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LEGAL STUDIES
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25 RUSSELL SQUARE
LONDON W.C.1

IN THE PRIVY COUNCIL

No.28 of 1971

O N A P P E A L

FROM THE COURT OF APPEAL OF THE SUPREME COURT
OF NEW SOUTH WALES

IN THE MATTER of the Estate of GEORGE BRERETON
SADLEIR FALKINER deceased

AND IN THE MATTER of the Stamp Duties Acts
1920-1959

B E T W E E N

10 PAULINE ARNOLD FALKINER and
PERPETUAL TRUSTEE COMPANY LIMITED Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES Respondent

CASE FOR THE APPELLANTS

RECORD

20 1. This is an appeal by leave of the Court of Appeal of the Supreme Court of New South Wales from the judgment and order of that Court made on the 20th May, 1971, ordering that the questions asked in a case stated under section 124 of the Stamp Duties Act, 1920-1959, of the State of New South Wales (hereinafter referred to as "the Act") be answered in the manner referred to in paragraph 17 hereof and ordering that the costs of the case be paid by the appellant. The stated case was heard before the Honourable Mr. Justice Asprey, the Honourable Mr. Justice Mason and the Honourable Mr. Justice Taylor on the 6th and 7th days of

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May, 1971 and judgment was reserved on the latter day.

P.3 1.13 2. The appellants required the Commissioner of Stamp Duties to state the case in consequence of the inclusion by the Commissioner in the dutiable estate of one George Brereton Sadleir Falkiner (hereinafter called "the deceased") of certain shares held by the trustees of settlements made by the deceased in his lifetime. The Commissioner claimed to be entitled to do this by virtue of sections 102(2)(a) and 102(2A) of the Act on the basis that the settlement contained a trust to take effect after the death of the deceased. 10

3. The circumstances of the settlement and matters of fact relevant to this appeal and to the contentions to be urged by the appellant are traversed in paragraphs 4-17 hereof. Section 102(2)(a) of the Act is set out in paragraph 18 hereof and the contentions to be urged by the appellant and the reasons of appeal are set forth in paragraphs 19-46 hereof. 20

P.1 1.17 4. The deceased died on 15th October, 1961, leaving him surviving three children and no more namely George Brereton Sadleir Falkiner, Frances Dorothy Falkiner and Suzanne Enid Falkiner each of whom was then under twenty-one years of age and unmarried. At the time of his death and at all material times theretofore the deceased was domiciled in and resident in the State of New South Wales. 30

P.1 1.27 5. Probate of the last will of the deceased was on 14th February, 1962, granted by the Supreme Court of New South Wales in its Probate Jurisdiction to Pauline Arnold Falkiner, Alexander Burnett Ramsay and Perpetual Trustee Company Limited. The said Alexander Burnett Ramsay died on 25th September, 1965. The said Pauline Arnold Falkiner and Perpetual Trustee Company Limited are and are herein called "the appellants". 40

P.2 1.4 6. Canberra Estates Pty. Limited (hereinafter

called "the trustee") is, and at all material times has been, a company incorporated in the Australian Capital Territory.

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7. On 4th October, 1961, and within the Australian Capital Territory -

- (a) the deceased paid to the trustee ten separate sums of one hundred thousand dollars (\$100,000.00) each, and P.2 1.8
- 10 (b) the deceased and the trustee executed ten separate deeds each bearing date 4th October 1961 and made between the deceased of the one part and the trustee of the other part

The terms of the said deeds are identical save as set out in paragraph 9 hereof.

8. Clause 3(b) of the deed which was the first schedule to the case stated was in these terms: P.7

20 "(b) Subject as hereinafter provided the Trustees shall stand possessed of the Trust Fund and all accumulations of income derived from such rents profits and income as aforesaid and the investments representing the same:

30 (i) UPON TRUST subject to and contingent upon GEORGE BRERETON SADLEIR FALKINER the son of the Settlor (hereinafter called "the Contingent Beneficiary") attaining the age of twenty-one (21) years thereafter TO PAY the income arising therefrom to the Contingent Beneficiary until he shall attain the age of 22 years or die under such age.

(ii) UPON TRUST subject to and contingent upon the Contingent Beneficiary attaining the age of 22 years as to the corpus of the

RECORD

said Trust Fund and all accumulations thereof for the Contingent Beneficiary absolutely.

- (iii) UPON TRUST should the Contingent Beneficiary die before attaining the age of 22 years leaving children him surviving for such of his children as shall attain the age of twenty-one years or marry under that age in equal shares or should no such child attain that age or marry under that age or should the Contingent Beneficiary die before attaining twenty-one years of age leaving no children him surviving them 10
- (iv) UPON TRUST for such of the children of the Settlor as shall be living at the date of the death of the survivor of the persons in this Clause previously mentioned and the children or remoter issue then living of any then deceased child of the Settlor in equal shares per stirpes and should the Trust Fund not vest as aforesaid then 20
- (v) UPON TRUST for the next-of-kin of the Settlor as determined by the provisions now in force of the Wills Probate and Administration Act 1898-1954 of the State of New South Wales." 30

9. Clause 3(b) of each of the other deeds was in the same terms as the clause set out in the preceding paragraph of this case save that the age specified in paragraphs (i) (ii) and (iii) of the respective clauses as the age upon the attainment of which the contingent beneficiary was to have the corpus of the trust fund and the accumulations thereof was different in each case. 40

10 The earliest age specified in any of the ten deeds was twenty two years and the greatest age thirty one years. The only other differences in the provisions of any of the other deeds to those contained in the deed which was the first schedule to the case stated were that clause 4 of the deeds which were the second, fourth, sixth, eighth and tenth schedules to the case stated contain the words "such part or parts as shall not in total exceed £40,000 in any one calendar year" in place of the words "apply the whole or any part or parts".

20 10. Thereafter also on 4th October, 1961, and within the Australian Capital Territory the trustee, in exercise of the powers conferred on it by the said respective deeds, applied each of the said ten separate sums of one hundred thousand dollars (\$100,000.00) in the acquisition by application and allotment of 10,000 fully paid ordinary shares of two dollars (\$2.00) each in Booka Pty. Limited (a company incorporated in the Australian Capital Territory) at par and 32,000 fully paid ordinary shares of two dollars (\$2.00) each in Senior Park Pty. Limited (a company incorporated in the Australian Capital Territory) at a premium of fifty (50) cents per share. Thereafter the trustee continued to hold each of the said ten parcels of 10,000 shares in Booka Pty. Limited, and 32,000 shares in Senior Park Pty. Limited on the trusts of the said respective deeds until, and so held the same at, the time of the death of the deceased. It is these shares which the Commissioner included in the dutiable estate of the deceased.

P.2 1.22

P.2 1.36

30 11. The powers of investment in each of the deeds was in general terms and did not refer to either Booka Pty. Limited or Senior Park Pty. Limited and was exercisable in the absolute discretion of the trustee.

P.10 1.21

- P.11

40 12. At the time of the death of the deceased, the value of each of the said ten parcels of 10,000 shares in Booka Pty. Limited and

P.2 1.42

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32,000 shares in Senior Park Pty. Limited was One hundred thousand dollars (\$100,000.00) and the total value of all of the said shares was one million dollars (\$1,000,000.00).

P.3 1.5

13. From the time of allotment until the death of the deceased and at all other material times all of the said shares in Booka Pty. Limited and in Senior Park Pty. Limited acquired and held by the trustee as aforesaid were registered in the share registers of the said companies maintained in the Australian Capital Territory. 10

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14. The Commissioner of Stamp Duties in assessing the death duty payable in respect of the estate of the deceased claimed that by virtue of sections 102(2)(a) and 102(2A) of the Act, each of the said ten parcels of 10,000 shares in Booka Pty. Limited and 32,000 shares in Senior Park Pty. Limited (a total of 100,000 shares in Booka Pty. Limited and 320,000 shares in Senior Park Pty. Limited) was included in the dutiable estate of the deceased, and the Commissioner accordingly assessed the death duty payable in respect of the said estate at the sum of seven hundred and thirty five thousand eight hundred and ninety nine dollars and twenty six cents \$735,899.26) (subject to an allowance or refund of four thousand three hundred and ninety dollars and twenty three cents \$4,390.23) pursuant to the provisions of section 103A of the Act.). 20 30

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- P.4

15. If none of the said shares in Booka Pty. Limited or in Senior Park Pty. Limited were to be included in the dutiable estate of the deceased the death duty payable in respect of the said estate would be reduced by the sum of two hundred and seventy thousand dollars (\$270,000.00) to the sum of four hundred and sixty five thousand eight hundred and ninety nine dollars and twenty six cents (\$465,899.26) (subject to an allowance or refund of four thousand three hundred and ninety dollars and twenty three cents (\$4,390.23) pursuant to the provisions of section 103A of the Act). 40

16. The questions which the Supreme Court were asked to answer pursuant to the case stated were :

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10 "(1) Whether the whole of the above mentioned 100,000 shares in Booka Pty. Limited and 320,000 shares in Senior Park Pty. Limited should be included in the dutiable estate of the deceased for the purpose of the assessment and payment of death duty.

P.4 1.12

(2) If the answer to question (1) is in the negative, whether any, and if so which, of the said shares in Booka Pty. Limited and in Senior Park Pty. Limited should be included in the dutiable estate of the deceased for the purpose of the assessment and payment of death duty.

20 (3) Whether the amount of death duty which should properly be assessed in respect of the estate of the deceased (subject to any allowance or refund pursuant to the provisions of section 103A of the said Act) is

(a) seven hundred and thirty five thousand eight hundred and ninety nine dollars and twenty six cents (\$735,899.26) or;

30 (b) four hundred and sixty five thousand eight hundred and ninety nine dollars and twenty six cents (\$465,899.26) or;

(c) some other, and if so, what amount.

(4) How are the costs of this Case to be borne and paid."

17. All the members of the Supreme Court held that in view of the provisions of paragraph (v) of Clause 3 (b) in each of the deeds of trust above mentioned the deceased had disposed of

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P.30-31

property by settlements each of which contained a trust to take effect after his death within the meaning of section 102(2)(a) of the Act. The judgment and order of the Supreme Court accordingly was that the questions be answered as follows :

(1) Yes

(2) Does not arise

(3) (a) Yes

(4) By the appellants

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18. Section 102(2)(a) of the Act is as follows:

"102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property :-

(1)

(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:

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Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust."

19. The appellants contend that section 102(2) (a) of the Act does not apply to include in the dutiable estate of the deceased the said shares in Booka Pty. Limited or the said shares in Senior Park Pty. Limited.

20. In support of this contention it is submitted:

10 (a) that upon the proper construction of paragraph (a) of section 102(2) of the Act that paragraph operates to bring into a dutiable estate only so much of the property actually disposed of by a deceased by a settlement containing a trust to take effect after his death, as at the time of the death of that deceased remains subject to such trust;

20 (b) that upon their proper construction the said deeds executed by the deceased did not contain any trust to take effect after his death within the meaning of paragraph (a) of section 102(2) of the Act and in particular that the provisions of paragraph (v) of Clause 3(b) in each of the said deeds, which paragraphs are hereinafter collectively referred to as "the trust for next of kin", did not give rise to any trust to take effect after the death of the deceased within the meaning of that paragraph.

30 21. It is submitted that for the purpose of ascertaining to what property paragraph (a) of section 102(2) of the Act applies the main provision of the paragraph and the proviso which follows it are to be read and construed together.

40 22. The proviso is a qualifying proviso and its effect is to qualify the main provision of the paragraph. Such a proviso will not be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing that effect to it and in this case

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the proviso should be construed as a relaxation of the full extension of the main provision. The appellants rely upon the observations of Lord Macmillan in Toronto Corporation v. Attorney-General of Canada ((1946) A.C. 32 at 37) and of Latham C.J. in Minister of State for the Army and Dalziel (68 C.L.R. 261 at 274).

23. Without the proviso paragraph (a) may have extended to any property disposed of by a deceased by a settlement containing a trust of the requisite character even though at the time of the settlor's death, because of supervening circumstances, the property disposed of was no longer in existence or was not subject to the trust. The effect of the proviso is to qualify the operation of the main provision of the paragraph by limiting the property to be included in the dutiable estate to so much of the property disposed of by a deceased as is still subject to the trust at the time of death. 10 20

24. The proviso has this effect since on each occasion the word "property" is used in it it refers back to the word "property" in the opening words of the main provision, that is to say, to the "property which the deceased has disposed of".

25. The shares in Booka Pty. Limited and in Senior Park Pty. Limited which were included by the Commissioner of Stamp Duties in the dutiable estate of the deceased do not answer the description of "property which the deceased has disposed of" since the shares were never property of the deceased. The property of which the deceased disposed was the ten separate sums of \$100,000 each referred to in paragraph 7 of this case. That property was disposed of by the deceased at the time he made the payments referred to in the said paragraph and it was not subject to the trusts of the settlements at the time of his death. 30

26. The money paid by the deceased cannot be identified with or be taken to exist in the shares 40

now subject to the trusts of the several settlements. The appellants rely upon Sneddon v. Lord Advocate (1954 A.C. 257); Commissioner of Stamp Duties (N.S.W.) v. Gale (101 C.L.R. 96) and Gale v. Federal Commissioner of Taxation (102 C.L.R. 1).

10 27. There is nothing in the context of paragraph (a) of section 102(2) of the Act requiring the proviso to be treated not as qualifying the main provision of the paragraph but as a substantive enactment. The opening words of the paragraph, namely "All property which the deceased has disposed of" refer to property of a deceased person in fact disposed of by him in the way there specified. They are entirely inapt to apply to property subsequently acquired by the trustees of a settlement. Even if any property is acquired with money provided by the settlor it is not property of the settlor and
20 it is not disposed of by him. If the proviso is construed as itself a substantive enactment applying to property acquired by trustees after the date of a settlement the paragraph departs from its original subject matter and relates to two different categories of property. Its operation would then, in some circumstances, such as the present, be inconsistent and contradictory. There being an alternate construction available such an effect, it is
30 submitted, should not be given to the proviso.

28. The appellants rely upon the decision of the High Court of Australia in Atwill v. Commissioner of Stamp Duties (N.S.W.) (45 A.L.J.R. 703) and upon the judgments of Barwick C.J. and Windeyer and Owen J.J. in that case. It is understood that the Commissioner is seeking to appeal to Her Majesty in Council against the order and judgment of the High Court.

40 29. The construction of paragraph (a) of section 102(2) in such a way as to confine its operation to property actually disposed of by a deceased is in accordance with the view of the

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basic notions of subsection (2) of section 102 as expressed by Isaacs J. in Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd. (Watt's case) (38 C.L.R. 12 at 32) and by Dixon C.J. (with whose judgment McTiernan J. agreed) in Commissioner of Stamp Duties (N.S.W.) v. Gale (101 C.L.R. 96 at 107-8). Similar views are expressed by Windeyer J. and Owen J. in Atwill v. Commissioner of Stamp Duties (N.S.W.) (supra at 707-8 and 709). Such a construction is also in accord with the view of paragraph (a) of section 102(2) expressed by Ferguson J. in In the Estate of W.O.Watt (Deceased) (25 S.R. (N.S.W.) 467 at 490) with which Higgins J. said he concurred when the case went on appeal to the High Court (38 C.L.R. 12 at 43). A construction of paragraph (a) as extending to property over which the settlor had at no time had a power of disposition would be contrary to those views and would, it is submitted, also be contrary to the view of subsection (2) of section 102 taken by the Privy Council in Johnson & Others v. Commissioner of Stamp Duties (N.S.W.) ((1956) A.C. 331) and in Thompson v. Commissioner of Stamp Duties (N.S.W.) ((1969) 1 A.C. 320). Furthermore the fact, that when the Act was amended in 1931 to add paragraph (ba) to section 102(2) and when it was again amended in 1939 to include in paragraph (b) of section 102(2) the words "Where the property comprised in any such gift consists of money, or money is paid as aforesaid in pursuance of any such covenant or agreement the property to be included in the estate pursuant to this subparagraph shall be the actual amount of the money given or paid", and to insert section 102(2A), no further amendment was made to the provisions of the paragraphs of subsection (2) of section 102 to extend their application to property other than that disposed of by a deceased, supports the contention that section 102(2)(a) is restricted in its application to property disposed of by the deceased.

SECOND SUBMISSION

30. It is proposed now to deal with the

submission lettered (b) in paragraph 20 of this case, namely that upon their proper construction the deeds of settlement in question do not contain any trust to take effect after the death of the deceased. The contention of the respondent Commissioner is that such a trust is to be found in the trust for next of kin.

10 31. It is submitted that the words in paragraph (a) of section 102(2) of the Act "trust to take effect after his death" mean a trust limited or intended or designed to take effect after the death of the settlor and that whether such limitation intention or design exists is to be ascertained by construction of the relevant settlement. If upon its proper construction it is seen that the settlement expressly or by necessary implication makes the death of the settlor a condition precedent to the taking effect of any trust or disposition in it or if 20 any trust in it is so expressed that it cannot operate to give immediate enjoyment until the specific event of the settlor's death has occurred, then but not otherwise is there a trust to take effect after the death of the settlor. The appellants rely upon the decision of the High Court in Keighley v. Commissioner of Stamp Duties (N.S.W.) (45 A.L.J.R. 620), and upon the judgments of Menzies J. and Gibbs J. in that case.

30 32. Where a trust is expressly limited to come into operation upon the happening of an event or events not being or including or related to the death of the settlor it is not a trust to the taking effect of which the death of the settlor is expressly made a condition precedent. Further, since the trust is limited to come into operation by express reference to contingencies there is no basis for the implication of any further contingencies. In such a case too the 40 express limitation necessarily excludes any intention or design that the trust shall take effect at or after or by reference to any event other than the event or events specified in the limitations. It is submitted that it follows

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that since the trust for next-of-kin is expressly limited to take effect upon the contingency "should the Trust Fund not vest as aforesaid" and the failure to vest is not in any way dependent upon the death of the deceased the trust for next of kin is not a trust to take effect after the death of the deceased.

33. Where a trust is limited to take effect upon an expressed contingency not being or including or related to the death of the settlor, it is not a trust to take effect after death merely by virtue of the fact that the settlor may anticipate that at the time at which the contingency is likely to happen he may be dead. 10

34. There is a distinction to be made between the taking effect of a trust and the ascertainment of the persons beneficially entitled under it. A trust may take effect or come into operation although there is no person presently entitled to the benefits of it. It is submitted that the trust for next of kin takes effect in the sense of coming into operation immediately upon the happening of the contingency by reference to which it is limited whether or not the person or persons entitled to the benefit of the trust are then ascertainable, as that event could have happened in the lifetime of the deceased although it did not in fact do so. The possibility of its having done so prevents its being a trust "to take effect after death" within the meaning of paragraph (a) of section 102(2) of the Act. 20 30

35. It is submitted further that the person or persons entitled to the benefit of the trust for next of kin would have been immediately ascertainable had the contingency by reference to which the trust is limited occurred in the lifetime of the deceased and that their ascertainment would not have been dependent upon the death in fact of the deceased. Nor does the fact that the beneficiary or class of beneficiary is described as "the next-of-kin of the Settlor" indicate an intention or design or otherwise have the effect of making the trust for next of kin a trust to 40

take effect after the death of the deceased.

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10 36. Although the expression "next-of-kin" may be used as a technical expression it will not be given its technical meaning when it is sufficiently clear upon the legal construction of the whole of the instrument in which it occurs that it is used with another meaning. The appellants rely upon Gutheil v. Ballarat Trustees, Executors and Agency Co., Ltd. (30 C.L.R. 293 at 298-9); Withy v. Mangles (4 Beav. 358 at 367); 10 Cl & F. 215 at 248, 249, 253.

20 37. It is submitted that the expression "next-of-kin" where used in a settlement means the nearest blood relations to the propositus: cf. Norton on Deeds 2nd Edn. P. 442. It does not mean the next of kin according to the relevant statute dealing with the administration and distribution of the estates of intestates and accordingly it does not import the notion of a class to be determined at the death of the propositus. It is submitted that the nearest blood relations of a propositus may be ascertained at any time, that is to say his nearest blood relations at any time may be determined at that time notwithstanding that the propositus is still living. In the event of the deceased being alive at the time of the failure to vest of the trust preceding the trust for next of kin, his next of kin within the meaning of the trust for next of kin could be determined immediately upon that failure notwithstanding that the deceased had not then died.

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40 38. It is submitted that the meaning of the expression "next-of-kin" of the settlor where used by the deceased in the trust for next of kin must be determined upon the proper construction of each settlement as a whole. It occurs in the limitation of a trust to take effect upon the failure to vest of dispositions in favour of persons who were or would be close in blood to the deceased, namely his children and their issue. Since their deaths would be the occasion of the trust for next-of-kin coming into operation it is improbable that the deceased

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meant the expression "my next-of-kin" to include those persons. It is submitted therefore that the deceased used the expression not in a technical sense but with the intention that it should have an artificial meaning namely his nearest blood relations excluding the persons whose deaths had brought the trust for next of kin into operation.

P.1 1.26

39. The expression "next-of-kin of the Settlor" in the trust for next of kin is qualified by the words "as determined by the provisions now in force of the Wills Probate and Administration Act 1898-1954 of the State of New South Wales." The deceased was domiciled in New South Wales. In that circumstance the reference to the statute coupled with the use of the expression "now in force", indicates an intention on the part of the deceased that the reference to the Act should be merely for the purpose of compendiously describing and identifying the persons whom he intended should take under the trust and not for the purpose of bringing about a disposition of the property subject to the trust for next of kin to those who under the said Wills Probate and Administration Act would take property as to which he might die intestate. Because the expression next of kin is not used in the trust in a technical sense cases such as *In re Ranking's Settlement Trusts* (L.R. 6 Eq. 601) and *Dean v. Lombe* (25 S.R. N.S.W. 502) have no application. The trust for next of kin upon its proper construction is not a trust in favour of the statutory next of kin of the deceased and the Court of Appeal was in error in holding that it was.

40. Since the deceased was thus referring to next of kin merely for the purpose of establishing an artificial class to be determined by reference to statutory provisions which would not certainly or necessarily be the provisions which would determine the disposition of any property as to which he died intestate there is, it is submitted, no reason for treating "the next of kin of the Settlor" as consisting of persons who

could not be determined until after his death. Since the reference to the Wills Probate and Administration Act served the purpose of identifying with some precision an artificial class it is unnecessary to impute to the deceased because of that reference the further purpose of intending thereby to fix the time for ascertainment of the ultimate beneficiaries under the settlement as being a time not earlier than his death.

41. The expression "next of kin" does not necessarily refer to a class to be determined at the date of death of a propositus. Where it is used in a technical sense by a testator in a Will referring to his own next of kin or the next of kin of a person taking a prior interest which has determined in consequence of his death the time for ascertaining the person or class answering the description is prima facie to be ascertained at the death of the testator or prior taker. But where the gift is to the next of kin of the testator and there is a sufficient indication of intention to that effect the time for ascertaining the person or class may be the time fixed by the Will as the period of distribution. The appellants rely upon Bullock v. Downes 9 H.L.C. 1, and Hutchinson v. National Refugee for Homeless and Destitute Children (1920 A.C. 794 at 801-2). Where the class of next of kin is thus an artificial class it is to be ascertained upon the hypothesis that the testator lived up to and died at the subsequent period. See Sturge and The Great Western Railway Co. (19 Ch.D. 444). In the case of a will the time at which such an artificial class is intended to be ascertained must necessarily be after the death of the testator, but in the case of a settlement taking effect from the time of execution an intention may be shown to create an artificial class of next of kin of the settlor, to be ascertained in certain contingencies at a time anterior to the death of the settlor. Where such an intention is shown and the contingency happens the artificial class will, it is submitted, be ascertained upon

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the hypothesis that the testator had died at the time at which the class is required to be ascertained.

42. Whether the word "then" where used in the deeds of settlement immediately preceding the trust for next of kin be construed as meaning "in that event" or "at that time" it does not relate to the death of the deceased and both the event or the time referred to may happen or come to pass before or after the death of the deceased. 10
It is submitted that the deeds manifest an intention that the class of next of kin should be ascertained not later than the happening of the contingency by reference to which the trust for next of kin is expressly limited and since that contingency may happen before the death of the deceased and the artificial class of next-of-kin becoming entitled may then be ascertained upon the hypothesis that the deceased too had then died the trust for next-of-kin may take effect prior to the death of the deceased. 20
Accordingly it is submitted it is not a trust to take effect after his death within the meaning of paragraph (a) of Section 102(2) of the Act.

43. It is further submitted that the fact that the trust for the next of kin following contingent trusts for the deceased's son, the son's children, the deceased's other children and their children or remoter issue and takes effect only upon failure of all the preceding trusts indicates that the deceased directed his mind to the possibility of the failure of all the trusts preceding the trust for next of kin occurring during the deceased's lifetime and suggests that his intention was to avoid any resulting trust in his own favour, and that in the event of the failure of the preceding trusts whenever occurring the trust for the next of kin was to come into operation. 30

44. For the foregoing reasons it is submitted that the trusts contained in paragraph (v) of clause 3(b) of the said deeds were, upon their 40

true construction trusts for the next of kin of the settlor to be ascertained at the date of failure of the preceding trusts whether that event occurred during the lifetime of the settlor or after his death.

10 45. If this be correct the death of the settlor was not a condition precedent to the taking effect of the subject trusts and they could come into operation during the lifetime of the settlor and the settlements did not therefore contain trusts to take effect after the death of the deceased within the meaning of section 102(2)(a) of the Act.

46. The appellants therefore submit that this appeal should be allowed and that it be ordered that the questions asked in the case stated and referred to in paragraph 16 hereof be answered

- (1) No
- 20 (2) None
- (3) (b) Yes
- (4) By the respondent

for the following (amongst other)

R E A S O N S

- (1) The shares referred to in paragraph 14 hereof were not property which the deceased disposed of within the meaning of section 102(2)(a) of the Act.
- 30 (2) Section 102(2A) of the Act did not authorise the inclusion of the shares in the dutiable estate.
- (3) The said deeds did not contain trusts to take effect after the death of the deceased within the meaning of section 102(2)(a) of the Act.

C.V. CULLINAN
Counsel

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF THE SUPREME
COURT OF NEW SOUTH WALES

B E T W E E N

PAULINE ARNOLD FALKINER
PERPETUAL TRUSTEE COMPANY LIMITED
Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES
Respondent

C A S E F O R T H E A P P E L L A N T S

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