Best v Gardner [2013] NTSC 60

PARTIES:	BEST, Brian James v GARDNER, Dean Harry As Executor of The Will of MARGARET JANE BEST
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	70 of 2013 (21333474)
DELIVERED:	23 September 2013
HEARING DATES:	19 September 2013
JUDGMENT OF:	RILEY CJ

CATCHWORDS:

WILLS AND PROBATE — Construction and effect of testamentary dispositions — Misdescription of asset — *Falsa demonstratio non nocet* — Whether bequest of 'MLC Shares' was intended to refer to MLC investment accounts.

Brennan v Permanent Trustee Company of New South Wales (1945) 73 CLR 404; *In re Gifford; Gifford v Seaman* [1944] 1 Ch 186; *Hardwick v Hardwick* (1873) 16 LR Eq 168, applied.

Perrin v Morgan [1943] AC 399; *Pringle v Pringle* [2010] WASC 206, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	R Arndt
Defendant:	L McCrimmon

Solicitors:

Plaintiff:	Ryan Arndt Barrister and Solicitor
Defendant:	Bill Piper Barristers and Solicitors

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Best v Gardner [2013] NTSC 60
No 70 of 2013 (21333474)

BETWEEN:

BRIAN JAMES BEST
Plaintiff

AND:

DEAN HARRY GARDNER as Executor of The Will of MARGARET JANE BEST
Defendant

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 23 September 2013)

[1] The plaintiff is the son of the late Margaret Jane Best, who died on 27 August 2012. He is one of the beneficiaries under her will dated 10 July 2012. The defendant is the executor of the estate. The defendant was granted probate on 16 January 2013.

[2] Clause 7 of the will provides:

> I give devise and bequeath my MLC Shares to be divided as follows:
>
> 7.1 Bernadine Best 80%,
>
> 7.2 Brian Best 20%.

[3] At the time of her death the testator's assets included financial products described as an MLC Master Key Unit Trust Account valued at $202,256.38 and an MLC Master Key Super and Pension Fundamentals Account valued at $ 1,073,655.38 ('the MLC Accounts'). There were no other assets in the estate which could possibly be described as 'MLC Shares'.

[4] The plaintiff commenced these proceedings seeking a declaration that the MLC Accounts do not form part of the property described as 'my MLC Shares' in cl 7 of the will. The defendant seeks a declaration as to the proper meaning of the words 'MLC Shares' in cl 7 of the will.

[5] The expression 'MLC Shares' is not defined in the will and nor are there any references in the will itself which might assist in defining more accurately the meaning of the term.

[6] The evidence placed before this Court reveals that MLC Limited is a long-established company which specialises in the provision of financial products. Although it is a public company, it is a wholly owned subsidiary of the National Australia Bank. It was not possible for the testator to own shares in the company or any of its subsidiaries. No such shares were listed or otherwise available for purchase by the public at the time the will was made. The only investment which someone such as the testator could have made in the MLC group of companies was by purchasing units or similar interests in one or more of MLC's financial products.

[7] As was observed by Kenneth Martin J in *Pringle v Pringle*,[1] the overriding consideration is always the language used in the testamentary instrument. The will is to be construed to give effect to the intention of the testator, such intention being gathered from the language of the will read in light of the circumstances in which the will was made.[2]

[8] In *Brennan v Permanent Trustee Company of New South Wales*[3] Dixon J observed:

> When the main purpose and intention of the testator are ascertained to the satisfaction of the court, if particular expressions are found in the will which are inconsistent with that intention, though not sufficient to control it, such expressions must be discarded or modified. The language of the testator should be moulded to carry into effect as far as possible the intention which, in the opinion of the court, the testator has, on the whole will, sufficiently declared.

[9] A further principle which guides the consideration of the present matter is to be found in *In re Gifford; Gifford v Seaman*[4] where Simons J said:

> If the consolidated stock is to pass, it must do so under the principle of *falsa demonstratio non nocet*, which means that, if, on consideration of the relevant parts of the will, one comes to the conclusion that the testatrix intended to pass something and can determine what that something is, then the fact that she has given the wrong description will not prevent her will taking effect in regard to that which is wrongly described.

[10] To similar effect were the observations of Lord Selborne LC in *Hardwick v Hardwick*[5] that:

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1 [2010] WASC 206 at [25].
2 *Perrin v Morgan* [1943] AC 399.
3 (1945) 73 CLR 404 at 414.
4 [1944] 1 Ch 186 at 188.

> I apprehend that if the words of description when examined did not fit with accuracy, and if there must be some modification of some part of them in order to pass a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded.

[11] The language employed in the will should be read in the sense which the testator herself appears to have attached to the expressions she used. [6]

[12] It was submitted on behalf of the plaintiff that the reference to 'MLC Shares' in cl 7 of the will is a reference to shares in a company. The defendant accepted this as the common use of the word but submitted it was not the only use, and that the term was broad enough to encompass financial instruments such as the MLC Accounts. Alternatively, it was submitted that the maxim *falsa demonstratio non nocet* should be applied, to recognise that the MLC Accounts were intended to be the object of the bequest, but were misdescribed as 'shares'.

[13] In my opinion it is apparent from the circumstances surrounding the will that the testator was using the term 'MLC Shares' as a reference to the unit holdings in financial instruments issued by MLC which she held at the time of making her will. It was not possible for her to hold actual shares in any MLC company and the only property which she owned which could be in any way labelled 'MLC', and therefore be described as 'MLC Shares', were the MLC Accounts. It is also apparent that the testator intended to pass

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5 (1873) 16 LR Eq 168 at 175.

6 *Brennan v Permanent Trustee Company of New South Wales* (1945) 73 CLR 404 at 414 per Dixon J.

property in something she described as MLC Shares. In all the circumstances the only property to which she could have been referring was the MLC Accounts.

[14] As at the date of her death, the liabilities of the testator amounted to around $174,000 and the balance of the estate not committed to specific bequests amounted to around $140,000. The plaintiff submitted the shortfall in capacity to meet the liabilities indicated that the testator intended the MLC Accounts or, at least, one of them, to be available to meet the shortfall. I do not accept this submission. At the date of making the will the testator could not have known the extent of the liabilities after her death. The liabilities include significant legal fees and credit card debts. There is nothing to suggest that the testator intended to balance out the liabilities with funds sufficient to meet them.

[15] I find the testator incorrectly used the word ‘shares’ to describe her interests in MLC and she intended to make provision for the MLC Accounts in cl 7 of the will. I declare that the MLC Accounts do form the property described as ‘my MLC Shares’ in cl 7 of the will.

[16] I will hear the parties as to the issue of costs and the form of final orders.

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