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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 347/82

544

BETWEEN GEORGE ISRAEL JOSEPH of Wellington, Barrister-at-law

Plaintiff

A N D DUNCAN STEVENSON McMILLAN of London, Underwriter

Defendant

Hearing: 4 and 5 April 1984

Counsel: J.R. Wild for Plaintiff
M.P. Reed and Glenese Adams for Defendant

Judgment: 18/5/84

JUDGMENT OF QUILLIAM J

This is an action by a former solicitor against his professional indemnity insurer.

Between 1968 and the end of 1975 the plaintiff and Jack Malcolm Moulder were, with others, in practice in partnership in Wellington as barristers and solicitors in the firm of Sladden, Stuart, Joseph and Moulder. That partnership was dissolved in December 1975 when Moulder commenced practice on his own account in Lower Hutt. The firm held a professional indemnity insurance policy with the defendant against claims made against them. On 5 December 1978 an action was commenced against the firm by the Public Trustee on behalf of the estate of Blanche Josephine Ware. The statement of claim alleged, first, that an advance of $950 had been negligently made by Moulder from Mrs Ware's

money to a company called Franco Enterprises Ltd on 25 June 1970. That allegation forms no part of the present proceedings and may be ignored. In addition, the Public Trustee claimed that two further advances had been made by Moulder out of Mrs Ware's money and that each had been made by him negligently or, in the alternative, fraudulently. The first was an advance of $10,000 to Amusement Enterprises (N.Z.) Ltd (to which I refer as Amusement Enterprises) on 5 July 1973 and the second was an advance of $2,000 to the same company on 4 June 1974. The allegations in respect of those two claims were resisted upon a number of grounds but in general that there was no evidence to support findings of negligence or fraud on the part of Moulder. There were also questions requiring determination as to the liability of the individual partners but I am not now concerned with such matters.

The Public Trustee's action was heard before Ongley J from 29 September to 1 October 1981 and a reserved judgment was delivered by him on 5 February 1982 in which he found that negligence on the part of Moulder had been proved in respect of both the advances of $10,000 and $2,000. He also referred briefly to the alternative causes of action which had alleged fraud and held that these had not been established. Judgment was given against three of the members of the firm in respect of the $10,000 and against four of them in respect of the $2,000. The present plaintiff was involved in both those judgments. It had been known to him that his firm's indemnifier was denying liability under the policy in respect of these two advances and it is unfortunate that the indemnifier was not joined as a party in the Public Trustee's action so that the whole matter could have been determined on the one occasion. The reason was said to be that it was assumed the indemnifier would accept the findings of Ongley J on the allegations of negligence and fraud and that liability under the policy

could be determined accordingly. Notwithstanding the finding that fraud had not been established, however, the indemnifier maintained a denial of liability and so the present action was commenced by the plaintiff to recover under the policy the amount which he had paid in satisfaction of the judgment, namely, $22,500.

It is convenient now to set out the passage in the judgment of Ongley J in which he dealt with the allegations of fraud. It appears at p 19 of the judgment:

> " I come now to the two actions against Moulder alleging fraud in respect of the sum of $10,000.00 and the sum of $2000.00. The actions which are alleged to have been fraudulent in each case are as follows:
>
> ' (a) He failed to disclose to Mrs Ware that he had a pecuniary interest in and effective control of Amusement Enterprises (NZ) Limited.
>
> (b) He failed to disclose the financial state of Amusement Enterprises (NZ) Limited of which he was well aware.
>
> (c) He failed to ensure that Mrs Ware was independently advised.
>
> (d) For his own pecuniary gain the Second Defendant ensured that moneys were channelled into an investment without regard to the fact that at the time of the advance the company was insolvent and better and safer investments were available. '
>
> In my view there is insufficient evidence to establish that Moulder failed to disclose to Mrs Ware the information referred to in either (a) or (b) of these allegations. Accepting that Mrs Ware was not independently advised as alleged in (c), that of itself would not be

> indicative of fraud. It would be a factor to be considered in conjunction with the other allegations but it does not compensate for the lack of evidence a more fundamental kind. As to (d), although it is clear that Moulder did stand to gain by reason of the advances to the company it has not been shown on the balance of probabilities that the company was insolvent when the advances were made or that Moulder then knew or should have known that they would become irrecoverable. "

In effect the plaintiff's case is that this finding is made upon the basis of facts virtually identical with those now presented and that I ought to arrive at the same conclusion, although, of course, it was acknowledged that I am not bound to do so. The defendant, in addition to a denial of the plaintiff's claim, has pleaded two affirmative defences. The first is that the claims do not arise out of the provision of "professional services" as defined in the policy. The second is that the claims come within an exclusion in the policy as having been "brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the assured".

The hearing followed a somewhat unusual course in so far as the oral evidence was fairly brief and consisted mainly of the production of the files of this Court in the Public Trustee's action and in other proceedings concerning Moulder, and of the files of the Wellington District Law Society and New Zealand Law Society regarding enquiries into Moulder's activities and concerning disciplinary proceedings taken against him. As a result of those proceedings Moulder had been struck off the roll of Barristers and Solicitors on 6 December 1977. No objection was taken on either side to the way the evidence was presented, although it would seem that many of the documents may have been of doubtful admissibility in the ordinary course. This was, however, a

convenient procedure to have followed and saved a great deal of oral evidence which would otherwise have been required. It follows, however, that I have had to regard the evidence adduced in this way with care.

Some of the files, both of the Wellington District Law Society and the New Zealand Law Society, were brought to the Court by the respective witnesses in response to subpoenas which had been served on them, but the question of whether there was any power for the Court to receive them was raised. It was necessary for me to hear argument on this and, to enable the hearing to proceed, to give a decision more or less at once. I decided that the files could be received and my reasons, although briefly expressed, are set out in the oral ruling which I gave at the time and which was separately recorded. In summary, I concluded that the provisions of s 85 (6) of the Law Practitioners' Act 1982 applied rather than s 99 (5) of the Law Practitioners' Act 1955.

A further matter which was raised in the course of the hearing concerned whether evidence could be given by experienced law practitioners as to the duties of solicitors in circumstances similar to those which surrounded the activities of Moulder in relation to the two advances. Strong objection was taken on behalf of the plaintiff to any such evidence. I allowed it on a provisional basis with the qualification that I was prepared to put it aside later if, on reflection, I thought it ought not to have been admitted. Some of the questions asked went a good deal further than the guidelines upon which I had said the evidence could proceed but in the end I am unable to see that the matter is of any particular significance. The questions asked were all of a nature which I was well able to have answered myself from my own experience and I certainly learned nothing new from them. The conclusions I

have reached are in no sense dependent upon that evidence having been allowed.

I turn now to the matters in issue.

The Policy

It is necessary to set out the main terms of the policy under which the claim is brought. Those parts which are relevant for present purposes are:

> " 2 Underwriters hereby agree, to the extent and in the manner hereinafter set forth:-
>
> (a) To indemnify the Assured against any one claim or claims first made against them or any of them only during the period specified in item 3 of the schedule and for limits specified in Item 6 of the Schedule by reason of any act error or omission, as defined herein, whenever or wherever committed by:-
>
> (i) The Assured.
>
> (ii) Any other person, firm or company with whom the Assured have or have had joint or other working arrangements
>
> in or about the provision of Professional Services, as defined herein.
>
> 5 DEFINITIONS
>
> (b) 'Professional Services' shall mean all advice given or services of whatsoever nature provided by or on behalf of the Assured provided that the

Named Assured shall be entitled to all fees accruing from such services, unless gratuitously provided.

(c) The words 'act error or omission' shall mean any

(i) Negligent act error or omission.

(ii) Breach of contract.

(iii) Breach of Warranty of Authority.

(iv) Breach of fiduciary duty committed in good faith.

(v) Libel and slander.

(vi) Failure unintentionally and in good faith to account for monies had and received during the conduct of any professional services, as defined herein, by or on behalf of the Assured.

8 EXCLUSIONS

This policy shall not indemnify the Assured against:-

(d) Any claim or loss brought about or contributed to by any dishonest fraudulent criminal or malicious act or omission of the Assured, except insofar as indemnified by the Dishonesty of Employees Extension. "

The First Defence

The first affirmative defence is expressed in para 20 of the statement of defence in this way:

" 20. THE claims made against the Assured in relation to the advances referred to in sub-paragraphs (b) and (c) of paragraph 5 of the Statement of Claim did not arise by reason of any act, error or omission (as defined in the Master Policy) on the part of the Assured in or about the provision of professional services (as also defined therein). "

It emerged in the course of the hearing that this defence was advanced on two bases. The first was that the advances of Mrs Ware's money were not made in the course of professional services rendered by Moulder to her but were merely for his own benefit. The second was that it was contrary to the principles of insurance law that the assured should recover an indemnity for his own deliberate acts, particularly when they are to his own advantage. These applied to both the sums advanced. I did not understand the first of them to be pursued in any strength and upon the evidence I am satisfied that it could not succeed. It is clear that what Moulder did with Mrs Ware's money he did in his capacity as her solicitor and that she was charged and paid a fee for his services.

The main submission on this aspect of the matter was the second. It was a submission which no doubt is available upon the basis of para 20 of the statement of defence although it is not expressly referred to there and, indeed, this submission was not really foreshadowed at all on the pleadings. Mr Wild, for the plaintiff, was taken by surprise and not in a position to argue the matter, and I accordingly reserved to him the right to do so if it should become material. Having considered the point I do not think it is.

This submission was advanced in reliance on the principle referred to in Beresford v Royal Insurance Co. Ltd [1938] 2 All ER 602. That was the case of a claim under a policy of life assurance which excluded liability in the event of the assured dying by his own hand within one year of the commencement of the policy. He committed suicide about ten years later and it was held that by implication liability in such an event had not been excluded but that the contract was unenforceable as being contrary to public policy. This was upon the principle in the judgment of Fry LJ in Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147 at p 156:

> " It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. "

The present case is not one which involves the commission of a crime or at least not of any crime actually charged against Moulder. In any event, for the principle to apply there would need to be at least dishonest or fraudulent conduct and this is the subject of the second affirmative defence which now requires consideration.

The Second Defence

In order to consider the defence that the two advances made to Amusement Enterprises were excluded from indemnity under the policy it is necessary to determine first how the policy is to be interpreted.

Clause 8 (d), which I have already set out, excludes any claim or loss brought about or contributed to by any dishonest or fraudulent act or omission. It was the

defendant's case that "dishonest" in that context involves something less than fraud and is to be construed in the more general and dictionary sense of not straight forward or underhand; (Shorter Oxford English Dictionary, 3rd ed, Vol. I, p 568). Mr Wild's argument for the plaintiff was that the words "dishonest" and "fraudulent", when used in an insurance policy, may be regarded as amounting to very much the same thing. I do not think it necessary to make any firm finding on this. I am content to approach the matter upon the basis of the defendant's submission and to consider whether the evidence shows that Moulder's conduct in respect of the two advances was dishonest in the sense that it was deliberate and such as to be called "not straight forward" and "underhand". This necessarily involves an intention to deceive. The onus of proving this is, of course, upon the defendant and the standard of proof is the balance of probabilities but recognising that the allegation is a grave one. It must also be borne in mind that I am being asked to make a finding of dishonesty against someone who is not a party to the proceedings and who has not been called as a witness so as to be able to give his own version of what occurred. I am not in any sense critical of the fact that he was not called. It was scarcely in the interests of the defendant to do so and the attitude of the plaintiff throughout has been that he is entitled to rely upon the finding of Ongley J as to an absence of proof of fraud. The implications of a finding of dishonesty against someone not heard in his own defence are none the less present and cannot lightly be put aside.

It is necessary now to set out the facts as they relate to the two advances in question. Amusement Enterprises was incorporated on 19 March 1973 with a share capital of $6,000 which was contributed as to $2,400 by Moulder and as to $3,600 by one Barton-Ginger. The principal object for which the company was incorporated was

the hiring to hotels of electronic poker machines. On 18 August 1972 Moulder had written to Mrs Ware's medical practitioner, Dr Griffin, in these terms:

> " The writer yesterday received further instructions relating to an amendment of her will.
>
> As Mrs Ware is inclined to change her mind for no apparent reason, and as she is inclined to penalise her son because of her feelings against her daughter-in-law and for a number of other reasons of which we are sure you will be aware, it would be appreciated if you would advise us whether you consider Mrs Ware has testamentary capacity at the present time. "

On 24 August 1972 Dr Griffin replied:

> " This is to certify that I examined Mrs. B. Ware of 188 Tasman Street on 22.8.72 re her testamentary capacity.
>
> Over the past 3 months I have noticed a deterioration in her mental faculties in that some days she is quite alert and orientated and on other days she is confused. She is given to periods of great praise for her intimates and then periods of anger and abuse of these people. She has dismissed me as her Doctor and then begged my further attendance.
>
> I feel her testamentary capacity is such as to be too variable to be reliable, fair and well thought out and so I judge her not to have full testamentary capacity. "

Dr Griffin was called as a witness. He is elderly and had by now retired from practice. He showed a marked tendency to drift off the point and his recollection cannot be regarded as entirely reliable. For instance, he considered that a meeting with Mrs Ware had been held in about 1956

when it must have been nearly 20 years later. It was also the case that Mrs Ware had lucid intervals and it must have been during one of those that on 13 June 1974 she made her last will. Apparently the Public Trustee was satisfied of her testamentary capacity then and evidently Dr Griffin was not consulted about her condition for the purpose of that document.

Moulder had acted for Mrs Ware on the sale of her house property and on 12 June 1973 she signed an authority addressed to him in the following terms:

> " I hereby authorise you to invest such monies as may come into your hands re the sale of my property at 188 Tasman Street on such terms and conditions as you think fit. "

On 5 July 1973 he applied $10,000 from that source in the first of the advances at present under consideration. It was advanced to Amusement Enterprises. At the time of the advance no security was taken by Moulder in Mrs Ware's favour. Eight payments of interest, each of $250, were made to the credit of Mrs Ware's trust account with Moulder's firm between 4 October 1973 and 6 October 1975. Those payments were made by Moulder personally.

On 18 June 1974 Amusement Enterprises executed a debenture in favour of Mrs Ware to secure the repayment of the advance of $10,000. That debenture, together with three others to other clients of Moulder's from whom advances had been received, were registered together on 28 June 1974 and all ranked equally. In the meantime the company had given four chattels securities, the first of them having been dated 19 December 1973. I am not aware when the accounts of Amusement Enterprises for the year ending 31 March 1974 were compiled, but as presented they show the company to have been then insolvent. They record a loss for that year of

$69,939, although it must be observed that this figure includes depreciation on the electronic machines of $66,452.

On 4 June 1974 Moulder made a further advance of $2,000 from Mrs Ware's money to Amusement Enterprises. This comprised money which Moulder had paid to the credit of her trust account by way of interest. It was advanced on no security. The two directors of the company signed a personal guarantee of repayment.

On the occasion of neither of the advances referred to did Moulder suggest to Mrs Ware that she ought to be separately represented.

On 23 July 1975 the Wellington District Law Society became concerned about Moulder and, in particular, suspected there may be some irregularity regarding advances made to Amusement Enterprises. His firm's auditors were asked to investigate and on 30 July 1975 they reported that four advances (which included the two with which I am concerned) had been made to Amusement Enterprises. They supplied a copy of the general authority given by Mrs Ware on 12 June 1973 which they accepted as a sufficient authority for the advance of $10,000 but observed that there was no authority for the advance of $2,000 (or for certain other advances to other clients). The auditors required Moulder to obtain written authorities in cases where none was already held. Moulder did so and supplied to the auditors an authority from Mrs Ware in respect of the $2,000 advance. This, along with similar authorities from other clients, was forwarded to the Wellington District Law Society on 27 August 1975 and the auditors then expressed themselves as satisfied with regard to the advances. That was accepted by the Wellington District Law Society as disposing of any question of unauthorised advances, although other matters were pursued in respect of Moulder.

The partnership of Sladden Stuart, Joseph and Moulder was dissolved in December 1975 and in February 1976 Moulder commenced practice on his own account in Lower Hutt. He gave the required notice to the Wellington District Law Society and informed them of his auditor, who was duly approved by the Society. It was in July 1976 that Mrs Ware's son complained to the Wellington District Law Society as to Moulder's handling of his mother's money and later the Public Trustee, as executor of her estate, pursued this by commencing an action. It was not until July 1977 that charges were preferred against Moulder by the Wellington District Law Society.

Virtually the same set of facts were put before Ongley J for the purposes of the Public Trustee's action but, of course, in a different context from that which is before me now. The Public Trustee alleged that in respect of each of the two advances the members of the firm were liable on the basis that the advance had been made negligently or in breach of duty and, in the alternative, had been made fraudulently. If either allegation could be made out then the Public Trustee was entitled to judgment although there were additional questions as to which members of the firm were liable. It is not surprising to find that Ongley J was able to conclude that the advances had been made in breach of Moulder's duty to Mrs Ware. This was all that was necessary to establish liability. It is perhaps for that reason that Ongley J dealt so briefly with the issue of fraud. One imagines that he would have been justified in not dealing with it at all and it may be argued that what he has said on this topic was obiter. It is for this reason, as well as the different nature of the present proceedings, that I have thought it better to approach the allegation of dishonesty now brought by putting aside the

finding made by Ongley J so far as I can and approaching the matter afresh.

The evidence has covered the whole range of Moulder's activities and it was contended for the defendant that there emerges a very clear picture of dishonest conduct on his part. I readily accept that to be so and that by the time he was struck off in 1977 his dishonesty could be seen to have extended back for a considerable time. It is, however, important to remember that what is alleged against him now is that he was acting dishonestly on 5 July 1973 when he made the advance of $10,000 and on 4 June 1974 when he made the advance of $2,000. It is proper to consider evidence of surrounding circumstances in so far as they may enable a decision to be made as to dishonesty in these particular cases, but care is required to ensure that subsequent dishonesty is not wrongly attributed to the earlier occasions. This is of particular relevance in a case such as the present because it will often be the case that what starts out as negligence and a failure to observe correct professional standards can later lapse into dishonesty. That, in fact, is what is argued on behalf of the plaintiff here. It is acknowledged that Moulder's actions eventually became dishonest but it is said that in respect of the earlier advance at least the evidence discloses no more than negligence and a failure to follow correct practice. Without conceding that there was dishonesty in respect of the advance of $2,000, Mr Wild accepted that his case was rather weaker than in respect of the earlier advance.

I now deal with the two advances separately.

(a) Advance of $10,000

I have set out the sequence of events in respect of this advance. The defendant's case that Moulder was acting dishonestly when he made the advance is based upon a number of submissions to which I refer separately.

(i) Moulder had a substantial personal interest in the company which was to engage in business of a speculative type and which must have had an uncertain future. All this is clearly correct, but it is far from establishing dishonesty. So far as the company and its prospects were concerned, Moulder was in no different position from countless optimistic souls who believe they have stumbled on a means to a fortune. There is nothing in the evidence to suggest that he knew from the outset that the company would certainly fail. Plainly he believed just the opposite. Mr Scoular, the chartered accountant who was in charge of the whole investigation on behalf of the Wellington District Law Society, reported that Moulder had informed him he believed he and Barton-Ginger were on to a gold mine and wished to keep it to themselves. Moulder even went so far as to form and incorporate another company for the purpose of investing the profits to be derived from Amusement Enterprises. There can be little doubt that this indicates the atmosphere in which Moulder and Barton-Ginger embarked on their venture. Amusement Enterprises was incorporated on 19 March 1973 and the advance of $10,000 was made on 5 July 1973. I can see no evidence to show that, during that period, it must have become apparent to Moulder that the venture was in the process of failing. By the time the accounts for the year ending 31 March 1974 were prepared there was certainly evidence from which Moulder ought to have realised that the company was insolvent, but in July 1973 he may well have believed it would be successful and that he could repay the advance.

(ii) Mrs Ware was considered by her doctor to be lacking full testamentary capacity in August 1972 and so there was an added responsibility on Moulder not to use her money in any speculative or unauthorised way. That again is true and there can be no doubt at all that Moulder departed from proper professional standards and failed to pay regard to his plain duty to his client. It does not follow, however, that this means he was acting dishonestly. He was certainly acting improperly and ought to have shown particular care to see that any investments made for Mrs Ware were completely free from risk. But the fact that his failure to do this was a breach of the Audit Regulations and of his professional duty does not mean that it must be regarded as dishonest. Some regard must be paid to the fact that he saw to it for about two years that interest at the prescribed rate was paid to Mrs Ware's account in respect of this advance. That act does not, of course, mean that he had no dishonest intent but it must be taken into account when assessing in his absence his motives and actions.

(iii) Moulder failed for about 11 months to register the debenture securing the $10,000 advance and then registered it without priority over later advances as well as allowing four chattels securities to be given by the company during that period. It may well be that those facts give rise to a strong and perhaps an irresistible inference of dishonesty but this cannot safely be related back to Moulder's state of mind on 5 July 1973. The first of the chattels securities was given in December 1973, and by then it may well be that he must have realised his gold mine was collapsing, but that cannot be said to have been the case earlier.

(iv) Specific authority to invest on the security of a debenture was not obtained until some two

years after the advance was made and a year after the registration of the debenture. This also is true, but it carries matters no further forward. There is no doubt that Moulder failed in his audit obligations. The reason he obtained the authorities when he did was because his auditors demanded that he should. He had already failed in his duty and the timing of the authorities is of no significance.

(v) The advance was made for his own personal benefit. This is undoubted, but if the company had prospered, as he hoped, then the making of the advance would presumably have remained as no more than a failure to comply with audit and professional requirements.

(vi) By July 1973 a pattern of dishonesty had already emerged going back to 1971 and this appears from the charges laid by the Wellington District Law Society. There were in total five advances made from clients' funds prior to 5 July 1973 which were included in the charges and found to have been proved. These charges alleged a failure to ensure that the client was separately advised, advancing money without adequate security, and failing to register securities. It may be that these actions arose out of dishonesty but there is nothing to show that they did and certainly the Disciplinary Committee made no such finding.

(vii) Moulder's personal overdraft at the Commercial Bank as at 30 March 1973 was $31,916. That appears to have been the case, but the overdraft was secured by a mortgage given by Moulder and his wife over their house property which was subsequently sold by the bank as mortgagee. Although Moulder's financial position at the time he made the advances to Amusement Enterprises was clearly parlous, this does not necessarily mean he was

acting dishonestly as distinct from negligently or irresponsibly.

(viii) A letter from the President of the Wellington District Law Society to Moulder dated 10 March 1977, which showed that the Society was concerned as to the honesty of Moulder's actions in respect of a transaction in 1971. This letter sets out a number of matters of concern with regard to an advance by Moulder to himself from money of a Mrs McKenzie. Moulder's reply to the queries raised in that letter was to the effect that Mrs McKenzie and her accountant were aware of the whole matter and that his auditor had expressed himself as satisfied. This matter was the subject of a charge against Moulder but there was no allegation of dishonesty. The charge was that he had borrowed the money without providing adequate security and without ensuring that Mrs McKenzie was independently advised. This charge was found to have been established but it does not assist in a determination as to when, in the present transactions, there had been a dishonest intention.

(ix) The report to the Wellington District Law Society by Mr Scoular as investigating accountant. This report disclosed Moulder's affairs in detail and it was presumably the basis of the charges which were then preferred by the Society against Moulder. In itself it does not seek to establish whether or not there was dishonesty on Moulder's part or at what stage any dishonesty could have been inferred. The report carries matters no further than to provide the basis for disciplinary proceedings.

I should make it clear that I am certainly not making any affirmative finding that Moulder did not act dishonestly when he advanced the $10,000. It may well be that he did. I am, however, on the evidence available, unable to accept that it has been proved on the balance of

probabilities that he did. The defence in respect of this advance must accordingly fail.

(b) Advance of $2,000

This advance was made less than a year after the $10,000 advance but by then the position had greatly changed. While Moulder held an authority of a general nature which could have applied to the $10,000 advance, for the second advance he held no authority at all. The money advanced represented interest which he himself had paid to Mrs Ware's trust account. By 4 June 1974 Moulder must certainly have known that his dreams for the company's prosperity had failed. It is not clear when the accounts for the year ending 31 March 1974 had been prepared but it is not acceptable that he was unaware in June that the company was insolvent. He was also aware that he had delayed registration of debentures and that there had been four chattels securities given.

Mr Wild was not prepared to concede dishonesty in respect of the second advance and sought to find indications that perhaps this was not yet really apparent. He referred to the fact that Moulder may not have seen the company's accounts until well after 31 March 1974 and that the loss then shown was mostly attributable to the writing off of depreciation. I am satisfied, however, that I cannot sensibly come to any conclusion other than that Moulder was acting dishonestly by the time he made this advance. He could not conceivably have believed that the business of the company was likely to prosper and his breaches of duty to his client had accumulated to the point where he could not have failed to realise what he was doing.

I find the affirmative defence has succeeded in respect of the second advance and that the terms of the policy are such as to exclude liability in that regard.

Quantum

Damages are claimed under three heads.

(1) The amount paid under the judgment in the Public Trustee's action. This, including interest, totalled $22,500, but in view of my findings the plaintiff can recover only that part which relates to the advance of $10,000. I am not sure of the calculation which needs to be made and leave it to counsel to work out. If they cannot agree then the matter may be referred back to me.

(2) Legal expenses in defending the Public Trustee's action. These amounted to $7,279.19 and evidence was given to establish that amount. I did not understand it to be contested that this sum was payable if the plaintiff was entitled to succeed on the issue of liability and I accordingly allow it.

(3) General damages $5,000. I accept that general damages may be awarded upon a claim in contract for non-pecuniary loss such as worry, anxiety, embarrassment and inconvenience, although it will not usually be the case that any large sum will be appropriate. The plaintiff's case is that the worry and anxiety of having to defend the Public Trustee's action, the personal embarrassment in having judgment given against him because of Moulder's actions, and the general strain

involved, affected his health and interfered with his ability to pursue his part-time activity of writing. Taking as sympathetic a view of these matters as I can I feel unable to regard them as justifying anything more than a modest award. There was no medical evidence of any substantial or lasting effect on the plaintiff's health. Reference was also made to the fact that nothing had been claimed by way of special damages for interest and it was said this could properly be taken into account.

Making allowance for all these matters I fix the general damages at $1,250.

There will accordingly be judgment for the plaintiff in accordance with the findings I have made. The plaintiff is also entitled to costs according to scale with disbursements and witnesses' expenses as fixed by the Registrar. I certify for a second day at $300.

Solicitors: J.A. Dean, WELLINGTON, for Plaintiff

Scott, Morrison, Dunphy & Co., WELLINGTON, for Defendant