

③ First X

IN THE HIGH COURT OF NEW ZEALAND

A. 1091/83

AUCKLAND REGISTRY

BETWEEN

KI
BENNETT

PLAINTIFF

A N D

THE PUBLIC TRUSTEE IN
AND FOR THE DOMINION
OF NEW ZEALAND

DEFENDANT

1707

**No Special
Consideration**

Judgment: 20 DECEMBER 1984

Hearing: 13 December 1984

Counsel:

JUDGMENT OF CASEY J.

The Public Trustee is executor of the Will of
W: Campbell who died at the age of
December 1980 and spent most of his working life farming near
Pukekawa. Mr Bennett, years younger, was a neighbour
since 1959 and brings these proceedings under the Law Reform
(Testamentary Promises) Act, 1949 alleging an express or
implied promise by the late Mr Campbell to reward him by
making testamentary provision for his services and assistance
on the farm over many years. The deceased had no close
relatives, had never married and employed housekeepers. Mrs
M (an old friend) had looked after him in this capacity
over the last eight years of his life and was the sole
beneficiary under his Will made on 27th November 1980. The
net worth of the estate is now about \$340,000. Her Counsel
was granted leave to withdraw after intimating that she would
be offering no evidence and supported the Public Trustee. I
rejected allegations of undue influence against her in an
action for probate of this Will in solemn form on 22nd August

1983 (A. 1164/81). Mr Bennett had supported a Will made two days earlier on 25th November 1980, in which the estate was left equally between him and Mrs McGill. Both Wills were prepared by the Public Trustee's District Manager at Pukekohe, Mr Boyd-Bell, and it was agreed that evidence and affidavits in that action could be used in these proceedings.

From the evidence a picture of Mr Campbell emerged as a conservative - perhaps "old fashioned" - farmer of thrifty habits running what had once been a small dairy farm but latterly confined to dry-stock. Many years ago he had suffered an injury to his leg which limited his ability to do some of the heavier or more awkward work around the farm. He received help from his neighbours, mostly from Mr Bennett with whom he was on very friendly terms, visiting him and his wife frequently. I accept their evidence that he did little in return for the help given to him over the years, no doubt because of his leg injury.

Mr Bennett described the work he did and was supported by his wife and Mr McGuire. I found him an honest and forthright witness who did not try to exaggerate or embroider his evidence, which was fully and fairly tested by Mr Williams for the Public Trustee. Bearing in mind the close scrutiny the Court must give to claims of this nature, I am satisfied that he did give considerable assistance to the deceased in his farming work as described in the Statement of Claim, which ranged across haymaking, top-dressing and other general farm work, as well as building repairs and maintenance, help with his car and with transport when needed. Perhaps the most useful benefit to Mr Campbell was his ready availability for practical help or advice on farming matters whenever he was needed.

He said that on a number of occasions Mr Campbell promised to pay him; I gathered this was in relation to bigger jobs such as painting the house etc. Mrs Bennett also related how she heard him say once or twice to her husband

that he would pay him for a particular job. Both of them eventually accepted that these were just empty promises. However, there were two occasions - one in 1963 and the other in 1964 when Mr Bennett did submit accounts for work and received payments totalling 17 pounds. He said they were mainly for petrol but some of it would be for his own time. He explained that he had to supplement his income by contract work at that time and Mr Campbell knew about this and insisted on treating it as a business transaction rather than as help from a neighbour. There were occasions when Mr Campbell expressed appreciation and gratitude for the assistance he gave. In all, I am satisfied that Mr Bennett did far more than is usually encountered in the case of farming neighbours who render each other mutual help and support. Mr Campbell acknowledged and appreciated this. He recognised at least some of it should be paid for and made promises to do so. Apart from the two occasions I have mentioned, he neither paid nor offered any money, nor did he give any substantial assistance to Mr Bennett in return. But nothing was ever said to Mr Bennett over these years about testamentary provision.

This brings me to a letter written to Mr Bennett about 1981 from a Mrs B. She was evidently a friend of both him and Mr Campbell, and the former had asked her to communicate with his lawyer about his claims. She set out what she had told him, because she was shortly going to Australia. She has since died and Mr E applied to have this letter admitted in evidence. I made an order accordingly, there being no opposition from Mr Williams. She said Mr Campbell told her how lucky he was to have Mr Bennett, regarding him as a good son because he did so much, and that he would see him well paid for what he had done because he was getting on in years and would make his Will in his favour. She also set out examples of the work she had seen Mr Bennett doing around the farm. The general tenor of this letter accords with the evidence I heard from the other witnesses, except that it contains the only reference to a Will. There

was no cross-examination of Mr Bennett suggesting that it had been written in collusion, nor does my impression of him support such a possibility. Notwithstanding the way it comes before the Court, I accept this as a truthful report of what the deceased said to Mrs Benton.

The circumstances surrounding the execution of the two Wills on 25th and 27th November 1980 respectively are fully described in my earlier judgment in A. 1164/81. I relied very much on the evidence of Mr Boyd-Bell, and he gave further evidence at this hearing. It is clear that Mr Campbell was not very well and unable to make up his mind what he wanted to do with his property on the first visit, at which Mrs McGill and Mr Bennett were present. Eventually he decided to leave it equally between his two friends, following a suggestion to this effect from Mr Bennett, although Mr Boyd-Bell was satisfied that he did not try to put any pressure on him. The interview lasted about one and a half hours and covered matters usually raised by professional advisors in this situation. Mr Boyd-Bell recalled a reference to the assistance given by Mr Bennett over the years, and that Mr Campbell did not indicate it was out of the ordinary or that he felt under any obligation about it.

He came back two days later with only Mrs M and Mr Boyd-Bell was then very concerned to find out whether he had made any promises to Mr Bennett to leave him something in his Will in return for his services, and was told that he had always paid him for his work. The witness did not go into details but recalled Mr Campbell mentioning work on a loading race and that he had paid for it. That, incidentally, was the last big job that Mr Bennett did for his neighbour and was obviously quite expensive. As I have indicated, I accept Mr Bennett's evidence that he was not paid for any of the work apart from the two small amounts over 20 years ago. I can only conclude that Mr Campbell had become confused and thought that he had actually carried out his promises to pay Mr Bennett.

I do not think it is possible to regard the Will he made on 25th November 1980 as recognition of an intention to reward the Plaintiff for his services. It is clear from the events related by Messrs Boyd-Bell and Bennett that Mr Campbell was quite undecided about what he wanted to do with his property and eventually accepted the latter's suggestion for the sake of reaching a decision. It would have been easier for me to take a more favourable view had Mr Campbell not changed his mind so radically only two days later - in that event, of course, there would have been no claim. Mr Boyd-Bell made it quite clear that the testator had then recovered from his previous indisposition, and was more communicative and forthright. He felt no sense of obligation to Mr Bennett and wanted to correct what he called his earlier mistake by leaving everything to Mrs M

Under s.2 of the Act, unless the context otherwise requires, the term "promise" is deemed to include any statement or representation of fact or intention. The claimant is required to prove an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for him. (s.3(1)). Mr Bennett described promises made to him of payment for the work done, but the only reference to testamentary provision was contained in the letter from Mrs Benton. In its ordinary sense the word "promise" conveys the idea of an assurance or statement made to the person intended to be affected. This seems to be the understanding of the Court of Appeal in Jones v. Public Trustee (1962) NZLR at p. 369, 374 where it said:-

"The important question in every case, is whether the claimant has satisfactorily proved that the deceased person did make a 'promise' to him of a testamentary provision as a reward for services rendered or to be rendered to the deceased."
(emphasis added).

This passage occurs in a context in which the Court emphasised that the promise need not amount to a contractual undertaking.

so that the reference "to him" may not be regarded as fully considered. It followed a discussion of cases which had suggested that some mutuality was required, but they were decided before the amendment to s.2 brought in statement of intention etc., which the Court of Appeal accepted as covering merely a unilateral undertaking by the deceased. Most of these cases assumed a communication of that intention to the claimant, but this will not always be possible or appropriate where the promise is only implied.

Section 3 does not stipulate that it has to be made to the claimant to be effective. However, counsel could not point to any case where a statement of intention made only to a third party was held to constitute an express "promise" under the Act, and in those I have read the enforceable promise has been one made to the claimant, with statements to third parties being treated only as corroboration. They may be made and retracted without the intended beneficiary ever getting to hear of them, or with no possibility of influencing his or her conduct. Accordingly I cannot find that the remarks made to Mrs B constitute an express promise to reward Mr Bennett in this way, and there is no other evidence of such a promise by Mr Campbell.

Can such a promise be implied? I come up immediately against Mr Williams' submission that while Mr Campbell undoubtedly intended to reward Mr Bennett, he said quite explicitly that it would be by way of payment. By themselves such promises could not involve an undertaking to benefit him by his Will. But they were made on a number of occasions over a period of years and each time Mr Campbell must have known the promises would have sounded more and more hollow because of his failure to redeem what he had said in the past.

Eventually there could have been no further point in repeating them, unless they were intended as expressions of an intention to benefit him in the only other way possible

- by payment out of his estate. The statement recorded in Mrs Benton's letter confirms that this must have been the case. Therefore, in the circumstances in which these statements about payment were made, the letter leads me to conclude that they implied a promise to reward Mr Bennett by making testamentary provision for him. If communication to the claimant is necessary (and this question may still be open) it was effectively made by the promises to pay.

I pass now to the question of amount. Mr Ennor argued - rather faintly, I thought - for half the estate, but this cannot be supported. Section 3 says that the claim is enforceable against the estate:-

"In the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate."

The discretion is a wide one. I understand from the previous hearing that Mrs M requires full-time nursing care, but having regard to the size of the estate there is no suggestion that her needs would limit adequate recognition of Mr Bennett's services. There are no other claimants. It is clear that had he received appropriate payment at the time they were rendered, the amounts in the early years would have been quite small; the two sums actually paid in the 60's demonstrate this. However, Counsel accept that he is entitled to have his services valued taking into account the value of money today.

Mr Bennett was unable to give me any estimate of what he thought they were worth and Counsel could not take

matters further, leaving it to the broad discretion reposed in the Court. I think a substantial award is justified. Some of the jobs were big ones such as the construction of the loading race, painting the house and general repair work on it. Others were of a recurring nature, like the haymaking and assistance with fencing. Of great importance was Mr Bennett's ready availability and willingness to help with the numerous matters which cropped up over the course of their long friendship. On the other hand, their relationship was such that I do not think it appropriate to include everything he did for his friend, such as fixing power plugs and helping to get the car started and so on. I have reached the conclusion that an award of \$25,000 would be appropriate. This is broadly averaged at \$1,000 per annum over 20 years for his personal services since 1959 and \$5,000 to cover the cost of materials, petrol etc. over that time. I give judgment to the Plaintiff accordingly, together with costs, disbursements and witnesses' expenses to be fixed. Presumably no order for costs is required in respect of Mrs Mc interest.

Mr. Casey

Solicitors:

Glaister Ennor & Kiff, Auckland, for Plaintiff
Shieff Angland Dew & Co., Auckland, for Defendant
Webb Morice & Partners, Auckland, for Mrs McGill