Privy Council Appeal No. 24 of 1989

Albyn Henry Stewart *Appellant*

v.

James Borthwick Welch *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD LOWRY
SIR ROBIN COOKE

*[Delivered by **Sir Robin Cooke**]*

This is an appeal in the case of *Re Welch* [1989] 2 NZLR 1. The case arises from claims made by the appellant, Mr. Albyn Henry Stewart, now aged 52, against the estate of his stepfather, the late Mr. Raymond William Welch, who died intestate on 3rd April 1982, leaving property which at the time of the hearing in the High Court (April 1986) was valued at $308,799 net. The main assets were a house in the country town of Alexandra, valued at $130,000, and shares in a company, Fulton Hogan Holdings Limited, valued at $136,852.

Mr. Welch had been employed by the company as a manager after selling to it his own business as a carrier. The house was the last matrimonial home of Mr. Welch and his wife, who is the appellant's mother; she had predeceased her husband by less than two months, having died on 11th February 1982. She left an estate of a total value of $35,000. By her will certain shares were bequeathed to children of her son, the appellant, and the residue of the estate was given to her husband for life and thereafter to the appellant absolutely.

The appellant has had only a limited relationship with his own natural father. As a child he was brought up by his mother and at about the age of 11 he

first met his stepfather when the latter began living with his mother. For some three years the appellant lived with them both in Dunedin, being treated as their child. They moved to Nelson but separated almost immediately, mother and son returning to Dunedin. Mr. Welch became ill and was in a sanatorium for several years but when he was discharged he and the appellant's mother became reunited. Soon after this, about 1954, they moved to Alexandra, where with her active help and the contribution of her savings he established the carrying business. From quite straitened circumstances at first, they built up the business and achieved the degree of prosperity indicated by the size of his estate.

In the meantime the appellant had married at the age of 17. He and his wife have five children. After their marriage in October 1954, the couple stayed with the Welches for a holiday period in Alexandra. His wife also lived with the Welches later while he was in Burham Camp performing compulsory military service. After his discharge they lived together with the Welchs in a garage for about four months. Ultimately the appellant and his wife had their own home in Alexandra, building a house on a section given to him by his stepfather as a 21st birthday present. Mr. Welch also found him employment in successive positions in Alexandra. The appellant and his family enjoyed a close relationship with his mother and stepfather, who had no other children. Mr. Welch was accustomed to introducing the appellant as his son and treated him as his son, just as the appellant treated Mr. Welch as his father. They were frequent companions on social occasions and there is evidence, accepted by the trial judge, that they enjoyed a good relationship.

There is considerable evidence that at various stages, but more particularly towards the end of the lives of his wife and himself, Mr. Welch indicated to the appellant and to other persons that he had made a will, or intended to make one, whereby the appellant would ultimately inherit at least most of the property of Mr. and Mrs. Welch. In the event, however, Mr. Welch died without leaving a will. Two proceedings were commenced by the appellant against his stepfather's estate in order to remedy this disappointment. One was an application made by him as executor of his mother and seeking an order under the Matrimonial Property Act 1963 based on her contributions to the assets of her husband. The other was an action under the Law Reform (Testamentary Promises) Act 1949, which confers on the court jurisdiction to grant relief when there has been failure to carry out a promise to reward by testamentary disposition a claimant who has performed work or services for the deceased.

No claim by the appellant would lie under the Family Protection Act 1955, which is concerned with the moral duty of persons to make testamentary provision for their children and certain other dependants: stepchildren are entitled to claim thereunder only if they were maintained or legally entitled to be maintained by the deceased immediately before his death, which was of course not the case with the appellant.

The beneficiaries on the intestacy of Mr. Welch were his eight brothers and sisters. In effect the contest in the litigation has been between them and the appellant. It has not been suggested on their behalf that any of them had any moral claim on the bounty of the deceased except such as may be said to follow from kinship alone.

The two proceedings brought by the appellant came on together before Williamson J., who heard oral evidence as well as having affidavits, and he decided in favour of each claim. Under the 1963 Act the judge awarded the appellant on behalf of his mother's estate, to reflect her contributions to the matrimonial property, a half share in the house and furniture and in the deceased's shares in Fulton Hogan Holdings Limited. Under the 1949 Act he awarded the plaintiff as a reward for services the other half interest in the same assets.

The respondent, as administrator of Mr. Welch's estate, appealed to the Court of Appeal against both awards. The appeals were heard by Somers, Casey and Hardie Boys JJ. on 20th June 1988 and the judgment of the Court of Appeal was delivered by Casey J. on 29th June 1988. The appeal against the matrimonial property award does not appear to have been pressed and was dismissed. The Court of Appeal were satisfied that the award was entirely appropriate for the reasons given by the High Court judge.

As to the testamentary promises award, counsel who appeared in support of the appeal in the Court of Appeal, taking what seems to their Lordships and evidently seemed to the Court of Appeal also an approach which if it erred at all did so on the side of generosity, conceded that there was enough evidence of services and a promise to reward them to give jurisdiction to make an award under the Act. The ground of the appeal was that the award was far too high. The Court of Appeal agreed, reducing the award under the 1949 Act to what they described as the relatively modest sum of $20,000. The appellant now appeals to Her Majesty in Council, seeking a restoration of the High Court judgment.

The Law Reform (Testamentary Promises) Act 1949, which as it now stands includes some later replacement provisions and amendments, is a more evolved version

of a pioneering piece of legislation passed by the New Zealand Parliament in 1944, being section 3 of the Law Reform Act of that year. The legislation has not come before the Judicial Committee previously and is apparently unique to New Zealand. There is a body of New Zealand case law on it; a number of the leading cases were cited to their Lordships in argument. The original 1944 provision was simply as follows:-

> "3.(1) Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of the amount specified in the promise or, if no amount is specified, of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the amount of the estate, and the nature and amounts of the claims of other persons against the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise."

In that form the legislation was considered by the Court of Appeal in *Nealon v. Public Trustee* [1949] NZLR 148. The main point decided in that case was that for the purposes of the section a promise to leave land to the claimant did not have to be evidenced by writing satisfying the Statute of Frauds. The judgments drew attention to the absence of power under the section to order specific property to be transferred: promises could be enforced under the section only as if they were promises of money. There was some difference of opinion among the members of the Court about the meaning of the "promise" necessary to found the statutory jurisdiction. One suggestion was that something similar to an executory contractual promise was necessary, to the extent that there must be, it was said, "mutual promises of a contractual character".

Nealon's case also identifies the origins of the section. Injustices had been caused by the common law requirement to establish certainty of the precise extent of the promised reward before a promise of testamentary reward for services would be held contractually binding on the estate of the promisor. Where the promise involved land, the Statute of Frauds and other statutory requirements for writing were another source of difficulty. Their Lordships note that these shortcomings in the evolution of the common law can still result in hard cases in England. Although a remedy by way of proprietary estoppel was granted in *Re Basham* [1986] 1 W.L.R. 1498, it has been held in *Sen v. Headley* [1990] 1 All E.R. 898 that a donatio mortis causa cannot be made of land.

After *Nealon's* case the 1944 section was replaced by the more elaborate provisions of the 1949 Act. Since then there have been further changes, the more significant for present purposes being in 1961. As they now stand, the principal provisions, sections 2 and 3, read as follows:-

> "2. Interpretation - In this Act, unless the context otherwise requires, the term 'promise' shall be deemed to include any statement or representation of fact or intention.
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> 3. Estate of deceased person liable to remunerate persons for work done under promise of testamentary provision -
>
> (1) Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including the particular circumstances in

which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise.

(2) This section shall apply -

(a) Whether the services were rendered or the work was performed before or after the making of the promise:

(b) Notwithstanding anything to the contrary in Section 4 of the Statute of Frauds 1677, or Section 2 of the Contracts Enforcement Act 1956, or any other enactment.

(3) Where the promise relates to any real or personal property which forms part of the estate of the deceased on his death, the Court may in its discretion, instead of awarding to the claimant a reasonable sum as aforesaid -

(a) Make an order vesting the property in the claimant or directing any person to transfer or assign the property to him; or

(b) Make an order vesting any part of the property in the claimant or directing any person to transfer or assign any part of the property to him, and awarding to the claimant such amount (if any) as in its opinion is reasonable in the circumstances.

(4) In awarding any amount on a claim under this Section the Court may, if it thinks fit, order that the amount awarded may consist of a lump sum or a periodical or other payment.

(5) The incidence of any payment or payments so ordered shall, unless the Court otherwise determines, fall rateably upon the whole estate of the deceased, or, in cases where the authority of the Court does not extend or cannot directly or indirectly be made to extend to the whole estate, then to so much thereof as is situated in New Zealand.

(6) The Court shall have power, after hearing such of the parties as may be affected as it thinks necessary, to exonerate any part of the estate of the deceased from the incidence of any such payment or payments, to determine priorities as between any benefit awarded by the Court to the claimant under this Act and the beneficial interest of any other person or persons in the estate of the deceased person, and to make such provision as it thinks fit as to the incidence of the whole or any part of the debts, testamentary expenses, and duty in respect of the estate of the deceased. For the purposes of this subsection the Court may direct any executor or administrator to represent, or appoint any person to represent, any such party.

(7) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

(8) Nothing in this section shall affect any remedy which a claimant may have apart from this Act in respect of any promise to which this section relates, and where a claimant has any such remedy he may at his option enforce that remedy or his remedy under this section, but not both:

Provided that nothing in this section shall prevent alternative claims in respect of those remedies from being made in the one action."

Some of the differences between the 1944 section and the present provisions are material to the present case. There is a definition of "promise" extending beyond the usual contractual meaning of that word, and even beyond the common meaning. It has been made clear that the promise may relate to past services or work. Where the promise relates to real or personal property still belonging to the deceased at his death, there is a discretion to make orders for specific vesting or transfer. The words "whether or not the provision was to be of a specified amount or was to relate to specific real or personal property" were introduced in 1961 and would appear to make explicit what had always been implicit in the legislation. More significantly for present purposes, in 1961 Parliament discarded the provision to the effect that, when the promise specified an amount, it was automatically that amount for which the claim was enforceable against the estate. Instead, in all cases where a claim lies it is enforceable as if there has been a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including certain listed factors in particular.

Among the particular factors listed are the value of the services or work and the value of the testamentary provision promised (in 1961 the latter words were enacted in place of "the value of any real or personal property specified in the promise"). So it is plain, considering section 3(1) as a whole, that whenever a claim to relief is made out under it the criterion as to the relief to be granted is reasonableness. That is always the result at which the court is to aim, no matter whether the award is of money or of specific property. If the deceased promised a certain sum or a certain property, that is a relevant consideration but not necessarily decisive. Their Lordships do not find this approach surprising. To give only one hypothetical example, if there were a promise of the whole estate prompted by gratitude, in perhaps an emotional moment, for a single act of rescue or kindness, it would not necessarily be reasonable to enforce that promise to the full.

It is not to be doubted that, for instance, where there have been meritorious services and considerable sacrifice on the part of a claimant and the property promised has been a central feature in the services or the life of the claimant, the natural order under the Act may be one vesting the property in the claimant, provided that this does no injustice to any others with meritorious claims against the estate. *Jones v. Public Trustee* [1962] NZLR 363 was such a case. On the other hand, despite a promise of a specific property, either the limited value of the claimant's services by comparison or other circumstances of the case may result in a lesser or different award, as in *Public Trustee v. Bick* [1973] 1 NZLR 301 and *Re Townley* [1982] 2 NZLR 87.

The legislation takes the form of making testamentary promises enforceable against the estate, if the services or work have been rendered or performed; but the criterion of reasonableness as to the extent of any order, together with the express discretion regarding vesting or transfer orders, mean that a large element of judicial discretion must enter into the administration of the Act. By section 5, claims are to be tried by a judge without a jury. The two decisions last cited and others have recognised that on appeal the Court of Appeal will not substitute its discretion for that of the judge at first instance unless some reasonably plain ground is made out for doing so, and that the trial judge's advantages in hearing the evidence orally are also to be borne in mind. Subject to those important considerations, it is desirable that a reasonable degree of judicial consistency be achieved in exercising the statutory jurisdiction. None of this was in dispute before the Board or appears to be capable of dispute.

During the period from 1954 to 1959 (when Mr. Welch sold his business) the appellant helped Mr. Welch in the business from time to time during holidays or in hours outside his own employment. In the earlier part of that period the appellant and his wife were at times living with Mr. and Mrs. Welch. The services were unpaid but the appellant and his family enjoyed reciprocal advantages. On the evidence some doubt must be entertained about whether Mr. Welch's indications that he intended to leave to the appellant the shares, and later the house and furniture also, were meant to signify reward for those services rather than a normal expression of family love or affection. Williamson J. accepted, however, that there was some element of promised reward for services to the business, and the point was not contested in the Court of Appeal.

The judge spoke of the relationship between the appellant and his wife and children and the deceased as a source of interest, comfort and joy to the latter. He said that the appellant had given the deceased companionship, mentioning for example that the appellant accompanied the deceased on trips to the hotel and other social gatherings, and that the appellant had also conferred on the deceased the enrichment of having a daughter-in-law and grandchildren.

It appears to their Lordships that some straining of the scope of the Act is required to bring within the concept of services the natural incidents and consequences of life within a close family group, such as existed in this case. The case is distinguishable from *Hawkins v. Public Trustee* [1960] NZLR 305, where a grandson changed his name to that of the deceased, became in effect his adopted son, worked for him full-time as manager of his farms, and entered into a bargain with the deceased whereby he was to receive initially the whole but as revised a quarter share of the estate. In those circumstances Shorland J. found that the actions of the claimant in gratifying the deceased by assuming his name and performing the role of near-adopted son were "services" within the meaning of the Act. That was a case of much more than a normal relationship between grandson and grandfather; whereas, in the present case, as the Court of Appeal put it:-

> "The evidence points to nothing more than a normal family relationship between a stepfather and stepson, who had the good fortune to get on well with each other. There was a reasonable balance of benefits and personal satisfaction on each side, and in earlier years Mr. Welch helped his stepson with job opportunities and the gift of a section, as well as providing the general support of a father, and this carried on into the mutual companionship and family association of later times."

In support of the present appeal Mr. Withnall contended that the deceased had made his own assessment of the value of the appellant's services by promising to leave him the chief assets in his estate, and that the deceased's own assessment should not be disturbed. As to that contention, manifestly it will often be impossible or inappropriate to weigh in any nice scales services or work on the one hand and testamentary reward on the other. An assessment, even a generous one, by a promisor able to exercise a sound judgment would not lightly be departed from. In this case, however, the difficulty is that there is no evidence that the promises were ever seen by either the deceased or the appellant as an assessment of a reward for services. As already indicated, their Lordships regard much of the evidence of services as tenuous. The discrepancy between the value of the deceased's assets and the value of anything that can pass muster as "services or work" underlines that the predominant motive of the deceased in making the representations was affection for his stepson and the latter's family, and the natural tendency to give effect to ordinary family expectations.

The Court of Appeal suggested that in making such a large award the judge must have overlooked the reciprocal advantages received by the appellant from his stepfather. As pointed out for the appellant on the argument of the present appeal, towards the end of his reasons the judge did mention that he had considered the benefits conferred by the deceased on the plaintiff during his lifetime. Their Lordships think that in seeking a reason why the award was out of proportion to the services the Court of Appeal may have rather overstated the point; it might have been more accurate to say that sufficient weight cannot have been given to the reciprocal benefits. What is clear is that there is a major disproportion.

Some sympathy must be felt for the appellant, who has not received his full expectations; but by no means has he gone away empty-handed. It is of the essence of the jurisdiction under the Law Reform (Testamentary Promises) Act 1949 that an award must be not more than reasonable recompense for services or work for the deceased. While a liberal approach to the question is fitting, and especially so when there are no competing moral claims, the conclusion that the initial award here went beyond the true scope of the Act is inescapable. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed, but without any order for costs.