

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
NAPIER REGISTRY

M. 28/70

IN THE MATTER of the Trustee Act 1956
Section 72

AND

IN THE MATTER of the Estate of ALEXANDER
ROBERT FOOTE late of Crownthorpe
Sheepfarmer, deceased.

AND

IN THE MATTER of an Application by ROBERT
LANCELOT FOOTE of Bennydale,
Farmer, ALLEN WILLIAM GILBERT
of Omapere, Farmer and JOHN
FISHER THURSTON of Taihape,
Farmer, for Trustees' commission.

Hearing : August 17, 1971

Counsel : Bisson in support
Gallen to oppose.

Judgment: August 26, 1971

RESERVED JUDGMENT OF WHITE J.

This is an application for trustees commission pursuant to s.72 of the Trustee Act 1956.

The application is in respect of charges for supervision, travelling expenses and telephone accounts claimed by Robert Lancelot Foote and Allen William Gilbert, who are two of the trustees. No previous commission has been paid and the administration of the estate is now complete.

The beneficiaries are the widow, who opposes the present application, the said Robert Lancelot Foote, and Rex Alexander Foote (who has purchased the property) and Margaret Edith Gilbert, (the daughter of the deceased and wife of the second trustee applicant). The trustee applicant and Mrs Gilbert have consented to the present application.

The basis of the claim is set out in paragraphs 8 and 9 of the Trustees affidavit of 30 June 1970 as follows :

8. THAT the basis or principle by which the amount of the said allowance is arrived at is as follows:

Actual time involved by the Trustees in supervising a farm property of 481 acres & roads at Crowthorpe being part of the trust property from the date of death of the deceased down to the date of sale of the said property namely the 3rd day of February 1969 including buying and selling of livestock, employing labour together with travelling expenses.

9. THAT the basis on which the proposed apportionment is sought is as follows:

Robert Lancelot Foote:

Time involved in supervision of the said property:		
12 days at \$5.00 per day	60.00	
Travelling expenses: 2280 miles at 10 cents per mile	<u>228.00</u>	\$288.00

Allen William Gilbert:

Time involved in supervision of the said property:		
166 days at \$5.00 per day	830.00	
Travelling expenses: 4378 miles at 10 cents per mile	437.80	
Toll calls	<u>80.00</u>	<u>\$1,347.80</u>
		<u>\$1,635.80 "</u>

The application is opposed on the following grounds :

- (a) The administration of the estate of the deceased who died on the 5th day of September 1967 has been tardy.
- (b) The trustees have not themselves been called upon in the course of administering the estate of the deceased to exercise any particular skills nor have they expended any great or unusual measure of personal effort therein.
- (c) Throughout the administration of the estate of the deceased the trustees have had the benefit of advice and assistance from professional and trained persons whose efforts have been or will be remunerated at the cost of the estate.
- (d) The trustees have not been required to assume any major farming or other time-consuming responsibility.
- (e) Whenever the trustees have been required to exercise discretion or judgment such discretion and/or judgment has been so exercised as not in my opinion to have brought any special benefit to the estate or its beneficiaries.

In his careful argument Mr Gallen invited me to give weight to the principle which has been applied in exercising the common law discretion, namely, that as a general rule trustees are "not entitled to remuneration for their labours on the trust; they are entitled to no compensation either for their personal trouble or for loss of time" - see Garrow & Henderson's Law of Trusts & Trustees 3rd Ed. p.243, and In Re Worthington (1954) 1 W.L.R. 527 at p.528, where it was said that the jurisdiction to allow remuneration to trustees "should only be allowed sparingly, and in exceptional cases". He referred also to In Re Brown (deceased) (1951) N.Z.L.R. 398, where there had been a petition for commission under the Administration Act 1908. In that case Hay J, after referring to the judgment of Denniston J. in In Re McLean (1911) 31 N.Z.L.R. 139 awarded commission in a case where there were "factors calling for sound judgment and a large sense of responsibility on the part of the trustees and they exercised both those functions with credit to themselves". It was also pointed out by Denniston J. in the earlier case that each case had to be dealt with on its merits. Mr Gallen argued that when the facts of the present case were examined the discretion should be exercised against making an order.

Before looking at the facts I shall consider Mr Bisson's submissions on the law, in reply. Naturally he relied on the language of s.72 of the Trustee Act 1958 - I quote s.72 (1), (2) and (3) :

"(1) The Court may, out of the property subject to any trust, allow to any person who is or has been a trustee thereof or to that person's personal representative such commission or percentage for that person's services as is just and reasonable :

Provided that the aggregate commission or percentage so allowed in respect of all persons who are or have been trustees should not exceed five percent.

(2) No such allowance shall be so made except on the termination of the trust, unless the Court otherwise orders.

(3) Where the Court allows a commission or percentage under this section in any case in which two or more persons are or have been the trustees, whether acting at the same time or at different times, the Court may, in its discretion, apportion the total amount allowed among the trustees in such manner as it thinks fit, and, in particular, may divide the amount in unequal shares or may make the allowance to one or more of the trustees to the exclusion of the other or others."

Mr Bisson then cited Re Bourke (deceased) (1966) N.Z.L.R. 327 and argued that the Court in giving effect to the statute is not restricted by the principles applicable in earlier days. It is to be noted, however, that in giving effect to s.72 Hutchison J. considered arguments that the applicant in that case should not be paid commission because of inefficiency in carrying on the farm property in the estate. Hutchison J. certainly considered the facts and exercised his discretion, commenting that "as applicant was the testator's chosen executor-trustee, empowered to carry on farming, she is entitled to be judged less critically than a professional trustee would be". And he held that she was entitled to some remuneration for "the day to day supervision and managerial responsibilities that fell to her".

The subsections of s.72 quoted above, which were substituted for the original s.72 by the Trustee Amendment Act 1960 are not merely declaratory of the common law. They are to the same effect as s.72(1), (2) and (3) of the 1956 Act and to ss. 31 and 32 of the Administration Act 1952, and s.31 was the successor of s.20 of the Administration Act 1908, construed in In Re Brown (deceased) and In Re McLean referred to above. Under s.20 of the Administration Act 1908 and s.72 of the Act of 1956 commission could be claimed for a trustee's "pains and trouble as is just and reasonable". The words of s.72 are "for that person's services as is just and reasonable". In my opinion the language of the present s.72 is somewhat wider but the discretion must still be exercised having regard to the facts of the case in deciding what is just and reasonable.

I have considered the affidavits and counsels' submissions. This is a case where there have been differences of opinion due in the main, it seems to me, to lack of communication between members of the testator's first family and his widow. As a result the widow has felt that the administration of the estate has not been as expeditious or as efficient as she thought should be the case. At one stage there were suggestions that some action would be taken but following further investigation this has not been done. In the circumstances I must consider the services in respect of which the claims are made. While full details of the claims are not available, they are not exorbitant and they are based on actual expenses and a charge for time spent on carrying out the duties of the trustees. The onus is on the claimants to establish their claims but when it comes to matters of personal accounting for travelling and time I consider, as Hutchison J. did in Re Bourke (deceased) (supra), that they should be judged "less critically than a professional trustee would be". The evidence they have given in their affidavits is on oath, and although the widow has questioned the time charged as spent on trustee business I have come to the conclusion that the claims should be accepted as reasonable in the circumstances. Had I considered that the claimants had been unreasonable or that reasonable information concerning them had not been supplied I would have had no hesitation in reducing the amount. Looking at the matter broadly however, I think that the details supplied are sufficient to justify the claims that have been made.

For these reasons the claim for commission, as apportioned, will be allowed to be paid to the applicants from the estate. The question of costs was not mentioned. If necessary I shall hear counsel or a memorandum may be submitted to me.