SUPREME COURT OF QUEENSLAND

CITATION:	*Bullock v Bullock* [2003] QSC 258
PARTIES:	**HOWARD MELVILLE BULLOCK** (First Applicant) **FREDERICK JAMES LISTON** (Second Applicant) v **ROBERT GEORGE BULLOCK** (Respondent)
FILE NO/S:	338 of 2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	31 July 2003
DELIVERED AT:	Cairns
HEARING DATE:	5 June 2003
JUDGE:	Jones J
ORDER:	**1. That upon the true construction of the last will of Robert Francis Pulver ("the deceased") the monies held to his credit in cheque accounts and all investments with banks and finance companies form part of the residuary estate.** **2. That the costs of both the applicant and the defendant of and incidental to this application be paid from the deceased's estate on an indemnity basis.**
CATCHWORDS:	WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – where testator had customarily kept certain investment certificates in a drawer but had transferred them for safekeeping to a safe two years before his death – whether this and other extrinsic evidence was admissible WILLS PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITION – where will provided for a disposition *inter alia* of his "office safe and contents thereof…" to the respondent beneficiary – whether this disposition should be construed as inclusive of certain investment certificates, not kept in the safe at the time of his writing his will, but transferred to the safe, for safekeeping, two years before his

death.

COUNSEL: G J Houston for the applicant

SOLICITORS: MacDonnells for the respondent

Introduction

[1] This is an application that upon the true construction of the last will of the deceased Mr Pulver, the monies held to his credit in cheque accounts and all investments with banks and finance companies form part of the residuary estate.

The factual background

[2] The deceased died on 21 July 1999. At the time of his death his assets included the sum of $20,000 held to his credit in two cheque accounts and some $110,000 invested with banks and finance companies. The deceased kept all the documents relating to these assets in his dining room sideboard drawer, until his niece advised him, some two years before his death, to keep these documents in his safe along with his decimal and pre-decimal notes and coins[1]. In particular, these documents included:-

(a) a cheque book and bank statements for an account held at Westpac which stands to the credit of the deceased in the sum of $9,165.00;

(b) cheque book and bank statements from the Commonwealth Bank account in the name of the deceased to credit in the sum of $10,887.00;

(c) records of the investment by the deceased with the Australian Guarantee Corporation identified by Certificate No. 17201398 to the value of $51,000.00 a true copy of the said certificate is exhibit "B" hereto;

(d) records of the investment by the deceased with the Australian Guarantee Corporation identified by Certificate No. 17587734 in the amount of $17,000.00, a true copy of the said certificate is exhibit "C" hereto;

(e) records of investment with the Commonwealth Bank Finance Corporation identified by Certificate No. 10023522 to the value of $18,089.00, a true copy of the said certificate is exhibit "D" hereto;

(f) documents relating to investment with the Commonwealth Bank Finance Corporation identified by Certificate No. 10028010 in the credit of $17,000.00, a true copy of the said certificate is exhibit "E" hereto;

(g) a record of a term deposit with the Commonwealth Bank of Australia identified by Certificate No. S/C221515 in the amount of $7,600.00 a true copy of the said certificate is exhibit "F" hereto."

[3] Six days after the death of the deceased one of the co-applicants, an executor of the will, removed the documents from his uncle's safe. On 5 December 1999 he rang the respondent and advised that he could collect the safe as, under paragraph 5 of the deceased's will, the respondent had been left the "office safe and contents thereof…"[2] .

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1 See Bullock affidavit sworn 26 June 2002 p 2 para 6

2 See Ex A to the Bullock affidavit sworn 26 June 2002

[4] On 23 March, 2000 the respondent complained to the Queensland Law Society that the second co-applicant, a solicitor and co-executor of the will, had not acted properly and professionally in instructing the first co-applicant to remove the investment certificates from the safe before the safe was handed over to him. The respondent contended that, as a result of this instruction, he had been "deliberately deprived of the property" his late uncle had intended would pass to him, in effect, all of the money in the estate other than approximately $6,000 cash in notes and coins.

[5] The two executor applicants do not regard any of the investment monies as part of the gift to the respondent under the will and have applied to the court to construe the will with regard to his issue.

Evidential objections

[6] The respondent objects to the admissibility in evidence of facts and circumstances deposed to in affidavit material, namely, that the deceased was not in the habit of keeping his investment documents in his safe until his niece advised him to do so[3]; and that the deceased had consulted with his solicitor about the making of his will some ten years before his death and had told him that there would be sufficient monies available in his estate to meet the legacies and other commitments made in that will[4]. The respondent submits that such material constitutes a statement of extrinsic facts and circumstances which are objectionable insofar as they go "to the deceased's subjective intention".

[7] I do not agree. If the respondent had submitted that such material goes "merely" to the deceased's subjective intention, then, if that were the only effect of such material, the respondents' objection should be upheld. But as Windeyer J pointed out in *Lutheran Church of Australia v Farmers' Co-op* Executors[5] (citing *Wigram on Extrinsic Evidence* in aid of the Interpretation of Wills p 8)

> "Any evidence is admissible, which, in its nature and effect, simply explains what the testator *has* written…the question in expounding a will is not – What the testator meant? as distinguished from - What [do] his words express? but simply - What is the meaning of his words?"

[8] Here I must determine the meaning of the testator's words "office safe and contents thereof" and the extrinsic evidence sought to be ruled out has a bearing upon the issue - "What is the meaning of his words?".

[9] That issue can only be resolved by the court first reading what the testator has written in the will itself, giving the words used in it their plain and natural meaning. I note that this principle should not be confined to the construction of the phrase in question, but calls for a consideration of the whole of the will.[6] Then the court is entitled to look at the surrounding circumstances – the testator's circumstances at the time of his making the will and at the time of his death.[7]

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3 See para 6 Bullock affidavit sworn 26 June 2002; and paras 2 and 3 of the Massasso affidavit sworn on 27 May 2003.

4 See para 6 of the Liston affidavit sworn 26 November 2002.

5 (1969) 121 CLR 628 at 649

6 [1903] A.C. CH.D. 120 at 122 per Lord Halsbury

7 See *In re Hodgson* (1935) 1 Ch 203

[10] The affidavit material, to the admissibility of which the respondent objects, addresses these very circumstances. I rule that, as such, it is admissible. I shall defer consideration of the separate question, "To what use may such evidence be put?" until I have ruled upon another objection which the respondent makes.

[11] The objection is this. The respondent objects to the whole of the Liston affidavit sworn on 27 May 2003. He does this on the basis that this affidavit presents "evidence of events that post-date the deceased's death" and thus "cannot bear upon the point of construction that is at large". I do not agree. In clause 6 of the will[8] the testator directs that the cost of the subdivision of Lot 1 on Registered Plan 37713 in the Count of Nares Parish of Barron is to be charged to the estate. All the Liston affidavit seeks to do is to inform the court as to the quantum of that charge. I rule that this evidence is to that extent probative of that charge and should be admitted, because it is relevant to a significant testamentary disposition which the testator either intended to make or intended to have no practical effect.

The issue

[12] By clause 5 of his will, the testator left to his nephew, the respondent in this case, farming property of 55 acres[9] and his "office safe and contents thereof…" It is not in dispute that, at the time of the testator's death, his safe contained indicia of his title to choses in action comprising both debenture stock[10] and an interest bearing deposit[11]. What is in dispute is whether these indicia of the testator's title to choses in action form part of the "contents" of the safe, within the meaning of Clause 5 of the will. If they do not, then they can be dealt with legitimately as part of the testator's residuary estate. If they do form part of the "contents" of the safe, then they are for the respondent alone to deal with as the specific beneficiary named in Clause 5 of the will. The applicants contend that the word "contents" does not include the choses in action associated with the certificates and that all the respondent is entitled to is the notes and coins found in the testator's safe after his death[12].

[13] The question I have to decide is what is the meaning to be given to the testator's words "my office safe and contents thereof…"

[14] The respondent has urged upon me that the word "contents" is a word of broad import which, on its plain and natural meaning, namely "what is contained in", might equally well refer to the tangible indicia of choses in action as to tangible chattels generally. He submits, therefore, that there is no warrant in the language of the Will for the reading down of the disposition which the applicants urge. And he seeks to support this proposition by arguing the alleged generality of the disposition in clause 5 with the alleged specificity and particularity of the disposition in Clause 7.

[15] Two points might be made about this submission. The first is that it is the language of the whole will which falls for consideration when the court is attempting to ascertain the meaning of particular words. The second is that there is no evidence

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8 See ex A to the Bullock affidavit sworn on 26 June 2002

9 See transcript 8/20-40

10 See exhibits B, C, D and E to the Bullock affidavit sworn 26 June 2002

11 See ex F to the Bullock affidavit sworn on 26 June 2002

12 See para 3 Bullock affidavit sworn on 26 June 2002

before me to suggest that Clause 5 is more general in its terms than Clause 7. A comparison of the dispositions in these two clauses could equally well be argued as revealing that the testator regarded improvements as not including household furniture and household effects, motor-vehicles and farm plant, that is, as being simply the buildings constructed on the land. This would mean, then, that the disposition in Clause 7 was the more general and inclusive. Then again, if there had been evidence to show that there was no household furniture and household effects, motor-vehicles and farm plant on Portion 231 (it was referred to before me[13] as simply "rural property in the Atherton area") then the disposition in both clauses could be regarded as being equally specific. Again, if there had been evidence before me that there were such chattels on the rural property, then arguably the two clauses read together would suggest that the respondent was not to inherit them; again Clause 5 would be the more specific clause. For these reasons I am not persuaded by the respondent's submissions that:-

> "…The specificity of that gift [in Clause 7] lies in contrast to the generality of the language employed within clause 5. The specificity of clause 7 is therefore consistent with the proposition that an entirely less categorical disposition was intended by the relevant passage within clause 5."

[16] Further, both Counsel have referred me to a number of cases which involve a consideration of the words "property" and "contents". Whilst each of them depends on its own facts, I shall now briefly review these cases.

[17] The first of these *In re Prater*[14] was decided by the Court of Appeal in 1886. In that case the court was called upon to construe the words "half of my property at Rothschild's bank", which property included certificates of the testator's title to various choses in action. Lord Halsbury L.C. who expressed himself as not laying down "any general canon of construction", came to the conclusion that by "property at Rothschild's bank" the testator meant everything belonging to him with which the bank was concerned; that is, including the choses in action. Lord Halsbury, in his reading of the will, could see nothing to cut down the wide general term "property", particularly as the testator had, in the preceding part of the will, distinguished money from property. Further he was unable to derive any assistance from the circumstances which existed at the time of the making of the will or from those existing at the time of his death. The reasoning of Lord Cotton L.J. follows the same line of argument: the testator had previously bequethed a sum of money and then he bequethed something which he expresses as property. His Lordship observed that "property" must not, be "cut down to money" as the trial judge had done, so as to make it pass only the banker's balance (486) and, further, that the rule that choses in action have no locality "does not mean that they are not" to be included in a gift of property in a particular locality, if we come to the conclusion that the intention of the testator was so to include[15]. Lord Cotton L.J. came to that conclusion "having regard to the facts existing at the time the testator made his will" (at 487).

[18] Taking into account the circumstances existing at the time the testator made his will, evidence of which I have ruled admissible, then I must conclude that the testator did

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13 See transcript 10/3

14 (1888) C.A. Chancery Division vol XXXVII 481

15 Ibid

not have the intention of including, in the contents of his safe, his investment certificates. At that time he did not keep these certificates in the safe, nor was it his intention, on this evidence, thereby to render legally ineffective his dispositions to other beneficiaries.

[19] *In re Harvey*[16] the question was whether the expression "house and contents" would include choses in action. It is of limited relevance in that it decided that a gift of the contents of a house would not include choses in action, but left open that question in respect of the contents of a safe. The same might be said of *In Re* Abbott[17] which, in the end, turned on the "contents of the (testatrix's) home". The items which should fall within the description of "contents of my house" was also an issue in *Re Boning*. In the latter, the court drew attention to the general rule that a gift in a will of goods and chattels in a house will not pass choses in action and could find nothing in the context of the will itself to lend the expression "contents of my house" any wider meaning so as to include any choses in action found at the house.

[20] This case before me is not about the meaning of the phrase "contents of my house" but, rather, about the meaning of the phrase "my office safe and contents thereof". However the *Boning* case also addressed the question whether the "contents of my house" included the contents of a bank safe deposit box, the key of which was located in the house. It is thus not without relevance in that it decided, as I have ruled, that the evidence showing where the contents of the safe deposit box were customarily kept was admissible and that chattels removed to a place of safekeeping may be construed as being located where they were customarily placed.

[21] In *re Plant*[18] it was held that moneys invested in a building society could not be included under the description of "cash held to my credit in any bank account in my name". This case is helpful to the extent that it cites one authority, (*In re Trundle*[19]) which clearly distinguished money from choses in action, and another, *In re Hodgson,*[20] which endorses the Court's entitlement "to say that the words which the testator has used were not intended to have their primary meaning if the surrounding circumstances are such as to lead inevitably to that conclusion" (per Farwell J at p 206).

[22] *In re Robson*[21] a testator gave his desk "with the contents thereof" to his nephew. The contents included promissory notes and securities. It was found that the words used were sufficient to pass all the choses in action. Justice Chitty in that case distinguished a gift of chattels in a house, which gift will not pass choses in action, from a gift of the contents of desk on the grounds that a desk "being the kind of thing in which men do usually keep valuable things".[22] It must be conceded that, *a fortiori*, a safe is the same kind of thing. However, *In re Robson*, there was no question as to how the things found in the desk at the testator's death came to be placed there. In this case there is evidence that it was the testator himself who put these certificates in the safe[23], but that he only did so on the advice of his niece in

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16 [1962] NZLR 524
17 (1994 2 All ER 457
18 (1974) QdR 203
19 [1960] WLR 1388 at p 1390
20 [1936] 1 Ch 203
21 (1891 2 Ch 559
22 at 563
23 See para 4 Massaso affidavit, sworn 27 May 2003

order to better secure the certificates. This was a departure from his former practice of keeping financial documents, as distinct from cash and coins, in his dining-room sideboard drawer. There is evidence that this was his practice at the time he drew up his will.

[23] It is the case that the *Succession Act* s 28(a) provides that a "will is to be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator" unless a contrary intention appears by the will. *In re the Will of Macaudo*[24] Derrington J clearly recognized that it is open to counsel for the applicant to point to "features appearing on the face of the will which individually and collectively do demonstrate that the testator had such a contrary intention." In the circumstances of that case Derrington J did not find that the testator had a contrary intention (that is, contrary to the operation of the *Succession Act* 1981 providing for a presumption that his son had predeceased him).

[24] In this matter Counsel for the applicant has persuaded me that there are features appearing on the face of the will which demonstrate that it was not the testator's intention, in this case, to make the respondent a bequest of his investments in excess of $110,000. Clause 3 of the will provides for legacies to charities collectively worth $3,000. Clause 4 provides for legacies to the testators nephews worth $17,000. Clause 6 provides that the testator's estate should be charged with the costs of subdividing land to be excised and bequeathed to the testator's brother (on the evidence, costs of some $56,000). Clause 9 further provides for the costs of the administration of the trusts of the estate, the likely quantum of which is not before me. Nevertheless in the light of the above and the testator's clear intention that the other six of his eleven nieces and nephews should receive a legacy from the residue of his estate, it is clear that, should the contents of the testator's safe be read as including the investment certificates, then most of these bequests would not be sensible, that is, they would be without any possible operation. (In *Re Allen* 1 QR 1).

[25] In any event, in *Re Willis*[25] Derrington J provided that s 28 of the *Succession Act* 1981 "would not affect the construction of a term that has no temporal factor…" (at 666 line 70). The term my office safe and contents thereof" does not have any temporal factor. Thus s 28 "cannot have any bearing on the meaning to be given to the terms used…" (at 667).

[26] For all of these reasons I consider that, on its proper construction, the phrase "my office safe and contents thereof…" should be understood as excluding the choses in action which, on the affidavit evidence before me, had been transferred to that safe for safekeeping.

1. I order that upon the true construction of the last will of Robert Francis Pulver ("the deceased") the monies held to his credit in cheque accounts and all investments with banks and finance companies form part of the residuary estate.
2. That the costs of both the applicant and the defendant of and incidental to this application be paid from the deceased's estate on an indemnity basis.

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24 (1993) 2 QdR 269

25 (1996) 2 QdR 664