Privy Council Appeal No. 17 of 1980

Daisy Elizabeth Lilley – – – – – – *Appellant*

v.

The Public Trustee of the Dominion of New Zealand – – – *Respondent*

FROM:

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY 1981

Present at the Hearing:

LORD WILBERFORCE
LORD SIMON OF GLAISDALE
LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRIDGE OF HARWICH

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a judgment of the Court of Appeal of New Zealand affirming a decision of Roper J. in the Supreme Court.

The action was brought by the appellant under the Law Reform (Testamentary Promises) Act 1949, as amended, in the following circumstances.

The appellant had lived in a house in Gibbon Street, Christchurch, as unpaid housekeeper and children's nurse since she was 16. The house belonged to her uncle. He, on his death in 1939, bequeathed it to his son Mr. Francis Israel Lilley ("Mr. Lilley"). After 1939 the appellant remained in the house as housekeeper and companion to Mr. Lilley until his death in 1974.

The respondent is the executor and trustee of Mr. Lilley's will: he took out probate on 17 April 1974.

The appellant claimed that Mr. Lilley made to her certain testamentary promises that in his will he would either leave her the house or would preserve for her the occupation of the house for the rest of her life. In fact, he had by a will made in 1942 provided only two years' occupation for her, and subject to this had left the property to his surviving brother and sister. The appellant was unaware of this action.

After Mr. Lilley's death in 1974 the appellant remained in the house. She said that she was given assurances by the devisees that she could

remain there indefinitely. The respondent however gave her notice to quit in March 1976 whereupon she took legal advice, and indicated that she would bring proceedings for provision to be made for her, as regards the house, out of the estate. The respondent opposed her claim on the ground that she had not, as required by s.6 of the Act of 1949, commenced her action within 12 months after the taking out of representation to Mr. Lilley's estate (17 April 1974). The Court has power to extend the time, by virtue of a proviso to s.6, which however provides that the application for extension must be made " before the final distribution of the estate ". The appellant has, by notice of motion dated 28 October 1976, asked that the time should be extended accordingly.

The appeal turns upon the meaning to be given to the words just quoted. The rival contentions as to this are the following. The respondent submits, and the Court of Appeal has held, that the words refer to the point of time at which the executor of the deceased person, having completed the administration of the estate, becomes the trustee. This has been referred to as the " equitable rule ". The trial judge found that this date was on or about 19 December 1974. The appellant argues that " distribution " means " actual distribution "—i.e. an actual parting with the assets by the executor, or trustee, to the beneficiaries. On this argument the final distribution has not yet been made.

The first step, in deciding between these alternatives, must be to consider the terms of the Act as a whole. In its present form, which it assumed as to relevant provisions in 1961, and which was operative at the date of the action and of this appeal, it reads, so far as relevant, as follows:—

> " 3. **Estate of deceased person liable to remunerate persons for work done under promise of testamentary provision**—(1) Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise.
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> 4. **Effect of order of Court**—(1) Upon any order being made under this Act, the portion of the estate comprised in or affected by the order shall be held subject to the provisions of the order.
>
> (2) Where an order is made under this Act—
>
> (*a*) . . . .
>
> (*b*) For all purposes other than those of the Estate and Gift Duties Act 1968—

(i) . . . .

(ii) Any property which by the order is vested in or directed to be transferred or assigned to any person shall be deemed to have been devised or bequeathed by the deceased to that person.

6. **Limitation of actions**—No action to enforce a claim under this Act shall be maintainable unless the action is commenced within 12 months after the personal representative of the deceased took out representation:

Provided that the time for commencing an action may be extended for a further period by the Court or a Judge, after hearing such of the parties affected as the Court or Judge thinks necessary, and this power shall extend to cases where the time for commencing an action has already expired, including cases where it expired before the commencement of this proviso; but in all such cases the application for extension shall be made before the final distribution of the estate of the deceased, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court, and after every notice (if any) of an intention to make an application under this Act has lapsed in accordance with subsection (6) of section 30A of the Administration Act 1952, as inserted by section 2 of the Administration Amendment Act 1960, shall be disturbed by reason of the application for extension, or of an order made on that application, or of any action or order that is consequential thereon."

In their Lordships' opinion a reading of these sections points towards the "equitable rule" construction. The references in s.3 to "administration", "estate" and "personal representatives" suggest, in their Lordships' view rather strongly, that the relevant stage of the application of the section is one at which the personal representatives are still acting as such and the estate has not been fully administered. S.4, confirming that any order under the Act is to be treated as a devise or bequest, is, at the lowest, consistent with this view. The reference in s.6 to a distribution made by the administrator before receiving notice of the application for extension is perfectly consistent with the same interpretation, since distributions may be made before the administration is complete. These indications point with some degree of clarity towards the "equitable rule" interpretation, which, moreover, derives support from the fact that the Supreme Court of New Zealand in 1931 accepted it as correct when construing similar words appearing in the Family Protection Act 1908 (*Public Trustee v. J. A. Kidd* [1931] N.Z.L.R.1). Its correctness has, however, been put in question by a recent decision of the High Court of Australia upon similar words in a New South Wales Act concerned with family maintenance (*Easterbrook v. Young* (1977) 136 C.L.R. 308), whose reasoning the Court of Appeal (N.Z.) found "persuasive if not compelling". So a fresh examination of the legislation is called for.

In aid of this, their Lordships think it proper to consider the legislative history of the relevant dispositions, as they came into the legislation in its present form. The Act as reprinted in 1979 is, relevantly, made up of (i) the Act of 1949, (ii) an amendment of 1953 and (iii) an amendment of 1961. The original Act of 1949 was itself preceded by an Act of 1944, which it replaced. There can be no doubt that consideration of these successive statutes forms a legitimate and indeed indispensable guide to the legislators' intention.

The original Act as regards testamentary promises was the Law Reform Act 1944. That Act contained (s.3) a period of limitation of 12 months after the taking out of representation, with no provision for an extension of time.

The 1944 Act was repealed by the Act of 1949. That Act enacted s.3(1) substantially as regards matters now relevant in the form which it now bears (see above). It enacted s.6 in the following form:—

> " No action to enforce a claim under this Act shall be maintainable unless the action is commenced within twelve months after the personal representative of the deceased took out representation:
>
> Provided that any such action may be commenced at any time within three months after the passing of this Act, notwithstanding that the aforesaid period of twelve months has expired before or after the passing of this Act, if at the time of the commencement of the action the estate of the deceased has not been finally distributed. For the purposes of this proviso, no real or personal property that is held upon trust for any of the beneficiaries in the estate of the deceased shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the executors or administrators after they have ceased to be executors or administrators in respect of that property and have become trustees thereof, or by reason of the fact that it is held by any other trustees."

The effect of this was to allow a period of three months' grace after the passing of the enactment, subject to the proviso that the estate had not been finally distributed, and to add words which their Lordships will refer to as " deeming words " relating to " distribution " and forming part of the estate. The fact that such a deeming provision was thought necessary suggests that without it the proviso would, or at least might, be read as embodying the " equitable rule ". The reasons which may have prompted the legislature to allow the three months' period of grace are set out in the judgment of the Court of Appeal, and their Lordships need not enter into them. What is now relevant is that the whole of the proviso, including the " deeming words " became spent after the expiry of the period of three months.

The legislature next intervened in 1953. By s.2 of the Law Reform (Testamentary Promises) Act of that year the (spent) proviso to s.6 was repealed. The legislature did not however re-enact the substance of the proviso on a permanent basis. What it did enact was the following:

> " Provided that the time for commencing an action may be extended for a further period by the Court or a Judge, after hearing such of the parties affected as the Court or Judge thinks necessary, and this power shall extend to cases where the time for commencing an action has already expired, including cases where it expired before the commencement of this proviso; but in all such cases the application for extension shall be made before the final distribution of the estate of the deceased, and no distribution of any part of the estate made before the date of the application shall be disturbed by reason of the application or an order made thereon."

Apart from some provisions at the end of the proviso (added in 1961) which are irrelevant to the present question, this proviso is as it now appears. The critical point is that it does not include the " deeming words ".

Some further amendments were made in 1961, which do not affect the issue under discussion. The " deeming words " were not restored.

Their Lordships, in entire agreement with the Court of Appeal, consider that there is only one conclusion to be drawn from these legislative developments. The " deeming words " were plainly designed to exclude the " equitable rule " and instead to make the ultimate bar to proceedings depend upon actual distribution. Their disappearance from the Act in 1953, after their presence in the Act of 1949, must be taken to be the result of a deliberate decision. That decision can only be that the " equitable rule " is to apply. A clearer case of revealed legislative intention cannot be imagined: this must dispose of the appeal. Their Lordships find the judgment of the Court of Appeal unanswerable in its reasoning.

There remain three matters on which brief comment is called for.

1. There is, in New Zealand, in addition to legislation concerned with testamentary promises, an older body of enactments concerned with family protection, a matter as to which New Zealand was the pioneer. Much of the wording in the later corpus has been taken over from the earlier. The various provisions as to time limitation, which have been considered above, have appeared at various periods in the Family Protection Acts: the " deeming words " were introduced in 1939. The Court of Appeal in the present case expresses the view that this was intended to abrogate the effect of the decision in *Kidd's* case (u.s.) and of a later decision *In re Donohue* [1933] N.Z.L.R. 477: their Lordships have no reason to differ from this opinion. The " deeming words " remain in effect in the family protection legislation. The appellant founded an argument upon this, to the effect that it would be anomalous if different rules as to what is meant by " final distribution " applied in the two codes, and urged that the Court, by judicial decision, should interpret the words, where they apply to testamentary promises, so as to bring about equivalence in the two sets of laws. But, whatever the merits in policy might be for assimilating the legislation (and reasons can be suggested why a stricter limitation might be applied as regards testamentary promises than is appropriate for family protection), their Lordships consider that the suggested assimilation by judicial decision has been precluded by the legislature. The " deeming words " have been just as deliberately omitted from the Testamentary Promises Acts as they have been inserted, and left, in the Family Protection Acts.
2. As regards the case of *Easterbrook v. Young* (u.s.), their Lordships do not consider it appropriate to embark upon an examination of the reasoning of the High Court. As a decision upon family maintenance legislation in Australia, it is of course conclusive. As regards family protection legislation in New Zealand, it is not an authority which needs to be followed, in view of the clear legislative directions contained in the New Zealand Act of 1939 referred to above. Equally, as regards the testamentary promises legislation in New Zealand—which, though *in simili materia,* is after all a separate body of legislation admitting of differences in policy—the legislature in New Zealand has taken its own course which prevents *Easterbrook v. Young* from being an authority which can be invoked.
3. It will have been observed that their Lordships have reached their decision in this appeal by a consideration of the provisions of the New Zealand legislation together with their legislative history. They have not found it necessary, or appropriate, to appeal to the doctrine of parliamentary endorsement of judicial decision some of the authorities upon which are referred to in the judgment of

the Court of Appeal (*D'Emden v. Pedder* (1904) 1 C.L.R. 91, 110, *Webb v. Outrim* [1907] A.C. 81, 89, *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402, and compare *Galloway v. Galloway* [1956] A.C. 299, 320, *Farrell v. Alexander* [1977] A.C. 59).

The Court of Appeal expressed the view that the intention of Parliament to endorse the previous New Zealand decisions had been so clearly demonstrated that the Court was "preempted" from an independent examination of their validity, but then went on to reach their conclusion upon the meaning of "final distribution" by the more direct method which has appealed to their Lordships. Their Lordships, recognising that reservations have been, and continue to be, expressed as to the validity and force (preemptive or influential) of "legislative endorsement" prefer to confine themselves to the direct method of interpretation which in this case, as the judgment of the Court of Appeal well demonstrates, leads to a conclusive result.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

DAISY ELIZABETH LILLEY

v.

THE PUBLIC TRUSTEE OF THE DOMINION OF NEW ZEALAND

DELIVERED BY
LORD WILBERFORCE

Printed by HER MAJESTY'S STATIONERY OFFICE
1980