FOLEY v. O'LOUGHLIN AND ORS.

Judgment. The Chief Justice.

I agree with the judgment of Rich J.

F O L E Y V. O' LOUGHLIN & OTHERS.

JUDGMENT. MR JUSTICE RICH.

FOLEY V. O'LOUGHLIN & OTHERS.

JUDGMENT RICH J.

This appeal concerns the interpretation of some very defective clauses in the will of a testator who died unmarried on the 23rd Septr. 1894. He left two nephews Martin and Thomas. Martin died in 1923 unmarried and Thomas in 1929 leaving issue. The testator by his will in a paragraph beginning "Sixtly" directed that his residuary estate should be held upon trust for such of the two nephews as should be living at his death. This clear direction which if unqualified would be construed in the events that happened as a gift to the nephews as tenants in common in equal shares is followed by a long provision still under the head of "sixtly" settling each share. The provision plainly applies to each respective share. In the course of the provision there is a reference to the share in the residuary estate and "any share to which such nephew may become entitled by survivorship accruer or otherwise". This raises an expectation that the final gift over contained in the provision settling the respective shares will be a cross-limitation so that

on the failure of the trusts, engrafted by means of the provision, of the share of the two nephews that share will pass under the trusts by which the share of the other of the two nephews is settled. But that expectation is not fulfilled by any express clause in the will. The gift over in the events stated is in fact expressed in the following terms. "But "if no child or no remoter issue of such nephew of mine being male attain "the age of 21 years or being female attain that age or marry then In "trust to allow the same to fall into and form part of my residuary "estate as next hereinafter directed". This provision seems to me clearly to apply to each of the two shares in turn. As Martin died without issue it would operate on his share but of course not on that of Thomas who died leaving issue who attained twenty one. But unfortunately there is no subsequent provision in the will disposing of residue or ultimate residue expressed so as to cover the event contemplated. After the interpolation of the maintenance clause the will goes on with a clause beginning "Seventhly". The clause is a disposition in favour of charities represented by the appellant. But it begins with a condition expressed as follows -

"Seventhly"

"But if there shall be no person who shall attain a vested interest in "my residuary estate under any of the trusts aforesaid Then I direct my "trustees to hold my said residuary estate Upon trust to divide " &c. These words do not describe a contingency which is satisfied by the death of one of the two nephews without issue. They are quite unambiguous in specifying a condition consisting in the failure of any person to attain a vested interest in the residuary estate. It has been urged that in the clause I have quoted the words "as next hereinafter directed" operate to pass the property affected by the clause according to the dispositions contained in the seventh clause, but altogether independently of the contingency expressed in the seventh clause as the conditions upon the fulfilment of which those dispositions depend. In my opinion the words, fairly construed, cannot be so interpreted. Probably the clause to which they were intended to refer, through some mistake, was never written into the will or somehow slipped out. But, apart from this conjecture, and taking them to refer to the seventh clause, they do no more than apply the actual direction expressed in that clause to the share of a nephew dying without

issue. The direction actually expressed which is thus applied to such a share is a direction that if no person obtains a vested interest in the residuary estate, that estate is to be held upon trust for the specified charities. Accordingly the effect produced by the words "as next hereinafter directed" is to prevent the share of either nephew passing to the charities unless no person obtains a vested interest in the residuary estate, an event which has not and cannot now happen. The appellant now contends, however, that from the context and the general structure of the will an implication arises which controls its natural meaning notwithstanding its unambiguousness. I cannot find in any of the considerations advanced any sufficient ground for giving such a tortured meaning to the condition as would be involved in an interpretation under which it would apply to Martin's share upon the event of his death alone without issue attaining a vested interest. The explanation of the absence of any express provision disposing of "the residuary estate" into which Martin's share is directed to fall except upon the double contingency of both nephews having no child or remoter issue who attain a vested interest lies doubtless in

the accidental omission of some clause or in defective draftsmanship. It may be that as Mr Ham has argued there are sufficient indications to warrant the implication of a cross-limitation or accruer. It may be that under the rule in Lassence v. Tierney, 1 Mac. & G. 551 and Hancock v. Watson, 1902 A.C. 14, 22, the absence of any ultimate limitation in the settlement of Martin's share effectually disposing of it allows the primary intention to vest it in Martin to take effect so that his share descends as part of his estate. Possibly there is an intestacy. But owing to the constitution of the suit which appears defective these questions cannot be raised for our determination and I abstain from dealing with them. But upon the question that is raised for decision I am quite clearly of opinion that the contingency has not occurred and cannot occur upon which the gift of the residuary estate to the charities depends. In my opinion the judgment of the Full Court was right and the appeal should be dismissed. Gavan Duffy J. who heard the suit in the first instance discovered what I have been unable to discover in the will namely a sufficient indication to justify an implication cutting down the condition and accordingly de-

cided in the now appellant's favour. The draftsmanship is more than unusually difficult and defective and as the appellant obtained a decision in the first instance which was reversed in the Full Court from which he in turn now appeals I think we may with propriety take the exceptional course of allowing the costs of the appeal out of the estate.

LOUGHLIN'S WILL FOLEY & OTHERS v. O'LOUGHLIN & OTHERS

JUDGMENT STARKE J.

Subject to various gifts set forth in his will Martin Loughlin directed "Sixthly and subject as aforesaid" that his trustees should stand possessed of the net moneys to arise from the sale collection and conversion of his trust estates in the will referred to and the income and interest thereof and in his will called his residuary estate upon trust for such of them his nephews Martin Loughlin and Thomas Loughlin as should be living at his death. He then went on to settle the share of each of his nephews in one clause upon trust as to the income for each nephew for life and upon the death of ~~the~~ "my same nephews" to hold as well capital of his share as the income and interest thereof in trust for his children and remoter issue in such manner as his nephew should appoint and in default of appointment in trust for the children of "my same nephew" living at his death and such of the issue then living of his children then deceased as being a male should attain the age of 21 years or being a female should attain that age or marry.

He then directed "But if no child or remoter issue of such nephew of mine being male attain the age of 21 years or being female attain that age or marries in trust to allow the same to fall into and form part of my residuary estate as next hereinafter directed."

And "Seventhly" he directs "But if there shall be no person who shall attain a vested interest in my said residuary estate under any of the trusts aforesaid then to hold my residuary trusts upon trust to divide the same into 330 equal parts or shares" for the benefit of various charities.

The nephew Martin Loughlin survived the testator but died in 1923 unmarried and without issue.

The nephew Thomas Loughlin also survived the testator but died in 1929 leaving issue five children.

The question for consideration is whether, upon the true construction of the will of the testator and in the events which have happened, the share in the residuary estate of the testator in which the nephew Martin had a life interest passed to the charities mentioned in the provision numbered "Seventhly" in the will of the testator.

The Supreme Court of Victoria resolved this question in the negative: hence the present appeal. The words in that clause in their plain and ordinary signification do not pass the share over to the charities for it only operates if there be no person who attains a vested interest in the testator's residuary estate under any of the preceding trusts, or shortly the failure of issue of both his nephews, an event which has not happened and cannot now happen. But the gift in the clause numbered "Sixthly", if there be no child or remoter issue of "such nephew" creates the difficulty. In that event the testator directs that the same shall fall into and form part of the residuary estate ~~of~~ "as next ~~thereinafter~~ hereinafter directed." What does the clause mean?

Do the words mean that if either of his nephews die without a child or remoter issue then the share provided for him and his issue shall fall into and form part of his residuary estate "as hereinafter directed" and be held upon trust for benefit of the charities, or do the words mean that if there be no child or remoter issue of either nephew in the sense of a failure of issue of both nephews, then "the same" or in other words "his residuary estate" shall fall into and form part of the ultimate residue given to charities. In the former case the condition upon which the share falls into residue is explicitly stated. It is then in and forms part of the ultimate residue. The condition imposed by the testator has been fulfilled. The condition stated in the claim numbered "Seventhly" would then have no application to the case and the trusts in favour of the charities would take effect. I cannot think that the words " as next hereinafter directed" in the clause numbered "Sixthly" would in this case operate to impose a further restriction or condition upon the disposition dealt with in that clause. Indeed such a construction as it seems to me would depart from the ordinary and natural signification of the words.

But in my judgment that is not the right construction of the will. It is the latter construction that in my judgment is the right one and it is that, I think, adopted by Lowe J. The indications in the will in its favour are the gifts of his residuary estate in the first place to his nephews, the settlement provisions which follow providing for every contingency but failure of issue of his nephews.

It may be that a cross executory limitation between nephews was omitted by some mistake or misapprehension on the part of the draftsman.

But the clause numbered "Seventhly" makes it abundantly plain that the testator had no intention to benefit charities however the words of the will operated if his nephews were alive or had children or remoter issue. It is in this context that the gift over in the clause numbered "Sixthly" must be construed.

The words in that clause "But if no child or remoter issue of such nephew of mine" deal with the case of a failure of issue and in its context appears more naturally to refer to the failure of issue of both his nephews. It is a construction which brings the clauses numbered "Sixthly" and "Seventhly" into harmony and does no violence to the language of the ~~will~~ trust.

In my opinion the judgment appealed from is right and the appeal ought to be dismissed.

Foley V O'Loughlin.

Judgment. Evatt J.

In this case I have read the judgment of my brother Rich with which I agree but there are some observations which I desire to add.

In my opinion, considerable importance should be attached to the side notes which constitute a portion of the will as admitted to probate. It is not merely probable that these notes were brought to the attention of the testator but improbable that much else would have been brought to his attention. At any rate they constitute an integral part of the will.

The question which this appeal will conclude is whether that share of the residuary estate in which the testator's nephew, Martin had a life interest has passed to the charities mentioned in the "seventhly" provision. Gavan Duffy J. treated the earlier phrase "as next hereinafter directed" as foreshadowing or indicating an intention that the "seventhly" provision of the will should be read "distributively' so as to make the gift over to charities referable and applicable to the share of either nephew in the residue. In my opinion, the words of the "seventhly" clause make such interpretation quite untenable. Macfarlan J. regarded the gift to charities as a trust of despair i.e. as taking effect only in the very improbable event that neither nephew would have issue. This view finds strong support in the general scheme of the will which contains seven relevant provisions. They are most conveniently summarised by reference to the testator's side-notes viz; (1) to pay debts etc. (2) to pay pecuniary legacies, (3) to pay charitable legacies, (4) legacies to god-children,(5) to pay brother annuity of £500, (6) residue for nephews Martin and Thomas, (to be held in strict settlement; income to nephews for life; restraint against alienation; after death for their issue; if no issue then back to residue), and (7) failing issue of nephews, to divide among charities.

Regarding the ultimate gift to the charities in the setting thus summarized the conclusion should be that the gift is to operate only if and when there is an entire failure of issue. The provision commences with the words "But if". Then come the words which define the condition. They are not equivocal - "if there shall be no person who shall obtain a vested interest in my said residuary estate under

any of the trusts aforesaid". The two words I have italicised reinforce the conclusion that the gift is to be made only if all else fails. The side note "failing issue of nephews, to divide among charities" is quite clear. It would be startling to hold that the testators real intention was: "failing issue of either nephew, his interest to be divided among charities."

So far as the phrase "as next hereinafter directed" is concerned, the most that can be said is that it indicates that, upon the event defined, the share of each nephew should fall separately into residue in the manner to be next directed. There is not even a hint that, when the direction is discovered, anything more will be found to happen than what is already stated in the relevant sidenote i.e. "if no issue then back to residue." It is true that the will contains no specific "next" direction as to the manner in which the share was to fall into residue. On a re-reading the intelligent draftsman must have discovered that no such direction was required.

In my opinion the appeal should be dismissed.

FOLEY V O'LOUGHLIN AND OTHERS.

JUDGMENT. McTIERNAN J.

I agree with the judgment of Rich J.