

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1820/99

**NOT
RECOMMENDED**

UNDER

the Family Protection
Act 1966

UNDER

the Law Reform
(Testamentary Promises)
Act 1949

IN THE MATTER

of the ESTATE OF ALFRED
AUGUSTUS BEUTH late of
Auckland, Retired,
Deceased

BETWEEN

ROLAND ALFRED BEUTH of
3/26 St Stephens Avenue
Parnell, Auckland,
Sickness Beneficiary

Plaintiff

A N D

WALTER HUGH KETTELWELL
and GARY WILLIAM MASSEY
both of Auckland,
Solicitors, as executors
of the Will and trustees
in the Estate of Alfred
Augustus Beuth, late of
Auckland, deceased.

Defendants

Hearing: 5th December 1988

Counsel: R J Towle for plaintiff
G N Jenkins for defendants

Judgment: 5th December 1988

ORAL JUDGMENT OF TOMPKINS J

The plaintiff has commenced proceedings under the Family Protection Act 1955, seeking further provision out of the estate of Alfred Augustus Beuth who died at Auckland on 3rd September 1987 and who was the plaintiff's father. He also seeks

relief under the Law Reform (Testamentary Promises) Act 1949 against the same estate.

Suzanne Janet Beuth is the wife of the plaintiff. She has filed a statement of claim in these proceedings also seeking relief against the estate under the Law Reform (Testamentary Promises) Act. Further, as a beneficiary under the will of the deceased, she is a person entitled to be served with the proceedings insofar as they are a claim under the Family Protection Act.

The plaintiff and Mrs Beuth have now applied for an interim injunction to prevent the defendants, who are the executors and trustees of the will of the deceased, from taking any further steps to evict the plaintiff and Mrs Beuth from the residential property owned by the estate, being Flat 3, 26 St Stephens Avenue, Parnell, and also from taking any further steps to sell or dispose of the property.

The affidavit by Mr Kettelwell, one of the defendants, discloses that the assets of the estate consist of cash in New Zealand, furniture valued at \$5,640 and the St Stephens Avenue property valued at \$120,000. There are also assets in South Africa consisting of a deposit of R27,003 that will be reduced by certain liabilities in South Africa to a net figure of R16,949.

The last will of the deceased is dated 4th June 1987. It makes certain bequests, namely of R25,000 to Glenda Collins, the deceased's late wife's niece, some furniture to Glenda Collins, and \$5,000 each to two sons of the deceased who are stepchildren of the plaintiff. The balance is to be divided into two parts. One part goes to Maurice James Beuth, who is the plaintiff's brother absolutely. The other part is to be held upon trust for ten years, with the income or capital at the discretion of the trustees to be paid for the personal support, maintenance, benefit, education or advancement in life of Maurice James Beuth, the plaintiff and Mrs Beuth. Any amount undistributed after ten years is to be divided equally between such of those three as shall then be living, and if more than one, in equal shares.

The plaintiff is aged 62. Mrs Beuth is aged 73. The plaintiff is in a poor financial position. He is an undischarged bankrupt. Further, as a result of two motor vehicle accidents, he is unable to work and is in receipt of a Social Security benefit. Mrs Beuth deposes to being entitled to a superannuation entitlement in New Zealand and to having "some inheritance monies" in England which she says are managed by solicitors there and are inaccessible. The monies, she states, are in a trust fund for her son and she has a life interest in the income only. She does not state how much money is involved, whether there is any right for her to receive any part of the capital and what amount she receives from her life interest in the income. She does however state that she does not have access to sufficient

funds to purchase a home for the plaintiff and herself in New Zealand. She deposes that on account of what she describes as very small income, she doubts they can afford suitable alternative accommodation.

The plaintiff and Mrs Beuth have been residing in the St Stephens Avenue property since December 1987. On 9th March 1988 there was completed a tenancy agreement between the defendants as landlord and the plaintiff and Mrs Beuth as tenants. It provides for rent at \$100 per week, commencing from 9th March. It contains a provision whereby the plaintiff and Mrs Beuth expressly acknowledge that the premises are to be offered for sale and the tenants shall permit purchasers and land agents to enter and view the premises.

Under the terms of the agreement, it was terminable on one month's notice or such greater period as may apply under the Residential Tenancies Act. By notice dated 13th September 1988, the defendants gave the plaintiff and Mrs Beuth notice to quit and deliver up possession of the premises by 21st December 1988.

In essence, the plaintiff and Mrs Beuth seek by their application for interim injunction, that the premises should be retained by the estate and that they should remain in possession of them until their claims have been heard and determined.

Mr Towle has submitted that they have made out an

arguable case. He submits that the plaintiff has a strong claim to further provision under the Family Protection Act and also in the light of the promises referred to by the plaintiff, under the Law Reform (Testamentary Promises) Act 1949. He also submits, in reliance on the affidavits by Mrs Beuth, that she too, had made out a strong case for relief under the Law Reform (Testamentary Promises) Act 1949.

Mr Towle acknowledges that even if grounds for relief are made out by the plaintiff and by Mrs Beuth, then having regard to the size of the estate as disclosed in Mr Kettelwell's affidavit, it is unlikely that they would together or separately, be awarded the St Stephens Avenue property. But he submits that the property should be retained essentially for two reasons.

First, the plaintiff in his affidavit has deposed to his belief that there may well be very substantial assets in South Africa that have not yet been located. Should that prove to be the case, then the possibility of the plaintiff and Mrs Beuth being awarded the property would at least to some extent, be increased.

Secondly, he submits that even if the assets of the estate should prove to be as they are now disclosed, the plaintiff and Mrs Beuthy may still receive by way of relief under their various claims, sufficient to enable them to purchase the property.

For these reasons he submits that the status quo should be preserved until the proceedings are determined. On the other hand, should the plaintiff and Mrs Beuth be required to vacate, this would lessen the options available to the Court when the proceedings are heard. In particular, such a course would eliminate the possibility of the plaintiff and Mrs Beuth as the result of an award being made to them, being able then to purchase the property from the estate.

Mr Jenkins for the defendants, submits that having regard to the size of the estate and the nature of competing claims, there can be no real prospect of the plaintiff and Mrs Beuth being awarded the property. Any monetary award would be able properly to be satisfied, particularly if the property had been sold. Mr Jenkins did not seek to point to any specific loss that may be caused to the estate and thereby to the beneficiaries if the property were to be held by the estate until the proceedings have been heard.

Weighing up these competing contentions, I am satisfied that the balance of convenience favours the retention of the property until the proceedings have been heard, provided the estate should receive a fair market rental for the property from the plaintiff and Mrs Beuth until the hearing. But I should make it clear that I do not, by the imposition of that condition, seek in any way to limit the relief that may ultimately be awarded to the plaintiff and Mrs Beuth and which relief could

possibly involve their receiving some credit for a proportion of the rent they will by then have paid. In that situation, the asset to which they claim to be entitled in whole or in part will be preserved and the other beneficiaries will not suffer any significant loss as a result.

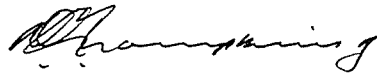
There will therefore be orders in terms of the relief sought but subject to the further condition that the plaintiff and Mrs Beuth pay to the defendants, a fair market rental for the property from today's date until the date of the hearing. That rental should be fixed by agreement, or failing agreement, by such other appropriate means agreed upon between the parties. If they are unable to agree on a method of fixing the rent, it is to be fixed under arbitration under the provisions of the Arbitration Act.

I reserve leave to the parties to apply further in respect of that condition. This is to cover the possibility that the plaintiff and Mrs Beuth may have difficulty in meeting the full market rental - that would depend on what that rental proves to be and what income Mrs Beuth has which may be able to be contributed towards it, neither of which are at present known to the Court. If that consideration should present a real difficulty, then the Court may review the terms of that condition.

The plaintiff and Mrs Beuth are entitled to costs on this application. Mr Jenkins is correct when he submits that the

defendants are under an obligation as trustees to resist applications under the Law Reform (Testamentary Promises) Act, but it would have been within their powers to have agreed to hold the property on similar terms to which I have pronounced.

There will be an order for costs in favour of the plaintiff and Mrs Beuth for \$600. Mr Towle advises that the plaintiff is legally aided.

A handwritten signature in cursive script, appearing to read "A. Chapman".

Solicitors for the plaintiff:
Haigh Lyon (Auckland)
Solicitors for the defendant:
Greig Bourke (Auckland)