1975 ACT CLAIMS: DISCERNING PRINCIPLES NOW THE ILOTT DUST HAS SETTLED

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Guildhall Chambers' Property and Estates team recently hosted a 'Breakfast Bites' seminar, at which I spoke on the abovementioned topic. Notwithstanding the profuse commentary which has appeared since the Supreme Court's decision in Ilott v The Blue Cross & Ors [2017] UKSC 17, handed down in March, it is clear to me that 1975 Act practitioners are still fascinated by the Ilott decision and how it will truly impact upon claims by adult children and, more generally, claims by those applicants who are restricted to the maintenance standard. As such, I have decided to enter the fray and set down my views on what we can take from Ilott and also consider some adult child decisions passing through the courts since Ilott.

Ilott

The testator, Mrs Jackson, left almost the entirety of her estate (circa £486,000) to charities to which she did not have any particular affiliation during her lifetime. Her only daughter, Mrs Ilott, made a claim for reasonable financial provision under the 1975 Act. Mother and daughter had been estranged for 26 years prior to the testator's death. The testator's wishes as regards her daughter were well-evidenced in a side letter which made clear that she felt no moral or financial obligation towards Mrs Ilott. Throughout the period of estrangement, Mrs Ilott married and had five children. She and her family lived in a house, rented from the Housing Association, and she had subsisted on a low income, largely derived from state benefits, some (though not all) of which were means-tested.

The District Judge at first instance found that the testator's will did not make reasonable financial provision for Mrs Ilott and Mrs Ilott was awarded £50,000 for her maintenance. There followed several appellate outings. Broadly, these can be categorised into two stages. In Stage 1, there were appeals to the High Court and Court of Appeal which focused on the question of whether the will had failed to make reasonable financial provision for Mrs Ilott. The Court of Appeal ultimately upheld the District Judge's order in this respect ("**Stage 1**"). In Stage 2, Mrs Ilott's extant appeal on quantum (which she had launched initially after the District Judge's decision but which was curtailed by the charities' successful cross-appeal in the High Court in Stage 1) was remitted to the High Court. After two further appeals regarding quantum, the Supreme Court finally reinstated the District Judge's original order of £50,000 ("**Stage 2**").

Principles

Ilott has been portrayed by many commentators as being a simple continuation of the uncertain territory in which we find ourselves in 1975 Act claims brought by adult children. However, what ought not to be overlooked is the fact that Ilott is the first time the Supreme Court (or the House of Lords before it) has considered 1975 Act claims and the judgment is, therefore, something to be cherished by practitioners in this field, as far as it makes any definitive statements on the law. As a result of the Supreme Court decision, we can now speak with some certainty on the following matters:

The correct, objective test:

The objective test to be applied in a claim under the 1975 Act is: does the will or intestacy make reasonable financial provision for the claimant? In adult children cases, such as Ilott (and, indeed, in respect of all other categories of applicant under the 1975 Act except spouses and civil partners), the question is: what is reasonable for the claimant to receive *for his or her maintenance*, assessed objectively?

The test does not involve an assessment of the reasonableness of the testator's conduct in making the provision that s/he did. This is something that could be assessed objectively, if necessary, but Lord Hughes made clear that doing so would be inapposite as far as the test under the 1975 Act is concerned (although the reasonableness of the testator's testamentary decisions can be a factor to be considered by the court within the relevant s.3 factor under the 1975 Act):

> *"There can be a failure to make reasonable financial provision when the deceased's conduct cannot be said to be unreasonable. The converse situation is still clearer. The deceased may have acted unreasonably, indeed spitefully, towards a claimant, but it may not follow that his dispositions fail to make reasonable financial provision for that claimant, especially (but not only) if the latter is one whose potential claim is limited to maintenance"* (paragraph [17])

Maintenance:

What, then, is 'maintenance' for the purposes of the abovementioned test? The often-cited In Re Dennis, deceased ([1981] 2 All ER 140) summary of maintenance was approved by the Supreme Court:

> *"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"* (per Browne-Wilkinson J).

Lord Hughes made clear that maintenance cannot extend to any or everything which it would be desirable for the claimant to have but it is not limited to subsistence level. We are told that, ultimately, it will fall to be assessed on the facts of each case.

Lord Hughes also clarified that, though maintenance is the provision of income rather than capital, it need not be made by way of periodical payments. Indeed, he said it will often be more appropriate for income to be provided by way of lump sum from which both income and capital can be drawn over the years, as with the Duxbury model used in family cases.

Most interesting of all was what the Supreme Court in Ilott said about life interests vis-à-vis maintenance. It was said that, if housing is to be provided by way of maintenance, that will usually be achieved by way of life interest rather than by a capital sum to buy the property. This poured further cold water on the decision of the Court of Appeal on quantum in Stage 2, by which Mrs. Ilott had been awarded £143,000 to buy the property she lived in (as well as the sum of £20,000 to be drawn down). Though it is understandable why a life interest is more in keeping with financial provision for maintenance than facilitating outright ownership by means of a capital sum, it is surprising that the Supreme Court was quite so firm on this since life interest trusts can be unattractive for a variety of reasons. However, firm it was, and this does seem to be in line with the general trajectory of travel, as has been reinforced recently in the case of Martin v Williams [2017] EWHC 491 (Ch) (albeit handed down just before Ilott). In that case, arguments against a life interest in a 1975 Act case based on the acrimony between the parties were minimised by the court (see paragraph [63]). Whatever my views on the subject, the Supreme Court decision probably means that, if a successful claimant has a housing need which the judge intends to satisfy by his or her order, that claimant will now have to work very hard to persuade the judge that some order other than a life interest is more appropriate.

Moral claims:

There is definitively no requirement for a moral claim in order for an adult child to succeed under the 1975 Act. However, Lord Hughes made clear that need, plus the relevant relationship to qualify the claimant, is not always enough. In Re Coventry [1980] Ch 461 was explained by Lord Hughes as not having imposed the need for a moral claim but, instead, as having added a subtle gloss to the effect that, where an adult child is capable of living independently, something more than simply being a qualifying applicant will be required to found a claim. This 'something more' may well be a moral claim, but it need not be.

Other brief headline points

These areas of relative certainty aside, what other key points are discernible from Ilott for practitioners in this field to take away? In brief:

- Discount: Originally, the District Judge had said that Mrs Ilott's award should be 'limited' in view of the fact that she had no expectation of benefit under the testator's will. The Court of Appeal (in Stage 2) had criticised the District Judge in failing to identify the extent of any limitation or

discount he was applying by virtue of that fact. However, Lord Hughes rejected the suggestion that there was any requirement *"to fix some hypothetical standard of reasonable financial provision and then either add to it, or discount from it, by percentage points or otherwise for variable factors"* [34].

- Benefits: State benefits are to be considered as part of the resources of the claimant and the court will need to consider the impact any order will have on the claimant's entitlement to such benefits. However, Ilott also shows what a difficult exercise it is to provide a solution for the claimant's needs without impacting on their state benefits. For example, the Court of Appeal (in Stage 2) had lamented the fact that the District Judge's decision meant that, until such time as her capital had reduced below the £16,000 threshold for means-tested benefits, the award would render Mrs Ilott ineligible for state benefits. The Court of Appeal didn't view the argument that she could simply go ahead and spend away until she reached that point, as an attractive one, referring to it (in para 42) as a "spending spree". In the Supreme Court, Lord Hughes disagreed with the Court of Appeal's criticism, especially since Mrs Ilott had said that she needed the money to replace many basic household items in any event so that she would not long retain more than £16,000.

- Judicial regret at the uncertain state of the law: In the Supreme Court, Lady Hale's judgment focused on this issue by highlighting, by reference to research, the wide divergence in public opinion about the circumstances in which adult children ought or ought not to make a claim on an estate which would otherwise go elsewhere. She concluded that the law gave almost no guidance on how to deal with, or balance, competing claims. In perhaps the most powerful part of any of the judgments, Lady Hale reinforced this issue starkly by pointing out that a respectable case could have been made for 3 different solutions in Ilott- (1) dismissal of the claim; (2) purchase of the house and settling it on trust for Mrs Ilott for life, with remainder for the charities; or (3) to award her £50,000 as the District Judge had done in the first place. In the face of such broad possibilities, practitioners may be rightly concerned as to how they can give forceful advice to their clients.

- Testamentary freedom: The importance of testamentary freedom was emphasised by Lord Hughes (see [1]). As his speech proceeded, he commented that, even though Mrs Jackson was not affiliated to the charitable beneficiaries, they represented her freely made and considered choice of beneficiaries [6]. The criticality of testamentary freedom does seem to be the general theme in the Supreme Court judgment (and, indeed, elsewhere at the present time- e.g. in a different context, the Law Commission's newly-published consultation paper, "Making a Will" proposes the prioritisation of testamentary intentions over formalities).

How has Ilott been applied?

There have been two reported decisions, applying Ilott, since the latter decision was handed down. The first is a case in the Leeds County Court, Nahajec v Fowle [2017] EW Misc 11 (CC) ("**Nahajec**"), and the second is a case heard in the Bristol District Registry of the High Court, Ball & Ors v Ball & Ors [2017] EWHC 1750 (Ch) ("**Ball**"). Both cases involved a claim for reasonable financial provision by an adult child or children and there were different outcomes in each.

In Nahajec, the claimant was one of the testator's three children. She had been estranged from her father for many years (except for a short period a few years prior to the testator's death). The estate was worth around £265,000 and the testator left the entirety of this to a friend but, as in Ilott, there was a letter of wishes explaining the rationale for excluding his children. One of the children (who was unable to work through ill-health) had made a claim under the 1975 Act but this had been settled for £22,000. One child made no claim. This was the claim of the remaining child. The claimant was in work but also had debts in the form of payday loans. She wanted to become a veterinary nurse and undertake the requisite training; she claimed £59,000 in order to do this. The judge found that reasonable financial provision had not been made and he awarded the claimant the sum of £30,000, referring to s.3(3) of the 1975 Act (the manner in which an applicant might be expected to be educated or trained). He had awarded her less than she claimed which took account of the debts, as well as the fact that she might never do the course she wanted to do. However, the judge felt that it was the best estimate of the capitalised cost of maintenance for a reasonable time going forward.

Ball was a claim by three adult children against their late mother's estate. There were alternative claims: firstly, a challenge to the validity of their late mother's will (on the bases of lack of capacity and/or undue influence) and, in the alternative, a claim for reasonable financial provision under the 1975 Act. The claimants had been estranged from their mother since 1991. Historically, the claimants had alleged that they had been sexually abused by their father when they were younger. The father had pleaded guilty to certain charges in respect of the Second and Third Claimants. However, the mother had thought some of the complaints by the claimants against the father were exaggerated and was annoyed that the claims had been made public and it was against this background that the three claimants were excluded from benefit under her will. The estate was worth approximately £160,000. The validity claims were all dismissed, as was the 1975 Act claim. HHJ Matthews appears to have based his overall decision on the fact that the existing beneficiaries (the mother's other eight children and a grandchild) were also in need and the estate was small.

Interestingly, in Ball, the judge talked about the "something more" that is required in adult child cases, with focus on the allegations of abuse. It was said that the mother had no moral obligation to the claimants as a result of their complaints to the police- sexual abuse by the deceased could be the "something else" that was required but it was not the deceased here that had committed the abuse. The mother did not condone the abuse the claimants suffered at the hands of her husband, though the abuse was something that could be taken into account if relevant (presumably, under s.3). Additionally, the judge made an interesting summary of the maintenance standard as follows: *"In my judgment, the words [for their maintenance] constitute an important limitation on the court's power under the Act. The Act does not confer power on the court to make provision for the applicant's advancement in life"*. This point was key because, although the claimants could have used a sum to advance them in life, they did not need it for their reasonable maintenance.

In Ball, Nahajec was distinguished on the basis that, there, the estate was larger, the number of children smaller, the father gave everything to a non-family member and there was no cataclysmic event tearing the family apart, as there was in Ball. However, these cases do show the unpredictability of adult child cases and the difficulty in placing any weight on similarities or differences between cases, when advising clients. For example, in Ilott, the defendant charities did not need the money whereas, in Nahajec, the defendant did need the money- there were awards in both. Equally, there was estrangement in all three cases- Ilott, Nahajec and Ball- but the claim only succeeded in two out of three. While the judge in Ball was quite clear that the allegations of abuse against the father did not constitute the "something more" that was required, the judge in Nahajec seemed to say that the "something more" required to found a claim was that the father was stubborn and intransigent which was not the claimant's fault. The latter does seem rather feeble as the necessary ingredient to a winning formula. Another way in which judicial approaches differed is that, in Ball, the judge had said that awards should not be for the applicant's advancement in life, yet, in Nahajec, the judge did not exercise such restraint and specifically wanted to cover *"expenses that would be necessary to improve [the claimant's] position"*.

Conclusion

In cases involving the maintenance standard, in particular those involving adult children, one needs sound instinct in order to give meaningful advice on merits. Additionally, clients are likely to only get one bite at the cherry- notwithstanding the Ilott marathon, 1975 Act decisions are very difficult to appeal- and so careful and thorough preparation of the case will be key.