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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2018-004-001089
[2021] NZFC 4522

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
AND	
IN THE MATTER OF	THE ESTATE OF LEWIS RICHARD JOHNS
BETWEEN	STEPHEN HENRY CYRIL JOHNS Applicant
AND	CHRISTOPHER NORMAL LORD COLIN CLIVE HOLLOWAY First Respondents
AND	GAIL PATRICIA JOHNS Other Party

Hearing: On the papers

Judgment: 5 July 2021

RESERVED JUDGMENT OF JUDGE D A BURNS
[As to application for costs]

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[1] I presided over a hearing at the Auckland Family Court on 1 October 2020.

[2] I released a reserved judgment on 16 October 2020.

[3] In paragraph [23] I made an order for costs. I set out paragraph 23 as follows:

> I order costs on a 2B basis in favour of the widow who has had to bear the costs of defending the application because there is no asset in the estate. That should cover Mr Jenkin's appearances and also Mr Gays. I direct Counsel to confer and see if they can reach agreement on the appropriate quantum. If there is disagreement memorandum can be filed and placed before me for resolution of the disputed quantum issue.

[4] I reserved the ability for Counsel to return to the Court if Counsel could not agree on quantum.

[5] My judgment was the subject of an appeal to the High Court. The appeal was dismissed in a judgment by Gordon J dated 25 February 2021.

[6] Because no agreement was reached with respect to quantum, the Court received further memorandum from Mr Gay and Mr Jenkin seeking the Court to determine quantum.

[7] I read the memorandum in Chambers. I reached the conclusion that the Court would benefit from further oral argument and set the matter down for hearing. The hearing was held on 12 March 2021.

[8] At the conclusion of the hearing I delivered a minute dated 12 March. I requested Mr Gay and Mr Jenkin to confirm that the actual costs incurred by their respective clients were in excess of scale. I also directed Mr Mitchell to provide evidence of his client's receipt of legal aid. The reason this was important was that if he was in receipt of legal aid a costs award can only be made against him in exceptional circumstances.

[9] Subsequently Mr Mitchell sought for an extension of the time specified for providing that evidence because he was having to correspond with the Legal Services Agency. The evidence of receipt of legal aid apparently was not clear from his file.

In Chambers I granted the application for extension. The Court received a memorandum dated 28 May 2021 from Mr Mitchell. A further memorandum was received by Mr Gay dated 29 June 2021. I intend to give judgment on quantum and then consider whether the grant of legal aid defeats the order for costs or not.

[10] I now deliver judgment on the question of quantum.

[11] Mr Jenkins filed a memorandum dated 18 November 2020. He sought costs on behalf of the respondents and the widow. The memorandum attached a letter sent to Mr Mitchell dated 3 November 2020. The memorandum and the letter sought costs in the total sum of $49,540.63. This was made up as follows:

(i)	widow's costs claim Scale 2B	$22,824.50
(ii)	widow's claim 25% uplift	$ 5,706.13
(iii)	respondent's claim for costs as per scale 2B	$16,808.00
(iv)	respondents' claim for 25% uplift	$ 4,202.00
	Total:	$49,540.63

[12] Mr Gay filed a further memorandum with respect to quantum dated 18 November 2020.

[13] Mr Mitchell filed a memorandum dated 25 November 2020 in reply.

[14] Mr Mitchell submitted in summary as follows:

(a) there should not be an order for costs;

(b) costs should lie where they fall;

(c) the quantum sought was excessive and not justified; and

(d) there should be no uplift.

[15] Mr Mitchell criticised the Court for making an award of costs as set out above without hearing from the parties. With respect, I do not consider that correct. A hearing took place and it was clear from the widow and from the estate that costs were being sought. Mr Mitchell and his client would have been well aware that costs were at issue. Correspondence provided by Mr Jenkin clearly shows that costs were an issue between the parties.

[16] An offer for settlement was made well before the hearing. As a result of Mr Johns electing not to accept that offer, he is $20,000 worse off than he would have been otherwise. In addition he has had to incur costs by engaging Mr Mitchell. On the other hand the widow is also $20,000 better off than she would have been but has had to incur costs in engaging Mr Jenkin and the estate has incurred costs in proceeding to the hearing in employing Mr Gay (the widow having to subsidise because the estate has no assets).

[17] The Court has already made an order for costs and has not provided for any uplift. As a result of the submissions filed the following issues require determination:

(a) should there be an uplift above scale?

(b) is the scale costs as set out by Counsel in the steps relied on appropriate?

(c) what is the overall conclusion of the Court?

[18] Dealing with each of those issues in turn.

Uplift

[19] Mr Jenkin seeks a 25% uplift above 2B costs relying on District Court Rules 14.6, sub rule 3(b)(ii) and (v) and DCR 14.6 (3)(d). I decline to order an uplift for the following reasons:

(a) whilst the applicant was unwise in not accepting the settlement offer (as his two siblings did) nevertheless he was entitled to pursue his application and have it determined by the Court. The arguments that he presented were unsuccessful but were not unreasonable. He had a belief about assets within the estate and clearly did not accept the advice received from the estate's solicitors. Whilst it could be argued he had no justification for not accepting the offer of settlement the result is that he is $20,000 worse off. He now faces an order for costs. He filed an application for further division from the estate and I accept that he was intransigent in his belief that there were assets in the estate despite clear advice to the contrary. Nevertheless I consider that he was entitled to have his day in court and have a ruling made about that. By doing so he must have known that he was exposing himself to an order for costs but I do not think his actions were so unreasonable as to warrant an uplift. I consider that the justice of the situation is met by the order that has actually been made.

[20] The Court has already made an order for costs. No uplift was provided in that order. Mr Mitchell argued that there should not be an order for costs but as pointed out by Mr Jenkin and Mr Gay in the hearing before me, there had already been an order made. Therefore Mr Johns' remedy was to appeal. He did take up that option but was unsuccessful. He did not appeal the cost award. I observe the High Court has made an order for costs against him. I do not understand the High Court to provide for increased costs. I consider that the justice of the situation is met by the order on a 2B basis and I decline to amend the order that the Court has already made (even if I had jurisdiction) for those reasons.

Quantum

[21] Mr Mitchell argues that the amount sought is excessive and not in accordance with true application of scale. The difficulty for the Family Court is that the scale is based on civil processes, not Family Court processes. There should be a separate schedule purely for Family Court proceedings, therefore I make no criticism of the schedule prepared by Mr Gay and Mr Jenkin because they have adopted the civil

approach. That is the only one available. I consider however that it is inappropriate in this proceeding. For example, one day is claimed for the filing of a notice of defence of the substantive application. I consider at best it should be .25. I consider that the preparation of an affidavit of executors in opposition to application for discovery for two days is excessive and I allow one day. I consider that the attending for a hearing before me for 1.5 days is excessive and I allow .5 days. This is based on travelling times, the actual time of the hearing which I advised Counsel is recorded on the log available. I therefore reduce the claim for calculation of the respondent's scale costs by two days which makes the total applicable 6.8 days. This comes to $12,988 which I round up to $13,000.

[22] I order costs in favour of the respondent on a 2B basis for $13,000 with no uplift.

[23] Turning now to the schedule of costs for the widow, Mr Mitchell presented an argument it should be reduced for the first five items claimed being $4,500 because his client was on legal aid.

[24] For similar reasons I reduce the claim for a notice of defence from one day down to .25. For preparation of written submissions I reduce to .5. I reduce the preparation time for the substantive hearing from 2 days to 1 day and similarly the preparation by Counsel for other authorities. I reduce the hearing time from 1.5 days down to 0.5. I calculate therefore that the widow's claim should be reduced by 4.5 days. That reduces the quantum by $8,595.00. This produces a net result of $14,324.50 which I round to $14,500. I therefore order costs in favour of the widow in the sum of $14,500 with no uplift.

[25] I consider the estate is entitled to costs as well as the widow. Both had to engage Counsel and Mr Gay gave the reasons for that in court which I accept.

Legal aid

[26] Mr Mitchell submitted in his memorandum in summary as follows:

- That the applicant received a grant of legal aid on 3 December 2018 and that the grant appears to remain current. That the grant remains current throughout the period of time for which costs have been sought and ordered above.

- He referred to the Legal Services Act 2011 and s 45 which says as follows:

> **45 Liability of aided person for costs**
>
> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
>
> (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
>
> (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
>
> (a) any conduct that causes the other party to incur unnecessary cost:
>
> (b) any failure to comply with the procedural rules and orders of the court:
>
> (c) any misleading or deceitful conduct:
>
> (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
>
> (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
>
> (f) any other conduct that abuses the processes of the court.

- Mr Mitchell said that the grant of legal aid was for his family protection proceedings. That differences arose between himself and his legally aided Counsel.

- That he was then subsequently unable to find Counsel willing to take the matter.

- He said that he had taken the matter on a pro bono basis partly to assist the Court but also recognising the applicant was unable to find a listed provider who had capacity to accept the brief. Mr Mitchell was accepting that he was not a listed provider.

- Mr Mitchell submitted as follows in paragraph 12:

  > It is accepted that the protection against costs set out in the Act, does not apply in exceptional circumstances. It is unusual for a legally aided party to be represented in the proceedings by Counsel not in receipt of legal aid. However, it is to be noted that the applicant met the criteria for grant of legal aid. Further, it was accepted by the Legal Services Commission that the proceedings should proceed with such a grant.

- Mr Mitchell therefore argued that whilst he was not paid by the Legal Services Agency nevertheless the applicant was in receipt of legal aid for the relevant period. He submitted that the protection contained in s 45(2) applied. He also argues that the existence of the grant of legal aid is a circumstance the Court should take into account that the applicant in any event is impecunious and unable to meet any costs award. A copy of an affidavit provided to the High Court was attached.

[27] Mr Gay in his memorandum of 29 June submitted in summary as follows:

- That the memorandum of 28 May was not received by him until 29 June. He submitted that at the time when the applicant gave instructions to Mr Mitchell on 29 August 2020 Mr Mitchell was not an approved legal services provider and therefore the proceedings were no longer being conducted under the grant of legal aid.

- That the applicant gave a private brief instruction to Mr Mitchell and his legal aid brief would have been terminated if the Legal Services Agency had been advised of that by the applicant.

- That accordingly from 29 August 2020 it was clear the applicant was thereafter not represented by approved legal services provider under the legal aid grant and therefore can no longer claim the cost shield contained in s 45(2).

- That Counsel have not been advised by the applicant that Mr Mitchell was acting on a pro bono basis.

- That the full terms of any retainer had not been disclosed.

- That the pro bono nature of the brief would not prevent Mr Mitchell from charging a fee if his had been successful. He argues that Mr Johns is trying to have his cake and eat it too. That he cannot instruct his Counsel to act on a private brief basis and then at the same time hide behind the cost shield contained in s 45.

- He argues that the costs decision of Gordon J is not relevant.

[28] Mr Gay then referred to a number of other matters.

[29] Mr Jenkins chose not to file any further memorandum but I understand supported the submissions made by Mr Gay.

Judgment on legal aid

[30] I find that effectively the grant of legal aid came to an end when Mr Mitchell took instructions on 29 August 2020. That costs should be awarded from that date onwards. I do not think that the applicant can rely on his own default in failing to advise Legal Services Agency of the nature of the change of brief for his Counsel but if he had done so the legal aid grant would have come to an end. I do not think the shield provided in s 45(2) should apply from 29 August 2020 onwards. Accordingly the award of costs made in this judgment stands from 29 August 2020 onwards. Any costs prior to would not be applicable but as I understand it the application for costs made and ordered apply after that date in any event. Because in my view the grant came to an end on that date I do not have to consider whether the exceptional

circumstances threshold has been met in this case. Accordingly the costs awarded in this judgment stand.

Dated at Auckland this day of 2021 at am/pm.

D A Burns
Family Court Judge