In the High Court
of Australia
Principal Registry

James
v
Gako

Certified Copy of
Reasons for Judgment
of His Honour Mr Justice
Gavan Duffy

IN THE HIGH COURT)
OF AUSTRALIA) No. 15 of 1953
PRINCIPAL REGISTRY)

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VICTORIA

B E T W E E N:

DAISY JOYCE JAMES (who is sued as executrix of the will of Edith Catherine May Wilkinson deceased) (Defendant) Appellant

-and-

STANLEY EGBERT LEMUEL GATES (Plaintiff) Respondent

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON, MR. JUSTICE WEBB and MR. JUSTICE KITTO.

MONDAY THE 12th DAY OF OCTOBER 1953.

THIS APPEAL from the judgment given by his Honour Mr. Justice Gavan Duffy in the Supreme Court of the State of Victoria on the 17th day of April 1953 upon the trial of Action No. 528 of 1952 coming on to be mentioned before this Court at Melbourne this day UPON HEARING Mr. Wright of Counsel for the abovenamed Appellant Daisy Joyce James and the solicitor for the abovenamed Respondent Stanley Egbert Lemuel Gates THIS COURT DOTH BY CONSENT ORDER that this appeal be and the same is hereby struck out -- AND THIS COURT DOTH ALSO ORDER that the sum of Fifty pounds -- (£50) paid into Court as security for the costs of this appeal - be paid out to the Appellant or her solicitors Messrs. Cook & - McCallum.

BY THE COURT,

DEPUTY REGISTRAR.

No. 15 of 1953

IN THE HIGH COURT

OF AUSTRALIA

PRINCIPAL REGISTRY

No. 15 of 1953.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VICTORIA

BETWEEN:

DAISY JOYCE JAMES (who is sued as executrix of the will of Edith Catherine May Wilkinson deceased) (Defendant) Appellant

-and-

STANLEY EGBERT LEMUEL GATES (Plaintiff) Respondent

ORDER OF THE FULL COURT.

COOK & McCALLUM,
422 Collins Street,
MELBOURNE.

Solicitors for the Appellant.

RD/S

Corrected copy
17-4-53

GATES V. JAMES

Judgment of Gavan Duffy, J.

This is an action claiming an order that the Defendant who is the Administratrix and Trustee of the will of one Edith May Wilkinson transfer to ~~him~~ the Plaintiff certain portions of the real estate of the testatrix.

The testatrix's will is a short one. She disposes of her property in one way if the defendant survives her, in another way if she does not. The relevant portion of the will reads "If my niece Daisy Joyce James survives me then I appoint her sole executrix and trustee of this my will and I devise and bequeath all my real and personal estate to her absolutely"....." " It is my wish that Stanley Gates of Beach Road Hawthorn" (the Plaintiff in this case) " who owns the property adjoining mine at Ferny Creek shall have the first right to purchase any portion of my real estate at the value at which it is passed for Probate provided that he exercises such right within six months from the date of my death.

The questions raised in the course of the hearing before me are

(1) Does the provision in the will commencing "It is my wish" give the Plaintiff any right at all enforceable in law, and is it not void for uncertainty.

(2) If such provision gives the Plaintiff any right in law is such right merely one to have the first offer if the administratrix sells, or a right to insist on a sale to himself.

(3) Is the right given to Plaintiff repugnant to the former gift of the realty to Defendant and therefore void.

(4) Has the Plaintiff lost whatever right he had

by failing to fulfil the condition "provided that he exercises such right within six months of my death".

Question (1)

The provision in question starts with the words "I wish". That fact of itself does not mean that no enforceable right is given to the Plaintiff ((c.f.) The Earl of Rodnor v. Shafts 11 Vesey 448 and Beloham v. Rollins where the words were "I desire".) In the present case the words "the first right" and "exercise such right" are consistant only with some right existing to which the administratrix must give effect, and the clause cannot be read as expressing a mere wish that may be given effect to or not as the administratrix may desire.

Mr.Voumard added that the clause was so uncertain in its meaning that it must be without effect. If it cannot fully be given a meaning the Plaintiff can take nothing under it, but "the modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning to it". As I shall have to say hereafter I think there is a real difficulty in saying what was the extent of the right intended to be given to the Plaintiff, but that difficulty can be solved and since price and the time of exercising the option are made plain, there is no uncertainty that should make the provision void. Ryan v. Thomas 55 Solicitors' Journal 364 relied on by Mr.Voumard was a very different case.

Question (2).

This is the point that has caused me most difficulty. It is certainly true that the use of the word "first" suggests rather strongly that the only right given was what is sometimes called a right of pre-emption, a right in the Plaintiff, if he exercised it in time, that the Respondent should not sell the property without first giving him the opportunity to buy at a price corresponding to the value at which it had been passed for Probate.

On the other hand such a construction is not easily reconcilable with the condition "provided he exercises such right within six months from the date of my death". The only thing Plaintiff could do during the six months, unless the administratrix herself offered the land to him or informed him that she proposed to sell, would be to give notice that in the event of her selling he wished to buy certain parts of the real estate. To call this exercising a right appears inapt: his right is inchoate until the administratrix determines to sell. At most it is giving notice that he wishes or proposes to exercise his right if the occasion arises. On the other hand as I shall have occasion to say later he can exercise his right in the full sense if what he is given is a right to buy if he wishes. That the use of the word "first" does not necessarily mean that an absolute right to buy is not given needs no authority but if authority were required it could be found in the decision of the Full Court of N.S.W. in McKay v. Wilson 47 S.R.(N.S.W.) 315. I have certainly felt a good deal of doubt on this point of construction but on the whole I am of opinion that the language calls for and justifies holding the right given to be an absolute right to buy, and treating the word "first" as being nothing more than ~~as~~ descriptive of a right which the Plaintiff may exercise before anyone else can take advantage of the right which would otherwise be open of ~~buying~~ accepting an offer from the Administratrix.

Question (3).

On this point I was referred to a number of cases dealing with restraint on alienation. Prima facie such a restraint ~~of allowing~~ following a demise ~~ni~~ in fee simple is bad for repugnancy. Logically or not however certain partial restraints have been held permissible. In my opinion however a direction to sell to a named person is a deduction

from the rights of an owner different from a restraint on alienation and greater than a limited restraint on alienation since it deprives him of one of his most important rights the right to enjoy the property in specie. On principle therefore such a direction should be held repugnant and ~~while~~ there is authority that it is repugnant (see 15 Halsbury 728 - Fry.J. in Shaw v. Ford 7 C.D.673.)

However I need not enter into a particular enquiry as to whether the provision in the present will in the Plaintiff's favour would be repugnant to a prior gift in fee simple since I ~~think~~ accept Dr.Coppel's submission that there is here no gift of the real property sufficiently specific to sustain an argument that the right given to the Plaintiff is repugnant to it.

The gift to the Defendant of the real property is not in form specific - the question is whether it is sufficiently specific in substance to make the subsequent provision for the Plaintiff void for repugnancy. Though the gift is not given in form as residue it is in effect a residuary gift and I therefore turn to the relevant authorities concerned with residuary gifts of realty. There is no doubt that before the passing of the Wills Act it was settled that ~~xxxxx~~ a residuary gift of realty was a specific gift of all the realty covered by it and after the Wills Act had provided that every will should be construed with reference to real estate as well as personal to speak and take effect as if it had been executed immediately before the death of the testator it was determined, after some difference of opinion, that such a gift was still specific (Mirehouse v. Scaife 2 Milne and Craig 695 - Hensman v. Fryer L.R. 3 ch. app.420 - Lancefield v. Iggulden 10 ch. app.136.)

However looking at the present order in which the assets of an estate are available to pay debts a residuary

gift of realty is no more a specific gift of any parcel of land otherwise undisposed of it than a residuary gift of personalty is a specific gift of any chattel otherwise undisposed of.

Lord Cottenham L.C. in Mirehouse v. Scaife described the distinction between the effect of a residuary gift of realty and one of personalty as follows (at p.695) "Where a testator gives the residue of his personal estate he knows that it will be uncertain till his death what will be comprised in the gift. But it is certain that the gift will operate upon part only ~~of~~ as what he may be possessed of at his death all debts, funeral expenses and other charges being to be paid out if it, and the expression necessarily implies what will remain after all charges are defrayed. On the other hand the testator knows precisely upon what real estate such a gift will operate unless there be charges affecting the land beyond what the personal estate can satisfy ". Such a distinction can no longer be drawn. Under Sections 8 and 9 of the Adminstration and Probate Act 1928, on the grant of probate the testator's real estate vests in the Administrator as fully as his personal estate and by force of Section 5 and Part II of the second schedule "Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift....." is made the first fund, after property undisposed of by the will, for payment of debts and expenses of administration.

A gift in the form of that to the defendant would be covered by these words. As Lord Cottenham pointed out in Mirehouse v. Scaife 2 Milne and Craig 695 at705 a gift of "all my lands in AB and elsewhere etc." would be a residuary gift as it could not be necessary that the terms "rest and residue" should be used in ~~one case more than the other~~ the case of real estate any more than in the case of personal estate.

It is true that in this case the defendant is the sole beneficary, and if there is sufficient personalty may elect to use it to pay debts and expenses and retain the realty in specie, and I may perhaps assume that in fact there was sufficient personalty, but in asking what was the nature of the gift we must look at it when the will was made. Then it was a gift of what should remain after what was necessary had been taken for debts and expenses, for contrary to what did occur there might not have been enough personalty to meet all charges when some or all of the realty would have had to be sold, and what is more important, had the ordinary course of administration been followed realty would have to bear equally with personalty ~~some~~ its share ~~store~~ of the charges. Had realty and personalty been given to different persons the position would be ~~lie~~ plain.

Question (4)

The Plaintiff within six months of the testatrix's death gave the Defendant Notice in writing (Exhibit B) that he elected and agreed to purchase two sufficiently described portions of the real estate at the value at which they had been passed for Probate. He subsequently tendered a transfer and the purchase price, which the defendant rejected, but this was after the six months had elapsed.

Mr.Voumard contended that what he had done within the six months did not amount to an "exercise" of his right; to exercise his right it was contended he must tender a transfer and the purchase money. But if the right is to "purchase" and if to exercise that right the Plaintiff must "purchase", he does not "purchase" by tendering a transfer and the purchase money. Purchase is not a unilateral act. the administratrix must play her part before the land is bought and sold. In truth Plaintiff's right is to purchase if he wishes to do so. He has in substance an option to purchase

though the word option is not used. The natural way of exercising that option is to give notice that he elects to purchase.

~~In~~ 'The right to purchase given to the Plaintiff gives him an equitable interest in the land (O'Neill v. O'Connell 72 C.L.R. 101) and when he elects to exercise this right he as Dixon J. (as he then was) said in that case at p.120 " incurs an equitable duty to perform the condition upon which under the provisions of the will he becomes entitled to the property". He has therefore not only elected to buy but bound himself to buy. Again ~~the~~ a right to purchase does not necessarily lose all its value because ~~he~~ the donee cannot obtain the land. It is considered so much in the nature of a benefit intended for him that if it must be sold to another he may still be entitled to the difference between the amount received on such sale and the price at which he was entitled to buy (in re Cant's Estate 4 de J & G 503). This principle was applied in the case of a sale consequent on a Creditors' Action in in re Kerry (1889) W.N.3. and in re Armstrong's Will and Trusts (1943) 1 ch. 400 to the case of a sale by the tenant for life. As was pointed out in Armstrong's case the question is one of construction to be determined by an inquiry as to the testator's ~~instruction~~ intention as disclosed in the will and it may be that even ~~where the will~~ though the will here in question contains no express power of sale or direction to sell the necessity of first paying debts which must be presumed to be in the testator's mind would prevent the inference that the testator intended a benefit in the proceeds of a sale for that purpose ~~(= c/f re Flint (1927) 1 ch. 570)~~. I do not however find it necessary to determine this question since for the reasons already given I am satisfied that the Plaintiff in this case has "exercised" his right within the time limited by the will.

The result is that none of the objections raised against the Plaintiff's claim have been sustained and, as it is not suggested that there is any impediment to an immediate transfer he must have the order he claims. The Statement of Claim states that the Plaintiff has suffered damage, but nothing was made of this before me nor was any evidence of damage given.

There will be an order that the Defendant transfer to the Plaintiff the two portions of the testatrix's real estate set out in paragraph 1 (a) and (b) of the Statement of Claim. The Defendant must pay the Plaintiff's costs of the Action. including Pleadings & Discovery – Stay of 28 days.

I certify that this is a true Office Copy of the Judgment of His Honour Mr Justice Gowans dated

Gowans Associates