

1976, 10

IN THE PRIVY COUNCIL

No. **41** OF 1975.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

ADMINISTRATIVE LAW DIVISION

BETWEEN:

PERPETUAL TRUSTEE COMPANY LIMITED

Appellant

AND:

THE COMMISSIONER OF STAMP DUTIES

Respondent

CASE FOR APPELLANT

SOLICITORS FOR THE APPELLANT

Kearney, Boyd & Johns,
86-88 Pitt Street,
SYDNEY.

By their Agents:

Kidd, Rapinet, Badge & Co.,
1-2 Gray's Inn Place,
Gray's Inn,
LONDON.
W.C. IR 5DZ

SOLICITOR FOR THE RESPONDENT

R.J. McKay,
State Crown Solicitor,
Chifley Square,
SYDNEY.

By his Agent:

Light & Fulton,
24 John Street,
Bedford Row,
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CASE FOR APPELLANT

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Nature of Proceedings

1. This is an appeal pursuant to leave granted by the Supreme Court of New South Wales from a Judgment of the said Supreme Court in its Administrative Law Division constituted by the order made on 7th March 1975 by the Honourable Mr. Justice Waddell that the Appellant's Summons be dismissed with costs.

p.65, 1.10

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2. (a) By its Summons the Appellant sought repayment from the Respondent of death duty (amounting to \$429,370.00) paid by the Appellant to the Respondent in respect of the residuary estate of Everest Reginald York Seymour deceased.

p.1

(b) The Appellant's claim was made pursuant to Section 140 Stamp Duties Act, 1920 as amended (N.S.W.) which provides as follows:-

RECORD

"140 (1) Where it is proved to the satisfaction of the Commissioner that any property has been wrongly included in the dutiable estate of a deceased person the death duty paid in respect of such property shall be repaid by him but (except in accordance with an order of the court under section one hundred and twenty-four) no refund shall be made in respect of any person whether dying before or after the passing of the Stamp Duties (Amendment) Act, 1931, by reason of any mistake in the construction of this Act.

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(2) (Repealed)

(3) The repayment of duty provided for in sub-section one of this section may be enforced by action or suit against the Commissioner of his official name as nominal defendant on behalf of the Crown in any court of competent jurisdiction and not otherwise.

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(4) No such action or suit shall be brought after the expiration of three years from the date of payment."

p.64, 1.4 3. His Honour held that the residuary estate had not been wrongly included in the dutiable estate of the deceased.

Questions

4. (a) The ultimate question raised by the appeal is:

Whether the residuary estate of Everest Reginald York Seymour deceased was wrongly included in the dutiable estate under the provisions of the Stamp Duties Act, 1920 as amended (N.S.W.) of the said deceased.

(b) The resolution of this ultimate question involves consideration of the following questions:

10 (i) Whether the residuary estate of the deceased was property comprised in a gift or bequest to an educational institution within the meaning of Section 2(1) and (3) Educational Institutions (Stamp Duties Exemption) Act, 1961 and thus excluded from the dutiable estate of the deceased.

20 (ii) Whether the said residuary estate was within either of the classes of property mentioned in sub-section 1 or sub-section 2(a) of Section 102 Stamp Duties Act so as to form part of the dutiable estate of the deceased.

Relevant Legislation

5. The more material parts of the said Sections are as follows:-

"2.(1) This Act applies to the following educational institutions, that is to say:-

.....

(b) The University of Sydney

(3) Nothing contained in the Stamp Duties Act, 1920, or in any Act amending that Act, whether passed before or after the commencement of this Act, applies to any real or personal property of any nature or kind whatsoever comprised in any gift, bequest or devise made to -

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(a) any educational institution to which this Act applies or to the trustees of any such institution or to the person or authority governing and managing any such institution,"

Stamp Duties Act, 1920 as amended

"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 -

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(1) (a) All property of the deceased which is situate in New South Wales at his death.....

to which any person becomes entitled under the Will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.

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- (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 to which at the time of his death is subject to such trust."

Facts

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6. The facts relevant to the proceedings and to the appeal may be summarized as follows:

- (a) On 9th January 1966 Everest Reginald York Seymour late of Wollstonecraft near Sydney in the State of New South Wales, Merchant deceased (hereinafter referred to as "the deceased") died leaving a Will and two Codicils Probate whereof was on 29th August 1966 duly granted by the Supreme Court of New South Wales in its Probate Jurisdiction to the Appellant.

p.3, 11.15-21

RECORD

(b) Clause 5 of the Will was in the following terms:

"5. As to the entire residue of my Estate of whatsoever kind and wheresoever situated IT IS MY WISH that my Trustees shall use the same for the purpose of the purchase or construction of a building (or to go towards a Fund for the purchase or construction of a building) in the City of Sydney to serve as a centre for the cultivation, education and performance of musical and dramatic Arts befitting the City of Sydney AND I DIRECT my trustees to transfer or to vest such residue of my Estate for the purposes mentioned in the Council of the Municipality of The City of Sydney or the University of Sydney or the New South Wales Government or in such other Public Authority as my Trustees shall consider fit."

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p.12,11. 9-23

(c) On 9th November 1966 the provisions of clause 5 of the Will were declared by the Supreme Court of New South Wales in its Equitable Jurisdiction to constitute a valid trust for charitable purposes.

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p.4, 11. 1-4
p.19,11.22-26

(d) On 29th October, 1970 the Appellant resolved that subject to receipt of judicial advice, the University of Sydney be selected as the body to which the residuary estate of the deceased be paid and transferred.

p.4, 11. 8-12
p.22

(e) On 23rd November 1970 judicial advice was given to the Appellant by the Supreme Court of New South Wales in its Equitable Jurisdiction that the Appellant would be justified in transferring the

p.4 11.17-21
p.24 11. 3-29

residuary estate of the deceased to the University of Sydney -

p.25 11. 1-5

"for the construction of a building in the City of Sydney to serve as a Centre for the cultivation, education and performance of musical and dramatic arts befitting the City of Sydney upon the University of Sydney by Deed in a form approved by the said Trustee and by the Attorney-General in and for the State of New South Wales undertaking:

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(a) To apply the said residue of the said estate for the aforesaid purpose.

(b) To commence within a reasonable time and carry through to completion the building and other work involved in providing such Centre upon the site at corner of Darlington Road and Cleveland Street Darlington mentioned in and so as to implement the project described in its letter dated the fifteenth day of October, One thousand nine hundred and seventy and attached documents styled "Seymour Bequest Submission" addressed to the said Executor and being Exhibit "B" herein.

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(c) To hold the land constituting the said site and to maintain and use such Centre thereon for the purposes prescribed in relation to such Centre by the trusts of the Will of Everest Reginald York Seymour deceased."

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p.4 11.24-27

p.29 1.29

pp.30-31

(f) By Deed of Trust dated 4th March 1971 executed by the University of Sydney pursuant to the said judicial advice the University of Sydney made declarations of trust implementing the said undertakings.

(g) The "Seymour Bequest Submission":

(a) proposed the erection of a building to meet three functional requirements:

(i) To meet the needs for teaching and research in musical and dramatic works. 10

p.32,11.38-42

p.33,11. 4-9

(ii) To provide the facilities to assist those interested to cultivate such arts, and

(iii) To provide a fitting forum for the production and presentation of musical and dramatic works in an area which would be readily available to the general public.

(b) pointed out that:

(i) The University was financially able and willing to conduct the Centre for the specified purposes in that it had an extensive range of relevant staff and activities in music and drama from which the work of the Centre could grow and attract cultural grants. 20

p.34,11.18-22

RECORD

- (ii) The Music Department of the University could provide and was anxious to provide for an extension of education and performance. p.34,11.24-35
- (iii) The University had a long standing and diverse set of dramatic interests and activities. p.35,11.9-10
- 10 (iv) Public use of the Centre would be assisted by the University's tradition of drawing members of the community into a variety of educational pursuits through its Adult Education Department, and summer and weekend schools would be organized to ensure maximum use of the Centre. p.36,11.1-10
- 20 (c) planned a large auditorium with two small theatres one of which would be used for experimental theatre; with provision made for practice rooms, workshop areas, and facilities for all forms of theatre including music, dance and ballet, music drama, prose drama, cinema art, radio and television drama; and with the possible provision of an open air theatre. p.36,11.17-37
- (h) Subsequently the major part of the residuary estate then available for distribution was paid and transferred by the Appellant to the University of Sydney. p.5, 11.5-8

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- p.5,11.9-16 (j) On 16th January 1967 the Appellant paid to the Respondent the sum of \$40,400.00 as a payment in advance of the amount of death duty then estimated by the Appellant to be properly payable on the basis that the dutiable estate of the deceased did not include his residuary estate.
- p.5, 11.9-16 (k) On 16th October 1967 the Respondent issued to the Appellant a notice of assessment of death duty payable in respect of the estate of the deceased including in that assessment the sum of \$429,370.00 as duty attributable to the residuary estate of the deceased the amount of which was assessed at \$1,717,480.00. 10
- p.46 (l) On 3rd December 1970 the Appellant requested the Respondent to amend his said assessment of death duty on the footing that the residuary estate of the deceased would be paid to the University of Sydney thus attracting exemption from death duty by virtue of the provisions of the Educational Institutions (Stamp Duties Exemption) Act, 1961. 20
- p.47, 1.20 (m) On 3rd March 1971 the Respondent advised the Appellant that death duty was properly payable in respect of the bequest of the residuary estate.
- (n) On 16th March 1971 the Appellant paid to the Respondent the balance of death duty payable in accordance with the aforesaid assessment, which included the said sum of \$429,370.00 referable to the residuary estate of the deceased. The said

sum was so paid under protest, on the ground that the residuary estate was wrongly included as part of the dutiable estate in the said notice of assessment.

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p.49,11.17-27

Contentions of Appellant at the Hearing

7. The Appellant at the hearing argued that:

(a) The jurisdiction of the Court under Section 140 Stamp Duties Act to entertain the Appellant's claim was established.

10 (b) The elements necessary to exclude liability for death duty in respect of the residuary estate pursuant to Educational Institutions (Stamp Duties Exemption) Act are established in that:

(i) The University of Sydney is an educational institution to which such Act applied.

p.57, 1.11

(ii) The disposition of the residuary estate in the Will, together with its implementation by the Plaintiff selecting the University and paying to it the residuary estate, constituted a gift.

pp.57-58

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(iii) The property comprised in the said gift passed from the deceased as donor to the University as donee by this composite transaction, as in the case of exercise of a special power of appointment contained in a Will or settlement.

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(iv) The gift was one made to the University, albeit that it was limited to be applied for the purposes specified in the Will.

(v) The exempting provision in the above Act is not limited to gift inter vivos; nor is it limited in operation to the date of death of the deceased. The only temporal limitation involved is that by reason of Section 140 Stamp Duties Act, the transaction constituting the gift must be completed within 3 years after payment of the duty sought to be recovered.

p.59

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(c) The residuary estate can be dutiable only under either Section 102(1) or Section 102(2) (a). Being disposed of for charitable purposes, the residuary estate is not property to which any person becomes entitled under the Will so as to attract liability under Sub-section 1 of Section 102. The actual property of the deceased is outside the scope of Sub-section 2(a) of Section 102 which deals only with property not vested beneficially in the deceased at his death.

p.61,11.20-28

pp.62-63

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Contentions of Respondent at the Hearing

(a) Death duty must be assessed as at the date of death and by reference to the circumstances then existing.

p.59,11.11-14

(b) At the date of death of the deceased the University of Sydney had not been selected as the body to which

the residuary estate should be transferred and it was not then absolutely certain that it would be selected. Hence it could not be said that the residuary estate was property comprised in a gift bequest or devise made to the University of Sydney.

p.59,11.14-19

(c) It is not correct that the matters alleged by the Appellant as together constituting a gift by the deceased to the University of Sydney create such a gift.

p.61, 1.7

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(d) The exemption in the case of gift, bequest or devise made to a designated educational institution applied only to a gift, bequest or devise made for the proper purposes of such institution.

p.61,1.11

(e) The gift alleged in this instance is not one for the proper purposes of the University of Sydney.

p.61, 1.14

(f) A claim for exemption from duty is not made out if the property in question could in the circumstances existing at date of death be applied consistently with the relevant trusts to a purpose not within the exemption.

p.61,1.18

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(g) The residuary estate is dutiable under either Section 102(1) or Section 102(2) (a).

Reasons for Judgment of Waddell J.

9. Waddell J. dismissed the Summons for the reasons that:

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- p.59,11.26-29
- (a) The determination of the operation of Section 2(3) of Educational Institutions (Stamp Duties Exemption) Act turns on two questions, namely:
- (i) When in accordance with the provisions of the Stamp Duties Act did that Act apply to the property in question.
- p.60,11. 3-6
- (ii) Was the property at that time comprised in a gift, devise or bequest to a designated institution.
- p.60, 1.7
- (b) The Stamp Duties Act became applicable to the property comprised in the residuary estate of the deceased at the date of his death. 10
- p.60, 1.15
- (c) At the date of death of the deceased the residuary estate was not property comprised in a gift, devise or bequest to the University of Sydney because it had not then been selected as the organisation to which the residuary estate was to be transferred.
- p.60, 1.18
- (d) Hence, the application of the Stamp Duties Act to the residuary estate was not denied by the exempting provisions of Educational Institutions (Stamp Duties Exemption) Act. 20
- p.61,11.4-19
- (e) This finding rendered it unnecessary to consider further arguments in relation to the operation of the exempting provisions of Educational Institutions (Stamp Duties Exemption) Act.

- (f) The context in which Sub-section 1 and 2(a) of Section 102 Stamp Duties Act appear does not deprive the introductory words of Sub-section 2(a) of what would otherwise be their prima facie wide meaning. p.63, 1.24
- (g) Accordingly, if the property included in the residuary estate of the deceased was not properly included in his dutiable estate pursuant to Sub-section 1 of Section 102, it was properly included under Sub-section 2(a). p.63,11.25-29
- (h) The property comprising the residuary estate of the deceased was not wrongly included in his dutiable estate. p.64, 1.4
- (j) The Appellant was not entitled to a refund of the duty already paid in respect of the residuary estate of the deceased. p.64,11.5-6

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Submissions of the Appellant

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10. The general submission of the Appellant is that the property comprising the residuary estate of the deceased was wrongly included in the dutiable estate for death duty purposes of the deceased.

11. In support of its general submission the Appellant submits two arguments, namely:-

- (a) That the Stamp Duties Act does not apply to the property comprising the residuary estate by reason

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of the provisions of the Educational Institutions (Stamp Duties Exemption) Act, 1961.

- (b) That the residuary estate was not within either of the classes of property mentioned in Section 102(1) or (2) (a) Stamp Duties Act and accordingly did not form part of the dutiable estate of the deceased.

12. Under its first argument the Appellant makes the following submissions:

p.57, 1.10

- (a) The University of Sydney is an educational institution to which the Educational Institutions (Stamp Duties Exemption) Act, 1961 applies.

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- (b) (i) The Educational Institutions (Stamp Duties Exemption) Act comprehends a relevant disposition to a relevant educational institution:

- (a) Absolutely,
(b) For all or any of its purposes,
(c) For purposes directly or indirectly benefiting such institution.

- (ii) The purposes of the trusts affecting the residuary estate are within the scope of the purposes of the University of Sydney under category (b) above. They also qualify for inclusion in category (c) above. (The Royal Choral Society v. Commissioner of Inland Revenue 1943 2 All E.R. 101 at 104-105; Minahan v. Commissioner of Stamp Duties 26

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(iii) Accordingly, the disposition whereby the residuary estate became vested in the University of Sydney was one "made to" an "educational institution to which this Act applies" within the meaning of Educational Institutions (Stamp Duties Exemption) Act.

10 (c) The disposition whereby the residuary estate was transmitted from the deceased to the University of Sydney was a gift.

(i) Thus -

(a) No consideration was involved, the disposition being wholly voluntary, and

20 (b) Apart from the interposition of the Appellant as Executor of the Will, the absolute legal and beneficial interest of the deceased in the property comprising the residuary estate passed from the deceased as donor to the University as donee in the manner and form directed by the deceased.

(ii) The gift was composed of the provisions of the Will coupled with the selection of the University made thereunder. The Will initiated and provided the framework of the gift which

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was filled in and completed by the selection of the University in fulfilment of the direction in the Will, by analogy with the principle governing the operation of special powers of appointment. This principle is stated by Lord Romer in *Muir v. Muir* (1943 A.C. 468 at p. 483), (see also *Pedley-Smith v. Pedley-Smith* 88 C.L.R. 177 at pp. 189 et seq; *In Re Beesty's Will Trusts* 1966 Ch. 223).

- (iii) A gift is not required by the Educational Institutions (Stamp Duties Exemption) Act to be made at any specified time. Hence a gift completed after the date of death of the deceased attracts the operation of this Act, which takes effect retrospectively in relation to such gift. The provisions of Educational Institutions (Stamp Duties Exemption) Act unlike, for example, the exempting provisions of Section 8 (5) Estate Duty Assessment Act 1914 as amended are not limited in their operation to the date of death of the deceased. Thus, authorities such as *Public Trustee v. Federal Commissioner of Taxation* (112 C.L.R. 326) and *Ryland v. Federal Commissioner of Taxation* (128 C.L.R. 404) are inapplicable. 10 20
- (iv) Accordingly, the residuary estate, as the subject of the gift constituted as above-mentioned, was beyond the reach of the Stamp Duties Act.

(d) As an alternative to the submission in paragraph 12(c) above, the disposition whereby the residuary estate was transmitted from the deceased to the University of Sydney was a bequest.

(i) The residuary bequest was incomplete until the legatee was selected.

(ii) The selection was merely the mode of effectuating the disposition of the residuary estate by identifying the residuary legatee.

10 (iii) Although the residuary estate was to be vested in University of Sydney upon trust to be applied for the specified purposes, the disposition qualified as a bequest made to the University for the purposes of the Educational Institutions (Stamp Duties Exemption) Act.

13. Under its second argument the Appellant makes the following submissions:

20 (a) The residuary estate is brought to duty for death duty purposes only under Section 102(1) or (2) (a) Stamp Duties Act, 1920 as amended.

(b) Being disposed of for charitable purposes, the residuary estate is not property to which any person becomes entitled under the Will so as to attract liability under Section 102(1) (Lemm v. Federal Commissioner of Taxation 66 C.L.R. 399

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at 410; Attorney-General (N.S.W.) v. Perpetual
Trustee Company Limited (63 C.L.R. 209 at 222).

- (c) The actual property of the deceased is outside the scope of Section 102 (2) (a) which deals only with property not vested beneficially in the deceased at his death. (Thompson v. Commissioner of Stamp Duties 68 S.R. (N.S.W.) 305 at 315 and on appeal 1969 1 A.C. 320 at 332-3). This is plain from the general scheme of Section 102.

Reasons

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14. The Appellant respectfully submits that the appeal should be allowed with costs AND that it be ordered that:

- (a) The order of the Supreme Court herein be set aside, and
- (b) In lieu thereof there be a declaration in terms of paragraph 1 (a) of the Summons, and an order and judgment for payment by the Respondent to the Appellant of the sum of \$429,370.00 with costs

for the following, among other, reasons:

- (a) The property comprising the residuary estate of the deceased was wrongly included in the dutiable estate for death duty purposes of the deceased. 20
- (b) The Stamp Duties Act does not apply to the property comprising the residuary estate of the deceased by

reason of the provisions of the Educational Institutions (Stamp Duties Exemption) Act, 1961.

- (c) The residuary estate was not within either of the classes of property mentioned in Section 102 (1) or (2) (a) Stamp Duties Act, and accordingly did not form part of the dutiable estate of the deceased.
- 10 (d) That His Honour was in error in determining the operation of the Educational Institutions (Stamp Duties Exemption) Act by reference to the time at which the provisions of the Stamp Duties Act applied to the residuary estate, and in enquiring whether the residuary estate was at that time comprised in a gift, devise or bequest to a designated institution.
- 20 (e) That His Honour should have first ascertained that a gift or bequest of the residuary estate was made to the University of Sydney, and thereupon have held that the residuary estate had been wrongly included in the dutiable estate under the Stamp Duties Act of the deceased.
- (f) His Honour was in error in holding that the residuary estate was properly included in the dutiable estate under Section 102 Stamp Duties Act.
- (g) His Honour should have made a declaration and order in favour of the Appellant.

J. B. KEARNEY, Q.C.

P. J. K. COHEN