

BETWEEN FRANCIS ANTHONY JEW and
LILIAN GAIL GODFREY, as
Executors of the Will of the late ERIC
SCHRODER and trustees of the
CLEVEDON TRUST

Applicants

AND SUSAN CATHERINE SCHRODER of
Auckland

Respondent

Coram: Gault J
Tipping J

Counsel: A P Molloy QC for Applicants
D K Wilson for Respondent

Judgment: 6 May 2004

JUDGMENT OF THE COURT

[1] The written submission in support of and in opposition to this application for leave to appeal have been considered. The Court has determined that it is unnecessary to have oral submissions and that leave to appeal should be refused.

[2] The proposed appellants are the trustees of the Clevedon Trust and of the estate of the late Mr Eric Schroder whose affairs were closely associated with the Clevedon Trust. The Trust is the residuary beneficiary under his will.

[3] The proposed respondent is Mr Schroder's widow. She was his second wife. She claimed against the estate under the Family Protection Act 1955. In the Family Court it was held that provisions made for her under the will did not discharge the testator's duty towards her. Instead of a legacy of \$50,000 and an entitlement, in the

discretion of the executors, to be provided with suitable residential accommodation during her life or until she established a new relationship, she was awarded from the estate (total assets upwards of \$3.5 million) a capital sum of \$400,000 and an interest free loan for life of a further \$400,000 secured against a house she was to purchase.

[4] Richard, a son of the previous marriage of the deceased, appealed to the High Court, challenging the part of the Family Court judgment awarding the interest free loan. His appeal was supported by the trustees. The appeal was dismissed in a judgment delivered by Nicholson J on 22 May 2003. Richard applied for leave to appeal to the Court of appeal. The trustees (as trustees of the Clevedon Trust) separately applied to the High Court for directions seeking the sanction of the Court for them to appeal or to support Richard's appeal. Both matters were heard by Nicholson J. He delivered separate judgments. In the first, delivered on 17 November, he refused Richard leave to appeal. In the second, delivered on 19 November and now reported at [2004] 1 NZLR 695, he directed that the duty on the trustees to remain neutral is paramount and that they have no overriding duty to appeal or support an appeal against the award of the interest free loan.

[5] Richard applied to the Court of Appeal for special leave to appeal against the decision upholding the award of the interest free loan. The trustees did not themselves seek to appeal against the decision. But they applied to the Court of Appeal for leave to appeal against the judgment of Nicholson J delivered on 19 November on their application for directions.

[6] In the Court of Appeal, it became apparent that the trustees had a right of appeal from the 19 November judgment and the Court treated their application for leave as a notice of appeal. However, because the Court declined Richard's application for special leave to appeal against the substantive judgment in the Family Protection Act proceeding, the trustees' appeal was regarded as being "left high and dry".

[7] The trustees application to this Court for leave to appeal is stated to be:

... against the judgment of the Court of Appeal [CA241/03, 26 February 2004] dismissing their appeal against:

- the judgment of the High Court, in *Re Schroder's Wills Trusts* [2004] 1 NZLR 695 [Auckland Registry CIV 2003-4128/03, 19 November 2003], on their application, under s66 of the Trustee Act 1956, for directions whether they should appeal against
- the decision of the High Court in *Schroder v Schroder* [Auckland Registry AP 103-SW03, 22 May 2003] dismissing the appeal of Richard Schroder, son of the deceased, against an award – to the Respondent herein, of a \$400,000 lifetime interest free loan – by
- the Family Court in *Schroder v Lawson, Godfrey and Jew* [Auckland FP 1154-B/00, 30 September 2002].

[8] While, when correctly construed, the application seeks leave to appeal against the Court of Appeal judgment so far as it relates to the trustees' application for directions, the grounds set out are directed to the merits of the decisions making and upholding the award of the interest free loan to the testator's widow.

[9] The trustees were not appellants to the High Court against the decision of the Family Court in the Family Protection Act proceeding; though their counsel supported Richard's appeal. They did not seek leave to appeal to the Court of Appeal in that proceeding. By seeking leave to appeal against the Court of Appeal judgment in respect of the Family Protection award they seek, in effect, to adopt Richard's cause. Richard was refused leave to appeal to the Court of Appeal and the trustees, even if they could step into Richard's shoes, could be in no better position in that proceeding.

[10] Section 7(b) of the Supreme Court Act 2003 precludes this Court from entertaining any appeal from a refusal of special leave to appeal to the Court of Appeal. Richard, therefore, could not obtain leave to appeal in that proceeding and the bar is even more complete against the trustees.

[11] That leaves the trustees' application as one seeking leave to challenge directions given in respect of an appeal that cannot be entertained. Any such appeal,

should leave be granted, would be entirely hypothetical and cannot satisfy the criteria in s13 of the Supreme Court Act for leave to appeal. We do not overlook the point that, in giving the directions he did, Nicholson J gave weight to the strength of the challenge to the provision in favour of the widow awarded in the Family Court. But that does not make the issue of the directions to the trustees any the less moot in the situation now presented.

[12] Leave to appeal is refused with costs to the respondent of \$2,500.

Solicitors

F A Jew, Auckland, for Applicants

R S Walker, Auckland, for Respondent