

New Zealand Treasury found to have fettered discretion over bona vacantia decision

Legislation	Ombudsmen Act 1975, Administration Act 1969
Agency	The Treasury
Ombudsman	John Robertson
Case number(s)	W25391
Date	1992

Bona vacantia—Crown’s discretion to provide for persons for whom deceased might reasonably have expected to make provision—unreasonable and oppressive exercise of discretion s.77(1)(e) Administration Act 1969

The complainant’s grandmother had died in 1982. On her death, her estate passed to the Crown as bona vacantia because all legatees mentioned in her will had predeceased her and the only person who could have otherwise inherited anything on her intestacy would have been the complainant who was the only child of her only son. However, the complainant was precluded from succession because he had been legally adopted by his stepfather and stepmother some seven years following his father’s death.

Section 77(1)(e) of the *Administration Act 1969* conferred upon the Crown a discretion to provide for any persons for whom the deceased might reasonably have expected to make provision out of the whole or any part of the property devolving on it as bona vacantia.

The complainant applied to the Crown under this provision on the grounds that he was the sole possible and sole intended heir of his grandmother and was paid 90 percent of the estate. The complainant was advised that the remaining 10 percent would be retained in the Consolidated Account in accordance with the usual Treasury practice ‘*as an insurance against future claims*’.

In 1985, 1986, 1987 and 1989 the complainant approached the Treasury requesting that consideration be given to paying the balance to him as no other claims had been made. Each time the request was declined on the grounds that there was no certainty that no claims would

arise in the future and that 10 percent was an entirely reasonable amount to be retained as an insurance against such claims.

In response to the Ombudsman's letter notifying the Department of the complaint that such continued retention was unreasonable, he was told that the Treasury agreed that a statutory discretion *'should be exercised properly and not fettered by blind adherence to policy'*. The Ombudsman was assured that the policy of retaining 10 percent was not *'blindly adhered to'* but that it was considered on the facts of each particular case and that on the facts of this particular case adherence to the 10 percent principle was *'fair and reasonable'*. The complainant was told that the possibility of another claimant coming along in the future with as good a claim as the complainant could not be ruled out and that 20 years would be a reasonable period to wait before this ought to be discounted.

The Ombudsman noted from the files that the same official had dealt with the case over the years and that in a memorandum to the then Minister of Finance in 1983, recommending payment of 90 percent of the estate to the complainant, had stated: *'the only person who could have inherited her estate on intestacy, was her grandson, who was the only child of her deceased son.'* He further said in the same memorandum that he had *'carefully examined'* the complainant's application together with the evidence provided in support thereof and a statement of the Public Trustee's administration. On that basis the official had advised the Minister that he was satisfied: (a) that the complainant was the natural grandson of the deceased and but for his adoption would have succeeded to the deceased estate under the laws of intestacy; and (b) that the deceased always intended the complainant should inherit her estate on her death.

The Ombudsman was surprised to note that in the light of this advice to the Minister the official could in the same memorandum maintain that 10% of the estate should be retained in the Consolidated Account *'as an insurance against any future claims'*. The Ombudsman could think of no clearer example of an unreasonable exercise of a statutory discretion than to accept that the complainant was the sole person who could, (and was indeed intended to), inherit the deceased's estate, and then to recommend that part of the estate should be withheld on the grounds of possible future claims.

The Ombudsman could not accept the assertion that the complainant's claim to receive 100 percent of the estate pursuant to the statutory discretion had received *'careful consideration'* on its merits, and considered the proposition that 20 years should pass before it could reasonably be assumed there would be no other claims was unreasonable and oppressive, and flew in the face of common-sense. The Ombudsman conveyed his opinion as a preliminary view to the Department saying that subject to any submissions it wished to make on the matter he was proposing to recommend it pay the complainant the balance of his grandmother's estate together with interest thereon at the rate allowed under the Judicature Act of 11% per annum from the date the original recommendation was accepted to the date of payment.

The Department did not reply to this preliminary view, but instead simply paid the complainant an amount calculated in term of the Ombudsman's proposed recommendation. In these

circumstances the Ombudsman was able to discontinue the investigation without the need for a formal recommendation.

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