Privy Council Appeal No. 32 of 1967

Cecil Wolsey Curtis Thompson and another – – – *Appellants*

v.

The Commissioner of Stamp Duties – – – – *Respondent*

FROM

THE SUPREME COURT OF APPEAL, NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MAY 1968

Present at the Hearing:

VISCOUNT DILHORNE
LORD MACDERMOTT
LORD PEARCE
LORD PEARSON

[*Delivered by* LORD PEARSON]

John Arthur Buckland, who died in 1931, had by his will left a share of his residuary estate in trust primarily for his daughter Mrs. Rita Buckland Thompson. The will provided that the trustees were to invest the share, and to pay the income to her during her life, and after her death to hold the share on certain trusts in favour of her children and subject to those trusts (which failed because she had no child) to "hold such share and the income thereof in trust for such person or persons for such purposes and in such manner in all respects as such daughter shall by will or codicil appoint".

The trustees set aside and appropriated certain assets of the estate to answer Mrs. Thompson's share or interest in the estate, and duly held them on the trusts of the will.

Mrs. Thompson who died in 1965, had by her will provided (*inter alia*) as follows:

> "If my husband the said Cecil Wolsey Curtis Thompson shall be living one month after my death I *devise and bequeath* to him the whole of my real and personal estate including all property over which I have a power of appointment under the will of my late father the late John Arthur Buckland."

Cecil Wolsey Curtis Thompson was living one month after the death of his wife and is still living. Accordingly the assets which have been mentioned passed to him under the appointment contained in her will.

She died domiciled in New South Wales.

At the time of her death the assets comprised certain items of property of comparatively small value situate in New South Wales and shareholdings valued at $288,167·43 situate outside New South Wales (being partly in Victoria and partly in Australian Capital Territory).

The appellants, who are the executors and trustees of the will of Mrs. Thompson, admit liability for death duty in respect of the items of property situate in New South Wales. The question at issue in this appeal relates to the shareholdings situate outside New South Wales. The respondent contends that they do, and the appellants contend that

they do not, form part of the estate of Mrs. Thompson for the purpose of the assessment and payment of death duty thereon.

In paragraph 20 of the stated case which came before the Court of Appeal of the Supreme Court of New South Wales the questions to be decided were:

"(1) Whether the said sum of $288,167·43 was for the purposes of the assessment and payment of death duty properly included in the final balance of the dutiable estate of Rita Buckland Thompson?

(2) If the answer to question 1 is in the negative whether any part, and if so, what part of the said sum of $288,167·43 was properly so included?

(3) How should the costs of this stated case be borne and paid?"

The Court of Appeal deciding in favour of the respondent's contention, answered the first question "Yes" and the third question "By the appellants". On the view which they took on the first question, the second question did not arise.

The principal factors to be taken into account in this appeal stand out clearly. Mrs. Thompson died domiciled in New South Wales. The assets with which this appeal is concerned were situate outside New South Wales at the time of her death. She had in respect of those assets a general power of appointment under the will of her father. She exercised the power in favour of her husband by her own will.

The relevant statutory provisions are contained in the Stamp Duties Act 1920–1965 of New South Wales, and are as follows:

Section 100.

"'Disposition of property' means—

. . .

(*b*) the creation of any trust;

. . .

'General power of appointment' includes any power or authority which enables the donee or other holder thereof, or would enable him if he were of full capacity, to appoint or dispose of any property, or to charge any sum of money upon any property, as he thinks fit for his own benefit, whether exercisable by instrument inter vivos or by will or otherwise, but does not include any power exercisable by any person in a fiduciary capacity for the benefit of others only arising under a disposition not made by himself, or exercisable as tenant for life under Part IV of the Conveyancing and Law of Property Act, 1898, or as mortgagee."

Section 101

"In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in the Third Schedule to this Act shall be assessed and paid—

(*a*) upon the final balance of the estate of the deceased, as determined in accordance with this Act. . . ."

Section 102

"For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:

(1) (*a*) All property of the deceased which is situate in New South Wales at his death. And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death;

. . .

(2) (*a*) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a

settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person;

Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

. . .

(*j*) Any property over or in respect of which the deceased had at the time of his death a general power of appointment.

. . .

(2A) All personal property situate outside New South Wales at the death of the deceased, when—

(*a*) the deceased dies after the commencement of the Stamp Duties (Amendment) Act, 1939; and

(*b*) the deceased was, at the time of his death, domiciled in New South Wales; and

(*c*) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of paragraph (2) of this section."

The general scheme of section 102 is plain. Paragraph (1) applies to the actual property of the deceased, *i.e.*, property actually belonging to him at the time of his death. Under this paragraph the dutiable estate includes all such property situate in New South Wales at the time of his death, and also includes such property then situate outside New South Wales if it is personal property and he was then domiciled in New South Wales. Paragraph (2) applies to various categories of what may conveniently be called "notional" property of the deceased, including in certain cases property disposed of by him. This paragraph (2) has been interpreted consistently with the language of paragraph (2A) sub-paragraph (*c*) as applying only to property situate in New South Wales at the time of the death. *Johnson v. Commissioner of Stamp Duties* [1956] A.C.331, 351–2. Then paragraph (2A) brings into the dutiable estate "notional" property of the deceased situate outside New South Wales at the time of his death if he was then domiciled in New South Wales.

The respondent claims that the assets with which this appeal is concerned should be included in the dutiable estate under either or both of the sub-paragraphs (*a*) and (*j*) in paragraph (2) of section 102 as applied by paragraph (2A) to property situate outside New South Wales at the death of the deceased. If the respondent has a valid claim under sub-paragraph (*a*) it will not be necessary to consider his claim under sub-paragraph (*j*).

The first point argued in this appeal is one of construction. Does paragraph (2) sub-paragraph (*a*) of section 102 on its true construction apply to this case? The appellants contend that it does not. The contention was not put forward in the Court of Appeal, but was allowed to be put forward in the argument of the present appeal, because it had been set out in the appellants' case, and it is matter simply of law and no evidence could have affected it, and it is within the scope of the first question to be decided as set out in paragraph 20 of the stated case.

The appellants' contention is that in the sub-paragraph (Section 102(2)(*a*)) the words "containing any trust in respect of that property to take effect after his death" qualify the word "will" as well as the word "settlement"; and therefore the words "such trust" in the proviso refer to a trust contained in the will or the settlement, as the case may be; and therefore the sub-paragraph has no application to a disposition by will unless the property disposed of was at the time of the death subject to a trust to take effect after the death; and in the present case Mrs. Thompson's exercise of her power of appointment in favour of her

husband by her will either did not create any trust or created only a trust coming into operation one month after the death so that the property was not " subject to such trust " at the time of the death, as required by the proviso.

There may be some difficulty or uncertainty affecting the last step in the argument, but there is no need to come to a decision on that point, because the argument fails at an earlier stage for several reasons. First, according to the proper grammatical construction of the sub-paragraph the words " containing any trust in respect of that property to take effect after his death ", are to be read with and qualify only the words " by a settlement ". If the intention had been to make the qualification apply to a will as well as a settlement, the appropriate wording would have been " by a will or settlement containing . . . ". Secondly it is unnecessary to refer to anything in a will taking effect after the death, because everything in a will must take effect after the death. Thirdly in *Rabett v. Commissioner of Stamp Duties* [1929] A.C.444, 448 their Lordships' Board held that the true interpretation of the sub-paragraph was to construe the qualifying words as applying only to the settlement. The sub-paragraph in the form in which they were considering it is set out at p. 447 of the judgment, and it has not been changed subsequently. Fourthly however, Mr. Snelling on behalf of the respondent referred to an earlier version of the provision as it was in section 49 (2) of Aot No. 27 of 1898:

> " Duties to be levied, collected, and paid according to the duties mentioned in the said Third Schedule shall also be charged and chargeable upon and in respect of—
>
> (A) all estate, whether real or personal—
>
> (*a*) which any person, dying after the twenty-second day of May, one thousand eight hundred and ninety-four, has disposed of, whether before or after that date, by will or by settlement containing any trust in respect of that estate to take effect after his death, under any authority enabling that person to dispose of the same by will or deed, as the case may be;"

In that early version of the provision there was no proviso. In the absence of a proviso there would be no reason at all for reading the qualification as applying to anything except the settlement. The addition of the proviso cannot reasonably be considered to have altered the construction of the main provision: it refers to " such trust ", which is the trust contained in a settlement.

The other point argued on behalf of the appellants was that the sub-paragraph (s.102 (2) (*a*)) as applied by paragraph 2A, in so far as it purports to cover a disposition of property situate outside New South Wales by the exercise of a general power of appointment, is invalid on the ground that there is no relevant territorial nexus with New South Wales.

In the words of the Supreme Court in *Johnson's* case (*supra*), quoted by their Lordships in their judgment at p. 350,

> " The legislature of New South Wales is a subordinate legislature. Its powers are to be found in the Constitution Act, 1902, section 5 of which, so far as material, provides that: 'The legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever'. Legislation on any subject-matter which has no relevant territorial connexion whatever with New South Wales falls outside the power of the legislature of New South Wales (see *Attorney-General v. Australian Agricultural Company* and *Commissioner of Stamp Duties (N.S.W.) v. Millar*)."

For the purpose of ascertaining whether there is a relevant territorial connection the scope of possible relevancy is wide. In *Broken Hill South*

Limited v. Commissioner of Taxation (N.S.W.) (1937) 56 C.L.R.337 in the High Court of Australia Dixon J. said at p. 375—

> "The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicil, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers."

Nevertheless it appears from decided cases that there is no "relevant territorial connection" if the connection with the territory of New South Wales is too slight. There is an element of degree involved.

In *Commissioner of Stamp Duties (N.S.W.) v. Millar* (1932) 48 C.L.R.618 it was held by the majority of the High Court of Australia that provisions purporting to authorise the inclusion in the dutiable estate of a person, dying resident and domiciled out of New South Wales, of shares held by him in a company incorporated out of and having no share register within that State, but which carried on the business of mining within the State, were in excess of the power of the legislature of New South Wales.

In *Johnson's* case (*supra*) the provision under consideration was sub-paragraph (*g*) of paragraph (2) of section 102, as applied by paragraph (2A) to property outside New South Wales. Sub-paragraph (*g*) provides for inclusion in the dutiable estate of any property in which the deceased or any other person had an estate or interest limited to cease on the death of the deceased or at any time determined by reference to the death of the deceased . . . to the extent to which a benefit accrues or arises by cesser of the limited interest . . . to or for the benefit of a person entitled to an estate or interest in the property in remainder or reversion expectant upon the determination of the limited interest. If paragraph (2A) is to apply, the domicile of the deceased must have been in New South Wales. But all other relevant persons and things (for instance the reversioners or remaindermen, the property concerned, the creation of the trust and the law governing its creation and execution) might be outside New South Wales. Also there would not, or might not be any relevant disposition by the deceased. In the judgment of their Lordships' Board at p. 355 there is this passage:

> "The case is not that of a deceased dying possessed of personal estate, or a case of a deceased who has given away property shortly before his death without valuable consideration. The deceased's only interest was a limited interest ceasing on her death, and it is not her estate that is brought into charge. If the presence of the property in the State at the death of the deceased is lacking, every other incident or circumstance associated with the limited interest may also find its place, as has already been exemplified, outside New South Wales. The domicile of a deceased within New South Wales at the date of his death is, in their Lordships' judgment, a quite insufficient ground by itself to make good the lack of any other connexion with the State. In the succinct language of the Supreme Court: 'The case may be exemplified as being one in which a duty is levied on or in respect of the property of A because of the domicile in the jurisdiction of B.'"

The last two sentences in that passage should be understood in relation to the sub-paragraph which was there under consideration (*i.e.*, sub-paragraph (*g*) as applied by paragraph (2A)) and not as necessarily applying generally in relation to all the sub-paragraphs in paragraph (2) of section 102.

There are, however, in the present case two material elements of territorial connection in addition to the domicile of Mrs. Thompson in New South Wales. First, being so domiciled she had in respect of the property a general power of appointment and she could have exercised it for her own benefit in a number of ways. Secondly, being so domiciled, she did in fact exercise the power and thereby she made a disposition of the property.

There are numerous judgments both in Australian and in English cases explaining the position of property subject to a general power of appointment, when the power is exercised, and the reasons for including "notional" property in a dutiable estate. It will be sufficient to cite passages from one English and one Australian case.

In *Commissioner of Stamp Duties v. Stephen* [1904] A.C.137, 140 Lord Lindley said:

> "The distinction between a person's own property and property which is not his own, but which he can dispose of by will in any way he pleases by virtue of a power conferred upon him, is well established. Such last-mentioned property is not his own in any proper sense; and even if he executes the power by his will, no probate duty is payable upon that property unless such duty is made payable by a statute so worded as clearly to comprehend it. A statute imposing duty on a testator's property generally is not sufficient for this purpose. This was finally settled in *Drake v. Attorney-General* affirming *Platt v. Routh.*
>
> But it has long been settled that property appointed by will under a general power of appointment is subject to the payment of the appointor's debts: *Beyfus v. Lawley;* and if such property is personal property, it is equitable assets of the testator which his executor can claim for distribution in the proper order: see *In re Hoskin's Trusts* and *In re Lawley.* Notwithstanding, therefore, the difference between a person's own property and property which he can dispose of as he pleases and does dispose of, although it is not his own, the distinction is one which the legislature can hardly be expected to recognise when imposing probate or other duties payable on the death of a person who has exercised his power of disposition. Accordingly, modern Acts imposing such duties are almost always, if not always, so framed as to include both classes of property; and this is reasonable and just."

In *Grey v. Federal Commissioner of Taxation* (1939) 62 C.L.R.49, Rich J. said at pp. 59–60:

> "A taxing Act, generally speaking, is aimed at obtaining a subvention to the treasury at the expense of the citizen either on some occasion when the citizen is found with replenished resources or in respect of his possession of property. Among such Acts those imposing death duties are usually concerned with the transmission of property on death. In order to prevent resort to gifts and dispositions *inter vivos* on the part of men of property who manifest more benevolence to their offspring or other claimants on their bounty than interest in the budgets of their country some provision is almost invariably included in such Acts whereby property, the subject of the gift, is treated as comprehended in the deceased's estate: *cf. Horsfall v. Commissioner of Taxes* (*Vict.*). Further, as a general power of appointment enables the donee of the power to dispose of property as if it were his own, it is usual to levy duty upon property subject to such power as if it were part of the estate passing upon death. Sec. 8 (3) (*a*) by the bracketed words reaches after property devolving upon the exercise of a general power."

In the same case Dixon J. said at pp. 63–64:

> "It is quite clear why it was thought proper to include in the dutiable estate property over which a testator had exercised a general testamentary power of appointment. It is because the donee of a general power of appointment has a right of disposition which is

in many respects the equivalent of property. The power enables him to appoint to himself or his executors. It enables him to devise or bequeath the property subject to the power as freely and effectually as if it were his own. That property becomes subject to his debts as if it were his own estate. He may release the power instead of exercising it. Further, all these things he may do for valuable consideration. A general power immediately arising, therefore, has many practical results which ordinarily flow from the ownership of property. At the same time, in point of law, property subject to a general testamentary power forms no part of the property or assets of the donee of the power and the instrument exercising the power, though in form a will operates rather as the completion of a conveyance than as a testament (*In the Goods of Tomlinson O'Grady v. Wilmot*)."

It follows from the principles stated in those judgments that the sub-paragraph (s. 102 (2) (*a*) as applied by paragraph (2A)) as affecting property outside New South Wales disposed of by the exercise of a general power of appointment by a person domiciled in New South Wales is not lacking in relevant territorial connection and is valid.

It is not necessary to consider the details of the definition of " general power of appointment " contained in section 100. That is only an " including " definition, designed to bring in powers or authorities which might not be within the ordinary meaning of " general power of appointment ", and it does not have any application to the present case, where there is a general power of appointment according to the ordinary meaning of the words.

Reference was made to other sections of the Act, especially sections 114, 115 and 120, relating to payment of the death duties and enforcement of the liability. Consideration of these sections does not alter the conclusions arrived at under section 102.

The decision of the Court of Appeal was correct and should be affirmed. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

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