IN THE HIGH COURT OF AUSTRALIA

MAYOR

V.

BRISTOW

REASONS FOR JUDGMENT

Judgment delivered at BRISBANE

on FRIDAY 18th JUNE, 1965

A. C. Brooks, Government Printer, Melbourne
C.7639/60

MAYOR

v.

BRISTOW

ORDER

Appeal dismissed with costs.

MAYOR v. BRISTOW

JUDGMENT

BARWICK C.J.
KITTO J.
TAYLOR J.

MAYOR v. BRISTOW

By his will, dated 7th September 1961, James Walter Bristow appointed his sister-in-law, the appellant, executrix of his will and gave and bequeathed to his wife, the respondent, the sum of one thousand pounds and "a weekly allowance of FIVE POUNDS Australian Currency to be paid to her during her life such weekly allowance only to be free of all duties". He also gave legacies of one thousand pounds and two hundred and fifty pounds respectively to his daughter and son and thereafter gave, devised and bequeathed the residue of his estate to the appellant. The testator died in Queensland some fifteen days after making his will and in June 1962 probate of his will was granted to the appellant. A statement of the assets and liabilities of the testator supplied to the respondent by the appellant's solicitors discloses that the net value of the testator's estate at the time of his death was £46,387 but this figure takes no account of an undisclosed income tax liability of £8,103 whilst succession duty and federal estate duty, it is estimated, will absorb respectively £10,500 and £3,690. Taking these liabilities into account there will remain for distribution approximately £24,000 less testamentary and other expenses.

After the testator's death the respondent commenced proceedings pursuant to The Testator's Family Maintenance Acts 1914-1952 and succeeded in obtaining an order that in substitution for all other benefits under the will an amount of £12,500 in Australian Currency should be paid to her free of all duties. In this appeal the order is attacked on three principal grounds. First of all, it is said, that the learned judge of first instance should have refused to make any order at all. Secondly, it is contended that there was no

justification for making an order for the payment of a lump sum and, finally, it was asserted that the amount awarded was excessive.

The case appears to us, as no doubt it did to the learned judge, as unusual in the extreme. The appellant and the respondent are sisters, the former, who was 59 years of age at the time of the hearing, being four years younger than the latter. The respondent and the testator were married in England in August 1921, their two children were born in 1923 and 1925 respectively and they lived together at various places in England until 1951. But early during their married life the testator began and thereafter continued an association with the appellant which ultimately led to their separation. In 1949 the testator came to Australia where he bought a garage business and, unknown at the time to his wife, was accompanied on this trip by the appellant. Thereafter the testator and the appellant returned to England where the former sold his property and arranged passages to Australia for his wife, his daughter and her husband. It was arranged that the testator should follow his family to Australia, and this he did in August 1951 - again accompanied by the appellant. However, on arrival in Australia he went to live with his wife where he remained for some short period and then announced to his wife in the presence of her mother and his daughter that he was leaving the home and was going to live with the appellant. This he did and thereafter continued to live with the appellant until his death. The respondent returned to England in 1953 where with the aid of money provided by the testator she purchased a house. From then until his death the testator remitted £100 sterling per quarter to the respondent and he has on other occasions sent her other unspecified sums.

It is plain that the respondent objected to the testator's association with her sister and this is but a brief outline of the undisputed evidence. It is clear to us, as it

was to his Honour, that in the circumstances the respondent's claim must be regarded as paramount and that there is no feature of the case which militates against this proposition.

The appellant's case upon the appeal was prefaced by observations concerning the amount which will probably be available for distribution. It was pointed out to us that the most substantial asset in the estate is realty, the value of which was shown in the statement referred to as £31,200. Then we were referred to a statement in the appellant's affidavit that "from enquiries made by me and on my behalf by my Solicitors the market price of the aforesaid real property in its present condition will be less than TWENTYSEVEN THOUSAND POUNDS (£27,000. 0. 0) and may not exceed TWENTYTWO THOUSAND FIVE HUNDRED POUNDS (£22,500)". His Honour refused to act upon this statement observing that the respondent, "who as executrix had the duty of placing before the court full information as to the position of the estate, did not say what inquiries were made, and it does not appear whose opinion as to the value of the realty is intended to be conveyed by this paragraph, or what were the qualifications of the person who held the opinion or the grounds on which it was based. As evidence the statement is worthless and I cannot act upon it. There is evidence that the property has been placed in the hands of agents and advertised for sale, and it appears that it may prove difficult to sell as well as difficult to let, but these facts do not establish its value. I feel bound to treat this land as having the value ascribed to it by the respondent for duty purposes". We fully endorse these observations and, therefore, proceed to consider the matter upon the basis that there will be an amount of, at least, £20,000 available for distribution.

On this, or indeed on any more limited view of the final balance of the estate, there was in our opinion a clear case for relief. During his lifetime the testator had

made an allowance to his wife of an amount in excess of £400 sterling per annum and this expressed in Australian Currency at a weekly rate was £16, or, twice as much as the allowance given to the respondent by the will. Nevertheless the respondent had found it inadequate to provide for her reasonable requirements and so informed the testator on a number of occasions. She has run into debt, particularly since the testator's death, and in addition to a mortgage on her home to secure repayment of a sum of £480 she owes £400 to her brother-in-law from whom she borrowed this amount for her maintenance. In these circumstances, it is impossible to suggest that it was not a case in which an order should have been made.

The next question is whether, in the circumstances of the case, it was proper for the learned judge of first instance to award a lump sum. As we have already observed the case is quite extraordinary and it was this circumstance which led his Honour to provide for the respondent in this manner. His Honour observed that the bulk of the estate comprised realty and that it was quite apparent, and a wise testator would have foreseen, that to pay duties, tax, testamentary expenses and legacies and to make periodic payments to the applicant it would be necessary to sell the land and re-invest such proceeds of sale as were available for investment. He added: "It is not desirable, if it can be avoided, that the applicant in England should have to rely on the respondent, who caused the testator to leave her, and who is in Australia, to manage the investments and remit the periodic payments for her maintenance. In the circumstances the widow's claim is strong enough to justify an award of a lump sum in substitution of the existing benefits under the will". No doubt in the absence of the special circumstance to which his Honour referred it would have been desirable, in the main, to have granted relief in the form of an appropriate annuity. But the reasons which induced his

Honour to take the course which he did were both relevant and substantial and we are by no means prepared to say that in taking this course his discretion miscarried. On the final question the lump sum which his Honour directed to be paid represents, perhaps, three-fifths of the amount which, as far as we can see, will ultimately become available for distribution. The amount awarded will enable the respondent to discharge her existing liabilities and the balance, after retention of, say £1,000 for emergency expenditure, will represent on a five per cent basis the present value of a little over £15 per week sterling for fifteen years or about £12 sterling per week for twenty years. This may, perhaps, be regarded as a not ungenerous provision but to say this falls far short of holding that the amount awarded was so excessive as to enable it to be said that his Honour's discretion was improperly exercised. That being so, we are of opinion that the appeal should be dismissed.