrs Raboni was also a friend of Mrs Silva.

7. From at the latest around 2002, Mr Boggia began to visit Mrs Raboni regularly, kept her company, did her food shopping for her, cooked, cleaned, and looked after her garden.

8. When Mrs Raboni's health worsened in 2003, Mr Boggia began to spend several nights a week at the house, staying in the spare room and keeping a change of clothes there.

9. It is disputed whether Mr Boggia actually took up residence with Mrs Raboni several years earlier. Whether he did or not has limited relevance to the case. It is clear that at the latest when Mrs Raboni was taken into hospital in 2003 Mr Boggia stayed at the house on a more permanent basis.

10. On 24 July 2003 Mrs Raboni made her last will ("the will") with the assistance of Mr Topping. Mr Topping was named as her executor and trustee, and in substitution the partners in the firm of Layzells Law LLP, known as Layzells Solicitors ("Layzells").

11. The beneficiaries under the will were Mrs Raboni's five nieces and nephews and Mrs Silva (together "the residuary beneficiaries"). The will also provided for the house to be retained as Mr Boggia's home during his lifetime, and for him to live there without charge (subject to him being responsible for insurance and maintenance costs).

12. Mrs Raboni died on 2 October 2004. After this, Mr Boggia informed the local authority that he had moved permanently into the house.

13. Probate of the will was obtained by Nicholas Hall and Norman Luper on 7 June 2005. (Mr Luper was replaced by Mr Lopez on 15 February 2017.) The grant stated that the gross and net values of the estate were £308,328 and £302,089

respectively. The estate comprised of little besides the house, the probate value of which was agreed with HMRC at £300,000. An IHT liability of around £15,600 arose on the deemed transfer of value on Mrs Raboni's death. There was insufficient cash in the estate to satisfy this liability.

14. The executors advised Mr Boggia and the residuary beneficiaries that Mr Boggia had a right to occupy the house as per the will.

15. The executors advised that there were insufficient assets in the estate with which to satisfy the IHT liability and that therefore the house would have to be sold in order to raise the necessary funds. They advised that the sale would be subject to Mr Boggia's right of occupation.

16. The residuary beneficiaries decided not to sell the house but rather to retain it as an investment. They paid the IHT from their own funds. This was a unanimous decision confirmed by each person in writing to the executors.

17. On 16 March 2017 Mr Boggia died, having remained resident at the house. The house was sold for £827,000 to a third party on the open market.

18. Following his death, the Appellants paid inheritance tax of £190,000 on the basis that Mr Boggia had held an interest in possession (IIP) in the house at the time of his death. This was the subject of a request for a refund on 26 April 2019 on the basis that Mr Boggia had not held an IIP in the house. Following correspondence, HMRC issued a Notice of Determination which is the subject of this appeal.

**THE APPEAL**

19. The sole issue in this appeal is whether, at his death, Mr Boggia had a beneficial interest in possession in settled property (the house).

**DISCUSSION**

20. There is much common ground in this appeal. The relevant clause in the will is clause 3 which says:

> I GIVE AND DEVISE unto my trustee my freehold house at 51 Fortis Green aforesaid UPON TRUST to sell the same with full power in his absolute discretion to postpone such sale for so long as he shall think fit without being liable for loss and to hold the net proceeds of such sale and the net rents and profits thereof until sale UPON TRUST in equal shares for my five nephews and nieces GIOVANNI RABONI LAWRENCE MARZOLINI ANDREW MARZOLINI JOSEPHINE LOTT ANGELA DAVIGHI and my friend RITA SILVA of 57 Fortis Green East Finchley aforesaid or the suvivors or survivor of them living at the date of my death and if more than one in equal shares absolutely and beneficially PROVIDED ALWAYS as hereinafter declared in the proviso to clause 4 in respect of my residuary estate where any beneficiary has predeceased me and PROVIDED FURTHER AND I DIRECT my trustee shall not sell or or dispose of the said freehold house during the lifetime of Lazzaro Boggia without his consent in writing to ntent that the same shall be retained as his home for so long as he shall desire without charge BUT he being responsiblefor the full cost of insuring the same against the usual householders comprehensive risks in its full reinstatement value from time to time as well as paying all outgoings relating thereto arid the expense of proper and adequate maintenance and repairs as well as decorations.

21. Clause 4 of the will says:

> I GIVE DEVISE AND BEQUEATH unto my trustee all the remainder of my property both real and personal of whatsoever nature and wheresoever situate not hereby or by any Codicil hereto otherwise specifically disposed of and including any property over which I may have a power of appointment or a power of disposition by will UPON TRUST to sell call in and convert into money all such parts thereof as shall not consist of money with full power in his absolute discretion to ,postpone such sale calling in and conversion for so long as he shall think fit without being liable for loss and to hold the net proceeds of such sale calling in and conversion and my ready money upon the following trusts namely:-
> (a) UPON TRUST to pay thereout all my just debts funeral and testamentary expenses and
>
> (b) UPON TRUST for my said five nephews and nieces and my said friend or the survivors or survivor of them living at the date of my death and if more than one in equal shares absolutely and beneficially PROVIDED ALWAYS that if any one or more of my said beneficiaries shall have died in my lifetime.leaving a child or children living at m.y death then such last-named child or children shall take by way of substitution that share of my estate which his her or their parent would have taken had he or she survived me and attained a vested interest under this my Will and if more than one in equal shares but contingently on attaining the age of Twenty-One years.

22. It is common ground that these clauses would have given Mr Boggia an IIP in the house had there been sufficient liquidity in the rest of the estate to pay the inheritance tax liability.

23. It is also common ground that had the property been sold to pay the inheritance tax liability, no IIP would exist. Mr Boggia's right was to reside at the property only, not to have any alternative accommodation provided.

24. The present situation arose partly due to the small quantum of the deficit in liquidity. If the inheritance tax bill had been larger, it is likely that not all of the beneficiaries would have consented to pay the tax out of their own pocket and wait an indeterminate period of time for their inheritance. However, as the amount due was relatively small, could be paid in instalments, and as Layzells at the time advised that the house would need to be sold subject to Mr Boggia's right of occupation, the residuary beneficiaries took the pragmatic decision to postpone the sale.

**THE LAW**

25. Interest in possession is not defined in statute but it is common ground that it is defined in the case of Pearson v IRC [1981] AC 753 as 'a present right of present enjoyment'.

26. s25 of the Administration of Estates Act 1925 sets out the duty of personal representatives:

> Duty of personal representatives.
>
> The personal representative of a deceased person shall be under a duty to—
>
> (a)collect and get in the real and personal estate of the deceased and administer it according to law;
>
> (b)when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;
>
> (c)when required to do so by the High Court, deliver up the grant of probate or administration to that court.

27. s34 of the Administration of Estates Act 1925 sets out that the estate of an individual shall be applicable to the discharge of expenses, including inheritance tax. It sets out the order in which assets in the estate shall be used to discharge these liabilities. This order is not of relevance here as there was a balance of inheritance tax due at the point that there was only one asset remaining in the estate, namely the house.

28. s6 of the Trusts of Land and Appointment of Trustees Act 1996 states:

> General powers of trustees.
>
> (1)For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.
>
> (2)Where in the case of any land subject to a trust of land each of the beneficiaries interested in the land is a person of full age and capacity who is absolutely entitled to the land, the powers conferred on the trustees by subsection (1) include the power to convey the land to the beneficiaries even though they have not required the trustees to do so; and where land is conveyed by virtue of this subsection—
>
> (a)the beneficiaries shall do whatever is necessary to secure that it vests in them, and
>
> (b)if they fail to do so, the court may make an order requiring them to do so.
>
> (3)The trustees of land have power to **[**acquire land under the power conferred by section 8 of the Trustee Act 2000.**]**
>
> (4). . . . . .
>
> (5)In exercising the powers conferred by this section trustees shall have regard to the rights of the beneficiaries.
>
> (6)The powers conferred by this section shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity.
>
> (7)The reference in subsection (6) to an order includes an order of any court or of the **[**Charity Commission**]**.
>
> (8)Where any enactment other than this section confers on trustees authority to act subject to any restriction, limitation or condition, trustees of land may not exercise the powers conferred by this section to do any act which they are prevented from doing under the other enactment by reason of the restriction, limitation or condition.
>
> **[**(9)The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land when exercising the powers conferred by this section.**]**

29. A number of other cases were raised by each side to demonstrate wording in a will that did, or did not, give rise to an interest in possession.

30. Inland Revenue Commissioners v Lloyds Private Banking Ltd, 1998 STC 559 held that the wording :

> '"I GIVE all my share and interest in equity as beneficial tenant in common in the proceeds of sale and in the net rents and profits until sale of the freehold property ... known as Hillcroft ... and all other (if any) my interest therein to my Trustee TO HOLD the same upon and SUBJECT TO the following trusts and provisions:

> (1) While my Husband ... desires to reside in the property and keeps the same in good repair and insured comprehensively to its full value with insurers approved by the Trustee and pays and indemnified [sic] my Trustee against all rates taxes and other outgoings in respect of the property my Trustee shall not make any objection to such residence and shall not disturb or restrict it in any way and shall not take any steps to enforce the trust for sale on which the property is held or to realise my share therein or to obtain any rent or [profit] from the property.
>
> (2) On the death of my said Husband ... I devise and bequeath the said property ... to my Daughter Kathleen Roberts-Hindle absolutely'

gave an interest in possession to the husband, as it was a present right to a present enjoyment of the property, not withstanding the property could not produce an income for the Husband.

31. HMRC submit that the wording in that will was very similar to the case here. Of course the crucial difference is the lack of liquidity was not present in that case.

32. I was referred to the case of Judge (personal representative of P Walden deceased) v HMRC [2005] STC 863. Both HMRC and the Appellant were in agreement with teh Tribunal in that case that the wording of the will in that case did not give rise to an interest in possession. The Tribunal held that the fact that she was treated by the executors and trustees as if she did was immaterial.

**SUBMISSIONS**

33. The Appellants submit that whilst in most cases, the right that a beneficiary will have at the end of the administration period is clear at the start of the administration period, it is not the case that that right exists during the administration period, and particularly in cases such as these, a potential right given under a will is subject to the correct administration of the will.

34. Whilst the estate is under administration, the right any beneficiary has is to compel due administration of the estate.

35. The duty of an executor is to collect in the assets of the estate, pay any liabilities, and to administer the estate according to the law (which, where there is a valid will, means according to the will).

36. The Appellants further submit that no action of the beneficiaries or the executors could confer on Mr Boggia a right to the estate that did not already exist in the will.

37. The Appellants therefore submit that the relevant point is what was the nature of the gift in the will to Mr Boggia. They say that this right is limited in scope to the occupation of that particular house, and that the combination of that limitation combined with the size of the estate meant that the rights under the will were never capable of maturing into an interest in possession.

38. The Appellants submit that any actions of the executors or the beneficiaries after Mrs Raboni's death cannot alter, to give or take away, the rights given to him under the will. Any actions that varied what he was entitled to under the will are an action of, for example, the beneficiaries, and not an operation of the will itself.

39. HMRC say that the IHT could have been raised in a number of ways, for example by a mortgage on the property by the executors, or, as actually happened, by the beneficiaries paying the inheritance tax liability.

40. They submit that as the tax was settled, and administration of the estate was completed, then provided the house was still available for occupation by Mr Boggia then the operation of clause 3 took effect, and therefore Mr Boggia had an interest in possession (that was given to him under the will).

41. HMRC submit that the Appellants' case places a significant weight on the fact that if the house had been sold, the IIP would not exist, whereas in fact the house was not sold.

42. HMRC submit that if the Appellants are right, then the need to meet even a £1 liability (beyond the assets in the estate except the house) would have frustrated the will of Mrs Raboni, and HMRC says that would be an undesirable and unnecessary outcome.

43. HMRC also submit that in the course of the proper administration of the estate, any decision to sell the property would have required, under s6 of the Trusts of Land and Appointment of Trustees Act 1996, a consideration of 'the rights of the beneficiaries' which in this case would have included a consideration of the rights of Mr Boggia. It is therefore unclear whether the proper consideration of those rights could have permitted the sale of the property.

44. The Appellants laid out their submissions in the format of 5 questions, and HMRC provided their reponses to the submissions contained within those questions, as well as their own submissions. The 5 questions are:

(1) What is an interest in possession?

45. As stated above, the leading authority is that of *Pearson* (Pearson v IRC [1981] AC 753) where the House of Lords defined an interest in possession as "a present right to present enjoyment" of trust property. (In Pearson the beneficiaries did not have such a right because the trustees had an overriding direction to accumulate the income).

46. It is a common ground that in different circumstances (there being sufficient other assets to pay the IHT) the will would have conferred an IIP on Mr Boggia. It is the Appellant's case that in the situation in point, it is not clear, without considering other factors, whether this will did give an IIP. It is HMRC's view that the construction of the will does give Mr Boggia an IIP.

(2) What is the nature of a beneficiary's interest in an unadministered estate?

47. The Appellants took me to the case of Commissioner of Stamp Duties-v-Livingstone [1965] AC 694, where the Privy Council had to consider the nature of a deceased beneficiaries rights in an unadministered estate. It was decided that during the administration of an estate, the assets were in the hands of the administrator and there was no beneficial interest at that time for the residuary legatees. This is explained by Viscount Radcliffe (p707-8):

> "When Mrs. Coulson died she had the interest of a residuary legatee in the testator's unadministered estate. ... It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed "duties in respect of the assets" as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense

> that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. ... At the date of Mrs. Coulson's death, therefore, there was no trust fund consisting of Mr. Livingston's residuary estate in which she could be said to have any beneficial interest, because no trust had as yet come into existence to affect the assets of his estate."

48. Here, and in other authorities, note is made of the fact that 'interest' in general language and in legislation, can mean a variety of specific legal concepts, and during a period of time when a person can be said to have an 'interest' in an asset, the nature of that interest can vary over time. It could, for example, mean chose in action, or a beneficial interest.

49. The Appellant submits that Mr Boggia did not have an interest in possession immediately upon Mrs Raboni's death. He had a right to compel due administration of the estate. Whether those rights could mature into an interest in possession depends on whether the will trust was capable of being achieved upon completion of the administration.

50. The Appellant's third question was:

> (3) What are the relevant rules governing the administration of estates?

51. Mrs Raboni's estate was solvent.

52. s34 and Schedule 1, Paerii of the Administration of Estates Act 1925 set out the order in which , in the absence of specific instructions in the will, the estate shall be applied towards the payment of liabilities.

53. The IHT due was just over £15,000. The estate contained the property and around £7,000 of other assets.

54. The IHT was due first from the residuary estate. Once that was exhausted, the balance of the estate was due from the specific legacy, namely the property.

55. The Appellant states that given these facts, it is still unclear that (contrary to the position where there had been greater liquidity) Mr Boggia's rights under the will matured into an interest in possession in the property.

56. Their fourth question is:

> (4) What was the nature of the clause 3 gift to Mr Boggia?

57. The answer to this is that the wording of the will gave Mr Boggia a right to reside in this property and only this property. There was no right to have another property purchased and a

right to live in that, nor was there a right to rent out the property and for Mr Boggia to enjoy the income. The Appellant contends that the combination of these limited rights and the lack of liquidity in the estate mean that Mr Boggia's rights *under the will* were not capable of maturing into an interest in possession. They then pose the 5th question:

> (5) Did the actions of the executors and beneficiaries somehow confer an interest in possession on Mr Boggia?

58. It is common ground that this hearing is about rights conferred by the will. HMRC agree that it is not relevant to try to determine what Mrs Raboni's wishes may have been and whether or not the will reflected that. Likewise HMRC agree that they are not submitting that the interest in possession they believe exists was conferred otherwise than by the will.

59. It is clear that Layzells considered Mr Boggia did have a right to occupy the property. They advised that any sale of the property would be subject to Mr Boggia's right of occupation.

60. It is clear that a sale was contemplated.

61. It is clear that Mr Boggia was not wealthy and often struggled to pay the insurance on the property.

62. Mr Boggia was permitted to remain at the property but the Appellants' contention is that this was not due to the maturation of his rights under the will into an interest in possession. The Appellants contend that his legal status was that of gratuitous licensee, and arose as a result of the decision of the Beneficiaries not to sell the property.

**DISCUSSION**

63. The question for this Tribunal is whether Mr Boggia had an interest in possession in the Property granted to him by the will.

64. This situation arose because of the complicated situation over a relatively small amount of money due to HMRC with no clear legal route to procure payment of that money.

65. It is clear that had the house been sold Mr Boggia would not have had an interest in possession after the sale.

66. HMRC submit that the Appellants' case rests strongly on this hypothetical, and is therefore a weak case because the sale is hypothetical.

67. HMRC submit that as the house was not sold, and the estate was properly administered, and at the end of the administration Mr Boggia obtained a right to occupy the house for life.

68. It is unclear what the legal position would have been on the sale of the property at a time shortly after death. It is known that Layzells believed that any sale would have been subject to a right of occupation by Mr Boggia, but it is extremely unclear whether that is the correct legal position, and whether a different firm would have advised differently. It is also possible that had the Beneficiaries contemplated a sale with vacant possession, Mr Boggia may have been able, legally if not practically, to take advice on what rights he had as a putative beneficiary of the will and as a current resident of the property.

69. It appears that the route that the Beneficiaries took was extremely practical.

70. It does not follow that, had everybody with a potential benefit under the will stuck to insisting on their legal rights, the route that was taken was the route that had to be taken.

71. It is also not clear whether, as a practical route was taken rather than everyone exploring what the legal position was for each of the beneficiaries, any end position is as a result of actions of the beneficiaries or executors, or the maturation of rights under the will.

72. HMRC contend it is maturation of rights, the Appellants contend otherwise.

73. It is clear, as HMRC point out, that it would also have been possible for the house to have been mortgaged to pay the IHT bill.

74. It is contested whether that could have been accomplished without agreement of the Beneficiaries, and therefore it is unclear whether, in the absence of the practical solution taken, it would be the route that legally had to be taken. In fact, it seems more likely that it was an option but not a legal necessity.

75. HMRC point to the fact that if an extremely small liquidity deficit can frustrate the wishes of the testator as expressed in the will, this would be an undesirable and unnecessary legal outcome.

76. It is of course open to testators to take legal advice on the effects of the will under a number of practical situations, and draft the will accordingly.

77. I consider that the case for each side requires consideration of hypothetical situations, because the practical route that was taken cannot, in and of itself, confer rights not given under the will.

78. On the face of it, the executors had two choices – to sell the house (after consideration of the rights of all the beneficiaries) or to raise the funds another way.

79. The Appellants contend that (in the absence of any input from beneficiaries) the executors were under a duty to sell the Property. A failure to carry out that duty would have been a breach of their fiduciary obligations and any one of the Beneficiaries could have exercised their right to compel due administration of the estate in order to realise their entitlement under the will. This is because (i) an executor's duty is to get in and realise the assets of the estate, pay the debts and liabilities and distribute the estate in accordance with the terms of the will and in accordance with law; and (ii) in the absence of an agreement not to sell, the Property was required to be sold in order to pay the estate's liabilities. Given the lack of liquidity in Mrs Raboni's estate and given the limited nature of the occupation rights granted to Mr Boggia (which did not extend to the right to occupy any substitute property purchased from the net proceeds of sale of the Property after payment of the IHT), any one of the Beneficiaries would have been entitled to insist on the Property being sold. The executors would not have been able to resist having to take such a course of action.

80. HMRC contend that the executors were not under a duty to sell the property, but to 'collect and get in' the property of the deceased and 'administer it according to law'.

81. HMRC agree that the Property was applicable towards the discharge of the estate liabilities, but disagree that this imposes a duty on the executors to sell the property. HMRC disagree with the assertions made by the Appellants about the duty to sell and that the beneficiaries would have been able to insist on this. HMRC submit that "applicable" here means "may be applied" or "is capable of being applied" but not "must be applied". Section 34 and the First Schedule to the Administration of Estates Act 1925 also do not specify the way property could or should be applied to discharge the debt. Those provisions do not say that the property must be sold and the proceeds used to pay the expenses.

82. I consider that whilst the Appellants may possibly not have been under a duty to sell the property, it is important to consider what was within their power, and what could be compelled.

83. The IHT needed to be paid. It is the executors' duty to settle the liabilities of the estate, from the funds of the estate. In the absence of the executors positively doing anything to pay it, and in the absence of any settlement by the beneficiaries themselves (which could not be

compelled) then presumably HMRC as a creditor would have taken steps to compel the payment.

84. Those steps could have included forcing a sale, and selling the property was undoubtedly within the powers of the executors.

85. However, no creditor could compel the taking out of a mortgage or other loan to pay the IHT. Had the executors chosen to take out a mortgage, which was also within their power, the Appellants contend that they could only have done so, without risk, with the agreement of the beneficiaries. They point out that as a practical point there were no estate assets from which to service regular mortgage repayments. Executors are of course not obliged to commit their own funds when administering an estate. Without the agreement of the beneficiaries the Appellants say this would have been an impossible solution to implement. If the mortgage interest had been rolled up, this would have been at a cost to the estate. The incurring of such interest would, the Appellants contend, unless the Beneficiaries agreed to it, be a breach of the executors' fiduciary and statutory obligations. The executors would also be committing the tort of devastavit (wasting the assets of the estate) and could be sued by any Beneficiary seeking to compel due administration of the estate.

86. The Appellants say that if the executors had chosen to mortgage the Property without consultation and agreement with the Beneficiaries, the Beneficiaries could have sued the executors for breach of fiduciary and statutory obligations to administer the estate in accordance with the law, and for the tort of waste (devastavit). The executors would also be vulnerable to a claim for their removal under s. 50 of the Administration of Justice Act 1985. They say that Mr Boggia was a mere gratuitous licensee and had no rights in relation to the Property.

87. HMRC disagree that Mr Boggia was a gratuitous licencee as their position is that he held an interest in possession. HMRC continue to state that a mortgage would have been within the executors power and could have been considered.

88. Whilst I agree with HMRC that the Administration of Estates Act 1925 does not specify how property should be used to meet liabilities, in this case, there is one asset and one liability. It is clear that the liability must be satisfied, and therefore I disagree with HMRC that in this case there was any option (absent agreement from the Beneficiaries, which cannot be a right granted under the will) but to sell the Property.

**DECISION**

89. I consider that in order to decide what right Mr Boggia had under the will, I need to consider what route the executors could have been compelled to take, in the absence of any consent by any of the parties.

90. Had the executors done nothing at all, the residuary beneficiaries could have compelled administration of the estate, and HMRC could have compelled the payment of their liability.

91. The only route that could have been compelled for the payment of the liability was the sale of the house.

92. It is common ground that had the house been sold, there would be no interest in possession.

93. It therefore follows that, due to the presence of a creditor once the estate contained only the Property, Mr Boggia could not enforce a right under the will to live in the Property.

94. I therefore consider that, at the date of his death, Mr Boggia did not have an interest in possession in the Property.

95. This Appeal is therefore ALLOWED.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

96. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**SARAH ALLATT**
**TRIBUNAL JUDGE**

**Release date: 10th JANUARY 2023**