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IN THE FAMILY COURT
AT WAIHI

FAM-2014-079-000017
[2016] NZFC 3759

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	ALISTAIR MICHAEL TOD, MATTHEW JOHN TOD, MARK ALEXANDER TOD, JULIA ORETI TOD Applicants
AND	SHEILA HOLMS TOD AS EXECUTOR AND TRUSTEE OF THE WILL OF THE LATE ALEXANDER MICHAEL TOD Respondent

Appearances: G L Harrison for the Applicants
A Fisher QC for the Respondent

Judgment: 10 May 2016

CHAMBERS DECISION OF JUDGE S J COYLE
[as to application for security for costs and application for costs]

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[1] The substantive proceedings relate to a claim against the estate of the late Mr Tod under the Family Protection Act 1955 ("FPA"). In the course of the proceedings an application for discovery was made by Ms Tod, the respondent, and she now seeks costs in relation to that application. Secondly, in relation to the substantive

claim under the FPA she now seeks security for costs and a direction that the proceedings be stayed until those security for costs has been paid.

[2] The substantive claim has been brought by the four adult children of the late Mr Tod who died on 1 August 2013. He and the respondent had been married for 18 years. Pursuant to Mr Tod's last will Ms Tod was appointed as sole executor and pursuant to the provisions of his will he left a life interest in his estate to Ms Tod. The provision that upon her death her estate was to be left equally to the six children (Mr Tod's four children and Ms Tod's two children via a relationship) to give effect to these arrangements the parties entered into under s 21 Relationship Property Agreement and mutual wills.

[3] In addition to the application under the FPA challenging provisions of Mr Tod's will, the applicants also filed an application in the High Court seeking the removal of Ms Tod as an executor, and her replacement by the Public Trust. That application was unsuccessful in the High Court, and an appeal was lodged with the Court of Appeal. By judgment dated 14 May 2015 Justice Brown ordered the applicants to pay $26,678.23 by way of costs and disbursements in respect of the failed High Court application. That cost order has been served on the applicants through their counsel. The respondent, Ms S Tod deposes in her affidavit of 5 February 2016 that those costs remain owing to her. The applicants have also not paid security for costs in relation to their appeal to the High Court and as a consequence the Court of Appeal has deemed the appeal to be abandoned and refuse to extend time. Ms Tod states at [12] of her affidavit sworn 5 February 2016:

> I cannot understand why the applicants have failed to comply with Court orders. I can only assume that they are unable to pay.

[4] Ms Tod therefore seeks security for costs on the basis of the High Court costs award, and given the modest size of the estate she deposes that she is worried that she will be unable to recover any of the legal costs if she is successful.

Discovery application

[5] Additionally Ms Tod seeks costs in respect of the application for discovery filed by the applicants on 4 December 2015 which they subsequently withdrew at a judicial conference on 21 January 2016.

[6] Ms Fisher QC in her submissions in support of her client's application states:

> (a) On 4 December 2015, the applicants filed a discovery application with no prior notice to the respondent. If the applicants had asked for the material, Mrs Tod would have provided it.
>
> (b) On 15 December 2015 Mrs Tod provided all relevant material to the applicant's counsel. Confirmation was sought from the applicants that this material addressed all their concerns.
>
> (c) The applicants did not respond.
>
> (d) Because of the application the court convened a judicial conference on 21 January 2016.
>
> (e) On 18 January 2016 the applicant advised the court that discovery was not complete and sought an order. Because of this, the respondent was put to the expense of filing an affidavit (by Ms Trudy Bourne) attaching all material provided to show that discovery was complete and filing a memorandum for the conference.
>
> (f) Without any prior notice to the respondent, the applicants advised the court at the judicial conference on 21 January 2016 that they intended to withdraw their application for discovery.

[7] Ms Fisher seeks costs on a 2B basis and has attached a schedule of the scale costs to her submissions which amount to $2,015. When that discovery application was withdrawn I recorded by minute the following:

> 1. Discovery application withdrawn.
>
> 2. Application for security for costs to be filed within 14 days 4 February. Any notice of intention to appear to be filed by 11 February 2016.
>
> 3. If cost sought on discontinued discovery application submissions to be filed by 4 February 2016, reply by 11 February 2016 and to be referred to me in chambers for determination.

[8] The applicants failed to file submissions in relation to the cost issue and/or a notice of intention to appear in relation to the application for security for costs by 11

February. On 15 February Ms Fisher QC filed a further memorandum seeking determination of the issue on the basis of the applicants' non-compliance. Two days later, namely 17 February, the applicants filed a notice of opposition to the respondent's application for order for security for costs and then on 18 March 2016 an affidavit in support of a notice of opposition was filed by Ms J O Tod, one of the applicants.

[9] No notice of opposition or submissions have been made in relation to the discovery cost application and that application is therefore unopposed.

[10] Pursuant to r 207 of the Family Court Rules 2002 ("FCR") costs are at the discretion of the Court. That rule states as follows:

> **207 Costs at discretion of court**
>
> (1) The court has discretion to determine the costs of—
>
> (a) any proceeding:
>
> (b) any step in a proceeding:
>
> (c) any matter incidental to a proceeding.
>
> (2) In exercising that discretion, the court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:
>
> (a) 14.2—principles applying to determination of costs:
>
> (b) 14.3—categorisation of proceedings:
>
> (c) 14.4—appropriate daily recovery rates:
>
> (d) 14.5—determination of reasonable time:
>
> (e) 14.6—increased costs and indemnity costs:
>
> (f) 14.7—refusal of, or reduction in, costs:
>
> (g) 14.8—costs in interlocutory applications:
>
> (h) 14.9—costs may be determined by different Judge:
>
> (i) 14.10—written offers without prejudice except as to costs:
>
> (j) 14.11—effect on costs:
>
> (k) 14.12—disbursements.

(3) This rule is subject to the provisions of the family law Act under which the proceedings are brought.

[11] Of particular relevance given that the discovery application is an interlocutory application as r 14.8 of the District Courts Rules ("DCR") states as follows:

14.8 Costs in interlocutory applications

(1) Costs on an opposed interlocutory application, unless there are special reasons to the contrary,—

(a) must be fixed in accordance with these rules when the application is determined; and

(b) become payable when they are fixed.

(2) Despite subclause (1), the court may reverse, discharge, or vary an order for costs on an interlocutory application if satisfied subsequently that the original order should not have been made.

(3) This rule does not apply to an application for summary judgment.

[12] The cases make it clear that costs must be fixed on a principled basis, but following *Ormsby v Ormsby*[1], it is clear that guidance should be sought through the scale costs.

[13] Given that the timeline of events as set out by Ms Fisher QC is not disputed by the applicants, it seems to me that the application was entirely unmeritorious. In the first instance Ms S Tod deposes that if the information had been requested by the applicants, it would have been provided, but no such request was made. Instead a discovery application was filed.

[14] I accept Ms Fisher's submissions that on 15 December Ms Tod then provided all relevant material to the applicants counsel, and confirmation was subsequently sought from the applicants that this material addressed their concerns. Ms Fisher did not receive the courtesy of a response. Then on 18 January 2016 the applicant advised the Court that discovery was not complete and sought an order and yet three days later the applicants advised the Court that they intended to withdraw their application for discovery.

[1] [2015] NZHC 641 at [41]

[15] I agree with Ms Fisher that the respondent has been put to unnecessary expense and I make an order for costs in the sum of $2015 as sought.

Security for costs

[16] The Family Court has jurisdiction to make an order for security for costs pursuant to r 207B of the FCR, which applies 5.48 of the DCR Family Court proceedings. DCR 5.48 addresses security for costs and states as follows:

> 5.48 Power to make order for security for costs
>
> (1) This rule applies if the court is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff—
>
> (i) is resident outside New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or
>
> (iii) is, within the meaning of section 158 of the Companies Act 1955 or section 5 of the Companies Act 1993, as the case may be, a subsidiary of a corporation incorporated outside New Zealand; or
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) When this rule applies, the court may, if it thinks fit in all the circumstances, order the giving of security for costs.
>
> (3) An order under subclause (2)—
>
> (a) must require the plaintiff or plaintiffs against whom the order is made to give security for costs in respect of the sum that the court considers sufficient—
>
> (i) by paying that sum into court; or
>
> (ii) by giving, to the satisfaction of the Registrar, security for that sum; and
>
> (b) may stay the proceeding until the sum is paid or the security given, as the case may be.
>
> (4) The court may treat a plaintiff as being resident out of New Zealand even though the plaintiff is temporarily resident in New Zealand.

(5) The court may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.

(6) References in this rule to a **plaintiff** or **defendant** are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[17] The basis of Ms Tod's application is that because of the failure of the applicants to pay the cost award in the High Court, and their subsequent failure to pay security for costs in the Court of Appeal, she expresses concern that she would be unable to recover any of her legal costs if she is successful in her defence of the applicants claim under the FPA.

[18] In *McLachlan Limited v MEL Network Ltd*[2] the Court of Appeal gave an overview of guidance in giving security for costs:

(a) The Court must be satisfied on the application of the defendant that there is reason to believe the plaintiff is unable to pay costs if unsuccessful. The decision whether to award security for costs is discretionary, and the quantum is also discretionary (at [13]).

(b) Secondly, while an assessment of the authorities can be of assistance, they cannot substitute for a careful assessment of the circumstances in a particular case. It is not a matter of going through a checklist of principles as that creates a risk that a factor will be accorded particular weight in a particular case and will be given disproportionate weight in quite different circumstances (at [14]).

(c) Thirdly, the Court needs to consider that r 5.48 (which contemplates an order for security in circumstances where a plaintiff will be unable to meet an award of costs) needs to be weighed against the fact that an order for substantial security may prevent the plaintiff pursuing a legitimate claim.

[2] (2002) 16 PRNZ 747 (CA)

(d) An order for security should only be made after careful consideration and in a case in which the claim has little chance of success, access to the Courts for a genuine plaintiff is not to be lightly denied (at [15]).

(e) The interests of a defendant must also be weighed; defendants must be protected against being drawn into unjustified litigation, particularly where it is overly complicated and unnecessarily protracted (at [16]).

[19] In *Murray-Kendall v Wilson*[3] the High Court noted that there are three questions to be determined (at [14-16]):

> 1. What are the financial circumstances of the plaintiff and whether there is reason to believe he or she will not be able to pay the defendant's costs if unsuccessful.
>
> 2. What are the merits of the plaintiff's case; if they are not strong and after having regard to other matters the Court may make an order because it is likely to have the effect of ending the prospects of the case being brought; and
>
> 3. Where the impecuniosity of the plaintiff was because of the defendant's actions.

[20] Brookers Commentary on Civil Procedure; District Courts in Procedure makes the following comments about what the person applying for security of costs must prove in relation to a plaintiffs impecuniosity.[4] The defendant does not have to prove a plaintiffs inability to pay in the normal civil sense. In the absence of direct evidence of the plaintiffs impecuniosity, it can be sufficient to adduce evidence of surrounding circumstances from which an inference of one's ability to pay can be reasonably drawn; *Totara Investments v ABOTH Limited* (HC) Auckland CIV-2007-404-000990 4 March 2009 at [28]. The practical onus then shifts to the plaintiffs to demonstrate that despite the implication arising from the defendant's evidence, the plaintiffs could, in fact, pay costs if unsuccessful.

[21] As stated above Ms Fisher QC asserts on behalf of Ms S Tod that there is an inference that the applicants are unable to pay costs in relation to these proceedings

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[3] [2015] NZHC 1921

[4] A Civil Procedure; District Courts and Tribunals (online looseleaf edition, Brookers) at 5.48 Power to make order for security of costs – DCR 2014

if they are unsuccessful because of their failure to pay costs in the High Court and security for costs in the Court of Appeal. In her affidavit in reply Ms J Tod, one of the applicants, sets out, very briefly at [2] of her four paragraph affidavit that:

> My financial circumstances are already spelled out on the Court file – and they have not changed in any significant way since that time.
>
> I also understand that is the position in relation to my 3 brothers – and, following on from that, it is clear that we could pay Court costs to the Respondent ("Sheila") if our claim for further (including more immediate) provision from our late fathers' estate is not successful.

[22] Further Ms J Tod asserts that if their claim is unsuccessful, on the basis that she is a long term beneficiary of the estate, then any costs they owe can be deducted from that share when Ms S Tod dies. That is, she is proposing that any costs that were awarded against her in relation to an unsuccessful FPA application could be paid to Ms Tod after her death. That submission is of course a nonsense because the effect of the mirror wills is that that debt would in effect be owed to the estate which would then be paid in accordance with provisions of the wills equally between the six children. It does not benefit Ms Tod who has had to pay the monies in terms of her legal costs in her lifetime, and would only result in a reimbursement to the estate in effect of two sixth of the actual costs awarded.

Financial circumstances of Mr A M Tod

[23] Mr Tod is one of the applicants. In his affidavit sworn 17 June 2014 he sets out his financial situation. He and his wife own a property in Victoria Australia worth $800,000 with a mortgage of $648,000 (and whilst it is not set out I assume that those figures are Australian dollar value and not New Zealand dollar value). He has a nett salary of $102,024 per annum and his wife has an annual gross salary of $33,000 per annum. They have no significant savings apart from their superannuation which they cannot access until 70. Thus they are of modest means, with their major asset being the equity in their home namely, $152,000.

Financial circumstances of Mr M J Tod

[24] Mr M Tod is also one of the applicants. His income and that of his partner is clearly modest and I consider the matters set out in their affidavit of 19 June 2014. He and his partner currently rent a property in Pakarunga in Auckland [details deleted]. However they own two other house properties in Auckland which on the basis of their valuation has a combined value of $1,140,000 with mortgages outstanding of $691,732. This leaves an equity in the two properties of $448,268.

Financial circumstances of Ms J O Tod

[25] Ms Tod lives in a de facto relationship. She and her partner rent a home in Browns Bay, Auckland. She too owns another two properties in Auckland. The combined value of those two properties amounts to $725,000, and mortgages of $633,427 leaving an equity of $91,573. Neither she or her partner have any savings.

Extent of the Estate

[26] The exact value of the estate appears at present to be unknown. There is a property in Waihi estimated by the applicants to be worth $1.2 million, modest sums in the bank, a share portfolio with the exact value known, and shares in a company which owns a property with equity of $160,000.

[27] Thus it is not surprising that none of the respondents have paid the costs in the High Court or failed to pay the security for costs in the Court of Appeal as none of the applicants have any funds available from which to do so.

[28] It is clear that the applicants do have equity in their respective properties, ranging from significant equity to very little, and thus there is potential for Ms S Tod to seek enforcement of any order as to costs by way of an order forcing the sale of the parties property. However I note that all those properties are owned in conjunction with the applicant's partners and thus are subject to claims under the PRA.

[29] Because of this equity that the parties have in the property however, it is my view that Ms S Tod has failed to establish that there are reasonable grounds for the Court to infer that the applicants would not be able to meet an order for costs. In reaching that view I rely upon the decision *Ayres v Lexis Nexis New Zealand*[5]. In that case the plaintiff Mr Ayres was, contrary to the facts of this case, not the registered proprietor of any realty and even in that circumstance the Court of Appeal was not prepared to conclude that security for costs should be made.

[30] I also determine that it is not possible to determine the merits of the claims at this interlocutory stage. As in the *DKH v DES*[6], I also have a concern that ordering security for costs would likely bring the proceedings to an end, leaving the applicants with a strong sense of injustice as they would not have their day in Court.

[31] Finally, whilst one of the applicants' major equity is in realty in Australia, it is nevertheless possible to enforce costs in Australia, although I acknowledge it would be costly.

[32] Accordingly for those reasons I decline to order security for costs.

S J Coyle
Family Court Judge

[5] [2015] NZHC 1348
[6] FC North Shore FAM-2008-044-002550, 10 October 2011