

25,1960

IN THE PRIVY COUNCIL

No. 9 of 1959

ON APPEAL

UNIVERSITY OF LONDON
W.C.I.
- 7 FEB 1961

FROM THE FEDERAL SUPREME COURT (BARBADOS)
(APPELLATE JURISDICTION)
(On transfer from the West Indian Court of Appeal)

INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE MATTER of THE ESTATE of GERTRUDE CODMAN
GILBERT-CARTER, Deceased

50937

- and -

10 IN THE MATTER of THE ESTATE AND SUCCESSION DUTIES
ACT, 1941

B E T W E E N

THE COMMISSIONER OF ESTATE AND SUCCESSION DUTIES
... .. Appellant

- and -

TREVOR BOWRING Respondent

C A S E FOR THE APPELLANT

RECORD

20 1. This is an Appeal, by leave of that Court, from Pp.149-150
a Judgment of the Federal Supreme Court of Barbados Pp.118-146
delivered on the 18th day of July, 1958, and the
Order consequent thereon, allowing the Appeal of the P. 117
Respondent from the Judgment of the Barbados Court Pp.101-113
of Chancery given on the 16th day of October, 1956,
which dismissed the Respondent's appeal from the
assessment of the Commissioners of Estate and
Succession Duty made on the 27th day of June, 1955,
of Estate and Succession Duty on the property
passing on the death of the above named Gertrude
Codman Gilbert-Carter (hereinafter called "Lady
Gilbert-Carter").

30 2. There is no dispute as to the amount of duty
exigible if it is properly payable; the sole
question for determination is whether, at the time
of her death the late Lady Gilbert-Carter was, Pp. 118 11
within the meaning of that phrase as used in the 27 - 34
Barbados Estate and Succession Duties Act, 1941,

RECORD

"competent to dispose" of property comprised in a Deed of Trust (hereinafter called "the Deed of Trust") dated the 16th day of June, 1936, and made between Lady Gilbert-Carter as Donor of the one part and Old Colony Trust Company and Charles Kane Cobb as Trustees of the other part, and Deeds supplemental thereto.

3. The Deed of Trust by Clause 1 thereof provided as follows:-

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"1. To pay the net income to the Donor not less often than quarterly as long as she shall live, together with such parts of principal as she may from time to time in writing request."

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Pp. 8 - 9

4. By Clause 2 thereof Lady Gilbert-Carter made provision for certain payments to be made on her death and provided that the same should be subject to reduction in certain events and should not duplicate identical payments already directed by her existing will which it was declared it was her intention to alter.

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5. By Clause 3 thereof the Deed of Trust provided that after the death of the Donor and after the foregoing payments the net income together with such parts of principal as he might from time to time in writing request should be paid over to Lady Gilbert-Carter's son, with remainder as he should appoint with provisions in default of such appointment.

6. Clause 4, 6 and 8 thereof provided as follows:-

P.9 1.44 -
P.10 1.9

"4. The Donor during her life, and her said son after her death, shall have the right at any time or times to amend or revoke this trust, in whole or in part by an instrument in writing, delivered to the Trustees. If the agreement is revoked in its entirety the revocation shall take place upon the delivery of the instrument in writing to the Trustees, but any amendment or any partial revocation shall take effect only when consented to in writing by the Trustees".

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P.10 11 17-
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"6. The Trustees shall each year render an account of their administration of the trust to the person or

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persons of full age entitled at the time to receive the income thereof. Such person's or persons' written approval of such an account shall as to all matters and transactions stated therein or shown thereby, be final and binding upon all persons (whether in being or not) who are then or may thereafter become entitled to share in either the principal or the income of the trust".

10 "8. Any trustee may resign as a Trustee hereunder from the trusts hereby created at any time by giving thirty (30) days' written notice delivered personally or by registered mail to the Donor, or, if the Donor has deceased, to the beneficiaries then entitled to the income. The person or a majority of the persons of full age to whom notice is thus given may appoint a successor Trustee by a writing endorsed hereon or annexed hereto or, if no such appointment is made within the said thirty (30) days, the resigning Trustee itself shall so appoint a successor. Any succeeding Trustee shall have all the powers conferred upon the original Trustees".

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20 7. It was further provided by the Deed of Trust that it should be governed by the laws of Massachusetts, in the United States of America.

P.12 11
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30 8. By a Deed of Amendment dated the 4th day of December, 1939, Lady Gilbert-Carter with the consent of the Trustees in exercise of the power in that behalf reserved to her by Clause 4 of the Deed of Trust amended the Deed of Trust in various respects, notably by striking out Clause 4 thereof and substituting the following clause therefor:-

Pp. 12 - 14

"4. The Donor during her lifetime shall have the right at any time or times to amend or revoke this trust, either in whole or in part by an instrument in writing, provided, however, that any such amendment or revocation shall be consented to in writing by the Trustees."

P. 14 11
22-27

40 9. By a Deed of Amendment dated the 28th day of December, 1939, Lady Gilbert-Carter waived and surrendered all rights and privileges under Clause 1 of the Deed of Trust beyond such rights and privileges as would have accrued to her if the said

P.15

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Clause 1 had read "To pay the net income to the Donor from time to time as long as she shall live".

Pp.15-16

10. Lady Gilbert-Carter with the consent of the Trustees executed a further Deed of Amendment on the 14th day of September, 1942, not here material to be set forth.

Pp. 15-17

11. By a Deed of Amendment dated the 13th day of June, 1944, Lady Gilbert-Carter with the consent of the Trustees in exercise of the power in that behalf reserved to her by Clause 4 as amended of the Deed of Trust further amended Clause 1 thereof to read as follows:-

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"1. To pay the net income to the Donor from time to time as long as she shall live, together with such parts of principal as the Trustees in their uncontrolled discretion shall deem advisable for the comfort and support of the Donor."

Pp. 17-21

12. Lady Gilbert-Carter with the consent of the Trustees executed further immaterial Deeds of Amendment on the 1st day of November, 1944, 17th day of October, 1950, and 31st day of August, 1951.

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P. 133 11
18-22

13. Lady Gilbert-Carter died on the 12th day of November, 1953 in Boston, Massachusetts, domiciled in Barbados; the Respondent is one of the Executors appointed by her Will dated the 15th day of March, 1952.

14. The Barbados Estate Duty on Absentees Act, 1895, provides inter alia as follows:-

"2. (1) On the death of any person whose property in Barbados would be liable to a duty in England under the Finance Act, 1894, a duty called "estate duty" shall be payable to the Colonial Treasurer for the benefit of the general revenue in respect of all property of such person which is situate in this Island and passes on the death of such person.

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(2) The amount of such duty shall be the same as, if this Act had not been passed and section twenty of the Finance Act, 1894, of the United Kingdom had not been applied to this Island, would have been payable in England in respect of such property under the said Finance

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Act, 1894, or any Act or Acts which may hereafter be passed altering or amending the same.

10 (3) Such duty shall be payable in respect of the same property, and under the same circumstances, and subject to the same conditions and in all respects (save and except so far as the mode of payment and recovery of the same are concerned) as estate duty would be payable in England under the said Finance Act, 1894, or any Act or Acts hereafter passed amending the same, if such property were situate in England."

15. The Barbados Estate and Succession Duties Act, 1941, (hereinafter called "the Act of 1941") provides inter alia as follows:-

"3. For the purposes of this Act :-

20 (a) a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or exercisable as mortgagee;"

30 "6. (1) In the case of any person dying after the coming into operation of this Act, there shall, except as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, settled or not settled, which passes on the death of such person, a duty called "estate duty" at the graduated rates set forth in Schedule "A" to this Act.

.....

(3) Where duty is required to be paid in this Island by the Estate Duty on Absentees Act,

RECORD

1895, and also by this Act in respect of the same property, then duty shall only be payable in respect of such property under the Act which yields the greater amount of tax."

"7. Property passing on the death of the deceased shall be deemed to include the property following, that is to say:-

(a) property of which the deceased was at the time of his death competent to dispose;"

"20. (1) The executor of the deceased shall pay the estate duty in respect of all property of which the deceased was competent to dispose at his death, on delivering the estate duty affidavit to the Commissioner, and may pay in like manner the estate duty in respect of any other property passing on such death not under his control, if the persons accountable for the duty in respect thereof request him to make such payment; but an executor shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received".

"32. Where it is proved to the satisfaction of the Commissioner that too much estate duty has been paid, the excess shall be repaid by him, and in cases where the over-payment was due to over-valuation by the Commissioner, with interest at the rate of three per cent per annum."

Pp. 2 - 3

16. On the 27th day of June, 1955, the Commissioner of Income Tax and Death Duties sent a letter to Respondent's Solicitors assessing the Death Duties payable on the death of Lady Gilbert-Carter, in the sum of \$137,723.28 which sum included an amount of \$120,336.29 in respect of the Estate Duty payable in respect of the property comprised in the Deed of Trust (as amended).

Pp. 4 - 5

17. By Notice dated the 25th day of July, 1955, addressed to the Commissioners for Estate and Succession Duties for the Island of Barbados, the Respondent timeously intimated that he intended to appeal against such assessment on the grounds :-

(1) That Lady Gilbert-Carter was not competent to dispose of the property comprised in the Deed of Trust as amended;

- (2) Further or alternatively that the said property was not under the control of the Executors; and
- (3) Further or alternatively that the said Commissioner had held the Executors liable for duty in excess of the assets which they had received as such Executors.

10 18. By a Notice dated the 24th day of August, 1955, the said Commissioner intimated that he maintained the said assessment in whole, and the claim made by him in respect of the said duty so assessed to the extent of the assets which the said proposed Executors should have received as Executors or might but for their own neglect or default have so received.

Pp. 5 - 6

19. On the 28th day of September, 1955, the Respondent presented a Petition to the Barbados Court of Chancery by way of appeal against the said assessment.

Pp. 6 - 7

20 20. On the hearing of the said Petition experts in the Law of Massachusetts were called on both sides; the experts called on behalf of the Respondent maintained that in accordance with the said Law and on the true construction of the Deed of Trust (as amended) the Trustees thereof were under a fiduciary duty to all the beneficiaries thereunder in giving or withholding their consent to an amendment to the Deed of Trust pursuant to the powers conferred upon Lady Gilbert-Carter by the provisions of Clause 4 thereof; the expert called on behalf of the Appellants was of the opinion that the Trustees owed no such fiduciary duty to the beneficiaries and that subject only to their acting in good faith and from a proper motive owed a duty to consent to any amendment or revocation proposed by the Settlor, and that the Courts of Massachusetts would not control their actions.

Pp. 22-100
Pp. 104 140
Pp. 105 117

30 21. All the experts agreed that the precise question had not arisen for decision in the Courts of Massachusetts; and they all agreed that the statement of the law of trusts contained in Professor Scott's work on the Law of Trusts and The Restatement of the Law of Trusts were regarded as of great weight and authority by all the Courts of the United States of America.

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40 Pp. 220-225
Pp. 217-220

RECORD

Pp.101-113 22. The Barbados Court of Chancery (Vice
Chancellor Collymore) by its Judgment of the 16th
day of October, 1959, dismissed the Respondent's
appeal. After a careful review of all the Authorities,
P.102 11 which had been cited to him the learned Vice Chan-
22-28 cellor came to the conclusion that the relevant law of
Massachusetts was as stated in Section 330.1 of the
Restatement of the Law of Trusts and Section 330.9
of Professor Scott's work on the Law of Trusts. He
proceeded as follows:-

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P.113 11 "I can find no standard of duty expressed or
12-26 implied in the trust instrument and I think
that in these circumstances the trustees owed
a duty to the settlor to give consent to any
revocation or amendment made by her and had no
other duty provided they acted in good faith
and from proper motives. It seems to me that
Lady Gilbert-Carter retained a power of control
over the property in the Boston Trust. This is
my view of the matter according to the law of
Massachusetts and according to it Lady Gilbert-
Carter had and retained until her death such a
power to revoke or amend as would enable her to
dispose of the property in the Boston Trust as
she thought fit."

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P.113 11 23. He accordingly dismissed the Respondent's
34-35 Appeal. On the 18th day of January, 1957, the
Pp. 114 - Respondent gave Notice of Appeal to the West Indian
116 Court of Appeal from the Judgment of the Vice
Chancellor, on the grounds that there was no
evidence to support any of the learned Vice-
Chancellors findings as to the Law of Massachusetts,
viz:-

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1. (a) That there was no standard of duty expressed or implied in the trust instrument;
- (b) That the Trustees owed a duty to Lady Gilbert-Carter to give consent to any revocation or amendment made by her;
- (c) That the Trustees had no other duty provided they acted in good faith and from proper motives.

2. Alternatively that these conclusions were
against the weight of evidence.

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3. That the decision was contrary to Section 20(1) and 3(a) of the Act of 1941.

And on the further grounds:-

1. That since the consent in writing of the Trustees to the amendment or revocation of the Deed of Trust was required, the power did not come within Section 3(a) of the 1941 Act.
2. That in the determination of 1 above it was irrelevant to consider whether the Trustees had a mere power of veto on the exercise of the power by Lady Gilbert-Carter or had a duty to exercise in the selection of the objects.
3. That accepting the evidence of the Appellant's witness and the statements of the Law of Massachusetts as contained in the said Restatement and Professor Scott's said work, the power of amendment or revocation was not such a power as came within Section 3(a) of the Act of 1941.

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24. The Federal Supreme Court of Barbados (Hallinan C.J., Rennie and Archer JJ), to whom the Appeal had been transferred from the West Indian Court of Appeal, by its Judgment of the 18th day of July, 1958, allowed the Respondent's said appeal, Mr. Justice Archer dissenting, and ordered that the Appellant should recover from the Respondent only the sum of \$17,386.99 together with interest in accordance with the provisions of the Act of 1941. Pp.118-145

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25. In the view of the learned Chief Justice, whilst accepting his findings as to the law of Massachusetts, the learned Vice Chancellor had nevertheless misdirected himself in holding that the Trustees owed any duty to the Settlor to give their consent to any exercise of the power of revocation and amendment. He could find nothing in the passages cited, or in the evidence of the expert witnesses, to support this contention. In his view the Trustees had such a discretion to give or withhold their consent as constituted a fetter on the power of Lady Gilbert-Carter to dispose of the property, comprised in the Deed of Trusts, and she was therefore not "competent to dispose" thereof within the meaning of that phrase as used in Section 3(a) of the 1941 Act. He was therefore in favour of allowing the Appeal. Pp. 123 11
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Pp.124 11
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26. The learned Vice Chancellor was therefore in favour of allowing the Appeal.

RECORD

P.128 1.47
P.129 1.2
Pp.129-133

26. Mr. Justice Rennie concurred in this reasoning, which he thought was sufficient to decide of the appeal. He proceeded, however, to consider the English Cases relating to powers exercisable with consent, and came to the conclusion that under English Law such a power was not a general power, so that if English Law applied Lady Gilbert-Carter would not be competent to dispose of the property comprised in the Deed of Trust within the meaning of Section 3(a) of the 1941 Act.

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27. Mr. Justice Archer dissented. His views may be summarised in his own words as follows:-

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"Lady Gilbert-Carter was the sole owner of the property which she handed over to Trustees in 1936. Only she could initiate revocation of the trust and after revocation she was not obligated to resettle the property. The Trustees had no duty towards beneficiaries nor could any beneficiary resist revocation. There is no evidence as to the reason for amendment of Clause 4 of the trust deed in December, 1939, but whatever the reason, she did not, in my opinion, thereby forfeit her right to retrace her steps. Her competency to dispose of the trust fund is not, in my view, to be determined by reference to the competency of the Trustees to prevent her from disposing of it."

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28. The Appeal of the Respondent was accordingly allowed. From this Judgment this Appeal is now preferred final leave so to do having been granted by the Federal Supreme Court on the 14th day of January, 1959.

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Pp.149-
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29. It is submitted that the decision of the Federal Supreme Court was erroneous, and that Lady Gilbert-Carter was competent to dispose of the property comprised in the Deed of Trust as amended at her death:-

- (i) For the reasons given by the learned Vice Chancellor and quoted in paragraph 22 hereof;
- (ii) For the reasons given by Mr. Justice Archer which are summarised in paragraph 27 hereof;

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- 10 (iii) Because Section 3(a) of the 1941 Act is in the same terms as Section 22(2) (a) of the English Finance Act, 1894, and ought to be given the same meaning as the English Section, not only on the general principles, applicable to the construction of colonial statutes, but also because of the provisions of Section 2 of the Barbados Estate Duty on Absentees Act, 1895; and that on the true construction of Section 22(2)(a) of the English Finance Act, 1894, (especially having regard to the words "a tenant in tail whether in possession or not") the need to obtain consent to the exercise of such a power as that contained in the Deed of Trust (as amended) does not prevent the donee of a power of revocation or of an otherwise general power from being "competent to dispose" within the meaning of that section.
- 20 (iv) Because on their true construction the words "general power" as contained in Section 3(a) of the 1941, Act include (in contradistinction to the words "absolute power of appointment" as used in the said Act) a power of revocation exercisable only with consent.

30 30. The Appellant therefore will humbly submit that the Judgment of the Federal Supreme Court in the matter was wrong and ought to be set aside, and that the Judgment of the Barbados Court of Chancery was right and ought to be restored for the following among other

R E A S O N S

- (1) BECAUSE at the date of her death Lady Gilbert-Carter had under and by virtue of the provisions of Clause 4 of the Deed of Trust as amended such a general power as enabled her to dispose of the property thereby settled.
- 40 (2) BECAUSE on the true construction of Section 3(a) of the 1941 Act the expression "general power" includes a power exercisable with the consent of another person.

- (3) BECAUSE in accordance with the Law of Massachusetts the Trustees of the Deed of Trust as amended were under no fiduciary or other duty when giving their consent to any proposed exercise of the power of amendment and revocation beyond a duty to act in good faith and from a proper motive.
- (4) BECAUSE the competency of Lady Gilbert-Carter to dispose of the property settled by the Deed of Trust as amended was not affected by any power in the Trustees to prevent her so disposing of the said property 10
- (5) BECAUSE on the true construction of Section 3(a) of the 1941 Act and the Deed of Trust as amended Lady Gilbert-Carter was at the date of her death competent to dispose of the property thereby settled
- (6) BECAUSE the Judgment and Order of the Federal Supreme Court was wrong and ought to be set aside 20
- (7) BECAUSE the dissenting Judgment of Mr. Justice Archer in the Federal Supreme Court was right for the reasons therein stated and ought to be upheld
- (8) BECAUSE for the reasons therein given the Judgment of the learned Vice Chancellor was right and ought to be restored.

RAYMOND WALTON

No. 9 of 1959
IN THE PRIVY COUNCIL

C N A P P E A L
FROM THE FEDERAL SUPREME COURT
(BARBADOS)
(Appellate Jurisdiction)
(On transfer from the West Indian
Court of Appeal)

Re: THE ESTATE of GERTRUDE CODMAN
GILBERT-CARTER, Deceased

- and -

Re: THE ESTATE & SUCCESSION DUTIE
ACT, 1941

B E T W E E N

THE COMMISSIONER OF ESTATE &
SUCCESSION DUTIES Appellant

- and -

TREVOR BOWRING Respondent

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