
O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

DAISY ELIZABETH LILLEY

Appellant

- and -

THE PUBLIC TRUSTEE OF
THE DOMINION OF NEW ZEALAND

Respondent

RESPONDENT'S CASE

MACFARLANES,
Dowgate Hill House,
London EC4R 2DY.

Agents for:

Joynt, Andrews,
Cottrell & Dawson,
Christchurch,
New Zealand.

Charles Russell & Co.,
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Agents for:

Anthony Polson & Co.,
Christchurch,
New Zealand.

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CASE FOR THE RESPONDENT

HISTORY

1. This is on appeal brought from a judgment of the Court of Appeal of New Zealand (unreported) dated 19th June 1978 refusing the appeal of the appellant from a judgment (unreported) of the Supreme Court of New Zealand dated 21st July 1977.

pp 56-68

pp 46-51

ISSUES OF THE APPEAL

20 2. The issues of the appeal arise from the following circumstances.

2.1 FRANCIS ISRAEL LILLEY (hereinafter called "the testator") died in Christchurch, New Zealand on 18th March 1974 leaving a last Will made on 31st January 1942. The said Will provided (inter alia) that a dwellinghouse situated at 15 Gibbon Street, Christchurch (hereafter called "the dwelling house") was left to the Respondent on trust to enable the Appellant to reside therein for two years from the date of death of the testator, thereafter the Respondent being obliged to "sell call in and convert into money the said dwellinghouse" and to hold the proceeds for certain brothers and sisters of the deceased.

pp 2,4,7,33,
46,52,56

pp 38-40

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p 39

2.3 In the events that happened the testator was survived by:

2.3.1 The appellant.

2.3.2 Ernest Vingo Lilley.

2.3.3 Phyllis Evelyn Webster (Lilley)

pp 2-4
pp 15-17
pp 8-10

2.4 The appellant remained living in the dwelling house for the said two years and continues to reside there.

p 3

10 2.5 On 29th October 1976 the Appellant made application to the Supreme Court of New Zealand for an order that the time for commencing her action under the provisions of the Law Reform (Testamentary Promises) Act 1949 (hereinafter called "the Act") be extended for a sufficient period to permit her action to be brought.

pp 1-2

20 2.6 Under Section 6 of the Act proceedings must be commenced within 12 months after the personal representative of a testator takes out representation but the time for commencing proceedings may be extended provided the application for extension is made "before the final distribution of the estate of the deceased." (hereafter called "the words")

pp 48, 57, 58,
59, 60, 65

(See Section 2 Law Reform (Testamentary Promises) Amendment Act 1953.)

p 65

30 2.6 The matters at issue between the parties are:

.1 what meaning should be given the words.

and .2 whether (depending on the meaning of the words) there had been a final distribution of the estate, before the appellant applied for an extension of time to commence proceedings.

pp 48-49
pp 59-60
pp 49-51

SUBMISSIONS OF RESPONDENT

1. Meaning of the words

40 3. The Respondent submits:

3.1 The words as used in the Act refer to that time when the personal representative of a deceased completes his executorial or administrative duties and becomes trustee.

3.2 Where particular words in a statute have received authoritative interpretation

by judicial decision, and such words are adopted in the framing of a later statute, it is submitted the legislature should be assumed to have intended that the words in the later statute bear the meaning given them in the earlier statute, by judicial interpretation.

(See: D'EMDEN v Pedder (1904) 1CLR91,110 p 66
Webb v Outtrim (1907) AC81,89) p 66

10 3.3 If the foregoing is correct, then having regard to the history of the use of the words in New Zealand statutes, the way in which those words have been interpreted by New Zealand Courts and the statutory amendments and enactments which followed such interpretation, it is submitted the meaning contended for the words by the respondent is the correct meaning. pp 48-49
pp 59-68

20 3.4. The New Zealand Statutes which should be considered are:

- (i) The Family Protection Acts; and
- (ii) The Act.

3.5 The Family Protection Act 1908 initially did not contain the words, in the section relating to the time within which proceedings might be taken. pp 60-61

30 3.6 By Section 2 of the Family Protection Amendment Act 1921-1922, the words were used in relation to the time within which an application for extension of time to bring proceedings might be made. p 61

3.7 In Public Trustee v J.A. Kidd (1931) N.Z.L.R.1 the meaning of the words contended for was given them in relation to a claim under the Family Protection Act 1908. pp 59,61,62
65,66

pp 60-61

40 3.8 That same meaning was continued by In Re Donohue (1933) N.Z.L.R. 477, a decision of the full New Zealand Supreme Court. pp 59-60,61,
62,66

3.9 By Section 23 (1) of the Statutes Amendment Act 1939, the Family Protection Act 1908 was amended so that no real or personal property held upon trust for any beneficiary, under a Will was deemed to have been distributed or to have ceased to be part of the estate of deceased by reason of the fact that it was held by p 62

executors or administrators after they ceased to be executors or administrators in respect of the property in question and had become trustees or the property was held by any other trustees.

10 3.10 In 1944 the forerunner of the Act was passed. However, there was no provision for extension of time for bringing proceedings contained in that Act. p 63

3.11 The Act was passed in 1949 and contained the following provision in relation to extension of time: pp 63-64

20 "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 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". pp 63-64

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3.12 The final distribution provision, just referred to, it is submitted applied for a period of three months only after the passing of the Act so that thereafter, there was no power to extend time for taking proceedings. pp 64-65

40 3.13 In 1953 the Act was amended, and the words were then enacted, giving a right to apply for extension of time for the issue of proceeding provided such application was made before the final distribution of the estate. p 65

50 3.14 In 1960, 1962 and 1976 the Supreme Court of New Zealand in three separate decisions concluded, that the words had the meaning contended for by the respondent.

(See: Gudgeon v Public Trustee (1960) N.Z.L.R. 233; Fowler v New Zealand Insurance Co. Ltd. (1962) N.Z.L.R. 947; Lamb v Lamb (1976) N.Z.L.R. 801) and that meaning is supported by the decision of the Court of Appeal of New Zealand to which this appeal relates.

pp 49,60,68
pp 49,60
p 60

2.
10 There had been a final distribution of the estate before the appellant applied for an extension of time to commence proceedings

4.1 At 19th December 1975, the only asset left in the estate of the deceased was the dwellinghouse.

pp 33-34,52-53

4.2 As well by then death duty had been paid, probate released by the Inland Revenue Department, the appellant had had the estate chattels transferred to her and had had the balance of estate cash paid to her.
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pp 33-34,50,
52-53


4.4 Clause 2 of the said Will of the deceased provides (inter alia):

30 "I give and devise all my estate and interest at my death in the dwellinghouse and land owned by me at the date hereof and situate and known as No. 15 Gibbon Street Christchurch, unto my trustee UPON TRUST as follows:" So that, it is submitted, the dwellinghouse was to be held by the Respondent on trust.

pp 38-39,50,
56-57

4.5 It is therefore submitted, by December 1975, having regard to the provisions of the deceased's last Will, the respondent held the dwellinghouse as trustee and not as executor, so that by the time the appellant applied for leave to issue proceedings under the Act there had been a final distribution of the estate and leave could not be granted.

DATED this 27th day
of JUNE 1980.



Counsel for Respondent

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