A

COMMISSIONER OF INLAND REVENUE

v.

B

BHANABHAI & CO. LTD.

[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Spring J.A.), 25th October, 3rd November]

Civil Jurisdiction

C *Income tax—trust deed—whether interests of beneficiaries contingent or vested—construction of deed—Income Tax Ordinance (Cap. 176) s.11(3) (a) and (b)—Court of Appeal Ordinance (Cap. 8) s.12(1) (d).*

Deed—construction—to be read as whole—reference to recitals where operative part doubtful.

Trusts—whether interest contingent or vested—distinction between vested in interest and vested in possession—application of income for benefit of beneficiaries by credit in accounts.

D

The Commissioner of Inland Revenue assessed income arising under a deed of trust for the year ending the 31st December, 1969, in the hand of the respondent company as trustee, applying section 11(3) (b) of the Income Tax Ordinance, on the ground that the beneficiaries under the deed had only contingent interests. Clause 5 of the deed provided that upon the death of the survivor of two named settlors the trust fund was E to be distributed among their respective children (named) in specified shares. Clause 3 provided that until the trust fund was vested in the beneficiaries the trustee "shall" apply the whole or any part of the income towards the maintenance and education or otherwise for the benefit of the beneficiaries.

The income for the year ending 31st December, 1969, was credited in F the books of the trustee company to the beneficiaries but the amount thereof was applied to reduce a loan made to the trust by the respondent company. The Supreme Court, reversing the Court of Review, set aside the assessment.

Held: 1. A deed must be read as a whole and where the operative part is doubtfully expressed a recital may be safely referred to as a key G to the intention of the parties.

2. The word "vested" was used in clause 3 of the deed in the sense of vested in possession.

3. The persons who would take the trust fund at the date of distribution were the named beneficiaries and their personal representatives and not unascertained persons.

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4. The income being subject to a direction that the trustee should apply it in whole or in part for the benefit of the beneficiaries and having been allocated to the benefciaries in the accounts, was vested in interest in the beneficiaries.

5. The crediting in the accounts was an application of income for their benefit notwithstanding that four of the beneficiaries were infants and that no receipts were given.

Cases referred to:

North Eastern Railway v. Hastings (Lord) [1900] A.C. 260; 69 L.J.Ch. 516

Simpson v. Peach (1873) L.R.16 Eq.208; 28 L.T.731.

Re Couturier; Couturier v. Shea [1907] 1 Ch.470; 96 L.T.560.

Perrott v. Davies (1878) L.T.52.

Re Gossling; Gossling v. Elcock [1903] 1 Ch.448; 88 L.T.279.

Re Williams; Williams v. Williams [1907] 1 Ch.180; 95 L.T.759.

Re Parker; Parker v. Parker (1880) 16 Ch.D.44.

Re Ussher; Foster v. Ussher [1922] 2 Ch.321; 127 L.T.453.

Browne v. Moody [1936] A.C.635; [1936] 2 All E.R.1695.

Re Vestey's Settlement; Lloyd's Bank Ltd. v. O'Meara [1951] Ch.209; [1950] 2 All E.R.891.

Orr v. Mitchell [1893] A.C.238; 9 T.L.R.356.

Appeal from a judgment of the Supreme Court sitting in appellate jurisdiction from the Court of Review under the Income Tax Ordinance.

R. G. Kermode and R. Nair for the appellant.

D. N. Sahay for the respondent company.

The facts sufficiently appear from the judgment of Spring J.A.

3rd November 1972.

The following judgments were read:

SPRING J.A.:

The circumstances giving rise to this appeal are briefly stated. The respondent, a limited liability company, was appointed trustee under a certain deed of trust bearing date 3rd October, 1968. The Commissioner of Inland Revenue, the appellant, issued an assessment of income for the year ending 31st December, 1969, on the basis that the income of the trust for that year was taxable in the hands of the respondent as trustee. The The Commissioner claimed that the beneficiaries under the trust deed had contingent interests in accordance with Section 11(3) (b) of the Income Tax Ordinance (Cap. 176) and accordingly the whole income was assessable against the trustee. The respondent served a notice of objection on the Commissioner objecting to the said assessment which he disallowed. The respondent appealed to the Court of Review which upheld the assessment. The respondent appealed to the Supreme Court against the determination by the Court of Review and the learned judge in the Court below allowed the appeal and set aside the decision of the Court of Review. It is against that decision of the Supreme Court dated 4th August, 1972, that the Commissioner of Inland Revenue now appeals to

this Court. By virtue of Section 12(1) (d) Court of Appeal Ordinance (Cap. 8) the present appeal is limited to questions of law alone. It will be convenient to set out here Section 11(3) (a) and (b) of the Income Tax Ordinance —

> "(3) Income accumulating for the benefit of unascertained persons or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity as if such income were —
>
> (a) in the case of an unascertained person, the chargeable income; and
>
> (b) in the case of a person with contingent interests, the total income as for an unmarried person."

The essential facts may be shortly stated. On 3rd October, 1968, a deed of Settlement (or Trust) was executed by eight settlors setting up a Settlement or Trust for the maintenance, education and benefit of Vijay Manilal, Dharmesh Manilal (sons of Manilal Bhanabhai) and Chandra Mohan, Ramesh Chandra and Dalip Kumar (sons of Maneklal Maganlal). The trustee appointed under the said Deed was Bhanabhai & Company Limited. There is no evidence on the record whether the said company is empowered under its memorandum of association to act as trustee but as the case was run before the Court of Review and in the Court below, this Court must, in my view, proceed on the basis that the Company was so empowered; it is a question of fact and on this appeal we are concerned only with matters of law.

It will be convenient to set out the relevant portions of the deed.

> "1. THE trustee shall hold the said leasehold property in trust for the beneficiaries during the joint lives of the said *MANILAL BHANABHAI* and *MANEKLAL MAGANLAL, PROVIDED HOWEVER* the trustee shall have the absolute discretion to sell the trust property and buy in substitution therefore or in addition thereto any property and hold the same in trust for the said beneficiaries.
>
> 2. THE said investment so acquired by the trustee as aforesaid and the investment money or property for the time being representing the same or which may be or become subject to the trusts hereby declared are hereinafter called the Trust Fund which expression is intended to mean the constituents for the time being of the said fund.
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> 3. UNTIL the trust fund is vested in the beneficiaries the trustee shall apply the whole or such part as it in its discretion thinks fit of the income of the trust fund for or towards the maintenance and education or otherwise for the benefit of the beneficiaries and may either itself so apply the same or may pay the same to the guardian or guardians for the time being of the said beneficiaries to any son mother daughter or any persons selected by it for that purpose without seeing to the application thereof.
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> 4. . . . . .

5. UPON the death of *MANILAL BHANABHAI* and *MANEKLAL MAGANLAL* whichever last occurs the said trust fund shall be distributed to the said beneficiaries as follows namely:— A

(a) 55% thereof to the said sons of *MANILAL BHANABHAI* in equal shares share and share alike; and

(b) 45% thereof to the said sons of *MANEKLAL MAGANLAL* in equal shares share and share alike." B

At the hearing before the Court of Review a statement of agreed facts was signed by both counsel for the appellant and the respondent and the relevant details are extracted therefrom.

"(a) The names and dates of birth of the beneficiaries named in the deed are — C
Chandra Mohan (s/o Maneklal Maganlal) — 13th November, 1948;

Ramesh Chandra (s/o Maneklal Maganlal) — 30th May, 1950;
Dalip Kumar (s/o Maneklal Maganlal) — 29th February, 1952;
Vijay Manilal (s/o Manilal Bhanabhai) 12th September, 1960;
Dharmesh Manilal (s/o Manilal Bhanabhai) — 25th November, 1965;" D

(b) On 6th August, 1970, the appellant lodged with the Department of Inland Revenue a set of accounts for the trust in respect of the year ending 31st December, 1969 showing the net income as divisible among the beneficiaries.

(c) On the 20th October, 1970, the Commissioner sent a letter to the appellant, stating that it would appear that no part of the income of the trust had been applied for the benefit of the beneficiaries during the year ending 31st December, 1969 in accordance with Clause 3 of the trust. E

(d) On the 8th November, 1970, a reply was sent to the Commissioner from the Legal Advisers to the appellant to the effect that Commissioner's contention was true. F

Counsel for the respondent stated at the hearing, before the Court of Review, that the letter was wrong. Nothing further was said about this and we are not aware whether any resolution of the trustee company pursuant to clause 3 of the deed was passed authorising the trustee company to apply income to the beneficiaries in the proportions shown in the balance sheet and accounts appearing in the record. However again this is a question of fact and the Court must proceed on the basis that the respondent trustee had taken all the necessary steps which culminated in the production of the balance sheet and figures. G H

(e) On 10th February, 1971, an assessment was issued by the Department of Inland Revenue assessing the whole income from the trust to the trustee company."

The only viva voce evidence called by the appellant was from Harold John Powell Accountant of Lami who had submitted the returns of the trust to the Department of Inland Revenue. The relevant portions of his evidence are repeated.

> "Harold John Powell, — Accountant of Lami. Employed by S. G. Gould & Co. I submitted income tax returns Ex. B. Mr. P. K. Bhindi was keeping the books of the company. We did a partial audit, but we did not render a certificate. Because we were not asked to do so. The sums shown as divisable were for the beneficiaries. So far as the amounts were concerned they were credited to the beneficiaries but the sums were actually applied to reduce the loan from Bhanabhai & Co. Ltd. to the same company as Trustee. Bhanabhai & Co. Ltd. also did other trading and a return went in for that. Building cost $69,700 in 1968. The loan was to pay for the building. Interest on loan was 5% for this year.
>
> *XXD. Jones* — I do not have an accountancy qualification. I have seen the books of Bhanabhai & Co. Ltd. as Trustee. There are two sets of books. I have the trustee set here. One is a ledger and one is a journal. They relate to financial transactions of the Trust. There are no separate bank accounts between the Trustee Funds and trading funds. All the money is retained in the one account whether it is trust money or trading money. There is no actual receipt from any beneficiary. All income has gone to pay off the debt. Nothing spent for benefit of any beneficiary, clothing, education etc. No beneficiary can draw on the one bank account. The directors draw on it."

The Commissioner argued that the beneficiaries under the trust deed had a contingent interest only in the income and that it would not become vested in the beneficiaries until after the death of the survivor of Manilal Bhanabhai and Maneklal Maganlal and accordingly assessed the whole of the income from the trust as taxable in the hands of the trustee Company. The trustee appealed to the Supreme Court and the learned Judge reversed the decision of the Court of Review and said —

> "Whether or not the beneficiaries have a contingent or vested interest in the income of the Trust can only be determined by correctly construing the provisions of the Deed.
>
> Before proceeding to an examination of those provisions it is necessary to bear in mind the distinction between the vesting *in interest* and the vestng *in possession* of trust property and income derived therefrom.
>
> I am satisfied that on their true construction clauses 3 and 5 of the Deed in combination operate to give the beneficiaries a vested interest in both the corpus and income of the Trust Fund. Under Clause 5 the gift of corpus is to take effect in possession on the happening of an event which is certain to happen; and clause 3 provides that until that event does occur the income of the Trust Fund is to be applied for the benefit of the beneficiaries or if not so applied the clear result is that it must be accumulated for their benefit and paid over to them at the same time as the corpus becomes distributable."

The Commissioner appealed to this Court on three grounds but at the hearing of this appeal he abandoned his third ground of appeal: we are concerned with the remaining two grounds of appeal.

"1. The Learned Judge erred in law in finding that on the facts and evidence in this case there was no contingent interest.

2. That the Learned Judge erred in law in failing to consider the findings of fact by the Court of Review, based on the evidence led."

Learned Counsel for the appellant argued both grounds together and I shall endeavour to summarise them. He claimed that the deed of trust did not have the effect of vesting either the corpus or the income of the trust fund in the beneficiaries until the death of the survivor of Manilal Bhanabhai and Maneklal Maganlal; he submitted that the cases relied on by the learned Judge were not applicable as they were concerned with a gift of income to a beneficiary whereas in the instant case there was no gift of any specific share or portion of the income of the trust fund to the beneficiaries; that the power of the trustee to pay the income to the beneficiaries did not arise until the trust fund was vested which in his submission was the date of death of the last survivor of the persons named in clause 5 of the deed; until such date the income would be accumulated by the trustee and be taxable in his hands; that as none of the beneficiaries had any right to call for payment of income the income was not vested in the beneficiaries and they merely had a contingent interest therein until the date mentioned in clause 5 as being the date of vesting; that the direction to pay interest in clause 3 was to a "class" and accordingly the income did not vest until the corpus vested under clause 5 of the deed; that the trust deed had the effect of accumulating the income of the trust fund for the benefit of unascertained persons as vesting would not take place until the date specified in clause 5 of the deed.

Mr. Sahay for the respondent submitted that there was no uncertainty as to the persons who were to benefit under the deed as they were named and described therein; they had a vested interest in the corpus of the trust fund from the date of the deed; that the beneficiaries had a vested interest not only in the corpus but also in the income of the trust fund as from the date of the deed; that in line 1 of clause 3 the word "vested" should be interpreted as meaning "vested in possession"; that the income was accumulating under the trust for the beneficiaries by the appellant.

who had vested interests and not merely contingent interests as claimed

The principal question to be answered on this appeal is whether the beneficiaries under the trust deed or settlement have a contingent or vested interest in the income of the trust fund.

Clause 3 of the deed states "until the trust fund is vested in the beneficiaries the trustee shall apply the whole or such part as it in its discretion thinks fit of the income of the trust fund for or towards the the word "vested" in clause 3 of the deed. Counsel for the respondent submitted that the word vested should be construed as meaning "vested in possession". It will be as well to pause here and consider the meaning of the word vested. A future interest in land may be either vested or contingent and vested interests may be either "vested in interest" or

A "vested in possession". An interest is "vested in possession" when it gives the right of present enjoyment; if it is vested in interest, but not in possession, it is a future interest since the right of enjoyment is postponed yet it is also an already subsisting right in property vested in its owner; it is a present right to future enjoyment. By contrast with a vested interest a contingent interest is one which will give no right at all unless or until some future event happens.

B The Court is faced with the question what does the deed mean when it says until the trust fund is vested?

The deed in my view must be read as a whole as Lord Davey said in *North Eastern Railway v. Hastings (Lord)* [1900] A.C. 260 at p.267 —

> C "The deed must be read as a whole in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions if the deed of that interpretation does no violence to the meaning of which they are naturally susceptible."

The intention must be inferred not from the force of a single expression if it militates against the collected general intention, but at the same time, as it is the rule that "ordinary words ought to be given their plain and D ordinary meaning," the court cannot disregard that meaning or deviate from the force of any particular expression unless it finds from other parts of the deed some expression which shows that the author could not have had the intention which the expression used and in its literal form would imply.

E In *Halsburg's Laws of England 3rd Edition* Vol. 39 at p.1119 it is stated

> "The context may show, however, by indications that the donee is to take a vested interest before the specified event, that the word "vest" is used in another sense, for example in the sense of "fall into possession", or "become payable" . . ."

Clause 3 says that "until the trust fund is vested in the beneficiaries the F trustee shall" etc. and it is to be noted that the word "shall" is imperative. In my view here is a clear direction, as I read clause 3, of a duty imposed on the trustee to apply the income in the manner directed until the date of distribution which is determined in clause 5. The draftsman of the deed could have been more explicit in the language which he used but in my view it is clear that he used the word "vested" in the sense of vested in possession or "fall into possession". Therefore applying the G maxim *ut res magis valeat quam pereat* the word "vested" in clause 3 I would construe as meaning "vested in possession."

Turing now to the argument that the persons who will take under the deed cannot be ascertained.

A perusal of clause 5 and the preamble to the deed clearly shows in H my view, that it will be the named children of Manilal Bhanabhai and Maneklal Maganlal and the death of the survivor of the last named persons has been fixed as the date of distribution. As from the date of the deed the beneficiaries named thereunder have in respect of the corpus of the trust fund an interest "vested in interest" and at the date of distribution

it will become an interest "vested in possession". The date of distribution is a date certain and accordingly the persons who will take the corpus of the trust fund will be the said named children, or, if any of them predecease the date of distribution then their personal representative will succeed to the share of the person or persons so dying.

In *Simpson v. Peach (1873) 28 L.T. 731* the facts taken from the Judgment are briefly stated

> "JANE ELIZA SIMPSON, by her will, dated the 12th Dec. 1848, bequeathed as follows :—
>
> I give the sum of 40001. payable at the decease of my sister to the brothers and sisters of the aforesaid Stephen Francis Simpson to be equally divided amongst them share and share alike the said shares to be vested interests on the majority or marriage of each and the interest and income thereof to be paid towards the maintenance and education of such child or children.
>
> The testatrix died in 1849. Stephen Francis Simpson had nine children, all of whom survived the testatrix's sister, who died in 1856.
>
> Two of the brothers and sisters had died under age and unmarried, and the bill was filed by their father, who claimed two ninth shares as their personal representative . . . .
>
> The VICE-CHANCELLOR held that each brother or sister of S. F. Simpson who survived the testatrix's sister took an absolute interest. The shares of those who had died under age went to their personal representatives, and the plaintiff was therefore entitled to the shares of his two deceased children."

In *re Couturier [1907] 1 Ch. 470* Joyce J. says at p.437 and p.474

> "A legacy to A. upon attaining a given age is contingent upon the attainment of that age by the legatee, but a legacy to A. payable at a given age is a present gift and vests at once, the payment only being postponed; so that if the legatee dies before the age prescribed for payment his legal personal representative will be entitled . . . . . I am, therefore, of opinion that each of these legatees upon attaining twenty-one is entitled to the payment of his legacy with the intermediate interest or income, and that the legal personal representative of any legatee who survived the testatrix and died before actual payment is entitled to the legacy or balance remaining unpaid of both income and principal."

Also *Perrott v. Davies (1878) 38 L.T. 52* where Bacon, V.C. says at p.53

> " . . . the trustees do as they could not do otherwise, ascertain the number of children living at the death of the testator's daughter; and, knowing that there were five, the inevitable conclusion was that the one who had attained a right of payment should receive one-fifth and no more. That is the only construction which it appears to me, holding it to be a vested interest in the five children only, I can put upon this will; and the children who have died without attaining twenty-one or marriage are as much possessed of that interest as if they had performed the conditions which the testator specified . . . . I think, therefore, as to each of the children of Augusta Ingersoll, as died in infancy, that they died possessed of an interest vested, and that their legal personal representative is now clearly entitled to their shares."

A Therefore I reject the argument of the appellant that the trust fund when it is distributed under clause 5 of the deed will be enjoyed by unascertained persons because the persons who will take are the named beneficiaries or their personal representatives — a group of people who in my view are clearly capable of definition. I turn now to a consideration of the question whether the direction to apply the income in the manner indicated in clause 3 to the beneficiaries is a vested or contingent interest. As I read clause 3 the trustee has a discretion whether to apply the whole B income or only part thereof for the beneficiaries, and the question is does this discretion have any effect on the issue whether the beneficiaries have a vested or contingent interest?

A consideration of certain authorities although admittedly dealing with trusts created by wills, is apposite.

C It has been decided that if the interest upon a legacy or share of residue is given to the legatee in the meantime until the time of payment arrives the gift is vested.

In *Re Gossling [1903] 1 Ch. 448* at p.450 Romer L.J. said

"Beyond question, if a share of a residuary estate is given to a person, to be paid or transferred to that person on attaining a parti- D cular age, and there is a maintenance clause providing for maintenance in the meantime out of the income of that share, then the share is vested."

The rule also applies in my view even if a trustee has power to apply the whole, or such part as he thinks fit of the income of a share in maintenance.

E

In *In re Williams [1907] 1 Ch. 180* at p.183 Neville J. said

"It is said, and I think quite accurately, that the rule is absolute that where a legacy is given at a future date accompanied by a gift of income in the meantime, the legacy vests in the legatee at once, notwithstanding the fact that he does not live until the date fixed for payment. Moreover, I think I may go one step further and say F that if the whole of the income of such a legacy be given for maintenance until the time fixed for payment, that is treated as a gift of income and the legacy is vested. There is a third form of gift which is open to some doubt, and which seems to be very near the form in the present case, viz., a gift of a legacy at a future date accompanied by a gift for maintenance in the meantime of the whole or such part of the income as the trustees think fit. Many cases have G been cited to me, but I do not intend to go into them in detail; I will simply state the view to which I have come. On the authorities I think the question really is whether Sir George Jessel M.R. was justified in the statement of the rule made by him in *In re Parker*. He said there: "When a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom H the legacy is given; and not the less so when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit'."

Also in *re Ussher [1922] 2 Ch. 321.*

In *Browne v. Moody [1936] A.C. 635* at p. 647-8 Lord MacMillan said

> ". . . . their Lordships do not find any special significance, indicative of a different intention, in the contrast between the expressions "I give, devise and bequeath" or "I give and bequeath" used in the case of the legacies payable on the death of the testatrix and the words "I direct that the said fund of $100,000.00 is to be divided, etc." used in the case of the destination of that fund. The difference would appear to be occasioned simply by the circumstance that in the one set of instances the testatrix was giving ordinary legacies immediately payable, whereas in the case of the $100,000.00 fund she desired to give a series of rather elaborate directions . . . The directions of the testatrix with regard to it are directions which it is the duty of the executors to see carried into effect."

Further it was argued that the beneficiaries had no claim upon the income and not entitled to any share thereof until the corpus vested in them. In my view when the trustee allocated the income to the beneficiaries in the manner shown in the accounts which were produced in evidence the beneficiaries became entitled to the monies so allocated and had a vested interest therein.

In *re Vestey's Settlement [1950] 2 All E.R. 891* which was a case where the beneficiaries had a contingent interest only, in the corpus the trustees in the exercise of their discretion decided "to divide" certain income among the infant beneficiaries and it was held that the infant beneficiaries became absolutely entitled to such allocations of income. Jenkins L.J. at p.902 said

> "In this case, however, it is plain that no infant has, under the terms of the trust, any share or interest whatever in the income, unless and until the trustees, in the exercise of their discretion, decide to pay or apply to or for the support or benefit of that infant some part of the income from time to time in hand. When that event happens, when the trustees decide to apply some part of the income in hand for the benefit of an infant, or to pay it to an infant, if the wider interpretation of that expression to which I have referred is admissible, then it seems to me that the infant becomes absolutely entitled to the amount in question by a new title consisting of the exercise of the trustees' discretion in the infant's favour, the infant having previously been merely a person eligible to benefit under the discretion. The infant becoming entitled to the sum of income allocated to him or her under the trustees' discretion, in my judgment, must become, in accordance with the terms of the allocation, absolutely entitled to that sum."

Therefore construing the word "vested" in clause 3 as I have stated and on the authorities quoted I am driven to the inescapable conclusion that the direction in the trust deed to the trustee that it shall apply the whole or such part of the income as it in its discretion thinks fit towards the maintenance education or otherwise for the benefit of the beneficiaries vests in the beneficiaries a vested interest in the income from the trust fund.

There were other matters urged upon the Court which I should discuss. It was argued that on the evidence adduced before the Court of Review that no receipt was given by any beneficiary in respect of income so

allocated; further nothing was actually spent on clothing, education or for the benefit of any beneficiary and that the trustee had not dealt with the income for the benefit of the beneficiaries.

According to the evidence the trustee received in "its hands" income from the trust fund and the direction in clause 3 in my view imposed a duty on the trustee to apply the whole or part of income to the beneficiaries in the manner indicated. The trustee utilised the whole income for the year ending 1969 by reducing in part the debt owing by the trust and this was I believe an application of the income "for the benefit" of the beneficiaries. The accounts submitted to the Court of Review show that income for the year 1969 was credited to the beneficiaries in accordance with the terms of the trust. Admittedly no receipts were obtained, but four of the beneficiaries at the material time were infants.

In *re Vestey's Settlement (supra) at p. 901* Jenkins L.J. said

> "I agree that in a strict and literal sense there can be no payment unless there is not only a hand to pay but also a hand to receive and a recipient capable of giving a receipt. Thus, in the strict and literal sense, there can be no payment to an infant. Words such as these, however, must be construed in their context, and, inasmuch as this is a discretionary trust in favour of a class of persons which, *ex necessitate*, includes infant beneficiaries, I would be disposed, if it were necessary to do so, to put a wider interpretation on the expression "pay", and include in it the transaction consisting of the allocation of a share of any year's income to an infant absolutely, although, owing to his infancy, no receipt is possible."

In my view the transaction carried out by the trustee in allocating moneys to them was an application of income for the benefit of the beneficiaries and had the effect of entitling them to the amounts allocated notwithstanding that no receipts were obtained from them.

It was further argued that the trust fund in clause 2 of the deed was a different trust fund from that mentioned in clause 5 of the deed. The deed must be read and interperted as a whole and if the operative part of a deed be doubtfully expressed then the recital may safely be referred to as a key to the intention of the parties. In *Orr v. Mitchell [1893]* A.C. 238 at p. 254 Lord Macnaghten said.

> "Where those words (in the operative part) are susceptible of two constructions the context may properly be referred to for determining which of the two constructions is the true meaning . . . . The rule applies though one of the two meanings is the more obvious one and would necessarily be preferred if no light could be derived from the rest of the deed. For the purpose of construing the dispositive or operative clause the whole of the instrument may be referred to, though the introductory narrative of recitals leading up to the clause are perhaps more likely to furnish the key to its true construction than the subsidiary clauses of the deed."

Applying the above principles, and after examining the preamble to the deed it is clear that the trust fund is to include all moneys and other assets coming into the hands of the trustee in addition to the sum of $16,000 paid by the settlors of the trust to the trustee; therefore I am of the opinion that the words "trust fund" in clause 2 should be interpreted in the wider sense rather than in the limited or more restrictive sense.

Lastly I do not agree with Counsel for the appellant's suggestion that the trustee could prefer one beneficiary at the expense of another and I respectfully agree with the learned Judge where he says in his Judgment

> "Having regard to the contents of the fourth recital in the preamble and the provisions of clause 5 of the Deed and in the absence of a power in the Trustee to differentiate amongst the beneficiaries I am satisfied that the income derived from the trust fund vests in interest in the beneficiaries in the same proportions as they are entitled to corpus under clause 5."

For the reasons which I have endeavoured to give I am of the opinion that the beneficiaries named in the deed have a vested interest in the income of the trust fund and not a contingent interest as claimed by the appellant.

Accordingly I would agree with the decision of the Court below and would dismiss this appeal with costs to the respondent.

MARSACK J.A.: I fully agree with the judgment proposed by Spring J.A. and have nothing to add.

GOULD V.P.: I have had the advantage of reading the judgment of Spring J.A. with which I agree and to which I have nothing to add.

As all members of the court are of the same opinion the appeal is dismissed with costs.

Appeal dismissed.