

Special  
Consideration

5/5

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IN THE MATTER of the Law Reform  
(Testamentary Promises)  
Act 1949 and its amendments

A N D

IN THE MATTER of the estate of A  
WATSON

Deceased

BETWEEN

J

KNIGHT

Applicant

A N D

THE VICAR AND CHURCH WARDEN  
for the time being of  
ST. MATTHEWS ANGLICAN CHURCH

First Respondent

A N D

THE PUBLIC TRUSTEE

Second Respondent

Hearing: 18 April 1983

Counsel: Mr Cameron for Applicant  
Mr Dawson for First Respondent  
Mr McVeigh for Second Respondent

Judgment: 26 - April 1983

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JUDGMENT OF HOLLAND, J.

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The plaintiff, described in the intitulement as the applicant, applies to this Court for an order that the defendant, The Public Trustee, as executor and trustee of the estate of A Watson, deceased (described as second respondent) do produce for inspection:-

1. Such documents forming part of the Public Trustee's file marked "Watson, A" as are dated prior to the date when the Second Respondent was advised on behalf of the Applicant that the present proceedings were contemplated.
2. All letters, notes and memoranda of other communications between the District Public Trustee and Alice May Watson."

The plaintiff has commenced proceedings by way of writ of summons under the Law Reform (Testamentary Promises) Act 1949 claiming that the late Miss Watson, who died on 1980,

had promised to leave her her house property at Christchurch and by her will had failed to do so.

Under the terms of the will which was executed some 17 years before the death of the testatrix the house property in question was specifically devised to the Vicar and Church Wardens for the time being of St. Matthews Anglican Church. The testatrix bequeathed a large number of small pecuniary legacies and established seven trust funds involving a total of \$7,500. The residue of her estate was left to the Social Services Counsel of the Diocese of Christchurch. The final balance of the total estate for death duty purposes was \$74,156.74. An order was made directing that the pleadings be served on the Vicar and Wardens of St. Matthews Anglican Church by serving their solicitor, Mr D.H.P. Dawson. That order was later amended by directing that service also be made on the Social Service Council of the Diocese of Christchurch. On the application before me the Vicar and Wardens of St. Matthews Church and the Social Service Counsel of the Diocese of Christchurch were both represented by Mr Dawson and indicated through him that they did not wish to take any part in the argument.

Although the solicitors for the plaintiff advised the Public Trustee within six weeks of the death of the deceased that they had been instructed by the plaintiff concerning an alleged testamentary promise and the solicitors for the plaintiff were in correspondence with the solicitors for the two principal beneficiaries as early as March 1981, when the plaintiff issued her writ on 28 August 1981 it was met with a statement of defence in which the Public Trustee pleaded inter alia that the plaintiff could recover no more than \$2,400, being the undistributed balance of the estate. Although the plaintiff holds the certificate of title to the property in question which she

alleges was given to her by the testatrix pursuant to the promise to leave the property by will, the Public Trustee apparently argues that he has completed his functions as executor by executing and delivering a memorandum of transfer of the property to the Church. Those matters, however, must wait to be determined until the action is resolved.

The plaintiff has obtained an order for discovery against the Public Trustee and the affidavit of documents filed by the Public Trustee pursuant to that order has listed as items 12 and 13 of the second part of the first schedule:

- "12. District Public Trustee's file marked 'Watson, Alice May' containing letters and memoranda
13. Various letters between legal advisers and between the District Public Trustee and Alice May Watson."

The Public Trustee in his affidavit has objected to produce those documents on the grounds

"that they relate to communications between the Public Trustee and the deceased testatrix in a solicitor/client relationship."

It is common ground that the relationship of the testatrix with the Public Trustee relating to instructions and advice concerning testamentary dispositions is to be treated in the same way as that of a solicitor and client insofar as a claim of professional legal privilege falls to be determined. Neither party made any reference or reliance on the provisions of s.17 of the Public Trust Office Act 1957.

The plaintiff in her statement of claim not only pleaded a promise to leave her the property in question and the transfer of possession of the certificate of title but also specifically pleaded

"the testatrix later altered a copy of her will dated the 27th day of June 1963 indicating that she wished to devise her Frances Avenue property to the Plaintiff and the testatrix subsequently sent the altered copy of the will to the Public Trust Office in Christchurch."

The Public Trustee in his statement of defence says in respect of this allegation that he:-

"admits that a document purporting to be a will with handwritten alterations contained on it was received by the Public Trust Office in Christchurch"

but otherwise denies the allegations.

When requested by letter from the solicitors of the plaintiff to give details of the instructions to alter the will in approximately September 1976 the Public Trustee replied

"I regret that it is not possible to let you have the information sought in your letter ..."

It is no doubt primarily in respect of this document that the order for production is sought.

In a case such as this where a disputed claim to privilege arises it is perhaps unfortunate that the deponent of the affidavit on behalf of the Public Trustee has not described the documents with more particularity. I was told from the Bar that the file described in item 12 goes back for almost 50 years. Obviously a great deal of that file will be irrelevant to the proceedings and as such is not discoverable. Similar remarks apply to item 13. Counsel suggested that the documents could be made available to the Court and the Court could select those which should be produced. Such a submission is inappropriate and is quite unacceptable to the Court. If bundles of documents are to be used as a description in an affidavit of documents then they should be separate bundles of similar documents and the documents should be only those relevant to the proceedings. The responsibility in this regard rests on the solicitors for the party concerned.

There is no doubt that confidential communications passing between a client and his legal adviser and made for the purpose of obtaining or giving legal advice are in general

privileged from disclosure and privilege is not lost by reason of the death of the client but remains for his benefit and that of his successors in title. The plaintiff submits that in the case of a claimant to a testamentary disposition the privilege does not exist against that claimant. Counsel relies in particular on Russell v Jackson (1851) 9 Hare 387 and the New Zealand cases of Re Moore (deceased) (1965) N.Z.L.R. 895 and Carmichael v Goddard (1979) 2 N.Z.L.R. 586.

In Blomfield v Ellis and Young, No. A.13/80, Auckland Registry, Judgment November 1981 I had occasion to consider these authorities in relation to an application for an order for the examination of a solicitor concerning alleged instructions received by him from a testator shortly prior to his death. I considered at some length the authorities as to the common law position relating to such privilege after the death of the testator and for what purposes it would survive and against whom it may be claimed. At page 12 of that judgment, for reasons which I do not repeat in this judgment, I held:

"The privilege in relation to communications between a Solicitor and his client relating to testamentary dispositions survives the death of the testator and passes to the executor or administrator but cannot be set up in relation to any claim brought against the executor or administrator in respect of the actual testamentary disposition of the testator. It is clear that that applies not only to earlier testamentary dispositions but to instructions and consultations relating to actual testamentary dispositions, or failure to make them."

Although in that case I was considering a claim under the Family Protection Act 1955 and not a claim under the Law Reform (Testamentary Promises) Act 1949, I can see no ground of distinction.

It was submitted to me that a plaintiff claiming under the Law Reform Testamentary Promises Act was in the position of a creditor and should be treated as a stranger or third party

to the estate. I do not consider that to be the case. The plaintiff is claiming that she should have been a beneficiary in the estate and her claim will not have the effect of reducing the estate of the testatrix in any way. If it is successful it will reduce the amount available to be distributed either to the specific devisee or the residuary beneficiary but her claim only affects the disposition of the assets of the testatrix and does not diminish them. That indeed was the finding of this Court in Re Moore (deceased) (supra) and counsel for the Public Trustee recognised that in order to sustain a claim for privilege that case must either be distinguished or not followed.

It was submitted that Moore's case could be distinguished because it related only to an order for production of previous wills. Although that is a factual distinction it is not a distinction in principle and no grounds exist for differentiating in this respect between executed wills and the instructions which might have been given in their preparation. The second ground of distinction relied on was that in Moore's case the plaintiff was one of the testator's next-of-kin and accordingly could be said to be claiming under the testator. It is correct that some of the earlier English cases referred to next-of-kin as claiming under the testator and distinguished such next-of-kin from strangers. I am satisfied that these dicta were made without any regard to persons claiming a testamentary promise and in this respect persons claiming a testamentary promise are to be treated in the same way as next-of-kin. The third ground of distinction was essentially one requiring me not to follow the earlier decision of Re Moore and was that a person claiming under the Law Reform (Testamentary Promises) Act was the equivalent of a creditor and was claiming against an estate and not under a testamentary disposition. With respect to counsel, I am not

satisfied that that sufficiently describes the type of claim. It is not a claim against the estate but is a claim that the plaintiff is entitled to part of the estate and should in fact be a beneficiary under the testamentary disposition. For that reason and the reasons earlier set out I am satisfied that Re Moore should be followed and the plaintiff is entitled to an order sought but not in the general terms set out in the notice of motion.

There will be an order that the Public Trustee produce for the inspection of the plaintiff such documents in his possession or power relating to the matters in question in this action and relating to the testamentary dispositions of the testatrix and instructions and communications made by the testatrix to the Public Trustee relating to proposed or existing testamentary dispositions.

Leave is reserved to any party to apply for further directions. Costs of all parties are reserved.

*J. D. Holland*

Solicitors:

E.J. Corcoran, Son, Thwaites & Brown, Kaiapoi, for Applicant  
Joynt Andrews Cottrell & Dawson, Christchurch, for First Respondent  
Public Trust Office, Christchurch, for Second Respondent