Privy Council Appeal No. 9 of 1959

The Commissioner of Estate and Succession Duties – – *Appellant*

v.

Trevor Bowring – – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF THE WEST INDIES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1960

Present at the Hearing

LORD REID

LORD COHEN

LORD KEITH OF AVONHOLM

[*Delivered by* LORD COHEN]

The question for the decision of the Board is whether Lady Gilbert-Carter, who died on the 12th November, 1953, in Boston, Massachusetts, was at the date of her death "competent to dispose" (within the meaning of that phrase in the Barbados Estate and Succession Duties Act, 1941), of property comprised in the Deed of Trust dated the 16th June, 1936, 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.

If she was so competent to dispose it is common ground that the respondent as an executor of her will dated the 15th March, 1952, is accountable under section 20 (1) of the Act for the estate duty payable in respect of the property comprised in the Deed of Trust; otherwise he is not so accountable notwithstanding that there was a passing of property within the meaning of section 6 (1) of the Act. There is no dispute between the parties as to the amount of duty exigible if the respondent is accountable for it.

It will be convenient in the first place to refer to those sections of the Act which deal with the questions of competency to dispose. They are sections 3 (*a*) and section 7 (*a*) which read as follows:—

> "3. For the purposes of this Act:—
>
> (*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."

"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."

In the course of the argument reference was also made to section 35 of the Act which so far as material provides as follows:—

"35. On the death of any person who dies after the commencement of this Act there shall be levied and paid, in addition to the estate duty imposed by this Act, a further duty called succession duty as set out in Schedule B hereto in respect of every interest or absolute power of appointment acquired or possessed by any person as the successor of the deceased in the property passing or deemed to pass on the death of the deceased and chargeable with estate duty."

The expression "absolute power" which appears in section 35 is perhaps used in contrast with conditional power, but it is contained in that part of the Act which deals with succession duty, and in their Lordships' opinion it throws no light on the meaning of general power in section 3 (*a*).

This case really turns on the construction of section 3 (*a*), but before dealing with that section their Lordships must consider the terms of the Deed of Trust. It was executed in the State of Massachusetts and it contained a provision that it should be governed by the laws of Massachusetts. Under it, in its original form, Lady Gilbert-Carter was entitled to the net income for her life together with such parts of principal as she might from time to time in writing request. After making provision for certain payments to be made on the death of Lady Gilbert-Carter, the Deed of Trust provided that after the death of the donor and after the foregoing payments had been made, 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.

Clause 4 is important and was in the following terms:—

"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".

Had the power thereby given to revoke the trust in whole without the necessity for anybody's consent been exercised clearly Lady Gilbert-Carter would have been competent to dispose of the property since there was no obligation on her to re-settle it. But she executed a number of Deeds of Amendment with the consent of the trustees in exercise of the more limited power given her under clause 4. It is unnecessary to consider these in detail. It is sufficient to say that prior to her death, clause 1 had been modified to read as follows:—

"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."

A more important amendment was made by revoking clause 4 and substituting the following clause therefor:—

"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."

Thus at the date of her death any revocation by her would be ineffective unless the trustees consented in writing to it.

It is common ground between the parties that the settlement must be considered in accordance with Massachusetts law and that the effect under that law of a provision reserving power to revoke a settlement with the consent of the trustees is correctly set out in section 330 (1) of the American Restatement of the Law of Trusts. The portion of that section relevant to the decision of the case before their Lordships reads as follows:—

> "If the settlor reserves a power to revoke the trust only with the consent of the trustee, he cannot revoke the trust without such consent. Whether the trustee can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent of the power conferred upon the trustee by the terms of the trust. To the extent to which discretion is conferred upon the trustee, the exercise of the power is not subject to the control of the court, except to prevent an abuse by the trustee of his discretion (see SS 187).
>
> "If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. Thus, if the trustee is authorized to consent to the revocation of the trust if in his judgment the settlor is in need, he cannot properly consent to the revocation of the trust if it clearly appears that the settlor is not in need. So also, if the trustee is authorized to consent to the revocation of the trust if in his judgment the beneficiaries of the trust are not in need, he cannot properly consent to the revocation of the trust if it clearly appears that the beneficiaries are in need.
>
> "There may be a standard by which the reasonableness of the trustee's judgment can be tested even though there is no standard expressed in specific words in the terms of the trust, and even though the standard is indefinite. Thus, it may be provided merely that the settlor can revoke the trust with the consent of the trustee. Such a provision may be interpreted to mean that the trustee can properly consent to the revocation of the trust only if he deems it wise under the circumstances to give such consent. In such a case the court will control the trustee in the exercise of a power to consent to the revocation of the trust where the circumstances are such that it would clearly be unwise to permit the revocation of the trust; as for example where the beneficiaries are wholly dependent upon the trust for their support, and the settlor desires to terminate the trust for the purpose of dissipating the property. So also, the circumstances may be such that it would clearly be unwise not to permit the revocation of the trust, and in such a case the court can compel the trustee to permit the revocation of the trust in whole or in part; as for example where a trust is created to pay the income to the settlor for life and to pay the principal on his death to a third person and it is provided that in the discretion of the trustee a part or the whole of the principal shall be paid to the settlor, and owing to a change of circumstances the income is insufficient for the support of the settlor who has no other resources, and the beneficiary in remainder has acquired large resources.
>
> "On the other hand, the trustee may be authorised to consent to the revocation of the trust with no restriction, either in specific words or otherwise, imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the trustee's judgment can be tested, and the court will not control the trustee in the exercise of the power if he acts honestly and does not act from an improper motive (see SS 187 and Comments i–k thereon). The power of the trustee in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries."

It was common ground between the parties that the power of revocation in the amended Deed of Trust which their Lordships have to consider fell within this last paragraph of the Restatement.

The learned Vice Chancellor, who had already considered the English cases of *re Dilke* [1921] 1 Ch. 34, *re Phillips* [1931] 1 Ch. 347, and *re Churston Settled Estates* [1954] 1 All E.R. 725, proceeded, after making the citation from the Restatement to which their Lordships have already referred, to consider a number of American cases. He then dismissed the appeal saying:—

> "I can find no standard of duty expressed or 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."

From this decision the respondent appealed and the appeal was heard by the Federal Supreme Court of Barbados. That Court by a majority (Hallinan C.J. and Rennie J., Archer J. dissenting) reversed the decision of the Vice Chancellor.

Hallinan C.J. said:—

> "With respect, I think that the learned judge misdirected himself in finding that the trustees owed any duty to the settlor to give their consent. I can find nothing in the passage he cited from Professor Scott nor in the evidence of the expert witnesses to support this conclusion.
>
> "All these witnesses agreed that under the terms of the Boston Trust the trustees had a complete discretion to give or withhold their consent provided they acted honestly and from a proper motive."

With this observation their Lordships respectfully agree.

After considering the English cases *re Phillips* (supra) and *re Joicey* 76 S.J. 459 the Chief Justice came to the conclusion that having regard to Massachusetts law which governed the interpretation of the Deed of Trust Lady Gilbert-Carter could not have disposed of the property comprised therein within the meaning of section 3 (*a*) of the Act. Their Lordships will refer later to the case of *re Phillips*. The decision in *re Joicey* is based on *re Dilke* and *re Phillips* and the case is so shortly reported as to be of no assistance to their Lordships in the present case.

Rennie J. considered the expert evidence as to Massachusetts law and said:—

> "The only conclusion one can come to on the totality of that evidence is that the Trustees possessed a wide discretion in relation to their consenting to the revocation of the trust and that the Courts of Massachusetts would not compel them to give their consent unless it could be shown that they acted dishonestly and from an improper motive. That restraining power of the Trustee amounts in my view to a fetter on Lady Carter's right to revoke the trust and is a sufficient fetter to render her not competent to dispose of the property as she thinks fit."

Archer J. dissented. After a detailed review of the English cases he said:—

> "I think that the criterion should be: 'Was there a way in which she could have made the property once more her own?' Not: 'Was there a way in which the Trustee could have frustrated her attempt to regain her property?' If she had obtained the consent of the Trustees to a total revocation of the trust, there being no provision for resettlement the revocation would have been unquestionably valid and there could not in that event have been any question as to her competency to dispose. There is no warrant for importing the conception of unreasonable Trustees in the matter: there is equally good, if not

> sounder, reason for assuming that the Trustees would have been reasonable persons and I do not believe that the determination of the settlor's competency can be made to depend on any such hypothesis. The weapon of veto was undoubtedly a fetter upon the settlor's power of revocation but so was it upon the power of appointment in *re Dilke* and *re Phillips* and yet repeated references to these cases continue to be made in recent decisions. The distinction between the authority of a Trustee to give or withhold consent to the exercise of a power where his consent is necessary to the validity of the exercise of the power and his authority where his discretion as to the selection of objects of the power is called into play seems to me to be well recognised. In my judgment, Lady Gilbert-Carter was competent to dispose because she could have made the trust fund her own as if no settlement had ever been made. I am not concerned with what the Trustees could, still less might, have done. I think that in popular language she was for practical purposes the owner because by revoking the trust she was free to deal with the trust fund in any way she pleased."

Their Lordships have cited this passage at length because it was on the argument there set forth that Mr. Peter Foster for the appellant principally relied. Their Lordships are unable to accept that argument. They agree that the question was, was there a way in which she could have made the property once more her own, but they do not agree that she could be said to have a way to make the property her own since the trustees were empowered to block that way. They prefer the view of Rennie J. in the passage they have cited.

The appellants relied on the provisions in Part I of the Finance Act, 1894, which deal with estate duty and especially on section 22 (2) (*a*) thereof which is for practical purposes identical with section 3 (*a*) of the Barbados Act. Mr. Foster referred in particular to the words " including a tenant in tail whether in possession or not ". He pointed out that under English law a tenant-in-tail in remainder could not dispose of the fee-simple without the consent of the protector of the settlement, yet for the purposes of Part I of the Finance Act, 1894, he was to be deemed competent to dispose of the property. He argued that by analogy a person in the position of Lady Gilbert-Carter who had a general power of revocation subject only to the limitation that the consent of the trustees was required to the revocation should be deemed competent to dispose of the property comprised in the settlement. Their Lordships are unable to accept this argument. It might be argued with equal if not greater force that the fact that it was thought necessary to make special provision for the case of the tenant-in-tail in remainder indicates that in other like cases the necessity for the consent of another to the exercise of a power would prevent the person entitled to the general power from being held competent to dispose of the property. In any event the argument from the reference to tenant-in-tail not in possession cannot be pressed in relation to the Barbados Act since the Barbados law as to estates tail contains no provision for a protector of the settlement.

There appears to be no decision directly in point either under the English Act or the Barbados Act, but Mr. Foster relied on the English decisions in *Re Dilke* and *Re Phillips* supra. In *Re Dilke* under a settlement made with the approval of the Chancery Division and the Master in Lunacy, Sir Charles Dilke a person of unsound mind not so found by inquisition, was given what would but for one provision have indisputably been a general power of appointment. That provision was that the consent and concurrence of the trustees of the settlement or a majority of three out of four of them should be required to an exercise of the power. Sir Charles recovered and by a deed to which the trustees consented he appointed that the trustees should after his death stand possessed of the trust funds in trust for such person or purposes as he should by will or codicil appoint. The question arose as to the validity of this appointment. It was argued that under such a power before they consent the trustees must know the persons who are to be appointed,

if not by name then by description, they must consent to the appointment of those particular persons, and they have no power to consent to the appointment of persons to take under this appointment who were not known to them at the time when they gave their consent. That argument was rejected both by Peterson J. and by the Court of Appeal. Lord Sterndale M.R. in the Court of Appeal adopted the answer given by Peterson J. in the following terms:—

> "On the whole, I am of opinion that on the true construction of this clause the trustees were not required to approve of the persons who are to benefit under the exercise of the power of appointment or of the extent to which they are to benefit, but that the exercise of the general power is conditional upon their consent. In my view the true meaning of the clause is that it is equivalent to a declaration that the trustees are to stand possessed of the trust funds in trust for such person or persons as the testator shall by deed appoint, such appointment to be made with the consent and concurrence of the trustee or trustees."

Applying that decision to the present case it would be authority for the view that the trustees are not bound to make any enquiry as to the persons who can be entitled under the power of appointment. But if in the exercise of their very wide discretion they thought fit to make such enquiry or if they ascertained what the objects of the appointer in desiring to make the appointment were, it would their Lordships think be impossible to maintain that they were not entitled to take the information thus obtained into account in deciding whether or not to consent to the appointment.

In *Re Phillips* under a settlement a fund was given to such persons after the death of A as he should with the consent of the trustees appoint by deed, and the question arose whether the power having been exercised the fund was equitable assets for the payment of A's debts notwithstanding that the consent of the trustees to the exercise of the power was necessary. Maugham J. held that it was. He does not expressly state that the fund would have been equitable assets had the power not been exercised, and their Lordships do not think that the decision in this case which was based on an equitable doctrine is of any assistance to them in deciding the question of construction arising under section 3 (*a*) of the Barbados Estate and Succession Duties Act, 1941.

Their Lordships were also referred to *Re Triffitt's Settlement* [1958] 1 Ch. 853 in which a similar question arose to that which was decided in *Re Dilke*, and Upjohn J. applying *Re Dilke* and *Re Phillips* came to the conclusion that under the power then in question the trustees could consent to an appointment in the widest possible terms and were not under any duty regarding the selection of the objects of the power. That case does not carry the matter any further, specially having regard to fact that the power of appointment then in question was not a general power but a hybrid power having some attributes of general power and some attributes of a special power.

Their Lordships do not question the correctness of the decisions in the cases to which they have referred but they do not derive any assistance from them in deciding upon the true construction of section 3 (*a*) of the Barbados Estates and Succession Duties Act, 1941, or of section 22 (2) (*a*) of the Finance Act, 1894.

The only decision to which their Lordships will refer which contained observations having a direct bearing on that question is *Re Churston Settled Estates* [1954] 1 Ch. 334. In that case by a deed of 1895 estates were settled on such trusts as A and B (during C's life with her written consent) should by deed jointly appoint. By a deed of 1898, A and B, exercising that power with C's written consent, appointed the property to such uses and on such trusts as A, B and C should by deed jointly appoint. In each deed there were further provisions in default of appointment. The question that the Court had to decide was whether appointments under the powers of 1898 should be read back into the

resettlement of 1895 for the purpose of applying the rule against perpetuities to the limitations which they purported to create. In the course of his Judgment, Roxburgh J. found it necessary to consider whether the joint power of appointment with written consent in the deed of 1895 was a special power or a general power. He held that it was a special power. He had also to consider whether the joint donees of the power of appointment in the deed of 1898 could be treated as owners and he held that they could not and that such a power was wholly different from a general and absolute power. After observing that a person having a common general power of appointment is treated as though he were for all practical purposes the owner of the property comprised in the settlement conferring that power, he asked himself the question "ought that doctrine to be applied to a joint power of appointment or to a power of appointment to which the consent of somebody is required?" He then proceeded to consider the position where the power of appointment is a joint power, and basing himself on dicta which he described as of great authority, one in the Court of Appeal and the other in the House of Lords, in *Attorney-General* v. *Charlton* (2 Ex.D. 398) which in the House of Lords became *Charlton* v. *Attorney-General* (4 App. Cas. 427) he came to the conclusion that a joint donee of a power could not for all practical purposes be treated as an owner. Unfortunately he did not proceed to consider whether there was any difference for this purpose between a joint power of appointment and a power of appointment to which the consent of somebody is required. But their Lordships think from the form in which he stated the question he may be taken to have regarded the two powers as on like footing for the purpose of deciding the kind of question which their Lordships now have to consider. If that be his intention, their Lordships respectfully agree with him.

As their Lordships have already indicated in expressing their agreement with the passage they have cited from the judgment of Rennie J. they are satisfied that upon the true construction of section 3 (*a*) of the Barbados Estate and Succession Duties Act, 1941, a person cannot be said to have a general power making him competent to dispose of property within the meaning of that paragraph if the consent of the trustees is required to the exercise of that power, and that provision is so framed that the Court will not control the trustees in the exercise of the power if they act honestly and do not act from an improper motive. The Act is a taxing Act, and their Lordships would not be justified in giving to the words used an extension of meaning which in their Lordships' view they would not naturally bear.

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

(39234) Wt. 8109—53 100 8/60 D.L.

In the Privy Council

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DELIVERED BY LORD COHEN

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