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ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

DEEP

V.

NASSER AND OTHERS

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 7th December 1955.

DEEP

v.

NASSER & ORS.

ORDER

Appeal allowed. Cross-appeal dismissed. Vary the decretal order of 27th May 1955 by omitting the second and third declarations therein and substituting therefor the following declaration, namely a declaration that under the devise to the plaintiff of the land in the will referred to as "the said shop and premises" the plaintiff is entitled to the whole of the land comprised in the certificate of title No. 4631 folio 243 having a frontage of 66 feet to Parker Street, Cootamundra, excepting only the portion thereof which passed under the aforesaid devise to the defendant Helen Nasser and her children. *cross appeal* Costs of all parties of the appeal to be taxed as between solicitor and client and paid out of the estate.

DEEP

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JUDGMENT

DIXON C.J.

WEBB J.

KITTO J.

DEEP

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This appeal concerns the identification of the subject matter of two trusts of realty declared by the will of Edith Scandra Deep who died on 2nd March 1953. The will in question was made on 4th June 1936. The testatrix was a widow who carried on a drapery business at Parker Street, Cootamundra, under the style, presumably adopted by her late husband, of Mick Deep. At the time of her death she had taken into partnership the appellant Norman Deep who in her will is described as her cousin. The relationship seems to have been through her late husband. At all material times she owned in fee simple a rectangular piece of land facing Parker Street having a frontage of 66 feet and a depth to a lane at the rear of 165 feet. The land was comprised in one certificate of title. Parker Street runs from south-west to north-east. On the north-easterly portion of this land was the shop in which she carried on her business. It occupied a frontage of 38 feet 8 inches and extended in depth for 50 feet 2 inches. It was No. 159 in Parker Street. Adjoining this shop upon the south was an older galvanised iron shop taking up the remaining 27 feet 4 inches of the frontage to Parker Street, where it was No. 161. At her death this shop was occupied by a watchmaker and at the time of the making of her will by a grocer named Fred Legge. These respective tradesmen occupied No. 161 as her tenants. This shop formed part of a building which extended back almost to the same line as the back of No. 159 but at that point there was a back veranda to No. 161 and the veranda had been closed in so as to form a bedroom. The land could be entered from the lane at a back gate and a path seems to have extended at all times from the gate to the back of her shop, No. 159. At her death it was a

concrete path and that may have been the condition of the path at the time when the will was made. At that date there was an old cottage which the testatrix occupied as a dwellinghouse. Between the date of the will and her death it was replaced by another small cottage, doubtless less tumbledown. The site where the successive cottages stood was on that part of the land that runs down from the galvanised iron shop No. 161. In other words it was against the south-west boundary. The three sides of the block on which these buildings stood were fenced with galvanised iron.

The difficulty arises in connection with the disposition contained in the will of the piece of land. The will begins by a general disposition of the real and personal property of the testatrix to her trustees. The will appointed the appellant and another resident of Cootamundra as executors and trustees. The first trust declared is as follows:- "As to all my drapery business carried on by me at Parker Street Cootamundra aforesaid under the style of 'Mick Deep' and all the stock furniture fittings and assets thereof and also the said shop and premises for my cousin Norman Deep absolutely subject however to the payments (sic.) to my Trustees by the said Norman Deep of the sum of one thousand pounds within one year after my death provided always and I hereby declare that my Trustees may in their absolute and uncontrolled discretion in any circumstances that seem to them fit extend the time for payment of such one thousand pounds or any part thereof for any further period not exceeding in all a further two years". It is enough to attempt to apply the description "the said shop and premises" to the state of facts that has been outlined to see that there is a serious difficulty in identifying exactly the area of land that is comprised within this trust in favour of the appellant. But the difficulty is much increased by what follows. The will proceeds thus: "And as to my other shop premises in Parker Street Cootamundra now let by me to Fred Legge upon trust for my niece Helen Nasser for her life and after her death for such of her children as survive her and attain the age of twenty-one years and

if more than one in equal shares as tenants in common and in the event of my said niece having no children who shall survive her I declare that the said shop and premises or the fund or investment then representing the same shall sink into and form part of my residuary estate." What part exactly of the land is comprised within this trust?

If the two trusts in question do not in combination amount to a disposition of the whole of the land what is left must fall into residue. There is a residuary disposition consisting in a direction to the trustees to hold the balance of the real and personal estate upon trust for certain nephews and nieces. The only other disposition contained in the will is a trust of the sum of £300 to apply portion or portions thereof as the trustees should think fit for or towards the education, advancement or benefit of the testatrix's nephew John George Nasser with a provision that any balance thereof not expended at his death should fall into residue.

The task with which a court is confronted in a case of this kind is to identify with the description the testatrix has employed the piece of property which she intended as the subject of the particular gift or disposition. It is not the same thing as the interpretation of a limitation or provision for the purpose of ascertaining what testamentary directions have been given with reference to an identified part of her property. What has to be discovered is the physical identity of the thing she has intended to refer to by the means of identification to which she has resorted. For such a purpose the Court must consider not only the nature and history of the property. It may go beyond this. For example what vocabulary she was accustomed to use and with what signification; her own conceptions of the nature and classification of property, the association of ideas which might be expected to arise from the manner in which she employed or engaged her property; the circumstances in which she made her will and the characteristics of her property as she

knew it; all these may be relevant considerations by the aid of which the meaning that she attached to the description may be ascertained. Of course the primary thing is the natural meaning of the description itself. But when the uncertainty arises out of the indefiniteness, inadequacy or ambiguity of the terms in which it is expressed it is rash to neglect the help which surrounding circumstances may give.

First it is to be noted that the testatrix was a Lebanese and that some members of her family had come to Australia. The persons who are to take under the residuary trust are described as "such of my sisters my three brothers my nephews and my nieces Fay, Elaine and Olga Nasser as survive me". Of this class at the date of the will a sister and a brother lived in the Near East and a sister and two brothers in Australia. Presumably the three nieces mentioned resided in Australia. There is no reason to think that the class were conceived as possessing any strong claims on her bounty or regarded as very suitable donees of a segregated rear portion of the land fronting the street in Cootamundra. The respondent Helen Nasser whom she describes as her niece was at the date of the will a child of about eight years of age. Of the appellant Norman Deep all that appears concerns his close relation with her as an employee and afterwards a partner in the business and that he was a cousin. It would seem that she determined primarily to provide for the appellant and then for her Australian niece Helen Nasser and, thirdly, for a nephew George Nasser. At the time when the will was made the shop No. 161 was let to Frederick Legge upon an oral lease at a rent of £1:5:0 per week. The premises occupied under this tenancy consisted of the shop with a short and narrow passage running down to the veranda which had been formed into a bedroom and from that passage there was an exit to the yard beyond. Between the shop and this veranda there was a room divided by partitions into two with a passage

between. This room was used by the testatrix for the storage of goods connected with her business and was not comprised in the lease to Legge of the shop No. 161. At the date of the will the bedroom formed by closing in the veranda was occupied by Norman Deep. He says that at that time and for a number of years before he had assisted the testatrix as an employee in the business and occupied that room and that he continued to occupy it until the testatrix's death. The room was furnished by the testatrix. He received no wages but he was supplied by her with clothing, board and pocket money and, of course, was not asked to pay for the room. This arrangement ended when she took him into partnership as from 1st July 1941. The old weatherboard cottage which lay between the concrete path and the southern side of the land was demolished in 1938 or 1939 and another weatherboard cottage erected in its stead. But the old cottage had been used not only as a dwelling-place. It served as an interim store for goods. The cases of goods were brought through the gate from the lane, broken down in the yard and then the contents stored in the cottage. There the testatrix Norman Deep checked them with the invoices. They were taken into the shop when there was room there. Since June 1936, when the will was executed, other out-houses and structures have been placed in the yard but they may be neglected. At the date of the will there were conveniences for those at work in the two shops. Two old structures of this kind stood on the north-eastern side of the land behind shop No. 159 and were used by all parties. A third that stood near the lane was used only by those who worked at shop No. 159. Two oil drums were used as incinerators and they stood about nine feet from the lane at the rear of shop No. 159. Legge used the incinerators and the convenience but otherwise he did not make any use of the land behind the shops. All supplies of groceries brought into his shop were brought through the front door from the street. Supplies to the drapers shop were more often than not

brought through the back door in the lane and up the path. Not only were some of these stored in the old weatherboard cottage but also in the storeroom which formed part of the building No. 161 and lay behind the veranda-bedroom. Thus it may fairly be said that the testatrix seems to have conducted her business from her shop and dwelling. It was her custom to go down from the shop to the dwelling to have her lunch. She went from the dwelling to the shop in the morning and from the shop to the dwelling in the evening. It is a reasonably certain inference that she would regard herself as conducting her business and residing upon the same premises as her own property.

Norman Deep as plaintiff issued an originating summons raising the questions as to the effect of the dispositions affecting the piece of land. The summons was argued before Myers J. whose opinion seems to have fluctuated a little as to the solution of the very real difficulty of identifying the exact subjects of the dispositions. Eventually his Honour declared that upon the true construction of the will the devise to Helen Nasser of the shop referred to as "my other shop premises in Parker Street Cootamundra now let to Fred Legge" comprised only the building constituting the shop actually occupied by Fred Legge, the storerooms behind and the veranda bedroom. At first his Honour was disposed to think that the devise covered only the actual shop, so that its subject matter would be part only of the somewhat old and ramshackle building containing the shop itself, but afterwards his Honour took the view that he ought not to impute to the testatrix an intention by her disposition to divide this old existing building into parts. His Honour's order next declared that Norman Deep under the devise to him of the land referred to as "the said shop and premises" was not entitled to the whole of the remaining land but only to the actual shop No. 159 (that is to say the building with a frontage of 38 feet 8 inches and a depth of 50 feet 2 inches). The order then declared

that the remainder of the land not comprised within the two foregoing declarations formed part of the residuary estate of the testatrix so that it passed to the nephews and nieces.

From this decretal order Norman Deep appeals to this Court on the ground that the trust in his favour extends to the whole of the land comprised in the certificate of title except that part which forms the subject of the trust to Helen Nasser. Alternatively, he contends that the judgment should at least have included in the trust in his favour the land immediately behind his shop extending down to the lane so that the land comprised in the certificate of title would be notionally divided into two parts, one having a frontage of 38 feet 8 inches to Parker Street and the other 27 feet 4 inches. By a cross-appeal Helen Nasser complains that the learned judge should have adopted this construction of the will which would give her that part of the entire land which would lie south-west of a line drawn from a point at Parker Street between two shops and extending back to the lane. It appears that the two shops were valued for rating in 1934 as two separate properties extending back to the lane and that in 1935 and 1936 they were rated accordingly in two separate assessments. But whether the testatrix was aware of this does not appear. It is relied on, however, in support of the supposition that it represents the division of the land which the testatrix intended by her disposition. As already has been said, the appeal depends upon the proper identification of the subject matter of a disposition with the description therein contained. The description is in terms that cannot be decisive in themselves and the ascertainment of the subject matter intended must be aided by circumstances. If the circumstances already stated are considered it is not difficult to perceive the standpoint of the testatrix with regard to the shop in which she conducted her business and the premises amidst which she dwelt. She treated the proper working of the business

as dependent upon the rather crude facilities offered by the rest of the land. For example, in the working of her business she relied upon the entrance from the lane, the use of the incinerator, the possibility of storing goods in her cottage and the possibility of storing further goods in the room at the back of the other shop and the use of the conveniences. It does not seem improbable that she would regard herself as living at her business premises, even if her cottage was actually detached from the shop. Her bequest and devise to Norman Deep puts first and foremost the drapery business with its stock, furniture, fittings and assets, and then goes on to speak of "the said shop and premises". The word "said" does not go back to any previous mention of the shop in terms. By a construction according to the sense rather than to the words it refers to the prior reference to the assets of the business in which she included the shop. She speaks not of the shop, but of the shop and premises. It is true that when she speaks of the shop No. 161 she uses a similar expression. In one place it is "shop premises" but in another place "the said shop and premises". The importance of the phrase is perhaps not great but it suggests a consciousness that the shop itself might be considered one thing ^{that} but/the shop and premises/^{would include} whatever adjuncts belonged to the shop.

But however this may be, it seems highly unlikely that she meant to divide both shop buildings completely from the land at the rear as the decree has done. When she spoke of her own business and its assets and the shop and premises and disposed of them in favour of the comparatively young man who had worked with her for so long and whom she afterwards took into partnership, the intention which one would understand her to possess is to bestow on him the whole means of carrying on the business as theretofore including the land at the back of the shop. In the same way in disposing of shop No. 161 in favour of Helen she may be taken to have regarded that as a disposition of what was necessary to carry on the business there. There is, however, this marked distinction between the two dispositions. In the case of the dispositions in favour of her niece Helen she obviously regards that not as something to enable

her niece to carry on the business personally but rather to give her some sort of income, meagre as we may think it. She speaks in terms which though not direct contemplate clearly enough the sale and the distribution of the proceeds and also some other investment. These references, indirect as they may be, to a sale of the premises, strongly support the view which Myers J. eventually took that the entire building should be considered as one, although possibly the words "shop premises" might have been confined otherwise to the actual shop which was occupied by Legge at the time the will was made. Difficult as it is to be sure of the testatrix's meaning, on the whole the circumstances, including the references to sale and investment, tend against the view that the testatrix meant any part of the land to pass only by the residuary gift to brothers, sisters, nephews and nieces. There is little or nothing to support the alternative that a line should be drawn down to the lane from the division between the shops. The rate assessments based on this view may represent an instinctive or popular understanding of what belongs to a shop frontage. But probably the testatrix would be unconscious of any such popular assumptions and there is nothing to suggest that it represents her understanding of the situation. If there had been a fence dividing the land it would be a different thing. But not only was there no fence, but the testatrix herself occupied as a place of residence part of this very land. It is not possible to adopt such a construction notwithstanding that it is contended for by the appellant as his alternative case and contended for by the cross-appellant as her case. On the whole the conclusion which has most to commend it is that the testatrix meant by her disposition to make a gift in favour of Helen and her children of the building and the land upon which it stood being No. 161 and consisting of the old shop, the two storerooms behind and the veranda bedroom and meant to dispose of the rest of the land comprised in the certificate of title in favour of the appellant Norman Deep.

This conclusion means that the decree of Myers J. should be varied by substituting for the two declarations dealing with the shop and premises being No. 159 and the remainder of the land which his Honour declared to fall into residue a declaration that under the devise to the plaintiff of the land in the will referred to as "the said shop and premises" the plaintiff Deep is entitled to the whole of the land comprised in the certificate of title 4631, folio 243, having a frontage of 66 feet to Parker Street Cootamundra excepting only the portion thereof which passed under the aforesaid devise to Helen Nasser and her children.

The appeal should be allowed, the cross-appeal dismissed, the costs of the appeal of all parties should be taxed as between solicitor and client and paid out of the estate.