THE DUTIABLE ESTATE IN RELATION TO INTERESTS ARISING ON DEATH

CATHELS v. *COMMISSIONER OF STAMP DUTIES*

This recent decision of the Full Bench of the Supreme Court of New South Wales[1] brings into issue questions in relation to the rights which a contract may confer on a third party and in relation to the interpretation of s.102(1)(a)[2] and s.102(2)(i)[3] of the New South Wales Stamp Duties Act, 1920-1959. The conclusions reached on the interpretation of s.102(2)(i) may have important practical effects on the future form of superannuation schemes, and it is in this field that the case holds most importance.

The facts are not complicated. H, who was travelling overseas by air with his wife, insured himself against accidental death for the sum of £10,000, and against injuries for smaller amounts, and paid the premiums himself. As part of the policy contract an annexure was added which read *inter alia* as follows: "At the request of the insured it is hereby declared and agreed that all claims under this certificate shall be paid to W" (wife of H) "or her executors or administrators whose receipt will be a full and sufficient discharge thereof". On the flight to London the aircraft crashed and the husband and wife were both killed, and she being the younger was presumed to have died after her husband. The insurance company paid the proceeds of the policy to the wife's executors. The Commissioner of Stamp Duties claimed that this sum should properly be included in the dutiable estate of H for the purposes of New South Wales death duty under s.102(1)(a) or s.102(2)(i) of the Stamp Duties Act, 1920-1959, and a case was stated for the opinion of the Supreme Court. The Commissioner also relied on s.102(2)(h) and s.102(2)(b), but his arguments in regard to these provisions were shortly dismissed by Else-Mitchell, J. and Sugerman, J., and need not concern us here.

The Full Court comprised Sugerman, J., Walsh, J. and Else-Mitchell, J., and though the decision was unanimous that the Commissioner was entitled to include the moneys paid out under the insurance policy in the dutiable estate of the husband, the reasons of Walsh, J. differed from those given by Else-Mitchell, J. and Sugerman, J.

Walsh, J. decided that the proceeds of the policy came within s.102(1)(a) and were "property of the deceased . . . situate in New South Wales at the time of his death".[4] Else-Mitchell, J. and Sugerman, J. disagreed with Walsh, J. as to the application of s.102(1)(a), but they decided that proceeds of the policy should be included in the husband's dutiable estate under s.102(2)(i), as the wife had an "interest" in those proceeds and that interest arose upon the death of her husband, within the meaning of the subsection.

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[1] *Cathels* v. *Commissioner of Stamp Duties* (1962) 79 W.N. 271.

[2] S.102 provides that for the purposes of the assessment and payment of death duty, the estate of a deceased person shall be deemed to include:—

(1)(a) All property of the deceased which is situate in New South Wales at his death.

[3] S.102 provides that for the purposes of the assessment and payment of death duty, the estate of a deceased person shall be deemed to include:—

(2) (i) Any annuity or other interest purchased or provided by the deceased, whether before or after the passing of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

This subparagraph shall not apply to any money payable under a policy of assurance to which subparagraph (h) of this paragraph applies.

[4] Stamp Duties Act, 1920-1959 (N.S.W.) s.102(1)(a).

The Problem Raised by Section 102(1)(a)

The question whether the proceeds of the policy were "property of the deceased . . . situate in New South Wales"[5] depended on a question of interpretation of the insurance policy. Should there be implied into the annexure, in which the insurance company undertook to pay the proceeds to the wife, the words "or as the covenantee (or his executors) may direct",[6] or words to that effect? Walsh, J., alone, thought that such words should be implied, and he reached the conclusion "that 'the insurance cases' relied upon by the Commissioner . . . do stand in a special category, in the sense that, in such cases, a construction will be readily adopted by which the substance of the contract is regarded as a promise to pay to the insured, certain money, in the events stipulated, and by which any stipulation or provisions as to payment to some other person will be treated as one which remains under the control of the insured, and may be countermanded or varied by him".[7] His Honour thought that such a construction should not be adopted where a trust had been created in favour of a third party, but in the present case it had been submitted by both parties that no trust had in fact been created.

The "insurance cases" relied upon by His Honour were *Cleaver* v. *Mutual Reserve Fund Life Association*,[8] *Re Engelbach*[9] and *Re Sinclair's Policy*.[10] His Honour considered that this special category of "insurance cases" was not restricted to life and endowment policies, and that the special principles of construction applied in these cases were equally applicable to policies covering death by accident. His Honour appreciated the inconsistency between these special principles and the general principles of contract law relating to implied terms, but felt bound to follow the insurance cases. He said:

> It may well be that, in putting these cases into a special category, there has not always been a logical application of the general principles of contract law or, in particular, of the principles relating to the construction of contracts as being subject to implied terms. But logical or not, it appears that a series of judicial decisions has put these cases into a special category, although the grounds upon which this has been done have not been stated with uniform consistency.[11]

The judgments in *Cathels' Case* leave some confusion as to what was the test applicable in determining whether the words "or as the covenantee may direct" were to be implied into the policy annexure. Sugerman, J. and Else-Mitchell, J., on the authority of *Re Schebsman*[12] and *Re Stapleton-Bretherton*,[13] thought it was a matter of whether, having regard to the whole of the surrounding circumstances, including the nature of the contract, its purposes and the parties concerned, the words "ought" to be implied. The inclusion of the word "ought" into the test, however, involves a value judgment and the judgment of Walsh, J. at least gives a more determinate test. Neither *Re Schebsman* nor *Re Stapleton-Bretherton* involved an insurance contract. In *Re Schebsman*, S agreed with his employers, that in consideration for his not entering into a

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[5] *Ibid.*
[6] *Op. cit.* at 282, *per* Else-Mitchell, J.
[7] *Id.* at 279 *per* Walsh, J.
[8] (1892) 1 Q.B. 147.
[9] (1924) 2 Ch. 348.
[10] (1938) Ch. 799.
[11] *Op. cit.* at 279. It is submitted that *Cleaver's Case* involves a departure from general principles of interpretation to reach a convenient result. The wife, being a murderer, could not obtain the proceeds of the policy for herself, but it seemed unjust that the insurance company should be free from liability after the insured had paid premiums for 30 years. The decision, therefore, was that the executors had a right to the proceeds of the policy.
[12] (1943) Ch. 366 *per* Uthwatt, J. This case was affirmed on appeal (1944) Ch. 83, though on somewhat different grounds.
[13] (1941) Ch. 482.

business similar to his employers' with any other company, he would be paid a certain amount each year, and after his death a set sum would be paid to his wife and/or daughter. His estate was adjudicated bankrupt after his decease, and the Official Receiver claimed that such sums as were directed to be paid to his wife and/or daughter belonged to his bankrupt estate. It was held by Uthwatt, J., applying the principles laid down in *In re Stapleton-Bretherton*, that payment to the wife and daughter, strangers to the agreement, was due performance unless on the true construction of the agreement there ought to be implied a term entitling S or his successors in title to intercept the sums agreed to be paid to them. His Lordship said that in determining whether, on the construction of the agreement, any such term should be implied, the legal consequences of non-performance were irrelevant and he held that on the true construction of the agreement in this particular case no such term should be implied. *In re Stapleton-Bretherton* was concerned with a deed of covenant entered into by two brothers under which each covenanted that he would make provision for named beneficiaries by the payment to them of certain annual sums. One brother died and it was contended by the executors that the surviving brother should make the payments to them. It was held by Simonds, J. that the executors were not entitled to require the survivor to make the payments to them, but that the survivor was entitled to perform his obligation in the way in which he had agreed to perform it and pay the stipulated sums to the beneficiaries. His Lordship said:

> Where on the other hand the proper inference is that the destination of the payment is to the covenantor an essential part of the bargain, it cannot be varied except by the consent of both contracting parties.[14]

He distinguished *Cleaver* v. *Mutual Reserve Fund Life Association* and the other insurance cases on the ground that the destination of the insurance moneys is a matter of indifference to the insurer.

In reaching the conclusion in *Cathels' Case* that the words ought not to be implied, Sugerman, J. had regard to the fact that the annexure commenced with the words "at the request of the assured", that it was expressed in language of authority, that the contingency of death was intermixed with various other contingencies and that the journey to London would be in stages. In all the circumstances he concluded that the husband's prime object in making the annexure was to provide immediately for his wife in the contingency of his own death; therefore that there was not sufficient ground for holding that an implication ought to be made that the direction "or as the covenantee or his executors may direct" should be implied into the annexure note. It would appear that, on his view, the principal consideration to be taken into account in determining whether the term ought to be implied, is the purpose for which the covenant is made. This at least takes us a step nearer the solution, though in many cases courts will have difficulty in discovering this purpose from the surrounding circumstances.

From the conclusion of Else-Mitchell, J. and Sugerman, J., it followed that the chose in action—the right to sue upon the contract—which was the property of the deceased husband at the time of his death, would only be of nominal value, and hence would not attract duty.

The Problem Raised by Section 102(2) (i)

This problem was considered only by Sugerman and Else-Mitchell, JJ., as Walsh, J. found it unnecessary to decide the issue. Their Honours concluded that under s.102(2) (i) the insurance policy moneys should be included in the dutiable estate of the deceased.

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[14] (1941) Ch. 482 at 486.

Section 102(2)(i) provides that the estate of the deceased shall be deemed to include "any annuity or other interest purchased or provided by the deceased, whether before or after the passing of (the) Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased".

For all relevant purposes this paragraph is identical with s.2(1)(d) of the Finance Act, 1894 (U.K.), and counsel for both parties understandably cited English decisions. It was admitted that the proceeds of the policy were within the meaning of "any annuity or other interest purchased or provided by the deceased", but the contentious questions which had to be decided by their Honours were:

(a) Was the wife's interest a "beneficial interest" within the terms of the paragraph?

(b) If so, did such interest "accrue or arise" on the death of the deceased?

It was submitted by counsel for the husband's estate on the basis of *In re Miller's Agreement*[15] that "interest" in this connection means "such an interest in property as would be protected in a court of law or equity", and so, in the absence of a trust or any right vested in the wife to sue on the policy at common law, she had no such interest. Counsel for the Commissioner submitted, however, that "interest" was used in a popular sense in the paragraph and that an interest might fall within the paragraph, even though the beneficiary had no legal right to enforce payment.

On the basis of two Australian decisions, *Ex parte Coote*[16] and *National Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation*,[17] their Honours held that a right to compel payment by legal process is not an essential element of an interest within the paragraph. On general principles of interpretation, giving "interest" its normal and natural meaning, and considering, as did Sugerman, J., that payment (other things being equal) would be made, it certainly seems that the interest of the wife under the policy is an "interest" within the meaning of the section, even though her executors could not sue the insurance company at law or in equity to force it to pay the proceeds of the insurance policy if in fact it refused to do so. However, the decisions relied upon by their Honours to reach their conclusion are decisions interpreting the term "interest" in different contexts to the present, whereas the decisions in *Re Miller's Agreement* and *Re J. Bibby and Sons Ltd., Pension Trust Deed*,[18] which they did not follow, are actually on the interpretation of "interest" as in s.2(1)(d) of the Finance Act, 1894 (U.K.) Once again it was necessary to decide whether to adhere to general principles or follow decided cases which created an apparent exception to those general principles. Perhaps if Walsh, J. had been called upon to decide this question, he may have felt bound by the two English decisions and decided that the wife's interest was not envisaged by the section, as it was not an interest she could enforce in a court of law or equity.

In deciding that the wife's beneficial interest did accrue on the death of the deceased, Sugerman, J. and Else-Mitchell, J. were forced to distinguish on precarious grounds two recent English decisions on the point, *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*[19] and *Westminster Bank* v. *Inland Revenue Commissioners*.[20] In *Westminster Bank Limited* v. *Inland Revenue Commissioners*, a decision of the Court of Appeal, life policies and investments

[15] (1947) Ch. 615.
[16] 49 S.R. (N.S.W.) 179.
[17] (1954) 91 C.L.R. 540.
[18] (1952) 2 All E.R. 483.
[19] (1953) A.C. 347.
[20] (1939) Ch. 610.

were settled on various relations of the settlor, to vest on the settlor's death. The Court directed that death duty should be paid on the relatives' interest as it fell within s.2(1)(d) of the Finance Act, 1894, being an interest provided by the deceased and arising on his death. In *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, a settlor appointed a life policy and other settled premises to the son absolutely, and from the date of the appointment the premiums were paid by the son, though, to the extent of the income from the other settled premises, premiums so paid were, by the Finance Act, 1939, s.30, attributed to the settlor. On the settlor's death, the Commissioners of Inland Revenue claimed that the whole of the proceeds of the policy were dutiable under s.2(1)(d) of the Finance Act, 1894. However, it was held by the House of Lords that the beneficial interest "belonged to the son and no beneficial interest"[21] in it accrued or arose on the death of the deceased within the meaning of this section. It seems from these cases that if the quality of the rights in question does not change on death, if there is merely a fruition of an interest already created, there is no liability for duty. But if in fact a new interest arises on death, then this is dutiable. The difficulty facing Sugerman, J. and Else-Mitchell, J. in *Cathels' Case* was to determine whether the wife's interest (being the moneys paid to her executors after the husband's death) arose on the husband's death, or whether this was merely the fruition of an interest which had in fact arisen when the annexure note was added to the policy.

Sugerman, J. noted that in the English cases referred to, the deceased had divested himself of the policy during his lifetime by settlement or assignment, but in the present case the deceased husband had retained the policy to himself. His Honour then stated that because the deceased husband had retained for himself the contractual rights under the policy, he had not conferred upon his wife any interest in the policy. Her interest arose only on the occurrence of the event which gave rise to the claim. Thus His Honour concluded, a beneficial interest in the moneys arose upon the husband's death by virtue of the provision contained in the annexure to the policy.

Else-Mitchell, J. also concluded that the interest arose only on the death of the husband but, it is submitted, his arguments tend to confuse the issue by introducing the notion that the interest of the wife arose on payment, and not on death. His Honour said:

> The right to the moneys may be something distinct from the right, if any, which the policy may confer to recover those moneys, and once the policy moneys are paid according to the tenor of the policy and received by the nominee, the interest of the nominee is established.[22]

This argument seems to attribute the change in the widow's position to the payment of the moneys which gives her a good title to them. This is not an interest accruing or arising on death, as required by the section, but an interest arising (or certainly basically changing) on payment.[23]

Thus, while the decision in *Cathels' Case* was unanimously in favour of the Commissioner, it may well be that it has not settled the law on the difficult questions involved. It is possible that courts will distinguish or even overrule it in future cases, even in cases of exactly analogous fact situations.

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[21] *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* (1953) A.C. 347 at 367 *per* Lord Moreton of Henryton. All the Lords concurred.

[22] *Op. cit.* at 286.

[23] One might attempt to distinguish *Cathels' Case* from these two English cases on the basis that the English cases dealt with life insurance policies, where an interest definitely had arisen on transfer and death was the fruition of such interest and death is inevitable, while in *Cathels' Case* there was an accident policy and it was possible that no accident would occur within the period covered by the policy, and no claim or benefits would ever arise. But this distinction is more apparent than real, for it may be assumed that, for these purposes at least, some benefit arises under the accident policy. In any event, such a distinction was not urged by any of the learned judges.

The Effect of the Decision on Some Forms of Superannuation Schemes

By a common form of superannuation scheme the employee is invited to make contributions (which may or may not be supplemented by the employer) which are invested in securities or, in some instances, in a life policy on the life of the particular employee, according to the terms of a trust deed. In the event of the employee dying before retirement, usually a lump sum payment is made to his widow or other members of his family under the terms of the deed. The trustee may have a limited discretion as to who should be the actual recipient of the payment. Such a scheme may be affected not only by New South Wales legislation but also by Commonwealth legislation. It is convenient to consider, firstly, the bearing of this legislation where the trust deed setting up the superannuation scheme provides that such moneys as are the employee's share of contributions should be invested in an insurance policy on the life of that employee. If the money is invested in life insurance on the employee's life it may well be that s.102(2)(h)[24] of the New South Wales Stamp Duties Act will be relevant, and will ensure that payments out of the proceeds made on the death of the employee are part of his dutiable estate without any consideration of the application of s.102(1)(a) or s.102(2)(i). The corresponding provision under the Commonwealth Estate Duty Assessment Act, 1914-1957 is s.8(4)(f).[25] Under the New South Wales Act, the proceeds may form part of the dutiable estate only if the premiums have been paid *by* the deceased. It is submitted that where contributions have been paid into a general superannuation fund by the employee, and premiums are then paid out of the fund by the trustee, the section is not applicable. The premiums have not been paid by the deceased. Section 8(4)(f) of the Commonwealth Act may include the proceeds in the dutiable estate where the premiums have been paid "on behalf of the deceased". But there is no legal obligation on the employee to pay the insurer. It is submitted, therefore, that the premiums have not been paid "on behalf of" the deceased. Moreover it is submitted that the payments made by the trustee to the members of the deceased's family have not been paid "under a policy of insurance" within the meaning of those words in s.102(2)(h) of the State Act or s.8(4)(f) of the Commonwealth Act.

It should be noted that under s.102(2)(h) of the State Act, the dutiable amount is only proportionate to the premiums paid by the deceased. If, as is suggested below, the result of *Cathels' Case* is that s.102(2)(i) of the State Act is applicable to the form of superannuation scheme here considered, there may be virtue in redrafting the scheme so as clearly to attract the application of s.102(2)(h) where the employer makes contributions. The effect, by virtue of the proviso to s.102(2)(i), will be to exclude s.102(2)(i) which would, of course, bring the whole of the payments made to members of the deceased's family into his dutiable estate.

Suppose, as a second alternative, that the contributions are *not* invested in a policy on the life of the contributor, but in securities, so that no question of the application of s.102(2)(h) or s.8(4)(f) arises. In this situation *Cathels'*

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[24] S.102 provides that the estate of the deceased person shall be deemed to include—
(2)(h) Any money payable to any person under a policy of assurance on the life of the deceased where the whole of the premiums have been paid by the deceased or a part of that money in proportion to the premiums paid by him where part of the premiums have been paid by some other person.

[25] Property . . . (f) being money payable to, or to any person in trust for, the widow, widower, children, grand-children, parents . . . of the deceased under a policy of assurance on the life of the deceased where the whole of the premiums has been paid by or on behalf of the deceased, or, where part only of the premiums has been paid by or on behalf of the deceased, such portion of any money so payable as bears to the whole of that money the same proportion as the part of the premiums paid by or on behalf of the deceased bears to the total premiums paid, shall for the purposes of this Act be deemed to be part of the estate of the person so deceased.

Case becomes decisive, and payments made by the trustee of the fund to the deceased's relatives have to run the gauntlet of s.102(1)(a) of the State Act and s.8(3)[26] of the Commonwealth Act, *and* s.102(2)(i) of the State Act and s.8(4)(e)[27] of the Commonwealth Act.

Whether the payments can be included in the dutiable estate by virtue of s.102(1)(a) of the State Act and s.8(3) of the Commonwealth Act, following the decision in *Cathels' Case*, will depend on whether the term "or as the employee shall direct" can be implied in the agreement made with the trustee of the superannuation fund. The uncertainty of the test in *Cathels' Case* to determine whether this should be implied was shown by the different results reached by Walsh, J., on the one hand, and Else-Mitchell and Sugerman, JJ., on the other. In practice, the trustee will take notice of any direction given by the employee as to the object of payment but, because it is usual for the trustee to have a limited discretion as to whom he will pay benefits on death, it would seem unlikely that the payments would be caught by these sections. One lesson to be learned from *Cathels' Case* may be that the scheme should expressly exclude any power in the employee or his executor to direct who will be entitled to the payments arising under the scheme.

However, when considering the application of s.102(2)(i) of the State Act and s.8(4)(e) of the Commonwealth Act to such a scheme, it is much more difficult to distinguish *Cathels' Case*. If *Cathels' Case* is correct in determining that an "interest" in the policy did spring up on death, then it may be that interests of the members of the family who would benefit under the scheme would arise on the death of the employee.

The same criticisms can be levelled against this conclusion as against the conclusion of Sugerman and Else-Mitchell, JJ. in *Cathels' Case*. By following *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* one could argue that the interests of the members of the family arose when the deceased first contributed to the superannuation scheme and that the death involved merely the fruition of such interests. It would appear that the situation considered in *Cathels' Case* and the situation arising under the superannuation scheme here considered, are basically the same. Therefore, all criticisms levelled at *Cathels' Case*, and the validity of distinguishing *D'Avigdor-Goldsmid's Case*, would apply equally to any attempt which may be made to include benefits under such a scheme in the dutiable estate of the deceased employee by virtue of s.102(2)(i) of the State Act and s.8(4)(e) of the Commonwealth Act. But *Cathels' Case* must be closely considered by those members of the legal profession who are concerned with drafting superannuation schemes.

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[26] For the purposes of this Act the estate of a deceased person comprises—
(a) his real property in Australia . . .
(b) his personal property, wherever situate . . . if deceased was at the time of his death domiciled in Australia, and
(c) his personal property in Australia . . . if the deceased had, at the time of his death, a foreign domicile.

[27] Property, (e) being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person; shall for the purposes of this Act be deemed to be part of the estate of the person so deceased.