NZLR

IN THE HIGH COURT OF NEW ZEALAND 8/5 No M767/91
AUCKLAND REGISTRY

UNDER THE Family Protection Act 1955

IN THE MATTER of the Estate of G.W. FIELD

595

BETWEEN W.P. FIELD

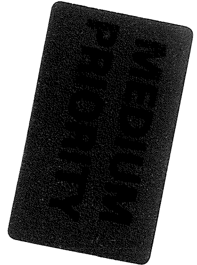
First Plaintiff

AND L.N. FIELD & ANOR

Second Plaintiffs

AND F.B. JORGENSON

Defendant



Date: 6-8 April 1992

Counsel: Ms Goodyer for plaintiffs
Ms Sinclair for Mrs Field
Ms Swadling for defendant

Judgment 8 April 1992

(ORAL) JUDGMENT OF HILLYER J

This is a claim under the Family Protection Act 1955. The first plaintiff has withdrawn his claim. The second plaintiffs are his children and the action has been continued on their behalf.

The first plaintiff was born on 6 June 1945 and adopted at an early age by the deceased, George Walter Field. He was brought up thereafter in a warm and loving atmosphere by the deceased and his wife.

On 8 April 1967 he married Zelda Robin Harris, and there were two children of that union, Lisa born on 26 August 1969 now aged 23 and Timothy, born on 15 November 1970, now aged 21, the second plaintiffs. The

deceased had no other children, nor has he any other grandchildren. His wife died some years ago. Again the relationship between the second plaintiffs and the deceased was a warm and loving one.

In 1973 the first plaintiff and his wife were separated and subsequently divorced. On 4 December 1978 he married Margaret Jane Jarvis who is the residuary beneficiary under the last will of the testator which was made on 1 May 1989.

In his affidavit, the first plaintiff recounts a discussion he had with his father prior to that will being made. He said that his father discussed with him his wish to change his will, and asked the first plaintiff what he wanted him to do. At that time the first plaintiff was in partnership with one Peter Pharo dealing with property, and his business was extremely successful. He had further separated from his second wife and they were trying to resolve their property division. The first plaintiff says he told the deceased he did not need any money, that he was a wealthy man and his children would have enough from him. The deceased told him he was thinking of leaving something to Margaret Jane Field. The first plaintiff says he told the deceased that if that would make the deceased happy it was ok by him, and that it might assist in the resolution of the matrimonial property matters which were at issue between Margaret Jane Field and himself. Unfortunately it appears that those issues are still unresolved.

On 1 May 1989 the deceased therefore made his will, leaving $10,000 each to the first plaintiff and to each of the second plaintiffs. The residue went to Margaret Jane Field. On 8 June 1990 the deceased died.

On 18 February 1991 the ANZ Bank with which the Pharo & Field partnership banked, froze the overdraft facilities that partnership had with the bank, and by October 1991 it was apparent that the first plaintiff was insolvent. A scheme of arrangement was filed in the High Court on behalf of the first plaintiff and his partner, which broadly speaking, provided that the first plaintiff and his partner would proceed with the realisation of the partnership assets. There were a very large number of buildings which at one stage had values, it was reputed, of the order of $20 million. Unfortunately, with the stockmarket crash in October 1987 and the subsequent downturn in the country's economy, those properties declined in value to such an extent that the first plaintiff and his partner became insolvent.

The claim is being pursued on behalf of the grandchildren of the deceased. S.3 of the Family Protection Act sets out the persons entitled to claim under the Act, and includes the grandchildren of the deceased living at his death. S3(2) is as follows:

> "In considering any application by a grandchild of any deceased person for provision out of the estate of that person, the Court, in considering the moral duty of the deceased at the date of his death, shall have regard to all the circumstances of the case, and shall have regard to any provision made by the deceased, or by the Court in pursuance of his Act, in favour of either or both of the grandchild's parents."

The law in Family Protection cases is well settled; the inquiry is as to whether there has been a breach of a moral duty judged by the standards of a wise and just testator or testatrix; *Little v Angus* [1981] 1NZLR 126.

The question as to the date at which the duty should be judged has been considered, and it is now settled that

the Court must look at the duty as at the date of the testator's death and the facts at that time.

In *Dun v Dun & Anor* [1959] 2 AllER 134, the Privy Council said at p135:

> "The question which has now to be decided is whether, on an application under the Act by or on behalf of a dependant of a testator, the court, in deciding on the adequacy of the provision, should have regard to the facts as they existed at the date of the application or to the facts as they existed at the date of the testator's death. It was not disputed that, if the latter were the correct date, the courts should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died."

Further at p.141, Lord Cohen delivering the opinion of the Privy Council said:

> "Moreover, their Lordships think that the intention of all the statutes in this field was to enable the court to vary the provisions of a will in cases where it was satisfied that the testator had not made proper provision for a dependant; it would be contrary to this intention to judge a testator not by the position as it was at the time of his death, but by the position as it might be as the result of circumstances which the testator could not reasonably have been expected to foresee. Their Lordships recognise that it may sometimes be difficult to determine what the testator should have foreseen, but the difficulty is no greater than is often incurred in assessing damages in personal injury cases and Parliament has not hesitated to cast this burden on a judge."

With respect, if one is considering the moral duty of a testator, it is logical that that moral duty should be determined as at the date of his death, because up until that date, the testator had the ability to make a fresh will.

Further, when considering whether there has been a breach of a moral duty, that could be judged only by whether the testator has taken into consideration not only the facts as they existed, but facts that he could reasonably have been expected to foresee. He does not have to have a crystal ball. He is not to be in the position of a person who is able to determine what would happen with hindsight. His moral duty will have been discharged if he takes into consideration what the well informed, wise and just testator would have anticipated.

The first question therefore that has to be determined in this action is what the situation was as at the date of death of the testator? I have had careful argument from both Ms Sinclair and Ms Goodyer on this point. In support of the second plaintiffs' claims, affidavits have been filed by a Mr Waller, a chartered accountant and by Mr Jans a valuer. The question that obviously has to be determined is what was the value of the first plaintiff's property at the date of death? Was it reasonably foreseeable that within 8 months he would be destitute?

The starting point, in my view, must be his own opinion. In May 1989, just over a year before his father died, he said that he was wealthy, that he did not need any money, and that his children would have enough from him. Even more however, in his own affidavit in support of this action, he said:

> "Para 56. After the deceased's death, I experienced an unexpected and dramatic downturn in my fortunes. My business partnership of Pharo and Field experienced a severe liquidity crisis as a result of the general economic downturn and both my business partner and I have had to sell or are selling all our assets to meet creditors' claims."

> "Para 58 I would summarise my position by saying that I have in the last year gone from being one of the wealthiest men in New Zealand to being virtually destitute."

That affidavit was made on 10 May 1991, about 2 years after the deceased's last will, and on the first plaintiff's own affidavit therefore, he says that the downturn in his fortunes was unexpected and dramatic and came after the deceased's death and since then he had become virtually destitute.

I would be unwilling however, to determine this case solely on what may have been an incautious comment, by the first plaintiff, and I have carefully considered the affidavits of Mr Waller and Mr Jans. Mr Waller gives a general overview of the first plaintiff's position as at date of death, and concludes his affidavit by saying:

> "I believe that there is a reasonable probability that the problem existed for some time prior to the bank foreclosing and that at the date of the deceased's death on 8 June 1990, 8 months prior to the bank's foreclosing, it cannot with any certainty be said that Wayne Field was a wealthy man or even in a position to provide any present or future financial support for his children."

Mr Jans concludes his affidavit by referring to a report which had been filed on behalf of the defendant from a Mr David Appleby, a chartered accountant. I had the advantage of hearing Mr Appleby subjected to a careful cross-examination by Ms Goodyer on behalf of the second plaintiffs. He analysed and set out the details of the assets held by the first plaintiff as at 8 June 1990, and gave facts and figures in support of his opinion. This must be contrasted with the general statements made by Mr Waller and Mr Jans.

After examining the large number of different partnerships, trusts and companies in which the first

plaintiff was involved at that time, Mr Appleby came to the conclusion that as at 8 June 1990, the effective net worth of the first plaintiff's personal and beneficial interests totalled $5,040,016. He noted that the partnership's overdrafts with the ANZ Bank had increased between 17 October 1990 and October 1991 when they presented their proposal to the creditors, from $1,487,919 to $3,287,408. He commented that it would appear therefore that after 17 October 1990 the ANZ Bank was sufficiently confident in the affairs of Messrs Pharo & Field to effectively increase their exposure by more than double. He exhibited clippings from newspapers which indicated that in the opinion of the financial writer for the NZ Herald, Messrs Pharo & Field had a net minimum worth of $25m each, and another newspaper clipping which suggested that they were worth $20m. That may be the partnership worth. Nevertheless it was a public perception. He concluded:

> "In the writer's opinion the accounts for the various interests of Messrs Pharo & Field show that Mr Field had substantial personal wealth both in his own name and through the various family trust structures as at 8 June 1990."

Mr Jans as I have said, commented on that opinion as follows:

> "I observe that Mr David Appleby's report insofar as it relies on property values is based upon valuation evidence from the 1989 financial year. Given the conclusion that I reach in my report that at June 1990 the Auckland commercial property market was well entrenched in a property downturn evidenced by increasing vacancy rates, falling rentals and falling property values, it is quite possible that at the date of the deceased's death on 8 June 1990, Wayne Field's equity in his various property interests had been completely eroded."

I note that Mr Jans says only that it is "quite possible," not that in his view they had been. Mr

Appleby pointed out that the valuations on which he relied were not based on valuation evidence from the 1989 financial year. He set out 22 of the substantial properties owned by Pharo & Field with the relevant valuation dates. Of those 22 only 7 were within the 1989 financial year. Nine properties were valued in the 1990 financial year, and six after June 1990. He commented that the valuation provided for the most valuable building, the MLC, 380 Queen Street, Auckland as $6.4 million, was provided two months subsequent to deceased's death. He drew a distinction between property developers and property investors and accepted that property developers to a very large extent had suffered substantially as a result of the flow on from the 1987 sharemarket crash. There were however, he commented, a large number of property holding companies which had survived the downturn. He accepted of course, that the value of properties had diminished, but what the plaintiffs are suggesting is that deceased should have been able, in June 1990, to foresee that the $10m or $5m empire of the first plaintiff would have totally collapsed by February 1991.

The first plaintiff himself did not foresee it. The evidence of Mr Appleby, which I prefer to the evidence of Mr Waller and Mr Jans, demonstrates although there was a substantial diminution in the value of the first plaintiff's assets, it had not got to the stage where a well informed, wise testator could reasonably have foreseen that it would totally disappear.

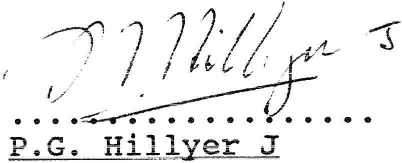
I have therefore come to the conclusion that as at the date of death, and in making the will that he made with the encouragement of the first plaintiff, the deceased was not in breach of any moral duty that he had to the second plaintiffs.

I have had evidence put before me as to the relative circumstances of the major beneficiary, Margaret Jane Field, who does seem throughout Mr George Field's life to have been a kind and loving daughter-in-law, and as to the situation of the two children of the plaintiff. As young people of course, they would appreciate, and indeed may need assistance at the present time. Had there been a breach of moral duty I may well have been inclined to make some modest provision for them, bearing in mind however that Mrs Margaret Field has financial problems which are substantial, but in the light of my determination that there was no breach of moral duty as at the date of death, no such course is open to me.

I have not gone into the question of the effect of the first plaintiff's withdrawal of his claim on the claims of the grandchildren. Counsel advise me that had he pursued and been successful with his claim, any benefit he received would have gone to his creditors. It may well be for this reason that he has abandoned his claim. What effect that might have had on his children's claim, I do not need to determine, but it seems clear from s32 of the Act, that if the first plaintiff had pursued his claim and provision had been made for him, that would have had to be taken into consideration by the court in considering the claim by the grandchildren.. However, I need take that no further.

The costs of the residuary beneficiary will come either directly or indirectly from the estate. The costs of the defendant also will be paid from the estate. The only question is as to the costs of the plaintiffs. In

all the circumstances the plaintiffs' costs are to be taxed by the Registrar on a modest scale and paid from the estate.



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P.G. Hillyer J

Solicitors
Ellis Gould for plaintiffs
Keegan Alexander Tedcastle & Friedlander for M.J. Field
Sellar Bone & Partners for defendant