

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

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INSTITUTE OF ADVANCED
LEGAL STUDIES

31011

ON APPEAL

FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE

BETWEEN

TAN TECK NEO (Defendant) - - - *Appellant*

AND

1. GEORGE TAN (Defendant)
- 10 2. LEE CHIM TUAN (Plaintiff)
3. LEE PANG SOO (Plaintiff)
4. TAN SOON KENG (Plaintiff)
5. S. Q. WONG (Plaintiff) - - - *Respondents.*

Case

For the Respondent GEORGE TAN.

RECORD.

RESPONDENTS CASE

1. This is an Appeal from a decree dated the 8th February 1947 p. 18. of the Supreme Court of the Colony of Singapore (in its Appellate Jurisdiction) upholding an order of the same Court (in its Original Civil p. 7. Jurisdiction) dated the 9th August 1946.

20 2. The question at issue in this Appeal is whether on the true construction of the Will dated the 11th March 1913 and Codicil dated 16th April 1919 of Lee Choon Guan deceased (hereinafter called "the Testator") an annuity given to the Appellant (who was the wife of the Testator) is payable after the date by the said Codicil fixed for the distribution of the estate of the Testator (namely 21 years from the death of the Testator) or ceases to be payable on that date.

3. The history of this litigation is as follows :—

30 4. By his said Will the Testator after appointing executors and trustees (hereinafter called "his Trustees") and giving pecuniary legacies p. 23. by clause 6 which he subsequently revoked, directed his Trustees as soon as possible after his death to purchase out of such part of his real and personal estate as they might think fit an annuity of 480 dollars payable in monthly instalments of 40 dollars each for his concubine Ah Lee during her life.

p. 25, l. 6.

5. By clause 8 of his said Will (which he subsequently revoked) the Testator gave a house and furniture to his widow the Appellant during her life and by clause 11 he devised and bequeathed all other the rest and residue of his real and personal estate not thereby or by any codicil thereto otherwise disposed of (hereinafter called his "residuary trust estate") to his Trustees upon trust to collect receive possess hold and deal with the same according to the directions hereinafter contained, that is to say to collect the income rents profits and dividends arising therefrom and to divide the same into two separate funds, one of which funds should consist of the income derived from his house and other real and leasehold property including any property which might at the time of his decease be in mortgage to him to secure any loan or loans, and the other of which funds should consist of the income derived from any other investments. The Testator further directed that each fund should bear its own casual or incidental expenses out of revenue and that in the event of any realisation of any investment or the sale of any house or other part of his real or leasehold property or the redemption or calling in of any mortgage, the proceeds thereof should be re-invested as therein provided but such re-investments and any subsequent variations thereof should be impressed with the nature of the original investment as it stood at the date of his death, and the income rents profits and dividends should be appropriated according to the directions given in that clause.

p. 25, l. 44.

6. By clause 12 of his said Will the Testator directed his Trustees to pay to the Appellant (so long as she should remain his widow) the sum of 1,000 dollars per month but if she should marry again the said sum of 1,000 dollars per month should be reduced to 100 dollars per month and he directed his Trustees thereafter to pay to Lee Chim Tuan in addition to the remuneration to which he might be entitled as a trustee the sum of 100 dollars per month during his lifetime and that the monthly payments set out in that clause should be paid as to one half from out of the income of his house and other real and leasehold property and mortgages and as to the other half by the income from his other investments.

p. 26, l. 9.

7. By clause 13 of his said Will the Testator directed his Trustees (after providing for the outgoings payments and charges thereinbefore set out) to divide the residue of the income rents and profits derived from his house and other real and leasehold property and mortgages at the end of every month into 30 equal shares and to pay to his son Lee Pang Seng 7 of such equal shares, to his son Lee Pang Chuan 6 of such equal shares, to his son Lee Pang Soo $5\frac{1}{2}$ of such equal shares, to his son Lee Sin Siang 5 of such equal shares, to his daughter Lee Poh Lian $2\frac{1}{2}$ of such equal shares, to his daughter Lee Poh Choo 2 of such equal shares and to his daughter Lee Poh Neo the remaining 2 of such equal shares: and in the event of any legitimate child or children being born to him after the execution of his said Will he directed his Trustees to increase the number of thirty parts or shares to such number as might be necessary to enable them to give to each such afterborn son 2 equal shares and to each such afterborn daughter one equal share and he directed them to pay to each such afterborn son 2 equal shares and to each afterborn daughter one equal share.

8. By clause 14 of his said Will the Testator further directed that with regard to the other of such funds as should consist of the income derived from his other investments his Trustees should accumulate the same by investing accumulations from time to time as therein provided and at the expiration of every period of 5 years from the date of his death his Trustees should divide such accumulated income together with any rent profits and interest accrued thereon amongst his children referred to in clause 13 thereof in the same proportions in which the income from his house and other real and leasehold property and mortgages was to be divided amongst them. p. 26, l. 28.

9. Clauses 15, 16, 17, 18 and 19 contained directions to take effect in case of any of his children referred to in clause 13 should have died before his decease or before the date of distribution and other matters.

10. By clause 24 of his said Will the Testator directed that upon the death of the last survivor of his children referred to in clause 13 thereof his Trustees should sell call in and convert into money if they in their absolute discretion thought fit the whole of his said real and personal estate or such part thereof as should not consist of money or at their absolute discretion make such partition or appropriation of the property and investments (or any part thereof) as they might think fit and should divide the whole of his residuary real and personal estate among the children then living and the issue of children then dead of his children referred to in clause 13 thereof (thereinafter called the "residuary legatees") per stirpes in the proportion in which his said children or their issue shared in the income thereof but so that the members of each stirps should inherit as between themselves in the proportion of two shares to a male and one share to a female and in case any one or more of the residuary legatees should have died leaving issue such issue should take the share which his or her or their parent or ancestor would have taken if he or she had lived to attain a vested interest and if more than one in the proportion of two shares to a male and one share to a female. p. 28, l. 24.

11. By clause 25 of his said Will the Testator directed that if any one or more of his children should have died leaving no child or children or remoter issue living at the date of final distribution then the share which would have passed to the stirps of such child or children so dying as aforesaid should be divided among the stirps of his other children which were then represented by living descendants in the proportions in which his said children shared in the income as set out in paragraph 13 thereof such accruing share to be divisible among the representatives (if more than one) of each stirps in the same manner as the original share and (by clause 26) he directed that if any son of his or remoter male issue in the direct male line should have died before the date of final distribution leaving a lawful widow who should be living at such date such widow should at the date of final distribution receive the sum of 5,000 dollars out of the capital sum divisible among the stirps of which her deceased husband had been a member but if any remoter male issue in the female line should have died before the date of final distribution leaving a lawful widow who should be living at such date such widow shall at the date of final distribution receive the sum of 2,500 dollars out of the capital sum divisible among the stirps of which her deceased husband had been a member. p. 28, l. 41.

p. 30. 12. The Testator made a Codicil dated the 16th April 1919 to his said Will whereby (clause 4) he revoked clause 6 of his Will and in place thereof he directed his Trustees to pay the sum of 120 dollars each per month during their respective lives to Ang Lee Neo (otherwise known as Ah Lee) Wee Bee Neo (otherwise known as Seah Lew) Fan Gan and Tan Chwee Neo, and he directed that such payments should be apportioned equally between the two funds referred to in clause 11 of his said Will. He further bequeathed to the presently expected child of Tan Chwee Neo a legacy of 15,000 dollars if he or she should survive him and (by clause 6) the Testator revoked clause 8 of his said Will and devised his house 10 No. 127A Tanjong Katong Singapore together with all furniture motor cars and other effects which might be on the premises at the time of his death to his wife the Appellant Tan Teck Neo absolutely.

p. 31, l. 8. 13. By clause 7 of his said Codicil he bequeathed to the Appellant in lieu of the monthly payment of 1,000 dollars (reducible to 100 dollars per month if she should remarry) bequeathed by his said Will a monthly payment of 2,000 dollars (irrespective of her remarriage) and in lieu of the monthly payment of 100 dollars bequeathed to Lee Chim Tuan by the said clause of his said Will he bequeathed a monthly payment of 200 dollars and he directed that such monthly payment should be appor- 20 tioned equally between the two funds referred to in clause 11 of his said Will.

p. 31, l. 17. 14. By clause 8 of the said Codicil the Testator directed that in lieu of the division of the funds referred to in clause 13 of his said Will the residue of income therein referred to should be divided into 30 (evidently meaning 38) equal shares of which 8 should be payable to his son Lee Lang Seng 6 each to his sons Lee Pang Chuan, Lee Pang Soo and Lee Sin Siang and 4 each to his daughters Lee Poh Lian, Lee Poh Choo and Lee Noh Neo: and he directed that if he should leave any posthumous child or children born of a wife married to me with full ceremonies his 30 Trustees should increase the said number of 38 shares so as to provide for and pay to each posthumous son three shares and each posthumous daughter two shares.

p. 31, l. 27. 15. By clause 9 of his said Codicil the Testator directed that in lieu of the period of 5 years referred to in clause 14 of his said Will the division of accumulated income should take place every 3 years.

p. 31, l. 46. 16. By clause 12 of his said Codicil the Testator directed that in lieu of the date of distribution being the date of the death of the last survivor of his children referred to in clause 24 of his said Will, the date of distribution should be 21 years from the date of his (the Testator's) 40 death.

p. 2, l. 37. 17. The Testator died on the 27th August 1924 without having altered or revoked his said Will except by his said Codicil and probate of his said Will and Codicil was granted by the Supreme Court of the Straits Settlements at Singapore on the 6th July 1925.

p. 2, l. 40.

18. The date of distribution referred to in clause 12 of the said Codicil was accordingly the 27th August 1945.

19. On the 23rd May 1946 the last four Respondents (who were then the trustees of the said Will and Codicil of the Testator) instituted

THE PRESENT SUIT

by the issue of an originating summons for the determination of (among other questions) the question whether the annuities bequeathed by clause 12 of the said Will as modified by clause 7 of the said Codicil and the annuities bequeathed by clause 4 of the said Codicil should continue to be paid after the date of distribution therein mentioned. p. 2, l. 5.

20. The Respondent George Tan is a son of Leo Poh Choo daughter of the Testator and was made a Respondent to the said Summons. p. 3, l. 33.

21. The said summons came before the Chief Justice of the said Court (Mr. Justice Murray-Aynsley) who by his decree dated the 9th August 1946 declared that the annuities ceased to be payable after the date of distribution. p. 7.

22. The learned Chief Justice in his judgment said "The other "question" (namely the question as to the duration of the annuities) "gives rise to more difficulty. The annuities are of two kinds. In the Will (clause 6) the Trustees were directed to purchase an annuity for one Ah Lee. By clause 4 of the Codicil this was revoked and instead the Trustees were directed 'to pay' certain monthly sums 'during their respective lives' to four persons. 'Such payments shall be apportioned equally between the two funds.' This must refer to clause 11 of the Will. The other annuities were created by clause 12 of the Will and modified by clause 7 of the codicil. p. 6, l. 13.

"It should be noted that in the will the payments are to be made 'during her life' and during his lifetime, while in the codicil there are no words to this effect.

"Both in the will and the codicil the payments are to be made out of the income; the words in the codicil are 'such monthly payments shall be apportioned equally between the two funds referred to in clause 11 of my said Will.' Clause 11 clearly provides for two funds to be created out of the income of the trust properties. Elsewhere notably in clause 17 of the will, the phrase is used 'income of the aforesaid two funds.' This language is inconsistent with the language of clause 11, and I take it to be merely a case of loose drafting. I think it is clear from the express reference to clause 11 in one case and the implied reference in the other case that the annuities in both cases were to be made out of income in the hands of the trustees and therefore when this income ceases the periodical payments must cease too, although expressed to be for life. In this my opinion coincides with that of Huggard C.J. in interpreting another clause creating another class of annuities.

"In view of this it is unnecessary to decide what meaning should be attached to the omission of words signifying 'for their lives' in clause 7 of the codicil."

p. 10, l. 32.

23. The Appellant (who had been appointed to represent the annuitants mentioned in clause 12 of the Will as modified by clause 7 of the Codicil and those mentioned in clause 4 of the Codicil) appealed to the Court of Appeal against the decree of the learned Chief Justice and the Appeal came before Mr. Justice Carey (acting Chief Justice) and Mr. Justices Jobling and Brown who by their decree dated the 8th February 1947 dismissed the appeal.

p. 9.

p. 18.

24. All the learned judges decided that the annuities were charged only on income and had no right to have recourse to capital; that after the date fixed for distribution there was no income available for payment of the annuities: and consequently that the annuities ceased to be payable. 10

p. 14, l. 2.

25. The learned acting Chief Justice referred to the case of *Foster v. Smith* 1 Phillips 628 and the judgment of Lord Lyndhurst therein. In that case the testator devised his freehold and leasehold estates to trustees in trust to receive the rents issues and profits thereof, when and as they should become due and payable and thereout to pay to his wife, if she should survive him, a clear annuity of £200 during the term of her natural life, and from and immediately after her decease upon trust for his three sisters. On the death of the widow there were unpaid arrears of the annuity owing to the deficiency of income in some years. 20 Lord Lyndhurst decided that a new trust arose on the widow's death because the trustees were directed "from and immediately after" that event to convey the estate to the sisters. If they performed that trust (which he thought they were bound to do) they would be disabled from applying the subsequent rents to the discharge of the arrears. To obviate this, it was proposed to construe the direction to convey to the sisters as a direction to convey subject to the annuity. This said Lord Lyndhurst was essentially to alter the Testator's Will. The learned acting Chief Justice applied the same principle to deciding the present case.

26. Mr. Justice Jobling in his judgment said:—

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"In my view therefore the annuities payable under clause 12 of the Will as modified by clause 7 of the Codicil and also the annuities payable under clause 4 of the Codicil are a charge on the income of the residuary trust estate. On the date fixed for the distribution of the residuary trust estate that estate vested in the beneficiaries and the income therefrom ceased. With the failure of the income the annuities payable out of it must cease too."

p. 21.

27. The Appellant being dissatisfied with the decree of the Court of Appeal obtained on the 8th September 1947 leave to appeal to His Majesty in Council and it is humbly submitted that the appeal ought to be dismissed with costs for (among other) the following 40

REASONS

- (1) BECAUSE the annuities were charged only upon the income of the designated funds of each year accruing until the date of distribution.

- (2) BECAUSE there was no income available to the Trustees to meet the annuities after the date of distribution.
- (3) BECAUSE the case cannot be distinguished in principle from *Foster v. Smith supra*.
- (4) BECAUSE the decisions of the Courts in Singapore were right and ought to be affirmed.

LINDSAY M. JOPLING.

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ON APPEAL

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of Singapore.*

BETWEEN

TAN TECK NEO - - *Appellant*

AND

GEORGE TAN and Others *Respondents.*

Case

For the Respondent **GEORGE TAN.**

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