

[HIGH COURT OF AUSTRALIA.]

BRUNKER . . . . . APPELLANT;  
 PLAINTIFF,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) }  
 AND ANOTHER . . . . . } RESPONDENTS.  
 DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF  
 NEW SOUTH WALES.

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}

SYDNEY,

Dec. 15, 16.

Rich, Evatt and  
 McTiernan JJ.

*Settlement—Deed—Construction—Settlor's right to nominate manager—Exercise of  
 right—Enforcement of trusts—Rectification—Locus standi of settlor's nominee.*

In a deed of settlement the settlor directed the trustee to pay the annual income of the trust funds to a certain society for its general purposes so long as the society maintained a sanctuary for birds and complied with certain conditions in connection therewith. A material condition was that for the purposes of the sanctuary the trustee should employ a manager and other servants, all of whom were to be approved of by the trustee. The employment, other than that of the settlor himself, was to be at such weekly wage as the trustee and the society agreed upon and was to be determinable by a week's notice from the trustee or the society. The settlor was to be employed as such manager during his lifetime, and he reserved to himself the right to nominate the first manager after his death. By letter he "appointed" B as manager for life at a salary of £5 per week. B, who was unable to agree with the society upon the terms upon which she should be employed as manager, brought a suit in equity claiming the right to be employed as manager during her life and as from the date of the death of the settlor, at the remuneration of £5 per week, or, alternatively, that the deed be rectified so as to accord with the intentions of the settlor.

*Held*, on the facts, that no case for rectification had been made out, and that in any event B had no *locus standi* to maintain the present suit.

Decision of the Supreme Court of New South Wales (Nicholas J.), affirmed.



APPEAL from the Supreme Court of New South Wales.

A suit was brought in the equitable jurisdiction of the Supreme Court of New South Wales by Bessie Brunker against the Perpetual Trustee Co. (Ltd.) and the Royal Society for the Prevention of Cruelty to Animals N.S.W. Incorporated claiming equitable rights under a deed of settlement executed by the late R. J. D. Sellar or, alternatively, that the deed be rectified to accord with the intentions of the settlor.

By deed dated 30th September 1930, and made between the late R. J. D. Sellar as settlor and the Perpetual Trustee Co. (Ltd.), the settlor transferred certain lands and declared his intention of paying £10,000 (which sum was subsequently paid) to the Perpetual Trustee Co. (Ltd.) as trustee upon trust to permit the Royal Society for the Prevention of Cruelty to Animals N.S.W. Incorporated to occupy the lands and to pay the income of the fund to the society so long as the society should observe and perform the conditions set out in clause 4 of the deed. This clause is set out in full in the judgment of *Rich J.*; it contained conditions incidental to the main purpose of the settlor, which was the creation of a perpetual sanctuary for birds, and provided that the society should “employ keep and maintain upon the said lands from time to time a manager and all necessary servants gardeners workmen and others for the purposes aforesaid all of which persons shall be approved of by the trustee and be employed at such weekly salary or wage as the trustee shall from time to time agree upon and such employment except as regards the settlor shall be determinable by a week’s notice from the trustee or society to the employee. The said settlor shall be employed as such manager during his lifetime and shall have the right to nominate the first manager after his death.” The deed contained a gift over to the Benevolent Society of New South Wales on failure by the Royal Society for the Prevention of Cruelty to Animals N.S.W. Incorporated to perform the conditions therein contained.

On 8th September 1933, the settlor wrote to his solicitors, Messieurs Faithfull, Maddock & Baldock, a letter stating that “in regard to my successor as manager I wish to appoint my housekeeper Bessie Brunker for life at a salary of £5 per week.”

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The settlor died on 2nd May 1934. After his death the society was willing to employ the plaintiff as manager of the sanctuary but only on its own terms as to tenure and remuneration.

The society accepted obligations under the deed as executed and had no notice that it did not accord with the intentions of the settlor, had that been the fact. The deed, however, correctly interpreted the instructions given by the settlor to his solicitor. By letter written about a year after the execution of the deed the solicitor in reply to a request for advice upon the matter informed the settlor that his appointee as manager would hold that office during good behaviour.

The plaintiff claimed the right to be employed as manager of the sanctuary during her life and as from the death of the settlor at the remuneration of £5 per week or, alternatively, that the deed be rectified to accord with the intentions of the settlor.

*Nicholas J.* dismissed the suit.

From that decision the plaintiff appealed to the High Court.

*Piddington K.C.* (with him *McKillop*), for the appellant. The word “nominate” as used in clause 4 (1) (e) of the trust deed means “appoint” (*Boyer v. Bishop of Norwich* (1)). From the date of nomination the appellant had a vested right to be appointed. The difference between the appellant and the subordinate servants was that both the settlor and the nominee were *cestuis que trust*; they had rights under the settlement. The words “being terminable on a week’s notice from the trustee or society” do not apply to any exercise by the settlor of his right either to be first manager or to nominate for absolute appointment. Where there is a right of nomination, the nomination must be carried into effect; in default, equitable relief is available (*R. v. Marquis of Stafford* (2)). Excepted out of the complete control is the right of the settlor to nominate and that gave him an equitable right as against the respondents if they co-operated in refusing that right. Out of his right springs the right of the person who benefits, that is, the appellant, to enforce it after the settlor’s death (*Re Will of P. R. Larkin, deceased*; *Perpetual Trustee Co. Ltd. v. Larkin* (3)). If clause 4 (1) (e) does not

(1) (1892) A.C. 417.

(2) (1790) 3 T.R. 646; 100 E.R. 782.

(3) (1913) 13 S.R. (N.S.W.) 691, at p. 692.



truly represent the intentions of the settlor it should be rectified (*Lister v. Hodgson* (1); *M'Mechan v. Warburton* (2)). The extent of the evidence necessary for rectification was dealt with in *Bacchus Marsh Concentrated Milk Co. Ltd. v. Joseph Nathan & Co. Ltd* (3). If upon rectification the respondent society desires to retire from the trusts under the deed, which is voluntary, it may do so. When rectification has been made, then all the rights and all the equities of the person affected by the instrument as rectified operate as if by insurance (*United States v. Motor Trucks Ltd.* (4)).

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[RICH J. At this stage the court desires to hear the submissions proposed to be made on behalf of the respondents.

[Mason K.C. (with him *Beresford Grant*), for the respondents. The submissions made on behalf of the respondents are (a) that on the statement of claim and facts proved there is no equity in the appellant to maintain the suit, because, in any event, the property would go to the Benevolent Society of New South Wales; (b) that clause 4 (1) (e) is only a machinery clause and not a beneficial clause creating a trust in the appellant; and (c) that there was no evidence tendered on which the court could rectify the document, that is to say, there was no evidence of mistake or that the intention of the settlor was not carried into effect. If there has been a breach of trust, forfeiture follows and the property passes to the Benevolent Society. In that event the sanctuary comes to an end, and it must necessarily follow that the appellant can no longer be manager. Upon such a breach of trust the question becomes one as between the Benevolent Society and the respondents, in which the appellant has no interest and, consequently, no *locus standi* to maintain a suit. Rectification would not affect this position. There is nothing on the face of the deed to indicate that one of its objects was to provide a means of livelihood for the appellant. Clause 5 of the deed is a protection to the trustee.]

*Piddington* K.C. As a matter of construction the appellant as manager, duly nominated and thereby appointed, was to be

(1) (1867) L.R. 4 Eq. 30, at p. 34.

(2) (1896) 1 I.R. 435, at p. 439.

(3) (1919) 26 C.L.R. 410, at pp. 427,

432, 433.

(4) (1924) A.C. 196, at pp. 200, 201.



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paid whatever remuneration, being reasonable, was fixed by the section; alternatively, whatever remuneration was reasonable, a matter which would be for the direction of the Master in Equity. The right of nomination was a right carved out of the transfer of the property and reserved to the settlor (*Mirehouse v. Rennell* (1)) and carries with it all that is necessary to give it effect, e.g., fixation of salary. The gift over in clause 6 is a collateral sanction for the trust and independent of such other sanctions for the trust as are included in remedies for a breach of the trust. The clause should not be construed in such a way as to reduce the deed to an absurdity (*The Duke of Buccleuch* (2)). Where a declarant makes a statement contrary to his interest the whole of the statement must be admitted in evidence (*Higham v. Ridgway* (3); *Taylor v. Witham*; *Witham v. Taylor* (4)). The trial judge imposed an unjustifiable limitation on the giving of evidence. Any evidence which tends to show mistake is admissible (*Torre v. Torre* (5)). Matters material for the ascertainment of a person's intention at a given time were discussed in *In re Grove*; *Vaucher v. The Solicitor to the Treasury* (6). Nomination conferred a right upon the nominee to be appointed to the post of manager with its benefits. Directly the appellant was appointed she was entitled to have the trusts declared upon in the settlement carried out in her favour. Forfeiture is only a collateral buttress to the settlor's intention (*Attorney-General v. Christ's Hospital* (7)). It is enforceable between different parties but does not adeem the appellant's right. She has an established enforceable equitable right to salary and to manage (*Levy v. Norton-Culhane* (8)). With reference to the appellant's right to sue, see *Ehrmann v. Ehrmann* (9).

*Mason K.C.* and *Beresford Grant*, for the respondents, were not called upon.

(1) (1832) 8 Bing. 490, at pp. 493, 494, 516; 131 E.R. 482, at pp. 483, 484, 492.

(2) (1889) 15 P.D. 86, at p. 96.

(3) (1808) 10 East 109; 103 E.R. 717.

(4) (1876) 3 Ch. D. 605.

(5) (1853) 1 Sm. & G. 518, at p. 521; 65 E.R. 227, at p. 228.

(6) (1888) 40 Ch. D. 216, at p. 242.

(7) (1830) 1 Russ. & M. 626; 39 E.R. 240.

(8) (1928) 28 S.R. (N.S.W.) 302, at p. 306; 45 W.N. (N.S.W.) 51.

(9) (1894) 72 L.T. 17.



RICH J. In this case the appellant brings a suit of a very unusual kind. She claims to have equitable rights under a trust deed or settlement. The trusts are not on their face in favour of any individual but have for their purpose the maintenance of a sanctuary for birds. The trust deed is made between the late R. J. D. Sellar and the Perpetual Trustee Co. (Ltd.). The Perpetual Trustee Co. (Ltd.) as trustee is directed to pay the annual income of the trust funds to the Royal Society for the Prevention of Cruelty to Animals N.S.W. Incorporated so long as the society shall observe and perform certain conditions which are set out. The conditions require it to keep up a sanctuary for birds. The society is not bound to apply the income in performing the conditions. The income is its own so long as it performs the conditions. Condition 4 is as follows:—"The trustee shall pay the annual income of the investments to the society for its general purposes and shall permit the society to use occupy enjoy and appropriate the sanctuary for its general purposes as aforesaid whilst and so long as the said society shall observe and perform the following conditions:—(1) The society shall otherwise than out of the income of the trust fund: (a) Well and sufficiently repair maintain amend and keep the said sanctuary with the appurtenances in good and substantial repair and all fences fixtures and things thereto belonging. (b) Pay all taxes rates and assessments whatsoever whether municipal local government parliamentary or otherwise which shall at any time be charged upon the said sanctuary or upon the trustee or society on account or in respect thereof. (c) Insure and keep insured against loss or damage caused by fire explosion lightning thunderbolt storm flood tempest earthquake riot civil commotion rebellion and insurrection all buildings and other erections upon the said lands in the full insurable value thereof in some insurance office approved of by the trustee in the name of the trustee and will upon the request of the trustee show to it the receipt for the last premium paid for such insurance and as often as such buildings and other erections upon the said lands shall be destroyed or damaged by fire explosion lightning thunderbolt storm flood tempest earthquake civil commotion rebellion and insurrection all or any sums of money which shall be recovered or received for or in respect of such insurance shall be laid out and

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expended in building or repairing the said buildings and erections upon the said lands or such parts thereof as shall be destroyed or damaged by fire explosion lightning thunderbolt storm flood tempest earthquake riot civil commotion rebellion and insurrection as aforesaid. (d) Pay or provide all costs charges expenses and outgoings of and incidental to the maintenance and management of the said sanctuary and the yards and grounds thereof and pay the salaries and wages of all managers housemaids gardeners and all servants and workmen who shall be employed in and about the said sanctuary and do all such works and things as may in the opinion of the trustee be from time to time necessary or desirable for the purposes aforesaid or any of them and in executing the trusts and powers herein contained. (e) Employ keep and maintain upon the said lands from time to time a manager and all necessary servants gardeners workmen and others for the purposes aforesaid all of which persons shall be approved of by the trustee and be employed at such weekly salary or wage as the trustee and the society shall from time to time agree upon and such employment except as regards the settlor shall be determinable by a week's notice from the trustee or society to the employee. The said settlor shall be employed as such manager during his lifetime and shall have the right to nominate the first manager after his death. The duties of the manager who shall have the control of any servants workmen or others from time to time employed for the purposes aforesaid shall in particular be as follows :—(i) To keep the said sanctuary clean and in good habitable condition including in particular the grounds and lawns and the fountain at present erected in the grounds of the sanctuary. (ii) To permit and encourage all Australian native birds including in particular native doves to come and drink at the said fountain at all times. (iii) To feed or cause to be fed all visiting birds three times daily in the summer at about six o'clock in the forenoon at about noon and at about five o'clock in the afternoon and at corresponding hours having regard to sunrise and sunset in the other seasons of the year with such quantity of wheat grain and/or seed as shall be sufficient to fully and properly feed at each of such times all such visiting birds such quantity of wheat grain and/or seed to be distributed



each week amongst such visiting birds to be not less than the equivalent of the quantity that could be purchased from time to time at current market rates for the sum of one pound. (iv) During the progress of feeding and/or drinking to keep such birds free from molestation of man or any kind of animal. And the due performance of such duties shall be one of the conditions on which the society shall be entitled to the use occupation and enjoyment of the sanctuary and to be paid the said income. (2) The society shall not lease assign transfer demise or part with the possession or by any act or deed procure the said lands or buildings or any part thereof to be assigned transferred demised or put into possession of any person or persons without the previous consent in writing of the trustee and shall not keep or maintain or permit to be kept or maintained in or upon the said sanctuary any animals birds fish or other classes or kinds of living things not approved of by the trustee." It is under this condition that the plaintiff claims to have rights in equity. The settlor, who is now dead, exercised his right to nominate the first manager after his death by nominating the plaintiff. She and the society have been unable to agree upon the terms upon which she shall be employed as manager. The society wish to appoint her at £2 a week together with the use of the residence, and apparently it treats her tenure as determinable by a week's notice. As I understand she claims that her tenure is *quam diu bene se gesserit*. She claims to be appointed at £5 per week because that is the wage at which she was appointed by the settlor. In my opinion there is more than one insuperable obstacle to the success of her suit. In the first place, it is quite opposed to what I think is the clear meaning of the clause. Clause 4 (1) (e) says: "which persons shall be approved by the trustee and be employed at such weekly salary or wage as the trustee and the society shall from time to time agree upon and such employment except as regards the settlor shall be determinable by a week's notice from the trustee or society to the employee." The expression "which persons" includes the manager; that, I think, is quite plain. The words "except as regards the settlor" except R. J. D. Sellar, but not his nominee. It follows that the salary is to be fixed by the trustee and the society and the plaintiff is liable to dismissal on a

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week's notice from either of them. But to overcome this difficulty she claims rectification of the deed. What her *locus standi* in a suit for rectification is I have not been able to grasp, but, passing that by, the deed was drawn, submitted to the settlor and approved by him; submitted to the society, considered by its counsel and approved by him and it; elaborately considered by the settlor's counsel and solicitor and passed by them with laudatory commendation on the part of the latter. You cannot rectify a deed because its effect is disappointing. You can only rectify it because its words depart from the words intended to be used. You have to find those words expressed somewhere or other antecedently to the deed: otherwise you have nothing to rectify it to. Here the settlor is dead and cannot contradict any evidence. But there is no evidence that at the time he executed the deed he intended any other words to be used or inserted in the deed. It does appear that about a year after the execution of the deed the settlor asked his solicitor for information as to matters in connection with the bird sanctuary, especially in regard to his successor as manager, and the solicitor in reply gave him the following advice:—"The manager so appointed by you (and the appointment can be made by letter addressed to The Perpetual Trustee Company (Limited) at any time) will continue to act as manager during capacity and good behaviour. In other words, he could not be removed during his lifetime except on the ground of proved misbehaviour or incapacity." I cannot agree, as I have already said, with this construction of the deed, and it may be unfortunate that the settlor was allowed to rest satisfied with it. But this can have no bearing on rectification. The solicitor's opinion a year after the execution of the deed is not admissible on the issue. In my opinion the claim for rectification cannot succeed and the deed must be given effect according to its construction. As I have already said, upon that construction the plaintiff's suit fails. But in any event I cannot see how the plaintiff can maintain the suit. The clause created no trust in favour of the settlor's nominee. The right to be employed as manager of the bird sanctuary is not property, and his power of nomination is not a power of appointment to an interest in property. There is nothing to show that in making the settlement he contracted as a



trustee for the plaintiff. The society is not a party to the deed. It is only bound to fulfil the terms of the deed as a condition of its right to the annual income. The conditions are expressed in the deed and the plaintiff has no right to enforce their fulfilment. The Attorney-General not being a party to the suit, it is not desirable to say anything in other respects about the effect of the deed in the events which have happened or are likely to happen.

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In my opinion *Nicholas J.* was right in dismissing the suit and this appeal should be dismissed with costs.

One other matter should be mentioned. I agree with the comment of *Nicholas J.* to the effect that a moral obligation rests upon the society to give effect as nearly as possible to the wishes of Mr. Sellar. In view of clause 5 of the deed providing for a gift over to the Benevolent Society in certain events the carrying out of such moral obligation may also turn out to be good policy.

EVATT J. I agree.

McTIERNAN J. I agree.

*Appeal dismissed with costs.*

Solicitors for the appellant, *William Patterson & Co.*

Solicitors for the respondents, *Iceton, Faithfull & Baldock.*

J. B.