Law Reports

A129/74

No Special Consideration

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NO-

IN THE SUPREME COURT OF NEW ZEALAND
DUNEDIN REGISTRY

IN THE MATTER of The Declaratory Judgments Act, 1908

AND

IN THE MATTER of the Estate of ROBERT SIMPSON formerly of Craigneuk, Tokarahi, but lately of Oamaru in New Zealand, Retired Farmer, Deceased

BETWEEN WILLIAM JAMES LINDSAY SIMPSON formerly of Epsom, Auckland, now of Wellington, Company Manager, and STRUAN THOMAS SIMPSON of Tokarahi in New Zealand, Farmer, as Executors of the Will of Robert Simpson, deceased

Plaintiffs

AND THE TRUSTEES EXECUTORS AND AGENCY COMPANY OF NEW ZEALAND LIMITED as Administrators of the Estate of Alice Agnes Simpson, deceased

First Defendant

AND JOHN ANTHONY SIMPSON of Wellington, Student, JAMES MAXWELL SIMPSON of Masterton, Company Representative, and LINDSAY BRETT SIMPSON of Masterton, Farm Worker

Second Defendants

Hearing: 12 April 1976

Judgment: 12 April 1976

Counsel: T.S. Nowland for Plaintiffs
P.B.A. Sim for First Defendant
G.P. Barton for Second Defendants

JUDGMENT OF COOKE J.

This case has been carefully argued by counsel of standing on both sides and in the result it has been possible to form a clear view without delay as to how the questions in the originating summons should be answered.

The testator died on 4 June 1966, leaving a will dated 23 February 1961. It was witnessed by solicitors and was apparently likewise professionally drawn. It is quite short. Clause 3 appoints executors and trustees. The next three clauses read :

> 3. I GIVE DEVISE AND BEQUEATH to my wife my estate excepting my Company shares.
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> 4. I GIVE DEVISE AND BEQUEATH all my other property whatsoever and wheresoever to my Trustee UPON TRUST with power to sell call in and convert the same into money and so that any such sale or sales may be by public auction or private contract and on such terms and conditions as to payment of purchase money or otherwise in all respects as my Trustees shall think fit PROVIDED ALWAYS that my Trustees may preserve my said estate or any part thereof in the form or condition whether as to investment or otherwise in which it shall be at the time of my death and may suspend the sale and conversion of my said estate or any part thereof for so long as they shall think fit and notwithstanding that it may be of a terminable perishable wasting speculative or reversionary nature.
>
> 5. SUBJECT to the payment of all my debts funeral and testamentary expenses including all death duties I direct my Trustees to invest all moneys for the time being available and not required for any other purpose hereunder including the proceeds of any such sale or sales and to stand possessed of my estate UPON TRUST to pay the sum of ONE THOUSAND POUNDS (£1,000-0-0) to THE PRESBYTERIAN SOCIAL SERVICE ASSOCIATION of Dunedin to be expended in carrying on the Hospital and Home for Aged People at Oamaru and SUBJECT thereto UPON TRUST to pay the net annual income therefrom to my wife, ALICE AGNES SIMPSON during her widowhood and subject thereto UPON TRUST for my three nephews, JOHN and JAMES and BRETT sons of my nephew, the said Lindsay James Simpson.

Clause 6 gives power to the trustees until realisation to carry on any business in which the testator might be engaged at his death, with incidental provisions including power to increase capital. Clause 7 empowers the trustees to take up bonus or

contributory shares or rights to shares.

A statement of the testator's assets and liabilities at his death shows a final balance in round figures of $81,800, of which $17,600 represents notional estate. Company shares, the bulk of them in Simpson Bros Limited, are shown at approximately $23,768 - that is to say, more than a third of the actual estate.- and the rest consisted mainly of monies in various accounts, a mortgage from Simpson Bros Limited and an interest as joint tenant in a residential property in Oamaru. The testator left no issue and his widow died in 1967, in effect intestate. The first defendant is the administrator of her estate. The contest is between her estate and the testator's great nephews, being the three remaindermen named in clause 5 of his will.

The will is rather unusual. Perhaps the word 'personal' was inadvertently omitted before 'estate' in clause 3. But that is speculation. Neither counsel has suggested that in this case the Court can supply any such word by implication or inference or otherwise.

As both counsel agree, the fundamental principle is that the will should be read as a whole. Approaching it as a whole, without regard to secondary rules of construction, one notes that clause 3 makes an apparently comprehensive and absolute gift directly to the wife of the testator's estate (an expression which, it is common ground, prima facie embraces all his assets) excepting only his company shares. Clause 4 gives devises and bequeaths to his trustees all his other property whatsoever and wheresoever. That is a long-winded way of describing company shares, but is perfectly capable of covering them. The power of sale by public auction and so forth and the details of the power of suspension suggest that more than company shares may have been in mind; but those powers are in common or stock form and on their face do not throw significant

light on the meaning of the disposing clauses in the will. The expression 'my said estate or any part thereof' again rather suggests more than company shares. But again it does not strike one as having any true significance : in the context of the proviso where it twice appears it can readily be understood as referring simply to whatever is comprised in the preceding expression 'all my other property whatsoever and wheresoever'. So it carries the question no further. Clause 5 refers to 'my estate' and subject to the payments therein mentioned leaves it upon trust for the testator's wife during her widowhood and the three great-nephews in remainder. This is equally capable of referring to what remains as the testator's estate after the gift, devise and bequest in clause 3 has taken effect. The remaining clauses, 6 and 7, confer powers which are largely inappropriate to trust assets consisting only of company shares, but I agree with Mr Sim that the insertion of standard machinery clauses of this kind throws little light on the meaning of the gifts in the will. The argument for the second defendants is that clause 5 deals with the whole estate. It is most unlikely that the testator would have intended to give his estate (whether absolutely or otherwise) to his wife in clause 3, but to except from that gift his company shares, and then to go on in clause 5 to give her an interest during widowhood in his whole estate, including his company shares. When the will is read as a whole, the only natural interpretation seems to me to be that she has an absolute interest under clause 3 in everything except the company shares; and that only those shares are subject to clauses 4 and 5.

When one turns to secondary rules of construction, that interpretation is confirmed by the principle put succinctly by Richmond J. in the Court of Appeal in Public Trustee v. Morrison (1887) 6 N.Z.L.R. 190, 194 : 'It is laid down that where there is a clear gift you must have clear words to cut

it down'. Stated slightly more fully, the rule is that a clear gift in a will is not cut down by anything subsequent in the will which does not with reasonable certainty cut it down. Other authorities on the rule are collected in Garrow and Willis's Wills and Administration, 4th ed. 534 and 538, and Williams on Wills, 4th ed. 561. Here the gift in clause 3 is clear and absolute. In my opinion, there is far from enough in any of the succeeding provisions to cut it down clearly or with reasonable certainty.

Mr Barton sought to invoke what he called the reasoning behind the rule in Lassence v. Tierney (1849) 1 Mac. & G. 551, 556. Citing that case and Hancock v. Watson [1902] A.C. 14, Eyfe v. Irwin [1939] 2 All E.R. 271 and In re Fergus [1948] N.Z.L.R. 368, he submitted that clause 3 gave the wife an absolute interest in the whole estate except the company shares; that clause 5 engrafted on the absolute gift certain trusts and also gave her an interest during widowhood in the company shares; and that in an event which has not happened, namely the failure of the clause 5 gift in remainder as a result of all three great-nephews predeceasing the testator, the absolute gift to the wife of the estate except the company shares would have prevailed, she also taking an interest during widowhood in the company shares but there being an ultimate intestacy as to those shares. I think the attribution of any such involved intention to the testator incredible. Mr Barton candidly accepted that his argument based on Lassence v. Tierney cannot succeed unless there is a conflict or inconsistency between clauses 3 and 5. For the reasons already given I do not consider there is a conflict or inconsistency. Putting the point in another way, the typical case for application of the rule arises when an apparently absolute gift and engrafted trusts relate to the same property; which,

as I see it, is not this case. Mr Sim suggested other reasons why Lassence v. Tierney may not apply, but it is unnecessary to go into these.

Accordingly the questions will be answered as follows :

(a) Does testator's widow take an absolute interest or a life interest in 'my estate excepting my company shares' within the meaning of those words as used by the testator in clause 3 of his will? Answer : An absolute interest .

(b) If the widow takes an absolute interest as aforesaid are the company shares only subject to the trusts under clause 5 of the will? Answer : Yes.

Question (c) does not arise. Costs are reserved.

R Blanchard J.

Solicitors:
Fitch, Mackay, Walker & Salisbury, Oamaru, for Plaintiffs
Hanan, De Courcy & Kendall, Dunedin, for First Defendant
Cook, Allan & Co., Dunedin, for Second Defendants