Privy Council Appeal No. 6 *of* 1958

Clifford John Chick and Jack Wesley Chick - - *Appellants*

v.

The Commissioner of Stamp Duties - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1958

Present at the Hearing:

VISCOUNT SIMONDS
LORD TUCKER
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* VISCOUNT SIMONDS]

This appeal, which is brought from a judgment of the Supreme Court of New South Wales, arises upon a case stated by the respondent, the Commissioner of Stamp Duties of New South Wales, under Section 124 of the New South Wales Stamp Duties Act, 1920-1956. The question which it raises is whether certain pastoral property near Gurley known as "Mia Mia", which on the 21st April, 1952, the date of the death of John Chick (who will be called "the deceased"), belonged to his son Clifford John Chick, should be included in the dutiable estate of the deceased. The respondent claimed that it should be included and the Supreme Court upheld his claim. Against that decision the appellants, the executors of the deceased, appeal.

The respondent rests his claim upon Section 102 (2) (*d*) of the Act which at the relevant date was in the following terms:—

> 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:—
>
> (2) (*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.

The material facts can be briefly stated. On the 19th February, 1934, the deceased transferred by way of gift to his son the appellant Clifford John Chick the property "Mia Mia" together with the improvements thereon. This gift was made without reservation or qualification or condition. The donee was then living in a homestead erected on the property and continued to do so until the death of the deceased. It is not in dispute that he assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the

deceased or of any such benefit to him as is mentioned in the subsection. The question is whether he also thenceforth retained it and this depends on the impact of the subsection on the facts next to be stated.

On the 25th July, 1935, some seventeen months after the gift, the deceased and the said Clifford John Chick and another son, the appellant Jack Wesley Chick, entered into an agreement to carry on in partnership the business of graziers and stock dealers under the name or style of John Chick & Sons. The agreement provided (by Clause 1) that the partnership should commence or be deemed to have commenced on 1st July, 1935, and, subject to the conditions thereof, should continue until dissolved in manner thereinafter appearing, (by Clause 2) that the deceased should be the manager of the said business and that his decision should be final and conclusive in connection with all matters relating to its conduct, (by Clause 4) that the capital of the business should consist of the livestock and plant then owned by the respective partners or thenceforth to be acquired in connection with the business, (by Clause 5) that the said business should be conducted on the respective holdings of the partners at or near Gurley and such holdings should be used for the purposes of the partnership only, (by Clause 12) that the partnership might be terminated as therein mentioned and (by Clause 13) that any and all lands held by any of the partners at the date of the agreement or acquired afterwards should be and remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership and any such partner holding any such land should have and retain the sole and free right to deal with the same as he might think fit.

In pursuance of this agreement each of the partners brought into the partnership livestock and plant previously owned by him. Each of them also at the date of the agreement owned a property near Gurley (the property of Clifford John Chick being "Mia Mia") and their three properties were thenceforth used for the depasturing of the partnership stock. This continued up to the death of the deceased. In computing the final balance of his estate for the purposes of the Act the respondent included the value of "Mia Mia", thus bringing up the total amount of duty chargeable from £13,590 to £27,100 11s. 6d. He contended that the facts which have been stated precluded the appellants from claiming that the bona fide possession and enjoyment of the property, though it might have been assumed by the donee immediately upon the gift, was thenceforth, that is at all times until the death of the deceased, retained by him to the entire exclusion of the deceased or any such benefit to him as is mentioned in the subsection. The Supreme Court upheld this contention and their Lordships have no doubt that they were right in doing so.

The respondent took his stand upon the plain words of the Section. How, he asked, could it be said that the deceased was entirely excluded from the property, the subject of the gift, or from the possession and enjoyment thereof, when for some 17 years before his death he had been a member of a partnership, whose right it was to agist their stock upon it, and himself moreover was the manager of the partnership business with the power to make final and conclusive decisions upon all matters relating to it. The "objective and outward facts" (to use an expression of Isaacs J. in *Thompson's* case, 40 C.L.R. 394) were, he urged, wholly inconsistent with such exclusion. To this simple presentation of the case no adequate answer, as it appeared to their Lordships, was given by the appellants. Whatever force and effect might be given to Clause 13 of the partnership agreement, upon which the appellants appeared to place some reliance, other parts of the agreement and in particular Clause 5 put it beyond doubt that the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted.

It is however right to refer to some of the contentions which were advanced on behalf of the appellants.

In the first place it is not disputed that the property was given outright by the deceased to his son. As was said by Dixon, C.J., in *Owens* case 88 C.L.R. 67 at p. 88, " if ever there was a gift of an estate in fee simple carrying the fullest right known to the law of exclusive possession and enjoyment, surely this was such a gift ". It follows that the decision of this Board in *Munro's* case ([1934] A.C. 61), upon which the appellants relied, has no application to the present case. It must often be a matter of fine distinction what is the subject matter of a gift. If as in *Munro's* case the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the Section not to be excluded from possession and enjoyment of that which he has given. This view of the Section, which was re-affirmed in *St. Aubyn* v. *Attorney-General* ([1952] A.C. 15 at p. 21) upon a consideration of a similar section in a British statute, need not be further elaborated. But the question may arise and, having arisen, may lead to a difference of opinion what is the subject matter of the gift. It was, as it appears to their Lordships, for this reason that in *Owens* case Williams, J., and Taylor, J., dissented from the majority of the Court. In the present case there is no room for any such difference.

Then it was contended that the Subsection had no operation because the partnership agreement was an independent commercial transaction for full consideration later than and in no way related to the gift and was a mode of enjoyment by the donee of his property and an exercise by him of the possession of it. (These are the words of the appellants' second formal reason.) In this reason there are several elements. The partnership agreement was " later " than the gift. This point was not pressed by learned counsel for the appellants. If possession and enjoyment are " thenceforth " to be retained by the donee, it is clearly irrelevant that there is an interval between the dates when the donor is excluded and ceases to be excluded. Nor is there wanting ample authority which shows that this is an irrelevant consideration. A recent example is *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of New South Wales* (*Davies' Case*) [1956] A.C. 512. Next, it was an " independent commercial transaction for full consideration ". It is to be assumed that it was an " independent " transaction : there was no evidence to the contrary. But the Subsection says nothing about independent transactions. The sole question is one of fact—was the donor excluded? If he was not excluded, it is not relevant to ask why he was not excluded. Equally with regard to the transaction being " commercial " and " for full consideration ". Their Lordships see no reason why a gloss should be put upon the plain words of the Subsection by excluding from its operation such transactions. As long ago as 1912 in *Lang* v. *Webb*, 13 C.L.R. 503 (a case where a testatrix gave certain blocks of land to her sons and on the same day took leases from them of the same land) Isaacs, J., at p. 517 said " The lease however gave to the donor possession and enjoyment of the land itself which is a simple negation of exclusion and brings the case within the statutory liability. It was argued that as the rent was full value the lessee's possession and occupation were not a benefit. The argument is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor ". This view of the Subsection has never been departed from and their Lordships respectfully adopt the words of Isaacs, J., in the present case. It is irrelevant that the donor gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the land that he had given to his son.

Then it is said that the transaction was " in no way related to the gift and was a mode of enjoyment by the donee of his property ". The words " related to the gift " are no doubt an echo of the words " referable to the gift " which are to be found in *Munro's* case and *St. Aubyn's* case and are lucidly explained by Dixon, C.J., in *Owens* case at p. 85 and at an earlier date by Owen, A.J., in *Rudd's* case, 37 N.S.W. 366, at p. 392. They might become of importance if it was the second limb of the subsection which

was under consideration and the question therefore was whether the donor had been entirely excluded from any benefit of whatsoever kind. But it is difficult to see what bearing they have when the simple question is whether the donor has been excluded from the subject matter of the gift, a pastoral property known as " Mia Mia ", and the clear answer is that he has not. Finally, the words " was a mode of enjoyment by the donee of his property " may be linked with the appellants' contention that the subsection was not applicable because (again to cite the formal reason) " neither the partnership agreement nor the use of the property pursuant thereto impaired or detracted from bona fide possession and enjoyment by the donee of the property given." This contention in their Lordships' opinion involves a misconception, for which the subsection provides no justification. It may be that the donee can make no better use of the property given to him than, for instance, by leasing it back to the donor. The question still is whether as a fact the donor has been excluded. This appears to be the contention raised in another form that a commercial transaction is not within the subsection. The answer is that the possession and enjoyment by the donee of the property given to him in the manner most advantageous to himself are by no means incompatible with the donor not being excluded from it. It was however natural that the appellants should refer to and rely on the case of *Oakes* v. *The Commissioner of Stamp Duties of New South Wales* [1954] A.C. 57. In that case the testator who owned a grazing property in New South Wales executed a deed poll under which as from July 1, 1924, he held the property upon trust for himself and his four children as tenants in common in equal shares. The deed gave him wide powers of management and in particular provided that in addition to reimbursing himself all expenses of administration he was to be entitled to remuneration for all work done by him in managing the trust property on which he resided with his family in his capacity as trustee and manager in the same manner and as fully in all respect as if he were not a trustee thereof. He continued to manage the trust property until his death receiving certain varying sums annually as remuneration and after deducting these and other outgoings and expenses he divided the profits from the property into five equal shares crediting one share to himself and one to each of his children. The children's shares he applied during their minority for their maintenance and education and paid them to the children when they came of age. The remuneration taken by the testator for managing the property was assumed to be appropriate and reasonable for any other manager.

Upon these facts the Commissioner claimed that the whole of the trust property should be included in the testator's estate for the purpose of duty. This claim was upheld by the High Court (85 C.L.R. 386).

The decision of the High Court was affirmed by this Board in a judgment delivered by Lord Reid, in the course of which certain observations were made which taken out of their context appears to be favourable to the appellants. It had been argued on behalf of the Commissioner that the testator derived a benefit within the meaning of the Subsection from the fact that he had applied the trust income in the maintenance of his children and, if it had not been available, would have had to spend more of his own. This contention was rejected, Lord Reid saying " . . . their Lordships will assume that there was some advantage to the deceased: but that advantage was not at the expense of the children and did not impair or diminish the value of the gift to them or their enjoyment of it. It is possible for a donee in the full and unrestrained enjoyment of his gift to use or spend it in a way that happens to produce some advantage to the donor without there being any loss or disadvantage to the donee. But in their Lordships' judgment any such advantage is not a benefit within the meaning of the section. The point is not strictly covered by authority but the contrary view would be difficult to reconcile with what was said in the House of Lords in *St. Aubyn's* case ". A passage to the same effect appears later in the judgment. Having disposed of this contention the Board then dealt with the benefit derived by the testator from his management of the property and held that it was such a benefit as to bring the subsection into operation.

But it was the cited passage on which the appellants relied. Applying it to the facts of this case they said that the partnership agreement and all that was done under it by the deceased may have been beneficial to him, but the benefit or advantage derived by him did not impair or diminish the value of the gift of the property to the donee. On the contrary it was the method most advantageous to the donee of dealing with the property. It was therefore not a benefit to the donor which brought the subsection into operation. Their Lordships cannot accept this view. It is in flat contradiction to the law cogently stated by Isaacs J. in *Lang* v. *Webb* at an earlier stage in this opinion which has been consistently followed. Where the question is whether the donor has been entirely excluded from the subject matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. It must be observed that in *Oakes's* case the Board appears to have been dealing with the second limb of the subsection, the question being whether the donor was entirely excluded from any benefit to him of whatsoever kind or in any way whatsoever. It is possible that in the consideration of this very difficult part of the subsection it may be pertinent in some cases to enquire whether the benefit derived by the donor is one that impairs or detracts from the donee's enjoyment of the gift. Their Lordships with great respect think that this is a matter which may require further examination, but, as they have already said, they are clearly of opinion that it is not a relevant consideration where the question arises under the first limb of the subsection and is whether the donor has been entirely excluded from the subject matter of the gift, and they repeat that in the present case that question can only be answered in the negative.

Learned counsel for the appellants in the course of his argument conceded that he could only succeed if it was held that *Owens* case, 88 C.L.R. 67, to which reference has been already made, was wrongly decided. Their Lordships therefore think it right to say that they agree with the reasoning and conclusion of the majority of the High Court in that case.

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

(39415) Wt. 8021—25 100 7/58 D.L.

In the Privy Council

CLIFFORD JOHN CHICK

and

JACK WESLEY CHICK

v.

THE COMMISSIONER OF STAMP DUTIES

DELIVERED BY VISCOUNT SIMONDS

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