IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000913
[2016] NZHC 3016

IN THE MATTER	of the Estate of JUDITH CLAIRE HAMPSON
BETWEEN	MARTIN RICHARD BARRON LESTER WITTY Plaintiff
AND	NICHOLAS RICHARD ROUT First Defendant
AND	NICHOLAS RICHARD ROUT Second Defendant

Hearing: 12 December 2016

Appearances: D M Lester and N Egoz for Plaintiff
No appearance for Respondent

Judgment 12 December 2016

ORAL JUDGMENT OF DUNNINGHAM J

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[1] The plaintiff as trustee of an estate in this matter seeks judgment against Mr Rout, a solicitor, in respect of his failure to insure one of the assets of the estate of the late Ms Hampson, being a property at Travis Road, Christchurch. The plaintiff also seeks wasted costs for an application to have Mr Rout removed as a solicitor and, finally, he seeks an indemnity from Mr Rout, in his capacity as solicitor for the estate, for the consequences of that loss.

[2] Ms Hampson died on 15 September 2010 and probate was granted to Messrs Witty and Rout on 4 October 2010. The insurance over the Travis Road property came to an end in November 2010 as the premiums were not paid, meaning the property was uninsured in the subsequent 2011 earthquakes, during which the property was damaged.

[3] The Travis Road property was then subsequently sold on an "as is, where as" basis on 10 August 2016. That sale realised $175,000. There is valuation evidence that had it been restored to its pre-earthquake condition, its value would have been $380,000.

[4] The first cause of action seeks damages for the loss in value, being $205,000. The second cause of action relates to costs incurred by the state in having Mr Rout removed as trustee and executor. Those total $4,353 plus GST, plus disbursements of $200. It is to be noted that Mr Rout co-operated in the removal process.

[5] Mr Rout has been served with the proceedings and there is an affidavit of service on file. However, he has not taken any steps in these proceedings. Because the claim does not involve a liquidated demand, it has had to be set down for today's formal proof hearing under r 15.9 of the High Court Rules.

[6] In this hearing, I must consider whether the claims for the sums sought are established on the evidence provided, and, in addition, whether the indemnity sought is warranted on the evidence provided.

[7] The major claim is, of course, for the loss the estate suffered as a consequence of the failure to insure the property when the policy fell due in November 2010. This relies on the plaintiff being able to demonstrate firstly that Mr Rout, as trustee, had a duty in the particular circumstances here to take out insurance, and secondly, that the loss is properly quantified at $205,000.

[8] Mr Lester, for the plaintiff, cites a number of authorities which set out a trustee's obligation to preserve trust property and secure it from risk or loss.[1] However, he acknowledges that the legal position is that this does not always translate into an obligation to insure the property. While it is acknowledged that insuring a property is not an absolute duty, it is clear from the authorities that in the ordinary course, it is appropriate to do so, as an extension of the trustee's duty to preserve trust property.[2]

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1 *Young v Hansen* [2004] 1 NZLR 37 (CA).
2 *Laws of New Zealand* Trusts at [386].

[9] In this regard, I refer to the statement in the text *Equity and Trusts in New Zealand*, where it was noted:[3]

> There is no explicit statutory obligation on a trustee to insure. However, the general duty to act in the beneficiaries' best interests and exercise reasonable skill, care and diligence, must override this in cases where it is appropriate to insure.

[10] I consider that in the current situation it was reasonable to insure. There was obviously a known risk in Christchurch with the 4 September earthquake having occurred only a month prior to the insurance policy falling due. Furthermore, the affidavit evidence is that there was sufficient cash in the estate to pay the premium. It would appear that the failure to pay the insurance premium was simply an oversight and not because some special circumstances arose which made it impracticable or unreasonable to require the trustee to insure.

[11] Being satisfied that it was appropriate to insure in the circumstances, and that the trustee failed in his duty by not doing so, I am also satisfied that the quantum sought is appropriate. The market was tested by way of auction to establish the value of the property, without the repairs, and it sold for $175,000. The plaintiff has also provided a market valuation of what the property would have been worth had it been repaired under the insurance policy and that is $380,000.

[12] I therefore enter judgment for the amount of $205,000 on the first claim.

[13] The next head of claim is for wasted costs. In this regard, Mr Lester submits that, as a result of Mr Rout not advancing the administration of the estate, presumably because of the difficulties created by the property being uninsured, the estate remained unresolved at the start of 2016. Given this was a simple estate with a house and some cash, it was an estate that should have been resolved relatively quickly. As a result of complaints from beneficiaries and a complaint to the Law Society, Mr Rout agreed to stand down as executor, once Mr Witty had taken advice from new solicitors.

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[3] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 139-140.

[14] Because Mr Rout had breached his duty as executor to deal with the estate in a timely way, it was appropriate that steps were taken to remove him as a trustee. The costs that were incurred in this total $5,205.95, and therefore, I consider reasonably incurred in the circumstances. Again, judgment is entered for that amount.

[15] The third claim is against Mr Rout in his capacity as solicitor for the estate. It seeks an order that Mr Rout indemnify Mr Witty in relation to any liability he would have arising from the absence of insurance on the basis that he failed to give advice in respect of the issue of insurance and he had an obligation to do so under his contract of retainer.

[16] In this regard, Mr Lester refers me to the decision in *Hansen v Young*.[4] He relies on that to demonstrate that it is possible for trustees and executors to assign tasks to solicitors by retainer and the solicitor can be liable to the trustees if the task falls within that retainer. Of course, the onus is on the plaintiff to establish that that is within the scope of the retainer. In the case of *Hansen v Young*, that was not established but, here, I am satisfied Mr Rout was given a broad retainer to manage the estate, and that was recorded in the letter of engagement setting out the scope of his instructions. The contract of retainer was simply described as "administration of the estate J C Hampson". To support the submission that attending to insurance was within the scope of that retainer, Mr Lester also refers to the other administrative tasks that Mr Rout's firm undertook in managing the estate. For example, the payment of rates and negotiation with EQC was undertaken by Mr Rout. This was consistent with the firm having agreed to complete administrative tasks such as arranging payment of accounts which are associated with the management of the estate.

[17] For these reasons I am satisfied that the plaintiff has established that the task of maintaining the insurance policy was properly within the scope of Mr Rout's retainer. He failed to do so and it is appropriate that he indemnify Mr Witty for any failure to do the same. On the third cause of action, I grant judgment in favour of the

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4 *Hansen v Young*, above n 1.

plaintiff and make an order that Mr Rout indemnify Mr Witty in relation to any liability he might have arising from the absence of insurance.

[18] Finally, there is of course the issue of costs. It is appropriate in the circumstances that 2B costs are awarded and I do so.

Solicitors:
Mortlock McCormack Law, Christchurch
D M Lester, Barrister, Christchurch