

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The National Trustees, Executors, and Agency Company of Australasia, Limited, v. The General Finance Agency and Guarantee Company of Australasia, Limited, from the Supreme Court of Victoria; delivered the 16th May 1905.

Present at the Hearing :

LORD DAVEY.

LORD LINDLEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

[*Delivered by Sir Ford North.*]

This is an appeal from a Judgment of the Full Court of the State of Victoria, affirming the Judgment of a Beckett, J., in the Supreme Court, holding the Appellants liable for breach of trust in not having paid to the Respondents their share in a trust estate.

The material facts are as follows :—

Roderick McDonell (who died in 1853) bequeathed his personal estate to trustees, upon trust to get in the same, and pay one clear fourth part to his wife absolutely; and to invest the residue, and pay the annual income to his daughter Ann Howe during her life, and after her death to hold the principal in trust for her children who should attain 21, or if daughters marry, in equal shares.

Six children of Ann Howe attained vested interests, and one of them, Mary Grace Howe, intermarried with John Fraser in July 1872.

Mary Grace Fraser died in August 1876 intestate, and administration to her estate was

granted to her husband John Fraser, who by the law of the Colony as it then stood was absolutely entitled to the whole of her personal estate. She left two children only.

By an Act of the Colony which came into operation on the 13th December 1884 (48 Vict., No. 828, Sect. 25) it was provided that the estate, real and personal, as to which any married woman died intestate after the commencement of the Act should, after payment of duties and funeral, administration or testamentary expenses and debts, be distributable between her husband and her children or next of kin, in the like manner and proportions in which the estate, real and personal, as to which a married man died intestate was distributable between his widow and his children or next of kin.

The Married Women's Property Act 1884.

By an indenture dated the 6th February 1891, John Fraser assigned to the Respondents all his share and interest in the personal estate of the testator McDonell, and in the estate of the said Mary Grace Fraser, whether as her husband, or administrator, or otherwise, by way of mortgage, for securing 650*l.*, with interest at 20 per cent. per annum.

John Fraser died intestate in June 1894, without having paid any of the principal or interest due on the mortgage. No administration was taken out to him.

By an indenture dated the 8th July 1895 the Appellant Company (hereinafter called the Trustee Company) and their managing director, Walter Madden, were, in exercise of a power contained in McDonell's will, appointed trustees of that will, and the investments representing the residue of his estate were transferred to the new trustees.

On the 18th of December 1897 Anne Howe, the tenant for life, died, and the trust estate became distributable.

The Trustee Company employed Messrs. Smith and Emmerton, a firm of high standing at Melbourne, as their solicitors in connection with McDonell's trust; and they in March 1898 took out in the name of the Trustee Company letters of administration *de bonis non* to Mrs. Fraser, with full knowledge of the actual date of her death. Notwithstanding this the solicitors by some extraordinary slip advised the Trustee Company and their officers that the two children of Mrs. Fraser were entitled, in equal shares, to her share in McDonell's estate; as to two-thirds thereof in their own right, and as to one-third as beneficiaries under their father, assuming that he left no debts.

On the 13th June 1898 Mr. Joy, then acting as liquidator of the Respondents, wrote to the manager of the Trustee Company reminding them of the mortgage, and warning them against distributing any part of McDonell's trust estate, as the Respondents were entitled to John Fraser's proportion.

On the 30th September 1898 Mr. Macoboy, the secretary of the Trustee Company, who had charge of this estate under Mr. Madden, the managing director, and who was in personal communication with the solicitors on the subject, had an interview with Joy with respect to the assignment; and he states that he informed Joy that his Company would get one-third and the Frasers two-thirds; and that Joy raised no question as to this. The Respondents seem to have accepted this statement as to their rights without verification, though a reference to their mortgage would have shown the date of Mrs. Fraser's death.

Questions were raised by John Fraser's children as to the validity of his mortgage, and what, if anything, was due upon it; and, in consequence, one-third of Mrs. Fraser's share was, under the

Colonial Act for the Relief of Trustees, paid into Court by the Trustee Company in March and August 1899. The other two-thirds were, about August 1899, divided between her two children. It does not appear how the money paid into Court was ultimately dealt with.

It is shown by the evidence of Mr. Macoboy that the solicitors of the Trustee Company did, at a subsequent date, discover and inform that Company that they had made a mistake in advising them that J. Fraser was entitled to one-third only; but no information as to this was given to the Respondents. They seem, however, to have subsequently discovered the mistake for themselves, and on the 30th December 1902 their solicitors wrote to the Trust Company that the Respondent Company, as Fraser's assignee, was entitled to the whole of his late wife's share, or so much thereof as would satisfy their claim, and asked for a statement of Mrs. Fraser's estate; to which, on the following day, Mr. Madden made the disingenuous answer that the money was paid into Court by the Trust Company in 1899. The Respondents' solicitors however insisted upon their claim to the whole of the share in the trust funds to which Mrs. Fraser was entitled; and not having received any satisfactory reply, the Respondents, on the 11th of March 1903, issued the writ in this action to recover the amount improperly paid by the Trustee Company to her children, and obtained judgment in their favour for 673*l.* 18*s.* 10*d.* and interest. This was affirmed on appeal, and the present is an appeal from those decisions.

The Appellants' counsel rested their case upon three grounds:—

1. That the Trust Company had paid the moneys to Mrs. Fraser's children upon the advice of competent legal advisers, and, therefore, there was no breach of trust;

2. That the Respondents were estopped by their conduct from disputing the validity of the payment; and
3. That the Trust Company were protected by Section 3 of the Trusts Acts 1901.

With respect to the *first* point, it is clear beyond all question that John Fraser was entitled to the whole of his wife's share in the trust estate, and not to one-third only; and that the payment of two-thirds to Mrs. Fraser's children instead of to the Respondents was a breach of trust. The fact that such payment was made through the bad advice of the solicitors of the Trust Company is no defence.

In *Doyle v. Blake*, 2 Sch. and Lef. 231, at p. 243, Lord Redesdale said, "I have no doubt that they" (the executors) "meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer." And there are many similar decisions in the books.

The Appellants relied on the case of *Speight v. Gaunt*, 9 App. C. 1, in which a trustee employed a broker to purchase certain securities for a trust. The broker said that he had done so, and produced a bought note and asked for the money to complete as next day was pay day, and the trustee gave him the necessary cheques, which the broker misapplied. In a suit to make the trustee liable, it was held that the payment to the broker was made in the usual and regular course of business, and that the trustee was not liable; in other words there was not any breach of trust. The present is a very different case.

The *second* point raised for the Appellants was that the Respondents' conduct induced them to believe that they admitted the title of Mrs. Fraser's children to the two-thirds, and that they acquiesced in and assented to the payment to them. Unfortunately for the Appellants there are no facts upon which such an argument can be based. There is not a shred of evidence to show that the Respondents were consulted about, or approved of, or assented to, or even were aware of, such payment being made. It is the common case of all parties that at that time everyone believed that John Fraser, and the Respondents through him, were interested in one-third only, and that the application of the rest of the fund was a matter in which the Respondents had no concern. Any request to them to concur in the payment of the two-thirds to the children would probably have led to an investigation of the facts, and resulted in the institution of this action some years before 1903. It is true that the Respondents did not ask for more than one-third; but they had been informed by the Trust Company that this was all to which they were entitled, and the Trust Company cannot complain that the Respondents accepted and acted on that statement. They did not discover the error till long afterwards. There is no evidence that they in any way misled the Trust Company; on the contrary, the Trust Company misled them.

The *third* point raised on the Appellants' behalf was that, even if there was a breach of trust, they should be relieved therefrom by virtue of Section 3 of the Trusts Act, 1901, which corresponds with Section 3 of the English Act, 19 & 60 Vict., c. 35. That Section is as follows:—"If it appears to the Supreme Court "that a trustee is or may be personally liable "for any breach of trust, whether the transac- "tion alleged to be a breach of trust occurred

“ before or after the passing of this Act, but
“ has acted honestly and reasonably, and ought
“ fairly to be excused for the breach of trust,
“ and for omitting to obtain the directions of the
“ Court in the matter in which he committed
“ such breach, then the Court may relieve the
“ trustee either wholly or partly from personal
“ liability for the same.” The Courts in the
Colony have found that the Appellants acted
honestly and reasonably, and their Lordships are
prepared to deal with the case upon that footing.
Mr. Terrell contended that these two things
being established, the right to relief followed as a
matter of course; but that is clearly not the
construction of the Act. Unless both are proved
the Court cannot help the trustees; but if both
are made out, there is then a case for the Court
to consider whether the trustee ought fairly to
be excused for the breach, looking at all the
circumstances. It is a very material circum-
stance that the Appellants are a limited Joint
Stock Company, formed for the purpose of
earning profits for their shareholders; part of
their business is to act as trustees and executors;
and they are paid for their services in so acting
by a commission which the law of the Colony
authorizes them to retain out of trust funds
administered by them, in addition to their costs.
What they now ask the Court to do is to allow
them to retain a sum of money to which the
Respondents’ title is clear, in order thereby to
relieve the Trust Company from a loss they
have incurred in the course of their business by
reason of their having paid a like sum to wrong
parties. The position of a Joint Stock Com-
pany which undertakes to perform for reward
services it can only perform through its agents,
and which has been misled by those agents to
misapply a fund under its charge, is widely
different from that of a private person acting as

gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the Appellants, their Lordships think it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the Respondents who have committed no fault, should lose their money to relieve the Appellants who have done a wrong, and have denied the Respondents' title. And that is not quite all. If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their *cestui que trusts*. In the present case there seems to be some ground for thinking that other proceedings were open to the Trust Company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the Trust Company have taken any such steps, or made any attempt whatever to replace the fund or relieve the Respondents from loss; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so. It may be that the solicitors would be willing or might be compelled to make good the loss, if the Trust Company should find they cannot obtain relief elsewhere. The Courts in the Colony held that under these circumstances the Appellants had not made out any case for relief under the Act; and their Lordships agree with them.

Their Lordships will, therefore, humbly advise His Majesty that this Appeal should be dismissed. The Appellants must pay the costs.
