Privy Council Appeal No. 23 of 1967

Derwent Peiris and others – – – – – – *Appellants*

v.

Abeysiri Munasinghe Laviris Appu – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY 1968

Present at the Hearing:
VISCOUNT DILHORNE
LORD GUEST
LORD WILBERFORCE
LORD PEARSON
SIR ALAN TAYLOR
[*Delivered by* LORD WILBERFORCE]

The action in which this appeal is brought is a *rei vindicatio* relating to some 200 acres of land in the Kurunegala District known as the Raglan Estate. The appellants claim this land as *fideicommissaries* under the will of their grandmother Adeline Winifred Peiris ("the testatrix"). The respondent's title rests upon a conveyance for value from the father of the appellants Richard Louis Peiris. The appellants' claim was upheld by the District Judge but his decision was reversed by the Supreme Court on the ground that the appellants failed to establish the existence of a *fideicommissum.*

The main question for determination is whether, under the terms of the will and in accordance with certain rules of Roman Dutch Law, a *fideicommissum* affecting the Raglan Estate in favour of the appellants ought to be implied; but before consideration is given to this question, it is convenient to state some matters of fact which gave rise to certain issues in the Courts below.

The will of the testatrix was made on 3rd June 1910 before a well known and experienced notary public A. W. Alwis. It appears that some dispute arose between the testatrix and her husband Richard Steuart Peiris as to the title to various properties, and on 31st May 1917 a Deed of Indenture was entered into between them, the occasion for which was the impending marriage of one of their daughters. This Deed, amongst other provisions, contained an agreement by the testatrix to convey the Moragolla Group of estates (which included the Raglan Estate) by way of gift to her eldest son Richard Louis Peiris (the appellants' father) subject to a *fideicommissary* condition, and further agreements for the gift of other pieces of land to others of her children. Before any steps were taken to implement these provisions, Richard Steuart Peiris died on 23rd October 1918. The testatrix herself died shortly after on 20th December 1918.

Richard Louis Peiris, the eldest son of the testatrix and her husband, was executor of the will of each of them and he initiated two testamentary cases (Nos. 6569 and 6571) in the District Court of Colombo, seeking a

decision on certain questions of doubt as to which differences had arisen between the heirs. All matters in dispute, which appear to have included the effect of the Indenture of 31st May 1917, were referred to arbitration, and in due course an Award was made. It is sufficient to state that the arbitrator found that the Indenture of 1917 was binding on the testatrix, her husband and their heirs, and that therefore the two testaments did not deal with the properties dealt with by the Indenture. He also found that the Indenture was binding on the children of the testatrix and her husband.

On 17th December 1925 the Award was made a Rule of Court by the District Court of Colombo.

None of the present appellants was a party to the testamentary cases or to the Award. The eldest of them was in fact not born until 1930.

The title of the respondent arises from a sale of the Raglan Estate in 1951 by Richard Louis Peiris to one U. B. Senanayake, whose title, if any, the respondent acquired on 9th August 1952. Richard Louis Peiris died in December 1954 and the present action was instituted on 18th March 1959.

The relevant portions of the will of the testatrix, of 3rd June 1910, are as follows:

> "I hereby will and direct that on the marriage of each of my daughters (with the sanction and approval of my said husband) my executor shall set apart and convey to her immovable property of the value of one hundred thousand rupees subject to the conditions following: viz.
>
> That such daughter shall not sell, mortgage or otherwise alienate such property or properties but shall be entitled during the term of her natural life only to take enjoy and receive the rents income and produce thereof. She shall not be at liberty also to lease or demise such property or properties for any term exceeding four years at any one time or to receive in advance the whole of the rents for such period and subject to the further condition that on the death of such daughter such property or properties so given to her shall go to and devolve on her children in equal shares. Should such daughter die without leaving issue then I will and direct that the properties so given to her shall devolve on her surviving sisters and the issue of such sister as shall then be dead. Such issue taking only amongst themselves the share to which another could have been entitled to or have taken if alive.
>
> So long as my daughters or any of them shall remain unmarried and shall prove dutiful and obedient to my husband my executor shall pay to each of them monthly a sum of two hundred and fifty rupees for her sole absolute use and benefit.
>
> 8a. I give devise and bequeath all the rest residue and remainder of my property and estate immovable and movable unto my sons in equal shares subject to the express condition that my said husband Richard Steuart Peiris shall be entitled during the term of his life to take receive enjoy and appropriate to himself for his own absolute use and benefit all rents income produce and profits of all the said property and estate with full liberty to expend for the management cultivation and upkeep thereof all such sums of money as he on his absolute discretion shall think fit and with full power and authority to my said husband should he deem it necessary to mortgage the said properties or any of them for the purpose of raising and borrowing money for any purpose whatsoever and upon such terms and conditions as he shall deem fit and proper and also subject to such conditions and restrictions as my said husband shall according to his absolute discretion and wish think fit to impose when conveying such property or properties to my sons.

8b. Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children taking only amongst themselves the share to which their father would have taken or been entitled to if living subject however to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

8c. If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be entitled to and receive one fourth of the nett income of the property to which her children would be entitled to under this my will."

The numbering placed before the three paragraphs dealing with the residue does not appear in the original will but has been added for convenience of reference.

It will be seen that while the will contains, in paragraph 8b, a gift, of a clearly *fideicommissary* character, in the event of any of the testatrix's sons dying without leaving issue (in the terminology of Roman Dutch Law a clause "*si sine liberis decesserit*"), there is no corresponding provision, in relation to the sons' original shares, which deals expressly with the event of a son dying but leaving issue, and in particular no gift in that event to the son's children.

The appellants' submission was that a *fideicommissum* in their favour ought to be implied. They advanced the following propositions:

I. That a "*si sine liberis decesserit*" clause, under Roman Dutch Law automatically gives rise to a *fideicommissum* in favour of the children mentioned in the "*conditio*" if the *de cujus* was a descendant of the testator.

II. That, if I is not correct, only slight indications from surrounding circumstances, or from other provisions in the will are required in order that such a *fideicommissum* should be inferred.

III. That if (contrary to II) very clear indications *aliunde* are needed to support the inference of a *fideicommissum*, indications of this quality are to be found in the present case.

Their Lordships commence their examination of these propositions by reference to the commentators. There is no doubt that support can be found in them for the appellants' submissions. *Grotius* endorses proposition I, though he does so in a negative rather than a positive form: answering the question whether, where the *conditio* exists, the heir is burdened with a *fideicommissum* in favour of his children he says:

"However, the generally accepted view is that this is not so unless the children were descendants of the testator . . . or unless the last will contained some other indications from which a contrary intention might be inferred". [The Jurisprudence of Holland: Tr. Lee (1926) p. 153.]

Voet discusses the question at greater length. In a section headed "Person burdened by condition may alienate property left unless it appears that those given place under condition were called as heirs" he states that this [alienation] is not permitted "should the children or others who have been given place under condition appear by that very fact to have been summoned by the testator to those properties in respect of which they have been so given place" and continues by stating four sets of circumstances from which such calling may be inferred—as to which "watchfulness is certainly needed . . . for cases are not lacking in which those who have been given place under a condition ought on account of various circumstances to be deemed to have been summoned under the last will".

The fourth of these is expressed as follows:

> " Finally Neostadius is authority for saying that with collaterals indeed . . . who have been given place under a condition, the view of the Roman law demonstrated above [*sc.* that those who are ' *positi in conditione* ' are not deemed ' *positi in dispositione* '] ought . . . to be approved; but that actual descendants of the testator who have been given place by him under a condition appear by our customs to have been summoned by the last will apart from any combination of reasonable inference such as has been already described." [Voet: Commentary Tr. Gane (1956) Vol. IV Bk. XXVIII Tit 2 s. 10.]

The cautious statement of this fourth proposition is to be noted: it is placed under the authority of *Neostadius* without direct endorsement by the author. That *Voet* himself considered the point a doubtful one is shown by a footnote to the passage last cited in which he refers to *Grotius* and *Van Leeuwen* on one side and to *Sande's* disagreement on the other. His own view appears to go no further than acceptance of the relevance of " various circumstances ". It may also be noted that the learned translator, in an introductory note to the title, says that (*inter alia*) section 10 has been " in modern times a veritable battleground on two most momentous questions " of which he states the present as one.

It is not necessary to refer at length to the writings of *Van Leeuwen.* In his Commentaries on Roman Dutch Law dealing with the special case of descendants of the testator he says " under the testator's children, grandchildren are held to be so included (*i.e.,* called to the inheritance) *if from the circumstances it appears that such was the intention* " (Commentaries Tr. Kotze (1921) 2nd Ed. Vol. I Bk. III Ch. VIII s. 12 p. 383). To what extent this reference to " the circumstances " introduces an additional requirement, and if it does what the strength of it must be, does not appear. In his earlier work the Censura Forensis he appears to approve the opinion expressed " by others " that even children and grandchildren are not to be considered as summoned to the inheritance by virtue of the condition " unless unmistakable and very evident inferences and necessary deductions from the testator's intentions require this, since . . . if the testator wish to summon the latter to the inheritance by means of a *fideicommissum* he ought expressly to say so, since in cases of doubt the presumption is always in favour of the heir and against the *fideicommissum* " (Censura Forensis Bk. III Ch. 7 s. 18).

Finally reference may be made to Professor Lee. After stating that the question (*sc.* whether a *fideicommissum* in favour of the children would be implied from the condition " *si sine liberis decesserit* ") was disputed, he states positively " If however the testator was an ancestor, not only does the above-mentioned clause create a *fideicommissum* in favour of the children, but even if the clause had been omitted it will be read into the will with the same result." (Lee, Introduction to Roman Dutch Law 5th Ed. (1953) p. 379.) For authority he refers to *Voet* and *Huber* and mentions *Galliers v. Rycroft* [1901] A.C. 130 a case concerned with the question whether the *conditio* ought to be implied.

Thus it can be said that the commentators, while in some passages supporting the implication of a *fideicommissum* in favour of descendants of the testator, are not entirely agreed on the question whether this implication may or should be drawn from the mere existence of the *conditio* or whether additional circumstances indicating the testator's intentions are required or whether, if so, slight, or strong indications are needed. It becomes therefore necessary to enquire to what extent and in what form the views so expressed have been received into the law of Ceylon. The correct approach to a question of this kind is not now in doubt, since this Board has given its approval to the formulation of it by Professor Lee:

> " The works of the older writers . . . have a weight comparable to that of the decisions of the Courts, or of the limited number of ' books of authority ' in English Law. They are authentic statements

> of the law itself, and, as such, hold their ground until shown to be wrong. Of course, the opinions of these writers are often at variance amongst themselves or bear an archaic stamp. In such event the Courts will adopt the view which is best supported by authority or most consonant with reason; or, will decline to follow any, if all the competing doctrines seem to be out of harmony with the conditions of modern life; or again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience." [Lee op. cit p. 14 approved *Abeyawardene v. West* (58 N.L.R. 313, 320 (J.C.)).]

In the present case, it is not only the difference of emphasis of the commentators, which leaves scope for clarification of the law by the courts. There is also the fact that the principles on which testamentary instruments are to be construed must differ widely from those applicable in 17th century Holland. In modern Ceylon, they are or may be made (as in the present case) in the English language, against the background of a mixed legal system, by notaries familiar with that system, for well-educated testators, themselves capable of understanding legal techniques. The courts at the present time are accustomed, rightly, to regard their primary task as being to ascertain the real intention of testators, from a fair consideration of the language of the instrument as a whole, account being taken no doubt of well known and accepted rules but with liberty to mould them so as to give effect to rather than to defeat that intention. It appears in fact that this is the process which has been adopted in Ceylon. The modern law on the question now under consideration may be said to have its origin not in a Ceylon decision but in a case decided in 1908 by the Supreme Court of Good Hope. This case (*Steenkamp v. Marais and others* 25 S.C.R. 483) was concerned with a joint will by a testator and his wife containing a gift in favour of their son Carel with (as was assumed) a *si sine liberis decesserit* clause in favour of another son. The question was whether Carel had power to mortgage the property subject to the bequest without regard to any interest of his minor children. On behalf of the latter it was claimed that the clause gave rise to an implied or tacit *fideicommissum.* Maasdorp J., after an examination of the relevant passages of the commentators, decided against the implied *fideicommissum :* the decision of the case, he held, depended wholly on the clause in question, there being nothing in any other portion of the will to indicate any other intention. In other words he decided that, even in a case concerned with descendants of the testator, the mere presence of the *conditio,* without other indication, was not sufficient to give rise to the implication.

This decision has been followed in other South African cases. Their effect has recently been stated as follows:

> "This question" (*i.e.,* whether children placed in the condition should be deemed to be called to the succession) has frequently been discussed in decided cases (compare *Steenkamp v. Marais* u.s., *Ex parte Richter* 1945 OPD 297, *Ex parte Kops and others* 1947 (1) SA 155 (0)) and the conclusion to which the Courts have come is that such a provision creates no *fideicommissum* in favour of the children. Such an intention can also not be deduced from the wording of the will (*sc, this* will) since in the analysis and interpretation of a will the most important indeed the only object is to establish the intention of the testator and then to give it effect; to this all so-called rules of interpretation are subordinate. All the different indications must be taken into account without laying too much emphasis on them. When there is a reasonable doubt in regard to the actual intentions of the testator the Court will decide against a *fideicommissum* (*Ex parte Swanepoel and others* 1948 (1) SA 1141 at p. 1143 (0). *Engelbrecht v. Engelbrecht en Andere* 1958 (3) SA 571 (0) per Klopper A. J.) [Transl. Honoré].

It remains to consider the extent to which the principle, now so firmly established, in South Africa has been accepted in Ceylon. The first of the modern cases in which the Courts of Ceylon had to consider the effect of a *si sine liberis decesserit* clause, was *Asiathumma v. Alimanchy* (1905)

1 A.C.R. 53. The gift was in favour of the donor's wife with a gift over, in the event of her dying without issue to the donor's brother in law. It was held that this did not create a *fideicommissum* in favour of any children his wife might have and that she was free to deal with the property. This was not a case involving a gift to descendants of the donor and the only relevance of it is that it shows that the Court was prepared to consider the terms of the will and the circumstances of the family before deciding that a *fideicommissum* ought not to be implied.

Learned counsel for the appellants in an argument to which their Lordships are indebted, referred to a number of later Ceylon cases, prior to 1962, which he submitted have not sufficiently been taken into account by the Supreme Court in their recent decisions.

In two of these, an implication has been drawn of a *fideicommissum* from the presence of the condition (*Sandenam v. Iyamperumal* (1916) 3 C.W.R. 58, *Deu v. Jayewardene* (1927) 5 T.C.L.R. 107), but neither of these cases contains an examination of the authorities and in the latter at least reliance was placed on other expressions found in the will. *Carolis v. Simon* (1929) 30 N.L.R. 266 requires somewhat fuller mention, for there a *fideicommissum* was implied and the case of *Steenkamp v. Marais* considered. The Supreme Court did not differ from the latter decision: it distinguished it upon the ground that the terms of the will showed that the testators had in contemplation not merely children or grandchildren but remoter descendants: the argument (invoked in *Steenkamp v. Marais*) that the testator's intention might have been, in the event of the birth of issue, to liberate their father from the bond of *fideicommissum* so that he could confer upon them benefits by will or on intestacy was insufficient to meet the case: there was moreover an express prohibition against alienation which would serve no purpose unless to ensure devolution of the property upon the descendants. There was a sufficient manifestation of intention that the property should remain with the testator's descendants. In *Appuhamy v. Holloway* ((1943) 44 N.L.R. 276, 280) Wijeyewardene J. said that even where there is an express "*si sine liberis*" clause in a will the better opinion of the jurists appears to be that a *fideicommissum* cannot be implied in favour of the children in the absence of special circumstances.

In *Thinoris de Silva v. Weerasiri et al* (1949) 51 N.L.R. 467 there was a clear and sufficient indication showing an intention to create a *fideicommissum* but Wijeyewardene J. again referred to the conflicting opinions of learned writers as to the effect of a *si sine liberis* clause taken alone.

These cases can hardly be taken as establishing a line of authority which commits the Courts of Ceylon to a different principle from that established in South Africa, or as preventing them from making a full examination of the relevant law for themselves.

This the Supreme Court undertook in *De Silva v. Rangohamy* (1961) 62 N.L.R. 553. It decided in terms that the presence in a will of a *si sine liberis decesserit* clause does not *per se* create a tacit *fideicommissum* in favour of grandchildren of the testator—even though the children referred to in the clause are descendants of the testator. In his judgment H.N.G. Fernando J. mentioned the opinion, to the contrary, expressed by Professor Nadaraja in his work "The Roman Dutch Law of *Fideicommissa*", and referred to the conflicting views of the text-writers. He said that the view that a tacit *fideicommissum* arises by implication from the clause alone was reasonable and might have been accepted by Ceylon and South Africa, but the law in both countries had developed otherwise. So far as the rationale of the presumption was concerned, he was not convinced that a demonstration of *pietas* (*sc.* in favour of descendants) by the clause, raised the necessary inference of an intention to call the descendants to the succession: the testator might have contemplated that they should take their benefits in another way, *e.g.*, by transfer or devise from the ascendant legatee. He accepted, and indeed held, that a *fideicommissum* in favour of descendants might be implied

if there was an intention to include them in the succession. This case was followed by the Supreme Court in *Rasammah v. Manar* (1963) 65 N.L.R. 467, a case of a deed of gift. Herat J. referred to the division of opinion among the commentators but reaffirmed the proposition that the trend of decisions in both Ceylon and South Africa was against implication of a *fideicommissum* from the clause alone: the intention to create a *fideicommissum* might be construed out of the language used and from the circumstances of the case. Both of the two latter decisions were followed by the Supreme Court in the present case.

Learned counsel for the appellants submitted that the law in Ceylon has not been settled by the two decisions of 1961–1963 and that it is still an open question whether, the clause, *per se,* in the case of a gift to descendants, gives rise to a tacit *fideicommissum.* If the question is still open, then, it was argued, the weight of opinion among the commentators is in favour of the implication.

Their Lordships cannot accept this argument. In the first place they consider that the decisions of the Courts in Ceylon show a definite trend, following or parallel to those of the Courts of South Africa against the implication of a *fideicommissum* from the clause alone. In cases where the implication has been drawn, this has been upon the basis (perhaps sometimes insufficiently founded) that there was shown to be an intention to create a *fideicommissum.* Secondly their Lordships consider that this trend is in accordance with the requirement that effect should be given to the intentions of testators which the Court ascertains from a fair reading of his testamentary dispositions in the light of the circumstances in which he was placed, rather than from the rigid application of rules of law.

As regards the law applicable in 1910 when the will was made, or in 1917 immediately before the testatrix's death, their Lordships are of opinion that, while not so decisively settled as at the present time, the tendency referred to above was sufficiently shown to form the basis of assumption upon which the draftsman would act. The decision in *Steenkamp v. Marais* (u.s.) was given in 1908 and at the least must have stood as a warning that if *fideicommissa* in favour of those mentioned in the condition were to be established, they should be established expressly.

In their Lordships' opinion the present law to be applied may be summarised in these propositions:

1. Where in a will (and *mutatis mutandis* the same would apply as regards deeds of gift), a bequest is made to a child of a testator, the mere presence of a clause, or condition, "*si sine liberis decesserit*" does not *per se* create a tacit *fideicommissum* in favour of that child's children.

2. Whether, in such a will, a *fideicommissum* is to be implied is a matter of the testator's intention to be ascertained from the dispositions in the will as a whole and from the circumstances in which the testator was placed when he made it.

3. Such an intention must be clearly established: in case of doubt the presumption is against the implication of a *fideicommissum.*

Their Lordships now turn to the will. It is first relevant to consider the circumstances in which it was made. The testatrix then had three sons and three daughters, none of the latter being married. She had a considerable estate and was in a position to make generous provision for her children. The scheme of the will was that each daughter should on marriage receive property worth Rs.100,000, and that the portion of her estate allocated to the daughters should be preserved for the daughters and their issue. The residue, subject to a life interest given to her husband, was to go to the sons. The dispositions of this portion of the estate were to be such as to prevent an intestacy and to exclude collateral relatives from benefit. Consequently there was to be imposed on the

share of each son an express *fideicommissum* which, in the event of his dying without leaving issue, would carry the share over to those of his brothers or their children. Provision was to be made for the sons' widows.

In considering, whether, in the event of a son's death leaving children a *fideicommissum* over his original share was to be implied in favour of those children, one is met, at once, by two strong indications pointing to a negative answer:

(1) There is, in relation to the daughters' shares, an express and clearly expressed *fideicommissum* in precisely this event.

(2) No prohibition, or restriction on alienation is imposed as regards the sons' shares, though again an express restriction is imposed as regards the shares of the daughters.

The appellants attempted to explain this distinction by saying that the gifts were different: the daughters, severally, took a fixed sum; the sons on the other hand took the residue jointly. This may be so; but the residuary bequest continues to provide for the devolution of each son's share—by means (in the event of his not leaving issue) of an express *fideicommissum*. The absence of a further express *fideicommissum* (corresponding to that affecting the daughters' bequests), should a son die leaving issue, remains striking.

The argument based on this distinction is a very strong one: in face of it an implication of a *fideicommissum* can only be drawn from some very clear indication indeed. The indication most relied on (indeed the only indication of any weight) is derived from the clause numbered 8c. It is one which requires consideration. It appears to deal with the very case now in question (" if any of my said sons shall die leaving children ") and it terminates with the words " the property to which her children would be entitled under this my will ". These words it is said show, and show with sufficient clarity, that it is supposed, or contemplated, that a son's children do take an interest under the will: this supposition would be falsified unless a *fideicommissum* were implied in their favour.

This argument has considerable *prima facie* force: it convinced the learned District Judge; it had some appeal to their Lordships. If no sense or meaning could be given to this clause but one which rests upon the inference of a *fideicommissum* in favour of the son's children, then, even in the face of the contrary indications, such inference might have to be drawn. If on the other hand a meaning can be given to it, which does not rest upon this inference, or require it to be drawn, then such meaning should be attributed; if it is a case of doubt which meaning it bears, that must be resolved against the *fideicommissum*.

Their Lordships consider that the clause can be interpreted in a manner which does not require the inference. For it may be read as an appendix to the clause numbered 8b. That clause may be analysed as follows:

(1) If a son dies (*a*) unmarried or (*b*) married but without issue then

(2) his share goes to (*a*) his surviving brothers or (*b*) the children of any deceased brother: provided that (as regards case 1 (*b*)) if there is a widow, she is entitled to one-quarter of the income during her widowhood.

The clause numbered 8c would then deal further with case 2 (*b*), in the additional event of there being a widow (this gives a meaning to the words " leaving children *and also* a widow "). In other words the clause is dealing with accrued shares and not with original shares: the intention being that as regards original shares a son who dies leaving children takes absolutely and so can make his own provision both for his widow and for his children.

This interpretation of the clause no doubt has its difficulties, both of construction and in its application: it is not the only possible interpretation. But it is a possible interpretation, sufficiently possible to

negative the necessity to infer a *fideicommissum* against which such strong indications exist elsewhere in the will.

Their Lordships are therefore of opinion that no *fideicommissum* ought to be inferred and that, in consequence, the appellants' case must fail.

There remains the second issue on which the appellants would also have to succeed if they were to make good their claim against the respondent. They would have to show that the Raglan Estate specifically formed part of the share of their father Richard Louis Peiris in the residuary estate, so as to be affected by the *fideicommissum*. As was pointed out in the Supreme Court this involves their making good the unusual claim that the Indenture and Award took effect so far as to confer upon Richard Louis Peiris a specific interest in the Raglan Estate; but failed to take effect (as against the appellants) so as to withdraw the Raglan Estate from the will and subject it to the terms of the Award. In making good their contentions the appellants would be in some difficulty from the form of their pleading and from the lack of positive evidence as to what precisely was done, as regards the various properties, following upon the Award. The judgment of H.N.G. Fernando J. in the Supreme Court set out, very fully and fairly, the manner in which the appellants sought to overcome these difficulties: without coming to a conclusion upon them, the Court evidently considered that the appellants' contentions were not without weight. In these circumstances, and because decision upon the first issue determines the appeal, their Lordships do not think it right to express a concluded view on this issue.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

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