

No 37-18/1949

(2)

IN THE HIGH COURT OF AUSTRALIA

HYAMS & OTHERS

V.

HUGHES & OTHERS.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on TUESDAY, 6th DECEMBER, 1949

HYAMS & ORS.

v.

HUGHES & ORS.

ORDER

Appeal allowed. Discharge so much of the order of Gavan Duffy J. as answers the question in the originating summons and in lieu therefor declare that upon the proper construction of the settlement and in the events which have happened the investments and moneys now held by the trustees and representing accumulations of income of the trust fund during the life-time of the settlor Alfred Abrahams are held upon trust to pay the income only derived from such accumulations as from the death of the said Alfred Abrahams to Esther Lyons and Miriam Hyams in accordance with clause (b) of the settlement and subject thereto to hold such accumulations and income thereof upon the trusts declared in clauses (d) and (e) of the settlement. Costs of all parties of this appeal to be paid out of the trust fund, the costs of the trustees as between solicitor and client.

A handwritten signature in dark ink, appearing to be 'J. G. C.', is written over the signature line.

HYAMS & ORS.

v.

HUGHES & ORS.

REASONS FOR JUDGMENT.

LATHAM C.J.

HYAMS & ORS.

v.

HUGHES & ORS.

REASONS FOR JUDGMENT.

LATHAM C.J.

This is an appeal from a decision of the Supreme Court of Victoria (Gavan Duffy J.) upon the construction of an indenture of settlement made on 2nd June 1934 under which Emanuel Abrahams and Alfred Abrahams were the settlors. They and Robert John Hughes were the trustees of the settlement. The question which arises relates to ^{certain} accumulations of income made during the lives of four persons including the respondents Esther Lyons and Miriam Hyams. The question is whether these persons are entitled to accumulated arrears of income or whether, on the other hand, the accumulations are to be added to the capital of the trust fund created by the settlement so that they will receive with the income of the trust fund itself only the income of the accumulated moneys and not those moneys as income. Gavan Duffy J. held that Esther Lyons and Miriam Hyams were entitled to the accumulated income. The appellants are persons who are interested in the capital and income of the trust fund upon the death of Mrs. Lyons and Mrs. Hyams. They contend that the accumulations are to be treated as part of the capital of the trust fund so that Mrs. Lyons and Mrs. Hyams will be entitled during their lives to the income thereon and that they (the appellants) will be entitled to receive the accumulations under another provision in the deed if they attain the age of 35 years.

By the deed the settlors and trustees declare that the trustees shall stand possessed of "the trust fund and of the income therefrom" upon the trusts declared in the settlement. The trust fund is stated to consist of certain moneys property and investments and all additions thereto. These moneys etc. are - (1) a sum of

£20 originally paid by the settlors to the trustees (2) the property real and personal and (3) the investments into which in exercise of the powers contained in the deed the said sum or any part or parts thereof may be converted (4) "any additions thereto". The provision which I have numbered (4) refers to a prior recital which shows that it was contemplated that the settlors might from time to time pay to or vest in the trustees moneys or other property by way of addition to the trust fund - as they in fact did.

The trusts are set forth in five paragraphs. Paragraph (a) provides for a trust to invest any moneys forming the trust fund and to accumulate the net income of the trust fund until such time as both the settlors shall cease to be trustees. This paragraph also provides that the trustees in their absolute discretion shall be entitled to pay to Frances Cohen, Esther Lyons, Miriam Hyams, Philip Cohen or any of them for their separate use benefit and/or maintenance such sums out of the income and of the trust fund as the trustees shall in their absolute discretion think fit. Frances Cohen has died and Philip Cohen has been excluded from the benefit of the settlement by a subsequent indenture made in pursuance of a power to revoke or vary the trusts contained in the original settlement. It will be observed that in paragraph (a) the distinction between the trust fund itself and the net income of the trust fund is maintained. The trust fund is to be invested. The net income of the trust fund is to be accumulated. But both the trust fund and the income thereof may be applied as the trustees think fit for the benefit of the named persons.

Paragraph (b) is in the following terms:-

"At such time as both of the settlors shall cease to be trustees hereof provided that all moneys due in respect of the trust assets have been paid to divide the income of the trust fund equally between the said Frances Cohen Esther Lyons Miriam Hyams and Philip Cohen for their own separate use and benefit during their lives without power of anticipation during coverture provided that on the death of any of the said Frances Cohen Esther Lyons Miriam Hyams or Philip Cohen the share of such deceased shall be divided equally between the survivors and if only one survivor then such survivor shall be entitled to the whole income."

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It is under this paragraph that the question to be decided upon this appeal arises. "All moneys due in respect of the trust assets" have been paid. Both of the settlors have died and paragraph (d) came into operation upon the death of the survivor of them on 26th June 1946. Therefore at that time the trustees became subject to a duty "to divide the income of the trust fund equally between" Mrs. Lyons and Mrs. Hyams. But although this trust is introduced by the words "at such time" it applies "during the lives" of the beneficiaries. It is therefore argued that the paragraph contemplates periodical payments during the lives of the beneficiaries and that it is not apt to cover the disposition of accumulated arrears of income which, in the events which have happened, amount to a large sum of money. On the other hand, paragraph (b) does deal most expressly with income and with all income. Income which had not been expended for the benefit or maintenance of the beneficiaries under paragraph (a) was still income.

Paragraph (c) provides that upon the death of the last survivor of the persons mentioned in paragraph (b) there shall be a trust to pay the income of the trust fund to Isaac Abrahams during his life. Isaac Abrahams died in 1937. Therefore this provision has never come into operation. It is a provision which relates only to income.

Paragraph (d) contains a disposition to take effect upon the death of the last survivor of the persons mentioned in paragraphs (a), (b) and (c). This paragraph creates a trust upon that event to stand possessed of "the trust fund both capital and income" upon trust for the appellants Phillip Leslie Hyams, Leslie Hyams and Louis Hyams sons of Henry Hyams in equal shares upon each attaining the age of 35 years with a proviso that if any of the said Phillip Leslie Hyams, Leslie Hyams or Louis Hyams shall not have attained that age the trustees shall pay to him the income of his share in the trust fund until he has attained the age of 35 years. Paragraph (e) contains a substitutionary gift to the children /

children of the last named persons in the events specified in the paragraph.

Thus the deed is introduced by a provision which draws a distinction between the trust fund and the income therefrom. Paragraph (a) again distinguishes between the trust fund and the net income of the trust fund. Paragraphs (b) and (c) relate only to income and then paragraphs (d) and (e) deal expressly with "both capital and income".

When there is a disposition of corpus and no disposition of the income therefrom, the income follows the corpus. This rule applies "in the absence of any direction to the contrary" - Wharton v. Masterman, 1895 A.C. 186, at p. 192. But in this case there is an express disposition of the income in paragraph (b) and the only question is whether by some means what was income has at some time and by some process become corpus.

There is no rule of law which requires that authorised accumulations of income shall be treated as capital, though the terms of a particular disposition may show that it was intended that accumulations of income were at some point of time to be treated as corpus. There is no ground for holding that income which was not immediately expended during the period to which paragraph (a) relates became capital. It could hardly be argued that separate sums of such income each became capital as soon as they were received if they were not immediately applied for the maintenance or benefit of the beneficiaries. If they did not then become capital, by what process did they become capital when the settlors ceased to be trustees and paragraph (b) came into operation? It was not argued that there is any rule of law which can bring about such a result, and I am unable to discover any provision in the deed which produces such a consequence. The survivor of the settlors died on 26th June 1946. What was accumulated income on 26th June 1946 was still accumulated income on 27th June 1946. There is, in my opinion, no provision in the deed which changed its character. It therefore passed under the gift of income contained in paragraph (b).

The scheme of the settlement is in my opinion as follows:-
During the lives of the settlors they are to have complete control over the disposition of the corpus and the income: they may pay as much of either or of both to the specified beneficiaries as they think proper: if they do not expend the whole of the income for the /

the benefit or maintenance of the beneficiaries there will obviously be a surplus of arrears at the time when the settlors cease to be trustees, and paragraph (b) comes into operation: paragraph (b) then deals expressly with the "income of the trust fund": the income of the trust fund includes past and future income: the whole of this income under the words of paragraph (b) is to be divided between the beneficiaries therein named. If Isaac Abrahams had survived those beneficiaries he would have been entitled to receive the whole of the income. The corpus of the fund, together with all future income, is then dealt with by clauses (d) and (e). The words "to stand possessed of the trust fund both capital and income" upon the trusts mentioned in paragraph (d) do not in my opinion show that income is included in the "trust fund". The phrase "trust fund both capital and income" is fully explained by the fact that paragraph (e) deals not only with the division of the corpus upon the persons named in the paragraph attaining the age of 35 years, but also with the income of the shares of those persons during the period before they attain the age of 35 years.

The appellants referred to a number of cases, but I agree with Gavan Duffy J. that those cases are of no assistance in interpreting the settlement. In re Bowlby, 1904 2 Ch. 685, for example, is a case which deals first with the construction of sec. 43 of the Conveyancing Act 1881, and secondly with "the question what is the established rule of construction of wills of parents who leave legacies to children, whether vested, but payable at a future time, or contingent, but making no provision, outside the legacy, for the maintenance of the child between the death of the testator and the date when the legacy becomes payable.": see report, p. 695. A decision upon this question has no bearing upon the interpretation of the indenture in this case. Re Mellor, 1922 1 Ch. 312, is a case which deals with the question whether a particular settlement was a settlement of both corpus and accumulated income or only a settlement of /

of the corpus. The decision depended upon the construction of a provision in a will relating to what was entitled "the residuary trust fund" of the trustees' estate. The rule of law which was applied was a rule that a gift of residuary personal property or of a share thereof on a future contingency carries with it the intermediate income so that as soon as the right to the residue or the share thereof is vested there is vested also a right to the accumulated intermediate income: see report, pp. 316-317. The only question was whether the terms of the will excluded the application of this rule. It is obvious that there is no room in the present case for the application of this rule relating to residuary personal property dealt with by a will. The other cases relied upon were also not relevant to the question to be determined.

For the reasons which I have stated I am of opinion that the decision of Gavan Duffy J. was right and that the appeal should be dismissed.

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JUDGMENT

RICH J.

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RICH J.

I have had the opportunity of reading the reasons of my brother Dixon and agree with them but as I venture to differ from the decision of the learned primary judge, I shall state very briefly my interpretation of the relevant clauses of the deed. The first clause - clause (a) - directs the trustees to invest the moneys forming the trust fund and to accumulate the net income of the trust fund until both the settlors cease to be trustees and empowers the trustees to pay to the beneficiaries named therein such sums out of the income and/or the trust fund as the trustees shall in their absolute discretion think fit.

The word 'accumulate' imports a continuous process of rolling up. And under the trusts in this clause the accumulations of surplus income are accretions to and follow the destination of the investments from which they result, Wharton v. Masterman 1895 A.C. 186 at pp. 197, 198. Accordingly the trust fund in clause (b) includes the accretions to it of the surplus income not already paid out but accumulated. Out of this fund the beneficiaries named in the clause are entitled during their lives to an equal share of the income only. In the first clause resort might also have been had to the corpus of the fund. Under the provisions of clause (b) the income to which they are entitled during their lives is only that which accrues after the settlors namely the current income. ceased to be trustees. The final destination of the fund and its accretions is provided for in clause (d). Whatever income is not taken out of the trust assets follows the fate of the principal whatever that may be, cf. Hanson v. Graham 6 Ves. 239, 249:

Bowley v. Bowley, 1904, 2 Ch. 685, 715.

I agree with the terms of the order contained in his
Honour's judgment.

HYAMS & ORS.

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JUDGMENT.

DIXON J.

JUDGMENT.

DIXON J.

This is an appeal from an order of Gavan Duffy J. made on an originating summons. The question to be decided concerns the interpretation of a settlement dated 2nd June 1934 made by two settlors. It is an indenture expressed to be made between the two settlors of the one part and themselves and a third person of the other part as trustees. There is a recital that the settlors are desirous of making such provision as thereafter contained for the benefit of their three sisters and a brother-in-law. It is then recited that they have caused to be placed at the credit of a bank account a sum of £20 with the intention that the sum shall be held upon the trusts and with and subject to the powers and provisions thereafter expressed and declared concerning the same. There is a further recital that the settlors may from time to time thereafter pay hand over transfer assure or vest in the trustees other property by way of addition to the trust fund subject to the provisions of the settlement.

The trusts contained in the settlement are set out under five lettered paragraphs by which successive limitations of the trust fund are expressed. Paragraph (a) relates to a period to terminate when the settlors cease to be trustees of the settlement. Paragraph (b) relates to a period beginning at that time and ending with the death of the survivor of the three named sisters and the named brother-in-law of the settlors. Paragraph (c) relates to the period from the death of the last survivor of those persons, and is a trust for one Isaac Abrahams for life if he be then living. Paragraph (d) is a trust after the death of all the aforesaid persons to stand possessed of the capital and income of the fund for a nephew and certain grand-nephews. Finally, paragraph (e) is a substitutional trust in case any of the last beneficiaries died leaving a child or children him surviving.

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The first trust, that stated in paragraph (a), begins as a trust to accumulate the net income of the trust fund until such time as both the settlors shall cease to be trustees. But the trust goes on to provide that the trustees in their absolute discretion shall be entitled to pay to the three named sisters and brother-in-law or any of them for their separate use benefit and maintenance such sums out of the income and the trust fund as the trustees shall in their absolute discretion think fit.

In the exercise of these powers the trustees did accumulate a large sum of money. They had in fact added a large amount of additional property to the £20 which was made the initial subject of the settlement. The settlement contains a power to the settlors with the consent of the trustees to vary alter or revoke any of the provisions of the trust deed. In the exercise of this power a variation was made by which the brother-in-law was excluded as a beneficiary and in discussing the settlement it will be convenient to ignore the reference to him. The two settlors have died. One sister and Isaac Abrahams have died. Two sisters are still surviving.

The question for decision is whether under the second trust (that created by paragraph (b)) the surviving sisters are entitled to the income accumulated under the first trust (that created by paragraph (a)). The second trust is expressed as follows:- "At such time as both of the settlors shall cease to be trustees hereof to divide the income of the trust fund equally between [the named sisters] for their own separate use and benefit during their lives without power of anticipation during coverture provided that on the death of any of the said [persons] the share of such deceased shall be divided equally between the survivors and if only one survivor then such survivor shall be entitled to the whole income."

Gavan Duffy J. construed this clause as meaning that the persons named therein should be entitled at the time that the settlors ceased to be trustees to the whole of the accumulated income in equal shares and to receive the income thereafter accruing until the death of the survivor of them. His Honour based this conclusion on

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considerations which I think may be stated under four heads. In the first place, he considered that the accumulated income was not comprised in the expression "trust fund" and there was no rule of law which would result in its becoming part of the trust fund. In the second place, he was of the opinion that the trust to divide the income of the trust fund among the sisters and brother-in-law was capable of including the income already accumulated. In the third place, His Honour considered that the recital of the desire of the settlors to make provision for their sisters showed that they were the primary objects. Lastly, His Honour found in the phrase "at such time as both the settlors shall cease to be trustees" a suggestion that the clause governed both accumulated and future income.

Before discussing the correctness of this construction of the settlement it is perhaps desirable to say more about the terms in which the other trusts are expressed, and also the language in which the trust fund is defined. The alternative to the view adopted by Gavan Duffy J. is that the accumulations form part of the fund which passes to the nephew and grand-nephews on the death of the sisters and Isaac Abrahams. The trust contained in paragraph (c) in favour of Isaac Abrahams is expressed as a trust upon the death of the last survivor of the named sisters and, provided that Isaac Abrahams is then living, to pay the income of the trust fund at such times and in such proportions as the trustees in their absolute discretion shall think fit to the said Isaac Abrahams during his life. Possibly something has gone wrong with the draftsmanship of this clause, but as the words stand it must be supposed that it is a trust to pay the whole of the income of the trust fund, with a discretion in the trustees to choose the times of payment and the amounts to be paid at the various times selected. However it is reasonably clear that the word "pay" must have the same force as the word "divide" in the previous trust, the difference being only due to the fact that under the earlier trust there are four beneficiaries and under the later one only.

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It seems certain that if Isaac Abrahams had survived the three sisters of the settlor and their brother-in-law he would have taken exactly the same interest as would have been divided amongst them. If they are entitled to the accumulation, as Gavan Duffy J. has held, so would he have been. Yet no reason can be suggested for accumulating income in order to pay the accumulations to Isaac Abrahams.

The trust contained in paragraph (d) is expressed as a direction upon the death of the last survivor of the three sisters and Isaac Abrahams to stand possessed of the trust fund both capital and income upon trust for the nephew and two grand-nephews in equal shares upon each attaining the age of 35 years, provided if any of them shall not attain that age the trustees shall pay to him the income of his share in the trust fund until he has attained the age of 35 years. The trust contained in paragraph (e) is expressed to cover the contingency of any of the three dying leaving a child or children him surviving, in which case the child or children are to take the share to which the deceased parent if living would have been entitled. The provision cannot relate to death at any time and the better interpretation restrains the contingency to death by a beneficiary before attaining 35 years. The trusts in paragraphs (d) and (e) are dispositions in remainder of the entire trust fund.

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The instrument contains a definition of trust fund which is included in the following description of the subject of the trust. The settlors declare and the trustees acknowledge that the trustees shall stand possessed of the sum of money and the full benefit thereof and all the property real and personal and the investments or investment into which in exercise of the powers therein contained the said sum or any part or parts thereof may be converted and any additions as aforesaid or otherwise from time to time made thereto (such moneys, property, investments and all additions thereto being hereinafter called the trust fund, which expression shall mean from time to time the constituents for the time being of that

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fund) and all the income therefrom upon the trusts and with and subject to the powers etc. There is no difficulty in treating the trust fund as consisting of the accumulations of income as well as of the original corpus. As a matter of verbal expression the use of the words "any additions as aforesaid or otherwise" in the definition of trust fund will cover any accretions from whatever source. But the ordinary rule would suffice, that is to say the rule that in the absence of any direction as to the application of income and of any express trust of the income of the trust fund and in the absence of any implication to the contrary, the income follows the title to the corpus of the fund and is treated as an accretion thereto; it has therefore the same destination as the corpus.

It appears to me that, in order to sustain the interpretation adopted by Gavan Duffy J., it is necessary to find in the trust of income created by paragraph (b) a sufficient indication that it was intended to cover accumulations, that is to say arrears of income accruing before the trust arose. Of course any such indications may be further supported by the context in which the trust stands and by any inference founded upon the general provisions of the will. But I am unable to find either in the express words of paragraph (b) or in any of the indications afforded by the deed any ground for treating the trust created in paragraph (b) as anything but the creation of a life interest in the fund entitling the objects of the trust to the income earned from time to time after the trust takes effect in possession. The interest under the trust created by paragraph (b) arises or comes into possession only when both the settlors shall cease to be trustees. It is an ordinary provision dealing with the income of the trust fund after the trust arises and during the subsistence of the interest it creates, that is during the lives of the beneficiaries or of the survivor of them. It is not merely an unusual, it is an unnatural, construction of such words as "at such time as both of the settlors shall cease to be trustees to divide the income among the persons named during their lives" if they are applied to past accrued income. So far as the indications contained in the trust deed go, to my mind they appear all to support the

construction /

construction of paragraph (b), which, as I think, is the ordinary and natural one. An evident purpose of the deed was to state the trusts of a fund which was still to be built up. The trust fund was to be built up during the life-time of the settlors, either by further contributions from the settlors, or by the trustees acquiring from the settlors property by some transaction which is not entirely one of gift. When you find in this setting a trust to accumulate income the natural inference is that the accumulation is directed for a like purpose.

The trust created in paragraph (a) cannot be considered apart from the power of variation and revocation which the settlement contains. By the power of revocation and variation the settlors retain a control over the trust which enables them within very wide limits, subject to the agreement of any co-trustee, to alter the trust so as to exclude beneficiaries or to add beneficiaries or vary the interests or limitations. The trust contained in paragraph (a) consists in a prima facie direction to accumulate qualified by a complete discretion to use the corpus and income of the trust fund as the trustees may think fit for the maintenance and benefit of the three named sisters. This left them almost in complete control of the use to which the income should be put. It seems reasonably clear that the plan to which it was sought to give effect was to enable the settlors, not only to decide from time to time what funds they would provide for the trusts of the settlement, but also who should continue as beneficiaries and how far income should be expended upon the primary objects and how far it should be applied as an accretion to the fund.

Although a direction to accumulate does not amount to a direction to capitalise, the purpose of accumulation is to create a fund or to add to a fund for future use. To my mind the plain inference is that the settlors desired to keep in their hands the power to use income to increase the corpus of the trust fund rather than to expend the income on the named beneficiaries if they found

it more than sufficient. Then when both the settlors died or retired from the office of trustee, the fixed trusts of the settlement would take effect. The first of them would be of the income to be derived thereafter from the corpus and to that income their sisters would be entitled for life. I do not think that any contrary inference can be drawn from the recital to the effect that the settlors were desirous of making such provision for the benefit of their sisters and brother-in-law as is afterwards contained in the settlement. Trusts for life for named persons and after their death to their children and grandchildren are considered to be for the benefit of the named persons. In any case the recital speaks of the trusts thereafter contained and the trusts thereafter contained cover not only nephews and grand-nephews of the settlor, but also Isaac Abrahams. As they are plainly objects of the trusts it is not easy to see how the recital supports any inference as to how an accretion to the fund should be dealt with as between the tenant for life and remaindermen.

For these reasons I think that the proper construction of the will is that the accumulations form part of the trust fund and do not form part of the income to be divided pursuant to the direction in paragraph (b). I think the appeal should be allowed and that so much of the order of Gavan Duffy J. as answers the question in the originating summons should be discharged, and in lieu thereof it should be declared that upon the proper construction of the settlement and in the events which have happened the investments and moneys now held by the trustees and representing accumulations of income of the trust fund during the life-time of the settlor Alfred Abrahams are held upon trust to pay the income only derived from such accumulations as from the death of the said Alfred Abrahams to Esther Lyons and Miriam Hyams in accordance with clause (b) of the settlement and subject thereto to hold such accumulations and income thereof upon the trusts declared in clauses (d) and (e) of the settlement. The costs of all parties of this appeal should be paid out of the trust fund, the costs of the trustees as between solicitor and client.