

INSTITUTED  
 - 7 APR 1972  
 25 APR 1972  
 LONDON

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

IN ITS EQUITABLE JURISDICTION IN APPLICATIONS

INSTITUTED BY ORIGINATING SUMMONS IN PROCEEDINGS:

- No. 1519 of 1967 (Applicant - Catherine Eileen Seery)
- No. 1210 of 1967 (Applicant - Mary Jane Fay Lousick)
- No. 1211 of 1967 (Applicant - Eileen Elizabeth Schuhmann)
- No. 1212 of 1967 (Applicant - Maureen Joan Williams)

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IN THE MATTER of the Estate of EDWARD SEERY deceased  
AND IN THE MATTER of the Testator's Family Maintenance  
 and Guardianship of Infants Act 1916 - 1954  
 (Consolidated pursuant to Decretal Order of  
 26th September, 1969)

B E T W E E N

ELIZABETH SCHAEFER Appellant (Intervener)

- and -

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ELLEN ELIZABETH SCHUHMAN,  
 MARY JANE FAY LOUSICK,  
 MAUREEN JOAN WILLIAMS and  
 CATHERINE EILEEN SEERY Respondents (Applicants)

- and -

CORNELIUS PATRICK SEERY Respondent (Respondent)

- and -

WILLIAM JOHN SEERY Respondent (Intervener)

CASE FOR THE RESPONDENT

Record

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1. The deceased was 76 years of age when he  
 died on 16th November, 1966. He made his  
 last Will on 23rd January, 1962. By his Will  
 he gave each of his four daughters £1,000  
 (\$2,000) and divided his residuary estate  
 equally between his three sons.

Record

2. After his wife died in 1962 he lived with one of his sons and his unmarried daughter. In 1966 he purchased land on which a cottage was erected at No. 124 Nuwarra Road, Chipping Norton, near Liverpool, N.S.W. and took up residence by himself. He advertised for a housekeeper and on 13th May, 1966 he engaged Mrs. Elizabeth Schaefer at £6 (£12) a week. He had not previously known her 10

Codicil:  
p.2 and 3

3. On 28th June, 1966 he executed a codicil to his Will the material provisions of which are :

"NOW I HEREBY DECLARE that if my housekeeper ELIZABETH SCHAEFER shall still be employed by me as a housekeeper at the date of my death THEN but not otherwise I GIVE DEVISE AND BEQUEATH free of all duties payable in consequence of my death unto her absolutely my house and land known as Number 124 Nuwarra Road, Chipping Norton, being the whole of the land comprised in Certificate of Title Volume 5425 Folio 9 together with all my furniture and household effects contained therein." 20

4. The deceased left an estate valued for Probate purposes at approximately \$90,000 which, after payment of debts, duties, and other outgoings, left property worth \$68,700 for distribution, including the cottage property and contents mentioned in the codicil valued at \$14,500. 30

Order:  
p.32

5. Applications were made to the Supreme Court of New South Wales in Equity by the four daughters of the deceased under the Testator's Family Maintenance Act 1916 as amended (hereinafter called "the Act"). Street J. made orders under the Act in favour of three of the applicants, namely, that \$10,000 be paid to each of two of them in addition to her legacy and that \$2,000 and the income of a capital fund of \$8,000 be paid 40

to the third in addition to her legacy.  
He refused an order in favour of the  
fourth applicant.

Record

10 6. Street J. gave Mrs. Elizabeth  
Schaefer leave to intervene in the  
applications at her own risk as to costs.  
The purpose of her intervention was to  
protect her specific gift from the  
burden of the orders which the Court  
might make.

20 7. She claimed that the deceased had  
contracted to leave to her the property  
mentioned in the codicil. No evidence  
was given of any promises, agreement or  
arrangement made by the deceased with  
Mrs. Schaefer before instructions for  
the codicil were given to his solicitor.  
No evidence was given by the solicitor  
who prepared the codicil for execution  
of his instructions. The whole of the  
evidence relating to the codicil was  
given by Mrs. Schaefer in paragraphs  
10 and 15 of her affidavit of 4th  
December, 1968. She was not cross-  
examined on that evidence.

Affidavit  
of Mrs.  
Schaefer  
p.11

30 8. Street J. held that the deceased  
had made a contract to leave Mrs.  
Schaefer the cottage property and  
its contents by Will if until his  
death she worked as his housekeeper  
and that the Codicil itself was a  
sufficient memorandum to satisfy  
section 54A of the Conveyancing Act,  
1919-54 but that nevertheless the  
cottage and contents formed part of  
the estate of the deceased for the  
purposes of the Act and that the  
Court had a discretion to distribute  
the burden of the orders made under  
the Act between it and the residuary  
estate. In reaching that conclusion  
His Honour followed Dillon v. Public  
Trustee of New Zealand (1941 A.C.  
294).

Reasons:  
p. 25  
line 27 to  
p. 26  
line 16

Reasons:  
p.26  
line 16  
to 21

40 9. His Honour in exercising his  
discretion under Section 6 of the Act  
directed that the burden of the orders  
made should be charged, except to the  
extent of \$2,300, on the property left

Reasons:  
p. 26 line  
22 to p.30  
line 2

Order:  
p. 35  
line 22

Record

to Mrs. Schaefer and the remainder of the burden should be borne equally between the shares of the three sons in the residuary estate.

10. On the Appeal this Respondent will submit

- (i) that Street J. was right in holding that he had jurisdiction to throw part of the burden of the award in favour of the Testator's daughters onto the property devised and bequeathed to the Appellant by the Codicil even if there was a contract between the deceased and the Appellant; 10
- (ii) alternatively that there was no evidence to support the finding of Street J. that there was any contract made between the deceased and the Appellant relating to the cottage and contents; 20
- (iii) alternatively (if submission (2) be wrong) that the only contract which can be spelt out of the evidence is a contract not to revoke the Codicil;
- (iv) further (if there was any contract between the deceased and the Appellant) Street J. was wrong in holding that there was a memorandum of such contract sufficient to satisfy section 54 A of the Conveyancing Act 1919 - 54. 30

These submissions are developed separately in the following paragraphs.

11. (i) Has the Court jurisdiction under the Act?

These submissions are made on the basis that (contrary to the Respondent's submissions (ii)(iii) and (iv)) Street J. was right in holding that there was a contract between the deceased and the Appellant. On this basis it is submitted that the decision of Street J. 40 was right on this point for the following reasons :-

- (a) that the decision and reasoning of the Privy Council in Dillon v. Public Trustee of New Zealand (1941) A.C. 294 is a binding authority

that under the New Zealand Family Protection Act such a contract does not prevent the Court making an award out of the property contracted to be bequeathed; Record

(b) that the decision in the Dillon Case is right, has stood for 30 years and has applied to many similar statutory provisions in other Commonwealth countries;

10 (c) that, although the New Zealand Family Protection Act contains no provisions corresponding to section 4 (1) of the New South Wales Act, this does not provide a relevant ground for not applying Dillon's Case to the New South Wales Act since the decision in that case is based on reasoning which does not depend on the detailed provisions of the Act but on the general consideration that a contract to leave property by Will operates subject to the  
20 overriding effect of any order of the Court made under similar statutory provisions.

(d) that the instant case, being a contract for personal services, is a stronger case than the Dillon Case. The present contract was not specifically enforceable during the lifetime of the deceased (see Alderson v. Maddison 7 Q.B.D. 174 at p. 181) and therefore created no trust during his lifetime (see Central Trust and Safe Deposit Co. v. Snider (1916) A.C.266). Therefore at  
30 the date of death the property formed part of the estate of the deceased: c.f. Re Keene 86 W.N. (Pt.I)(N.S.W.) 317 and sub.nom. Cope v. Keen 118 C.L.R. 1.

(e) that if the Respondent's submission that the contract (if any) was merely a contract to leave the Codicil revoked is correct, the Appellant cannot claim to have  
40 any rights greater than she would have under the Codicil immediately after the moment of its execution i.e. rights which on any footing were subject to the Court's jurisdiction under the Act.

12. (ii) Was there a contract?

The only evidence relating to the arrangements between the deceased and the Appellant are contained in paragraphs 10 and 15 of her Affidavit. Such evidence discloses no more than a unilateral

Affidavit  
of Mrs.  
Schaefer  
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statement by the deceased: there is no evidence of any agreement of any kind or of any acceptance by the Appellant of the proposal. The facts are more consistent with a statement by the Testator of testamentary intention: c.f. Maddison v. Alderson 8 A.C. 467. The Court should not readily infer a contract in such circumstances.

13. (iii) Was the contract (if any) a contract not to revoke the Codicil? 10

If Street J. was correct in holding that he could infer a contractual intention, the right contract to be inferred was that the Codicil (which was already in existence before any discussion with the Appellant took place) should not be revoked.

14. (iv) Was there a sufficient memorandum? 20

Street J. decided that the Codicil itself was a sufficient memorandum. Such decision was wrong in law. In order to constitute a sufficient memorandum, the document must contain (inter alia) the consideration for the promise: no consideration is expressed in the Codicil. Moreover the document must not only contain all the material terms but also show an intention to contract: see Parker v. Clark (1960) 1 W.L.R. 286. The Codicil evinces no intention to contract but only an intention to confer bounty. 30

Moreover if the only contract was (as submitted in paragraph 14 supra) a contract not to revoke the Codicil, the Codicil itself cannot be a memorandum of such contract.

15. The Respondent therefore submits that the appeal should be dismissed for the following (amongst other) 40

REASONS

1. Dillon's Case was rightly decided and covers the present case.

2. Dillon's Case is not distinguishable Record

3. That (in any event there was no contract to leave the cottage and contents to the Appellant, but at most a contract not to revoke the existing Codicil.

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4. If there was a contract it was not evidenced by a sufficient memorandum in writing and therefore the cottage and contents formed part of the estate of the deceased.

N. BROWNE-WILKINSON

No. 14 of 1971

IN THE PRIVY COUNCIL

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ON APPEAL FROM THE HIGH  
COURT OF AUSTRALIA

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SEERY deceased.

SCHAEFER

v

SCHUMANN & OTHERS

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CASE FOR THE RESPONDENT

CHURCH ADAMS TATHAM & CO.,  
19 Lincoln's Inn Fields,  
London, W.C.2.