IN THE COURT OF APPEAL [1994] QCA 158

SUPREME COURT OF QUEENSLAND

Appeal No. 202 of 1993.

Brisbane

[Bruynius v. Bruynius]

BETWEEN:

KELLY LEE BRUYNIUS
(Applicant) Respondent

AND:

ROY EVERT HERMAN BRUYNIUS and
ERNST FREDERICK ALBERT BRUYNIUS
(Respondents) Appellants

Fitzgerald P.
Pincus J.A.
Derrington J.

Judgment delivered 20/05/1994.

Joint reasons for judgment of Pincus J.A. and Derrington J, the President separately. All concurring as to the orders made.

APPEAL DISMISSED WITH COSTS

CATCHWORDS: **SUCCESSION - Husband died intestate - after husband died widow and deceased's brothers entered into agreement to pay into a trust account any benefit received by the parties for or on behalf of the estate, for later division between the parties - respondent then received superannuation benefits as a relict under s. 31(1)(a) *State Service Superannuation Act* 1972 - whether superannuation benefits required**

to be paid into trust account under the terms of the agreement - whether assignement of benefits prevented by s.54 of the Act.

EQUITY - Assignments - whether agreement to pay benefits received for and on behalf of the estate into the trust account constituted an equitable assignment of the widow's benefits under s.31 of the Act for the purposes of s.54 of the Act.

Counsel: Mr D R Boughen for the respondent.
Mr K C Fleming Q.C. for the appellants.

Solicitors: Biggs & Biggs Francis & McGregor for the respondent.
Gregor McCarthy & Co. for the appellants.

Date of Hearing: 3 May 1994.

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JOINT REASONS FOR JUDGMENT OF PINCUS J.A. AND DERRINGTON J.

Judgment delivered 20/05/1994

This is an appeal from a judgment of the District Court declaring that a sum of $150,970.87 "is to be retained by the Applicant as the person solely entitled thereto", the person referred to in the order as the applicant being the respondent to this appeal, Mrs Bruynius. Her late husband, G P G Bruynius, died intestate on 28 April 1991, and the appellants are his surviving brothers. In consequence of a dispute between the appellant and the respondents about his estate, an agreement was drawn up by solicitors and signed by the parties. The agreement is undated, but is said to have been made about January 1992.

It is cl. 6, reading as follows, which is in issue:

> "All monies paid to or payable by the estate shall be dealt with through the Trust Account of Messrs Gall Standfield & Tiley. All parties shall cause to be paid to the Trust Account of Messrs Gall Standfield & Tiley any benefit which they may be entitled to receive for or on behalf of the estate in particular those funds payable from the Government Superannuation Office of Queensland. Such payments to Messrs Gall Standfield & Tiley shall form part of the proceeds of the estate of Gerard and be distributed in accordance with the terms of this Agreement."

The sum of $150,970.87 mentioned in the District Court's order was obtained by the respondent from the Government Superannuation Office on the basis that the respondent was entitled to it under s. 31 of the *State Service Superannuation Act* 1972 ("the Act"). At the relevant time, s. 31(1) read in part as follows:

> "Subject to subsections (3) and (5), in respect of -
>
> (a) a male contributor who became a contributor before the passing of the *Superannuation Acts Amendment Act 1984* and who when he died was -
>
> a contributor for category A benefits; or
>
> a contributor for category B benefits and had completed at least 10 years' service;
>
> ...
>
> a relict of the contributor "is entitled to the payment of an amount calculated - ..."

There follows a formula for calculating the amount to which the relict is entitled. Other provisions of s. 31 create other entitlements in relicts. We understand the entitlement with which we are concerned arises under subs. 1(a), which we have quoted in part, but it is of no consequence whether the

entitlement arises under that or some other provision of s. 31; it is not in dispute that the sum here in question was paid to the respondent, as a relict of her late husband, under s. 31 and that she was entitled to the payment under that section as being a "relict" within the definition in s. 4 of the Act.

A difference arose between the parties with respect to the sum so paid to the respondent under the Act and, to resolve it, the respondent applied to the District Court for appropriate relief, resulting in the making of the declaration we have mentioned in her favour.

In his reasons, the primary judge referred to cl. 2 of the agreement referred to above, under which the respondent was entitled to 50% of the net proceeds of her late husband's estate, and the appellants to 50% of it. His Honour, as to cl. 6, remarked:

> "The relevant part of Clause 6 is any benefit which a party, i.e. either the applicant or the respondents, is or are entitled to receive for and on behalf of the estate. ... The addition of the words 'in particular those funds payable from the Government Superannuation Office of Queensland' does not serve to convert the money the applicant received as a relict into money received 'for and on behalf of the estate'."

It was argued before us that the expression "for and on behalf of the estate" in cl. 6 does not qualify "benefit", but is a description of the basis on which moneys are paid into the

trust account of Messrs Gall Standfield & Tiley (a firm of solicitors). The expression "for and on behalf of the estate" is more naturally read as referring to "any benefit which they may be entitled to receive", rather than to earlier parts of the sentence. But we think that the problem of construction is best approached by keeping firmly in mind the circumstance that in respect of the late Mr Bruynius, the only moneys payable from the Government Superannuation Office of Queensland when the agreement was made, were those moneys which the respondent received from that Office under cover of a letter dated 1 April 1992, viz the sum of $150,970.87 which is in issue. If the expression "those funds payable from the Government Superannuation Office of Queensland" did not refer to that sum, it referred to nothing. It is true that, as the learned primary judge pointed out, in other circumstances than those which existed some moneys might have been payable by the Superannuation Office to the deceased's personal representative; if so, then the expression "in particular those funds payable from the Government Superannuation Office of Queensland" might have referred to those moneys. But the words just quoted are general and unqualified and it would involve a straining of the language to extract from them an intention, devoid of practical effect, to require payment to the trust account only of such part of the sum payable from the Superannuation Office as was due to the personal representative.

In short, it seems to us preferable to treat the expression "those funds payable from the Government Superannuation Office of Queensland" as referring to the funds which were in fact payable, rather than as surplusage.

It should be added that there was some discussion in the judge's reasons and before us of cl. 5 of the agreement, referring to a certain order made in the Family Court. That clause, which we do not think is necessary to set out, appears to us to have no ascertainable effect; but if it has any meaning, that is not such as to assist the respondent on this question of construction.

It would follow, then, that the appeal should be allowed, were it not for a point which was raised in this Court. This is that, so it was argued, s. 54 of the Act invalidates that part of cl. 6, which (as we have held) on its proper construction required the respondent to pay into the solicitors' trust account the funds she received from the Superannuation Office. Section 54 reads as follows:

> "**Assignment of pensions**. Subject to sections 46A and 55 pensions, benefits and payments under this Act shall not be in any way assigned, charged, taken in execution, attached, or passed by operation of law or otherwise howsoever to any person other than the beneficiary or payee, nor shall any claim be set off against the same, and any moneys payable out of the Fund on the death of an officer, beneficiary or payee shall not be assets for the payment of his debts or liabilities."

Sections 46A and 55 are not presently relevant, so that the question is whether, construed as we have read it, cl. 6 constitutes an assignment or a passing "by operation of law or otherwise howsoever to any person other than the beneficiary or payee" of a benefit or payment under the Act.

It is convenient first to consider the question whether a benefit or payment is "in any way assigned" by cl. 6. At the time when the agreement was made, the respondent, her husband being deceased, was entitled to the payment under s. 31 which she received with the letter of 1 April 1992. Clause 6 contained a promise by her to pay the sum to which she was entitled to the solicitors, who were to hold it subject to the trusts created by the agreement - i.e. after making any necessary payments, to divide it, half to the appellants and half to the respondent. It was said in Durham Bros v. Robertson (1898) 1 Q.B. 765 at 769, per Chitty L.J, that:

> "To operate as an equitable assignment no particular form of words is required in the document: an engagement or direction to pay, out of a debt or fund, a sum of money constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt".

That statement was quoted with approval by Isaacs J in Tooth v. Brisbane City Council (1928) 41 C.L.R. 212 at 221.

An example of application of the principle is to be found in the decision of Lowe J in Re McPherson, Thom & Co. (1929) V.L.R. 295. There, a debtor promised his creditor, in the event

of the sale of certain sheep, "to pay the nett proceeds to the Company in full, or to the extent of my indebtedness to that Company...". Distinguishing Palmer v. Carey [1926] A.C. 703, it was held that the agreement amounted to an equitable assignment to the creditor of the proceeds of sale of the sheep. Another example of an assignment of this kind is to be found in Re Irving Ex parte Brett (1877) 7 Ch.D. 419. Similarly, In re Gillott's Settlement [1934] 1 Ch. 97, an agreement to pay certain sums, when received, into a specified account was held to effect an equitable assignment. There, the moneys paid into the account were to be used in paying certain debts and the rest was to be paid to those who had caused the moneys to be paid in; the agreement was thus of a similar kind to cl. 6, which we are considering. It should be noted, in passing, that In re Gillott's Settlement Maugham J gives an explanation of Palmer v. Carey (at pp. 109, 110) which appears to place it on a different foundation from that which would be deduced from a reading of the report of the case in the Privy Council.

In our view, insofar as cl. 6 contains a promise by the appellant to pay to the solicitors the sum then due to her under the Act, when received from the Office, it amounts to an equitable assignment of benefits or payments under the Act contrary to s. 54 of the Act and is therefore invalid. We understand that the proceedings were brought under s. 66(b)(xiii) of the *District Courts Act 1967*, which gives the

Court jurisdiction in matters -

> "for the determination of any question of construction arising under a deed, will or other written instrument, and for a declaration of the rights of the persons interested where the sum or the property in respect of which the declaration is sought does not exceed in amount or value the monetary limit."

This provision does not in terms allow the District Court to decide such a question as the application of s. 54 of the Act; but s. 54, as it happens justifies the declaration of the learned primary judge that the sum in question is to be retained by the respondent as the person solely entitled thereto, so that the appeal fails.

There was some mention at the hearing of the possible consequences of invalidation of that part of cl. 6 of the agreement with which we have dealt, in particular its effect upon the validity of the agreement as a whole, and of payments made under it. It seems to us clear that we should not attempt to deal with any such questions.

The appeal must be dismissed with costs.

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(Respondents) Appellants

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 20/05/94

The circumstances giving rise to this appeal are set out in the reasons for judgment of Pincus JA and Derrington J.

Under subsection 93(2)(b) of the *District Court Act 1967*, on an appeal from the District Court this Court may make any order "to ensure the determination on the merits of the real questions in controversy between the parties". In this matter, the real question in controversy between the parties is whether the respondent is entitled to retain the sum of $150,970.87 which she received from the Government Superannuation Office on 1 April 1992 or whether she is obliged to pay that amount to the Trust Account of Messrs. Gall Standfield and Tiley, Solicitors, to be applied and distributed in accordance with an undated

agreement between the appellants and the respondent entered into in about January 1992.

It is not in dispute that the respondent was entitled to the money in question when the agreement was made: see section 31 of the *State Service Superannuation Act 1972*. The appellants contend that, by clause 6 of the agreement, the respondent engaged to pay the money when she received it to the Solicitors for distribution in accordance with the agreement, under which both parties are entitled to share. The respondent disputes the contention that she made such an engagement on the proper construction of clause 6 but says that, in any event, such an engagement would have been invalid as contrary to section 54 of the *State Service Superannuation Act*, in that it would have constituted an assignment or charge of the debt which the respondent was owed by the Government Superannuation Office. The appellants do not dispute that any assignment or charge, including an equitable assignment or charge, would have contravened section 54 or that the consequence of such a contravention would be the invalidity of at least the material provision of the agreement. Conversely, the respondent does not dispute that the appellants' and respondent's respective promises in the agreement provided consideration for each other. Nor does she seek to rely on section 54 of the Act on any basis other than that stated.

It is convenient to start with the assumption that, by clause 6 of the agreement, the respondent made the engagement attributed to her by the appellants; ie., that she engaged to pay the money when received from the Government Superannuation Office in payment of its debt to her to the Solicitors on trust for distribution in accordance with the agreement. That is to say, the transaction said to constitute an assignment or charge is an engagement by A to B that A will pay to D, as trustee for A and B, money received by A in payment of a debt from C. The question is whether such a transaction is an assignment or charge.

As Pincus JA and Derrington J. point out, an affirmative answer to that question is supported by Durham Brothers v. Robertson (1898) 1 QB 765, 769. However, it is necessary to consider whether the opposite conclusion is warranted by the decision of the Privy Council in Palmer v. Carey (1926) AC 703. That case has been followed on a number of occasions[1] but has also been distinguished, not always on an entirely convincing basis.[2]

In Palmer v. Carey, A promised a creditor, B, that he would pay the money received from other persons (C), in respect of goods sold to them by A, to B's bank to the credit of B for appropriation and distribution between A and B in accordance with their agreement. The Privy Council held that moneys received and held by A from such sales had not been equitably assigned or charged. The judgment was delivered by Lord Wrenbury, who said at pp.706-707:

> "The law as to equitable assignment, as stated by Lord Truro in Rodick v. Gandell (1D.M. & G. 763, 777, 778), is this: `The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such persons to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers.'
>
> An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to

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[1] See, for example, Re Kelly (1932) 4 AC 258; Re Hamling (1957) 18 ABC 121; Hall v. Hunter unreported judgment of the Supreme Court of NSW, delivered 10 September 1990.

[2] Re McPherson Thorn and Co; Sandhurst and Northern District Trustee etc. Co. Ltd. v. Coombie Pastoral Co. Pty. Ltd. (1929) VLR 295; Re Gillott's Settlement: Chattock v. Reid (1934) 1 Ch. 97, followed in Re Haynes Will Trusts; Pitt v. Haynes (1949) 1 Ch 5. See also Re Davies Deed of Arrangement (1931) 3 ABC 190; Re Docker (1938) 10 ABC 198; Re Buring and Chapman (1941) 13 ABC 72.

> restrain its application in another way. But if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance."

It is convenient to pass over further consideration of that passage for the moment, noting however that it has been authoritatively approved: e.g., Freeway Mutual Pty. Ltd. v. Taylor (1978) 22 ALR 281, 286-6; Swiss Bank Corporation v. Lloyds Bank Ltd. (1982) AC 584, 613; Re Charge Card Services Ltd. (1987) Ch 150, 175; affirmed (1989) 1 Ch 497.

In Palmer v. Carey at p.707, Lord Wrenbury continued:

> "The goods ... are [A's] goods ... . The goods are to be sold. The proceeds of sale when the goods are sold belong to [A]. They arise from the sale of goods belonging to him."

Pausing there, the critical issue for decision was glossed over and dealt with by assumption in the passage last quoted. Accepting that the goods sold belonged to A and the proceeds arose from the sale of those goods, it did not necessarily follow that the proceeds of sale belonged to A. Whether or not they did so depended on whether or not there had been an equitable assignment or charge, which was the question to be decided. The assumption which was made prevented the proper consideration of that question and led inevitably to the answer given.

Further down p.707, his Lordship continued:

> "... however, the proceeds are to be paid to [B's] credit at his bank. This gives [B] a most efficient hold to prevent the misapplication of the proceeds, but there is nothing ... to give him a property by way of security or otherwise in the money of [A] before or after [B] has them in his charge.

> Their Lordships, therefore, fail to find in the agreement any provision creating, contractually or otherwise, any right of property in either the goods or the proceeds of sale of the goods. The Chief Justice says: `The words of agreement on which the appellant relies are apt to express a contact .. to apply the money in the purchase of goods, to sell those goods, and to pay the proceeds of the sale into [B's] bank account, but I can see nothing in them to indicate that the intention was to assign any interest in goods purchased by [A] or to create either a charge over or a trust of such goods in favour of the appellant.'
>
> Their Lordships agree with this."

It is implicit in the Privy Council's approval of the statement by the Chief Justice (in the High Court) that it endorsed the proposition that a contract to pay money to be received in satisfaction of a debt into another person's bank account does not assign or charge either the debt owed to the promisor or the money received to discharge the debt.

The explanation for the conclusion reached in Palmer v. Carey seems to lie in the application to the facts of that case of the first passage quoted above (from pp.706-707). On analysis, that passage is not free from difficulty.

One problem is that it is not plain what the additional requirement insisted on by Lord Wrenbury at the foot of p.706 was meant to entail. The first premise is that "An agreement for valuable consideration that a fund shall be applied in a particular way ... will not amount to an equitable assignment". The second premise is that there will be an equitable assignment if "an obligation has been imposed in favour of [a] creditor to pay the debt out of the fund." But an agreement to pay a creditor out of a fund is merely an instance of an agreement to apply the fund in a particular way.

In any event, it is not obvious why the transaction in that case did not meet the requirement of an agreement for valuable consideration that the proceeds of a transaction were to be applied to pay a creditor's debt out of the fund.

Further, there is a critical distinction drawn in the

second of the two paragraphs quoted above from pp.706-707 of Palmer v. Carey which can no longer be justified. In the final sentence of that paragraph, reference was made to the "familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance." That was contrasted with an agreement for valuable consideration to apply a fund in a particular way which would (or might) merely "found an injunction to restrain its application in another way." The clear implication was that such an injunction would not amount to specific performance of the agreement. However, modern authority is to the contrary: Hewett v. Court (1983) 149 CLR 639, 665-7 (where Palmer v. Carey was referred to); Stern v. McArthur (1988) 165 CLR 489, 522; Chan v. Cresdon Pty. Ltd. (1989) 168 CLR 242, 252-3.

In the latter case, Mason CJ, Brennan, Deane and McHugh JJ. said in the passage referred to:

> "Although it has been stated that the equitable interest is commensurate with what a court of equity would decree to enforce the contract, whether by way of specific performance ..., injunction or otherwise ..., the references in the earlier cases to specific performance should be understood in the sense of Sir Frederick Jordan's explanation adopted by Deane and Dawson JJ. in Stern v. McArthur:
>
> > 'Specific performance in this sense means not merely specific performance in the primary sense of enforcing an executory contract by compelling the execution of an assurance to complete it, but also the protection by injunction or otherwise of the rights acquired under a contract which defines the rights of the parties ..."

See also Meagher Gummow Lehane "Equity Doctrines and Remedies', 3rd ed. para.340.

In my opinion, critical aspects of the reasoning in Palmer v. Carey cannot be supported and that case should not be accepted as justifying a conclusion that clause 6 of the agreement between the present parties did not effect an

assignment or charge. On the contrary, Durham Brothers v. Robertson, which was not referred to in Palmer v. Carey, should be followed. It follows that clause 6 did involve an assignment or charge, and the appeal should be dismissed with costs.