

ADAMS & OTHERS v. PERPETUAL TRUSTEE CO.LTD. & OTHERSJUDGMENT:KNOX, C.J.:

These were appeals by several of the beneficiaries under the will of W.J.Adams from an order made by Street, C.J. in Equity on an originating summons which raised for decision a number of questions turning on the construction of the will.

The questions involved in these appeals are those numbered 4, 5, 8, 9, 10, 12 and 13 in the originating summons. After hearing argument the Court intimated that the decision of the learned Chief Judge in Equity on questions 4, 12 & 13 would be affirmed, but that the declaration in answer to question 13 would be expressed to be without prejudice to the rights of unborn children. It is unnecessary to deal further with these questions.

The declaration made in answer to questions 5 & 8, which were taken together, was that so long as the trustees of George Adams' will should continue to manage under the agreement of 15th February 1912 and so long as the Trustees of the will of W.J.Adams should receive only the balance of the net income in accordance with that agreement they should pool the whole of the net income receivable by the four children of the testator in respect of the lands specifically devised to them respectively and divide the same in the proportion of 3/13 for each daughter and 4/13 for the defendant W.C.Adams.

The answer to be given to these questions depends upon the true construction of a provision in the will which is in the words following, viz:-

"I declare that my trustees may in their absolute discretion pay any annuities or lapsed annuities under the will of the late George Adams, interest on mortgages, land tax Federal or State and any City or Municipal tax in respect of the said properties, devised to my Trustees upon trust for my said four children out of the rents or income derived from any one or more of the said properties so devised to my four children my intention being that my said Trustees shall as far as possible equalise the annual income to be received by each of my children from the said properties so devised to them but so that my son William Charles Adams shall receive one-third more than each of his sisters."

I think the use of the expression "as far as possible"

as qualifying "equalise" shows that that the testator did not intend the income of the specifically devised properties to be pooled or form one fund, for if the income were pooled in this way there would be no difficulty in obtaining actual equality in the shares of income. But it is clear that the testator contemplated a method of dealing with the income which would tend to equalise the benefits given to his children without necessarily achieving absolute equality. He indicates a means for bringing about this result by authorising his trustees in their discretion to throw the burden of certain outgoings payable in respect of the specifically devised properties on any one or more of those properties in exoneration of the others, and in my opinion the true meaning of the provision is that the trustees are by utilising the income derived from any of the properties for payment of the outgoings specified to bring about as nearly as may be equality between the amounts of income to be received by his children respectively subject to the proviso that the son is to receive 1/3 more than each of the daughters. In effect I read the clause as if the words "shall as far as possible equalise" were "shall thereby as far as possible equalise". The testator knew that the trustees of George Adams' will were managing these properties, receiving the rents and paying outgoings, and he must have contemplated that they would in all probability continue to do so for some years at least. In construing the direction contained in his will regard must be had to this fact. I think the trustees of his will should be regarded for the purpose of this provision as if they and not the trustees of George Adams' will actually received the rents and paid the outgoings in respect of the specifically devised properties, and that the power to pay the specified outgoings out of the income of any of the properties should be treated as a power to adjust accounts as if these payments had been made out of the income of the property or properties out of which the trustees of W.J. Adams' will would have made them if they had been in receipt of the rents and managing the properties. In other words they are to be regarded for the purposes of this clause as if they and not the trustees of George Adams' will were managing the properties. No period during which this power may

be exercised is limited by the will but I think the inference that should be drawn as to the testators intention in this respect is that the power of adjustment is to endure until the time when the devisees of all except one of the specifically devised properties shall have become entitled to call for conveyances of the properties devised to them respectively. The declaration made by Street, C.J. in Equity on this question should in my opinion be modified accordingly.

Questions 9 & 10. I agree with the answers given by Street, C.J. in Equity to these questions.

HIGH COURT OF AUSTRALIA.

COURT COPY.

(pp.1 to 7)

PERPETUAL TRUSTEE COMPANY. V ADAMS.

JUDGMENT.

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MR. JUSTICE ISAACS.

MR. JUSTICE RICH.

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Most of the questions have been already dealt with and the decision thereon of Street, C.J. in Equity upheld with a declaration of non prejudice to the rights of unborn children. Two remain for consideration.

One is as to the direction to accumulate.

The other is as to what is called the pool.

One general observation is necessary.

The will is rather difficult owing to various causes. The variety and complexity of its subject matters, the solicitude of the testator to make equitable adjustments and balances and to provide for possible events some distance ahead, and some incautious phrasing have all contributed to make the contested provisions doubtful. But familiarising oneself with the relevant circumstances in which the testator found himself and reading his will as a whole, as that of a father carefully and fairly providing for his children and as a businessman with complicated rights in valuable property, his dominant intention with respect to the two matters referred to may be discerned as we think with reasonable certainty.

1. Accumulation.

This is a direction in the codicil. The testator being entitled to the Pitt and George St. properties subject to a mortgage of £40,000 to the A.M.P. Society had in his lifetime made arrangements by which broadly speaking, the Bulli Company had given to the Trustees of the head will debentures for £40,000 payable in 1937 for the purpose of redeeming the mortgage. The mortgage was due long before 1937, but apparently it was anticipated it was so safe an investment for the mortgagee that it would not be called in before that date.

The testator devised the several properties specifically to his four children respectively who therefore took at once a vested interest subject to the mortgage.

The testator having by means of the Bulli Coy. debentures provided for redemption if they were met when due proceeded to provide a principal fund for redemption if they were not met, when due - that is in 1937.

He created a trust which in substance was that his Trustees should as prudent men consider the probability of the Bulli Company meeting its engagements in 1937, and if prudence so dictated, the Trustees were to accumulate so much of the residuary income as they considered necessary to pay off either wholly or in conjunction with what the Bulli Company would pay, the mortgage debt in 1937. The discretion of the Trustees however in this respect was to be influenced also by what they thought the benefit of the children during minority.

There is nothing uncertain, and nothing obnoxious to the rule against Perpetuities in this.

The children were entitled as from the testator's death to their specific devises subject to the encumbrances, The trustees of the head will no doubt had the management, but that is immaterial. The mortgage, at the testator's death was due well within the requisite period, and though there was power if all parties consented to renew it, that also is immaterial, for the same could be said of every debt of a testator however fixed it may be, and the Trustees of the head will would have no just reason to extend the mortgage against the obvious advantage of the beneficiaries.

The two conditions - viz the condition of the possible failure of the Bulli Company to pay in 1937, and the date of the mortgage debt, were both within the necessary period.

2. The Pool.

The contest centred round the passage in the will relating to the Trustee's discretion to pay annuities, interest on mortgages etc. out of the rents of all or any of the specifically devised properties and the equalisation of income from those properties with a condition as to proportions.

That passage when read with other parts of the will is to be regarded as has been said in another connection rather as "the guide than as the vehicle" of the testator's intention ~~as to~~

as to eventual pooling. The directly operative provision in that particular passage is the first provision namely for the trustees discretion to pay the outgoings mentioned out of the income from any one or more of the properties. The latter portion of the clause is the dominant indication of general intention as to allocation of income because it instructs the Trustees to equalise the income of the specific properties "as far as possible."

So far it is only by means of distributing any of the outgoings mentioned which may be paid of that class of income that the equalising process can be achieved.

The result of that as an isolated operation would be to bring down to the credit of each child a certain balance as representing his or her income from those particular properties. But the will does not stop there, and the clause resulting in the different individual credit balances of that class of income is not to be read as isolated and self complete. That class of income is not really "equalised", and it is impossible to limit the word

"equalise" by the introduction of a word such as "thereby" which was suggested by learned Counsel but is not found in the will later. When we turn to portions of the will we find the intention to equalise income carried further, and made complete.

A common fund is provided for. First the children's respective residuary income and their income under the head will are formed into a Common fund, to be divided "in the proportions hereinafter mentioned" which are 3.3.3. and 4.

Then he further declares that "until each child arrives at the age of twentyfive years the income from my estate payable to such child shall be so treated."

The testator's language there "the income from my estate " is a clear change from the expression just previously used "the incomefrom any residuary real and personal estate."

Other parts of the will use the larger term, and are unmistakably applicable to the whole income from the estate. Particularly in this connection may be mentioned the clause requiring full

information by registered letter to be given to the children at 21. We gather that the testator's actual intention as ascertained by the words of his will, was as follows. He intended that until the enjoyment by any beneficiary of his specifically devised land in specie, or up to the age of 25 whichever occurred first, his share of income from the Pitt and George St. properties, ascertained after applying the special clause referred to, should go into the common fund and together with the rest of that common fund be divided in the stated proportions. Then at 25 if not already in enjoyment of the specifically devised land, each child was to be "absolutely entitled to the enjoyment of his duly ascertained share of income. But this was subject to the further provision as to voluntarily pooling that income, at peril of divestiture of half. This will be again referred to presently. We further gather as to residuary income that up to 25 the right to full enjoyment is deferred and the pool continues. Again the absolute right applies subject to the divesting provision. This intention lasts as long as the pooling and its conditions are operative - that is necessarily until the youngest surviving child is 25.

But the deferred enjoyment provisions are challenged on the ground that the doctrine of *Saunders v. Vautier* (4 Beav. 115 Cr. and P.240) applies, and that at 21 each beneficiary is entitled to receive his full share of income. But does it apply? The rule is inapplicable if some other destination of the income is made during the intervening period, so that some other person has an interest in enforcing the trust. This is clear (*Wharton v. Masterman* (1895 A.C.186)). If the whole of the beneficiaries were at one in breaking the trust the Court would no doubt apply the doctrine and not enforce the trust. But they are not. Some are insisting on that trust and so the matter must be examined. The provision for a compulsory common fund which operates up to 25 creates a destination of income from each specifically devised property to persons other than the specific devisee during the period from 21 to 25. The doctrine invoked therefore does not apply. The provision for divesting one half after 25 unless there be

voluntary pooling is no doubt repugnant to the original clear gift. But a testator has a right to end his will with a provision repugnant to his earlier disposition, even to the extent of annulling it. He can do it by a codicil, and he can do it by any later provision. The repugnancy of course extends only to the end of the pool that is until the youngest surviving child attains 25. The result then is, that as to each child's total income the whole must go into the common fund until he or she attains 25 and after that period and until the youngest survivor attains 25, the whole may but one half must go into that fund.

The decretal order should therefore be varied as follows:-

1. The declaration in answer to the fifth question to be varied by substituting for all the words beginning "so long as" down to "in accordance with that agreement" the words following:- "until the devisees are entitled to possession of the properties respectively specifically devised to them, or until the youngest survivor of such devisees attains the age of 25 years whichever first happens."
2. The declaration in answer to the 9th and 10th questions to be varied by substituting for the words "at the present time" the words following:- "until the due date of the debentures for £40,000 given by the Bulli Colliery and Coke Works Limited or until such earlier date as the mortgages hereinafter mentioned are discharged."
3. The declaration in answer to the 13th question to be expressed without prejudice to the rights of unborn children.
4. The declaration in answer to the 25th question to be varied by substituting for the words "the period provided for payment under the agreements referred to in the said Will and Codicil", the words following:- "the year 1937."