

21/1925

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O' FARRELL AND OTHERS

Rich J
Stark J
+ Deam J.

v

PERPETUAL TRUSTEE COMPANY LIMITED AND OTHERS

This is an appeal from the judgment of Harvey C.J. Eq.
pronounced as long ago as the 3rd April 1925. It relates to a
difficult set of provisions in the will of a testator who endeavoured
to propound a detailed scheme for supporting officers, whom he
called " Educational Experts ", in certain dioceses of the Roman
Catholic Churches in New South Wales. At the request of the
parties, the appeal has been allowed to stand out of the list until
the present in order that they might overcome by some agreement

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the difficulties which have arisen in carrying out the scheme.

This, however, has been found impossible, and we are now called upon to place a construction upon the provisions of the will.

The first and most important question is whether the sums of money which the testator directs to be expended by articles I, 7, 8, and 9 of the will are in each case to be applied exclusively in or towards the payment of the salary, or salaries, of the educational experts. We agree with Harvey C.J. Eq. in thinking that this question must be answered in the affirmative.

In the case of articles I and 7, the terms in which the provisions are expressed are explicit, and allow of no escape from

the conclusion that the money must be so applied in salary and cannot be devoted to any other purpose. In the case of article 9 the language is not so explicit, but the words "for such purpose" which occur at the end of the article, make it quite clear that the sums which fall within that clause must be applied to the same object. Article 8, however, contains no such definite expression. We cannot doubt, however, that the limitation upon the total amount to be received by a Diocese refers to the sum made up of the amounts applied under articles 1 or 7 and article 8 and when this is considered with the fact that only those dioceses which have made appointments of experts are to take, together With the context in which article 8 occurs, we think

there can be no doubt of the meaning of article 8, and that the surplus income to which it refers must be applied in the same limited manner. We are unable to attach to the expression in article 9 "the income to which such Diocese would have been entitled" the importance given to it by the appellant's counsel. We think it is merely a compendious reference to the benefit the Diocese takes by receiving a subvention to the salary of an expert. We do not say that the trustees must personally pay the experts' salaries, but unless the trustees take a receipt and undertaking pursuant to article II, they are not relieved from the responsibility of ascertaining that the

money is applied in conformity with the testator's directions.

The next question is whether the income arising in any given year must be expended in that year upon salary payable for that year. A preliminary doubt may arise as to what period of twelve months is contemplated as the year of income by the expression "per annum" in articles 1, 7, 8, and 9, but we agree with the view upon which the decree of Harvey C.J. Eq. proceeds viz :- that the period must be calculated from the date of the testator's death and its anniversaries. Consideration of the terms of the articles and of their operation has, however, satisfied us that the decree needs some modification in its rigid discrimination between the income of different years. We think it is clear

that the income of each year must be ascertained separately for the purpose of arriving at a surplus exceeding £400 per annum within the meaning of article 7, and exceeding £800 within the meaning of article 8. But when this has been done and it is found that

a sum is available under article 8 it does not, we think, follow that the whole of the sum referred to in article 1 must be expended in the payment of salary or salaries for the year in which that income arose. Indeed the very words which introduce articles

7 and 8 " in the event of the money available exceeding £400 (or £800) p.a. " require a computation which never could be completely made before the end of the year, and perhaps in some

circumstances could not be made with enough approximation ^{EVEN} until the year closed. We think that it is enough that income

has arisen under these articles to enable the trustees to apply it towards the payment of the salary of ~~the~~ an educational expert, although the salary may be due after the close of the year in which the income was earned. On the other hand, we do not

think that income, which arose before the year in which the first educational expert was appointed, can be applied in payment of salary. Such income is derived before the scheme begins to operate and, unless accumulated pursuant to article 5, passes under article 10.

Having regard to the amount of income derived from the

trust fund, and to the fact that all Dioceses have now appointed experts, it seems improbable that there will be any surplus income after satisfying the trusts by paying £600 per annum each. But we have not overlooked the question how article/¹⁰should be applied in such an event. That question is, what period should be taken for ascertaining the surplus? If, as we think, income earned in one year can be applied in the next, it may be said that there is no basis of time for considering whether there is a surplus of income over £600 per annum for each Diocese. We think this/^{is}an error. It is only necessary, in such an event, to consider whether in fact during a year more than £600

for each Diocese with an expert has been available and has been distributed as required by articles 8 and 9 without regard to the question whether the income was all earned in that year, or some of it had been earned in a previous year. It is perhaps necessary to add that upon the terms of articles 8 and 9 it is plain that no Diocese can benefit under these articles, unless, before the year in which that benefit is distributed, it has appointed an educational expert. The modifications which we think ^{it} necessary to make in the decree in order to give effect to these views will appear from the formal judgment to be pronounced.

The remaining question of importance which we are required to determine upon this appeal relates to the qualification which

article 3 prescribes for the expert in these words :- " every
" such expert shall be a layman or a laywoman ". The question is
whether members of the teaching orders of the Sisters of St Joseph,
the Sisters of Mercy and the Christian Brothers are to be regarded
as laywomen and laymen within the meaning of the testator's words.
We think the testator did not use these expressions in their correct
ecclesiastical meaning, if indeed the expression " laywoman " can
be considered as anything but an ecclesiastical solecism.

O R D E R

Decree of Harvey C.J. in Eq varied as follows :-

Substitute for (A)(I) in the Decree the following :-

(A)(I) That it is the duty of the trustees to ascertain whether in each such year there is available (a) a sum not exceeding £400 under article I of the said will (b) a further sum exceeding the said sum of £400 and not exceeding £800 under article 7 thereof (c) a sum exceeding £800 under article 8 thereof and that, save in so far as at all as the application of any part of such sums is governed by the provisions of article 10 thereof, the purpose for which such sums must be applied is limited to the payment of the whole or ~~part~~ part of the salary of a duly appointed educational expert or experts.

In A (2) in the decree make the following amendments :-
after the words " in respect of which " strike out the words " for
" such year salary is payable to an educational expert " and
substitute " an educational expert has before the end of the year
in which such net income arose been duly appointed ".
Strike out the words " in all " and substitute " in any year
~~commencing~~ since the testator's death commencing as aforesaid ".
Strike out the words " is payable only..... not payable " and
substitute " must be applied to the purpose of paying the whole or
" part of the salary of a duly appointed educational expert or
" experts and if and in so far as it cannot be so applied ".

In (B) in the decree make the following amendments :-

Strike out the words " for such year/ salary is payable to an
" educational expert " and substitute " an educational expert has
" before the end of the year in which such net income arose been
" duly appointed "

Strike out the words " in all " and substitute " in any
" year since the testator's death commenced as aforesaid ".

Strike out the words " is payable only..... not payable "
and substitute " must be applied to the purpose of paying the whole
" or part of the salary of a duly appointed educational expert or
" experts and if and in so far as it cannot be so applied ".

Otherwise appeal dismissed.

By consent, costs of the appeal will be paid out of the
estate as between solicitor and client.