Privy Council Appeal No. 6 of 1936

The Attorney-General of New Zealand - - - - - *Appellant*

v.

The New Zealand Insurance Company, Limited, and others - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1936

Present at the Hearing:

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
LORD ALNESS.
SIR LYMAN POORE DUFF.

[*Delivered by* LORD MACMILLAN.]

The late Mrs. Catherine Smith of Auckland in her will dated 23rd December, 1930, dealt with her residuary estate as follows:—

> "As to the rest, residue and remainder of my real and personal property of whatsoever kind and wheresoever situate (including all money or property bequeathed or devised as aforesaid where such bequest or devise shall have lapsed) I direct my Trustee to apply the same in making other bequests towards institutions, societies or objects established in or about Auckland aforesaid for charitable, benevolent, educational or religious purposes and my Trustee may benefit such institutions, societies or objects and in such amounts or amount as it in its absolute discretion shall deem advisable."

The testatrix died on 12th August, 1933, and the net value of the residue of her estate was between £80,000 and £90,000. The sole question for determination is whether the residuary bequest above quoted is valid and effectual. Herdman J. in the Supreme Court of New Zealand held that it was, but his decision was reversed by the Court of Appeal (Reed J. dissenting).

Their Lordships find themselves so fully in agreement with the views expressed by the learned Chief Justice and his colleagues in the majority in the Court of Appeal, and in particular by Johnston J. in his brief but very lucid judgment, that it would be superfluous to repeat what has already been so well said.

The privilege of controlling by will the disposition of property after death is subject to the condition that such disposition must be made in favour of ascertained or ascertainable persons or objects. A testator is not permitted to delegate to others the disposition of his property, subject to this that he may confer upon his trustees a power of selection and apportionment among a definitely prescribed class of beneficiaries. In the case of charitable objects the law, by reason of the favour in which charity is held, has accepted such objects as constituting a sufficiently ascertained class notwithstanding its wide extent, and permits a testator to direct a fund to be distributed among such charities and in such proportions as his trustees may in their discretion decide. But in all other cases the requirement of definite precision is enforced in the definition of the individuals or classes to be benefited.

Now it is settled beyond dispute that a bequest by a testator in favour of benevolent objects to be selected by his trustees does not answer this requirement and is ineffectual because of its indefiniteness. In the present bequest the fatal word " benevolent " occurs on which so many testamentary dispositions have been shipwrecked, but it is urged that the bequest is salved by the fact that it is not in favour of benevolent purposes at large to be selected by the trustee but is in favour of institutions, societies or objects in or about Auckland for benevolent purposes. It is suggested that sufficient definiteness is imparted to the benevolent objects of the bequest by specifying that they are to be institutions, societies or objects, presumably in existence and ascertainable, and that these institutions, societies or objects are to be in or about Auckland, so that the trustee should have no difficulty in determining the class of objects among which to select beneficiaries.

It is probably the case that the addition of a local qualification may in certain circumstances render sufficiently definite what would otherwise be too wide a class, but in the present instance the want of precision is inherent in the word " benevolent " itself. Consequently, however circumscribed the local area and assuming that only existing organisations are intended, it still remains that to predicate of an institution, society or object in or about Auckland that it must be " benevolent " is not to identify it with the requisite precision. That being so, it is unnecessary to discuss whether a further ambiguity lurks in the word " objects," or to comment on the peculiar form of the direction to the trustee to make bequests.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed and the judgment of the Court of Appeal of New Zealand of 18th May, 1935, be affirmed. By arrangement between the parties no order with regard to costs is necessary.

(12/36) (39824r—3A) Wt. 8138—2 25 12/36 P. St. G. 338

In the Privy Council.

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v.

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DELIVERED BY LORD MACMILLAN

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