Ilott v The Blue Cross & others [2017] UKSC 17

Need, maintenance and moral obligations

1. Background: the approach to 'maintenance' prior to *Ilott*

1.1 Before the Supreme Court's decision in *Ilott v The Blue Cross*, the Court consistently applied the dicta of Oliver J and Goff LJ in *Re Coventry*[1] and of Browne-Wilkinson J in *Re Dennis*[2] as setting out the correct approach to 'maintenance' for the purposes of section 1(2)(b) of the Act. These dicta have endured since the infancy of the 1975 Act.

1.2 In fact, in both *Coventry* and *Dennis* the learned judges sounded a note of caution as to defining 'maintenance' too prescriptively for the purposes of a claim under the 1975 Act:

1.2.1 In *Dennis*, Browne-Wilkinson J prefaced the remarks which have since been taken to be a definition of 'maintenance' with the following:

'*The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach*.'

1.2.2 Goff LJ had previously said in *Coventry*:

'*What is proper maintenance must in all cases depend upon all the facts and circumstances of the particular case being considered at the time*'.[3]

[1] [1980] 1 Ch 461 at 474F-475C and 484H-485D respectively

[2] [1981] 2 All ER 140 at 145h-146a

[3] at 485C

1.3 Goff LJ went on to say in Coventry: '*... I think it is clear on the one hand that one must not put too limited a meaning on [maintenance]; it does not mean just enough to enable a person to get by; on the other hand, it does not mean anything which may be regarded as reasonably desirable for his general benefit or welfare.*'

1.4 Just over a year later, Browne-Wilkinson J said in *Dennis*[4]: '*... in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need by way of income payments. The provision can be by way of a lump sum, for example to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure*'.[5]

1.5 Oliver J accepted in *Coventry* that '*maintenance does not mean mere subsistence*', referring to the fact that *Re E* [1966] 1 WLR 709 and *Millward v Shenton* [1972] 1 WLR 711 had been cited to him. On appeal, Goff LJ considered that Oliver J had been right to accept the 'wider' principles in those two cases.

- In *Millard v Shenton*, a testatrix had left her entire estate to a cancer charity. One of her adult sons, then aged 52 and by then severely disabled and entirely dependent on state benefits, having had a '*normal affectionate*' relationship with his mother, brought a claim against her

[4] [1981] 2 All ER 140 at 145h-146a

[5] That statement was made in the context of an unsuccessful application by an adult son for permission under section 4 of the Act to bring a claim out of time, and the merits of the claim were considered as part of the Court's exercise of discretion as to whether to grant such permission. In his prospective claim, the applicant sought a lump sum to enable him to discharge his liability for capital transfer tax on lifetime gifts to himself by the deceased. He had already been generously provided for by his father, but had dissipated the monies given to him.

estate. He was awarded 11/12ths of her estate. Lord Denning MR said at 715G that the fact that the claimant was dependent on state assistance '*is not a reason for depriving him of anything. In Re E (decd) Stamp J pointed out that reasonable provision is not limited to keeping a dependant above the bread line**. So far from state assistance being a ground for giving him less, it is a ground for giving him more by doing something to alleviate the distress under which he suffers***. *It may not necessarily be by increasing his income. It may be better by providing a lump sum so as to enable him to have a television set, or a car, or **even a better house***.' (emphasis supplied)

2. The Supreme Court's approach to 'maintenance'

2.1 Lord Hughes[6] considered that the limitation of the statutory jurisdiction of the Court to award only 'maintenance' to any non-spousal claimant to be an important legislative choice. He said at para 13 that it demonstrated the significance attached by English law to testamentary freedom.

2.2 Lord Hughes considered that the frequently-cited summary of 'maintenance' in *Dennis* (partly cited at 1.4 above) is '*helpful*' (para 14). He further said that:

2.2.1 the concept of maintenance is

- '*no doubt broad*' (para 14)
- '*clearly flexible*' (para 15)

- '*falls to be assessed on the facts of each case*' (para 15);

2.2.2 maintenance is by definition '*the provision of income rather than capital*' (para 15);

[6] With whom Lord Neuberger PSC, Lady Hale DPSC, Lord Kerr, Lord Clarke, Lord Wilson and Lord Sumption JJSC agreed; Lord Hughes' judgment is therefore to be taken as the judgment of the Court

2.2.3 it may, nonetheless, be provided by lump sum, for example in the following situations:

- provision of a lump sum from which both income and capital may be drawn, e.g. on the *Duxbury* model

- provision of a car to enable a claimant to commute to work (paras 15 and 40)

- the facts of this case, where it was appropriate for a lump sum to be paid to enable the claimant to purchase '*necessities for daily living*' such as essential white goods, basic carpeting, floor covering and curtains, and the replacement of worn out and broken beds (para 41). [At trial the claimant had proffered an extensive schedule of desired capital expenditure on refurbishing and re-fitting her home, which she said in evidence was in a poor decorative state and rather damp with mould in the kitchen and bathroom. She had sought to get the housing association to improve its condition but without much success.]

- provision of (a life interest in?) a house or a sum of money to enable the purchase of a house [see further below];

2.2.4 maintenance '*cannot extend to any or every thing which it would be desirable for the claimant to have. It must import*[7] *provision to meet the everyday expenses of living*' (para 14);

[7] 'Import' is a curious word to have used. Its dictionary definition is '*indicate or signify*' or '*express or make known*', but it may not naturally be read as absolutely restricting its object. Nonetheless, from its context, this may be what was intended.

It appears that this may be strictly construed. Lord Hughes agreed with the result in *Dennis* in which the claimant faced the threat of bankruptcy as he could not afford to pay the capital transfer tax payable on a generous gift made to him by the deceased. Despite that threat, it was held that he should not receive an award for his maintenance as he was well able to work for his own living. Lord Hughes observed at para 14 that the claimant in that case was well capable of maintaining himself even if bankrupt.

2.3 Lord Hughes emphasises the importance of remembering that the statutory jurisdiction of the Court under the 1975 Act is not to confer capital on a claimant but only to provide for his/her 'maintenance'. Therefore, although the provision of housing may well be a form of 'maintenance', '*it is likely more often to be provided by .. a life interest rather than by a capital sum*'. [Although note that this is not an absolute prohibition on awarding a capital sum for housing, presumably because it was acknowledged that maintenance must be tailored to the case. It is easily possible to imagine, for example, awards of capital sums for housing being made in consent orders, where the claimant has relinquished other forms of relief. See, too, *Lewis v Warner* [2017] EWCA 2182 (Civ) referred to below.]

This point made at paras 15 and 44 of Lord Hughes' judgment was echoed in the supplemental judgment of Lady Hale DPSC, with whom Lord Kerr and Lord Wilson JJSC agreed). She said at para 65(1):
'*It is difficult to reconcile the grant of an absolute interest in real property with the concept of reasonable financial provision for maintenance: buying the house and settling it upon her for life with reversion to the estate would be more compatible with that.*'

2.4 It is not entirely clear whether the Supreme Court regarded a holiday as an everyday expense of living. The only clue is at para 40 where Lord Hughes said that the claimant's list of desired capital expenditure did not include '*other similar necessities such as a reliable car, nor a holiday*'. This may be

interpreted as indicating that he did consider a holiday to be a 'necessity for daily living', as indeed do many; recent research[8] has established that many people would not sacrifice an annual holiday abroad in order to save for a deposit on a first property. Alternatively, those few words could be construed as indicating that a holiday is not a 'similar necessity' so that a claimant would have to demonstrate on the facts of the case that one holiday a year (or several holidays a year) is 'maintenance'. [In fact, Mrs Ilott had included in what was subsequently found to be a somewhat ambitious list of future outgoings £900 for an annual holiday for her two youngest children, and the outgoings for a car.]

3. The Supreme Court's approach to 'needs'

3.1 Lord Hughes observed at para 19 that all cases which are limited to 'maintenance' (i.e. claims by non-spousal claimants) will turn largely upon needs asserted by the claimant.

3.2 'Need' is to be judged by the standard appropriate to the circumstances, and not by subsistence levels (para 19).

- In practice, this must mean that the living standards of some claimants may be improved (as, marginally, in the case of Mrs Ilott), although no doubt the ambitions of other claimants will not be realised.

- The references in paras 15 and 19 to 'subsistence level' were the only (passing) references to one of the main arguments in the appeal, namely whether it could properly be said that it is always a claimant's current standard of living which is relevant to the standard of 'maintenance'. Clearly, if that were right, a claimant who lives on state benefits would be unlikely ever to succeed (although other claims by such claimants have

[8] For example, see http://news.bbc.co.uk/1/hi/uk/7528143.stm and http://www.thisismoney.co.uk/money/mortgageshome/article-3949532/Holidays-meals-new-clothes-Britons-refuse-property-ladder.html

succeeded in the past). It seems that the Supreme Court implicitly rejected that argument. It is suggested that a trial judge will always take into account a claimant's current circumstances, as well as considering whether the claimant's current standard of living is appropriate in all the circumstances.

3.3 Further, 'needs' are not necessarily the measure of the order which ought to be made (para 22). Various reasons are given for this, including competing claims of others (it is not clear, though, whether this refers to other 1975 Act claims against the same estate, or 'claims' of beneficiaries who wish the testator's wishes to be upheld: see para 44 re the 'claim' of the Charities, and para 46) and the relationship between the claimant and the deceased.

4. Testamentary wishes

4.1 Lord Hughes said at para 47 that

'*It is not the case that once there is a qualified claimant and a demonstrated need for maintenance, the testator's wishes cease to be of any weight. They may of course be overridden, but they are part of the circumstances of the case and fall to be assessed in the round together with all other relevant factors*'.

4.2 It seems that Lord Hughes is saying here that the testator's wishes are a mandatory factor for the Court to consider in every case under section 3(1)(g).

4.3 It is not clear how this will be applied in practice:

- This passage could be construed as imposing an additional hurdle for a claimant to surmount in every 1975 Act claim against a testate estate. (Do claimants have an advantage where there was an intestacy?)

- However, the reasonableness of the testator's wishes may undoubtedly be a further factor under section 3(1)(g) and sometimes 3(1)(d), as stated by

Lord Hughes at para 17. [If there is any explanatory note accompanying the will, the court is likely to be prepared to consider the factual accuracy of any such note, as it did in *Ilott*.]

- Will the weight to be attached to a testator's wishes also depend on (as, it is suggested, it should) other factors which might also be regarded as part of the circumstances, such as:

  - how recently the testator expressed the wishes?

  - the knowledge the testator had at the time of making the will?

  - whether the testator had indicated any intention to change his last will?

  - (possibly) the consistency of his wishes and the length of time for which he had held such wishes?

5. Moral obligation

5.1 The 'obligations' owed by the deceased to the applicant or to any beneficiary of the estate are a single factor which the Court is required by section 3(1)(d) of the Act to consider along with all the other section 3 factors. It is within the ambit of the Court's discretion under the Act to make provision for an applicant to whom the deceased did not owe any 'obligation' for the purposes of section 3(1)(d) in an appropriate case where one or more other section 3 factors weigh in the applicant's favour in the balancing exercise.

5.2 Many of the decisions in applications by adult children under the 1975 Act since Court of Appeal handed down its judgment in *Re Coventry* have focused on the debate about whether it is necessary or appropriate for the Court to find that the deceased owed a 'moral obligation' to the applicant or that there is some other 'special circumstance' (hence why Sir Nicholas Wall P said in the first Court of

Appeal decision in *Ilott* in 2011 that it was important to note both what was said and what was not said in *Coventry*).

5.3 The debate began as a result of Oliver J's dictum in *Re Coventry* at 475C:

'*It cannot be enough to say "here is the son of the deceased; he is in necessitous circumstances; there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore these dispositions do not make reasonable provision for the applicant." There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made.*'

5.4 In *Coventry*, the applicant was the deceased's son. He was employed, but was on a low wage, and had liabilities towards his ex-wife. Oliver J accepted that he was in financial need although had '*considerable reserve*' about his figures especially in relation to the costs of his accommodation since Oliver J seems to have thought that he might be re-housed by his local authority if he could not afford to pay rent, and that he had not made proper enquiries about the cost of smaller accommodation. The estate was modest, and the defendant was the deceased's widow (and the applicant's mother) who was living on state pension and lived '*on a very slender margin*' (466G). Oliver J said at 478B that the claim rested on two limbs: (1) that the applicant was a son of the deceased with whom it might be thought that there would be a bond of natural affection and (2) that although he was in employment and capable of maintaining himself his circumstances left him little or no margin for expenditure on anything other than the necessities of life.

5.5 Oliver J's apparent requirement that an applicant should have a '*moral claim*' to be supported by the deceased was (it is suggested, mistakenly) used to support such submissions by counsel and the Court's approach to the Act in subsequent

authorities[9], despite the clear dictum of Goff LJ in *Coventry* itself at 487G that '*Oliver J nowhere said that a moral obligation was a prerequisite of an application under section 1 (1) (c); nor did he mean any such thing. It is true that he said a moral obligation was required, but in my view that was on the facts of this particular case, because he found nothing else sufficient to produce unreasonableness*'.

5.6 In fact, Oliver J had noted that the Court must consider all the section 3 factors, and said at 474D that '*I think, in these circumstances, that I ought not to approach this application with any preconceived notion that there is some especially heavy burden on a male applicant of full age beyond that which must, as a practical matter, necessarily exist when a person who applies to be maintained by somebody else is already capable of adequately maintaining himself*'. This was echoed by Browne-Wilkinson J in *Dennis* at 145b: '*The court now approaches claims made by a son on the same basis as claims made by any other applicant*'.

5.7 Notwithstanding these remarks in 1978 and 1980 respectively, it was not until the late 1990s, some 20 years after the decision in *Re Coventry*, that in a series of decisions the Court of Appeal made it clear (again) that it was not a requirement for success that the applicant had to demonstrate that the deceased owed him a 'moral obligation' or that there was some other 'special circumstance'[10]. For example, in *Re Hancock deceased* Sir John Knox said: '[Counsel's] *argument that an adult child cannot make a successful application, unless he or she can establish a moral obligation by the deceased or some other special reason to show that there was a failure to make reasonable provision, is only correct to the extent that it means that there must be some reason for the court to decide that the scales fall in favour of the conclusion that there has*

[9] for example, in *Re Jennings* [1994] Ch 286 at 295E per Nourse LJ; in *Re Hancock deceased* [1998] 2 FLR 346 at 350D (submissions of Counsel)

[10] *Re Hancock deceased* [1998] 2 FLR at 351F per Butler-Sloss LJ, 356B per Judge LJ and 357G per Sir John Knox; *Espinosa v Bourke* [1999] 1 FLR 747 at 755D-H per Butler-Sloss LJ

been a failure to make reasonable financial provision. So limited, the submission is a truism which does not advance the argument. What is not permissible is to use Re Coventry, or indeed any other authority, to establish that any particular factor has to be placed on one side or the other of the scales. Of course there has to be a reason justifying a court's conclusion that there has been a failure to make reasonable financial provision but the use of the phrase "special circumstance" does not advance the argument. The word "special" means no more than what is needed to overcome the factors in the opposite scale'[11].

5.8 In the decision on the 'Threshold' issue in *Ilott* in 2011, Sir Nicholas Wall P re-confirmed, agreeing with *Hancock*, that '*an adult son or daughter of the deceased does not have to show that the deceased owed him or her a moral obligation or that there were other special circumstances in order to succeed under the Act*' [12]. In the same decision, Arden LJ said '[Eleanor King J] *took the view that there had to be some separate factor apart from just a filial relationship and "necessitous circumstances", that is, the need for maintenance … the additional factor which the judge found necessary is not, in my judgment, required by the authorities…. The financial circumstances of the applicant need to be considered against all the other factors in the case. It is in that sense that need alone is not enough*'[13].

5.9 Therefore, an adult child is in no different position to any other applicant for relief under the Act[14].

5.10 In *Ilott*, Lord Hughes referred at para 20 to the previous cases cited above, and expressly agreed with the Court of Appeal's decisions on this point in *Re Coventry* and *Hancock*. He said:

[11] [1998] 2 FLR at 357F-H

[12] at para 27

[13] at para 69

[14] per Butler-Sloss LJ in *Espinosa v Bourke* at 755G

'*There is no requirement for a moral claim as a sine qua non for all applications under the 1975 Act, and Oliver J did not impose one. He meant no more, but no less, than that in the case of a claimant adult son well capable of living independently, something more than the qualifying relationship is needed to found a claim, and that in the case before him the additional something could only be a moral claim. That will be true of a number of cases. Clearly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act.*'

5.11 It seems from this passage that the *status quo* as to the role which moral obligations play in 1975 Act claims has not been altered by *Ilott*.

6. Cases since *Ilott*

6.1 Moral obligations and maintenance were considered in the more recent decision of the Court of Appeal in *Lewis v Warner* on 19 December 2017. In that case a 91-year-old claimant had co-habited with the deceased in her property for 20 years. He was financially well able to re-house himself, but wished to remain living in the same property as he had lived his whole life in that area, he was within walking distance of a village shop and had as a next door neighbour a doctor who could respond swiftly if he pressed his emergency button and who kept an eye on him daily. At first instance the recorder ordered that the property be transferred to him in exchange for payment of £385,000 (which was a price based on an expert valuation). This decision was upheld by Newey J on 18 July 2016, and upheld again by the Court of Appeal on the respondent's second appeal.

6.2 Sir Geoffrey Vos, the Chancellor, cited *Ilott* very extensively in his judgment, and noted at para 25 that 'maintenance' can extend to the provision of a house in which the applicant can live (albeit that it might most often be provided by way of life interest). He noted that in this case the trial judge had found that the applicant was being 'maintained' by the deceased as she had provided a roof

over his head, and that he needed that particular maintenance to continue rather than being required to move house. The Chancellor did not disagree with the trial judge's evaluation. It was irrelevant that the applicant had not expected to be able to carry on living in the property after the deceased's death, and it was likewise irrelevant that he did not subjectively regard the deceased as having any moral obligation to continue to provide that particular roof over his head. The Chancellor said: '*the absence of a moral obligation was outweighed by what was required to preserve the status quo for a very old and infirm person, who had been kept in a suitable house by the deceased for the nearly 20 years of their relationship. Even if Mr Warner did not "think" he had a moral claim, the question of whether the deceased has made reasonable financial provision for Mr Warner's maintenance has, as I have said, to be evaluated objectively ..*'. (There may be a hint in this passage that in fact Mr Warner could be said to have had a moral claim, but that argument was not put on his behalf.)

6.3 As to maintenance, the Chancellor noted that the Act did not require that in any particular method of making provision for an applicant's maintenance, consideration had to pass away from the estate, and that there might be occasional cases where the applicant needed some *in specie* property, and where the precise financial value of that property was less important to the applicant than the property itself. This was just such a case. Once it was established that the deceased was 'maintaining' the applicant by providing that particular roof over his head, it followed inexorably that an order could be made for that particular form of maintenance to continue.

6.4 Finally, two other post-*Ilott* decisions which of course turn on their own facts:

6.4.1 *Ball v Ball* [2017] EWHC 1750 (Ch) (Bristol District Registry, 2 August 2017, HHJ Paul Matthews). In that case the testatrix had 11 children (3 were claimants, and 8 were defendants). In 1991 the claimants had reported their father for sexual abuse when they were children. He had pleaded guilty, and received a suspended prison sentence. As a result of their actions, they were excluded by their mother from her will, which

instead split her small £157,000 estate between her other 8 children and her grandsons. Financially, the claimants were 'getting by' in modest circumstances, and could all do with a lump sum to advance them in life but did not need further income for their maintenance (and were generally better off than the defendants). The Judge found that the father's abuse had not been authorised, instigated or encouraged by the deceased, and that her conduct in reacting to the claimants' complaints about their father by disinheriting them did not put her under any kind of moral obligation to them. There being no other special circumstances, the claim was dismissed as not having passed the 'threhold'.

6.4.2 *Nahajec v Fowle* (18 July 2017, Leeds County Court, HHJ Saffman). In this case the deceased had left his entire £265,000 estate to a friend. The deceased's 31-year-old daughter brought a claim. She was his child by a second marriage. The deceased had separated from the claimant's mother when she was 11 years old and cut himself off from her. There had been a brief reconciliation between the claimant and her father between 2007 and 2009 but the deceased then cut himself off again as he disapproved of the claimant's boyfriend. The claimant worked 32 hours a week for salary, plus 10-15 unpaid hours to gain experience to become a veterinary nurse. Without debts of £6,600, she would have been able to fund her outgoings on a '*frugal*' existence with only modest expenditure on '*fun*' items. It was held that the will failed to make reasonable financial provision for the claimant, and she was awarded £30,000. Although the claimant was an independent adult, claim was based on '*something more*' than the qualifying relationship (which seems to have been that she had repeatedly tried to have relationship with her father, she was not profligate, she was seeking to exploit her earning capacity, and she had genuine ambition to improve herself by becoming a veterinary nurse). The defendant had money problems too, which militated against a significant award to the claimant. The judge considered that £30,000 would enable the claimant to clear her debts and

should enable her to improve her position by undertaking a course so as to qualify as a veterinary nurse.

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