

IN THE PRIVY COUNCIL

No. 17 of 1980

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

DAISY ELIZABETH LILLEY

Appellant

- and -

THE PUBLIC TRUSTEE OF THE
DOMINION OF NEW ZEALAND

Respondent

RECORD OF PROCEEDINGS

MACFARLANES,
Dowgate Hill House,
London EC4R 2DY

Agents for:

Joynt, Andrews,
Cottrell & Dawson,
Christchurch,
New Zealand.

CHARLES RUSSELL & CO.,
Hale Court, 21 Old Buildings,
Lincoln's Inn, London, W.C.2.

Agents for:

Anthony Polson &
Robertson,
Christchurch,
New Zealand.

(1)

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IN THE PRIVY COUNCIL No. _____ of 1980

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

DAISY ELIZABETH LILLEY

Appellant

and

THE PUBLIC TRUSTEE OF THE
DOMINION OF NEW ZEALAND

Respondent

10

RECORD OF PROCEEDINGS

No. 1

NOTICE OF MOTION TO EXTEND TIME

In the Supreme
Court of New
Zealand

IN THE SUPREME COURT OF NEW ZEALAND

CHRISTCHURCH REGISTRY

No. 4397/76

No. 1

BETWEEN

DAISY ELIZABETH LILLEY
of 15 Gibbon Street,
Christchurch, Spinster

Notice of
Motion to
Extend Time

Plaintiff

28 October
1976

20

A N D

THE PUBLIC TRUSTEE OF
THE DOMINION OF NEW
ZEALAND, sued as
Executōr and Trustee of
the Estate of the late
FRANCIS ISRAEL LILLEY
late of Christchurch
Railway Employee,
deceased

Defendant

In the Supreme
Court of New
Zealand

No. 1

Notice of Motion
to Extend Time

28 October 1976

- continued

TAKE NOTICE that on Friday the 3rd day of September 1976 at 10 o'clock in the fore-noon or so soon thereafter as counsel can be heard, counsel for the abovenamed Plaintiff WILL MOVE this Honourable Court at Christchurch FOR AN ORDER that the time for commencing her action herein against the above Defendant under the provisions of the Law Reform (Testamentary Promises) Act 1949 shall be extended for a sufficient period to permit the said action to be brought AND FOR A FURTHER ORDER that the costs of and incidental to this application and the Order thereon be reserved UPON THE GROUNDS that the Defendant took out representation in the Estate of the abovenamed deceased on the 17th day of April 1974, but has not finally distributed the said Estate AND UPON THE FURTHER GROUNDS that it is in the interests of justice that the said Order be made AND UPON THE FURTHER GROUNDS appearing in the Affidavit of the Plaintiff sworn and filed herewith.

10

20

DATED at Christchurch this 28th day of October 1976

"D.H.P. Dawson"

Solicitor for the Plaintiff

No. 2

No. 2

Affidavit of
Appellant in
Support

27 October 1976

AFFIDAVIT OF APPELLANT

I, DAISY ELIZABETH LILLEY of Christchurch, Spinster make oath and say as follows: 30

1. THAT I am the intended Plaintiff in the within action to be brought by me against the estate of the late FRANCIS ISRAEL LILLEY under the provisions of the Law Reform (Testamentary Promises) Act 1949.

2. THAT the said deceased died on the 18th day of March 1974, and I then found that my occupation of the house property after his death was limited by the terms of his Will to two years.

40

3. THE only two of the deceased's brothers and sisters who survived him were Ernest Virgo Lilley and Phyllis Evelyn Webster both of Christchurch and they told me after the provisions in the Will were made known that if I wanted to stay in the house, I could. Mrs Webster said to me: "You're set, there's nothing to worry about. Forget the whole business".

10 4. SOMETIME after the death of the deceased I built two fences on the property, and I asked the said Phyllis Evelyn Webster whether I should put up the second fence. She encouraged me to do so, saying "then you'll be set".

27 October
1976

- continued

20 5. THAT I accordingly believed that I would be allowed to spend my old age in the property, and although I was urged by Mr R.H. McCaughan to take legal action at the time the terms of the Will became known, I considered I would be alright because of what the said Ernest Virgo Lilley and Phyllis Evelyn Webster had told me.

30 6. THAT on the 18th day of March 1976 I received a letter from the defendant calling upon me to vacate the property. I then went for advice to my local Legal Aid Centre and was referred to my present solicitors. On the 23rd day of July 1976 they lodged an application for legal aid on my behalf and after some delay legal aid was granted, but later withdrawn because I have savings in the bank of \$3309. Over the period from the 30th day of March 1976 my solicitors have been in correspondence with Messrs. Kerr Mackintosh & Co, solicitors for the said Ernest Virgo Lilley and Phyllis Evelyn Webster and they have thus been informed that I have been intending to bring this claim.

40 7. THAT I am still living in the property, although the defendant on the 11th day of June 1976 commenced proceedings in the Magistrate's Court seeking possession of the house property from me. These proceedings stand adjourned awaiting a fixture for hearing.

In the Supreme Court of New Zealand

No. 2

Affidavit of Appellant in Support

27 October 1976

- continued

3. THAT had I known that the terms of the Will would be applied strictly to me, I would have taken legal advice soon after I became aware of those terms, and it was only because of the assurances given me by the said Ernest Virgo Lilley and Phyllis Evelyn Webster that I have delayed taking action. I say that the matters set forth in the draft Statement of Claim to be lodged herewith are true.

SWORN at Christchurch this) 10
27th day of October 1976) "D.E. Lilley"
before me:)

"Isabel M. Mitchell"

A Solicitor of the Supreme Court of New Zealand

No. 3

20

No. 3

STATEMENT OF CLAIM

Statement of Claim

(Undated)

 day the day of 1976

The plaintiff by her solicitor DANEFORD HECTOR PIERCE DAWSON sues the defendant and says:

1. THAT she is seventy years of age and is a 20
cousin of the abovenamed deceased.

2. THE defendant by probate granted in the Supreme Court at Christchurch on the 17th day of April 1974 is the Trustee and Executor of the Estate of the said deceased.

3. THE plaintiff from the age of sixteen years has lived at 15 Gibbon Street, Christchurch, a property then owned by her uncle Walter Donald Lilley, now deceased, and looked after him and his children as an unpaid housekeeper and the children's nurse until he died in 1939. The house was left to the abovenamed deceased, with whom the plaintiff continued to live, and for whom until his death on the 18th day of March 1974 she carried out housekeeping and the work of a companion without payment. 30

4. THE Will of the deceased, which is being administered by the Defendant, permits the Plaintiff to reside in the house property for a period of two years after the date of death of the testator, and bequeaths the house property to the surviving brother and sister of the deceased, Ernest Virgo Lilley and Phyllis Evelyn Webster, both of Christchurch. The residuary estate of the deceased is bequeathed to the Plaintiff but consists only of \$2102-16 comprising furniture, motor car and cash. The house property, representing virtually the only asset in the said estate, is worth approximately \$40,000-00 by way of market value.

In the
Supreme
Court of
New Zealand

No. 3

Statement
of Claim

(undated)

- continued

5. THE said Will was made on the 31st day of January 1942 when the deceased was in the Army, and at that time the Plaintiff was friendly with a man named Frank Kelly. The Plaintiff never married but remained friendly with Mr Kelly who stayed as a boarder in the deceased's house from time to time over the following 25 years. He and the deceased were very close friends but since Mr Kelly was not well the deceased asked the Plaintiff to remain living with him rather than marrying Mr Kelly. He said to the Plaintiff "If you don't marry him there is a home here for you as long as you live or as long as you want it".

6. ON many other occasions over the years before his death the deceased gave the Plaintiff to understand that after his death the house would be preserved for her occupation, and the Plaintiff at no time knew that under the terms of the Will her period of occupation was limited to two years after the death of the deceased. On another occasion the deceased said to the Plaintiff that if he died, she would "stay put as you are. There is a home here for you as long as you live or want it".

7. ABOUT three years before his death the deceased said to his nephew Mr R.H. McCaughan that if he died, the Plaintiff "would be alright. She can stay on in the house".

In the Supreme
Court of New
Zealand

The Plaintiff says it was well known amongst other members of the deceased's family that her right to live in the property would be preserved after his death.

No. 3

Statement of
Claim

(undated)

- continued

3. THE deceased was extremely shy of strangers, and kept out of the way when neighbours or friends called. The Plaintiff looked after him and assisted him in this social problem by dealing with strangers on his behalf. For her services in this and all other respects she at no time received or expected any payment from the deceased, but was never in any doubt that she would be looked after if he died. 10

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANT:

- (a) An Order that such provision shall be made for her out of the estate of the deceased as to this Honourable Court seems fit. 20
- (b) The costs of this action.
- (c) Such further or other relief as to this Honourable Court seems fit.

No. 4

No. 4

AFFIRMATION OF EVELYN WOODS

Affirmation
of Evelyn Woods
28 October 1976

I, EVELYN WOODS of 16 Gibbon Street, Christchurch, Pensioner, make oath and say as follows:

1. THAT I have lived in Gibbon Street for about forty years and I have known the abovenamed Deceased and the abovenamed Plaintiff over that period. 30

2. THE Deceased was a very retiring man and I am aware that the Plaintiff looked after him by doing his housekeeping and protecting him from strangers to some extent.

3. I am acquainted with Ernest Virgo Lilley of Christchurch a brother of the Deceased who spoke to me after the death of the Deceased. He asked me to keep an eye on the Plaintiff and said that he and his sister had no intention of putting her out of the property. He spoke about the possibility of building her a house on part of the section.

In the Supreme Court of New Zealand

No. 4

Affirmation of Evelyn Woods

28 October 1976

10 AFFIRMED at Christchurch this)
28th day of October 1976) "E. Woods"
before me:)

- continued

"C.A. Bates"

A Solicitor of the Supreme Court of New Zealand

No. 5

AFFIDAVIT OF ROBERT HECTOR McCAUGHAN

No. 5

I, ROBERT HECTOR McCAUGHAN of 27 Arthur Street, Christchurch, Railways Engineering Assistant, make oath and say as follows:

Affidavit of Robert Hector McCaughan

18 October 1976

20 1. THAT I am a nephew of the abovenamed Deceased and I am aware that he and the abovenamed Plaintiff lived together from 1939 until his death on the 18th day of March 1974, she carrying out all housekeeping work and looking after him without receiving any payment that I know of.

30 2. THAT about five years ago I spoke to the said FRANCIS ISRAEL LILLEY, who was painting the house, and said that he should be careful that he did not fall off the roof. He replied that it would not matter much so I said "What about Daisy?" The Deceased said to me "She will be alright. She can stay on in the house".

3. AFTER my uncle died I was surprised to learn that the Plaintiff was only given two years occupation of the house and I advised her to take legal action but she said at

In the Supreme
Court of New
Zealand

that time that she had been told she would be alright because the two beneficiaries had said she would be.

No. 5

Affidavit of
Robert Hector
McCaughan

18 October 1976

4. I discussed the matter with an officer of the Public Trust Office on one or two occasions after my uncle's death, but I could not get the Plaintiff to take any action since it was clear that she did not want to offend the other beneficiaries with whom she was on friendly terms.

10

- continued

SWORN at Christchurch this)
18th day of October 1976) "R.H. McCaughan"
before me:)

"R.J. McKenzie"

A Solicitor of the Supreme Court of New Zealand

No. 6

No. 6

AFFIDAVIT OF PHYLLIS EVELYN WEBSTER

Affidavit of
Phyllis Evelyn
Webster

I, PHYLLIS EVELYN WEBSTER of Christchurch, Married Woman, make oath and say as follows:

10 March 1977

1. THAT I am the only surviving sister of the late FRANCIS ISRAEL LILLEY and am a residuary beneficiary of his estate. 20

2. THAT I am now aged 71 having been born on 20th May 1905.

3. I have been advised of the contents of the affidavits of the Plaintiff, Evelyn Woods and Robert Hector McCaughan sworn and filed herein.

4. AS far as the affidavit of the Plaintiff is concerned I would say as follows: 30

(a) That I accept what the Plaintiff says in paragraphs 1 and 2 of her affidavit.

(b) While accepting my brother Ernest and I are the only surviving brother and sister of the said Francis Israel Lilley

I deny that I ever made known to the Plaintiff after the death of the said Francis Israel Lilley that if she wanted to stay in the house in question she could. I further deny, I said to the Plaintiff "you're set, there's nothing to worry about. Forget the whole business", or anything which could have given the Plaintiff the idea I would have no objection to her remaining in the house in question beyond the period specified in the will of the deceased.

In the Supreme
Court of New
Zealand

—
No. 6

Affidavit of
Phyllis Evelyn
Webster

10 March 1977

• continued

10

20

30

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- (c) In August 1975, two fences on the property in question were blown down during the storms which occurred in Christchurch during that month. The fences were put up again, but I certainly never encouraged the Plaintiff to put up the second fence in the way she alleges. The fence had to be replaced because it had been blown down. I deny telling the Plaintiff if she put up the second fence she would be set. I have no recollection of the Plaintiff asking me if the second fence should be put up and would have thought, if any inquiry was made concerning the fence or fences, it was more likely to have been made to the Public Trustee.
- (d) I do not know and therefore can make no comments on the matters alleged by the Plaintiff in paragraph 5 of her affidavit.
- (e) While accepting, that on or about 18th March 1976 the Plaintiff received a letter from the Public Trustee calling upon her to vacate the property I do not know whether she went for advice to her local Legal Aid Centre; or that on 23rd July 1976, an application for legal aid was filed, later granted but subsequently withdrawn. I agree, that from 30th March 1976 the Plaintiff's solicitors have been in correspondence with the District Public Trustee and my solicitors but the correspondence.

In the Supreme
Court of New
Zealand

which took place is as follows:

No. 6

Affidavit of
Phyllis Evelyn
Webster

10 March 1977

- continued

- (a) Annexed hereunto marked with the letter "A" is a letter dated 30th March 1976 from the Plaintiff's solicitors to the District Public Trustee.
- (b) Annexed hereunto marked with the letter "B" is a letter dated 16th September 1976 from the Plaintiff's solicitor to the Public Trust Office.
- (c) Annexed hereunto marked with the letter "C" is a photocopy of a letter dated 24th September 1976 from my solicitors to the Plaintiff's solicitors. 10
- (d) Annexed hereunto marked with the letter "D" is a photocopy of a letter dated 22nd October 1976, from my solicitors to the solicitors acting for the Plaintiff.
- (e) Annexed hereunto marked with the letter "E" is a photocopy of a letter dated 10th December 1976 from the Plaintiff's solicitors to the District Public Trustee. 20
- (f) Annexed hereunto marked with the letter "F" is a photocopy of a letter dated 13th December 1976 from the Plaintiff's solicitors to my solicitors.

4. THAT I am unable to say anything with regard to the allegations made by the Plaintiff in paragraphs 7 and 8 of her affidavit or the allegations made by Evelyn Woods and Robert Hector McCaughan. 30

5. IN terms of the deceased's last will the plaintiff's right to occupy the house in question expired on 18th March 1976. Because of my age I would like the house sold so I can obtain my share of my brother's estate.

SWORN at Christchurch)
this 10th day of March) "P.E. Webster"
1977, before me:)

"L.V. North"

40

A Solicitor of the Supreme Court of New Zealand

11.

"A"

JOYNT ANDREWS COTTRELL & DAWSON
Solicitors
Christchurch.

The District Public Trustee
Christchurch.

30 March 1976

Attention Mr D.G.H. Evans

Dear Sir,

re: Estate of Francis Israel Lilley

10 We acknowledge your letter of the 18th
March 1976 to Miss D.E. Lilley of 15
Gibbon Street, Christchurch. This is the
first time that Miss Lilley has been to a
solicitor over her cousin's will.

From what she tells us, it appears clear
to us that she has a claim under the
Law Reform (Testamentary Promises) Act
1949. However, at the present time we
are making further investigations and
enquiries into this claim.

20 We would like to give you notice that a
writ will issue as soon as we are in a
position to file it.

30 In the meantime, we consider it unreasonable
to expect Miss Lilley to vacate the house
which she has lived in almost all her life.
We would advise you that should you take
any action to obtain possession it will
be strongly resisted. As far as the
garage is concerned, we enclose a photo-
copy of the account from the Addington
Timber Company for the Garage paid for
by Miss Lilley.

Yours faithfully
JOYNT ANDREWS COTTRELL & DAWSON

per: "A.R. Cottrell"

In the Supreme
Court of New
Zealand

No. 6

Annexure "A"

Letter dated
30 March 1976

12.

"B"

In the Supreme
Court of New
Zealand

JOYNT ANDREWS COTTRELL & DAWSON
Solicitors
Christchurch.

No. 6
Annexure "B"

The District Public Trustee
Christchurch. 16 September 1976

Letter dated
16 September
1976

Dear Sir, WITHOUT PREJUDICE

Re: Miss D.E. Lilley

We confirm that Miss Lilley has now been granted Legal Aid to enable her to make application under the Testamentary Promises Act for a share in the home which she now occupys. In these circumstances if any fixture were granted on the action against her by the Estate it would have to be adjourned until her application under the Testamentary Promises Act was determined.

10

Although Miss Lilley has now given full instructions and we are in the process of preparing an application under the Testamentary Promises Act we are minded that the beneficiaries in the Estate might be prepared to settle the matter before everyone has been involved in the delays and costs of Court proceedings of this type and on a without prejudice basis we now confirm that Miss Lilley would be prepared to leave the home and to settle her claim under the Testamentary Promises Act provided she was paid the sum of \$8,000.

20

30

This sum represents only a small proportion of the property that we are concerned with when related to the life time of service given by Miss Lilley but is the minimum amount that would be needed by her to set herself up in alternative accommodation.

Yours faithfully,
JOYNT ANDREWS COTTRELL & DAWSON

40

Per:

13.

"C"

KERR MACKINTOSH & CO
Solicitors
Christchurch.

In the Supreme
Court of New
Zealand

Messrs. Joynt Andrews Cotterill & Dawson
Solicitors
Christchurch. 24 September 1976

No. 6

Annexure "C"

Dear Sirs

Letter dated
24 September
1976

re: Estate F.I. Lilley & Miss D.E. Lilley

10 Thank you for a copy of your letter of
16th September last to the District
Public Trustee.

The residuary beneficiaries in the above
estate have instructed us to advise you
that they will not entertain any suggestion
of a settlement of your client's claim
under the Testamentary Promises Act, at
this stage.

20 Accordingly, we would ask you to proceed
to issue your application for leave to
bring the proceedings out of time
forthwith.

In the meantime, again on the residuary
beneficiaries instructions, we have
requested the Public Trustee to proceed
to obtain a fixture in the Magistrates
Court.

Yours faithfully
KERR MACKINTOSH & CO

per:

"D"

No. 6

30 KERR MACKINTOSH & CO
Solicitors
Christchurch.

Annexure "D"

Messrs. Joynt Andrews Cotterill & Dawson
Solicitors
Christchurch. 22 October 1976

Letter dated
22 October
1976

In the Supreme
Court of New
Zealand

Dear Sirs

re: Estate F.I. Lilley & Miss D.E. Lilley

No. 6

As you know, we act for the two residuary beneficiaries in the above estate.

Annexure "D"

Letter dated
22 October
1976

We have been instructed to advise that they will be requesting the Public Trustee to defend any application for leave to bring proceedings out of time under the Law Reform (Testamentary Promises) Act.

- continued

To our knowledge your client first advised the Public Trustee on 30th March 1976 that it was proposed to bring a claim under the above act and we note that over six months has passed since that letter.

10

Our clients are most upset that through your clients delays they are losing the benefit of the proceeds of sale of the property.

We are again instructed to advise that your application to bring the proceedings out of time will be strenuously defended.

20

Yours faithfully
KERR MACKINTOSH & CO

per:

"E"

Annexure "E"

Letter dated
10 December
1976

JOYNT ANDREWS COTTRELL & DAWSON
Solicitors
Christchurch.

The District Public Trustee
Christchurch. 10 December 1976

30

Dear Sir

re: Estate F.I. Lilley Application of
D.E. Lilley to bring Testamentary
Promises action out of time.

We are concerned to note that you have

taken no action on the Ready List application forwarded to you on 8 November.

If we hear nothing within a week we will be obliged to apply unilaterally to set the matter down for hearing.

Yours faithfully
JOYNT ANDREWS COTTRELL & DAWSON

per:

"F"

10 JOYNT ANDREWS COTTRELL & DAWSON
Solicitors
Christchurch.

Messrs. Kerr Mackintosh & Co
Solicitors
Christchurch. 13 December 1976

Attention: Mr J.R. Mackintosh

Dear Sir

re: D.E. Lilley

20 We acknowledge receipt of your letter dated 9th inst. and now enclose a letter we had already prepared to the Public Trustee. From it you will note that we are concerned about the further delays and we would ask that you file any documents you want considered by the 17th inst. failing which we will be filing a Ready List Application.

Yours faithfully
JOYNT ANDREWS COTTRELL & DAWSON

30 per: "D.H.P. Dawson"

No. 7

AFFIDAVIT OF ERNEST VIRGO LILLEY

I, ERNEST VIRGO LILLEY of Christchurch,

In the Supreme Court of New Zealand

No. 6

Annexure "E"

Letter dated
10 December
1976

- continued

Annexure "F"

Letter dated
13 December
1976

No. 7

Affidavit of
Ernest Virgo
Lilley

In the Supreme
Court of New
Zealand

No. 7

Affidavit of
Ernest Virgo
Lilley

10 March 1977

- continued

retired, make oath and say as follows:

1. THAT I am the only surviving brother of the late FRANCIS ISRAEL LILLEY deceased and am a residuary beneficiary of his estate.

2. THAT I am now aged 79 years having been born on 20th February 1898.

3. I have been advised of the contents of the affidavits of the plaintiff, Evelyn Woods and Robert Hector McCaughan filed herein.

10

4. THAT as far as the affidavit of the plaintiff is concerned, I deny I made known to the plaintiff that if she wanted to stay in the house in question she could do so. I am unable to make any comments on any of the other matters raised in the plaintiff's affidavit where such matters deal with conversations between the plaintiff and persons other than myself. I would confirm the matters sworn to by my sister Phyllis Evelyn Webster in her affidavit in so far as the allegations made by the plaintiff in paragraphs 6 and 7 of her affidavit are concerned.

20

5. THAT I am unable to make any comment on the matters stated by Robert Hector McCaughan in his affidavit.

6. THAT as far as the affidavit of Evelyn Woods is concerned, I would say as follows:

30

(a) A few days after my brother's death I called at Evelyn Wood's property in Gibbon Street, in order to speak to his wife.

(b) I wished to thank her, for what she had done on the night of my brother's death, and I also wished to speak to her about the plaintiff. I was concerned, at the effect my brother's death might have on the plaintiff,

40

and I wanted to ask Mrs Woods to keep an eye on her.

In the Supreme Court of New Zealand

(c) I duly spoke to Mrs Woods about the two matters just referred to.

No. 7

(d) I have no recollection of telling Evelyn Woods my sister and I had no intention of putting the plaintiff out of the property and I have no recollection of speaking to Evelyn Woods about the possibility of building the plaintiff a house on part of the section adjacent to the property. There would have been no reason as far as I can recall, why I should discuss with Evelyn Woods either of the two matters just referred to and in particular, I simply did not have the money which would have enabled me to build a house for the plaintiff.

Affidavit of Ernest Virgo Lilley

10

10 March 1977

- continued

20

7. THE plaintiff remains resident in the property and is paying no rent for it. My sister and I are required to pay the outgoings on the property and neither of us are receiving any enjoyment of the property.

30

8. THE property is old, large, in a poor state of repair, and has big grounds. All of these facts seem to me, to make the property an unsuitable residence for a woman of the plaintiff's age.

SWORN at Christchurch)
this 10th day of March) "E.V. Lilley"
1977, before me:)

"L.V. North"

A Solicitor of the Supreme Court of New Zealand

No. 8

No. 8

AFFIDAVIT OF DENNIS GEORGE HALDON EVANS

Affidavit of

In the Supreme
Court of New
Zealand

I, DENNIS GEORGE HALDON EVANS, of
Christchurch, Trust Officer, the Public
Trust Office, make oath and say as
follows:

No. 8

Affidavit of
Dennis George
Haldon Evans

24 March 1977

1. THAT I am employed by the Public
Trust Office at Christchurch, and have
been dealing with the estate of FRANCIS
ISRAEL LILLEY.

2. ON 2nd April 1974, I wrote to the
plaintiff (hereinafter called "Miss
Lilley") concerning the estate of
Francis Israel Lilley and annexed hereunto
marked with the letter "A" is a photocopy
of that letter. 10

3. I wrote again to Miss Lilley on 12th
June 1974, and annexed hereunto marked
with the letter "B" is a photocopy of
that letter.

4. ON 17th October 1975, I wrote to
Miss Lilley and annexed hereunto marked
with the letter "C" is a photocopy of
that letter. Subsequently, Miss Lilley
telephoned me and I repeated to her, what
I had told her in exhibit "C". 20

5. THAT annexed hereunto marked with
the letters "D" "E" "F" and "G" are
letters written by me to Miss Lilley on
9th January 1976, 4th February 1976, 3rd
March 1976, and 18th March 1976.

6. THAT during the administration of
the estate I recollect receiving several
visits and numerous telephone calls from
the plaintiff. I also recollect
receiving visits and at least two
telephone calls from Mr McCaughan. The
visits and calls are not recorded
specifically on my file, so I am unable
to depose precisely what Miss Lilley and
Mr McCaughan were told. 30

7. I am able to depose however, that
Miss Lilley was anxious from the early
stages of administration of the estate
with regard to her future use of the 40

house property. Miss Lilley and Mr
 McCaughan were both advised that the
 Public Trustee in his position as trustee,
 was bound to abide by the terms of the will
 in the absence of any arrangement that
 might be made by the beneficiaries or by
 an order of the Court. Both Miss Lilley
 and Mr McCaughan who I understood to be
 her advisor, were informed at an early
 date after administration of the said
 estate commenced, that she should seek
 independent legal advice if she contested
 the provisions of the will.

10

20

30

40

8. I formed a clear view, from my
 discussions with Miss Lilley that she
 intended taking no action to resolve her
 situation with regard to the Gibbon
 Street property, nor to seek alternative
 accommodation, but, that she intended to
 live in the Gibbon Street property in the
 hope the remaindermen would allow her to
 remain there. Attempts were made to
 impress on her, the untenable nature of
 the situation and the need for her to take
 some positive action without success,
 until late last year, when she finally
 approached a solicitor regarding the
 financing of the purchase of a property
 an acquaintance of hers had available in
 the vicinity of the estate property.
 However no purchase was made.

9. IN October 1975, a Mr Mole of the
 Canterbury Aged Peoples Welfare Council
 contacted me on behalf of Miss Lilley.
 Annexed hereunto marked with the letter
 "H" is my memorandum recording the
 conversation I had with Mr Mole.

SWORN at Christchurch)
 this 24th day of March) "D.G.H. Evans"
 1977)

"H.E. Russell"

A Solicitor of the Supreme Court of New
 Zealand

In the Supreme
 Court of New
 Zealand

—
 No. 8

Affidavit of
 Dennis George
 Haldon Evans

24 March 1977

- continued

"A"

In the Supreme
Court of New
Zealand

PUBLIC TRUST OFFICE
Christchurch.

No. 8

Miss D.E. Lilley
15 Gibbon Street
Christchurch.

2 April 1974

Annexure "A"

Dear Miss Lilley,

Letter dated
2 April 1974

Estate of FRANCIS ISRAEL LILLEY

Further to our recent interview, it is confirmed that the Public Trustee is executor of Mr Lilley's will and application has been made to the Court for a grant of administration.

10

As discussed, pursuant to the will you are entitled to occupy the property at 15 Gibbon Street, Christchurch for a period of 2 years or until your sooner death or you cease to permanently reside in the property subject however, to your paying all outgoings and maintaining the property. It is, of course possible that some compromise may be reached with Mr E.V. Lilley and Mrs Webster, regarding occupation of the property by you for a longer period, but this matter will be further discussed when you call again with your nephew.

20

You are, of course also entitled to receive the balance of the estate after the payment of debts and expenses including any death duty.

30

From details available, it would appear that the assets and liabilities of the estate will be as follows:

ASSETS

P.O.S.B. Account	\$4007-51
Triumph Herald motorcar	not yet valued
P.O. bonus bonds	30-00
Furniture	not yet valued
Accrued U/superannuation	details awaited
House Property -	

40

21.

15 Gibbon Street, Chch Not yet valued

In the Supreme Court of New Zealand

LIABILITIES

Lamb A. & Hayward Ltd
funeral expenses

Account not yet received

No. 8

Administration expense,
including the Public
Trustee's charges and
death duty

To be determined

Annexure "A"

Letter dated
2 April 1974

10 A withdrawal is being made from the Post Office Savings Bank account to provide funds to meet the funeral account and preliminary administration expenses. The account will not be closed until the Public Trustee is in a position to proceed with distribution of the estate.

- continued

20 I have arranged with the SIMU to insure the motorcar and have also instructed Amuri Motors Ltd to value it for death duty purposes and arrange for the warrant of fitness to be renewed. That firm will telephone to arrange a convenient time to uplift the car.

The P.O. bonus bonds are being withdrawn and the amount of accrued Universal superannuation is being ascertained.

30 The Public Trustee's Property Inspector, Mr Cox, will be telephoning you shortly to arrange a convenient time to inspect the dwelling and furniture. As discussed, it is necessary for the Public Trustee to be aware of the present condition of the property in order to ensure that it is adequately maintained in the future.

40 Although it is understood that the funeral account is the only estate debt, a notice to creditors has been inserted in the local newspaper giving them a period of one month within which to submit their claims against the estate. Any accounts received will be referred to you for confirmation before they are paid.

In the Supreme
Court of New
Zealand

—
No. 8

Annexure "A"

Letter dated
2 April 1974

- continued

Death duty accounts and taxation returns will be filed in the estate in due course and it is not possible at this stage to estimate the amount of any death duty or taxation that will be payable. You will, however be advised of details at a later date.

This is a preliminary letter only and you will be kept informed regarding the administration of the estate. If in the meantime you require any additional details, please do not hesitate to enquire.

10

Yours faithfully,

"D.G.H. Evans"

for District Public Trustee.

—
"B"

Annexure "B"

Letter dated
12 June 1974

PUBLIC TRUST OFFICE
Christchurch.

Miss D.E. Lilley
15 Gibbon Street
Christchurch.

12 June 1974

20

Dear Miss Lilley

Estate of FRANCIS ISRAEL LILLEY

Further to my letter of 23 April 1974, the motorcar was valued for death duty purposes at \$1600 and death duty accounts were filed on 6 May 1974.

As you are aware, the house property was re-valued for death duty purposes and the new valuation as at 18 March 1974 is \$28,500. This results in death duty of approximately \$2,666 being payable in the estate.

30

There is a right to object to the death duty valuation of the property, if it is considered unrealistic, but any objection must be lodged by 10 July 1974. It is

difficult in the absence of a special valuation of the property to say whether or not the death duty valuation is realistic and it would be appreciated if you would ring me to discuss whether a registered valuer should be employed to make a check valuation. The cost of such a valuation would be in the vicinity of \$30 but could result in a substantial saving of death duty if it is possible to have the Inland Revenue Department agree to a reduction in the value of \$28,500.

10

Taxation returns have been filed in the estate but a taxation assessment is still awaited. At this stage, it is anticipated that taxation of approximately \$123-80 will be payable.

I have heard nothing further from Mr Lilley's brother and sister and am therefore, unable to advise you further regarding the future of the house property.

20

Yours faithfully

"D.G.H. Evans"

for District Public Trustee

"C"

PUBLIC TRUST OFFICE
Christchurch

Miss D.E. Lilley
15 Gibbons Street
Christchurch.

30

17 October 1975

Dear Miss Lilley

Estate of FRANCIS ISRAEL LILLEY

Under the provisions of Mr Lilley's will your right to reside in the house property expires on 18 March 1976, and as there have been no alternative developments it would be appreciated if you would confirm that you are making appropriate arrangements to vacate the property at the required time.

40

In the Supreme
Court of New
Zealand

No. 8

Annexure "B"

Letter dated
12 June 1974

- continued

Annexure "C"

Letter dated
17 October
1975

In the Supreme
Court of New
Zealand

—
No. 8

Annexure "C"

Letter dated
17 October
1975

- continued

If you would like to discuss this matter with me, please do not hesitate to telephone or call, but if calling, please arrange an appointment to ensure that I will be available.

Yours faithfully

"D.G.H. Evans"

for District Public Trustee

—
"D"

PUBLIC TRUST OFFICE
Christchurch.

10

Annexure "D"

Letter dated
23 January
1976

Miss D.E. Lilley
15 Gibbon Street
Christchurch, 2.

9 January 1976

Dear Miss Lilley

Estate of FRANCIS ISRAEL LILLEY

Further to my letter of 17 October 1975, and as possession of the house property will be required on the expiration of your right of residence on 18 March 1976, please confirm urgently that you are making alternative arrangements with regard to accommodation.

20

If I can be of any assistance with regard to alternative accommodation, please do not hesitate to contact me.

Yours faithfully

"D.G.H. Evans"

for District Public Trustee

—

25.

"E"

PUBLIC TRUST OFFICE
Christchurch.

Miss D.E. Lilley
15 Gibbon Street
Christchurch.

4 February 1976

Dear Miss Lilley

Estate of FRANCIS ISRAEL LILLEY

10 Thank you for forwarding the receipted
rate demand, which has been noted and is
enclosed.

Shortly prior to my going on holiday, we
discussed your obtaining alternative
accommodation, and it would be appreciated
if you would ring me to advise what has
transpired since that time.

Yours faithfully

"D.G.H. Evans"

for District Public Trustee

"F"

20 PUBLIC TRUST OFFICE
Christchurch

Miss D.E. Lilley
15 Gibbon Street
Christchurch.

3 March 1976

Dear Miss Lilley

Estate of FRANCIS ISRAEL LILLEY

30 Further to previous correspondence, please
advise me urgently regarding alternative
accommodation. You will remember that the
period of two years expires on 18 March.

Yours faithfully

"D.G.H. Evans"

for District Public Trustee

In the Supreme
Court of New
Zealand

No. 8

Annexure "E"

Letter dated
4 February
1976

Annexure "F"

Letter dated
3 March 1976

26.

"G"

In the Supreme
Court of New
Zealand

PUBLIC TRUST OFFICE
Christchurch.

REGISTERED LETTER

No. 8

Miss D.E. Lilley
15 Gibbon Street
Christchurch.

18 March 1976

Annexure "G"

Dear Miss Lilley

Letter dated
18 March 1976

Estate of FRANCIS ISRAEL LILLEY

As you are aware, your right of residence
in the estate property at 15 Gibbon Street
granted under Mr Lilley's will expires
today.

10

After discussion with the residuary
beneficiaries, the Public Trustee cannot
grant any extension of the right of
residence and has been instructed to take
appropriate action to obtain possession
if you have not vacated the property by
8 April 1976.

If you have not already done so (and have
no immediate alternative accommodation)
you should make immediate application
for either pensioner or Housing Corporation
accommodation.

20

In order that the position regarding
ownership of the garage on the property
may be established, please forward the
receipts for purchase of the garage
recently mentioned by you for noting.

Yours faithfully

30

"D.G.H. Evans"

for District Public Trustee

Annexure "H"

"H"

Memorandum
for File
dated
4 November
1975

MEMO for: FILE

Estate of FRANCIS ISRAEL LILLEY

1. Mr Mole of the Aged Peoples telephoned on 29.10.75 regarding Miss Lilley's eviction from the estate property.

In the Supreme Court of New Zealand

2. Mr Mole enquired whether an extension of time could be obtained and was informed of the position. He was also advised that the beneficiaries, and in particular the deceased's brother, required the proceeds of sale of the property for their own needs, the brother having moved to the North Island for health reasons, and hoping to purchase a house there.

No. 8

Annexure "H"

10

Memorandum for File dated 4 November 1975

3. The possibility of Court action was mentioned by Mr Mole, but it was explained to him that it would be necessary for Miss Lilley to approach her own solicitor as she had been advised some time ago, but also that it may not be in Miss Lilley's best interests to remain in the property, particularly from a health angle. Mr Mole will arrange for a Welfare Officer to discuss the matter personally at the property with Miss Lilley and will advise developments.

- continued

20

4. Mr Mole was advised that it had been suggested to Miss Lilley in the initial stages that she should seek alternative accommodation then to avoid difficulties later, but that it appeared she was living in the hope that she would be able to remain in the house property.

30

T.O.
4.11.75

No. 9

No. 9

AFFIDAVIT OF DANEFORD HECTOR PIERCE DAWSON

Affidavit of Daneford Hector Pierce Dawson

I, DANEFORD HECTOR PIERCE DAWSON of Christchurch, solicitor make oath and say as follows:

29 March 1977

40

1. THAT I am a partner in the legal firm of Joynt Andrews Cottrell & Dawson, solicitors to the plaintiff herein.

In the Supreme
Court of New
Zealand

—
No. 9

Affidavit of
Daneford Hector
Pierce Dawson

- continued

29 March 1977

2. THAT I have read the affidavits of Ernest Virgo Lilley and Phyllis Evelyn Webster filed herein in opposition to the Application for leave to bring proceedings out of time.

3. THAT towards the end of March 1976 the plaintiff instructed my firm with regard to her rights under the estate of the late Francis Israel Lilley, bringing to us a letter dated the 18th day of March 1976 from the District Public Trustee giving her notice that her right of residence in the estate property at 15 Gibbon Street expired on that date. After writing on the 30th day of March 1976 to the District Public Trustee, giving notice that a claim under the Law Reform (Testamentary Promises) Act 1949 was being investigated, we were involved on behalf of Miss Lilley in briefing evidence and checking financial and other details relating to her claim. Miss Lilley then brought to us a notice dated the 21st day of April 1976 issued by the District Public Trustee demanding possession of the property from her by the 24th of May 1976, and on the 7th day of May 1976 we wrote to the District Public Trustee, a copy of which letter is hereunto annexed and marked with the letter "A".

10

20

30

4. THAT after making further investigations, we lodged an Application for Legal Aid with the Canterbury District Legal Aid Committee on the 23rd day of July 1976, and on the 24th day of August 1976 we wrote to the Committee showing our concern that no decision on the Application for Legal Aid had as yet been made. On or about the 31st day of August 1976 legal aid was granted to Miss Lilley, and on the 6th day of September 1976 we wrote to her advising her of this. However it then became clear that she had made an error in her original Application for legal aid, her savings being greater than had been shown therein, and on the 16th day of September 1976 we advised the Committee of this error.

40

On the 27th day of September 1976 the Committee advised that in view of the changed financial circumstances legal aid was refused and on the 28th day of September 1976 we obtained an opinion from counsel on Miss Lilley's claim.

In the Supreme
Court of New
Zealand

—
Affidavit of
Daneford Hector
Pierce Dawson

- continued

29 March 1977

10 5. THAT following receipt of that opinion, proceedings herein were drafted and draft affidavits sent to three deponents for their consideration. Some delay in having the affidavits finalised took place and the proceedings were eventually filed in the Court on the 29th day of October 1976. I acknowledge that the letters exhibited to the affidavit of Phyllis Evelyn Webster were exchanged with the solicitors advising her, but I desire to add that since the issue of proceedings there has been delay on the part of the defendant which should be taken into account. Attached hereto and marked with the letter "B" is a letter written by the solicitors to the defendant on the 9th day of December 1976, and attached hereto and marked with the letter "C" is a copy of a letter from the same solicitors to the Registrar of this Honourable Court dated the 7th day of March 1977. I desire to point out that in the period between the dates of those two letters my firm had several times exerted pressure to have the pleadings completed, but the defendant requested time for further investigation both as to the facts and as to possible settlement.

20

30

40 6. THAT in addition to the correspondence between our firm and the solicitors for the defendant and beneficiaries there have been several telephone discussions between us between April 1976 and the present time and such solicitors have always been aware that she intended to continue with these proceedings if no settlement could be reached.

7. THAT from the steps taken by my firm, and the matters outlined by the plaintiff

In the Supreme
Court of New
Zealand

No. 9

Affidavit of
Daneford Hector
Pierce Dawson

in her affidavit, I would respectfully
submit that no prejudice has been caused
to the defendant or the beneficiaries
by the delay which has occurred on the
part of the solicitors representing both
parties in these proceedings.

S.W.O.M. (at Christchurch)
this 29th day of March) "D.H.P. Dawson"
1977, before me:)

- continued

29 March 1977

M.A.S. Ringburn

19

A Solicitor of the Supreme Court of New
Zealand

Annexure "A"

Letter dated
7 May 1976

JOYCE ANDREWS CORRELL & DAWSON
Solicitors
Christchurch.

The District Public Trustee
CHRISTCHURCH. 7th May 1976

Attention Mr Evans

Dear Sir,

20

re: Estate of Francis Israel Lilley and
Miss D.E. Lilley

On behalf of Miss Lilley we acknowledge
receipt of your notice dated the 21st
April 1976. This is to confirm that
Miss Lilley will not be in a position to
vacate the premises by Monday, 24th May
1976, and further to give you formal notice
that a claim will be lodged on her behalf
under the Law Reform (Testamentary
Promises) Act 1949, full particulars of
which we will be shortly in a position to
give you.

30

In our view, Miss Lilley has been treated
very badly by her first cousins, esp-
ecially in view of a lifetime of devoted

31.

service that she has given to their family. Please do not communicate further with Miss Lilley but make all further communications direct with us. We have authority to accept service or to deal with any further matter.

Yours faithfully
JOYNT ANDREWS COTTRELL & DAWSON

per:

In the Supreme
Court of New
Zealand

—
No. 9

Annexure "A"

Letter dated
7 May 1976

- continued

10

—
"B"

KERR MACKINTOSH & CO
Solicitors
Christchurch.

Annexure "B"

Letter dated
9 December 1976

Messrs. Joynt Andrews Cottrell & Dawson
Solicitors
CHRISTCHURCH. 9th December 1976

Attention Mr D.H.P. Dawson

Dear Sirs

re: Lilley Estate

20 I have been instructed by the District Public Trustee to act for the above estate.

I am giving consideration to the possibility of filing affidavits in reply to those which have been filed on behalf of your client.

I am not in a position to advise you at this stage, whether I will file affidavits in reply, but hope I may be in a position so to do in the relatively near future.

Yours faithfully
KERR MACKINTOSH & CO

per: "R.L. Kerr"

32.

"C"

In the Supreme
Court of New
Zealand

KERR MACKINTOSH & CO
Solicitors
Christchurch.

No. 9

The Registrar
Supreme Court
CHRISTCHURCH.

7th March 1977

Annexure "C"

Letter dated
7 March 1977

Dear Sir

re: Lilley v Public Trustee -
1.397/76

I have been instructed to act for the
Public Trustee.

19

Mr Dawson, who acts for Miss Lilley, the
plaintiff, made application to put the
application for leave to issue pro-
ceedings out of time, on the ready list.

I wish to file affidavits and am not
yet in a position to sign the application
to put the application in question on the
ready list.

Would you please note the file accordingly.

20

Yours faithfully
KERR MACKINTOSH & CO

Per: "R.L. Kerr"

No.10

No. 10

Affidavit of
John Jensen
Barnes

AFFIDAVIT OF JOHN JENSEN BARNES

16 May 1977

I, JOHN JENSEN BARNES of Christchurch,
Trust Officer, for the Public Trust
Office, Christchurch, make oath and say
as follows:

1. THAT I am employed by the Public
Trust Office at Christchurch and am
dealing with the estate of FRANCIS
ISRAEL LILLEY. Dennis George Haldon
Evans was formerly dealing with the
estate but he has now been transferred

30

out of Christchurch.

2. THE estate file discloses that the said Francis Israel Lilley died at Christchurch on 18th March 1974, and Probate of his will was granted to the above-named defendant on 17th April 1974.

In the Supreme
Court of New
Zealand

—
No.10

Affidavit of
John Jensen
Barnes

- continued

16 May 1977

10 3. THE said file further discloses that Death Duty Accounts were filed with the Inland Revenue Department, Christchurch, on 7th May 1974, and Probate was released by the Department on 2nd July 1974, there being \$2,666-46 duty assessed, which sum was paid on or about 17th June 1974.

4. THE assets of the estate for administration purposes were:

- (a) Furniture which was transferred to Daisy Elizabeth Lilley on or about 21st October 1974.
- 20 (b) A Triumph Motor car which was transferred to Daisy Elizabeth Lilley on or about 21st October 1974.
- (c) A Post Office Savings Bank Account.
- (d) Accrued Universal Superannuation.
- (e) Accrued Government Superannuation.
- (f) Bonus Bonds.
- (g) F.A.B. Account.

30 5. AFTER payment of administration expenses; taxation; death duty; property and other expenses, the Public Trustee's charge for administration, and liabilities at date of death, the balance of cash remaining in the estate of \$392-16 was paid to the said Daisy Elizabeth Lilley on or about 19th December 1974.

In the Supreme
Court of New
Zealand

No.10

Affidavit of
John Jensen
Barnes

- continued

16 May 1977

6. THE remaining asset of the estate,
the House property in Gibbon Street, was
transmitted to the Public Trustee, by
Transmission, on 21st May 1974. The
Public Trustee holds the said house
property as trustee of the Estate of
the said Francis Israel Lilley.

SWORN at Christchurch)
this 16th day of May) "J.J. Barnes"
1977, before me:)

10

"G.K. Leaming"

A Solicitor of the Supreme Court of New
Zealand

No.11

Affidavit of
Daneford Hector
Pierce Dawson

18 June 1977

No. 11

AFFIDAVIT OF DANEFORD HECTOR PIERCE DAWSON

I, DANEFORD HECTOR PIERCE DAWSON of
Christchurch, Solicitor, make oath and
say as follows:

1. THAT I am a partner in the legal
firm of Joynt, Andrews, Cottrell &
Dawson, solicitors to the plaintiff
herein.

20

2. THAT I refer to the affidavit of
John Jensen Barnes sworn on the 16th day
of May 1977 and filed herein, in which
it is claimed that from about 1974
onwards the Public Trustee has been
acting in this matter only as trustee
and not as executor.

3. ATTACHED hereto and marked with
the letter "A" is a copy of the Notice
to Quit the Premises given by the
Public Trustee to the Plaintiff on the
21st day of April 1976, which Notice
was given by the Public Trustee as
Executor of the said Will. Attached
hereto and marked with the letter "B"
is a copy of the Statement of Claim
issued out of the Magistrate's Court
by the Public Trustee against the

30

Plaintiff, and such Statement of Claim also is lodged by the Public Trustee as Executor of the said Will. Annexed hereto and marked with the letter "C" is a copy of the amended Statement of Claim also issued by the Public Trustee as Executor of the said Will.

In the Supreme Court of New Zealand

No. 11

Affidavit of Daneford Hector Pierce Dawson

18 4. ATTACHED hereto and marked with the letter "D" is a copy of the last Will and Testament of the abovenamed Francis Israel Lilley.

- continued

SWORN at Christchurch this)
18th day of June 1977,) "D.H.P. Dawson"
before me:)

18 June 1977

"N. Gilroy"

A Solicitor of the Supreme Court of New Zealand

"A"

Annexure "A"

20 To: Miss Daisy E. Lilley
15 Gibbon Street,
CHRISTCHURCH, 2.

Notice to Quit

21 April 1976

30 TAKE NOTICE that the Public Trustee as executor of the will of FRANCIS ISRAEL LILLEY late of Christchurch in New Zealand, Retired Railway Employee, HEREBY DEMANDS POSSESSION of all that piece of land situate and known as Number 15 Gibbon Street, Christchurch and being more particularly described as that piece of land containing Thirtyfour perches (0a.05.34p.) or thereabouts and being Lots 34, 35, 36 and 37 on Deposited Plan 731, excepting that part of Lots 34 and 35 taken by proclamation for the widening of Gibbon Street and being the remaining land comprised and described in Certificate of Title Volume 130 folio 60, Canterbury Registry and the whole of the land
40 contained and described in Certificates of Title Volume 147 folio 40 and Volume 147 folio 41, Canterbury Registry AND

In the Supreme
Court of New
Zealand

—
No.11

HEREBY REQUIRES you to vacate the said
premises on or before Monday the 24th day
of May 1976 and to remove therefrom all
of your own personal chattels on or before
the said date.

Annexure "A"

DATED at Christchurch this 21st day of
April 1976.

Notice to Quit

illegible
for District Public Trustee
for Christchurch

10

- continued

21 April 1976

—
"B"

Annexure " B"

IN THE MAGISTRATES COURT
HELD AT CHRISTCHURCH

Statement of
Claim

BETWEEN THE PUBLIC TRUSTEE
as executor of the
will of FRANCIS
ISRAEL LILLEY

(undated)

Plaintiff

A N D DAISY ELIZABETH
LILLEY

20

Defendant

STATEMENT OF CLAIM

The plaintiff by his solicitor says:

1. THAT the dwellinghouse and land
situate at and known as number 15 Gibbon
Street, Christchurch, is owned by the
estate of Francis Israel Lilley, late
of Christchurch, in New Zealand,
Retired Railway Employee, who died on or
about the 18th day of March 1974.

30

2. THAT the Public Trustee has been
appointed the executor of the said will,
probate being granted by the Supreme
Court of New Zealand, Christchurch
Registry, on the 17th day of April 1974.

3. THAT pursuant to paragraph 2 of the

will of the said deceased the defendant was permitted personally to reside in the said dwellinghouse until the expiration of a period of two years from the 19th day of March 1974.

In the Supreme Court of New Zealand

—
No.11

10 4. THAT the said two year period expired on the 19th day of March 1976 and on the 24th day of April 1976 a Notice to Quit the said dwellinghouse and to remove all of her personal chattels therefrom on or before the 24th day of May 1976 was served on the said Daisy Elizabeth Lilley.

Annexure "B"

-Statement of Claim

- continued

(undated)

20 5. THAT the said two year period expired on the 19th day of March 1976 and the said Daisy Elizabeth Lilley has continued to reside in the said dwellinghouse without any legal right to do so and has refused to deliver up possession of the said dwellinghouse and land.

6. THAT the plaintiff claims to recover from the defendant possession of the said dwellinghouse and land together with the costs of this action.

7. THAT the nearest Magistrates Court to the said dwellinghouse and land is the Magistrates Court at Christchurch.

30

—
"C"

Annexure "C"

IN THE MAGISTRATES COURT
HELD AT CHRISTCHURCH

Amended Statement of Claim

(undated)

BETWEEN THE PUBLIC TRUSTEE
as executor of the
will of FRANCIS
ISRAEL LILLEY

Plaintiff

A N D DAISY ELIZABETH
LILLEY

Defendant

40

In the Supreme Court of New Zealand

AMENDED STATEMENT OF CLAIM

No.11

Annexure "C"

Amended Statement of Claim

- continued

(undated)

1. The Plaintiff by his solicitor says that the Plaintiff further claims from the Defendant mesne profits at Fifteen dollars (\$15-00) per week from the 18th day of March 1976 to the date when this action is adjudicated upon by this Honourable Court in respect of the Defendant's occupation of the dwelling-house and land referred to in the Plaintiff's Statement of Claim.

19

"D"

Annexure "D"

Will dated 31 January 1942

THIS IS THE LAST WILL AND TESTAMENT of me FRANCIS ISRAEL LILLEY of Christchurch in the Provincial District of Canterbury in the Dominion of New Zealand, Railway Employee.

1. I REVOKE all wills and testamentary dispositions at any time heretofore executed by me AND I APPOINT THE PUBLIC TRUSTEE of the said Dominion (hereinafter referred to as "my trustee") to be the executor and trustee of this my will.

20

2. I GIVE AND DEVISE all my estate and interest at my death in the dwellinghouse and land owned by me at the date hereof and situate at and known as Number 15 Gibbon Street, Christchurch, unto my trustee UPON TRUST as follows:

30

(a) As from my death to permit my cousin DAISY E. LILLEY personally to reside therein until the expiry of a period of two years from the date of my death or the death of my said cousin or until she ceases to make my said dwellinghouse her place of permanent residence whichever first occurs (the first of such events to occur or the date of my death whichever is the later being hereinafter referred to as

40

"the period of distribution" subject to her paying all rates taxes interest insurance premiums and other outgoings usually payable out of income from time to time payable in connection therewith and to her keeping the same in good order and condition to the satisfaction of my trustee except in respect of any injury or deterioration occasioned by
 10 fire lightning tempest earthquake or other inevitable accident AND I DECLARE that my trustee shall have the power to determine the point of time when my said cousin ceases to make my said dwelling-house her place of permanent residence and that she shall not be deemed to cease to make it her place of permanent
 20 residency by reason only of temporary absence therefrom occasioned by sickness or holidays or any other reason which in the opinion of my trustee whose opinion shall be final and binding on all persons beneficially interested under this my will shall be a sufficient justification for such absence.

(b) From and after the period of distribution I DIRECT my trustee to sell call in and convert into money the said dwellinghouse and land and to stand
 30 possessed of the proceeds of such sale calling in and conversion UPON TRUST for such of my brothers and sisters WALTER HENRY LILLEY, ROBERT HECTOR LILLEY, WILLIAM RICHARD LILLEY, ERNEST VINGO LILLEY, MURIEL MARY LILLEY and PHYLLIS EVELYN LILLEY as survive me and if more than one in equal shares.

3. I FORGIVE my brother-in-law THOMAS McCAUGHAN all interest owing
 40 at the date of my death in respect of a sum of Six hundred pounds (£600) lent by me to my said brother-in-law prior to the date of this my will.

4. I FORGIVE my brother the said Walter Henry Lilley all interest owing at the date of my death in respect of a sum of Two hundred and fifty pounds

In the Supreme
 Court of New
 Zealand

—
 No.11

Annexure "D"

Will dated
 31 January
 1942

- continued

In the Supreme
Court of New
Zealand.

(£250) lent by me to my said brother
prior to the date of this my will.

No.11

Annexure "D"

Will dated
31 January 1942

- continued

5. I GIVE DEVISE AND BEQUEATH the
whole of my estate both real and
personal of whatsoever nature or kind
and wheresoever situate not hereinbefore
otherwise disposed of unto my trustee
UPON TRUST to pay thereout my just
debts funeral and testamentary
expenses and all estate and succession
duty payable in respect of my estate
and to stand possessed of the residue
for my cousin the said Daisy E. Lilley.

10

AS WITNESS my hand this thirty first
day of January One thousand nine hundred
and fortytwo.

SIGNED by the said Francis Israel
Lilley as and for his last will and
testament in the presence of us both
present at the same time who at his
request in his presence and in the
presence of each other have hereunto
subscribed our names as witnesses: AND
we hereby certify that before execution
hereof the words "not hereinbefore
otherwise disposed of" were inserted
between the words "situate" and "unto"
in the third line of paragraph 5
hereof:

20

"Francis Israel Lilley"

30

"F.E. Chappell JP"
Scty. YMCA
Trentham

Witness

Fred Evans Chappell JP
Secty YMCA
Trentham M.C.

Lloyd George Purser
Secy YMCA
Main Road
Upper Hutt.

Witness

40

AFFIDAVIT OF JOHN MICHAEL O'SULLIVAN

In the Supreme
Court of New
Zealand

I, JOHN MICHAEL O'SULLIVAN of Christchurch
District Public Trustee, make oath and
say as follows:

—
No.12

1. THAT I am the District Public
Trustee for Christchurch.

Affidavit of
John Michael
O'Sullivan

10 2. THAT I have been shown the documents
annexed hereunto marked with the letters
"A", "B" and "C", those documents
being respectively a Notice to Quit dated
21 April 1976, and addressed to Daisy
E. Lilley; a Summons for Recovery of
land dated 11 June 1976 and between
the Public Trustee as Executor of the
estate of Francis Israel Lilley and
Daisy Elizabeth Lilley; and a Statement
of Claim between the Public Trustee as
20 Executor of the will of Francis Israel
Lilley and the said Daisy Elizabeth
Lilley, which statement of claim
relates to the Summons for Recovery of
Land.

21 June 1977

3. IN each of the said documents just
referred to, the Public Trustee is
stated to be the "Executor of the
estate of Francis Israel Lilley" and
in the Notice to Quit it is specifically
stated that:

30 "The Public Trustee as Executor of
the will of Francis Israel Lilley
late of Christchurch in New
Zealand, Retired Railway Employee
HEREBY DEMANDS POSSESSION".

4. IT has always been the practice
of the Public Trustee in administering
the estate of a deceased person, in
any Court proceedings or steps in
relation to anticipated Court proceedings
40 to describe himself as "Executor" of
the estate on whose behalf he is taking
whatever step is required.

In the Supreme Court of New Zealand

No.12

Affidavit of John Michael O'Sullivan

- continued

21 June 1977

5. THE designation of "Executor" has no relation to whether or not the Public Trustee is still carrying out his executorial duties or has completed those duties and is acting simply as trustee, but as a matter of practice is used as a description of the Public Trustee. In this case the use of the word "executor" was strictly incorrect and the term "trustee" would have been more accurate, however whichever term was used was immaterial for the proceedings for the recovery of possession.

19

6. FROM my perusal of the file relating to the estate of Francis Israel Lilley, I consider that the executorial duties were completed on the 2nd day of July 1974.

SWORN at Christchurch)
this 21st day of June) "J.M.O'Sullivan"
1977, before me:)

20

"P.C. Straubel"

A Solicitor of the Supreme Court of New Zealand

"A"

Annexure "A"

Notice to Quit

21 April 1976

To: Miss Daisy E. Lilley,
15 Gibbon Street,
CHRISTCHURCH, 2.

TAKE NOTICE that the Public Trustee as executor of the will of FRANCIS ISRAEL LILLEY late of Christchurch in New Zealand, Retired Railway Employee, HEREBY DEMANDS POSSESSION of all that piece of land situate and known as Number 15 Gibbon Street, Christchurch and being more particularly described as that piece of land containing Thirtyfour perches (0a.0r.34p.) or thereabouts and being Lots 34, 35, 36 and 37 on Deposited Plan 731, excepting that part of Lots 34 and 35 taken by

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40

10 proclamation for the widening of Gibbon Street and being the remaining land comprised and described in Certificate of Title Volume 130 folio 60, Canterbury Registry and the whole of the land contained and described in Certificates of Title Volume 147 folio 40 and Volume 147 folio 41, Canterbury Registry AND HEREBY REQUIRES you to vacate the said premises on or before Monday the 24th day of May 1976 and to remove therefrom all of your own personal chattels on or before the said date.

DATED at Christchurch this 21st day of April 1976.

"illegible"

for District Public Trustee for
Christchurch.

20 AR Registered.

In the Supreme
 Court of New
 Zealand

—
 No.12

Annexure "A"

Notice to Quit

- continued

21 April 1976

44.

"B"

In the Supreme
Court of New
Zealand

No.12

Annexure "B"

Summons for
Recovery of
Land

11 June 1976

SUMMONS FOR THE RECOVERY OF LAND

In the Magistrate's Court
held at CHRISTCHURCH

Plaint No.
004781.

BETWEEN THE PUBLIC TRUSTEE as executor of
the estate of FRANCIS ISRAEL LILLEY
late of Christchurch in New Zealand,
Retired Railway Employee,

Plaintiff

AND DAISY ELIZABETH LILLEY 10

of 15 Gibbon Street, Christchurch, Spinster

Defendant

YOU ARE HEREBY SUMMONED to attend at the
Magistrate's Court to be held at Christchurch
No. 6 Court on Tuesday the 20th day of July
1976, at the hour of 10 in the forenoon, to
answer the plaintiff's claim to recover the
dwellinghouse and land situated at 15 Gibbon
Street, Christchurch, on the grounds stated in
the statement of claim annexed hereto, and 20
also to recover the sum of \$--- mentioned in
the statement of claim.

Dated this 11th day of June 1976.

L.S.

R.B. Paton

Deputy Registrar.

45.

"C"

In the Supreme
Court of New
Zealand

IN THE MAGISTRATES COURT
HELD AT CHRISTCHURCH

No.12

BETWEEN THE PUBLIC TRUSTEE
as executor of the
will of FRANCIS
ISRAEL LILLEY

Annexure "C"

Plaintiff

Statement of
Claim

A N D DAISY ELIZABETH
LILLEY

(Undated)

10

Defendant

STATEMENT OF CLAIM

The Plaintiff by his solicitor says:

1. THAT the dwellinghouse and land situate at and known as number 15 Gibbon Street, Christchurch, is owned by the estate of Francis Israel Lilley, late of Christchurch, in New Zealand, Retired Railway Employee, who died on or about the 18th day of March 1974.
- 20 2. THAT the Public Trustee has been appointed the executor of the said will, probate being granted by the Supreme Court of New Zealand, Christchurch Registry, on the 17th day of April 1974.
- 30 3. THAT pursuant to paragraph 2 of the will of the said deceased the defendant was permitted personally to reside in the said dwellinghouse until the expiration of a period of two years from the 18th day of March 1974.
4. THAT the said two year period expired on the 18th day of March 1976 and on the 24th day of April 1976 a Notice to Quit the said dwellinghouse and to remove all of her personal chattels therefrom on or before the

In the Supreme
Court of New
Zealand

24th day of May 1976 was served on the
said Daisy Elizabeth Lilley.

—
No.12.

5. THAT the said two year period
expired on the 18th day of March 1976
and the said Daisy Elizabeth Lilley
has continued to reside in the said
dwellinghouse without any legal right
to do so and has refused to deliver up
possession of the said dwellinghouse
and land.

10

Annexure "C"

Statement of
Claim

- continued

6. THAT the plaintiff claims to recover
from the defendant possession of the
said dwellinghouse and land together with
the costs of this action.

(undated)

7. THAT the nearest Magistrates Court
to the said dwellinghouse and land is
the Magistrates Court at Christchurch.

—
No. 13

No.13

REASONS FOR JUDGMENT OF ROPER J.

Reasons for
Judgment of
Roper J.

Hearing: 20 July 1977

20

Judgment: 21 July 1977

21 July 1977

Counsel: J.F. Burn in support
R.L. Kerr to oppose

This is an application for leave to proceed
out of time on an application under the
Law Reform (Testamentary Promises) Act 1949.

The intended plaintiff, Miss Lilley, seeks
relief against the estate of her deceased
cousin Francis Lilley (hereinafter
referred to as the Testator) who died on
the 18th March 1974. By his last will
dated the 31st January 1942 the Testator
bequeathed the whole of his estate (after
forgiveness of a debt of £600 owed by
his brother-in-law Thomas McCaughan,
and interest on a loan of £250 to his
brother Walter Lilley) to Miss Lilley,
subject to one important exception. His

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will provides that Miss Lilley may occupy his dwelling in Gibbon Street for a period of two years from his death, subject to her paying all outgoings and keeping the property in good order and condition, and that at the end of that time the property is to be sold and the proceeds divided equally between such of six named brothers and sisters as survive him. Only two of the named brothers and sisters survived - Mr Ernest Lilley and Mrs Phyllis Webster. Miss Lilley, the intended plaintiff, is 71, Mr Ernest Lilley 79 and Mrs Webster 72, so that unless this unfortunate and rather sad affair is not resolved without delay there will be no one left to enjoy the fruits of victory. The estate has been administered with effect that Miss Lilley has received all that she was entitled to under the will, namely the furniture, motorcar and cash to a total value of about \$2,100 but she will not vacate the dwelling.

Her reason for this stand is that she has lived in the house since she was 16. She looked after her uncle and his children until the uncle died in 1939 and thereafter cared for the testator until his death in 1974. There is some evidence of a promise by the testator that Miss Lilley would be permitted to remain in the house during her lifetime.

At the expiry of the two year period of occupation provided for in the will Miss Lilley was still in residence and indeed is there to this day. All attempts to dislodge her have failed. Letters have been written, a notice to quit served and even proceedings for possession issued in the Magistrate's Court. Furthermore advice from more than one quarter that she seek legal advice with a view to the issue of a testamentary promise proceedings went unheeded for months. When she did seek legal advice difficulties about legal aid held the matter up with the result that the present application was not filed until the 23th October 1976. The basic reasons advanced for her inactivity are first, that following the testator's

In the Supreme
Court of New
Zealand

—
No.13

Reasons for
Judgment of
Roper J.

- continued

21 July 1977

In the Supreme
Court of New
Zealand

—
No.13

Reasons for
Judgment of
Roper J.

- continued

21 July 1977

death Miss Lilley claims that she received assurances from the surviving beneficiaries, Mr Ernest Lilley and Mrs Webster, that she would not be required to vacate the property, and secondly, she did not wish to antagonize the beneficiaries by issuing proceedings. Both beneficiaries deny giving any such assurance and not unnaturally on account of their age want the property sold and the proceeds distributed. Miss Lilley has paid no rent and the beneficiaries have met the outgoings.

10

Section 6 of the Act provides that no action to enforce a claim shall be maintainable unless the action is commenced within twelve months after the personal representative of the deceased took out representation. Probate was granted to the Public Trustee on the 17th April 1974, so that the present application is about eighteen months out of time. The proviso to s.6 empowers the Court to extend time, even where the time for commencement has already expired, but there is an important limitation to the power - the application for extension must be made "before the final distribution of the estate".

20

Mr Kerr for the Public Trustee submitted that there had been "a final distribution" of the Testator's estate within the meaning of those words in the proviso to s.6 before the date of this application, and that consequently the Court now has no jurisdiction to extend time. He further submitted that in any event leave should be refused on the merits but I did not call on Mr Burn to argue that aspect. I am firmly of the opinion that despite Miss Lilley's delays, and what some might regard as quite unreasonable attitude, it would in the circumstances of the case as I know them be unjust to refuse leave if the Court has jurisdiction to grant it.

30

40

It must be taken as settled law that there has been "a final distribution" of the estate within the meaning of the proviso to s.6 when the executor of a

will has fully performed his executorial duties and holds the assets of the estate as trustee of the will only, and that the question whether executorial duties have been completed in any case is a question of fact. It has been so held by Hutchison J. in Gudgeon v. Public Trustee [1960] NZLR 233 (followed by Macarthur J. in Fowler v. New Zealand Insurance Coy Ltd [1962] NZLR 947).

In the Supreme
Court of New
Zealand

—
No.13

Reasons for
Judgment of
Roper J.

- continued

21 July 1977

The question whether executors have ceased to be executors and have become trustees often arises when the same persons are named in the will as both executors and trustees and it is not always easy to determine the point at which one duty ends and the other begins.

In Gudgeon Hutchison J. approached the problem thus at page 237:

20 "I go then to the question whether the Public Trustee has fully performed his duties as executor and holds the assets of the estate as trustee only. I have had much difficulty with this, and I am in good company in that, as is shown by the many cases on the point.

30 The question is primarily a question of fact. I take the position to be as stated in the judgment of Lord Hanworth M.R. in Inland Revenue Commissioners v. Smith [1930] 1 KB. 713: "All the relevant matters must be taken into consideration and, as Rowlatt J. says in his judgment in the present case, you may have an assent by conduct:

40 "When it is said that the executor "assents to a bequest", what is meant is not that he assents to the disposition of the testator, but that he assents to its taking effect upon the specific property if the bequest is specific, upon a sum of money if it is

No.13

Reasons for
Judgment of
Roper J.

- continued

21 July 1977

pecuniary, or upon the residue brought out by the executor at the end of the administration if it is a residuary bequest. Lord Haldane's exposition in Attenborough v. Solomon [1913] AC 76 makes this clear. The assent of the executor, it is important to add, may be inferred, when there is clearly nothing more to be done by way of administration'.

19

The question is, in all cases: Has the administration of the estate reached a point of ripeness at which you can infer an assent, at which you can infer that the residuary estate has been ascertained and that it is outstanding and not handed over merely for some other reason'."

The practical difficulty is to know when the residue has been "ascertained". In Davenport v. Stafford (1851) 14 Beav. 319, Romilly M.R. said "it is not possible to treat a residue as ascertained until all the assets have been got in, and all the debts have been paid".

20

In the instant case the District Public Trustee Mr Sullivan has deposed that his executorial duties were completed by the 2nd July 1974 when probate was released, and Mr Kerr submitted that at the very latest they were completed by the 19th December 1974. By that time account had been filed, the house registered in the name of the Public Trustee, death duties, debts and funeral expenses and the residuary estate not only ascertained but paid or transferred to Miss Lilley. By that time all that remained was the house property and in terms of the will that was held by the Public Trustee "upon trust as from my death to permit my cousin Daisy E. Lilley personally to reside therein until the expiry of a period of two years from the date of my death ... and from and after the period of distribution (being the date on which Miss

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Lilley ceased to reside in the house) to sell ... the said dwellinghouse and stand possessed of the proceeds of sale upon trust for such of my brothers and sisters ... as survive me ...".

In the Supreme
Court of New
Zealand

No.13

Mr Burn, who relied on Gudgeon and Fowler (and incidentally the same passages as Mr Kerr cited), also referred to In re Ponder [1921] 2 Ch., the headnote to which reads:

Reasons for
Judgment of
Roper J.

- continued

21 July 1977

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"An administrator who has paid all expenses and debts and cleared the intestate's estate stands in the same position towards the next of kin as that which an executor who has cleared the estate stands in towards the residuary legatees; he ceases to be an administrator and becomes a trustee, and the Court can appoint a new trustee to act jointly with him."

20

(That is a decision of Sargeant J. which has undergone some vicissitudes. It was followed by Clauson J. in Re Pitt (1928) 44 TLR 371, criticised by the Court of Appeal in Harvell v. Foster [1954] 2 QB 367, and restored to favour by Danckwerts J. in Re Cockburn's Will Trusts [1957] 3 WLR 212).

30

Mr Burn argued that the executor had not completed his duties in that he had not cleared the estate; and that until the house was sold and the proceeds held he remained an executor. I cannot accept that. I agree with Mr Kerr that the will makes it clear that the house was to be held on a specific trust, and that after the 19th December 1974 that was the only duty to be performed and it was a duty of the trustee. I conclude, therefore, but with regret, that the estate was finally distributed on or about the 19th December 1974 and that I have no jurisdiction to grant leave sought.

40

The application is dismissed with no order as to costs.

FORMAL ORDER

No.14

Formal Order

11 August 1977

THIS APPLICATION for leave to proceed out of time, under the Law Reform (Testamentary Promises) Act 1949, coming on for hearing on the 20th day of July 1977, before His Honour Mr Justice Roper, after hearing the Plaintiff and the Defendant and the evidence then adduced, it is adjudged that the application is dismissed with no order as to costs.

10

DATED the 11th day of August 1977.

By the Court

"P.R. Fantham"

Deputy Registrar,

No.15

Chronology

No. 15

CHRONOLOGY

1. Francis Israel Lilley 18th March 1974
2. Public Trustee writes to Plaintiff advising terms of will and summarising estate assets. Refers to 2 year occupation by plaintiff of house. 2nd April 1974
- 2(a) Probate granted Public Trustee 17th April 1974
3. Death Duty accounts filed Inland Revenue Department 7th May 1974
4. Estate House Property registered in name of Public Trustee by transmission 21st May 1974

20

30

	5. Public Trustee writes to plaintiff as to administration of estate and indicates not having heard from Mr Lilley's brother and sister regarding future of house property	12th June 1974	In the Supreme Court of New Zealand — No. 15 Chronology
10	6. Death duty paid (on or about)	17th June 1974	- continued
	7. Probate released	2nd July 1974	
	8. District Public Trustee considers executorial duties completed	2nd July 1974	
	9. Estate furniture transferred to plaintiff	21st October 1974	
	10. Estate motor car transferred to plaintiff	21st October 1974	
20	11. Balance of estate cash of \$302 paid to plaintiff	19th December 1974	
	12. Time for taking proceedings without leave expires	18th March 1975	
30	13. Public Trustee writes to plaintiff reminding her right to reside in house property expires 19th March 1976	17th October 1975	
	14. Mole of Aged People telephones Public Trustee as to plaintiff residing in house	29th October 1975	
40	15. Telephone discussion between employee of Public Trustee and plaintiff as to residing in house	Between 17th October and 9th January 1976	

In the Supreme
Court of New
Zealand

No.15

Chronology

- continued

- | | | |
|---|-------------------|----|
| 16. Public Trustee writes to plaintiff as to residing in house | 9th January 1976 | |
| 17. Public Trustee writes to plaintiff as to residing in house | 4th February 1976 | |
| 18. Public Trustee writes to plaintiff as to residing in house | 3rd March 1976 | |
| 19. Plaintiff's right to reside in house expires | 18th March 1976 | 10 |
| 20. Public Trustee writes to plaintiff as to residing in house and requiring her to vacate by 8th April 1976 | 18th March 1976 | |
| 21. Plaintiff's solicitors write making claim under Law Reform (Testamentary Promises) Act | 30th March 1976 | 20 |
| 22. Notice to Quit issued to plaintiff | 21st April 1976 | |
| ("Public Trustee as executor of the will of Francis Israel Lilley") | | |
| 23. Plaintiff's solicitors write to Public Trustee indicating (inter alia) Plaintiff unable to vacate property | 7th May 1976 | 30 |
| 24. Summons for recovery of land and statement of claim issued by Public Trustee as executor of the will of Francis Israel Lilley | 11th June 1976 | |
| 25. Application to issue proceedings under Law Reform (Testamentary Promises) Act filed | 28th October 1976 | 40 |

55.

No. 16

NOTICE OF MOTION OF APPEAL

IN THE COURT OF APPEAL OF NEW ZEALAND

No. CA.106/77

BETWEEN DAISY ELIZABETH LILLEY
of 15 Gibbon Street,
Christchurch, spinster

Appellant

A N D THE PUBLIC TRUSTEE OF
THE DOMINION OF NEW
ZEALAND sued as
executor and trustee of
the estate of the late
FRANCIS ISRAEL LILLEY
of Christchurch, Railway
Employee, deceased.

Respondent

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20

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TAKE NOTICE that on day the
day of 1977 this Honourable Court
will be moved by counsel for the appellant
on the first day of the commencement on
the next sitting of this Honourable Court
or so soon thereafter as counsel can be
heard on appeal from the whole of the
judgment of the Supreme Court of New
Zealand bearing date the 11th day of
August 1977 and delivered by Mr Justice
Roper at Christchurch UPON THE GROUNDS
that the said judgment is wrong both in
fact and in law.

DATED at Christchurch this 9th day of
September 1977.

"D.H.P. Dawson"

Solicitor for the Appellant

In the Court
of Appeal of
New Zealand

No.16

Notice of Motion
on Appeal

9 September 1977

No.17

REASONS FOR JUDGMENT OF THE COURT
DELIVERED BY SOMERS J.

Reasons for
Judgment of
the Court

19 July 1978

Coram: Richmond P.
Richardson J.
Somers J.

Hearing: June 16, 1978

Counsel: J.F. Burn for appellant
R.L. Kerr for respondent

Judgment: July 19, 1978

This is an appeal from a judgment of Roper J. 10
delivered on 21 July 1977 in which he
dismissed an application by the appellant
under s.6 of the Law Reform (Testamentary
Promises) Act 1949 for leave to commence
an action under that Act against the
respondent, the Public Trustee, as
executor and trustee of the will of
Francis Israel Lilley (to whom we will
refer as the testator).

The testator died on 18 March 1974 and 20
probate of his will was granted to the
Public Trustee (therein called "my
trustee") the executor therein named on
17 April 1974. By his will the testator
devised his house property at 15
Gibbon Street, Christchurch, to his
trustee upon trust:

"(a) As from my death to permit
my cousin DAISY E. LILLEY (the
appellant) personally to reside 30
therein until the expiry of a
period of two years from the date
of my death or the death of my
said cousin or until she ceases
to make the said dwellinghouse her
place of permanent residence
whichever first occurs (the first
of such events to occur or the date
of my death whichever is the later.

being hereinafter referred to as 'the period of distribution') subject to her paying all" [outgoings].

In the Court
of Appeal of
New Zealand

No.17

Reasons for
Judgment of
the Court

- continued

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"(b) From and after the period of distribution I DIRECT my trustee to sell call in and convert into money the said dwellinghouse and land and to stand possessed of the proceeds of such sale calling in and conversion UPON TRUST"

20

(in the events that happened) for his brother Ernest Vingo Lilley and his sister Phyllis Evelyn Lilley. After making certain other specific bequests the testator gave the remainder of his estate to his executor upon trust to pay thereout his debts, funeral and testamentary expenses and all estate duties and to hold the residue for the appellant.

19 July 1978

30

The learned judge found that the executor had completed his duties as such on or about 19 December 1974 and that from that time he held the assets then in his hands as trustee and not as executor. That the date was expressed as being "on or about" is not surprising for in the absence of a written assent it is always difficult to ascertain the precise point of time at which that translation takes place. Indeed, according to Mr Augustine Birrell, in his lectures on the Duties and Liabilities of Trustees, Sir John Wickens (described as a nice observer) "used to tell his pupils it invariably "took place in the dead hours of the night". That uncertainty is a feature of the argument for the appellant.

40

The time limited by s.6 of the Law Reform (Testamentary Promises) Act 1949 (the 1949 Act) for bringing an action without leave expired on 17 April 1975. The appellant's right to reside in the house property in terms of the will ended on 18 March 1976. On 30 March 1976

In the Court
of Appeal of
New Zealand

—
No.17

Reasons for
Judgment of
the Court

- continued

19 July 1978

the appellant's solicitors wrote to the Public Trustee advising of the appellant's claim under the Act. The application for leave was filed on 28 October 1976.

Section 6 of the 1949 Act provides as follows:

"No action to enforce a claim under this Act shall be maintainable unless the action is commenced within twelve months after the personal representative of the deceased took out representation: 10

Provided that the time for commencing an action may be extended for a further period by the Court or a Judge, after hearing such of the parties affected as the Court or Judge thinks necessary, and this power shall extend to cases where the time for commencing an action has already expired, including cases where it expired before the commencement of this proviso; but in all such cases the application for extension shall be made before the final distribution of the estate of the deceased, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court, and after every notice (if any) of an intention to make an application under this Act has lapsed in accordance with subsection (6) of section 30A of the Administration Act 1952, as inserted by section 2 of the Administration Amendment Act 1960, shall be disturbed by reason of the application for extension, or of an order made on that application, or of any action or order that is consequential thereon." 20 30 40

Roper J. considered that in the circumstances of the case as made known to him it would be unjust to refuse leave. That

finding was not attacked. But he held that he had no power to grant leave considering himself bound by a number of cases in which it has been held that "the final distribution" referred to in the proviso to s.6 of the 1949 Act occurs when the executor ceases to hold the assets in that capacity and holds them as trustee.

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10 The first point taken by Mr Burn of counsel for the appellant was that final distribution in that sense had not taken place at the date upon which the application was made. His submissions were directed to one matter only. He submitted that the obligation cast upon the Public Trustee by clause 2(b) of the will, to sell, call in and convert into money the testator's house property at the defined period of distribution, was an obligation attaching to the Public Trustee in his character as executor of the will. Clause 2 of the will contains a specific devise to the executor upon the trusts there set out. It is no different in relevant quality from any other bequest or

20 devise. The asset, the subject matter of the devise, was available in due course of administration for the liabilities of the testator subject of course to any right of the beneficiaries to have the

30 assets marshalled. The assent of the executor to the devise to himself upon the trusts contained in Clause 2 caused him to become a trustee of the property. The trust for sale was a trust imposed upon the Public Trustee qua devisee and not as executor. The learned judge was right to reject that submission.

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40 The principal contention of the appellant was that the term "final distribution" in the proviso to s.6 of the 1949 Act was reference not to the change in the nature of the fiduciary character of the person holding the assets but to an actual distribution in the sense of a parting with assets to the beneficiary. That involved necessarily the contention that the line of decisions in New Zealand commencing with Public Trustee v. J.A. Kidd [1931] NZLR 1 and In re Donohue

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(dec'd), Donohue v. Public Trustee [1933] NZLR 477 under the Family Protection Act 1908, and including Gudgeon v. Public Trustee [1960] NZLR 233, Fowler v. New Zealand Insurance Co Ltd [1962] NZLR 947 and Lamb v. Lamb [1976] 1 NZLR 501 under the 1949 Act, were wrongly decided or ought not now to be followed and that the decision of the High Court of Australia in Easterbrook v. Young (1977) 13 ALR 351, 10 not mentioned to Roper J. and probably not then available, should be preferred. Mr Burn prayed in aid the various considerations which led the High Court, in construing provisions of the Testator's Family Maintenance and Guardianship of Infants Act 1961 (NSW) which were similar in terms to s.6 of the 1949 Act, to differ from the conclusions reached in Public Trustee v. J.A. Kidd and In re Donohue. 20

If the present case fell to be determined solely upon the present wording of s.6 of the 1949 Act, the reasoning in Easterbrook v. Young, although related to testator's family maintenance legislation, might be thought to have persuasive if not compelling force. But the history of the present enactment and the reasons which led to its being passed in its present form, both of which are legitimate aids in its construction (Mangin v. C.I.R. [1971] NZLR 591, 594) provide an obstacle to the appellant's submissions which in the end is insurmountable. That history and those reasons extend to the provisions of the Family Protection Act 1955 and its forerunners. 30

A convenient starting point is s.33(9) of the Family Protection Act 1908 re-enacting s.3(9) of the Testator's Family Maintenance Act 1906. It provided: 40

"No application shall be heard by the Court at the instance of a party claiming the benefit of the Act unless such application is made within twelve months from the date of the

grant in New Zealand of probate
of the will:

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10 Provided that the time for making an
application may be extended for a
further period of twelve months by
the Court or a Judge, after hearing
such of the parties affected as the
Court or Judge shall think necessary,
and this power shall extend to cases
where the time for applying has already
expired, including cases where it
expired before the passing of this
Act:

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Provided that in such cases the
application for extension be made
within twelve months from the date
of the grant of probate."

20 That provision was altered by s.2 of the
Family Protection Amendment Act 1921-22.
The words "twelve months" were omitted
from the first proviso, and the second
proviso was repealed. The effect of
those amendments was that the time within
which an application to extend time might
be made and the period of such permissible
extension were no longer limited by purely
temporal considerations. In lieu of those
provisions the following words were added
to the first proviso:

30 "but in all such cases the application
for extension shall be made before the
final distribution of the estate, and
no distribution of any part of the
estate made prior to the application
shall be disturbed by reason of the
application or of an order made thereon."

40 That was how the law stood when Public
Trustee v. J.A. Kidd [1931] NZLR 1 and
In re Donohue [1933] NZLR 477 were decided
and it appears that the New South Wales
statute construed in Easterbrook v. Young
(1977) ALR 351 was in like form. In the two
New Zealand cases, the second of which was a
unanimous decision of a Full Court comprising

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Myers C.J., and Reed, MacGregor, Ostler,
and Smith J.J., it was held that when
executors who are also trustees have got
in the estate and performed the duties
of their office they thenceforth hold the
residuary property vested in them as
trustees for the beneficiaries under the
will and that the property then ceases
to be part of the estate of the testator.
If has then been "finally distributed":
see Public Trustee v. J.A. Kidd [1931] NZLR
1, 5-6. Save for the reference to
distribution before notice the present
proviso to s.6 of the Act is in the same
terms as the enactment considered in the
context of the Family Protection Act
1955 in the two New Zealand cases.

10

By s.23(1) of the Statutes Amendment Act
1939 it was enacted that:

"For the purposes of Part II of
the Family Protection Act, 1908,
no real or personal property that
is held upon trust for any of the
beneficiaries in the estate of any
deceased person shall be deemed to
have been distributed or to have
ceased to be part of the estate of the
deceased by reason of the fact that
it is held by the executors or
administrators after they have ceased
to be executors or administrators in
respect of that property and have
become trustees thereof, or by
reason of the fact that it is held by
any other trustees."

20

30

That provision was clearly passed to
abrogate the effect of the decisions in
Public Trustee v. J.A. Kidd [1931] NZLR
1 and In re Donohue [1933] NZLR 477. In
other words, it would seem that Parliament
accepted those decisions as correctly
interpreting the words "final
distribution" as they appeared in the
Act prior to the 1939 amendment.

40

10 In 1944 a first step was taken by the
Legislature in the field of testamentary
promises. Section 3 of the Law Reform
Act 1944 rendered enforceable in the
manner there set out claims made against the
estate of a deceased person founded upon
the rendering of services to or the
performance of work for the deceased during
his life where the claimant was able to
10 prove an express or implied promise by the
deceased to reward him for such services
or work by making some testamentary
provision. The mischiefs at which that
legislation was aimed were probably in-
tended to overcome such common law
problems as uncertainty, past consideration,
contractual capacity and, in the case of
promises relating to land, the provisions
of the Statute of Frauds. Section 3(2)
20 provided:

"No action to enforce a claim under
this section shall be maintainable
unless the action is commenced within
twelve months after the personal
representative of the deceased took
out representation."

There was no provision for an extension of
time.

30 The Law Reform (Testamentary Promises)
Act 1949 was passed in substitution for
s.3 of the Law Reform Act 1944 which was
accordingly repealed: see 3.7(1) of
the 1949 Act. As originally enacted s.6
provided as follows:

40 "No action to enforce a claim under
this Act shall be maintainable
unless the action is commenced within
twelve months after the personal
representative of the deceased took
out representation:

Provided that any such action may be
commenced at any time within three
months after the passing of this Act,
notwithstanding that the aforesaid
period of twelve months has expired

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before or after the passing of this Act, if at the time of the commencement of the action the estate of the deceased has not been finally distributed. For the purposes of this proviso, no real or personal property that is held upon trust for any of the beneficiaries in the estate of the deceased shall be deemed to have been distributed or to have ceased to be part 10 of the estate of the deceased by reason of the fact that it is held by the executors or administrators after they have ceased to be executors or administrators in respect of that property and have become trustees thereof, or by reason of the fact that it is held by any other trustees."

The proviso, in its reference to final distribution, gave a direction of the same 20 type as that enacted in respect of the Family Protection Act by the Statutes Amendment Act 1939.

The three month period of grace was no doubt given because the 1949 Act laid at rest certain apprehensions that had previously been expressed as to the scope of s.3(1) of the Law Reform Act 1944, and because it also cured some defects and problems 30 exposed by litigation. Some of those matters are referred to in the article by Professor I.D. Campbell in (1947) 23 NZLJ 221, 235. In Nealon v. Public Trustee [1948] NZLR 324 Fleming J., in a decision delivered on 5 February 1948, had held that in relation to real property the Statute of Frauds applied. Although that decision was reversed by the judgments given in this Court on 17 December 1948 in Nealon v. Public Trustee [1949] NZLR 148, the judgment 40 at first instance may have deterred some claimants from commencing an action. There was doubt too as to whether performance of services antecedent to the promise was sufficient. That point was not resolved in Nealon v. Public Trustee. Both the latter points are covered by s.3(2) of the 1949 Act. The Legislature enacted the 1949 Act in

substitution for the 1944 enactment and must be taken to have considered that some persons may have been deprived of a claim intended to have been embraced by the Law Reform Act 1944. When the Legislature decided to allow a three month period of grace, running from the commencement of the Act of 1949, it evidently considered that the expression "final distribution" should be given a wider meaning than had been attributed to it in Public Trustee v. J.A. Kidd [1931] NZLR 1 lest it fail in its alleviating effect. But once the period of three months had passed the period of limitation reverted to the simple and original period of twelve months from grant of representation.

10

Section 2 of the Law Reform (Testamentary Promises) Act 1953 repealed the proviso to s.6 of the 1949 Act (which was in any event spent) and substituted the following:

20

"Provided that the time for commencing an action may be extended for a further period by the Court or a Judge, after hearing such of the parties affected as the Court or Judge thinks necessary, and this power shall extend to cases where the time for commencing an action has already expired, including cases where it expired before the commencement of this proviso; but in all such cases the application for extension shall be made before the final distribution of the estate of the deceased, and no distribution of any part of the estate made before the date of the application shall be disturbed by reason of the application or of an order made thereon."

30

40

As has already been observed, that amendment put the limitation provisions of the 1949 Act in similar terms to those contained in the Family Protection Act 1908 after the amendment of 1921-22.

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It is not necessary to go past that point for the subsequent amendment (s.4 of the Law Reform, (Testamentary Promises) Amendment Act 1961) does not affect the point at issue.

From that lengthy but necessary recital of the history of the legislation certain points emerge. First, the Legislature recognised and accepted the decisions in Public Trustee v. J.A. Kidd [1931] NZLR 10 1 and In re Donchue [1933] NZLR 477 as to the meaning of the expression "final distribution". It did so when it passed the 1939 amendment to the Family Protection Act. Secondly, and in the field of testamentary promises, it expressly departed from that meaning for a three month period only. In doing so it adopted words similar to those which had earlier been used when the Family Protection Act was amended 20 by the Statutes Amendment Act 1939. Thirdly, when in 1953 a general right to apply for leave out of time was for the first time given in relation to testamentary promises, the Legislature conferred that right in terms whose meaning had been established by the Courts in the Donohue case and had been accepted by the Legislature in 1939 when enlarging the meaning of 'final distribution' in the Family Protection Act. Fourthly, at 30 the very time it substituted the present proviso as to leave it repealed the more extensive terms of the (temporary) proviso enacted in 1949. The proviso, though spent, was a direct reminder of the need to give an enlarged meaning to "final distribution" if it were thought desirable for time to run beyond the point when the duties of the executors were completed. Yet no step was taken to achieve such a result. 40

Mr Kerr submitted that this was a case suitable for the application of the principle of construction enunciated by Griffith C.J. in D'Emden v. Pedder [1904] 1 CLR 91, 110 and approved in Welsh v. Outram [1907] AC 81, 89 namely:

"When a particular form of
legislature enactment, which has

received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

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- 10 We appreciate that the rule referred to by
the Chief Justice has not gone without
criticism: see Galloway v. Galloway
[1956] AC 299, 320 per Lord Radcliffe;
R. v. Reynhoudt (1962) 107 CLR 381, 388
per Dixon C.J.; and Farrell v. Alexander
[1977] AC 59, 74 per Lord Wilberforce,
89-91 per Lord Simon of Glaisdale. It
has always been subject to the
consideration that it should not lead the
20 Court to perpetuate the construction of a
statutory provision which it considers to
be erroneous: Barras v. Aberdeen Steam
Trawling and Fishing Co Ltd [1933] AC 402,
446, 447; Salvation Army (Victoria) Property
Ltd v. Fern Tree Gully Corporation (1952)
35 CLR 159, 174. The history of the
legislation now under consideration has
however followed a very special course.
- 30 It is for that reason that we are of opinion -
in the words of Lord Simon of Glaisdale
in Farrell v. Alexander [1977] AC 59, 91 -
that the intention of Parliament to endorse
the previous New Zealand decisions has
been so clearly demonstrated that the Court
is pre-empted from an independent examination
of the validity of those earlier inter-
pretations. Even if the decisions on the
Family Protection Act are put to one side
and regard is had solely to the course of
40 the legislation affecting testamentary promises
the only tenable conclusion is that
Parliament intended the words "final
distribution", as they appear in the present
enactment, to have a narrower meaning than
that contended for by the appellant. The
Legislature, in its positive enactments
and repeals, has itself defined the
meaning to be attributed to those words.

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The wording of s.3 of the Law Reform (Testamentary Promises) Act 1949 has at all times lent some support to that conclusion. The opening words are "where in the administration of the estate of any deceased person a claim is made against the estate ...". The claim is expressed to be "enforceable against the personal representatives of the deceased" and the nature and amounts of the claims of creditors are matters to which regard is to be had. That terminology suggests a claim under the 1949 Act is to be made in the course of administration of an estate and is in the nature of a claim by a creditor, a view which is consonant with the mischief which the Act was designed to cure. 10

The difference between the provisions of the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 on this point may arise from the fact that the possible claimants under the former are restricted to certain close relatives while those under the latter are subject to no such limitation. However that may be, and for the reasons which we have given it is not now open to this Court to adopt the reasoning of the High Court in Easterbrook v. Young (1977) 13 ALR 351. 20 30

For those reasons, which in the main are the same as those which influenced Hutchison A.C.J. in Gudgeon v. Public Trustee [1960] NZLR 233, this appeal cannot succeed.

The appeal is accordingly dismissed.

In the Supreme Court there was no order as to costs. In this Court the respondent is entitled to costs which we fix at \$400 together with disbursements including reasonable agency costs and other necessary payments and reasonable travelling and accommodation expenses of counsel as fixed by the Registrar. 40

"E.J. Somers J."

69.

No.18

In the Court
of Appeal of
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JUDGMENT OF THE COURT OF APPEAL

BEFORE. THE RIGHT HONOURABLE MR JUSTICE
RICHMOND, PRESIDENT
THE RIGHT HONOURABLE MR JUSTICE
RICHARDSON
THE HONOURABLE MR JUSTICE SOMERS

No.18

Order of the
Court of
Appeal

WEDNESDAY the 19th day of July 1978

19 July 1978

10 THIS APPEAL coming on for hearing on the
16th day of June 1978 AND UPON HEARING
Mr J.F. Burn of counsel for the appellant
and Mr R.L. Kerr of counsel for the
respondent THIS COURT HEREBY ORDERS
that this appeal be and the same is hereby
dismissed AND THIS COURT HEREBY FURTHER
20 ORDERS that the appellant pay to the
respondent their costs of the appeal
fixed in the sum of \$400.00 together with
disbursements including reasonable agency
costs and other necessary payments and
reasonable travelling and accommodation
expenses of counsel as fixed by the
Registrar

By the Court

L.S.

'W.D. L'Estrange'

Registrar

No.19

No.19

ORDER GRANTING FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL

Order Granting
Final Leave to
Appeal to Her
Majesty in Council.

30 Monday the 12th day of February 1979

Before the Right Honourable Mr Justice Cooke,
the Right Honourable Mr Justice Richardson 12 February 1979.
and Before The Honourable Mr Justice Quilliam.

UPON READING the Notice of Motion of the
Appellant for an order granting her final

In the Court
of Appeal of
New Zealand

leave to Appeal to Her Majesty in Council
and the Affidavit of Daneford Hector
Pierce Dawson filed herein

No.19

Order Granting
Final Leave to
Appeal to Her
Majesty in Council

AND UPON HEARING Mr C.P. Brosnahan as
Counsel on behalf of the Appellant and
Mr P. O'Brien as Counsel on behalf of the
Respondent this Honourable Court hereby
orders that the Appellant be granted
final leave to Appeal to Her Majesty in
Council

10

12 February 1979

BY THE COURT

- continued

L.S.

'D.V. Jenkin'

REGISTRAR

71.

No.20.

CERTIFICATE OF REGISTRAR OF COURT OF
APPEAL OF NEW ZEALAND.

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of Appeal of
New Zealand

No.20

Certificate
of Registrar

21 March 1980

10 I, WILLIAM DORMER L'ESTRANGE Registrar of
the Court of Appeal of New Zealand DO HEREBY
CERTIFY that the foregoing 70 pages of
printed matter contain true and correct
copies of all the proceedings, evidence,
judgments, decrees and orders had or made in
the above matter, so far as the same have
relation to the matters of appeal, and also
correct copies of the reasons given by the
Judges of the Court of Appeal of New Zealand
in delivering judgment therein; such reasons
having been given in writing:

20 AND I DO FURTHER CERTIFY that the Appellant
has taken all the necessary steps for the
purpose of procuring the preparation of the
record, and the despatch thereof to
England, and has done all other acts, matters
and things entitling the said Appellant to
prosecute this Appeal

AS WITNESS my hand and Seal of the Court
of Appeal of New Zealand this 21st day of
March 1980.

L.S.

'W.D. L'Estrange'

REGISTRAR

IN THE PRIVY COUNCIL

No. 17 of 1980

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

DAISY ELIZABETH LILLEY

Appellant

- and -

THE PUBLIC TRUSTEE OF THE
DOMINION OF NEW ZEALAND

Respondent

RECORD OF PROCEEDINGS

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Agents for:

Anthony Polson &
Robertson,
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New Zealand.