SUPREME COURT OF QUEENSLAND

CITATION:	*The Trust Company Limited v Gibson & Anor* [2012] QSC 183
PARTIES:	**THE TRUST COMPANY LIMITED (AS EXECUTOR OF THE ESTATE OF ALLAN ROBERT JOHN GIBSON, DECEASED)** **(applicant)** **v** **RODNEY JOHN GIBSON AND DEBRA JO-ANNE CAMPBELL** **(respondents)**
FILE NO:	BS2446 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	29 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2012
JUDGE:	Mullins J
ORDER:	**1. It is declared that:** **(a) as the result of the disclaimer by Dorothy Isabel Gibson of her interest in the estate of Allan Robert John Gibson deceased (the deceased) under clause 3(a) of the will made on 29 February 1985 (the will), the deceased's estate must be distributed pursuant to clause 3(b) of the will;** **(b) the gift to Rodney John Gibson and Debra Jo-Anne Campbell under clause 3(b)(i) of the will was adeemed by the sale during the deceased's lifetime of the property described in clause 3(b)(i) of the will (the Holland Park property);** **(c) the balance of the proceeds of the sale of the Holland Park property held on the account of the deceased and any accretions form part of the deceased's residuary estate; and** **(d) as the result of the disclaimer by Ann Louise Rickuss of her interest in the deceased's estate under clause 3(b)(ii) of the will, the share in the deceased's residuary estate that she otherwise would have taken passes in equal shares to Rodney John Gibson, Debra Jo-Anne Campbell and Kerry-Anne Jarvis.**

2. The respondents' costs of the application are to be assessed on an indemnity basis and paid from the deceased's estate.

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ASCERTAINMENT OF TESTATOR'S INTENTION AS EXPRESSED OR IMPLIED BY WORDS OF WILL – where the testator's wife disclaimed her interest under the will and in respect of the testator's estate – where the testator's wife was the primary beneficiary under the will with a gift over, if the testator's wife predeceased or failed to survive the testator – whether will should be construed to imply disclaimer by the testator's wife as falling within the contingency to activate the gift over – whether the rule in *Jones v Westcomb* applies

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ORDINARY AND GRAMMATICAL MEANING OF WORDS – where the testator devised the real property that was his matrimonial home or any substitute property – where the matrimonial home was sold prior to the testator's death and no substitute property was acquired – whether "any substitute property" must be construed as meaning real property

SUCCESSION – EXECUTORS AND ADMINISTRATORS – ADMINISTRATION – DISTRIBUTION – LEGACIES AND DEVISES – ADEMPTION – where the real property of the testator had been lawfully sold prior to his death by his attorney – whether the exception to ademption recognised in *Re Viertel* [1997] 1 Qd R 110 applies

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – LEGACIES AND DEVISES – LAPSE AND INTEREST UNDISPOSED OF – INCLUSION IN RESIDUE – where the residuary estate was given to the testator's two children and two stepchildren as shall survive the testator in equal shares – where one of the residuary beneficiaries disclaimed her interest under the will or in the testator's estate – whether the residuary estate given in fractional parts – whether s 33P of the *Succession Act* 1981 (Qld) applies

Succession Act 1981 (Qld), s 33P

Powers of Attorney Act 2003 (NSW), s 22

Brown v Heffer (1967) 116 CLR 344, considered
Ekert v Mereider (1993) 32 NSWLR 729, considered
Ensor v Frisby [2010] 1 Qd R 146, not followed
Fell v Fell (1922) 31 CLR 268, considered
Re Fox's Estate [1937] 4 All E R 664, followed
Jones v Westcomb (1711) 24 ER 149, followed
*Probert v Commissioner of State Taxation (*1998) 72 SASR 48, considered
Public Trustee of Qld v Lee [2011] QSC 409, not followed
RL v NSW Trustee and Guardian [2012] NSWCA 39, considered
Simpson v Cunning [2011] VSC 466, considered
In re Sinclair, deceased [1985] Ch 446, considered
The Trust Company Limited v Zdilar [2011] QSC 5, considered
Verrall v Jackson [2006] QSC 309, considered
Re Viertel [1997] 1 Qd R 110, not followed

COUNSEL: R T Whiteford for the applicant
C M Tam for the respondents

SOLICITORS: The Trust Company (Legal Services) Pty Ltd for the applicant
Quinlan Miller & Treston for the respondents

[1] The applicant, as one of the named executors, has been granted probate of the last will of the late Allan Robert John Gibson (the deceased) who died on 16 September 2010. The last will was made on 19 February 1988.

[2] From the deceased's first marriage, there were two children, Mr Rodney Gibson (Rodney) born in 1952 and Ms Debra Campbell (Debra) born in 1959, who are the respondents in this proceeding. The deceased's first wife died in 1967 and the deceased married Dorothy Eastaughffe (Mrs Gibson) in 1985. There were no children of that marriage, but Mrs Gibson had two children of an earlier relationship, Ms Rickuss and Ms Jarvis. Ms Jarvis has been estranged from her mother and sister since at least 1985 and, despite inquiries, Ms Jarvis' location is presently unknown to the parties.

[3] The deceased and Mrs Gibson lived in the property at 29 Turquoise Street, Holland Park which was owned by the deceased.

[4] Under the last will the deceased appointed Mrs Gibson and the predecessor of the applicant as executors and trustees. Under clause 3(a) of the will, the deceased left his estate to Mrs Gibson, if she survived him.

[5] Clause 3(b) of the deceased's will provided:

> "IN THE EVENT of the said DOROTHY ISABEL GIBSON predeceasing me or failing to survive me, then the whole of my estate to my Trustees upon trust -

> (i) TO TRANSFER my real property and improvements thereon situate 29 Turquoise Street, Holland Park aforesaid or any substitute property I shall own at the date of my death to my son RODNEY JOHN GIBSON and my daughter DEBRA JO-ANNE CAMPBELL as tenants in common in equal shares each share for his or her separate and individual use and benefit absolutely and
> (ii) TO PAY transfer and set over the balance of my residuary estate to such of my son RODNEY JOHN GIBSON and my daughter DEBRA JO-ANNE CAMPBELL and my step-daughters ANN LOUISE RICKUSS and KERRY ANNE JARVIS as shall survive me in equal shares each share for his or her separate and individual use and benefit absolutely."

[6] On 27 January 2006 the deceased executed an enduring power of attorney appointing Mrs Gibson his attorney for financial, personal and health matters, with the appointment to commence when he was incapable of managing his affairs. The deceased's cognitive state deteriorated from late 2006. The deceased and Mrs Gibson were still living in their matrimonial home at Holland Park, when the deceased was admitted to hospital in April 2009. An assessment performed whilst he was in hospital approved him for permanent high level residential care due to his Alzheimer's disease and severe cognitive impairment requiring constant supervision. The deceased was then admitted to a nursing home.

[7] Mrs Gibson continued to live in the Holland Park house until August 2009 when she wanted to move into a retirement village for which she needed an accommodation bond. The Holland Park house was sold by Mrs Gibson as the deceased's attorney. Mrs Gibson, Rodney, Debra and Ms Rickuss entered into a deed that covered the distribution of the proceeds from the sale of the Holland Park house, so that Mrs Gibson received $169,000 to enable her to pay the accommodation bond, the balance of the sale proceeds were to be divided equally between Mrs Gibson and the deceased, and the deceased was entitled to the money in the joint account he held with Mrs Gibson.

[8] The settlement proceeds were distributed in accordance with the deed on 22 December 2009. Under the deed, Mrs Gibson also agreed to renounce her appointment as executor under the deceased's will and disclaimed any interest as beneficiary under the will and in the deceased's estate and Ms Rickuss made a similar disclaimer.

[9] On 27 September 2010 Mrs Gibson signed a document confirming her disclaimer of her interest in the deceased's estate. Ms Rickuss signed a similar document on 20 October 2010.

Issues

[10] The issues that were raised at the hearing of this application were:

(a) did clause 3(b) of the will take effect where Mrs Gibson disclaimed her interest under the will and in the deceased's estate?
(b) whether "any substitute property" in clause 3(b)(i) of the will can be construed to mean cash;

(c) whether the exception to the ademption rule in *Re Viertel* [1997] 1 Qd R 110 applies; and
(d) as a result of the disclaimer by Ms Rickuss, does her share in the residuary estate pass on intestacy or to the other residuary beneficiaries?

Effect of Mrs Gibson's disclaimer

[11] The effect of her disclaimer was to divest Mrs Gibson's right to call on the executor of the deceased's will to transfer the entire residuary estate to her under clause 3(a) of the will and to allow the executor to administer the will on the basis that the gift to Mrs Gibson failed: *Probert v Commissioner of State Taxation* (1998) 72 SASR 48, 55.

[12] Clause 3(b) of the will was expressed to apply where Mrs Gibson died before or failed to survive the deceased. On a literal interpretation, disclaimer of her interest does not fall within the contingencies of Mrs Gibson's predeceasing or failing to survive the deceased. The general principle is that where there is a gift over upon alternative contingencies, the gift over will not take effect unless one or other of those exact contingencies happens: *In re Sinclair, deceased* [1985] Ch 446, 455. Potentially the failure of the gift to Mrs Gibson would therefore result in intestacy.

[13] It is the entrenched approach to the construction of a will to favour the construction that avoids intestacy: *Fell v Fell* (1922) 31 CLR 268, 275-276. Intestacy in respect of the failure of the gift to Mrs Gibson will be avoided, if the rule in *Jones v Westcomb* (1711) 24 ER 149 applies. The rule is an exception to the general principle that the gift over on certain contingencies only takes effect if those contingencies happen and allows the will to be construed to imply an additional contingency for the gift over to take effect. The rule was explained in *Re Fox's Estate* [1937] 4 All E R 664 at 666, by Sir Wilfrid Greene MR:

> "Where a testator has provided for the determination of an estate in any of two or more events, and has then given a gift over expressly to take place in one only of those events, the court will, in the absence of any indication to the contrary, imply, by way of necessary implication, an intention of the part of the testator that the gift over shall take effect, nor merely in the specified event, but on the happening of any of the events which were to determine the previous estate. That is the ordinary case of the application of the rule. It is to be remembered that that rule does not depend upon the existence in the will of some particular word or phrase, which, as a matter of construction, produces that result. It is dependent upon the necessary implication of a provision to that effect, in order to carry out what must have been the intention of the testator."

and at 669 by Romer LJ:

> "The principle is applicable, therefore, only in those cases where the court, looking at all the relevant circumstances of the case, including, of course, the will itself, comes to the conclusion that the testator must *a fortiori* have intended the disposition over to take effect in the event which has actually happened, although it is not the event which he has specified in his will as the one in which the gift over is to take effect."

[14] In a case where the gift failed on the ground of public policy that the beneficiary had killed the testator, it was observed that the rule in *Jones v Westcomb* does not permit the court to interpret a will merely to obtain a result which it considers to be fair: *Ekert v Mereider* (1993) 32 NSWLR 729, 732. That follows as the rule in *Jones v Westcomb* assists in the construction of the terms of the will. The court must construe the will to determine the real contingency that was intended to be met by the clause and determine whether the event that has actually occurred was impliedly intended by the deceased to be covered by that contingency: compare *Verrall v Jackson* [2006] QSC 309 at [97].

[15] From the structure of the will, the deceased intended that Mrs Gibson would be his primary beneficiary and addressed the contingencies in clause 3(b) of Mrs Gibson predeceasing him or failing to survive him by setting out his preferred disposal of his estate, if Mrs Gibson did not succeed to his estate. In the circumstances, what the deceased intended to guard against was an intestacy due to the gift to Mrs Gibson not taking effect. The result of the disclaimer of the gift by Mrs Gibson is the same contingency that the deceased was endeavouring to avoid by including clause 3(b) in his will. In those circumstances, the rule in *Jones v Westcomb* should apply, and clause 3(b) of the will should be construed as impliedly including the event of Mrs Gibson disclaiming the gift under clause 3(a) of the will. Although the application of the rule in *Jones v Westcomb* results in other difficulties with the application of clause 3(b) of the will that are otherwise addressed in this application, those difficulties arising from the terms in which the gifts were made in clause 3(b) should not prevent the recognition of the implied intention of the deceased to dispose of his estate under clause 3(b) of the will, if the gift to Mrs Gibson under clause 3(a) of the will failed.

[16] Clause 3(b) of the will therefore took effect on the disclaimer by Mrs Gibson of her interest under clause 3(a) of the will.

Construction of "any substitute property"

[17] The respondents submit that the proper construction of the words "any substitute property" in clause 3(b)(i) of the will covers the remainder of the cash in a bank account held on behalf of the deceased after the property was converted to cash prior to the deceased's death and the proceeds distributed in accordance with the deed. The Holland Park house had been acquired by the deceased in about 1959 and was the most significant asset owned by him during his lifetime. The structure of clause 3(b) is that the deceased disposed of the Holland Park house (or any substitute property) to his two children and then divided the balance of his estate among his two children and his two stepdaughters.

[18] Although the word "property" can be given a wide variety of meanings depending on the context, little guidance is obtained from resorting to statutory definitions of "property" for the purpose of particular statutes. The meaning to be given to "any substitute property" in clause 3(b)(i) of the will is controlled by the context of clause 3(b). It is uncontroversial that the ordinary meaning of "substitute" is to put to stand in place of another: *The Trust Company Limited v Zdilar* [2011] QSC 5 at [27].

[19] The words "any substitute property I shall own at the date of my death" in clause 3(b)(i) take their meaning from the description of the property that was primarily

disposed of under that clause which is the Holland Park house that was described in terms of "my real property and improvements thereon." All the terms used in clause 3(b)(i) are consistent with the transfer of real property and not the disposition of proceeds of sale: the trustee is directed to "transfer" the property to the respondents "as tenants in common in equal shares each share for his or her separate and individual use and benefit absolutely."

[20] Read as a whole and in context, clause 3(b)(i) shows that the deceased's intention was to dispose of the Holland Park property or any substitute real property under clause 3(b)(i) to the respondents. The balance of the proceeds from the sale of the Holland Park property held on account of the deceased at his death do not fall within the description of "any substitute property" in clause 3(b)(i) of the will.

Ademption of Holland Park property

[21] Ademption of a specific devise by will occurs where the property the subject of the devise has been disposed of by the testator before his death, so that there is nothing in the testator's estate that fits the words of the gift: *Brown v Heffer* (1967) 116 CLR 344, 348.

[22] When the application was heard, the parties' submissions proceeded on the basis that *Viertel* was authoritative in recognising an exception to ademption in a case where the real property of the testatrix who had become mentally incapacitated was lawfully sold and the proceeds of sale preserved during her lifetime by her attorneys who had no knowledge of the terms of her will. The devise of the property in *Viertel* to those attorneys was held not to be adeemed. After I had reserved my decision, the parties' counsel drew my attention to *RL v NSW Trustee and Guardian* [2012] NSWCA 39. In *obiter dicta* Campbell JA who gave the leading judgment (with which Young JA and Sackville AJA agreed) concluded that *Viertel* and cases which applied it (including *Ensor v Frisby* [2010] 1 Qd R 146 and *Public Trustee of Qld v Lee* [2011] QSC 409) were wrongly decided. The parties agreed that, if I were to follow *RL*, the conclusion would follow that the gift to the respondents under clause 3(b)(i) of the will was adeemed and the sale proceeds held on account of the deceased would properly fall into residue.

[23] *RL* was concerned with the manner in which the manager of the estate of an incapable protected person was obliged to invest the net proceeds of sale of an asset that was the subject of a specific legacy in the last will that the protected person made before becoming incapable. Although *RL* was not directly concerned with the question of ademption that arose in *Viertel*, arguments had been addressed to the court based on *Viertel*. Campbell JA dealt in detail with those arguments and set out in Appendix B to his reasons at [148]-[187] why *Viertel* and cases following it were wrongly decided. It is a comprehensive and convincing analysis.

[24] It should be noted that in *Viertel* Thomas J had expressed hesitation (at 115) in finding that the factual circumstances in that case fell within an exception to ademption recognised in *Jenkins v Jones* (1866) LR 2 Eq 323. In *Ensor*, McMurdo J considered facts that were indistinguishable from those in *Viertel*. McMurdo J (at [18]-[20]), but for the authority of *Viertel* which had been followed elsewhere in Australia and which he found was not affected by s 107 of the *Powers of Attorney Act* 1998, would not have treated the sale by the testatrix' attorney of the real property as an exception to ademption.

[25] *Viertel* and the cases that have followed it have responded to circumstances that have become commonplace, as described by Hargrave J in *Simpson v Cunning* [2011] VSC 466 at [45]:

> "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."

[26] There has been a legislative response in New South Wales in s 22 of the *Powers of Attorney Act* 2003 which regulates ademptions of testamentary gifts by an attorney under an enduring power of attorney by giving the beneficiary who would have succeeded to the adeemed asset the same interest in any surplus money or other property arising from the disposition of the relevant asset, subject to any order made by the court varying the operation of s 22.

[27] The analysis undertaken by Campbell JA in *RL* of the relevant authorities on which *Viertel* was based concluded that the exception to ademption in *Jenkins v Jones* should be confined to a case where the subject matter is extinguished by fraud or tortious acts unknown to the testator. I therefore consider that I should apply the *dicta* in *RL* and not follow *Viertel* and the cases that have followed *Viertel*. It will be a matter for the Parliament in Queensland to address whether there should be any statutory response to the circumstances that resulted in the decision in *Viertel*.

[28] It follows that the gift under clause 3(b)(i) of the will was adeemed by the sale of the Holland Park property and the balance of the proceeds of the sale of the Holland Park property held on the account of the deceased (and any accretions) form part of the deceased's residuary estate to be disposed of under clause 3(b)(ii) of the will.

Effect of Ms Rickuss' disclaimer

[29] The applicant submits that, as a result of Ms Rickuss' disclaimer of her share in the residuary estate, that share passes to the other residuary beneficiaries on the application of s 33P of the *Succession Act* 1981 (the Act). Section 33P(1) provides:

> "If a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, the part that fails passes to the part that does not fail and, if there is more than 1 part that does not fail, to all those parts proportionately."

[30] The first issue in relation to the possible application of s 33P is whether the gift of the residuary estate under clause 3(b)(ii) is able to be characterised as a disposition in fractional parts of the residue. The purpose of clause 3(b)(ii) of the will is to divide the residuary estate equally between whichever of the four children and stepchildren survived the deceased in equal shares. Although the clause does not express the interest of each beneficiary in fractional terms, the effect of the clause is to dispose of the residuary estate in fractional parts, with the fraction being determined by the number of survivors. As there is no evidence that Ms Jarvis did not survive the deceased, each of named beneficiaries succeeded to a one-quarter share of the deceased's residuary estate, subject to the effect of Ms Rickuss' disclaimer.

[31] The second issue in relation to the possible application of s 33P is whether disclaimer of her interest under the will by Ms Rickuss equates to the failure of the

gift to her within the meaning of s 33P(1). That is the effect of Ms Rickuss' disclaimer which, but for s 33P, would mean that the gift would pass on in intestacy.

[32] The purpose of s 33P of the Act is to avoid intestacy. There is no contrary intention disclosed in the will that precludes the application of s 33P(1) of the Act. The conditions for its application have been fulfilled. It applies to the share of Ms Rickuss under clause 3(b)(ii) of the will which she has disclaimed, so that the share which she otherwise would have taken passes proportionately to the other three named beneficiaries under clause 3(b)(ii) of the will.

[33] The applicant made alternative submissions to achieve the same result based on the application of the rule in *Jones v Westcomb* or the principle explained in *Arnott v Leong* [2009] NSWSC 187. It is unnecessary to consider these alternative submissions, because the s 33P of the Act applies in the circumstances. If it were necessary to consider alternative submissions, it is clear that the rule in *Jones v Westcomb* should apply to Ms Rickuss' disclaimer on the basis that the real contingency that the deceased was guarding against by disposing of his residuary estate to those of his children and stepchildren who survived him was a partial intestacy. Clause 3(b)(ii) of the will should be interpreted as if the event of disclaimer was within the contingency for which express provision was made in clause 3(b)(ii).

Costs

[34] The costs order that was sought in the originating application, as filed, was that the costs of all parties of the application be paid from the estate of the deceased on an indemnity basis. The applicant as executor does not require a costs order in order to recover its costs from the deceased's estate. It is appropriate that the respondents have their costs from the estate on an indemnity basis.

Orders

[35] It follows that the orders that should be made are:

1. It is declared that:
    - (a) as the result of the disclaimer by Dorothy Isabel Gibson of her interest in the estate of Allan Robert John Gibson deceased (the deceased) under clause 3(a) of the will made on 29 February 1985 (the will), the deceased's estate must be distributed pursuant to clause 3(b) of the will;
    - (b) the gift to Rodney John Gibson and Debra Jo-Anne Campbell under clause 3(b)(i) of the will was adeemed by the sale during the deceased's lifetime of the property described in clause 3(b)(i) of the will (the Holland Park property);
    - (c) the balance of the proceeds of the sale of the Holland Park property held on the account of the deceased and any accretions form part of the deceased's residuary estate; and
    - (d) as the result of the disclaimer by Ann Louise Rickuss of her interest in the deceased's estate under clause 3(b)(ii) of the will, the share in the deceased's residuary estate that she otherwise would have taken passes in equal shares to Rodney John Gibson, Debra Jo-Anne Campbell and Kerry-Anne Jarvis.

2. The respondents' costs of the application are to be assessed on an indemnity basis and paid from the deceased's estate.