SUPREME COURT OF QUEENSLAND

CITATION:	*Public Trustee of Qld as Administrator of the Estate of Ellen Olwen Richardson, deceased v Lee & Ors* [2011] QSC 409
PARTIES:	**PUBLIC TRUSTEE OF QLD AS ADMINISTRATOR OF THE ESTATE OF ELLEN OLWEN RICHARDSON, DECEASED** (applicant) **v** **CARITA LEE, PATSY CHRISTENSON AND THE CORPORATION OF THE SYNOD OF THE DIOCESE OF BRISBANE** (first respondents) **FREDERICK BIGGAM, ELLEN MULLER, SAMUEL BIGGAM, GAYLE HODGSON and SALLYANNE WILKS** (second respondents) **MYFANWY RICHARDSON** (third respondents) **WAYNE WILLIAM RICHARDSON and ELIZABETH McKENZIE** (fourth respondents) **JOHN PRYCE-DAVIES, JENNIFER DIVER, PETER PRYCE-DAVIES and ROSEMARY WILLIAMS** (fifth respondents) **MARLENE RUSSELL and DELRAYNE HODGE** (sixth respondents) **JAMES PRYCE-DAVIES** (seventh respondent)
FILE NO/S:	10135 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2011
JUDGE:	Ann Lyons J
ORDER:	**The Court declares that;** **(a) the sale of the Taringa property did not adeem the gifts in clause 5.05 of the will;** **(b) the Public Trustee should apply the following in paying those gifts:**

(i) from the accommodation bond refunded to the Public Trustee on 10 January 2001, the sum of $96,485.27;
(ii) from the money paid to the Public Trustee from Colonial First State on 29 December 2010, the sum of $313,421.46,
together with interest

CATCHWORDS: SUCCESSION – EXECUTORS AND ADMINISTRATORS – ADMINISTRATION – DISTRIBUTION – LEGACIES AND DEVISES – ADEMPTION – Sale of property devised under will be attorney – Where exemption to the ademption rule applies

Powers of Attorney Act 2000, 2 107

Ensor v Frisby [2009] QSC 268
Jenkins v Jones (1866) LR 2 Eq 323
Re Hartigan (Supreme Court of Western Australia, 9 December 1997, unreported)
Re Viertel [1997] 1 Qd R 110.
Simpson v Canning [2011] VSC 466

COUNSEL: R Whiteford for the applicant

SOLICITORS: Official Solicitor to the Public Trustee for the applicant
T O'Connor for the respondents

[1] This is an application by the Public Trustee of Queensland as executor of the estate of Ellen Olwen Richardson. She made her last will on 13 October 1999. On 12 December 2011 I gave short reasons and made the orders as set out above. I indicated I would publish more extensive reasons in due course. These are those reasons.

[2] The application seeks a determination as to whether certain gifts in the will be adeemed by disposal of the property during the deceased's lifetime by her attorney. If the gifts were not adeemed the Public Trustee seeks directions about tracing the sale proceeds of that property.

The Will

[3] Mrs Richardson's husband had predeceased her and she had no children. Pursuant to the last will dated 13 October 1999 Mrs Richardson appointed her brother, Thomas Pryce-Davies as her executor and trustee; however, if he predeceased her, she appointed the Public Trustee as her executor and trustee. Her brother died on 14 February 2008.

[4] Mrs Richardson died on 6 November 2010 at the age of 97.

[5] By clause 5.05 she left her estate –

> "... house and land at ... Taringa Parade, Taringa ... TO my Trustee to sell it and hold the proceeds on trust as follows ...
> (a) $1,000.00 to CARITA LEE ...;
> (b) $1,000.00 to PATSY CHRISTENSON ...'
> (c) $1,000.00 to ... St Alban's Anglican Church ...
> (d) the balance of the proceeds as follows:
>
> (i) a ¾ share TO those of my sisters MARGARET ESTHER EILEEN BIGGAM and MYFANWY ISOBEL RICHARDSON and my brother THOMAS MORGAN PRYCE-DAVIES who survive me and if more than one equally. If any gift to ...my sisters or my brother does not take effect THEN any benefit to which that person would have been entitled is to be taken by ... his or her ... children who survive me and if more than one then equally;
>
> (ii) a ¼ share TO those of my nieces MARLENE RUSSELL and DELRAYNE HODGE ... my nephew WAYNE WILLIAM RICHARDSON and my niece ELIZABETH ANNE MCKENZIE ... who survive me and if more than one equally. If any gift to ...my nieces or my nephew does not take effect THEN any benefit to which that person would have been entitled is to be taken by ... his or her ... children who survive me and if more than one then equally.

[6] By clause 5.09 she left her residuary estate to her siblings Thomas Pryce-Davies, James Pryce-Davies, Margaret Biggam and Myfawny Richardson and provided that the share which would have been taken by any of those siblings who predeceased her was to go to that person's children.

[7] On 21 July 2006, the deceased gave an enduring power of attorney for financial, personal and health matters to Thomas Pryce-Davies. It is clear that he was aware of the terms of the deceased's 1999 will, and that he had a copy of it.

[8] In February 2007, the deceased was admitted to the Greenslopes Hospital suffering from dementia. It would seem clear that at this time she had lost capacity. Her MMSE score was 17 out of 30, she was neglecting to pay her accounts; her electricity had been disconnected; and she forgot to buy food. She frequently locked herself out of the house. There is also evidence that she wandered the streets at night looking for her deceased parents and that she would approach her neighbours at night asking to be driven to her childhood home in Goodna.

[9] During the hospital admission in February 2007 it became clear that the deceased required nursing home placement. An accommodation bond in an amount of $132,000.00 was required. The deceased did not have sufficient funds to pay for the bond. Her attorney, Thomas Pryce-Davies tried to explain to her that her house had to be sold to pay the bond, but the affidavit material indicates that it is highly likely that she did not understand the need for the sale or even the fact that the sale of the property subsequently occurred.

[10] On 28 June 2007, Mr Pryce-Davies, as attorney, sold the Taringa house.

[11] The Public Trustee of Queensland obtained an Order to administer the estate on 13 December 2010. The estate consists of:

Commonwealth Bank account	$47,576.60
Funeral bond	$10,759.57
Refund of nursing home bond	$120,156.00
Colonial First State investment	$396,736.03
Other	$287.30
	$575,616.57

Liabilities are about $8,300.

ADEMPTION

[12] Generally a specific gift is lost when the subject matter does not exist or has fundamentally changed in its character at the date of the testator's death. The general principle of ademption was set out in *Jenkins v Jones*[1]:

> "... that if there be a specific legacy of a chattel or anything else, and if at the time of the testator's death the specific thing cannot be found, the subject matter of the bequest having been extinguished, the gift cannot take effect."

[13] In *Brown v Heffer*[2] the High Court held that ademption of a specific gift in a will occurs when the property which is the subject of the gift is no longer the testator's at the time of his death or where the property is regarded by the rules of equity to have been converted into other property.

[14] It is clear that the house property at Taringa which was the subject of the gifts in clause 5.05 has been sold. Can the gift take effect?

[15] Only specific legacies, not general or demonstrative legacies, are adeemed by *inter vivos* dispositions of the subject matter of the gift. *Jarman on Wills*, 8 ed, at p.1047 says:

> "A gift of money payable out of land may be specific; thus **if a testator directs land to be sold and £400 to be paid out of the proceeds to A, this is a specific bequest**. But if there is first a bequest of a legacy, and then a particular fund or property is pointed out as that which is primarily liable for its payment, the legacy is demonstrative." (emphasis added)

[16] *Theobald on Wills*, 14 ed, p.327 says:

> "A devise of land to be sold and divided among certain person makes them specific legatees."

[17] It is clear that pursuant to clause 5.05 there was a specific direction that the property was to be sold and that the legacies be paid from the proceeds of sale. There is not

---

1 (1866) LR 2 Eq 323 at p 327.
2 (1967) 116 CLR.

therefore first a bequest of a legacy and then the designation of a particular fund to be primarily liable for it.

[18] In my view the gifts in clause 5.05 are specific and normally would be subject to ademption. What was given by clause 5.05 were gifts of various proportions or parts of the proceeds generated by the sale of a specific property. As the specific property was unavailable to generate those sales proceeds, *prima facie* the gifts in clause 5.05 have been adeemed. However in Australia there is a well recognised exception to the principle of ademption.

An Exception to the Rule

[19] The exception to the ademption rule was discussed in the Queensland decision of *Re Viertel*.[3] In that decision Thomas J indicated that where a property of a person who has become mentally incapacitated is lawfully sold and the proceeds of sale are preserved during the person's lifetime by their attorney, who had no knowledge of the terms of her will, then the previous devise of that property to those attorneys was not thereby adeemed. His Honour held that the attorney was entitled under the will to the proceeds of sale.

[20] Significantly Thomas J noted that acts done in the exercise of a power of attorney are in fact the authorised acts of the principal and are as effective as far as third parties are concerned as if the principal had done them herself. He indicated however that he was concerned not so much with the validity of the sale and transfer as with the secondary consequences of that transfer, namely whether an ademption is to be presumed to follow. His Honour concluded that the exception to the consequence of ademption as expressed in *Jenkins v Jones*[4] applied to the circumstances before him. In that decision, Stuart VC stated the general principle of ademption followed by an exception. He stated:

> "But quite another consideration arises, where after the testator has given a specific thing, and without his knowledge, perhaps against his wishes, or tortiously, another person has sold it or has done enough to wholly alter its character."

[21] Thomas J in *Viertel* indicated that he could see no reason why *Jenkins v Jones* should be regarded as having been overruled and he considered,

> "However I can see no reason why *Jenkins v Jones* should be regarded as having been overruled, and in principle I regard it as expressing a reasonable exception which ought to be followed. The validity of the factors that may contribute to the existence of such an exception has also been recognised in the cases mentioned above including *Re Larking* and *Re Dorman*. *Re Larking* reinforces the notion that a testator's intention is not defeated by acts done by a committee of his estate of which the testator was not aware…
>
> In these circumstances I consider that Mr and Mrs McCallum's entitlement under the will was not lost. The result should be no different than if a stranger had converted or misapplied an asset in circumstances where the proceeds of the asset can be traced."

---

3 [1997] 1 Qd R 110.

4 (1866) LR 2 Eq 323 at p 327.

[22] Accordingly, *Viertel* established that there is an exception to the ademption rule if:

(a) the sale of the property is lawfully made by the deceased's attorney;
(b) the deceased was unaware of the sale;
(c) the deceased's intention to benefit those named as recipients of the gift is unchanged;
(d) the attorney is unaware of the terms of the will;
(e) the sale proceeds can be traced.

[23] I pause to note at this point the provisions of s 107 of the *Powers of Attorney Act* 2000 which provides that a person whose benefit in a person's estate is lost because of a sale or other dealing with the principal's property by an attorney, can apply to the Supreme Court for compensation. However as Philip McMurdo J held in *Ensor v Frisby*[5] s 107 applies when there "has been an ademption, rather than affecting the common law as to the circumstances when an ademption occurs."

[24] Accordingly it is necessary to first consider whether an ademption has in fact occurred or whether the exception applies.

[25] I am satisfied that this first limb for qualification for the exception is satisfied. It is clear that the sale of Mrs Richardson's property was made by Mr Pryce-Davies as attorney to raise money for her nursing home bond.

[26] I am also satisfied on the evidence that the second element has been satisfied. I am satisfied that at the time the sale was made Mrs Richardson was unaware of the sale because she had lost capacity.

[27] In terms of element (c) I am satisfied on the basis of the affidavit material, particularly the evidence of her nephew, Samuel Biggam and her niece Jennifer Diver that the deceased's brothers and sisters and their children were important to her as she had no children of her own. There is nothing to indicate that the deceased would have changed her mind about wishing to make the gifts that she had set out in clause 5 of her will. I am satisfied that element (c) is satisfied.

[28] In relation to the fourth element, that the attorney be unaware of the terms of the will, it is clear that in the present case Mr Pryce-Davies was aware of the contents of the deceased's will as Ms Diver's affidavit makes clear. There is no dispute that despite knowing the contents of the will the attorney had no real option but to sell the deceased's property to fund the nursing home bond to ensure that she was appropriately accommodated.

[29] Accordingly all of the criteria Thomas J considered to be pre-requisites to qualification for the exception to the rule cannot be satisfied.

[30] The issue which is raised on this application is whether this requirement that the attorney be unaware of the terms of the will is an essential requirement before the exception to the ademption principle can be relied on.

[31] In my view, whilst such a component was present in the factual background in that case, I do not consider that such an element is essential. I can see no valid reason why ignorance of the contents of the will should be an essential component before the exception to the rule can be invoked particularly when one of the duties of an

---

5 [2009] QSC 268.

attorney would always be to make decisions in the best interest of the principal. Furthermore the cases relied on by Thomas J in *Re Viertel* are not cases which made ignorance by the person disposing of the property an essential element.

[32] I also consider that the analysis by Parker J in the decision of *Re Hartigan*[6] should be endorsed. In that case the Western Australia Public Trustee was administering the estate of an incapacitated person. Pursuant to her will, Ms Hartigan had left her house to a number of beneficiaries. The Public Trustee was aware of this, but needed to sell the house to pay her expenses as she had few assets other than the house. The Public Trustee sought judicial advice as to whether the sale would adeem the gift. Parker J said:

> "I have, with respect, found the analysis of the position and reasoning of Thomas J (in *Re Viertel*) helpful and persuasive. The heart of that reasoning turns on the sale of property by a person other than the testator at a time when the testator is incapable of selling the property or of altering an existing will to give effect to the testator's intentions in the changed circumstances. If that is correct it ought not to be a material distinction whether or not the person effecting the sale knew of the terms of the will.
>
> I am somewhat reassured in this view by another opinion under s 58 of the *Public Trustee Act* given by *Re Bearsby*, SCrt of WA (Wheeler J); Civ 1919 of 1997; 29 August 1997 where her Honour gave the opinion that the proposed sale of a property would not adeem its devise in a will in circumstances where the testatrix lacked the capacity both to sell the property herself and to change her will."

[33] There is also a recent Victorian Supreme Court authority which also supports this principle. In the decision of *Simpson v Canning*[7] the deceased had left her house to her son in her will and her attorney was aware of this but had to sell the property to pay a nursing home bond.

[34] In that decision Hargrave J analysed the decisions in *Re Viertel* and *Re Hartigan*, and held there was no ademption. His Honour analysed a number of the recent decisions.

> "[43] In *Re Viertel*, Thomas J was prepared to take 'a less than literal approach to the test in *Jenkins v Jones*'. On this basis, he extended the exception in that case to include an authorised sale by an attorney who is ignorant of the terms of the will. In doing so, Thomas J gave the exception expressed in *Jenkins v Jones* a wide interpretation, extending it to any disposition of the relevant asset by a third party without the testator's knowledge and inconsistently with his intention; at least where the third party did not know the terms of the will.[28] A different view has been taken in England. In *Banks v National Westminister Bank PLC & Anor*, the exception in *Jenkins v Jones* was confined to dispositions made without the testator's knowledge and without lawful authority.

---

6 Unreported, Supreme Court of Western Australia, 9 December 1997.

7 [2011] VSC 466.

> [44] In *Ensor v Frisby* McMurdo J considered *Banks*, but nevertheless held that *Re Viertel* should be followed in Australia because: once an exception is recognised for an unauthorised act of which the testatrix was unaware, it is a relatively smaller step to recognise, as Thomas J did, an exception where the act was done under the authority of an enduring power of attorney. Ultimately I am persuaded to follow *Re Viertel*, followed as it has been in two other Australian jurisdictions.
>
> [45] In my opinion, the statements in *Jenkins v Jones* were not intended to create a new exception to the ademption principle. Rather, as held in *Banks v National Westminister Bank*, *Jenkins v Jones* was an application of the existing exception for unauthorised dispositions of the relevant asset without the knowledge or consent of the testator. However, I am nevertheless of the view that a further exception to the ademption principle, to the effect expressed in *Re Viertel*, constitutes a justified extension of the common law to reflect current circumstances. People are living longer than in the past and their physical health is outlasting their mental capacity. It is commonplace for properties owned by incapacitated persons to be sold under the authority of enduring powers of attorney, to fund accommodation bonds and other necessities and comforts for an aging population. Further, as noted, there is no good reason why the position should be different if, in the absence of an applicable enduring power of attorney, it is necessary to appoint an administrator under the *Guardianship and Administration Act* to sell property of an incapacitated person for such purposes." [footnotes omitted]

[35] I therefore endorse the approach which has been adopted by Hargrave and Parker JJ and agree that there is no good reason why a sale by an attorney or an administrator with knowledge of the contents of the will should have a different outcome. Hargrave J concluded that he would follow *Re Viertel* and recognised that there was a further exception to the ademption principle whenever there is an authorised sale by an attorney in circumstances where:

(a) the deceased lacked testamentary capacity;
(b) the Court is satisfied that the deceased, if possessed of testamentary capacity, would have intended the donee of the asset in the will to have the remaining proceeds of sale; and
(c) the remaining proceeds of sale can be identified with sufficient certainty.

[36] His Honour concluded:

> "Further, in my opinion this exception should apply whether or not the attorney knew of the terms of the will. There is no good reason to limit it to circumstances where the attorney has no knowledge of the terms of the will, and thus of the possible effect of the ademption principle following a sale."

[37] I agree that the exception to the ademption rule should apply irrespective of whether the attorney or administrator knew the contents of the will.

[38] The remaining criterion which needs to be addressed is whether the proceeds of the property can be traced.

Can the proceeds of the property be traced?

[39] It is clear that the majority of the sale proceeds can be traced. The affidavit material establishes that;

(a) on 6 July 2007, the sale proceeds ($449,859.97) were deposited into the deceased's Commonwealth Bank passbook savings account no. 5000991;

(b) at the commencement of business on 11 July 2007, the balance in that account was $560,341.82, of which $449,858.97, or 80.3% came from the sale;

(c) on 11 July 2007, two withdrawals were made from that account totalling $120,156.00. 80.3°/o of this is traceable to the sale;

(d) of the money withdrawn on 11 July 2007, $134,593.07 was paid to the nursing home. Of this, $132,000.00 was for the accommodation bond. The balance was for other fees and cannot be traced. The amount of the accommodation bond refunded on the deceased's death was $120,156.00. 80.3% of this, or $96,485.27 can be traced to the sale;

(e) the rest of the money withdrawn from the passbook savings account on 11July 2007, namely $420,748.75, was used to open a Commonwealth Bank Pensioner Security Account, No. 10015383. 80.3% of this, or $337,861.25, can be traced to the sale;

(f) at the commencement of business on 19 November 2007, the balance in that account had increased to $427,453.44. That day, $400,000.00 was withdrawn from that account and invested with Colonial First State. Therefore, the proportion of the traceable proceeds in the monies paid to Colonial First State was ($337,861.25 + $427,453.44) x 100 = 79%;

(g) when Mrs Richardson died, the amount paid to the Public Trustee from the Colonial First State investment was $396,736.03. 79% of this is $313,421.46.

[40] It is clear that the beneficiaries have instructed the Public Trustee that they do not want an exhaustive tracing. I am satisfied that a further and more comprehensive tracing is not required. I am also satisfied that all relevant parties have been notified of this application.

[41] Accordingly I am satisfied that the sale of the Taringa property did not adeem the gifts in clause 5.05 of the Will.

[42] In all the circumstances then I am satisfied that there should be the following declarations:

(a) the sale of the Taringa property did not adeem the gifts in clause 5.05 of the will;

(b) the Public Trustee should apply the following in paying those gifts:

(i) from the accommodation bond refunded to the Public Trustee on 10 January 2001, the sum of $96,485.27;

(ii) from the money paid to the Public Trustee from Colonial First State on 29 December 2010, the sum of $313,421.46,

together with interest.

[43] It is likely that the traceable amount will be less than the proceeds of sale especially as costs of the proceedings must be paid out of them and not out of residue. Accordingly, I am satisfied that the legacies in clause 5.05 should abate rateably *pari passu*. There should be declarations in the terms sought.

[44] **ORDERS**

It is declared that

(a) the sale of the Taringa property did not adeem the gifts in clause 5.05 of the will;

(b) the Public Trustee should apply the following in paying those gifts:

(i) from the accommodation bond refunded to the Public Trustee on 10 January 2001, the sum of $96,485.27;

(ii) from the money paid to the Public Trustee from Colonial First State on 29 December 2010, the sum of $313,421.46,

together with interest.