Privy Council Appeal No. 8 *of* 1955

The Commissioner of Stamp Duties – – – – – *Appellant*

v.

The New Zealand Insurance Company Limited – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH FEBRUARY, 1956

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD RADCLIFFE
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW

[*Delivered by* LORD RADCLIFFE]

The question in this appeal is whether the appellant, the Commissioner of Stamp Duties in New Zealand, ought to make an allowance in respect of the obligation to pay a life annuity when computing the final balance of the estate of a deceased person for the purposes of estate duty under the Death Duties Act, 1921, of New Zealand. The issue depends almost entirely upon the effect of s. 9 of that Act.

Section 9 runs as follows:—

9. Allowance to be made for debts.—

(1) In computing the final balance of the estate of the deceased, allowance shall, save so far as otherwise provided by this Act, be made for all debts owing by the deceased at his death.

(2) No such allowance shall be made—

(*a*) For debts incurred by the deceased otherwise than for full consideration in money or money's worth wholly for his own use and benefit; or

(*b*) For debts in respect whereof there is a right of reimbursement from any other estate or person, except to the extent to which reimbursement cannot be obtained; or

(*c*) More than once for the same debt charged upon different portions of the estate; or

(*d*) For contingent debts or any other debts the amount of which is, in the opinion of the Commissioner, incapable of estimation.

(3) If any debt for which by reason of the provisions of paragraph (*d*) of this section an allowance has not been made becomes at any time within three years after the death of the deceased actually payable or, in the opinion of the Commissioner, capable of estimation, an allowance shall be made therefor, and a refund of any estate or other duty paid in excess under this Act shall be made to the person entitled thereto, but no action for the recovery of any such refund shall be commenced except within three years after the payment of the duty so paid in excess.

The material facts of the case are very simple. The deceased person is a Mr. Francis Joseph Rolleston, who died on 8th September, 1946. Some years before his death, in 1941, he had been one of the parties to a deed, apparently a sort of family arrangement, under which he and other persons had undertaken to remit to a Miss Helen Mary Rolleston a monthly sum of £31 5s. New Zealand currency during her lifetime. In return Miss Rolleston released to the grantors of this annuity a legacy and a share of residue to which she was entitled under the will of another member of the Rolleston family. It was common ground between the parties to the appeal that what Miss Rolleston received was fully adequate consideration for what she gave up under the deed and that accordingly no gift duty was payable in respect of her disposition.

Miss Rolleston was alive at the date of the death of the deceased. He was at that date liable for his share of the accruing monthly instalment of the annuity, which share amounted to the figure of £1 16s. 5d. This amount was admitted by the appellant as a deduction under section 9 (1).

The respondent claimed that a further deduction of £1,052 9s. ought to be made, as representing the estimated amount of the sum owing in respect of the annuity at the date of the deceased's death. The Case Stated by the appellant, which is the origin of the present proceedings, does not contain any information as to how the figure of £1,052 9s. was arrived at, but it seems to have been assumed throughout that it was the figure of the actuarial value of the share of Miss Rolleston's annuity payable by the deceased at the same date. The appellant rejected this claim, but conceded that under section 9 (3) the sum of £281 5s. ought to be deducted, this amount being the sum of the deceased's share of the monthly payments of £31 5s. which had become actually payable since the date of his death.

The question thus raised has occasioned a difference of opinion in the Courts of New Zealand. In the Supreme Court Northcroft, J., upheld the appellant's rejection of the deduction claimed. The basis of his decision was that the liability under the annuity was a contingent debt within the meaning of subsection (2) (*d*); and that, since the period of the annuitant's life was not capable of determination in advance, an estimate of the quantum of the contingent indebtedness or pecuniary liability could not be made. This treatment of the matter seems to assume that as a matter of construction the relative clause in subsection (2) (*d*) "the amount of which is in the opinion of the Commissioner incapable of estimation" qualifies both of the preceding phrases "contingent debts" and "any other debts". It should be added that the learned Judge found considerable support for the view that he had taken in the judgments of the High Court of Australia in *Commissioner of Stamp Duties* v. *Permanent Trustee Co. of New South Wales Ltd.* (1933) 49 C.L.R. 293, a case to which some reference will be made below.

In the Court of Appeal the decision of the Supreme Court was reversed, and it was held that the deduction of £1,052 9s. ought to be allowed. All the three Judges in that Court (Fair, Stanton and Hay, J.J.) adopted the same line of reasoning. In their view there was a material distinction between a liability which could be described as "a debt that may never become due," such as, for instance, a guarantee of a bank overdraft or an uncalled liability on shares, and a liability "where liability is certain but the ultimate amount that will be payable depends on a contingency." Only the first class were contingent debts for the purpose of subsection (2) (*d*). A life annuity belonged to the second class. Further,

they held that there could not be any doubt that the amount of the debt represented by the annuity was capable of estimation for the purposes of the same subsection, and that the opinion recorded by the appellant to the opposite effect must have been founded on some misapprehension of the relevant law and could not be allowed to prevail.

Thus the Order of the Court, dated 18th December, 1953, which is now appealed from is to the effect that the allowance to which the respondent is entitled for the liability of the deceased under the annuity deed ought to be estimated on the proper actuarial basis in respect of the annuity.

In their Lordships' view the essential question in this case is not the bare question, Is the liability for an annuity for life a contingent debt? Indeed it is very difficult to answer such a question in isolation, since the nature of the answer will depend upon the context to which the existence of the contingency is relevant. No doubt any particular amount which is claimed to be due in respect of the liability at the date of death (except the small accrued sum due by apportionment) is only contingently due in the sense that it cannot be said with certainty that it or any part of it will have to be paid out of the estate. The sum that will have to be paid depends on the number of months that the annuitant survives. No doubt, too, the value of the annuity estimated on actuarial principles is not the same thing as the amount of the debt itself. On the other hand it may be that there is a relevant distinction for this purpose between a liability for an annuity accruing *de die in diem* and only terminating with the death of the annuitant and a liability which, while not the less incurred by the date of death, will not result in a pecuniary debt except in a future event as yet uncertain. Their Lordships do not think it necessary to express an opinion on this point, which is admittedly a difficult one, since in their view the allowance or rejection of a life annuity as a debt to be allowed against the final balance of an estate can be decided more satisfactorily by reviewing the wording of section 9 as a whole.

First, is the annuity "a debt owing by the deceased at his death"? Having regard to the interpretation of "debt" in section 2 as including "any pecuniary liability, charge or encumbrance," it is clear that it is: and, if so, it is to be allowed under subsection (1) of section 9, "save so far as otherwise provided by this Act." The main grounds of exclusion are set out in subsection (2) of the same section, and of the four subheadings subhead (*d*) stands apart from the others. It is expressed in a form which is itself productive of some ambiguity: —"For contingent debts or any other debts the amount of which is in the opinion of the Commissioner incapable of estimation." If the relative clause qualifies both the preceding phrases a liability which is admissible under subsection (1) is not disallowed, even if contingent, so long as it is not incapable of estimation: while, if the relative clause qualifies only the phrase "any other debts", which immediately precedes it, any liability properly described as contingent is disallowed merely by that fact, even though it is readily capable of estimation.

Their Lordships do not think that the latter gives a reasonable construction of an ambiguous sentence. There is nothing in its favour except the grammatical argument that the word "debts" should not have been used twice if the relative clause was intended to cover contingent as well as other debts, and the point, in itself of little weight, that there was no need to refer to contingent debts at all if the sentence was intended to mean no more than that any debt which was incapable of estimation was to be disallowed. If it is said that a contingent debt was meant to be disallowed as such and without qualification because it was regarded by the Legislature as an obvious example of a liability which could be safely assumed to be incapable of estimation, the argument turns round upon itself, since then it becomes highly improbable that the phrase "contingent debt" was intended to cover a life annuity, the obligation under which is of all uncertainties the one most readily capable of estimation. And the explanation leaves unexplained how it could be fair or reasonable to provide that no debt that was not a contingent debt

was to be disallowed, if capable of estimation, while a debt that was a contingent debt was not to be allowed, even if capable of estimation.

In the light of these considerations their Lordships are of opinion that the meaning of subsection (2) (*d*) is that the only debts within the meaning of subsection (1) which are disallowed are those the amount of which is in the Commissioner's opinion incapable of estimation. On this basis it does not matter whether the annuity is to be thought of as a contingent debt or not. The section does not say, but it is necessarily to be assumed, that if there is a debt the amount of which is capable of estimation that amount is itself to be treated as the debt and allowed as such. Their Lordships are not unmindful that in the case stated the appellant recorded the opinion that " the liability of the deceased under the said deed as from his death is incapable of estimation ". But having regard to the known practice of the valuation of life annuities on actuarial principles for many purposes, including bankruptcy, administration and insurance business, they are content to accept the view of the Court of Appeal on this point, that he must have been acting under some misapprehension of the applicable law when he committed himself to this view.

The reading of the section which has been adopted by their Lordships makes it unnecessary to consider the case of *Commissioner of Stamp Duties* v. *Permanent Trustee Co. of N.S.W. Ltd.* supra to which Northcroft, J., made detailed reference in his judgment in the Supreme Court. For, while it is true that the effect of that decision was to exclude a life annuity from allowance under the Death Duties Act of New South Wales, the ground of the decision was that under that Act the basic condition of allowance of any debt was that it must be " actually due and owing " at the date of death (see section 107 (1) of the Act). If a debt was not capable of being so described—and, whatever else can be said about the liability to pay a life annuity it is hard to see how it can properly be described in those terms—the range of allowance was not impliedly extended by the presence of a subsection (2) (*d*) in the same terms as subsection (2) (*d*) of the New Zealand Act, from which circumstance it had been sought to draw the conclusion that any liability ought to be allowed against the dutiable estate if, though a contingent debt, it was capable of estimation. The High Court rejected this argument, holding that the prohibition contained in subsection (2) could not be construed as an implied enlargement of the phrase " actually due and owing " in subsection (1). It is plain that there is a material difference between the words " actually due and owing " in the New South Wales Act and the words " owing by the deceased " (as interpreted by section 2) in the New Zealand Act. Further there was no definition of " debt " in the New South Wales Act, as there is in section 2 of the New Zealand Act. Accordingly the decision of the High Court of Australia does not therefore bear upon the issue of the present case.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

(39595) Wt. 8064—69 100 3/56 D.L.

In the Privy Council

THE COMMISSIONER OF STAMP DUTIES

v.

THE NEW ZEALAND INSURANCE COMPANY LIMITED

DELIVERED BY LORD RADCLIFFE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1956