



Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

REVISED COPIES ISSUED
State Reporting Bureau
Date: 11 December, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No S5438 of 2003

IN THE MATTER OF SYBIL MARY BRAYBROOK
AND WARWICK RUTLEDGE CHESTERS AS
EXECUTORS OF THE ESTATE OF BROOKE
DAVID GAREH (DECEASED)

BRISBANE

..DATE 02/12/2003

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: The applicants, Sybil Mary Braybrook and Warwick Rutledge Chesters, are the executors and the trustees of the estate of the late Brooke David Gareth ("the deceased"). Mrs Braybrook is the sister of the deceased. Mr Chesters was the deceased's solicitor. The deceased died on 2 October 2002. Probate of his last will made on 12 September 2002 was granted on 6 December 2002. The originating application filed on 20 June 2003 seeks directions under section 96 of the Trusts Act 1973 in relation to a number of matters which have arisen in respect of the administration of the estate.

In anticipation of the filing of the application the applicants provided drafts of the originating application, the statement of facts and the submissions of the applicants to each of the proposed respondents who are the beneficiaries under the will. These respondents were then served and there was no appearance when the matter was first heard in the Court on 24 July 2003. On that date his Honour Justice Fryberg declined to make the directions sought because he was not satisfied that the Court was in a position to investigate whether there were any matters that may be advanced to the advantage of the infant beneficiaries and suggested that an independent solicitor be appointed for that purpose.

An affidavit of solicitor Paul Dent, which was filed on 21 November 2003, was obtained as a result of that reservation. Mr Dent concluded that the interests of the infant beneficiaries had been appropriately considered and he could not suggest any interpretation of the will which was open

which would improve the position of the infant beneficiaries.
The respondents were notified of the adjourned hearing date
and there was no appearance by any of them for the hearing
which took place on 1 December 2003.

1

In October 2000 the deceased, together with Mrs Braybrook and
her husband Rodney Vernon Braybrook, completed the acquisition
of the land situated at 11 Star Avenue, Mermaid Beach ("the
land") as joint tenants. All the funds for the purchase of
the land were provided by the deceased. At the time the
deceased and the Braybrooks contracted to purchase the land a
written explanation of the effect of the death of a joint
tenant was provided to the deceased and the Braybrooks.
Subsequently instructions were provided by the deceased and
the Braybrooks that the land was to be acquired by them as
joint tenants.

10

20

30

The deceased and Mr Braybrook were the directors of a company
Gabro Developments Pty Ltd ("Gabro") in which each held 50 of
the issued shares. Gabro was formed or acquired on
accountant's advice for the purpose of carrying out the
construction of the duplexes on the land. An agreement dated
18 December 2001 was signed by the deceased and the Braybrooks
as the owners of the land by which Gabro was to construct the
duplexes on the land for the owners for a fixed price of
\$450,000. The agreement was not signed on behalf of Gabro.
Gabro was not a licensed builder. Gabro, however, acted in
accordance with the agreement and contracted with a licensed

40

50

builder by an agreement in writing dated 19 December 2001 to
construct the duplexes on the land.

1

At the date of the deceased's death the duplexes had been
substantially completed. In about March 2002 the deceased
transferred from his Bank of Bermuda Hong Kong account an
amount of approximately \$A331,800 to an Australian bank
account and such funds were largely paid to Gabro. As at the
date of the deceased's death he had paid \$333,300 into Gabro
and Mr Braybrook had paid \$49,950 into Gabro. Subsequent to
the date of death of the deceased Mr Braybrook paid a further
\$30,550 into Gabro. The total amount paid to Gabro by Mr
Braybrook was \$80,500. The total amount paid into Gabro by
the deceased and Mr Braybrook was \$414,800. One third of that
is \$137,933. Mrs Braybrook has paid no money into Gabro. All
of the funds paid into Gabro were used to meet the costs of
building the duplexes, except for \$215 remaining in the bank
and an anticipated GST refund of \$12,966.

10

20

30

The first set of directions are sought in respect of issues
that arise from the acquisition of the land, construction of
the duplexes and the associated transactions. The above
recitation of facts comes from the statement of facts.
Neither Mr or Mrs Braybrook has sworn an affidavit dealing
with these facts.

50

The respondents are obviously content for the Court to proceed
on the basis of the statement of facts. Mr Conrick of Counsel
for the executors has analysed the law relating to the

purchase of land in joint names where only one of the purchasers provided the funds for the purchase, and submitted that there was a presumption of a resulting trust in favour of the deceased but that could be rebutted by evidence of a contrary intention.

1

10

Reliance is placed on two matters to support a submission that the presumption of a resulting trust was rebutted. The first is the instructions given by the deceased that the purchase was to be as joint tenants in the face of advice as to the effect of holding land as joint tenants. The second is that the deceased left to Mr and Mrs Braybrook under his will his shares in Gabro, which, it is submitted, is consistent with an intention that the whole interest in the land was intended to pass to the Braybrooks.

20

30

The executors are, in effect, seeking a declaration that the deceased has no beneficial interest in the land. That is a substantive issue of ownership, which is not the type of matter which would usually be dealt with on an application for directions. The purpose of the application for directions being brought on a written statement of facts is to allow the Court to approve a course of conduct or decision proposed by trustees in respect of trust property that is identified and not for resolving an issue as to whether or not some property is trust property.

40

50

It is likely that one or both of Mr and Mrs Braybrook can give evidence of any acts or declarations of the deceased prior to

the purchase of the land relevant to inferring whether the intention of the deceased was that the beneficial interest was to be held as joint tenants, and also any declarations made by the deceased against interest after the purchase: *Calverly v. Green* (1984) 155 CLR 242, 262.

1

10

The declaratory relief which is sought in this respect by the executors should not be given by the Court in the absence of affidavits from Mr and Mrs Braybrook, or either of them, dealing with the circumstances surrounding the purchase of the land. It would be artificial to make the declaration sought on the limited facts disclosed in the statement of facts.

20

Despite the fact that the originating application was intended to be limited to seeking directions under section 96 of the Trusts Act, I would allow the executors, if so advised, to file an amended application seeking the declaratory relief in respect of the ownership of the land, if they wish to pursue this issue on the basis of proper evidence. I decline, however, to make the so-called direction sought, "That the executors have no interest in the proceeds of sale of the land and duplexes."

30

On the issue of the characterisation of the payments made by the deceased to Gabro, in the light of the agreement signed by the owners dated 18 December 2001, which, though not signed by Gabro was then acted upon by Gabro entering into the building contract, and otherwise on the basis of the statement of facts, the deceased had a right at the date of his death to

50

recover from Mr and Mrs Braybrook the amount of the
overpayments made by the deceased on their behalf to Gabro.
It follows that the money recovered from the Braybrooks in
respect of the deceased's excess contributions to Gabro will
fall into residue.

1

10

Although the source of these moneys paid by the deceased to
Gabro can be traced to the deceased's Hong Kong bank account,
any repayment by the Braybrooks to the executors of the
amounts paid on their behalf by the deceased to Gabro is not
required under the will or otherwise to be returned to the
Hong Kong account.

20

The second set of issues arises out of clause 3, paragraphs
(g) and (h) of the will, which relevantly provide:

30

"(g) Seventhly, to liquidate and distribute the proceeds
from the sale of all my shares held in publicly listed
companies (wherever situated) and all money held in any
bank account (including term deposits) held with the Bank
of Bermuda, Hong Kong in the following manner:

(i) to give my nephew David Stuart Braybrook the sum of
\$150,000.00;

(ii) to give my nephew Sean Rodney Braybrook the sum of
\$150,000.00;

40

(iii) to give my nephew Joel Riley Braybrook the sum of
\$150,000.00;

(iv) to give my niece Emily Gareth the sum of
\$150,000.00;

(v) to give my niece Rebecca Gareth the sum of
\$150,000.00;

50

(vi) to give my niece Sheena Ann McKenzie the sum of
\$150,000.00.

(vii) to pay for all my debts, funeral and testamentary
expenses as referred to in paragraph 3(a) of this my
will (specifically including the costs of
administration of this my estate).

(viii) to transfer the balance of this portion of my estate to the general residuary component of the whole of my estate.

I direct that if there are insufficient assets in this part of my estate to make the specified distributions referred to in this clause, then each of the specific bequests made to my nieces and nephews in clauses 6(i) to 6 (vi) (inclusive) be reduced equally to enable the specified expenses to be paid. I further state that all monetary bequests are expressed in Australian dollars.

10

(h) I direct that any bequest to my nieces or nephews made in clause 3(g) hereof be paid to them upon their reaching thirty-five years of age. If any of my said nieces or nephews dies before reaching thirty-five years of age I direct:

20

(i) If such niece or nephew has a child or children then their child or children receive on their thirty-fifth birthday (and if more than one in equal shares) the share their parent would have received had he or she reached thirty-five years of age.

(ii) If such niece or nephew has no children then the share that the niece or nephew would have received upon turning thirty-five years of age will form part of the general residuary component of the whole of my estate."

30

Each of the gifts under clause 3 of the will is specific. It is of identified funds and specific provision is made for the legacies to be reduced should the fund prove inadequate to meet the bequests and administration costs. Pursuant to section 59 of the Succession Act 1981 as the funds in the Hong Kong account are specifically charged with the payment of debts, the estate's debts, funeral, testamentary and administration expenses are to be paid from this account.

50

At the date of his death the deceased held no shares in public listed companies. The transfers of funds by the deceased in

2002 from the Hong Kong account reduced the balance of that account to approximately A\$700,000 at the date of the deceased's death. As a will is applied to the assets of the deceased at the date of death, there will be a shortfall in attempting to pay the debts of the estate and six legacies of \$150,000 each from this account.

It is appropriate to make the direction sought by the executors that to the extent that the funds available in that account after payment of the estate's debts are insufficient to pay the legacies referred to in paragraph 3(g) subparagraphs (i) to (vi) of the deceased's will, such legacies are adeemed pro tanto.

On the issue of whether each legacy under clause 3(g) is vested or contingent, if it were a matter limited to the wording of clause 3(g), each gift is vested. Each gift, however, is subject to the further direction in clause 3(h), which provides that if the beneficiary dies before reaching thirty-five years there is a gift over of the legacy, or if that fails, the legacy falls into residue. The inclusion of a provision for a gift over is consistent with divestment in the event that the beneficiary does not meet the contingency: Re Heath [1936] Ch 259, 264-5.

I will therefore make orders in terms of the amended draft initialled by me and placed with the file.
