ANDREWS v *PARTINGTON*: *A RULE OF CONSTRUCTION RE-EXAMINED*

In answering the "short but not easy" question posed by the recent case of *Re Clifford* [1980] 1 All E.R. 1013 as to what amounts to a sufficient intention to exclude the operation of the rule in *Andrews* v *Partington* [1775-1802] All E.R. Rep 209, Sir Robert Megarry V.C. found himself on "difficult terrain in uncharted territory".

That being so, it is intended, in this note, first, to look at the rule in *Andrews* v *Partington* itself, then, secondly, to examine the difficulties raised by *Re Clifford* before, finally, estimating to what extent that case broke new ground as regards the application of the rule in *Andrews* v *Partington*.

The rule in *Andrews* v *Partington* is most often quoted as it is found in *Hawkins on the Construction of Wills* (3rd Edn (1925) at p.96):—

> Where there is a bequest of an aggregate fund to children as a class, and the *share of each child* is made payable on attaining a given age, or marriage, the period of distribution is the time when the *first* child becomes entitled to receive his share, and children coming into existence after that period are excluded.

Although the statement of the rule in those terms refers only to wills, it is clear from the decision in *Re Knapp's Settlement, Knapp* v *Vassell* [1895] 1 Ch. 91 that the rule may equally apply to a settlement inter vivos. Thus North J. said at 98-9:

> . . . I certainly do not know of any case in which the doctrine has been applied to the case of a settlement; but, on the other hand, no one can refer me to any statement in any case whatever indicating any reason why the rule should not apply to a voluntary settlement—a settlement by a voluntary deed instead of to a settlement by will; and I do not see any distinction between the two.

The rule has been variously described as a rule of convenience, not founded on the intentions of the testator, as in *Re Emmet's Estate, Emmet* v *Emmet* (1880) 13 Ch.D. 484, and as a rule of construction, as in *Re Bleckly, Bleckly* v *Bleckly* [1951] 1 All E.R .1064.

In *Re Emmet's Estate* (at 490), Jessel M.R. gave his view of the nature and ambit of the rule in *Andrews* v *Partington* thus:

> There has . . . been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being alo a rul that you let in all who are born, up to the time when a share becomes payable.

In *Re Bleckly* (at 1070), however, Sir Raymond Evershed's opinion was that—

> Although this rule is called a rule of convenience . . . I think . . . that it is, in truth, a rule of construction. It may be artificial, it may be said to defeat the apparent intention of the testator, but it is a rule of construction and must, therefore, give way to the language of the will in question, if the language is sufficiently clear to displace it . . .

Whichever view of the nature of the rule is preferred, it is clear that the rule itself defers to a contrary intention expressed in the instrument.

What amounts to a contrary intention in these circumstances must, it seems from the cases, be evidenced in words which are so strong that this question is answered in the affirmative — "Is it clear from the language of the instrument in the circumstances in which that language is used that the rule is not applicable?" (per Russell L.J. *Re Edmondson's Will Trusts* [1972], 1 All E.R. 444, 449).

In *Re Edmonson's Will Trusts* the Court of Appeal was concerned to ascertain whether a trust in favour of children "whenever born" served to exclude the rule in *Andrews* v *Partington* or whether that expression was to be construed in the same way as these apparently similar ones which have been held not to exclude the rule — "all the children . . . whether now born or hereafter to be born"; "all and every the children of X"; "the children of X as many as there might be"; "all or any the children or child of X".

Russell L.J. took the view that the four last mentioned expressions all shared a common charactertistic in that they were all general references to the future "*without express limit* in time and, therefore, consistent with a limit in time imposed by the direction for vesting and the rule". (at 449) But, he continued to explain, the expression "whenever born" was to be looked at differently it was "a particular reference to the future *expressly unlimited* in time and, therefore, readily to be distinguished as inconsistent with a time limitation such as is imposed by the rule" (at 449).

Russell L.J.'s distinction in the Court of Appeal was not appreciated in the lower court by Goulding J. who had held that all the terms discussed above attracted the rule in *Andrews* v *Partington*. Such a discrepancy of opinion between two eminent judges highlights the difficulties which face draftsmen in finding words which are so sufficiently emphatic that "it is impossible to make [the words] march in step with the rule" (in *Andrews* v *Partington*) as Buckley J. put it in *Re Wernher's Settlement Trusts* [1961] 1 All E.R. 184, at 188. "Whenever born" are words which satisfied that test in Russell L.J.'s opinion. For practical purposes, then, the position in such cases appears clear: if a draftsman wants to avoid the rule in *Andrews* v *Partington* where there is a gift of an aggregate fund to children as a class and the share of each child is made payable on attaining a given age or marriage then he should use the phrase "whenever born" instead of, for example, the phrase "all or any the children or child of X".

This practical conclusion which, it is submitted, is to be drawn from *Re Edmondson's Will Trusts* is subject to a caveat: on the facts of that case the gift of the fund was to a single and not a compound class. What amounts to sufficiently strong language to exclude the rule in *Andrews* v *Partington* in a gift to a compound class is a more complex question. It is the question which confronted Sir Robert Megarry V.C. in *Re Clifford*.

In *Re Clifford* the settlor, by a deed dated 25 August 1954, settled certain shares in favour of his grandchildren, the children of his son, John Lewis Clifford in, inter alia, the following terms:

> Clause 2. The Trustees shall hold the Trust Fund in Trust for [(a)] the children of the Settlor's son the said John Lewis Cyifford born in the Settlor's lifetime or after his death who before the expiration of the period of Twenty one years

from the death of the survivor of the Settlor and the said John Lewis Clifford shall attain the age of Twenty five years and [(b)] the other children or child of the said John Lewis Clifford living at the expiration of such period and if more than one in equal shares.

At the date the settlement was made the settlor's son, John Lewis Clifford, had two infant children, one aged about 2½ years, the other about 2½ months. Subsequently, in 1956 and 1960 two more children were born to John Lewis Clifford. The settlor died in 1955. Thus, the relevant period under Clause 2 was 21 years from the death of the son.

The argument advanced on behalf of the four children mentioned above was that once the eldest had attained 25 years the rule in *Andrews* v *Partington* applied to close the class and confine the settlement to such of the children then living who had reached 25 years and to those then living who reached 25 years at some future date. (At the time of the litigation the eldest and second eldest had already attained 25 years.)

Against that counsel for the Trustees argued on behalf of any children of the son yet to be born who would be excluded from the settlement in Clause 2 if the rule in *Andrews* v *Partington* was to be applied to it. Their argument was, in essence, that Clause 2(b) showed a sufficient contrary intention to exclude the operation of the rule — in other words, that the language in Clause 2(b) was so emphatic that it was "impossible to make [the words] march in step with the rule" (*Re Wernher's Settlement Trusts*, per Buckley J. at 188). This argument was expressed in the form of two main submissions —

(1) If it were accepted that the rule in *Andrews* v *Partington* could not apply to Clause 2(b) if that clause stood alone, (as Sir Robert Megarry suggested it could not at 1017 ". . . if there is a single point of time at which it is to be determined which children are to take, no question of the premature closing of the class by reason of one member becoming absolutely entitled in advance of the others can possibly arise"), then, argued counsel for the Trustees, the rule could not apply to a compound class of which Clause 2(b) was one limb. The inapplicability of the rule to one limb of a compound calss necessarily excluded the rule from applying to the entire class.

(2) If the application of the rule would prevent one limb of the words of gift from having any operation at all except in improbable circumstances, then that sufficed to exclude the rule. Sir Robert Megarry succinctly explained the ramifications of this contention at 1017:—

In this case, if the rule were to be held to apply to the gift, and it took effect in respect of limb (a), then limb(b)could not operate. The only circumstances in which limb (b) could have had any effect were the improbable circumstances of the settlor and the son dying promptly after the making of the settlement. In that case, neither of the two children then living (then aged 2½ years and a few months respectively) could attain the age of 25 years within 21 years of the death of the settlor and the son. Each would then be able to take only by satisfying limb (b) by living until 21 years had elapsed after the death of the settlor and the son. This, said counsel for the trustees, was improbable, for the natural expectation when the settlement was executed was that the son would live for many years and that he would or might have further children, as in fact he did. The bare existence of improbable circumstances in which limb (b) could have operated even if the gift was held to be subject to the rule was not enough to leave it within the scope of the rule: instead, it showed that the rule was intended to be excluded.

Sir Robert Megarry dealt with each submission in turn.

As regards the first submission, Sir Robert Megarry stated that in order that the rule in *Andrews* v *Partington* be excluded the provision in the settlement must be necessarily incompatible with it or it must be impossible for the two to march in step — not merely improbable. "The mere fact that the rule cannot apply to part of a compound class does not appear to me to demonstrate any incompatibility of the rule with the other part, or with the gift as a whole." (at 1018) An additional reason for rejecting this first proposition was that it would be extremely inconvenient for the children who were already 25 years old, as they would not know, until their father's death, what the minimum size of their share would be or for another 21 years after that what its exact size would be.

As regards the second submission, Sir Robert Megarry did not think that it accorded with the test laid down in *Re Wernher's Settlement Trusts*:

> The question is one of impossibility, not improbability. If the application of the rule would deprive limb (b) of all possible effect, I would expect the rule to be excluded. But where, as here, it does not do that but merely reduces the scope of limb (b) to circumstances which, though by no means impossible, are less probable than other circumtances, then I can see nothing to exclude the rule . . . . In any case, I do not think that the exclusion of the rule can depend on a mere estimate of a degree of improbability.

In conclusion, therefore, Sir Robert Megarry decided that the rule in *Andrews* v *Partington* applied to the case, with the result that, on attaining the age of 25 years, the eldest child became absolutely and indefeasibly entitled to a quarter share of the capital under the trusts of the settlement.

In trying to estimate to what extent *Re Clifford* broke new ground as regards the application of the rule in *Andrews* v *Partington* Sir Robert Megarry helps by indicating that, as regards the first proposition of counsel for the trustees, he is on "difficult terrain in uncharted territory" (at 1018).

None of the cases cited in argument concerned, precisely, a gift to a compound class where the rule applied to one part but not the other with the resultant question: was the rule to apply to the whole class or not? It is submitted that Sir Robert Megarry dealt with this question, raised by the 'Trustees' first argument, in a fashion in keeping with the relevant authorities as far as they went and as a logical extension of them thereafter.

Limb (a), if it stood alone, plainly attracted the rule in *Andrews* v *Partington*. Limb (b) if it stood alone, on the other hand, equally plainly did not. Thus there was an impasse. Was the rule to obtain in respect of the compound gift or not?

Each limb having, as it were, cancelled each other out if considered alone, Sir Robert Megarry had to weigh up other relevant factors to decide which way the scales were ultimately to tip. Bearing in mind the Courts' eagerness to be able to close classes and inform beneficiaries of their minimum entitlement, whence the rule in *Andrews* v *Partington* originally emerged, Sir Robert Megarry was anxious not to inconvenience the children who had already attained 25 years by holding that the class would not close finally until their father's death, with the result that they would be uncertain of their full entitlement until 21 years thereafter. That consider-

ation, although insufficient alone to hold that the rule in *Andrews* v *Partington* applied to the compound gift, was certainly a sufficient incentive to the court to look for other factors which supported the application of the rule in this case.

Those "other factors", it is submitted, Sir Robert Megarry found in the discussion of terms in the authorities canvassed in argument in *Re Edmondson's Will Trusts*. In that case the only expression out of five apparently equally similar ones which excluded the rule in *Andrews* v *Partington* was the expression "whenever born". The expression, for example, "the children of X as many as there might be" could not be looked at in the same light as "such of the children of X whenever born" although, it is submitted, that most laymen and many lawyers would, at first sight at least, find little to distinguish the two.

What that decision shows, it is submitted, is the courts' determination to find the rule in *Andrews* v *Partington* excluded only in the very clearest circumstances and only when all inguistic arguments in favour of importing the rule have been exhausted. Viewed in this way Sir Robert Megarry's excursion into "uncharted terrain", although exploratory, seems to benefit from the use of tested instruments to keep him on course.

As far as the second argument raised by counsel for the Trustees was concerned, Sir Robert Megarry did not seem to think that it raised a new point of law. His view was that the argument did not accord with the accepted test as expounded in *Re Wernher's Settlement Trusts*: Was it impossible to make the words of the settlement march in step with the rule? Improbability did not equal impossibility therefore the argument failed. An analysis of the relevant authorities must, it is submitted, have produced this answer to the Trustees' second argument. On a purely linguistic basis alone it is irrefutable.

Thus Sir Robert Megarry examined the relevant law and extended it consistently with the existing authorities and attitudes of Chancery. A question which remains, however, is how far he reflected the settlor's true intention by his decision? That will probably never be known. What is known, however, is that rules of construction (or convenience), of which *Andrews* v *Partington* is one, enable a court to ascertain a settlor's intention in so far as it is able to do so from the language he uses and that such rules are invaluable in the efficient administration of Chancery matters. The extension of such rules in decisions the calibre of *Re Clifford* make for every confidence on the part of settlors, beneficiaries and lawyers alike in this area of the law.

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A BANK'S DUTY OF CARE

The recent decisions in *Manthel Holdings Ltd and Manthel Motors Ltd* v *Broadlands Finance Ltd and Australia & New Zealand Banking Group Ltd* [Supreme Court, Wellington, 14 May 1979, A 559/77], *Remfor Industries Ltd* v *Bank of Montreal* (1979) 90 D.L.R. (3d) 316 and *Barclays Bank Ltd* v *W. J. Simms Son & Cooke (Southern) Ltd* [1979] 3 All E.R.