IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-2199
[2016] NZHC 1642

IN THE MATTER	of the Estate of Margaret Joy Ropati
BETWEEN	SOSENE JOHN ROPATI Applicant
AND	PETER ROPATI AND JOSEPH ROPATI Respondents

CIV-2015-404-2419

IN THE MATTER	of the Estate of Margaret Joy Ropati
BETWEEN	PETER ROPATI AND JOSEPH ROPATI Applicants
AND	SOSENE ROPATI, TONY BLANC, FEU ROPATI, PETER ROPATI, FEAGIAI SUSAN ROPATI, JOSEPH ROPATI, FAATEA ROPATI, IVA LEWIS ROPATI AND ROMI LEONE ROPATI Respondents

Hearing: 18 February 2016

Appearances: P J Napier for Applicant in CIV-2199 and First named Respondent in CIV-2419
V T M Bruton for Respondents in CIV-2199 and Applicants in CIV-2419

Judgment: 19 July 2016

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 19 July 2016 at 4.15 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Introduction

[1] This judgment determines the two originating applications shown in the intituling. Both arise in connection with the administration of the estate of Margaret Joy Ropati. One is brought by one of Mrs Ropati's sons, Sosene or John Ropati, and the other by two other sons, Peter and Joseph Ropati, who are the executors and trustees of the estate ("executors").

[2] Mrs Ropati died in September 2014, leaving a will dated 23 March 2011. Probate was granted on 29 October 2014. Mrs Ropati's principal asset was her home in Mt Wellington ("property").

[3] The executors have sold the property to another brother, Faatea or Tea, Ropati and hold the proceeds of sale, from which they propose to pay "priority sums" they consider Mrs Ropati owed to themselves, Tea and another of Mrs Ropati's sons, Romi Ropati. The priority sums total approximately $125,000. Thereafter, in their capacity as trustees, they would distribute the balance of the residuary estate in accordance with the will. Mrs Ropati had nine children and all are beneficiaries in equal shares.

[4] The applications before me arise as follows. Following Mrs Ropati's death, Tea expressed interest in purchasing the property. There was a dispute, however, between Tea and John on the one hand and the executors on the other as to fair market value for the property. Eventually that particular issue was resolved and the sale agreed.

[5] Thereafter, in about March 2015 the executors repeated advice that they had given to the family members in September 2014, namely that they would pay sums due from Mrs Ropati to the members of the family to whom I have referred before the balance of the estate were distributed.

[6] That advice led John to write to the solicitors for the estate ("RWA"). Amongst other things, he sought information regarding the sums said to be due, and said that the executors had a conflict of interest and should be replaced. John then instructed his solicitors, and protracted correspondence followed regarding the

information that John sought. Although the executors provided information which they considered clearly established that the sums were owed, John remained dissatisfied.

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[7] In the course of correspondence, John sought the bank statements for all of Mrs Ropati's bank accounts and, when these were not forthcoming to his satisfaction, made his originating application for an order that the executors provide them. John also sought orders that the executors retain a sum sufficient to make the priority payments; distribute the balance of the estate in accordance with the will; and pay their own and his costs personally, so that the estate was not diminished.[1]

[8] The executors advised that they would abide the decision of the Court on the bank statements but opposed the other orders sought.[2] Given the decision to abide, Palmer J directed the executors to provide the statements, subject to John bearing the bank's costs.[3] This was done, and the only remaining issue on that application is costs.

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[9] As for the executors' application, the principal direction they seek concerns the priority sums to which I have referred. They seek a direction that they should:[4]

> (a) … pay the following liabilities of the estate from estate funds:
>
> (i) To Peter Ropati, the sum of $74,347.67;
>
> (ii) To Joseph Ropati, the sum of $15,000;
>
> (iii) To Romi Ropati, the sum of $6,480;
>
> (iv) To Faatea Ropati, the sum of $20,000.

[10] The executors consider that these sums are due pursuant to clause 5 of the will, and particularly the words in bold type:

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1 Notice of Originating Application for Orders Pursuant to Section 68 of the Trustee Act 1956 dated 6 October 2015.

2 Notice of Opposition by Respondents dated 19 October 2015.

3 *Re Ropati* HC Auckland CIV-2015-404-2419, 23 November 2015 (Minute).

4 Notice of Originating Application for Directions under section 66 of the Trustee Act 1956 dated 19 October 2015.

> 5. I desire that my property … be sold as soon as reasonably practicable after my death and after payment of all loans secured by mortgage and all outgoings and costs in relation to the sale have been paid **and all amounts due to be reimbursed to my sons, PETER ROPATI, FAATEA ROPATI, JOSEPH ROPATI and ROMI ROPATI pursuant to a Deed dated 31 October 1995 and the Addendum to same dated 20 December 2009 have been made**, the net proceeds thereafter be divided equally between ...
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> (Emphasis added)

[11] Before me, John's opposition was confined to two components of the intended payment to Peter – one of $10,000 which John submits should be $5,000 and one of $39,347.67 which John submits is not due at all.[5]

Background

[12] Mr and Mrs Ropati purchased the property from Housing New Zealand in 1995. Peter and Tea each lent $5,000 to enable payment of the deposit of $10,000. Mr and Mrs Ropati borrowed the balance of approximately $80,000 and Peter and Tea guaranteed repayment of those borrowings.

[13] Mr and Mrs Ropati, Peter and Tea subsequently entered into the Deed, in which Mr and Mrs Ropati acknowledged receipt of the $10,000, defined as the "Principal Sum". Mr and Mrs Ropati also agreed that the Principal Sum would include any further advances that Peter and/or Tea made after the date of the Deed. They also agreed that, in consideration of the advance of the Principal Sum and Peter and Tea's guarantee of the loan, the property (or any substitute) would be transferred to Peter and Tea as tenants in common in equal shares on the death of the survivor of Mr and Mrs Ropati.[6]

[14] There is no dispute that Mr and Mrs Ropati could not have purchased the property without this financial assistance from Peter and Tea and no dispute that they also required ongoing assistance with payments due to the bank, rates, insurance and maintenance.[7]

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5 There is some dispute as to whether the correct amount is $39,347.47 or $39,347.67 – see Affidavit of F Ropati sworn 15 September 2015 at [30] and Affidavit of P Ropati sworn 15 October 2015 at [24].

6 Deed dated 31 October 1995 at cls 1 to 4.

7 Affidavit of P Ropati, above n 5.

[15] Peter's evidence is that, in 2002, he, Tea, Joseph, Romi and Iva (another brother) agreed to contribute financially; that in July 2005, they (excluding Iva), "took over" payment of the mortgage completely; and that they also paid for renovations, repairs to the roof and other items entirely unrelated to the home.

[16] Also, in late 2007, Peter personally paid $39,347.67 for further work required, as his parents could not meet those costs by increasing their borrowings. John does not dispute that Peter paid for the work, only his entitlement to be repaid. For myself, if the sum is not due to Peter under clause 5, it is due under clause 6 but I shall address the argument regardless.

Addendum

[17] These additional financial contributions led to the Addendum, which is at the heart of the dispute.

[18] The parties to the Addendum are Mr and Mrs Ropati, Peter, Tea, Joseph and Romi. The recitals record that the Addendum constituted an amendment to the Deed; was to provide for further advances that Peter and Tea were making to assist with mortgage payments; was to provide for an agreement by Peter to advance up to $40,000 towards the refurbishment of the property; and was also to provide for Joseph and Romi's advances towards their parents' mortgage.

[19] There are significant differences between the Deed and the Addendum. The Deed provided that the sums that Peter and Tea had advanced originally were payable on demand. The Addendum made no such provision. Also, the agreement that Peter and Tea would have the property on their parents' death was abandoned, with provision for (some) repayment in its place. Peter, Joseph and Tea have all advanced more than they are to be repaid.

[20] The relevant provisions of the Addendum are:

> 1. Peter shall advance to Sosene and Margaret a maximum sum of $40,000 towards the refurbishment of Panama Road including painting, insulation and new doors and windows. This sum shall be and constitute "further advances" to Sosene and Margaret as defined in the deed and shall be interest free and repayable upon demand in writing from Peter.

2. Sosene and Margaret both acknowledge and agree that Peter and Tea and Joe and Romi have and will make further advances to them to assist in repaying their loan to Westpac which is secured by way of first mortgage over Panama Road. In the event Panama Road is sold or otherwise disposed of, then all such advances so made shall be repaid to each of Peter, Tea, Joe and Romi from the sale proceeds of Panama Road.

3. For the avoidance of doubt, the parties agree that the priority of payments due on the sale or other dispositions of Panama Road, after the payment of all loans secured by mortgage, outgoings and costs shall be in the following order

    a) Firstly in repayment of the sum of $10,000 each to Peter and Tea with regards to deposit paid and

    b) Secondly, in repayment of the sum of $40,000 advanced by Peter for the purposes of refurbishment of Panama Road and

    c) Thirdly, all loans made to Sosene and Margaret by Peter and Tea for loan repayments to Westpac, $25,000 to Peter and $10,000 to Tea and

    d) Lastly, all advances made to Sosene and Margaret by Joe and Romi for loan repayments to Westpac to a maximum of $15,000 each to Joe and Romi.

Clause 3(a)

[21] The sums the executors propose to pay Peter and Tea include "$10,000 each" pursuant to clause 3(a) of the Addendum.

[22] Counsel for John submits that the reference to "$10,000 each" is a mistake, as Peter and Tea lent only $5,000 each for payment of the deposit. Counsel submits that it must have been intended to repay $10,000 in total, that is $5,000 each, given that clause 3(a) refers to "repayment" and "as regards the deposit". John also relies on Tea's evidence which is to the effect that the reference to $10,000 is a mistake, and should be $5,000.

[23] For his part, Peter states that the Addendum is the result of instructions he gave RWA to, first, draw up a will for his parents and secondly, "loan documents recording the repayment to me, Joseph [etc] of [our advances]…". His evidence is that Tea was not involved beyond executing the Addendum, so is not in a position to say that the reference to $10,000 each is a mistake.

[24] Peter goes on to say:[8]

> 6. I have always acknowledged that the amount loaned by Tea and me to our parents for their purchase of Panama Road in 1995 was $5,000 each. We also guaranteed their bank loan. As I explained at paragraph 14 of my October affidavit, my parents agreed that Tea and I would receive Panama Road when they both died – see exhibit pages 7 to 9 of my October affidavit.
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> 7. The 2009 deed (in fact drafted in 2007) came into being at my instigation because I thought there should be provision from my parents' estate for my other siblings, but my parents wanted also to provide some compensation to those of us that had assisted them financially over many years. At clause 3(a) they agreed that Tea and I would be repaid "the sum of $10,000 each ... with regards to deposit paid." This was the repayment amount they wanted us to have for the $5,000 we had each advanced in 1995, many years earlier.

[25] I accept the submission for John that clause 3(a) might have been better expressed but, given Peter's explanation, I am not persuaded that the reference to "$10,000 each" is a mistake, so that I should depart from its terms. As I have said, the Addendum represented a significantly less favourable outcome to Peter and Tea than the Deed and, as at 2009, the original advance of the deposit had been made 12 years earlier. Peter and Tea could expect to be out of their money for some further period – another eight or nine years as it turned out. In those circumstances, I am not persuaded that the reference to "$10,000 each" is a mistake.

Clause 3(b)

[26] The executors submit that the $39,347.67 that they propose to pay to Peter is owed pursuant to clauses 1 and 3(b) of the Addendum.

[27] John submits this cannot be so because Peter had already paid for the works by the time the Addendum was executed, and clause 1 contemplates a future advance, that is one made after the Addendum was executed.

[28] The Addendum was drafted in 2007 but not executed until late 2009.

[29] The "$40,000" referred to in clauses 1 and 3(b) could only refer to the $39,347.67 that Peter advanced in 2007. There is no suggestion that another $40,000

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[8] Affidavit of P Ropati sworn 9 February 2016.

was advanced for works to the house. However, if I am wrong in this, the payment would constitute a debt which the executors would be required to pay pursuant to clause 6 of the will, which provides:

> 6. I give to my trustees upon trust all the rest of my real and personal property (if any) of whatever kind and wherever situated, including any property in respect of which I may have a power of appointment, to pay my debts, funeral, testamentary and memorial expenses … and to hold the balance ("my residuary estate") for such of my said children who shall survive me and, if more than one, as tenants in common in equal shares.

[30] Accordingly, whatever drafting problems have arisen as a result of failing to update the Addendum to take account of changes between drafting and execution, I am satisfied that there is a debt due to Peter of $39,347.67.

[31] It follows that I make the direction as to payment that the executors seek.

Costs

[32] Costs should follow the event on the executors' application. The executors should have their costs from the estate as it was proper for them to make an application for directions, given the dispute that had arisen. John should pay costs to the estate on that application on a 2B basis, together with disbursements. I record that the majority of the evidence and hearing time concerned the executors' application for directions, to the extent that affects the assessment of costs in respect of affidavits and hearing time.

[33] John seeks costs from the executors personally on his application. Counsel for the executors opposes this and contends that I should make the same orders that I have made on the executors' application. This is on the ground that a beneficiary such as John has no basis to require executors to disclose estate documents, as appears from *Re Maguire*.[9] Counsel's submission is that John's correspondence and his application was based on a misconception as to an executor's obligation to provide the deceased's documents to a residuary beneficiary. For his part, counsel

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[9] *Re Maguire (deceased)* [2010] 2 NZLR 845 (HC).

for John referred me to *Re O'Donoghue*, but that was a case concerning a trustee, not an executor.[10]

[34] Despite *Re Maguire*, I consider that costs and disbursements relating to John's application should lie where they fall. The application was resolved at an early stage and on practical, rather than legal, basis. The effect of the early resolution is that the costs that might be payable would be minimal, essentially the costs on a notice of opposition and for one or two appearances. Given that, I propose to order that those costs should lie where they fall.

[35] Accordingly:

(a) I make an order in terms of [1](a) of the Notice of Originating Application by the executors dated 19 October 2015;

(b) the executors may pay from the estate their legal costs in both proceedings shown in the intituling;

(c) John Ropati is to pay to the estate of Margret Joy Ropati costs on a 2B basis, together with disbursements, on the application referred to in (a) above; and

(d) costs on John Ropati's application are to lie where they fall.

[36] There is leave to apply if required.

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Peters J

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[10] *Re O'Donoghue* [1998] 1 NZLR 116 (HC).