

JERSEY / JUDGMENT

Re X v [2002] JRC 71 (27 March 2002)

[2002] JRC 71

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judgment

the deputy bailiff: 1. This case raises the question of when it is appropriate for the Court to grant a declaratory judgment.

Background

2. X is a wealthy widower. He has no children. For many years he has been looked after by his housekeeper. She has given him loyal service and he is very appreciative of this. On 12th March 1996 he made a Will of personal estate. It is not necessary to set out its terms in detail. He left a number of substantial bequests (including one to the housekeeper) and left the residue in trust for relatives. 3. On 13th November 1996 X made a first codicil to his Will. By that first codicil he bequeathed the housekeeper a legacy of £150,000 in any event together with an additional £250,000 if she was still in his employment at the date of his death. This provision was in place of the legacy under the Will. 4. On 26th August 1997 X executed a second codicil. This revoked the first codicil. He increased the legacy to the housekeeper by bequeathing to her the shares in the company which owns his home together with the contents of the home, his car and the sum of £100,000. However the whole legacy was conditional upon the housekeeper still being employed by X at the time of his death. It can be seen therefore, that the total amount left to the housekeeper was increased but whereas previously, she would have received £150,000 in any event, she will now receive nothing if she is not still employed by X at the time of death. 5. On 16th January 1998 Advocate Lakeman ("the Curator") was appointed as curator of X. It is clear from the Curator's affidavit sworn in support of these proceedings that there is a serious question as to whether X had testamentary capacity at the time that he executed the second codicil in August 1997. We do not need to say more of this issue at this stage. The proceedings 6. Notwithstanding that X is still alive and that his testamentary dispositions have therefore not taken effect, the Curator has brought proceedings seeking a declaration as to whether X had testamentary capacity at the time of executing the second codicil. All those named in the testamentary documents have been convened to these proceedings, as has the Attorney General. 7. On 15th December 2001 the Court ordered that a preliminary issue should be tried as follows:- "Whether the Royal Court has jurisdiction to make a declaration as to the capacity of a person to make any testamentary disposition prior to the death of such person

but after he has been placed under interdiction under the provisions of the Mental Health (Jersey) Law 1969." By agreement the preliminary issue has been extended to encompass the question of whether, if the Court finds it has jurisdiction to try such an issue, it should exercise its discretion in favour of so doing on this occasion. 8. All the Respondents, save the Attorney General, rest on the wisdom of the Court and accordingly we have heard argument only from Advocate Langlois on behalf of the Curator and from the Solicitor General. 9. The Curator argues that it is necessary and appropriate for the Court to resolve the matter of X's testamentary capacity at the time of the second codicil for a number of reasons:- (i) the medical evidence is that X does not have testamentary capacity now and will never recover it. Accordingly the second codicil will remain in being until his death. X could live for a number of years and any litigation would then turn on events many years earlier. Some evidence might not be available, e.g. doctors who saw him at the time, those who have attested the codicil etc. (ii) From his conversations with X the Curator does not believe that the second codicil reflects X's wishes. X has apparently said that he very much values the care of his housekeeper and wishes to provide for her irrespective of whether she is employed by him at the date of his death: but he does not wish her to inherit his house. This is of course inconsistent with the second codicil which leaves her the home (amongst other things) but makes the whole legacy conditional upon her continued employment. (iii) There is a real risk that X will have to move into a nursing home for medical reasons at some stage in the future. If that were to happen the Curator could no longer justify employing the housekeeper. She might therefore find her employment being terminated with the result that, if the second codicil is valid, she would lose her entire legacy despite many years of loyal service. (iv) The Curator believes that a more appropriate step for him to take in order to reflect his interdict's wishes, might be for him to make some form of inter-vivos provision (possibly by way of a trust) for the housekeeper (subject to the Court's approval under Article 50 of the Mental Health (Jersey) Law 1969). However, he cannot ascertain the correct nature and level of inter-vivos provision until he knows whether it is the first or second codicil which would be the effective testamentary disposition following X's death. Jurisdiction to grant declaratory relief 10. The Curator is applying for declaratory relief: in other words a formal statement pronouncing upon the existence or non-existence of a legal state of affairs but without any order for enforcement against any party to the proceedings. It is clear that the Court has jurisdiction to grant declaratory relief (see *Craven -v- Island Development Committee*

(1970) JJ 1422), but it is a jurisdiction which should be exercised sparingly. No guidance is offered in *Craven* as to the circumstances in which it is appropriate for the Court to exercise this jurisdiction, the Court having said only this:- "The first point taken against the plaintiff is that the Court has no power to give declaratory judgments. No authority whatsoever was cited for that proposition and we reject it. We have no doubt that the Court has power to give declaratory judgments in appropriate circumstances. What circumstances are appropriate it is unnecessary for us to say, other than that in this case the circumstances are appropriate. The plaintiff claims a right which is disputed by the defendant and the

issue is a practical and not a theoretical one. It is an original remedy and not a supervisory one which the plaintiff seeks, and it is our view that it has always been possible to seek such a remedy by way of an Order of Justice." 11. In the absence of local guidance as to the circumstances in which it is appropriate to grant a declaratory judgment, Miss Langlois referred us to a number of English authorities and to extracts from Zamir

- The Declaratory Judgment (Second Edition). It is clear that the declaratory judgment has had a somewhat chequered history in English law. Although, Zamir contends, it is arguable that the Court of Chancery always enjoyed jurisdiction to make declarations of right not followed by consequential relief, the English courts were historically extremely reluctant to do so. The legislature intervened in 1852 making it clear that there was jurisdiction to grant declarations of right without granting consequential relief, but it took a long time for the courts to recognise the usefulness of declaratory judgments. It was not until 1915 in the case of *Guaranty Trust Co of New York v Hannay & Co*
- (1915) 2KB 536 that it was authoritatively stated that a declaration of right could be given whether or not there was an underlying cause of action in the traditional sense i.e. for which executory relief would be granted. 12. In recent times the English courts have been much more liberal in their approach. For an authoritative statement of the position, it is convenient to refer to the comments of Lord Diplock in *Gouriet v Union of Post Office Workers*
- (1978) AC 435 at 501:- "The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or give to advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else." 13. A vital aspect of the decision as to whether an English court may grant declaratory relief appears to be whether the right at issue can be categorised as "future" or "hypothetical". It is not clear from the authorities submitted to the Court whether that distinction goes to the question of jurisdiction or to the discretion as to whether to exercise that jurisdiction. Zamir would appear to incline to the former view in a passage where he explains the difference between hypothetical and future rights at paragraph 4.123 on page 159:- 4.123 "However, this declaratory power in private law proceedings does not extend to all rights which could be described as future rights. A distinction has to be drawn between hypothetical and future rights. Rights which will only come into existence if a contingency occurs may be described as hypothetical - they are in effect "nothing more than a bare expectation of a future right" - and are, therefore, outside the ordinary private law

declaratory power of the courts. The rights which are being considered here are those which, though not yet in existence, are treated by the courts as certain to come into effect, either on a certain date or on the occurrence of some specified event. These rights are subject to the declaratory jurisdiction of the courts. But, obviously, there are very few things which are certain to occur, and if the courts were to categorise a right as hypothetical merely because of a remote possibility that a certain event might not happen, the scope for declarations of future rights would be limited. In order, therefore, to treat a right as being "future", and not "hypothetical", the courts only require for the purpose of their declaratory powers, a real prospect that the event will occur." He goes on to say at the beginning of paragraph 4.125:- 4.124 "Once the court has classified a right as a future right so that it is within the jurisdiction to make a declaration, it is then a matter for its discretion whether or not to grant the declaration." 14. The only other Jersey authority on declaratory judgments is *Jersey Hotels Limited v Inglebert Properties Limited*

- (1979) JJ39. The Solicitor General was critical of this decision. She pointed out that the court in that case, having stated that the principles governing the exercise of the discretion to grant declaratory relief had not been laid down in Jersey, immediately turned to the English authorities and appeared to rely upon them. In particular it adopted the distinction between hypothetical and future rights and doubted - but without definitely deciding - that there was jurisdiction to make a declaratory judgment in the case of a hypothetical right. 15. It is however of interest that, when considering the difference between hypothetical and future rights, the court in *Jersey Hotels* relied upon the equivalent passage from the first edition of *Zamir* to that which we have quoted at paragraph 13 above. There is critical difference between the first and second editions. In the first edition it is said that, in order for a right to be categorised as "future" rather than "hypothetical", there must be "a practical certainty of occurrence". In the second edition it is said to be sufficient to categorise a right as "future" if there is "a real prospect that the event will occur". That is clearly a very different test. 16. The position in England is to be contrasted with that in Scotland. It is clear from Chapter 8 of *Zamir* (written by Lord Clyde) that Scottish law has not been bedevilled by the reluctance to utilise the declaratory judgment shown by English judges. Thus at paragraph 8.01 on page 269 it is stated:- 8.01 "The process of declarator, whereby rights may be declared and fixed even in cases where they are not capable of immediate enforcement, has for a long time been recognised as a very valuable process. Lord Jeffrey regarded it as "the triumph and pride of our judicial system" and its advantages won the admiration and envy of Lord Brougham. It is a process "deeply rooted in the law of Scotland and in the practice of its Supreme Court". 17. A great merit of the action of declarator in Scotland is said to be its elasticity; the scope of its availability is potentially very wide. In particular the Scottish courts do not appear to have become involved in technical considerations of whether a right is future or hypothetical. They have adopted a much broader approach. That approach is conveniently summarised by Lord Clyde at paragraph 8.06 of *Zamir* as follows:- 8.06 "It has been observed that it is the function of the courts to decide only live, practical questions and that they have no

concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy that they should adopt in the ordering of their affairs. "The Courts are neither a debating club nor an advisory bureau". Hypothetical questions will not be entertained. The action "cannot be used for the mere purpose of declaring legal propositions when no practical question or dispute lies beneath." It is a matter of the circumstances of each particular case whether there is or is not a live practical question. There must be a sufficient degree of reality and immediacy before a declarator will be granted. If the declarator will have a practical bearing upon the resolution of an actual dispute it will be competent. It is sufficient for the competency of a declarator that there be an actual consequence either pecuniary or "in facto praestando". This need not be an immediate practicality: a real possibility of the critical eventuality emerging may be sufficient." 18. We think that the broad and flexible approach summarised above is preferable to the more structured and technical approach which appears to hold sway in England, which is based partly upon historical considerations which have no application in Jersey. The principles of Scottish law described above offer a sensible and convenient approach to the question of when the Court should agree to give declaratory relief and we hold that they represent the correct approach under Jersey law. We do not think that the court in *Jersey Hotels* was purporting to hold definitively that the distinction between future and hypothetical rights went to the jurisdiction of the Royal Court to grant declaratory judgment but, if it did so hold, we respectfully disagree. In our judgment the Court should not become embroiled in a technical consideration of whether a matter can be categorised as a future or hypothetical right. The Court should adopt a broader approach and consider whether there is a live practical question with practical consequences when deciding whether to exercise its discretion to grant declaratory relief. Application to the facts 19. We turn to apply the principles set out above to the facts of this case. Interestingly, Miss Langlois and the Solicitor General approached the facts from opposite standpoints. Miss Langlois categorised this case as a question of ascertaining the rights of the beneficiaries (particularly the housekeeper) under the testamentary dispositions of the testator. The Solicitor General, on the other hand, argued that the reason why the Court should exercise its discretion to grant declaratory relief in this case was because the Curator, who was an officer appointed by the Court, needed to have the matter resolved in order that he could decide how best to carry out his duties. 20. The Court was provided with medical evidence which satisfied us that there is no prospect of X recovering his testamentary capacity. This is an important factor. Were there any possibility of the second codicil being revoked, the Court would consider that this was a matter which was too hypothetical and did not raise a live question. It would be a completely unknown question as to whether the second codicil would ever come into effect or whether the testator would change his testamentary disposition before his death. Testamentary documents only take effect upon death and can be changed at any time before then. The occasions upon which it would be right for a Court to rule on testamentary documents before the death of a testator will be rare indeed. However in this case, given the medical evidence, we are satisfied that there is a live question with

practical consequences which would justify the Court granting declaratory relief. For the reasons set out earlier the Curator cannot know the best course for him to follow in relation to inter vivos dispositions until he knows whether the second codicil is valid. What he does will be affected by the Court's decision on that issue. Having been appointed by the Court to undertake the duties of looking after the interdict, it seems reasonable for him to request the Court's assistance in this respect. 21. It will of course also be convenient for the housekeeper, in particular, to know where she stands and for the validity of the second codicil to be determined whilst the evidence is still available and events are fresh in everyone's memory. Had this aspect of the matter stood alone, we are not convinced that we would necessarily have found that these considerations justified the Court granting declaratory relief at this stage. However we express no concluded view on this in the light of our decision that the question of how the Curator should carry out his duties raises an issue with sufficient practical consequences for us to conclude that this is an appropriate case in which to grant declaratory relief. 22. It is for these reasons that, at the hearing of the case, we ordered that there be a trial of the issue whether or not X had testamentary capacity to execute a second codicil on 26th August 1997. Authorities *Craven -v- Island Development Committee* (1970) JJ 1422. *Zamir: The Declaratory Judgment* (2 nd Ed'n). *Guaranty Trust Co of New York v Hannay & Co* (1915) 2KB 536. *Jersey Hotels Limited v Inglebert Properties Limited* (1979) JJ39. Page Last Updated: 28 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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