REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL

AD 122/96

In the case between

RONALD JOSEPH HOFER First Appellant
GERALD MARK HOFER Second Appellant
LORENZ GORDON HOFER Third Appellant

and

JACK KEVITT N O First Respondent
CHARLES WILLIAM WYKEHAM Second Respondent
ELEANORA BLANCHE HOFER (Bom Wykeman) Third Respondent
THE MASTER OF THE SUPREME COURT Fourth Respondent
IDRIS JEREMY MULLER NO Fifth Respondent

CORAM: VAN HEERDEN DCJ, FH GROSSKOPF, HOWIE, OLIVIER JJA et VAN COLLER AJA

Date of hearing: 29 August 1997

Date of judgment: 26 September 1997

JUDGMENT

VAN COLLER AJA

VAN COLLER AJA

The Charles Dickson Trust was established on 13 September 1949. The founder and donor was Charles Gordon Campbell Dickson and the beneficiaries were his brother, Herbert Noel Wykeham ("Herbert"), and Herbert's two children, Charles William Wykeham ("Charles"), the second respondent, and Eleanora Blanche Hofer, born Wykeham, ("Eleanora"), the third respondent. Further beneficiaries were the children and grandchildren of Charles and Eleanora. The three appellants are the children of Eleanora. The trust property was inherited by the donor from his father and was subject to a usufruct in favour of his mother. As far as the scheme of devolution is concerned, the trust deed distinguished between the capital of the trust and the income derived from it. In terms of the trust deed the trustees were to pay the whole of the nett income of the trust to the donor

after the death of the usufructuary. The trust deed further stipulated that upon the death of the donor the income of the trust was to devolve upon Herbert and upon his death it was to devolve in equal shares upon Charles and Eleanora. Upon their respective deaths the income which devolved upon each of them was to accrue to their issue per stirpes. On the death of the last survivor of Herbert's grandchildren the capital of the trust was to devolve per stripes upon the issue of such grandchildren. The trust deed also stipulated that if on the death of the last surviving grandchild there would be no issue surviving, the capital of the trust was to be held by the trustees in perpetuity and the income was to be applied towards the furthering of medical research. No provision was made in the trust deed for the amendment of its terms nor was there any reservation of a unilateral right of revocation for the donor.

The original trust deed was amended on three occasions by means of notarial deeds. The first amendment took place on 2 July 1973, the second on 17 January 1986 and the third on 21 February 1989. The effect of the first amendment was to exclude from the right to capital and income any

of the children of the appellants (and of Charles' grandchildren). The trust

capital was ultimately to be held in perpetuity and the income utilised for

the furthering of medical research. This income was to be distributed in consultation with the medical faculty of the University of Cape Town and

the nominee of the South African Medical Council. In terms of the second

amendment only 20% of the income which would have devolved upon

the

appellants on Eleanora's death was to be paid to them and 80% of the

income was to be paid to or for the benefit of one or more charitable

institutions in South Africa for the benefit of blind persons. The third

amendment provided that on the death of the last surviving child of Charles and of Eleanora the income of the trust was to devolve in equal shares on institutions promoting the interests of blind persons and those promoting cancer research. On each of the three occasions upon which the trust deed was amended on the instructions of the donor the trutees for the time being consented thereto. In regard to the second and third amendments the beneficiaries Charles and Eleanora also gave their consent. Herbert died on 17 October 1978 and the donor on 30 August 1991.

These amendments gave rise to an application by the three appellants to the Court a quo for an order declaring them to be without force and effect. The first respondent was cited in his capacity as trustee of the Charles Dickson trust. A Cape Town advocate, Mr I J Muller, was appointed as curator ad litem to the unborn issue of Charles and Eleanora

and to any children to be born to the appellants. Mr Muller supported the application and there can be no doubt that the amendments are prejudicial to the potential beneficiaries represented by him.

On 6 March 1995 a rule nisi was issued calling upon the respondents or any other interested person to show cause on 23 May 1995 why an order should not be made declaring the above-mentioned amendments to the Charles Dickson Trust to be without force and effect. The rule was served on the respondents and it was also published in two newspapers. There was no opposition on the return day but Eleanora filed an affidavit to which I will refer shortly. The Master of the Cape of Good Hope Provincial Division did not oppose the application but on the question of a variation of a trust he referred to Honore's South Africa Law of Trusts 4th Edition by Honore and Cameron at 417. On 6 January 1996 Conradie J dismissed

the application with costs but granted leave to appeal to this Court. The appeal was not opposed by any of the respondents.

The grounds upon which the appellants relied in the founding affidavit can be summarised as follows. The right of the trustees to vary the trust was not unfettered and if the proposed variations were not in the interests of both the donor and the potential beneficiaries, it was the duty of the trustees not to agree thereto. The trustees, in agreeing to the amendments, failed to comply with their duty as trustees to consider the interests of the potential beneficiaries of the trust and the possible consequences of the amendments for such beneficiaries. The amendments contained in each of the notarial deeds of amendment were not in the interests of the potential beneficiaries of the trust. The trustees would appear to have acted directly on the donor's request and without

independent consideration of the effect of the proposed amendments which their office as trustees required. The founding affidavit concluded with the submission that the decisions of the trustees were irregular and should be set aside.

The origin of the grounds on which the appellants relied is to be found in the views expressed in a number of articles which appeared in legal journals shortly after the judgment of this Court in Crookes N.O. and

Another v Watson and Others 1956(1) SA 277 (A). The appellants relied strongly, both in the Court a quo and in this Court, on the following view of Honore and Cameron op cit at 417.

> "Though the matter has not been authoritatively decided, we consider that a trustee is not always free to agree with the founder that the trust should be cancelled or varied, even if it is not expressed to be irrevocable. A trustee holds an office ... and is not merely party to a contract with the founder. In principle therefore, in the absence of an express provision in

> the trust instrument, he is entitled to agree to revocation of variation only if he thinks that to do so is in the interests of both the founder and of the actual or potential beneficiaries ... It is fallacious to argue that a trustee can have no duty to take account of the interests of contingent beneficiaries or those with vested rights who have not yet accepted. His duty is to see to the execution of the trust to the best of his ability, and if the trust includes provision for beneficiaries who have not yet come into existence or accepted ... they must necessarily fall within the scope of his concern."

Reference was also made to Olivier, Trust Law and Practice at 44-45 where similar views are expressed.

In the Court a quo Conradie J expressed doubt whether, in view of dicta in Crookes case, he could accept the submission that the trustee "committed a breach of his fiduciary duty which meant that the purported variation of the trust was ineffective." He also had reservations about the alleged fiduciary duty of a trustee and he doubted that the office occupied by a trustee could by itself serve as a source of a fiduciary duty to a

potential beneficiary. In the event he found that the exercise of an equitable discretion to protect the interests of non-parties to a deed of trust is not imported by law into the office of a trustee.

Mr Walther, who appeared on behalf of the appellants in this Court, contended that the approach on which the appellants rely does not detract from the basic rule laid down in the Crookes-case. It will be recalled that according to the judgments of the majority in that case a trust inter vivos is in effect a contract for the benefit of a third person and unless the beneficiaries have accepted the benefits stipulated for them it can be varied by agreement between the founder and the trustee. Mr Walther submitted that an approach which recognises that an inter vivos trust in South African law is not purely contractual in nature should be adopted. Support for this approach is to be found, according to Mr Walther, not only in the minority

judgments of Schreiner JA and Fagan JA in Crookes' case but also in the judgment of Steyn JA in that case. He referred to what was said by Steyn JA at 304 F-G and 305 H-306 A. Once it is accepted that a trustee is not merely a party to a contract with the founder, the trustee, in view of his fiduciary position, so it was argued, may only agree to a revocation or amendment of the trust agreement if he considers it to be in the interests of the beneficiaries or potential beneficiaries. 1 cannot agree with this argument. Firstly, it must be pointed out that what has to be determined in this application is not whether the trustees are liable to the beneficiaries for a breach of an alleged fiduciary duty. What has to be decided is whether or not the amendments are valid. In Crookes' case two questions had to be decided. Centlivres CJ formulated the first question at 284 B-D as follows:

> "The first question to be decided in this appeal is whether a settlor, having executed a trust deed and having handed over

> the subject matter of the trust to the two trustees appointed in terms of the deed, one of whom is himself and the other of whom holds his office during the pleasure of the settlor, is entitled to amend the deed with the concurrence of his co-trustee and of the only beneficiary who has accepted any benefit under the deed, if the result of such an amendment will be to prejudice the rights of other beneficiaries who have not notified their acceptance of any benefit and who have not agreed to the amendment."

This question was answered in the affirmative by both Centlivres CJ and Van den Heever JA. Although Steyn JA stated in his judgment that a trust may also have other than contractual incidents it is quite clear from his judgment that he also answered the aforesaid question in the affirmative. See Crookes' case at 306 A-C.

In the present case the amendments were made before the benefits had been accepted by or on behalf of the children of Charles and Eleanora and consequently they were on the authority of Crookes' case, valid.

During argument Mr Walther, in reply to a question, submitted that the majority judgment was wrong but the submission was made without any motivation or conviction. Subject to departure from previous decisions that might be influenced by the provisions of s 39(2) of the Constitution of the Republic of South Africa, Act 108 of 1996, it is well known that this Court is bound by its own decisions "and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors - such preference, if allowed, would produce endless uncertainty and confusion." (Per Stratford JA in Bloemfontein Town Council v Richter 1938 AD 195 at 232.) In my judgment it cannot be said that the majority judgment was clearly wrong.

In order to overcome the hurdle presented by the fact that there had been no acceptance of the benefits by the appellants and the other more remote beneficiaries Mr Walther endeavoured to invoke what may be called "the exception of Perezius." Perezius ad Cod. 8. 55 stated as a general rule that a donation is recoverable unless accepted by the donee. He added, however, the important qualification that

> "in the case of the settlement of property in a family the acceptance of the first donee enures for the benefit of and is considered an acceptance by all the beneficiaries."

The Perezius exception has been received and applies to beneficiaries under trusts created inter vivos in South Africa. See Honore and Cameron op cit at 422 n 72, and cases there cited.

It was pointed out, however, by Centlivres CJ in Crookes' case at 288 E-H that the exception only applies if the donated property is to remain

in the family of the donor and also is to be inalienable and is to remain intact. It is clear from the provisions of the trust deed in the present application that the trustees were empowered to sell the assets and to invest the proceeds in such manner as they in their sole discretion deemed fit. There was also no prohibition of alienation to persons outside the family imposed on the ultimate beneficiaries of the trust capital. Furthermore the donor, Herbert, Charles and Eleanora were only entitled to the income of the trust and their acceptance of that benefit cannot be regarded as an acceptance of the capital which was to go to the ultimate beneficiaries. The exception of Perezius cannot therefore apply to the present case.

It remains to deal with Mr Walther's alternative argument that the Court a quo erred in not setting aside the second and third amendments on the grounds of undue influence. This argument was founded on the

6 allegations contained in the affidavit of Eleanora. She stated that she and

the donor, her uncle, were good friends but when she married in 1963 and moved to Germany he did not approve and was in fact very unhappy about it. In 1985 she received a letter from the donor concerning the amendment of the trust. He wrote that his association with her children had, through force of circumstances, never been a close one. In view of this he had become increasingly unhappy at the thought of them receiving the same proportion of the trust as she would be receiving. Eleanora stated that the donor continuously put pressure on her late mother to persuade her (Eleanora) to agree to the amendment. The donor resided with her mother and he constantly followed her around the house discussing the question of the amendment of the trust deed and her reluctance to consent thereto. Her mother repeatedly told her to sign the document to avoid a deterioration of

7 their relationships. In order to avoid a confrontation and further

unpleasantness she eventually signed the required power of attorney. With regard to the third amendment Eleanora stated that the donor, in the same manner as before, again placed emotional pressure on her through her mother to sign the power of attorney. She again signed the document to put an end to the harassment of her mother and to avoid a confrontation.

In order to have a contract set aside on the grounds of undue influence it must be proved, infer alia, that the influence complained of was exercised in an unscrupulous manner in order to induce the innocent party to consent to the transaction. See Patel v Grobbelaar 1974(1) SA

532 (A) at 534 A-B. In my view it has not been proved that the donor acted in an unscrupulous manner. I am inclined to agree with the Court a quo that the situation which arose was not unusual in a family context and

8 that the donor's conduct cannot be described as exertion of oppressive

control over another. The alternative ground of attack on the validity of the second and third amendment was in my judgment correctly rejected by the Court a quo.

The appeal is dismissed with costs.

A P VAN COLLER, AJA

VAN HEERDEN, DCJ
F H GROSSKOPF, JA
HOWIE, JA
OLIVIER, JA
Concur