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NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.57/83

NOT RECOMMENDED

IN THE MATTER OF The Family Protection Act 1955

AND

IN THE MATTER OF The Estate of NEDILKO DEVCICH

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BETWEEN MARIE EVE RUNNING of Brookvale, New South Wales, Australia, Married Woman, SONIA ANNE KEEVIL of Orange in New South Wales, Australia, Married Woman, JEANETTE THERESE DEVCICH of Napier in New Zealand, Spinster and KATHLEEN IRIS STEVENS of Orange in New South Wales, Australia, Femme Sole

Applicants

A N D RICHARD JAMES DEVCICH and MICHAEL JOSEPH DEVCICH of Ngahinapouri in New Zealand, Farmers

Respondents

Hearing: 24 April 1986

Counsel: B.J. Paterson for applicants in support
A.L. Hassall for respondents to oppose

Judgment: 30 APR 1986

JUDGMENT OF GALLEN J.

The abovenamed deceased Nedilko Devcich died at Ngahinapouri on 2 June 1981. The net value of his estate appears to have been in the vicinity of $190,514.44. Of this, by far the most substantial asset was a mortgage from the

abovenamed respondents for $158,524, the sum owing as a result of family transactions relating to a family farm.

The deceased left seven children surviving him, two sons and five daughters. Under the provisions of his Will the five daughters each received a legacy of $5,000. The whole of the residue went to the two sons. The affidavits allege and I assume for the purposes of this application, that some at least of the daughters are in necessitous circumstances. Probate of the last Will and Testament and Codicil thereto of the deceased was granted to the respondents on 13 June 1981. On 13 August 1981 there was a transmission of a mortgage comprising the principal asset in the estate to the respondents as executors.

On 5 July 1982, one of the daughters consulted a solicitor in Hamilton and gave him instructions to advise herself and the other daughters of the deceased, on the possibility of claims under the provisions of the Family Protection Act 1955 for further provision out of the estate of the deceased. Mrs Running who actually consulted the solicitor, informed him that she had been unable to obtain a copy of the Will of the deceased. On 26 July 1982, the solicitor concerned wrote to the solicitors for the estate requesting information regarding the terms of the Will of the deceased and the assets and liabilities of the estate.

On 2 August 1982 the solicitors to the estate forwarded a copy of the Will of the deceased together with a statement showing the assets and liabilities of his estate, to the solicitors for the applicants. On 22 March 1983, the applicants filed an originating summons for further provision and seeking an order extending time. On 24 March 1983, an ex parte notice of motion for directions as to service was filed. This document which is of course on the Court file, has noted on the outside "Affidavit to be filed, solicitor advised, 24 March 1983." The originating summons is noted in the same handwriting, "Hold until directions as to service given."

On 22 March 1983, the solicitors for the applicants wrote to the solicitors for the estate advising that an originating summons had been filed and that a notice of motion for directions as to service had been filed. The letter asked whether or not the solicitors for the estate would be authorised to accept service of the proceedings on behalf of the executors and the respondents. On 4 November 1983, the solicitors to the estate wrote to the solicitors for the applicants with regard to distribution in terms of the Will.

On 9 November 1983 the respondents executed a discharge of mortgage as executors in favour of themselves as beneficiaries. On 14 November 1983, the solicitor for the applicants wrote to the solicitors for the deceased, again asking whether or not those solicitors were able to accept

service. On 21 November 1983, a further letter was written. On 22 November 1983, the solicitors to the estate indicated that they were authorised by the trustees to accept service of the documents concerned. Service however could not take place since no directions had been given as to service.

Nothing more seems to have happened until 12 July 1984 when consents were filed by counsel to act on behalf of infant children and a memorandum in support of motion for directions as to service was filed. On 15 July 1984, Tompkins J. queried the need for counsel to be appointed for grandchildren. On 29 August 1984 Tompkins J. made an order for service on the defendants and upon Irene Devcich. It should be pointed out that that Minute was made more than a year after the filing of the originating summons and more than a year after the date shown on that originating summons.

On 22 January 1985 the respondents were served. On 7 February 1985 the respondents in their capacity as trustees, filed an affidavit. On 13 February 1985 addresses for service of the respondents in their personal capacities were filed and on 21 February 1985 an address for service of the respondents in their capacity as trustees was filed. On 7 May 1985 the respondents filed this motion to set aside the originating summons.

The applicants in their turn filed a notice of opposition to the respondents' application and in addition a notice of motion has been filed for orders following assets.

Mr Paterson submitted in support of the motion that on the basis of the decision of the Court of Appeal in Re Fugler (1984) 2 N.Z.L.R. 124, Rule 32 of the then Code of Civil Procedure applied so that the originating summons should be set aside as not having been served within the 12 months period.

It is I think important to note that a contrary view had been taken in the Supreme Court in Re Geary 1971 N.Z.L.R. 523. The decision in Re Fugler which overruled the decision in Re Geary, was delivered on 20 July 1984 but seems not to have been reported until the April 1985 issue of Recent Law. Mr Hassall relied upon the decision of the Court of Appeal in England in Sheldon v. Brown Bayley's Steel Works Limited and Dawnays Limited (1953) 2 Q.B. 393 where it was held that a writ although it did not remain in force for more than 12 months from the date, was not thereafter a nullity but remained a writ. Where a defendant entered an unconditional appearance to the writ which had been served on him out of time, that appearance was a step in the action and amounted to a waiver by the defendant of the irregularity in the service of the writ, preventing him from setting up that such service was bad in law.

Mr Hassall contended that the filing of addresses for service subsequent to service, amounted to a step in the proceedings and that the decision in Sheldon v. Brown Bailey clearly applied. Mr Paterson submitted that the decision in that case was either wrong or had no application in New Zealand, but he was unable to cite any authority for this proposition. It is perhaps worth noting that R.131 of the current High Court Rules, makes special provision for a defendant who objects to the jurisdiction serving an appearance stating his objection. That would suggest that in the absence of such a special procedure, the filing of addresses is a step in the proceedings.

Sheldon's case dealt with a writ of summons, but the reasoning of the Court of Appeal in Re Fugler would tend to equate a writ of summons with an originating summons for the purposes of the present application and I do not think that any distinction may reasonably be found on this ground.

Mr Paterson submitted that until the respondents became aware of the decision of the Court of Appeal in Re Fugler, they not unreasonably accepted the authority of the earlier decision in Re Geary and accordingly, filing an address for service was appropriate. He drew attention to the fact that an application was filed immediately the respondents became aware of the decision in Re Fugler.

This must I think amount to a submission that although the filing of the address for service at the time it was done amounted to a step in the proceedings and therefore a waiver, the respondents were entitled retrospectively to change the effect of this step because they became aware of the authoritative decision in Re Fugler. I do not think that this submission can stand. The decision in Re Fugler did not in theory change the law, but simply stated what it must always have been regarded as being. There is no injustice in this case in adopting such a standpoint because in as much as the respondents relied upon the decision in Re Geary, no doubt the plaintiffs did likewise, assuming that they were not on the authority of that case, under any obligation to serve within a period of a year.

In my view therefore, the notice of motion must fail because the respondents took a step in the proceedings and thereby waived any right to rely upon the failure of the plaintiffs.

In case however I am wrong, I should consider the other arguments raised. Mr Hassall contended that bearing in mind the provisions of R.541 of the then Code of Civil Procedure, the applicants could not effect service until such time as an order giving directions had been made and that order was not itself made until more than a year had elapsed from the date on the originating summons. He argued that in making the

order giving directions as to service, the learned Judge who made the order must implicitly be regarded as having extended time. No doubt the question of the date was not drawn to the attention of the learned Judge who made the order, but in any event the submission is clearly contrary to the decision in Re Fugler where the factual situation was exactly the same. The particular point was not adverted to in the decision of the Court of Appeal but if I were to accept it in these proceedings, I should have to come to a conclusion which was in conflict with the decision of the Court of Appeal. This I cannot do and in my view, this submission must fail.

The applicants also applied if necessary, to enlarge the time for service. Mr Hassall submitted that it was appropriate to apply the provisions of the Rules now in force and in particular, relied upon the provisions of R.128 and R.6. Mr Paterson submitted that R.128 could have no application because it dealt with a situation where service had not actually been effected. That was not the case here. R.6 is a general power of extension, substantially re-producing R.594 of the former Code. Mr Paterson conceded that the respondents had not in this case been prejudiced by the delay. He did however submit that a substantial portion of the estate of the deceased had been distributed and that distribution could not be disturbed. He submitted that there was therefore practically no real advantage in allowing the matter to proceed.

I have already mentioned the fact that the applicants have filed a motion seeking the right to follow assets. Neither counsel were in a position to argue this motion on the present application and I think in any event it would be more appropriate for it to be argued at the time of the substantive hearing. I do not think the point made by Mr Paterson can be decisive in this case because it is accepted there are some assets in any event which have not been distributed and it should not be forgotten that there are five applicants. It may be that the Court in weighing up the various applications might see fit to disturb the proportions of distribution of what is left. In any event, it would not be true to say that there is no room for the exercise of any jurisdiction in terms of the Family Protection Act. No doubt the point is one which could have a bearing on the ultimate discretion reposed in the Court in terms of the Rules giving the right to extend time, but it is only one factor. I take into account that there has been long delay in this case and it is delay which has not been adequately explained on the papers before me. Nevertheless, there does seem to have been some delay on both sides.

I think the matters raised would be best considered in connection with the substantive application to extend time, rather than determined in this application. It is my view that having regard to all of the circumstances, if I were wrong in my first conclusion, that in any event I should be prepared to

extend the time for service under either the provisions of R.6 of the present High Court Rules or R.5594 of the former Code if this applied.

Counsel indicated that in the event of my reaching this conclusion, it would not be necessary for service to be effected again and the matter could proceed on the basis of the service which has already been effected.

The application will therefore be dismissed. The question of costs is reserved.

Solicitors for Applicants in Support:	Messrs Hemara, Weir, Dawe and Rennie, Hamilton
Solicitors for Respondents to Oppose:	Messrs O'Neill, Allen and Company, Hamilton