A.No.187/81

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN PHILIPPA JANE GYLES, and ALISTAIR JOHN NICOLSON

Plaintiffs

AND HERBERT DONALD GYLES

Defendant

M.No.289/83

BETWEEN HERBERT DONALD GYLES of Waikanae, Company Director

Applicant

AND PHILIPPA JANE GYLES of Armidale, New South Wales, Australia, Widow, VIVIEN CAROLE GYLES of Wellington, Spinster and ALISTAIR JOHN NICOLSON of Wellington, Solicitor as trustees in the estate of the late CYRIL HAYDN STANLEY GYLES

Respondents

Hearing: 1, 2, 3, 8 and 9 February 1984

Counsel: R A Dobson for Plaintiffs/Respondents
R A McGechan for Defendant/Applicant

Judgment: 1.3.84

JUDGMENT OF EICHELBAUM J

This judgment relates to separate proceedings, heard together by virtue of a consent order,

concerning the estate of Arthur Stanley Gyles : an action alleging breach of trust against the surviving trustee Mr H D Gyles and an application by the latter for trustee's commission. It was agreed that evidence adduced in either proceeding was to be evidence in the other.

Background

For many years the Gyles family has conducted a printing business in Wellington. By his last will Mr A S Gyles bequeathed all his shares in the business to his two sons C H S and H D Gyles. As to the residue of his estate he left a life interest to his wife Violet with remainder to the two sons. Those three persons were appointed executors and trustees of the will.

Following the death of A S Gyles in 1942 the sons continued to conduct the printing business, which I will call "the company". Its premises were in an old building in Vivian Street, Te Aro owned by the estate. The accounts indicate that in addition to the building the estate owned two residential properties, one presumably occupied by the widow, and a modest portfolio of shares. They show that in the years immediately following the testator's death, his widow received in the vicinity of £500 per year by way of income from the estate.

In 1967 C H S Gyles died. He was survived by his widow Mrs P J Gyles, who is a party to

these proceedings, and by children from that marriage and an earlier one. In addition to the widow the executors and trustees under Mr C H S Gyles' will were Mr W Olphert, a Wellington solicitor, and Mr A Anderson a chartered accountant. The widow received a life interest, with the children entitled in remainder.

In the same year as C H S Gyles died the company faced a major decision in regard to its premises. The building was an earthquake risk and there was the possibility of a demolition order. Further the company's printing machinery had reached the stage where it needed replacing. Modern machines of a larger and heavier character would require more substantial floors than provided by the old building. Any possibility of redevelopment had to be discarded on account of difficulties relating to the site. Thus the company was faced with moving to new premises. These problems affected the estate because it rapidly became apparent that the old building would be difficult if not impossible to sell.

What appeared at the time to be a stroke of good fortune then occurred. Mr H D Gyles (from this point onwards I can conveniently refer to him simply as Mr Gyles) became aware that space was available in a building on the corner of Vivian and Marion Streets called Rostrevor House. It had been a venture by P Graham & Sons Ltd and floors had been sold off separately to owner-occupiers or investors. The first and second floors however had remained unsold for a considerable period. The developer was in some financial difficulty and Mr Gyles was able to arrange a deal on the basis that the estate acquired the two floors without

any cash contribution in that the developer took over the Vivan Street building in part payment and finance was arranged for the balance.

The company continued its business in the new premises. It occupied the two floors as tenant of the estate on an informal basis. In 1973 or 1974 Mr Gyles bought out the shareholding of his late brother's estate. At that stage the entire shareholding was owned by or on behalf of Mr Gyles or members of his immediate family. Two of his sons were or became directors but I infer that for practical purposes the company was then under Mr Gyles' control.

By 1974, for reasons which need not be detailed, the company had become dissatisfied with the premises. The problems were discussed at a directors' meeting held 30 August 1974 which Mrs Violet Gyles attended by invitation. The minutes record that Mr Gyles and his mother expressed the opinion that if the Rostrevor House floors were retained, inflationary trends would eventually provide a substantial asset for the beneficiaries. It was agreed that the present arrangements should continue but a target date of 1980 was set for the company to vacate at which stage the estate could realise the asset. It is not clear why those concerned rejected the alternative that the company would vacate immediately, leaving the premises to be let to a third party on a commercial basis, or indeed whether that course was considered.

The remaining events can be chronicled briefly. Mrs Violet Gyles died in 1976 at the age of 86. In 1980 the company moved to premises in

Kaiwharawhara. After considerable difficulties the estate sold the two floors in Rostrevor House.

Action for breach of trust

This involves two separate allegations.

1. Rental

In respect of the period commencing with the death of Mrs Violet Gyles the plaintiffs allege that the defendant, as sole trustee, failed to obtain a proper commercial rental for the Rostrevor House premises. In monetary terms the allegation is that a reasonable rental for the four year period in question would have totalled $86,670 whereas rent paid by the company totalled $44,351.

It is now necessary to refer to the arrangements between the A S Gyles estate and the company regarding the occupancy by the latter of the Rostrevor House space. Although this is not exactly the way that Mr Gyles described it in evidence, from the estate accounts and as a result of what I was told from the bar it seems that the rent was fixed each year at a sum sufficient to cover all the outgoings of the estate plus a reasonable living allowance for Mrs V. Gyles, it being recognised that she was not in need of any substantial income. Mr Olphert, who in earlier days acted for Mrs V Gyles as well as for other members of the family, and who as already mentioned was originally a trustee in the C H S Gyles estate, was aware of the arrangement as was Mr Anderson. It was also

referred to in the minutes of the 30 August 1974 meeting. On the evidence I am satisfied that it had the approval of Mrs Gyles. It is significant that in describing the arrangement Mr Olphert described it in terms that something less than market rental should be paid although Mr Gyles contended that in fact the payments made by the company amounted to a reasonable rental. During the period with which I am concerned the figure shown as rent in the accounts fluctuated. Comparing 1968($5895) with 1979 ($9941) the increase was only 70%. However, the peak figure ($12850) occurred in 1977.

The estate accounts show that for a number of years down to 1968 the income available to Mrs Gyles, translated to dollar terms, was consistently in the area of $2500 to $3000. From 1969 to 1974 inclusive however, it dropped by about half. In the next three years the estate profit was shown as $2852, $2664 and $3839 respectively. In 1978 the figure was $44 and in 1979 $38. The 1977 accounts include a note explaining that although income was credited to Mrs Gyles at the figures shown she did not always draw it in full. The accrued balance owing to her at her death was a little over $5000.

Although such a situation is by no means uncommon in family affairs it will already have become apparent that the various hats worn by Mr Gyles placed him in a position of conflict of interest. Its nature varied as events occurred in the family history. If indeed the company was paying less than a commercial rent it is perhaps instructive to pause to consider in whose favour, or to whose detriment, that operated from time to time. Obviously, until her death in 1976 it

was to the detriment only of Mrs Violet Gyles who as stated, concurred in the arrangement. From then on any detriment fell equally upon the remaindermen, that is to say H D Gyles on the one hand and the C H S Gyles estate on the other. As to any benefit, until the change in shareholding this accrued equally to H D Gyles on the one hand and the C H S Gyles estate on the other. From then onwards it accrued entirely to Mr Gyles or the members of his immediate family who were shareholders. Thus in the period in in respect of which the claim is brought one half of any detriment was suffered by the C H S Gyles estate while any benefit accrued to Mr H D Gyles or his immediate family. It cannot be suggested that the C H S Gyles estate ever consented to the continuation of an arrangement of the kind prevailing in Mrs Violet Gyles' lifetime. Indeed I think it is implicit in the nature of those arrangements that they were to apply only while circumstances remained the same and that they did not contemplate or purport to legislate for the situation that would arise on the death of Mrs Violet Gyles.

Correspondence produced showed that after Mrs Gyles' death, the question of a proper rental had been discussed between Mrs P J Gyles and Mr Olphert, her solicitor, as early as 9 July 1976. Mr Gyles was then overseas but Mr Olphert to the best of his recollection raised the matter at a meeting with Mr Gyles in May 1977. From a letter written by Mr Olphert to Mrs P J Gyles on 23 March 1977 it is obvious that in his view the justification for the previous arrangements had ended with the death of Mrs V Gyles and that from that date onwards

the company should pay an economic rent. I have no doubt that he raised the matter with Mr Gyles. However Mr Olphert appreciated that he himself was in a situation of conflict of interest and made arrangements to disengage himself from the Gyles family's affairs. Mr J S B Brown of Stone & Co who succeeded Mr Olphert as solicitor for Mrs P J Gyles wrote to Mr H D Gyles on 2 May 1978 and specifically referred to the question of fixing an appropriate rent as well as other matters. It was of course for the A S Gyles estate to take up the question of a rental with the company and at this stage there was uncertainty regarding who would act for the estate in future. Likewise there was a period when, according to Mr Gyles, he believed that Mr Olphert would continue to act for him personally (possibly he meant, in his capacity as trustee in the A S Gyles estate as well) and from the correspondence and file notes it is apparent that Mr Brown found himself at times dealing with Mr Olphert, sometimes with Mr Gyles direct, then with new solicitors consulted by Mr Gyles, and then again with Mr Gyles direct. During this period Mr Brown obtained a valuation of the Rostrevor floors. On 5 November 1979 he wrote to the solicitors then acting for Mr Gyles setting out the salient points of the valuer's report. If the valuer's advice was correct then the rent paid by the company since Mrs Gyles' death was less than half the commercial value. By this time Mr Gyles was actively negotiating the sale of the two floors but of course that would not have prevented consideration being given to any past liability in respect of rental. At any rate, notwithstanding threats of court proceedings Mr Brown was unable to obtain any positive response from Mr Gyles on this aspect so that in the end in July 1981 the plaintiffs issued their writ.

The nature and extent of a trustee's duties in the circumstances were not in dispute. A trustee is bound to execute the trust with fidelity and reasonable diligence, and ought to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs; but beyond this he is not bound to adopt further precautions : 38 Halsbury 3rd Edn para 1679. In cases of doubt or difficulty he may take legal and other expert advice (ibid). Except in the case of a discretionary trust it is the trustee's duty to hold an even hand between the parties interested under the trust and not to benefit one beneficiary or set of beneficiaries at the expense of others. In In re Whiteley 1886, 33 Ch D 347, 355 Lindley LJ emphasised that the trustee had to have regard for those who were to enjoy the subject matter of the trust at some future time and not solely those presently entitled to the income, and the converse must equally apply. The trustee must of course not place himself in a position where his personal interests may be in conflict with his duty to the beneficiaries, Halsbury (above) para 1657. The question of diligence is to be judged objectively by the standard of the ordinary prudent businessman in conducting his own affairs.

Under the heading "Improvident leasing or letting", Underhill's Law of Trusts and Trustees, 13th Edn p 465 states :

> " Precisely the same principles [sc. as with improvident sales] apply to the leasing or letting of trust property; and if the trustees do not take proper steps, by consulting a practical

> valuer, to ascertain the proper rent, or, a fortiori, knowing the proper rent accept a lower rent, they will be liable to make good the difference. "

As to quantum, the measure of a trustee's responsibility for breach of trust is restitutionary in nature, see Underhill p 701, Bartlett v Barclays Bank Trust Co Ltd (No 2) 1980 2 All E R 92, 95 and Re Dawson, Union Fidelity Trustee Co Ltd 1966 2 NSWR 211. Except in one respect the plaintiffs did not contend that it could make any difference to the measure of damages if the defendant's breaches were regarded as other than "innocent".

Mr Gyles gave evidence at length. He impressed me as an articulate, shrewd and capable businessman. From a comparatively early age he carried a considerable burden of responsibility within the family, much of it relevant to his own interests, but affecting also the affairs of his mother and from 1967 onwards, the estate of his late brother. I recognise that private individuals carrying out the role of executor and trustee often have a thankless and difficult task, and further that conflict of interest can be a subtle concept not always fully understood even by those with professional training. Making due allowance for all those factors I have to say I am left in no doubt that Mr Gyles' conduct in regard to the rental in the period under examination fell short of the standard of the ordinary reasonable prudent businessman. Notwithstanding the conflicting interests he should have been able to fulfil the duty

cast upon him without undue difficulty. He might have arranged for the appointment of new trustees in the A S Gyles estate who could have taken up the question of rental. More simply he could have instructed solicitors who were not otherwise involved with the family to advise the A S Gyles estate and take such steps as they thought necessary, or referred the issue to arbitration. In fact he did not even take the elementary course of seeking advice from a valuer whether the rental being paid was in line with obtainable economic rentals for similar space in the locality. The tenor of his evidence was that he simply held fast to a pre-determined course of action of retaining the Rostrevor House investment for a set period to the ultimate benefit of the remaindermen of whom he of course was one. Implicit in his view was that this course had the approval of all concerned but there is no basis for saying that after 1976 it had the concurrence of the other remainderman, the C S H Gyles estate. In any event the question of obtaining a proper income from the investment pending its realisation required separate attention by the trustee. It would be insulting to Mr Gyles' ability and intelligence to think that he was unaware of these considerations.

The next and more difficult issue is whether the rental actually earned by the estate during the period in question was less than a reasonable commercial rental. In using that expression I am mindful of course that it is not merely a matter of the rental which in theory the premises should have been able to command. Linked inseparably is the question of the demand at the relevant time. A considerable proportion of the evidence related to these aspects.

As there was some dispute regarding the precise floor area I should first state that I accept the plaintiff's evidence that the letable floor area amounted to 3,240 square feet on each floor.

Not a great deal was said on the topic of the likely term of a lease commencing in 1976. However, on the evidence of Messrs Blackley and Hughes the most probable conclusion is that any such letting would have been on the basis of a rent review after three years.

On the question of the appropriate rental on a square foot basis, my finding is that in 1976, a reasonable rental obtainable for the first and second floors of Rostrevor House for a lease on the terms just stated would have been $2.50 per square foot. In amplification of that finding I comment :

1. In general I prefer the evidence of Messrs Blackley and Hanna where that of the defendant's witnesses was in conflict. They are well qualified, experienced valuers who independently reached very similar conclusions. The defendant's evidence on the other hand was based on a somewhat narrow viewpoint, essentially that of one real estate firm.

2. Mr Blackley was careful to recognise that property zoned for office use could command a higher rental. He proceeded on the basis of the actual zoning of Rostrevor House, that is Industrial B.

3. Although examples of exactly comparable premises were sparse, several of those relied on by the plaintiffs' valuers provided a reasonable degree of comparison. In addition to the Castrol building, there were the Databank premises, the NAC building and Anvil House. I refer also to the sixth floor of Rostrevor

House itself, let in 1976 at $2.85. De facto this was used for offices but the fact that this was not in accordance with the zoning requirements must have had some restrictive effect on a rental payable long term.

4. For the reasons given by Mr Hanna I do not regard the examples relied on by the defendant's witnesses, the Standard Press building and Ballinger House, as fairly comparable.

5. Mr Blackley's calculation of the capital value of the premises, made in 1979 prior to the actual sale of the two floors, was quite closely in line with the actual results : $220,000 compared with the sale prices totalling $205,000, the latter figure being 93% of the former. If on the other hand we take the estimate made by the defendant's witness Mr Hughes for 1979 rental ($9620) we find that if capitalised on the basis adopted by Mr Blackley, the result is so distant from the actual prices obtained on sale as to lend force to Mr Hanna's comment that the rental figures put forward by the defendant's witnesses are not credible. At the same time, because in the event, Mr Blackley's basis turned out to be a shade higher than was achieved in actuality some reduction of his estimate is warranted.

6. All witnesses agreed that the company would have been entitled to some allowance for the fact that the landlord supplied less than the normal amenities but there was no consensus on the method to be adopted. I have made an arbitrary deduction in the vicinity of 5%. It should be pointed out that the plaintiff's valuers made no addition for the tenant

meeting any proportion of the rates, or even increases in the rates.

7. I am satisfied that separate allowance should be made for the car parks. I have assessed their worth in 1976 as $5.00 per week each.

8. The 1976 rental should, in my view, be assessed as if payable by an incoming tenant. The company was not obliged to stay; its position should not be equated with that (recognised as more favourable to the landlord) of an existing tenant compelled to submit to a rent review after renewing his lease.

As to the rent that would have been fixed on a review in 1979, the period 1976-79 was one of high inflation. Making every allowance for the absence of strong demand for Industrial B space in the locality, I am quite unable to accept that the increase would have been as little as 10%. The figures given by the plaintiffs' valuers postulated an increase of between 25% and one third. I propose to adopt a basis of 25%.

Calculation of rental

1 July 1976 to 30 June 1979

6480 square feet x $2.50	=	16200
5 car parks x $5.00 per week	=	1300
Total for each of the 3 years		$17500 per annum

1 July 1979 to 31 March 1980

$17500 + 25% for 9 months = $16406

In explanation I add :

(a) Mrs Gyles died in April 1976. In my view, as indicated, the existing arrangement terminated on her death; but a reasonable time should be allowed for the negotiation or fixing of a new rental. Accordingly, I have taken the calculation from 1 July.

(b) I have not acceded to the plaintiffs' invitation to go beyond the pleaded period, namely four years from Mrs Gyles' death. In this respect Mr Dobson, referring to Bartlett v Barclays Bank Trust Co Ltd (above) at p 97, submitted I should find that the defendant's breach went beyond negligence. However, in the case cited the plaintiffs sought a declaration of liability and an account. Here, I do not think I should go outside the pleadings.

Trustee Act 1956, s 73

It is well established that a trustee seeking to rely on the relieving provisions of the section must establish that he acted both honestly and reasonably; if so there is then a case for the Court to consider whether the trustee ought fairly

to be excused for the breach, looking at all the circumstances : National Trustees Co of Australasia v General Finance Co 1905 AC 373, 381; Stevenson v Brand 1917 NZLR 902, 908. "Reasonably" means reasonably as trustees, In re Grindey 1898 2 Ch 593 per Chitty LJ at p 601. Having regard to the language used and the general object in view, namely the relief of honest trustees who act reasonably, the section should not be construed narrowly (ibid). The Court has to strike a balance between the interests of the beneficiaries at whose expense relief is granted on the one hand, and on the other the trustee, who as in the present case may be acting gratuitously : In re Lord de Clifford's estate, Lord de Clifford v Quilter 1900 2 Ch 707, 713. The Court has been loath to lay down any general principles; each case must depend on its own circumstances : In re Turner 1897 1 Ch 536, 542, In re Kay 1897 2 Ch 518, 524, Stevenson v Brand (above) p 908. The onus lies on the trustee : In re Stuart 1897 2 Ch 583, 590.

In the present case, the short answer is that the trustee has failed to satisfy me that he acted reasonably. Indeed once the contentions of the C H S Gyles estate in regard to rental were put forward, which occurred no later than Mr Olphert's interview of May 1977, the suggestion that Mr Gyles acted reasonably when in fact he simply took no steps in response to the estate's requests is unarguable. But I do not think it needed any specific move on behalf of the C H S Gyles estate to bring about this result. The death of Mrs V Gyles brought to an end the justification for the state of affairs which had existed to that point and as I indicated earlier, I am sure Mr Gyles so appreciated.

Accordingly, on this cause of action the plaintiffs will have judgment on the basis of the calculation of rental set out earlier. I award interest at 11% to be calculated as from 31 March 1977 on the sum then owing, and similarly as at each succeeding 31 March (but not so as to allow compound interest). Against the total there will of couse be set off the rental obtained which it is agreed totalled $44,351. The plaintiffs will be entitled to judgment for one half of the final sum. If the parties are unable to agree on the arithmetic I will settle the figure.

2. Improvements

When the move to Rostrevor House took place, the premises consisted of a bare concrete shell. The company met the whole of the cost of fitting the two floors out in a manner suitable to its requirements. It was said that the estate had no funds for this purpose. To the extent it was thought appropriate that the estate should contribute to the expense, I do not understand why the necessary payments could not have been made by the company on the estate's behalf and the position properly recorded in their respective accounts. Any contention that this was the effect of the arrangement was I imagine precluded by the fact that the company treated the expenditure as its own and claimed depreciation for taxation purposes. Further, some of the expenditure, such as partitioning and carpeting, and provision of special wiring for the company's machinery, was of a kind that in any event would commonly have fallen on a tenant. I accept however that in the particular

case the expenditure went further than that : for example, the painting of the concrete and the provision of toilets, and of ordinary electric wiring, were all met by the company.

It may be that because of the then relationships within the family, and the identity of interest as between the remaindermen in the A S Gyles estate and the shareholding in the company, it was not thought necessary to analyse responsibility for the expenditure at that time. At a later stage however the matter was discussed between Mr Gyles and his mother. It is of some significance that in his evidence when introducing the topic Mr Gyles, upon being asked whether there was any understanding or arrangement to compensate the company, said :

> " I think in all fairness that the company should be compensated for instituting all the necessary arrangements which we would leave and vacate eventually and . . . . couldn't take . . . . with us. "
>
> (p 54)

I particularly noted the way Mr Gyles put this at the time because it seemed to indicate so clearly that he was speaking in terms of his present frame of mind rather than on the basis of some past arrangement which might have entitled the

company to be compensated. However, he went on to refer to an occasion when his mother raised the subject, saying that if the company ever fell on hard times it would be fair that the estate should compensate the company for its efforts in moving into Rostrevor House, and all the improvements then installed. Mr Gyles said this had never occurred to him, but he prepared a document which he and his mother signed and which at a later stage he gave to Mr Olphert for safe keeping. Mr Olphert could not recall any such incident and no such paper has been found. However, from a legal point of view it seems clear that any arrangement reached between Mr Gyles and his mother would fail to attract contractual status, if for no other reason than the absence of consideration.

At a meeting on 30 September 1979 the directors of the company resolved to terminate their occupancy of the Rostrevor House premises. As the minutes recorded, the estate had been endeavouring for some time to sell the floors. The minutes stated :

> " Office fixtures, carpets, drapes etc and numerous other chattels owned by the company to be sold at a reasonable valuation cost to the purchasers of the floors. "

However, that is not how the improvements were dealt with in the event. Neither the contract for the sale of floor one (20 November 1980) nor that for the second floor (10 June 1981) made any reference to improvements or chattels. Nor was the subject mentioned in an abortive offer made for the second floor in 1981, or in conditions of sale relating to an unsuccessful auction held during that year. However in November 1979 Mr Gyles had obtained a report from a firm of public valuers in regard to the improvements, which were set out in the letter as follows :

" 1. Concrete plastering.
2. Electrical wiring (extensive for the printing business)
3. Supply of light fittings and heaters.
4. Fire alarm system and attendant apparatus.
5. Staff meal room facilities.
6. Internal partitioning (superior in main offices).
7. False ceilings.
8. Floor coverings.
9. Drapes. "

The report stated that the improvements were worth $21,000. The valuer (Mr Svensen) said in evidence that a reasonable apportionment would have been $15,000 to the first floor and $6000 to the second. The basis of his valuation was an assessment of a reasonable price that either a landlord or an

incoming tenant might be prepared to pay. Mr Svensen agreed that in the case of a number of the items, it would not be worth the tenant's while to try to remove them.

Without going into refinements the legal position of course is that during his term a tenant is entitled to remove tenant's chattels, Hill and Redman's Law of Landlord and Tenant 17th edn 1982 p 505. Whether an article has been so affixed to the building as to become a fixture depends on the object and performance of the annexation, Hill and Redman p 506. These aspects were not explored in detail in evidence and not at all in argument but it seems certain that the improvements in question were a mixture of fixtures and chattels; in all probability, mainly the latter. Accordingly, in an arm's length situation, if the company had quit its tenancy in the normal way, in accordance with usual commercial practice the company may well have been able to turn the situation to account by selling the "chattels" either to the landlord or to an incoming tenant. In fact the company did not endeavour to do so. In theory the presence of some of the improvements might have assisted to make the premises more attractive to a purchaser but whether in the particular cases they were a help or a hindrance I cannot say. For purposes of the present discussion the more pertinent aspect is that Mr Gyles, as trustee, had no conceivable legal basis for simply deducting, as he did, the sums of $15,000 and $6000, and paying these to the company (his company) before accounting to the beneficiaries. In dealing with this aspect unilaterally he put himself in a hopeless position of conflict of interest, being concerned in the transaction as trustee, beneficiary and proprietor

of the company. The only other interest involved was that of the C H S Gyles estate and there would have been no difficulty in apprising the beneficiaries of that estate of the problem, although no doubt he would have failed to obtain their consent to the course he wished to adopt. In a letter to Mr Gyles' solicitors dated 5 November 1979 Mr Brown had stated that in the opinion of his valuer, the improvements did not materially affect the price likely to be obtained for the premises, and had warned that the C H S Gyles estate strenuously opposed any suggestion that the company was entitled to any part of the purchase price.

In the circumstances it is obvious that Mr Gyles was in breach of trust in making the payments to the company. Further, I have a clear view that he did not act reasonably, so as to enable him to rely on s 73. He could not reasonably believe that any understanding with his mother could avail him against the views so clearly expressed by the C H S Gyles estate. Accordingly, under this cause of action there must be judgment for the plaintiffs, calculated with interest at 11% from the dates when the respective payments of $15,000 and $6,000 were made to the company. Judgment will be for one half of the final product. Again, I will settle the figure if agreement cannot be reached.

Trustee's Commission

Turning to the claim for trustee's commission, such claims are now governed by s 72 of the Trustee Act 1956. The present terms of the

section were enacted by an amendment in 1974. The Court is empowered to allow such commission or percentage for the services rendered as is just and reasonable, the section spelling out in detail the matters to which the Court is to have regard. Reported New Zealand cases were decided under a less elaborate provision pursuant to which the award was limited to a maximum of 5%, such limitation being removed by the 1974 amendment.

In principle of course trustees are not entitled to remuneration for their labours in the trust. Prior to the enactment of legislation allowing for trustee's commission the Court in exercising its inherent jurisdiction to allow remuneration did not do so unless a special case was made out : Warnock v Jones 1925 GLR 189, per Reed J. However, the statute now governs the position and the jurisdiction is not limited to cases in which special circumstances justify an award.

The reported cases do not provide a great deal of assistance as to the principles on which an application under the modern s 72 is to be approached. They tended to make reference to matters to which the Court is now bound to have regard by virtue of the more detailed terms of the current legislation. It has been said more than once that the practice of fixing the award by a varying percentage on the amounts received and disbursed is not to be regarded as invariable : it is "a convenient but somewhat empirical method, not necessarily to be adopted in all cases" : In re McLean 1911 31 NZLR 139, 143 per Denniston J. I have considered all the cases cited by Sir Wilfred Sim KC in argument for

the trustees in In re Brown 1951 NZLR 388, 389 but none is especially apposite to present circumstances and as Sir Wilfred Sim said each case must be carefully weighed on its own particular merits and there is no place for rigid formulae. Some remarks by Gillies J in In re Costley 1884 3 NZLR (SC) 155 are worth mentioning. His Honour said that no invariable rule had been adopted as to the percentage to be allowed to executors; each case must be judged on its own merits. As a general rule a lower percentage should be allowed on large estates than on small ones. The nature of the estate had to be taken into account inasmuch as two estates of equal value might according to their composition involve very different amounts of trouble in their realisation. In the case before His Honour a large part of the estate arose from the disposal of mortgages shares and real estate "the realisation of which necessarily involved some trouble and anxiety to the executors". On the amount so realized, His Honour allowed the executors 1%.

The case of In re Cawthorn 1920 NZLR 814 came before the Court following a Registrar's report. There was a large sum on fixed deposit in respect of which the executors claimed a commission of 1%, but the Attorney-General suggested one eighth of one percent. There were also outstanding mortgages in respect of which it appeared commission was claimed based on the principal. In both instances the Registrar made a recommendation founded on the time expended rather than a commission basis and Chapman J confirmed the Registrar's report.

In re Levin 1931 NZLR 366 was a decision of Myers CJ. One item related to the subdivision of a farming property. When certain of the purchasers defaulted, the trustees had had to resell. A commission of 1½% was sought in respect of the purchase money on the properties sold. In the result that claim was disallowed because the learned Chief Justice took the view that the award made on an earlier application should be regarded as covering the item in issue. The amount allowed on the previous application was 1½%. Myers CJ also decided In re McLean 1939 GLR 51. It was an application for approval of a compromise in relation to trustee's commission. The estate was described as a very large one in which there had been considerable difficulties in administration in some respects. The four trustees had been left legacies totalling £2000 in all and the proposed compromise, which was approved by the Court, allowed them a further sum of £2500 altogether. So far as one can tell from the report this was based on time and trouble rather than some percentage of the assets handled. In Re Bourke 1966 NZLR 327 Hutchison J took into account a trustee company's scale, which commenced at 3 3/4%, decreasing to 2½% at higher levels. His Honour awarded a little less than would have been produced by application of the scale. In deciding Re Spedding 1966 NZLR 447 Moller J awarded a trustee company commission approximating to 2% of the value of the assets. The estate, not an unduly large one, seems to have been free of complication.

On behalf of the plaintiffs it was submitted that where a trustee seeking commission had been in breach of trust such conduct should be

considered as among "other circumstances" under subpara (h) of s 72(1A) and I was referred to the dictum of Edwards J in Public Trustee v French (1900) 3 GLR 12, 14 that to be entitled to a commission, an administrator must administer the estate with the utmost punctuality, regularity, impartiality and honesty. In that case however there was a finding of fraud. With respect I do not see any basis for holding that a finding of breach of trust automatically disentitles the trustee to commission : Phipps v Boardman 1965 1 All ER 849, per Lord Denning MR at p 857; in that case the decision of the Court of Appeal that the trustee was entitled to remuneration was among the findings affirmed by the House of Lords, see Boardman v Phipps 1966 3 All ER 721.

Against these general considerations I turn to the specific circumstances set out in s 22 to which the Court has to have regard :

(a) The total amount already paid to the trustee. In this case there has been no remuneration.

(b) The amount and difficulty of the services rendered by the trustee. Although not exclusively confined to this, the applicant's case has concentrated upon the acquisition and sale of the Rostrevor House premises. I think that the disposal of the old Vivian Street building was a difficult matter which demanded a good deal of attention by Mr Gyles. To some extent it was intertwined with the future location of the company but a major consideration was to turn the estate's asset to good account. Like-

wise I accept that in the period 1977 to 1981, and notwithstanding that land agents were heavily involved, Mr Gyles had to spend considerable time and energy on the disposal of the Rostrevor floors. This included an abortive attempt to obtain planning permission to have the floors used for office purposes.

There is also the factor that for some ten years Mr Gyles undertook the duties of chairman of directors of the Rostrevor House company. (The ownership structure was that the holding of particular groups of shares conferred occupation rights to the corresponding floors.) There must have been advantages to his own company in having its representative in that office; but on its face he held the position as representative of the Gyles estate and I believe that in the circumstances described by Mr Gyles it was no sinecure. He must be given credit for the work he performed on behalf of the estate in this capacity.

I have no doubt that over all the long period of years for which Mr Gyles was a trustee there were many other aspects of the estate administration that required his attention but so far as the evidence went those mentioned were the only out of the ordinary.

(c) The liabilities to which the trustee has been exposed, and the responsibilities imposed on him. The factors already related under (b) and those to be mentioned under (d) and (e) refer to the responsibilities. As to liabilities, the only aspect mentioned was the present proceedings. I find it difficult to see how this is a factor that can be taken into account in Mr Gyles' favour.

(d) The skill and success of the trustee. The disposal of the old building to P Graham & Son Ltd was described as a coup. Here Mr Gyles undoubtedly displayed business acumen in a transaction which achieved a satisfactory capital gain for the estate.

(e) The value of the trust property. In round figures, after deduction of the amounts paid to the company for "chattels", the net sum available to the beneficiaries from the sale of the floors was $163,000.

(f) The time and services reasonably required of the trustee. Remarks under previous headings sufficiently deal with this. I accept that they were considerable.

(g) Refusal through delay; and

(h) All other circumstances.
Under these headings the plaintiffs made a number of criticisms in relation to the conduct of the affairs of the estate in recent years. It is clear that after the death of Mrs Violet

> Gyles, when the rights of a different set of beneficiaries came to the fore, some tensions developed. I do not think it is necessary or profitable to refer to these matters in detail. To do so would only revive ill feeling. Once the likelihood of litigation emerged it was inevitable that there would be some delays.

Summary and conclusion

Having considered all the circumstances, individually and collectively, I have reached the conclusion that it would be a proper case to award commission. As to quantum I think it is a case where I should fix a lump sum, rather than rely entirely on a percentage. The circumstances deserving the most weight is the reinvestment of that part of the estate originally represented by the old Vivian Street property, and its ultimate realisation. As a guide I note that an allowance of 2½% on $163,000 would come to $4075. In addition I think it is proper to take into account an allowance on an annual basis for the period 1967-1981. Having regard to the other aspects, some for, some against, my decision is that Mr Gyles should be allowed the sum of $7,500.

Costs

In the action, the plaintiffs are entitled to costs according to scale, with disbursements and witnesses expenses as fixed by the Registrar. Taking

into account the time occupied by matters relevant to the claim for commission, I allow the plaintiffs a certificate for two extra days.

On the claim for commission, I allow the applicant a lump sum of $1000 for costs. There will be no witnesses expenses but in addition the applicant is entitled to disbursements as fixed by the Registrar.

Leave is reserved to both parties to apply in respect of any certificates or other matters relating to costs not covered by the foregoing orders.

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