

IN THE HIGH COURT OF NEW ZEALAND  
NEW PLYMOUTH REGISTRY

A. No. 23/86

BETWEEN DEREK FRANK, Technician  
and WENDY JOY FRANK,  
Married Woman both  
of New Plymouth, LYNETTE  
ANN WARD of Napier,  
Married Woman and PETER  
ROBERT BONIFACE of  
Wellington, Electrician

Plaintiffs

A N D FRANCIS ROGER MORI,  
Solicitor and REGINALD  
NORMAN CHILCOTT, Solicitor,  
both of New Plymouth

Defendants

**NOT  
RECOMMENDED**

Hearing: 22 and 23 February 1988

Counsel: G.M. Ross for the defendants in support  
J.T. Boyd for the plaintiffs to oppose

Judgment: 25 February 1988

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JUDGMENT OF SAVAGE J

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This is an application by the defendants, in an action to recall a grant and to make a grant in respect of an earlier will, for an order requiring the plaintiffs to answer certain questions contained in interrogatories delivered by the defendants to them. The nature of the application and the circumstances generally require some explanation but I first record that there are four plaintiffs: Derek Frank, Wendy Joy Frank, Lynette Ann Ward and Peter Boniface. There are two defendants: Francis Roger Mori and Reginald Norman Chilcott. The defendants are both

solicitors. The defendants in March 1987 gave notice to the plaintiffs to answer a series of interrogatories. The interrogatories were in three parts marked in the notice A, B and C.

Part A - Questions to be answered by Peter Boniface  
and Lynette Ann Ward

Part B - Questions to be answered by Wendy Joy Frank

Part C - Questions to be answered by Derek Frank.

The interrogatories were eventually answered by the nominated plaintiffs save that some of the questions were not answered in each of the three parts. I will return to what those questions were shortly. The defendants applied for orders requiring the plaintiffs to answer the questions they did not answer and that is the application at present before the Court. I should add that some issue in relation to the procedure followed was raised but it is not necessary to go into that. I also record, because Mr Ross made a specific request in this respect, that the application was heard in Chambers though the actual hearing was held in the Court. The nature of the action must now be described briefly.

It arose out of the grant of probate of a will dated 19 December 1984 made by the late Mrs Elsie Wallath of New Plymouth, a widow, who died on 15 October 1985. Probate of that will and a codicil dated 19 May 1985 was granted in October or November 1985 to the defendants. On 18 June 1986, the four plaintiffs filed a Notice of Proceedings

and in their statement of claim they alleged that the late Elsie Wallath's last will and testament was executed on 16 December 1977 and that the later will dated 19 December 1984 and the codicil of which probate was granted to the defendants was a pretended will. The plaintiffs alleged that the second will was invalid on two grounds: first, that Mrs Wallath was not of sound mind, memory and understanding when she executed it and, second, that its execution was obtained by undue influence by or on behalf of the defendants named in the original Notice of Proceedings and statement of claim. Although it is not important so far as the substance of the matter is concerned I record, because of the way in which the allegation of undue influence was framed, that when the proceedings were commenced a Mr Hills was named as one of the two defendnats, the other being, as already noted, Mr Chilcott. This appears to have been on the basis that Mr Hills was named in the second will but in the event, the codicil to the second will revoked Mr Hill's appointment and appointed in his place Mr Mori. The proceedings at some stage were amended to substitute Mr Mori as a defendant for Mr Hills. The statement of defence filed by the defendants denied both the allegation of unsoundness of mind and the allegation of undue influence. Since the point is important for the determination of the questions before the Court it is also necessary to record that the statement of claim alleged that all four plaintiffs were beneficiaries under the second will in respect of which probate was granted. In fact, it became clear that this is not so. One of them, Lynette

Ann Ward, is not. Mr Boyd for the plaintiffs accepted that the allegation in the statement of claim was wrong and indicated that an amended statement of claim would be filed. It should also be noted that of the plaintiffs only one, Derek Frank, was a beneficiary under the first will though the children of the other three plaintiffs were.

I now turn to the questions asked in each of the three parts of the interrogatories which were not answered and in respect of which the defendants seek orders requiring particular plaintiffs to answer. There were a number of these questions but they can be divided broadly into three categories. The nature of the three categories will become apparent as I deal with the questions under the three parts of the interrogatories already mentioned, namely, Parts A, B and C.

Part A - Questions to be answered by Peter Boniface  
and Lynette Ann Ward:

This question asked whether the two plaintiffs or either of them had any arrangement, understanding or agreement with any of the other plaintiffs regarding provision being made for him or her in the event of the grant of probate being set aside and probate of the earlier will being granted. This question is in the first category of the three categories mentioned earlier. The two plaintiffs had objected to answering the question on the basis that it was not relevant to any matter in issue in the proceedings. During

argument it became clear that the basis of this contention was that whatever the plaintiffs might have agreed amongst themselves on such a matter, if they had agreed at all, it could not bear upon the question of whether Mrs Walleth was of unsound mind when she made the will or whether Messrs Chilcott or Hills exerted any undue influence upon her at that time. I understood Mr Ross accepted that the question was not directly relevant to the two causes of action but he contended it was relevant to issues arising in the case for two reasons. The first was that it related to the status of the plaintiffs as plaintiffs. It appears clear that all of the plaintiffs, other than Lynette Ann Ward, are beneficiaries under the will in respect of which probate was granted and therefore plainly they are entitled to be plaintiffs in respect of proceedings relating to that will. I understood Mr Ross accepted that. Lynette Ann Ward, in answers she gave to other questions in the interrogatories, had admitted that she was not a beneficiary under either will. It follows that no answer is necessary from her to the question on the basis that it relates to her status because on her own admission that she has no interest under either will it is difficult to see how she justified being a plaintiff at all. I add no other matter was suggested or put forward by Mr Boyd as being a basis upon which she could be a plaintiff. In those circumstances, the question of whether she can continue as a plaintiff at all is a different issue altogether from the matter of answers to interrogatories and should be determined, if the defendants wish to pursue

it, in an application to remove her name from the proceedings. I add that in any event I find it rather difficult to see how any such agreement, if there was one, could either create or destroy the status of a plaintiff in relation to the proceedings. Mr Ross secondly contended that the question was relevant because it bore upon the question of whether Mrs Wallath had divided her estate as she wanted or whether she was unduly influenced by anyone or was of sound mind? He related this to the answer given by Wendy Joy Frank to question No. 15 in Part B of the interrogatories. That question relates to whether Mrs Wallath was in need of medical care and, if so, did Wendy Joy Frank refer her or take her for medical treatment and what was the condition from which she was suffering that required such treatment? Wendy Joy Frank answered the question by saying that Mrs Wallath was in need of medical care but that she had not arranged for her to receive any treatment. It followed that there was no requirement to answer anything further in relation to that question about Mrs Wallath's condition. I cannot see that the proposed interrogatory bears upon the answer to question No. 15 at all. The refusal to answer this interrogatory is thus justified.

Part B - Four questions to be answered by Wendy Joy Frank

The first question is the same as that just dealt with in Part A, namely a first category question, and the same considerations apply and the result is the same. The second question asks if Wendy Joy Frank claimed that Mr Chilcott "used his position to unjustly enrich himself and/or his family"? This question is in the second category of the

three categories mentioned earlier. Unjust enrichment is not a part of the cause of action which is that of undue influence. It is clear that Wendy Joy Frank does claim that Mr Chilcott exerted undue influence upon Mrs Wallath in connection with the making of her will, for that is one of the allegations in the statement of claim, and therefore this question does not need to be answered. The third and fourth questions are related to the execution of the will of Mrs Wallath's husband, Hubert West Wallath, on 19 December 1977. These questions are in the third category of the three categories. The third question is whether Wendy Joy Frank ever claimed that the execution of Mr Wallath's will was obtained by undue influence by or on behalf of Mr Chilcott or Mr Hills and the fourth question was whether she now claimed that the execution of Mr Wallath's will was obtained by such undue influence. Mr Ross was constrained to accept that the circumstances surrounding the execution of Mr Wallath's will were not immediately relevant to the facts in issue in relation to the execution of Mrs Wallath's will though he urged that the questions were not oppressive or unreasonable. In my view, such questions might well be asked during the course of evidence at the trial in relation to the matter of undue influence in respect of Mrs Wallath's will but they are not questions that are relevant to establishing whether or not undue influence was exerted upon Mrs Wallath at the time she made her will. At all events, in my view, these questions need not be answered.

Part C - The question to be answered by Derek Frank

This question, a first category question, is the same as the question asked under Part A and the first question under Part B and, accordingly, the same considerations apply.

This question, therefore, also need not be answered. That covers all the questions referred to in the application and it follows that the application is accordingly dismissed. I make no order as to costs now but the costs of the application will be costs in the cause.

*Derek Frank*

Solicitors:

Nicholson Kirkby Sheat & Co., New Plymouth, for the  
defendants in support

Boyd & Knowsley, New Plymouth, for the plaintiffs to  
oppose