

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TRUSTS, EQUITY & PROBATE LIST

Not Restricted

S CI 2017 02320

JAMES ERIC BARR (as an executor of the
estate of Susie Rockman, deceased)

First Plaintiff

-and-

DELMONT CREST PTY LTD (ACN 053 633
971) (as trustee of the Rockman Family Trust)

Second Plaintiff

v

LIONEL ROCKMAN

First Defendant

-and-

RONALD MERKEL (as an executor of the
estate of Susie Rockman, deceased)

Second Defendant

JUDGE: McMillan J
WHERE HELD: Melbourne
DATE OF HEARING: 28 July 2017
DATE OF JUDGMENT: 28 September 2017
CASE MAY BE CITED AS: Barr & Anor v Rockman & Anor
MEDIUM NEUTRAL CITATION: [2017] VSC 581

WILLS AND ESTATES – Executors seeking to finalise administration of estate – Risk of contingent liability to estate – Where risk is remote – Whether executors justified in making final distribution of estate – *Supreme Court (General Civil Procedure) Rules 2015*, r 54.02.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Ms K A O’Gorman	Keith R Cameron
For the First Defendant	Mr R E Cook	Salinger & Co
For the Second Defendant	Mr E M Nekvapil	Kenna Teasdale

HER HONOUR:

Introduction

- 1 Susie Rockman died on 2 October 2007. Probate of her will was granted to her three named executors on 16 November 2007. One of her executors has since died. The first plaintiff ('Mr Barr') and the second defendant are the remaining executors and trustees of her estate.
- 2 The second plaintiff ('Delmont Crest') is the trustee of the Rockman Family Trust ('the Trust').
- 3 The first defendant is a specified and general beneficiary of the Trust and a beneficiary of the estate. The first defendant did not oppose the directions sought by the plaintiffs.
- 4 Although a trustee of the estate, the second defendant did not consent to being joined as a plaintiff to the proceeding and, pursuant to r 54.03(b) of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules'), he has been named as a defendant in the proceeding. The second defendant will abide the decision of the Court on the directions sought and, if the directions as sought by Mr Barr in the estate of the deceased are made by the Court, he wishes to be included in those directions as an executor of the estate. Mr Barr agreed with the second defendant's position.

Plaintiffs' application

- 5 Pursuant to r 54.02(2) of the Rules, the plaintiffs seek the Court's directions concerning the liability of the trustees of the estate and Delmont Crest as trustee of the Trust to creditors and beneficiaries upon the distribution of the estate and the Trust. In support of their applications, the plaintiffs relied on an affidavit of Mr Barr sworn 16 June 2017 in his capacity as an executor of the estate and a director of Delmont Crest ('the Barr affidavit'). Mr Barr seeks directions as an executor of the estate and a director of Delmont Crest to ensure that the estate is properly administered and the Trust is properly managed. This may include that proper

provision, if any, is made for the contingent liabilities of the estate and the Trust arising out of a motor vehicle accident that occurred on 30 January 2007 at a property owned by Delmont Crest at 978 Wilsons Creek Road, Wilson Creek, New South Wales ('the Mullumbimby property'). Specifically, the plaintiffs seek directions that the first plaintiff is at liberty to distribute the estate and Delmont Crest is at liberty to distribute the funds of the Trust without making any retention or provision in respect of any potential contingent liability arising out of the motor vehicle accident.

Motor vehicle accident in 2007

- 6 The motor vehicle accident occurred on the driveway of the Mullumbimby property and involved a motor vehicle where a Mr Benhur, a tenant of the property, suffered serious injuries to his chest, abdomen and pelvis, although his injuries were not critical injuries. A police report sets out the full circumstances of the accident. In summary, a motor vehicle became caught in a rut on the side of two concrete runs of the driveway of the Mullumbimby property. The motor vehicle then became dislodged, rolled backwards and squeezed Mr Benhur against a large tree as it slid down the hill past him. Subsequently, Mr Benhur commenced a proceeding against the driver of the motor vehicle. On 28 June 2008, Mr Benhur compromised his claim on confidential terms. Despite enquiries made on behalf of the executors of the estate, the terms remain confidential.

Insurance cover held by Delmont Crest

- 7 At the time of the motor vehicle accident, Delmont Crest held two insurance policies for liability cover in respect of the Mullumbimby property, one with RACV Insurance Services Pty Ltd and underwritten by Insurance Manufacturers Pty Ltd ('the RACV policy'), and the other with EMB Insurance Brokers and underwritten by QBE Insurance (Australia) Ltd ('the EMB policy').
- 8 The policies cover Delmont Crest for liability for an incident that occurs on the Mullumbimby property in respect of all personal injury for up to \$10 million under the RACV policy and up to \$20 million under the EMB policy.

- 9 On 19 February 2007, both policy insurers were notified by letter of the motor vehicle accident. Mr Barr did not receive a response to his letters. On 14 December 2007, the solicitors for the estate and the Trust requested each insurer to confirm whether the Trust would be indemnified in respect of any claim made by Mr Benhur.
- 10 On 11 June 2008, the solicitors also notified the two insurers that the Mullumbimby property had been sold and that Delmont Crest did not intend to renew the insurance policies.
- 11 On 13 May 2009, the solicitors received a response from the representatives of the RACV policy to the effect that until a claim was made it was not possible to confirm whether Delmont Crest was indemnified under that policy.
- 12 Mr Barr deposed in his affidavit that, apart from receiving a response from the representatives for the EMB policy that the policy referred to an incorrect number for the property, that is, 987 instead of 978, he is not clear as to the insurer's position if a potential claim were made by Mr Benhur.

Distributions made by the estate and the Trust in 2008

- 13 During the financial year ended 30 June 2008, distributions were made by the estate and the Trust. The impetus for these distributions was in part savings from capital gains tax discount relief provided by the relevant legislation for that period. Prior to making the distributions out of the Trust, the beneficiaries of the Trust were requested to indemnify the directors of Delmont Crest for the portion of the distribution allocated to and to be received by them. The reason for this request was to provide the directors of Delmont Crest with protection in the event there were insufficient funds in the Trust to meet a claim, given that a distribution was being made with knowledge of a potential contingent liability.
- 14 Of the beneficiaries who received distributions from the Trust, all but two provided indemnities and certain retentions were made on behalf of these two beneficiaries pursuant to agreement entered into by them. Security was obtained for the

indemnities to cover any potential claim made by Mr Benhur and held by a corporate entity as stakeholder for the various beneficiaries. It was agreed that the indemnities continue until a final accounting of the Trust. A notional reserve was recorded against the two beneficiaries who did not provide indemnities in the accounts.

15 Mr Barr deposed that, taking account of the current liabilities set out in his affidavit and other contingencies, such as GST for the estate and the Trust, the only other contingent liability that he is aware of is the potential claim by Mr Benhur.

Distributions from the estate

16 Mr Barr's affidavit sets out the distributions made to the beneficiaries of the estate during the financial years of 2008, 2009 and 2010. The assets of the estate include two ordinary shares in Tysule No 11 Pty Ltd ('Tysule') valued in the accounts at \$2. As at 31 December 2016, the shares in Tysule were valued in the estate at \$2 and the net assets of Tysule are \$309,852 held in two bank accounts.

17 The trustees of the estate are now in a position to complete the administration of the estate and distribute the remaining net assets of the estate of \$781,998 as at 31 December 2016, barring resolution of issues relating to remuneration of the trustees.

The Trust

18 The Trust was created by deed of settlement dated 3 December 1991. The Trust is a discretionary trust with specified and general beneficiaries, as named in Mr Barr's affidavit. Delmont Crest has been the trustee of the Trust since 1991.

19 From November 1991 up to her death in October 2007, the deceased was a director of Delmont Crest, together with other directors. On her death, a replacement director was appointed to Delmont Crest and has since died. The current directors of Delmont Crest are Mr Barr and Deborah Jane McLennan.

20 Prior to her death, Susie Rockman indemnified the first plaintiff from liabilities that

may be incurred by him as a director of Delmont Crest and Tysule as set out in agreements and resolutions of executors made 11 September 2008 and 30 June 2009 respectively and exhibited to the Barr affidavit.

- 21 Delmont Crest is now in a position to distribute the last of the property of the Trust of \$628,793, as at 31 December 2016, to the beneficiaries of the Trust, barring resolution of any issues relating to remuneration of the directors.

Wishes of the deceased

- 22 Mr Barr wishes to distribute the funds of the Trust as the deceased's will included her wishes that those funds be administered as if they formed part of her estate as at the date of her death and that they be brought into account as part of her residuary estate. Mr Barr considers it appropriate that the deceased's wishes be taken into account.

Advice regarding a potential claim by Mr Benhur

- 23 Mr Barr's intention has always been to distribute the estate and the Trust as soon as he was advised of the expiry of the limitation period. He has taken privileged and confidential advice since 2007 about the potential for a claim being made by Mr Benhur, arising from his injuries sustained in the accident, that manifests at some point after the date of the accident and following his compromise of his proceeding in 2008. The advices identify different limitation periods that would apply to any potential claim by Mr Benhur and there are reasons why a cause of action by Mr Benhur in respect of his injuries may not necessarily be barred by reasons of the limitations of action.

Risk of a contingent liability to the estate

- 24 There is a risk that the accident may give rise to a contingent liability to the estate as the deceased managed the Mullumbimby property and tenancy personally, with the help and advice of her daughter who lived near the Mullumbimby property, and a bookkeeper who worked for Mr Barr when he was at Price Waterhouse.

The bookkeeper facilitated communications between the deceased and her daughter in relation to the management of the Mullumbimby property. The deceased had indemnified Mr Barr from liabilities that he may have incurred as a director of Delmont Crest and Tysule. As it may be alleged that Mr Barr was negligent in some way for his failure to repair the Mullumbimby property before the accident, it may also be alleged that the deceased ought to indemnify Mr Barr for any sum for which he may be found liable. It must also be borne in mind that by reason of s 29 of the *Administration and Probate Act 1958*, any potential cause of action by Mr Benhur survives the death of the deceased.

Risk of a contingent liability to Delmont Crest

25 In respect of Delmont Crest, there are reasons for there being a risk that the accident may give rise to a contingent liability as follows:

- (a) Delmont Crest owned the Mullumbimby property on which the accident occurred. It may be alleged that the accident would not have occurred had the driveway been in better repair, placing Delmont Crest at risk of being found liable in negligence for failing to keep the driveway in a better state of repair;
- (b) Mr Barr was a director of Delmont Crest at the time of the accident and had some involvement in the maintenance of the Mullumbimby property:
 - (i) in May 2006 before the accident, he conducted a landlord's inspection of the property. He observed the driveway and the rest of the property to be in good order and repair. The tenant told him he had no need for any repairs or maintenance whatsoever and asked him whether he could buy the property himself from the Trust in due course;
 - (ii) in a telephone call from the deceased's daughter just before Christmas 2006, Mr Barr was advised that the driveway was in need of urgent repair. In that conversation, Mr Barr directed the daughter to make immediate arrangements for the repair of the driveway given that she

lived nearby and had previously arranged for repairs to the property, however, the accident occurred before the repairs were carried out.

Liabilities of the estate and the Trust

26 As at 31 December 2016, the estate had liabilities of \$19,101 and the Trust had liabilities of \$20,147. Mr Barr intends to claim \$59,330 as executor's commission from the estate and \$70,655 (both inclusive of GST) as director's remuneration from the Trust. The deceased executor of the estate, who was also a director of Delmont Crest, has claimed executor's commission of \$65,454 and director's remuneration of \$29,752 (both exclusive of GST). The second defendant does not intend to claim executor's commission.

27 There are other expenses of the estate and the Trust, such as administrative expenses, costs of obtaining legal advice and estimated costs associated with the final distribution of the estate and the Trust, that will need to be retained from any distribution to the beneficiaries of the estate and the Trust.

28 In the event that the directions sought by the plaintiffs are made by the Court, Mr Barr intends to take the necessary steps to distribute the estate and the Trust, except for directors' remuneration and the expenses already set out.

Notices to creditors

29 Creditor's notices on behalf of the estate and the Trust were placed in The Age newspaper on 20 September 2015 and in the Victorian Government Gazette on 1 October 2015 advertising the executor's and Trust's intentions to distribute fully the assets of the estate and the Trust respectively. On 28 September 2015, notices of intention to distribute for the estate and the Trust were placed in the Sydney Morning Herald in New South Wales. Mr Barr has not received notification of any claims either in his capacity as an executor of the estate or as a director of Delmont Crest after the publication of the notices in 2015 in Victoria and New South Wales.

Consideration

- 30 Where an executor or trustee is faced with circumstances where there is a liability of a potential contingent claim that may arise in the future against an estate or a trust, then distribution to beneficiaries with knowledge of such a liability could expose them to a personal liability if the contingent liability crystallised. In those circumstances, an executor or trustee may seek the direction of the Court, pursuant to r 54.02 of the Rules. Executors or trustees acting in accordance with such directions are deemed to have discharged their duty as trustees in respect of the subject matter of the application, provided all relevant evidence is before the Court and the facts are substantially as submitted in the application.¹
- 31 Before any trust can be finalised by distribution of the trust property to the beneficiaries in accordance with the terms of the relevant trust, the trustees of the trust must settle outstanding claims against the trust, including any unsatisfied right of indemnity to the trustees. In fulfilling this obligation, trustees must publish prescribed notices that require creditors, next of kin and others who have claims against a trust to provide particulars of their claim to the trustees within a specified period of time. At the expiration of time fixed by the notice, trustees may distribute the trust assets to those entitled to it, having regard to the claims of which they have notice. Generally, where trustees know of or reasonably anticipate an outstanding claim, a sufficient sum must be retained to satisfy the claim before distribution of the trust assets.
- 32 In *Thompson v Gamble*,² Slattery J considered the issue of what a trustee of an estate of a Lloyd's of London name must do in distributing an estate in the context of the Lloyd's restructure and the possibility of a claim being made against the estate of a Lloyd's name in the future. In considering the applicable principles, his Honour relied on and followed the English decision of Lindsay J in *Re Yorke; Stone v*

¹ *Re Atkinson* [1971] VR 612, 615 (14 December 1970); G E Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) 585–6 [23-170]; J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 8th ed, 2016) 532–5 [21-34].

² [2010] NSWSC 878 (30 July 2010) (*'Thompson'*).

Chataway.³ The dilemma in both cases was that there was no certainty at the time that a claim would ultimately be made against the estate of a Lloyd's name, despite the special measures put in place by the restructuring of Lloyd's. Slattery J identified the 'stark choice' faced by the executors was:

between retaining the entire estate indefinitely which would be unfair to the beneficiaries or distributing on the basis that the creditors have no right to expect the trustees to make such an indefinite retention when the creditors have protection which has been assessed to be commercially appropriate'.⁴

33 His Honour identified other factors that should be taken into account included the risk of a possible claim being made in the future by a creditor, whether protection could be achieved by taking out adequate insurance that has been assessed as commercially appropriate to cover the contingency and whether the trustee had advertised the intention to distribute the estate. His Honour concluded that the possibility of a future claim by a Lloyd's policy holder in a relevant syndicate year being made against the estate of the Lloyd's name 'must be seen as extremely remote; and so remote indeed as not to prevent distribution'.⁵

34 The plaintiffs are concerned about the possibility of a potential contingent claim against the estate or the Trust arising from the injuries sustained by Mr Benhur as a result of the motor vehicle accident but which only come to light since 2008 when he compromised his proceeding against the driver of the motor vehicle. The plaintiffs have set out a comprehensive and detailed account of all relevant matters. In my view, those matters establish that the possibility of a future claim must be seen as so remote as not to prevent the final distribution of the estate and the Trust.

35 The reasons for reaching this conclusion are as follows:

(a) Mr Benhur received compensation for all injuries that arose immediately from the motor vehicle accident and, as presently informed, there is no basis to expect that he has developed or will develop any further injury that could be

³ (1997) 4 All ER 907.

⁴ *Thompson* [2010] NSWSC 878[19].

⁵ *Ibid.* See also *Estate of Hall* [1999] NSWSC 1297 (Austin J) where a similar order to that made in *Re Yorke* was made.

- shown to be an injury that arose out of the accident;
- (b) The description of events and the actions of Mr Barr, Delmont Crest or the deceased do not establish negligence in failing to repair the driveway at the Mullumbimby property before the motor vehicle accident or otherwise caused the accident;
 - (c) The two insurers at the time of the accident were notified of the accident. The two insurance policies cover Delmont Crest for liability for an incident that occurs on the Mullumbimby property in respect of all personal injury for up to \$30 million in total. These policies provide reasonable protection to the estate, the Trust and to contingent creditors with respect to any contingent liability of the estate or the Trust;
 - (d) The executors of the estate and Delmont Crest have advertised their respective intentions to distribute fully the assets of both the estate and the Trust and no notice has been given to the executors or Delmont Crest of any other liabilities.

Orders

36 The Court will make the following orders:

- (a) The executors of the estate of Susie Rockman, deceased, ('the estate') have liberty to distribute the estate without making any retention or provision in respect of any potential liability arising out of the motor vehicle accident that occurred at 978 Wilsons Creek Road, Wilsons Creek, in the State of New South Wales on 30 January 2007 ('the accident').
- (b) The second plaintiff have liberty to distribute the funds of the Rockman Family Trust ('the Trust') without making any retention or provision in respect of any potential liability arising out of the accident.
- (c) The costs of the first plaintiff of and incidental to this proceeding and related to the administration of the estate, including any such costs paid on behalf of

- the first plaintiff by any other person or entity, be paid or retained out of the estate on an indemnity basis.
- (d) The costs of the second plaintiff of and incidental to this proceeding and related to the administration of the Trust, including any such costs paid on behalf of the second plaintiff by any other person or entity, be paid or retained out of the Trust on an indemnity basis.
- (e) The costs of the defendants of and incidental to this proceeding calculated on an indemnity basis be paid in the following proportions:
- (iii) as to one half share, out of the estate; and
 - (iv) as to the other half share, out of the Trust.
- (f) The exhibits be kept in an envelope on the Court file and marked 'confidential' and be unsealed only on application by the executors of the estate or upon the order of a Judge of this Honourable Court.
