IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-2855
[2020] NZHC 952

	BETWEEN	LARA ALIX UNKOVICH by her litigation guardian, ALAN JOHN UNKOVICH Plaintiff
	AND	MARGARET ANNE CLAPHAM Defendant

Hearing: 13 March 2019

Counsel: V T M Bruton QC and C R Tataru for Plaintiff
T M Molloy for Defendant

Judgment: 11 May 2020

JUDGMENT OF WHATA J

This judgment was delivered by me on 11 May 2020 at 2.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Simpson Grierson, Auckland

[1] Lara is a beneficiary of a trust created by the Will of her grandfather, Noel, executed in 2016 (the Will). Lara sought to be advanced the full sum set aside for her when she turned 21 (the Trust funds). The trustee, Margaret (also Lara's aunty), refused. Lara commenced proceedings against Margaret. Lara claimed the Will was invalid; that Margaret's refusal was unreasonable; and that Margaret should be removed as the trustee. Margaret denied the Will was invalid and that she had acted unreasonably, but she signalled at an early stage in the proceedings that she was prepared to relinquish her trusteeship, provided she did not have to reimburse the legal fees she incurred, or pay litigation costs. Lara rejected this offer and similar subsequent offers. Lara wanted the legal fees paid out of the Trust funds reimbursed to her.

[2] The matter came before me, and I directed Lara (among other things) to make an election about whether to enforce the Will or have it set aside.[1] Eventually, Lara elected to seek orders setting aside Margaret's refusal and a direction that Margaret transfer the Trust funds to Lara. They are not opposed, and I am satisfied that the funds should be transferred for the specific purpose of advancing Lara's education. I make those orders accordingly.

[3] That leaves the following matters to be resolved:

(a) Did Margaret breach her duty to the Trust?

(b) Is Margaret entitled to be indemnified from the Trust funds?

(c) What is Margaret's liability for the litigation costs, if any?

Involvement of counsel

[4] All counsel appearing were active in the background to this dispute. However, there was no objection to counsel appearing and I was content to proceed on that basis because it was cost effective do so.

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1 Minute dated 16 September 2019.

Background

[5] The Will specified that Lara would be paid her share of her grandfather's residuary estate when she turned 21. More specifically, cl 3 of the Will states:

> **3 Residue**
>
> I give the whole of my estate to my Trustee on trust:
>
> 3.1 To pay my debts and funeral expenses, my Trustee's administration expenses, and any death duty payable on my dutiable estate.
>
> 3.2 To dispose of or sell the residual estate as my trustee sees fit and to divide the residue equally into six parts and to pay each part as follows:
>
> 3.2.1 To pay one part to my daughter Margaret Anne Clapham; and
>
> 3.2.2 To pay one part to my son Peter James Murphy; and
>
> 3.2.3 To pay one part to my daughter Adrienne Unkovich; and
>
> 3.2.4 To pay one part to my granddaughter Morgan Sara Clapham; and
>
> 3.3.4 To pay one part to my granddaughter Danielle Amy Clapham; and
>
> 3.2.6 To pay one part to my granddaughter Lara Unkovich on reaching her 21st birthday.
>
> However, if any of my children or grandchildren so named dies before me leaving a child or children living at my death, then that child will take or those children with take equally, the share which his, her or their parent would otherwise have taken under this clause 3.2. If any share shall fail through the death of the person entitled to that share, then the share shall be added equally to the other share.

[6] Clause 4 states:

> **4 Power to Make Payments**
>
> My Trustee may use all or any part of the income or capital of the vested or contingent interest of any beneficiary under this will for the maintenance, education, advancement or benefit of that beneficiary. Payments may be made for those purposes to a parent or guardian of the beneficiary without my Trustee requiring that person to account.

[7] Lara's share in the Trust initially equated to $65,833.

[8] In October 2016, shortly after Lara's grandfather passed away, Lara's mother, Adrienne, wrote to Margaret about Lara's share of the residuary estate. Adrienne expressed dismay at learning her father's will had been amended. She also sought immediate pay-out. Lara needed it for her education in Australia, which also provided her with the best opportunity to improve her national tennis ranking and possibly gain a scholarship to a US university. Lara also wrote to Margaret in December that year seeking her inheritance. In January 2017, Adrienne wrote again to Margaret through Margaret's solicitor, Mr Fortune. Adrienne essentially complained to Mr Fortune about Margaret's management of her father's estate.

[9] Mr Fortune responded saying, among other things, that he had advised Margaret that she should not pay Lara's contingent entitlement "as clause 3.2 of the will provides that if Lara dies before reaching 21, her share is to be divided amongst the other beneficiaries named in clause 3.2, assuming Lara has no children before she turns 21". He also said Margaret had a responsibility to manage the funds carefully and:

> [t]herefore, if you (Lara or her parents) want funds for Lara's maintenance, education or advancement, it would be usual for Mrs Clapham in each instance to be given details of the purpose for which the funds are sought and to whom the funds are to be paid to enable Mrs Clapham to determine whether or not it is appropriate for funds to be paid from the estate.

[10] This response angered Lara's parents. They objected to what they perceived to be Margaret's interference in Lara's upbringing. They also noted that cl 4 of the Will enabled payments to be made "to a parent or guardian" without Margaret "having to require that person to account".

[11] Attempts at a negotiated outcome in the early part of 2017 failed. Lara's parents, through an intermediary, emphasised Lara's need for the money to advance her tennis prospects. Margaret, through her solicitor, emphasised Margaret's potential exposure and the need to be careful. Lara then wrote again to Margaret in July 2017 expressing her concern about the impact this dispute was having on her and her family. This was followed by a letter by Adrienne in September 2017 that set out in detail the nature and purpose of the request for Lara's pay-out. She referred to the opportunity for Lara to obtain a tennis scholarship to a US college and the prerequisites for being

accepted into one of her choice. She said it was not about her or Alan (Lara's father). She said it was about investing and helping Lara gain a US$500,000 scholarship which would "set her up for the rest of her life".

[12] Though unclear, it appears that Margaret offered to advance 40 per cent of Lara's share in September 2017. This was followed by a query as to why only 40 per cent would be advanced, and responses from Mr Fortune that his client had obligations under cl 3.2 of the Will which prevented her from making a greater distribution.

[13] Multiple exchanges then ensued between the parties' solicitors with similar effect. There were demands for explanations and replies that it would be unsafe to give a full advance. Mr Fortune maintained that Lara's interests were a contingency based on age and recorded his instructions not to respond, other than to make the proposed distributions. A letter by Ms Tataru (Lara's solicitor) also cautioned that Margaret "has the ability to act in Lara's best interests in accordance with clause 4 but we also reiterate that your client is not automatically entitled to have her legal expenses paid from Lara's residuary share of the estate".

[14] The same letter also records:

> Your client can rest assured that Lara's parents love and support their daughter passionately, are creating a US College opportunity for her and for the avoidance of doubt have provided Simpson Grierson with a copy of the US College program for 2018 and 2019 set up by Lara's professional managers, Study and Play USA.

[15] This advice, together with advice in March 2018 that there may be an opportunity for Lara to be placed with the Rafa Nadal Academy, did not cause Margaret to alter her position. Mr Fortune, however, said that Margaret still authorised payment of his own invoices for some attendances from the Trust funds.

[16] Ms Bruton QC (Lara's current counsel) was then engaged. Her plea for common sense to prevail in June 2018 did not bring about any change between the parties. Mr Fortune did, however, enquire on a without prejudice basis in July 2018

as to how Margaret might be protected if she were to pay out the full sum.[2] Ms Bruton responded that if Margaret paid, Lara could have no possible action against Margaret, referring to cl 4. Ms Bruton further emphasised that Lara's parents were absolutely committed to her maintenance, education, advancement and benefit.

[17] Mr Fortune responded (again, without prejudice) that cl 4 is a power of advancement that may only be exercised where there is good reason and where it will truly benefit the advanced beneficiary. He also asked for the information Ms Bruton considered sufficient for Margaret to make the distribution. Ms Bruton responded that "advancement of Lara's vested share of the estate to her is for her benefit, so as to further her education and tennis career".

[18] In September, after further correspondence between the solicitors, Mr Fortune advised that Margaret did not consider she had "receive[d] any information that reasonably enable[d] her to form a view that there is good reason to advance any monies in addition to the 40%", and that senior counsel was to be instructed to review the situation. This led to advice from Mr Molloy in late September 2018 that Margaret had acted reasonably by retaining Lara's legacy for her future needs, and that Margaret would commit a breach of duty if she paid the monies out to Lara's parents while concerned that they might not apply it for Lara's benefit.

[19] Mr Molloy observed:

> I understand that Lara is now 16 years old. Even if she has a high age group world ranking the chances of her ultimately succeeding in a career as a professional tennis player would appear to be extremely small. I understand that the Trustee has been provided with little objective information that Lara has genuine prospects on professional tennis circuit.
>
> In the absence of any such information, the Trustee is perfectly entitled to take into account the fact Lara is unlikely to achieve financial security from a career as a professional tennis player and that it would not be in her best interests for legacy to be paid to her parents and exhausted on tennis related costs. If there is objective evidence that Lara has a real chance of succeeding a professional tennis player then that evidence should be provided to the Trustee.

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[2] Many of the emails and other correspondence purport to contain "without prejudice" communication. Neither party sought to rely on such assertions and I have simply proceeded on the basis that the parties agree that they must be taken into account in order to properly understand the merits of the respective claims on the issues of costs and indemnity.

[20] Further, he stated that:

> In the present case, the Trustee has concerns about the financial stability and prudence of Lara's parents and that the legacy will therefore be applied exclusively for the benefit of Lara …
>
> As such if the Trustee is legitimately concerned about Lara's parents financial prudence and stability then it would be a breach of duty to advance Lara's legacy to them. To do so would not discharge the Trustee's basic duty to ensure that the advancement is applied for the benefit of Lara.
>
> If the Trustee was provided with objective evidence that Lara has real prospects of a professional career in tennis, and forms a view that it is in her best interests to be supported in that career, then a solution could be for the tennis club to invoice the Trustee directly on a monthly basis so that the Trustee is satisfied that advancements are for that purpose alone.

[21] Mr Molloy also concluded that the Court would be "very unlikely" to order the distribution of Lara's legacy to her parents and that she would be entitled to rely on her indemnity to recover legal costs from the Trust funds.

[22] This was met with criticism from Lara's parents, who said that Mr Molloy's advice was based on flawed factual assumptions that (in summary):

(a) Lara's chances of succeeding as a professional tennis player would be "very extremely small";

(b) if Lara does not succeed as a professional tennis player, she would need access to the Trust funds, for example to pay university fees;

(c) the funds sought would be spent on "tennis lessons"; and

(d) the trustee has concerns as to the financial stability and prudence of Lara's parents.

[23] Lara's solicitors advised:

> Lara is in the top 5% of students in her year academically, having been admitted to Mosman High School via a selective programme for bright students. Her school report, and accompanying principal's award for July 2018, which we have seen, is outstanding. She achieved a national tennis ranking of 192 in calendar week 9 of 2017, at age 15, out of 2066 nationally ranked woman in Australia.

> Because of her stellar academic and tennis ability and results Lara is on track to obtain a fully funded US tennis scholarship, starting in August 2020. US Universities are already courting her. Over the four years of her degree, this scholarship will be worth about $AU500,000.

[24] They also recorded that Mr Molloy's assertion that Margaret and her brother, Peter Murphy, had been required at times to advance personal funds to Lara's parents was wholly incorrect. They also sought documentary evidence in support, to which there was no response.

[25] Rather, in reply, Mr Fortune said his client's position remained unchanged, but if there were specific costs that they would like to be met, then they were invited to prove evidence of those costs. He said his client was simply unwilling to either advance the entirety of Lara's legacy to her parents or resign as a trustee in favour of Lara's parents (which would ultimately have the same outcome).

[26] Ms Tataru advised that the requirement to provide evidence of specific costs would be of no utility to Lara's parents because of an agreement they had with CB Sports Pty Limited to jointly manage Lara's costs. She also noted Margaret did not have the appropriate knowledge to provide meaningful input as to what would be in Lara's best interests. Mr Fortune then sought a copy of that agreement and an explanation as to the funds required. Ms Tataru responded on instruction that there was no scope for Margaret to become involved in those arrangements.

[27] Lara's father was appointed her litigation guardian in early 2019. He then commenced proceedings on Lara's behalf – the statement of claim pleaded three causes of action (in summary):

(a) The Will was invalid for want of testamentary capacity;

(b) Margaret's refusal to advance was unreasonable; and

(c) Margaret should be removed as a trustee.

[28] The relief sought on the first cause of action included orders that:

(a) Margaret pay Lara's costs associated with the administration of the Will and refusal to advance; and

(b) Margaret is not entitled to be indemnified for her administration of the Will.

[29] The relief sought on the second cause of action included orders that:

(a) Margaret's refusal to advance be set aside;

(b) Margaret be removed as a trustee;

(c) Margaret pay Lara's costs associated with Margaret's refusal; and

(d) Margaret is not entitled to an indemnity for costs incurred in the proceedings.

[30] The relief sought on the third cause of action included orders that:

(a) Lara's parents be appointed as trustees;

(b) Margaret be removed as a trustee;

(c) Margaret pay Lara's costs; and

(d) Margaret is not entitled to an indemnity for costs in the proceedings.

[31] Prior to filing her statement of defence, Margaret offered to resign in favour of the Guardian Trust or the Public Trustee so she could spend more time with her very ill husband. This was rejected. It was suggested to Margaret that the proper course was for her to take a neutral position in the proceedings and not incur further costs, and that she would receive the protection of the Court if the Will was valid. Margaret then filed her statement of defence, denying that Noel lacked testamentary capacity and that her refusal of the advance was unreasonable, while also claiming she acted

honestly and reasonably. However, she pleaded that she did not oppose being removed and replaced as trustee by an independent entity.

[32] Margaret's husband died on 13 April 2019. Shortly after, Margaret offered to:

(a) advance the balance of Lara's legacy to her parents, then $57,104, with no issue as to costs provided that Lara's parents indemnify Margaret; or

(b) not oppose the Court appointing Lara's parents as trustees in her place, on the same basis.

[33] This offer was also rejected. Ms Tataru said the refusal was due to the offer being based on an incorrect understanding of Lara's pathway and incorrect assumptions about Lara. She also said that any future settlement offer would need to include a proposal for resolving Lara's costs.

[34] Margaret then filed a memorandum on 26 April 2019 advising the Court, among other things, that she did not oppose Lara's parents being appointed as trustees. Margaret submitted that the matter be allocated a hearing to determine the following issues:

(a) Should the Court appoint Lara's parents as trustees in place of Margaret (this was unopposed by Margaret)?

(b) Should Margaret distribute the Trust funds to Lara's parents (Margaret agreed to surrender her discretion to the Court)?

(c) Should Margaret be ordered to indemnify Lara or Lara's parents for their costs to date?

(d) Is Margaret entitled to be indemnified from the Trust for her costs to date?

[35] Following a case management conference, Lara's solicitor sent an open offer on 23 May 2019 to settle the proceedings if:

(a) Lara's parents were appointed trustees;

(b) Margaret reimbursed the Trust funds for the legal fees she had spent, being $9,341;

(c) the funds were paid to Lara's parents on an undertaking they would hold them as a separate investment for Lara; and

(d) Margaret reimbursed Lara's parents on a 2B basis.

[36] Margaret agreed to this proposal, save that she would not reimburse costs paid from the Trust or pay the plaintiff's scale costs.

[37] A conference with Associate Judge Bell followed on 24 May 2019. He directed that the matter be set down only in relation to the second and third causes of action, as pleaded by Lara through Alan, dealing with Margaret's trusteeship. Lara's parents were not happy with this and applied to have those orders varied. Margaret then responded by applying to have Lara's father removed as a litigation guardian. Mr Fortune also gave an undertaking that no further funds from the Trust would be expended on legal fees.

[38] On 7 August 2019, Ms Bruton then repeated the offer made on 23 May 2019. Margaret refused again.

[39] The matter then came before me on 13 September 2019. As recorded in my minute, the following became clear:

(a) Margaret did not oppose the substantive relief sought by Lara in each of the causes of action, save in relation to costs;[3] and

[3] My minute inadvertently transposed the plaintiff and the defendant.

(b) Lara had an election to make, namely whether she would seek to set aside the Will, or seek orders giving effect to it.

[40] I also noted that the issue of Alan's status as litigation guardian had become moot. I dismissed the application to have him removed and directed that Lara had to make her election by 7 October 2019.

[41] From there, Lara requested information about her grandfather's medical condition at the time he executed the Will. Margaret initially requested that her associated costs be covered but, ultimately, took steps to provide the information in any event. An affidavit was produced by Peter Murphy, along with a reply from Alan. Both parties agreed that this evidence need not be read by me.

[42] Also, notably, by email dated 19 September 2019, Margaret wrote to Lara's solicitors proposing that the Trust funds (of just over $58,000) be paid to Lara's parents with an additional payment of $5,000 to resolve this matter on the condition that Lara and her parents sign an appropriate settlement agreement. By this point, Margaret had incurred further fees of more than $40,000. She says the result would have been that Lara would have received $63,000 in clear funds, and that she would have been out of pocket for her own legal fees. Lara refused this offer.

[43] There was then a subsequent email (dated 25 September 2019) from Simpson Grierson noting that, in the absence of Noel's medical records (which Lara had requested from Margaret not long before, at Margaret's cost), Lara was unable to consider her proposal.

The evidence

[44] Affidavit evidence was filed by Lara, her father, Alan, and Margaret in support of their respective positions on the issue of costs. The evidence sets out in detail the exchanges between the parties over the years since the testator's passing. Their respective different perspectives and positions on those exchanges and the position adopted by them is littered through the evidence, the gist of which has been noted above.

Issues

[45] As noted, in order to resolve the balance of Lara's claims, I must answer three questions:

(a) Did Margaret breach her duty to the Trust?

(b) Is Margaret entitled to be indemnified from Lara's Trust fund?

(c) What is Margaret's liability for the litigation costs, if any?

(a) Did Margaret breach her duty to the Trust?

[46] It is not disputed that cl 4 confers a discretionary power to advance Lara's Trust fund for the purposes of her "maintenance, education, advancement or benefit". *Lewin on Trusts* states (helpfully cited by Mr Molloy):[4]

> Where a power is given to trustees to do or not do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in the exercise of that power, provided that their conduct is informed, bona fide uninfluenced by improper motives:
>
> > "It is settled law that when a testator has given a pure discretion to trustees as to the exercise of power, the Court does not enforce the exercise of the power against the wish of the trustee, but it does prevent them from exercising it improperly."
>
> The principle is both that the court will not interfere before the trustees have acted to compel a particular exercise of power and except as stated, that after they have acted it will not overturn their exercise of power. The mere fact that the court would not have acted as the trustees have done is no ground for interference. The settlor has chosen to entrust the power to the trustees, not the court.

[47] While simply stated, the application of this principle, and the judicial control of trustee decisions, has not been entirely coherent.[5] A trustee's discretion is not, however, as unfettered as the principle suggests. In *Wrightson*, Fisher J observed that a trustee decision may be set aside:[6]

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4 Lynton Tucker, Nicholas Le Poidevin & James Brightwell *Lewin on Trusts* (19th ed, Sweet and Maxwell Ltd, United Kingdom, 2014) at 1386.

5 *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [62.6.3.1].

6 *Wrightson Ltd v Fletcher Challenge Nominees Ltd* CP 129/96 at pp 41 – 43.

(a) for improper motive;

(b) where the trustee has considered the wrong question or misinterpreted the trust deed;

(c) where the trustee has considered irrelevant considerations or failed to consider relevant considerations, which extends to the appreciation of significant facts and their relevance to the problem at hand (though a Court will not intervene if the trustee's decision might or would have been the same in any event); and

(d) where the trustee has reached a decision that is perverse or capricious.

[48] More recently, the Supreme Court of the United Kingdom had cause to revisit the law as it relates to the reviewability of trustee decisions in *Pitt*.[7] The principles stated therein were cited with apparent approval by Mander J in *Masters*,[8] as well as van Bohemen J in *Clement.*[9] In *Pitt*, Lord Walker (speaking for the Court) confirmed an observation previously expressed by him:[10]

> Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is, however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretion, even to experts.

[49] Lord Walker also explained a trustee may err by going beyond the scope of their power ("excessive execution") and/or err by failing to give proper consideration to relevant matters in making a decision within the scope of the relevant power ("inadequate deliberation") and/or by exercising a power for an improper purpose, though he considered the latter type of error might fall somewhere between the

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7 *Pitt v Holt* [2013] 2 AC 108 (UKSC).
8 *Masters v Stewart* [2014] NZHC 2419 at [28] [*Masters*].
9 *Clement v Lucas* [2017] NZHC 3278 at [68] [*Clement*].
10 *Pitt v Holt*, above n 7, at [10], quoting *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 717.

categories of excessive execution and inadequate deliberation. This categorisation and the supporting conceptual framework described by Lord Walker in *Pitt* provides a helpful guide for the purpose of assessing whether a trustee has materially breached their duty to the trust. I therefore adopt it.

[50] The present case is not about excessive execution,[11] so I will focus on the principles attaching to cases of alleged inadequate deliberation. The inadequacy of deliberation must be material to the decision in the sense that, objectively assessed, it would or might have affected the trustee's decision.[12] It must also be sufficiently serious so as to amount to a breach of duty, that is, a failure by a trustee to consider something that her or she was under a duty to consider.[13] Thus:[14]

> If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence to obtain relevant information, the trustee cannot be in breach of that duty merely because that information turns out to be incorrect.

[51] And:[15]

> Breach of duty is essential (in the fullest sense of that word) because it is only a breach of duty on the part of trustees that entitles the court to intervene (apart from special cases of powers of maintenance of minor beneficiaries) … It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention.

[52] In addition, if the trustee has acted on information or advice from an apparently trustworthy source, and what the trustee purports to do is within the scope of their power, then the only direct remedy must be made on the basis of mistake.[16] The

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11 However, Margaret's decision may be impugned on the grounds of wrongful interpretation of the Will – see [63]-[64] below.

12 *Pitt v Holt*, above n 7, at [39], referring to *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch) at [21] [*Abacus*]; and as to the requirement for "objective" assessment, see [78]; see also *Clement*, above n 9, at [73](a).

13 *Pitt v Holt*, above n 7, at [39], referring to Lightman J in *Abacus*, above n 12; Lord Walker also approved the observation made by Lloyd LJ in the Court of Appeal in *Pitt v Holt* [2011] EWCA Civ 197 that "the trustees duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable" at [70].

14 *Abacus*, above n 12, at [23], cited with approval in *Pitt v Holt*, above n 7, at [39]. See also *Clement*, above n 9, at 73(b).

15 *Pitt v Holt*, above n 7, at [73].

16 At [41]. See also *Clement*, above n 9, at [73](b).

trustee's duty does not extend to being right, except perhaps in particular cases, for example, those concerned with the maintenance of minors.[17] In addition, even if a trustee has erred in a material way, the trustee's decision is only voidable, not void.[18]

[53] As Lara was a minor at the time Margaret refused to make payment, it is also worth noting that:[19]

> *Prima facie*, a minor cannot give good receipt. But where the trustee instrument expressly provides a share of a trust can be paid to a person under age (e.g. 18 or earlier marriage) the trustees may quite properly comply with the provision and will get good discharge notwithstanding the minority, and the same applies to income. A trustee may alternatively at their discretion, retain capital distributions until the minor has come of age, and if the trustee's discretion is surrendered to the court it has jurisdiction to decide which course is for the minor's benefit.

[54] *Bryant* is an illustration cited by Mr Molloy of the application of the principle of deference in a child maintenance case.[20] In that case, four trustees of five refused to distribute to a mother (also the fifth trustee) a fund held on trust for the children of the deceased. She wanted it for their maintenance. The trustees did not think it was in the children's best interests. The trustees believed the mother had sufficient funds already from the testator's estate to provide for the maintenance of the children, and that the application for the funds was not made in the interests of the children, but in the interests of another (namely, the step-father). Chitty J said, "the trustees have acted honestly and prudently in the exercise of their discretion, and I think I am not in a position, as a matter of law, to overrule their discretion."[21]

[55] Another illustration, not cited by counsel but mentioned in *Pitt*, is *Re Pauling's Settlement Trust*.[22] It provides a salutary warning to trustees charged with the power of making advances of a vested share of a child. In that case the bank, a trustee, made several such advances without being sure that the advances were for good reason and

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17 See discussion in *Pitt v Holt*, above n 7, at [88].

18 At [43]; see also *Clement*, above n 9, at [73](c).

19 *Lewin on Trusts*, above n 4, at 1082 – that passage also notes, citing the Trustee Act 1925 (UK), that "a minor's parent or guardian now generally seems to have authority to receive a capital sum of the ward." I was not taken to any comparable provision by counsel in the present case, so I say no more about this.

20 *In re Bryant* [1894] 1 Ch 324.

21 At 33.

22 [1963] 3 All ER 1.

for the benefit of the children. The bank was held liable for those advances. Willmer LJ relevantly noted:

> Being a fiduciary power, it seems quite clear that the power can be exercised only if it is for the benefit of the child or remoter issue to be advanced or, as was said during argument, it is thought to be "a good thing" for the advanced person to have a share of capital before his or her due time.

[56] And further:[23]

> … if the trustees make the advance for a particular purpose which they state, they can quite properly pay it over to the advance if they reasonably think they can trust him or her to carry out the prescribed purpose. What they cannot do is to prescribe a particular purpose, and then raise and pay money over to the advance leaving him entirely free, legally and morally, to apply it for that purpose or to spend it in a way he or she chooses, without any responsibility upon the trustees even to inquire as to its application.

[57] A further example, also mentioned in *Pitt*, is *Klug v Klug*. In that case, the Court set aside the refusal of the widow trustee to distribute part of the trust corpus to the daughter beneficiary because that daughter married without her approval. The Court found that she had not exercised her discretion at all and directed the trustees to pay out of the corpus.

[58] *Thurston, Sunde*, *Davis*, *Wrightson Limited* and *Clement*, all cited by Ms Bruton, are further illustrations of cases where trustee conduct was clearly amenable to correction. In *Thurston*, the High Court granted an application for removal of the relevant trustees on grounds of impartiality – one of the defendant trustees, Mrs Thurston, had a life interest in the trust property as a beneficiary (solely reaping the benefit of the trust property investments), and the other was a solicitor trustee on more than one trust with Mrs Thurston.[24] In *Sunde,* both the High Court and the Court of Appeal found that it should have been obvious to the trustee that his opposition to distribution to pay debt was baseless.[25] In that case, the trustee had refused to pay out on an indisputable deed of acknowledgement of debt. In *Davis*, the trustees were proposing to exercise powers to vest the entirety of a trust fund to a single beneficiary, relying on a lost trust deed and without cogent and reliable

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23 *Re Pauling's Settlement Trust*, above n 22, at 8.
24 *Thurston v Thurston* [2013] NZHC 3250.
25 *Sunde v Sunde* [2018] NZHC 3038; [2019] NZCA 552.

secondary evidence as to the terms of the trust.[26] In *Wrightson Limited,* the trustee charged with administering a superannuation fund misunderstood the nature of the fund from the outset,[27] wrongly disregarded the interests of Wrightson as a participating company in the fund,[28] and made no conscious effort to act fairly between eligible members.[29] In *Clement,* the trustees failed to have regard to important information about the intentions of the settlors.

[59] By contrast, *Masters* is a case where the trustees' decision to distribute the sum of $250,000 to three of four siblings was not amenable to correction, because the trustees could rely on the settlor's assessment that it would equalise the distributions among all of them. While that assessment may have been inaccurate, the trustees sought to act in good faith, believing that the distribution was fair and equitable in the circumstances.[30]

Assessment

[60] In light of the principles mentioned above, two key issues must be resolved:

(a) Was there a material error?

(b) If so, did the error(s) amount to a breach of duty?

Was there a material error?

[61] Lara alleges four main errors:

(a) An erroneous assumption about the contingent nature of Lara's interest;

(b) an erroneous assumption about the purpose for which the funds would be put – namely, toward a professional tennis career (rather than toward her educational advancement more generally);

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26 *Davis v White* [2016] NZHC 1626.
27 *Wrightson Ltd v Fletcher Challenge Nominees Ltd*, above n 6, at 43.
28 At 44.
29 At 45.
30 *Masters*, above n 8, at [79].

(c) ill-will between Margaret and Lara's parents; and

(d) an erroneous assumption about Lara's parents' financial imprudence.

[62] I will address each of these claimed errors individually and where relevant, address their collective significance when I come to the issue of breach.

The nature of Lara's interest

[63] Mr Fortune advised Margaret early on that Lara's interest was contingent (rather than vested) and that this was a good reason not to distribute the entirety of the funds to Lara. While the point was barely argued before me, I consider the advice to be incorrect. Clause 3.2 directs that one of six parts of the residuary estate go to Lara "on reaching her 21st birthday". It also provides, "[h]owever if [Lara] dies before me leaving a child ... living at my death, then that child will take … the share" and "if any share shall fail through the death of [Lara], then the share shall be added equally to the other shares." Read as a whole, I agree with Ms Bruton that the testator's likely intention at cl 3.2 was to vest one share to Lara to be distributed to her on reaching 21 but, should she die before him, leaving no children, the share would be distributed among the other surviving beneficiaries. I also agree that the contingency point was moot, because cl 4 conferred a clear discretionary power to distribute the entire fund to the parents.

[64] If the correspondence between Margaret and her lawyers, and Lara and her lawyers is anything to go by, the approach taken by Margaret was based, at least in part, on the abovementioned legal advice. She also confirms this in her evidence. Therefore, her decision to refuse advancement is prima facie reviewable for misinterpretation, which led to a failure to exercise power in accordance with the Trust instrument, namely, the Will. But the precise nature of Lara's interest, correctly understood, was not and is not determinative of whether the funds would or might have been advanced. Objectively assessed, and the incorrect advice unconsidered, any trustee in Margaret's position was still obliged to exercise caution when dealing with demands to advance all of the Trust funds, and she was acting prudently in taking legal

advice. Furthermore, as noted by Lord Walker in *Pitt*, there is no duty to act only on correct advice.[31]

Purpose of advancement

[65] Margaret was clearly troubled throughout with the proposed use of the monies to further Lara's professional tennis aspirations. Ms Bruton complains that this unduly narrow focus meant that Margaret misunderstood the true purpose to which the funds would be put, namely, to assist Lara in obtaining a scholarship to study at a prestigious US university. I agree. Lara needed the funds to help her obtain a university scholarship. Tennis was simply a means to this end. However, as stated in Mr Molloy's letter, Margaret considered the professional tennis path to be very risky and a reason to refuse advancing the entirety of the fund.

[66] I am satisfied therefore that Margaret erred insofar as she misunderstood the purpose of the advance and therefore failed to have regard to a relevant consideration, namely its core educational purpose. This error was material as it can be said that, objectively assessed, a trustee properly appraised of that purpose and the educational opportunity in fact open to Lara, would or might have advanced the funds in their entirety.

Ill-will toward Lara's parents

[67] I am not satisfied there is sufficient evidence of ill-will. Margaret's apparent desire to spend time with Lara is hardly compelling evidence of such ill-will. Nothing in the evidence (including evidence that Margaret was concerned about Lara's parents' financial imprudence) suggests to me that Margaret harboured deep-seated feelings that might have improperly influenced her decision-making. She was not cross-examined about this allegation. Conversely, it is evident from the correspondence between them that Lara's parents felt entitled to the funds. If anything, this sense of entitlement appears to have generated a high level of ill-feeling toward Margaret.

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31 *Pitt v Holt*, above n 7, at [88].

Financial stability and imprudence

[68] However, it appears Margaret's ongoing refusal to advance the funds was based on an assumption that Lara's parents were financially unstable and imprudent. It was a notable feature of Mr Molloy's opinion. But there is no evidence before me to support this assumption. It was thus an irrelevant factor in this case. It is also available to me to infer that Margaret's ongoing refusal to distribute the entirety of the Trust fund was influenced by this unsubstantiated concern.

[69] I am also satisfied that, without that error and in the absence of any evidence that Lara's parents were financially imprudent, objectively assessed, a trustee properly appraised of the facts, would or might have been disposed to advance the entirety of the fund. It was therefore a material error.

Did the proven errors amount to a breach of duty?

[70] While not a clear case of breach, I have come to the view that Margaret's errors amount to a breach of her fiduciary duty. Margaret was empowered by the testator to use all or any part of the income or capital of the vested or contingent interest of any beneficiary under the Will for the maintenance, education, advancement or benefit of that beneficiary. Payments may have been made for those purposes to a parent or guardian of the beneficiary without requiring Margaret to account. Margaret was obliged to give proper consideration to whether an advance of the Trust funds in their entirety would achieve one of those purposes. She did not do this.

[71] To elaborate, Margaret cut herself off from the correct evaluation by wrongly focusing on the risks associated with a professional tennis career and an erroneous assumption about Lara's parent financial imprudence. Furthermore, on the evidence available to me, she did not use all proper care and diligence in obtaining all relevant information, especially relating to the financial stability and prudence of Lara's parents. It appears she may have relied on anecdotal information supplied by her brother, Peter, but did not enquire further. And, problematically, she did not respond to the request by Simpson Grierson made in its letter dated 12 October 2018 for evidence of this imprudence. Lara was thus justified in commencing this litigation to obtain a decision based on the correct information. In addition, Margaret did not

provide evidence to support her assumption. I am therefore driven to the conclusion that she failed to use the requisite care expected of trustees when she exercised her discretionary power and refused to advance all of the Trust funds to Lara.

[72] Finally, Margaret appears to have relied heavily on her legal advice. That advice reinforced the need for caution. Unfortunately, the advice appears to have relied on Margaret's instructions that, among other things, Lara's parents were financially imprudent.

[73] Accordingly, while Margaret's duty did not extend to being right, the failure by Margaret to make proper inquiry was not, to invoke Lord Truro's phrase, "a fair consideration of subject".[32]

(b) Is Margaret entitled to be indemnified out of Lara's fund?

[74] Margaret has incurred the following legal expenses:

(a) $13,000 in the twelve-month period between 21 December 2017 and 20 December 2018;

(b) $2,531.58 for outstanding invoices from her solicitors, together with $785 for work in progress; and

(c) At least $57,845 (GST inclusive) for counsel's fees in respect of these proceedings (which does not include hearing attendances).

[75] Margaret makes the point that as at the date of her offer in April and Lara's offer in May, her legal fees were only about $9,000, and it was only Lara's insistence on reimbursement, plus payment of her costs, that kept the litigation going.

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[32] *In re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448 per Lord Truro LC:
"…that in such cases as I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases"; cited also by Lord Walker in *Pitt v Holt*, above n 7, at [88].

[76] There is no express trustee indemnity in the Will, but s 38(2) of the Trustee 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 …

[77] To be indemnified, the trustee must act properly. That is, reasonably and honestly.[33] As stated by the Court of Appeal in *Sunde*:[34]

> [6] The classic authority for recovery of litigation costs is *Re Beddoe*. In that case a trustee had unsuccessfully defended an action against the trust. He sought indemnity out of the trust fund. Bowen LJ said:
>
> > The vanquished trustee now seeks to impose the costs of this idle and fruitless litigation on the estate … The principles of law to be applied appears unmistakeably clear. A trustee can only be indemnified out of the pockets of his cestuis que trust against costs, charges and expenses properly incurred for the benefit of the trust – a proposition in which the word "properly" means reasonably as well as honestly incurred.

[78] The assessment of "honesty" involves two steps. First, it is necessary 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. Second, it is necessary to assess whether, in light of what she knew, he or she acted in a way an honest person would in the circumstances. This is to be assessed on an objective basis.[35]

Assessment

[79] While Margaret erred in breach of her duty as trustee, this is not a case of bright-line error of the kind in *Thurston*, *Sunde*, *Davis*, and *Wrightson Limited*, or *Klug*. Those cases are characterised by acts of bad faith, patent unfairness and/or irrationality. While Margaret erred, her conduct cannot be characterised in the same

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33 *Sunde v Sunde* [2018] NZHC 3038 at [11]; [2019] NZCA 552 at [6]-[7].
34 [2019] NZCA 552 at [6]-[7].
35 *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190 at [131].

way. She did not knowingly act in breach of the Trust. On the contrary, she relied, as I have noted, on independent legal advice about her obligations.

[80] There is nothing in the evidence to suggest Margaret was acting dishonestly. She openly believed that the primary purpose of the advance was to further Lara's professional tennis aspirations and that she thought this was risky. She also transparently expressed her concerns about Lara's parent's financial instability. She sought and obtained advice based on these understandings. An honest trustee in Margaret's position, might well have considered that the primary object of the funding was to pursue a career in professional tennis and that this was very risky. Also, an honest trustee might well have considered Lara's parents were financially imprudent based on what Peter, the uncle, is recorded as saying.

[81] Finally, the disputed pre-litigation costs plainly relate to the execution of the Will. While some of the advice received was disputable, Margaret was acting prudently in seeking it.

[82] The just way to respond to this complicated situation is to require indemnification for Margaret's legal costs up to the commencement of the litigation. However, given her errors and breach of duty, she should personally bear her own litigation costs and any liabilities she may have in relation to Lara's costs. In short, her decision to seek advice was not unreasonable, but, her persistent refusal was based on erroneous assumptions and demanded correction and reconsideration. Lara should not carry the full burden of the correction process.

(c) What is Margaret's liability for the litigation costs?

[83] Normally, when a trustee is removed, they may be ordered to pay all the costs involved in the case.[36] Furthermore, disputes between beneficiaries and trustees about acts or omissions of trustees (e.g. an action for breach and removal) is hostile litigation, in which costs follow the event and do not come out of the estate unless the trustee enjoys a right to be indemnified.[37] Liability and quantum for costs must be determined

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[36] *Garrow and Kelly of Trusts and Trustees* (7th ed, Lexis Nexis, Wellington, 2013) at [17.71].
[37] *Hunter v Hunter* [1938] NZLR 521 538-539; *Thurston v Thurston*, above n 24, at [17].

in accordance with Part 14 of the High Court Rules 2016. Success normally follows the event, but quantum may be adjusted depending on the conduct of the parties through the course of the litigation.[38]

[84] *Davis* provides a helpful illustration of the approach taken to costs. In that case, the trustees had to cover 50 per cent of their own costs and the entire costs award against them because they had acted unreasonably and pursued an argument that lacked merit, putting the respondent to unnecessary cost. But the fact they acted on legal advice meant that indemnity costs were not appropriate.[39]

[85] Ms Bruton submitted that Margaret has effectively abandoned all grounds of opposition to the substantive relief sought. On that basis, the defence to the claim should be treated as discontinued and costs ought to be payable by Margaret accordingly without inquiry into the background.[40] Moreover, the proceedings should not have been issued in the first place and multiple opportunities were given to Margaret to allow family harmony to prevail by advancing Lara's funds to her parents. She could have taken a neutral position and not opposed and abided the decision of the Court but, instead, Margaret insisted on having her costs paid. Furthermore, Ms Bruton submits that it was not until the conference before me that Margaret made unconditional concessions that the substantive relief in respect of Lara's actions would not be opposed, save costs. In terms of quantum, to enable matters to be brought to an end as efficiently as possible, Lara has decided to confine her costs application to 2B scale costs with a 50 per cent uplift.[41]

[86] Mr Molloy submitted:

(a) From an early part of the litigation, Margaret advised Lara that her second and third causes of action were effectively unopposed, noting:

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38 High Court Rules 2016, rr 14.2(1)(a), 14.6-14.7; see also *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400, (2009) 19 PRNZ 385 (CA); *Cunningham v Butterfield* [2014] NZCA 213; *Weaver v Auckland City Council* [2017] NZCA 350.

39 *Davis v White*, above n 26.

40 Citing *Sunde v Sunde*, above n 25, and *Thurston v Thurston*, above n 24.

41 Citing *Davis v White*, above n 26.

(i) on, 1 March 2019, Margaret agreed to be removed and have an independent trustee appointed;

(ii) Margaret's statement of defence, dated 13 March 2019, expressly recorded that Margaret wished to retire as a trustee and did not oppose her removal;

(iii) by letter dated 16 April 2019, Margaret agreed to advance the balance of the Trust funds to Lara's parents on the condition of an indemnity and that she would not oppose appointing them as trustees;

(iv) this offer was repeated on 24 April 2019;

(v) on 26 April 2019, Margaret told the Court she agreed to surrender her discretion to the Court and would not oppose the appointment of Lara's parents; and

(vi) Margaret then confirmed her position in September.

(b) Margaret was not obliged to take a neutral position as suggested by Lara's counsel, given the position Lara had taken on the issue of pre and post litigation costs.

(c) Margaret sought to have Alan removed as Lara's litigation guardian because of the belligerent approach he was taking to the litigation, exemplified by the application to set aside Associate Judge Bell's orders.

(d) Margaret was forced to stay engaged with the proceedings after my minute in September by Lara's insistence on pursuing a challenge to the validity of the Will and was put to the cost of producing information sought by Lara in that regard.

Assessment

[87] I find that costs should be awarded against Margaret on a standard 2B basis, together with disbursements for all attendances up to 26 April 2019 (including the application to appoint a litigation guardian), being the date of Margaret's memorandum consenting to the transfer of the trusteeship. Costs should otherwise lie where they fall.

[88] These are my reasons. Lara succeeded and is entitled to her costs in respect of her claims up to 26 April 2019 when Margaret advised the Court that she would not oppose to transfer the trusteeship to Lara's parents. In effect, Margaret abandoned the primary grounds of her defence on all the main claims (with exception to the claim in respect of costs and indemnity). Scale 2B is sufficient because Margaret's actions prior to this point in the proceedings were not unreasonable.

[89] The position after that is somewhat murky. From 26 April 2019, Lara had an election to make – whether her parents should take the trusteeship and thus resolve the balance of the issues in their pleadings without Margaret's involvement, or continue the litigation in full and insist on the claim in respect of Margaret's legal fees and indemnity. Lara and her parents chose the latter option. Associate Judge Bell then directed that the matter proceed on the second and third causes of action, dealing with the alleged breach of trust and the application to remove the trustees. Lara responded by applying to set aside that decision, while Margaret sought to have Lara's father removed as a litigation guardian. Both steps were wasteful and would ordinarily attract costs but, in the end, offset each other. It was not until the conference before me, and the issuing of my minute in September 2019, that Lara agreed to take steps in earnest to make an election to narrow the scope of the litigation.

[90] However, Margaret remained ensnared by (but not entirely neutral in) the proceedings as Lara focused on proving the first cause of action, namely, that the Will was invalid. Margaret was asked to provide information at her own cost and, feeling exposed to claims for costs in the event the invalidity claim succeeded, she took steps to defend that aspect of the claim. This escalated attendances further still. But, overall, Lara's actions, not Margaret's, prolonged the litigation unnecessarily. Therefore,

Lara, though successful in key respects, should carry the remaining burden of her own costs for doing so.

[91] I am fortified in this view given the response to Margaret's September offer which would have resolved the litigation altogether by transfer of the balance of the funds, plus a top-up of $5,000. It is not appropriate to make an order of costs in favour of Margaret, given that her offer was not fully vindicated by the result, but the nature of Margaret's offer shields her from further cost claims after that point, including those for the hearing before me. Relevantly also, the success on the remaining issues was, broadly speaking, evenly shared – Margaret breached her duty, but she remained entitled to be indemnified for her legal fees up to the commencement of the litigation.

Outcome

[92] I find:

(a) Margaret breached her duty as a trustee, but her legal fees were properly and reasonably incurred in respect of the execution of the Will.

(b) Margaret is to be indemnified for her legal fees up to the commencement of the litigation, but not thereafter.

(c) Margaret must pay 2B scale costs for all attendances by Lara up to 26 April 2019.

(d) If quantum as to legal fees and/or disbursements cannot be agreed, they are to be fixed by the Registrar.

(e) Costs must otherwise lie where they fall, including for the present hearing.

[93] I also set aside the decision to refuse advancement, and direct that the remaining funds be transferred to Lara's parents for the specific purpose of assisting Lara's education. It is demonstrably clear that Lara will benefit from the use of those

funds for the purpose of obtaining and/or securing a university tennis scholarship. A final order to that effect is to be provided for my approval.