Constructive Trusts

In *New Zealand Netherlands Society "Orange" Inc.* v. *Kuys* [1973] 2 N.Z.L.R. 163 the Privy Council held that a man when acting as secretary to a society and editor of its newsletter was in a fiduciary position and could not normally obtain profit from it. However in that case the secretary in establishing another newsletter had acted with the consent of the society after full disclosure of material facts to it, and accordingly the Board held that there had been no breach of the fiduciary relationship by the secretary and he was entitled to an injunction prohibiting the society from publishing a newsletter of a similar kind.

Another New Zealand case in which a constructive trust was held to exist was *Westminster Chemical N.Z. Ltd.* v. *McKinley* [1973] 1 N.Z.L.R. 659 but this case involved a company director and has already been noted in the section on Company Law.

M. G. Menzies

WILLS AND ADMINISTRATION

Wills expressed to be in contemplation of marriage

In the case of *Public Trustee* v. *Crawley* [1973] 1 N.Z.L.R. 695, the question arose as to whether or not the use of the words "my fiancee" was sufficient to bring a will within the ambit of s. 13 (1) Wills Amendment Act 1955 as being a will expressed to be in contemplation of marriage, or whether the use of such a phrase would not have the prenuptial will from revocation under s. 18 Wills Act 1837 (U.K.). In *Burton* v. *McGregor* [1953] N.Z.L.R. 487 F. B. Adams J. had held that a provision for a fiancee was not sufficient to save the will from revocation but in the same year in *In re Langston* [1953] 1 All E.R. 928 Davies J. took the opposite view. The Supreme Court in *Crawley's* case chose to follow *Burton* v. *McGregor* and decided that the mere fact that provision is made for a fiancee in a will is insufficient to show that the will was made expressly in contemplation of, and therefore not to be revoked by, the subsequent marriage.

Revocation and republication of wills

Guardian Trust Co. Ltd. v. *Darroch* [1973] 2 N.Z.L.R. 143 represents a considerable inroad into the established rule of construction of wills, that when a person with capacity executes a will and has it read through to him he adopts the words in that will, and the ordinary meaning of those words, even where the will was not home-made but prepared by a solicitor and the words concerned had a special legal meaning. In 1963 there had been a will made by the testatrix while in New Zealand, which disposed of all her property. In 1970 she executed

a new will whilst in Australia, which incorporated the usual words that this new will was to revoke all former wills. In this new will, however, she disposed of her Australian property only, and this would have led to an intestacy as far as her assets in New Zealand were concerned. McMullin J. held that the New Zealand will was revoked only in so far as it dealt with the Australian assets of the testatrix. This decision was reached because from the facts it was apparent that the testatrix had no intention of revoking any testamentary provisions concerning her New Zealand assets. In reaching this decision, McMullin J. had regard to the facts that structurally, the two wills were designed to be read together; that the Australian solicitor had told the testatrix that the revocation related only to her Australian assets; and that there was an obvious intention on the part of the testatrix to dispose of her property in detail, and avoid an intestacy.

Law Reform (Testamentary Promises) Act 1949

The principles to be used in determining a claim under s. 3 (1) of this Act were discussed by the Court of Appeal in *Public Trustee* v. *Bick* [1973] 1 N.Z.L.R. 301. In this case, a woman in excess of 80 years of age died intestate. A claim under the Act was made by Bick on the basis of an oral promise of a somewhat vague nature to leave him her house. The estate was small in this case, and Bick had rendered services which, though small in value themselves, were of considerable value to the deceased, and this fact together with the terms of the promise actually made and the absence of any other claims against the estate had induced the Supreme Court to award the deceased's house to Bick. On appeal however, the Court of Appeal held that too much emphasis was placed by the Supreme Court on the terms of the promise actually made and insufficient emphasis placed on the circumstances in which the promise was made, the services rendered and the value of those services. In fact the deceased's age, her confused state of mind, the vague nature of her promise and the small amount of time lost by the claimant in performing the services were held to be factors relating to the circumstances of the promise which tipped the scales against giving effect to the actual promise made and accordingly the award was amended by allowing the claimant the sum of $3,000.

The deceased's age and state of mind also gave rise to the question of capacity to make a testamentary promise. The Court of Appeal held that this question was to be approached as a matter of contractual rather than testamentary capacity. This has two important consequences: first that proof of incapacity rests upon the administrators of the estate of a deceased and not the claimant, and secondly that administrators will have to show that the deceased did not know what he was doing and that the promisee was aware of that, and not that the deceased was unable to survey the extent and nature of his estate and the claims of others upon him, which is the normal requirement for testamentary capacity. In this case the burden

fell upon the Public Trustee and it was conceded that there was insufficient evidence to establish incapacity.

Family Protection Act 1955

The deceased in *In re P.* [1973] 2 N.Z.L.R. 734 had been married and divorced on two occasions, and the claimants under the Family Protection Act 1955 were the two children of her first marriage. There were no children of the second marriage. In her will, the deceased left the residue of her estate to her brother and his wife. No provision was made for her two children. At the time the will was made, the deceased's daughter had been an inmate of a mental institution for 27 years, and there was no evidence to suggest the testatrix was aware of the possibility of her daughter being discharged from the institution. Since the date of death, and indeed since the date the application was filed on her behalf, the daughter was discharged and she was living in a private rest home paying $18 per week for board which was covered by an invalid benefit of $22 per week. The Public Trustee, as manager of her property, sought further provision from the estate to provide more pocket money and to pay her board. The claim for board failed because the testatrix could not have foreseen the need for such maintenance arising. However, there was a moral duty to provide pocket money for the daughter and accordingly $3,000 was set aside as a fund to provide for her a weekly allowance of $4.

With regard to the other claimant, the deceased's son, he had gone to Australia with the deceased's first husband and had not been in touch with his mother for 32 years. In these circumstances it was held that the deceased was under no moral obligation to make any provision for him or his children.

In *In re Wilson* [1973] 2 N.Z.L.R. 359 the deceased and his widow were both spastics. The deceased had married relatively late in life, and for the last two years of a four year marriage had been bed-ridden and nursed by his wife. Under the terms of his will, his wife was left a life tenancy in his house, and the income from a discretionary trust in which his capital was to be settled. The capital amount was rather small, but was to include the proceeds from the sale of the house if and when his widow decided to have it sold. The trustee did however have the power to pay capital to the widow in certain undefined circumstances, and upon her death the whole estate was to go to the testator's nieces and nephews, who were at the time of the claim in no need, and who had had little to do with the deceased during his life-time.

At the time of the testator's death, his widow was able to earn $38 a week in a factory job, but her working life was severly limited due to her condition. Because of financial pressure, she was forced to leave the house and live with her parents, the amount she then received from the trust, after the sale of the house, being only $5 a week. On this basis, the widow claimed further provision from the estate under the Family Protection Act 1955. Against her claim there were two main objections: (i) the testator's desire expressed to his solicitor

to prevent the widow's parents obtaining the benefit of any disposition of his property, and (ii) the policy outlined in the case of *In re Williamson* [1954] N.Z.L.R. 288 against the award of capital sums to widows unless there are special circumstances. The Court of Appeal found first that the fears of the testator concerning the widow's parents were probably groundless in that the evidence showed that the widow was capable of handling her own affairs and second that special circumstances did in this case exist, viz., the absence of any other dependents, the physical condition of the widow, the small size of the estate, the length of time during which the widow had nursed the deceased, and the widow's right to a life independent from her parents. The Court of Appeal took the view that there had not been adequate provision made for the widow in the will, and she was entitled to the capital of the estate. The Court made it clear that a testator cannot normally off-load his moral responsibility by leaving the distribution of his estate to his trustee's discretion.

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