Appl
Clay v Clay
(1999) 20
WAR 427

[HIGH COURT OF AUSTRALIA.]

PARTRIDGE AND OTHERS . . . . APPELLANTS;
PLAINTIFFS,

AND

EQUITY TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, Oct. 14-17, 29.

Starke, Dixon and Williams JJ.

Will—Trust—Trustee company appointed executor and trustee of will—Trust for conversion, with discretion to postpone—Debt due to testator by company in which he was shareholder—Trustee empowered by will not to press for payment of debt but to grant the company "such reasonable time as it may require"—Statutory power to allow time for payment of debt—Loss to estate through allowance of time—Breach of trust—Power of Court to relieve trustee of liability—Action for loss occasioned by breach—Nature of action—Limitation of time—Rights of life tenants and remaindermen—Property Law Act 1928 (*Vict.*) (*No.* 3754), *s.* 304*—*Supreme Court Act* 1928 (*Vict.*) (*No.* 3783), *s.* 82 (1) (c)†—*Trustee Act* 1928 (*Vict.*) (*No.* 3792), *ss.* 15, 61, 67‡—*Trustees Companies Act* 1928 (*Vict.*) (*No.* 3793).

In s. 15 of the *Trustee Act* 1928 (Vict.), the words of par. (*e*) "allow any time for payment of any debt," include an allowance of time whether made the subject of a binding agreement or not. The section involves the exercise of an active discretion, not the mere passive attitude of leaving matters alone, and no relief is afforded where loss has arisen from carelessness or supineness.

Re Greenwood; *Greenwood* v. *Firth*, (1911) 105 L.T. 509, applied.

* The *Property Law Act* 1928 (Vict.), provides, by s. 304: "After the first day of June One thousand eight hundred and sixty-four no action or suit or other proceeding shall be brought to recover . . . any legacy but within fifteen years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same; unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable or his agent to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within fifteen years after such payment or acknowledgment or the last of such payments or acknowledgments (if more than one) was given."

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The testator, who died on 20th July 1926, left a will, dated 8th April 1926, by which he gave, devised and bequeathed all his real and personal estate to the defendant (a trustee company under the *Trustee Companies Act* 1928 (Vict.)) as his sole executor and trustee on trust for sale and conversion and, subject to payment of debts and legacies, to pay the income to all his children in equal shares during their respective lives and immediately after the death of each child to stand possessed of his share, as well original as accruing, of and in the capital and income of the estate for the child or children of the deceased child who attained the age of twenty-one, and, if there should not be any such child of such deceased child, such share should be added to the shares of the other children equally. The trustee was given a discretion to postpone conversion and to hold any shares or investments held by the testator at the date of his death. The will concluded as follows : " I desire that my trustees shall not press for payment of any debt which may be owing to me by " H. Pty. Ltd. " but will grant the said company such reasonable time as it may require at such rate of interest as my said trustees may deem fit." The defendant compromised this indebtedness. An instalment of £650 under the compromise fell due in January 1932 and was allowed to remain outstanding at interest, as also was the balance of £1,500 which fell due in July 1932. In 1932 and for some time thereafter the trial judge found the company could have paid the capital sums totalling £2,150 if the defendant had insisted on payment; but the company's financial position was deteriorating and, on 29th January 1936, when it seemed unlikely that the amount would be recovered unless the company's finances improved, the defendant agreed to leave the total of £2,150 outstanding for a further five years with interest at five per cent per annum. In October 1938 the company went into voluntary liquidation; its assets were insufficient to meet the claim of a secured creditor, and the whole sum of £2,150, together with some arrears of interest, was lost to the estate. In 1945 the beneficiaries brought an action against the defendant, on the footing of a wilful default of the defendant as executor, and, alternatively, on the footing of a breach of trust and wilful default of the defendant as trustee of the will, to compel it to make good the loss.

Held :—

(1) The loss was due to a wilful default or breach of trust on the part of the defendant which occurred when the defendant failed to insist on payment

† The *Supreme Court Act* 1928 (Vict.), provides, by s. 82 (1) : " Subject to the provisions of this Division actions suits or other proceedings as herein set out shall be commenced within the times herein expressed after the causes of such actions suits or other proceedings respectively . . . (c) (i.) Actions of debt upon any award where the submission is not by specialty. (ii.) Actions for money levied under any *fieri facias*. (iii.) Actions of account other than such accounts as concern the trade of merchant and merchant their factors or servants. (iv.) Actions of account or for not accounting and suits for such accounts as concern the trade of merchandise between merchant and merchant their factors and servants. (v.) Actions in the nature of actions for— Trespass *quare clausum fregit*. Trespass to goods. Detinue. Trover. (vi.) All other actions founded on any simple contract including a contract implied in law. (vii.) All other actions founded on tort. (viii.) All other actions in the nature of actions on the case : Six years.

in 1932 or shortly afterwards; the final clause of the will conferred merely a power to allow time to pay which was fiduciary and was to be exercised with due care and diligence and solely in the interests of the estate and the power had not been so exercised.

The defendant could not rely on s. 15 (*e*) of the *Trustee Act* 1928 (Vict.), because it had not exercised an active discretion such as the section required, and, as it has not acted reasonably, relief under s. 61 of the Act was not available.

In re Grindey, (1898) 2 Ch. 593, and *In re Mackay*, (1911) 1 Ch. 300, distinguished.

(2) When the default occurred the estate was no longer vested in the defendant as executor, but was vested in it as trustee of the will. The action of the beneficiaries was not subject to the limitation of time provided by s. 304 of the *Property Law Act* 1928 (Vict.) in respect of an action against an executor to recover a legacy, nor was it an action for a *devastavit* so as to be within the limitation provided by s. 82 (1) (c) (viii) of the *Supreme Court Act* 1928 (Vict.) for actions on the case. It was an action for breach of an express trust "to which no existing statute of limitations applies," within the meaning of s. 67 (1) (*b*) of the *Trustee Act* 1928 (Vict.), so that the defendant was entitled to the benefit of the lapse of time, as therein provided, against the children of the testator in respect of their vested life interests but, as the other interests of the beneficiaries were not interests in possession, the action was not otherwise barred by time.

(3) Accordingly, the defendant should be ordered to pay the sum of £2,150 to the estate to be invested and held on the trusts of the will, but it should be declared that the defendant was entitled to retain for its own benefit so much of the income from the investment of that sum as would, if their claim had not been barred, have been payable to the children of the testator in respect of their vested life interests.

Decision of the Supreme Court of Victoria (*Lowe* J.) reversed.

‡ The *Trustee Act* 1928 (Vict.) provides:—By s. 15: "A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trustee company, a sole acting trustee where by the instrument (if any) creating the trust, or by statute a sole trustee is authorized to execute the trusts and powers reposed in him, may, if and as he or they think fit . . . (*e*) allow any time for payment of any debt . . . and for any of" the purposes mentioned "may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith." By s. 61: "If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same." By s. 67: "(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was a party or privy or is to recover trust

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APPEAL from the Supreme Court of Victoria.

In an action commenced on 18th May 1945 in the Supreme Court of Victoria by Arthur Reginald Partridge and others against the Equity Trustees Executors and Agency Co. Ltd. the statement of claim of the plaintiffs (who are more specifically described in par. 5 thereof) was substantially as follows:—

1. The defendant is and was at all material times a company duly incorporated under the law of Victoria and is sued as the executor of the will of George Partridge, deceased (subsequently referred to as the testator), or, alternatively, as the trustee of his estate.

2. The testator died on 20th July 1926.

3. By his last will, dated 8th April 1926, the testator appointed the defendant executor and trustee thereof and gave, devised and bequeathed all his real and personal estate to the defendant upon trust to sell, call in and convert the same into money and to pay thereout his just debts, funeral and testamentary expenses and the probate and estate duties payable on his estate and certain legacies specified in the will and to invest the residue and, subject to the payment of an annuity as therein directed, to pay the income from such investments to all his children in equal shares during their respective lives and immediately after the death of each child of his to stand possessed of such child's share as well original as accruing of and in the capital and income of the trust estate in trust for the

property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use the following provisions shall apply:—(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: (*b*) If the action or other proceeding is brought to recover money or other property and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary is an interest in possession. (2) No beneficiary as against whom there would be a good defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded. (3) This section shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations. (4) For the purposes of this section, the expression 'trustee' includes an executor or administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee and the provisions of this section relating to a trustee shall apply as well to several joint trustees as to a sole trustee."

child or all the children of such deceased child who should attain or have attained the age of twenty-one years and if more than one in equal shares and if there should not be any such child of such deceased child such share to be added to the shares of the testator's other children equally.

4. Probate of the will was granted to the defendant by the Supreme Court of Victoria on 5th October 1926.

5. The testator had four children, namely, the plaintiffs James Russell Partridge (upon whose death after action brought Arthur Reginald Partridge, as representing his estate, was by order of the Supreme Court joined as plaintiff), Arthur Reginald Partridge, Blanche Barber and Louisa Mary Dawborn, and such children had six children, namely, the remaining plaintiffs, Gwyneth Mary Harwood, Alfred James Partridge, Lionel Reginald Dawborn, David Russell Partridge, John Milburn Partridge and Mary Lynette Barber (the last three being infants who sued by their next friend, Roland Nicholson Barber).

6. The defendant as such executor has been guilty of wilful default in not getting in certain moneys forming part of the estate of the testator. Particulars:—On 1st January 1932 a sum of £650 became due and payable by William Hartley Pty. Ltd. to the defendant as such executor under an agreement made between them on or about 19th May 1930 for the settlement of claims by the defendant as such executor against William Hartley Pty. Ltd. On 1st July 1933 a further sum of £1,500 became so due and payable. The defendant was aware of these facts but has at all times since the said sums became due and payable neglected to take appropriate or any action to obtain payment of such sums. In or about the year 1936 William Hartley Pty. Ltd. became insolvent, and on or about 10th October 1938 it went into voluntary liquidation and by reason of the said neglect the said two sums have been lost.

7. Alternatively with par. 6, the defendant as trustee of the estate of the testator has committed breaches of trust and been guilty of wilful default in not getting in certain moneys forming part of the estate of the said testator. Particulars:—The plaintiffs repeat the particulars given under par. 6.

The plaintiffs claimed (so far as is material): Under pars. 1-6, administration of the estate with accounts and inquiries upon the footing of wilful default; alternatively, under pars. 1-5 and 7, to have the trusts of the will carried into execution under the direction of the Court with accounts and inquiries upon the footing of wilful default and/or breach of trust.

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The defendant, by its defence, traversed pars. 6 and 7 of the statement of claim and pleaded substantially as follows:—

8. The will referred to in the statement of claim contained the following provision: "I desire that my trustees shall not press for payment of any debt which may be owing to me by William Hartley and Company Proprietary Limited but will grant the said company such reasonable time as it may require at such rate of interest as my trustees may deem fit."

9. The moneys referred to in par. 6 of the statement of claim were debts owing to the testator at the date of his death by William Hartley Pty. Ltd.

10. The defendant refrained from pressing for payment of such debts in the bona-fide exercise of the powers and discretions conferred upon it by the provisions of the will referred to in par. 8 hereof.

11. The moneys were lost to the estate of the testator by reason only of the fact that the company requested the defendant to grant to it and the defendant did grant to it a reasonable time for the payment of the moneys.

12. The defendant from time to time allowed to the company extensions of time to pay the moneys aforesaid but in so doing it exercised its discretion honestly and fairly and in the well-founded belief that any action on its part to enforce payment of the moneys would have been fruitless.

13. In allowing the extensions of time the defendant did what to it seemed expedient and it acted reasonably and in good faith. It will accordingly rely upon the provisions of s. 15 of the *Trustee Act* 1928 (Vict.)

14. The right (if any) of the plaintiffs to maintain this action is barred by lapse of time, and the defendant will rely upon the provisions of s. 82 (1) (c) (viii) of the *Supreme Court Act* 1928 (Vict.) or, alternatively, of s. 67 of the *Trustee Act* 1928 (Vict.) or, alternatively, of s. 304 of the *Property Law Act* 1928 (Vict.).

15. If the defendant has committed any breach of trust or has been guilty of any wilful default such as is alleged in the statement of claim, it acted at all times honestly and reasonably in connection with the matters complained of by the plaintiffs and it ought fairly to be excused for such breach of trust and wilful default and for omitting to obtain the directions of the Court in the matters aforesaid.

16. The plaintiffs and each of them with full knowledge of all material facts and circumstances consented to and concurred in the acts and omissions of the defendant alleged in pars. 6 and 7 respectively of the statement of claim.

The plaintiffs replied, joining issue and alleging that the interests of the grandchildren, and also the children's life interests in remainder, were not yet interests in possession.

The action came for trial before *Lowe* J., who dismissed it on the ground that, in view of the provision of the will upon which the defendant relied in par. 8 of its defence, the plaintiffs had failed to establish the default alleged.

From this decision the plaintiffs appealed to the High Court. Further facts appear in the judgment hereunder.

Coppel K.C. and *T. W. Smith*, for the appellants.

Coppel K.C. The special clause of the will had no application to the circumstances existing at the material times, and it affords no defence to the appellant's claim. Unless it was justified by that clause, the failure of the defendant to get in the money in question when the debtor company was in a position to pay it was clearly culpable neglect. It is submitted that the clause has no application to the money lost; it was a debt due to the defendant under the compromise of May 1930 and was not a debt owing to the testator within the meaning of the clause. *Lowe* J. appears to have treated the clause as intended for the benefit of the debtor company, as justifying the defendant in refraining indefinitely from taking steps to enforce payment and in disregarding the interests of the beneficiaries. This was a wrong construction of the clause, which should be read as merely conferring a discretion to be exercised with due regard to the interests of the beneficiaries. However that may be, the clause itself prescribes conditions which, so far as the evidence goes, do not appear to have been complied with, and it was for the defendant to show such compliance. The clause called for an actual request by the debtor that time be granted and an actual decision by the defendant to grant time, subject to the condition that the time granted should be reasonable. There is no evidence that it ever considered the debtor's requirements or made any such decision as the clause required. It simply allowed the matter to drift, apparently assuming, without obtaining any advice, that it was empowered to do so. If, as is submitted, the clause did not give such a power, s. 15 (*e*) of the *Trustee Act* 1928 (Vict.) did not give it either. That section has no application to a case of neglect, such as the present; it relates only to a positive exercise of a discretion. (*Re Greenwood*; *Greenwood* v. *Firth* (1)). The respondent's claim to the protection of s. 61 in effect concedes that the appellants'

(1) (1911) 105 L.T. 509.

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argument up to this point is correct; it assumes that the money was lost through a breach of duty for which the defendant must pay unless the court can, and does, relieve it from liability. The section requires that the trustee shall have acted reasonably. It is submitted that the defendant's conduct in the circumstances of this case was not at all reasonable, and the section, therefore, cannot apply.

[At the instance of the Court, the argument for the appellants as to the defence relating to limitation of time and equitable defences, which was to be presented by *T. W. Smith*, was deferred until counsel for the respondent had been heard.]

Dean K.C. (with him *Voumard*), for the respondent. The intention of the special clause was to put the respondent in the position of the testator so far as allowing time was concerned. The respondent was not bound to consider only the interests of the beneficiaries. Indeed, it is difficult to see how a power to grant a debtor company "such reasonable time as it may require" could be exercised solely in the interests of the beneficiaries. Unless the clause contemplated the grant of some indulgence to the debtor, it would seem to have no purpose. It can scarcely be construed as a direction that the trustee should in no circumstances allow time to pay. *Lowe* J. found affirmatively that the respondent had acted honestly; it follows that, if he had considered s. 15 (*e*) of the *Trustee Act* relevant, he would have found that it had acted in good faith within the meaning of that section. No doubt the respondent thought itself justified by the special clause in the will, but that is no reason for treating s. 15 as irrelevant. The section changes the burden of proof (*Re Owens*; *Jones* v. *Owens* (1); *Re Greenwood*; *Greenwood* v. *Firth* (2); *Underhill* on *Trusts and Trustees*, 9th ed. (1939), pp. 288, 289, 346, 347, 384). *In re Brogden* (3) is not in point; it deals with the position before the enactment of the section. [He referred to *National Trustees Executors & Agency Co. Ltd.* v. *Dwyer* (4).] The special clause should be regarded as reinforcing the section so as to confer on the trustee a wider discretion (and, therefore, a greater protection) than the section of itself would confer. The result is that, even if the respondent was wrong in thinking that the special clause authorized it to act as it did, it is protected as having acted in good faith. Even if that is not so, the respondent is, nevertheless, entitled to the protection of s. 61 of the *Trustee Act*. It extends to acts not covered by s. 15 and gives an entirely different protection; it is unrelated

(1) (1882) 47 L.T. 61.
(2) (1911) 105 L.T. 509.
(3) (1888) 38 Ch. D. 546.
(4) (1940) 63 C.L.R. 1, at pp. 22, 23, 42, 43.

to s. 15, though a trustee may come within both sections. The conditions of fact on which the application of s. 61 depends have been fulfilled. As already pointed out, *Lowe* J. found that the respondent acted honestly; he added that he could recall no challenge by the plaintiffs to its honesty. He also found that it had acted reasonably; this finding is adequately supported on the facts. Regard must be had to the special clause; even though it was a misconstruction, it was reasonable to think that the clause gave protection. The section protects trustees who misconstrue the will, provided their construction is reasonable; that is to say, the court has jurisdiction to excuse them in a proper case. If the will is obscure, the question is whether the view of its meaning taken by the trustees is one which might reasonably be taken (*In re Grindey* (1); *In re Mackay* (2)). A trustee company is entitled to the benefit of the section (*National Trustees Executors and Agency Co. Ltd.* v. *Dwyer* (3), per *Starke* J.). *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* (4) is not an authority to the contrary. The fact that a company is paid is relevant, but most trustees are now paid; the case of the gratuitous trustee, which the Privy Council stressed by way of contrast, is now the exception rather than the rule. The respondent could be excused in part; that is, as to income only. The life tenants were well aware of what was going on; it would work no hardship to excuse the respondent as against them. As to the limitation of time, s. 67 of the *Trustee Act* is the relevant provision. It must be conceded that the section does not bar the claim of the grandchildren, because their interests were not vested in possession; but it bars the life tenants in respect of their vested life interests, with the result, under s. 67 (2), that, if the respondent has to make good the fund, the life tenants have no claim on the income, past or future, and the future income must go back to the respondent. The action is not one for a *devastavit* (which, as an action on the case, would be within s. 82 (1) (c) (viii) of the *Supreme Court Act* 1928 (Vict.)), nor is it an action to recover a legacy within s. 304 of the *Property Law Act* 1928 (Vict.). The respondent's power to allow time was conferred on it as trustee, not as executor, and any abuse of the power was committed by it as trustee (*Commissioners of Inland Revenue* v. *Smith* (5); *In re Swain* (6); *In re Barker* (7); *In re Oliver* (8); *Hourigan* v. *Trustees Executors and Agency Co. Ltd.* (9); *Equity Trustees Executors*

(1) (1898) 2 Ch. 593, at p. 601.
(2) (1911) 1 Ch. 300.
(3) (1940) 63 C.L.R., at pp. 30, 31.
(4) (1905) A.C. 373, at p. 381.
(5) (1930) 1 K.B. 713.
(6) (1891) 3 Ch. 233.
(7) (1892) 2 Ch. 489.
(8) (1927) 2 Ch. 323.
(9) (1934) 51 C.L.R. 619; See pp. 635, 636.

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and Agency Co. Ltd. v. *Fenwick* (1); *Cain* v. *Perpetual Trustees & Executors Association of Australia Ltd.* (2); *Underhill* on *Trusts and Trustees*, 9th ed. (1939), p. 524). As against the life tenants, the respondent relies on the defences of laches, acquiescence and concurrence. The fund was lost on the liquidation of the debtor company in 1938. There was no complaint by the life tenants until 1944, although they were well aware of the facts. The equitable doctrines—laches, in particular—are still applicable even if the statute is not a bar. Perhaps acquiescence is more appropriate here. Mere delay may be evidence of acquiescence; there is an abundance of such evidence here. If the fund is restored, the life tenants are clearly not entitled to any past income (that is, on the basis that there was acquiescence), and the position is the same as to future income. They cannot complain of the breach of trust and cannot enforce any right in respect of it.

T. W. Smith, for the plaintiffs, on the questions of limitation of time and equitable defences. There is some evidence that the life tenants were informed of the compromise in 1930, but there is no evidence that they had knowledge of a breach of trust. It does not appear that they were told any facts from which it was reasonable to suppose that there had been any breach of trust. In such circumstances they cannot be said to have concurred in any breach; they were entitled to assume that the defendant knew its business and was duly administering the estate (*Hanbury* on *Modern Equity*, 4th ed. (1946), pp. 290, 291). The doctrine of laches is wholly excluded where a statute of limitations is applicable (*Brunyate* on *Limitation of Actions in Equity*, p. 257; also p. 245). Moreover, the beneficiaries cannot be barred by laches unless they had knowledge of the relevant facts (*Brunyate*, pp. 254, 255; also pp. 190, 191). As to acquiescence, the only kind relevant here could be subsequent ratification or release; but here, again, knowledge of the facts is necessary (*Brunyate*, pp. 192, 193, 241; *Lewin* on *Trusts*, 14th ed. (1939), pp. 797, 798). The attitude of the respondent is curious in that it says there was no breach of trust, but, if there was, the beneficiaries are to be treated as having known and ratified it. As to the Statute of Limitations, s. 304 of the *Property Law Act*, it is submitted, is the relevant provision here. If so, the life tenants are not barred. The plaintiffs' claims are alternative, (1) against the executor as such for administration, (2) alternatively, against defendant as trustee. The first is entitled to succeed. There must

(1) (1905) V.L.R. 154.

(2) (1900) 26 V.L.R. 58, 243.

be assent before executors hold as trustees. It was only in the latter capacity that formerly no statute of limitations was applicable (*Brunyate* on *Limitation of Actions in Equity*, p. 75). *In re Oliver* (1) does not decide that all property held by executors on an express trust must be sued for as for a breach of trust. A particular fund, being the proceeds of conversion, was so treated, and *In re Swain* (2) is to the same effect. The word "legacy" in s. 304 of the *Property Law Act* covers residue. An action by a residuary legatee for administration on the basis of wilful default is an action for a legacy. The *Supreme Court Act*, s. 80, excludes s. 82 thereof, because s. 304 of the *Property Law Act* otherwise provides. A trust for conversion to pay debts makes an executor a trustee vis-à-vis creditors, but not beneficiaries. The respondent had property vested in it as executor; to rely on s. 67 of the *Trustee Act* it must show positively that it has come to hold the property as trustee.

[DIXON J. referred to *Elliott* v. *Elliott* (3).]

[Counsel referred to *Sims* v. *Sims* (4); *Matthews* v. *Trustees Executors & Agency Co. Ltd.* (5).]

Coppel K.C. in reply. The special clause in the will cannot be applied to the debt arising from the compromise; no inference can be drawn from the will as to what the testator's attitude to the altered circumstances would have been. The words of s. 15 (*e*) of the *Trustee Act*, "allow any time," &c., are capable of meaning "permit time to pass" or "make an agreement to give time"; par. (*e*) is linked with par (*f*), which rather suggests the latter meaning. Whichever it is, it causes difficulty to the respondent. If the former is the meaning, the 1936 agreement is not within it; if the latter, it does not apply to the period before 1936. [He referred to *Re Greenwood*; *Greenwood* v. *Firth* (6).] As to s. 61 of the *Trustee Act*, even if the respondent acted reasonably, it is not entitled to the benefit of the section. In order that relief may be granted, it must appear that the trustee "ought fairly to be excused," not only for the breach of trust, but also for "omitting to obtain the direction of the court." In the circumstances of this case there was no excuse for omitting to obtain the direction of the court on the unusual clause in the will. [He referred to *In re Windsor Steam Coal Co.* (1901) *Ltd.* (7).]

Cur. adv. vult.

(1) (1927) 2 Ch. 323.
(2) (1891) 3 Ch. 233.
(3) (1841) 9 M. & W. 23, at p. 27 [152 E.R. 11, at p. 12].
(4) (1827) 5 L.J. K.B. (O.S.) 140.
(5) (1898) 24 V.L.R. 258, 643, particularly at p. 644.
(6) (1911) 105 L.T., at p. 513.
(7) (1929) 1 Ch. 151, at pp. 164, 165.

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THE COURT delivered the following written judgment prepared by WILLIAMS J. This is an appeal from a judgment of *Lowe* J. sitting as the Supreme Court of Victoria dismissing with costs an action brought by the appellants, who are the residuary beneficiaries of the will of George Partridge deceased, as plaintiffs against the respondent, which is the sole executor and trustee of the will as defendant.

The plaintiffs allege that a sum of £2,150, part of a larger debt owing to the estate by a company called William Hartley Pty. Ltd. (hereinafter called the company), was lost by the wilful default of the defendant as executor, or alternatively, by the breach of trust and wilful default of the defendant as the trustee of the will, and claim that the defendant should be ordered to make good the consequential damage.

The relevant facts are shortly as follows. By an indenture made on 8th August 1919 between Edith and George Howell as vendors of the first part, F. H. Thompson and the testator as purchasers of the second part, and the company of the third part, the vendors agreed to sell 15,000 fully paid shares in the company to the purchasers for £10,000 to be paid by the company out of its funds on or before 1st July 1924 with an option which was exercised to extend the time for payment until 1st July 1929. The indenture provided for the immediate transfer of one hundred shares to the testator to qualify him to be a director of the company. The indenture also provided that the purchasers should advance £2,000 to the company which should not be withdrawn whilst any part of the purchase money remained unpaid. The whole of this sum was advanced by the testator. The indenture also provided that the purchasers should advance to the company any further sums which the company might require for the efficient and successful carrying on of its business. The testator advanced sums totalling £1,500 at seven per cent interest for this purpose. The indenture also provided that the vendors should receive out of the dividends of the company or the funds or assets thereof quarterly a sum of money equivalent to six per cent per annum on the outstanding purchase money and that the balance of the dividends should be the property of the purchasers.

By his will made on 8th April 1926 the testator, who died on 20th July 1926, gave devised and bequeathed all his real and personal estate to the defendant as his sole executor and trustee upon trust to sell call in and convert the same into money and to pay thereout his just debts funeral and testamentary expenses and the probate and estate duties and certain pecuniary legacies, and subject thereto to pay the income to all his children in equal shares during their

respective lives, and immediately after the death of each child to stand possessed of his or her share as well original as accruing of and in the capital and income of his trust estate for the child or children of the deceased child who attained the age of twenty-one years, if more than one in equal shares, and if there should not be any such child of such deceased child such share should be added to the shares of his other children equally. The testator empowered his trustees to suspend for such period as they should judge expedient the sale conversion and getting in of his estate or any part thereof, and during this period to manage and order all the affairs thereof. He empowered his trustees to hold any shares or investments held by him at the date of his death or to which he or they might be or become entitled or possessed of so long as they in their discretion thought advisable. The final clause in the will is in the following terms: "I desire that my trustees shall not press for payment of any debt which may be owing to me by William Hartley and Company Proprietary Limited but will grant the said company such reasonable time as it may require at such rate of interest as my said trustees may deem fit."

At the date of the will the company was making profits and substantial dividends had been declared. The testator had not drawn the balance of the dividends amounting to £6,177 to which he was entitled after paying interest thereout to the vendors, but had lent this balance to the company at interest to be used in the business. He must therefore have thought when he made his will that the company would be indebted to him or his estate for moneys advanced to the company and for undrawn dividends, but that he or his estate would become indebted to the company for the sum of £5,000 for money paid by the company on his behalf to purchase the shares.

But in 1929 the vendors repudiated the sale and the defendant was advised by counsel that the indenture could not be enforced. This advice was accepted by the defendant, the shares and unpaid dividends reverted to the vendors, and a compromise was reached of the defendant's claims against the company. By this compromise, the propriety of which has not been challenged, the company agreed to pay the defendant the total sum of £4,100, as to £2,600 by four half-yearly payments each of £650 without interest on 1st July 1930, 1st January and 1st July 1931, and 1st January 1932. The balance of £1,500 was to become payable six months after the last instalment of £650 became payable, that is to say, on 1st July 1932, and this sum was to bear interest at seven per cent per annum. The first three instalments of £650 were paid, but the fourth instalment of

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£650 and the £1,500 totalling £2,150 were never paid. These sums remained outstanding until the end of 1935, interest being paid on the £650 at six per cent per annum and on the £1,500 at seven per cent per annum. On 29th January 1936 the defendant agreed to allow the whole amount of £2,150 to remain outstanding for a further five years at five per cent per annum. In October 1938 the company went into voluntary liquidation. Shortly afterwards the National Bank of Australasia which held a debenture over the assets appointed a receiver. The assets were realized but the proceeds were insufficient to pay the secured creditor and the whole sum of £2,150 and some interest in arrears was lost.

The learned judge below found that if the defendant had insisted on payment, the company could have paid the £2,150 in 1932 and for some years thereafter. But his Honour found for the defendant and dismissed the action on the ground that the conduct of the defendant was justified by the final clause in the will. His Honour thought that the testator had indicated in the first limb of this clause a desire that his trustees, whilst seeking to obtain payment of the debt, should stop short of measures amounting to pressure, that is to say that they should not demand payment or sue for the debt if it was not paid, and that the meaning of this limb should not be cut down by the language of the second limb. His Honour said that the testator seemed to have been content to rely on the debtor's sense of obligation to pay any debt owing to his estate, and to have assumed its capacity to do so.

We cannot agree with this construction. It imputes an intention to the testator to be benevolent to the company, even where the benevolence would be detrimental to the estate. We are of opinion that the clause was inserted in the will not for the benefit of the company but for the benefit of the estate. The testator contemplated that his estate would be interested in the company as a creditor and a shareholder, and he would not wish the hasty enforcement of the debt to prejudice the stability of the company to the detriment of his estate. He authorized the defendant to hold any shares to which it might become entitled, and instead of being obliged to demand and enforce immediate payment, to grant the company such reasonable time as it might require to pay the debt at such rate of interest as the defendant might think fit. " Debts due upon personal security are what executors without great reason ought not to permit to remain longer than is absolutely necessary " (*Powell* v. *Evans* (1); *In re Gasquoine* (2); *Williams* on *Executors*, 12th ed.

(1) (1801) 5 Ves. Jr. 839, at p. 844 [31 E.R. 886, at p. 888].

(2) (1894) 1 Ch. 470, at p. 476.

(1930), p. 1187). We are of opinion that the clause in question should not be severed into two limbs but read as a whole, and that the second limb defines what is meant by the desire expressed in the first limb that the defendant should not press for payment of the debt. The will contains an imperative trust to sell call in and convert the whole estate into money. This paramount duty is qualified by a general power to suspend the conversion into money of any part of the estate, and a special power to postpone the getting in of the company's debt. But the debt was not forgiven, the paramount duty to collect it in full remained.

We agree with his Honour that the £4,100 was a debt within the meaning of the final clause, that the power was not exhausted by a single exercise, and that it was open to the defendant to give the company such further time as the defendant considered the company might reasonably require to pay the £2,150. But we are of opinion that the power was a fiduciary power to be exercised with due care and diligence and solely in the interests of the beneficiaries. It was the duty of the defendant to examine the financial position of the company and only to grant further time if it was satisfied that the company reasonably required such time to pay the debt and that it could be granted without detriment to the estate. The overriding duty was to get in the debt.

An examination of the evidence relating to the years 1932-1935 inclusive does not disclose that the defendant exercised due care or diligence in this period. No agreement was made with the company to pay the £2,150 at any particular future date or even to reduce it by instalments. No attempt was made to obtain any guarantee or other security from the principal shareholders. Matters were allowed to slide. In February 1933 the defendant demanded payment of the £650 and overdue interest thereon but not of the £1,500. But when the interest was paid, the demand for the payment of principal was dropped. In August 1933, when interest was overdue on the £650 and the £1,500, the defendant demanded payment of both sums. But the company paid the interest and the demands for payment of principal were again dropped.

During the whole of the period from 1932 to 1935 the financial position of the company was deteriorating. But it was still able to meet its current liabilities, it reduced its indebtedness to the bank by £2,000, and apparently repaid £1,700 off a loan made by the managing director. Towards the end of 1935 the affairs of the company were approaching a crisis. The bank considered that the management was unsatisfactory and was insisting on a change before it would continue to finance the business. An accountant appointed by the

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bank reported that there was a deficiency of assets to pay the unsecured creditors unless the shareholders who were loan creditors agreed to convert their debts into six per cent preference shares. The management was changed, the bank then continued to finance the business, and the shareholders converted their loans into preference shares.

We are prepared to infer from the evidence that as part of these transactions the defendant on 29th January 1936 agreed to allow the £2,150 to remain outstanding for five years. We are also prepared to hold that, having regard to the then financial position of the company, the only hope of getting in the debt was that the company would recover under the new management. But the defendant would not have been placed in this position if it had not allowed the matter to drift in the preceding period. We are of opinion that the failure of the defendant to take active measures during this period to get in the debt was culpable and would make it liable to make good any loss flowing therefrom in an account taken upon the footing of wilful default. His Honour has found affirmatively, and we agree with him, that if the defendant had insisted on payment in 1932 or soon afterwards the company would have been able to pay the debt. But it would be enough to say that the onus rested on the defendant to show that, even if there had been no default in its duty, the debt could not have been recovered and the loss avoided (*Re Brogden* (1)).

It is therefore necessary to examine the other defences relied on by the defendant. The defendant has pleaded s. 15 of the *Trustee Act* 1928 (Vict.). This section provides, so far as material, that a personal representative may, if he thinks fit, allow any time for payment of any debt without being responsible for any loss occasioned by his doing so if done in good faith. We are of opinion that the words " allow time for payment of any debt " are wide enough to include an allowance of time whether made the subject of a binding agreement or not. But the section " involves the exercise of an active discretion, not the mere passive attitude of leaving matters alone, and no relief is afforded where (as here) loss has arisen from carelessness or supineness " : *Re Greenwood* ; *Greenwood* v. *Firth* (2) ; *Godefroi* on *Trusts*, 5th ed. (1927), p. 258.

The defendant has also pleaded s. 61 of the *Trustee Act*. This section provides that " if it appears to the court that a trustee . . . is or may be personally liable for any breach of trust . . . but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of

(1) (1888) 38 Ch. D. 546.

(2) (1911) 105 L.T. 509.

the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same." We are of opinion that a professional trustee like the defendant is not beyond the protection of the section: see *National Trustees Executors & Agency Co. of Australasia Ltd.* v. *Dwyer* (1). But such a trustee should be particularly careful to act strictly within the line of its duty and would have to establish a strong case before the court would apply the section in its favour.

It is not disputed that the defendant acted honestly, but it is disputed that the defendant acted reasonably. It is also contended that even if the defendant acted honestly and reasonably, the case is not one in which the defendant ought fairly to be excused for the breach of trust or for omitting to obtain the directions of the court. The defendant relied on *In re Grindey* (2) and *In re Mackay* (3). These cases show, in the words of *Parker* J., as he then was, in the later case (4) " that in considering whether a trustee has acted reasonably within the meaning of the section the terms of the instrument creating the trust ought to be taken into consideration. If an ordinary business man might reasonably entertain a particular view of the construction of the instrument, and the action of the trustee would have been justified if that view had been the true one, the trustee cannot be said to have acted unreasonably merely because this view of the construction of the instrument is wrong."

Each case must be decided on its own facts. The present will, unlike that in *Grindey's Case* (2), contains an imperative trust to sell call in and convert the estate into money. We do not think that any business man reading the will as a whole could have fairly come to any other conclusion in 1932 than that his dominant duty was to get in the debt, and that he should only grant the company further time if he was satisfied after a proper investigation of its affairs that the company reasonably required further time to pay the debt and that he should then only do so on terms which would afford reasonable protection to the estate. A large amount was at stake, so that it would have been reasonable for the defendant to have obtained the directions of the court. But it did not do so and it does not appear even to have sought advice from counsel or its solicitors. It placed its own construction on the clause and acted accordingly. In all the circumstances we are unable to agree with his Honour that the defendant acted reasonably. The question whether it ought fairly to be excused does not therefore arise.

(1) 63 C.L.R. 1, at pp. 30-31.
(2) (1898) 2 Ch. 593.
(3) (1911) 1 Ch. 300.
(4) (1911) 1 Ch. at p. 307.

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The defendant has also pleaded that the right if any of the plaintiffs to maintain the action is barred by lapse of time and that it would rely upon the provisions of s. 82 (1) (c) (viii) of the *Supreme Court Act* 1928, or alternatively of s. 67 of the *Trustee Act* 1928 or alternatively of s. 304 of the *Property Law Act* 1928. We are of opinion that the wilful default or breach of trust occurred when the defendant failed to insist on the payment of the debt in 1932 or soon afterwards. The writ was issued on 18th May 1945. The testator had two sons and two daughters, each of whom acquired a life interest in one-fourth of the residuary estate at the date of death. The two daughters and one of the sons are plaintiffs. The other son was also a plaintiff but died after action brought and a representative has been appointed of his estate. The remaining plaintiffs are the children of the sons and daughters of the testator. Some are adults and some are infants. They are interested in remainder under the trusts of residue. At the date of the writ none of the interests in remainder had vested in possession and it is not contended that the interests of the grandchildren are barred. The question is whether the interests of the life tenants are barred. In addition to the vested interest already mentioned, each of the children of the testator has a life interest in remainder in the other three parts of residue contingent on the life tenant of that part not having a child who attained twenty-one years. None of these contingent interests have vested in possession.

We are of opinion that the proper inference to be drawn from the facts is that in 1932 the estate was no longer vested in the defendant as executor but was vested in it as the trustee of the will. Apart from the outstanding debt of the company, the residue had long since been ascertained and the trusts of the will had become operative. Part of the company's debt was still outstanding, but this would not be sufficient to negative the inference that the defendant had assented to the estate which had vested in it as executor being divested and becoming vested in it as trustee: see *Commissioners of Inland Revenue* v. *Smith* (1). The rights of the beneficiaries against the defendant in 1932 were therefore rights derived from the express trusts of the will, and the action is not an action brought against the defendant as executor to recover a legacy within the meaning of s. 304 of the *Property Law Act*, or for a *devastavit* in which case it would be an action on the case within the meaning of s. 82 (i) (c) (viii) of the *Supreme Court Act*.

It is an action for breach of an express trust to which no existing statute of limitations applies within the meaning of s. 67 of the

(1) (1930) 1 K.B. 713.

Trustee Act: *In re Oliver* (1). Under this section the defendant is entitled to the benefit of lapse of time as a bar to the action in the like manner and to the same extent as if the claim had been against it in an action of debt for money had and received, but so that the statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary is an interest in possession. Section 67 (2) provides that no beneficiary as against whom there would be a good defence by virtue of the section shall derive any greater or other benefit from a judgment obtained by another beneficiary than he could have obtained if he had brought such action and this section had been pleaded. The son and daughters of the testator had life interests in possession at the date of the breach of trust. If these had been their only interests it is clear that actions by them would have been barred at the date of the writ. It was contended, however, that they were not barred because of their contingent life interests in remainder. But the section clearly provides that time will run against an interest in possession and will bar an action brought in respect thereof. The life tenants are therefore barred in respect of their vested interests, and upon the defendant being ordered to pay £2,150 to the estate, a declaration should be made that the defendant will be entitled to receive the income of these interests (*In re Fountaine* (2)).

The defendant has also pleaded consent and concurrence in the breach of trust and laches and acquiescence on the part of the life tenants. Since we have held that these beneficiaries are barred under s. 67 of the *Trustee Act*, it is unnecessary to discuss these defences.

There remains the question of costs. The plaintiffs who are remaindermen succeed in the action and on the appeal and should have the general costs of the action and of the appeal. The question is whether the life tenants should be left to pay the costs of the action and of the appeal so far as there are costs exclusively attributable to their claim. The life tenants fail in respect of the life interests which vested in possession at the death of the testator but succeed in respect of their contingent life interests in remainder. On the whole we do not think that we should make any special order as to the costs in question.

Appeal allowed and judgment of the court below set aside. In lieu thereof order that the defendant pay the sum of £2,150 *to the estate of the testator within twenty-eight days to be invested and held on the trusts of the will. Declare that the*

(1) (1927) 2 Ch. 323. (2) (1909) 2 Ch. 382.

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defendant is entitled to retain for its own benefit so much of the income from the investment of the £2,150 *as would otherwise be payable to the children of the testator in respect of the life interests which vested in them at the date of his death. Order that the defendant pay interest at four per cent on* £537 10s. *to the one-fourth share of residue settled on the son of the testator James Russell Partridge deceased and his children from the date of his death to that of payment of the* £2,150 *to the estate. Order that the defendant pay the costs of the plaintiffs of the action and of this appeal. Liberty to apply to the Supreme Court in respect of any further or other relief.*

Solicitors for the appellants, *Cornwall, Stodart & Co.*
Solicitors for the respondent, *Eggleston, Eggleston & Lee.*

E. F. H.