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Jeanette Ramona Clay v Mark Gregory Clay, Paul James Clay and Moira Helen Clay and Mark Gregory Clay, Terence Charles Edwards and Delta Consulting Australia Pty Ltd

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Case Commentary:
Jeanette Ramona Clay v Mark Gregory Clay, Paul James Clay and Moira Helen Clay And Mark Gregory Clay, Terence Charles Edwards and Delta Consulting Australia Pty Ltd

by Denis SK Ong[1]

Headings in this case note:

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1. Background

{1} James Edward Carter Clay (hereinafter Mr Clay) married Jeanette Ramona Clay (hereinafter Mrs Clay) in October 1963. It was Mr Clay's second marriage. By his first marriage Mr Clay had three children: Mark Gregory Clay, Paul James Clay and Moira Helen Clay (hereinafter the stepchildren). By his second marriage (to Mrs Clay) Mr Clay had one child: Jeanette Simone Clay (hereinafter Simone Clay), who has not been a party, at any stage, to the proceedings.

{2} Mr Clay died testate on 20 November, 1970. Some time before his death, Mr Clay had acquired absolute registered ownership of a residential property at 24 Queenslea Drive, Claremont, Western Australia (hereinafter the property). The property became an asset of Mr Clay's deceased estate. Mr Clay had made his will on 17 October, 1969, in which he had purported to appoint two executors and trustees. However, for reasons which are of no present relevance, probate of the estate was granted on 10 October 1972 to only one of the two executors and trustees named in the will: David Merritt Speed (hereinafter the executor). Under Mr Clay's will, the executor was empowered to make advancements out of the income and/or corpus of the estate to Mrs Clay to a maximum of $20,000 a year, the residuary estate being given, in equal shares, to the stepchildren and Simone Clay.

{3} At the date of Mr Clay's death, Mrs Clay became, by reason of her status as the sole surviving parent, the guardian of the stepchildren and Simone Clay. Her status as guardian was derived from s 10 of the *Guardianship of Children Act* 1972 (WA).

{4} Two distinct fiduciary relationships were created by virtue of Mr Clay's death, testate. First, there was the fiduciary relationship between the executor of Mr Clay's estate, on the one hand, and, on the other hand, the stepchildren and Simone Clay.[2] Secondly, there was the fiduciary relationship between Mrs Clay, as guardian, on the one hand, and, on the other hand, the stepchildren and Simone Clay (the wards).[3]

{5} On 7 March, 1973, Mrs Clay and the executor executed, pursuant to a contract of sale, an instrument of Transfer of the property in favour of Mrs Clay. The purchase price for the property was specified in the instrument of Transfer as: "FORTY THOUSAND DOLLARS or such sum as may be finally determined by the Commissioner of State Taxation for the purpose of assessing stamp duty under the Stamp Act 1921 whichever is the greater" [AB at 32].

{6} The executor died on 19 June, 1992. The present executors of Mr Clay's estate are Mark Gregory Clay, Terence Charles Edwards and Delta Consulting Australia Pty Ltd (hereinafter the present executors).

{7} The present executors (the first plaintiffs) and the stepchildren (the second plaintiffs) commenced an action against Mrs Clay (the defendant) seeking from her the delivery up to them of property (including the property) and moneys, which, they claimed, she had wrongfully derived from Mr Clay's estate (hereinafter the estate).

{8} In the context of Mrs Clay's pending appeal to the High Court, only those presently relevant issues raised in paragraph 9 of the statement of claim will be examined. Paragraph 9 of the statement of claim reads [AB at 106]:

> " 9. At the date of transfer the true market value of the Property was in the range of $60,000 - $65,000 of which matter the defendant knew or was recklessly indifferent. In the premises the defendant breached the duties pleaded at par 6 and in the premises holds the Property on constructive trust for the Estate, alternatively for the beneficiaries, alternatively as express trustee as guardian for the beneficiaries."

2. Judgment of White J

{9} At first instance, the case was heard and decided by White J in the Supreme Court of Western Australia. White J treated paragraph 9 of the statement of claim as raising the issue "whether [the property] was sold to [Mrs Clay] at an undervalue in breach of trust and that [Mrs Clay] knew of such breach".[4]

{10} White J determined that the executor had breached his duty, "at least technically" [AB at 39], to sell the property at the best price, namely, at the market price [AB at 34 and 39]. In White J's view, the executor should not have relied solely on the valuation of the property given to the Commissioner of State Taxation by the Valuer-General for Western Australia for the purpose of assessing stamp duty on the property, because the Valuer-General's valuation of property is "generally conservative" [AB at 34], and the executor was under a duty to obtain the best price for the property, and "not simply a conservative price" [AB at 34]. He held that the executor had breached his duty by failing to obtain separate advice as to the market value of the property, in that, in his attempt to ascertain the market value of the property, the executor had relied solely on the valuation of the property made by the Valuer-General [AB at 39]. However, White J found that Mrs Clay was not liable to the estate because she was not a knowing party to the executor's breach of duty [AB at 39].

{11} Nevertheless, White J decided that the valuation of the property made by the Valuer-General was in fact the market price for the property because "no loss arose by reason of" [AB at 39] the executor's breach of duty. It is suggested that White J was wrong to have held

that the executor had breached his duty to sell the property at the market price [AB at 34 and 39]. The executor had *not* breached his duty to sell the property at the market price because, as White J himself found, the executor *had* sold the property at the market price, given White J's determination that *no loss* was caused to the estate by the sale of the property at $45,000 [AB at 39], the sum of $45,000 being the value of the property as determined by the Valuer-General, and also being the value accepted by the executor to represent the market price of the property.

{12} White J dismissed the plaintiffs' claim that, because the property had been sold at an undervalue by the executor in breach of his duty and because Mrs Clay knew of this breach of duty, Mrs Clay held the property as trustee either for the estate or, alternatively, for the stepchildren and Simone Clay. White J did so on the ground that the sale of the property to Mrs Clay caused no loss to the estate despite the executor's breach of duty [AB at 32, 39 and 40]. However, it is suggested that, in order for White J to be consistent with his own conclusion that the sale of the property caused *no loss* to the estate, he should have dismissed the plaintiffs' claim on the ground that the sale of the property by the executor was *not* made in breach of his duty to obtain the market price for the property. White J was not justified in his finding that the executor had breached his duty to obtain the market price for the property, given his other finding that the property had been sold at the market price. Therefore, it is suggested that on the facts, no issue could have arisen before White J as to whether or not Mrs Clay had knowingly participated in the executor's alleged breach of duty.

3. The Joint Judgment of the Full Court

{13} The stepchildren, but not the present executors, appealed against White J's decision to the Full Court of the Supreme Court of Western Australia (hereinafter the Full Court). Again, in the context of Mrs Clay's pending appeal to the High Court, only the presently relevant issues raised in paragraph 9 of the statement of claim will be examined.

{14} In her appeal to the Full Court, Mrs Clay submitted that the sale of the property to her was binding on the estate and its beneficiaries by virtue of s 50 of the *Trustees Act* 1962 (WA). Section 50 of that Act provides:

> "50. (1) A trustee may, for the purpose of giving effect to the trust, or any of the provisions of the instrument (if any) creating the trust or of this Act or any other Act, from time to time ascertain and fix the value of any trust property, or of any property that he is authorised to purchase or otherwise acquire, in such manner as he thinks proper; and where the trustee is not personally qualified to ascertain the value of any property he shall consult a fully qualified person (whether employed by him or not) as to that value; but the trustee shall not be bound to accept any valuation made by any person whom the trustee may consult.
>
> (2) Any valuation made by the trustee in good faith under this section is binding on all persons beneficially interested under the trust."

Section 6 of the *Trustees Act* defines "trustee" in the Act to include "a personal representative".

{15} In rejecting Mrs Clay's submission that the executor's sale of the property to her was binding on the residuary beneficiaries of the estate by virtue of s 50 of the *Trustees Act*, the Full Court held that s 50 did not so apply because it was "too tenuous to say that [the executor] 'consulted' a valuer by selling at the value at which [the property] was assessed for stamp duty, even though he knew that the assessment process would include a valuation by the Valuer-General" [AB at 113].

{16} However, it is suggested that the reason that s 50 of the *Trustees Act* did not apply to protect the executor in respect of the sale of the property was not the reason which was given by the Full Court. Section 50 did not apply to the price at which the property was sold because that section specifically provides that "the trustee shall not be bound to accept any valuation made by any person whom the trustee may consult". Thus, s 50, as one of the conditions of its applicability, implicitly required the executor to *assess* the valuation made by the person consulted by him, in order to enable the executor to decide whether or not he should *accept* that valuation. Section 50, therefore, does *not* apply where an executor or trustee purports to *bind* himself *in advance* of the valuer's valuation to accept that valuation. Yet the contract of sale (as evidenced in the instrument of transfer dated 7 March, 1973) made between the executor and Mrs Clay did purport to *bind* each of them *in advance* to *accept* the subsequent valuation of the property made by the Valuer-General, provided only that that valuation was not less than $40,000. The purchase price for the property was agreed as between the executor and Mrs Clay to be [AB at 32, italics added]: "FORTY THOUSAND DOLLARS or such sum as may be finally determined by the Commissioner of State Taxation for the purpose of assessing stamp duty under the Stamp Act 1921 *whichever is the greater*".

{17} Thus did the executor purport to bind himself in advance to accept the valuation which was subsequently to be made by the Valuer-General (subject only to a minimum price of $40,000), thereby removing the executor's acceptance of that valuation from the protection of s 50 of the *Trustees Act.* By purporting to disable himself in advance from assessing the valuation of the property to be made by the Valuer-General, the executor thereby excluded the purchase price of the property from the terms of s 50 of the *Trustees Act*.

{18} Although the Full Court held, in agreement with White J, that the sale of the property by the executor fell outside of the protection afforded by s 50 of the *Trustees Act*, the Full Court nevertheless upheld the other finding made by White J [AB at 39-40] that the property *was* sold to Mrs Clay at *market value* [AB at 115 and 138]. The Full Court observed [AB at 138, emphasis added]: "…[T]he sale was *not* in breach of [the executor's] duty to the estate and the estate *received market value* for the sale".

{19} Thus, the Full Court determined that the persons entitled to Mr Clay's residuary estate (the stepchildren and Simone Clay) could *not*, at any time, have successfully brought an action through their guardian, Mrs Clay, against the executor to impeach his sale of the property to her. This means that when Mrs Clay purchased the property from the estate there was *no possibility* that she, as guardian, could have commenced, on behalf of her wards (being also the residuary beneficiaries of the estate), a successful action against the executor to impeach the sale of the property to her. No possibility existed, at any time, of Mrs Clay commencing any such action, as guardian, successfully, because the Full Court had determined that " the sale was *not* in breach of [the executor's] duty to the estate and the estate *received market value* for the sale" [AB at 138, emphasis added].

{20} Given that the unimpeachability of the sale of the property to Mrs Clay precluded Mrs Clay, in her capacity as the guardian of the stepchildren and Simone Clay, from successfully bringing an action on behalf of her wards, in the latter's other respective capacities as the residuary beneficiaries of the estate, against the executor to impeach the sale of the property to her, there was *no possibility* of her purchase of the property creating any conflict between "her duty as guardian to watch out for and protect the wards' residuary interests in the estate" [AB at 138] and "her personal interest in acquiring and retaining [the property]" [AB at 138].

{21} It is suggested that the Full Court's determination that the *sale* of the property to Mrs Clay was *not* made in breach of the executor's duty to the estate [AB at 138] is inconsistent with its other determination that the *purchase* of the property by Mrs Clay created "a sufficient risk that her personal interest…might impede the faithful performance of her duty as guardian to watch out that [the executor] duly administered the estate,[so] as to constitute the acquisition of [the property] a breach of her fiduciary duty as guardian" [AB at 138].

{22} Mrs Clay's purchase of the property could *not* have impeded the faithful performance of her duty as guardian to watch out that the executor duly administered the estate precisely because, as the Full Court determined, in the very act of *selling* the property to Mrs Clay at the market price, the executor was *duly* administering the estate [AB at 138].

{23} Therefore, it is suggested that, in purchasing the property at the market price from *the estate* (and *not* from the beneficiaries of any trust of which she was the trustee), Mrs Clay was not acting in the breach of her fiduciary duty as guardian, just as, in selling the property to Mrs Clay at the market price, the executor was not acting in breach of his fiduciary duty as executor. Consequently, Mrs Clay is the absolute legal and beneficial owner of the property, and is not a constructive trustee of three-fourths of the property for the benefit of the stepchildren (the second plaintiffs and now the first respondents) in equal shares. In purchasing the property from the estate Mrs Clay did not create "*a real sensible possibility of conflict*"[5], indeed, she did not create *any* possibility of conflict, between her duty as guardian and her personal interest as purchaser (given that she was not purchasing the property of her wards). The entitlement of the residuary beneficiaries of the estate is derived from the estate, and their entitlement, therefore, cannot be greater than the entitlement of the estate itself. As Mrs Clay has unimpeachably purchased the property *from the estate*, the residuary beneficiaries of that estate are *bound* by that sale. The residuary beneficiaries of the estate cannot obtain for themselves, as such beneficiaries, property which has been validly sold and transferred by the estate to another party. Their status as the wards of the purchaser of the property cannot be invoked by them to *augment* their entitlement as the residuary beneficiaries of the estate. The residuary beneficiaries of the estate should not be permitted to obtain the property for themselves in an indirect way (as wards) when they are unable to obtain the property directly as such beneficiaries of the estate. The relevant duty owed by Mrs Clay, as the guardian of her wards, was to ensure, on behalf of her wards, that the executor duly administered the estate. The executor *did* duly administer the estate in selling the property to Mrs Clay at the market price. Therefore, in purchasing the property for herself, at the market price, from the estate, Mrs Clay, as guardian, could *not* have breached her relevant duty to ensure, on behalf of her wards, that the executor duly administered the estate.

{24} However, if the Full Court is nevertheless correct (although it is suggested that it is not so correct) in holding that Mrs Clay acquired three-fourths of the property on constructive trust for the stepchildren in equal shares [AB at 140 and 161], then it is suggested that the Full Court should not have applied, although it did apply, *Taylor v Davies* [1920] AC 636. In

applying *Taylor v Davies*, the Full Court held that the stepchildren's claim against Mrs Clay that they were the equal beneficiaries of a constructive trust of three-fourths of the property was statute-barred [AB at 140]. *Taylor v Davies* was a decision of the Judicial Committee of the Privy Council on the Ontario counterpart to s 47 of the *Limitation Act* 1935 (WA). Section 47(1) of the *Limitation Act* provides that in any action against a trustee, the trustee is entitled to rely on the relevant limitation period "*except* where the claim is…to recover trust property or the proceeds thereof still retained by the trustee" [emphasis added]. Section 47(3) of the *Limitation Act* then provides that for the purposes of s 47 "the expression 'trustee' includes…a trustee whose trust arises *by construction* or implication of law" [emphasis added]. Thus, s 47(3) of the Act specifies that the word "trustee" in s 47(1) of the Act includes a *constructive* trustee, such that, read literally, s 47(1) of the Act provides that no limitation period is available, as a defence, to a trustee, including a *constructive* trustee, where, *inter alia*, the claim against the trustee is to recover trust property or the proceeds thereof still retained by the trustee.

{25} Observing upon the relevant statutory exception to a trustee's statutory right to rely on the limitation period, the Privy Council in *Taylor v Davies* said: "…The expressions 'trust property' and 'retained by the trustee' properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others".[6]

{26} *Taylor v Davies*, if correctly decided, requires that whereas (i) an express trustee, (ii) a trustee *de son tort* (a person who, by reason of his intermeddling with trust property purportedly as a trustee, is *estopped* from denying that he is an *express* trustee[7]), and (iii) a resulting trustee, may *not* rely on the limitation period in an action to recover trust property or the proceeds thereof still retained by the trustee, a *constructive* trustee (namely, a trustee who is not an express trustee, a trustee *de son tort*, or a resulting trustee) *may*, in contradistinction, rely on the limitation period as a bar to such an action.

{27} Three criticisms may be made of *Taylor v Davies*:

> (i) The reasoning of the Privy Council in that case contradicts the express provisions in s 47 of the *Limitation Act* 1935 (WA) and its counterparts. In particular, the Privy Council's reasoning fails to give effect to the deliberate statutory removal, in the context of the relevant non-availability to trustees of reliance on the limitation period, of the distinction between constructive trustees and other trustees;
>
> (ii) There is no reason in policy to give a constructive trustee more favourable treatment than, for example, an express trustee, in relation to a defence based on the limitation period. Evidence of an express trust, or of a trusteeship *de son tort*, or of a resulting trust, is no less likely to be difficult to find after the expiration of the limitation period than is evidence of a constructive trust after the expiration of such a period. Yet a constructive trustee is permitted to rely on the limitation period precisely because of the alleged greater difficulty of proving a constructive trust, as distinct from other trusts, after the expiration of the limitation period.[8] However, in respect of the relevant statutory exception to a trustee's right to rely on the limitation period, the right conceded by *Taylor v Davies* to constructive trustees is denied to other trustees, notwithstanding that proof of the existence of these other trusts is likely to be

just as difficult to obtain as proof of the existence of constructive trusts, after the expiration of the limitation period; and

(iii) s 47(3) of the *Limitation Act* 1935 (WA) provides that the expression "trustee" in s 47 includes "a trustee whose trust arises by construction or implication of law", namely, the expression "trustee" in s 47, by virtue of s 47(3) of the Act, includes a *constructive* trustee as well as a *resulting* trustee. However, the decision in *Taylor* v *Davies* requires that the expression "trustee" in s 47 be understood to include a *resulting* trustee but to exclude a *constructive* trustee. Thus, the expression, in s 47(3) of the Act, "a trustee whose trust arises by construction or implication of law" is truncated by *Taylor v Davies* so as to read "a trustee whose trust arises by implication of law", thereby excising from that expression a trustee whose trust arises *by construction of law.*

{28} If the Full Court is correct in holding that Mrs Clay acquired three-fourths of the property on constructive trust for the benefit of the stepchildren in equal shares, then it is suggested that the Full Court is wrong in deciding that the stepchildren's action to enforce that constructive trust is statute-barred [AB at 139-140].

{29} The Full Court also found that, in purchasing the property, Mrs Clay had *breached* the *express* trust which had been imposed on her by s10 of the *Guardianship of Children Act* 1972 (WA) [AB at 139-141]. Surprisingly, this finding was apparently made concurrently with the Full Court's other finding that Mrs Clay was a constructive trustee of the property [AB at 138 — 140]. Nevertheless, it is suggested that, for the following reasons, neither s10 of the Act nor any other circumstance, imposed any express trust on Mrs Clay:

(i) Section 10 of the Act, which creates the relationship of guardian and ward, does not, either in its express terms or by any implication known to law, create any trust, whether such trust be an express trust, or any other form of trust;

(ii) The relationship of trustee and beneficiary is quite distinct from the relationship of guardian and ward, although both of these relationships are fiduciary in character. These two types of fiduciary relationships were specifically distinguished from each other by Field J in *Plowright v Lambert* (1885) 52 LT 646, at 652. This distinction was made by Field J in the very passage relied upon by the Full Court [AB at 128] to support its view that the relationship between guardian and ward is a fiduciary relationship;

(iii) It is axiomatic that there cannot be an express trust without trust property. This proposition of law is the foundation of the decision of the Judicial Committee of the Privy Council in *Commissioner of Stamp Duties (Qld) v Livingston*,[9] a decision which was extensively quoted with approval by the Full Court [AB at 129-131]. The relationship of guardian and wards was respectively created as between Mrs Clay (the guardian) and the stepchildren and Simone Clay (the wards) upon the death of Mr Clay on 20 November, 1970, by virtue of s 10 of the *Guardianship of Children Act* 1972 (WA). If an express trust was, on 20 November, 1970, created by reason only of that statutorily created relationship of guardian and wards, where, and what, it may be asked, was the trust property for that express trust? The answer to this question is unavoidable: on 20 November, 1970, there was *no* trust property for the express trust found by the Full Court to have then arisen [AB at 139-140]. Thus, on 20 November,

1970, given the absence of any relevant trust property, Mrs Clay could *not* have been an express trustee for the stepchildren and Simone Clay, although she did become their guardian as from that date until they respectively reached the age of majority. Furthermore, no circumstance occurred after 20 November, 1970, to make her an express trustee for the stepchildren and Simone Clay; and

(iv) Even if (although it is suggested that, in the circumstances, this was conceptually impossible) Mrs Clay was an express trustee for her wards before and at the time of her purchase of the property, and even if (although it is suggested that this was not the case) Mrs Clay's purchase of the property was made in breach of her fiduciary duty in her capacity as such an express trustee, the property so purchased would have been held by her on a *constructive* trust,[10] and not, as the Full Court determined [AB at 139-140], on an *express* trust under s 10 of the *Guardianship of Children Act* 1972 (WA).

{30} Given that Mrs Clay has never been a trustee, express or otherwise, of the property, the Full Court's purported application, to the stepchildren's claim against her, of s 25(2) of the *Supreme Court Act* 1935 (WA), which applies only as against an *express* trustee [AB at 140-141], is inapposite. Section 25(2) of that Act provides: "Except as provided by the *Trustees Act 1900*, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations".

Endnotes:

1. Associate Professor of Law, Bond University.

2. *Commissioner of Stamp Duties (Qld) v Livingston*[1965] AC 694 at 707 (per Viscount Radcliffe in delivering the advice of the Privy Council); *Official Receiver in Bankruptcy* v *Schultz* (1990) 170 CLR 306 at 313-314 (per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

3. *Plowright v Lambert* (1885) 52 LT 646 at 652 (per Field J).

4. Application Book at 32. This head of liability was expounded by Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252. See also *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378.

5. *Boardman v Phipps* [1967] 2 AC 46 at 124 (per Lord Upjohn); *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399 at 401 (per Lord Scarman in delivering the advice of the Privy Council).

6. [1920] AC 636 at 653 (per Viscount Cave).

7. *Life Association of Scotland v Siddal* (1861)3 De G F & J 58 at 72, 45 ER 800 at 805 (per Turner LJ).

8. *Taylor v Davies* [1920] AC 636 at 651-652 (per Viscount Cave in delivering the advice of the Privy Council).

9. [1965] AC 694 at 708 (per Viscount Radcliffe in delivering the advice of the Privy Council). See also *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 312 and 313-314 (per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

10. *Furs Limited v Tomkies* (1936) 54 CLR 583; *Boardman v Phipps* [1967] 2 AC 46; *Chan v Zacharia* (1984) 154 CLR 178.