Privy Council Appeal No. 61 *of* 1936

The Honourable Sir Richard Micallef, K.C.M.G., and others *Appellants*

v.

Giuseppe Bugeja Bonnici - - - - - *Respondent*

FROM

THE COURT OF APPEAL, MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1937.

Present at the Hearing:

LORD RUSSELL OF KILLOWEN.

LORD ROCHE.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

This is an appeal from a decree, dated the 2nd November, 1934, of the Court of Appeal at Malta, which set aside a decree, dated the 10th June, 1933, of His Majesty's Civil Court (First Hall), Malta.

The solution of the matters in dispute depends upon the true construction of article 17 of the will (dated the 24th June, 1890) of a testator, Marchese Vincenzo Bugeja, who died on the 6th September, 1890. There are two questions involved. The first is whether the respondent only acquired an interest in an annuity bequeathed by article 17 if and when he attained the age of 21 years, with the result that he was only entitled to participate as from the happening of that event in the current annual amount of the annuity or in the current annual income of the fund appropriated to meet the annuity; or whether (as he contends) he became entitled on attaining the age of 21 years not only to his participation but also to receive the accumulations of one-third of the annual amount of the annuity or of the income of the appropriated fund which had accrued since the death of the testator. The second question relates to a deficiency in the income of the appropriated fund, and can best be considered and disposed of separately.

There are certain facts which must first be stated. The testator had no children; but when he made his will, and when he died, there were living (1) his nephew Carlo (a son of the testator's brother Michele and his wife Ursula), (2) a great-nephew Eduardo (son of Carlo), (3) a great-niece Maria (daughter of Carlo), and (4) a great-nephew Giuseppe (son of his deceased nephew Salvatore, who was another child of Michele and Ursula). The respondent (whose name is also Giuseppe and who

is the third child of Carlo) was not born until the year 1899, some nine years after the testator's death. About ten years before his death the testator had founded a charitable institution called " Conservatorio Vincenzo Bugeja ", which, as will appear, was by his will constituted his universal heir. He left behind him a very large estate of some £250,000 in value.

By his will (article 10) he bequeathed to his nephew Carlo the usufruct of certain properties described in two annexed documents marked respectively A. and C. On the death of Carlo he directed that his great-nephew Giuseppe (the son of Salvatore) should succeed to the usufruct of one moiety of those properties. He bequeathed (article 11) the ownership of the same properties as to one moiety to the children born and that might yet be born of the said Giuseppe, and as to the other moiety to the children born and that might yet be born of Carlo; and he stated that " the present legacy is made subject by me to the following terms and conditions ", one of which was that the children should be living at the death of their respective fathers, and another of which was a condition relating to their educational attainments. The portion of any child who did not fulfil the conditions was not to accrue to the others, or to devolve on any one except the testator's universal heir. If any of the children should after receiving their legacy die without leaving any descendants and without having by deed or will disposed of it, the whole or the part undisposed of was to devolve on the testator's universal heir. By articles 14 and 15 the testator bequeathed to the children born and yet to be born of Carlo, a debt due to the testator from Carlo, " subject to the condition that the legatees shall complete the eighteenth year of age." The portion of a legatee who did not fulfil the condition was to devolve on the testator's universal heir. By article 16 the testator bequeathed specified Government securities of the value of £100,000 to the future issue of the said Giuseppe, and to the future issue of the children already born and that should be born before the testator's death of Carlo. This legacy he stated " is made subject by me to the following terms and conditions." One of the conditions specified ran thus:—" That none of the legatees may acquire the legacy except when he or she has completed and if he or she shall have completed twenty-five years of age; and if being a male he shall have obtained a Doctor's degree and, being a female, she shall have received an education " as described.

The provisions of article 17 must now be set out in full. It runs thus:—

> " I, Vincenzo Bugeja, bequeath to the said Giuseppe Bugeja an annuity during his life-time of Two Hundred and Nineteen Pounds, Thirteen Shillings and Ten Pence (£219.13.10), and I bequeath to the children born and that may yet be born of the said Carlo Bugeja an annuity during their life-time of Two Hundred and Thirteen Pounds, Five Shillings and One Penny (£213.5.1).
>
> I declare that I have fixed the amount of the two annuities as above so as to leave to the legatees an amount equal to the present

income yielded by the hereditary property of their respective grandparents, Michele and Ursula, as results more clearly from the annexed two Statements, marked with the letters "E" and "F", both signed by the said Carlo Bugeja.

If the said Giuseppe Bugeja dies before me without leaving any children, the said annuity of £219.13.10 shall devolve upon the children born, and that may yet be born, of the said Carlo Bugeja; and if all the children of the said Carlo Bugeja, born and yet to be born, die before me without leaving any descendants, the said annuity of £213.5.1 shall devolve upon the said Giuseppe Bugeja.

I order expressly that this legacy shall be subject to the right of accretion between the children of the said Carlo Bugeja, even after the acceptance of the legacy; hence the portion of any deceased children shall accrue to that of the surviving children.

Each co-legatee shall commence to draw (*percepire*) the said annuity as soon as each completes the twenty-first year of age, without any other condition.

I destine for the one and the other annuity, that is, for that of £219.13.10 left to the said Giuseppe Bugeja, and for that of £213.5.1 left to the children born and yet to be born of the said Carlo Bugeja, as many Government Securities as shall suffice to yield the one and the other annuity, same to be chosen by the said Managing Committee from among those to be found in my estate, one half in British Securities and one half in French Securities."

By article 18 the testator disposed of the corpus of the annuity funds, under the description "the ownership of the said securities as above specified," as follows, as regards the portion the income wherefrom was to be enjoyed by Giuseppe, to his "immediate children", and as regards the portion the income wherefrom was to be enjoyed by the children of Carlo, to the "immediate children" of the born children of Carlo and of those to be born to Carlo during the testator's lifetime. Each legatee might acquire his portion "if and when he attains the twenty-fifth year of age." If a child of Carlo died before any of his children had attained the 25th year of age, then the testator directed "that the child who has not attained the twenty-fifth year of age shall draw the interest accruing on the portion due to him in ownership until such time as having completed the twenty-fifth year of age he shall, as stated above, be entitled to the acquirement and possession of that portion as the owner thereof, or until his death, if he dies before attaining the twenty-fifth year of age."

By article 28 the testator appointed the Conservatorio his universal heir. His residuary estate was to be applied for divers charitable purposes specified in the will. It is unnecessary, their Lordships think, to refer to any other part of the will in dealing with the first question; but some further facts must be stated.

When the testator died Carlo's two children Eduardo and Maria were aged respectively nine years and five years. A year or so after the testator's death an annuity fund composed of British Consols and French Rentes was duly set aside out of the testator's estate in compliance with article 17, the income of which appears to have been accumulated. The respondent was born on the 5th

November, 1899. On the 9th June, 1902 Eduardo attained his age of 21 years and claimed payment of one-third of the £213 15s. 1d. annuity as from the date of the testator's death. Those who represented the Conservatorio were only prepared to pay him as from his 21st birthday and not from the testator's death, with the result that on the 15th October, 1903, Eduardo issued a writ of summons in the Civil Court, First Hall, claiming to be paid one-third of the annuity for each year since the testator's death, viz., for the year ending the 6th September, 1891, and for each succeeding year up to and including the year ending the 6th September, 1903. This litigation appears not to have been pursued, but on the 19th April, 1904, with a view to putting an end to it, a deed of compromise was executed between the representatives of the Conservatorio and the special curator of Eduardo. By that deed the Conservatorio agreed to pay to Eduardo one-third of the annuity as from the 6th September, 1891, but the one-third was (owing to the contribution which it had to make towards the *quarta uxoria* of the testator's widow) to be reduced to £62 15s. 0d., and certain payments already made to or for the benefit of Eduardo were to be deducted from the amount due to him on the above footing. Other matters were dealt with by the deed, but of these it is only necessary to refer to a provision which kept alive any claim by Eduardo to further participation in the annuity in the event of it being thereafter determined that his brother Giuseppe was not entitled to share in the annuity.

Maria attained her age of 21 years on the 5th September, 1906, and on the 25th April, 1907, a deed was entered into between the representatives of the Conservatorio and Maria, then the wife of Walter Ellul Bonnici. By that deed the amount due to Maria in respect of one-third of the annuity from the death of the testator down to the 5th September, 1906 was agreed and paid; and the amount to be drawn in subsequent years was agreed at £65 8s. 9d.

The respondent attained his age of 21 years on the 5th November, 1920. The question then rose whether he, having been born after the testator's death, took any share in the annuity. This was decided in Giuseppe's favour by a judgment given by the Civil Court (First Hall) on the 31st May, 1922, and affirmed by the Court of Appeal on the 15th May, 1924, by which it was declared that the legacy must not be held as being restricted to the children of Carlo born during the life-time of the testator, but that children of Carlo born after the testator's death were included.

Subsequently, on the 11th January, 1926, the respondent issued a writ in the Civil Court (First Hall) against the representatives of the Conservatorio, which initiated the proceedings which have culminated in the present appeal. By his writ he claimed payment of the accumulated amount of one-third of the said annuity from the 5th September, 1890, to the 5th September, 1925. The exhibits produced with the writ included copies of the before-mentioned deeds of the 19th April, 1904, and the 25th April, 1907.

The Conservatorio representatives by their statement of defence contended that the respondent was, as they had been advised since the dates of those deeds, only entitled to his one third of the annuity as from the date on which he attained the age of 21 years.

Judgment was pronounced on the 10th June, 1933, by the trial judge, who decided that upon the true construction of the will the respondent was entitled to one third of the said annuity, but only as from the 5th November, 1920, when he attained his age of 21 years. After allowing for the before mentioned *quarta uxoria*, the amount of the respondent's third of the said annuity amounted to £59 16s. The total amount due to him to the 5th September, 1925, was declared to be £318 18s. 8d. (afterwards corrected by agreement to the sum of £289 0s. 4d.); but since the Conservatorio had advanced a larger sum for the education of the respondent and were entitled to set off an equivalent thereof against the said sum of £289 0s. 4d., nothing was due to the respondent at the date of the writ. Each party was ordered to bear their own costs.

From this judgment the respondent appealed, and by order of the Court of Appeal dated the 2nd November, 1934, it was declared that the respondent was entitled to a one third portion of the said annuity from the date of the testator's death, and adjudged that the defendants should pay to the plaintiff the accumulated sum of £59 16s. per annum for the period from the 6th September, 1891, to the 5th September, 1925, less the moneys advanced for the plaintiff's education. The amount payable on this footing was stated in the order to be the sum of £1,723 2s. 6d., but this was subsequently corrected to a sum of £1,663 5s. 6d. Each party was ordered to bear their own costs. This judgment embodied the decision of two out of the three judges who heard the appeal, viz., Judges R. F. Ganado and Sir Augustus Bartolo. His Honour the Chief Justice, Sir A. Mercieca (President of the Court) dissented.

Judges R. F. Ganado and Sir Augustus Bartolo were of opinion that the words "each co-legatee shall commence to draw the said annuity as soon as each completes the twenty-first year of age without other condition" were not intended to impose a condition, but were only intended to fix a time for the commencement of payment of the legacy. In support of this view they relied upon differences in the language used in other parts of the will which left no doubt as to the intention to impose a condition; and also upon the reference to the hereditary property of Michele and Ursula as indicating that the annuity was money which was due to the annuitants. Further they relied upon a letter written by the testator on the 17th February, 1886, which by article 54 was annexed by him to his will, but which does not appear to have any reference or relation to the annuity in question.

In consequence of the appeal to His Majesty in Council, the Chief Justice stated in writing the grounds of his dissent.

He was of opinion that the words in question made the attainment of 21 years of age a condition, and the sole condition, for the payment of the legacy, and fixed the starting point of such payment.

The point is a short one and as appears from both judgments its decision does not depend upon articles 427 and 428 of Ordinance No. VII of 1868, but depends upon the intention of the testator as expressed in his will.

Their Lordships having heard the matter fully argued are of opinion that no child of Carlo was entitled to a share of the annuity unless and until he or she attained the age of 21 years. The provision that "each co-legatee shall commence to draw the said annuity as soon as each completes the twenty-first year of age without any other condition" indicates clearly, their Lordships think, two things: first that the attainment of 21 years is imposed as a condition of becoming entitled and as the only condition; and secondly that the right to which the child became entitled on the fulfilment of the condition, was a right to be paid an annual sum in the future, and not to be paid a sum composed of income accrued and accumulated in the past. The word "draw" is appropriate to describe the first operation, but would seem to be inappropriate to the second. Their Lordships can find nothing in other parts of the will which would justify a departure from what appears to them to be the plain meaning of the language used by the testator in article 17. Nor does the reference to the hereditary property appear to afford any assistance in the matter; it merely purports to explain the reason for fixing the amount of the annuity.

In their Lordships' opinion the true operation of article 17 as regards the £213 5s. 1d. annuity was as follows:—(1) no child of Carlo was entitled to draw the annuity until he or she attained the age of 21 years; (2) until a child attained the age of 21 years the annuity or the income of the fund (if any) set apart to answer it, belonged to the Conservatorio as universal heir; (3) when Eduardo attained 21 he became as from that date entitled to the annuity so long as he was the only child of Carlo in existence who had attained that age; (4) when Maria attained the age of 21 years she and Eduardo became as from that date entitled to the annuity in equal shares until Giuseppe attained the age of 21 years; (5) as from that date the three children would be entitled to the annuity in equal thirds during their joint lives; and (6) as and when each died the accruer provisions would operate so that the two survivors would be entitled to the annuity in equal shares for their joint lives, and the eventual survivor of the three would be entitled to the whole annuity for the remainder of his or her life.

Their Lordships appreciate that the parties concerned have not hitherto acted upon this view; but inasmuch as the opinion contained in this judgment that Giuseppe is not entitled to any past income or accumulation of income is founded upon a view of article 17 which must necessarily

apply also to the rights of Eduardo and Maria, they have felt bound to state their view of the operation of article 17 in general terms, notwithstanding the fact that Eduardo and Maria were not represented before their Lordships' Board. It may well be that all parties are bound as regards the past by what has taken place. As to that their Lordships cannot and do not express any opinion.

In the result upon this part of the case their Lordships are of opinion that the judgment of the Civil Court (First Hall) was correct.

The second question in dispute between the parties arises in connection with that part of article 17 which provides for the selection of British and French securities forming part of the testator's estate, sufficient to yield the two annuities of £219 13s. 10d. and £213 5s. 1d.

After the testator's death the Conservatorio representatives (in December, 1891) selected British Consols and French Rentes as directed by the will for the purpose of the annuities. Subsequently by an order of Court of the 5th July, 1909 authority was given to the Conservatorio to change these investments into Funded French Rentes. Owing to the fall of French currency in relation to the pound sterling, the income of the fund became insufficient to provide the annuities in full. The respondent claimed that his right to one third of the annuity of £213 5s. 1d. was unaffected by this insufficiency, and that he was entitled to be paid his one-third in full out of the testator's estate. There was a question whether the order of the 5th July, 1909, was binding upon the respondent. The judge in the Civil Court (First Hall) decided that whether the order was binding upon the respondent or not, the Conservatorio had power under article 39 of the will to effect the change of investment, and that the respondent was only entitled to one third of the actual income produced by the fund, but subject however to a right to have the deficiency made good out of the accumulations of past years.

Article 39 has in their Lordships' opinion no application to the question here in dispute. It is merely a general power to convert investments made by the testator in Government securities and industrial bonds, into Government bonds; a transaction which (as he states) he hopes will be completed within five years of his death. It has no reference to the fund (if any) which is called into existence under article 17.

The Court of Appeal took a different view. They were unanimously of opinion that the respondent was entitled to be paid his one third share of the annuity irrespective of the question whether the fund which had resulted from the original setting apart and the order of the 5th July, 1909, did or did not by its income produce the required amount. In this view it became unnecessary to consider whether the order of the 5th July, 1909, was or was not binding upon the respondent. The Court of Appeal based its decision upon a judgment of the Civil Court (First Hall) pronounced

on the 16th December, 1925, in proceedings instituted by Giuseppe Ricardo Bugeja (the son of Salvatore) for the purpose of having the same question determined in relation to the £219 13s. 10d. annuity.

Their Lordships agree with the decision of the Court of Appeal. Prima facie the bequest of these annuities of fixed amounts in British currency, must be paid and satisfied out of the residuary estate. It is no doubt open to a testator to provide for the setting apart of a fund to answer an annuity and to provide further either expressly or impliedly that on the fund being set apart for that purpose, the residuary estate shall be freed from any further liability to provide the annuity. In this will, however, their Lordships are unable to find any words which can be said to amount to an express declaration, or to involve an implied direction, that residue should after the setting apart of the fund be freed from its liability to provide the annuities, and that the annuitants thereafter should look for the annuities only to the segregated fund. The liability of residue to provide the annuities in full accordingly remains.

Upon the whole appeal their Lordships are of opinion that the order of the Court of Appeal should be varied by substituting for it a declaration that the plaintiff became entitled on the 4th November, 1920, when he attained his age of 21 years and only as from that date to a one third share of the annuity of £213 5s. 1d. bequeathed by article 17 of the testator's will, and that he is entitled to be paid the sum properly payable in respect of his said one third share out of the testator's residuary estate notwithstanding that the fund set apart under or by virtue of the said article 17 is unable to provide the full amount thereof. Their Lordships will humbly advise His Majesty accordingly.

In regard to costs, the parties have been made to bear their respective costs in each of the Courts of Malta. Their Lordships think that the same course may well be adopted here.

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In the Privy Council

THE HONOURABLE SIR RICHARD MICALLEF, K.C.M.G., AND OTHERS

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GIUSEPPE BUGEJA BONNICI

DELIVERED BY
LORD RUSSELL OF KILLOWEN

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