Privy Council Appeal No. 54 of 1940

The Guardian Trust and Executors Company of New Zealand Limited – – – – – – – *Appellant*

v.

The Public Trustee of the Dominion of New Zealand – – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1942

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT SIMON)
LORD THANKERTON
LORD ROMER
LORD JUSTICE CLAUSON

[*Delivered by* LORD ROMER]

Miss Elizabeth Smith, of Christchurch, New Zealand, died on the 9th July, 1935, having made a will on the 8th June, 1934, whereby she appointed as her executors the appellants, to whom probate in common form was granted on the 19th July, 1935. On the 3rd April, 1936, proceedings were instituted by two of the next of kin of the deceased for revocation of probate on the ground of her want of testamentary capacity. The proceedings were successful, and by order of the Court dated the 17th December, 1936, probate was recalled. The deceased had made no other will, and on the 19th April, 1937, letters of administration were granted to the respondent. In the meantime the executors had paid out of Miss Smith's estate sums amounting in all to £8,450 in respect of pecuniary legacies which she had purported to give by her will to certain persons and institutions not being persons entitled to share in her estate on an intestacy. The question accordingly arose whether, having regard to the circumstances in which such payments were made, and which are hereinafter described, the executors were liable to refund the £8,450 to the respondent as administrator of Miss Smith's estate. This question was answered in the negative by Northcroft J., but his decision was reversed by the Court of Appeal (Myers C.J., Smith J. and Fair J., Ostler J. dissenting), and from such reversal the executors now appeal to His Majesty in Council.

The history of the case may be said to have begun with the death of Miss Smith's unmarried brother in the year 1923. The appellants were his executors and in this way got into touch with Miss Smith who had benefited to the extent of some £20,000 under his will. The brother and sister had lived in the same house at Christchurch where various nephews and nieces would seem to have stayed with them during his lifetime. But after his death their visits gradually became less frequent and Miss Smith had lived alone for a number of years preceding her death. She was a woman without any knowledge of or aptitude for business, but Mr. Harris, who was the appellants' manager at Christchurch and had frequently seen her in connection with the winding up of her brother's affairs, had kept in touch with her and was able to advise her to some extent about her own.

But she was a person who would easily fall a victim to the blandishments of the fraternity of fraudulent share pushers and in 1933 Mr. Harris discovered that she was in their toils. He came to her assistance and appears for a time to have succeeded in his efforts on her behalf. It was plain to him however that she needed to be protected from herself and he persuaded her to execute a power of attorney in favour of his employers the appellants. This did not, however, succeed altogether in its object. Mr. Harris found that Miss Smith was still being victimised and he reported the circumstances to Mr. Ward, the general manager of the appellants, whose headquarters are at Auckland. Correspondence between these two gentlemen ensued and in the end and with the concurrence of certain of her relatives a petition under the Aged and Infirm Persons Protection Act, 1912, was presented by the appellants asking that a protection order might be made appointing the appellants managers of the estate of the lady who, at this time, was of the age of 79 or thereabouts. On the 14th December, 1933, a protection order as asked by the petition was made, and on the same day Mr. Harris wrote to Mr. Ward a letter as follows:—

> " I was pleased to wire you to-day that we have come to the end of our troubles in connection with Miss Smith's affairs by getting the Court Order. . . . Miss Smith called on me yesterday and I am pleased to say that I was able, without any trouble, to get her to see the wisdom of the Court proceedings being completed. She is now quite resigned to allowing us to handle everything and I only hope that we will be able to do something towards restoring her finances."

Subsequent events showed that this hope was abundantly justified, but Mr. Harris was sadly mistaken in thinking that he and the appellants had come to the end of their troubles in connection with the old lady's affairs. For only about three months after the making of the protection order Mr. Harris conceived an idea that led eventually to their being involved in a great deal of trouble, which culminated in the present proceedings. The idea was that Miss Smith should make a will, and he informed Mr. Ward of the idea in a letter to that gentleman of the 16th March, 1934. " I will now make an endeavour," he wrote, " to get Miss Smith to a proper state of mind for the making of a will." He certainly got her to make a will, but it was beyond his powers to get her into a proper state of mind to do so, and as has already been said probate of the will was eventually recalled on the ground that at the time of making it the lady had not the requisite testamentary capacity. It is unnecessary to detail the steps taken by Mr. Harris to procure the making of the will. They were carefully considered by Northcroft J., who tried the action for the recall of the probate, and the following extracts from his judgment in that case show the view that he took of Mr. Harris's activities: " It is proper to say that he does appear in this matter as in all others relating to Miss Smith, to have been moved by a genuine desire to assist one whose infirmities had enlisted his sympathies." And a little later: " I am satisfied that although his action was mistaken and arose from inexperience Mr. Harris acted genuinely in the best interests of the testatrix as he judged them." These views of his found practical expression in his order that the costs of the present appellants of those proceedings should be paid out of the estate as between solicitor and client. And there their Lordships are content to leave it. Nor is it necessary to state in any detail the provisions of the will. It is sufficient to say that she gave pecuniary legacies amounting to a little over £12,000 to various persons and institutions amongst whom were included several persons entitled to a share in her estate on an intestacy, and bequeathed the residue of her estate to the appellants upon certain charitable trusts. As has already been stated she appointed the appellants her executors.

The events that took place after her death must, however, be stated in some detail.

On the very same day as that on which the appellants obtained probate, viz., on the 19th July, 1935, Mr. Harris wrote to Mr. Ward as follows: " I have heard it rumoured that some of the relations are not too pleased with the will and there has been some talk of contesting it, but on reflection

I am sure that they will realise their folly." On the next day he is found writing to a Mr. Thomas, a solicitor whom he had employed in connection with the preparation of the will, in the following terms:—

> " I had an informal talk with McKay a Solicitor of the office of Stanton of this city and he mentioned that Miss Pyne one of the beneficiaries of Miss Smith, had consulted them as regards the Will. Apparently she is getting in touch with the other relatives to see if they will join in taking steps to have the Will upset. . . . The question of testamentary capacity was mentioned, but I ridiculed any suggestion that she was lacking in this respect."

On the 25th July, 1935, Mr. Ward, writing to Mr. Harris, said in connection with the question of the will being contested: " I understand that Miss Pyne is pressing the matter somewhat and the solicitors are now looking into the matter of testamentary capacity. Personally I think that they would have great difficulty in upsetting it on this account." On the 9th August, 1935, Mr. Harris wrote to Mr. Ward that he understood that Miss Pyne was not taking any action as regards upsetting the will but that a Mrs. Dando and a Mrs. Cookson were interesting themselves in the matter. It was this Mrs. Cookson who was subsequently one of the plaintiffs in the action brought for revocation of the grant of probate. Now, however firmly Mr. Ward and Mr. Harris may have believed that Miss Smith was possessed of full testamentary capacity when she executed the will, these letters show that after her death they had been given ample warning that others who were interested in the matter took a different view. Having regard to the lady's history it is plain that such warning could not be disregarded and that until the question of testamentary capacity had been settled in favour of the will payment by the appellants of the legacies could only be made at their peril. That this was fully appreciated by Mr. Ward and the directors of the appellants is made manifest by two letters written by Mr. Ward to Mr. Harris on the 15th and the 16th October, 1935, respectively. In the first of these Mr. Ward writes:—

> " The Solicitor who is acting for some of the beneficiaries mentioned to me casually the other night that they propose to take proceedings with a view to upsetting the Will. I am rather inclined to think that those moving in the matter are the Dandos, but I have no confirmation of this. I have also heard from another source that some of the beneficiaries were proposing to take proceedings on the grounds that The Guardian Company had practically coerced this woman into making her Will.
>
> " In view of the possibility of proceedings we consider it would be unwise to make any payment to the legatees, because there is just the chance if the Will was upset that they may not turn out to be the actual next-of-kin who are entitled and if payment were made of the legacies inside the Executor's year we would possibly be under some liability."

In the second letter paragraphs (2) and (3) are as follows:—

> " (2) With regard to a possible distribution, the Board have decided that in view of information we have received indirectly it is anticipated that proceedings will be instituted to attack the Will.
>
> " (3) Consequently it would be inadvisable for us to pay the legacies in case the provisions of the Will are upset and if this is so of course there would be an intestacy. . . ."

These letters suggest that Mr. Ward and his directors may not have been unmindful of what befell another executor who paid the legacies given by a will that was afterwards declared to be invalid, and whose sad story was told by him to Sam Weller when they were fellow inmates of the Fleet prison. (All of which may be found reported in Chapter XLIV of the *Pickwick Papers*.) But however this may be it may well be asked in view of the letters why the appellants nevertheless paid all the legacies. The answer to that question is to be found in paragraphs (4) and (5) of the letter last quoted. They are as follows:—

> " (4) Therefore, under the circumstances, the Board considered it advisable that an Order under S. 74 of " The Trustee Act " should be obtained, and, after expiration of the time allowed by the Court, if no further claims are made, the legacies should be paid out.
>
> " (5) We should be pleased if you would instruct the Estate Solicitors to prepare the necessary petition for execution by the Board as soon as possible."

The section of the Trustee Act, 1908, to which the letter refers is in these terms:—

> (1) " Where an executor or an administrator has given such notices as a Judge, upon application by petition to him, directs for creditors and others to send in to the executors or administrators their claims against the estate of the testator or intestate, such executors or administrators, at the expiration of the time named in such notices or the last of the said notices for sending in such claims, may distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto having regard to the claims of which such executors or administrators have then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claims such executors or administrators have not had notice at the time of distribution of the said assets, or a part thereof, as the case may be.
>
> (2) " But nothing in this Act shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the persons who have received the same respectively."

How anyone could have persuaded himself that this section was going to enable the appellants to pay the legacies with safety it is difficult to understand. It would appear, however, that Mr. Ward and the board reasoned amongst themselves somewhat as follows: " In the case of *Newton* v. *Sherry*, 1 C.P.D. 246, the Court of Appeal in England decided that the words ' and others ' in the 29th section of Lord St. Leonards Act, which corresponded with section 74 of our Trustee Act, included next of kin. If therefore we issue notices under section 74 and at the expiration of the time named in such notices no claims have been sent in by any of the next of kin, we can safely pay the legacies." But such reasoning is based upon a complete misapprehension of the object and effect of the section and of the decision in *Newton* v. *Sherrey*. That (as one might have guessed) was a case of an intestacy. In such a case it is of course essential that the administrator should be protected from the claims of unknown next of kin as much as from the claims of unknown creditors. The decision has no bearing upon a case like the present except for the observations made by Lindley L.J. as to the object and effect of section 29 of Lord St. Leonards Act. As regards the object he said it was to enable the executor or administrator to " administer the estate without the expense and delay of a Chancery suit." As to its effect he said this: " If proper advertisements are issued for creditors and others to come in and substantiate their claims the executor or administrator is not liable for parting with the assets in a due course of administration amongst those of whose claims he has notice." It is plain from this, as indeed it is from the language of the section itself, that the only persons who are to be affected by the notices are those whose claims against the estate are to be met by the executor or administrator as the case may be in a due course of administration, and not persons whose claims are that the executor or administrator has no right to administer the estate at all. It is probable that neither Mr. Ward nor any one of his directors addressed his mind to the question of what the appellants would have done if in pursuance of the notices one of the next of kin had sent in a claim that the will was invalid. If that had happened and the construction put upon the section by Mr. Ward and his directors were to prevail, the appellants at the expiration of the time named in the notice would have been entitled, in the words of the section, to distribute the assets of Miss Smith amongst the parties entitled thereto having regard to the claims of which they then had notice. A construction that can lead to so absurd a result is plainly wrong.

The petition was nevertheless presented to the Court and an order was made thereon on the 10th December, 1935. In due course notices were published as directed by the order requiring all " creditors and other persons " having claims against the estate of Miss Smith to send in such claims to the appellants " together with written particulars thereof " on or before the 31st January, 1936. The notices stated that after such date the executors proposed to distribute the assets amongst the parties entitled thereto having regard to the claims of which they should have then received notice.

As might have been expected none of the next of kin sent in a claim in pursuance of the notices, but the solicitors acting for some of them had

seen the notices and upon the 18th December, 1935, wrote to Mr. Harris as follows:—

> We have been consulted by certain of the next-of-kin of the late Miss Elizabeth Smith with a view of taking proceedings for the revocation of the probate granted to your Company in July last, on the ground of the lack of testamentary capacity on the part of the testatrix. At present certain enquiries are being made and Counsel's opinion is being taken, but it will not be available until after the legal vacation.
>
> Our attention has been drawn to an advertisement in the Christchurch " Press " on the 14th inst. as to your intention to distribute the estate after the 31st January next. At the present time we desire merely to notify you that the question of taking proceedings for the revocation of probate is under consideration and that a definite decision will be arrived at in the matter before the end of January next, and as soon as this is done we shall advise you of the course it is proposed to take.
>
> We would be glad to have an acknowledgment of this letter.
>
> Yours faithfully,
>
> O'DONNELL & CLEARY,
>
> p. T. P. Cleary.

A formal acknowledgment of the receipt of this letter was sent to Messrs. O'Donnell and Cleary, but otherwise no notice was taken of it by the appellants who, on various dates between the 14th and the 20th February, 1936, and without any further communication to those gentlemen proceeded to send out cheques in payment of the legacies the subject matter of the present appeal. On the 20th February, 1936, Messrs. O'Donnell and Cleary wrote a further letter to Mr. Harris stating that they had by then received instructions to take proceedings for the revocation of the probate granted to the appellants and that such proceedings would be issued shortly. They were informed in reply that " distribution in the estate has been made."

The proceedings referred to having been taken with the result which has already been stated, the present action was instituted on the 22nd December, 1937, by the respondent against the appellants for the purpose of recovering for the benefit of the next of kin the £8,450 and interest. By his amended statement of claim the respondent alleged amongst other things that at the time or times when the cheques for this sum were issued the appellants had notice (1) that certain of the next of kin of the deceased claimed that at the date of the execution by her of the will she was not of testamentary capacity, (2) that certain of the next of kin intended to take or contemplated taking proceedings on that ground for the revocation of the probate granted to the appellants and had consulted solicitors with a view to the institution of the said proceedings. That the appellants did have such notice in fact is plain from what has already been stated. The question to be decided is whether they are by reason thereof liable to make good the said sum to Miss Smith's estate.

There does not appear to be any statute in force in New Zealand that governs the case. It falls therefore to be decided in accordance with the well established principles of equity. One of those principles is that if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is or may be claimed by A he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded. This principle has indeed been recognised by the New Zealand legislature in dealing with cases that are closely akin to the present one. By section 26 of the Administration Act, 1908, it is provided that an administrator acting under the provisions of the Act who makes any payment or does any act bonâ fide under or in pursuance of the administration shall not be liable for the sums so paid or the acts so done by reason of the existence of any will of the deceased owner (where the administrator acts under letters of administration without will annexed), or of any will other than that of which administration has been granted (where he acts under probate or under letters of administration with will annexed)—but then follow these words: " if the existence of such first mentioned will or such other will, as the case may be, was unknown to him at the time of making such payment or doing such act." It follows that if he knew of such a will at the time, he would be liable for making

the payment or doing the act. In the present case, apart altogether from what they had previously heard, the information conveyed to the appellants by the letter of the 18th December, 1935, from Messrs. O'Donnell and Cleary was of such a nature that no reasonable man should have disregarded it. The appellants should on its receipt at least have applied to the Court for directions, and, if the facts and circumstances had been placed before it, the Court would certainly have refused to sanction any payment to the legatees for the time being, even though the 31st January, 1936, had passed without anything further having been heard from those solicitors. It is, indeed, quite plain that the appellants themselves would not have paid the legacies in disregard of the information contained in the letter had they not misunderstood the meaning and effect of section 74 of the Trustee Act, 1908. As it is, the section and their proceedings under it can avail them nothing and they have no effective answer to the claim of the respondent.

The action was nevertheless dismissed by Northcroft J. because he was satisfied that the appellants at all material times believed that Miss Smith had testamentary capacity, and that they had acted throughout with perfect honesty. But with all respect to the learned judge the question is not whether the appellants acted honestly in disregarding the information that they had received. A trustee who has received information of a charge upon the interest of his cestuique trust in favour of a third party is not entitled to disregard it merely because he honestly believes the charge to be invalid. Nor can an executor who has information of the existence of a later will act in disregard of such information merely because he honestly believes that his testator was not at the time of making it of testamentary capacity. In all such cases, as in the present one, the question is whether the person acting in a fiduciary capacity has had notice of the claim and not whether he formed a favourable or unfavourable view as to the prospect of the claim succeeding. In their Lordships' opinion the appellants had ample notice of the claims of the next of kin in the present case before they paid the legacies and it follows that in their opinion the Court of Appeal were right in reversing the order of Northcroft J. In the course of his judgment in that Court, after a review of the facts of the case, Myers C.J. said that he could come to no other conclusion than that the payments to the legatees were made with knowledge and notice on the part of the respondents of facts and circumstances which should have made it plain to any ordinary reasonable and prudent man of business that the payments should not have been made.

With this conclusion of the learned Chief Justice their Lordships find themselves in complete agreement.

One further point should be mentioned. It was urged on behalf of the appellants that the equitable principle to which their Lordships have referred has no application to the present case inasmuch as the appellants by reason of the grant to them of probate were acting under the order of the Court. They were, so it was argued, under an obligation to the Court to pay the legacies. But there was in truth no such obligation. For although a grant of probate is an order of the Court (see *Hewson* v. *Shelley* [1914] 2 Ch. 13) it does not, actually, order the grantee to do anything. In New Zealand it runs, so far as material for the present purpose, as follows:—

> " Be it known to all men that on this day of in the year the last Will and Testament of deceased, a copy of which is hereunto annexed, has been exhibited read and proved before and administration of the Estate Effects and Credits of the deceased has been and is hereby granted to the Executor in the said Will and Testament named, being first sworn faithfully to execute the said Will by paying the debts and legacies of the deceased as far as the property will extend and the law binds. . . ."

Even the oath, therefore, only binds the executor to pay the legacies " so far as the law binds." In the present case the law did not so bind.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent's costs of the appeal must be paid by the appellants.

(16930) Wt. 8194—7 90 2/42 D.L. G. 358

In the Privy Council

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DELIVERED BY LORD ROMER

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1942