1930 No. 37. (5)

Hunter

v

Hanson & ors

Reasons for Judgment.

Isaacs C.J.
Gavan Duffy & Starke JJ.
Rich J.
Dixon J.

Delivered Melbourne
11th December 1930.

HUNTER V' HANION AND OTHERS.

ORDER.

O R D E R

Appeal allowed.

Judgment of the Supreme Court discharged. In lieu thereof questions in the originating summons answered as follows :-

ANSWER to question I.

(a) Y e s ; immediately upon the death of the testator.

(b) The offer contained in such letter to Jeannie Hunter was in proper form and a valuation ought not to be first made.

(c) In the circumstances of this case within a reasonable time after this judgment.

ANSWER to the first part of question 2 . No

ANSWER to second part of question 2.

By giving to Jeannie Hunter the option of purchasing at a valuation the said land and buildings encumbered by her right at the termination of the existing lease to take a lease for ten years at a fair annual rental without bonus viz ; at such fair and reasonable rent as would be likely to be commercially obtainable from a tenant who pays no bonus or ingoing by a landlord who is not anxious but is willing to let. The valuation to be made pursuant to the terms of the will after her exercise of the option to purchase. If she shall not exercise such option,then by offering for sale in manner directed by the will the lands and buildings encumbered as aforesaid.

ANSWER to question 3.

This question does not arise.

Answer to question 4.

The costs of all parties of the proceedings in the Supreme

Court should be taxed as between Solicitor and Client and paid out of the estate.

Costs of this appeal out of the estate, those of the trustee as between Solicitor and Client.

High Court of Australia
Court Copy
HP 1504

HUNTER v HANLON

JUDGMENT ISAACS C.J.

JUDGMENT ISAACS C.J.

This is an appeal from the Supreme Court of Victoria upon an originating summons to determine certain rights of the beneficiaries under the will of Thomas Hogan. The testator died on September 6, 1926. His wife predeceased him, but he left five children him surviving. The questions propounded concern certain rights of one of the children, namely, Mrs. Jeannie Hunter, in respect of a portion of the testator's estate known as the Commercial Hotel.

The principal question is whether the trustees have the power and the duty to lease the hotel to Jeannie Hunter, having regard to the fact that her mother predeceased the testator. McArthur J. held that that trust has failed.

Applying Lord Wensleydale's words in Abbott v Middleton (7 H.L.C. at p. 114), I arrive at the opposite conclusion. Lord Wensleydale said:- "The question in expounding a will, "as Sir J. Wigram most correctly states....."is not what "'the testator meant, but what is the meaning of his words'."

Now the will, after dealing with some special matters not affecting the present case, directs the Trustees "to grant "a lease" of described land under the Transfer of Land Act "upon which is erected the Commercial Hotel to my daughter "Jeannie Hunter at the termination of any lease which may be "in existence at the time of my death for a period of ten "years or for the lifetime of my said wife whichever be the "longer at a fair yearly rental and without requiring any "bonus for the granting thereof, and if my said daughter shall "not wish to take such lease then to grant leases for the said "land and hotel during the lifetime of my wife for periods "not exceeding ten years at any one time at a fair annual rental "and upon such consideration as to bonuses and ingoings as "my said Trustees shall deem fit."

Directions are given to pay to the widow during her lifetime all net rents, and also "the proportionate yearly part of any "bonus and ingoing received upon the granting of leases during "her lifetime", and if these fell short of £300 a year, then to make over to her such additional sum as would make the widow's income amount to £300. The Trustees are also directed, "after "the death of my said wife" tp give Jeannie "the option of "purchasing the said land hotel and buildings thereon at a "valuation to be made by two valuers, one appointed by my said "Trustees, and the other by my said daughter and in the event of "their disagreeing then by a valuer acting as umpire appointed "by the aforesaid two valuers. And if she shall not exercise "such option then I direct my said Trustees to sell the same by "public auction or private contract and to pay one-half of the "proceeds of any such sale whether such sale be to my daughter "or not unto my said daughter Jeannie and to divide the other "half thereof between my said sons Thomas and John in equal "shares, share and share alike."

The respondent's contention is that the learned primary Judge's construction is correct, namely, that the power to lease was confined to the event of the widow surviving the testator. It is so, with reference to tenants other than Jeannie, by the express words, "during the lifetime of my wife". But there are no such uniting words attached to the direction to grant the lease to Jeannie, and we have no power to insert them. Jeannie's right to a lease rests on a clear direction to the trustees to grant it on the happening of a stated event, that is, whenever the subsisting lease (if any) terminates. Then and then only does the trustee's duty and power arise to grant the lease to her, and then and then only can she be called upon to say whether she will accept or refuse it.

But it is said that the direction that the term of the lease to her is to be "a period of ten years or for the "lifetime of my said wife whichever term shall be the longer", indicates by implication that the power of leasing to Jeannie is restricted to the event of her mother's surviving the

testator. The direction to grant her a lease at all is, however, expressly fixed to be exercised at a point of time marked by "the termination of any lease which may be in "existence at the time of my death". The term of the lease to her is to be at least ten years from that point of time, and it is to exceed that term if the life of the widow exceeds it. But if the widow's life for any reason does not exceed that period, the term remains at ten years.

The survival of the wife up to the granting of the lease may in the result be unknown when the lease is granted, and so affect the term, but it does not affect the right of the lease. Suppose, for instance, the wife survived the testator, and died in 1930, what would be the expressed term of the lease in 1932 ? Clearly, ten years simpliciter. If, as contended for by the respondents, the condition of Jeannie's right to a lease is the widow's survival, then to be consistent it must be her survival until 1932. It has not been contended that her right depends upon her mother's survival until 1932.

Nor is there any extraordinary difficulty in fitting this interpretation to the option of purchase. If the widow had survived the testator, but died before 1932, Jeannie's right to a grant of the lease would still be in futuro, and the valuation of the hotel for sale or the price to be obtained at auction would have to be arrived at by business men on business methods. Suppose, for instance, an hotel were to be sold subject to an existing lease with an option of renewal, the chances of renewal would be a factor in arriving at the price of the hotel. But that is nothing more than a business risk to be taken into consideration. The assignee of the reversion would be bound by the option.

Some reliance was placed by the respondents on the provisions as to bonus. The "fair annual rent" required of Jeannie is to be "without requiring any bonus for the granting" of the lease. The bonus referred to in the will

is not in the nature of rent. Its nature is correctly indicated in the quoted words of the will, and is clearly recognised in the recent case of Hill v Booth (1930 1 K.B., 381). The "fair annual rent" is the same thing both with regard to Jeannie and other possible tenants. This indicates that Jeannie's interest in the lease was considered as x paramount to the widow's income, which was protected otherwise up to £300 a year.

I am of opinion that the trust to grant a lease to Jeannie has not failed. As to the option of purchase, I agree with McArthur J. that the offer set out in Paragraph 5 of the affidavit is in the proper form, and that Jeannie must say yes or no to that offer within a reasonable time. It was admitted that a reasonable time for acceptance has not yet expired.

IN THE WILL OF HOGAN DECEASED. HUNTER V. HANLON AND OTHERS.

JUDGMENT

GAVAN DUFFY & STARKE JJ.

The testator directed his trustees to grant a lease of certain lands to his daughter Jeannie , at the termination of any lease which might be in existence at the time of his death, for the period of ten years, or the lifetime of his wife, whichever term should be the longer, at a fair yearly rental and without requiring any bonus for the granting thereof. At the time of his death, a lease of the premises subsisted, which expires in 1932. The testator's wife predeceased him.

The duty of the Court is to ascertain the meaning of the words used by the testator, "and not to wander from the actual words of a will into "the region of conjecture as to what it is reasonable to suppose the "testator would have done had he contemplated a certain event happening". The whole will must, of course, be read together, on the ordinary principles of construction of any document.

The testator here has given an explicit direction to his trustees. What is there in the will that qualifies or cuts it down?

First, it is said that the direction is simply for the benefit of his wife, because he diredts that, after payment of certain expenses, the yearly rents and profits shall go to his wife during her lifetime. That cannot be the intention, for if the wife had survived the testator, and a lease were granted, amd the wife died before the expiration of the period of ten years, the lease would still subsist and enure for the benefit of the testator's daughter. Again, the direction that his daughter shall have the lease at a fair yearly rental, without any bonus being required (that is, any sum for the granting of the lease), confers a distinct benefit upon the daughter;and that is the more marked if this direction be compared with the clause relating to leases to strangers, should the testator's daughter not wish to take a lease. The view that the daughter must pay a rack rent is quite contrary, in our opinion, to the intention of the testator gathered from the words he uses. It is not a rent equal, or nearly equal, to the full value of the land, that the testator contemplates, but a rent which his trustees regard as fair in all the circumstances.

Next, it is said that the testator's direction to give his daughter an option of purchasing the property after the death of his wife, and if he should not exercise that option, then to sell the property, makes it

clear that the daughter is to have one or other of the options if the wife predeceased her husband, but not both. We cannot see any good reason for this conclusion. If the daughter were granted a lease in the life-time of her mother, that lease would subsist for ten years, despite the death of her mother during that period. In that case, it is clear the daughter would have the benefit of both options, and why she should be deprived of that benefit if her mother predeceased the testator is somewhat difficult to follow.

Lastly, it was suggested that the direction to grant a lease at the termination of any subsisting lease, coupled with the duty to sell after the death of the testator's wife, makes the will practically unworkable - a result the testator cannot have intended or contemplated. But we should have thought that the direction to grant a lease at the termination of any existing lease referred to the commencement of the term, and not the point of time at which the lease was to be granted. If this be so, any practical difficulties there might be in selling the testator's property subject to the daughter's right to take a lease, if she so wished, at a then undetermined yearly rental, wholly disappear.

We agree with the judgment of the Court, other than the answer to the second part of the second Question, from which we dissent.

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HUNTER V. HANLON.

JUDGMENT. MR JUSTICE RICH.

HUNTER V. HANLON.

JUDGMENT. RICH J.

This appeal is concerned with the devise of the testator's hotel property. His intention as I discover it from the language used in the will was that during his widow's lifetime the property should be leased to provide the primary fund for her maintenance. After the widow's death the property was to be sold and an option of purchase is given to the testator's daughter Jeannie Hunter. It is apparent that in dealing with this property the testator makes provision for two periods - that before and that after the widow's death. To secure continuity of management and permanence of tenure the testator in the trust to lease empowers his trustees to grant a lease to his daughter Jeannie Hunter. In the event of her refusal to exercise this option power is given to the trustees "to grant leases for the said land and "hotel during the lifetime of my wife for periods not exceeding ten year at any one time". The scheme of the whole will appears to me to indicate that the power to lease whether to the daughter or to

strangers(in which case the language is express) is bounded by the life of the widow. The basis and object of the power is the maintenance of the widow,and nothing is said as to the disposition of the intermediate rents and profits after the widow's death. The appellant's argument that she is entitled to exercise her option after the widow's death is not justified by the language of the leading provision and is inconsistent with the immediate sale directed to be made upon the widow's death and also clashes with the option of purchase given to the appellant which she must thereupon make. The leasing power is not wide enough to enable the trustees during the continuance of any existing lease to grant a lease to the appellant to come into operation at its termination. Apart from express provision,such a proceeding would constitute a breach of trust. Trustees cannot deprive themselves by anticipation of their power, or anticipate the arrival of the proper period . Chambers v. Smith 3 A.C.759 at p,815. The principle is that they shall find the best tenant when the time arrives for them so to dispose of the estate,Moore v. Clench 1 C.D. 447 at p. 453; Oceanic Company v. Sutherberry 16 C.D. 236. This is reinforced by the rule of construction "that a general indefinite power will not

authorize a lease in reversion, but that it requires special words for that purpose" Sugden on Powers 8th Edtn Chp.18 sec.4 para.16 p. 752. "An intention to allow leases in reversion cannot be imputed to a settlor, unless that intent is manifested by expression or plain implication" ibid para 20 p.754. In some forms of option of purchase it has been said that it is reasonable that valuation should precede the exercise of the option, Lord Lilford v. Keck 30 Beav. 295 at p.299, but the strict construction of the language of this option does not lead to such an opinion I think the conclusion arrived at by the learned primary judge and his answers to the questions propounded are right.

HUNTER V. HANLON AND OTHERS .

JUDGMENT . MR JUSTICE DIXON.

Judgment . Dixon J.

The testator owned a country hotel which, at his death, was occupied by a tenant under a lease for a term of eight years, the unexpired period of which was five years and eight months. This term commenced about a year after the date of the will and it does not appear by whom or upon what ~~terms~~ tenure the hotel was occupied when the will was made.

The testator, by his will, directed his trustees to grant a lease of the land upon which the hotel is erected to the appellant (who is one of his three daughters) at the expiration of any lease which might be in existence at the time of his death for a period of

ten years, or for the lifetime of his wife, whichever term should be the longer at a fair yearly rental, and without requiring any bonus for the granting thereof, and if the appellant should not wish to take such lease, then to grant leases of the hotel during the life time of the testator's wife for periods not exceeding ten years at any one time. The provision goes on to direct the trustees to receive the rents and profits whether from the appellant or other tenants, and after paying all outgoings to pay the balance to his wife during her life time, and, if the net amount is less than £300 per annum, to raise the deficency and charge it upon his real and personal estate. After the death of his wife, he directed his trustees to give to the appellant the option of

purchasing the hotel at a valuation to be made by two valuers, one appointed by the trustees and the other by the appellant, and, in the event of their disagreeing, by an umpire, and if she should not exercise such option then he directed his trustees to sell the hotel and he directed them to pay to the appellant half of the proceeds of any sale (whether a sale to the appellant or not) and to divide the other half equally between two of her brothers.

The testator's wife predeceased him.

The appellant claims that notwithstanding her mother's death before the will took effect, she is entitled to an option for a lease of the hotel at a fair rent without ingoing for a term of ten

years to commence at the expiration or sooner determination of the lease to the present tenant, and that this option is additional to the option to purchase.

Macarthur J.,upon originating summons,decided against this claim,and held that,upon the true interpretation of the whole will,the direction to lease the hotel to the appellant was confined to the life time of the testator's wife,and therefore never became effectual. I agree with the learned Judge in this conclusion. It is true that the will contains no explicit statement which in terms attaches to the direction to lease the hotel to the appellant a condition that the testator's wife should survive him. But I think a number of considerations combines to show that the provision containing this

direction isbased upon the assumption that the testator's wife should then be alive, and is meant to take effect in that event only.

I. The term of the lease to be granted to the appellant is measured by reference not only to an absolute period of time,but also to the life of the testator's wife. It is to be granted for " a " period of ten years or for the life time of my said wife whichever " is the longer ".

2. The alternative to the appellant taking this lease is a direction to the trustees to grant leases " during the life time of " my said wife ".

3. The net revenue to be derived from the lease to the appellant

as well as from any lease to strangers is to be paid to the testator's wife during her life, and no provision is made for the disposal of rent after her death.

4. The trust for sale upon the wife's death is expressed in absolute terms, which leave no doubt that, whether subject to a lease or not, the hotel must then be sold and the proceeds distributed. Even if the wife had survived the testator, she might have died before the end of a lease granted by the testator and unexpired at his death. In such an event the trust for sale would arise before the expiration of a lease in existence at the testator's death. It is difficult to see how the trustees are

to perform this trust and sell and yet obey a direction to grant a lease at the termination of any lease which might be in existence at the testator's death. To meet this difficulty, it was suggested that the direction to grant a lease meant that the lease was to be granted at once before the expiration of any current lease, but to commence at the termination of the current lease. But this suggestion not only DOES violence to the language in which the direction to lease is expressed, but also attributes to the testator the somewhat curious intention of requiring that his hotel should first be encumbered with an additional lease for ten years, if the appellant chose to take it, and then that the land should

forthwith be offered ~~for sale~~ at a valuation to the appellant and sold either to her or to a stranger subject to her lease.

5. The dispositions of the hotel are framed so as to provide for the wife for life, and after her death to sell and distribute the proceeds, but, at the same time, to ensure that both before and after her mother's death the appellant shall be able to occupy and conduct the hotel if she chooses to do so upon commercial terms. The option to lease without a bonus being required does not appear to me to mean that she shall get a lease at less than its value. It of course protects her against the exaction of an immediate lump sum payment by way of

bonus or ingoing. But a rent must be fixed which is fair when no ingoing is payable. No evidence has been given of any usage or practice in the hotel trade by which the amount of the bonus or ingoing payable upon the grant of a lease is determined without regard to the amount of the rent, and the amount of the rent without regard to the amount of the ingoing. Such a practice would indeed be astonishing. The bonus and the rent, one a lump sum and the other distributed over the term, together form the total money consideration for the lease and it is evident that the question whether any and what part shall be paid in a lump sum affects the time and occasion of payment rather than the amount of the consideration to be given. At any rate, in the absence of evidence, a Court cannot suppose the

the amounts to be unrelated at which they are fixed. I do not see therefore how the direction that a lease shall be granted to the appellant can be considered to disclose some intention of giving her an interest of greater pecuniary value than her share upon distribution. There seems to me to be no reason for treating the direction to grant her a lease as intended to give her anything but a clear right to conduct the business of the hotel, if she chose, with a definite tenure, but upon terms which would give her no interest in the property of any greater pecuniary value. The only advantage given her is that she is allowed to pay the whole consideration for the lease in the from of rent.

For these reasons, I think that the direction to lease to the appellant at her option proceeds upon the assumption that the testator's wife is alive, and the assumption that she is alive is adopted as an essential condition of the direction.

If, contrary to the view I have expressed, the appellant's option to take a lease is not confined to her mother's lifetime, the question arises whether the trustees are empowered, in their discretion to fix conclusively " the fair rent " and the terms and conditions of the lease. The appellant's Counsel adopted the view that the fair rent must be determined, not by the discretion of the trustees, but as a question of external fact, a view which accords

with the language of the direction. No consideration, however, was given to the further question whether, upon this construction, the direction to grant a lease was sufficently certain to give the appellant a beneficial right to a lease. Compare Earl of Radnor v Shafto II Ves Jun 449 ; Milnes v Gery I4 Ves 400 at p.407 ; and Waite v Morland I4 L.T.649 revsg I3 L.T. 91. Perhaps there is enough certainty if the " Fair rent " means such fair and reasonable rent as would be commercially obtainable from a tenant who pays no ingoing. But if this is the meaning of the expression, the appellant must pay in the form of rent the full market value of the lease. Accordingly she maintains that she

is entitled to a lease at a " fair rent " which is not affected in amount by the circumstance that no bonus or ingoing is to be paid. If this be the meaning of the provision, the testator must either have supposed that a fair rent could be ascertained without regard to the amount of bonus payable, or else having have intended that a rent was to be fixed which would be fair upon the hypothesis that some bonus which he failed to specify or indicate were payable, and that the lease should then be granted to the appellant at this rent without payment of the ingoing.

It is not very easy to see why the testator should be understood as adopting either of these views. Why should he suppose that a rent could be estimated regardless of the amount

of the bonus ?. An answer was sought in the suggestion that rent is conceived as the consideration for the interest in the land and bonus as the consideration for the interest in the business conducted upon the land. This suggestion raises another question : Is the rent to be assessed upon the footing that the premises are unlicensed ? If this be so, the task of determining the rent would perhaps present little difficulty,although of course such an interpretation would result in a great diminution not only of the rent intended as a primary source of the widow's income, but also in the selling value of the reversion,unless indeed the appellant's altruism were sufficent to lead her to reject the

valuable asset which she might thus acquire. But the answer is given by the text of the will itself ; for it seems plain enough upon its language that the testator was considering the hotel as a licensed house and directing that it should be leased out at a rent proper to licensed premises. But if the fair rent is to be computed as for licensed premises, how is it possible to treat the bonus as the consideration for the business in contradistinction from the premises ? Good will and licence cannot be separated. It would be news indeed that rent could be estimated without regard to the amount of the bonus. Yet if this be the supposition upon which the will proceeds, the basis for computing the rent fails. If the testator meant a fair rent to be

determined according to a non existent standard, it does not seem to matter whether he intended his trustees to perform the task by a conclusive exercise of their judgment, or whether he treated it as a matter of fact capable of ascertainment. In each case the fair rent would be uncertain. On the other hand if the testator assumed that the amounts of rent and bonus were inter dependent and could not be arrived at regardless one of another, and yet meant that the appellant's rent should be that which a stranger would pay who also gave a bonus, it seems to follow that unless the amount of the assumed bonus is known, the rent cannot be fixed. The testater's failure to specify or indicate this amount would

therefore result in complete uncertainty as to rent.

The second question in the originating summons asks whether the bequest of the lease has failed in view of the death of the testator's wife before his,and enquires if it has not so failed how are the trustees to carry out both the trust to sell the land and also the trust to give the lease to the appellant at the termination of the existing lease. As I am of opinion that the direction to give a lease failed to take effect because of the death of the testator's wife, it would be unnecessary for me to answer the latter enquiry unless a majority of the Court are of opinion that the direction to give a lease has not failed.

But upon the view contrary to mine,then unless the provision be void for uncertainty,the second question does appear to me

to contain the following questions.

i. Is the lease to be granted at the termination of the existing lease or at once to commence from the determination of the existing lease ?

ii. If at once, must the option to take the lease be exercised and the rent fixed before,after or at the same time as the option to purchase ?

iii. If at the termination of the existing lease, are the trustees to sell the hotel in the meantime, and if so, subject to the option to lease as an encumbrance,or for an unencumbered estate or interest?

iv. If subject to the option to lease, is the valuation for the purpose of the appellant's option to buy to be made upon the footing that an option to lease is outstanding, with a view of ascertaining what a stranger would give for the property so encumbered?

v. If for an unencumbered estate or interest, how can the option to lease remain exercisable ?

vi. Is the " fair rent " to be fixed by the conclusive discretion of the trustees ?

vii. Is the " fair rent " to be fixed (a) as the rent which a stranger who paid no ingoing might reasonably be expected to give, or

(b) as the rent which a stranger might reasonably be expected

to give if some,and if so what, ingoing be postulated ; and in each case (c) as the rent of the land and buildings considered as licensed premises the licence for which would be transferred to the lessee or (d) as the rent of the land and byildings considered as unlicensed or without a transfer of the license ?

In the view I have adopted these questions do not arise, but if my opinion upon them is required my answers to these questions are as follow :-

i. The lease is to be granted at the termination of the existing lease. It appears to me that the words of the will do not allow of any other answer.

iii. The trustees are to sell the hotel in the meantime.

Again I think the words of the will are explicit. But as the hypothesis is that the appellant has a beneficial option outstanding the sale must be subject to the encumbrance which that option constitutes.

iv. The valuation must be made upon the footing that the lease is outstanding with a view of ascertaining what a stranger would give for the property so encumbered.

vi. The discretion of the trustees in fixing the fair rent is not conclusive, but the fair rent must be determined between the parties as a question of fact.

vii. The "fair rent" is to be fixed as the rent which a

a stranger, who paid no ingoing, might reasonably be expected to give as the rent of the land and buildings considered as licensed premises, the licence for which would be transferred to the lessee.

The learned Judge's order disposed also of questions which arise out of the provision giving the appellant an option of purchase. He decided that the trust for sale of which this option forms a part arose at once, and there can be no doubt of

the correctness of this conclusion.

He further decided that the option must be exercised by the appellant before the valuation is made. The language in which the option is expressed supports this view. The testator directs his trustees " to give " the appellant " the option " of purchasing "the hotel " at a valuation to be made by two " valuers... " etc. The phrase " purchase at a valuation " ordinarily conveys the idea that the purchase is made at a price afterwards to be fixed by valuers.

Some slight additional support for the learned Judge's view is to be found in the consideration that nothing is said by the will as to what is to be done if the appellant simply

fails to appoint a valuer which,if valuation was to precede the exercise of the option, she might do. The alternatives contemplated by the language of the will are simply exercising and not exercising the option.

It is true that it may seem somewhat hard to make a beneficiary buy before she knows the price, but this consideration did not affect Lord Langdale who,in Edwards v Edwards I Jur 654, gave the same interpretation to a somewhat similar provision and,on the other side,it may be said that a valuation by arbitration before the option was exercised might prove not only a useless expense,but an embarassment in selling at a high price

if it were not gg exercised.

On the whole, I think the learned Judge' s decision upon this question was right.

In my opinion the appeal should be dismissed with costs. If,however,the appeal be allowed and the first part of question 2 is answered No , then I think the second part should be answered in the manner or to the effect I have stated.