

**IN THE DISTRICT COURT
AT WHANGAREI**

**I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA**

**CIV-2017-029-000134
[2018] NZDC 17064**

IN THE MATTER OF	AN ENDURING POWER OF ATTORNEY DATED 24 SEPTEMBER 2004
BETWEEN	LYNDA KAYE JEANS Plaintiff
AND	PETER ERIC UPTON First Defendant
AND	HOSPICE NZ INC; THE SALVATION ARMY NZ TRUST; AND THE STARSHIP FOUNDATION Second Defendants

On the papers 21 August 2018

DECISION OF JUDGE G M HARRISON ON COSTS

Costs issues generally

[1] In my decision of 29 June 2018 I made no order for costs, despite the present submission of the plaintiffs to that effect. I indicated that in my view at that time the estate should pay the plaintiff's full solicitor/client costs of the proceeding but that, in the event of disagreement, I reserved leave for memoranda to be filed.

[2] No agreement has been reached and so the issue of costs remains to be resolved by this decision.

[3] In general terms, the plaintiff sued the estate of her late stepfather for approximately \$70,000 being the shortfall in his payment to her of her share of the net

proceeds of the sale of two properties in New Zealand following a relationship property claim.

[4] The deceased, acting in the role of a trustee and fiduciary, breached that trust by intermingling the plaintiff's funds with his own by banking them to his own account, and then by failing to account to her in full.

[5] Having received memoranda from all counsel, I have reconsidered my view on the proper incidence of costs.

Interest

[6] Before considering the costs issue further I note that the plaintiff seeks interest from 2004 to the date of hearing at the rates of interest prescribed from time to time by the Judicature Act 1908 as then in force, and the Rules of Court.

[7] The sum of \$57,263.91 is sought. Neither defendant challenged that calculation and I accordingly certify that amount as being recoverable by the plaintiff from the estate.

Costs of the executor

[8] Mr Upton as trustee of the late Donald Thompson is a lay person, and not a professional trustee.

[9] He was faced with this particular claim and also, as I understand it, other claims which have been initiated in the High Court, although I pay them no regard in reaching my decision.

[10] Clearly Mr Upton had to take care in his investigation of these claims and he explained how he searched the records of the deceased to endeavour to obtain the best evidence he could. Remarkably there were few, if any, documents that he was able to discover for the years 2004 and 2005, being the critical period, leading to the implication that the deceased had destroyed them to conceal his retention of the plaintiffs funds.

[11] At the hearing, although the plaintiff complained that it was late in the piece, Mr Upton did not take an active role on the basis that the second defendant charities were doing so.

[12] The general rule is that a trustee has the right to be paid costs out of the estate unless the trustee has acted unreasonably or essentially for the trustee's own benefit rather than that of the fund. *Hunter v Hunter* [1938] NZLR 520.

[13] Section 38(2) of the Trustee Act 1956 (the Act) empowers a trustee to reimburse himself from the trust property and, furthermore, s 71 of the Act empowers the Court to charge costs on the trust estate.

[14] I am quite satisfied that Mr Upton did what he regarded as being in the best interests of the estate, and of a duty he no doubt held towards his deceased friend. I do not accept that he acted unreasonably or for his own benefit, and consequently I direct that his reasonable costs of this proceeding be paid from the estate.

The charities

[15] An issue may have arisen as to whether or not the second defendants should have received some or all of their costs reimbursed from the estate, but they have not sought such a direction. Ms Angus, in her submission, makes it clear that the second defendants have paid their own legal fees of this proceeding and will not seek reimbursement.

The plaintiff's costs

[16] That leaves for consideration my indication that the estate should pay the plaintiff's solicitor/client costs. My initial view was that because of the highly inappropriate conduct of the deceased in his management of the plaintiff's affairs it was appropriate for his estate to bear her legal costs.

[17] However, Ms Angus' submission and the application of the relevant rules and reported authorities have tempered that view.

[18] I note firstly that costs are at the discretion of the Court – r 14.1 District Court Rules 2014. Rule 14.6 deals with increased costs and indemnity costs.

[19] Rule 14.6(4) sets out six criteria by which a Court may order a party to pay indemnity costs, although none of those are applicable in this case.

[20] In *Black v ASB Bank Limited* [2012] NZCA 384, the Court of Appeal considered circumstances in which it is appropriate to award indemnity costs.

[21] It drew a distinction between a contractual right to indemnity costs, and indemnity costs awarded in the Court's discretion.

[22] At [79] of its decision, the Court said:

Thus, where the entitlement to indemnity costs is contractual and the Court is exercising its power under r 14.6(4)(e), the position is distinctly different from orders under either of r 14.6(4)(a) or (b). *Bradbury v Westpac Banking Corp* (2008) 18 PRNZ 859 demonstrates the different approach required where an order is made under r 14(6)(4)(a).

[23] The later Court of Appeal decision in *Bradbury v Westpac Banking Corp* (2009) 3 NZLR 400, at [29], after reviewing authorities, listed circumstances in which indemnity costs have been ordered: These are:

- (a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- (b) Particular misconduct that causes loss of time to the Court and to other parties;
- (c) Commencing or continuing proceedings for some ulterior motive;
- (d) Doing so in wilful disregard of known facts or clearly established law;
or
- (e) Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[24] The second defendants were not guilty of any of those criteria.

[25] I am of the view, however, that having received the report of their expert witness, Ms Greenwood, which in the end the plaintiff relied upon in advancing her

claim and which I accepted as the most accurate calculation of the plaintiff's loss, the second defendants should have then set about settling the plaintiff's claim and avoiding the further and unnecessary cost of the hearing.

[26] Rule 14.6(3) empowers the court to order a party to pay increased costs, with subclause (b)(v) providing that increased costs may be awarded if a defendant fails, without reasonable justification, to accept an offer to settle or dispose of the proceeding.

[27] Such an offer was made by the plaintiff on 8 June 2018 whereby she was prepared to accept the sum of \$64,819.36 plus interest from the estate and \$20,000 towards her legal fees. That figure with the exception of interest and costs, was the amount assessed by Ms Greenwood. She was the defendants' expert witness. Despite that offer, the defendants chose to put the plaintiff to proof of her case, and as a consequence in my view an award of increased costs is appropriate.

[28] Ms Angus has calculated 2B costs as totalling \$14,062. The plaintiff's solicitor/client costs and disbursements total in excess of \$67,000.

[29] In my view, and in the exercise of my discretion, an appropriate amount of costs to award the plaintiff on an increased basis is \$28,000 plus GST if that is payable bearing in mind that the plaintiff is resident in the USA.

[30] The second defendants also challenge disbursements whereby the plaintiff claims an additional amount of \$5,980 relating to advice obtained from a barrister but, in all of the circumstances of this case, bearing in mind the plaintiff's residence in the USA and her profound deafness and difficulties associated with that condition, the incurrence of that disbursement was justified. The other minor disbursements challenged relate to overnight accommodation and travelling and research costs which, in my view, are appropriately claimed.

The High Court proceedings

[31] The plaintiff also submitted that I should direct the second defendants to pay these costs. That is because there is further litigation in the High Court and if costs are paid from the estate fund that may reduce the amount that might otherwise be available for distribution to the plaintiffs in the High Court. I am not concerned with the High Court proceedings. It would be quite inappropriate for me to tailor the costs award in this Court as against what might occur in the High Court proceedings.

[32] I therefore direct that the plaintiff's costs as now fixed be paid from estate funds.

G M Harrison
District Court Judge