NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M 136/93

IN THE MATTER of the Trustee Act 1956

A N D

IN THE MATTER of the Estate of ROSS DERISLEY WOOD formerly of Guernsey, Deceased

A N D

IN THE MATTER of an application by THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED and DERISLEY PETER MANSON CHRISTIE of Rotorua, Retired for directions under s 66 and for authority to pay Trustees commission

Applicants

Hearing: 12 September 1994

Counsel: J E C Allen QC for Applicants
J H Olphert for Life Tenants
M S McKechnie for remainder persons

Judgment: 12 September 1994

---

ORAL JUDGMENT OF ROBERTSON J

---

Solicitors

Davys Burton, Rotorua for Applicants
Dennett Olphert Sandford & Davis, Rotorua for Life Tenants
McKechnie Quirke & Lewis, Rotorua for remainder persons

Ross Derisley Wood (the testator) died in Guernsey on 26 June 1988. He was then 85. He was a New Zealander by birth, but had lived out of this country since the early 1950's and had been resident on and domiciled in Guernsey since the late 1960's. He never married and had no children. He had one brother and one sister. The brother had predeceased him, leaving one daughter. His sister who also predeceased him was survived by three sons and one daughter.

The deceased left three operative and relevant testamentary dispositions.

On 23 September 1982 he executed a will with respect "to his real and personal estate situated in New Zealand and Australia." That specifically noted that it did not deal with "real and personal estate not situated in New Zealand and Australia" which was dealt with in a will "made contemporaneously." There were two codicils to the New Zealand will. One of 31 August 1984 and another of 27 November 1987.

There were two separate Guernsey wills. The last will with regard to real estate in Guernsey was also signed on 23 September 1982. I assume that there was a Guernsey will with regard to personalty on that day as well, but there was certainly a subsequent will which was executed on 27 November 1987 which was the operative disposition with regard to non Australasian personalty.

The importance of those dates is that I am left with the clear conclusion that notwithstanding the fact that these three separate instruments dealing with various parts of his estate were concluded from

time to time, there was a clear cohesion and interrelationship about them. I am satisfied that on the question of construction I am required to look at the totality of the material and the interrelationship between the various items. That is consistent with the general approach to the interpretation of any testamentary disposition as evidenced by cases like ***Hipwell v Hewitt*** [1945] 2 ALL ER 476,477.

The Guernsey realty will which it appears dealt only with his residence, left everything to the executor of his New Zealand will to be dealt with in accordance with that latter disposition. The words used there were "to hold the net proceeds of such conversion and any income accruing thereto in order to distribute the same in accordance with my New Zealand will of personalty."

The Guernsey will of personalty is in human terms an intriguing document. There are some 26 or 27 specific legacies to a variety of persons and institutions, which indicate the reflections at the end of a long and vivid life. The concluding provision thereof is as follows :

> *"(y) the rest, residue and remainder of my estate to the person or persons who may be sworn as the executor or administrator (with will annexed) of my New Zealand will to be distributed in accordance with the dispositions of such will and any codicil or codicils thereto."*

The net effect of the two Guernsey documents was that the balance of his estate outside of Australasia was to be distributed in accordance with the provisions of the New Zealand testamentary requirements. The effect of the New Zealand will and its [illegible] codicils was to appoint one of the present

applicants, Mr D P M Christie, as sole executor, to provide equal life interests in the estate for the executor, his two brothers, his sister and his cousin (ie, the nieces and nephews of the testator) and upon the death of the last survivor of that group of five persons, to divide the estate per capita equally between the children then living of those five persons.

The other applicant, the Guardian Trust, had been heavily involved in the testator's affairs up until this time. It is not clear why it was deleted as executor just before the testator's death. For very good reason Mr Christie exercised the rights he had to have the Guardian Trust act as a joint executor with himself. The two have acted in concert in dealing with the not inconsiderable problems which have emerged from the date of death down to the present time.

Mr Christie, together with his two brothers went to England when their Uncle died. It is clear that this was a particularly valuable trip. Valuable in dealing with human factors, but also very beneficial in monetary terms. The sale of the residence in Guernsey was completed at a significantly greater amount as a result of the steps which were taken directly by Mr Christie. An additional £50,000 was acquired for the estate as a result of the personal intervention.

Communication between New Zealand and Guernsey has been somewhat one-sided and the representatives of the estate in New Zealand have not been provided with the degree of information and detail to which they were undoubtedly entitled and which in the normal course of events I would have expected would have come to them. Having faced a wall of silence for sometime they suddenly learned that a number of assets and

investments of the estate (which might well have been retained) had been disposed of, and the sum of £400,000 suddenly emerged in cash.

Another £225,000 which is the net proceeds of the sale of the house is more easy to follow. There was a further sum of between £40 and £50,000 which had also been received. There has never been sent in New Zealand terms anything like estate accounts. There have been some figures about income and payments and some documents appear not to have had the benefit of a "Carbolic Smoke Ball" differentiation between personal activities and company business which might have been expected.

There have been some quite substantial delays. Not all of them in Guernsey and some because one of the wills appears to have been mislaid somewhere in the activities of New Zealand Government agencies.

The position has now been reached where the present applicants have in their control as funds in the estate of R D Wood, approximately $1.3 million in New Zealand dollars, $560,000 in Australian dollars and about £266,000 in the United Kingdom.

There are two issues in respect of this application under the Trustee Act. The first is whether any part of that total sum now held by the applicants is in fact income, and therefore the property of the five nieces and nephews of the deceased. Secondly, there is an issue of proper payment to Mr Christie (one of the applicants) in respect of the extraordinary amount of work which he has had to carry out.

When the applicants obtained the funds they did from Guernsey in respect of personalty, there was no accounting which demonstrated what in

fact had occurred from the date of death until that time. There was a period of about 2 years before the first substantial sum was paid over.

It is now contended that by the times those funds were handed over, there had been substantial amounts of income which had accrued and which should accordingly be dealt with for the benefit of the life tenants rather than treated as part of the corpus of the trust.

This involves a consideration of the New Zealand will and particularly clause 5 thereof which is as follows :

> *"5. I GIVE AND BEQUEATH all the balance of my real and personal estate situated in New Zealand and Australia UPON TRUST to pay thereout my just debts owing in New Zealand and Australia and any testamentary expenses and death duties in respect of my estate in New Zealand and Australia and to hold the residue together with any assets which may be added to this trust by the executors and trustees of my estate not situated in New Zealand and Australia after my death UPON TRUST ..."*

Mr McKechnie, who represents the residuary beneficiaries, argues that as a matter of construction those words indicate that an executor in New Zealand simply takes what is sent and adds that to the corpus of the trust fund which already existed and arises from the New Zealand and Australian assets. Thereafter the income is dealt with in one way and the capital is preserved as required.

I confess to an initial attraction to that approach because of the somewhat loose words which are used - "assets which may be added to

those trusts" - but I have reached the firm conclusion that such interpretation is not to be favoured when the package of instruments are taken together. I do not confess to understand why there were these three separate testamentary documents or what tax or other advantages were sought (or in reality accrued) as a result. But the dates, and the timings and the interrelationship between them led me to the inevitable view that they must be read as a whole. It is clear that if all the provisions existed within one document and an executor in New Zealand was dealing with everything, then the obligation to differentiate between income and capital would have existed as from the date of death. There would be a duty to determine whether receipts were in respect of capital or income. All payments out would likewise have required a determination as to whether they were liabilities to be charged against capital or expenses which were incurred in the creation of income and deductable accordingly.

Now difficulty arises in this case because of the failure of anyone to draw those lines. But the fact that it has not occurred does not have any particular significance.

I do not overlook the fact that there was one undivided sum paid. That I see as a manifestation of a less rigorous approach to this task in Guernsey than one would have expected if it had been carried out in New Zealand. It is not of significance in and of itself.

Secondly, although the Guernsey personalty will did not specifically talk of any division, it is revealing to note that the realty will did and it specifically provided that "the proceeds of conversation and any income accruing was to be distributed in accordance with the New Zealand will." I take the view therefore that there was implicitly a recognition that income

would accrue from date of death even if there was a period during which realisation took place in respect of the personalty. Inasmuch as the formula which was used in realty was not re-used in the personalty will, one must conclude that a different approach was intended and that the normal distinction between capital and income will apply.

Thirdly, although there are difficulties in being scrupulously accurate about what is income and what is capital, the law has never allowed difficulty to be reason for deflecting it from what is required to be done and making the necessary assessment.

The issue next is what is the amount which is to be treated as being income. There are funds said to be income which up to the date of death, had arisen and in the period from death until the funds came into the control of the applicants. The bulk of this relates to the activities of a company called BTW Electronics Limited which was the deceased's investment vehicle. The applicants have obtained accounting records in connection with the company. As a result it is possible to conclude that in the year in which the testator died there was substantial income which had accrued in the company and in years thereafter similar situations arose.

Documents sent to New Zealand suggested the £400,000 payment was a capital distribution. All counsel before me agreed on the authority of the Privy Council decision in ***Hill v Permanent Trustee Co of New South Wales Ltd*** [1930] AC 720, that that cannot have been the case. There was a substantial loan account. At the date of death it was some £370,327 and at 1990, £324,717. Funds to repay that loan are clearly capital. But in respect of the rest, whatever label might have been put on it in Guernsey, it does not alter the fact that the company which was not liquidated until

some considerable time thereafter, lacked the ability to distribute capital. The additional payments made must have been in the nature of income.

The Court has benefited from a careful and detailed analysis of these accounts by Mr M L Patchell, the Branch Manager of the New Zealand Guardian Trust in Rotorua. He has been able from the information provided, to estimate income from the date of death until 11 February 1992. First he did this with regard to investment outside of BTW and that is clear and unambiguous. In the activities of the company itself, I am satisfied now that counsel have had an opportunity to take me through the figures, that there is a sum of £74,662.56 which is income and is to be treated as such by the applicants.

There is an additional figure of £50,443.50 which arises from the 1988 accounts and the treatment of it is discussed in para 23 of Mr Patchell's affidavit of 16 September 1993. Likewise I am satisfied that is income. This is in accordance with the ***Hill*** decision. Although there is room for a degree of uncertainty about minutia because of the absence of traditional accounts, I am satisfied on the balance of probabilities that figure has been shown as appropriately to be treated as income.

For completeness I should note that the conclusions which I have reached are in their approach consistent with s 85 of the Trustee Act in New Zealand. I do not overlook Mr McKechnie's proper submission that the section only has application in restricted circumstances but the total effect of the three documents here in my view most properly accord with an interpretation which is not inconsistent with that philosophy.

I note that this interpretation of the totality of the material avoids the possibility of any vacuum arising in the scheme. If I adopted Mr McKechnie's approach that the New Zealand executors were simply required to accept whatever they received whenever they received it and treat it as capital, the potential for injustice to the life tenants was enormous. My construction provides an equitable response to the competing claims in accordance with the testator's wishes.

The second issue raised on the proceeding relates to the proper payment to Mr D P M Christie. There is no opposition. There could not be by any reasonable bystander who has assessed the extraordinary task which this man has been required to undertake. Those of the life tenants and potential residuary beneficiaries who have responded to the litigation have endorsed the appropriateness of a payment. I am satisfied that it is proper that Mr Christie receive a net sum after tax of $10,000 to recompense him for those services. I suspect that that means that a payment of $15,000 needs to be made to allow for the taxation component. But that is amply justified on the basis of what he has done and achieved. It is clear that without his keen and continuing interest in this matter the estate would have been put to enormous sums by way of other professional costs in employing persons to carry out essential tasks.

As far as these proceedings are concerned, I am of the view that the proper costs of and incidental to the bringing of them and the hearing of this matter are properly chargeable against the estate. They are the sole responsibility of the corpus of the estate and not a charge to be made against income.

The costs of the applicant do not require the intervention of the Court. The Court concurred in the appointment of Mr Olphert to represent the life tenants and Mr McKechnie to represent the residuary beneficiaries. Memoranda will need to be filed supporting their claims for appropriate orders as to costs.

J.