

Jeannette Robinson Belyea and another - - - *Appellants*

v.

Samuel A. McBride and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 13TH JULY, 1942

Present at the Hearing:

VISCOUNT MAUGHAM

LORD THANKERTON

LORD RUSSELL OF KILLOWEN

LORD MACMILLAN

LORD ROMER

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal raises a question of very considerable difficulty as to the true construction and effect of the testamentary dispositions of a testatrix (one Maria Famicha Ganong) in relation to certain shares of \$100 each owned by her in the common and preferred stock of a company called Ganong Brothers Limited.

The relevant facts are as follows:—

The company was formed in the year 1916 under the laws of the Dominion, and purchased as a going concern, a business which was being carried on by a company incorporated under the laws of the Province of New Brunswick. The testatrix made her will on the 25th September, 1924. At that time she owned 1,100 preferred shares and 436 common shares in the capital stock of the company. In addition she had by a trust indenture of the 15th March, 1918, assigned to trustees 3,790 preferred shares and 3,600 common shares (which had been bequeathed to her by her deceased husband) upon certain trusts for her own benefit during her life and after her death for the benefit of certain named relatives of her husband. This trust indenture was in certain events revocable, and it was in fact revoked by the testatrix with the result that at her death her estate included 4,890 preferred shares and 4,036 common shares.

The rights of the preferred shares are declared by bye-law No. 54 of the company. They "shall have a fixed cumulative preferential dividend of seven per cent. per annum payable as may be convenient half-yearly." On a winding-up the holders "shall be entitled to payment of their stock in full at par (together with any dividends in arrear) and no more . . . in preference and priority to any payments to holders of the common stock." The bye-law continues thus:—

"The said fixed dividend of seven per cent. shall be payable only out of the net profits of the Company, but they shall be cumulative dividends, that is to say, if not earned fully and paid in each year, the amount of such dividend or any portion thereof remaining unpaid from time to time shall be paid out of the first net profits of the Company accumulated or earned thereafter; and no dividends shall be declared or paid on the Common Stock of the Company until after payment in full of all such dividends at the rate of seven per cent. per annum then payable on the Preference Stock, but in case any dividend on such

Preference Stock or any part thereof is not paid when due and payable as aforesaid, owing to lack of profits sufficient therefor, the amount so payable and not paid shall bear no interest.

The said dividends shall begin to run from the first day of July, 1916."

The certificates of the preferred shares state their rights in the following terms:—

" CONDITIONS OF PREFERENCE SHARES.

1. The holders of preference shares shall be entitled out of the net profits whenever ascertained, to a fixed cumulative preference dividend at the rate of seven per cent. per annum on the amount paid up thereon in priority to any payment of dividend upon the Common Stock, such dividend to be paid at such times as the Directors may determine but to be payable only out of the profits, and the holders shall not be entitled to participate in further dividends or profits.

2. The holders of preference shares, in case the Company shall be wound-up or its assets otherwise distributed shall have the right to have the surplus assets, applicable for distribution among the shareholders, applied first in payment of the Capital paid up on the said preference shares with all cumulative dividends thereon before any proportion of such surplus assets is distributed among holders of shares not entitled to such preference, but the holders of the said preference shares shall not be entitled to participate in any surplus remaining after the whole amount of capital paid up on such preference shares has, with cumulative dividends, been returned to the holders thereof."

The testatrix by her will appointed her brother and sister (the appellants) and one Samuel McBride to be executors and trustees. She ratified and confirmed the trust indenture of the 15th March, 1918; as to the rest of her shares in the Company she bequeathed the bulk of her preferred shares to or in trust for the children of her brother, the remainder she bequeathed to charitable institutions and to other persons. She made no specific bequest of her common shares, which accordingly would form part of the residuary estate, which she devised and bequeathed to the appellants.

Paragraphs 17 and 20 of her will ran thus:—

" 17. I do hereby will and declare that my Executors shall pay out of my personal estate all Succession Duties which at my death may become payable upon the bequests hereby made, it being clearly understood that my estate shall not be liable and nothing herein shall make my estate liable for any Succession Duties or other dues, duties, taxes or other charges or expenses of any kind payable or which may be or become payable upon or in respect of any moneys, stocks, shares of stock, gifts or other benefits which have passed or which may hereafter pass under the provisions of the said Trust Agreement dated the 15th day of March A.D. 1918 mentioned in said Paragraph fifteen (15) of this my Will."

" 20. I hereby further will and declare that it is my intention and purpose that any and all of the shares of Ganong Bros. Limited, so hereby bequeathed as aforesaid, shall be and remain the property of my estate and be held by my Executors and Trustees as part of my estate until after the first annual meeting of Ganong Bros. Limited shall have been held subsequent to my decease and until all dividends accruing on said shares of stock from the business of the year in which my decease may occur shall have been paid to my estate for the benefit of my estate intending by this Section of my Will to show that both semi-annual dividends on the Preferred Shares that will be paid during the fiscal year subsequent to my decease but which will have been earned during the fiscal year [in which] my decease may occur must be paid to my estate before making any transfers of the stock, shares devised and bequeathed as aforesaid."

The Company failed to maintain payment of the dividend on the preferred shares, the last such dividend being declared and paid in July, 1933. The dividend was again passed in January and July, 1934, nor has any dividend been subsequently paid. It was this default that entitled the testatrix to put an end to the trusts of the indenture of the 15th March, 1918, and to have the shares comprised therein to be retransferred into her name; and on or about the 29th September, 1934, she exercised her rights in this respect.

On the 13th October, 1934, she executed a second codicil to her will, a first codicil dated the 21st August, 1926, being immaterial for the purposes of this appeal.

By the second codicil she revoked the paragraph of her will by which she had confirmed the trust indenture of the 15th March, 1918; she made specific bequests of the said 3,790 preferred shares. She also made specific bequests of common shares amounting to 3,644 shares, declaring that she realised that the common shares had, at that time, no monetary value, but that she hoped that eventually they might become of worth and value. She made no alteration of importance in regard to the preferred shares specifically bequeathed by her will. Clauses 20 and 21 of the second codicil are in the following terms:—

“ 20. I hereby revoke and make void Paragraph 17 of my said last Will and Testament dated the twenty-fifth of September, 1924, and in lieu thereof and in substitution therefor I Will and declare that my Executors and Trustees shall pay out of my personal estate any and all Succession Duties which may at my death become payable upon any of the bequests made in my said last Will and Testament or in any Codicil thereto, including this Codicil, it being my intention that all gifts and bequests, including gifts of shares in the Capital Stock of Ganong Bros. Limited, either Preferred or Common, to any nephew or niece of my late husband, shall be free from Succession Duty.

But while I make the foregoing provision with respect to Succession Duty it is my express will and intention and I hereby direct that notwithstanding anything hereinbefore contained any and all of the shares of the Capital Stock of Ganong Bros. Limited, in and by my said last Will and Testament and in and by this Second Codicil to my said last Will and Testament bequeathed by me, shall be and remain the property of my Estate and be held by my Executors and Trustees as part of my Estate until all dividends on the Preferred Shares accrued to the date of my death have been paid in full and also until the two half yearly dividends which shall accrue immediately subsequent to the date of my death shall have been paid in full to my Estate for the benefit thereof, it being my intention by this paragraph of this Second Codicil to my Will that all dividends on said Preferred Shares accrued due to the date of my death, whether earned or declared or not, together with a full year's dividends accruing due after my death, whether earned or declared or not, shall be paid to my Executors and Trustees for the benefit of my Estate before making any transfers of the stock or shares of Ganong Bros. Limited, Common or Preferred, devised and bequeathed under my said last Will and Testament and under this Second Codicil thereto.

21. In all other respects I do hereby ratify and confirm my said last Will and Testament, save in so far as any part thereof shall be revoked or altered by this Codicil thereto or any previous Codicil.”

The testatrix died on the 30th November, 1934; and her will and codicil appear to have been proved by Samuel A. McBride alone. Being, not unnaturally, in doubt as to the meaning and effect of clause 20 of the second codicil, he issued an Originating Summons, in his capacity of sole executor and trustee, in the Supreme Court of New Brunswick (Chancery Division), joining the residuary legatees and others interested as defendants, for the determination of the following questions, viz., “ (1) Who are entitled to the shares in the capital stock of Ganong Brothers Ltd., either common or preferred bequeathed under any clauses of either the last will and testament of Maria Famicha Ganong or the second codicil thereto? (2) When are the beneficiaries of the said shares entitled to delivery thereof? ” To these questions a third was subsequently added, viz., “ (3) Under the circumstances of the present case are any dividends and, if so, what, apportionable.”

The summons was heard by Baxter, C.J. who by his judgment of the 15th January, 1940, answered the questions thus:—“ (1) The persons and institutions named therein. (2) Immediately. (3) No question of apportionment arises.”

On appeal, the Appeal Division of the Supreme Court, by a majority, took a different view, and by order of the 19th April, 1940, returned the following answers to the questions—“ (1) The persons and institutions named therein subject to a charge upon the shares bequeathed by the will

and second codicil in favour of the executors and trustees to the amount of two years dividends on the preferred shares so bequeathed, viz., \$68,460. (2) When the amount of the said charge has been paid to the estate or the said charge released. (3) No question of apportionment arises."

The present respondents appealed to the Supreme Court of Canada, and that Court by its judgment dated the 20th December, 1940, allowed the appeal and ordered that the judgment of the Chief Justice of New Brunswick be restored. The residuary legatees have, by special leave, appealed to His Majesty in Council.

Those being the relevant facts which have led up to this present appeal, there can be no room for doubt as to the difficulty of the primary question which arises for consideration, viz., the true meaning of the language used in clause 20 of the second codicil. Divergent views have prevailed in the different Courts in Canada.

The Chief Justice thought that all that the testatrix meant was, that her estate was to receive any dividends which might be unpaid at her death, and any dividends which might accrue in the two half-yearly periods after her death, and that the shares were not to be transferred until after those dividends had been paid. "I find," he says, "that the shares vested in the takers at the death of the testatrix, but that the executor could not transfer them upon the books of the company until certain dividends were paid; that no such dividends ever accrued; that the time fixed by the will had elapsed, and that the legatees are entitled to receive their legacies." As their Lordships read this judgment it depends upon the view that the testatrix refers only to dividends which have "accrued" or "accrued due," in the strict sense of having been declared by the company as to some before her death (but not paid till after), and as to two half-yearly dividends after her death. He rejects the words "whether earned or declared or not" as meaningless in this connection, and as having been introduced in consequence of the draftsman having been confused "between preferential shares *per se* and the rights of preferential shares upon a winding up." The result of this view would be that the period for the retention of the shares by the executors would terminate when the two half yearly dividends after her death had either failed to be declared, or having been declared had been duly paid to the executors; and therefore no question of perpetuity could arise. When the period terminated in July, 1935, the shares were (subject to the executor's year) transferable to the legatees.

Grimmer J. (the dissenting judge in the Appeal Division) took, it appears to their Lordships, the same view as that taken by the Chief Justice. He treated the words "whether earned or declared or not" as only applicable to the case of the Company being wound up, and therefore "utterly meaningless in the connection in which they have been introduced." As a result he disregards the words, and holds that "the reservations in section 20 of the second codicil were not designed to deprive the legatees of their legacies, but merely to ensure that the dividends, if any, shall go into the estate." Accordingly when it transpired that none of the dividends described in the second codicil had been declared, the legatees were entitled to have the shares transferred into their names.

Harrison J. delivered the judgment of himself and Fairweather J. in the Appeal Division. They were of opinion that although (agreeing with the Chief Justice) the shares vested immediately in the legatees, the codicil imposed upon the common and preferred shares a charge in favour of the executors of the amount of two years dividends at seven per cent. per annum upon the 4,890 preferred shares, viz., a sum of \$68,460. They disagreed with the view that the words "whether earned or declared or not" were meaningless and that there could never be accrued dividends unless there were profits out of which they could be paid and unless they had been declared; and they pointed to bye-law 54 of the Company as a context in which the words "accrued due" and "dividends in arrear" bore the meaning of dividends whether earned or declared or not. They held that the 20th paragraph of the second codicil (giving full effect to its language) required in the events which had happened the executors and

trustees to retain the shares until the amount of two years dividends on the preferred shares had in fact been paid. They were however of opinion that the rule against perpetuities would not apply, because in the present case "the legatees have a vested interest in the shares bequeathed to them subject to a charge on all the shares of stock of Ganong Brothers Ltd. bequeathed, which charge is held by the executors and trustees for the benefit of the two residuary legatees both of whom are living. By the joint action of all these parties the stock could be conveyed at any time after the death of the testatrix."

In the Supreme Court of Canada the only judgment delivered was that of Crocket J., which was concurred in by his colleagues Davis, Kerwin, Hudson and Taschereau JJ. He was of opinion that the words in paragraph 20 of the second codicil "all dividends on said preferred shares accrued due to the date of my death" and "dividends accruing due after my death" could only mean dividends which had become payable by the corporation to the shareholder, in face of the language used in the share certificates and bye-law No. 54. "A preferential dividend—" he says—"at a fixed rate may be said of course to be always running between fixed dividend periods, and perhaps in that sense to be accruing from day to day, but how can these dividends in the face of the express terms of the share certificates and of the by-law in pursuance of which they were issued, possibly be said to have 'accrued due' or to be 'accruing due', when no profits have been earned to provide for their payment, and no declaration has been made by the directors fixing any date therefor." The learned judge after pointing out that the wording of the clause points to payment by the company and excludes the idea of any payment by the beneficiaries, then says that if the clause be read without the qualifying phrase (by which he can only mean the words "whether earned or declared or not") and if the other words be given their ordinary meaning, "they clearly contemplate only the payment of dividends which the directors of the corporation might legally declare to be payable thereon on definitely appointed dates." He then asks whether the testatrix intended that the shares should be withheld only for a year after her death, or did she intend that the withholding should continue for an indefinite time. After dismissing the latter view as inadmissible, he held that the absolute bequests of the shares were only modified to the extent of withholding from the legatees their right to receive the dividends for the two years in question, in the event and only in the event, of their being paid by the Corporation within a period of one year following the death of the testatrix.

It thus appears that while the Chief Justice of New Brunswick, Grimmer J., and the Supreme Court of Canada construed paragraph 20 of the second codicil as directing the executors to retain the shares for one year only after the death of the testatrix in order that the dividends, if any, declared and paid within that time might form part of her estate (a construction which involved no question of perpetuity), the majority of the Appeal Division construed the clause as directing retention until such time as two years' dividends were in fact paid, and imposing a charge on the shares for the amount thereof, which the legatees could redeem at any time, with the result that, by the joint action of the legatees of the shares, the executors and the residuary legatees, the shares could be disposed of at any time after the death of the testatrix, and the rule against perpetuities be thus free from infringement.

The case was fully and carefully argued before the Board, and having considered the respective arguments their Lordships have reached the conclusion that the appeal should fail, but as will appear, for reasons different from those which have hitherto prevailed.

The respondents contended that the bequests to the legatees of the shares were clearly vested gifts of the shares and all rights attaching thereto, and that by the reservation of certain dividends in favour of the estate of the testatrix she had not made any sufficiently clear disposition of those dividends in favour of any substituted legatee, to justify the view that the legatees were deprived of the ownership thereof. Their Lordships do not accede to this argument; for reasons which will appear later, they are of

opinion that the testatrix intended by the reservation of the dividends in favour of her estate, to add the amount thereof thereto for the benefit of her residuary legatees.

Their Lordships agree with the opinion of the Supreme Court of Canada that no charge for the amount of the dividends was imposed upon the shares by the second codicil; indeed this argument was not advanced before the Board.

Their Lordships also agree with the opinion of all the judges in Canada that the legacies of the shares vested in the legatees on the death of the testatrix, subject only to whatever qualification or limitation of their rights is (in the events which have happened and upon its true construction) imposed by paragraph 20 of the second codicil.

It is upon this question of construction that their Lordships find themselves compelled respectfully to differ from the Chief Justice of New Brunswick, Grimmer J.; and the Supreme Court of Canada.

The over-riding duty of a Court of construction is to construe the language which the testatrix has in fact employed, giving due weight to all the words used, and rejecting none to which a meaning can reasonably be assigned. It is by failing to observe this canon of construction, and by omitting to give due effect to certain words of the codicil, that these learned judges have reached a construction of paragraph 20 of the second codicil which their Lordships think is not warranted by the words of the testatrix.

It is legitimate to consider the circumstances in which she made her will in 1924 and her second codicil in 1934. Her will was made at a time when the Company had without fail paid the seven per cent. on the preferred shares. No dividend was in arrear; the idea of default was not a matter of present concern. The 20th paragraph of the will (which refers only to preferred shares) assumes that the dividend thereon will be regularly declared and paid, and, as their Lordships read it, is framed so as to provide that the legatees shall not get those dividends which though declared and paid after the death of the testatrix, are really attributable to her lifetime, as having been earned during her existence. Although that paragraph is not in terms revoked by the second codicil it is obviously superseded and rendered inoperative by the 20th paragraph thereof.

That last mentioned paragraph begins by throwing on the residuary estate the heavy burden of the succession duties payable on all bequests. The testatrix then adds, as a corollary or sequel to that provision (and, as their Lordships think, as a compensating benefit to residue), the reservation which falls to be construed. At the date the company is no longer prosperous; the preference dividends are already two half years in arrear. The codicil is made on that footing. The testatrix no longer assumes that the dividends will be regularly declared or paid; on the contrary she expressly provides for their retention as part of her estate (for the benefit of residue) "whether earned or declared or not" i.e. at the appointed time.

It is at this point that their Lordships cannot agree with the construction which has prevailed in Canada. The Chief Justice, Grimmer J., and the judges of the Supreme Court have struck those words out of the codicil, rejecting them as meaningless, because repugnant to the phrases "dividends . . . accrued due" and "dividends accruing due", which they say according to the legal meaning of the words, and according to the express terms of the share certificates and the bye-law, can only exist when profits have been earned to provide for their payment, and a declaration of dividend by the directors has been made.

To their Lordships, however, it seems that what has to be sought is not the legal meaning of those words, or the meaning of the express terms of the certificate or bye-law, but the meaning of those words as used in the second codicil by the testatrix; and it appears to them that if the words "whether earned or declared or not", instead of being rejected as meaningless, are given their due weight, they are a dictionary which the testatrix has supplied, and which shows that she is not using the words "dividends . . . accruing due" and "dividends accrued due" in the strict sense.

but is directing a retention of the shares until (in the event which happened) the arrears of the preference dividends for the two years ending on the 1st July, 1935, had been declared and paid in full to her executors.

If this be, as their Lordships think it is, what the testatrix has said, she has purported to cut down the vested gift of the preferred shares by a gift to the residuary legatees of moneys to be paid if and when dividends for the two years are declared and paid, or by a gift of non-existent property if and when it comes into existence. In whichever light the gift is viewed, it is a gift upon a contingency which may not be fulfilled within the perpetuity period. The gift is therefore bad, and of no effect.

The resultant position is that the direction to retain the preferred shares is inoperative. It is a postponement of part of the enjoyment of a gift, the enjoyment of the part which is postponed not having been effectively given to any one else in the meantime. As regards the retention of the common shares it is difficult to see how the direction to retain could ever have prevailed against the legatees to whom they were bequeathed.

For the reasons indicated their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of the respondents who appeared.

In the Privy Council

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AND ANOTHER

v.

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DELIVERED BY LORD RUSSELL OF KILLOWEN

Printed by His Majesty's STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1942