

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2012-404-2021
[2013] NZHC 3250**

BETWEEN LYALL GRAEME THURSTON
Plaintiff

AND COLLEEN ELIZA THURSTON, JOHN
STEPHEN BURRETT AND BRIDGET
GORINSKI as trustees of the Estate of G
N Thurston
Defendants

CIV-2012-404-2022

BETWEEN LYALL GRAEME THURSTON
Plaintiff

AND COLLEEN ELIZA THURSTON AND
JEREMY JAMES MALLABY
GOODWIN
Defendants

Hearing: On the papers and 4 December 2013

Appearances: V T Bruton and D M Urmson for Plaintiff
A H Waalkens QC for C E Thurston
G M Harrison for J J M Goodwin

Judgment: 6 December 2013

COSTS JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 6 December 2013 at 1.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

[1] This judgment determines matters as to costs between the parties in respect of two proceedings.

[2] The first, CIV-2012-404-2022, is a proceeding in which I gave judgment in July 2013 (“trustee proceedings”). In that judgment, and pursuant to the inherent jurisdiction of the Court, I granted an application by the Plaintiff for the removal of the Defendants as trustees of the Thurston Family Trust (“the trust”). The trust was settled by Mr Graeme Thurston (“Mr Thurston”), the Plaintiff’s father.

[3] The second proceeding was an application by the Plaintiff for the recall of grant of probate of Mr Thurston’s will (“probate proceedings”), being CIV-2012-404-2021. The Defendants to this proceeding were the executors of the will. At the hearing before me the Plaintiff advised that proceeding would be discontinued, as it was shortly thereafter. Matters were left on the basis that costs on the discontinuance would be determined at the same time as costs in the trustee proceedings.

[4] I have received comprehensive submissions from all the parties. They have also had an opportunity to speak to those submissions at a telephone conference.¹ I also gave the continuing trustees, Ms B Gorinski and Mr J Burrett, an opportunity to be heard. They advised they would abide the decision of the Court.

Probate proceedings

[5] Rule 15.23 of the High Court Rules provides:

15.23 Costs

Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[6] Counsel for the Plaintiff submits that, in this instance, the Court should order that costs are to lie where they fall on the grounds that the Plaintiff had a tenable basis for contending that Mr Thurston lacked testamentary capacity and that the Defendants to the proceeding failed to discharge their onus as to capacity. Counsel

¹ Held on 4 December 2013.

for the Plaintiff also submits that the decision to discontinue was made close to the date of the hearing before me, on the basis that the proceedings were unnecessary given the strength of the Plaintiff's case on the trustee proceedings.

[7] I am not persuaded that there is any basis to make the order sought. In particular, I do not consider that I can form any view on the merits of the evidence of capacity.

[8] Given that decision, it will be for the Plaintiff to pay the costs of the probate proceedings on a 2B basis, with disbursements as fixed by the Registrar.

Trustee proceedings

[9] The position is more complicated in the trustee proceedings. The issues which arise are:

- (a) the costs to which the Plaintiff as the successful party is entitled and whether he should have indemnity or increased costs; and
- (b) whether the Defendants are entitled to an indemnity from the trust fund in respect of the Plaintiff's costs and in respect of their own.

Background

[10] Mr Thurston settled the trust in 2003. Mr Thurston, Mr Burrett and Ms Gorinski were the first trustees.

[11] Mr Thurston died in September 2010. By his will, Mr Thurston appointed the Defendants, Mrs C Thurston and Mr J Goodwin as trustees, with Mr Burrett and Ms Gorinski continuing as trustees.

[12] Mrs Thurston was Mr Thurston's second wife. She is a beneficiary of the trust, as is the Plaintiff and his sons. Mr Goodwin is a solicitor and professional trustee. He became Mr Thurston's solicitor in 2001 and commenced acting for Mrs Thurston in 2005. He is, or has been, a trustee of and solicitor for two trusts settled by Mrs Thurston.

[13] As at 31 January 2013, the trust fund comprised investments to a face value of \$7.3 million and a residential property (“property”). The property was valued at approximately \$6 million at the date of hearing. The trustees carried out substantial works to the property in 2011 costing approximately \$875,000. These works and their cost brought matters to a head between the Plaintiff and Defendants. Mrs Thurston has a life interest in the property (see below) and so she alone enjoys the benefit of this expenditure, at least to the extent to which the works went beyond maintenance.

[14] There are two relevant classes of beneficiary:

- (a) Group A, being Mrs Thurston. Mrs Thurston has a life interest in the “Group A Fund”, comprising \$2,500,000 and the property.
- (b) Group B which includes the Plaintiff and his three adult sons, each of whom swore an affidavit supporting the Plaintiff’s application.

[15] The grounds on which the Plaintiff applied to remove the Defendants as trustees were that they had not acted and/or were incapable of acting impartially as between the beneficiaries. I considered those grounds were established, hence the orders I made.

Issues

Plaintiff’s costs

[16] The Plaintiff seeks an award of costs on the basis that he was the successful party and an award of indemnity, alternatively increased, costs. The Defendants accept that the Plaintiff should have an award of costs on a 2B basis but oppose any award of indemnity or increased costs.

[17] There is no dispute between the parties that, as a general principle, an unsuccessful party to hostile litigation between a beneficiary and trustee is ordered to pay the costs of the successful party. This appears from the following:

When a trustee is removed, the trustee may be ordered to pay all the costs involved in the case. Normally the trustee's costs will not be paid out of the trust fund. However, the court may decide that a certain portion only of the trustee's costs should be paid from the trust fund, or may leave this to the discretion of the trustee.²

and:

Second, there are disputes ('beneficiaries' disputes') with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future, eg an action for breach of trust and removal of trustees. Such a dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate. ...³

[footnotes omitted]

[18] Accordingly, I am satisfied that the Plaintiff should have an award of costs and disbursements and that, subject to any right of indemnity, these should be paid by the Defendants.

[19] Counsel for the Plaintiff also seeks an award of indemnity or increased costs. The main argument in support of this submission is that the Plaintiff invited the Defendants to retire as trustees on several occasions but they declined to do so. As matters transpired, the reasons why the Plaintiff proposed the Defendants should retire were those I considered proved on the evidence.

[20] For instance, by letter dated 31 May 2012, the solicitors for the Plaintiff advised that they considered there was an urgent need for removal of the Defendants, pending resolution of the substantive issues in the proceeding. This proposal was made on the basis of evidence given by Ms Gorinski and Mr Burrett that administration of the trust was deadlocked, that Mrs Thurston was not capable of acting impartially, that Mrs Thurston had misconducted herself by committing the trustees to the expenditure in relation to the building works at the property, and that Mr Goodwin had failed to act in the interest of all beneficiaries.

² Greg Kelly and Chris Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington 2013) at [17.71].

³ David Hayton and others *Underhill and Hayton Law of Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at [85.39]. See also *Hunter v Hunter* [1938] NZLR 520 at 538 – 539.

[21] By letter dated 7 June 2012, Mrs Thurston's solicitors, Stafford Klaassen, replied and said:

...

We can be quite certain that Mrs Thurston will not accept the assertions in the affidavits and she certainly will not agree to step aside as a trustee. We do not accept that there are sufficient grounds to warrant this.

We must put your clients on notice that if they persist in their apparent enthusiasm to litigate on every possible aspect relating to this matter (we note this even extends to assertions that Mr Thurston lacked testamentary capacity – a point that completely overlooks the medical and other evidence about this at the time) then the ordinary rule that costs are paid by the estate will be rigorously opposed. Your clients' actions are going to incur very considerable costs to the estate and to our client and they will be sought against them personally with the appropriate uplift.

...

[22] In concluding that letter, Stafford Klaassen proposed that the parties mediate.

[23] Counsel for Mr Goodwin replied by letter dated 8 June 2012 and said:

... Neither Mrs Thurston, nor Mr Goodwin have conducted themselves in the course of the administration of the trust to date, in a manner that would cause a Judge to remove them. If need be a detailed affidavit will be provided by Mr Goodwin to confirm that, again at unnecessary cost.

[24] Similar letters from the Plaintiff's solicitors followed in September and November 2012.

[25] I accept the Plaintiff's submission that he could not have put his position, and his proposal that the Defendants retire, more clearly than in the letters to which I have referred and that the replies did not address the important issues that he raised.

[26] After some consideration, however, I have decided not to order the Defendants to pay costs greater than the sum due the Plaintiff on a 2B basis, together with the usual disbursements. The manner in which the Defendants conducted the litigation did not lead to any increased cost and their conduct not of such a standard as to warrant indemnity costs.

[27] The Plaintiff, however, should not be left to bear the balance of his own costs. His proceedings were for the benefit of the trust. Given that, I consider the trust fund should bear any costs and disbursements incurred by the Plaintiff over and above that which the Defendants are required to pay.⁴

Indemnity

[28] The next issue is whether the Defendants have a right of indemnity from the trust fund in respect of their liability to the Plaintiff and in respect of the costs they incurred in defending the proceeding. The Defendants rely on s 38 of the Trustee Act 1956 (“Act”) and cl 8.2 of the trust deed dated 12 September 2003 (“trust deed”).

Section 38(2) Trustee Act 1956

[29] Section 38(2) of the Act provides:

38 Implied indemnity of trustees

...

- (2) A trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers; but, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust:

Provided that the Court may on the application of the trustee allow such costs as in the circumstances seem just.

[30] The issue which arises under s 38(2) of the Act is whether the costs of the Plaintiff and Defendants constitute an expense:

... reasonably incurred in or about the execution of the trusts or powers; ...

[31] I am not satisfied that the costs were such an expense. Costs were incurred because the Defendants failed in their duties as trustees and the Plaintiff applied to

⁴ High Court Rules, r 14.6(4)(c).

remove them. Such costs cannot be said to be reasonably incurred in or about the execution of the trusts or powers.

Clause 8.2 trust deed

[32] The Defendants rely also on cl 8.2 of the trust deed which provides:

Each Trustee or former Trustee shall be entitled to a full and complete indemnity from the Trust Fund for any personal liability which that Trustee may incur in any way arising out of or in connection with that Trustee acting or purporting to act as a Trustee of the Trust, provided such liability is not attributable to that Trustee's own dishonesty, or to the wilful commission or omission by that Trustee of an act known by that Trustee to be a breach of trust.

[33] The Defendants submit that their costs, and any liability that they may have for the Plaintiff's, constitute a personal liability incurred in connection with their acting as trustees and that they are entitled to indemnity accordingly.

[34] The Plaintiff submits that the Defendants are not entitled to indemnity under cl 8.2 because the liability is attributable to their own dishonesty or to their wilful commission or omission of an act they knew to be a breach of trust.

[35] I accept the Plaintiff's submission for the following reasons.

[36] The issue of what constitutes "dishonesty" for the purposes of a clause in a trust instrument purporting to exclude liability was considered recently by the Court of Appeal in *Spencer v Spencer*.⁵ In the present case the clause is one for indemnity but I do not consider that distinction material on the point in issue.

[37] In *Spencer*, the Court of Appeal was considering an appeal from a decision by French J,⁶ in which she had determined that trustees had acted in breach of trust, causing a loss to the trust fund. The trustees sought to rely on cl 10 of the trust deed, which provided:⁷

⁵ *Spencer v Spencer* [2013] NZCA 449.

⁶ *Spencer v Spencer* HC Wellington CIV-2011-485-857, 19 October 2011, [2012] 3 NZLR 229.

⁷ *Spencer v Spencer*, above n 5 at [115].

10. NO trustee acting or purporting to act in the execution of the trusts of these presents shall be liable for any loss not attributable to his or her own dishonesty or to the wilful commission or omission by him or her of an act known to be a breach of trust and in particular no trustee shall be bound to take or be liable for failure to take any proceedings against a co-trustee for any breach or alleged breach of trust committed by such co-trustee.

[38] The trustees appealed. The Court of Appeal upheld French J's findings as to breach of trust, and then considered cl 10 and particularly what must be considered in determining whether a trustee has acted dishonestly for the purposes of such a clause. The Court said:⁸

[131] We conclude that in New Zealand, the assessment of a trustee's honesty comprises both subjective and objective elements. A critical first step is to establish what the trustee actually knew about the terms of the trust relevant to the breach alleged and whether the trustee knew that the impugned conduct amounted to a breach of trust. The trustee's knowledge might include constructive knowledge arising from wilful blindness in the sense described in *Westpac* although we do not need to determine that in this case. The second step requires an assessment of whether, in the light of what the trustee knew, he or she acted in the way an honest person would in the circumstances. This is to be assessed on an objective basis. A trustee who believes his or her actions or omissions were in the best interests of the beneficiaries will not necessarily be entitled to protection.

[39] Accordingly, in determining dishonesty for the purpose of reliance on the indemnity, the first step is to ascertain what the trustee knew about the terms of the trust relevant to the breach and whether they knew that they were acting in breach of trust.

[40] As appears from my judgment, Mrs Thurston proceeded with extensive works to the property despite the trustees agreeing at two separate meetings that she would not do so pending receipt of further information.

[41] The first agreement is recorded in the minutes of the meeting of the trustees on 8 March 2011. At that time the trustees had received reports from an architect and quantity surveyor and the works were estimated to cost approximately \$450,000. The minutes of the meeting record that the "extent and value(s) estimated came as a

⁸ Ibid, at [131].

bit of a surprise”. The trustees agreed at that meeting that Mrs Thurston would obtain “firm quotes for the work” before proceeding further.

[42] The second agreement is recorded in the minutes of the trustees’ meeting in April 2011. These minutes record that Mrs Thurston advised the other trustees that the works had commenced. The minutes record the trustees’ agreement that the works would not be further advanced pending the trustees’ approval. Mrs Thurston did not, however, instruct the builders to stop work. In [62] of my judgment I referred to Mr Burrett’s email to Ms Gorinski and Mr Goodwin of 13 April 2011 in which he said that a number of the rooms had been “gutted”, some areas had been “stripped back to bare timber wall framing”, and that the builder had “voiced concern that he had no plans or drawings from the architect who swanned in and out”. Mr Burrett asked “whether anyone had signed an instruction and scope of work?”.

[43] In his submissions on costs, counsel for Mrs Thurston referred to her apology when giving evidence for proceeding as she did in the absence of trustee agreement and Mrs Thurston’s acknowledgement, also when giving evidence, that she had made an error of judgment in proceeding as she did. I am satisfied, however, that at the relevant time Mrs Thurston knew the trustees were required to act unanimously and knew that she was acting in breach of trust in proceeding as she did.

[44] In so far as concerns Mr Goodwin, as a professional trustee and solicitor he knew that a trustee has an obligation to act impartially as between beneficiaries. I am satisfied that Mr Goodwin favoured Mrs Thurston’s interests and that he knew he was doing so in breach of the duty that he owed to all beneficiaries.

[45] Coming to the second step in *Spencer*, in light of what Mrs Thurston knew and assessed objectively, I am satisfied that Mrs Thurston did not act in a way an honest person would act in the circumstances. I am satisfied that an honest person would not have proceeded as Mrs Thurston did.

[46] In so far as concerns Mr Goodwin, in light of what Mr Goodwin knew and assessed objectively, I am satisfied that Mr Goodwin did not act in a way an honest

person would act in the circumstances. I am satisfied that an honest person would have complied with their obligation to act impartially as between beneficiaries or would have retired if they considered themselves unable to do so.

[47] It follows from the application of *Spencer* that neither Defendant is entitled to indemnity pursuant to cl 8.2 of the trust deed, whether in respect of their liability for a share of the Plaintiff's costs or for their own costs.

Other submissions

[48] Counsel for Mrs Thurston submitted that I should delay determination of costs pending resolution of other litigation between the parties. I decline to do so. Costs should be dealt with at the conclusion of a proceeding unless there is good reason not to do so. Also the Plaintiff and Mr Goodwin, who will take no further part in the other litigation, are entitled to know their position.

[49] Counsel for Mrs Thurston also proposed that I should take into account Mrs Thurston's submission that Mr Thurston had not made sufficient provision for her, whether in his will or as a beneficiary. Those matters are irrelevant to the issues that arise as to costs.

Result

[50] I make orders as follows.

CIV-2012-404-2021

[51] The Plaintiff is to pay the costs of the Defendants in this proceeding on a 2B basis together with disbursements, to be fixed by the Registrar in the event of dispute.

CIV-2012-404-2022

[52] The Plaintiff is entitled to indemnity costs and disbursements in this proceeding.

[53] The Defendants are jointly and severally liable for that proportion of the Plaintiff's costs and disbursements that is equivalent to costs on a 2B basis with standard disbursements, to be fixed by the Registrar in the event of dispute.

[54] The trustees of the Thurston Family Trust are to pay the balance of the Plaintiff's costs and disbursements. Whether the sum should be met from capital or income or both is matter for the trustees to consider.

[55] The Defendants are not entitled to indemnity in respect of the costs referred to in [53] nor in respect of their own costs, whether pursuant to s 38 Trustee Act 1956 or cl 8.2 of the trust deed of the Thurston Family Trust dated 12 September 2013.

.....
M Peters J

Solicitors: TGT Legal, Auckland
Stafford Klaassen

Counsel: A H Waalkens QC, Auckland
G M Harrison, Auckland
R J Moody, Auckland