

[1] The plaintiffs and the defendant are the sons and only children of Jan and Natalie Pabirowski. Jan Pabirowski died on 15 June 1986 and Natalie Pabirowski died on 10 October 2007.

[2] Under the Will of Jan Pabirowski his surviving widow Natalie received a life interest in the estate with the residue being paid to the defendant, subject to a legacy to the plaintiffs of \$20,000. Under the Will of Natalie Pabirowski, subject to payment of \$5,000 to each of the plaintiffs, the balance of her estate went to the defendant.

[3] Following Natalie's death in October 2007 the plaintiffs gave notice of intention to apply for further provision out of her estate under the Family Protection Act 1955. At that time all parties believed that the family farm at Oetzman Road, Towai had been owned by Natalie, the farm property passing to her on Jan's death. A search of the title did not include the words "as executrix" following the description of Natalie on the title to the property as the registered proprietor. However, a historical title search would have revealed the correct position.

[4] On 30 October 2007 the defendant, who was sole executor of Natalie's estate obtained probate. At the time of her death Natalie was the sole executrix of Jan's estate. Consequently, the defendant following Natalie's death became the sole executor of Jan's estate. The estates of both Natalie and Jan were administered through Henderson Reeves Connell Rishworth solicitors of Whangarei. Mr Peter Lynch was the solicitor with that firm who dealt with both estates. On 20 November 2007 the defendant executed a transmission of the farm property at Oetzman Road into his sole name as executor of Natalie's estate. That transmission was duly registered by Mr Peter Lynch on 30 November 2007.

[5] On receiving notice of the plaintiffs intention to claim further provision from Natalie's estate the solicitors for the plaintiffs entered into negotiations with solicitors for the defendant with a view to settling that claim.

[6] On 12 May 2008 Mr Badham, who at that time was acting for the defendant in the defendant's personal capacity, became aware that the farm property was an asset of the estate of the late Jan Pabirowski and was not an asset of the late Natalie Pabirowski. On 13 May 2008 Mr Badham telephoned Sarah O'Donnell of Henderson Reeves and informed her of his discovery. In that conversation, he instructed Sarah O'Donnell to transfer the farm property to the defendant as beneficiary of the estate of the late Jan Pabirowski. However, in the letter he forwarded to Messrs Henderson Reeves Connell and Rishworth on 13 May 2008 following that discussion, he advised that his firm would register a transfer of the property to the defendant as the residuary beneficiary.

[7] On 15 May 2008 Mr Badham telephoned Mr Bell, who was acting for the plaintiffs, and advised Mr Bell of the fact that the farm property did not form part of Natalie Pabirowski's estate but was in fact part of Jan Pabirowski's estate. The farm property has been appraised as being worth about \$1.6 million. The removal of the farm property from the estate of Natalie Pabirowski reduces the value of that estate to just under \$75,000 gross and has a significant impact on any claim by the plaintiffs to further provision out of that estate under the Family Protection Act 1955. Consequently, when he was advised that the farm property did not form part of the estate of Natalie Pabirowski but was in fact part of the estate of the late Jan Pabirowski, Mr Bell advised Mr Badham that he believed a Court would in the circumstances grant leave to bring a claim by the plaintiffs under the Family Protection Act 1955 against the estate of the late Jan Pabirowski out of time.

[8] Mr Bell informed Mr Badham that the plaintiffs were not aware of the contents of their father's Will. Mr Badham pointed out to Mr Bell that the Will concerned was a public document as probate had been granted. He advised Mr Bell he had to do legal work in this area to form an opinion as to how this affected the plaintiff's claim. During the discussion there was reference to an appropriate mediator who could assist the parties in resolving their dispute.

[9] Mr Badham acknowledges that he did not inform Mr Bell on 15 May 2008 of his intention to arrange for the farm to be transferred to the defendant as residual

beneficiary. It is clear from the letter Mr Badham wrote to Henderson Reeves Connell Rishworth on 13 May 2008 that such intention had been formed.

[10] On 23 May 2008 the farm property was transferred into the defendant's name as residual beneficiary. The transfer was executed by the defendant as surviving executor of the Will of the late Jan Pabirowski.

[11] Section 9 of the Family Protection Act deals with time limits on claims under the Act. The relevant part of section 9 provides:

No application in respect of any estate shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made before the expiration of the prescribed period specified in subsection (2) of this section:

Provided that the time for making an application may be extended for a further period by the Court, after hearing such of the parties affected as the Court thinks necessary; and this power shall extend to cases where the time for applying has already expired, including cases where it expired before the commencement of this Act:

Provided also that no such extension shall be granted unless the application for extension is made before the final distribution of the estate, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court [and after every notice (if any) of an intention to make an application has lapsed in accordance with [[subsection (1) of section 48 of the Administration Act 1969]] shall be disturbed by reason of that application or of any order made thereon, and no action shall lie against the administrator by reason of his having made any such distribution.

[12] In this case the prescribed period for the plaintiffs to bring their claim is twelve months from the date of the grant of probate. Probate in the estate of Jan Pabirowski was granted on 1 August 1986. Consequently, the plaintiffs claim to provision out of that estate was out of time, as such claim would have to have been brought by 1 August 1987.

[13] The transfer of the farm property into the defendant's name as beneficiary resulted in a partial distribution of the estate to the defendant. Consequently, under the proviso of section 9 the plaintiffs can no longer make a claim to that farm property. As the farm property appears to be the only remaining asset of the estate of

Jan Pabirowski, the plaintiffs claim to further provision out of that estate has been effectively defeated.

[14] There being no other asset in the estate of Jan Pabirowski to satisfy the plaintiffs entitlement to the \$20,000 legacy, the defendant sought agreement from the plaintiffs to pay that legacy from the defendant's entitlement from the estate of Natalie Pabirowski. The defendant considered payment could not be made from the estate of Natalie Pabirowski without the Plaintiff's consent as they had issued proceedings for further provision out of that estate.

[15] The net result is that the defendant as executor and trustee of the estate of Jan Pabirowski distributed to himself the farm property but did not distribute to the plaintiffs their legacy of \$20,000.

[16] The plaintiffs bring these proceedings against the defendant claiming that as executor of the estate of the late Jan Pabirowski he had a fiduciary duty to them not to take advantage of his position as executor to make a distribution to himself whilst negotiations were on foot to settle their claims under the Family Protection Act 1955. They also bring a claim against the defendant for payment of the \$20,000 legacy which is payable to them in terms of the Will of Jan Pabirowski.

[17] The defendant denies being in breach of any fiduciary duty to the plaintiffs. Following the issue of these proceedings he paid the \$20,000 legacies. The plaintiffs are seeking interest. Their claim to interest is being opposed by the defendant.

[18] The defendant now seeks to strike out the plaintiffs claim based on breach of fiduciary duty claiming that the facts as pleaded do not establish any breach of such duty. The plaintiffs apply for summary judgment as to liability. If summary judgment should be entered as to liability they seek an adjournment to a hearing for the purposes of assessing damages, being the amount they would have received had they been able to bring proceedings under the Family Protection Act 1955.

Case for defendants in support of application to strike out claim and in opposition to application by plaintiffs for summary judgment

[19] Counsel for the defendant claims that the transmission of the farm property into the defendant's name in November 2007 resulted in a distribution of that asset to the defendant, relying on decisions such as *Re Heberley* [1971] NZLR 325. In that case the Court of Appeal held a transfer of a mortgage to an executor in circumstances where there was agreement for the executor to receive the mortgage in satisfaction of all claims in the estate resulted in a distribution of that mortgage to the executor. In coming to that conclusion Turner J at page 333, line 44 states:

Once an executor-trustee has effectively assented to his own devise or legacy and has finally conveyed to all other beneficiaries everything appropriated to any of them under the transaction in which the assent is given, in my opinion he is *functus officio* as trustee of the property affected by the trust, and the beneficial and legal estates of the property appropriated to himself vest completely in him. A man cannot be trustee for himself alone. He may be trustee for himself with others, but once his duties to those others have been finally and completely discharged, and he is left with no obligations under the trust but to himself, that trust disappears – Lewin on Trusts 16th ed 4; *Re Cook, Beck v Grant* [1948] Ch 212; [1948] 1 All ER 231; *Re Annett* (*supra*).

[20] In the circumstances of this case it is contended that the defendant, as both executor and beneficiary in respect of the farm property, was not in breach of any fiduciary duty to the plaintiffs by effecting a transfer of that property into his sole name on 23 May 2008. The defendant accepts that the duty on him as executor is not to deliberately provide misleading information as to the value of the estate following *MacKenzie v MacKenzie* (1998) 16 FRNZ 487, but he contends his duty did not extend to a duty not to distribute an estate if the defendant knew of the existence of a possible claim. In this respect counsel relied on the following extract from the decision in *Re Stewart* [2003] 1 NZLR, 809 at page 824:

[63] As a matter of semantics a proscriptive duty expressed in terms of an obligation not to distribute an estate if the executors knew of the existence of possible claimants would, in practical terms, operate to impose a prescriptive duty to advise those persons prior to distribution.

[64] As I have already indicated, I have a clear view that it would be desirable in the public interest, and consistent with the objects of the Act, for executors to be under such a positive duty, be it expressed prescriptively or proscriptively.

[65] In the final analysis I have concluded, reluctantly, that regard must be paid to the fact that no such general duty is provided for in the Act which confines any such obligation to persons under a disability. This being the case, and putting aside my own inclinations as to what should be the law, I have further concluded that the duty of even-handedness imposed on executors does extend to the class of persons which included the plaintiffs, but that duty cannot be expressed as going beyond a proscriptive duty not to conceal the fact of death from any such persons.

[21] It is submitted the defendant has complied with his duty to promptly inform the plaintiffs of all relevant information to enable the plaintiffs' solicitors to provide appropriate legal advice. In particular, the defendant's solicitor advised the plaintiffs' solicitors of the true position relating to the farm property as soon as that position was known to the defendant's solicitor. The plaintiffs' solicitor therefore was in possession of sufficient information and did have sufficient time to bring an application for leave to apply out of time for further provision out of the estate. There was it is submitted no obligation on the defendant to inform the plaintiffs' solicitors of the defendant's intention to proceed immediately with the distribution of the farm into the defendant's sole name.

[22] If, however, the Court concludes that there has been a breach of fiduciary duty by the defendant, then the defendant seeks relief under section 73 Trustee Act 1956 relieving him personally from liability for any breach of trust on the ground that he has acted honestly and reasonably and ought fairly to be excused for the breach of trust.

[23] The defendant had to concede that if reliance was to be placed on s 73 Trustee Act 1956 it would be completely inappropriate for the Court to strike out the plaintiff's claim for breach of trust. It was also acknowledged that if there was a breach of trust it would be very difficult for the defendant who has benefited from the breach, to be able to rely on s 73 to relieve him from personal liability.

Case for plaintiffs

[24] The plaintiffs submit that the transmission in November 2007 did not effect a transfer of the farm property to the defendant as a beneficiary because the defendant had an obligation to pay the legacy of \$20,000 to the plaintiffs before there could be

a final distribution of the estate. In this respect the plaintiff relies on s 25(a) Administration Act 1969 which provides:

“Subject to the provisions of this Act, the administrator shall hold-

- a) The estate of any person who dies or has died either before or after the commencement of this Act leaving a will according to the trusts and dispositions of the will, so far as the will affects that estate:

[25] Consequently the defendant as executor holds the estate of Jan Pabirowski subject to the legacy to the plaintiffs. He cannot evade this responsibility by transferring the farm to himself as residuary beneficiary on the basis that the farm property stands charged with payment of the plaintiff's legacy. The plaintiffs relied on *Re: Parry (deceased); Parry v Parry*, HC AK, M.791/97, 20 October 1997 decision of Potter J. In that case a house at Red Beach was subject to a charge in favour of the Social Welfare Department. The defendant claimed the estate was fully distributed when he took title as executor under a transmission. It was held that the estate had not been fully distributed because of the debt to the Social Welfare Department. The defendant as executor was required to meet that debt. It is therefore submitted that in this case the farm has not been distributed because the executor has a responsibility to pay the legacy to the plaintiffs from the assets in the estate.

[26] The plaintiffs submission is consistent with the decision in *Re Heberley* because in the present case the defendant's obligations under the Will have not been discharged. The defendant cannot claim to have no obligations under the trust but to himself because he has obligations to the plaintiffs.

[27] Furthermore, it is submitted that there has in the circumstances of this case been a clear breach of fiduciary duty by the defendant. Reference is made to *Cook v Evatt (No 2)* [1992] 1 NZLR 676 at page 685 where Fisher J emphasised that the existence and scope of fiduciary obligations are not to be determined by attempting to place a case in a preconceived category and then invoking the duties thought to attach to that category, but must be tailored to a particular case after a meticulous examination of its own facts. In the circumstances of this case such examination establishes a fiduciary duty that has been breached.

[28] The circumstances in this case are similar to the situation referred to by Hammond J in *MacKenzie v MacKenzie* pages 493 where he says:

In my view, it has to be the case that there was a relationship between the executrix, and these plaintiffs, of a character which a Court of Equity will protect. If, to take a neutral example, on receipt of an indication of a claim or a possible claim, an executrix abruptly transferred away an estate, it is inconceivable that this Court would not interfere. Whether the relationship is characterised as a “fiduciary” one, or one of “trust and confidence” (to use older Chancery language does not overly concern me; it is clear that the defendant was bound in equity to act other than in the manner she did.

[29] Consequently, there has been a clear breach of fiduciary duty, the defendant can have no defence to the claim, the plaintiff should therefore be entitled to judgment as to liability and the proceedings adjourned for assessment of the damages suffered by the plaintiffs.

Decision

[30] If, when he transferred the farm property to himself as executor under the transmission registered on 20 November 2007, the defendant had also paid the \$20,000 legacies to the plaintiffs as required by the Will of Jan Pabirowski there would have been a distribution of the farm property to the defendant, because he would have discharged his obligations as executor. The summary of the law relied upon by the defendant in *Re Heberley* makes it clear that before an executor trustee can claim beneficial and legal estate of the property he has appropriated completely to himself he must have finally conveyed to all other beneficiaries everything appropriated to any of them under the transaction in which the asset is given. As the defendant had not paid the plaintiffs their legacy when the farm property was transmitted to him the farm property was not distributed at that time.

[31] Counsel for the defendant attempted to persuade me that a transmission of the farm property to the defendant in circumstances where the provision in the Will charged the farm property with payment of the plaintiff’s legacy was a distribution. It was argued that the property was subject to an equitable charge to secure the legacy payable to the plaintiffs.

[32] Assuming that the Will in this case did create an equitable charge over the farm property in favour of the plaintiffs I am still satisfied that the transmission effected before payment of the legacies to the plaintiffs did not effect a distribution of the farm property to the defendant as beneficiary. His obligations under the Will to pay the legacy had not been discharged. When considering the situation where property had been conveyed subject to a charge in favour of the Social Welfare Department Potter J in *Re Parry* states:

In this case, to put it slightly loosely, the defendant is trustee for himself as beneficiary and trustee for the Social Welfare Department which is a creditor of the estate. As executor and trustee the defendant has a statutory obligation and an obligation under the will of the deceased to meet the debts of the estate. Until he does that, he cannot wind up the estate and distribute the net assets available. It seems fundamental to me that the Social Welfare Department has a claim against the estate. It is entitled to pursue the debt, it having crystallized in terms of the charge, on the death of the deceased. Until that charge is satisfied the defendant's duties as executor and trustee have not been completed and he is not in a position to finally distribute the estate.

[33] Consequently, I do not consider the farm property to have been distributed to the defendant on the registration of the transmission in November 2007. It must therefore follow that until registration of the transfer from the defendant as executor to the defendant as beneficial owner on 23 May 2008 the farm property had not been distributed and the plaintiffs could have applied for leave under s 9 Family Protection Act 1955 to bring a claim under that Act for further provision out of the estate of Jan Pabirowski, which included the farm property.

[34] Counsel for the defendant accepted there to be a fiduciary duty arising out of the relationship between the defendant as executor of the estate and the plaintiffs as beneficiaries. It was also accepted that such duty included an obligation on the defendant to act even handedly between himself and the plaintiffs. Clearly, his action in transferring the farm property to himself before paying the plaintiffs' legacy was in breach of the duty to act even handedly. His action placed his own interests ahead of the plaintiffs.

[35] Applying the summary of general fiduciary principles referred to by Fisher J in *Cook v Evatt (No 2)* to which I have referred to earlier in this judgment it is necessary to examine the circumstances of this case carefully to determine whether

the fiduciary obligations of the defendant have been breached. Those circumstances include the following:

- a) At the date of Natalie Pabirowski's death all assumed that the farm property formed part of her estate.
- b) The plaintiffs gave notice of intention to bring proceedings under the Family Protection Act 1955 for further provision out of the estate of Natalie Pabirowski and in fact issued proceedings within time.
- c) It was the understanding of the parties that the major asset of the estate of Natalie Pabirowski was the farm property.
- d) The removal of the farm property from amongst the assets of the estate of Natalie Pabirowski had a dramatic impact on the plaintiffs' claim to further provision out of that estate.
- e) The defendant as executor on becoming aware of the true position that the farm property formed part of the estate of Jan Pabirowski advised the plaintiffs of this fact. At that time the plaintiffs through their counsel advise that the plaintiffs would be bringing a claim to further provision out of the estate of Jan Pabirowski. Having regard to the time limits prescribed by the Family Protection Act 1955 leave would need to be obtained to bring such claim.
- f) It is accepted that when the plaintiffs were advised of the true position relating to the farm property the defendant had decided to proceed with distribution of the farm property to himself as beneficiary. It is a reasonable inference that the main reason in proceeding with the distribution of the farm property to himself before satisfying the plaintiffs' entitlement to legacies was to remove the farm property from being included in the assets of the estate of Jan Pabirowski that could be subject to the plaintiffs' claim for further provision under the Family Protection Act 1955.

- g) At the time the plaintiffs were informed of the true position relating to the farm property the parties were actively engaged in negotiating a settlement of the plaintiffs claim.

[36] The circumstances in this case are equivalent to the example referred to by Hammond J in *MacKenzie v MacKenzie* where he stated “if, to take a neutral example, on receipt of an indication of a claim or a possible claim, an executrix abruptly transferred away an estate it is inconceivable that this Court would not interfere.”

[37] In this case the defendant, on becoming aware of the true position relating to the farm property, abruptly transferred that property to himself as beneficiary, being fully aware of the plaintiffs’ intention to claim further provision out of the estate that included the farm property. In this way the defendant clearly has abused his position as executor by preferring himself over the plaintiffs, not only in arranging for the farm property to be transferred to himself before paying the plaintiffs their legacy, but also abruptly transferring the property, being fully aware of the plaintiffs’ intention to seek further provision.

[38] In the circumstances of this case it is inconceivable that the Court could relieve the defendant from liability by applying s 73 of the Trustee Act 1956, as the defendant has personally benefited substantially from the breach of trust. My findings preclude a conclusion that the defendant acted honestly and reasonably and ought to be excused for the breach of trust, as required by s 73 of the Trustee Act 1956 before relief can be granted to the defendant.

[39] It must follow therefore that the defendant’s application to strike out the plaintiffs’ claim must be dismissed. I conclude that the defendant has no defence to the plaintiffs’ claim based on breach of fiduciary duty and consequently the plaintiffs are entitled to judgment on the issue of liability.

[40] Counsel for the plaintiffs conceded that if the application for summary judgment on the first cause of action arising out of breach of fiduciary duty was successful, then the plaintiffs would seek an adjournment of the application for

interest in respect of the legacies referred to in the second cause of action on the basis that such interest would be a factor to consider in assessing damages arising out of the breach of the fiduciary duty.

[41] In summary, the plaintiffs are entitled to judgment against the defendant as to liability arising out of the first cause of action referred to in the statement of claim. The defendant's application to strike out the plaintiffs claim is dismissed. The proceedings will be adjourned to a further case management conference by telephone to consider further directions relating to the amount to be paid by the defendant by way of damages.

[42] I will reserve costs.

Associate Judge Robinson