

SUPREME COURT OF QUEENSLAND

CITATION: *Stevens v Hamilton and Anor* [2015] QSC 279

PARTIES: **ERROL DAVID STEVENS as Executor of the Estate of Lionel Alexander Stevens deceased as Trustee of the Lionel Stevens Trust Fund and as Beneficiary of the Estate of Lionel Alexander Stevens deceased**
(Applicant)
v
DIANA CRYSTAL HAMILTON and GLENN PETER COLLIER HARWOOD as Executors of the Will of Lois Isabel Stevens deceased
(Respondents)

FILE NO/S: Brisbane No 3075 of 2015

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 8 October 2015

DELIVERED AT: Brisbane

HEARING DATE: 28 July 2015

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of orders, and costs.**

CATCHWORDS: SUCCESSION – ADMINISTRATION OF ESTATE – where the applicant, who was the executor of the deceased’s Will and trustee of the deceased’s Trust Fund, sought an order pursuant to the *Trusts Act 1973 (Qld)* as to how he ought to treat funds held in the deceased’s investment account – whether the funds in issue are an asset of the deceased’s estate or of the deceased’s Trust Fund

Succession Act 1981 (Qld)
Trusts Act 1973 (Qld)
Re Gulbenkian’s Settlement Trust (1978) AC 508, cited
The Public Trustee of Queensland v Smith [2008] QSC 339, cited

COUNSEL: S K McLeod for the applicant
R T Whiteford for the respondents

SOLICITORS: Madsen Lawyers for the applicant
YHC Lawyers for the respondents

- [1] **BODDICE J:** By originating application, filed 26 March 2015, the applicant sought an order pursuant to Section 96 of the *Trusts Act 1973* (Qld) as to how funds held in an investment account ought to be treated by him as Executor of the Will of Lionel Alexander Stevens, deceased, and as Trustee of the Lionel Stevens Trust Fund.
- [2] At issue is the proper interpretation of the Will of the deceased and whether the funds in question are an asset of the deceased's estate or of the Lionel Stevens Trust Fund.

Background

- [3] The deceased was born on 6 October 1916. He had two sons: Errol, who is the applicant, and Gregory, who died in December 1995. On 25 May 1996, the deceased married his second wife, Lois Isabel Stevens. The deceased died on 9 March 2014.
- [4] Lois Isabel Stevens died on 20 March 2015. Probate of her Will was granted to her executors, Diana Crystal Hamilton and Glenn Peter Collier Harwood on 24 June 2015. Those executors are the respondent in this application.
- [5] The deceased's last Will was dated 4 April 2003. It appointed the applicant as his Executor. Relevantly, it gave to the applicant "all of my share or interest in the Lionel Stevens Trust Fund". The residuary estate was left to the deceased's wife.
- [6] The Lionel Stevens Trust Fund was established by Deed dated 1 March 1996. It was still in existence as at the date of the deceased's death. The applicant was its Trustee. The deceased was entitled to the income of the Trust during his lifetime. On his death, the applicant as Trustee had power to distribute the Trust assets to himself.

Evidence

- [7] The deceased was the sole beneficiary of the estate of his late son Gregory. The applicant claims the deceased received approximately \$400,000 on account of that estate which was deposited into a Commonwealth Bank account in or about 1996 to be held "on trust by the Lionel Stevens Trust Fund". The Commonwealth Bank has no record of any account in the name of the Lionel Stevens Trust Fund.
- [8] On 10 June 1998, the deceased opened Commonwealth Bank Portfolio Investment Account No 704. The account was opened in the name of "Lionel Alexander Stevens". The income generated from that account was paid into Commonwealth Bank Pensioner Security Account No 004 in the names of the deceased and his wife.
- [9] On 20 August 2004, Account No 004 was closed and Commonwealth Bank Pensioner Security Account No 368 in the name of "L Stevens" was opened. Distributions from Account No 704 were thereafter paid into Account No 368. On 23 August 2004, Account No 704 was closed and the proceeds (\$378,128.55) paid into Account No 368.

- [10] On 30 August 2004, the deceased withdrew \$335,000 from Account No 368 to establish an investment account with the Colonial First State. That investment was established by application dated 26 August 2004. The investor was listed as Lionel Alexander Stevens with the “Superannuation Fund/Trust” listed as “Lionel Stevens Trust Account”. The deceased was the sole signatory of that application. The income of that investment account was paid into Account No 368.
- [11] On 6 June 2013, the deceased withdrew \$20,000 from the Colonial First State Investment account. The remaining amount was retained in that account. At the time of the deceased’s death the amount in the Colonial First State Investment account was \$329,107.64.
- [12] Throughout the period since establishing the investment account with Colonial First State, the deceased declared the income from that investment in his tax returns. His accountant did not, at any time, prepare tax returns for the Lionel Stevens Trust Fund.

The application

- [13] The applicant submits the words “Lionel Stevens Trust Fund” in clause 4 of the Will refer to the funds held in the Lionel Stevens Trust Account at Colonial First State. He submits those monies were the proceeds of funds received by the deceased from the Estate of his late son Gregory, which were held on trust by the Lionel Stevens Trust Fund. The deceased’s intention was that the applicant receive these funds.
- [14] Alternatively, the applicant submits the proceeds of the Colonial First State Investment account are an asset of the Lionel Stevens Trust Fund. Those funds do not form part of the residuary estate of the deceased.
- [15] The respondents submit the terms of the deceased’s Will are unambiguous. The deceased left the applicant his interest in the Lionel Stevens Trust Fund. There is no evidence the funds held in the Colonial First State Investment account ever belonged to the Lionel Stevens Trust Fund. The fact those funds are characterised as the Lionel Stevens Trust Account does not mean they are funds of the Lionel Stevens Trust Fund. Those funds form part of the residuary estate of the deceased.

Applicable principles

- [16] Section 33C of the *Succession Act* 1981 (Qld) provides:

“(1) In a proceeding to interpret a will, evidence, including evidence of the testator’s intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it –

- (a) meaningless; or
- (b) ambiguous on the face of the will; or

(c) ambiguous in the light of surrounding circumstances.

(2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).

(3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will.”

[17] The deceased's Will is to be construed according to the plain English meaning of the words in that Will. Evidence of the circumstance surrounding the deceased at the time he made his Will is admissible to discover the meaning of what the testator has written. However, such evidence cannot be used to alter the plain meaning of the words used.

[18] The applicable principles were summarised by Atkinson J in *The Public Trustee of Queensland v Smith*:¹

“... The Court of construction should start with the words of the Will. If their usual meaning is clear, the Will will be given that construction. If not, the Court may have regard to such extrinsic evidence as allowed by the rules of construction traditionally applied by the Courts with the addition of the aids to construction found in Section 33C of the Act.”

[19] The approach to be adopted by a Court where there is ambiguity, or the words are meaningless, was summarised by Lord Upjohn in *Re Gulbenkian's Settlement Trust*:²

“It is then the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settler's or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it.”

Discussion

[20] The deceased's Will was clear and unambiguous. By clause 4, it gave all of his share of the interest in the Lionel Stevens Trust Fund to the applicant with the rest and residue of his estate being left to his wife, Lois Isabel Stevens, unless that gift did not take effect in which case the rest and residue was given to the applicant.

[21] At the time of the making of the Will, and as at the date of the deceased's death, there was in existence a Trust called the Lionel Stevens Trust Fund. It had been established by

¹ [2008] QSC 339 at [26].

² (1978) AC 508.

Deed of Trust on 1 March 1996. As such, it cannot be said that the gift of the deceased's interest in that Trust Fund was "adeemed".

- [22] Further, as the words used by the deceased correctly identified an existing Trust, it cannot be said there has been a mis-description such as to invoke the rules of construction applicable to meaningless words. The words used in clause 4 in relation to the Lionel Stevens Trust Fund provide a specific description giving certainty as to what was to pass.
- [23] There is no issue of construction which arises from the terms of the deceased's Will. The true issue for determination is whether the proceeds of the Colonial First State Investment account, known as the Lionel Stevens Trust Account, were funds provided by the Lionel Stevens Trust Fund such that it is appropriate to declare that those proceeds are an asset of the Trust Fund and not of the deceased's estate.
- [24] On this aspect, the evidence overwhelmingly supports a conclusion that these funds were the deceased's funds, not the funds of the Lionel Stevens Trust Fund.
- [25] First, the applicant's assertion that the funds received by the deceased from the estate of his son Gregory were gifted by the deceased to the Lionel Stevens Trust Fund is not supported by any contemporaneous documentation or other objective evidence. There is no evidence of any gift of that money to the Lionel Stevens Trust Fund.
- [26] Second, there is no evidence those funds were ever treated as an asset of the Lionel Stevens Trust Fund. The fact the Colonial First State Investment account was entitled "Lionel Stevens Trust Account" is irrelevant. The statement of the institution responsible for that account stated that the account name was "Lionel Alexander Stevens, Lionel Stevens Trust Account, Lionel Stevens Trust A/c". At no time is the "Lionel Stevens Trust Fund" mentioned in the statement of that account.
- [27] Further, the application setting up that account provided the investor's details as being "Lionel Alexander Stevens". The nomination of the "superannuation fund/trust" as being "Lionel Stevens Trust Account" does not support a conclusion that the funds in that account were owned by the Lionel Stevens Trust Fund.
- [28] The deceased did not mention that Trust Fund when setting up the account. The reference to the name of the fund as being the Lionel Stevens Trust Account is consistent with the deceased believing he was the holder of those funds by way of a trust account. That conclusion is not inconsistent with a finding the funds were never the property of the Lionel Stevens Trust Fund.
- [29] Third, a tracing of the funds of that account does not support a conclusion that the monies were ever funds of the Lionel Stevens Trust Fund. The funds were paid to the Colonial First State Investment Account from a Commonwealth Bank Account held in the deceased's name. All distributions of income from the fund were paid to a bank account in the deceased's name. The deceased had withdrawn monies from that fund and paid them into an account in his own name.

- [30] The applicant submits that it is significant that the deceased declared the distribution of income from the Colonial First State Fund as income from a trust fund in his tax return. However, that declaration is consistent with the income coming from what was designated as a trust account. It does not support a conclusion the funds were owned by a totally separate entity, the Lionel Stevens Trust Fund.
- [31] The applicant also submits it is significant that the deceased declared to a solicitor that he was the sole trustee of a trust, and that he had a right to appoint a new trustee in place of the applicant. Whilst those statements may be consistent with the deceased believing he was trustee of the Lionel Stevens Trust Fund, it does not follow the deceased had gifted funds held in the account of the Colonial First State Investment Account to the Lionel Stevens Trust Fund, or that the deceased ever intended to do so.

Conclusion

- [32] The words in clause 4 of the deceased's Will are neither meaningless nor ambiguous. There is no evidence the funds in the Colonial First State Investment Account were ever the property of the Lionel Stevens Trust Fund. Those funds were the property of the deceased, at the time of his death.
- [33] I shall hear the parties as to the form of orders, and costs.