IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 110/2019
[2019] NZSC 136

BETWEEN	ALLAN DAVID MCLEAN Applicant
AND	PUBLIC TRUST Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	D R Tobin and R M Reeve for Applicant A R Gilchrist for Respondent R B Stewart QC and L W Dixon for Mr Flaus
Judgment:	6 December 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay one set of costs of $2,500 to be divided equally between the respondent and Mr Flaus as trustee for the estate of Mrs Ruth McLean.

REASONS

Introduction

[1] The applicant, Allan McLean, brought a proceeding in the High Court concerning the construction of the will of his late father, James Alexander McLean (Mr McLean). Nation J in the High Court found against the applicant[1] and that

1 *McLean v Public Trust* [2018] NZHC 3268.

decision was upheld on appeal by the Court of Appeal.[2] The applicant now seeks leave to appeal against that decision.

Background

[2] The factual background is set out in the judgment of the Court of Appeal.[3] We need only note the following matters.

[3] First, Mr McLean's last will bequeathed the "rest residue and remainder" of his estate to his trustees upon a number of trusts permitting his wife, Ruth McLean (Mrs McLean), to for example: occupy the family home; be paid the net annual income arising from the estate during her life; and, if necessary, resort to capital to make up the income to a sufficient amount for her "proper maintenance".

[4] The next clause in the will was as follows:

> 5. UPON the death of my said wife:
>
> (a) I GIVE DEVISE AND BEQUEATH all my farming plant and machinery, Four Hundred (400) Ewes and that piece of land known as Section 46 Block X New River Hundred containing 32.3635 hectares and being all of the land in Certificate of Title 21/212 to my said son JOHN McLEAN.
>
> (b) TO HOLD the balance of my residuary estate for such of them my children as survive me and if more than one as tenants in common in equal shares.

[5] Second, as the Court of Appeal notes, the dispute over the meaning of the will concerns two competing interpretations of clause 5, namely:[4]

> (i) the gifts comprised in cl 5(a) were contingent on John surviving his mother and therefore, because John died before his mother, the gifts fell into the residuary estate to be disposed under cl 5(b).
>
> (ii) the gifts comprised in cl 5(a) vested in John on his father's death subject only to the life interest of his mother.

[6] The applicant's case is that the first interpretation is correct. On that basis, because his brother, John, did not survive their mother, he says John's estate is not

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2 *McLean v The Public Trust* [2019] NZCA 449 (French, Mallon and Moore JJ) [CA judgment].
3 At [1]–[20].
4 At [2].

entitled to all of the cl 5(a) gifts. Instead, the specific gifts to John failed and fell into Mr McLean's residuary estate for distribution as provided for by cl 5(b). John died intestate in July 2010 and, as he was not married and had no children, under the Administration Act 1969 all of his estate passed to Mrs McLean as his surviving parent. Mrs McLean died seven years later in June 2017. In her will she left her interests in the farm to the applicant's ex-wife and three of her grandchildren (the applicant's two children and his sister's child).

[7] The Courts below both found the second of the two competing interpretations was correct, namely, that the gifts in cl 5(a) vested in John when Mr McLean died subject only to Mrs McLean's life interest.

[8] The additional points to note as part of the background relate to a proceeding brought in 2014 in the High Court by the applicant and his sister while Mrs McLean was still alive. This proceeding related to Mrs McLean's administration of Mr McLean's estate and was settled in 2016. As part of the settlement, the Public Trust, the respondent, became trustee and executor of Mr McLean's will.

[9] A statement of defence was filed in the current proceeding by John Flaus as a party served. Mr Flaus is the executor of Mrs McLean's estate. He pleaded that in the current proceeding the applicant was seeking improperly to re-litigate matters settled in 2016. The question of whether the current proceeding was res judicata was, however, put to one side and the matter proceeded in the High Court and before the Court of Appeal solely on the question of the meaning of the will.

The proposed appeal

[10] The applicant accepts there is case law for the proposition that, in the absence of personal qualification, such as "I give to my son, should he attain the age of 25", clauses like cl 5 are "commonly deemed to imply vesting at the date of death".[5] However, he wishes to argue that interpretation does not apply here. That is because he says that the wording of cl 5 is clear. He also wishes to argue there are a number

[5] See for example *Browne v Moody* [1936] AC 635 (PC) at 647; *Tanner v New Zealand Guardian Trust Co Ltd* [1992] 3 NZLR 74 (CA) at 76; and *Re Shannon (Deceased), Public Trustee v Redmayne* [1968] NZLR 852 (CA) at 860.

of other provisions in the will which cannot be reconciled with the interpretation of cl 5 adopted by the Courts below. The submission is that how the various, apparently conflicting, principles about the interpretation of wills are to be reconciled gives rise to a question of general importance and that the interpretation adopted has given rise to a miscarriage of justice.

Assessment

[11] The Court of Appeal approached the interpretation of cl 5 on the basis the authorities "consistently" have held that:[6]

> … notwithstanding the creation of a life interest, a devise or bequest to a residuary beneficiary still vests in that residuary beneficiary on the death of the will maker unless there are express and clear words to the contrary. The residuary beneficiary's interest is certainly postponed in possession until the death of the life tenant — the property will not be transferred until then — but it is nevertheless a vested interest during the lifetime of the life tenant. Clear words are required before the gift will be held to be contingent on the death of the life tenant and so not vest until then. As to what form of words might be needed to achieve that result, the authorities also show that wording such as "on the death of [the life tenant]" is not of itself sufficient. Something more is required.

[12] The applicant does not dispute there is case law to that effect. Rather, as noted above, he seeks to distinguish the present case. That is a fact-specific question. No question of general or public importance or of commercial significance arises.[7]

[13] The challenge based on the other provisions in the will would reprise arguments made in the Court of Appeal. The Court evaluated this aspect concluding that the other clauses in the will relied on were:[8]

> … general standard machinery or boiler plate clauses and while the will must be read as a whole, any significance to be attached to those clauses is in our view very limited and certainly not sufficient to displace the long established meaning of the phrase "upon the death" as used in cl 5.

[14] In addition, the Court considered cl 7 of the will was more important than the other clauses the applicant relied on. That was because cl 7 gave John the option, within ten years of the date of Mr McLean's death, of purchasing the balance of the

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6 At [38] (footnotes omitted).
7 Senior Courts Act 2016, s 74(2)(a).
8 CA judgment, above n 2, at [39].

farm property "together with all remaining stock other than that bequeathed to him under paragraph 5(a)" of the will. The Court took the view that this clause was evidence of Mr McLean's "intention that John, already having a vested interest in part of the farm and stock, might wish to acquire the balance".[9]

[15] Again, the construction of these clauses is a question specific to these facts. Nothing raised by the applicant gives rise to any concerns about the Court of Appeal's assessment of the clauses. Nor does anything raised by the applicant give rise to the appearance of a miscarriage of justice.[10] The issues the applicant wishes to pursue have been carefully considered by the Courts below applying principles which are essentially not in dispute.

Result

[16] The application for leave is accordingly dismissed. The applicant must pay costs of $2,500 to be divided equally between the respondent and Mr Flaus as trustee for the estate of Mrs McLean.

Solicitors:
Wilkinson Rodgers Lawyers, Dunedin for Applicant
Public Trust, Auckland for Respondent
Patterson Hopkins, Auckland for J M Flaus

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9 At [44].

10 Senior Courts Act, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].