



serle court

## ***Ilott v Mitson***

**Judgment of the Supreme Court, 15<sup>th</sup> March 2017**

**(handed down as *Ilott v The Blue Cross and others* [2017] UKSC 17)**

At 9.45am on 15<sup>th</sup> March 2017 the Supreme Court handed down judgment in *Ilott v The Blue Cross and others* (previously known as *Ilott v Mitson*). This is the first case in which the Supreme Court (or House of Lords) has heard an appeal under the Inheritance (Provision for Family and Dependents) Act 1975 or its predecessor.

Judgment was given by Lord Hughes with whom Lord Neuberger PSC, Lady Hale DPSC, Lord Kerr, Lord Clarke, Lord Wilson and Lord Sumption JJSC agreed.

Lady Hale DPSC (with whom Lord Kerr and Lord Wilson JJSC agreed) gave a further judgment raising concerns about the inadequacy of the existing legislation.

### **Headlines:**

- The Charities' appeal was allowed, and the first instance decision awarding £50,000 to the Claimant was restored
- The Supreme Court highlighted the significance of testamentary freedom. A testator's wishes are part of the circumstances of the case in a 1975 Act claim. It cannot be ignored that an award under the Act is at the expense of beneficiaries chosen by the testator

- The estrangement between the testatrix and her daughter was not '*of little weight*' and might have led some judges legitimately to conclude that the claim should be dismissed. However, the trial judge was entitled to make provision for the claimant
- The concept of maintenance is '*broad*', but must import provision to meet the everyday expenses of living. It is not limited to subsistence level
- If housing is provided by way of maintenance, it will probably more often be provided by way of life interest rather than capital sum
- Dismissing the claim, and awarding reasonable financial provision to the claimant would both have been legitimate outcomes in this case
- Lady Hale, Lord Kerr and Lord Wilson JJSC considered (in a supplemental judgment) that the present law is '*unsatisfactory .. giving no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance*' and that the judiciary might well have a range of opinion in such claims

## **Facts:**

Mrs Heather Ilott brought a claim under s.1(1)(c) of the 1975 Act against the estate of her mother, Mrs Melita Jackson who died in 2004. Mrs Jackson left the entirety of her estate (worth about £486,000) to three charities with which she had no connection during her lifetime ('the Charities'). The claimant and Mrs Jackson had been estranged for many years, following the claimant's decision in 1978 to leave the family home aged 17 to live with her boyfriend (now husband) of whom Mrs Jackson disapproved. Although the court found fault on both sides, ultimately it was Mrs Jackson's unsatisfied demand that claimant effectively reject her husband that was at the root of their separation.

Before the birth of her first child, the claimant had worked for several years as a bank teller. Since 1984 her primary occupation has been that of raising her five children. Mr Ilott, although suffering from a medical condition, has worked throughout the marriage. The majority of the family's income derives from State benefits. The family's lifestyle is extremely modest, with their home in need of repair, household goods needing replacing and the family never having enjoyed a family holiday.

The claimant and her family had lived for many years in a 3-bedroom house rented from a housing association. The claimant had the right to buy that house for a discounted price, but did not have the means to do so.

## The proceedings:

2007 DJ Million found that Mrs Jackson had failed to make reasonable financial provision for her daughter in her last will, and awarded £50,000 to the claimant. The claimant appealed against the amount of the award, and the Charities cross-appealed contending that the claim should have been dismissed.

2009 Eleanor King J allowed the Charities' cross-appeal and did not consider the claimant's appeal as to the amount of the award.

2011 The Court of Appeal (Sir Nicholas Wall P, Arden and Black LJJ) allowed the claimant's appeal and remitted her outstanding appeal as to the amount of the award to a Judge of the Family Division. (The Charities applied for, but were refused permission to appeal this decision to the Supreme Court.)

2013 Parker J dismissed the claimant's appeal as to the amount of the award.

2015 The Court of Appeal (Arden and Ryder LJJ, Sir Colin Rimer) allowed the claimant's second appeal, holding that DJ Million's order had been wrong on the grounds that:

- (1) the judge had failed to ascertain the effect of his award of £50,000 on the claimant's state benefits;
- (2) the judge, while entitled to limit the award based on the claimant's limited expectation of inheritance and ability to live within her means, had failed to explain what the award might otherwise have been and to what extent it was limited by those matters.

The Court of Appeal set aside the judge's award, and in exercising its own discretion awarded the claimant the following:

- a lump sum of £143,000 (the cost of buying her house under the right-to-buy scheme)
- reasonable expenses of purchasing the property
- the option to take a further sum up to a maximum of £20,000 so that the claimant could continue to claim state benefits if she chose to do so

2016 The Charities were given permission to appeal to the Supreme Court on condition that the costs order made in the claimant's favour in the Court of Appeal in 2015 remain undisturbed.

[The Charities agreed that if they won the appeal, they would allow the claimant to retain c. £122,000 – the eventual purchase price of her house due to a conveyancing issue as to the extent of the parcel conveyed – and would take a charge over the property for that sum.]

## The Supreme Court's judgment

The appeal was allowed, because the Supreme Court rejected the criticisms which the Court of Appeal had made of the District Judge's reasoning at first instance (paras 35, 39-41).

The Supreme Court recognised that the factors for a judge to take into consideration would be '*highly individual*' in every claim under the Act, and that an appellate court should be very slow to interfere in a value judgment made by a trial judge (para 24). This case was said to be '*unusual*' (para 66).

### 1. Testamentary wishes

The Supreme Court criticised the Court of Appeal for failing to give sufficient weight to Mrs Jackson's very clear wishes. It was important that the Charities were the chosen beneficiaries of Mrs Jackson. It could not be ignored that an award under the 1975 Act is at the expense of those whom the testator intended to benefit (para 46).

The testator's testamentary wishes did not cease to be of weight once a qualifying claimant could show financial need, but were part of the circumstances of the case [presumably under section 3(1)(g)] and fell to be assessed in the round together with all other relevant factors (para 47).

The reasonableness of the testator's decisions are capable of being a factor for consideration within section 3(1)(g), and sometimes section 3(1)(d), although just because a testator has behaved unreasonably does not mean that (when analysed objectively) his will fails to make reasonable financial provision for a claimant (para 17).

### 2. Estrangement

The Supreme Court also criticised the Court of Appeal for failing to give sufficient weight to the very long estrangement between mother and daughter. It was acknowledged that the trial judge had held that both were responsible for the continuation of the estrangement whilst attaching greater responsibility to the mother. The Supreme Court held that '*these matters of conduct were not irrelevant, but care must be taken to avoid making awards under the 1975 Act primarily*

*rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased* (para 47).

### **3. Maintenance**

The Supreme Court cited with approval the well-known dicta in *In re Coventry* [1980] Ch 461 and *In Re Dennis, deceased* [1981] 2 All ER 140.

Lord Hughes stated at para 14 that the concept of maintenance is *'no doubt broad'* but *'it cannot extend to any or every thing which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living'*.

He went on to say at para 15 that: *'The level at which maintenance may be provided for is clearly flexible and falls to be assessed on the facts of each case. It is not limited to subsistence level.'*

Maintenance is *'by definition the provision of income rather than capital'* but it will very often be more appropriate for it to be provided by way of a lump sum from which both income and capital can be drawn over future years, e.g. on the *Duxbury* model (para 15). Other examples of cases where a lump sum might be appropriate are:

- a) the provision of a vehicle to enable a claimant to get to work (para 15);
- b) this case – the £50,000 awarded at first instance would enable the claimant to purchase essential household items such as white goods, basic carpeting, floor coverings, curtains and beds, as well as a reliable car. It seems also to have been indicated that it would have been *'maintenance'* for her to spend some of that money on a holiday (paras 40-41).

A claimant's need for maintenance should be judged by the standard appropriate to the circumstances (para 19), but needs are not necessarily the measure of the order which ought to be made (para 22).

Maintenance may be provided by way of housing, but if so it should probably more often be provided by way of a life interest rather than by a capital sum (para 15). In this case, if it had been appropriate for the Court of Appeal to make its own value judgment, the right award would probably have been a life interest in the necessary sum to enable the claimant to purchase her home, rather than an outright award of that sum (para 44).

#### **4. Adult children**

A qualifying non-spousal claimant's need for maintenance '*is a necessary but not a sufficient condition for an order*' (para 19). Lord Hughes referred to the much-cited reference in *Coventry* as to the need for a moral claim where an adult child with financial needs is the claimant, and suggested that in '*a number of [similar] cases*' the additional factor needed for success could only be a moral claim: '*Clearly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act.*'

#### **5. The process to be followed by a trial judge**

The Supreme Court has doubted the usefulness of separating out the judgments in 1975 Act claims into two stages, i.e. (1) has there been a failure to make reasonable financial provision and if so (2) what order should be made? Lord Hughes stated in para 23 that in most cases there would be a '*very large degree of overlap*' between the two stages.

He went on to say at para 24: '*The Act plainly requires a broad brush approach from the judge to very variable personal and family circumstances. There can be nothing wrong, in such cases, with the judge simply setting out the facts as he finds them and then addressing both questions arising under the Act without repeating them.*'

#### **6. The 'timing issue'**

One issue in the case was whether, when re-exercising the discretion under the Act, the Court of Appeal should have taken into account the facts as they were at the date of the trial in 2007, or the facts as they were in July 2015 (by which time the claimant was in a better financial position, and the purchase price of her home had been reduced). The Supreme Court dealt with this issue very briefly at para 25, saying that on an appeal, any request to adduce further evidence would have to be judged by ordinary *Ladd v Marshall* principles.

## **7. State benefits**

Lady Hale stated at para 65(1) that *'the law has not, or not yet, recognised a public interest in expecting or obliging parents to support their adult children so as to save the public money'*. She went on to say that it would have been legitimate for the Court to have made an order one effect of which would have been to save the public purse the most money (para 65(2)).

At para 45 of his judgment, Lord Hughes considered that there could be cases where a claimant received more by way of state benefits than the testator could have provided, so that it might be reasonable for no further provision to have been made for the claimant.

But generally, benefits are to be treated as a resource of the claimant and the court must consider whether they will continue to be received. Practitioners should provide the court with materials as to the impact on the claimant's receipt of state benefits of any order the court might make (para 38).

## **8. Charities**

The Supreme Court made only brief comments on the position of charities as defendants, noting that although the claim of charities to an inheritance is not based on personal need, charities depend heavily on testamentary bequests for their work. It was more fundamental that the Charities were the chosen beneficiaries of Mrs Jackson (para 46).

## **9. Range of possible outcomes and inadequacy of present law**

It was recognised by all seven JJSC (at para 35) that legitimate outcomes at trial would have included dismissal of the claim (on the basis of the long estrangement) and the grant of reasonable financial provision in the form of an award of £50,000.

Lady Hale (with whom Lord Kerr and Lord Wilson JJSC agreed) went further, and highlighted at para 58 the range of opinions which might be formed by judges hearing 1975 Act claims by adult children. She said:

*'The problem with the present law is that it gives us virtually no help in deciding how to evaluate these or balance them with other claims on the estate.'*

Lady Hale suggested at para 65 that a '*respectable case could be made for at least three very different solutions*' in this case, namely:

- (1) dismissal of the claim;
- (2) an order which would give the claimant what she needed and save the public purse the most money (which the Court of Appeal did, but which Lady Hale said should have been done by an award of a life interest to the claimant);
- (3) an award of £50,000 to the claimant.

Lady Hale concluded by saying:

*'I have written this judgment only to demonstrate what, in my view, is the unsatisfactory state of the present law, giving as it does no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance. I regret that the Law Commission did not reconsider the fundamental principles underlying such claims when last they dealt with this topic in 2011.'*

**Constance McDonnell of Serle Court was Junior Counsel for the Respondent, Heather Ilott, in the Supreme Court.**