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◀ Gordon ▶ v ▶ Attorney-General ▶ HC Auckland CIV 2010-404-3672 [2010] NZHC 1592 (23 August 2010)

Last Updated: 21 September 2010

IN THE HIGH COURT OF NEW ZEALAND AUCKLAND REGISTRY

CIV-2010-404-003672

IN THE MATTER OF the Trustee Act 1956

BETWEEN MARIE JEAN ▶ GORDON ▶, JUDITH ANN SOUSTER AND JULIENNE MARIE HAYWARD

Plaintiffs

AND ▶ ATTORNEY-GENERAL ▶ OF NEW ZEALAND

Defendant

Hearing: 23 August 2010

Counsel: A F Grant for the plaintiffs

K Kelly for the minor and unborn children

No appearance for the defendant

Judgment: 23 August 2010

(ORAL) JUDGMENT OF POTTER J

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▶ GORDON ▶, SOUSTER AND HAYWARD v ▶ ATTORNEY-GENERAL ▶ OF NEW ZEALAND HC AK CIV-

2010-404-003672 23 August 2010

Introduction

[1] The plaintiffs seek two orders from the Court as set out in the statement of claim. They are:

- a) An order pursuant to ss 64 and 64A of the Trustee Act permitting the plaintiffs to sell the property at 36 College Hill, Ponsonby to Lancastergate Holdings Limited and/or nominee for \$760,000;
- b) An order pursuant to ss 64 and 64A of the Trustee Act amending the will (that being the will of the late Charles Henry Alexander Kean ("the deceased") made on 17 July 1998 and a codicil of 21 December

2000) by the inclusion of the following clause:

Clause 8 Trustee's remuneration

Any Trustee or advisory trustee of the Trust, or in the case of a Corporate Trustee, a director of the Corporate Trustee, engaged in any profession, business or trade may act in that capacity in connection with the affairs of the Trust, and such Trustee or advisory trustee of the Trust, may charge and be paid all reasonable and proper charges for all services rendered, business transacted, responsibility involved, time spent and all acts done by that Trustee, advisory trustee, or by any firm or entity of which that Trustee or advisory trustee is a member, employee or associate in connection with the affairs of the Trust.

[2] The **Attorney-General** was named as a defendant. On 29 July 2010 Lang J excused the **Attorney-General** from further attendance. On 17 June 2010 Duffy J made orders for service on the adult beneficiaries and ordered that Mr Paul Collins, a solicitor, be appointed to represent the infant beneficiaries and any beneficiaries yet unborn. All adult beneficiaries have been served pursuant to the directions of the Court. None has filed a statement of defence or objection to the orders sought. Some have written in support. Mr Collins has filed a report. He is represented in Court today by Ms Kelly.

Background

[3] The background to this matter is as follows. The deceased made a will on 17

July 1998 and a codicil on 21 December 2000. He died on 26 April 2001. By the will and codicil the plaintiffs were appointed executors of the estate and trustees of the trust that was established by the will. Probate of the will and codicil was granted to the plaintiffs on 17 July 2001. The deceased left a substantial estate having a value in the vicinity of \$9m. One of the assets is a single storey villa at 36 College Hill, Ponsonby ("the property"). The late Mr Kean brought up his family there and it was his home until he moved to Selwyn Village in the later years of his life.

The will

[4] Clause 5 of the will includes a direction in relation to the property and another asset of the deceased, namely his shares in Hutchinson Bros Ltd. The trustees are directed to retain those assets as part of the residuary estate of the deceased until the date of distribution.

[5] The date of distribution is defined in clause 3 of the will which states:

... the expression "the date of distribution" shall mean the date on which the last surviving of my said daughters JUDITH ANN SOUSTER and MARIE JEAN **GORDON** and my son HENRY WILLIAM KEAN shall die.

[6] Given that the three surviving children of the deceased are now in their 60s it may well be that the date of distribution is not reached for thirty years or more.

[7] Essentially the will divides the residuary estate into four shares. It gives a life interest in a quarter share to each of the deceased's three children with the capital to vest in their children, the grandchildren of the deceased, at the date of distribution. One of the deceased's sons predeceased him so the fourth share is dealt with differently. It is left upon trust for two named grandchildren.

[8] There is a substitutionary provision whereby the issue of grandchildren who die before the distribution date may be substituted for their parents. This gives rise

to a class of infant beneficiaries and potential beneficiaries who are yet unborn. The Court sought to protect the interests of those beneficiaries by appointing Mr Collins to represent their interests.

College Hill, Ponsonby

[9] I shall consider first the order sought in respect of this property. Since the deceased ceased to live at the property a five storey apartment building has been built immediately on its eastern boundary. Since the date of his death a four to five storey building has been built immediately on the southern boundary. The owner of the property on the western boundary is proposing to construct a six storey building on that site and recently gained resource consent for that development. Surrounding developments are harmful to the long term value of the property. 36 College Hill will be denied sun and light as the result of the surrounding structures and will be incongruous in an area which is now given over to multi storey developments.

[10] The owner of the property on the western boundary, that is, No 38 College Hill, is willing to pay \$760,000 for the property and the trustees have entered into an agreement for sale and purchase with that owner.

[11] The adult beneficiaries have all been informed of the proposal to sell the property for \$760,000 and none has indicated any opposition.

[12] Julianne Marie Hayward, one of the trustees and a plaintiff, refers to these matters in her affidavit dated 9 June 2010. She attaches photographs which vividly demonstrate that the development in College Hill has placed the property in the invidious situation of being surrounded by modern multi-storey buildings which will seriously, if not completely, erode any attraction this small 329 square metre (13 perches) site may have as a residential property.

[13] Ms Hayward says that her grandfather, the deceased, was a clever businessman, and the trustees do not think it likely he would have allowed himself to have been locked into a poor investment when new circumstances arose that he had not foreseen which would materially undermine the long term value of the

investment. She says that she thinks it unlikely that the deceased, when he made his will twelve years ago, could have foreseen the way in which development would occur in College Hill, and could not have foreseen that the property would be surrounded by three huge apartment buildings leaving the property with no privacy, no views of the city, no sunlight at the rear of the property and the prospect of having to create light shafts to bring light into the house.

[14] In her second affidavit dated 16 July 2010, Ms Hayward advises that resource consent for the proposed development at 38 College Hill, to which the trustees had lodged an objection, has been granted. Once this development is completed the property will be surrounded on three of its four sides by multi-storey apartment buildings.

[15] However, the trustees have negotiated an agreement to sell the property to the developer of No 38 to Lancastergate Holdings Limited at a price of \$760,000. The agreement is conditional on this Court's consent to the sale. It provides for settlement six calendar months after that condition is satisfied with provision for the purchasers to bring forward the settlement date. The agreement was also made conditional on the trustees withdrawing their objection to the developers' resource consent application but this provision has been overtaken by the consent having now been granted.

[16] A valuation of the property by Mr R G Hawkes of Telfer Young dated 23

March 2010 values the property "as is" at \$660,000 and, assuming completion of the proposed development at No 38 College Hill, at \$594,000. It can thus be seen that the purchase price the trustees have been able to negotiate with Lancastergate Holdings Limited exceeds appreciably the current value, and significantly the likely future value of the property.

[17] The property is currently generating rental income which is expended in meeting outgoings on the property including repairs and maintenance.

[18] The trustees have taken advice from JMIS Limited (Jarden Morgan

Investment Services) concerning investment of the sale proceeds of the property and

propose reinvestment in property trusts in New Zealand and Australia to retain investment in real estate, to provide a measure of diversification, and to provide an acceptable level of income return as well as long term capital growth.

Trustee's remuneration

[19] The other order sought from the Court by the trustees is to allow a trustee who is a professional person to be paid for his/her services in administering the trust. As Mr Grant states in his submissions, it can be assumed from the fact that none of the beneficiaries opposed this application that they all recognise it is expedient that the trustees should be able to enter into a transaction with a professional person whereby that person can be appointed by the trustees and be able to charge for his/her services. He submits that the merits of the application are self evident. Ms Hayward, I understand, is an accountant well experienced in business matters and able to provide the trustees with many of the services they require.

The law

[20] The application is brought under ss 64 and 64A of the Trustee Act 1956 which relevantly provide:

64 Power of Court to authorise dealings with trust property

(1) Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the Court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, ...

provided that, notwithstanding anything to the contrary in the instrument (if any) creating the trust, the Court, in proceedings in which all trustees and persons who are or may be interested are

parties or are represented or consent to the other, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.

64A Power of Court to authorise variations of trust

(1) Without limiting any other powers of the Court, it is here declared that where any property is held on trusts arising under any will, ... of any person ... the Court may if it thinks fit by order approve on behalf of –

(a) any person having, directly or indirectly an interest, whether vested or contingent, under the trusts who by reason of infancy or other capacity is incapable of assenting; or

...

(c) any unborn or unknown person; or

...

any arrangement (by whomsoever proposed, and whether or not

there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts: provided that, ... the Court shall not approve any arrangement on behalf of any person if the arrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs: ...

(2) Any rearrangement approved by the Court under subsection (1) shall be binding on all persons on whose behalf it is so approved, and thereafter the trusts as so rearranged shall take effect accordingly.

...

[21] The application of ss 64 and 64A has been considered in *Re Lyell*

(deceased), [1] *Winter v Attorney-General*, [2] *Re Greenwood* [3] and *McKnight & Ors v Craig*. [4]

[22] In *Re Lyell* Beattie J explained the difference between the two provisions in s 64 and s 64A. He said: [5]

The position ... is that pursuant to s 64 the court has a supervisory function whereby it can enlarge on the inadequate powers of administration and management as contrasted with s 64A where the court is empowered to act as a statutory agent to vary beneficial interests.

[23] Mr Grant submits that both orders sought would fall with the Court's jurisdiction under s 64 but they also fall within the jurisdiction of the Court under s 64A. It has to be arguable whether the order relating to trustee's remuneration would qualify as an "other disposition" or "other transaction" within the meaning of s 64, but I accept there is jurisdiction for both orders under one or both of s 64 and s 64A.

[24] In *Re Greenwood* there was no power to sell a farm which was subject to trusts in a will. The capital was unlikely to vest for forty years or more and the farm was showing a very poor return. Tipping J said:[6]

Section 64 gives the Court power, where in its opinion any sale is expedient in the management or administration of any property vested in a trustee or would be in the best interests of the persons beneficially interested under the trust, and where the same cannot be effected by reason of the absence of any power for that purpose, by order to confer upon the trustee the necessary power, subject, if necessary, to conditions and other necessary consequential directions. The section expressly contemplates a sale where there is the absence of a power of sale and indeed, because of the proviso, a sale contrary to the trust instrument. Even that may be authorised in appropriate proceedings, where all concerned are represented or consent.

[25] That of course is the situation here where the power of sale or the order for sale sought is contrary to a direction in the trust instrument. But all adult beneficiaries have been served and do not oppose and the minor and unborn beneficiaries are represented.

[26] In *Re Greenwood* Tipping J concluded that he was prepared to approve on behalf of the infant beneficiaries the arrangement proposed by the trustees whereby they should be given power to sell the farm.

[27] In *McKnight* French J distilled a number of principles from the three previous judgments as follows:[7]

- (i) The power to approve a variation is discretionary.
- (ii) The Court may consider any proposal which varies or revokes any or all of the trusts or a proposal which enlarges the powers of the trustees in managing or administering the property subject to the trust.
- (iii) The discretion is exercised in the interests of the person on whose behalf the Court is asked to approve the variation and from their point of view. The Court should therefore ask itself whether the person would have given approval if that person were alive, of full capacity and properly advised.
- (iv) The Court can approve a scheme which conflicts with the intentions of the settlor but shall not do so lightly.
- (v) The Court considers the trust provisions afresh if circumstances have arisen which were not foreseen or may not have been foreseeable at the time the trust was established.
- (vi) The Court cannot approve an arrangement to the detriment of any person on whose behalf the Court is giving consent.
- (vii) But the Court is to take a wide approach to benefits and detriments in arrangements and must consider the arrangements as a whole in a practical and businesslike way. Indirect and intangible benefits and detriments are relevant including the welfare and honour of the family.
- (viii) Difficulties may be met by amendments to the proposal or covenants by persons benefiting to

make good losses to the disadvantage of other beneficiaries.

(ix) An order approving a proposed variation may be conditional.

Mr Collins' report

[28] Mr Collins, counsel for the minor and unborn beneficiaries, has filed a comprehensive report dated 13 August 2010. He has annexed to it a helpful family tree listing the children, grandchildren and great grandchildren of the deceased and also recording the category of unborn grandchildren. The ages of the minor beneficiaries range from adult to four months. Mr Collins notes that any benefit the great grandchildren may receive under the will is contingent upon:

a) That child's parent dying before the date of distribution; and b) That child:

i) being alive at the date of distribution; and

ii) having attained the age of twenty years as at that date.

[29] Mr Collins has interviewed the beneficiary parents of all the contingent great grandchildren except for the mother of Elias Kean who is aged eight, with whom he was unable to make contact. He concludes:

As a result of the inquiries I have described in this report, I believe that the variations sought by the plaintiffs are in the best interests of the minor great- grandchildren (and any unborn great-grandchild beneficiaries), and that there is no basis upon which the application should reasonably be opposed on behalf of those parties.

In my capacity as Court appointed counsel for the minor and unborn great- grandchildren, I express the opinion that the proposed variations are in the interests of those parties and I therefore support the application.

Conclusions

[30] The evidence and arguments advanced satisfy me that the sale of the property is expedient in the management and administration of the assets of the trust, and not to the detriment of the persons beneficially interested whether vested in possession or contingently under the trust.

[31] I am also satisfied that an enlargement of the powers of the trustees, to include provision for a trustee acting in a professional or business capacity on behalf of the trust to charge and be paid reasonable and proper charges for services rendered to the trust, is expedient in the management and administration of the assets of the trust, and not to the detriment of persons beneficially interested under the trust.

[32] Whereas adult beneficiaries may themselves consent to variations of trusts in appropriate circumstances, minors and unborn beneficiaries cannot. It is therefore the role of the Court in an application under ss 64 and 64A to approve arrangements where the Court considers it appropriate so to do.

[33] In the circumstances of this case, which have been admirably presented to the

Court in the affidavits of Ms Hayward, the report of Mr Collins and the submissions

of Mr Grant, I am prepared to approve on behalf of the infant and unborn beneficiaries the arrangements proposed by the trustees and to make the orders sought.

[34] In reaching that conclusion I take into account that the sale of the property is contrary to the intention of Mr Kean as expressed in his will. But I consider it most unlikely, that being the astute businessman and investor he clearly was, confronted with the rapid changes that have occurred in the Auckland central business district, and in particular the nature of the development that has spread apace westwards along College Hill, he would have elected to continue to own a property for which the traditional use has been overtaken, and which is seriously at risk of diminishing in value in the short and medium term, possibly significantly. I would expect that Mr Kean would have opted for the trusts to benefit from the offer to purchase the property which the trustees have been able to negotiate.

Result

[35] For those reasons there will be orders in terms of clauses A and B in the statement of claim as set out in [1].

[36] The proper and reasonable costs of this proceeding are to be a charge to the estate.

[1] *Re Lyell (deceased)* [1977] 1 NZLR 713 (SC).

[2] *Winter v Attorney-General* HC Auckland CP609-IM01, 7 December 2001.

[3] *Re Greenwood* [1988] 1 NZLR 197 (HC).

[4] *McKnight & Ors v Craig* HC Dunedin CIV-2009-412-919, 22 June 2010.

[5] At 716.

[6] At 218.

[7] At [8].