IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA10/2019
[2019] NZCA 449

BETWEEN	ALLAN DAVID MCLEAN Appellant
AND	THE PUBLIC TRUST Respondent

Hearing:	30 July 2019
Court:	French, Mallon and Moore JJ
Counsel:	D R Tobin and R M Reeve for Appellant A R Gilchrist for Respondent R B Stewart QC and L W Dixon for J M Flaus
Judgment:	23 September 2019 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs for a standard appeal on a band A basis with usual disbursements to each of the respondent and Mr Flaus as trustee for the estate of Margaret Ruth McLean. We do not certify for two counsel.

REASONS OF THE COURT

(Given by French J)

[1] Clause 5 of the last will of Mr Alex McLean provides:

> 5. UPON the death of my said wife:
>
> (a) I GIVE DEVISE AND BEQUEATH all my farming plant and machinery, Four Hundred (400) Ewes and that piece of land known as Section 46 Block X New River Hundred containing 32.3635 hectares and being all of the land in Certificate of Title 21/212 to my said son JOHN McLEAN.
>
> (b) TO HOLD the balance of my residuary estate for such of them my children as survive me and if more than one as tenants in common in equal shares.

[2] A family dispute has arisen over the meaning of cl 5(a). The two competing interpretations are:

(i) the gifts comprised in cl 5(a) were contingent on John surviving his mother and therefore, because John died before his mother, the gifts fell into the residuary estate to be disposed under cl 5(b).

(ii) the gifts comprised in cl 5(a) vested in John on his father's death subject only to the life interest of his mother.

[3] In the High Court, Nation J held the second interpretation was the correct interpretation.[1]

[4] Dissatisfied with that outcome, the testator's other son Allan now appeals against that ruling.[2]

[5] We turn first to explain the background to the case, noting that the only relevant factual material available to us was a brief agreed summary of facts filed in the High Court.[3]

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1 *McLean v Public Trust* [2018] NZHC 3268.

2 We refer throughout this judgment to members of the McLean family by their first name, in order to avoid confusion.

3 At our request, counsel did provide us after the hearing with affidavit evidence filed by Allan who represented himself in the High Court. The affidavit did not assist us with the construction of the will.

Background

[6] The testator Alex McLean was a farmer. The farm consisted of several blocks of land. The block of land referred to in cl 5(a) was known as the Home Block.

[7] Alex died on 6 April 1989. He was survived by his wife Ruth and their three children, Allan, Lesley and John. Probate of Alex's last will dated 1 September 1986 was granted on 1 May 1989.

[8] The general scheme of it can be conveniently summarised as follows:

(a) Ruth, Allan and John were appointed as executors and trustees.

(b) Alex gifted his car and other personal chattels to Ruth and gave her a life interest in his residual estate.

(c) Clause 5 made provisions in favour of Alex's three children as quoted above.

(d) There was provision for a gift over in favour of Alex's grandchildren.

(e) John was given an option to purchase the balance of Alex's farm property together with all remaining stock other than that bequeathed to him under cl 5(a).

(f) Various standard powers were conferred on the trustees.

(g) There was a standard non-apportionment clause.

[9] In the early 1990s John exercised the option given to him under the will and purchased all of the farm property that had been owned by his father, other than the Home Block.

[10] John died on 24 July 2010. He died without a will. He was not married and did not have any children. Under the Administration Act 1969, the whole of his estate

passed to his mother Ruth as his surviving parent. Ruth herself died seven years later on 30 June 2017.

[11] As already indicated, the significance of the fact that John died before his mother is that if Allan's interpretation of the will is correct (specific gifts detailed in cl 5(a) contingent on John surviving his mother) then the specific gifts to John failed and fell into Alex's residuary estate for distribution in accordance with cl 5(b).

[12] Clause 5(b) it will be recalled directed the trustees to hold the balance of Alex's residuary estate for Allan, John and Lesley, they being his surviving children, as tenants in common in equal shares. Allan accepts cl 5(b) means John's estate and hence Ruth's estate remain entitled to a third of Alex's residuary estate including a third of the cl 5(a) gifts that he says failed.[4] What Allan does not accept is that John's estate and hence Ruth's estate are entitled to all of the cl 5(a) gifts.

[13] That however is the effect of the interpretation favoured by Nation J. John's entitlement under cl 5(a) vested in him at the date of his father's death. Having vested in John, the specific gifts subsequently became part of Ruth's estate as a result of John's intestacy and so fall to be divided in accordance with Ruth's will.

[14] Ruth's will left her interests in the farm to Allan's ex-wife and three of Ruth's grandchildren (Allan's son and daughter and Lesley's daughter). Ruth gave the residue of her estate to be divided equally among such of her grandchildren as survived her and reached the age of 20.

[15] In 2014 (that is, while Ruth was still alive) Allan and Lesley issued proceedings in the High Court against her regarding the administration of their father's estate. The proceeding was settled, and the terms recorded in a consent order dated 1 September 2016. One of the terms of settlement was that Ruth, Allan and Lesley would be replaced as trustees and executors of Alex's will by the respondent the Public Trust.

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[4] It is unclear to us whether Allan accepted this in the High Court when he was representing himself but it was unequivocally accepted on appeal that cl 5(b) — as distinct from cl 5(a) — created a vested interest in John, that is an interest that vested on Alex's death.

[16] The current proceeding was issued by Allan in November 2017, his mother having died in July 2017. In its various iterations, the statement of claim sought a declaration under the Declaratory Judgments Act 1908 that, upon the true construction of Alex's will, the gifts in cl 5 were contingent upon Ruth's death and did not vest in interest or possession until Ruth's death and that, as the gift in cl 5(a) did not vest in interest or possession, the gift did not form part of John's estate but fell into and formed part of the residuary estate in cl 5(b) of Alex's will.

[17] The Public Trust filed a statement of defence and counterclaim in which it sought a declaration that, upon the true construction of Alex's will, the gifts in cl 5 were not contingent upon the death of Ruth and did vest in interest or possession prior to Ruth's death and that the gifts in cl 5(a) did not form part of the residuary estate in cl 5(b) of Alex's will.

[18] A statement of defence was also filed by the trustee and executor of Ruth's estate, Mr Flaus, as a party served. Mr Flaus' statement of defence contained a pleading of res judicata contending that the current proceeding was seeking improperly to re-litigate a matter that had already been settled in 2016. This was disputed by Allan. The scope of the 2016 settlement agreement accordingly also became an issue in this proceeding.

[19] In August 2018, counsel for the Public Trust and Ruth's estate sought a Court order that the interpretation issue be tried separately from the res judicata issue. This was granted by an Associate Judge, and accordingly the sole focus of the hearing before Nation J and hence this appeal was the meaning of Alex's will.

[20] Finally, in this recital of the background history we record that the Public Trust, having no financial interest in the outcome of the proceeding, took the position in the High Court (and indeed before us) that the main protagonists in the dispute were Allan and Ruth's estate. The only interest the Public Trust had was "to validly, legitimately and properly administer [Alex's] Probated Will."

The High Court decision

[21] The Judge identified the following principles of interpretation relating to wills:[5]

(a) The fundamental principle is to give effect to the intention of the will maker as expressed in the words of the will.[6]

(b) The intention is collected from the whole will and not merely the particular provision in dispute, together with such evidence as the rules allow.[7]

(c) When using similar words to those which have been interpreted by the courts in previous decisions, drafters and will-makers are presumed to have those decisions in mind.[8] Similar words should produce similar results unless the context requires otherwise.[9]

(d) Where it is doubtful whether a gift is vested or contingent (contingent meaning subject to a condition precedent) the courts favour the former construction.[10] Early vesting is favoured to avoid the uncertainty of gifts being left in suspense.

(e) The established rule for the guidance of the court in construing devises of real estate is that they are held to be vested unless a condition precedent is expressed with reasonable clearness.[11]

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5 *McLean v Public Trust*, above n 1, at [18]–[21] and [34]–[48].

6 Nicky Richardson (ed) *Wills and Succession — Construction of Wills* (online ed, LexisNexis) at [6.6] citing *Re Prescott* (1997) 15 FRNZ 352.

7 At [6.6] citing *Crumpe v Crumpe* [1900] AC 127 (HL); *Re Macandrew's Will Trusts* [1964] Ch 704; and *Re Green (deceased)* [1975] 1 NZLR 475 (SC). See also *Bethell v Bethell* [2014] NZCA 442, [2015] NZAR 1620 at [35].

8 *Tanner v New Zealand Guardian Trust Co Ltd* [1992] 3 NZLR 74 (CA) at 77.

9 At 77.

10 Andrew Alston (ed) *Alston and Garrow: Laws of Wills and Administration* (5th ed, Butterworths, Wellington, 1984) at 381. See also *Re Sutcliffe* [1982] 2 NZLR 330 (HC) at 342; *Re Lushington (deceased)* [1964] NZLR 161 (CA) at 171–172; and *Commissioner of Taxes v Johnson* [1946] NZLR 446 (SC) at 448.

11 At 381. See for example, *Tanner v New Zealand Guardian Trust Co Ltd*, above n 8.

(f) An interest can vest in a beneficiary on a will-maker's death but be postponed in possession, meaning that the beneficiary's right to possess and enjoy the gift is postponed.[12]

(g) The most common situation in which this arises is where a life interest is "let in" for the benefit of another person.[13] The interest in possession is postponed until the expiry of the life interest.

(h) The mere postponement of distribution for the convenience of the estate or to enable an interposed life interest to be enjoyed has never by itself been held to exclude vesting of the capital at the date of the will maker's death.[14]

[22] After considering the various provisions of Alex's will, the Judge then turned to other cases which have also had to determine whether a gift in a will is vested or contingent. In his view, authorities such as *Tanner*,[15] *Browne v Moody*,[16] *Acland v Friedland*,[17] and *Re Wood*,[18] showed that where wording materially similar to the wording of cl 5 in Alex's will has been used, the gift has been held to be vested and not contingent.[19] Conversely, in cases where a gift has been held to be contingent, the wording has been different to that contained in cl 5.[20]

[23] The Judge cited as an example of the latter, the decision of *Re Dawson*. There, a gift was expressed to be "for such of my nephews and nieces as shall be living at the date of death of my said wife".[21] The explicit requirement that the donees

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12 *Browne v Moody* [1936] AC 635 (PC) at 645–646; and *Re Wood (Deceased)* [1924] NZLR 529 (SC) at 530–531.
13 *Browne v* Moody, above n 12, at 645–646; *Re Wood (Deceased)* above n 12, at 530–531; *Acland v Friedlander* [1924] NZLR 446 (SC) at 447; and *Tanner v New Zealand Guardian Trust Co Ltd*, above n 8, at 76–77.
14 *Browne v* Moody, above n 12, at 644–645.
15 *Tanner v New Zealand Guardian Trust Co Ltd*, above n 8.
16 *Browne v* Moody, above n 12.
17 *Acland v Friedlander*, above n 13.
18 *Re Wood (Deceased),* above n 12.
19 *McLean v Public Trust*, above n 1, at [36]–[48].
20 At [45] citing *Re Dawson* [1987] 1 NZLR 580 (CA).
21 *Re Dawson,* above n 20, at 582.

survive the widow was held to create a true contingency meaning that the nieces and nephews did not have a vested interest during the lifetime of the widow.[22]

[24] The Judge went on to say that had Alex McLean intended that John should only benefit if he survived Ruth, then that could easily have been made clear by adding to the end of cl 5(a), the words "if he survives my said wife." As it was, those words or their equivalent were absent.[23]

[25] Justice Nation concluded by stating that the words actually used in the will have to be interpreted and given the construction that the courts have authoritatively stated is appropriate.[24] On such a construction, it was clear, the Judge said, that John's interest in the property referred to at cl 5(a) vested in John on his father's death.[25]

[26] The effect of the decision was that John took a vested interest in the specific bequests and devise in cl 5(a) and also a vested interest in one third of the residue under the residuary bequest in cl 5(b). Those interests were postponed in possession in order to let in Ruth's life interest. On his death, the interests passed into his estate which in turn passed to Ruth as a result of John dying without a will. Allan and Lesley have no interest in the gifts made to John pursuant to cl 5(a) of their father's will.

Arguments on appeal[26]

[27] Mr Tobin, who represented Allan on the appeal, accepted that the principles detailed at [20] above are well established and had been correctly articulated by the Judge. What Mr Tobin challenged was the Judge's application of them to the will at issue.

[28] In particular, Mr Tobin submitted the Judge had erred in trying to determine Alex's intentions by focusing on one part of cl 5 and what previous decisions have

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22 At 583–584.

23 *McLean v Public Trust*, above n 1, at [50].

24 At [51].

25 At [51].

26 In the notice of appeal and written submissions, Mr Tobin advanced two alternative arguments. The first was the specific gifts to John were contingent on him surviving Ruth. The second was that at the date of Alex's death, the gifts vested in John equitably but not absolutely and were subsequently divested. This second argument was abandoned at the hearing, Mr Tobin accepting it was contrary to the decision of *Acland v Friedlander*, above n 13.

said about those words instead of looking, as the Judge was required to do, at the will as a whole. Mr Tobin contended that when the language of the will is looked at in its entirety, the finding that the gifts in cl 5(a) were absolutely vested in John upon Alex's death cannot stand.

[29] Developing this central theme, Mr Tobin argued that certain features of other clauses in the will point "irreducibly" to the fact that Alex contemplated scenarios where vesting would not take place on his death and that unless cl 5(a) was construed as creating a contingent gift, these other clauses would be rendered pointless.

[30] Of the various clauses he relied upon to support his submission, Mr Tobin said the starting point was cl 6, the gift over clause. In his submission the wording of cl 6 was irreconcilable with an intention that the specific gifts in cl 5(a) vested on Alex's death. Clause 6 states:

> 6. I DECLARE that if any beneficiary shall predecease me or die before attaining a vested interest in my estate leaving a child or children who shall survive me or be born after my death and who shall attain the age of twenty (20) years such child or children shall take and if more than one in equal shares the share in my residuary estate that his her or their parent would have taken had he or she survived me and attained a vested interest hereunder.

[31] Mr Tobin emphasised the use of the expression at the beginning of the clause "shall predecease me or die before attaining a vested interest in my estate", noting that if all the interests under the will were intended to vest on the date of Alex's death, the sentence would have ended at "predecease me." There would have been no need to go on to cover the situation of a beneficiary dying before attaining a vested interest. Yet, "predecease me" was followed by an "or", thereby denoting that a situation of the beneficiary pre-deceasing Alex and the situation of a beneficiary dying before attaining a vested interest were perceived as two distinct and separate situations.

[32] Mr Tobin acknowledged that apart from cl 5(a) there was another contingent gift under the will that technically would give some work for the phrase "die before attaining a vested interest." That was the gift of furniture and cars to Ruth that was expressed to be conditional on Ruth surviving Alex for 30 days. However, in his submission it was not realistic to assume that was the sole reason for the wording in cl 6. All Ruth's existing children would automatically take on her death anyway under

the other provisions of the will and so if that was the only contingent gift, a separate gift over clause would have been superfluous.

[33] Mr Tobin derived further support for his interpretation of cl 5(a) from cl 8 of the will. Clause 8 confers various powers on the Trustees "in and about the execution of the trust of this my Will." The first of these powers in cl 8(a) reads as follows:

> (a) To pay or repay the whole or any part of the capital of the expectant contingent or vested share of any child of mine under the trusts of this my will or the income arising from such share in or towards the maintenance education or advancement or otherwise for the benefit of such child and for such purpose to pay the same or any part thereof to the guardian or guardians of such child without being bound to see to the application thereof.

[34] Mr Tobin pointed out that cl 8(a) expressly contemplates the existence of both vested and contingent shares for the children. That can only, in Mr Tobin's submission, be a reference to the two limbs of cl 5 because that is the only clause which creates gifts to the children. "Vested" is referring to cl 5(b) and "contingent" to cl 5(a). There can be no other explanation and therefore no other interpretation.

[35] Mr Tobin further submitted that cl 8(b) also sits uncomfortably with John taking a vested interest in the Home Block. Clause 8(b) gives trustees the power:

> (b) To sell all or any part of my real and personal property either by public auction or private contract or in such manner and subject to such terms and conditions as my trustees shall in their absolute discretion think fit with power to allow the whole or any part of the purchase money to remain on either first or subsequent mortgage of the property sold.

[36] Turning to cl 5 itself, Mr Tobin pointed out the differences in wording as between the two sub clauses. He submitted the differences were telling. Clause 5(b) contained the phrase "such of them my children as survive me" which clearly denoted vesting on date of Alex's death. Clause 5(a) however did not contain any equivalent phrase, such as "if John survives me". Its opening phrase was "upon the death of my wife." There could not have been a clearer contingency. John was only to take a vested interest if he survived Ruth. He died before her and therefore the gift failed.

[37] As regards the cases relied upon by the Judge which have considered similar wording, Mr Tobin submitted it is only permissible to apply previous judicial

interpretations if the clause in question is ambiguous. In the present case, there was in his submission no ambiguity and therefore the principles favouring a construction of immediate vesting did not apply. Otherwise a court would be wrongly strait jacketing Alex's intentions.

Our view

[38] As the Judge noted, the courts have consistently held that notwithstanding the creation of a life interest, a devise or bequest to a residuary beneficiary still vests in that residuary beneficiary on the death of the will maker unless there are express and clear words to the contrary.[27] The residuary beneficiary's interest is certainly postponed in possession until the death of the life tenant — the property will not be transferred until then — but it is nevertheless a vested interest during the lifetime of the life tenant. Clear words are required before the gift will be held to be contingent on the death of the life tenant and so not vest until then. As to what form of words might be needed to achieve that result, the authorities also show that wording such as "on the death of [the life tenant]" is not of itself sufficient.[28] Something more is required.

[39] We acknowledge the points made by Mr Tobin about cls 6 and 8. However, those clauses are general standard machinery or boiler plate clauses and while the will must be read as a whole, any significance to be attached to those clauses is in our view very limited and certainly not sufficient to displace the long established meaning of the phrase "upon the death" as used in cl 5.

[40] Take for example cl 8(a) relied upon by Mr Tobin. As Mr Dixon for Ruth's estate submitted, it is apparent that the drafter of the will did not give any specific consideration as to the appropriateness of those powers to Alex's estate. At the time the will was written, all three children were adults and there was no realistic prospect of Alex having any more children. Yet cl 8(a) talks about paying funds to guardians.

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27 In addition to the authorities relied upon by the Judge, there are also the decisions of *New Zealand Insurance Co Ltd v Powell* [1932] NZLR 500 (SC) and *Cargo v Dunne* [1916] NZLR 597 (SC) to the same effect.

28 See for example *New Zealand Insurance Co Ltd v Powell*, above n 27, at 501 and 504–505; *Browne v* Moody, above n 12, at 645–646; and *Tanner v New Zealand Guardian Trust Co Ltd*, above n 8, at 76.

More fundamentally, having regard to the trustee's obligations to Ruth under other sections of the will, there was no scope to pay out the children's shares in the capital early.

[41] As for cl 5 itself, the phrase "upon the death of my said wife" prefaces both sub-clauses of cl 5. Mr Tobin's argument therefore involves the odd result that the phrase creates a contingent gift in one sub-clause but a vested gift in the other, despite the fact the whole purpose of having two sub clauses was simply to differentiate between what went specifically only to John and what went to all the children.

[42] It is not in our view a sufficient answer to say the different result as between the sub-clauses is because sub-cl (b) ends with the qualifying phrase "as survive me" and there is no equivalent phrase in sub-cl (a). In our view, there is a far more logical and simpler explanation for that difference. Sub-clause (b) of necessity required the qualifying phrase "as survive me" because it was dealing with more than one beneficiary. In contrast, it was not necessary to insert the words "as survive me" in cl 5(a) because it was only dealing with John.

[43] We are further reinforced in that conclusion by reference to cl 7. Mr Tobin's analysis sits very uneasily with cl 7. It is the clause that conferred an option on John and reads as follows

> 7. I DIRECT that my son JOHN McLEAN shall have the option to be exercised within TEN (10) years from the date of my death of purchasing the balance of my farm property together with all remaining stock other than that bequeathed to him under paragraph 5(a) of this my Will used in connection therewith at a valuation as fixed by the Inland Revenue Department for estate duty purchases and I EMPOWER my trustees to leave the whole or any part of the purchase price owing to be secured by a registered charge over the property upon such terms as to repayment and interest (if any) as my trustees may in their absolute discretion see fit NOTWITHSTANDING that such advance may not be of a class authorised by law.

[44] We agree with Mr Dixon that the giving of the option can only sensibly be interpreted as evidencing Alex's intention that John, already having a vested interest in part of the farm and stock, might wish to acquire the balance. We attach much more significance to this clause which is specific to Alex than we do the very generic boiler plate clauses relied upon by Allan.

[45] We conclude that the High Court correctly interpreted cl 5(a) of the will.

Outcome

[46] The appeal is dismissed.

[47] As regards costs, it was agreed these should follow the event. We therefore order the appellant to pay costs for a standard appeal on a band A basis with usual disbursements to the respondent and to Mr Flaus as trustee for the estate of Margaret Ruth McLean. The appeal was relatively straightforward and we are therefore not willing to certify for two counsel.

Solicitors:
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Patterson Hopkins, Auckland for J M Flaus