Privy Council Appeal No. 43 of 1950

The Commissioner of Stamp Duties of the State of New South Wales - - - - - - - - - - *Appellant*

v.

Francis Harmsworth Way and Others - - - - *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 10TH DECEMBER, 1951

Present at the Hearing:

LORD NORMAND

LORD OAKSEY

LORD RADCLIFFE

[*Delivered by* LORD RADCLIFFE]

This appeal relates to a claim for death duties on the death of one Robert Winton Gillespie who died on the 2nd August, 1945. The property which is said to be subject to the claim consists of certain funds which at the date of his death were held upon the trusts of a Settlement for charitable purposes made by him many years previously. Two clauses in that Settlement are founded upon by the appellant, the Commissioner of Stamp Duties for the State of New South Wales, as bringing the Trust Funds within the charge to duty imposed by the Stamp Duties Act, 1920-1949 (to use its current citation), of New South Wales.

The material section for the purposes of the claim is section 102 of that Act. Alternative claims are preferred under subsection 2 (*a*), subsection 2 (*c*), each of the three sub-divisions of which is relied upon, and subsection 2 (*d*). The relevant portions of the section are thus as follows, it being common ground that if these Trust Funds fall within any of the categories there described they will be liable to a charge for duty.

> "(2) (*a*) All property which the deceased has disposed of . . . by will or by a settlement containing any trust in respect of that property to take effect after his death . . .
>
> 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 . . .
>
> (i) by which an interest in or benefit out of or connected with that property, or in the proceeds of 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

(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 the deceased at any time . . . 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 . . ."

At first sight it is not easy to see what there is in the Settlement made by Sir Robert Gillespie which could bring its funds within the charging provisions of this section. The Settlement, which was made on 5th September, 1928, was a trust disposition under which Sir Robert, as Settlor, transferred and assigned to himself and two other gentlemen certain specified funds and property to be held upon the trusts and subject to the conditions and provisions set out in the deed. In effect the Trust Fund was to be held by the Trustees upon trust to pay and apply it and its annual income towards lawful charitable purposes under the heads of "(*a*) educational, (*b*) the relief of poverty in Australia, and (*c*) the general benefit of the community in Australia not falling under the preceding head", but subject to such provisions and conditions as were set out in later portions of the document.

Two of such provisions are put forward as bringing the property within the charge of section 102. The first is a clause, clause 3, which immediately follows the declaration of the charitable purposes. It runs:—

"3. The time, manner and the head or heads under which the application and appropriation of the said trust fund and the said 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."

The appellant argues that the effect of this clause is that on the Settlor's death, when his power of direction and approval necessarily determined, a trust took effect after his death within the meaning of section 102 (2) (*a*), because a new trust arose for the objects of the charity, those objects being thereafter selected by the existing Trustees freed from the Settlor's power of direction and approval.

The second provision, clause 24, occurs, inappropriately, in a chapter of the deed entitled "Application of Income." It immediately precedes a clause dealing with the Trustees' powers of investment and it runs as follows:—

"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 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 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."

The appellant argues that the effect of this clause is to reserve to the Settlor some interest in or benefit out of or connected with the trust property or a right to reclaim or to restore it to himself, and that by one or other of the roads offered by section 102 (2) (*c*) and (*d*) the appellant is entitled to succeed in his claim for duty.

It will be convenient to deal first with clause 3 and section 102 (2) (*a*) and to defer consideration of clause 24, the effect of which depends, primarily, upon a conclusion as to the construction that ought to be placed upon its words.

The appellant's argument upon section 102 (2) (*a*) succeeded with the majority of the Supreme Court of New South Wales: it was rejected on appeal by the High Court of Australia. The basis of the Supreme Court's decision was that the Settlement contained two trusts, one for those recipients of charitable bounty whom the Settlor might select during his life, the other, " to take effect after his death," for those recipients whom the Trustees might select in the period following upon his death.

The situation was thus likened to that which arose in *Burrell* v. *A.G.* [1937] A.C. 286: although it must be observed that *Burrell's* case was a decision as to what constitutes a " passing " of property for the purposes of section 1 of the Finance Act 1894 of the United Kingdom and it has no direct bearing on the meaning of the words " to take effect after death " in the Stamp Duties Act of New South Wales. The High Court on the other hand treated the Settlement as creating one trust and one trust only, a trust for charitable purposes ; and this trust, in their view, took effect immediately the Settlement was created and continued as one despite the fact that during its continuance different persons might have the right or duty of deciding in what manner the Trust Funds were to be applied.

Their Lordships agree with the view of the High Court. Firstly, this trust was not in any true sense a trust for different groups of beneficiaries. It was from beginning to end a trust for charity or specified charitable purposes, and those persons who may from time to time receive payments or other benefits out of the Trust Funds are less beneficiaries than objects of the charitable purpose. This circumstance alone distinguishes the case from that of *Burrell* v. *A.G. supra,* in which the situation that had to be considered was one where there were two groups of beneficiaries, changing in their composition upon the occasion of a death, though including persons common to each group. The real issue was whether the Trust Fund as a whole ought to be treated as passing notwithstanding the continuing membership of those persons. Here there was no separate trust for any new group of owners that took effect after the Settlor's death.

But, secondly, it is apparent from the Judgment of Jordan, C.J., which expresses the views of the majority of the Supreme Court, that the two trusts which he extracted from the provisions of clause 3 consisted as much of the powers of selection exerciseable first by the Settlor and then by the remaining Trustees as of the trusts properly called for the charitable purposes which the Trust Deed defined. To look at the matter in this way is to treat a mere right or duty of exercising a discretion or taking a decision in the course of the administration of the trust as if it were itself a trust to take effect after the death within the meaning of section 102 (2) (*a*). Their Lordships do not think that this is a sound construction of that subsection : nor do they think that the decision of the Board in *Rabett* v. *Commissioner of Stamp Duties* [1929] A.C. 444, which clearly weighed with the Supreme Court in their decision, ought to be regarded as an authority for such a proposition.

In *Rabett's* case the Settlement to be considered was a Marriage Settlement of personalty in common form. The death which was said to attract duty was that of the husband and Settlor and, since the wife had been given the first life interest in the settled fund, the situation of affairs as at the husband's death was that the wife's life interest, already in

possession, continued to subsist and, as there were surviving children of the marriage, their interests in reversion remained interests in reversion but subject to the effect of any appointment which the wife might make in exercise of the special power of appointment among children and remoter issue created by the Settlement. Even if the children's interests alone were to be considered it would be difficult to say of such a settlement that it did not contain a trust to take effect after the Settlor's death.

Nor was such an argument preferred until the case came to be argued before the Board. Until then it had been assumed that a claim for duty did arise, the issue being whether the whole value of the settled property ought to be included in the dutiable estate or only so much of that value as exceeded the value of the widow's life interest. That indeed was the sole question which the Commissioner of Stamp Duties had submitted for the consideration of the Court.

Lord Buckmaster, who delivered the opinion of the Board, dealt with the appeal without strictly distinguishing between the two lines of argument. The foundation of his decision is to be found in the words which occur at the top of page 448 in the report and are as follows :—" but the words of the section do not provide that the duty only attaches to property in respect of which the trust arises or takes effect on the death of the Settlor but after his death, and their Lordships see no escape from the conclusion that property of the deceased settled by an instrument which contains trusts that take effect after and by reference to his death is to be deemed part of the estate." This conclusion was sufficient to dispose of the appeal.

Difficulty has arisen because of certain words that Lord Buckmaster went on to use in meeting one branch of the argument that even if the settled property itself was deemed to pass the value of the widow's life interest ought to be deducted from the dutiable estate.

What he said was:—" Nor can their Lordships assent to the view that as the testator might, had he thought fit, have given his wife in cash the present value of her life interest and then settled the remainder, the result is the same when he adopted a different method of disposition.

The section assumes that the testator has disposed of the property, and the only condition required for duty to attach is that the Settlement contains trusts to take effect after his death. In the present case the trusts that took effect after his death were : (1) a trust enabling his widow alone to sell and vary investments ; (2) a trust enabling her if the joint power was unexercised to appoint among the children by deed or will ; and (3) a trust for the benefit of the children in default of appointment and subject to their mother's life interest ; and these trusts affected the whole settled property, and not that part only which would be left if the value of the wife's life interest were taken away."

Their Lordships have given careful attention to this passage, but they are satisfied that it ought not to be taken as a decision that each of the three provisions which are listed under the heads (1), (2) and (3) constitutes by itself a trust to take effect after the death for the purposes of section 102 (2) (a). What Lord Buckmaster was concerned to establish was that there was a trust within the meaning of the section that affected the whole settled property and not merely the " value " represented by the value of the reversions. This is plainly right. So long as there was one such trust, it did not matter whether there were others as well, and it is only fair to assume that had Lord Buckmaster intended to give a binding decision as to the status of each of the " trusts " that he mentions he would have been altogether more precise in his language. On the contrary, he seems to have been at no pains to state them accurately. (1) was neither a trust nor even a power. Under the Settlement, a copy of which has been made available to their Lordships in this appeal, the widow had nothing but the usual right to give or withhold her consent to a proposed change of investment. (2) was not a trust. It was the usual special power of

appointment among children or remoter issue. No doubt, had there been an appointment, there would have been a trust for the appointees and Lord Buckmaster's language may have been intended to extend to such a trust. (3) was, of course, a trust.

Having regard to these considerations their Lordships are of opinion that the first branch of the appellant's argument must fail.

Clause 24 of the Trust Deed is not in itself a complete piece of machinery. But the mere fact that it is formally incomplete is no reason for reading into it more than the provisions of the clause actually contain. Its main purport, at least, is reasonably clear. It is to afford authority for the use or application of Trust Funds for certain purposes or in certain ways that would not otherwise be permissible. It is thus something analogous to but not the same as the investment clause which immediately follows. The second half of the clause is designed to authorise the use of Trust Funds for the purpose of acquiring property from the Settlor who was in the inception and was no doubt likely to remain one of the Trustees. But for the power of direction given to the Settlor the nature of the clause would be quite plain. But there has been engrafted upon the authority thus given to the Trustees a right for the Settlor during his lifetime to require that Trust Funds shall be applied to the purpose of such an acquisition and it is argued that this right to control the action of the Trustees brings the trust property within one or other of the categories of section 102 (2) (c) and (d). This contention prevailed with all the members of the Supreme Court of New South Wales who held that an interest in the settled property had been reserved to the Settlor during his life. It was rejected by the High Court partly on the ground that the power of direction given to the Settlor was a fiduciary power to be exercised only for the benefit of the Settlement and partly because, whatever the power was, it did not amount to a reservation to the Settlor of an interest in the settled property or of a right to reclaim or restore it to himself.

Their Lordships are of opinion that the views of the High Court are well founded, and it is unnecessary to make any material addition to what is said in the judgment of Williams J. which gives the Reasons of the Court. The Settlor's power of direction is to be taken as fiduciary because in its context it is merely a right to secure that his views would, in the event of disagreement, prevail over the views of the other Trustees. It was not, of course, inevitable that he would always remain a Trustee during his life, but the circumstances were such that it was natural to assume that he would. Even if he did not, the question that he was given power to decide was the question how Trustees should apply their Trust Funds, and in the absence of express provision to the contrary the presumption would be that his decision was to be given for the benefit of the Settlement, not of himself. Indeed he had inserted in the clause a stipulation that, if the trust did acquire property from him, it must be on terms that would be to his own pecuniary disadvantage and to the trust's advantage. It was argued that the presence of this stipulation showed that his direction was regarded as non-fiduciary, since otherwise it would not need to be controlled by this limitation. But this can hardly be. The stipulation operates even if the Trustees acquire property from him without a direction, so it is not aimed at his special power of direction: and it seems a curious way of establishing that a power is beneficial to show that by its terms it cannot be exercised in a way that affords a benefit.

If the power of direction is, as their Lordships think, a fiduciary one, there is no ground for regarding it as the kind of benefit or interest with which section 102 (2) (*c*) and (*d*) are concerned. Apart from that, however, the power is not one that amounts to an interest in or benefit out of or connected with the trust property. It does not extend far enough to reach the trust property. All that it could do would be to substitute the Settlor's decision that Trust Funds should be used to acquire property from himself for a resolution of the other Trustees to the same effect. Given the achievement of that resolution, the Settlor would

have no power under the clause to decide what items of the Trust Fund should be used for that purpose. The decision on that point would lie with the Trustees generally: and, if they decided to proceed by way of exchange, not of purchase, it would be for them again to decide at what value they would be prepared to release the item or items selected in exchange for the Settlor's property valued as the Trust Deed requires. All this goes to show that, whether the Settlor's power of direction was fiduciary or not, it was not in any event such a power as gave him any hold over the Trust Funds. Their Lordships were pressed with the consideration that the Settlor could at least achieve this much: by tendering property of his own worth 5 per cent. more than the value of the whole trust property (assuming that to be capable of undisputed appraisement) and by exercising his power of direction he could make sure of recovering any single item of the Trust Funds since he would be entitled to get back the lot. But this is at best to describe an incidental consequence of the power of direction rather than to describe the nature of the power itself: and it does nothing to establish that a right is a benefit when it can only be exercised to the detriment of its holder. Whether or not a power having such a possible consequence could properly be described as a right to restore to the holder or to reclaim the settled property within the meaning of subsection 2 (*c*) (iii) it cannot amount to such a right if the Settlor can only act by way of effecting a change of investment in the interests of the Settlement.

Their Lordships will humbly advise His Majesty that the appeal from the Order of the High Court of Australia dated the 18th August, 1949, should be dismissed. The appellant must pay the costs of this appeal.

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In the Privy Council

THE COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES

v.

FRANCIS HARMSWORTH WAY AND OTHERS

DELIVERED BY LORD RADCLIFFE

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