Privy Council Appeal No. 11 *of* 1952

Edie Maud Leeder - - - - - - - - - *Appellant*

v.

Nance Ellis - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH OCTOBER, 1952

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* LORD COHEN]

This appeal raises a point under the New South Wales Statute "Testator's Family Maintenance and Guardianship of Infants Act, 1916" (hereinafter referred to as "the Act").

Section 3 (1) of the Act so far as material is in the following terms:—

> "If any person (hereinafter called 'the Testator') dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them."

Section 4 (1) enacts that every provision made under the Act shall, subject to the Act, operate and take effect as if the same had been made by a codicil to the will of the deceased. Section 5 (1) provides that the Court may not entertain an application by a party claiming the benefit of the Act unless in the case of a party dying after the passing of the Act the application is made within twelve months from the date of the grant or re-sealing in New South Wales of probate of the will. Section 6 (1) requires that an order making any provision under the Act shall *inter alia* specify the amount and nature of such provision and the part or parts of the estate out of which such provision shall be made. Section 6 (4) enables the Court on the application of the executor or of a person beneficially interested in the estate to rescind or alter any order making any provision under the Act.

Their Lordships do not find it necessary to refer to any other provision of the Act but would observe that neither section 6 (4) nor any other provision in the Act enables the Court to re-open the matter at the instance of an applicant under the Act whose application has been rejected.

The testator Herbert Ellis the terms of whose will gave rise to these proceedings died on the 28th July, 1949. He had been married once only and left him surviving his widow the respondent and three children--a son aged 33 and married, a married daughter and a younger daughter aged 17 who lived with her parents.

By his will dated the 27th June, 1947 the testator appointed the appellant executrix and trustee of his will; be bequeathed to her two specified articles of furniture and to his widow the rest of his furniture; he left the whole of his residuary estate to the appellant absolutely. Probate was granted to the appellant on the 15th February, 1950.

The estate of the testator consisted only of the furniture (which was claimed by the respondent to be her own property) and a cottage which was the matrimonial home, was valued as at the date of the testator's death by the Valuer-General at £1,000 and was subject to a mortgage on which there was owing about £887.

The appellant had lived with the testator and his family in the matrimonial home from some time in the year 1931 until January 1933 when she left but thereafter the testator spent almost every weekend with the appellant from Saturday morning until Sunday evening. The rest of his time he lived with his wife. He had been an invalid pensioner from 1943 until his death.

Those being the circumstances it is not surprising that on the 8th March, 1950 the respondent took out a summons under the Act asking that provision be made for her maintenance, education or advancement.

In her affidavit in support of that summons she said that she had no property from which she derived income and that her only income was a widow's pension of £1 17s. 0d. a week and any contributions her unmarried daughter or her son might choose to make. She referred to the Valuer-General's valuation of the cottage at £1,000 and made her claim to all the furniture in the house. In the course of her affidavit she said that she had received substantial support from her son during her husband's lifetime after her husband became an invalid. She did not specify the nature of the support but their Lordships think that the context indicates that the support took the form of periodical payments. The son who was called did not give any evidence to suggest that he was willing to provide any substantial capital sum.

Rule 5 of the Rules made under the Act required the appellant as executrix when entering an appearance to the summons to file an affidavit setting out the nature and amount of the estate and giving such information as might be available to her as to the family of the testator and the persons beneficially entitled to the estate. In compliance with the Rule the appellant filed an affidavit in which *inter alia* she valued the cottage at £1,000 "as per the Valuer-General's certificate" and stated that the sum of £886 13s. 4d. was owing under the mortgage thereon. She also claimed that the testator was indebted to her in sums totalling £497 13s. 7d. These debts had not been disclosed in the affidavit lodged with the application for administration, but the trial judge accepted as satisfactory the explanation of the omission which she gave in cross-examination. The appellant filed a further affidavit dealing with the ownership of the furniture and with her relationship with the testator. Their Lordships do not find it necessary to go into these matters in detail.

There is one other matter of fact to which reference must be made. At the date of the testator's death the cottage was subject to the Land Sales Control Act, 1948, which in effect restricted its value to what would have been a fair and reasonable price for it on the 10th February, 1942. This Act ceased to apply to the cottage on the 1st September, 1949.

The case came before Sugerman, J. (who their Lordships were informed happened to be the Judge in New South Wales appointed to deal with Land Valuation matters), on the 28th July, 1950. The respondent and her son were called and so was the appellant. The cross-examination of the appellant was directed mainly to the validity of the debts claimed by

the appellant to be due from the estate but it also emerged from the cross-examination that the financial position of the appellant was far more secure than that of the respondent.

In these circumstances it is not surprising that the trial Judge expressed the view which Mr. Barwick for the appellant did not seek to contest that if there were available in the estate the means of making further provision for the respondent, that should be done. Nonetheless the trial Judge dismissed the application.

Dealing with the question of the debts claimed by the appellant to be due to her he said:—

> " Even if Miss Leeder's claim is not supportable for its full amount, it appears to be supportable as to a substantial part of it, at least an amount of somewhere between £200 and £300."

He then asked himself the question whether there was likely to be any surplus out of which provision for the respondent could be made and answered the question in the negative saying:—

> " On probate values, the estate is clearly insolvent. It is possible, and perhaps likely, that the cottage would now realise more than the probate valuation which was made while land sales control was still in force. How much more does not appear and there is no evidence that it would be so much as to leave a surplus. Indeed, that is not how the applicant's case has been conducted, and her counsel has said that the interest in the cottage would not be worth much at the present day. The applicant has sought rather to cut down Miss Leeder's claim."

Later on in his judgment he said:—

> " But since it does not appear that there is anything out of which further provision might be made for the widow and since the only result would appear to be to disturb the arrangements which the testator has made partly with a view to simplifying the discharge of his obligation to Miss Leeder, in my opinion no order should be made in this application."

It was argued that the insolvency of the estate was not the real ground of his decision and that he was influenced largely by the " moral " considerations indicated in the passage of his judgment last cited. It was suggested that he ought not to have had regard to these considerations. Their Lordships think that having regard to the wide words of the section such matters are not excluded from the Judge's consideration. Their weight is another question, but in this case their Lordships think it is reasonably clear from the judgment of Sugerman, J., that the basis of his judgment was his finding that the estate was insolvent. This conclusion is supported by the fact that dealing with a further argument advanced by counsel after he had concluded his judgment he said:—

> " The estate is insolvent and it would be nothing more than a futility to give it to the widow."

From this decision the respondent appealed to the Full Court of New South Wales. On this appeal she sought to adduce further evidence consisting of the affidavits of two qualified valuers one of whom swore that the house was worth £2,500 with vacant possession and £1,750 without it while the other estimated the then market value of the house at £2,450.

The application to adduce fresh evidence fell within section 84 of the Equity Act of 1901 which corresponds very closely with O. 58 R. 4 of the Rules of the Supreme Court in England. Under that section the order appealed from, being an order upon the merits at the hearing, the fresh evidence could only be admitted on special grounds and with special leave.

When the matter came before the Full Court, Street, C.J., with whom the other members of the Court agreed dealt first with the question of fresh evidence and decided that it ought not to be received. He then dealt with the matter apart from the evidence and came to the conclusion that the appeal failed saying :—

> " The application has to be determined on the position as presented to the Court at the time of the hearing, when undoubtedly future prospects should be taken into account, if there were evidence justifying a conclusion that the estate was likely to appreciate or depreciate in the future. If there were no evidence to that effect, then the matter must be dealt with on the evidence as it then stands, and if on that evidence the order would be in effect a nullity and would confer no benefit, then I do not think the Court would be justified in making an order on the chance that it might, in some unforeseen circumstances, provide some benefit for the applicant."

The respondent then appealed to the High Court of Australia who allowed her appeal on the 3rd August, 1951. All the Judges were of opinion that the respondent was entitled to succeed on the evidence before the trial judge bearing in mind that the Land Sales Control Act, 1948, no longer applied to the cottage. Dixon, Williams and Kitto, JJ., also considered that the fresh evidence should have been admitted. McTiernan and Webb, JJ., expressed no opinion on this point. Accordingly the High Court allowed the appeal and awarded the respondent the whole estate. They ordered the appellant to pay the respondent's costs in the Full Court and in the High Court. From this order the appellant by special leave granted on the 14th November, 1951, appealed to this Board.

Their Lordships find themselves in disagreement with the High Court of Australia on both points. Dealing first with the question of the admission of fresh evidence the conclusion of the majority was based on their view that the principles laid down for the guidance of an Appellate Court when considering an application for leave to adduce further evidence in order to secure a retrial of a case before a jury have no application to an appeal of the present nature. Their Lordships, however, think that the principles are of general application though the circumstances which it may be relevant to take into account may be different. Sir Frank Soskice sought to support the view of the High Court by pointing out that in *Nash* v. *Rochford Rural Council* (1917) 1 K.B. 384 the object of the application to call fresh evidence was to secure a new trial and that the observations of Lord Chelmsford in *Shedden* v. *Patrick* (L.R. 1 H.L.Sc. 470 at p. 545) which were cited by Scrutton, L.J., in the first-mentioned case were also directed to such applications. But their Lordships do not think that Scrutton, L.J., or Lord Chelmsford would have expressed a different opinion had the object of the application been to adduce further evidence on an appeal from a judge sitting without a jury. In this connection it is to be observed that in *Sanders* v. *Sanders* 19 Ch.D. 373, Jessel, M.R., said at page 380 :—

> " The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court."

That was a case of an appeal from Malins, V.C., sitting without a jury and it supports the conclusion that the principles to which their Lordships have referred are of general application. See also per Cozens-Hardy, M.R., in *Nash* v. *Rochford Rural Council* at pp. 390 and 391.

Sir Frank relied on another passage from the judgment of Jessel, M.R., where he said at page 381:—

> "Moreover, speaking for myself, I think that when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds."

It may well be that had the Full Court decided to admit the evidence which the respondent sought to adduce the High Court would not have felt bound to reverse their decision, but the matter being one within the discretion of the Full Court, their Lordships consider that the High Court should not have interfered with the exercise of that discretion except in accordance with the well-recognised principles applicable in such cases.

Sir Frank relied on some observations of Lords Atkin and Wright in *Evans* v. *Bartlam* (1937) A.C. 473. Lord Atkin at pages 480 and 481 said:—

> "while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."

Lord Wright said at page 486:—

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

Sir Frank contended that applying the principles thus laid down injustice would be done unless the additional evidence was admitted. He argued that the order of Sugerman, J., left the respondent without redress whereas if an order in her favour had been made it could not have prejudiced the appellant if in fact the estate proved to be insolvent. He relied also on R. 5 of the Rules made in pursuance of the Act which imposed on the appellant the duty of making an affidavit as to the nature and amount of the estate. It is plain, however, from the judgment of Street, C.J., at pages 39 and 40 of the Record that both these points were present to the minds of the Full Court when that Court reached its decision. Moreover the evidence which it was sought to adduce was not as to a matter of fact but as to a matter of opinion which it would have been open to the appellant to challenge and it is impossible to say that the evidence if admitted would necessarily have been conclusive of the matter or at least have an important influence on the result. See as to the importance of this consideration *R.* v. *Copestake* (1927) 1 K.B. 468 at p. 477. Looking at the matter as a whole their Lordships do not think that the facts of this case would have justified the High Court of Australia interfering with the exercise by the Full Court of New South Wales of the discretion vested in it under section 84 of the Equity Act. Accordingly their Lordships would not be prepared to send the case back to the Full Court of New South Wales to hear further evidence. The question therefore is whether on the facts as established before Sugerman, J., the High Court were justified in reversing his decision confirmed as it was by the Full Court. Those facts stated shortly were as follows:—

1. The only relevant asset was the equity of redemption of the house.

2. That house was valued as at the testator's death by the Valuer-General at £1,000.

3. On the basis of this valuation the equity of redemption was worth only £113.

4. The Land Sales Control Act, 1948, had ceased to apply to the house since the testator died. As a result some increase of value might be expected but the respondent's counsel said that the interest in the cottage would not be worth much at the date of the hearing.

5. Out of the proceeds of sale of the equity there had to be discharged funeral expenses (£31), the costs of obtaining probate, the costs of the application before Sugerman, J., any other testamentary expenses and the liability, if established, of the testator to the appellant.

6. Sugerman, J., found the appellant's claim to be supportable at least to the extent of £200 and £300.

If that be the correct view of the facts, it seems difficult to say that the learned judge did not judicially exercise the discretion entrusted to him by the Act or indeed that the conclusion he reached that the estate was insolvent was not justified.

In the Full Court it would appear that the only points seriously argued were first as to the admission of the fresh evidence, and secondly that the Court ought to make an order even though the estate might be insolvent. With the first point their Lordships have already dealt. Sir Frank Soskice repeated the second submission before this Board. He argued that unless it was conclusively established that there was no net estate, the Court, if satisfied that the widow had made a case on what he called the merits, must make an order. Their Lordships do not find it necessary to decide what is the proper course for a judge to adopt who is left in doubt as to whether the estate will ultimately prove to be solvent or not since as they read the learned judge's judgment he reached a definite conclusion that the estate was hopelessly insolvent. Sir Frank did not dispute that if that conclusion was right, the learned judge was justified in refusing the order.

Their Lordships do not think that the High Court took a different view of the law. As their Lordships read the judgments of the learned judges of the High Court they came to the conclusion that on the evidence before him Sugerman, J., should have come to the conclusion that the estate was solvent and that there would be a surplus available to meet the widow's claim. They based this conclusion on two grounds. The first and that on which they chiefly relied was that in their opinion the house had a value considerably above £1,000 in the middle of 1950. The second was that they were not satisfied that the appellant had a valid claim against the estate.

The validity of the appellant's claim against the estate depended mainly on whether her evidence was accepted. The learned judge who saw her treated her as a witness of truth and their Lordships do not consider the High Court were justified in disturbing his finding on that point.

The main issue was as to the value of the house. Dixon, J., relied for his conclusion on the fact that the Land Sales Controls Act, 1948, had ceased to apply to the house and the effect that in his view that event must have had on the price of houses such as the testator's. McTiernan, J., took the same view. It is plain however that the Trial Judge took notice of the fact that the consequence of terminating control was that the market price of cottages rose and the official valuation which was accepted for probate purposes would not be a true estimate of the price at which the cottage could be sold. He reached his conclusion with these considerations in mind. It may have been wrong but it plainly did not shock the judges of the Full Court. Moreover the circumstances to which Dixon, J., and McTiernan, J., refer must have been present to the minds of the legal advisers of the respondent when the matter was before Sugerman, J., and they called no evidence to support the view that there

was the substantial rise which the High Court assumed to be a matter of notoriety. The issue is one as to a matter of opinion and their Lordships think that in all the circumstances the High Court were not justified in disturbing the order of Sugerman, J., supported by the evidence before him and confirmed by the Full Court because they differed from him on a matter of opinion on a subject as to which the opinions even of experts generally differ. On this branch of the case their Lordships agree with the observations of Street, C.J., which they have already cited.

Their Lordships feel great sympathy with the respondent but they agree with Street, C.J., when he said:—

> "It is impossible for this Court, within the limits which necessarily control it, to achieve abstract justice in every case. It must work within its prescribed limits, and rules must be observed and complied with in the general interests of justice, and one general interest is that there should be an end to litigation, once it is instituted, and that parties should not be permitted to protract proceedings indefinitely by taking a chance on the hearing in the lower court as to whether the evidence is sufficient, and on finding it insufficient should then be able to come to the appellate court and ask for fresh evidence to be admitted, which was available at the time and in respect of which no difficulty arose in the way of putting that evidence before the Court, and seek to have the matter reopened on that ground."

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal and restore the order of the Full Court. The respondent must pay the appellant's costs of the appeals to the High Court and to this Board.

(16443) Wt. 8096—1 125 10.52 D.L., Pl./3

In the Privy Council

EDIE MAUD LEEDER

v.

NANCE ELLIS

[DELIVERED BY LORD COHEN]

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1952