

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M 613/90

UNDER

the Trustee Act 1956
and its Amendments and
Part 1 of the Judicature
Amendment Act 1972

IN THE MATTER

of an action for
breach of fiduciary duty and
of an application for
removal of trustees by
SIMON LEONARD PRICE

BETWEEN

REBECCA ANNE
BEESELEY of Christchurch,
Bakery Assistant

Plaintiff

AND

HAROLD ARTHUR
BEESELEY, Foreman and
MARY EDNA BEESELEY,
Married Woman, both of
Christchurch as Trustees
pursuant to a Deed of
Family Arrangement dated
7 December 1982

Defendants

Hearing: 8 March 1994

Counsel: P D Woolley for Plaintiff
Ms K Felltham for Defendants

Judgment: 11 APR 1994

RESERVED JUDGMENT OF HOLLAND J.

The pleadings have done little to simplify these proceedings. The issue between the parties is really a claim for damages for breach of trust by the plaintiff as beneficiary, against the defendants, her father and stepmother, as trustees.

The evidence was placed before the Court by way of affidavits.

The prayer for relief in the statement of claim seeks:

- "1. An order that the sum of SIX THOUSAND THREE HUNDRED AND TWENTY DOLLARS AND NINETY FIVE CENTS (\$6,320.95) being the principal under the deed of family arrangement be held on trust to the credit of REBECCA ANNE BEESLEY.
2. An order that the sum of \$10,025.96 representing interest on the said principal from the establishment of the deed and accrued on the basis of 17% until April 1987 (being the basis of payment to the plaintiff's sister) and thereafter at 14 per centum per annum until 30 August 1990 be held on trust to the credit of REBECCA ANNE BEESLEY.
3. An order that further interest from the date hereof down to the date of judgment at the rate of 14 per centum per annum at the rate of \$6.27 per day be quantified and be held on trust to the credit of REBECCA ANNE BEESLEY.
4. An order that the defendants be removed from the office of trustees under the deed of family arrangement and in the defendants' place and stead SIMON LEONARD PRICE and JOHN ALEXANDER McRAE be appointed or otherwise such fit person or persons as the Court shall consider appropriate.
5. The plaintiff be awarded in full or such part as the Court shall consider just and appropriate the solicitors and client costs incurred by him on behalf of REBECCA ANNE BEESLEY.
6. The defendants bear all costs of an incidental to these proceedings and order thereon.
7. The defendants be ordered to personally bear the whole of such part without recourse to the assets of the estate as the Court considers appropriate of the costs awarded under paragraphs 5 and 6 hereof."

Although the proceedings are entitled as being brought by the plaintiff as guardian ad litem for a minor, the minor has attained her majority on 4 December 1991. In accordance with Rule 87 of the High Court Rules the proceedings are carried on in her name as plaintiff.

The plaintiff is the daughter of the first named defendant and his first wife, who died on 25 November 1981. At that time the plaintiff's mother and father had been separated for some five or six years. A

decree absolute in divorce was granted on 15 June 1981. No final agreement had been reached between the defendant and his first wife as to matrimonial property. The plaintiff, her sister, and her mother resided, until the mother's death, in the former matrimonial home at 31 Northcroft Street, Christchurch. The house property was in the joint names of the first defendant and his former wife. It passed to the first defendant by survivorship. At the time of the death of his first wife the first defendant had remarried. His second wife was the second defendant.

The first wife died intestate. There is no evidence as to her estate apart from her joint interest in the house property which passed to the first defendant. The plaintiff was nearly 10 years of age when her mother died. Her elder sister was aged 14. Both girls were taken into the home of the defendants.

On 7 December 1982 both defendants, stating in the document that they were doing so as administrators of the estate of the deceased mother of the two girls, entered into a deed with the first defendant stated in the document to be guardian of the two infant children. This deed records that the former matrimonial home was sold on 15 May 1982 and that one half share of the nett proceedings amounted to \$12,641.90 which "is now held in the name of the estate of Maureen Iris Beesley (the mother) upon trust for the said daughters of the deceased".

The deed recorded that the defendant held the sum of \$12,641.90 for the plaintiff and her sister as to both capital and income in equal shares payable as each of the two children attains the age of 20 years. Notwithstanding that this deed appeared to create a vested interest in each daughter, a provision was added for substitution of issue in the event of either child's death before attaining a vested interest. A

further provision in the deed contemplating the possible death of both daughters before obtaining a vested interest does not require further consideration.

The deed invoked all statutory powers and granted the additional powers, authorities and discretions contained in a schedule comprising no less than nine pages of closely typed script.

The addition of the plaintiff and her sister to the defendants' household required some alterations to the defendants' home. The defendants were expecting a child to be born to them. The first defendant spent some three or four thousand dollars from the proceeds of sale of the former matrimonial home on improvements and additions. In his affidavit the first defendant says that with the \$12,000 he received from the sale of the house he repaid the existing first mortgage on the house owned by the first and second defendants and he borrowed the other \$12,000 being the moneys held on trust for his daughters, applying it in repayment of a second mortgage, redecoration of the house and the purchase of a motor car. A memorandum of mortgage was signed by both the defendants acknowledging the advance of \$12,000 from the "Estate Maureen Iris BEESLEY" payable upon demand without interest.

The affidavits of the plaintiff and the defendants contain pages and pages of vituperative allegations, denials and counter allegations as to the relationship of the plaintiff with her father and stepmother. Suffice it to say that the relationship was not satisfactory. The plaintiff's sister left home in 1983 on attaining the age of 16. The plaintiff ran away in 1985 and came to the attention of the Department of Social Welfare at least in early 1986. She was in foster care arranged by the Department of Social Welfare. For a very short period the first

defendant paid maintenance of \$20 per week to the Department. There was practically no communication between the plaintiff and her father.

When the plaintiff's sister attained her majority she instructed solicitors to bring a claim against the first defendant. In a letter dated 2 April 1987 marked "without prejudice" but produced by consent that claim was settled by payment of \$11,610.28 calculated on the basis of half of \$12,641.90 with interest from 21 June 1982 at 17% per annum compounded quarterly with an appropriate deduction for taxation.

Some representations were made by the Department of Social Welfare at this time on behalf of the plaintiff. The first defendant acknowledged the plaintiff's right to the capital of \$6,320.95 with interest from the date of settlement. It is said, and not denied, that the plaintiff said she was not concerned about past interest. The Department very properly said that as she was a minor she could not make such a concession.

In November 1988 the Department sought from the defendants \$6,320.95 with accrued interest on the same basis as had been paid to the plaintiff's sister. A year later a similar request was made by the plaintiff's solicitors. The first defendant replied that he had paid \$6,000 into an interest bearing deposit account at Trust Bank Canterbury as the plaintiff's share of capital. This sum was deposited on 28 June 1988 in the name of the first defendant as trustee. She was advised by the first defendant that this step had been taken. Although the plaintiff makes no mention of it in her first affidavit or in her affidavit in reply she does not challenge the statement in the first defendant's first affidavit that "When we were advised in November 1990 that she needed funds for Varsity I immediately arranged for it all to be released to her solicitors".

In what counsel for the plaintiff described as a synopsis he says that on 28 June 1989 the first defendant paid the sum of \$6,628.15 to

the plaintiff. There is no evidence from the plaintiff as to any receipt of money from the defendants. Although the first defendant refers to payment in November 1990 there is no explanation as to where counsel for the plaintiff obtained the date of 28 June 1989. It is adverse to the plaintiff but I have proceeded on the basis that her counsel's synopsis is correct and that she received \$6,000 and accumulated interest at that date. Having found no breach of trust in depositing the \$6,000 in Trust Bank in June 1988 it makes no difference to the calculations.

The settlement by the first defendant of the sister's claim and the deposit of the \$6,000 in 1988 was met as a result of the retirement of the first defendant and his consequential receipt of superannuation in a capital sum of \$65,000. The first defendant deposes that from this sum he paid off a mortgage of \$4,000, bought a new car, deposited the \$6,000 for the plaintiff and spent the balance on overseas travel for himself and his wife and his two daughters of his second marriage. The settlement of the sister's claim was met from the proceeds of sale of a caravan. Insofar as interest and costs were paid the first defendant says that these payments were made by his solicitors without his authority. They were paid from moneys in the solicitor's trust account.

There was no viva voce evidence before me. The affidavits on both sides are prolix and in many respects are not directed to the major but limited relevant points in issue. Counsel for the defendants did not challenge the submission that there had been a breach of trust in their applying the trust funds of \$12,641.90 for their own purposes from the commencement of the trust in December 1982 until payment to the sister in full and the deposit of \$6,000 on behalf of the plaintiff in June 1988.

It is submitted on behalf of the defendants that the circumstances are such that full relief should be given to them under s.73 of the Trustee Act 1956.

S.73 provides as follows:

"Power to relieve trustee from personal liability - If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for the same."

Although the deed contains the widest of powers and discretions to the trustees, including power to invest in funds not productive of income and to act notwithstanding that their own interests may conflict with their duty to the beneficiary, the circumstances were such that the trustees could not have been relieved from their liability for breach of trust on those accounts.

The affidavits of the defendants contain some veiled suggestions that the moneys were spent for the benefit of the beneficiaries in improving their accommodation standards and by repaying mortgages with consequent reduction of interest payments, allowing greater funds to be available for their maintenance. Although the first defendant denies that he agreed to pay the elder sister interest, he claims that even if she were entitled to interest, the plaintiff is not, as she stayed at home for a much longer period than her sister.

Counsel for the defendant did not argue before me that the application of the trust funds by way of improvements to the home and repayment of mortgages was a legitimate exercise of powers given to

the trustees under the Deed. It was submitted that these were circumstances relevant to relief under s.73.

The trust deed contained a power of advancement for the benefit of the beneficiaries. Nevertheless the plain facts are that the two beneficiaries were the infant daughters of the first defendant. Their mother was dead. He was primarily responsible for their maintenance.

Before considering the application of s.73 it is helpful to consider what, if anything, would be awarded to the plaintiff in the absence of any statutory provision for relief. In this respect the onus of proof is on the plaintiff.

The statement of claim seeks payment of an amount calculated as was the amount paid to the sister as at April 1987, namely, \$10,025.96 with interest thereafter at 14% per annum until 30 August 1990 (presumably the date of the statement of claim) together with further interest at 14% per annum to the date of judgment. No allowance is made in the statement of claim for the \$6,628.15 paid to the plaintiff's solicitors on 28 June 1989. In his concluding submissions counsel for the plaintiff recognised that credit must be given for this sum.

In an affidavit by the solicitor for the plaintiff he deposes that the amounts paid to the sister totalled \$11,937.67. The letter produced by consent and presumably intended to be accurate discloses a total of \$11,610.28. As I am calculating the plaintiff's loss independently this ambiguity is immaterial. The affidavit states that if \$11,937.67 had been deposited on behalf of the plaintiff and invested on mortgage through his nominee company up until the date of hearing it would have produced \$16,294.77. On a bank term deposit it would have produced \$13,107.06. Both calculations allow for a reduction of \$6,628.15 on 28 June 1988. Again I assume this is an error and is intended to be 28 June 1989 when payment was made. The calculations reflect the very

high interest rates received during this period. Those interest rates in recent times have substantially dropped.

Although the solicitor states that "these amounts are intended to be indicative of what might be expected as available to Rebecca" there is no evidence of what form of investments might be expected to be made by a trustee of a trust of this nature other than the production of figures calculated on the basis of mortgage investment through the solicitor's nominee company and on term deposit at a bank.

In the absence of evidence I am not prepared to find that the defendants were in breach in any respect in investing the \$6,000 on deposit in Trust Bank as they did in June 1988. Nor can they be responsible for any loss of income on this sum following the payment of \$6,628.15 to the plaintiff's solicitors in June 1989.

The plaintiff is clearly entitled to the \$320.95 capital short paid on the deposit of \$6,000 with accumulated interest. The only other payment to which the plaintiff is entitled is compensation for loss of interest from the inception of the trust on 7 December 1982 to 28 June 1988.

Again in the absence of evidence I am not prepared to hold against the defendants that with a fund of just over \$12,000 of which half was payable within five or six years and the balance payable four years later it was a breach of trust not to make a long term investment. Nevertheless with allowance for trustee's income tax at 33% (it may have been higher in the earlier period) I consider that a minimum nett return after tax of 6.5% would be expected.

I would accordingly allow the plaintiff by way of damages a sum totalling \$5,140.95 as follows:

| | |
|----------------------|-----------|
| Balance of principal | \$ 320.95 |
|----------------------|-----------|

| | |
|--|-------------------|
| Estimated interest on that sum at 6.5% per annum with monthly rests from 7 December 1982 to the date of judgment | \$ 320.00 |
| Estimated interest on \$6,000 at 6.5% per annum with monthly rests from 7 December 1982 to 28 June 1988 | \$3,000.00 |
| Estimated interest on the above sum of \$3,640.95 at 6.5% per annum with monthly rests from 28 June 1988 to the date of judgment | \$1,500.00 |
| | <u>\$5,140.95</u> |

I turn now to s.73. I have considerable sympathy for the defendant. He is a layman. The deed and the mortgage to himself and his wife were all devices prepared by his solicitors. He should have been advised of the risks he took. He says he was not. I am satisfied that he acted honestly on a subjective test but I do not consider that he acted reasonably. It is not sufficient for him to say he acted in accordance with his solicitor's advice if that advice were bad. I am not finding that the advice was bad between the defendant and his solicitors. That is a matter between them.

Nor do I consider that the defendants ought fairly to be excused for the breach or breaches. Notwithstanding that this was a family trust trustees must appreciate that trust property is not their own. It may be that the defendants could have obtained Court approval for the advance of some part of the funds to themselves interest free while they were caring for the beneficiaries but there is insufficient evidence of the financial position of the defendants to make any reasonable assessment. It may be that Court approval would have been too expensive to acquire but at least independent trustees should have been obtained to exercise an unfettered discretion. The law must protect beneficiaries incapable of making decisions of their own.

It follows that the defendants are not entitled to relief. The plaintiff is entitled to judgement for \$5,140.95. The plaintiff is legally aided. Notwithstanding this fact and for the reasons really apparent from all that is said in this judgment there will be an order that each party pay his or her own costs. These proceedings should have been brought as a simple claim for damages for breach of trust. The proceedings are entitled as being brought under Part I of the Judicature Amendment Act 1972. The reason for that escapes me. The relief sought in paragraphs 1 and 4 of the statement of claim was abandoned at trial. Extensive and unnecessary costs have been incurred.

A handwritten signature in black ink, appearing to read "A D Howard". The signature is written in a cursive style with a large, sweeping flourish at the end.

Solicitors:

Cunningham Taylor for Plaintiff
Dougall Stringer for Defendants