IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 345/84

IN THE MATTER of the Family Protection Act,1955

AND

IN THE MATTER of the Estate of MEROD AUGUSTINE FARRY

BETWEEN JOY LILLIAN PUSCHMANN and SANDRA DAWNE CLARKE

Plaintiffs

AND STEPHEN RODNEY FARRY, ROYCE CARLTON FARRY, JOHN MEROD FARRY and GEORGE McCULLOUGH JOHNSTON

Defendants

Hearing: 7 December, 1987 (Written submissions filed 17, 21,23 December, 1987)

Counsel: P.A. Fusic for plaintiffs
M.G.P. Knapp for defendants
S.C. Ennor for S.R. Farry and C.T. Oliver
P.J.K. Spring for C.E. Barlow
Miss Swadling for widow
No appearance for R.C.Farry and J.M.Farry in personal capacity

Judgment: 19 February, 1988

INTERIM JUDGMENT OF BARKER J

Merod Augustine Farry late of Auckland, Retired ('the deceased') died on 8 June, 1983. His last will was dated 4 May, 1983; it was made very shortly after he had remarried. The deceased was aged 61 at his death.

The deceased was survived by his widow, 7 adult children of his first marriage and 12 grandchildren. The size of the estate is such that claims by any of the grandchildren for provision from the estate could not seriously be advanced. Claims for further provision were brought by three daughters - the plaintiffs and Mrs Barlow.

This case is unusual in that there still exists uncertainty as to the value of certain assets in the estate. The reasons for this uncertainty will be discussed later. Before discussing the value of the estate, I record other relevant facts, such as the dispositions under the will and the financial circumstances of the various parties.

Provisions of Will:

Under the will, the deceased appointed the defendants - three of his sons and a solicitor - as his four executors and trustees. The creation of four trustees must rarely be desirable in the average estate; it was unnecessary in this relatively small estate where there has been blurring of the roles of trustee and beneficiary by at least one of the defendants.

The deceased bequeathed certain jewellery to his son, Royce Carlton Farry (now aged 32) and $2,500 to his former wife, Lillian Farry (now aged 66). Neither of these bequests is attacked by the plaintiffs.

He bequeathed to his youngest daughter, Charmaine Therese Oliver, (now aged 28) "any motor car owned by me at my death subject to and conditional upon my said daughter transferring by way of gift any motor car owned by her at my death to her mother, the said Lillian Farry".

He next forgave Mrs Oliver and her husband a debt of $60,000 "or such part of it as may be outstanding at the date of my death secured over their house property in Glendene." Clearly under this provision, Mr Oliver became a major beneficiary in the estate; he should have been served with the proceedings. However, counsel for the plaintiffs did not suggest that he be served in his memorandum to the Judge giving directions as to service. This failure to make Mr Oliver a party to these proceedings has had the unfortunate effect of delaying resolution of one important factual issue.

The deceased bequeathed to his son, Stephen Rodney Farry (now aged 32) "all my interest in RAF Finance subject to him assuming liability for all debts owing by the said RAF Finance". RAF Finance and the details of its assets and liabilities at the deceased's death will be disscussed later.

The remainder of the estate was placed in residue to be divided into 10 parts - two parts were left to Beth Anne Sutherland, his widow (now aged 53) and to two of his sons, Royce Carlton Farry and John Merod Farry (now aged

42 and 32 respectively); the remaining four parts went to his four daughters, namely the plaintiffs, Sandra Dawne Clarke and Joy Lillian Puschmann (now aged 43 and 34 respectively) and the claimant, Karen Amelia Barlow (now aged 37) and Mrs Oliver. John Merod Farry and Royce Carlton Farry in their personal capacities have taken no steps to defend the claims brought by three of their sisters.

Relevant History:

Throughout his lifetime the deceased pursued various activities of an entrepreneurial nature; in particular, at the time of his death, he was engaged in buying and selling cars, although not licensed so to do. Earlier in his life, he had been involved with side-shows and in the entertainment industry. He had been a travelling salesman, worked on the wharf, run a motel, sold washing machines, developed a horoscope card game - to name a few of his diverse activities.

There is little argument about basic family history and about the general allegation of the claimants that in various ways they did not have an easy childhood, and that they received little monetary assistance from their father in his lifetime.

Mrs Clarke, asserts that, in her early years, the deceased devoted more time to his businesses than to his family;

her childhood was marked by financial highs and lows and by constant unsettling travelling. She lived at times with both sets of grandparents; living conditions with her father were spartan. Mrs Puschmann refers to her father as a busy man, preoccupied with commercial affairs.

There is little dispute that the claimants were dutiful daughters; Mrs Clarke as eldest child, was called on by her parents to perform housework and mind her younger siblings; there were obvious difficulties caused by the nomadic lifestyle of the deceased.

Mrs Clarke acted as mother to the younger children. She helped her father with clerical work. When the deceased operated a motel, she did cleaning work there for no remuneration. She claims that the deceased entertained fixed ideas on the place of women; he tended to favour sons, while giving daughters little.

At aged 18, Mrs Clarke collapsed at the motel with a heart condition; medical advice was that she was working too hard for one so young. She had been required by her father to leave secondary school after 3 years. He would not let her become a nurse, as she would have liked; he required her to help in the home full-time, when her mother was pregnant with her youngest sister, Mrs Oliver.

Mrs Clarke received no gifts from her father, despite a friendly relationship with him after her marriage. Her

husband is self-employed as an excavating contractor in a small way; his taxable income last year was $25,000; they own a home, purchased some 3 years before the date of death of the deceased, for $66,000. It is currently on the market. They have mortgage commitments.

In an updating affidavit, sworn shortly before the hearing, Mrs Clarke refers to current difficulties with her marriage; she and her husband may separate if the house is sold. Her health is not good; she has no separate income of her own.

Mrs Puschmann confirms, so far as she can, her elder sister's recollection of the early days and her father's attitudes towards daughters and sons. She obtained typing qualifications, but her father would not let her go to University as she had wished. Despite promises of assistance with career opportunities, she received from him only $1,000 which was both a wedding present and an acknowledgment of her considerable typing assistance. She recounted her father's demanding attitude, particularly with regard to typing work in connection with a fortune-telling card game which absorbed much of his energies at one period. She claims to have enjoyed a reasonable relationship with her father.

She too was in modest circumstances at the date of death of the deceased. She and her husband (then a self employed taxi driver earning $18,000) own a home in Mt

Albert purchased in 1984 for $130,000; they have a bank overdraft and a mortgage of $40,000. They have 2 schoolage children.

Mrs Puschmann's present circumstances have changed little since then; she has a modest and frugal lifestyle and relies on her husband for support; her health is not good and a 10 year old son has some health problems. Her husband now works as a commission agent and enjoys a reasonable income. With the proceeds of the sale of his taxi business, they bought an investment property for $160,000 which has a mortgage of 22-1/2% on $130,000. They each have a car; she has had ongoing health problems.

Mrs Barlow is the third child of the deceased; she and her husband have two young children. They own their own home purchased for $60,000. Her earliest childhood memories are of living with her maternal grandparents on a farm in Central Otago, whilst her parents were Auckland with her brothers and Mrs Clarke. She speaks of a fairly restricted childhood and of having to leave school after Form 2 to work for her father at the motel. She never had any secondary education. She cleaned units, cooked breakfasts and generally acted as a domestic assistant; she earned only £1 a week. The motel was sold by the deceased when she was 16; she was required by her father then to work on a building site of 7 residential home units. She laboured fulltime on this job. She then decided to branch out on her own and obtained a job as a

shop assistant; this show of independence annoyed her father. Soon after her marriage in 1973 she and her husband assisted her father in the grounds of the father's house.

Eventually, and to her great credit, she obtained a certificate as a kindergarten teacher. At the date of her father's death, her husband was an electronics technician and a part time taxi driver; he is now a full time owner-driver of a taxi with net annual earnings of some $12,000. They own a home in Massey worth about $80,000, but have debts on the taxi.

Stephen Rodney Farry is aged now 37. He claims also to have worked at the motel - for pocket money only. He claims to have given up normal employment to become a salesman for his father's horoscope game. He was associated with his father car dealing and in the business of RAF Finance He brought that business after his father's death into his own company - S.R. Farry Ltd.

No details of the current financial situation of either that company or of Mr S.R. Farry himself were offered. He and his wife own a home at Massey, said in October 1984 - without any valuation evidence - to be worth $45,000. I think the Court can take judicial notice of property values in Auckland and can be fairly sure that this assertion of value is too low. Despite the lack of information, Mr Ennor was initially minded to make a claim

for further provision on behalf of Stephen Rodney Farry; wisely, in my view, this claim was later abandoned at the hearing.

Value of Estate according to 3 of the Trustees:

According to an affidavit, sworn only days before the hearing by the three of the trustees, but not by the defendant Stephen Rodney Farry, the current worth of the estate at the date of hearing was stated to be $162,221; after deducting bequests (including forgiveness of the Oliver mortgage) the residue is said to be $73,310 On these figures, the benefactions under the will can be calculated thus -

To Royce Farry a ring, a watch plus $14,663 (2/10ths residue);

to the first wife, $2,500;

to Mrs Oliver (1/10th residue) $7,231, plus the value of a car $6,500, plus forgiveness of the long-term interest-free mortgage of $60,000;

to Stephen Farry RAF Finance - said in his affidavit to be worth $26,405 but probably worth more;

to the widow (2/10ths residue) $14,663;

to John Farry (2/10ths residue) $14,663;

to each of the three claimants (1/10th residue) $7,331.

Cross-examination:

At the commencement of the hearing, Mr Fusic persuaded me to allow cross-examination of Mrs Oliver, Mr S.R. Farry and the widow. I emphasised that R.508(2) means what it says, namely, that a copy of a notice requiring cross-examination must be given to the Registrar as well as to other parties. No such notice had been given to the Registrar.

In my experience, cross-examination is not common in Family Protection cases; it is normally to be discouraged for the reasons discussed by Wild, CJ in Re Meier [1976] 2 NZLR 257. However, Mr Fusic did not wish to cross-examine on family history; he sought to obtain information on transactions which had not been fully explained by the defendants. He was able to point to lack of co-operation.

The outstanding factual issues were stated in opening to be -

(a) A claim by the widow that the deceased had gifted to her a cheque for $12,000 from Mrs Oliver;

(b) The identification and value of the deceased's interests in RAF Finance;

(c) The financial arrangements between the deceased and Mr and Mrs Oliver concerning the purchase of their property; and

(d) The post-death refund of airline tickets paid for by the deceased. This latter issue was not really pursued and need not be mentioned further.

The Widow:

The widow did not appear for cross-examination despite a notice requiring her attendance. An affidavit from her doctor indicated that she is suffering from a neurological complaint, as a result of which she speaks with difficulty, is affected by muscular wasting and unsteadiness, and suffers generalised weakness and diffuse pain. She has an ischaemic heart condition which would be aggravated by a stressful event as an appearance in Court.

In her affidavit, the widow deposed that she had known the deceased for some 8 years before they married, on 30 April, 1983; he took ill a month after they were married; shortly before his death he had received a cheque from Mrs Oliver for $12,000 in part payment of the loan to which reference will later be made; she claimed the deceased had

handed the cheque to her saying "This cheque is for you to put in your bank account because over the years I haven't given you very much". She claimed that the deceased had promised to compensate her for helping him with his business.

Because some of the family challenged the gift, the widow paid this money into the estate's solicitors; she still maintains the cheque was a gift, despite a statement by the estate's solicitors in a letter to the plaintiff's solicitors that the widow wanted the money to go into residue to avoid family ructions.

She lives in her own home unit which was the matrimonial home of a former marriage. She has a small investment derived from her first husband; apart from that she has no other income or assets.

She wrote the following letter to the estate solicitors on 22 November, 1983.

"1B 1 Divich Avenue,
Te Atatu South
22.11.83

Johnston, Pritchard & Fee,
Barristers & Solicitors,
Auckland

Dear Mr Bury,

Please find enclosed cheque for $12,000 to be included in estate settlement, given by Charmaine Oliver to Rodney, before his death and has caused much ill feeling. I wish no further contact in regards to estate matters. As mentioned in

> earlier letter, any monies due to me, to be made out to John & Susan Farry for the sole purpose of purchasing their home, which they will most appreciate this well meant gesture.
>
> Thanking you,
> Yours faithfully,
> "E. Farry" (E Sutherland)"

She deposed what she really meant by the letter that the solicitors were to hold the money on trust for her 'until the matter could be sorted out'. She did not intend the money to be part of the estate.

She claimed also in her affidavit that she and the deceased were going on a honeymoon to Singapore and that she had bought air tickets in her own name with her own funds. Because of the deceased's death these were cashed and she received a refund which she paid to the estate.

Counsel for the claimants was fully entitled to expect that the widow would be available for cross-examination so that these assertions could be tested. Counsel did not refer to R.508(3) or the authorities thereon. However, the sub-rule states that where a deponent is not produced for cross-examination, the affidavit should not be read without "special leave" being granted.

It seems that in the circumstances of the widow's ill health, confirmed by the doctor's affidavit, that I must grant special leave to read the affidavit. However, the weight which must be placed on it is somewhat less than it would have been had she been available for

cross-examination.

However, the deceased was not unduly generous to his widow especially when compared to his treatment of his youngest daughter. I am not willing to disturb the provision made for the widow; even with the $12,000 alleged gift added, the total provision made by the deceased for his widow seems modest enough.

Mrs Oliver's situation:

The transaction between the deceased and his youngest child needs to be examined. By agreement for sale and purchase dated 14 April, 1983, Mr and Mrs Oliver purchased from the deceased a house property at Glendene; he had purchased it himself a short time before. The stated purchase price was $105,000.

The agreement provided that $60,000 was to be represented by a first mortgage in favour of the deceased for a term of 20 years, interest free; there was to be a second mortgage of $15,000 to the Post Office Savings Bank. There is dispute as to the source of the remaining $30,000 of purchase price.

Mrs Oliver claims that it had been the deceased's intention to reduce the principal of the $60,000 by annual gifts of $15,000 each. Mrs Oliver asserts that the house is now worth $130,000. She says that a car (said to be

worth $6,500) was passed on to her by her brother Stephen, out of the RAF stock after the death of the deceased; this was sold by her for $2,500 as a wreck after an accident in which neither vehicle was insured. She passed on to her mother a Datsun 1200 worth $2,500 in compliance with the terms of the will.

It is clear that Mrs Oliver and the deceased were on excellent terms. She was not subjected to the hardship of her elder sisters. When she married in 1980, the deceased gave her a wedding present of $1,000. After their honeymoon, she and her husband asked the deceased to stay with them in their home which he did for 9 months, paying the rent every other month and occasionally buying groceries. The Olivers then went to Australia; they were persuaded by the deceased to return to New Zealand on a promise of assistance with the provision of a home. Mrs Oliver claims that her husband relinquished a good position in Australia because of this promise.

A chartered accountant, Mr Moore, suggests a value of $14,334 for the mortgage, being the present value of $60,000, repayable in 16 years time.

There is difficulty in determining the exact personal contribution of the Olivers to the purchase of the house. The solicitors for the estate advised the claimants' solicitors that a bank cheque for $45,000 was credited by Mrs Oliver to the deceased's current account

on 1 April, 1983. Cheques for $15,000 each were debited to his account on 29 March and 15 April, 1983; these were recorded in the butts as "gifts" to Mrs Oliver. The solicitors for Mrs Oliver claimed that this rather unusual banking arrangement was "a matter of the deceased's convenience".

Mrs Oliver stated in evidence that $12,000 from her personal savings was paid by her to her father shortly before his death; this was the cheque he allegedly made over as a gift to the widow. The Olivers claim that all they now owe the estate is $3,000 (the balance of one lot of $15,000) because the other $15,000 was a gift. However, in her affidavit Mrs Oliver swore that they had given another mortgage in favour of the deceased for $15,000, repayable after 10 years, at 12%. She claimed that this was the mortgage from which she had paid off $12,000.

The agreement clearly shows that there was $30,000 owed to the deceased; there has been an explanation for $15,000. Even after seeing Mrs Oliver in the witness box, I can find any adequate explanation for the shortfall of $15,000. No mortgage document was produced. On the present state of the evidence I am not prepared to accept that there was a further gift of $15,000; however, I am not able to make a final determination on the point.

It might have been possible for me to have resolved the

issue if Mr Oliver had been made a party to this proceeding. I cannot resolve the dispute without him before the Court.

RAF Finance:

S.R. Farry was cross-examined on the deceased's trading activities at the date of his death. To say that the position is confused is an understatement.

It seems now that the deceased, his son Mr S.R. Farry and a Mr Taylor of Belmont Car Sales were in some sort of partnership; the deceased would buy cars which would then be sold to the public under Mr Taylor's licence on Mr Taylor's lot. The cars on the lot at the time of the deceased's death were legally his, although his name did not appear on the registration papers.

This factual situation emerged on cross-examination. Such was not always the assertion. On 6 December 1983, the deceased's accountants advised the estate solicitors that RAF Finance showed a loss of $6,750; they asked for information about vehicles shown by cheque butts to have been purchased by the deceased shortly before his death. On 12 December, 1983, the estate solicitors told the accountants they were unable to provide any information. The solicitors said that they were advised by Mr Taylor that no money was owing to the deceased by Belmont Car Sales.

S.R. Farry in an affidavit sworn on 25 July, 1985 deposed that the deceased had no interest in any vehicle. Yet he acknowledged in cross-examination that the cars were his father's under a "floorplan" arrangement, as is commonly used in ~~the~~ motor vehicle dealing.

The claimants inspected the cars on the Belmont lot shortly after the death of the deceased; they produced a list of these and their certificates of ownership. Assessments of the value of these cars were put in evidence; they seemed not to have been carried out with any care. Accountants first fixed the value of the RAF business at $26,655. This was on the basis of assets of $32,500 less debts payable.

Mr S.R. Farry in an answer to interrogatories swore that the cars in the RAF business were worth $29,000; under cross-examination he acknowledged that that estimate was rather light. How much more than $29,000 they had been worth he could not say; he agreed with counsel that he could be talking in thousands.

Without a full hearing, I cannot determine the net value of the deceased's interest in RAF Finance. All I can say is that it was worth more than $29,000. From whatever the sum is must be deducted the overdraft of $5,609, taxation $6,000 and possibly the value of the cars transferred to both Mrs Oliver and the deceased's first wife. With these deductions, the amount bequeathed to

S.R. Farry under the will would not be such as would justify granting further provision to the plaintiffs at his expense.

Merits of Claims:

In my view, all three claimants have justified their claims for further provision out of the estate. It is not necessary to recite the applicable principles which are well-known in claims by adult daughters. Those principles were not challenged.

In summary, in various ways the deceased must to be found wanting in his duty as a just and loving testator to these three daughters. All suffered various deprivations in their early life stemming from the deceased's nomadic lifestyle and his views on the role of women. None of the claimants is in a very sound financial situation. Strangely, the deceased treated his youngest daughter in a starkly overgenerous way at the expense of his three other daughters.

The difficulty in this case is deciding how best to award further provision for the plaintiffs in view of the difficult situation of the estate. Clearly, Mrs Oliver should relinquish the 1/10th share in her residue. The motor vehicle which she received is rather "cancelled out" by the requirement that she transfer a vehicle to her mother.

More importantly, I cannot upset the terms of the mortgage which does not require repayment for many years; it was the fruit of an inter vivos arrangement. Justice would seem to require most of the further provision for the claimants to have come from Mrs Oliver's share; such is not practicable.

Other than the unchallenged statement of Mrs Clarke's affidavit that the deceased gave Royce a fully furnished unit as a wedding present, I know nothing about the affairs of John Farry or Royce Farry. If they see fit not to advise the Court of their financial situation or personal circumstances then the Court can only assume that they are well placed.

For the reasons given, I do not think it appropriate to interfere with the provision for the widow, despite the shortness of her marriage nor with the provision for S.R. Farry which, after payment of RAF debts, is not generous.

My imperfect solution is the most just that I can assess in these circumstances.

The provisions of the will are to be altered thus -

(a) to cancel the bequest to Mrs Oliver of the 1/10th residue;

(b) to give a legacy of $4,000 to both John Farry and

Royce Farry but to exclude them from sharing in the residue;

(c) to provide for the widow a legacy equivalent to what she would have received before the residue was augmented by (a) and (b) above. Since she does not seek further provision it would be wrong to give her any more than the will currently does. If the residue varies for whatever reason, such as a successful claim against the Olivers then her legacy is to be adjusted accordingly;

(d) To provide that the balance of the residue be shared equally amongst the three claimants.

Counsel asked that I should determine the question of the amount owing by Mr and Mrs Oliver to the estate. I cannot do this, even though I have heard Mrs Oliver in evidence. There would then have to be a further proceeding. However, I hope that such a course will be unnecessary and an accommodation can be reached amongst the parties. It is high time this acrimonious litigation subsided.

I have decided not to alter the provision forgiving the mortgage from the Olivers. The alternative would be to leave as an asset in the estate a mortgage not due until the year 2003 without interest. It is preferable that this estate be finalised and family dissensions abate.

If final distribution were to wait another 15 years, then inflation and the effluxion of time would render the benefaction fairly meaningless.

Costs:

Mr Fusic submitted that the trustees should be prohibited from taking their costs out of the estate and should pay the plaintiffs' costs personally. He submitted that the defendants did not perform their duties properly and that, in consequence, the plaintiffs had to incur expense and spend time in establishing facts that should have been furnished by the defendants.

Under S.11A of the Act, the obligations of the trustee/defendant in a Family Protection claim is stated as follows -

> "Duty of Administrator to assist Court - On any application under this Act it shall be the duty of the administrator to place before the Court all relevant information in his possession concerning the financial affairs of the estate and the deceased's reasons for making the dispositions made by his will or for not making any provision or any further provision, as the case may be, for any person:
>
> Provided that the duty imposed by this section shall not extend so as to require the administrator to place any such information before the Court if it is known to him by reason only of its having come to his knowledge in circumstances which impose an obligation, whether legal or moral, on the administrator not to disclose it, and its disclosure in connection with any application under this Act would be a breach of that obligation."

The first response by the defendants to their duty under this section was an affidavit sworn on 19 December, 1984 by one only of the trustees, Mr Johnston. It purported to enumerate the assets in the estate. It made no mention of RAF Finance despite earlier correspondence from the plaintiffs' solicitors. No reason was advanced by Mr Johnston as to why the other trustees had not made the affidavit.

Generally speaking, all trustees should join in an affidavit in pursuance to their duties under the Act, unless there is some good reason to the contrary, such as absence overseas or illness. In this case, the plaintiffs' solicitors requested an affidavit from all trustees, pointing out, that a solicitor trustee can only state what he has been told by family members. Such has never been furnished despite the appropriatness of this request.

On 2 December, 1987 a further affidavit was sworn by three of the four trustees (but not Mr S.R. Farry) which deposed blandly that, further to Mr Johnston's affidavit of 3 years previously, "Further information has come to hand". There was no explanation as to why S.R. Farry had not joined in the affidavit, particularly when RAF Finance matters were canvassed. Nor was there any indication of why RAF Finance had not been referred to earlier. A figure of $26,405 was put down as the value of RAF Finance, the $12,000 from Mrs Farry was included as an

asset.

The affidavit stated that the business of RAF Finance had not been dealt with by the trustees. Again no reason for this assertion was advanced, despite the passing of 4-1/2 years since date of death. The deponents simply stated that the value of the business was based on accounts prepared by Seal & Co, Chartered Accountants, which were annexed. The accounts were in the name of "R.A. Farry, trading as RAF Finance". The net profit for the period ending 8 June, 1983 was $25,259 and a bank overdraft and other accounts payable of $6094. Current assets of $32,500 were shown. The inventory was stated to have been valued at the "lower cost net realisable value". Whatever that may mean.

This affidavit was filed only after the plaintiffs' solicitors had obtained an order requiring the answering of interrogatories concerning RAF Finance by Mr S.R. Farry. These interrogatories were eventually answered on 25 July, 1985. Mr S.R. Farry swore that the deceased was trading under the name and style of RAF Finance as a financier, involved in the financing of car sales and that monies outstanding to him at the time of his death were $29,000. The funds had been advanced by RAF Finance for the purchase of vehicles on behalf of Belmont Car Sales. However, this statement is at odds with his evidence in which he acknowledged the cars actually belonged to the deceased.

Mr Farry also claimed in his affidavit that the deceased did not own any car at the time of his death; to carry out the deceased's wish he acquired another Honda Civic car which he transferred to his mother, the deceased's former wife.

I had occasion to consider the question of disallowing costs to a trustee for alleged dereliction of duty in a different fact situation in Re Fallon (A52/83, Auckland Registry, judgment 7 May, 1987).

I there noted that a trustee is entitled to be indemnified by the estate against all costs etc properly incurred for the benefit of the estate. The word "properly" means reasonably, as well as honestly incurred. A trustee is not to be visited with personal loss on account of a mere error of judgment, short of negligence or unreasonableness but if his conduct is so unreasonable as to be vexatious, oppressive or otherwise wholly unjustifiable and it causes a beneficiary expense which would not otherwise be incurred, the trustee must bear such expense. See National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd (1905) AC 373.

In addition to these general principles of trustee law, S.11A of the Act casts a positive duty on the trustee; accordingly the Court should, in appropriate circumstances, deprive a trustee of costs because of failure to comply with this duty.

The trustees seem to have failed in their duty in the following respects -

(a) Not investigating properly the RAF Finance set up and obtaining a proper valuation of the deceased's motor vehicles. It is now impossible after all these years to obtain a proper valuation. This duty particularly devolved upon Mr S.R. Farry who had all the necessary information;

(b) Not investigating the RAF Finance situation and accepting incorrect assertions as to the true situation;

(c) The transaction with the Olivers should have been investigated with care, approaching suspicion, as should the alleged gift of $12,000 to the deceased's widow;

(d) Information should have been provided to the Court and to the plaintiffs' solicitors more readily and more promptly. It should not have been necessary for them to have had to resort to interrogatories or cross-examination. There should not have been an interval of 3 years between the two affidavits filed on behalf of the trustees;

(e) All trustees did not make prompt response to an order for discovery made on 22 November, 1985, despite many requests.

(f) All trustees should have joined in the affidavits in the absence of good reason to the contrary; particularly when there was evident unhappiness on the part of the plaintiffs with their performance;

(f) Differing versions of the estate's interest in RAF Finance were provided over the years. In the interrogatories, S.R. Farry's answers seemed to infer that the deceased lent money to Belmont Car Sales, whereas the deceased actually owned the cars.

If, for reasons of family loyalty, some of the trustees felt inhibited in making the necessary investigations, then they should have resigned as trustees. If these matters had been properly investigated at the time of the deceased's death then the obvious dissention in the family would probably have been reduced.

I shall hear submissions from the trustees as to whether they or all of them should either not receive costs out of the estate.

I am prepared to make an award of costs to the claimants

I shall hear submissions as to quantum and as to whether these costs should be paid out of residue or by one or more or all of the trustees. It may be that Mr Johnston on the one hand, Mr S.R. Farry on another, and the other trustees may wish to be separately represented; because of the matters indicated earlier, I think that there is sufficient prima facie case put forward by the plaintiffs for me to consider awarding costs against the trustees personally or at least depriving them of reimbursement from the estate. I am happy to arrange another hearing; written submissions will be in order.

I am not prepared to make any order granting costs out of the estate to the widow, S.R. Farry and Mrs Oliver.

R.D. Barker J.

Solicitors: Kennedy Tudehope Railey & Martin, Auckland, for plaintiffs
Keegan Alexander Tedcastle & Friedlander, Auckland, for Mrs Barlow
Johnston Prichard Fee & Partners, Auckland for trustees
Glaister Ennor & Kiff, Auckland, for Mrs Oliver and Mr S.R. Farry
Sellar Bone & Partners, Auckland, for Widow