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In the Privy Council.

No. 43 of 1950.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

THE COMMISSIONER OF STAMP DUTIES of the State of New South Wales

AND

10 FRANCIS HARMSWORTH WAY, GEORGE ROLAND LOVE (since deceased), WILLIAM GARRICK WILSON, JOHN CADWALLADER, and MILTON REWI DUNKLEY the Executors of the Will of the late ROBERT WINTON GILLESPIE Respondents

UNIVERSITY OF LONDON
W.C. 1.
20 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES
Appellant

Case on behalf of the Respondents

1. This is an appeal by leave from a Judgment of the High Court of Australia pronounced on the 18th day of August 1949 whereby that Court constituted by Dixon McTiernan Williams and Webb JJ allowed with costs an appeal from the Judgment of the Full Court of the Supreme Court of New South Wales upon a case stated by the Commissioner of Stamp
20 Duties for the State of New South Wales the present Appellant.

2. The case was stated by the Commissioner at the request of the Respondent pursuant to Section 124 of the Stamp Duties Act 1920-1940 (N.S.W.).

3. The Repondents who are the executors of the Will of Robert Winton Gillespie deceased objected to the amount at which the Appellant assessed the estate of the said deceased for death duty under the said Stamp Duties Act.

4. The appeal raises questions as to the true construction of a settle-
30 ment executed by the said Robert Winton Gillespie in his life-time and in relation thereto questions as to the construction and application of Section 102 (2) (a) (c) and (d) of the Stamp Duties Act.

5. The relevant clauses of the settlement bearing date the 5th day of September 1928 are as follows:—

(2) The said parties hereto of the second part or the survivors of them or other the Trustees for the time being of these presents (all of whom are hereinafter included in the expression "the Trustees") shall hold the said moneys debts and securities for moneys and

RECORD
pp. 39, 40.
pp. 37, 38, 39.
p. 28.
pp. 1-18.

pp. 5-15.

pp. 5-15.

p. 5, l. 37.

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property and all other the investments securities and property for the time being representing the same hereinafter referred to as "the trust fund" upon trust out of the corpus to pay any duty or duties the payment of which may be demanded and enforced by the Government of any of the States of the Commonwealth upon the execution of this Indenture and upon further trust on and after the date of these presents to hold the Trust Fund or the balance thereof as the case may be upon trust to apply and appropriate such Trust Fund and the annual income thereof after payment of all salaries expenses costs charges and outgoings 10 hereinafter authorised towards lawful charitable purposes under the following heads *vide licet*.

(A) Educational.

(B) The relief of poverty in Australia.

(C) The general benefit of the community in Australia not falling under the preceding head

but subject to all the provisions and conditions set out in these presents.

p. 6. l. 16.

(3) The time manner and the head or heads under which the application and appropriation of the said Trust Fund and the said 20 income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the Trustees but during the lifetime of the Settlor subject to his direction and approval and the Settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound up the trust within ten or fifteen years.

p. 9. l. 18.

(24) The Trustees may also apply and appropriate any property belonging to the Trust in its then present condition for any Trust purposes and may also use any of the moneys of the Trust either 30 corpus or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The Trustees may whether during the lifetime of the Settlor or afterwards and shall during the lifetime of the Settlor if he so directs apply and appropriate any property including moneys belonging to the Trust for the purposes of acquiring by purchase or exchange from the Settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least 40 five per cent. below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the Trustees other than the Settlor.

6. Sections 102 (2) (a) 102 (2) (c) 102 (2) (d) of the Stamp Duties Act are as follows:—

102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

- 10 (2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment whether exercisable by the deceased alone or jointly with another person:

Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

- (c) Any property passing under any settlement, trust, or other disposition of property made by the deceased whether before or after the passing of this Act—

20 (i) by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or

(ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or

30 (iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof.

- (d) Any property comprised in any gift made by deceased at any time, whether before or after the passing of this Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.

40 7. The questions submitted in case stated for the decision of the Supreme Court of New South Wales were as follows:—

- (1) Should the property which was at the date of death of the testator subject to the trusts of the said settlement be deemed to be included in his estate for the purposes of the assessment and payment of death duty thereon?

RECORD

- p. 5, l. 14. (2) What was the amount of death duty payable in respect of the estate of the testator?
- p. 5, l. 16. (3) How should the costs of this case be borne and paid?
- p. 28. 8. By its Judgment dated 26th May, 1949 the Supreme Court answered the questions submitted as follows:—
- p. 28, l. 32. (1) Yes.
- p. 28, l. 33. (2) Not answered.
- p. 28, l. 34. (3) By the Respondents, the executors of the Will of the said Robert Winton Gillespie.
- pp. 19-27. The Judgments delivered by the Supreme Court are now reported in 49 S.R. 10 (N.S.W.) page 331.
- pp. 19-24. 9. In the Supreme Court Jordan C. J. with whom Maxwell J. concurred, was of the opinion that the property comprised in the settlement was dutiable under Section 102 (2) (a) and also under Section 102 (2) (c). Owen J. was of opinion that it was dutiable under Section 102 (2) (c) only.
- p. 23, l. 13.
- p. 24, l. 17.
- p. 26, l. 37.
- p. 26, l. 43. 10. By Notice of Appeal dated 15th June, 1949 the present Respondents appealed from the Judgment of the Supreme Court to the High Court of Australia, which said Appeal was heard on the 3rd, 4th and 5th days of August, 1949 by that Court constituted by Dixon McTiernan Williams and Webb JJ. 20
11. On the hearing of the Appeal to the High Court it was argued on behalf of the present Respondents that:—
- (A) The settlement did not contain any trust to take effect after the settlor's death, because
- (i) Clauses 2 and 3 of the settlement constituted an immediate and binding single trust for charitable purposes.
- (ii) The circumstance that the trustees were given a discretion to determine which actual charities should benefit did not create a new trust or cause a new trust to take effect each time the discretion was exercised.
- (iii) The circumstance that the settlement required that in his lifetime the settlor should concur in any particular exercise of discretion did not mean that after his death a new or different trust was created or took effect. 30
- (iv) The case of *Rabett v. Commissioner of Stamp Duties* 1929 A.C. 444 is not applicable on the point but should it be held that it is, what was said by Lord Buckmaster when delivering the report of the Judicial Committee (1929 A.C. at p. 448) was *obiter dicta*, and it was submitted, was said per *incuriam*.
- (v) There was at all relevant times only one trust even though it was administered by different persons after the death of the settlor from those by whom it had been administered before his death. 40

(B) *That the settlement made by the said Robert William Gillespie was not a settlement*

- (i) by which any interest or benefit was reserved to the settlor for his life or at all in or out of *or in connection with either (a) the property actually passing thereunder or the proceeds thereof or (b) property at any time representing such property*; or
- (ii) which was accompanied by the reservation or assurance of or a contract for any benefit to the deceased for the term of his life or at all;
- 10 (iii) by which the deceased reserved to himself the right to restore to himself *either (a) the property actually passing thereunder or the proceeds thereof or (b) property at any time representing such property*; because
- (aa) Clause 24 is a clause for the benefit not of the settlor but of the fund, and although by it the settlor was enabled to require the exercise of the power therein described, the power still remained a fiduciary power *and the clause therefore did not reserve to the settlor an interest in or a benefit out of or in connection with any property whatever*;
- 20 (ab) *Even if the clause did reserve to the Settlor an interest or benefit, such interest or benefit was not in or out of or in connection with the property passing under the settlement*, because
- (i) in the case of a purchase made pursuant to the clause, the purchase price received by the deceased is in no sense identified with the property passing under the settlement i.e. the money thereby settled by the deceased; *and (ii) in the case of an exchange, the property taken in exchange by the deceased is in no sense identified with the property so passing*.
- 39 (ac) The clause was an investment provision, and gave the settlor no right to nominate the property which was to be sold by the trustees or the fund of money which was to be used by the trustees.
- (ad) The clause created no option in the deceased to acquire any property: but that even if contrary to the submission it did so, it neither created nor reserved any benefit to the deceased.
- 40 (ae) In any case the clause constituted no benefit to the deceased out of or in connection with any property affected by the settlement.

12. On the hearing of the Appeal in the High Court it was argued on behalf of the present Appellant: —

(A) On the true construction of the settlement there was a trust which took effect after the death of the settlor because: —

(i) there is no difference between the case where one set of beneficiaries is nominated in the lifetime of the settlor and another after his death and that where one method of selecting the particular beneficiaries of a charitable trust in the lifetime of the settlor is provided and another after his death.

(ii) The control which the testator in his lifetime exercised over the other trustees in the manner of selecting the beneficiaries constituted a different trust from that which the trustees, free from his control, exercised after his death. 10

(B) Section 102 (2) (c) of the Stamp Duties Act was correctly construed and applied by the Supreme Court because: —

(i) The property which passed under the settlement included not only the actual choses in action represented by the settlor's cheques but the property as found in the settlement from time to time and as existing at the date of the settlor's death.

(ii) The phrase "interest in or benefit out of" is wide enough to cover the power of direction of the trustees conferred on the deceased by the settlement. 20

(iii) The court is not concerned with inquiring into whether or not there is any actual benefit to the settlor.

(iv) Clause 24 is a clear and unambiguous covenant and places the settlor outside the trust altogether; for the purpose of that clause he is not a trustee at all.

(v) A right to exchange property indicates a right or interest in the property to be exchanged.

(vi) On the true construction of the settlement as a whole Clause 24 is a benefit to the settlor. 30

(c) Section 102 (2) (d) of the Stamp Duties Act applies because, for the reasons submitted on Section 102 (2) (c), an interest was reserved to the settlor, and therefore on the execution of the settlement, even assuming *bona fide* possession to have been assumed by the donees, it was not to the exclusion of that benefit reserved to the settlor.

13. The High Court reserved its Judgment and on 18th August, 1949 allowed the Appeal of the present Respondents. The Judgment of that Court, which was delivered by the Honourable Mr. Justice Williams is reported in 79 C.L.R. 477. 40

14. On the question as to whether the trust created only one trust or more than one trust, the Court held that the settlement contained only one trust. The relevant part of the Court's reasons for this conclusion is expressed in the following passage from the Judgment (79 C.I.R. at pp. 489, 490): —

10 “ There are three objects of the charitable trust, the trustees having
a discretion to apply the trust funds both income and corpus for
the advancement of these objects. The settlor in his lifetime had
a control over the manner in which the discretion of the trustees
should be exercised to the extent that the exercise was subject to
his direction and approval. Trustees of a charity in the absence
of a provision to the contrary in the trust instrument can act
by a majority. In this case there is a provision to the contrary,
and it may be that the word “direction” would have been
sufficient to compel the other trustees to exercise their discretion
as the settlor directed, but the better opinion would appear to
be that the effect of the provision was merely to give the settlor a
right to veto, so that the majority could not exercise their
discretion in a manner of which the settlor did not approve. But
20 on either view it would not be correct to construe the settlement as
containing two trusts (1) a trust during the lifetime of the settlor
to distribute the trust funds amongst the charitable objects in
accordance with his direction and approval; and (2) a trust after
his death to distribute the trust funds amongst such objects in the
absolute discretion of the trustees. It is not a trust which can be
divided into a trust, like that in *Waldo v. Caley*, limited to endure
for the life of the settlor with a further and different trust to take
effect on his death. It is a single trust though different persons are
30 to exercise the discretion as to the manner in which the trust funds
should be distributed amongst the charitable objects during the
life of the settlor and after his death. There is a general charitable
intention to benefit the objects of the trust irrespective of the
mode by which the gift is to be carried into effect from time to time,
and in such a case equity will not allow the trust to fail by reason
of the failure of the appointed mode. The trust would therefore
have taken effect during the life of the settlor although he had
refused to act as a trustee or had retired or had become for some
other reason unwilling or unable to exercise his discretion
(*Attorney General v. Gladstone*; *In re Willis*; Halsburys Laws
of England 2nd ed. vol. 4 p. 192). The settlement contains one
40 trust and one trust only and that is a charitable trust which took
effect immediately upon the settlor handing the initial sum
of money to the trustees of the settlement.”

15. On the question as to the true construction of Clause 24 of the settlement the Court (p. 492) held that: —

“ The power to direct the other trustees conferred on the settlor by
p. 34, l. 4.

clause 24 is at most a power as a trustee to control the exercise of the discretion by the trustees as a body and it is a fiduciary power which must be exercised in the interests of the trust property. If the other trustees refuse to accede to his direction the only remedy of the settlor would be to sue them for breach of trust joining the Attorney-General as a party to represent the charities. He could not sue the other trustees for specific performance of a contract to exchange an asset of his own for an asset of the trust."

16. On the submission of the present Appellant that the property comprised in the settlement was dutiable under Section 102 (2) (a) the Court (p. 493) held: — 10

p. 34, l. 27.

"The settlement contains only the one trust, namely the charitable trust for educational purposes, the relief of poverty in Australia and the general benefit of the community in Australia not falling under these heads. This trust took effect in the lifetime of the settlor and did not in any sense take effect after and by reference to his death."

17. On the submission of the present Respondents that the reference to "property passing" in Section 102 (2) (c) was limited to the money paid by the settlor to the trustees at the time of the execution of the settlement the Court held: — 20

p. 35, l. 34.

"The purpose of the Stamp Duties Act is to include in the notional estate of a settlor for the purposes of death duty property which can be identified and valued at the date of death, and the words "that property" in the Section mean the trust fund as it exists from time to time."

18. On the submission by the present Appellant that the property comprised in the settlement was dutiable under Section 102 (2) (c) (i) the Court held: —

p. 35, l. 42.

"These are wide words, but they are not wide enough to apply to the right conferred on the settlor by Clause 24 of the settlement. This right was at most a right to have his real or personal property purchased with trust moneys or exchanged for trust property on terms advantageous to the trust and only when the settlor in the exercise of a fiduciary power thought it proper to direct the trustees to acquire his property on these terms. This is not an interest in or benefit out of or connected with the settled funds within the meaning of the paragraph. It is simply a power to alter the investment of the trust funds for the benefit of the trust. The power does not confer on the settlor any beneficial interest in or the right to receive any payment out of or connected with the income or corpus of the trust as it exists from time to time. To fall within the paragraph such an interest in or benefit out of or connected with the trust fund must confer on the settlor some legal or equitable right to obtain some benefit in money or money's 30 40

worth for his own advantage out of or connected with the trust property.”

19. On the submission by the present Appellant that the property comprised in the settlement was dutiable under Section 102 (2) (c) (ii) the Court held:—

10 “ Further since Clause 24 of the settlement does not create a covenant, it could not be said that the disposition of property made by the settlor was accompanied by the reservation or assurance of, or a contract for, any benefit to the settlor for the term of his life within the meaning of par. (ii).” p. 36, l. 19.

20. On the submission by the present Appellant that the property comprised in the settlement was dutiable under Section 102 (2) (c) (iii) the Court held:—

20 “ The words “restore to himself” and “reclaim” in this paragraph indicate that it is intended to apply to cases where the settlor has the power to diminish the value of the trust property by freeing it or some part of it from the trusts and appropriating it to his own use without consideration or adequate consideration in money or money’s worth, and it would not therefore apply to an alteration in the investment of the trust assets from which the settlement and not the settlor derived the advantage.” p. 36, l. 24.

21. On the submission by the present Appellant that the property comprised in the settlement was dutiable under Section 102 (2) (d) the Court held:—

30 “ In the present case the beneficial possession and enjoyment of the donor’s bounty was immediately and indefeasibly vested in the objects of the charitable trust. The income and corpus of the trust property could be applied for the benefit of those objects and for no other purposes. The settlor as donor was therefore entirely excluded *ab initio* from possession and enjoyment of the settled property and had no enjoyment and possession such as is contemplated by the Section. Further it follows from what has already been said that the settlor was excluded from any benefit of whatsoever kind or in any way whatsoever whether enforceable at law or in equity because the benefit from the exercise of the power contained in Clause 24 was a benefit to the settlement and not to the settlor.” p. 37, l. 2.

22. On the hearing of this Appeal the present Respondents will submit that the Judgment of the High Court was correct (except as to the matter stated in paragraph 17 hereof).

40 23. The Respondents further submit that this Appeal should be dismissed with costs for the following amongst other

REASONS

- (1) Because upon the true construction of Clauses 2 and 3 of the settlement and Section 102 (2) (a) of the Stamp Duties Act, 1920-1940 only one trust was created, and that trust took effect immediately and indefeasibly upon the execution of the settlement.
- (2) Because the property comprised in the settlement at the date of the settlor's death was not property which passed under the settlement within the meaning of Section 102 (2) (c). 10
- (3) Because on the true construction of the indenture of settlement and particularly Clause 24 thereof there was not within the meaning of Section 102 (2) (c) (i) reserved to the settlor for his life or for any other period any interest in or benefit out of or connected with (a) the property actually passing under the settlement or the proceeds of the sale thereof or (b) property at any time representing the same.
- (4) Because on the true construction of the indenture of settlement and particularly Clause 24 thereof there was not within the meaning of Section 102 (2) (c) (ii) a reservation or assurance of or a contract for any benefit to the settlor for the term of his life. 20
- (5) Because on the true construction of the indenture of settlement and particularly Clause 24 thereof there was not within the meaning of Section 102 (2) (c) (iii) reserved by the settlor the right by the exercise of any power to restore to himself or reclaim the property actually passing under the settlement or the proceeds of the sale thereof or property at any time representing the same.
- (6) Because on the true construction of the indenture of settlement and particularly Clause 24 thereof *bona fide* possession and enjoyment of the property comprised in the settlement within the meaning of Section 102 (2) (d) was assumed by the donees immediately upon the execution of the settlement and was thenceforth retained to the entire exclusion of the settlor or of any benefit to him. 30
- (7) Because on the true construction of the settlement no interest, power or benefit of any kind whatsoever was reserved to or enjoyed by the deceased out of or in respect of or in connection with the subject matter of the settlement.

- (8) Because the Judgment of the High Court was right (except as to the ground stated in paragraph 17 hereof) for the reasons appearing in it.

G. E. BARWICK, K.C.

J. H. A. SPARROW.

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