4181

IN THE PRIVY COUNCIL No. 17 of 1980

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

DAISY ELIZABETH LILLEY Appellant

- and -

THE PUBLIC TRUSTEE OF THE DOMINION OF NEW ZEALAND Respondent

CASE FOR THE APPELLANT

Record

HISTORY

1. This appeal is brought from a judgment of the Court of Appeal of New Zealand handed down on 19 June 1978 dismissing the appeal of the abovenamed Appellant from a judgment of the Supreme Court of New Zealand delivered by Roper J. on 21 July 1977. 56, 46

2. The issues in this appeal arise from the following circumstances.

3. The Respondent is the Executor and Trustee of the Will of the late Francis Israel Lilley of Christchurch New Zealand who died on 18 March 1974. He was at his death the owner of a house property in Gibbon Street Christchurch which had been bequeathed to him by his late father (the uncle of the Appellant) who died in 1939. Before that time the Appellant had lived in the house as an unpaid housekeeper and children's nurse since she was 16 years of age. After the death of her uncle in 1939 she remained in the house as housekeeper and companion to the late Francis Israel Lilley until his death. The affidavits filed in the Supreme Court by Evelyn Woods and Robert Hector McCaughan vouch for the services rendered by the Appellant to the said Francis Israel Lilley throughout his life. 4, 6, 7

4. The Appellant in her Statement of Claim alleges that 4

Record

certain testamentary promises were made to her by the said Francis Israel Lilley to the effect that he would either leave the house to her in his Will or would by his Will preserve for her the occupation of the house for the rest of her life. Without her knowledge he had in fact by a Will made on 31 January 1942 provided only two years occupation for the Appellant in the house and had then bequeathed the property to his surviving brother and sister Ernest Virgo Lilley and Phyllis Evelyn Webster of Christchurch.

5. The Appellant after the death of the said Francis Israel Lilley remained in the house and is still there. She
1 caused her Notice of Motion to be filed herein on 28 October
2 1976 and in her affidavit filed therewith says that her delay in taking action arose from her accepting assurances given by the residuary beneficiaries the abovenamed Ernest Virgo Lilley and Phyllis Evelyn Webster that she could stay on in the house without limitation as to time. After receiving a
3 notice to quit given by the Respondent in March 1976 she took legal advice for the first time and these proceedings were commenced.

48 6. The Supreme Court expressed the opinion that it would be unjust to refuse the Appellant leave to proceed
58 against the Respondent out of time, and the Court of Appeal recorded such finding without expressing any contrary view.
59 The finding was not attacked in the Court of Appeal by the Respondent.

58 7. Section 6 of the Law Reform (Testamentary Promises) Act 1949 provides that no action to enforce a claim shall be maintainable unless the action is commenced within twelve months after the personal representative of the
33 deceased took out representation. Probate of this estate was granted to the Respondent on 17 April 1974 so that the Appellant's application was some 18 months out of time. The proviso to Section 6 empowers the Court to extend time, but provides that the application must be made "before the final distribution of the estate".

8. In both the Supreme Court and the Court of Appeal the Appellant argued that in the circumstances of this case there had not been a final distribution even though the Respondent on or before December 1974 had completed his executorial duties and held the house thenceforth in trust for the period of occupation permitted to the Appellant under the Will. Thus no actual distribution had yet finally occurred. This argument is not advanced before this Board.

Record

9. No attack was made upon the equitable rule in the Supreme Court, because earlier authorities appeared to settle the point, and the decision of the High Court of Australia in EASTERBROOK v. YOUNG (infra) had not yet been reported in New Zealand. This was however the mainstay of the appeal to the Court of Appeal, where the Appellant argued that "distribution" in the proviso to Section 6 meant actual and not deemed distribution. This is again her case before this Board. 60

10. The Court of Appeal held however that the history of the present enactment and the reasons which it found had led to its being passed in its present form precluded the Court from adopting the reasoning of the High Court in EASTERBROOK v. YOUNG. Otherwise it might have thought that decision to have "persuasive if not compelling force". 68 60

11. Canvassing the earlier legislation the Court of Appeal construed the proviso to Section 6 as incorporating still the equitable rule as to distribution which deems that to have taken place when the executor becomes the trustee (see paragraphs 13 to 16 infra). 60 - 65

MAIN SUBMISSIONS

12. The Appellant submits that the decision of the Court of Appeal should be set aside on the following grounds :

(A) The old rule at equity that distribution takes place in an estate when the executor becomes the trustee has no place in the construction of this Statute.

(B) The rule of construction which promotes the purpose of the Statute should be applied as all-important and the word "distribution" should be construed as "actual distribution".

(C) The divergence now seen in the latest judgments on this point between the pronouncement of the High Court of Australia EASTERBROOK v. YOUNG (1977) 136 C.L.R. 308 and that of the Court of Appeal of New Zealand (in this case) should be resolved in favour of the former.

ARGUMENT

13. The legislative forerunner of Section 6 in its present form was Section 33(9) of the Family Protection Act 1908, which provided that the limitation period was 12 months from 60

Record

the grant of representation provided that the time might be extended by the Court for another 12 months. By an
61 amendment in 1922 the "further period" was rendered unlimited in time and a proviso was added that any application for extension should be made before final distribution of the estate, and no earlier distribution should be thereby disturbed.

61 14. In PUBLIC TRUSTEE v. KIDD (1931) N.Z.L.R. 1 and in In Re DONOHUE (1933) N.Z.L.R. 477 (the latter a decision of a Full Court of the Supreme Court) it was held that, in construing the then section of the Family Protection Act, when the period of executorship is concluded and the personal representative holds only qua trustee then "final distribution" has taken place although no actual distribution may have occurred.

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the Statutes Amendment Act 1939
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ıld on trust should be deemed to
eason of the fact that it is no
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t 1944 first rendered enforceable
t one based on claimed testa-
e was a simple 12 month limi-
sion for extension. The present
h the original Section 6 having
proviso as set out in the Statutes
[illegible]ment Act 1939 (paragraph 15 above). Thus actual distribution was the touchstone. Then a 1953 amendment substituted an empowering proviso as to limitation which did not contain the explanatory gloss on the words "final distribution" and which was in essence the same as that Section 6 now before this Board.

17. It is argued by the Respondent that the 1953 amendment in removing the "explanation" as to how the word "distribution" is to be construed means that the Court must construe it under the equity rule as to deemed distribution. It is submitted by the Appellant that no such conclusion can be safely drawn. The Legislature may not have intended to change the law (it did not and has not done so in respect of claims under the Family Protection Act) - it may have thought the importance of actual distribution had been well demonstrated and being well-known needed no repetition.

18. More important is the purpose of the Act. That may

Record

well have been as the Court of Appeal has suggested to overcome such common law problems as uncertainty, past consideration, contractual capacity and the Statute of Frauds. It is certainly designed to permit a Court to make such order as it thinks fit to grant relief to a person who finds a promise made by a testator not honoured in his Will. That purpose is hardly served by making a claimant's right to relief turn on factors intrinsic to the Will itself - whether its framework causes an executor to become the trustee early or late in his stewardship. Nor does it promote certainty in the limitation of claims.

19. Nor does the construction imposed by the Court of Appeal pay any heed to the equivalent limitation section in the Family Protection Act 1955 save by observing that claimants under the latter Act must be close relatives (and presumably to therefore have less barriers put in the way of their claims). It is submitted that the similarities between the two jurisdictions are strong, and the drawing of possible inferences from earlier legislation should not support the turning back of the clock to produce a situation neither consistent nor logical.

20. It is submitted that the careful survey of the authorities and the legislation of Australia and New Zealand in the judgment of the High Court should not be disregarded. The Statute should be construed in the light of its purpose, and without recourse to antecedents. It is submitted that if this is done, the Board will reach the same conclusion as did the High Court.

21. It is submitted that, the Supreme Court having considered that leave should be given if the Statute permits it and it being common ground that actual distribution had not and has not yet taken place this Board should allow the appeal and grant the Appellant leave to bring her well-merited claim.

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- and -

THE PUBLIC TRUSTEE OF THE DOMINION OF NEW ZEALAND
Respondent

CASE FOR THE APPELLANT

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