Privy Council Appeals Nos. 4 and 29 of 1982

The Commissioner of Estate and Gift Duties – – *Appellant*

v.

Fiji Resorts Limited – – – – – – – *Respondent*

AND

Fiji Resorts Limited – – – – – – – *Appellant*

v.

The Commissioner of Estate and Gift Duties – – *Respondent*

(Consolidated Appeals)

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER 1982

Present at the Hearing:

LORD DIPLOCK

LORD KEITH OF KINKEL

LORD LOWRY

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

[*Delivered by* LORD BRIGHTMAN]

The question arising on this appeal relates to estate duty on shares in two Fiji companies; the shares were part of the community property of a husband and wife under the law of the State of California; the claim to duty is made on the death of the husband, who died in 1972 and is survived by his wife. It is conceded on the part of the tax-payer that estate duty is payable in respect of a half interest in the shares. The Commissioner, however, claims estate duty on the whole. His submission succeeded at first instance but failed on appeal.

The deceased, Mr. Alan Davis, was married in 1940. In 1948 he and his wife acquired a domicile of choice in the State of California. The law of California at the relevant time is not in dispute. It imposes on parties to a marriage the regime of community of goods, unless the parties contract out under section 5103 of the Civil Code. Subject to any such contract, all property acquired by either party during the subsistence of

the marriage is community property, except property acquired by gift, bequest, devise or descent, and the income thereof, and certain other descriptions of property which need not be mentioned. In particular, the earnings of each spouse when living together are community property. Subject to certain exceptions, the husband has control of community property. This is provided for by section 5125 in the following terms:—

> "Except as provided in Sections 5113.5, 5124 and 5128, the husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community property without the written consent of the wife."

The exception in section 5113.5 relates to property transferred by both spouses to trustees to be held as community property. Section 5124 confers on the wife the management and control of her own earnings, and certain other receipts, so long as they retain their separate identity. Section 5128 deals with the case of a spouse who is *non compos mentis*.

Lastly, though appearing earlier in the Code, section 5105 provides as follows:—

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in Sections 5125 and 5127. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

Section 5127 deals with the management and control of community real property.

The only sections directly relevant for present purposes are sections 5105 and 5125.

These sections are further explained in an affidavit of Mr. G. A. Strader, an attorney of the State of California, filed on behalf of the appellant, the Commissioner of Estate and Gift Duties. He says this:—

> "The extent of a husband's control over community funds is such that he is entitled to possession of same, and has a cause of action against his wife, in the event of her secreting same and refusing to pay same to him after demand, such action by the wife being an invasion and violation of his right to manage, control, and dispose of them."
>
> "The husband's relationship to community property is such that as a general rule he, and he alone, has lawful standing to bring court actions concerning community property; an exception being that the wife may resort to appropriate judicial remedies to protect and safeguard the community property against inconsiderate and fraudulent acts of the husband."
>
> "The husband has control of community property, and may mortgage personal property without his wife's consent."
>
> "Gifts of community property made by a husband without consent of his wife are not void, but are voidable only at instance of the wife."
>
> "All community property is liable for the husband's debts, and subject to his disposal. Community property is not liable for the

wife's torts or contractual obligations after marriage since such liability would impose an unwarranted interference with and infringement upon the husband's right to management and control."

None of these propositions was disputed by Mr. Martin A. Schainbaum, who gave affidavit evidence for the respondent tax-payer, and added this:—

"The major premise upon which California community property laws operate is that property acquired during marriage is presumed to be community property. All that is necessary to cause the presumption to arise is proof that the property was acquired during marriage."

The property in regard to which the claims to duty arise consist of holdings in two companies incorporated in Fiji and known as Fiji Mocambo Holdings Limited ("Mocambo") and Yanuca Island Limited ("Yanuca").

The origin of the Mocambo shares dates back to September 1961, when the deceased and his wife bought shares and notes in Fiji Holdings Limited with a cheque drawn on their joint banking account. These shares and notes were registered in their joint names on 23 October 1961. Further shares and notes in Fiji Holdings Limited were issued in their joint names in April 1965. In March 1966 Fiji Holdings Limited was placed in voluntary liquidation, and the share- and note-holders received instead shares (technically stock units) and notes of Mocambo. In 1969 as a result of certain conversion arrangements and a bonus issue, the deceased and his wife ended with 37,354 shares of $1 each in Mocambo, registered in their joint names.

Between the date of the purchase of the shares and notes in Fiji Holdings Limited and the registration thereof in their joint names, namely on 6 October 1961, the deceased and his wife entered into an agreement regulating their property interests. The agreement recited that—

"All property of every kind and nature now owned or held by said parties in their joint names was acquired and purchased with the community earnings of said parties;"

and that—

"It is the intention of said husband and wife to enter into a written memorandum of agreement attesting to the community status of their joint tenancy property, and the separate status of certain other property."

The parties then agreed, so far as relevant for present purposes:—

"(1) That all property of every kind, nature and description now owned or held of record title by said husband and wife in their joint names as joint tenants, at all times herein mentioned has been, now is, and shall remain, the community property of said husband and wife without regard to the form and record of ownership under which the same was acquired or is now held.

(2) That all property inherited by either said husband or said wife during their marriage is the separate property, respectively, of said husband or of said wife.

(3) That all property that may *hereafter* be acquired by said husband and wife, during the continuance of their marriage, *EXCEPT* that acquired by either of them by gift, bequest, devise or descent shall become and remain the community property of said husband and wife without regard to the form and record of ownership under which the same is acquired or held."

In general effect, the agreement merely confirmed the situation arising under Californian law in the absence of an agreement for separation of goods.

In October 1967 and July 1968 there were issued in the sole name of the deceased shares of £1 each in Yanuca (then called Fiji Resorts Limited) amounting in all to 25,180 shares. These were subsequently converted into shares of $2 each.

On 28 February 1972 the deceased died, possessed of 37,354 shares in Mocambo held in joint names, and 25,180 shares in Yanuca in his sole name.

At some time after his death and by some means, the Mocambo shares were converted into 101,404 shares of $1 each in the respondent Fiji Resorts Limited registered in the joint names of the deceased and his widow, and the Yanuca shares were converted into 131,661 shares of the same company registered in the sole name of the deceased. The First National Bank of San Jose California, the executor named in the deceased's will, obtained probate in California, in May 1972. In and after September 1973 a sale of the shares in the respondent company was made and transfers in favour of the purchasers were registered by the company notwithstanding that no representation had been taken out in Fiji. The will was ultimately proved in Fiji in November 1976.

The Commissioner of Estate and Gift Duties claimed that the respondent company was accountable for death duties on the shares on the ground that it had intermeddled in the estate and had therefore incurred accountability pursuant to section 31 of the Estate and Gift Duties Ordinance Cap.178. This claim was upheld in November 1977 in the Supreme Court of Fiji, and by the Court of Appeal in August 1978.

The respondent duly filed an account in 1977 pursuant to the Order of the Supreme Court. In April 1978 the appellant assessed estate duty upon the basis that the entirety of the Mocambo and Yanuca shares were dutiable on the deceased's death. The respondent contested this assessment, and claimed

(1) that the Mocambo shares, which were held in joint names, were the separate property of the wife and therefore not dutiable, and

(2) that only the Yanuca shares, which were held in the deceased's sole name, were community property.

The matter came back to the Supreme Court on the assessment in 1979. On the questions of fact which were raised, Mr. Justice Williams held that both the Mocambo and the Yanuca shares had been purchased out of community funds, and were therefore community property at the death of the deceased. The learned judge made no finding whether part or the whole of the funds used for the acquisition of the shares had originated from the deceased or from his wife or both, and having regard to the complexity of the evidence this is not a matter for surprise.

Before turning to the decision of the learned judge on the duty consequences of his findings of fact, their Lordships will refer to the Ordinance itself.

The Ordinance was passed as a consolidating Ordinance in 1966. Under section 3, duty is payable on the final balance of the estate of the deceased as determined in accordance with the provisions of the Ordinance. The duty is assessed as a percentage of the final balance of the estate. In computing the final balance, the deceased's estate is deemed to include and consist of certain classes of property set out in section 5(1), of which four are material for present purposes.

The first class reads as follows:—

"(*a*) All property of the deceased which is situate in Fiji at his death and to which any person becomes entitled under the will or intestacy of the deceased except property held by the deceased as trustee for another person."

The second, third and fourth classes are descriptions of property comprised in any gift, and in a *donatio mortis causa*. These classes are not relevant.

The fifth class is not expressed as "property" but as "beneficial interest". It reads as follows:—

"(*e*) The beneficial interest held by the deceased immediately before his death in any property as a joint tenant or joint owner with any other person or persons if that property was situate in Fiji at the death of the deceased."

The next two classes are policy money and an annuity or other interest purchased or provided by the deceased, and are not relevant.

The eighth class is property subject to a general power of appointment. It reads as follows:—

"(*h*) Any property situate in Fiji at the death of the deceased over or in respect of which the deceased had at the time of his death a general power of appointment."

This paragraph has to be considered in conjunction with section 2, which is the interpretation section. It provides that, unless the context otherwise requires—

"'General power of appointment' includes any power or authority which enables the donee or other holder thereof, or would enable him if he was of full capacity, to obtain or appoint or dispose of any property or to charge any sum of money upon any property as he thinks fit for his own benefit, whether exercisable orally or by instrument *inter vivos* or by will or otherwise howsoever, but does not include any power exercisable by a person in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee."

The ninth and last class is property comprised in a settlement made by the deceased under which he has an interest. It is described as follows:—

"(*i*) any property situate in Fiji at the death of the deceased comprised in any settlement, trust or other disposition of property (including the proceeds of the sale or conversion of any such property and all investments for the time being representing the same and all property which has in any manner been substituted therefor) made by the deceased whether before or after the commencement of this Ordinance—

(i) by which an interest in that property or in the proceeds of the sale thereof is reserved, either expressly or by implication, to the deceased for his life or for the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or

(ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person or for any period determined by reference to the death of the deceased or of any other person; or

(iii) by which the deceased has reserved to himself the right by exercise of any power to restore to himself or to reclaim that property or the proceeds of the sale thereof."

Their Lordships return to the judgment of Mr. Justice Williams.

The learned judge first considered the application of paragraph (*h*). He decided that the deceased had at the time of his death a general power of appointment over the entirety of the community property, and that therefore his estate was deemed to include the whole of the Mocambo and Yanuca shares.

The learned judge then considered paragraph (*i*). He found that the shares were also dutiable under this paragraph, on the footing that the agreement of October 1961 was a disposition within the meaning of that paragraph, and that under such disposition an interest was reserved to the deceased for his life.

In reaching his conclusions the learned judge relied to a large extent on a decision of the New South Wales Court of Appeal in *Ochberg v. Commissioner of Stamp Duties* (1949) 49 S.R. (NSW) 248. This involved a claim to death duty on the death of the husband in 1937 in respect of Australian Government Bonds, the parties having been married in the regime of community of goods under the law of the Province of the Cape of Good Hope. Under that law, the husband had the exclusive right of controlling, managing and administering the community property, including power to alienate, pledge or mortgage without the wife's consent, subject to the wife's right to protect herself against the prodigality of her husband by applying to the court for a *separatio bonorum*. Under section 102(2)(j) of the Stamp Duties Act 1920 the estate of a deceased person was deemed to include—

> " any property over or in respect of which the deceased had at the time of his death a general power of appointment ".

A general power of appointment was defined in terms which are not identical to, but are for practical purposes the same as, the definition in the Fiji Ordinance. Under section 102(2)(c) of the Act the estate of a deceased person was also deemed to include property passing under any settlement, trust or other disposition of property made by the deceased under which he had a reserved interest, benefit or right as in sub-paragraphs (i), (ii) and (iii) of paragraph (*i*) of the Fiji Ordinance.

The claim to duty in the *Ochberg* case was first considered in the context of paragraph (c) of the Australian legislation. The court held that the conditions of that paragraph were satisfied because (i) the parties by the act of marrying produced the same result as if they had entered into a formal contract for community of property; (ii) the bonds had been provided by the deceased; and (iii) the effect of the regime of community of goods was that the deceased had a beneficial interest in the whole of the community property. The court also held that the bonds were dutiable under paragraph (j) as being the subject matter of a general power of appointment, but no separate reasons were expressed for that conclusion.

When the instant case came before the Court of Appeal of Fiji, the court first considered whether duty was exigible on the shares under paragraph (*e*), that is to say on—

> " the beneficial interest held by the deceased . . . . in any property as a joint tenant or joint owner with any other person . . . . "

This claim, which was not the subject matter of decision in the Supreme Court, was rejected because—

> " the powers of the husband do not create any beneficial interest in a joint tenancy or joint ownership ".

The court then turned to paragraph (*h*). That claim also was rejected, primarily on the ground that the deceased could not appoint the community property to himself absolutely and therefore could not appoint it " as he thinks fit for his own benefit ".

Finally, the court considered the claim under paragraph (*i*). The court held, first, that—

> " Until a final division is made the husband remains a fiduciary in respect of his wife's interest "

and therefore—

> " the husband did not make, nor was he competent to make, any reservation to himself in respect of his wife's half interest ".

The *Ochberg* case was considered distinguishable, because there the husband was the provider of the funds.

In the result, the case was remitted to the Supreme Court of Fiji for the assessment of duty on the basis that one-half only of the community property was liable for duty.

In argument before their Lordships, the Revenue first argued the claim under paragraph (*h*). Counsel conceded that the deceased could not appoint the community property to himself absolutely, so as to become his separate property. But he submitted that whenever the deceased exercised his power to sell an asset forming part of the community property, he acquired the potentiality of using the proceeds for his own exclusive benefit. It was submitted that a general power of appointment, as defined, included a power which enabled the donee to appoint or otherwise dispose as he thought fit, provided that the donee himself could benefit as a result of such appointment or disposition.

In considering paragraph (*h*), there is one preliminary point which their Lordships mention although it does not call for decision. The paragraph refers to property over which the deceased " had at the time of his death " a general power of appointment. In the present case the power of disposition vested in the deceased ended with his death. He had no power of disposition which could affect the property after his death, as in the case of a testamentary power of appointment. It follows that paragraph (*h*) can have no application to the instant case unless " at the time of his death " means or includes " immediately before his death "; the latter formula is to be found in paragraph (*e*). There may be room for argument whether paragraph (*h*) is directed to an *inter vivos* power of appointment or to a testamentary power of appointment, or to both. It is not however necessary to express a concluded opinion, having regard to the view which their Lordships take on the meaning in the Ordinance of a general power of appointment.

The definition of general power in section 2 of the Ordinance is not expressed as an exhaustive definition. Throughout section 2 the words defined sometimes " mean " what follows, and sometimes " include " what follows. In the case of a general power of appointment the word is " includes ". It must therefore be accepted that the Ordinance does not purport to set out an exhaustive definition of a general power of appointment. A power may, at least in theory, be a general power for the purposes of the Ordinance although it does not precisely answer the description in section 2. Nevertheless, in their Lordships' view, the definition which is contained in the section, by necessary implication, quite plainly excludes a power unless it is one which " enables the donee . . . . to obtain or appoint or dispose of . . . . or to charge . . . . as he thinks fit for his own benefit ".

Their Lordships entertain no doubt that the words " obtain ", " appoint ", " dispose " and " charge " are to be read disjunctively, and that the qualification " as he thinks fit for his own benefit " applies to each of such acts.

The appellant conceded that, without the agreement of his wife under section 5103 of the Californian Code, the deceased could not " obtain " the shares for himself absolutely, nor " appoint " them to himself absolutely, so as to remove them from the community chest and make them his separate property; nor could he " dispose " of them to another by way of gift; nor " charge " them to raise money which he could place in his own pocket as distinct from the community chest. The nearest which the appellant was able to get to an illustration of the deceased's power to deal with the shares " as he thinks fit for his own benefit ", was to assume a disposition of the shares by way of sale and the application of the proceeds of sale in the purchase of services or consumables which the deceased then enjoys or consumes personally to the exclusion of his wife. But these are not examples of " dispositions " of property within the meaning of the definition. When the deceased consumes a consumable, he is not a disponer of what he consumes.

Once it is conceded, as it inevitably must be conceded, that the deceased was not entitled to make the shares his own absolute, separate property, or to give them to another, or to deal in like manner with the proceeds of sale of the shares, it must follow that he was not able to obtain, or appoint, or dispose or charge them as he thought fit for his own benefit. The claim to duty under paragraph (*h*) therefore fails.

Their Lordships turn to paragraph (*i*) of the Fiji Ordinance. The crucial words are

> " settlement, trust or other disposition of property . . . . made by the deceased ".

Generally speaking, a settlement of property is " made " by a person, not because he has executed an instrument of settlement but because he has brought the property into settlement. The settlor of property may have been the sole party who executed the instrument of settlement; or he may have been one of a number of parties so executing; or he may not have been a party at all. If he subjected property to the instrument of settlement, it is he who made the settlement *quoad* that property. Although it simply confirmed the legal position according to Californian law, their Lordships will assume, without deciding, that the agreement of 6 October 1961 was a " settlement, trust or other disposition " within the meaning of paragraph (*i*). On that basis the shares became " comprised " in such disposition when they became community property. The question then arises, whether the " disposition " *quoad* the shares so " comprised " was " made by the deceased ". This must be answered by seeking the origin of the acquisition of the shares as community property. If, for example, the shares were purchased out of earnings of the deceased, it would be right to regard the shares as comprised in a settlement " made by the deceased " because he would have provided that part of the subject matter of the settlement. Similarly if the shares claimed as dutiable were a re-investment of the proceeds of sale of other assets which had been similarly provided by the deceased. In the instant case, however, it is conceded by the appellant that he cannot show that the shares were to any defined extent mediately or immediately provided out of assets contributed to the community chest by the deceased. Therefore it is not established that the " settlement, trust or other disposition " of the shares was a settlement " made by the deceased ". In fact, it is sufficient for the purposes of the tax-payer if there is no evidence that more than half the shares were provided by the deceased, because liability for duty on half is conceded. The claim to duty on the entire share-holding under paragraph (*i*) accordingly fails.

Their Lordships turn lastly to the claim under paragraph (*e*). The subject matter of the claim under this paragraph is the deceased's beneficial interest in any property as a joint tenant or joint owner with

any other person or persons. Their Lordships will assume, without deciding, that the shares and other community property can be described, in a broad sense, as having been in the joint ownership of the deceased and his wife during the marriage, though not subject to the incident of survivorship. Nevertheless what is deemed to be included in the deceased's estate is not the shares, but the beneficial interest of the deceased in the shares. Under section 5105 of the Californian Code the interests of the husband and the wife in community property were " equal interests ". By definition, therefore, the beneficial interest of the deceased in the shares was equal to the wife's beneficial interest, and cannot have exceeded a half interest. Accordingly the claim to duty on the whole of the shares under paragraph (*e*) fails.

It is common ground that on the death of the first to die of the parties to a marriage, the deceased's estate is entitled to half the community property. That half is accordingly dutiable under paragraph (*a*) of the Fiji Ordinance. The respondent has therefore correctly conceded that a half interest in the shares must be deemed to have been included in the deceased's estate.

The respondent lodged what Counsel termed a defensive cross-appeal, claiming that the respondent was wrongly held by the Supreme Court and the Court of Appeal to be accountable for duty under section 31 of the Ordinance. As the respondent does not dispute that half the community property is dutiable and is willing to accept accountability to that extent, the respondent has not sought to argue the cross-appeal.

In the result their Lordships will humbly advise Her Majesty that the appeal should be dismissed and that no order should be made on the cross-appeal. The appellants must pay the respondent's costs of the appeal and each party will be left to bear its own costs of the cross-appeal.

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In the Privy Council

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DELIVERED BY
LORD BRIGHTMAN

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