SUPREME COURT OF QUEENSLAND

CITATION:	*Re Story* [2002] QSC 017
PARTIES:	**IN THE MATTER of the *Trusts Act* 1973** And **IN THE MATTER of the Estate of CHARLES GORDON DALTON STORY (also known as GORDON DRUMMOND DALTON STORY, GORDON CHARLES DRUMMOND STORY, CHARLES GORDON DRUMMOND STORY, GORDON STORY and GORDON DRUMMOND STORY) deceased**
FILE NO:	4235 of 2001
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	7 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2001, 14 November 2001, 1 February 2002
JUDGE:	Ambrose J
ORDER:	**1. Annuity Plan No. T730311(5) with the Colonial Mutual Life Assurance Society Limited the subject of the specific bequest in clause 5 of the testator's will was adeemed when the testator redeemed that annuity policy on 3 April 1997 for the amount of $77,791.90 and any proceeds of that redemption form part of the residuary estate of Charles Gordon Dalton Story specifically bequeathed under clause 6 of the will.** **2. The specific bequest of the guaranteed insurance bond policy TC30260(8) with Colonial Mutual Life Assurance Society Limited was adeemed on 23 November 1992 when upon redemption by the testator, he was paid the sum of $28,028.82 and that sum or any part thereof forms part of the residuary estate of the testator specifically bequeathed under clause 6 of the will.** **3. 3396 shares held by the testator in Colonial Mutual Limited at the date of his death which were subsequently replaced by 1189 shares in Commonwealth Bank upon its acquisition of Colonial Mutual Limited subsequent to the death of the testator on 7 March 2000 are not part of the specific bequest contained in paragraph 5 of the last will and testament of the deceased and those shares form part of the residuary estate of the testator bequeathed under clause 6 of the will.**

4. I order that the applicant's costs of and incidental to the application including reserved costs be assessed on an indemnity basis and paid out of the estate of Charles Gordon Dalton Story deceased.

CATCHWORDS: TRUSTS AND TRUSTEES – applications to the court – application by executrix of deceased estate for directions under s 96 of *Trusts Act* – where testator bequested capital and proceeds of a mutual society annuity plan and insurance bond to be held on trust – where shares granted to mutual society members as a result of membership of the society – where annuity plan and insurance bond were redeemed by testator prior to death – whether the specific bequest of the annuity plan extended to those shares

Trusts Act 1973 (Qld), s 96

Attorney - General v Oldham [1940] 2 KB 485, considered
In re Kuypers; Kuypers v Kuypers [1925] Ch 244, followed
In re O'Brien; Little & Anor v O'Brien & Ors (1946) 175 LT 406, considered
In re Slater; *Slater v Slater* [1907] 1 Ch 665, considered

COUNSEL: DA Skennar for the applicant

SOLICITORS: McCarthy Palethorpe & Blanch for the applicant

[1] This is an application for declarations that bequests of an annuity plan with a mutual life assurance society and of a capital guaranteed insurance bond with that society were adeemed and that any proceeds thereof form part of testator's residuary estate, and that 3396 shares held by the testator at the time of his death in Colonial Limited, a company formed in the process of demutualising the mutual life assurance society in 1996, form part of the testator's residuary estate and that the specific bequest of the annuity plan did not extend to those shares held by the testator in Colonial Limited by reason of demutualisation of the society in which the testator had held the annuity plan.

[2] Under clause 5 of the testator's will it was provided inter alia:

> "5. I GIVE DEVISE AND BEQUEATH my Annuity Plan No. T730311(5) with Colonial Mutual Life Assurance Society Limited or the residuary capital value thereof or other the proceeds thereof and my capital guaranteed insurance bond Policy No. TC30260(8) with Colonial Mutual Life Assurance Society Limited or the proceeds thereof UNTO AND TO THE USE OF my Trustee UPON TRUST to sell call in collect and convert the same into money and TO STAND POSSESSED of the balance, as well the income as the capital thereof, UPON TRUST for such of [specified grand children]…"

[3] Under clause 6 of the will the testator bequeathed the rest and residue of his property for the benefit of his widow whom he appointed to be executrix of his will.

[4] The annuity was purchased by the testator on 8 December 1989. It was redeemed by him on 3 April 1997 when he received $77,791.90.

[5] The insurance bond was purchased by the testator on 23 February 1989 and was redeemed by him on 23 November 1992 when he received the sum of $28,028.82.

[6] In December 1996 Colonial Mutual Life Assurance Society Limited demutualised. At the time of demutualisation the testator had redeemed the insurance bond but not the annuity.

[7] As a consequence of the demutualisation the testator received 2830 shares in Colonial Limited. Subsequently the testator elected to take up a further allotment offered and as a consequence eventually held 3396 shares in Colonial Limited.

[8] Subsequently Commonwealth Bank acquired Colonial Limited and in lieu of the 3396 shares formerly held in Colonial Limited the testator's estate from June 2000 held 1189 shares in Commonwealth Bank.

[9] The current value of those shares exceeds $20,000.

[10] The testator died on 7 March 2000.

[11] Initially as a matter of precaution the executrix of the will (who is residuary beneficiary under it) sought the declarations to which I have referred upon an ex parte application.

[12] In light of the apparent difference in interests between the grandchildren as specific legatees under the will, and that of the executrix residuary beneficiary, steps were taken to serve upon all grandchildren named as specific legatees under clause 5 of the will or upon their guardians, copies of all material upon which the applicant executrix relied together with oral and written argument addressed upon it on 13 and 14 November 2001.

[13] The testator's grandchildren named in clause 5 of the will (or their parents) to whom all that material was forwarded were also advised that the matter would be determined finally on 1 February 2002 and that they might make written submissions or attend at that hearing should they wish to be heard on the application. When the matter was called on for hearing none of the grandchildren appeared. Only one written submission from Michelle Veness under cover of a letter dated 18 December 2001 was forwarded in opposition to the application for declarations. I will make that submission and covering letter "Ex A" so that they may be recorded.

[14] In my view the redemption by the testator of his insurance bond on 23 November 1992 when he received in cash the whole of his entitlement under the terms of that bond clearly adeemed the specific devise of that bond under cl 5 of his will.

[15] Similarly in my view, the testator's redemption of his annuity plan on 3 April 1997 when he received in cash his full entitlement upon it also clearly adeemed the specific bequest of the benefit of that annuity under clause 5 of his will.

[16] In my view, the only matter which needs consideration is whether the shares issued to the testator prior to his redemption of his annuity plan prior to demutualisation is part of that annuity – as may have been the case had he redeemed only half his entitlement to the annuity which he bequeathed under clause 5 of his will.

[17] It was contended by Michelle Veness on behalf of the testator's grandchildren referred to in clause 5 of his will, that the shares issued to the testator upon the demutualisation of the Colonial Mutual Life Assurance Society come within the phrase "residual capital value thereof or other proceeds thereof" in that clause. It is contended that they do because the issue of those shares was "a direct result of his holding of the annuity plan".

[18] In my view the fact that he received those shares "as a result of" or "because of" his membership of the mutual society is no more relevant to the issue of ademption than would be the fact that any bank account into which he transferred the proceeds of redemption might also properly be described as the repository of a benefit received as a "direct result of" or "because of" of the annuity which he adeemed.

[19] The real question in my view is whether the shares held ultimately as a consequence of demutualisation of the mutual life assurance society of which he was a member at the time of demutualisation may be categorised as being "substantially the same thing" as the annuity entitlement. In this respect I refer to *In re Slater*; *Slater v Slater* [1907] 1 Ch 665 per Cozens-Hardy MR at 672 and per Kennedy LJ at 676 – 677. In *Attorney - General v Oldham* [1940] 2 KB 485 it was held that bonus shares issued to a testator who had specifically bequeathed ordinary shares in a company did not pass under the specific bequest. Clauson LJ observed that -

> "…between the time of the gift and that of the father's death the defendant, by virtue of her shareholding, acquired some further shares, but they were not the subject-matter of the gift."

[20] That was a case where the Crown claimed estate duty not only on shares transferred to the testator's daughter, which was admittedly payable, but also on bonus shares issued to the daughter as donee of those shares between the time of the gift and the time of her father's death.

[21] In *In re O'Brien; Little & Anor v O'Brien & Ors* (1946) 175 LT 406, relying upon this authority Roxburgh J held at 408 that the bequest of shares by the testator in that case:

> "…or such shares or cash or shares and cash as the case may be which may be allotted or transferred to me or to my trustees in substitution therefor in any company with which the said K.M. Company, Limited may be amalgamated or reconstructed or to which its assets may be sold or transferred or otherwise"

did not encompass "bonus shares" issued to the testator subsequent to the time he made his will and prior to his death.

[22] Roxburgh J referred to *In re Kuypers; Kuypers v Kuypers* [1925] Ch 244. In that case there had been a reorganisation of the capital of a corporation in which the testatrix held 600 shares which she bequeathed in her will. In that reorganisation new shares were created and the testatrix was allotted different categories of shares with different dividends. In fact the shares that she had bequeathed were 600 15% preferred ordinary shares. After the reorganisation she was left with those 600 shares with a dividend reduced from 15% to 8% per annum as well as another 600 shares each of which entitled her to an 8% dividend.

[23] Stated shortly, after the reorganisation the testatrix held 1200 preference shares with a dividend of 8% in lieu of the previously held 600 shares with a preferred dividend at the rate of 15%; she made no alteration to her will subsequent to this company reorganisation.

[24] Tomlin J at 248 observed –

> "The principle to be applied is stated by Cozens-Hardy M.R. in *In re Slater* [[1907] 1 Ch 665, 672] …when he says: "Where is the thing which is given? If you cannot find it at the testator's death, it is no use trying to trace it unless you can trace it in this sense, that you find something which has been changed in name and form only, but which is substantially the same thing." On that principle cases such as *In re Clifford* [[1912] 1 Ch 29] … have been decided…"

[25] At 249 Tomlin J continued –

> "It seems to me that I must come to the conclusion in this case that the gift takes effect, but as to the original shares only. I can find here the actual shares that were referred to in the will. It is true that their name has been changed and that they have lost some of their attractiveness; but they remain the same shares, with a continuous history since before the will was made. The other shares were wholly new shares subscribed and paid for out of the reserve fund; and although those allotted to the testatrix were allotted as part of the arrangement and in view of the alteration and rights of the original shares, that circumstance does not to my mind justify me in coming to the conclusion that they are part of the original holding of shares. They seem to me to be in the nature of a form of compensation for loss of rights, but a form of compensation which cannot be treated as the thing itself.
>
> If I took any other view that which passed would be something greater than that which was given. It would not only be a gift of shares of double the nominal value, but it would be a gift of shares having a somewhat greater return by way of dividend than the shares in the original gift."

[26] In my view the shares issued to the testator in Colonial Mutual Limited were issued by way of "compensation" for his loss of rights as a member of a mutual society

when that society was reorganised – more than three years prior to his death and shortly prior to his redemption of the annuity. I adopt the approach of Tomlin J in *Kuypers* and hold that the shares issued in Colonial Mutual Limited to the testator because at that time he held the annuity as a member of the mutual society which entitled him upon its reorganisation to those shares cannot be treated as the annuity itself. Those shares issued to him on demutualisation in my view, must be treated as compensation payable to him as a member of the mutual society for deprivation of any rights he had as a member of that society upon its reorganisation at a time when he still enjoyed the entitlement to rights under the annuity itself which he had held for nearly 7 ½ years.

[27] It was contended by Michelle Veness that the inclusion of the words "the residual capital value thereof or other proceeds thereof" in clause 5 of the will specifically provided for additional proceeds such as the issue of the shares upon reorganisation of the mutual society upon demutualisation and the issue of the shares in the Commonwealth Bank.

[28] It was contended that neither the issue of the shares in Colonial Mutual Limited nor their conversion to Commonwealth Bank shares when that bank acquired Colonial Mutual Limited "took place at the behest of the testator but rather by virtue of the change in legal status of the CML".

[29] In my view, this is not a consideration relevant to determination of whether the shares issued to the testator upon reorganisation of the mutual society to a limited corporation had the consequence that the shares issued became "part of" the testator's "annuity plan no. T730311(5) with Colonial Mutual Life Assurance Society Limited, or the residual capital value thereof or other the proceeds thereof".

[30] The residual capital value of that "annuity plan" at the date of death of the testator was the money to which he was entitled (if any) under that plan at the date of death. On the facts of this case he was not entitled to any monies under that plan at date of death because he redeemed that annuity nearly three years prior to his death.

[31] In my view on the material advanced upon this application, it could not be said that the shares issued to the testator in Colonial Mutual Limited in December 1996 were the "proceeds of" the annuity then still on foot and not redeemed until 3 April 1997.

[32] In my view it is quite unhelpful to speculate as to what the intention of the testator or his wishes may have been with respect to the disposition of the shares he received upon demutualisation of the mutual society or those he received when he elected to acquire further shares in Colonial Mutual Limited or with respect to the 1189 Commonwealth Bank shares which his estate received when that bank acquired Colonial Mutual Limited. In my view, at all material times, the shares issued to the testator upon demutualisation of the mutual society together with the additional shares he acquired in that company when he exercised an option to acquire further shares in it all of which were replaced by the 1189 Commonwealth Bank shares in June 2000 – three months after the death of the testator – do not pass to the beneficiary grandchildren of the testator named in clause 5 of the testator's last will and testament.

[33] I therefore declare –

(1) Annuity Plan No. T730311(5) with the Colonial Mutual Life Assurance Society Limited the subject of the specific bequest in clause 5 of the testator's will was adeemed when the testator redeemed that annuity policy on 3 April 1997 for the amount of $77,791.90 and any proceeds of that redemption form part of the residuary estate of Charles Gordon Dalton Story specifically bequeathed under clause 6 of the will.

(2) The specific bequest of the guaranteed insurance bond policy TC30260(8) with Colonial Mutual Life Assurance Society Limited was adeemed on 23 November 1992 when upon redemption by the testator, he was paid the sum of $28,028.82 and that sum or any part thereof forms part of the residuary estate of the testator specifically bequeathed under clause 6 of the will.

(3) 3396 shares held by the testator in Colonial Mutual Limited at the date of his death which were subsequently replaced by 1189 shares in Commonwealth Bank upon its acquisition of Colonial Mutual Limited subsequent to the death of the testator on 7 March 2000 are not part of the specific bequest contained in paragraph 5 of the last will and testament of the deceased and those shares form part of the residuary estate of the testator bequeathed under clause 6 of the will.

(4) I order that the applicant's costs of and incidental to the application including reserved costs be assessed on an indemnity basis and paid out of the estate of Charles Gordon Dalton Story deceased.