OF 1949 No 1

IN THE HIGH COURT OF AUSTRALIA.

Cooper

v.

Executor Trustee Agency Co of SA Ltd

Appeal

REASONS FOR JUDGMENT.

Of Full Court

(Of Dixon, Kitto and Taylor JJ)

Judgment delivered at Adelaide

on 16 September 1949

H. J. Green, Government Printer, Melbourne.

C.5060.

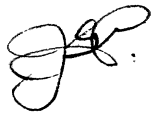
COOPER & ANOR.

v.

EXECUTOR TRUSTEE & AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED & ANOR.

ORDER.

Appeal dismissed with costs.



COOPER & ANOR.

v.

EXECUTOR TRUSTEE & AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED & ANOR.

REASONS FOR JUDGMENT (ORAL). LATHAM C.J.

This is an appeal from a judgment of His Honour Mr. Justice Reed in an action in which the plaintiffs were Christopher Booth Cooper and Joseph Henry Cooper who are the legal personal representatives of Louisa Cooper deceased, and the defendants were the Executor Trustee and Agency Company of South Australia Limited and Thomas Edward Cooper, who represented the late Thomas Cooper. The claim is a claim for the administration of the trusts of the will of the late Thomas Cooper (who died in 1898) for an order for accounts and enquiries, and payment of the amount found due.

The case for the plaintiffs depends upon, in the first instance, the true construction of the will of Thomas Cooper. The case depends upon there being a trust of the estate the terms of which require the executors, who were the four sons of Thomas Cooper, to hold the estate until certain obligations imposed upon the executors and trustees under the will had been performed and discharged.

Mr. Pickering has ably presented an argument designed to show that there was a trust of the whole estate of the testator; that the estate was to be held by the four sons in trust to make periodical payments to the widow and some other relatives, Mrs. Hill and Mrs. Derrington, and to transfer certain relatively small items of personal property to other beneficiaries. It has been contended that it was the duty of the trustees to hold the estate as trustees until these duties were fully performed. There was a power in the will which, it is contended, constituted

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a trust, to carry on the business of the testator as a brewer under the firm name of Thomas Cooper & Sons as partners in accordance with the terms defined in the will. Those terms were that the shares of the four sons in the said estate and in the profits and proceeds arising therefrom should be equal, with particular provisions as to the disposition of the profits between the sons. After the directions as to certain payments to the widow and others which I have mentioned the testator included this provision in his will, "and subject to the above desires trusts and bequests I give devise and bequeath all my estate to my said Trustees for their own absolute use and benefit as tenants in common". Therefore the position was that the interest of the four sons was subject to certain desires trusts and bequests. The four sons, subject as aforesaid, were to be entitled absolutely to the estate of the testator in equal interests.

It is contended that the words "I request that my trustees will carry on the business" in all the circumstances, having regard to all the provisions of the will, create a trust to carry on the business. We have not heard argument opposed to the contention that the will creates a trust under which the executors were bound (1) to carry on the business; (2) to hold the estate until the payments had been made which the will directed. But the case may, in the view which we take, be dealt with upon the basis that there was a trust of the character stated.

It is plain that the four sons were authorised to form a partnership and to carry on the business of the brewery with the assets of the estate. This they did, entering into a partnership agreement on 16th March 1899. The rights of the sons inter se in relation to the assets with which this agreement dealt were then determined by the partnership deed. The partnership deed contained a provision dealing with the case, inter alia, of a partner becoming incapable of assisting in the management of

the business. This was clause 20 of the partnership deed. It provided that in such a case it should be lawful for the other partners to dissolve and determine the partnership in respect of that partner, and that thereupon his share and interest in the partnership should belong to the other partners and that such sum or sums of money should be paid to the departing partner (who was described as an expelled partner) as would have been payable to his executors or administrators under clause 18 if he had died on the day when notice was given exercising the powers of the remaining partners under clause 20. Under clause 18 there was a provision for the death of a partner which became or might become applicable under the conditions to which clause 20 refers. Clause 18 provides that in the case of the death of the partner his executors or administrators should be entitled to what may be called half his share of profits for four years and that at the end of the four years the executors or administrators of the partner dying should be entitled to receive from the surviving partners the value of his share in the capital of the partnership. When Christopher Cooper became incapable of continuing to take part in the management of the business this clause was not applied, but an arrangement was made between Christopher and his brothers which was reduced to writing on 26th November 1908.

The arrangement made on the retirement of Christopher Cooper was that, instead of being retired, he should receive £5 a week instead of the amount stipulated in clauses 18 and 20. Christopher Cooper died on 7th November 1910. His widow Louisa was his executrix and his sole beneficiary. The surviving partners did not take the view that the arrangement which I have already mentioned for £5 a week was in final settlement of all his rights or claims as either a partner or a beneficiary. It was treated as applying only in respect of income during his life. His widow Louisa then made an agreement in writing on 12th April 1911. This document is introduced by the words -

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"With a view to agreeing upon the value of the interest of the late Christopher Cooper in the firm". The document continues, stating the value of certain assets, brewery and dwelling house and so forth, reaching a sum of £1,035:4:11, described as "the one fourth share of the deceased"; that is evidently the one fourth share of the late Christopher Cooper in the firm. The continuing partners agreed by this document to pay the widow £156 per annum in lieu of interest upon the sum of £1,035. It is agreed that Mrs. Cooper will be a creditor of the firm and that a proper deed will be drawn out. This was a preliminary agreement before the deed was drawn out. There is a document containing a valuation upon which this preliminary agreement, and the final agreement also, was founded. This document shows that the valuation of £1035:4:11 was a valuation of a one fourth interest in the freehold property, machinery, plant and brewery business of Thomas Cooper & Sons, Upper Kensington, after deducting the liabilities together with the present value of the annuities. The assets are then tabulated. Included in them is household furniture (£123) as well as many assets which are plainly brewery assets. This document shows that the household furniture was taken into account in arriving at the value of the interest of Christopher in the assets with which this agreement dealt.

A new partnership agreement was made between the three surviving sons on 12th July 1911 and on 26th July 1911 a formal agreement was made replacing the informal agreement to which I have already referred. This agreement is very important in the case. It is an agreement between the three surviving sons and Louisa, who is described as the sole executrix of Christopher, and it is stated in clause 1 that the value of the one fourth share estate and interest of Christopher Cooper deceased of and in the assets, including good will of the partnership business of Thomas Cooper & Sons of Upper Kensington, Brewers, computed

as at the time of his decease is agreed at the sum of £1035:4:11. Clause 2 provides that the amount of undrawn profits to the credit of the said Christopher Cooper at the time of his decease amounted to so much, and that a certain amount has been paid, leaving a sum, stated at £105:15:1, to the credit of Louisa. Clause 3 provides that the said one fourth share mentioned in clause 1 to wit the sum of £1035: 4:11 shall remain with the said partners as a fixed deposit to the credit of Louisa during the currency of the partnership. At the end of the partnership it is therefore plain that Louisa would be entitled to demand and receive payment of this sum of money. This agreement, which is Exhibit M, deals with all the assets of the partnership and confers upon Louisa certain rights, namely the right to leave the sum mentioned as a fixed deposit, and the further right to receive £156 per annum in lieu of interest. The agreement confers upon her these rights in substitution for any rights which she might otherwise have had in relation to the assets to which the partnership relates. This is an agreement with respect to the assets which were the subject matter of the contract between the parties. Louisa was sui juris and the only person interested in her husband's estate. There is no allegation of fraud or over-reaching. There is no claim to set aside the document to which I have referred. The sons were the only persons entitled to the assets of the estate subject to the performance (upon the hypothesis that there was a trust) of the duties imposed upon them to make certain periodical payments.

The sons had bought another piece of land which was apparently used for brewery purposes. Christopher had been one of the purchasers, and on 28th July 1911, immediately after the agreement last mentioned, Louisa transferred to the three surviving sons Christopher's one fourth undivided interest in that land, thus vesting it completely and entirely and not subject to any trust in the three surviving brothers. I have said that

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the sons were absolutely entitled to the estate under the residuary gift subject only to the provisions as to payments to the widow and others. The testator's widow died in 1928. Louisa, it may be mentioned, died in 1938. By 1928 all the obligations of the trustees under the will had been performed. But Louisa had accepted the arrangement of 26th July 1911 as a final settlement in respect of her rights in relation to all the assets of the partnership (which were also all the assets of the estate) except the last piece of land to which I have referred, and perhaps some other later acquired assets. The obligations of the sons under the agreement of 26th July 1911 were performed. The sons sold the assets of the partnership to a company in 1923. Louisa had been informed some years before that such a transaction was under consideration. She was aware at all times of the existence of the company and of the transfer. She made no claim. As already stated she died in 1938. But in my opinion the case should not be decided upon any application of the law with respect to laches or acquiescence. There is no claim to set aside the agreement of 26th July 1911, and upon the construction of that agreement, which I regard as the correct construction, Louisa is not in the position of h aving had a claim which, though it was a good claim, might be held to be barred by latches or acquiescence. Upon my view the question of laches or acquiescence does not arise because by Exhibit M Louisa disposed of or accepted in lieu of her pre-existing interest in the assets of the estate and of the partnership the obligation contained in the agreement to be performed by the three surviving partners. That obligation has been performed and, accordingly, in my opinion Louisa has no claim and the appeal should be dismissed.

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JUDGMENT (ORAL). DIXON J.

I agree. The ground upon which we are deciding this appeal is a short one and, I think, a simple one. We accept for the purpose of our decision the contention that under the will of the testator active trusts were created which did not determine until the death of the testator's widow (which occurred in 1928). We accept that argument subject to a qualification or, at least, a comment. The corpus of the assets of the estate was vested beneficially in the trustees, as well as in their capacity of trustees. The result of that qualification is that they occupied a dual position. They occupied the position of trustees and they occupied the position of the beneficial owners of the substantial assets in the estate subject to the performance of certain duties, - the duty to allow the testator's widow to occupy the residence and the further duty of making certain periodical payments - not very large payments. The direction in the testator's will that they should enter into partnership appears to me to mean that they should enjoy their beneficial interest in the estate as partners, leaving it, however, subject to the express trust which they could only carry out by carrying on the business. The direction is expressed in the form of a request but, having regard to the rest of the document, it is difficult to suppose that the request did not amount to a direction which the testator, of course, could not help but understand might not be carried out. But if it were not carried out it would mean the withdrawal from the office of trustee of those who refused to fall in with it.

Beginning with a partnership of that kind Christopher fell out. He fell out because of incapacity. It is not material

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in my view to determine whether clause 18 or clause 20 of the deed of partnership was in the result directly applied. Clearly they were not either of them applied in their entirety. But they contain provisions which suggest the transaction upon which in my view the appeal turns; that is, a transaction by which, after the death of Christopher his interest was definitely quantified in a sum of money. That interest had a dual character. It was an interest in a partnership and in the partnership itself was included the whole of the assets, in which Christopher was beneficially interested as to a one fourth share. When it was quantified in the sum of money the quantification, whatever its further effect, necessarily resulted in fixing a sum of money which represented both those interests.

There are two points, as it appears to me, upon which the decision of the ground of our decision depends. One is the construction of the agreement of 26th July 1911 by which this was done. The other is the question whether Mr. Pickering is right in his attempt to distinguish between the operation of the agreement upon the partnership and the operation of the agreement upon the estate. So far as the construction of the agreement is concerned, it appears to me that it does more than merely fix the amount in terms of money of the share of the partnership and proceed to stipulate for an annual income of £156 in lieu of interest and to dispose of the other matters with which it deals, matters which are not material to the decision of the case. It not only fixes the amount; it fixes it as a debt, that is to say it converts the interest of Christopher deceased in the assets into a debt which is to be owed by the continuing partners to the estate of the deceased partner, who had been a retiring partner. This is done in a very short phrase, but it is, I think, a decisive phrase. The agreement first of all fixes the value of the assets, including the goodwill of the partnership. We know from the other documents and from the circumstances of the case that

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those assets included all the assets of the partnership and all the remaining assets in the estate. That share was then fixed at £1,035:4:11 by a calculation which is shown by a document before us. That having been done, it was provided that the sum should remain with the partners (that is, the continuing partners) as a fixed deposit to the credit of the said Louisa Cooper the executrix of Christopher during the currency of the partnership. It appears to me that that is an express and perfectly clear conversion of a right against the assets to a right in a sum of money taking the form of a pecuniary liability of the continuing partnership, and it meant only one thing; that is to say, that the amount of the share is not simply the value for the purposes of future dealings with it, but it is transferred and converted into a sum remaining as a deposit to be paid as a pecuniary liability and a debt. That being so, it appears to me that as executrix of her husband's estate, Louisa parted with the interest in the assets and parted with the interest in the partnership of the estate, both at once.

That, I think, disposes of the case unless the view which has been put can be supported, namely that the transaction should be considered as a partnership transaction only and not also as a dealing with the assets and the interest in the estate. It would mean that the thing bears a double aspect, one of which only is effective. In considering that contention I have a great difficulty in applying it to the circumstances as they existed. I can quite understand the contention being applicable, if it were still possible to invalidate the transaction on the ground that it was a transaction between a beneficiary and the beneficiary's trustees. It would certainly wear the double aspect, but if that were the case the transaction would be invalidated as a whole, if steps were taken to invalidate it on that ground. The time, however, has passed when that could be done. The transaction is very old. It took place in 1911. The fiduciary obligations of a trustee are, of course, well known. They

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preclude him from dealing with his cestuisque trustent in respect of their beneficial interest in the estate. He cannot do so unless they are at arms length and if he does the transaction is voidable. But at this date, having regard to all that has happened in the meantime, it would not be possible to take that ground. It is essential for the plaintiffs' case that either no disposition of the interest in the estate took place or if a disposition was made that it was completely void ab initio. The contention that the two aspects of the transaction can be disentangled and distinguished for that purpose seems to me to be fallacious. The transaction dealt with an interest in physical and other assets. There was one interest of Christopher in them. The interest bore a double character - an interest in them as partnership assets and as part of the estate. But they were the same assets, and the interest was the same, one quarter. The value of the interest was fixed at £1035 and transformed into a debt owing by the owners of the remaining threequarters. They necessarily became entitled to the quarter interest in respect of which they became debtors in this sum. It is not possible to draw a distinction and say that as partners they took over the interest but as trustees they held it for Christopher's executrix. That being so, the defendants' case does not rest on laches or acquiescence. Nor on the plaintiffs' side is it possible for them to invoke the exceptions to the Statute of Limitations and, treating this as an express trust, sue on the basis that the trustees converted the assets to their own use or retained them in their hands or those of their legal personal representatives. The whole matter rests upon a dealing by Louisa with Christopher's interest which must stand, it being impossible now to avoid it. For these reasons I think the appeal should be dismissed.

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JUDGMENT (ORAL). McTIERNAN J.

I agree that the appeal should be dismissed. There is nothing additional in substance which I think can be added to reasons which have been given. I shall only add that I think that the appeal should be dismissed on the short ground that Louisa Cooper, the widow of Christopher Cooper, effectively disposed of her quarter interest in the estate for valuable consideration to her deceased husband's brothers, the surviving partners. She did so by the instrument dated 26th July 1911 to which she and the partners were parties. It applies to her husband's "one fourth share estate and interest" in the assets of the partnership. She succeeded to that interest. This fourth interest is identical with his interest in the estate of/Thomas Cooper deceased. By the instrument which Louisa and the surviving partners executed on 26th July 1911, they agreed that the value of the fourth interest was £1035. The effect of the instrument is that she agreed to convert the fourth interest into money of that amount and to part with the fourth interest for that amount and the other consideration in the instrument to the surviving partners upon the terms of the instrument. One condition was that she loaned the money to the partnership during its currency. The instrument had dispositive force in respect of her husband's one fourth share in Thomas Cooper's estate. The action is founded upon the/assumption that this interest had not been effectually transferred to the surviving partners. For that reason I think that the appeal should be dismissed.