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Ilott - Upholding Testamentary Freedom

***Ilott (respondent) v The Blue Cross and others (Applicants)* [2017] UKSC 17**

After a litigation saga lasting for a decade, the judgment of the Supreme Court in the case of Mrs Heather Ilott was handed down on the 15th March 2017. As the sixth judgment in the matter, the case is remarkable not only for its longevity but for the series of reverses that successive courts at all levels of the judicial hierarchy have imposed upon decisions below. This is the first time that a case under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act) has reached the highest court in England and Wales, and the ramifications will doubtless take some time to trickle down. The judgment of the Supreme Court appears to mark a return to legal orthodoxy and in particular the protection of testamentary freedom, while highlighting (in Lady Hale's words) *"the unsatisfactory state of state of the present law".*

The Facts

The facts of the case are not particularly remarkable in themselves. The testatrix, Mrs Jackson, had one daughter, Mrs Ilott. They had been more or less estranged for the 26 years preceding Mrs Jackson's death in 2004, it appears largely in consequence of her disapproval of her daughter's decision to leave home at the age of 17 to live with the gentleman who became her husband, with whom she had five children. Mrs Ilott had at all time thereafter lived independently of her mother, but in straitened financial circumstances so that she was dependent upon state benefits, while her husband earned a modest living as an actor.

In her last will made in 2002 Mrs Jackson left the majority of her estate to a number of charities and made no provision for her daughter. This was a decision Mrs Jackson had made as early as 1984, reflected in an earlier will of that year. Mrs Ilott had been aware for many years of this decision and

had lived without any expectation of benefit from the estate.

Following Mrs Jackson's death in 2004 Mrs Ilott issued proceedings under the 1975 Act seeking provision from her late mother's estate on the basis that the will failed to make reasonable provision for her.

The Litigation

The litigation that followed went through six stages.

1. At first instance, on the 7th August 2007 District Judge Million in the Family Division held that the will failed to make reasonable provision and awarded Mrs Ilott £50,000 as capitalised reasonable maintenance. Result: Mrs Ilott £50,000.

2. Both Mrs Ilott and the charities appealed: her on the basis that £50,000 was insufficient, and they on the basis that her claim should not have been allowed at all. This was heard by King J. in the Family Division whose judgment dated 1/12/09 dismissed Mrs Ilott's claim and allowed the charities' cross-appeal. Result: Mrs Ilott £0.

3. Mrs Ilott appealed the decision of King J. to the Court of Appeal, which gave judgment on 31/3/11 in her favour but sent the matter back to the Family Division for a Judge (but not King J.) to decide quantum. As an ironic counterpoint, the charities sought permission to appeal to the Supreme Court but were refused permission, which might otherwise have shortened matters significantly. Result: Mrs Ilott £tba.

4. On 3/3/14 Parker J. in the Family Division gave judgment on the quantum of Mrs Ilott's appeal against the £50,000 award at first instance. Her appeal was dismissed, so that the original award of £50,000 stood. Result: Mrs Ilott £50,000.

5. Mrs Ilott appealed the £50,000 awarded at first instance and upheld by the High Court to the Court of Appeal, *inter alia* on the grounds that the District Judge had failed to consider the effect

of the award upon her state benefits. On the 27th July 2015 the Court of Appeal ruled in her favour, awarding her £143,000 to exercise her right to buy her housing association property, and a further sum of £20,000 to be invested for supplementary income without affecting her means-tested benefits.

In reaching this decision the Court of Appeal held that the District Judge had made two errors of principle in his approach. First, having held that the award should be limited in light of the long estrangement between Mrs Ilott and her mother and the lack of expectation of any benefit, he had not gone on to identify what the award should have been without these factors and the appropriate degree of reduction attributable to them. Second, he had made his award without knowing what the effect would be upon Mrs Ilott's means-tested benefits, where she would lose entitlement to some if in possession of capital exceeding £16,000.

Result: Mrs Ilott £163,000.

6. The charities appealed that decision to the Supreme Court. In its decision handed down on the 15th March 2017 the Court (Lord Neuberger, Lady Hale, Lords Kerr, Clarke, Wilson, Sumption and Hughes) unanimously allowed the charities' appeals, setting aside the award of £163,000 made in the Court of Appeal and upholding the initial award of £50,000 made 9 ½ years earlier by DJ Million. Result: Mrs Ilott £50,000

The Judgment

The judgment was given by Lord Hughes, with whom the rest of the Court agreed, and was augmented by a supplementary judgment of Lady Hale with whom Lords Kerr and Wilson also agreed.

The Court held that the District Judge had not made either of the two errors upon which the Court of Appeal relied to revisit his award, and consequently the Court of Appeal's order must be set aside and the order at first instance restored.

In a judgment that was surprisingly critical of the Court of Appeal, the Supreme Court reiterated that the matters to which the court must have regard in exercising its power to award reasonable financial provision are those listed under s.3 of the 1975 Act. For an applicant other than a spouse or partner, reasonable financial provision is limited to what it would be reasonable for her to receive *for maintenance only*. This is an objective standard, to be determined by the court. The limitation to maintenance provision represents a deliberate legislative choice of parliament and *demonstrates the significance attached by English law to testamentary freedom*. Maintenance cannot extend to any or everything which it might be desirable for the claimant to have, but conversely it is not limited to subsistence level. The level at which maintenance may be provided is flexible and falls to be assessed on the facts of each case, as at the date of hearing. While maintenance is by definition the provision of income rather than capital, it may be provided by way of a lump sum (judgment ¶¶12-25). I would add that the provision of a capitalised lump sum is almost invariably the preferable course).

As to the first error attributed to the District Judger, the process suggested by the Court of Appeal is not warranted by the 1975 Act, which does not require a judge to fix a hypothetical standard of reasonable provision and then increase or discount it with reference to variable factors. All of the s.3 factors, so far as they are relevant, must be considered, and in light of them a single assessment of reasonable financial provision should be made. The District Judge had clearly worked through each of the s.3 factors, and was entitled to take into account the nature of the relationship between Mrs Jackson and Mrs Ilott in reaching his conclusion.

As to the second suggested error, the District Judge had specifically addressed the impact on benefits twice. The Court of Appeal's criticism that his award was of little or no value to Mrs Ilott was unjustified. A substantial part of the award could be spent on replacing old and worn out household equipment which the family had previously been unable to afford. This fell within the provision of maintenance of daily living, and would avoid Mrs Ilott retaining capital for long above the £16,000 threshold, so that while benefit entitlement might be curtailed for a limited period, it would be likely to resume once the home had been effectively overhauled (judgment ¶¶29-41).

As to the ever-elusive definition of 'reasonable financial provision', the Court held that this can in

principle include the provision of housing, but ordinarily by creating a life interest rather than a capital and inheritable sum, which possibility appeared not to have been considered by the Court of Appeal.

Finally, and perhaps most importantly going forward, the Supreme Court held that the Court of Appeal's ruling gave little weight to Mrs Jackson's very clear wishes and the long period of estrangement. The Court of Appeal's justification for this approach, that the charities had little expectation of benefit either, should be treated with caution, given the importance of testamentary bequests for charities, and because the testator's chosen beneficiaries, whether relatives, charities or otherwise, do not need to justify their claim either by need or by expectation (judgment ¶¶44-47). This portion of the judgment is, I suspect, that which will be seen as a swing of the pendulum in future, highlighting the importance of testamentary freedom and the absence of need for a beneficiary by will to justify their position.

Lady Hale's addendum to the judgment reviews the history of the 1975 Act and preceding legislation. She highlights the unsatisfactory state of the law, giving as it does no guidance as to the weight of the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance. The approach under the Act requires a 'value judgment', which will almost invariably be problematic where the public and judiciary hold a divergent range of opinion regarding the circumstances in which adult descendants ought or ought not to be able to make a claim on an estate which would otherwise go elsewhere (¶¶49-66).

Practice Points

First and foremost, I imagine that the judgment of the Supreme Court will serve as somewhat of a brake upon the frequency of claims for provision by able-bodied adult claimants, previously emboldened by earlier manifestations of the Ilott saga. The emphasis placed by the Court upon the importance of testamentary freedom should give many potential claimants - and those advising them - significant pause for consideration.

Subject to that, the following points seem to b of significance:

1. The limitation in the 1975 Act to provision for maintenance is a deliberate legislative choice, and is of considerable importance.

2. Maintenance is however not limited to subsistence and can be interpreted flexibly and on a fact-specific basis. Importantly, it can in many cases be capitalised as a lump sum from which both income and capital could be received. 'Maintenance' in this broad sense might encompass a vehicle to allow someone to get to work and to transport her children, household appliances and maintenance or decoration work, and/or a life interest in property.

3. *Re Coventry* [1980] Ch 461 remains good law: the Court is not there to re-write the will of the deceased and in particular is not there to provide rewards for meritorious conduct.

4. What has hitherto been relied upon by practitioners as a two-stage approach to claims is not necessarily correct: what is required is a broad brush approach to very variable personal and financial circumstances.

5. In considering claims, a 'value judgment' is a preferable term to the exercise of discretion, and once a value judgment has been made an appeal court should be slow to interfere.

6. State benefits must be taken into account as a resource of a claimant, and in particular the effect of any award upon the ongoing provision of benefits is an important factor to be considered.

7. Factors such as a 25-year estrangement and (here) Mrs Jackson's very clear wishes in her will are important.

8. As a point which will resonate heavily in favour of bequests to charities, they as the chosen beneficiaries depend heavily on legacies to do work which is by definition for public benefit, so that what might hitherto have been seen as a virtual open season upon organisations that have no definable 'needs' is emphatically at an end.

9. As highlighted by Lady Hale, the present law however gives no guidance on the factors to be taken into account in considering whether a claimant is deserving or undeserving of maintenance.

Conclusion

The effect of the decision will of course take some time to permeate through the legal profession and the Courts. As mentioned above, I imagine that it will lead to some moderation in the frequency of claims, and perhaps to more care in the formulation of such claims as are brought. As ever, there can be no substitute to obtaining advice at the outset when considering a claim, and negotiation whether through ADR or otherwise at the earliest stage is almost always preferable to bringing contested claims which, as Mrs Ilott found, can take almost unimaginable amounts of time and which are by their very nature prone to uncertainty. This uncertainty is particularly true in the case of 1975 Act claims, and is in large part attributable to the unsatisfactory nature of the judicial value judgment required by s.3, as highlighted by Lady Hale.

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