DIAMOND v THE STANDARD BANK OF SOUTH AFRICA LIMITED (EXECUTOR) AND FOUR OTHERS (1965) ZR 61 (CA)

COURT OF APPEAL
BLAGDEN CJ, PICKETT AND CHARLES JJ
12th May 1965

Fly note and Headnote

[1] Civil Procedure - Appeal - non-discretionary judgments by lower court - function of appellate court:

On an appeal from a non-discretionary judgment or order, the appellate court focuses on whether the lower court (1) was correct in principle or application of the relevant law, (2) made findings of primary fact supported by the evidence and by a proper approach to the evidence, and (3) made proper conclusions from the primary facts found.

[2] Succession - Wills - maintenance of dependant not given adequate provision in will - Inheritance (Family Provision) Act construed generally:

The Inheritance (Family Provision) Act authorises a departure from the dispositions of the testator only in the limited function of providing reasonable provision for certain of the testator's dependants who did not receive such provision in the will.

[3] Succession - Wills - 'reasonable maintenance' defined - Inheritance (Family Provision) Act construed:

'Reasonable maintenance' for a dependant not adequately provided for in the testator's will refers to the testator's failure to provide adequate maintenance for proper support, but the court may also consider whether the testator had good reason for making the provision in question.

[4] Succession - Wills - 'reasonable maintenance' defined - objective test - Inheritance (Family Provision) Act construed:

An objective test is used to determine whether the testator made 'reasonable' provision for a dependant; relevant circumstances to be taken into account include, *inter alia*: (1) the size of the nett estate; (2) the past, present and future income and capital of the claimant (from any source); (3) the conduct of the claimant in relation to the deceased; and (4) the deceased's reasons for the provision made for the claimant.

Cases cited:

(1) *In re Pugh* [1943] 2 All ER 361.

(2) *In re Inns* [1947] 2 All ER 308.

(3) *Ward v James* [1965] 1 All ER 563.

(4) *In re Howell* [1953] 2 All ER 604.

(5) *Bosch v The Perpetual Trustee Co. Ltd* [1938] AC 463, [1938] 2 All ER 14.

(6) *In re Borthwick* [1949] 1 All ER 472.

(7) *In re Joslin* [1941] 1 All ER 302.

(8) *In re Simson* [1949] 2 All ER 826.

(9) *In re Andrews* [1955] 3 All ER 248.

(10) *In re Franks* [1947] 2 All ER 638.

(11) *Dun v Dun* [1959] 2 All ER 134, [1959] AC 272.

Statutes construed:
Inheritance (Family Provision) Act (1938), ss. 1 (1), 1 (2), 1 (6), 1 (7).

Dare, Q C, for the appellant
Smith, Q C, Simkin, Weed, for the respondents

Judgment

Charles J: This is an appeal in respect of an order of Dennison, J, dismissing an application by the appellant under the Inheritance (Family Provision) Act, 1938, for reasonable provision for her maintenance to be made out of the nett estate of Sidney Diamond deceased.

The appellant is the widow of Sidney Diamond who died on the 22nd December, 1960, leaving a will dated the 1st December, 1960. Probate of that will was granted by the High Court of Northern Rhodesia to the first respondent, the Standard Bank of South Africa Limited, as executor on the 1st February, 1961. By the will the deceased bequeathed to the appellant a legacy of £1,000 free of duty and, until her death or remarriage, an annuity of £1,000, free of duty. He also bequeathed legacies, some more and others less than £1,000, to sisters, nieces, charities and employees, and two annuities, each less than £1,000, to his mother and her companions. One of the two annuities has now ceased. The will provided for the residuary estate being held upon trust for the second, third, fourth and fifth respondents as tenants in common in equal shares, subject to conditions as to vesting, which need not be mentioned here. The second and third respondents are the deceased's daughter and son respectively by the appellant, and the fourth and fifth respondents are the deceased's brother and nephew respectively. The nett value of the deceased's estate to meet the legacies, annuities and residuary bequest is approximately £800,000.

Section 1 of the Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. VI, c. 45), which was applied to Northern Rhodesia by the Imperial Acts Extension Ordinance (Cap. 27) and under which the appellant's application was made provides, so far as relevant here, as follows:

' (1) Where, after the commencement of this Act, a person dies domiciled in England leaving -

(a) a wife . . .

then, if the court on application by or on behalf of any such wife . . . (in this Act referred to as a "dependant" of the restator) is of the opinion that the will does not make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the testator's nett estate for the maintenance of that dependant.

(2) The provision for maintenance to be made by an order shall, subject to the provisions of sub-section (4) of this section, be by way of periodical payments of income and the order shall provide for their termination not later than -

(a) in the case of a wife . . .her remarriage . . .or, in any case . . . her death.

(6) The court shall, on any application made under this Act, have regard to any past, present or future capital or income from any source of the dependant of the testator to whom the application relates, to the conduct of that dependant in relation to the testator and otherwise, and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise.

(7) The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient including any statements in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.'

The reference to England in subsection (1) is to be read as a reference to Zambia, for the purpose of the application of the Act here. (High Court Ordinance, s. 12.)

The following facts were found by the learned judge, or appear as undisputed from the evidence: the appellant and deceased were married in Johannesburg, South Africa, on the 17th June, 1939. The appellant was then twenty - five years of age, and the deceased was then thirty - eight years of age. Two children were born of the marriage: a daughter on the 22nd October, 1942, and a son on the 9th January, 1947. They are the second and third respondents respectively. The appellant and deceased lived together until 1951 or 1952, and during that period they moved to Northern Rhodesia and the appellant there helped the deceased in his business from which his fortune was made. The parties became domiciled in Northern Rhodesia. In 1951 or 1952 the appellant and deceased became

estranged and they separated, never to live together again. On the 14th January, 1955, the appellant instituted divorce proceedings in the High Court of Northern Rhodesia against the deceased on the ground of cruelty. Those proceedings were not prosecuted but, under them, the appellant claimed alimony pending suit against the deceased, and the parties agreed, in respect of that claim, that the deceased was to pay £150 per month to the appellant, the appellant was to have free occupation of the flat in which she was living, and the deceased was to pay the children's school fees and expenses. That agreement was observed until the deceased's death. In addition the deceased paid various sums for and on behalf of the appellant for household, labour, holiday and other expenses until his death. It was agreed by counsel that the total value of the benefits which the appellant received under the agreement, and as a result of additional payments, was between £2,100 and £2,250 *per annum*. At the time of making his will in 1960 the deceased handed a letter to a friend, who was also his bank manager, saying: 'If it is ever necessary, this will explain the provision I have made for my wife in the will'. The letter had been written over nine years previously, and bore the date 25th February, 1951. It had been attached to a previous will which had been made at about that date and which later had been destroyed. The letter read:

> ' Gentlemen, should any dispute as to the allowance left in my Will to my wife Margaret Diamond. I have left her far more than she deserves.
> She has from time to time been unfaithful, having various so called lovers, we have had from time to time many disputes over same, and it has been I may say the only black spot in my happy and successful career.
> I feel that she would have left me a long time ago, if it was not for my money, as she often told me. Mostly for the sake of my children I am tolerating her in my house.'

The application to the High Court was not opposed by the two children.

The learned trial judge's reasons for dismissing it may be summarised as follows: The authorities, particularly *Re Pugh*, 1943, 2 All ER 361, and *Re Inns,* 1947, 2 All ER 308, show that the jurisdiction under the Act only arises if the court is satisfied by the evidence before it, and after putting itself in the position of the testator, that the provision made for his wife by the testator in his will was unreasonable or unwarranted. The provision which the testator had made for the appellant was not shown to have been unreasonable, having regard to the deceased having probably seen the appellant as a wife who had been a wife in name only since 1951, who had not lived with him since that date, who had instituted a divorce suit against him but had not pursued it, who was content to remain on the alimony rate which she had agreed to accept, and whose possible expenses in connection with the children would cease when the estate was distributed; and the deceased having obviously made his will with a sense of generosity and responsibility as shown by his other dispositions in it.

The appeal has been brought on several grounds, some of which follow the all too common practice of criticising passages taken out of their context from the judgment. The substantial grounds are:

(a) The trial judge failed to apply the proper principles of law, particularly having regard to the size of the nett estate and to the appellant having been receiving from the deceased until the time of his death maintenance which was approximately double in amount that of the provision which he made in the will.

(b) The trial judge made no findings as to the truth of the allegations made by the deceased in the letter explaining the reasons for not having made greater provision for the appellant, and failed to consider the reasons for the break - up of the marriage when the weight of evidence pointed to the appellant as the innocent party.

(c) The trial judge failed to recognise the undisputed fact that the appellant had assisted the deceased in his business and had thereby contributed to the amassing of a fortune.

(d) The trial judge overlooked the Act that under the agreement for maintenance, it was the deceased, and not the appellant, who had to pay the children's school fees and expenses. Consequently, the death of the deceased and the children's entitlement under the will did not alter the appellant's position in respect of financial responsibility for the children.

[1] The Inheritance (Family Provision) Act, 1938 (hereinafter referred to as 'the Act'), was a departure from the recognition which English law had come to give, at least in the nineteenth century, to testators having an unfettered right of disposition over their own property. The departure is a limited one as it only confers on the court a jurisdiction to depart from the dispositions of a testator by providing reasonable provision for certain of his dependants if it is of the opinion that he had not done so himself. The principle of departure was not new to the Commonwealth, however, as at least as early as 1908 the New Zealand Parliament had provided for judicial interference with the dispositions of a testator who had left a dependant without 'adequate maintenance for his proper support', and similar provision had also been made in the Australian States and certain Canadian Provinces some years before 1938. The change in the wording of the English Act from the wording in the dominion legislation as to the basis of jurisdiction suggests that a different basis was intended to be applied under the English Act. If the change has any real significance, however, it can only be that a more extensive jurisdiction is conferred by the English Act, [2] as a failure to provide reasonable maintenance must mean at least a failure to provide adequate maintenance for proper support. (Cf. *Halsbury,* 3rd ed, vol. 16, at 460.)

Although section 1 of the Act is in terms which appear to vest a court called upon to deal with an application under it with a discretion, it does not really do so. The court's jurisdiction to make reasonable provision for the maintenance of a dependant only arises if it is of the opinion, that is if it is satisfied, that such provision has not been made by the testator. If it is satisfied as to that, the court then is bound, in my opinion, to make such provision or further provision as appears to it to be reasonable, notwithstanding the use of the permissive word 'may'. It would be contrary to the manifest object of the Legislature to construe the word 'may' literally, so as to enable the court to find that reasonable provision had not been made by the testator and then to refuse to correct the discrepancy. The court may, of course, consider that the testator had good reason for not making provision or greater provision for a dependant but that is a consideration relating to the question whether he had made reasonable provision, and not to the question whether a failure to make reasonable provision should be corrected by the court.

[3] It follows that, if there is a distinction between appeals in respect of discretionary judgments or orders and appeals in respect of non-discretionary judgments or orders, the concern of an appellate court on an appeal relating to an order under the Act is that which arises on appeals in respect of any non-discretionary judgment or order. That concern is whether the judgment or order of the court below was wrong in principle or application of the relevant law, whether its findings of primary facts were supported by the evidence and by a proper approach to the evidence, and whether its conclusions from the primary facts were correct. It may be noted in passing that if there is a distinction between the two classes of approach it is not as to the concern of the appellate court but only in the scope afforded to the appellate court to manifest its concern: with either class the appellate court will allow the appeal if it is satisfied that the trial judge was wrong. (*See Ward v James,* 1965, 1 All ER 56 (3), at 570 per Lord Denning, M.R pro Cur.)

I turn now to consider section 1 of the Act both with regard to its wording and to the authorities relating to it. As I can see little, if any, practical difference between 'reasonable provision for maintenance' and 'adequate maintenance for proper support' - except that the former may be a wider concept than the latter - dominion authorities are also pertinent.

[4] It is inherent in the term 'reasonable' that its assessment should be in accordance with objective, and not subjective, tests. Hence, whether a testator has or has not made reasonable provision for a dependant does not depend upon whether or not he had reasons which appeared to him to be valid for not providing for the dependant otherwise than he did. The initial question is whether or not the relevant circumstances before the court show that the testator acted towards the dependant in a way which would be condemned by any reasonable testator faced with the same circumstances: a reasonable testator being one whose reasonableness embraces a sense of justice and obligation, untinged with affectionate or vicious feeling, towards his dependants, in short the 'gravitas' of a Roman *pater familae. (See Re Pugh* 1943, 2 All ER 361; *Re Inns,* 1947, 2 All ER 308; *Re*

Lowell, 1953, 2 All ER 604; *Bosch v The Perpetual Trustee Co. Ltd.* 1938, 2 All ER 14 at 20 - 2.)

CHARLES J
The section either expressly or impliedly prescribes certain matters which have to be taken into account as relevant circumstances in determining the reasonableness of the testator's provisions, namely -

(a) the size of the nett estate; (subsection (3); *Re Borthwick,* 1949, 1 All ER 472);

(b) the past, present and future capital and income of the claimant dependant from any source (subsection (6));

(c) the conduct of the claimant dependant in relation to the deceased (subsection (6));

(d) the deceased's reasons for the manner in which he has disposed of his property, so far as these reasons can be ascertained (subsection (7)). As jurisdiction has to be determined objectively, the validity of those reasons has also to be determined objectively with regard to them being factual or imaginary, or of a normal person or of a person with an aversion or some other mental peculiarity or idiosyncrasy, and the like.

The section then provides, by subsection (6), that any other relevant or material circumstance is to be taken into account. The following have been held to be relevant circumstances or factors which have to be taken into account in determining whether the provision made by the testator, or his failure to make any provision, for a dependant was reasonable:

(i) The legal claims of the claimant dependant on the testator for maintenance. (*Re Joslin,* 1941, 1 All ER 302; *Re Simson,* 1949, 2 All ER 826 at p. 827; *Re Andrews,* 1955, 3 All ER 248; *Bosch v The Perpetual Trustee Co. Ltd sup.*)

(ii) The condition in life and standard of living of the claimant dependant and the testator respectively at the time of the latter's death. (*Re Borthwick, sup.; Bosch v The Perpetual Trustee Co. Ltd sup.*)

(iii) The number of other dependants of the testator and their respective legal and moral claims upon him and the nature and extent of those claims. (Cases cited in (i) above.)

(iv) Whether or not the claimant dependant's claim came into existence without the testator having had the opportunity to alter his will in the dependant's favour. (*Re Franks,* 1947, 2 All ER 638.)

(v) The nature and extent of the legal and moral claims of non-dependants who have benefited under the testator's will to such benefits. (Cases cited in (i) above.)

(vi) Changes in the value of money and rates of interest which have occurred or are likely to occur since the death of the testator and which a reasonable testator would have foreseen at that time. (*Re Howell, sup., Bosch v The Perpetual Trustee Co. Ltd sup.; Dun v Dun and Another,* 1959, 2 All ER 134.)

CHARLES J
With all respect to the learned judge, it appears to me that he really approached the question whether the deceased had made reasonable provision for the appellant's maintenance subjectively by endeavouring to seek the answer through the eyes of the deceased as an apparently reasonable man who recognised that he owed some obligation to his wife, notwithstanding that she was estranged from him and that he regarded her as having been unfaithful. In adopting that approach the learned judge rightly recognised that the deceased's allegations had not been proved, and that of necessity they could not be proved, but he failed to take into account a significant feature of the letter which the deceased left behind him That feature is that the letter reveals the deceased as not being a reasonable man in his attitude to the appellant, since it shows him as a man who was prepared to smear the appellant by repeating after his death allegations which either he

was unable or unwilling to prove against her in his lifetime and which would be difficult, at least, to prove against her after his death.

The learned judge's approach also seems to have led him into overlooking the following factors which should have been considered:

(a) As the causes of the estrangement between the appellant and deceased had not been proved, all that the court could recognise was the bare fact of the estrangement itself.

(b) The size of the nett estate, £800,000 approximately, and the size of the residuary estate, approximately £780,000, half of which was bequeathed to a brother and nephew equally.

(c) A husband with an estate of that size may be expected to maintain his wife, who has not been proved to have been guilty of a matrimonial wrong, at a higher standard of living than that represented either by the allowance which the deceased had made in his lifetime or by the allowance which he had made by his will. Against that, regard also had to be had, of course, to the fact that the appellant did not take any steps or any effective steps to have her maintenance increased during the deceased's lifetime. Even so, that fact did not warrant the appellant's maintenance from the large estate, and consequently her standard of living, being reduced by approximately one - half under the will.

(d) The estrangement between the appellant and the deceased did not destroy the moral obligation under which the latter was to the former for such assistance as she had rendered in laying the foundation of his wealth.

(e) The appellant's pecuniary needs are likely to become greater with age and failing health, and she should not be left to seek assistance from the children, who may be expected to acquire other obligations, both legal and moral, with the years.

CHARLES J

(f) It is a notorious fact, and therefore a matter of judicial knowledge, that the cost of living has continued to rise since the 1939 - 45 war and the value of money consequently to decline. That fact must have been known to the deceased, as a successful businessman, both at the time of making his will and at the time of his death.

In my opinion, any reasonable testator who desired to be just, but neither sentimental nor vindictive, to an estranged wife, would have considered greater provision necessary out of such an estate as this for the proper maintenance and support of the appellant than that made by the deceased. The minimum provision which it appears to me that such a testator would have allowed in all the circumstances, particularly having regard to the future, is an income of £3,000. As the appellant has received a legacy of £1,000, which if invested at 5% would yield an income of £50 *per annum*, and an annuity of £1,000, she should receive an additional £1,950 per year.

I would allow this appeal, therefore, by setting aside the order of Dennison, J, and substituting for it an order to the following effect:

(a) That further provision for the maintenance of the appellant be made out of the nett estate of the deceased, such further provision to be in the sum of £1,950 *per annum*.

(b) That effect be given to the order for further provision as if the bequest of the annuity to the appellant under clause 6 *(a)* of the deceased's will were varied by substituting the words 'Two thousand nine hundred and fifty pounds' for the words 'One thousand pounds' therein, and that the said will in all respects and for all purposes be construed and read accordingly.

(c) That the costs of all parties on this appeal and in the court below be taxed on the basis of solicitor and client and then be paid out of the estate.

* "restator " should read "testator"

Judgment

Blagden CJ and **Pickett J** concurred.
Appeal allowed