

The Union Trustee Company of Australia Limited - *Appellant*

v.

Lena Ethel Bartlam and others - - - - - *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1948

Present at the Hearing :

LORD MACMILLAN
LORD SIMONDS
LORD NORMAND
LORD OAKSEY
LORD MACDERMOTT

[*Delivered by* LORD SIMONDS]

This appeal by the Union Trustee Company of Australia, Ltd., which will be called "the Trustee Company," from a judgment of the High Court of Australia raises a question of some importance upon the construction and effect of section 17 of the Victorian Trustee Companies Act, 1928.

The relevant facts are not in dispute.

Robert Ernest de Little, who was domiciled in the State of Victoria, died on the 1st October, 1926, having by the joint effect of his will dated the 30th July, 1924, and a codicil thereto dated the 17th December, 1925, appointed the respondents Ethel Ludlow de Little, his wife, and John Ernest de Little, his son, and the Trustee Company to be executors and trustees thereof. They duly proved his will on the 24th February, 1927, in the State of Victoria.

It is unnecessary to state the terms of the will beyond saying that the testator bequeathed his residuary estate upon trusts (through the medium of a trust for sale with a power to postpone it) under which the respondents took certain beneficial interests and that the will contained an express power for the trustees to carry on at their discretion any business or pursuit in which he might be engaged at his death with wide ancillary powers including a power to commit the management to others.

The testator was at his death the owner of two farming stations in Western Victoria known as Caramut South and Aringa North of a value of about £50,000, where he carried on the business of grazing, and personal estate of a value of about £26,000 including sheep valued at £13,599 11s. 6d., cattle valued at £3,012 and horses valued at £403. There were, however, outstanding mortgages and other liabilities amounting to over £27,000.

The trustees exercised the discretion vested in them by the will to postpone the sale of the testator's farming stations and the live and other stocks thereon and carried on the business of grazing in continuation of that carried on by him as regards Aringa North until the year 1931 and as regards Caramut South until the 29th June, 1944, when the latter property with the live and dead stock thereon was sold to the respondent John Ernest de Little pursuant to a provision contained in the will.

Doubts having arisen upon the question what commission the trustee company was entitled to charge in respect of the income of the trust property the proceedings out of which this appeal arises were commenced by originating summons in the Supreme Court of Victoria, the trustee company being the plaintiff and the respondents the defendants. The respondent Lena Ethel Bartlam was appointed for this purpose to represent all persons beneficially interested in the residue of the estate except the other respondents.

Before stating more precisely the questions that must be answered it is convenient to set out the single section of the Act upon the true construction of which the issue depends and to refer to the method of accounting adopted by the trustee company.

By section 17 of the Victorian Trustee Companies Act, 1928 it is provided as follows:

“ 17. A trustee company shall be entitled to receive, in addition to all moneys properly expended by it and chargeable against the estates placed under the administration and management of such trustee company, a commission to be fixed from time to time by the directors of the said company, but not to exceed in any case Two Pounds ten shillings for every One hundred pounds of the capital value of any estate committed to the management of such trustee company as executor administrator trustee receiver committee or guardian of the estate under the Lunacy Act 1928 or as sole guarantor or surety or guardian of any infant or lunatic, and Five pounds for every One hundred pounds of income received by such trustee company as executor administrator trustee receiver committee or guardian of the estate under the Lunacy Act 1928 or as such sole guarantor or surety as aforesaid or guardian of any infant or lunatic or of capital or income received by such trustee company as an attorney acting under power of attorney, and such commission shall be payable out of the moneys or property committed to the management of such trustee company and shall be received and accepted by it as a full recompense and remuneration to it for acting as such executor administrator trustee receiver committee or guardian or as such sole guarantor or surety as aforesaid or attorney, and no other charges beyond the said commission and the moneys so expended by the said company shall be made by such trustee company. But if in any case the Supreme Court or a judge thereof is of opinion that such commission is excessive it shall be competent for such court or judge to review and reduce the rate of such commission: Provided that the commission to be charged by a trustee company shall not exceed in any estate the amount of the published scale of charges of the said company at the time when such estate was committed to it. Nor shall this enactment prevent the payment of any commission directed by a testator in his will in lieu of the commission hereinbefore mentioned.”

The rate of commission fixed by the trustee company pursuant to the section on income received by it as executor or trustee, where the annual total exceeds £400, has been 2½ per cent. per annum.

The method of accounting adopted by the trustees, upon the figures of which the commission on income charged by the trustee company has been calculated, is stated in the formal case presented by the trustee company compendiously and accurately as follows:—

“ In respect of each Station, a separate livestock account was kept for sheep, cattle and horses. These accounts recorded the livestock on hand at the beginning of each year and the purchases, natural increases and reductions by sale or slaughter during the year; they preserved as capital flocks and herds equivalent in number to those existing at the Testator's death and showed as a profit or loss the surplus or deficit resulting at the end of the year from the figures recorded for the year. The addition to livestock in each year arose substantially from breeding, and purchases were a small item. The balance each year of these accounts (which on a few occasions was a deficit) was carried into the revenue accounts which took the form

of, first, a working account for each station and, secondly, a combined trust income account. In the working accounts the proceeds of sales of wool and other station produce were combined with the balance from the livestock accounts and from the aggregate thus obtained was deducted outgoings including the costs and expenses of and incidental to working and managing the Station properties. The balance thus arrived at of the working accounts was carried to the trust income account where the other revenues of the Trustees, such as rents and dividends, were added and general expenses and outgoings, including interest on borrowed moneys and Appellant's commission on income, were deducted and the balance being the amount available for beneficiaries was transferred to the beneficiaries accounts."

The commission charged by the trustee company annually in the accounts was always based upon the aggregate of the items brought into the working account and the trust income account and was calculated before deducting any of the costs and expenses which were deducted in those accounts for the purpose of ascertaining the net income. Over the whole of the seventeen years the total amounts alleged to be "income" in respect of which commission was chargeable was £151,706 10s. and the amount of commission in fact charged and retained was £3,792 13s. 8d.

In these circumstances the questions finally formulated for the decision of the Court, which can now be stated, were as follows:—

"(a) Should the said income (i.e. the income upon which commission is chargeable) be calculated in yearly rests from the 1st day of October to the 30th day of September next following? [This question has been finally disposed of.]

(b) Should the said income be calculated by adding together the amount of the profit shown on the Livestock Accounts referred to in the said affidavit (being an affidavit sworn in support of the said summons), the gross amount received by the plaintiff from the sale of wool and all amounts other than capital receipts received by the plaintiff from any part of the estate but without deducting therefrom any amount for expenses or outgoings paid by the plaintiff out of the estate?

(c) Should the said income be calculated by deducting from the gross amount calculated as in (b) the costs and expenses paid by the plaintiff in working and managing the station properties referred to in the said affidavit but none of the costs and expenses referred to in (d)?

(d) Should the said income be calculated by deducting from the amount calculated as in (c), all or any and which of the following costs and expenses paid by the plaintiff out of the estate. . . ." There followed an enumeration of costs and expenses which are now conceded not to be deductible for the purpose of the relevant calculation.

Upon these questions the Full Court of the Supreme Court of Victoria (Macfarlan and Lowe JJ., Martin J. dissentiente) on the 25th May, 1945, made an order declaring that the income received by the trustee company as executor and trustee of the will upon which it had been since the death of the testator and was then entitled to receive commission was all amounts other than capital receipts received by it from any part of the estate of the testator without deducting therefrom any amount for expenses or outgoings paid by it out of the estate and that it was unnecessary to answer any other questions raised by the originating summons.

From this decision the present respondents appealed to the High Court of Australia (Latham C.J. and Rich Starke Dixon and McTiernan JJ.) which allowed the appeal and discharged that part of the order of the Supreme Court which has been stated above and in lieu thereof declared that the first question of the originating summons should be answered by saying that in so far as it related to income derived from the testator's business already mentioned the income therefrom upon which the trustee company as executor and trustee was entitled to receive commission should be ascertained upon ordinary accounting principles but in accordance with the following declarations or directions made or given in respect of the particular sub-questions to those questions, namely:—

"(a) [no longer material].

(b) and (c) for the purpose of ascertaining the income in respect

of which the plaintiff is entitled to charge commission the amount of profit appearing from the Livestock accounts the gross amount arising from the sale of wool and any other proceeds of sale of produce of the business should be credited and there should be debited the costs and expenses incurred for the working and managing of the station properties.

(d) None of the items of costs and expenses enquired about in subparagraphs (i) (ii) (iii) (iv) (v) and (vi) of paragraph (d) of the first question should be debited or deducted.

From this Order the trustee company has by special leave appealed to His Majesty in Council submitting that it is wrong in so far as it declares that, for the purpose of ascertaining the income upon which commission is chargeable, the costs and expenses incurred in the working and management of the testator's station properties ought to be debited as thereby directed.

From the statement that has already been made of the questions raised and the declarations made by the Supreme Court of Victoria and the High Court of Australia it is clear that however much the argument may be elaborated the narrow point is what upon the true construction of section 17 of the Act is the meaning of the words "income received by such trustee company as executor administrator trustee, etc." where they occur in that section. Whatever view may be taken of the meaning of those words, there may be difficulty in its application to particular circumstances, but it may be said generally that the difference of opinion between the Supreme Court of Victoria and the High Court of Australia lies in the fact that the latter Court holds that in relation to a business carried on by a trustee company the relevant words mean an amount which cannot be ascertained until the expenses of carrying it on so far as they are chargeable to revenue have been brought into account.

With the conclusion of the High Court their Lordships are in full accord. But as the question is said to be one of general importance in Australia they think it right to make these observations.

They would first observe that neither in section 17 nor in any other section of the Act is there any reference to a business being carried on by a trustee company. An executor or trustee has generally no power to carry on his testator's business except so far as is necessary for winding it up, unless the will itself authorises him to do so. It is therefore not surprising that the section which provides for remuneration does not expressly deal with the case where the trust property consists of a business which the trustee company is authorised to carry on. Their Lordships have no doubt that, had such a case been within the contemplation of the Legislature, special provision would have been made for it and the ambiguity, which has caused a difference of opinion in the Courts of Australia, would have been avoided. Meaning and effect must however be given to the section in an unforeseen context and the question is what is income received by a trustee company as trustee where it carries on a business. The nature of the business, trading, manufacturing or merchanting, and the method of accounting adopted in any particular case are alike irrelevant to this question of construction.

It appears to their Lordships that there are only two possible meanings that can be attributed to the relevant words; (a) that they include all receipts properly entered on the revenue side of the account of the business or (b) that they mean the balance of profits and gains ascertained according to ordinary methods of accountancy. To the first of these meanings the trustee company is logically driven and indeed commits itself in the formal reasons of the case that it presents to the Board. But, as appears from the statement already made of the method of accounting adopted by it, there is brought into the account as income any surplus on the livestock accounts which is reached not by any cash receipts but as the result of a calculation of numbers of livestock and an arbitrary though convenient valuation of them. No doubt is cast upon the propriety of this method of accounting whether for tax purposes or as between the persons interested in

the trust property. But it is clear that, if the meaning of "income" in section 17 is that for which the trustee company contends, there can be no justification for treating as income that which is a notional profit and nothing more. Rather, to be consistent, the trustee company should, just as it treats as income the gross proceeds of wool, treat also as income the proceeds of sale of every head of stock that it sells, but apart from such sale bring nothing into income account.

But a construction which leads to such a result, seen indeed in its nakedness in the case of the gross proceeds of sale of wool but even more startling in the case of a business, where the turnover might take place many times in a year, or in the case of a manufacturing business, where the return for each article manufactured might represent a very small margin over the cost of production, is one that their Lordships would not readily adopt where the subject matter is the remuneration of one who stands in a fiduciary relation to his beneficiary. It was urged that if the result was an excessive commission, a remedy was provided by the section in that the beneficiary might apply to the Court for its reduction. But this does not appear to be an adequate justification for adopting such a construction, if another is reasonably tenable.

Their Lordships then turn to the alternative suggested construction. Since it is the income of the trust property upon which a commission is chargeable and *ex hypothesi* the trust property is a business and there need be no other trust property, it is difficult to avoid the conclusion that the section must *propter subjectam materiam* be read as referring to the income of or from the business received by the trustee. In other contexts the word "income" may bear other meanings, but that in relation to a business it means substantially the balance of profits and gains which results from carrying on that business appears to be indisputable. It is true that in *Lawless v. Sullivan* 6 A.C. 373, where it was said "There can be no doubt that in the natural and ordinary meaning of language the income of a bank or trade in any given year would be understood to be the gain if any resulting from the balance of the profits and losses of the business in that year" the context was an Income Tax Act. But it appears to their Lordships that, whatever the context, if the question is asked, what is the income of or from a business, the answer must be substantially the same, and it neither adds to nor detracts from that meaning that the words "received by the trustee" follow. Their Lordships then conclude that in its present context the word "income" in relation to a business is used in what they concur in thinking is its natural and ordinary, or (as Martin J. said in the Supreme Court) in its popular, meaning. If so, it is not disputable that in the present case it can only be ascertained, as the Order of the High Court directs, upon ordinary accounting principles and in particular after debiting the costs and expenses of working and managing the station properties.

It was urged against this view that the result might be that in a bad year the trustee company would as the reward of much hard work and anxiety get little remuneration or none at all. This argument is of little weight. It is not obligatory on a trustee company to accept a trust. If it appears likely, taking one year with another, to be unremunerative, it can decline to do so. And, as a practical matter, it will usually be consulted before appointment and may then bargain for proper remuneration, if it is to undertake the carrying on of a business. The section itself contemplates and permits such an event.

No cross appeal having been raised, their Lordships think it unnecessary to say more than that they respectfully concur in the views expressed by the High Court that none of the items mentioned in question 1 (d) of the originating summons is deductible in ascertaining the income upon which commission is chargeable.

Their Lordships would not be thought wanting in respect to the learned Judges of the High Court, if they do not fully discuss the reasoning which has led them to the same conclusion as that now adopted. It is significant that the result is the same. For this is just because income in its "natural and ordinary" meaning is an amount that is only ascertainable by the process which is elaborately pursued in the judgments of

Latham C.J. and Dixon J. and particularly by making the adjustments between capital and income which are a familiar feature of proper accountancy. They adopt as a summary of their own views the words of Dixon J. "the gross returns from the pastoral business forming part of the estate cannot properly be described as income and it is only the net balance ascertained according to the usual and recognised principles of accounting that answers the description."

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the first respondent's costs of the appeal, such costs to be taxed as between solicitor and client in accordance with the conditions imposed when special leave to appeal was granted.



In the Privy Council

THE UNION TRUSTEE COMPANY OF
AUSTRALIA LIMITED

2.

LENA ETHEL BARTLAM AND OTHERS

DELIVERED BY LORD SIMONDS

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