SUPREME COURT OF QUEENSLAND

CITATION:	*Szanto v Aston* [2011] QSC 87
PARTIES:	**ALEXANDER FRANK SZANTO** (plaintiff) **and** **CHRISTINA ELIZABETH ASTON** as Executor and Personal Representative of the Estate of the Late **LAJOS SZANTO** (first defendant) **and** **STEPHEN LOUIS SZANTO** (second defendant) **and** **DEBORAH SZANTO** (third party)
FILE NO/S:	S441 of 2010
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	14 April 2011
DELIVERED AT:	Townsville
HEARING DATE:	6 April 2011
JUDGE:	Cullinane J
ORDERS:	[1] I declare that the prize money or so much thereof to which the estate of the deceased Lagos Szanto is entitled does not fall within clause 3 of the will of the deceased. [2] I declare that the said prize money or so much thereof to which the estate of the deceased is entitled forms part of the residuary estate of the said Lagos Szanto.
CATCHWORDS:	SUCCESSION – Wills, probate and administration – Construction and effects of testamentary dispositions - What property will pass by particular words and descriptions-

	Particular words and phrases – Goods, chattels, effects etc.
LEGISLATION	Lotteries Rule 1998
CASES	*Sammut v Manzi* [2009] 1 WLR 1834 *Bullock v Bullock* [2003] QSC 258 *Robinson v Jenkins* (1890) 24 QBD 275 *In re Givan (deceased)* [1966] 1 WLR 1378 *Green v Symonds* (1730) 1 Bro CC 129, n; Amb 848; 27 ER 529 *Fleming v Brook* (1804) 1 Sch & Lef 318; 9 Rev Rep 35 *Stuart v Marquis of Bute* (1806) 11 Ves Jun 657, 662; 32 ER 1243, 1245 *Marquis of Hertford v Lord Lowther* (1843) 7 Beav 1; 49 ER 962 *In Re Prater* (1888) 37 Ch D 481 *In re Robson* [1891] 2 Ch 559 *Quazi v Quazi* [1980] AC 744 *In re Pharazyn* (1897) 15 NZLR 709
COUNSEL:	Mr A Moon for the plaintiff Mr M Conrick for the first defendant Mr D Fraser for the second defendant
SOLICITORS:	Connolly Suthers Lawyers for the plaintiff Carne Reidy Herd Lawyers for the first defendant Lee Turnbull & Co for the second defendant

[1] In this matter the court is asked to determine a discrete question which turns on the construction of the will of the deceased, Lajos Szanto.

[2] The deceased died on 14 February 2010.

[3] Surviving him were four children, two sons Alexander Frank Szanto, (the plaintiff in action No 441 of 2010), Stephen Louie Szanto (the second defendant in the action) and two daughters, Christina Elizabeth Aston (the first defendant in the action) and Margie Ann Szanto.

[4] On or about 8 February 2010 the deceased bought a lottery ticket bearing coupon receipt number 01109971306408185256006406.

[5] There is a dispute the subject of other proceedings as to whether the deceased acquired the ticket for himself alone or for himself and the second defendant, Stephen Louie Szanto. That issue remains to be determined irrespective of the outcome of this matter.

[6] The lottery draw relevant to the ticket held by the deceased occurred on 13 February 2010 the day before the death of the deceased.

[7] The ticket became, as a result of the draw, a winning ticket attracting prize money of $1,818,181.82.

[8] At the time of the death the lottery ticket was located in a granny flat occupied by the deceased and occupied by him since 1993. The granny flat was built under what

had been the family home. There had been an agreement between the deceased and the first defendant as a result of which the former family home was transferred to the first defendant who agreed to spend $100,000 in constructing a granny flat in which the deceased could live for the remainder of his life.

[9] By clauses 3 and 4 of his will dated 26 November 2002, the deceased made the following provision:

3. I DEVISE AND BEQUEATH all furniture and chattels that are in the house at 19 Murray Street, North Ward, as at the date of my death to such of my said daughter CHRISTINA ELIZABETH ASTON and my son-in-law JAMES ASTON as shall survive me and if more than one in equal shares.

4. I DEVISE AND BEQUEATH the rest and residue of my estate both real and personal of whatsoever nature or kind and wheresoever situate unto and to the use of my trustees upon trust as follows:

4.1 For such of my three children, MARGIE ANNE SZANTO, ALEXANDER FRANK SZANTO and STEPHEN LOUIS SZANTO of Townsville as shall survive me and if more than one as tenants in common in equal shares

4.2 PROVIDED HOWEVER that if any child of mine shall predecease the leaving a child or children him or her surviving then such child or children shall take and if more than one in equal shares the share which his her or their parent would have taken under this my Will had such parents survived me.

[10] The question which arises on this application is whether the prize money (or so much of it as the deceased was entitled to) passes under clause 3 of the will (the beneficiaries being the first defendant and her husband) or clause 4 (the beneficiaries being the other three children of the deceased) or whether there is a partial intestacy in relation to it.

[11] Pursuant to the will the first defendant was appointed as executrix.

[12] The first defendant in an affidavit sworn by her sets out the deceased's habits in acquiring Lotto tickets and the Lotto games which he entered. The coupon relevant to this matter is exhibited to the affidavit of the first defendant who deposes to the markings on it being in the deceased's hand. The winning ticket corresponding to the coupon is also exhibited to her affidavit.

[13] It was the deceased's habit to keep the marked coupons and tickets, together with other material relating to Lotto games in the granny flat.

[14] The Lotteries Rule of 1998 (since repealed) governed the conduct of lotteries of this kind.

[15] Section 32 provided as follows:

Lottery tickets are property of lottery operator

A lottery ticket remains the lottery operator's property at all times.

[16] The effect of the rules was that upon acquiring a ticket, one became entitled to participate in the draw relevant to that ticket.

[17] Section 22 provided for the payment of Division 1 prizes (of which this is one) in the following terms:

Payment for division 1 prizes

(1) A lottery operator may pay a division 1 prize to a person if-

(a) the person gives the lottery operator a paper ticket that is a division 1 prize-winning ticket; or

(b) the player has entered the drawing as a registered player.

(2) The lottery operator may wait 14 days after the drawing of the lottery before paying a division 1 prize but must pay the prize as soon as practicable after the 14 days.

(3) This section is subject to sections 20(2) to (5) and 26.

[18] The task of the Court in construing a will has been the subject of many judgments. A significant number of these are referred to in the outlines of the parties in this case.

[19] Counsel for the first defendant placed particular reliance upon the recent judgment of the Privy Council in *Sammut v Manzi* [2009] 1 WLR 1834. The following passage appears at 1838:

The approach to construction

4. The starting point when construing any will is to attempt to deduce the intention of the testator by giving the words of the will the meaning that they naturally bear, having regard to the contents of the will as a whole. Sometimes it is legitimate to have regard to extrinsic evidence in order to show that words used had a special meaning to the testator, but it has not been suggested that this is such a case.

5. Extrinsic evidence of the testator's intention may also be admissible to resolve uncertainty or ambiguity. On 10 November 2004 Mr Manzi, the first defendant, wrote to Mr Jean Claude Sammut, one of the cousins, notifying him that he had a beneficial interest in "five percent (5%) of the residuary estate". Mr Holbech, for the plaintiffs, submitted that this was admissible extrinsic evidence of the testator's intention. Their Lordships do not consider that any significance can be attached to the terms of that letter. There is nothing to suggest that they represented anything more than Mr Manzi's own understanding of the true construction of clause 6(ii).

6. There were placed before their Lordships no less than 17 decided cases, some of which involved decisions on wording that bore some similarity with that used in the present case. Little assistance in construing a will is likely to be gained by consideration of how other judges have interpreted similar wording in other cases. Counsel rightly recognised that the starting point must be to look at the

natural meaning of the wording of the will to be construed without reference to other decisions or to prima facie principles of construction.

[20] In *Bullock v Bullock* [2003] QSC 258, Justice Jones put the task of the court in this way at paragraph 8 and 9 (footnotes omitted):

[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. 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.

[21] The term "chattels" is, as Fry LJ said in *Robinson v Jenkins* (1890) 24 QBD 275 at 279:

"…one of the widest words known to the law in its relation to personal property."

See also *In re Givan (deceased)* [1966] 1 WLR 1378.

[22] It will thus be given such a meaning unless the context indicates that it is used in a more confined sense. See *Theobald on Wills* 16th edition at page 326 at 24-78.

[23] "Chattels" includes choses in action as well as choses in possession.

[24] The entitlement of the deceased to the payment of the sum of money with which the court is concerned is a chose in action. This is plainly so and is common ground.

[25] There is a significant body of authority of long standing that a bequest of chattels in a house will not pass choses in action because a chose in action is incorporeal property and has no locality as such. See *Green v Symonds* (1730) 1 Bro CC 129, n; Amb 848; 27 ER 529; *Fleming v Brook* (1804) 1 Sch & Lef 318; 9 Rev Rep 35; *Stuart v Marquis of Bute* (1806) 11 Ves Jun 657, 662; 32 ER 1243, 1245; and *Marquis of Hertford v Lord Lowther* (1843) 7 Beav 1; 49 ER 962.

[26] On the face of things this matter falls within that general principle.

[27] However, counsel for the first defendant placed considerable reliance upon cases in which bequests of property in a particular location were held to include choses in action.

[28] It is important to bear in mind when dealing with the issue of construction that reference to other cases involving the construction of a will may not provide great assistance to the Court. This is because of the need in each case to focus closely upon the language used in the will under consideration and the particular context in which it is used.

[29] In *In Re Prater* (1888) 37 Ch D 481 the testator by his will bequeathed a number of pecuniary legacies before going on to provide:

"I give to the *Société Protectrice des Animaux of Paris* the sum of £500, also half of my property at *Rothschilds'* bank, *Rue Lafitte, Paris*. The remaining half of my property at *Rothschilds'* bank I give to be divided equally between the following two public libraries in *Paris*, namely the *Mazarin* and the public library in the *Rue Richelieu*."

[30] The deceased at the time of his death had a cash balance standing to his credit at the bank which also held various documents amounting to choses in action.

[31] Cotton LJ said at page 486:

"It is said that authority is against us. No doubt there are a great many cases which lay down that *choses in action* cannot be referred to as of any particular locality. Again, there are cases where a gift of property in a particular locality has been held to include debts due from persons in that locality. I think these latter cases go upon this – that there was in the wills a sufficient indication of intention to include under the description of property in a particular place that which really cannot have any locality. Those cases, in my opinion, shew that the rule that *choses in action* have no locality must not deter us from holding them 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 them."

[32] Lord Halsbury LC at page 484 distinguished the cases upon which the general principle is founded "because here the words are used by the testator as part of the description of the property disposed of, and he makes it part of the description of the property that it is property at the bank".

[33] The court held that the choses in action in the particular circumstances of that case passed by virtue of the bequest.

[34] In *In re Robson* [1891] 2 Ch 559 the Court was concerned with a bequest by the testator to a nephew of "my old mahogany desk with the contents thereof, my double leaved mahogany table, and Dr *Adam Clark's* Commentaries ---."

[35] Chitty J at page 562 referred to the general principle:

"There is no question on the authorities that have been referred to that, as a general rule, a gift in a will of goods and chattels in a house will not pass *choses in action*--- "

[36] Nonetheless he concluded that the bequest in that case passed with it the choses in action found in the desk.

[37] At pages 562 and 563 he said:

"There is a distinction between a gift of chattels in a house and a gift of the contents of a desk; a desk being the kind of thing in which men do usually keep valuable things. There is no question of fact in this case how the things that were found in the desk at the testator's death came to be placed there. On the evidence, I am satisfied that it was the testator himself who put these things in the desk."

[38] In the two cases just mentioned it seems to me that unlike in the case of a bequest of property "in a house" in which those words are words of limitation, the location of the property threw light upon the intention of the testator's intention to include the choses of action.

[39] In the New Zealand case *In re Pharazyn* (1897) 15 NZLR 709, the testator gave his wife "all the furniture, linen, plate, china and other chattels of every kind and description whatsoever which should be in or about his dwelling house at the time of his death."

[40] The question arose whether a promissory note for £500 endorsed to the testator and negotiable without further endorsement was included in the bequest to the wife.

[41] Prendergast CJ said at 721-722:

"Nor do I think that the expression 'chattels of every description in the house' includes the note. There are many authorities deciding this: See cases collected in *Theobald on Wills*. Such choses-in-action as promissory notes are not considered property in the house, but evidence of title to property elsewhere. The decision in the case of a gift of a desk 'with its contents,' which held that the gift did carry the promissory notes in the desk, was not intended to overrule, and did not overrule, the authorities to the effect that a gift of chattels in a house does not carry choses-in-action." (footnotes omitted)

[42] In my view this matter falls squarely within that general principle of longstanding.

[43] The rights which the deceased obtained upon the ticket which he had acquired becoming a winning ticket amounted to a chose in action. As such those rights were incorporeal property having no locality and cannot fall within the terms of clause 3 of the will because of the limitation as to locality contained in the words "*that are in the house"*.

[44] I should add for completeness that I do not think that the term "chattels" which is of the widest import should in any way be read down because of its juxtaposition to the word "furniture." Nor is it possible to advance any argument based upon the of the ejusdem generis principle here. See *Quazi v Quazi* [1980] AC 744 at 807-808; [1979] 3 WLR 833 at 839.

[45] Counsel for the first defendant advanced an argument that the appearance in clause 4 (the residuary clause) of the words "wheresoever situate" imports a locality limitation into the residuary disposition which would have the result that the chose in action did not pass pursuant to that clause with the further result that there is a partial intestacy in relation to that asset.

[46] I cannot accept this argument.

[47] Clause 4 is expressed in the widest terms and it is plain that the deceased intended it to cover all of the property not specifically dealt with. The words "wheresoever situate" are not words of limitation but rather the reverse.

[48] There will be declarations in the following terms:

[49] I declare that the prize money or so much thereof to which the estate of the deceased Lagos Szanto is entitled does not fall within clause 3 of the will of the deceased.

[50] I declare that the said prize money or so much thereof to which the estate of the deceased is entitled forms part of the residuary estate of the said Lagos Szanto.