RE W. J. BARTLETT, DECD.

OPINION

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In this matter the facts are that the late Mr. Bartlett by his last Will dated the 3rd April, 1935 directed as follows:-

"AS to my real property situated in Clinton and Sloane Streets Goulburn aforesaid and consisting of the Southern Railway Hotel and the weather board cottage adjoining previously occupied by Ah Chong and the terrace houses formerly part of Mandelshon's terrace in Sloane Street Goulburn aforesaid and also the property now occupied by James McIntyre and formerly known as Stewart's I GIVE the same to my Trustees UPON TRUST to continue to receive the rents and profits thereof and also to further let or lease the same or any part thereof UPON such terms and conditions as my Trustees think fit for any periods as to any of such property up to ten years from the date when the sublease of the said Southern Railway Hotel shall fall due and during such periods of ten years my Trustees shall receive the rents and profits and place same to a special account out of which all rates repairs maintenance and insurance on all such property shall be paid and any balance/shall form part of my residuary estate and be divided at such times as may be thought practicable or convenient by my Trustees amongst the persons who take the residuary estate as hereinafter mentioned PROVIDED that as regards the terrace property and the weatherboard cottage in Sloane Street Goulburn aforesaid my Trustees may if they think fit sell the same or any part thereof for cash on terms and invest the proceeds as aforesaid with power to vary same as aforesaid and income of such investments shall be paid to my residuary devisees as if same were any balance of rents and profits as aforesaid. At the expiration of the said ten years as aforesaid I direct my Trustees to sell and convert into money the said properties in Sloane and Clinton Street Goulburn aforesaid either privately or by public auction or for cash or on such terms as they ~~m~~ think fit and divide the nett proceeds thereof in equal shares amongst the said Hubert Dudley Taylor Elizabeth Taylor Mary Lester Robson and Nancy Maude Robson who are hereby called my residuary devisees...."

-Testator further directed as follows:-

"ALL the rest and residue of my property both real and

personal I GIVE to my Trustees UPON TRUST to convert the same into money as they think fit and to divide the same with any other money equally between my aforesaid residuary devisees I EMPOWER my Trustees to postpone the conversion of any part of my property for so long as they think fit and the income of any property remaining unconverted shall from the time of my death be paid and applied in the same manner as if it were income of investments of the proceeds of the conversion thereof.....AND I DECLARE that if any respective legatee or devisee under this my Will die before me and any issue of his or her be living at my death the gift of the legacy or devise shall not lapse but in that event I GIVE the said respective legacy or devise to his or her personal representative to be disposed of as part of his or her personal estate ".

The said testator appointed Messrs. Thomas, Carman and Williams Executors and Trustees and I am instructed that all three duly proved the Will and accordingly Probate was granted to them.

In 1936 proceedings were instituted in the Supreme Court of New South Wales in Equity by way of originating summons by the said Trustees as plaintiffs and joining certain beneficiaries under the said Will as defendants to determine certain questions arising with respect to the provisions of the testator's Will and the administration of his estate. It is not necessary to refer herein to those questions. Suffice to say that the originating summons never came on for hearing before the Equity Court but a Deed of Family Arrangement was entered into between the Trustees and the said adult beneficiaries and the same was approved of by the Court on behalf of the infants.

The next step in the matter was that on the 17th February, 1938 a Deed containing Releases and Covenants was executed by the said Trustees (therein referred to as the releasees) and Hubert Dudley Taylor Elizabeth Taylor Mary Lester Robson and Nancy Maude Robson (therein referred to as the releasors).

The said Deed provided that the releasors had examined the estate accounts prepared by the releasees covering their administration from the 28th June, 1937 to the 8th January, 1938 and had found them to be correct and that they had been duly paid the bal-

ance appearing by the third accounts to be due to them. The said Deed then set out:-

"AND further it is hereby agreed and declared by and between all parties hereto that this Deed is operative only between all parties hereto that this Deed is operative only and has reference only to all such assets of the estate of the said Testator as are included in that part of the said Will of the said Testator as deals with the general estate of the said Testator and such only as set out in the Schedule hereto and in no way affects the future administration of the trusts and authorities of the said Releasees as set out in the Will of the said Testator in regard to the properties included in the said ten years Trust and which ten years Trust is acknowledged to begin from the eighth day of January One thousand nine hundred and thirty eight which is the date when the sublease of the Southern Railway Hotel as mentioned in the Will of the said Testator falls due And in regard to the administration of the said ten years Trust it is hereby agreed and declared that the said Releasees shall each year file only annual accounts of receipts and disbursements of such ten years trust and for their pains and trouble as Executors of the said William John Bartlett deceased receive as commission on such yearly accounts calculated at three per cent on income and one per cent on capital received and the said Edward Francis Thomas or his firm in addition shall also be paid out of the said estate or out of the rents and profits collected by the Releasees all costs and charges and expenses for work done by him or them whether the same can be said to be ordinary legal or work executorial work provided that such costs charges and expenses shall be of such amounts as is permitted for such work or matters as are sanctioned by the scales of costs to be paid to legal practitioners in New South Wales".

Although Messrs. Carmen and Williams have no doubt that the testator earnestly desired that the property comprised in the ten years trust should be held and managed by them until the expiration of the trust, demand has now been made by such beneficiaries for the transfer and conveyance to them immediately of such trust property. Advice has been given by Counsel that the Trustees are obliged to comply with such demand.

On these facts I am asked to advise upon the following matters:-

1. Do you consider that the opinion given by Mr. Wilson is a correct statement of the Law on the particular matter submitted to him for opinion?

2. Whether such opinion is correct or not, would my two clients be justified in asking that the Court should be approached for its opinion on the matter, so that the issue might be put beyond all doubt?

3. If such an application to the Court were made and Mr. Wilson's opinion upheld what would be my clients' position in regard to the costs of the application?

4. If the Court did uphold Mr. Wilson's opinion would the Trustees be entitled to the remuneration provided for in the Release of the 17th February 1938 or have any claim under the provisions of that deed, beyond the date on which they conveyed the residuary estate to the beneficiaries?

I have given careful consideration to the subject matter and to the documents forwarded to me together with the case for opinion. Mr. advice is -

Question 1:

Yes, in my opinion the law has been correctly stated by Mr. Wilson in the matter submitted to him. It is assumed of course, that debts, funeral and testamentary expenses have been paid and that all the named devisees are ~~sini~~ sui juris and not under any legal disability. I appreciate fully the fact that Messrs. Carman and Williams well understood the testator's wishes as expressed during his lifetime to these close friends of his. But unfortunately the Courts refuse to embark upon an enquiry as to what was the testator's intention otherwise than seeking to ascertain that intention by arriving at the meaning of the words used by the testator.

"The object of all exposition of written instruments" said Coleridge, J. in Shore V.Wilson (9 Cl. & F. 525), "must be, to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention".

In Doe d. Brodbelt v. Thomson (12 Moo. P.C.C. 116), Turner,

L.J., says: "It is upon intention either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, their Lordships feel bound to proceed" (at.p.127).

In Abbott v. Middleton (7.H.L.C. 68), Lord Cranworth says: "It is not the duty of a Court of Justice to search for the testator's meaning, otherwise than by farily inter-preting the words he has used".

And Lord Wensleydale, in the same case: "The use of the expression, that the intention of the testator is to be the guide, unaccompanied by the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be in writing, and that writing only is to be considered" (at p.114).

In Ralph v. Carrick (11 Ch.D.at p.878), Cotton, L.J., says: "As regards our duty when wills come before us for construction, it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule laid down or established bycases, we are at liberty to construe wills as ordinary intelligent persons would do . There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. Even very intelligent perons whose minds are not so trained are accustomed to jump at a comclusion as to what a person means by considering what they, under similar circumstances, think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims

of the different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that the technical words which are necessary in some instruments should be used for the purposes of giving effect to it".

In this Will the late Mr. Bartlett has used language which in my opinion admits of no interpretation other than that at the date of his death the named residuary devisees took vested shares in the subject properties.

There is no other person or class interested in such properties or the income of such properties. There is no gift over and although it is true that in such cases as Small v. Dee (2 Salk.415 Re Eve.Belton v Thompson (93 L.T.235) Re Cartledge (29 B.583), it has been held that in certain special circumstances where there was a direction to pay a sum of money to a legatee at the end of a certain time, e.g. ten years from testator's death (the only gift being in the direction to pay) the gift failed if the legatee was not alive at the end of the time but an examination of such cases shows that they are very special in their language and circumstances and in my opinion the Court would not regard them as applying to the interpretation of the Will of Mr.Bartlett Onthe contrary the Court leans in favour of early vesting and even if the matter admitted of doubt as to construction (which in my opinion it does not) the Court would strive to resolve that doubt by vesting at the date of the testator's death.

Questions 2 & 3.

The ordinary rule is that a Trustee who has not been guilty of misconduct is allowed as between solicitor and client costs of administration proceedings and like proceedings: See - In re Love (29 Ch.D.348); In re Medland (41 Ch.D.476) and in order to deprive a Trustee of his right to costs there must be something either of an act of violation or of a culpable or gross neglect of duty (O'Brien v.Tracy (24 W.N.44)) or the procee

ings must be shown to have been unnecessary, (Re Cabburn (46.L.T.848)) Unless therefore all three Trustees joined in submitting the matter to the Court and they were able, if necessary, to satisfy the Court that the proceedings were necessary to determine a doubt arising as to the true construction of the Will there would be some risk of the Trustees who brought the proceedings not being allowed their costs out of the estate. If the matter were submitted to the court by all three Trustees then in my opinion they would be allowed their costs. But to my mind the danger is that if Messrs. Carman and Williams submitted it the defendant devisees would bring to the notice of the Court the fact that the Trustees had been advised by Counsel that the shares were vested and they they had not even been advised that the case was one which admitted of sufficient doubt, and ought to be submitted to the Court.

In all the circumstances, therefore, my advice with respect to these two questions is that Messrs. Carman & Williams would be justified in asking their co-trustee to submit the matter to the Court and in asking the devisees to concur in that being done, but unless submission to the Court can be obtained with a concurrence of the co-trustee and the beneficiaries I would advise them not to approach the Court.

Question 4.

In my opinion the Trustees would have no claim under the deed of the 17th February 1938 after the termination of the time during which the property in question was in fact administered by them. The Deed of the 17th February, 1938 did not in terms alter the legal position, whatever it might be, arising by virtue of the true construction, whatever that might be, of the testator's will. In the Deed the parties agreed that the Deed was operative only and had reference only to the parts of the estate set out in the schedule and in no way affected the future administration of the properties included in the ten years' trust. It is true that the parties did agree that in exercise of their duties with respect to such ten years' trust a specified mode of performance would be sufficient and that the Trustees should receive remuneration for such performance, but that was merely a mode of performance of their duties as executors and

trustees. That agreement did not create any fresh duties over and above those relating to that office and therefore if the duties associated with such office came to an end in accordance with the law the Trustees would in my opinion have no further right to receive remuneration. The remuneration under the Deed was "as Commission on such yearly accounts".

There was no covenant or agreement by the devisees (Releasors) that the trust properties should not be converted or conveyed prior to the expiration of the ten years period. On the contrary the Deed on its true construction in so far as it refers to the ten years trust merely fixed the commencing date and merely fixed remuneration to the Trustees for their duties in connection with such trust. In the eyes of the law it was merely a trust for ten years or until it should be brought to an end in the way the law permitted and as requests by the beneficiaries to have the property converted or conveyed to them is a method, which the law permits, by which this trust should be terminated, there is, in my opinion, no further right in the Trustees to receive the remuneration mentioned after the termination in fact of their duties with respect to such property. I answer question 4 accordingly.

I return papers herewith.

(Sgd) E.S.Miller.

DENMAN CHAMBERS,
182 Phillip Street,
SYDNEY.

12th February, 1940.

RE W. J. BARTLETT, DECD

OPINION

J.B. MULLEN,
Solicitor,
GOULBURN.