



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 46
P378/21

Lord Menzies
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD MENZIES

in the Petition

by

VINDEX TRUSTEES LIMITED

Petitioner

for

Directions under section 6 of the Court of Session Act 1988

Petitioner: Tosh; Dentons UK and Middle East LLP

3 September 2021

Introduction and factual background

[1] The petitioner is the sole executor under the will and codicils of the estate of the late Estelle Brownrigg, who was born in South Africa in 1945 and lived and was educated there during her teenage years. She later moved to work as a pharmacist in London, where she met her husband. The couple lived in Johannesburg, Brussels and Canada before ultimately settling in Scotland in or around 2012. Neither the deceased nor her late husband had any children. The deceased's estate at the date of her death amounted to

approximately £1,349,000. With the exception of a legacy made to a friend, the net residue of her estate was to be left to the Scottish National Party and three different charities. One of the three charities was named in the will as the "Nelson Mandela Educational Fund, South Africa". The petitioner seeks directions from the court, in accordance with section 6(vi) of the Court of Session Act 1988, on the following question:

"Whether the petitioner, as executor, may properly distribute one sixth of the deceased's residual estate to the Nelson Mandela Children's Fund, South Africa 21 Eastwold Way, Saxonwold 2196, Gauteng, PO Box 797, Highlands North 2037".

[2] Intimation and service of the petition was dispensed with and there are no respondents to the petition.

The Nelson Mandela Educational Fund

[3] No further details of the charity appear in the will and codicils. The petitioner has made enquiries with the solicitors who prepared the will; they have advised that their file had been destroyed. They were unable to provide any information about the charity. The petitioner has reviewed historic files pertaining to the deceased and her late husband's executry but has been unable to find any further clarification as to the identity of the intended beneficiary. It has also undertaken independent research with a view to finding the correct charity; legal advice has been sought in South Africa but no charity with the name "the Nelson Mandela Educational Fund" has been identified.

[4] The South African Register of Non-Profit Organisations shows that when the deceased signed her will in March 2003, there were three registered organisations whose names included the words "Nelson Mandela". These were (i) the "Nelson Mandela Children's Fund" registered on 19 February 1999 ("the Children's Fund"); (ii) the Young Women's Christian Association (Nelson Mandela Port Elizabeth) registered on

12 November 2002; and (iii) the "Nasoda Nelson Mandela Local" registered on 21 February 2003. The Children's Fund is based in South Africa and is and was, at the time of preparation of the will, the longest established of all the non-profit organisations in existence bearing the name Nelson Mandela. The purpose of the fund is to educate disabled children and assist young people in developing skills for work. In the petitioner's view, the most likely intended object of the legacy was the Children's Fund.

Submissions for the petitioner

[5] The petitioner moved the court to answer the question posed in the affirmative or to give such other directions as it considers appropriate.

[6] There is no information available to the petitioner to suggest that an organisation known as the Nelson Mandela Educational Fund ever existed. This suggests that the legatee has been wrongly designed in the will. If the legatee has been wrongly designed, then the court requires to consider what effect that ought to have on the distribution of the deceased's estate. The general rule is that erroneous description of the object of a legacy is not fatal (*falsa demonstratio non nocet*). Extrinsic evidence is admissible to determine the identity of the intended legatee as a matter of construction of the will. The identity of the intended legatee need not be determined with absolute certainty. Reasonable certainty will suffice (*Macfarlane's Trustees v Henderson* (1878) 6 R 288, at 289).

[7] The petitioner acknowledged that the deceased's will includes the following provision immediately after the bequests of the residue of her estate ("Clause 4"):

"... Declaring that if any legatee has changed name or has amalgamated with or transferred its assets to any other body or has been wrongly designed then my executors shall give effect to such legacy as if it had been made to such body with similar purposes as my executors may in their sole discretion decide."

[8] If the purpose of that clause was to allow the executors to make over the legacy to a charity with similar purposes, and to avoid unnecessary trouble and expense along with the risk of any legacy failing, then the petitioner accepts that it may proceed to exercise its discretion. However, an Opinion produced by counsel previously instructed on behalf of the petitioner suggests that it may only do so where a “condition precedent” is fulfilled. The condition precedent is said to be that the petitioner is unable to “see through” the erroneous description and perceive the true identity of the intended legatee. If that construction is correct, consideration must be given to whether the petitioner can determine, without invoking the power conferred on it under Clause 4, that the Children’s Fund is the intended legatee.

[9] If the court reaches the view that the question upon which directions are sought may be resolved as a matter of construction of the will and that, on the evidence available, it can conclude with reasonable certainty that the Children’s Fund is the intended legatee, it may answer the question posed in the affirmative. However, if the court is not so satisfied then it must consider whether the petitioner is entitled to exercise the discretion conferred upon it by the declaration, including whether all conditions precedent have been satisfied. If the court answers that question in the affirmative, the follow-on issue is whether the Children’s Fund is a “body with similar purposes”.

[10] The petitioner acknowledges that if the proper construction of the clause is that the selection of a substitute legatee is a matter which falls entirely to be determined by it, exercising its sole discretion, then the court may refuse to answer the question posed and should instead simply give directions to the effect that the petitioner is entitled to exercise the discretion conferred by the declaration.

[11] In the petitioner's submission the purposes of the Children's Fund can be said to be similar to that of the named beneficiary. That is on the basis that the inference may be drawn from the title of the organisation that the relevant purposes are ones associated with education in South Africa, which are consistent with the philosophy, values and concerns of Nelson Mandela. The purposes of the Children's Fund - getting disabled children into school and helping young people develop skills for work- are sufficiently similar to the inferred purposes of the Nelson Mandela Educational Fund. As such, the question upon which directions are sought should be answered in the affirmative.

Decision

[12] Paragraph 5 of the written submissions states that, in the light of its investigations, the petitioner has formed the view that the intended beneficiary has been wrongly designed and that, for the reasons set out in statement 13 of the petition, it is most likely that the deceased intended to make the legacy in favour of the Nelson Mandela Children's Fund. The petition seeks the court's approval for a disbursement on this basis.

[13] These are matters concerning the administration of the executry estate and fall to be resolved by the exercise of the executor's managerial discretion and good judgment. The court does not consider that it should adjudicate or give advice on the matter, see *Noble's Trustees, Petitioners*, 1912 SC 1230.

[14] However it can be noted that the petitioner has the comfort of knowing that it would be acting in accordance with the views of counsel. He advised that, on the information before him, it seemed that the Children's Fund was the intended beneficiary, and that if the executor was of the same opinion it could proceed accordingly.

[15] In these circumstances, and again consistent with counsel's opinion, the discretionary power granted by Clause 4 of the will to give the legacy to a "body with similar purposes" does not arise. But even if it did, the various questions posed in this context in the written submissions again raise matters of management of the estate.

Disposal

[16] The court declines to make directions in terms of section 6 of the 1988 Act. The petition is refused. The expenses of the petition shall be awarded to the petitioner on a solicitor client, client paying basis. Although we have declined to grant the directions sought, the petitioner has not acted unreasonably in raising the petition on the basis of advice from counsel.