

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.374/79

247 .

BETWEEN THE PUBLIC TRUSTEE as
executor of the will of
A ANDERSON late
of Christchurch, Retired
Foreman Stevedore, deceased

Plaintiff

A N D J PARR of
Christchurch, Married Woman

Defendant

Hearing: 21 February 1984
Counsel: D.J. O'Rourke for Plaintiff
D.I. Jones for Defendant
Judgment: 12 MAR 1984

JUDGMENT OF ROPER J.

In this action the Public Trustee as executor of the late Anderson claims from the Defendant, who is the deceased's daughter, the sum of \$14,000, and interest thereon from the 18th April 1975. This sum, with interest, is alleged to be owing pursuant to a deed of mortgage of shares dated the 14th April 1975 whereby Mrs Parr acknowledged a loan of \$14,000 from her father. Pursuant to the deed Mrs Parr covenanted to repay the loan by the 18th April 1980 and to pay quarterly interest thereon at 8% per annum until repayment. Mrs Parr has not repaid the loan and has paid no interest.

In her Statement of Defence Mrs Parr has admitted the existence of the deed but alleged that it does not express the true intent of the parties. In a counterclaim Mrs Parr alleges that her father in consideration of her past, present and future services wished to transfer to her by way of gift his shares in a company, Grove Courts Ltd. The shares represented Mr Anderson's interest in his ownership flat. She claimed that she executed the deed to avoid gift duty, it being the deceased's intention to gift \$4,000 in each year

until the nominal indebtedness was extinguished. She claims that the deceased died without performing his part of the arrangement and she seeks specific performance of the alleged promise and agreement to forgive the debt.

I heard formal evidence from Mr Kendrick, a trust officer in the employ of the Public Trustee, which established the transfer of the shares to Mrs Parr, the execution of the deed, and her failure to pay interest on demand and repay the principal. I then heard evidence from Mrs Parr and Mr J.N. Creighton, the late Mr Anderson's solicitor. That evidence established beyond any doubt that it had been Mr Anderson's intention to gift his shares in Grove Courts Ltd to his daughter, a decision he reached quite free from any influence from Mrs Parr, and motivated by the care and attention she lavished on him. He informed Mr Creighton in a telephone conversation on the 2nd April 1975 that that was his intention, and when he called on Mr Creighton on the 14th April he would have signed the necessary documents there and then to make the gift complete. It was at Mr Creighton's suggestion that he did not do so. Mr Creighton told him that payment of gift duty could be avoided if he sold the shares to his daughter, took a mortgage back and then gifted not more than \$4,000 of the principal in each year, and that was the way it was arranged. There was an initial gift statement for \$4,000 on the 24th April 1975 but Mr Anderson's failing mental health frustrated Mr Creighton's plan. When Mr Creighton next went to see him to obtain documentation with a view to further gifting he concluded that Mr Anderson was in no fit mental state to execute documents. There was no improvement in Mr Anderson's condition up to his death in Mr Creighton was quite adamant that Mr Anderson had no change of heart. He was insistent throughout that the property be gifted to his daughter. No interest was paid in Mr Anderson's lifetime and none was demanded. I accept Mrs Parr's statement that she was reluctant to accept the flat, but only did so because of her father's insistence, and certainly would not have signed the mortgage if she had thought that she would be liable under it.

Mr O'Rourke submitted that the allegation of gift must be examined with scrupulous care, even with suspicion, and I accept that that is the proper approach. The Court should look for corroboration of the evidence of an alleged donee, although there is no hard and fast rule that such evidence must be rejected if uncorroborated. I found Mrs Parr an impressive witness and I accept her testimony, and of course that of Mr Creighton, without reservation.

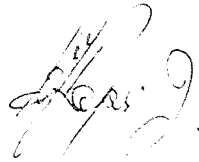
It was submitted by Mr O'Rourke that at best all we have here is an incomplete or imperfect gift, or perhaps a conditional gift, with no question of a binding contractual arrangement. However, I accept Mr Jones' argument that when one looks at the overall picture there is a good deal more to it than that. I think there are all the requisites of an enforceable contract, and that it was the intention of the parties that the mortgage would be forgiven. There was valuable consideration moving from Mrs Parr in the provision of future care (which was supplied) not to mention the assumption of the burden of a mortgage.

The words of Lord Wright in G. Scammell & Nephew Ltd v. Ouston [1941] A.C. 251 are in point. "The object of the Court is to do justice between the parties, and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form".

There will therefore be an order that the Plaintiff do specifically perform the agreement by the deceased to gift the property to the Defendant.

Having regard for the size of the estate and the provisions of the will an order for costs hardly seems appropriate but if counsel think otherwise I will receive Memoranda on the point. Counsel will also have to decide what is to become of Mrs Parr's Family Protection Act

proceedings.

Handwritten signature or initials, possibly "H. C. P.", written in dark ink.

Solicitors:

The Solicitor, Public Trust Office, Christchurch, for
Plaintiff
Purnell, Creighton, McGowan & Co., Christchurch, for
Defendant