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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 211/96

BETWEEN MICHAEL BEDE BROWN

Plaintiff

AND PATRICK KIRWAN BROWN AND MARY BROWN

First Defendants

AND MICHAEL DESMOND HODGINS AND GERALD PATRICK ROONEY

Second Defendants

ORAL JUDGMENT OF MASTER VENNING

SOLICITORS
Saunders & Co., for the Plaintiff
Wolfe Stone as Agents for McKinnon & Co., Hamilton for the First Defendants

N2CD
Procedure
~~Legal Service~~

+ Further particulars
Security for costs

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP211/96

BETWEEN MICHAEL BEDE BROWN of 90 Michael Street, Rakaia, Beneficiary

Plaintiff

AND PATRICK KIRWAN BROWN of 16 Michael Street, Rakaia, Retired and MARY BROWN of Raglan, Retired

First Defendants

AND MICHAEL DESMOND HODGINS and GERALD PATRICK ROONEY Barristers and Solicitors of Christchurch

Second Defendants

Date of Hearing: 22nd April 1997

Counsel: D.M. Lester for the Plaintiff
B Stone for the First Defendants
N. Corner for the Second Defendants

ORAL JUDGMENT OF MASTER VENNING

There are two applications before the Court today. First, an application that the plaintiff file and serve a more explicit statement of claim, and, secondly, the plaintiff provide security for costs. The applications are brought by the first defendant. The second defendant is represented today, and whilst they have not brought any applications themselves they abide the decision of the Court.

The plaintiff was a beneficiary of his father's estate. His father died in 1954. The first defendants were appointed as trustees of the plaintiff's father's estate. The principal asset of the estate was a house property at Hare Street, Upper Riccarton, Christchurch. The second named first defendant, Mary Brown, is the plaintiff's aunty. She raised the plaintiff and his brother in the Hare Street property until approximately 1971, at which time the plaintiff and his brother became independent.

These proceedings are based on events that took place in 1976. At that time the property at Hare Street was sold; the proceeds of sale were apparently paid into Mary Brown's bank account, and it is alleged with those proceeds of sale she purchased a property at Raglan for herself.

The plaintiff says as against the first defendant that as Mary Brown purchased the property using trust funds, the property at Raglan is held on trust for the benefit of the beneficiaries. Secondly, that if the property is not held on trust then in applying the proceeds of Hare Street to the purchase of the Raglan property in her own name she did so in breach of the trust, and the plaintiff seeks judgment against her for that breach.

The second defendants were solicitors acting in the administration of the trust. They have filed a full statement of defence. The first defendants, by their solicitors, seek particulars of various parts of the plaintiff's claim. I record Mr Stone is appearing on instructions, and was not in a position to concede any of the particulars sought by the first defendants, but, nevertheless, after discussions with counsel I am satisfied that the first defendants' application can be met by the following directions:

1. The plaintiff is to supply by way of letter particulars of the following paragraphs in the statement of claim:

(a) Paragraph 8 - confirming that the approach by the second defendants was by way of a letter dated 17th December, 1976.

(b) Paragraph 9 - confirming that the plaintiff's consent to the release of the funds was given in the authority dated 17th December 1976, that the consent was given to the trustees c/- the second defendants' solicitors.

(c) Paragraph 12 - that the plaintiff's agreement to the funds being distributed was on the 17th December, 1976, being the date of the authority, and that the funds were paid to Mary Brown on or about the 23rd December, 1976, in accordance with the settlement statement annexed to the affidavit of Treasure McKinstry in support of this application.

(d) Paragraph 13 - that the money was paid by the second defendants to Mary Brown. That the amount was $18,912.66, and was paid on or about the 23rd December, 1976.

(e) Paragraph 14 - that the agreement referred to in paragraph 14 is the same agreement as that referred to in paragraph 12.

Further particulars of paragraph 15 are not required. In my view, paragraph 15 already contains particulars of the allegations of the breach of trust. When those particulars are considered with the particulars that will be given, as directed above, paragraph 15 speaks for itself. It does not require further particulars to be granted or supplied.

I expressly record that the particulars are to be given by way of letter at this stage and, of course, the plaintiff will be free to file an amended statement of claim once discovery has been completed. In that regard, I direct that the particulars are to be supplied within 7 days of today's date, and that the

first defendants are to file a statement of defence within 21 days of the receipt of the particulars.

The other application before the Court is an application for security for costs.

The plaintiff is legally aided, with a contribution of $50. Mr Lester realistically concedes that jurisdiction exists for the rule to operate. It is then a question of considering the principles, and the Court's discretion.

The focus of the submissions before me today has been directed at the question of the legal aid factor. It seems to me that that factor is the principal factor for the Court to consider on this application. The effect of legal aid on an application for security has been considered in a number of recent decisions. In *O'Malley v Garden City Helicopters Limited* 8 PRNZ 182, Tipping J put the matter this way:

> " My starting point would be security should not be ordered against a legally aided person above the amount of his contribution unless the person seeking it can demonstrate a reasonable prospect that a costs order in excess of that amount will ultimately be made in that person's favour. This means that the party seeking an order against a legally aided party must show that there is some reasonable prospect of an ultimate order for costs being made in his favour. There is no point in having security unless there is a reasonable likelihood of security being required. Various factors may weigh in that consideration. While, as Greig J said in *Amev,* the merits of the claim will ordinarily have been considered by the legal aid authorities, it may be possible for a party seeking security to show that the merits are nevertheless extremely thin, and that could have a bearing on the Court's ultimate discretion." (p.185).

His Honour then went on to refer to the case of *Caldwell v Gaze Burt* (1994) 7 PRNZ 491, a decision of Thorpe J, which has also been referred to me today by counsel. In that case Thorpe J. accepted that:

" In many cases it will be difficult for the Court to reach a firm and satisfactory assessment of the likelihood that at the conclusion of the substantive hearing the factors bearing on an award of costs would be of such a nature that the s86(2) limitations would not apply. But I believe the Court should be slow to exercise its discretion to order security unless at the time it is asked to make the order it appears reasonably likely that in the event of the legally aided party being unsuccessful the Court could properly make an order for costs against that party for an amount of or approximating the amount of the security ordered. " (p.499)

S.86(2) opens the possibility for an order for costs in excess of the amount of contribution, but only in exceptional circumstances. The question is whether there are exceptional circumstances in this case. In the *Caldwell v Gaze Burt* (supra) decision Thorpe J considered exceptional circumstances could include substantial equity in a home, the Court's belief the claim was wholly without merit if the claim was grossly exaggerated, or if there was likely availability of funds from a third party.

In the present case the focus of the argument has really been on the merits of the plaintiff's claim. As noted above, it is the plaintiff's allegation that the first defendants are in breach of their duties as trustees. Mr Lester is correct that the Courts are careful to uphold and preserve the obligations trustees owe to beneficiaries. He referred me to a passage from *Underhill and Haton Law of Trusts and Trustees* 15th Ed. at page 647. The text records a statement of principle that a disposition of trust property to a trustee is automatically voidable by a beneficiary unless, inter alia, the beneficiary acquiesced in the transaction.

He then referred to the decision of *Holder v Holder* [1966] 2 All ER 116 and the comment at p.654 of the text that the onus is on the trustee to prove the beneficiaries were in receipt of full information, including the nature of the agreement to the purchase of an asset by the trustees. He submitted the position was a fortiori in the case of effectively a gift in favour of the trustee.

The principles are quite clear, and I accept them. This question is in this case whether or not it can be said the plaintiff acquiesced in the payment of the trust

funds to Mary Brown in 1976. In this case there is before me a letter from the second defendants solicitors dated 17th December 1976, in which it is stated:

> " Mary advises us that she had arranged with yourselves that she would sell 25 Hare Street and this has been done and the sale price is $19,500.00 less commission legal expenses etc. And she also advised us that you had told her that she was to take this money and utilise it to buy a home for herself in the North Island.
>
> We will require your authority to pay the proceeds of the sale to Mary as basically this money would belong to yourself and your brother in equal shares less, of course, any moneys that Mary have paid off the mortgage during the time she was in it. "

The letter then enclosed the authority.

I understand from counsel that as at December 1976 the plaintiff was no longer a minor, and it appears from plaintiff's the statement of claim that as from 1971 he was independent. There is no evidence before me the plaintiff was in any way disadvantaged , or was unable, or incapable of acting in a rational and informed manner. The letter of 17th December 1976, in my view, makes it clear the proceeds of Hare Street, which belonged to the plaintiff and his brother, are to be paid to Mary Brown for the purchase of a home for herself, not for the trust. The authority enclosed with the letter refers to payment of net proceeds of sale to Mary Brown who is one of the trustees in the estate. The authority may, perhaps, be ambiguous in that on one view of it, it might be suggesting the payment is to be made to her as trustee. On the other hand, it could simply making it clear that the payment is to be made to her and that she is a trustee, thereby reinforcing the importance of the plaintiff's agreement to the payment being made to here in her personal capacity.

On the basis of the letter and the authority, it seems to me that the plaintiff is going to be faced with extreme difficulties in pursuing the claim against the first defendants based on breach of trust. That factor, together with the fact that these claims are brought some 20 years after the transaction in

question, without any explanation before the Court at the present time as to why the claim has taken so long to be brought, amounts, in my view, to exceptional circumstances which could justify the Court to make an order under s.86(2) if the plaintiff's claim ultimately fails.

In those circumstances, I consider that despite the fact the plaintiff is legally aided an order for security is appropriate in this case. However, the fact the plaintiff is in receipt of legal aid is a factor to be taken into account in fixing the quantum of the order. The plaintiff has chosen not to put before the Court any information of his financial position. In attempting to do justice on the information before me, I fix the order for security in the sum of $5000.

There will, therefore, be an order that the plaintiff provide security to the satisfaction of the Registrar of this Court in the sum of $5000 by the 30th June 1997. If security is not provided by that date, the plaintiff's claim is to be stayed.

The costs on these applications are fixed in the sum of $1,500, together with disbursements, but liability is reserved until trial.

MASTER VENNING

Solicitors
Saunders & Co., for the Plaintiff
Wolfe Stone as Agents for McKinnon & Co., Hamilton for the First Defendants