IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1688
[2019] NZHC 920

UNDER	Part 18 of the High Court Rules Trustee Act 1956
BETWEEN	VICKI ANN TRIEZENBERG and PAUL MORLEY DODD Plaintiffs
AND	ALEXANDER CHARLES MASON First Defendant
	WENDY ANNE MASON Second Defendant

Hearing: On the papers

Appearances: VTM Bruton QC and J Matheson for Plaintiffs
G J Thwaite for first Defendant

Judgment: 30 April 2019

JUDGMENT OF FITZGERALD J
[As to power of appointment and costs]

This judgment was delivered by me on Tuesday 30 April 2019 at 3.00 pm
Pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Solicitors: Wilson McKay, Auckland
G J Thwaite, Auckland

Introduction

[1] The plaintiffs (Ms Triezenberg and Mr Dodd) sought Court orders removing the first and second defendants (Mr and Mrs Mason respectively) as trustees of two family trusts of which all four were trustees. There was no dispute it was appropriate for Mrs Mason to be removed; she has advanced dementia and is incapable of fulfilling her role as trustee. Mr Mason, however, disputed his removal.

[2] The backdrop to these proceedings is an irretrievable breakdown of the relationship between Mr Mason on the one hand, and Ms Triezenberg (his daughter) and Mr Dodd (the long-standing family accountant) on the other. The rift between trustees resulted in significant dysfunction in the trusts and unsustainable dissipation of trust assets. In addition, Mr Mason did not fully understand his role as trustee, nor, given the rift with Ms Triezenberg and his other daughter, Ms Richardson (both of whom are beneficiaries of the trusts), was he capable of considering all beneficiaries of the trusts in a fair and impartial manner.

[3] After a substantive hearing in September last year, I made orders removing both Mr and Mrs Mason as trustees.[1] I also considered removing but did not remove the plaintiffs as trustees.

[4] In addition to orders removing Mr Mason as trustee, the plaintiffs also sought orders amending the terms of the trust deeds so that the power of appointment of new trustees vests in the trustees for the time being, rather than currently vesting in Mr Mason on the one hand, and the plaintiffs (as trustees) on the other. I deferred making any orders on this aspect of the claim until after the parties were aware of my findings on the proper interpretation of the trust deeds' provisions on power of appointment and removal of trustees, which was also in dispute.

[5] After delivery of my substantive judgment, I sought further submissions on this issue. The plaintiffs maintain their application for an order varying the power of appointment and removal, so that it vests in the trustees. Mr Mason opposes any such variation.

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1 *Triezenberg v Mason* [2019] NZHC 14 [*Substantive Judgment*].

[6] I also sought submissions on the question of the costs of these proceedings, which to date, and at least on an interim basis, have been met by one of the trusts.[2] The plaintiffs say that Mr Mason should pay their costs in the proceedings (on a scale 2B basis), with the balance to be met by one of the trusts, and Mr Mason ought not to be indemnified by the trust for either the cost of meeting the plaintiffs' costs or his own legal costs. In other words, Mr Mason should personally bear all the costs of this litigation. Mr Mason, disputes this, and says it was reasonable for him to defend the attempt to remove him as trustee. His position is that all parties' costs should be met from trust assets.

[7] This judgment therefore determines the plaintiffs' application for orders varying the trusts' provisions concerning appointment and removal of trustees, as well as the competing positions on costs.

Factual background – summary

[8] The factual background to the dispute between the parties is set out in detail in my substantive judgment. It is not repeated here. But in brief terms:

(a) Mr and Mrs Mason settled the first family trust (the Mamari Trust) in 1994. The family home and a commercial property were settled on that trust.

(b) In 2012, Mrs Mason was diagnosed with early stage dementia.

(c) Before Mrs Mason's condition progressed, she and Mr Mason made various arrangements in relation to the next stages of their lives. These comprised (among other steps):

(i) Settling a second family trust (the Mamari (No. 2) Trust), into which substantial cash deposits were settled. The concept was for this second trust to fund what would ultimately become Mrs Mason's increasing care needs as her dementia progressed.

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2 As ordered by Venning J in February 2018; *Triezenberg v Mason* [2018] NZHC 186.

(ii) Mrs Mason appointing Ms Triezenberg as her attorney in respect of property affairs and personal care and welfare. Ms Richardson was appointed as successor attorney.

(iii) Mr and Mrs Mason entering into a memorandum of guidance to trustees, which I found was intended to and applies to both trusts. Under this, the trustees' first responsibility is to consider on a regular basis the circumstances of Mr and Mrs Mason, such that while each of them is living, their comfort and wellbeing is the trustees' primary consideration.

(d) Mrs Mason's health deteriorated over the ensuing years. In mid-2015, she was assessed as mentally incapable due to advanced dementia. This activated Ms Triezenberg's enduring power of attorney (EPOA). With the agreement of the Masons' three children,[3] Mrs Mason was admitted into residential dementia care at St Andrew's Village.

(e) Mr Mason never fully accepted his wife's condition and was vehemently opposed to her admission to St Andrew's Village. Over time, Mark Mason also objected to Mrs Mason remaining at St Andrew's. Mrs Mason's admission to St Andrew's Village led to the complete breakdown of Mr Mason's relationship with his daughters, and also the relationship between Ms Triezenberg and Ms Richardson on the one hand, and Mark Mason on the other. Mr Mason also blames Mr Dodd for what he considers to have been bad advice to settle the two family trusts in the first place.

(f) In December 2015, Mr Mason commenced Family Court proceedings seeking orders revoking Ms Triezenberg's EPOA.

(g) The rift between the trustees, and Mr Mason's views in relation to Mrs Mason's diagnosis and care, led to serious disruption in the trusts, and in particular, ongoing disputes as to payment for Mrs Mason's care.

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3 I.e. Ms Triezenberg, Ms Richardson and their brother Mr Mark Mason.

Mr Mason viewed the costs as excessive compared to what he considered to be his wife's condition. His behaviour vis-à-vis St Andrew's Village led to that organisation giving notice of termination of Mrs Mason's care arrangements as of November 2016.

(h) Shortly before Mr Mason's Family Court proceedings were to be heard, in September 2016, the parties to those proceedings reached a settlement of the issues between them. The settlement terms included that Mrs Mason was to move home with new 24/7 care. Ms Triezenberg's EPOA was terminated and Mr Michael Allen appointed as Mrs Mason's property manager and welfare guardian. It was also agreed that on agreement of new professional trustees, all trustees would stand down. Unfortunately, the parties could not agree on new trustees, so this aspect of the settlement agreement was never implemented.

(i) Despite Mrs Mason's return home, Mr Mason continued to object to the ongoing costs of her care, and quickly took against Mr Allen, as well as various medical professionals and nursing staff who did not agree with his views. Successive caregivers withdrew their in-home care of Mrs Mason given Mr Mason's behaviour and interference.

(j) The plaintiffs commenced these proceedings in July 2017, seeking, inter alia, Mr Mason's removal as trustee.

(k) In February 2018, Venning J made orders to the effect that, on an interim basis at least, the parties' legal fees associated with this proceeding would be met by the Mamari (No. 2) Trust.[4]

(l) In March 2018, Mr Mason executed deeds by which he purported to remove the plaintiffs as trustees and replace them with Mark Mason. Mr Mason sought declarations in these proceedings that the deeds were valid.

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4 *Triezenberg v Mason*, above n 2.

(m) In my substantive judgment of January this year, I made orders removing Mr and Mrs Mason as trustees and ruled on the proper interpretation of the power of appointment and removal of trustees. I also dismissed Mr Mason's counterclaim in relation to the validity of the March 2018 deeds purporting to remove the plaintiffs as trustees.

[9] I turn now to the plaintiffs' application to vary the trust deeds' provisions concerning the power of appointment and removal of trustees.

Should the powers of appointment and removal be varied?

Introduction and parties' submissions

[10] The power of appointment and removal in the Mamari Trust (cl 7) currently provides as follow:

> The power of appointment of new Trustees hereof shall be vested in the Settlors during their lifetimes and after the death of the first of the Settlors to die then in the surviving Settlor and after the date of death of the surviving Settlor in the administrator or executor for the time being of the surviving spouse's Will and if at any time after the death of the surviving Settlor and the winding up of that person's estate there shall be no such administrator or executor able or willing to act then in the person or persons in whom the statutory power is vested by the Trustee Act 1956 or any statutory modification therefore for the time being in force.

[11] As I held in my substantive judgment, by virtue of cl 7 and s 43 of the Trustee Act 1956 (the Act), the power of appointment (and removal) vests jointly with Mr Mason on the one hand and Mr Mason and the plaintiffs on the other (as the then existing trustees).[5] With Mr Mason's removal as trustee, the power of appointment now vests in Mr Mason on the one hand, and the plaintiffs, as trustees, on the other.

[12] The power of appointment and removal in the Mamari (No. 2) Trust (cl 17) currently provides as follows:

> **17 APPOINTMENT AND REMOVAL OF TRUSTEES**
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> 17.1 **Settlor's powers of appointment and removal**: Each Settlor shall have the powers, exercisable from time to time, to appoint one Trustee and to remove every Trustee appointed by that Settlor. For the purposes of this clause

5 *Substantive Judgment*, above n 1, at [101]-[103].

Alexander Charles Mason shall be deemed to have appointed himself and Wendy Anne Mason shall be deemed to have appointed herself.

17.2 **Transfer of powers of appointment and removal**: A Settlor may, be deed or will, and on such terms and conditions as the Settlor thinks fit, transfer the power of appointment and removal held by that Settlor to any other person. Where such a transfer is made, it shall apply to both the powers of appointment and removal set out in clause 17.1 and in clause 17.4, which are held by the Settlor.

17.3 **Death, disability and unwillingness to act**:

(a) If a Settlor dies, subject to the terms of any transfer of the powers of appointment and removal held by that Settlor, those powers shall, from the date of the Settlor's death be exercisable by the legal personal representatives of the Settlor and after the final distribution of the estate of the Settlor, by the Trustees.

(b) If a Settlor is unable or unwilling to act, the Settlor's power of appointment and removal of Trustees shall be exercisable:

(i) If the Settlor shall have appointed an attorney or attorneys under an enduring power of attorney in relation to property, by that attorney or those attorneys (who shall execute any document required upon the exercise of his, her or their powers under this subclause in the manner prescribed in the terms of his, her or their appointment as attorney or attorneys);

(ii) If the Settlor shall not have appointed an attorney or attorneys under an enduring power of attorney in relation to property, by the Trustees.

(c) If a settlor shall have transferred the powers of appointment and removal of Trustees held by that Settlor to another person, and that person dies or is unable or unwilling to act, those powers shall, subject to the terms of the transfer, be exercisable:

(i) By the Settlor who originally held those powers if that Settlor is then living; or

(ii) if that Settlor is not then living, by the legal personal representatives from time to time of that Settlor, and after the final distribution of the estate of that Settlor, by the Trustees.

17.4 **Additional and advisory Trustees**: The holder or holders of the powers of appointment and removal of Trustees shall jointly (if more than one) have the power to appoint and remove such additional and advisory Trustees as the holder or holders may determine. Paul Morley Dodd and Vicki Ann Triezenberg shall be deemed to have been appointed an additional Trustee pursuant to this clause.

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> 17.7 **Means of appointment and removal**: Exercise of the powers of appointment and removal shall always be by deed but, in the case of the powers held by either of the Settlors, may be by will. Where the power of removal is vested in the Trustees, the power of removal may be exercised by a majority of not less than 75% of the Trustees."

[13] I held that as a result of cl 17 (properly interpreted), the power of appointment and removal (to be exercised jointly) vested in Mr Mason on the one hand, and Mr Mason and the plaintiffs on the other.[6] Again, with Mr Mason's removal as trustee, the power of appointment and removal now vests with Mr Mason on the one hand, and the plaintiffs on the other.

[14] Given the current relationship between Mr Mason and the plaintiffs, Ms Bruton QC, senior counsel for the plaintiffs, submits it is inevitable that there will be a deadlock or dispute between the parties over any future appointment or removal of trustees. The plaintiffs accordingly seek a variation so that the power of appointment and removal vests in the trustees.

[15] Ms Bruton also addresses the position should Mrs Mason die before Mr Mason. Under the Mamari Trust deed, Mr Mason would have the sole power of appointment.[7] Under the Mamari (No. 2) Trust, on Mrs Mason's death, her power of appointment passes, in the first instance, to her legal personal representative. Ms Bruton submits that if Mr Mason survives Mrs Mason, there is almost certain to be an attempt by Mr Mason to secure control of at least the Mamari Trust, through his sole power of appointment and discord with whomever he jointly holds the power of appointment under the Mamari (No. 2) Trust.

[16] Ms Bruton refers to several authorities which confirm that the power to appoint and remove trustees is a fiduciary power, to be exercised in the best interests of the beneficiaries. For example, in *Carmine v Ritchie,* Gilbert J summarised the position as follows:[8]

> The power to appoint new trustees is generally acknowledged to be a fiduciary power even though it may not have been conferred on trustees or the holder of any other office. Equally a power to remove a trustee and replace him with

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6 *Substantive Judgment*, above n 1, at [106]-[112].
7 See the terms of cl 7 of the Mamari Trust deed, set out at [10] above.
8 *Carmine v Ritchie* [2012] NZHC 1514 at [66].

> a new trustee is almost always considered to be a fiduciary power to be exercised in the best interests of the beneficiaries. This is because the subject matter of the power is the office of the trustee which lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole.
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> (footnotes omitted)

[17] Ms Bruton submits that given my findings in my substantive judgment, including that Mr Mason does not believe in the concept of the trusts and was therefore unsuitable as a trustee, he also ought not hold the power of appointment. Ms Bruton submits Mr Mason is and will be unable to exercise his power of appointment in a manner consistent with his fiduciary duties. She points to Mr Mason's quite frank admission that he wants Ms Triezenberg out of his life and out of the trusts, his view that there is a proper basis to ignore some of the beneficiaries and his attempt to remove the plaintiffs as trustees and appoint Mark Mason in their place.

[18] Ms Bruton submits that amending the power of appointment and removal now will avoid the inevitable cost and disruption of further disputes, both in Mr Mason's lifetime and/or after Mrs Mason's. She refers to the depletion of trust funds caused by the present dispute as a "travesty".

[19] Mr Mason objects to the proposed variation. He says he would be aggrieved at Mr Dodd holding half the power of appointment and removal, given what Mr Mason considers to have been Mr Dodd's bad advice in relation to settling the trusts. He also notes that given the current trustees are relatively young, as a practical matter, there may not be any need to appoint new trustees for some time. Further, Mr Thwaites, counsel for Mr Mason, submits that removing Mr Mason's power of appointment and removal will be the final severance of Mr Mason's connection with the bulk of the assets that he and his wife built up over a working lifetime, which will affect Mr Mason's morale. Mr Mason is also concerned that the current trustees may appoint a person or institution which is not suitable to him, particularly if they are removed from the family and possibly charge high fees.

Discussion and decision

[20] I accept the Court has inherent jurisdiction to vary administrative provisions of trust deeds, including the power of appointment and removal of trustees.[9] Indeed, it was not submitted otherwise on behalf of Mr Mason; rather the dispute is whether the jurisdiction ought to be exercised in the present case.

[21] Given the power of appointment and removal is fiduciary, the power cannot be used by a settlor, i.e. Mr Mason, for the purpose of advancing his own personal interests or to pursue some other collateral objective.[10] The power is to be exercised according to the best interests of the beneficiaries.[11] This Court has taken the step of varying the power of appointment and removal when it would be "pointless" removing trustees without also amending the power to prevent further dispute and/or abuse of the power.[12]

[22] I have concluded that it is appropriate to vary the terms of the trust deeds so the power of appointment and removal of trustees vests in the trustees.

[23] Much of my reasoning for removing Mr Mason as a trustee applies equally to removing from him the power of appointment and removal. As noted, I found that he does not believe in the concept of the trusts. I do not consider he is capable of carrying out his power of appointment or removal in accordance with the fiduciary duties which accompany that power. He is, in my view, incapable of exercising the power in accordance with the interests of *all* beneficiaries of the trusts, given his now deep animosity towards his two daughters. I consider he is likely to use any sole power of appointment and removal for the purpose of regaining sole control of the trust assets to the detriment of the beneficiaries as a whole.

[24] I note that the authorities in which the power of appointment has been varied following removal of trustees concern scenarios in which the power of appointment

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9 *Clifton v Clifton* (2004) NZTR 14-018; *Mudgway v Slack* (2010) 3 NZTR 20-023; *Tarasiewicz v Titford* [2013] NZHC 3466; *Nysse v Nysse* [2014] NZHC 2833;

10 *Green v Green* [2015] NZHC 1218 at [505].

11 *New Zealand Māori Council v Foulkes* [2015] NZCA 552 at [22], [24].

12 *Clifton v Clifton*, above n 9, at [43]; *Mudgway v Slack*, above n 9, at [38]; *Nysse v Nysse*, above n 9, at [25].

vested solely in the person removed (or a person aligned with that person). Unless and until Mrs Mason dies before Mr Mason, and other than in the Mamari Trust, Mr Mason does not hold the sole power of appointment. But that scenario may come about, and even before that time, it is inevitable in my view that there will be dispute between the current holders of the power of appointment and removal. It is not known what events may occur which might require the exercise of the power in the short to medium term. In circumstances where I am satisfied that Mr Mason is not able, and will not be able, to exercise the power of appointment and removal consistent with his fiduciary duty, I do not consider it appropriate to let a scenario ripe for dispute to continue.[13]

[25] I do not accept amendment of the trust deeds' terms will sever Mr Mason's last connection with the trust assets. Mr Mason remains a beneficiary under both trusts and pursuant to the Memorandum of Guidance, his and Mrs Mason's interests are the trustees' primary consideration so long as each of them is living. The Court also retains supervisory jurisdiction over the trusts. I accept that amending the powers of appointment and removal will affect Mr Mason's morale, and it is certainly not a step I take lightly. But ultimately, any effect on Mr Mason's morale is not a valid reason for the Court to decline to grant relief in circumstances where it is otherwise warranted.

[26] There will therefore be orders amending the terms of the trust deeds so that the power of appointment and removal of trustees vests in the trustees.

[27] I turn now to the costs of these proceedings.

Costs

Introduction and parties' positions

[28] As noted at [6] above, the plaintiffs say that costs should follow the event in the ordinary way and Mr Mason should pay their costs on a scale 2B basis. They also seek an order that the balance of their costs are to be paid out of the trust assets pursuant to the indemnity clauses in each trust deed and/or s 38(2) of the Act.

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[13] See *Tarasiewicz v Titford*, above n 9. in which Lang J made orders varying the power of appointment to avoid what he considered to be a real risk of future dispute and disruption.

[29] In terms of Mr Mason's own legal costs, the plaintiffs submit that those costs were not incurred by him *qua* trustee, in that his actions were taken for his own personal benefit and in an effort to regain control of the trust assets. In those circumstances, Ms Bruton submits that Mr Mason's costs have not been incurred by him in the context of his trusteeship (for the purposes of the indemnity clauses in the trust deeds), nor were they reasonably and properly incurred for the purposes of the indemnity contained in s 38(2) of the Act.

[30] Again, as noted at [6] above, Mr Mason's position is that all trustees' costs ought to be met out of trust assets, pursuant to the indemnity provisions in the trust deeds and/or under s 38(2).[14] Mr Thwaite, counsel for Mr Mason, submits that when all the circumstances are considered, it was reasonable for Mr Mason to defend the application for his removal as trustee, and while there was discord among the trustees, Mr Mason's quite proper incentive was that trust assets were not dissipated by costs and/or actions he did not consider necessary. Further, Mr Thwaite submits the indemnity provisions in the trust deeds apply on their terms, and the exclusion (being, in broad terms, costs arising from a trustee's own dishonesty or wilful commission of any act known to be a breach of trust) does not apply.

Legal principles

[31] A trustee may be indemnified by an express provision contained in the relevant trust deed, or pursuant to the statutory indemnity contained in s 38(2) of the Act.

[32] The indemnity provision in the Mamari Trust, cl 11, provides:

> The Trustees … shall be kept safe harmless and indemnified against all actions, proceedings, liabilities, claims, damages, costs and expenses in relation to or arising out of their Trusteeship except in respect of any matter for which a Trustee's liability is not excluded by the preceding clause …

[33] The exclusion in cl 10 of the Mamari Trust deed is for any costs caused by the trustee's own dishonesty or wilful commission of any act known by the trustee to be a breach of trust.

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[14] In practical terms this is indemnification by the Mamari (No. 2) Trust, being the trust with substantial cash deposits.

[34] The indemnity provision in the Mamari (No. 2) Trust is in similar terms:

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

[35] The meaning of what constitutes "dishonesty" for the purposes of a clause in a trust instrument purporting to exclude liability was considered by the Court of Appeal in *Spencer v Spencer.*[15] In *Thurston v Thurston,* and with reference to *Spencer v Spencer,* Peters J concluded there was no material distinction between the concept of "dishonesty" in a clause purporting to exclude liability on the part of a trustee and to indemnify a trustee.[16] I respectfully agree with that view.

[36] In *Spencer v Spencer*, the Court of Appeal considered an appeal from the High Court's finding that the trustees in that case had acted in breach of trust and caused the trust loss. The trustees sought to rely on an exclusion of liability clause in the following terms:[17]

> 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….. .

[37] The clause was accordingly in similar terms to the indemnity provisions in this case.

[38] The Court of Appeal focused in particular on the concept of "dishonesty" and said the following:[18]

> 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

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15 *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190 at [120]-[131].
16 *Thurston v Thurston* [2013] NZHC 3250 at [36].
17 *Spencer v Spencer*, above n 15, at [115].
18 At [131].

> 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] In terms of the trustee indemnity contained in s 38(2) of the Trustee Act, the Court of Appeal has recently restated the applicable legal principles as follows:[19]

> [20] It is one of the fundamental rights of an honest express trustee that costs and expenses properly incurred in the administration of the trust are compensable out of the assets of the trust. As Danckwerts J explained in *Re Grimthorpe*:
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> > It is commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out.
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> [21] The proposition is so fundamental that it need not be justified. It is a right, probably proprietary in nature, recognised by equity as an incident of trusteeship. The right is to an indemnity for reasonable costs and expenses incurred in the administration of the trust. That is not the same as an award of indemnity costs in litigation. The entitlement in the first instance is against the trust and its assets. A current trustee may therefore deduct reasonable costs and expenses incurred in the administration of the trust from the trust assets, in exercise of a right of exoneration. Former trustees may claim such costs and expenses from their successors or, failing satisfaction, via the court. Exercising its supervisory jurisdiction the court will review costs and expenses incurred to ensure they are both necessarily incurred in the interests of the trust and reasonable in extent. The limitation was set out in *New Zealand Māori Council v Foulkes*:
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> > The limitation on a trustee's right of indemnity is, however, that the expenses are "properly incurred". The duty to seek advice does not extend, for instance, to pose questions the answers to which are perfectly obvious. Nor where no real and substantial dispute exists. Unnecessary proceedings, or the taking of unnecessary procedural steps needlessly increasing costs, may mitigate (or eliminate) the right of indemnity. Again, excessive costs lie beyond the scope of indemnity. Every dollar paid in trustees' expenses is a dollar denied to beneficiaries of the Trust.
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> (footnotes omitted)

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19 *Butterfield v Public Trust* [2017] NZCA 367 at [20]-[21].

[40] I also note the summary by the learned authors of *Lewin on Trusts* of the operation of a trustee's indemnity in different types of proceedings in which a trustee might become involved, including proceedings for the removal of trustees:[20]

> In a case where a claim for removal of trustees forms part of the relief sought by a breach of trust action, the position as to costs will be governed by the general principles applicable to breach of trust actions. If a trustee is removed on the ground of misconduct, even if some of the charges of misconduct are rejected, the trustee who is removed will normally be ordered to pay the costs of the successful applicant as well as bear his own costs, though the court will consider whether the costs of discrete issues on which the trustee was successful should be treated differently. If a trustee is removed on the ground of conflict of interest and duty, the court might normally be expected to make an order for costs against the trustee, though might allow the trustee his costs in special circumstances, for example where the conflict is expressly authorised by the terms of the trust, but the court nonetheless considers that the trustee should be removed. **If a trustee is removed on other grounds, the trustee is at less risk of being ordered to pay the applicant's costs, and will obtain an order for costs from the trust fund if he acted reasonably in defending the claim for removal**.
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> [Emphasis added]

[41] The highlighted portion of the above extract cites this Court's decision in *Kain v Hutton* as the relevant authority.[21] In that case, Pankhurst J made orders removing various trustees.[22] He did not consider removal for breach of trust warranted, but concluded removal was nevertheless appropriate given the sheer degree of hostility between the trustees and beneficiaries.[23]

[42] In his costs judgment, Pankhurst J first considered who had been the successful party or parties in the litigation for costs purposes.[24] He considered the plaintiffs had enjoyed significant success in obtaining an order that a professional trustee replace the individual trustees of the various trusts.[25] The Judge then addressed the legal principles applicable to the trustee indemnity contained in s 38(2) of the Act. Against those principles, Pankhurst J concluded that "in all the circumstances, including in particular the hostile dimension of this case, I am of the view that the evidence does

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20 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet and Maxwell, London, 2014) at [27-191], citations omitted.
21 *Kain v Hutton* (2004) 1 NZTR 14-022.
22 At [275].
23 At [273]-[275].
24 *Kain v Hutton* HC Christchurch M198/00, 18 November 2005.
25 At [56].

not disclose matters which disentitle the defendant trustees to their reasonable costs out of the trust funds."[26]

Discussion

[43] I consider first, whether the plaintiffs ought to be awarded their costs in this proceeding, and whether that award ought to be made against Mr Mason. I then consider whether any balance of costs incurred by the plaintiffs ought to be the subject of indemnity under either the trust deeds' provisions or pursuant to s 38(2). Finally, in relation to any costs award against Mr Mason and his own costs, I consider whether he ought to be indemnified from the trust assets for any liabilities in that regard.

[44] There is no real dispute that the plaintiffs were the successful parties overall. They plainly were. In my view, in hostile litigation such as this, costs ought to follow the event in the ordinary way. I therefore consider a costs award in favour of the plaintiffs and against Mr Mason (as the unsuccessful party) is appropriate.

[45] There was no suggestion that anything other than scale costs ought to be awarded. In my view, that is also correct. There was nothing about the manner in which Mr Mason conducted or participated in the litigation itself which would warrant increased or indemnity costs. There is accordingly a costs award against Mr Mason in favour of the plaintiffs on a scale 2B basis.

[46] The plaintiffs did not address in their submissions the various steps and disbursements for which scale costs are sought. Those matters ought to be readily ascertained and agreed by reference to the costs schedules to the High Court Rules. In the event of disagreement, the steps and disbursements are to be fixed by the Registrar.

[47] In terms of the shortfall of any costs award in the plaintiffs' favour and their actual costs, there was equally no dispute that this ought to be met out of the trust assets. Indeed, as noted earlier, Mr Mason's overall position is that *all* trustees' costs ought to be met out of the trust assets. I agree that the plaintiffs' costs fall within the

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[26] At [70].

scope of the trust deeds' indemnity provisions and were properly incurred for the purposes of s 38(2) of the Act.

[48] In practice, the Mamari (No. 2) Trust is the trust best placed to meet the shortfall in the plaintiffs' costs. It has substantial cash deposits, whereas the Mamari Trust's assets are real property. There is no desire, nor need, to sell such trust assets to meet cost liabilities, given the Mamari (No. 2) Trust's assets.

[49] There is accordingly an order that the plaintiffs be indemnified from the Mamari (No. 2) Trust assets for the shortfall between the scale costs award in their favour and their actual costs liability.

[50] I now turn to the more contentious aspect of the costs argument, namely whether Mr Mason's liability for the plaintiffs' costs, together with his liability for his own costs, should also be met by the trust assets.

[51] In his judgment permitting the trustees' costs to be met in the first instance from the trust funds, Venning J stated:[27]

> The starting point is that a trustee may reimburse him or herself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers of the trusts.[28] In the present case the trust deed also provides for the trustees to be indemnified for any liability (cost) arising out of or in connection with the trustee acting as a trustee. **The clause is broad enough to cover legal expenses properly incurred.**
>
> [Emphasis added]

[52] The trustee indemnity provisions in the trust deeds do not expressly state that the costs must be properly or reasonably incurred – rather, as noted, they provide a broad indemnity, subject to certain exceptions.[29] I therefore approach the issue on the basis of whether Mr Mason is entitled to indemnification pursuant to cl 21.2 of the Mamari (No. 2) Trust, and then if required, whether he is entitled to be indemnified pursuant to s 38(2) of the Act.

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27 *Triezenberg v Mason*, above n 2, at [5].

28 Trustee Act 1956, s 38(2).

29 Accepting, of course, that costs arising from a trustee's dishonesty or wilful commission of a breach of trust could not be viewed as having been properly incurred.

[53] I first consider the express terms of the Mamari (No. 2) Trust indemnity.[30] It is framed in extremely broad terms. It applies to any liability "in any way arising out of or in connection with" a trustee acting "or purporting to act" as a trustee of the trust. The indemnity accordingly envisages a situation in which a trustee is found not to have acted as a trustee but nevertheless benefits from the indemnity if they were purporting to so act (subject of course, to the exceptions not applying).

[54] In this context, it is necessary to consider the basis upon which the trustee's liability for which indemnity is sought arises, and whether that can be said to have been incurred "in any way arising out of or in connection" with the trustee "acting or purporting to act" as a trustee of the trust. The liability for which Mr Mason seeks indemnification is his costs liability to the plaintiffs (as determined by this judgment) and his own liability to his legal counsel for costs and disbursements associated with these proceedings. The liability was accordingly incurred as a result of Mr Mason's defence of and conduct in these proceedings.

[55] Mr Mason's conduct in defending the application to remove him as trustee was, in my view, conduct "arising out of or in connection" with his role as trustee. Ms Bruton accepted that in a broad sense at least, that is so. But she submits that at no stage in the litigation was Mr Mason acting or purporting to act wearing his "trustee hat", but rather he acted solely to advance his own personal position and interests.

[56] Despite Ms Bruton's submission, I nevertheless remain of the view that the costs liability incurred by Mr Mason arose out of or in connection with him acting or purporting to act as trustee. Indeed, the very reason Mr Mason's cost liabilities were incurred was because of his role as trustee, and his position that he ought to remain a trustee. In my view, the points raised by Ms Bruton are better considered in the context of whether either of the exceptions to the indemnity apply, to which I now turn.

[57] The exceptions are, broadly, where the liability is attributable to the trustee's dishonesty or wilful commission of breach of trust.

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[30] Noting that the principles applicable to the construction of contracts apply to the construction of trust deeds; *New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [71].

[58] There was no pleading or suggestion in this case that Mr Mason had committed, wilfully or otherwise, any breach of trust and for that reason ought to be removed. The principles concerning costs in breach of trust cases (in which trustees found to have breached their duties will not ordinarily benefit from trustee indemnification) accordingly do not apply.

[59] Rather, the plaintiffs applied to remove Mr Mason given the (then) trustees' inability to communicate or work together to reach decisions in the interests of the beneficiaries.[31] Mr Mason was ultimately removed given his inability to properly carry out his trustee duties going forward, and in the context of the deep hostility which had developed between him and his fellow trustees, and between him and some of the beneficiaries. I accordingly view this case as being more similar to that category of cases described in *Lewin on Trusts* where a removed trustee will ordinarily be entitled to indemnification, provided they have acted reasonably in defending the claim for removal.

[60] In this context, while I found it an "inescapable conclusion" that Mr Mason ought to be removed from the office of trustee, that does not itself mean he acted unreasonably in defending the proceedings. Mr Mason is one of two settlors of the trusts, and thus his removal as trustee was a very significant step and issue for him. Given there was no suggestion of breach of trust by him, and given Mr Mason's role as settlor, it was not surprising and ultimately not unreasonable for him to seek to defend the application to remove him. I also found that Mr Mason was the primary source of the friction between himself and his fellow trustees. Again, however, that does not itself mean it was unreasonable for him to defend the proceedings. A large measure of that friction arose from disputes between the trustees over the authorising of expenses which Mr Mason considered excessive. This stance does not evidence Mr Mason refusing to consent to various payments out of trust funds for a collateral or improper purpose. Rather, he sought to minimise expenditure at all times, on the basis of a (misguided) view of what costs were proper and appropriately incurred. Further, the friction had reached a "tolerable" state, where the earlier and extremely

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[31] First Amended Statement of Claim, at [38].

fraught circumstances surrounding Mrs Mason's ongoing care arrangements had been resolved.

[61] I am also mindful that all parties, including Mr Mason, made a number of genuine attempts to resolve these proceedings without the need for formal court intervention. Various proposals and counter-proposals were made, but unfortunately did not eventuate in a resolution. This was not a case, therefore, of one trustee being wholly "obdurate" by not engaging in proposals for resolution of the proceedings.

[62] In all of these circumstances, including the unfortunate hostility between family members and trustees which provided the backdrop to these proceedings, I cannot conclude that Mr Mason's costs liability associated with these proceedings was "attributable to [his] own dishonesty" in the sense described in *Spencer v Spencer*.

[63] I am accordingly making an order that Mr Mason is entitled to be indemnified under cl 21.2 of the Mamari (No. 2) Trust for his costs liability to the plaintiffs, and his liability to his own legal counsel (for both costs and disbursements) in relation to these proceedings.[32]

[64] The practical effect of the orders made at [45], [49] and [63] above is that the parties' costs associated with these proceedings are to be met out of the Mamari (No. 2) Trust.

[65] Venning J's orders as to the payment of costs on an interim basis also reserved the reasonableness of the quantum of the costs for determination following the substantive judgment in this matter.

[66] Neither party made any substantive submissions to me challenging the reasonableness of the quantum of the other party's costs, other than Mr Thwaite suggesting costs should be "equal" as between the two sides and capped at the "less expensive legal team". Venning J rejected a similar submission in the context of the interim payment of costs,[33] and I also reject the present submission. As Venning J

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32 Given this, it is not necessary to consider whether Mr Mason's costs liability is covered by the statutory indemnity in s 38(2) of the Act.

33 *Triezenberg v Mason*, above n 2, at [14].

noted, what may be reasonable for one party may not be reasonable for the other. The suggestion that a party's fees are unreasonable simply because they are higher than another party's fees is unprincipled.

[67] It appears from the papers before the Court that the quantum of Mr Mason's costs in relation to these proceedings is $144,394 (incl GST) (for attendances in 2017) and $187,128 (incl GST) (for attendances in 2018). It now appears to be accepted that the $144,394 has been met (on an interim basis, pending this judgment) from the Mamari (No. 2) Trust, such that only the 2018 fees remain outstanding.

[68] The plaintiffs do not submit that Mr Mason's own legal fees are unreasonable. At least on the basis of the information presently before the Court, and taking into account the nature of and steps taken in this hard fought litigation, the fees do not appear on their face to be unreasonable in quantum.

[69] Mr Mason has not suggested the plaintiffs' legal fees are unreasonable in quantum (save for the suggestion that the fees should be equal, a proposition rejected above). The Court does not, however, have any visibility of the quantum of the plaintiffs' legal costs.

[70] I accordingly reserve leave to any party to file a memorandum setting out any challenge to the *quantum* of fees which are to be met by the Mamari (No. 2) Trust. Any such memorandum is to be filed within **15 working days** of this judgment, with any memorandum in response following within a further **five working days**. No memorandum is to be longer than five pages in length. I would hope that in light of this judgment and with senior and experienced counsel involved, an agreed position can be reached. It is in no parties' interests for trust assets to be further depleted by ongoing skirmishes.

Result

[71] On the plaintiffs' application for orders varying the terms of the trust deeds, I made the following orders:

(a) Clause 7 of the Deed of Trust for the Mamari Trust dated 26 April 1994 is amended so that the text reads, in place of the existing text, "The power of appointment of new trustees hereof shall be vested in the trustees for the time being."

(b) Clause 17 of the Mamari (No. 2) Trust dated 20 May 2013 is amended so the text reads, in place of the existing text, "The power of appointment and removal hereof shall be vested in the trustees for the time being".

[72] There are costs orders in accordance with [45], [49] and [63] above. The practical effect of these orders is that the parties' costs associated with these proceedings are to be met out of the Mamari (No. 2) Trust assets.[34]

[73] Leave is reserved to any party to file a memorandum should there be any residual issue concerning the quantum of costs, in relation to which the timetabling orders at [70] above apply.

Fitzgerald J

Postscript

On the afternoon of 29 April 2019, after this judgment had been finalised but before issued to the parties, I received an A4 envelope addressed to me which appeared to have been hand delivered to the Registry. It contained a handwritten letter to me from Mr Mason, correspondence which appears to be from Mr Mason to the Family Court and some further documents which appear to be without prejudice correspondence from Mr Mason to the plaintiffs.

[34] For the avoidance of doubt, this is not to suggest that the costs of any future litigation concerning these trusts will be similarly met.

I have not read the materials, other than to note that they came from Mr Mason and to observe from the headings of the documents what they appeared to be.

Given Mr Mason is represented by counsel in these proceedings (who also remains solicitor on the record), and who has made submissions on Mr Mason's behalf on the issues determined in this judgment, I did not consider it appropriate to read the materials sent to me by Mr Mason.

I directed the case officer to make arrangements for the documents to be returned to Mr Mason.

As I have not read the materials, they have not been taken into account by me in this judgment (which as noted, was finalised at the time of their receipt in any event).