Privy Council Appeal No. 20 of 1938

Elizabeth Arminella Burrows Sifton - - - - - *Appellant*

v.

Clifford Sifton and others - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF APPEAL FOR THE PROVINCE OF ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JUNE, 1938

Present at the Hearing:
LORD THANKERTON.
LORD ROMER.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD ROMER].

This is an appeal from a judgment of the Court of Appeal for the Province of Ontario which varied a judgment of Middleton J. given upon an application by way of originating motion brought by the respondents, Clifford Sifton and Wilfred Victor Sifton, the surviving trustees of the will of Clifford Winfield Burrows Sifton, deceased. By the motion the trustees sought the opinion, advice and direction of the Court on certain questions arising in the administration of that testator's estate.

The testator died on the 13th June, 1928, leaving him surviving his widow, the respondent Mabel Cable Sifton, and his daughter and only child, the appellant, who was then of the age of 13 years.

The will (dated the 12th July, 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows:—

> "I give devise and bequeath all other property real and personal to my executors upon the following trusts namely—
>
> "To manage the corpus of the estate in accordance with their best judgment continuing any investments that exist at the time of my death if they see fit and to pay to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is forty years of age after which the whole income of the estate shall be paid to her annually."

But the will then proceeded as follows:—

> "The payments to my said daughter shall be made only so long as she shall continue to reside in Canada."

The principal question arising upon this appeal is whether this last-mentioned direction is not void for uncertainty. No light is thrown upon this question by the remainder of the will which merely provided that if the appellant should

die leaving issue her children should receive the whole estate in equal shares on attainment respectively by each child of the age of 25 years, but that if the appellant should die leaving no issue the corpus of the estate should be divided equally between the then living grandchildren of the testator's father Sir Clifford Sifton by the testator's mother the late Lady Elizabeth Sifton. The will contained no express direction as to what was to happen to the income of the estate during the rest of the appellant's life after she should have ceased to "reside in Canada."

The testator is stated in the evidence to have been "domiciled" in England during the years 1915 to 1925 but to have returned to Canada in the last-mentioned year with his daughter, and to have taken up his residence (presumably with her) at Assiniboine Lodge in the County of Leeds, Ontario, where he continued to reside except for temporary absences on business or pleasure until his death in 1928. After the death of her father the appellant appears to have remained in Canada continuously until the month of October, 1934, during the latter part of which period she was taking a course in modern languages at the University of Toronto. This course provided an option to take the third year thereof by travelling abroad and the appellant accordingly spent the period between October, 1934, and September, 1935, in European countries, travelling and studying for the purpose of completing her education. Thereafter she returned to Canada where she has remained down to the present time. Since the month of June, 1936, she has maintained an apartment of her own in the City of Montreal which she has taken on lease and fully furnished. In the month of February, 1937, however, she was desirous of going abroad again for the purpose of study and travel, but very naturally was anxious to know to what extent she could gratify that desire without any risk of it being held that she did not "continue to reside in Canada" within the meaning of the will. It was in these circumstances that the respondent trustees issued their originating motion for the determination by the Court of certain specific questions. The first five of these questions illustrate so well the difficulties that arise in trying to ascertain the meaning of the words "continue to reside in Canada" that it is worth while setting them out in full. They were as follows:—

> "(*a*) In the event of Elizabeth Arminella Burrows Sifton maintaining a residence in Canada but temporarily going abroad (out of Canada) for the purpose of travelling and/or studying for a period not exceeding eleven months and returning to Canada thereafter, would the said Elizabeth Arminella Burrows Sifton during her temporary absence from Canada 'continue to reside in Canada' within the meaning of the words 'continue to reside in Canada' as used in said will?
>
> "(*b*) If the answer to question (*a*) be in the affirmative, could Elizabeth Arminella Burrows Sifton after a lapse of not less than one month again go abroad under similar circumstances and similarly 'continue to reside in Canada'?
>
> "(*c*) In the event that Elizabeth Arminella Burrows Sifton so temporarily goes abroad for a period of eleven months should constitute a failure on her part to so 'continue to reside in Canada'

may Elizabeth Arminella Burrows Sifton absent herself from Canada for any period under any circumstances and still so ' continue to reside in Canada ' and, if so, for what periods and under what circumstances may she so absent herself?

" (*d*) Is the purpose for which Elizabeth Arminella Burrows Sifton absents herself from Canada material to the question of whether or not she so ' continues to reside in Canada '?

" (*e*) If the answer to question (*d*) be in the affirmative

" I. Is any temporary purpose sufficient?

" II. If the answer to (*e*) I. be in the negative, what purposes would be sufficient?

" III. If intention be material, would the written statement of Elizabeth Arminella Burrows Sifton of her intention delivered to the executors of said estate sufficiently evidence said intention? "

The motion in due course came on for hearing before Middleton J., the appellant being the only respondent to the motion. The only question argued before him was as to the meaning of the words " continue to reside in Canada." The point that such words were void for uncertainty was not raised on that occasion.

On the 18th February, 1937, the learned Judge delivered judgment. In the course of it, after referring to the contention at that time being advanced by the appellant that the will only required her to maintain a residence in Canada and that so long as she maintained such a residence she was at liberty to spend as much of her time outside Canada as she thought fit, he continued as follows:—

" After very careful consideration I am of opinion that the testator contemplated a far more restricted meaning to this clause of his will than the daughter apparently thinks. I agree with her that a merely temporary absence from Canada for the purpose of education or travel will not bring about a forfeiture. The absence during 1934 and 1935 was for such a temporary purpose and I think worked no forfeiture, but it is impossible to say that an absence during each of the following years for 11 months in the year will not bring a forfeiture. That would, I think, work a forfeiture unless the executors are satisfied that any particular trip or extended period of residence abroad is in good faith for the purpose of completing her education. It is impossible for the Court to define with any accuracy what future conduct will fall within the terms of the will."

Later he added these words:—

" The questions as propounded in the notice of motion do not admit of categorical answers."

In the judgment as drawn up, however, an attempt was made to give the executors somewhat more specific directions. It was, so far as material, in these terms:—

" 1. This Court doth declare that the true intent, meaning and construction of the clause, ' The payments to my said daughter shall be made only so long as she shall continue to reside in Canada ' used in the said last will and testament is:—

" (*a*) That the words ' to reside in Canada ' are equivalent to ' spend substantially all of her time in Canada ' but that mere temporary absences from Canada in certain circumstances would not bring about a forfeiture of the interest of the said daughter in the estate.

" (*b*) That any and all absences of the said daughter from Canada not exceeding two calendar months in the

> aggregate on one or more occasions during any one calendar year, or not exceeding two calendar months on one continuous occasion and one additional calendar month on one or more additional occasions in one calendar year, be in all events incapable of constituting a failure to continue to reside in Canada. . . .
>
> " (*c*) That the absence of the said daughter from Canada abroad between October, 1934, and September, 1935, does not work a forfeiture of such interest.
>
> " (*d*) That an absence from Canada for a period of eleven months during the next two or three years will work a forfeiture of such interest unless the executors . . . are satisfied it is in good faith for the purpose of completing the education of the said daughter.
>
> * * * *
>
> " 2. And this Court doth further order and adjudge that the questions propounded in the notice of motion do not now admit of categorical answers but the parties may apply to this Court from time to time as circumstances arise, for the advice, opinion, and direction of the Court on the matters in question."

Their Lordships realise to the full the difficulty of construing the words in question. But with all respect to Middleton J. they cannot feel that his solution of the difficulty is a satisfactory one. It merely introduces further difficulties of construction. What, for instance, is the meaning to be attributed to the words " substantially," " temporary " and " certain circumstances " in sub-paragraph (*a*) of the declaration? Sub-paragraph (*b*) was no doubt added for the purpose of indicating what the learned Judge meant to indicate by the word " temporary," and that sub-paragraph and those lettered (*c*) and (*d*) may be regarded as intended to throw some light upon the expression " certain circumstances." But the indication contained in sub-paragraph (*b*) that absences from Canada for three calendar months in the aggregate on one or more occasions during any one calendar year are not or may not be permissible when no one absence is a continuous one for two calendar months, yet are permissible if one of such absences is a continuous one for two calendar months, only adds to the difficulty of construing the word " temporary." Sub-paragraph (*b*) moreover covers absences for the periods therein mentioned under all circumstances and for any purpose, whereas sub-paragraphs (*c*) and (*d*) are dealing with absences for the purpose of completing the appellant's education. But when (if ever) a person's education can be said to be completed is not an easy matter to determine. It is further to be observed that the judgment as drawn up in no way refers to any obligation upon the appellant to maintain a residence in Canada, though in giving his decision the learned Judge had said:—

> " The word ' residence ' is an elastic word; it takes colour from the context in which it is used. Here it means an actual permanent residence, a home. It will not cease to be a a residence by reason of mere temporary absence."

Whether or not he considered the maintenance of a house or other place of residence to be obligatory is therefore left in some doubt.

But the learned Judge had plainly stated that it was impossible to define with any accuracy what future conduct would fall within the terms of the will, and although the judgment was a meritorious attempt to assist the parties, it abundantly confirmed the truth of that statement.

On the 5th March, 1937, the appellant issued a notice of appeal from the judgment of Middleton J. to the Supreme Court of Ontario, inviting that Court to disagree with the construction placed by the learned Judge upon the words in question. But on the 8th April, 1937, having presumably by that time come to the conclusion that the learned Judge was right in his view as to the impossibility of defining the words with any accuracy, the appellant gave notice of her intention of submitting upon the hearing of the appeal that the clause containing the words was a condition subsequent and as such was void for uncertainty. She had, in other words, determined to avail herself if possible of the principle enunciated by Lord Cranworth in the case of *Clavering* v. *Ellison*, 7 H.L.C. 707. In that case a testator devised his real estate to the children of his son for what were held to be vested equitable estates in tail liable to be divested on breach of a condition subsequent. The condition was in these terms:—

> "Provided further and I do hereby declare that the devises hereinbefore contained to the children of my said son are made upon this express condition, that the children of my said son be educated in England and in the Protestant religion according to the rites of the Church of England, and in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England, then I do hereby revoke all and every devise to such child or children so educated as aforesaid."

Questions having arisen whether there had been a breach of this condition subsequent in the case of some of the son's children, the matter ultimately came before the House of Lords. It was held by Lord Campbell L.C. that the condition had not in fact been broken. Lord Cranworth agreed with the Lord Chancellor that there had been no breach of the condition as to the children being educated in the Protestant religion. But he did not find it necessary to come to any definite conclusion upon the question whether the children had in fact been educated abroad as he held the condition to be void for uncertainty. He said (p. 725):—

> "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.
>
> "In my opinion, if there was no direct authority for it, I should still have arrived at the same conclusion; but I have looked at the authorities, especially that of Lord Eldon in the case of *Fillingham* v. *Bromley*. I think that looking at the language here used, it is far too indefinite and uncertain to enable the Court to say what it was that the testator meant should be the event on which the estate was to determine."

Then, after giving instances in which it would be difficult to say whether a child had or had not been educated abroad, he added this:—

> " But the question is, not whether in the particular case he was educated abroad, but whether you can predicate on reading the will, what it was that was to defeat the vested estate? I concur in Lord Eldon's observations about an estate being defeated by a person not living and residing in a particular house, which he thought too remote; and I think that this is far more remote than that."

Much to the same effect has been said in later cases, of which it will be sufficient to mention three. In *In re Sandbrook* [1912] 2 Ch. 471, at p. 477, Parker J. stated the principle in these words:—

> " Conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the Court can say with reasonable certainty in what events the forfeiture will occur."

In *In re Viscount Exmouth,* 23 C.D. 158 at p. 164, Fry J. used the following language:—

> " The condition must be clear and certain. That, in my opinion, includes, not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect."

These words of Fry J. were considered by Russell J. in the case of *In re Lanyon* [1927] 2 Ch. 264. He said (269):—

> " They do not, I think, mean that the person affected must be in a position at all times to know whether he is committing a breach of a provision the nature of which is clearly expressed."

Their Lordships respectfully agree. If the provision be clearly expressed, it is the fault or the misfortune of the person affected if he should fail to know whether he is committing a breach of it. But this is implied in the language used by Fry J. He said that it must be " ascertainable " whether the provision has taken effect or not; not that it must be ascertained in fact by the person affected or even ascertainable by him without difficulty.

In the particular case with which Russell J. was dealing the condition was that a person should not marry a relation by blood. The learned Judge held the condition to be void as tending to the prohibition of marriage altogether. He declined, however, to hold it void for uncertainty inasmuch as he considered the meaning of blood relationship to be clear enough. If the words included the whole of the human race the person affected by the condition would know that any and every marriage would cause a forfeiture, and the condition though bad on other grounds would not be void for uncertainty. If, however, they did not include the whole human race, and presumably they could not have been intended to do so, the testator had failed to specify the number of generations in which no common ancestor of the spouses was to be found; and in their Lordships' opinion and with all respect to the learned Judge, the condition might on that ground have been held to be void for uncertainty.

Had any particular number of generations been specified, the fact that it might be difficult to ascertain whether or not there was a common ancestor in such generations would not, their Lordships respectfully agree, have rendered the condition void. For whether there was such a common ancestor or not would necessarily be ascertainable if the search were sufficiently diligent.

In the present case the appellant raised the contention before the Court of Appeal that it is impossible to tell with any certainty what she may do in the matter of absence from Canada without incurring the risk of losing her income under her father's will; and that the provision for cessation of payment of that income is a condition subsequent, which in accordance with the principle laid down in the cases to which reference has been made is void for uncertainty.

In view of this contention on her behalf the Official Guardian had on the 21st April, 1937, been appointed to represent the grandchildren of the late Sir Clifford Sifton mentioned in the will and also any unborn infants. It had also been ordered that the widow of the testator might be represented at the hearing of the appeal. She did not, however, avail herself of this order—nor was she represented at the hearing before their Lordships.

The appeal came on for hearing on the 17th June, 1937, before the Chief Justice of Ontario, Latchford C.J., Fisher and Henderson JJ.A. and Kingstone J. In the result it was dismissed (Henderson J.A. dissenting) though the Court varied the judgment of Middleton J. in manner indicated later.

The learned Chief Justice of Ontario was of opinion that there is nothing uncertain or ambiguous about the words "to reside in Canada." The words "to reside," he said, have a clear and definite meaning. They mean to live in a place. But he agreed that a person residing in Canada does not cease to reside or to live in Canada because he goes abroad occasionally for business or pleasure. An unmarried woman, he said, having no actual residence of her own in Canada and having no profession or occupation to which she is devoting her life in Canada may be said to be residing wherever she is living for the time being. If such a person, he said, left Canada, save for a limited period for a purely temporary purpose a Court might conclude that she had ceased to reside in Canada. He did not, however, say what would be a "limited" period or what would be a "purely temporary" purpose. He added, indeed, that whether or not the appellant had at any time ceased to reside in Canada would be a question of fact which would have to be determined in view of all the circumstances. Latchford C.J. said that he agreed in substance with the Chief Justice of Ontario. But he, too, refrained from indicating with any precision what were the obligations imposed upon the appellant by the condition in question. He did not think that the Court could at present be properly called upon to decide how long or what was the period for which Miss Sifton might absent herself from Canada without infringing the

restriction imposed upon her as to residing in Canada. If that question should arise at any time, the executors, he said, must apply their judgment to it whatever the consequences. Fisher J.A. (according to the report of his judgment supplied to their Lordships) said that what the word reside means and what the testator meant it to mean was that his daughter must live in Canada and make Canada her permanent place of abode. The word " permanent ", however, would appear to be a clerical error in the report for " principal ". For he agreed with the other members of the Court that absence from Canada would be permissible for definite and particular purposes and for definite periods of time. But he too refrained from indicating with precision either the purposes or the periods that would be permissible. It is, he said, always a question of fact for the executors to determine before making payments of income, to satisfy themselves that the daughter has up to that time resided and continued to reside in Canada. Kingstone J. said that on the argument he was of opinion that the words " as long as she shall continue to reside in Canada " were so indefinite and uncertain as to be incapable of being properly and satisfactorily determined, but that on further reflection he thought the words " to reside in Canada " must be held to mean what they say: " to live in a place ", namely, Canada. But he added that it might well be that when certain events (which he did not specify) happened there would be difficulty in saying whether or not they fell within the proviso in the will, but that that was not a matter with which the Court were then concerned or on which it should attempt to express itself. Henderson J.A. dissented. He was of opinion that the clause in question was a condition subsequent and was void for uncertainty on the principle enunciated in *Clavering* v. *Ellison* (*supra*).

By the order of the Court of Appeal as drawn up the judgment of Middleton J. was varied and as varied was ordered to be as follows:—

" 1. This Court doth declare—

" (1) That the clause or condition, ' The payments to my said daughter shall be made only so long as she shall continue to reside in Canada,' used in the said last will and testament, is not void for uncertainty.

" (2) That the true intent, meaning and construction of the said clause or condition is that the words ' to reside in Canada ' are equivalent to ' to live in Canada '.

" (3) That leaving Canada for a limited period and for a purely temporary purpose with the intention of returning to Canada and actually returning when the temporary purpose is accomplished, would not be a breach of the condition.

" (4) That the absence of the said daughter from Canada abroad between October, 1934, and September, 1935, pursuing her studies as part of her University course, does not work a forfeiture of such interest.

" And doth order and adjudge the same accordingly.

" 2. And this Court doth further order and adjudge that the questions propounded in the Notice of Motion do not now admit of categorical answers but the parties may apply to this Court from time to time, as circumstances arise, for the advice, opinion and direction of the Court on the matters in question."

With the greatest respect to the majority of the Court of Appeal, their Lordships are unable to agree with their decision. If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of Lord Cranworth, the Court and, their Lordships venture to add, the parties concerned can see from the beginning precisely and distinctly upon the happening of what events it is that the payments to the appellant are to cease. In their Lordships' opinion it is impossible to define these events precisely or distinctly. Henderson J.A. said that a cogent argument for this conclusion was furnished by the statement of Middleton J. in the Court below, that it was impossible for the Court to determine with any accuracy what future conduct would fall within the terms of the will. Their Lordships agree. But they also venture to think that equally cogent arguments are to be found in the reasons of the majority of the Court of Appeal and in the formal judgment of that Court. None of those learned Judges defined or attempted to define precisely or distinctly the events that would constitute a ceasing on the part of the appellant to reside in Canada. Had they attempted to do so they must, in their Lordships' judgment, have failed because they would have been attempting the impossible.

Their Lordships' attention was called during the arguments to numerous authorities in which the Court has been called upon to consider the meaning of the words reside and residence and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word "reside" means something different from either being in residence or merely maintaining a residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that so long as she maintained a residence in Canada she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately he omitted to define either the purposes or the periods. The result is that the majority of the Court of Appeal have found themselves unable to give any more precise direction than that the appellant may leave Canada for a limited period and for a purely temporary purpose, without being able to define either the word "limited" or the word "temporary". It necessarily followed that they, in common with Middleton J., were of opinion that the questions propounded in the trustees' notice of motion do not at present admit

of categorical answers. Their Lordships are of the same opinion. But if the appellant's interest under the will is to be forfeited upon her "ceasing to reside in Canada", she has a right to have those questions categorically answered; and inasmuch as they cannot be so answered, the words, if constituting a condition subsequent, are void for uncertainty.

It only remains to consider whether the words in question are a condition subsequent. As to this their Lordships feel no doubt. Henderson J.A. was of opinion that the words constituted a condition subsequent and in this as in other respects their Lordships agree both with his conclusions and the reasons he gave for them. Where it is doubtful whether a condition be precedent or subsequent the Court prima facie treats it as being subsequent. For there is a presumption in favour of early vesting. It was said on behalf of the official guardian that even without the condition the appellant took no vested interest in the income of the testator's estate accruing between his death and the time she attains the age of 40 years. But, however this may be, the appellant, apart from the condition, would plainly take a vested life interest in the estate as from that time. The condition must therefore be treated as a condition subsequent so as not to interfere with the vesting of that interest. It was further contended on behalf of the official guardian that the words in question merely limit the duration of the trust for payment and are not in the nature of a condition at all. But the trusts for payment to the appellant are quite distinct from the words with which their Lordships are concerned and which are in a separate clause. These words do not, in their opinion, qualify the trusts for payment. They are merely designed to abrogate the trusts in a certain event. In substance, no doubt, there is not much difference between a trust to pay until the happening of a certain event, and a trust to pay that is abrogated on the happening of that event. But the legal effect in the two cases of the event being described with insufficient certainty are widely different. In the first case the trust will fail altogether. In the second case the trust will remain and it will be the clause of abrogation that will fail.

For these reasons their Lordships are of opinion and will humbly advise His Majesty that this appeal should be allowed; that the judgment of Middleton J. as varied by the Court of Appeal should be set aside except in so far as it dealt with the costs of the hearing of the motion and of the appeal; and that a declaration should be made that the clause in the will of the testator directing that the payments to the appellant should be made only so long as she continues to reside in Canada is void for uncertainty.

The costs of all parties represented on this appeal, those of the respondent trustees and the official guardian as between solicitor and client, should be paid out of the estate of the testator.

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In the Privy Council.

ELIZABETH ARMINELLA BURROWS SIFTON

v.

CLIFFORD SIFTON AND OTHERS

DELIVERED BY LORD ROMER

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