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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.627/83

968

No Special Consideration

BETWEEN D THOM, of Wellington, Solicitor, R FOKERD, of Lower Hutt, Company Director, and F CAMERON of Lowry Bay, Company Director as administrators of the estate of R WEBBY, deceased

OBJECTORS

AND THE COMMISSIONER OF INLAND REVENUE

COMMISSIONER

Hearing 30 July 1984

Counsel M R Camp and C M Stevens for Objectors
A G Keesing for Commissioner

Judgment 14 August 1984

JUDGMENT OF DAVISON C.J.

This is an appeal by way of case stated pursuant to s 92 of the Estate and Gift Duties Act 1968.

The question in issue is whether the Commissioner acted correctly in including in the deceased's dutiable estate the sum of $113,949.05 being part of the proceeds of two life policies on the life of the deceased. The Commissioner contends the policies belonged to the deceased personally. The Objectors claim that they were held in trust for the deceased's family trusts.

THE FACTS

Before proceeding further it is important that I find the facts. They were these.

In 1970 the deceased, Mr Webby, had become a successful building contractor and developer. His insurance adviser, Mr Barrell, who represented the Government Life Insurance Office, advised him to take steps to preserve his estate from

the inroads of death duty by taking out life insurance policies on his life. It was decided that an existing policy of $100,000 should be converted into two policies of $50,000 each and that those policies should be vested in Mr Webby's family trusts. At that time, however, it was a requirement of the Government Life Insurance Office that life insurance should be purchased by an individual and not by trustees. The arrangement made was therefore that Mr Webby would purchase the two policies of life insurance in his own name and then assign them or sell them to the trustees of the family trusts at a later date.

Applications for life insurance each of $50,000 were completed on 19 October 1970 and at the same time Mr Webby, who was authorised by the trusts to sign all cheques, drafts, etc. on the trust bank accounts, signed bank order forms authorising the bank to debit the trust bank accounts with the two premiums each of $101.50 commencing from 1 December 1970. The bank order forms were signed " R E Webby - R E Webby Trusts" and then followed the account numbers.

Thereafter the premiums on the two policies were paid by the family trusts. Although subsequent to the death of the deceased on 1978 there was some confusion as to the source of those payments, evidence produced at the hearing satisfies me (as was also acknowledged by counsel for the Commissioner) that the trusts did in fact pay the premiums throughout the relevant period.

In 1978 Mr Webby learned that he had a terminal illness. His advisers took steps to put his estate in order and in the course of doing so his solicitors requested his accountant, who was also the accountant to the family trusts, to turn up the two insurance policies. It was then discovered that they were each still in the name of R Edward Webby.

The solicitors prepared and had executed on 25 May 1978 a deed between Mr Webby and the trustees providing:

> "1. The Vendor and the Trustees hereby record that the Vendor sold the said policies to the then Trustees of the Family Trusts on the 31st day of March 1973 for the sum of

Five Thousand Six Hundred and Eighty Four Dollars ($5,684.00) which price was paid by the then Trustees of the said Trusts to the Vendor.

2. That since the said 31st day of March 1973 the premiums payable under the said policies have been paid by the Trustees of the Family Trusts.

3. That forthwith upon the execution of these presents an assignment of the said policies shall be endorsed thereon and the said policies shall be forwarded to the insurance office mentioned in the Schedule hereto for registration.

4. The Trustees hereby declare and acknowledge that they hold the said policies pursuant to the terms of the Family Trusts. "

The figure of $5684 being the price referred to in the deed represented the total premiums paid by the trusts under the policies up to that time as evidenced by the trusts' accounts.

Also on 25 May 1978 Memoranda of Transfer were completed on each of the two policies, transferring them from Mr Webby to the trustees. The transfers were then presented to the Government Life for registration and registered.

The reason why the deed recorded that the policies were " sold " to the trustees "on 31 March 1973" was that the accountant had advised the solicitors by letter that -

" From the notes made on the file by one of my staff the premiums for the policies were transferred as at 31 March 1973. The premiums on the policies have been paid by the Family Trust since that date."

That advice was in error as has now been established.

Mr Webby died on 1978. During the subsequent administration of his estate the accountant was asked to make a thorough examination of the records of the family trusts. This he did and on 13 November 1980 wrote to the Commissioner at the request of the estate solicitors as follows:

" I have now ascertained that the premiums on Government Life Policies Nos 7024238 and 7024239 were paid by R E Webby Limited and transferred by journal entry to the R E Webby Family Trust from the commencement of these policies up to 31 March 1973. From this date the R E Webby Family Trust paid the premiums from its own bank account. No premiums were paid by the deceased personally. The amount of $5684.00 quoted in the Deed dated 25 May 1978 was a calculation of the total premiums paid on such policies by the R E Webby Family Trust up to 31 March 1973.

It is now apparent from checking the Family Trust ledger that the deceased was holding these policies on Trust for the R E Webby Family Trust from the commencement of these policies. The subsequent assignment of these policies was not in terms of a sale by the deceased but was an assignment pursuant to such trust. To that extent the preparation of the subsequent Deed dated 25 May 1978 stating that the vendor sold the policies was incorrect.

This letter records the true position regarding these policies and I apologise for any inconvenience caused by the error in the Deed dated 25 May 1978. "

Following receipt of such information the solicitors prepared a Deed of Rectification between the estate trustees and the family trust trustees, which deed recited that the earlier deed had been entered into in error, cancelled the earlier deed and provided:

cl.2. " The Estate Trustees and the Family Trustees confirm that the said policies have at all times been owned by the Trustees from time to time under the Family Trusts who have paid all premiums properly payable in respect thereof. The Estate Trustees and the Family Trustees further confirm that the deceased held the said policies at all times upon trust for the Family Trusts until the deceased assigned the said policies pursuant to such trust to the Family Trustees on the 31st day of August 1978.

cl.3. The Trustees declare that they hold the proceeds of the said policies pursuant to the terms of the Family Trusts. "

I find on the evidence that the intention of the deceased in taking out the two policies with Government Life was that they be owned by the family trusts. The failure to vest the policies in the trusts was due to oversight. The two policies were, however, shown as assets in the balance sheets of the family trusts for the year ended 31 March 1971 and for each succeeding year and premiums on those policies were paid by the family trusts and their payment recorded in the accounts. I reach this conclusion from the evidence of Mr Barrell, from Mr Clegg the accountant, and from the records of the family trusts' accounts.

Mr Keesing raised an objection to the admission of a passage in the evidence of Mr Barrell relating to the intentions of Mr Webby in taking out the two policies. I allow such evidence, however, under the Evidence Amendment Act (No 2) 1980 ss 7 and 8.

LEGAL ISSUES

For the objectors it was contended that although the two policies remained in the name of the deceased from the date they were taken out, they were in fact and in law held by him in trust for the family trusts. At least that was so until the assignments were made on the policies on 25 May 1978.

For the Commissioner, Mr Keesing submitted:

(a) That if the deceased intended to transfer the policies to the family trust then he intended to do so by way of gift and the failure to complete the transfers resulted in incomplete gifts.

(b) The alleged sale of the policies to the trust in 1973 as evidenced by the 1978 deed is not a proper disposal of the policies at that

earlier date and in any event the trustees of the estate and the trustees of the family trusts have disavowed such sale in the 1981 Deed of Rectification.

(c) The 1981 Deed of Rectification is a nullity in that it purported to be made without regard to the interests of the beneficiaries.

(d) The deceased was the absolute owner of the policies down to the date of the assignments endorsed on the policies in May 1978. Prior to that date the deceased may have intended to assign the policies but never did so. He never made a declaration of trust.

(e) The objectors appear not to be relying upon common intention as a source of constructive trust but on the power of the Court to impose a constructive trust. In such case the trust is imposed as from the date of the Court order.

DECISION

The objectors' case as presented by Mr Camp was:

First That the deceased held the two policies on an express trust for the benefit of the two family trusts.

Second In the alternative, the policies were held by the deceased on a presumed or implied trust or on a constructive trust for the benefit of the two family trusts.

THE TRANSACTIONS

Before proceeding further I think it is necessary to deal with the two attempts by way of deed to deal with the policies in 1978 and 1981.

In 1978 when Mr Clegg was requested to turn up the two insurance policies he clearly made an error in writing to the solicitors on 15 May 1978 when he said:

> " The premiums for the policies were transferred as at 31 March 1973. The premiums on the policies have been paid by the Family Trust since that date. "

It has now been established that the premiums amounting to $5,684 were not transferred as at 31 March 1973 but that they had from the taking out of the policies in November 1970 always been paid by the trusts. It was that mistake that the premiums up to 31 March 1973 had been paid by Mr Webby that resulted in the solicitors reaching the conclusion that the trust would have to pay Mr Webby for the premiums up until then paid on their behalf and for that reason the transfer of the policies to the trust was recorded as effected by way of sale. Had the solicitors been correctly advised that the trusts had always paid the premiums then there would have been no basis for acting by way of sale.

One cannot read too much into the fact that Mr Webby signed the deed of 25 May 1978 referring to a sale and conclude from that deed that Mr Webby must have known what was being done and agreed to it. He was no doubt merely relying on the advice of his solicitors and accountant as to what should be done and in those circumstances was mistaken just as the accountants were, coupled with the fact that he had only recently become aware of his terminal illness. I am not prepared to place any reliance upon that deed when deciding with what intention Mr Webby took out and held the two policies of insurance. Likewise, nothing can be inferred from the transfers endorsed on the policies themselves dated 25 May 1978 because those transfers were executed on the same date as the deed and no doubt in pursuance of the deed.

It was only in the month of November 1980, after Mr Clegg was asked by the estate solicitors to make a thorough examination of the records of the family trusts, that the true

position relating to the two policies being recorded in the books as assets of the trusts from November 1970 and to the premiums on those policies having been paid by the trusts since that date became known.

It was as a result of that discovery that Mr Clegg wrote to the solicitors the letter of 13 November 1980 earlier referred to in which he stated that it was apparent that Mr Webby was holding the policies on trust for the family trusts and that the deed dated 25 May 1958 stating that Mr Webby sold the policies to the trusts was incorrect.

Following receipt of that letter the solicitors endeavoured to correct the position by the Deed of Rectification dated 25 May 1981 which purported to cancel the deed of 25 May 1978 to the intent that it should be regarded as never having been executed and to declare that the policies had at all times been owned by the trusts and that the deceased at all times held the policies upon trust until they were assigned pursuant to that trust to the family trustees on 31 August 1978. (Although the policies were assigned pursuant to the deed of 25 May 1978 on 25 May 1978, it was on 31 August 1978 that the original trustees, Messrs Webby, Thom and Clegg themselves assigned them to new trustees Messrs Webby, Thom and Cameron).

What is the effect in law of those various transactions? In so far as the deed of 25 May 1978 and transfers endorsed on the policies are concerned, I think that there can be little doubt that in spite of the mistakes made, the deed coupled with the transfers endorsed on the policies effectively assigned the two policies to the family trusts. The transfers were noted by the insurance company as having been registered on 1 June 1978 at 3.30 p.m. and by s 43(1) of the Life Insurance Act 1908 such assignment -

> " shall have the effect of vesting the policy absolutely in the assignee".

By virtue of s 43(4) -

> " No notice of any trust shall be inserted in the assignment or endorsed upon the policy. "

The registration of the subsequent transfers of the policies on 31 August 1978 merely vested them in the new family trustees. They remained thereafter vested absolutely in such trustees.

The Deed of Rectification of 26 March 1981 did not in any way affect the ownership of the two policies by the family trustees. The policies remained vested in them and that situation was never changed by the registration of transfers with the Insurance Company under the provision of s 43 of the Life Insurance Act 1908 to new trustees. What the Deed of Rectification purported to do was to cancel the deed of 25 May 1978 which on its face evidenced a sale of the two policies from Mr Webby to the family trustees and to declare that the two policies had at all times been owned by the family trusts and that Mr Webby had held them on trust for the family trusts until formally assigned to the trustees.

I do not need to decide upon the validity or otherwise of the attempted cancellation of the deed of 25 May 1978 by the Deed of Rectification of 26 March 1981 because the deed of 25 May 1978 is only evidence of the intent with which the assignment of the policies was made. The legal assignment of those policies vesting them in the names of the family trustees has been effected by the transfers under the Life Insurance Act 1908. However, it may well be that the deed of 25 May 1978 was executed under a mistake common to both Mr Webby and to the family trustees to the effect that the premiums up until 31 March 1973 were paid by Mr Webby and not by the trust and that the two policies had not up until then been recorded as assets of the trusts and that the deed is void for such common mistake: 12 Halsbury (4th ed) para 1367; Huddersfield Banking Co Ltd v Henry Lister & Son Ltd [1895] 2 Ch 273, 281; Scott v Coulson [1903] 2 Ch 249, 252; Grist v Bailey [1966] 2 All ER 875, 877; Bell v Lever Bros Ltd [1932] A.C. 161. I refer to these various transactions simply as the basis for my recording that I do not consider that I am bound by any statements in the two deeds referred to in considering the intentions with which Mr Webby took out

the two insurance policies or his intentions in relation to his dealings with them. I am entitled to look at all the evidence and the circumstances of the transactions in deciding whether or not Mr Webby, as the objectors contend, held the two policies prior to 25 May 1978 in trust for the family trusts.

The Deed of Rectification executed on 26 March 1981 can have no legal effect so far as the assessment of duty by the Commissioner is concerned. That assessment must be made as at the date of Mr Webby's death, 3 September 1978.

WAS THERE A TRUST?

I must consider this matter, looking at the whole of the evidence in the case after putting aside the deed of 25 May 1978 and the Deed of Rectification. The deed of 25 May 1978 was entered into as a result of mutual mistake and the Deed of Rectification of 26 March 1981 was too late to affect the position as at date of death even if it had that effect.

Before looking at the facts it will first be helpful to note what is required to establish a valid trust and what evidence is necessary to prove the existence of that trust.

The objectors put their case on alternative bases - express trust, presumed or implied trusts and constructive trusts. The distinctions between such trusts are briefly set out in Garrow and Kelly's Law of Trusts and Trustees (5th ed) p 12:

Express or declared trusts

> " In the case of an express or declared trust, the creator has used language which expresses an intention to create a trust. The author of the trust has meant to create a trust, and he has used language which explicitly expresses that intention, either orally or in writing. The fact that a trust was intended may even be deduced from the conduct of the parties concerned but, if there is any uncertainty as to intention, there will be no trust. "

Presumed or implied trusts

" In the case of presumed trusts the intention of the transferor of the property has not been expressed and cannot be inferred in any way from the language he has used in transferring the property to the trustee, but from the circumstances of the case the law presumes that a trust was intended, notwithstanding the absence of language expressive of such an intention. "

Constructive trusts

" In the case of constructive trusts, the trust is raised without any reference to the intentions, presumed or otherwise, of the parties. Thus in Brown v Litton (1711) 1 P.W.140, where the mate of a ship took possession of the deceased captain's money and effects during the course of a voyage and traded with the money, he was held to be a constructive trustee of the profit made. The captain had expressed no intention, directly or indirectly, of entrusting his money to the mate, but the Court held that the latter could not hold the profit made for his own benefit. There was thus no question of intention, express or implied, to create a trust, but the Court simply imposed a trust in order that justice might be done. This principle applies wherever an express trustee makes a profit by reason of his office. It applies also where strangers to the trust have acted as trustees, or have participated in the fraud of a trustee or improperly received trust property knowing that it is trust property. "

It is well settled that no technical language is required to create a trust. It is sufficient if a Court is satisfied that the settlor has shown an intention to create the trust; that he has identified the trust property; and that he has identified the intended beneficiaries of the trust and the purposes of it: see Kelly pp 27-37; Public Trustee v McCarthy (Court of Appeal, Wellington, CA.118/81, 5 May 1982).

The objectors say first that Mr Webby created an express trust. I must be satisfied that they have established

the three matters to which I have just referred which are commonly known as the three certainties. It is not in dispute that two of these certainties, namely, the trust property and the beneficiaries and purposes of the trust are clearly established. They are the two life policies in the Government Life Insurance Office and the members of the family trusts, the purposes of which trusts are clearly established. The area of dispute was whether it was proved that the seller had shown an intention that the policies which he took out in his name were held by him in trust for the family trusts.

No evidence was given of language used by Mr Webby as to his intention. His intention to create a trust, if he had one, must be deduced from the conduct of the parties concerned: see Re Armstrong [1960] V.R. 202, 205. In considering that conduct, care must be taken to keep in mind the distinction between an intention to make a gift and an intention to create a trust. As Herring C.J. said in Re Armstrong at p 205:

> " After pointing out that an imperfect gift will not be construed as a declaration of trust, the learned author (Professor Maitland) proceeds at p 74:
> 'The two intentions', viz to make a gift and declare a trust, 'are very different - the giver means to get rid of his rights, the man who is intending to make himself a trustee intends to retain his rights but to come under an onerous obligation. The latter intention is far rarer than the former. Men often mean to give things to their kinsfolk, they do not often mean to constitute themselves trustees. An imperfect gift is no declaration of trust.' "

The approach of the Court to the question of whether or not a person has intended to constitute himself a trustee is well expressed by Bacon, V.-C. in Heartley v Nicholson (1873) L.R. 19 Eq. 233 at p 239:

> " All such questions are, from their very nature, of difficulty, and sometimes of very great nicety. The difficulty is occasioned by the desire which the court must feel to give full effect to the intention of the party or parties to the transaction, and by the duty which the court is under of preserving unimpaired those rules which have been established and which form the law, even though they should frustrate the plain intention. The nicety often arises from the attending circumstances, because they require the closest consideration in order to arrive at a satisfactory conclusion as to what was the true intention, and as to the propriety of carrying that intention into effect. "

The distinction to be preserved between a trust and an imperfect gift has been recently referred to by Scarman L.J.,as he then was, in Paul v Constance [1977] 1 All ER 195. At p 198 after referring to Jones v Lock (1865) 1 Ch App 25; Richards v Delbridge (1874) LR 18 Eq. 11; and Milroy v Lord (1862) 4 De GF & J 264, Scarman, L.J. said:

> " The facts of those cases do not, therefore, very much help the submission of counsel for the defendant, but he was able to extract from them this principle: that there must be a clear declaration of trust, and that means there must be clear evidence from what is said or done of an intention to create a trust or, as counsel for the defendant put it, 'an intention to dispose of a property or a fund so that somebody else to the exclusion of the disponent acquires the beneficial interest in it'. He submitted that there was no such evidnece.
>
> When one looks to the detailed evidence to see whether it goes as far as that - and I think that the evidence does have to go as far as that - one finds that from the time that Mr Constance received his damages right up to his death he was saying, on occasions, that the money was as much the plaintiff's as his."

The evidence in the present case establishes that when Mr Webby took out the two life policies it was

his intention that they be owned by the family trusts. The family trusts were already established and the purpose of taking out the insurances and vesting them in the trusts was to preserve his estate from payment of a large sum of death duties. Mr Webby knew, because he was so told by his insurance representative, that he was unable to take out such policies directly in the name of the trusts, but that they would need to be first taken out in his own name and then assigned or sold to the trusts at a later date once the policy had been issued. The issue of the policy at that time took approximately seven weeks.

The policy proposals were completed and at the same time Mr Webby, who had signing authority on the family trusts' bank accounts, signed bank order forms in the names of the trusts directing that the trusts' bank pay monthly to the insurance company the premiums due under the policies. When the two policies were subsequently issued they were given to the trusts' accountant for safe keeping, but for reasons which are unexplained, the vesting of those policies in the names of the trustees by transfer as required by s 43 of the Life Insurance Act 1908 was never carried out. Mr Webby may have thought it had been done, or the matter may have been overlooked, but what is plain is that each year after the policies were taken out, they appeared as assets in the balance sheet of the family trusts of which Mr Webby was a trustee. Each year the minute book of the family trusts records that the accounts of the trusts were "approved and adopted" and such minutes were signed by Mr Webby.

I am satisfied that these facts establish that Mr Webby intended to dispose of the two policies so that the family trusts to the exclusion of himself acquired the beneficial interest in them.

The evidence does not refer to any express statements made by Mr Webby of his intention to hold the policies in trust for the family trusts, but such is not of course necessary. Mr Webby's conduct was such that only one conclusion can be drawn from it, namely, that he took out

the two policies for the purpose of and with the express intention of vesting them in the family trusts when he could do so, and that in the meantime they were to be considered as being beneficially the property of those trusts, and that Mr Webby held them on their behalf.

I do not agree with Mr Keesing's submission that the transaction resulted only in an incomplete gift. This was not a case of gift at all. When taken out, the policies were paid for by the family trusts. They paid the premiums. The policies were to be in the name of the family trusts from the outset and this was prevented only by the Life Office rule to the contrary. Mr Webby held the policies in his name only until such time as they could be transferred to the trusts. The facts distinguish the present case from cases such as Jones v Lock (ante) where the intention to make a gift failed because the gift was imperfect; Richards v Delbridge (ante) where Mr Richards intended to make a gift of a business by endorsing on the lease a memorandum to that effect; and Milroy v Lord (ante). They also distinguish the cases of In re Rose [1952] Ch 499; and Scoones v Galvin [1934] NZLR 1004 which were also cases of imperfect gift.

It was not the intention of Mr Webby to make a gift of the policies to the trusts. They were in effect taken out ab initio on behalf of the trusts themselves but until such time as they could be formally transferred into the name of the trusts they were held by Mr Webby on their behalf: they were held in trust for them.

This whole transaction has been blurred by the mistakes made in May 1978 when Mr Webby's advisers endeavoured to tidy up his business affairs. Had the true position regarding the policies and the family trusts accounts been then known, there would have been no deed purporting to evidence a sale. The true position, namely, that the policies were beneficially those of the trusts would have caused the trust to be recognised, and the appropriate steps to vest those policies in the trusts would have been taken.

I have treated this case as one of an express trust where the fact that a trust was intended may be deduced from the conduct of the parties concerned. It is arguable, however, that the circumstances may establish a presumed or implied trust within the categories referred to in Garrow and Kelly. For an example of such a trust see James v Holmes (1862) 4 DeG F & J 470. It may be said that Mr Webby originally intended that the policies should be taken out in the name of the family trusts but when he found that such could not be done immediately, he arranged for the trusts to pay the premiums on the policies, to hold them when issued, and to include them as assets in their books, with the intention that in the meantime he would hold the policies in his name on their behalf.

Although the objectors also raised the possibility of a constructive trust, I have not considered such in this case because to find a constructive trust, if such there be, would not assist the objectors. The Courts where they find a constructive trust do so in order to do justice in a particular case, and the trust is imposed by the Court order and operates from that date. To make such an order now would not affect the estate duty position of the deceased's estate.

In the result, the answer to the question posed in the case as to whether the Commissioner acted incorrectly in including in the deceased's dutiable estate the amount of $113,949.05, being part of the proceeds of the two policies, is Yes! However, I should say that in the confused situation with which he was confronted in this case it is understandable that he reached the conclusion he did. It was necessary for the full facts to be traversed in a Court hearing before the liability of the deceased's estate could be properly determined. In those circumstances, it is appropriate that no order be made as to costs.

Solicitors for the Objectors Phillips, Shayle-George & Co (Wellington)

Solicitors for the Commissioner Crown Law Office (Wellington)