

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

CIV-2008-454-389

BETWEEN	KAYE SAUNDERS First Plaintiff
AND	CAROL LATIMER Second Plaintiff
AND	PAULINE BROWN Third Plaintiff
AND	THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED Defendant

Hearing: 15 June 2009

Appearances: G.A. Paine - Counsel for the plaintiffs
T.G.A. Manktelow - Counsel for Defendant
M.B. Ryan - Counsel for applicant C. Guy
T. Cleary - Counsel for applicants The Cancer Society of New Zealand, NZ Society for the Intellectually Handicapped and The NZ Heart Foundation

Judgment: 24 June 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 24 June 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] Before the Court are two applications for further and better particulars of the plaintiffs' statement of claim, and an application for inspection of certain documents.

[2] The applicants in the first application ("the first application") which seeks further and better particulars and certain inspection orders are The NZ Guardian Trust Company Limited, The Cancer Society of New Zealand, New Zealand Society for the Intellectually Handicapped, the New Zealand Heart Foundation and Christine Guy ("Ms. Guy"). The applicant in the second application ("the second application") which seeks further and better particulars is Ms. Guy alone.

[3] All applications are opposed by the plaintiffs.

Background Facts

[4] These proceedings relate to a dispute over the last will of Clarice Barbara Greenbank ("the deceased"), who died at Palmerston North on 20 January 2008. Pursuant to this will, which is dated 14 December 2007, the deceased made bequests of personal property and legacies totalling \$57,000, \$40,000 of which amount was given to Christine Guy, along with a property valued at \$263,000. The residue of the estate of approximately \$640,000 was left in trust for three charities, namely the Heart Foundation, the Cancer Society and the New Zealand Society for the Intellectually Handicapped.

[5] The plaintiffs are three granddaughters of the deceased's husband, William Ferrars Greenbank ("William"), who died on 19 August 2000. They describe themselves as the deceased's "step granddaughters". Pursuant to the will of William, his estate was to be held by his widow, the deceased during her lifetime with the remainder to be left to his great grandsons on her death. William's will did not consider the plaintiffs as beneficiaries. They did not challenge his will.

[6] The plaintiffs have brought claims against the estate of the deceased based on s 3 of the Law Reform (Testamentary Promises) Act 1949, lack of testamentary capacity and undue influence.

[7] In respect of the testamentary promises claim, it is alleged that the deceased made repeated promises that all her estate would be left to the plaintiffs and that accordingly the plaintiffs performed services and duties for the deceased throughout her lifetime. These included foregoing a right to claim for provision from William's estate. They now seek an order pursuant to the Law Reform (Testamentary Promises) Act 1949 vesting the deceased's estate in the plaintiffs.

[8] It is further alleged that, at the time of her last will, the deceased was influenced by Ms Guy into making changes to the will that were unduly generous towards Ms Guy. Ms Guy was the deceased's caregiver for the last five years of her life. It is claimed that her control over the deceased was such that she could not communicate with any other parties except through Ms Guy, and that Ms Guy acted as the deceased's "interpreter" when she was giving instructions concerning her will. The plaintiffs accordingly seek an order that the deceased's will be set aside.

Applications for Further and Better Particulars

[9] The Applications for Further and Better Particulars are brought in reliance upon rules 5.21 and 5.26 High Court Rules. The degree of particularity required will necessarily vary depending on the facts of each individual case: *Commerce Commission v Qantas Airways Ltd* (1992) 5 PRNZ 227 at 230. However, regard must be had to the purpose of pleadings, which is "to define the issues and thereby inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it": *Farrell v Secretary of State* [1980] 1 All ER 166 (HL) at 173.

[10] The relevant legal principles regarding the purpose, and particularisation, of pleadings are uncontroversial. The object of a statement of claim is to "state" the "claim" in each case, so that the Court has sufficient clarity and detail to understand the issues it has to rule on, and the defendant knows the case which is to be met and

is able to prepare for trial: *Price Waterhouse v Fortex Group Limited* CA179/98 30 November 1998 Blanchard, Tipping and McGechan JJ at 18).

[11] Rule 5.26(b) specifically requires that a statement of claim shall give sufficient particulars “of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff’s cause of action”.

[12] In particular, r 5.26 requires that a statement of claim must set out the factual circumstances relied upon giving rise to each cause of action alleged and the relief claimed as a consequence: *McGechan* at HR5.26.03. It is important, however, to distinguish particulars ordered under r 5.21 from interrogatories obtainable under r 8.1. *McGechan* at HR 5.21.04 describes this difference as follows:

“Particulars are matters of pleading, designed to make plain to the opposite party the case to be raised. Interrogatories are sworn statements of fact, procured by the opposite party to assist that party in proving his or her case. The one is pleading; and the other proof.”

[13] Factors which the Courts have viewed as relevant when considering whether further particulars are necessary include:

- a) Has sufficient information been provided to inform the other party of the case they have to meet and to enable them to take steps to respond? *Price Waterhouse v Fortex Group Limited*.
- b) Is there a real risk that the other party may face a trial by ambush if the further particulars are not provided? *Price Waterhouse v Fortex Group Limited*.
- c) Is the request an unreasonable burden or oppressive for the party concerned? *Commerce Commission v Telecom Corporation of New Zealand Ltd & Anor* HC AK CIV-2004-404-1333 21 December 2004 Rodney Hansen J.
- d) And finally and importantly, a request for further particulars can be resisted if the request goes beyond the scope of particulars, and is probing for evidence — *McGechan* at HR5.26.04.

Joint Application for Further and Better Particulars (the first application)

[14] In the first application, the defendant, the charity beneficiaries and Ms. Guy seek further and better particulars regarding the testamentary promises pleading at paragraph 8 of the plaintiff's Second Amended Statement of Claim. Those applicants contend that the particulars sought from the plaintiffs are necessary to give fair notice of this particular cause of action.

[15] Paragraph 8 has been the subject of previous requests for – and attempts at – particularisation. In a notice to the plaintiffs dated 11 September 2008, the defendant sought further particulars concerning a number of allegations made in the plaintiff's initial Statement of Claim filed on 5 June 2008, including paragraph 8. Paragraph 8 contained then, and still contains, the plaintiffs' claim that the deceased made several promises to leave all her estate to the plaintiffs:

“8. That the said CLARICE BARBARA GREENBANK on diverse occasions sometimes together with the said William Ferras Greenbank and in the presence of others promised that all her Estate would be left to the Plaintiffs.”

[16] At the time, the defendant demanded that the plaintiffs specify the dates of these alleged promises and the persons that were present when these promises were said to be made.

[17] In a minute dated 14 October 2008, I expressed concerns over the plaintiffs' testamentary promises pleading and reminded counsel for the plaintiffs of the need to properly inform the defendants of the case they have to meet and the basis upon which the plaintiffs were alleging factual circumstances which gave rise to the alleged cause of action. In doing so I urged the plaintiffs to address these pleading issues in a prompt fashion.

[18] The plaintiffs then filed two further amended statements of claim in January 2009 and February 2009. Paragraph 8 of the Second Amended Statement of Claim now reads as follows:

“8. That the said CLARICE BARBARA GREENBANK on diverse occasions sometimes together with the said William Ferras Greenbank and in the presence of others promised that all her Estate would be left to the Plaintiffs.

In particular at the birthday of William Ferris Greenbank (his 90th) the deceased advised Gwenyth Majorie Greenbank that the deceased would leave her Estate to the Plaintiffs.”

[19] The applicants contend that the reference to “diverse occasions” requires particularisation as it is unclear on which occasions, other than William’s birthday, the deceased is alleged to have promised her estate to the plaintiffs. They therefore seek particularisation of dates and identification of individuals present at these occasions. In response, the plaintiffs refuse to provide this information claiming that the applicants are fully aware of the nature of the claim.

[20] The applicants submit that the particulars sought go to the heart of the plaintiffs’ testamentary promises claim. This claim is governed by s 3 of the Law Reform (Testamentary Promises) Act 1949 and requires the plaintiffs to prove “an express or implied promise by the deceased to reward them for the services or work by making some testamentary provision for the claimant”.

[21] In response, the plaintiffs maintain that it is clear when the promises were “broadly made”. They also advance what I see as a somewhat inconsistent argument that the unspecified “diverse occasions” occurred over a period of many years and throughout the plaintiffs’ lives, and that they could therefore not be expected to specify particular dates.

[22] In the present case it is my view that the plaintiffs’ pleadings in paragraph 8 are insufficient to inform the applicants plainly of the case they have to meet. While I do not think it necessary to require particularisation of all individuals who were present when the promises were made, under the circumstances here I am not satisfied that the plaintiffs are entitled to plead that promises were made “on diverse occasions” without further specifying instances of these occasions.

[23] Unlike *Re Greenfield* [1985] 2 NZLR 662, the present case does not appear to be pleaded on the basis that there was a clear long-standing implication that the estate would go to the plaintiffs. As the pleading in question clearly implies that the deceased’s promises were made on specific occasions, and were not merely the result of an implied understanding between the deceased and the plaintiffs, I consider

it crucial that examples of these occasions be provided. This necessarily includes information on whom the promise was made to and also a broad indication of time, such as the year in which the promise was made.

[24] Should particularisation of the year in which each of the alleged promises was made prove impossible, it is my view that the plaintiffs are at least required to specify as best as they can the timeframe within which the promise was made. I note at this point that inability to give particulars properly required is no excuse: see *Reid v NZ Trotting Conference* [1984] 1 NZLR 8 at 14; *McGechan* at HR5.21.07.

Application for Further and Better Particulars by Ms. Guy (the second application)

[25] I turn now to consider the second application and those parts of the plaintiffs' pleading of which only one of the applicants, namely Ms. Guy, complains. The pleading in question here relates to the plaintiffs' claim that Ms. Guy exerted undue influence over the deceased in the making of her last will.

[26] In her application, Ms. Guy applies for an order that the plaintiffs give further particulars of these allegations of influence in paragraph 14 of the Second Amended Statement of Claim. She contends that the particulars sought are necessary to sufficiently inform the Court and the other parties to this claim of the factual situation upon which the plaintiffs rely to support their allegations of undue influence against her.

[27] Paragraph 14 reads:

“14. That alternatively if the Defendant had capacity she was influenced by Christine Guy into making the changes made in her last Will.

Particulars

- (i) That the control Christine Guy had over the deceased was such that the deceased could not communicate with any other parties except through Christine Guy;
- (ii) That Christine Guy, being present when instructions were given which incorporated her as a principle (sic) beneficiary of the deceased's Will, was able to influence the deceased into making her Will in this way.

- (iii) It is unclear what the deceased may have been saying in terms of Will instructions as the said Christine Guy was “interpreter”.

[28] On this, Ms. Guy applies for particularisation of the following five matters.

Control

[29] Ms. Guy contends that the plaintiffs’ allegation of her control over the deceased in paragraph 14(i) requires particularisation as to the nature and duration of the control, the circumstances in which the control was exercised, and the place or places where the control was exercised. She says that the pleading merely asserts the assumption of control without enabling her to take steps to respond to the allegation.

[30] I take the view that there is little in this contention advanced for Ms. Guy. It is apparent from the nature of the cause of action that the claim of undue control must relate to the period of time leading up to the date of the deceased’s last will. And it is reasonably arguable here that the particulars sought were broadly within the knowledge of Ms. Guy in any event. Moreover, I am satisfied that the allegation as currently stated enables the applicant to provide a pleading in response.

Inability to communicate

[31] Secondly, Ms. Guy contends that the plaintiffs’ allegation in paragraph 14(i) that the deceased could not communicate with any other parties except through Ms. Guy must be amended to specify why and how the deceased was unable to communicate with anyone else. Ms. Guy submits that, because the allegation includes a long period of time in which the deceased clearly communicated with family, friends, medical staff and others, particulars are required as to dates, places and names of the persons the deceased was unable to communicate with. She also notes that this allegation is contradicted in part by the evidence of Mr. Gordon Greenbank, a visitor of the deceased, and by one of her friends, Ms. Jean Whitehead.

[32] Again, it is my view that this request for further particulars is not justified. The application clearly goes beyond the scope of a request for particulars and instead seeks to obtain evidential material showing the nature or extent of the deceased’s inability to communicate with others. I repeat at this point the observation in

McGechan at HR5.26.04 that a request for evidence cannot simply be treated as a request for further particulars.

[33] If the pleading is indeed inconsistent with affidavit evidence or is too widely cast, this may indicate possible weaknesses of the plaintiffs' case, but it is not a ground for an order for further and better particulars.

When instructions were given

[34] Thirdly, Ms. Guy requires specification of paragraph 14(ii), in particular when the instructions were given which incorporated her as a principal beneficiary in the will, and whether anyone else was present. She says that it appears to be accepted by all parties that instructions were given for the preparation of the deceased's last will on more than one occasion, and that she was not present on every such occasion. It is accordingly submitted that particularisation of dates and names is necessary to avoid confusion.

[35] I agree that it may be helpful on the plaintiffs' part to provide an indication of the date on which the deceased gave instructions regarding her will and was thereby allegedly influenced by the applicant. This would serve to ensure that the applicant has sufficient clarity and detail to understand the particular claim of undue influence that is here pleaded and is in turn able to take proper steps in response. An order to this effect is to follow.

Ability to Influence

[36] Fourthly, again with respect to paragraph 14(ii), the applicant asks for further information on how she allegedly influenced the deceased in the making of her will. She says that the issue is how, given the presence of Guardian Trust representatives, she was supposedly able to influence the deceased.

[37] I do not share the applicant's concerns in this instance. The issue of how the applicant was capable of influencing the deceased despite the presence of others appears to me to be a matter of argument that should ordinarily be confined to parties' submissions. I also repeat my comments at [32] and note that, to the extent

the applicant here questions her own ability to influence the deceased, the request would more properly be the subject of an order for interrogatories.

Clarity of instructions

[38] Lastly, Ms. Guy seeks clarification and amendment of paragraph 14(iii) where the plaintiffs appear to allege that she misrepresented the deceased's instructions to others. It is submitted that it should be clarified whether the pleading is an alternative to that in paragraph 14(ii), and that particulars of the alleged misrepresentation should be provided to enable the applicant to be fairly informed of the case they have to meet.

[39] I find that there is merit in the applicant's criticism of this part of the plaintiffs' pleadings. As previously noted, r 5.26 requires the plaintiffs to show the general nature of their claim and to provide the factual circumstances giving rise to it. The applicant is entitled to know whether the allegation in paragraph 14(iii) is one of misrepresentation. Although this particular allegation is clearly implied in the choice of the term "interpreter", it is worded rather awkwardly and creates doubt as to the actual role Ms. Guy is said to have played in the drafting of the will. In this context the plaintiffs may wish to take note that their pleading should be more than simply the minimum which the applicants need so as to be able to plead: *Price Waterhouse v Fortex Group Ltd.*

[40] In summary, I agree with Ms. Guy's application to the extent that it asks the plaintiffs to particularise the date(s) on which the deceased was allegedly influenced by the defendant in giving instructions concerning her will and to clarify the nature of the allegation in paragraph 14(iii). An order to this effect is also to follow.

Discovery

[41] As previously stated, the applicants also seek inspection of certain documents that the plaintiffs have so far refused to disclose. There are three documents in question (documents 13, 17 and 19) all of which were passed to me for consideration at the conclusion of this hearing. Two of these documents, which are specified as numbers 17 and 19 in part 1 of the plaintiffs' list of documents, are described as

“original letter from Kaye Saunders” dated 6 March 2008 and “copy letter from Kaye Saunders to Christine Guy” dated 24 March 2008. These draft letters were apparently never sent.

[42] The plaintiffs claim that these documents are either privileged or not relevant and that they are therefore not obliged to make them available for inspection. It is said that the documents were mistakenly included in the “discoverable” part of the list of documents when they should in fact have been listed under the “privileged” part.

[43] The applicants respond that they are entitled to rely on the plaintiffs’ verified list of documents as being conclusive as to its terms: *Lyell v Kennedy (No 3)* (1884) LR 27 Ch D 1 (CA). The list does not expressly state that documents 17 and 19 are protected by privilege, and neither does the description of the documents indicate a claim of privilege.

[44] This preliminary point can be dealt with quickly by reference to r 8.21 and the commentary provided by *McGechan* at HR8.21.06, which clearly contemplates that any mistakes in a list of documents can be rectified by filing a supplementary list. Regardless of any remaining mistakes, however, the Court retains the ultimate discretion to exclude a privileged document if it considers that it would be prejudicial to allow it in evidence: *National Insurance Co Ltd v Whirlybird Holdings Ltd* [1994] 2 NZLR 513.

[45] Inspection is also sought of document 13 in part 2 of the plaintiffs’ list, which is described as “19/01/06 – OL from L to G Greenbank”. The plaintiffs again claim privilege with respect to this letter, arguing that it is a communication between instructing solicitors and client which commenced this matter.

[46] The applicants note that Mr. Gordon Greenbank is not a party to these proceedings, that the date of the letter pre-dates the death of the deceased by some years, and that therefore the document cannot attract litigation privilege.

[47] In passing I note that the applicants also sought from the plaintiffs inspection of two computer disks and two sets of handwritten notes, all of which have since been provided by the plaintiffs. I therefore do not need to consider these items.

[48] Before addressing the substance of counsel's arguments, it is necessary to briefly set out the relevant principles dealing with orders for disclosure of documents alleged to be privileged. Pursuant to r 8.31, a party may apply to the Court for an order setting aside or modifying a claim to privilege, and the Court may require the document under review to be produced for the purpose of deciding the validity of the claim. That is what has occurred here. As I have noted above, I have been provided with originals of the documents in question.

[49] Claims of privilege can be based on non-litigious legal professional privilege or litigation privilege. The former is provided for in s 54 of the Evidence Act 2006. This confers privilege for communications with legal advisers and provides that a person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was intended to be confidential, and was made in the course of and for the purpose of obtaining or giving professional legal services. Its rationale was expressed in the following way in *A Ltd v Director of the Serious Fraud Office* HC AK CIV-2005-404-6833 28 March 2007:

“[80] ... [T]he right to the law's protection of information prepared for the purpose of seeking and giving legal advice is a fundamental constitutional entitlement. The precept that ignorance of the law is no excuse contains the corollary that access to legal advice must be encouraged. To do so requires that it be protected. That simple principle has been endorsed repeatedly by the highest courts of New Zealand, Australia, Canada and England...”

[50] In my view, there is no doubt here that document 13 constitutes a communication between solicitor and client and should be protected as such. Because the requirements of s 54 are clearly met, I do not need to consider whether this particular communication is also protected by litigation privilege. And in any event the relevance of this document which appears to relate to the earlier estate administration of William must be seriously questioned.

[51] Litigation privilege is conferred by s. 56 of the Evidence Act 2006. This confers privilege for a communication or information that was “made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding”. It belongs to a person who is, or on reasonable grounds contemplates becoming, a party to a proceeding: s 56(2). It is relevant in this context that the privilege applies in respect of information compiled or prepared by the party or the party’s legal adviser.

[52] The rationale behind s. 56 seems to accord with the previous position at common law that litigation privilege seeks to protect:

“the right of a litigant or potential litigant to seek and obtain legal advice on his prospects and the conduct of proceedings under the seal of confidence [and to] the right of such a litigant and his legal adviser to prepare for and conduct his case without, directly or indirectly, revealing the effect of that advice”: *Dinsdale v Commissioner of Inland Revenue* (1997) 2 NZPC 755, referring to *Ventouris v Mountain* [1991] 3 All ER 472 at 476 per Bingham LJ. ”

[53] It is not disputed that Ms. Kaye Saunders, the author of the letters identified as documents 17 and 19, is one of the parties to this proceeding, and that she was the one who prepared the “information” (or the letters). However, the requirement that the letters were prepared for *the dominant purpose* of preparing for an apprehended proceeding poses greater difficulties. While this is unquestionably the case with regard to document 17, a “to whom it may concern” letter, it is unlikely that document 19 being Ms. Saunders’ letter to Ms. Guy can be properly considered to meet this test. On the contrary, it appears that the letter was written with a view to avoiding legal proceedings or at least to determining whether legal proceedings would be necessary. I am thus satisfied that document 19 does not attract litigation privilege.

[54] The plaintiffs also claim that they are not required to make the documents available for inspection because they are not relevant to the proceedings. Relevance is tested by reference to the matters identified in the pleadings, and has been described as follows:

“It seems to me that every document relates to matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words ‘either directly or indirectly’ because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry which may have either of those two consequences”: *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (CA) at 63.

[55] Given the subject-matter of the letter, document 19 must be treated as a document which “may fairly lead [the defendants] to a train of inquiry” and which may enable them to advance their own case or damage that of the plaintiffs. It is clearly relevant to the matters that are pleaded as it sets out the plaintiff’s belief in entitlement under the deceased’s will. As an alternative, it may also become relevant as evidential material concerning the quality of Ms. Guy’s care of the deceased here.

[56] Moreover, the plaintiffs should not have included the documents in the list of documents if they are not relevant in these terms. This was made clear in *M v L* [1999] 1 NZLR 747 at 751:

“There was a suggestion in the present case that there should be no inspection of the counselling notes because they were not relevant, or not sufficiently relevant to qualify at least prima facie for inspection. Whether they are sufficiently relevant when viewed in the light of their confidentiality is a separate and subsequent issue. If it could honestly be said that the notes, or some of them, have no relevance at all for discovery purposes, they should not have been included in the list. In any event, the argument that the documents lacked any possible materiality was unpersuasive.”

[57] I accordingly conclude that documents 13 and 17 are protected by privilege, but that document 19 must be made available for inspection by the defendants. At the hearing counsel for the plaintiffs urged me to restrict any possible disclosure of a document to the defendants’ counsel. In my view, no such limitations are justified as it has not been shown that the document in question, document 19, contains any confidential or sensitive information.

Result

[58] The applicants' joint application for further and better particulars of the testamentary promises claim in paragraph 8 is successful.

[59] Ms. Guy's application for further and better particulars of the undue influence claim in paragraph 14 is only successful in part.

[60] The applicants' joint application for inspection of documents 13, 17 and 19 is successful as to one document only.

[61] Orders are therefore made as follows:

- a) As to further and better particulars of the plaintiffs' claims, within 20 working days of the date of this judgment the plaintiffs are to file and serve more explicit pleadings of their second amended statement of claim to provide the further and better particulars of paragraphs 8 and 14 to the extent specified above.
- b) As to the requests for inspection, within 10 working days of the date of this judgment, the plaintiffs are to produce for inspection to the applicants the letter from Ms Saunders to Ms. Guy being document 19 in the plaintiffs' list of documents.

Costs

[62] Costs are reserved. If counsel are unable to agree between themselves on the question of costs they may file memoranda (sequentially) which are to be referred to me and I will decide the issue based on the material before the Court.

'Associate Judge D.I. Gendall'