IN THE HIGH COURT OF AUSTRALIA

PLUMMER

V.

POLSON & OTHERS.

ORAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on 10 May 1950

H. E. Daw, Gov. Print., Melb.

C.12280/45

PLUMMER

v.

POLSON & ORS.

REASONS FOR JUDGMENT
(ORAL)

LATHAM C.J.
McTIERNAN J.
WILLIAMS J.
WEBB J.
FULLAGAR J.

PLUMMER v. POLSON & ORS.

ORDER.

Appeal dismissed. Costs of parties to the appeal to be paid as between solicitor and client out of proceeds of the land referred to in the codicil to the will of the testator.

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

The decision on this appeal depends upon the construction of a provision in a codicil to the will of Robert Plummer, whereby he provided that a certain specified parcel of land should be held by his executors in trust for the benefit of a crippled granddaughter who was the daughter of his daughter Alice Milligan. The codicil provided that if the land should be leased to one of the sons of the testator at a yearly rental, the rent should be used for the sole support of the said grandchild as long as she should live.

Then the codicil contained a provision which raises the question which calls for the decision of the Court - "On her decease I direct that the said land be sold and the proceeds equally divided amongst my sons then living and if deceased then in equal shares among their children." Two opposing constructions of this provision have been suggested. In the first place, on behalf of the appellant, it is argued that the words "and if deceased" apply to the event of all the sons being deceased at the relevant time - which was referred to by the word "then" in the phrase "then living". Plainly "then" refers back to the decease of the grandchild. The argument for the appellant is that these words mean that the latter part of the clause, namely, "and if deceased then in equal shares among their children", comes into operation only if all the sons of the testator are deceased at the time of the death of the grandchild. That event has not happened. One son, but one son only, was living at the date of the death of the grandchild, and it is contended that therefore the second part of the provision does not come into operation at all, so that the words of the gift which operate are simply these - "I direct that the land be sold and the

proceeds equally divided amongst my sons then living", and it has not been argued that if only one son were then living that one son would not receive the whole of the proceeds.

The opposing view is this: that the second part of this provisionmeans that 'if any of my sons are then deceased, then what would otherwise have been the share of that deceased son is to be divided equally among their children,' that is, among the children of the deceased son.

In choosing between these constructions, each of which requires some amplification to be made of this very short provision in the codicil, one matter which is of importance is this: the words provide for division in two cases, - the proceeds are to be equally divided among my sons and there are also words referring to division in equal shares among their children. On the contention of the appellant the words referring to a division in equal shares among their children are quite unnecessary and it is impossible to attach any meaning to them, because the meaning of the provision would have been exactly the same as that contended, if the words had been these - "and the proceeds equally divided among my sons then living and if deceased among their children". There would have been no point, upon the appellant's construction, in repeating a provision about dividing into equal shares.

Further, it may be pointed out that the word of connection between the two parts of this provision is the word "and" and not the word "or". The use of the word "and" suggests that the two parts of the provision may operate simultaneously. The word "or" would be more apt to introduce an alternative. If the word "or" had been there instead of the word "and" it would be more easy to hold that the clause provided for an alternative, so that if the first part did not operate in favour of a son or sons then the second part would not operate in favour of the children, but the use of the word "and" is rather strongly against that view of the words.

The gift therefore is, in my opinion, a gift to a composite class consisting of all the sons living at the death of the grandchild and the children of deceased sons, those children taking what would otherwise have been their father's share equally.

Accordingly, I am of opinion that the decision of His Honour Mr. Justice Sugerman was right, that the appeal should be dismissed and that an order should be made in accordance with the agreement between the parties that the costs of all parties to the appeal should be paid as between solicitor and client out of the proceeds of the land referred to in the codicil.

McTIERNAN J.: I agree.

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JUDGMENT
(ORAL)

WILLIAMS J.

I agree. It seems to me that on the true construction of the codicil the gift is to a composite class consisting of the sons and their children, and the children of sons take by substitution the shares of those sons who were dead at the period of distribution. Something must be read into the words of the codicil to give effect to the wishes of the testator, and it comes down to a choice of inserting the word "all" or the word "any" between the two words "if deceased" in the expression "and if deceased then in equal shares among their children."

Reading the codicil as a whole, and taking into account the considerations urged by Mr. Myers, it seems to me to be more apt to insert the word "any" than "all" and that this is what the testator intended.

For these reasons I am of opinion that the appeal should be dismissed and that the order for costs should be as stated by the Chief Justice.

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JUDGMENT (ORAL) — WEBB J.

I agree.

JUDGMENT. — FULLAGAR J.

I also concur.
