IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-472
[2018] NZHC 2482

BETWEEN	ANGELA O'KEEFFE Applicant
AND	DAIL MICHAEL JOHN JONES Respondent

Hearing: 10 August 2018

Appearances: K E Wiseman for the Applicant
D M J Jones, the Respondent in person

Judgment: 21 September 2018

JUDGMENT OF PALMER J

This judgment is delivered by me on 21 September 2018 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors/Counsel:
K Wiseman, Barrister, Auckland
Vodanovich Law, Auckland

Copy to:
The Respondent

Summary

[1] Ms Angela O'Keeffe and Mr Dail Jones were trustees of an estate. They disagreed on a variety of aspects of its administration. Ms O'Keeffe asked Mr Jones to step down but he refused and invited her to take legal proceedings. Ms O'Keeffe applied to the High Court to have Mr Jones or both of them removed as trustee. Mr Jones consented to both of them being replaced by the Public Trust. Then he opposed Ms O'Keeffe's costs on the application being met from the estate. Ms O'Keeffe acted reasonably in bringing the application and was successful in doing so. Mr Jones' conduct unnecessarily required the application and prolonged the proceedings. I order Mr Jones to pay Ms O'Keeffe's costs personally, on an indemnity basis, with the reasonableness of the costs to be assessed by a senior barrister.

What happened?

The O'Keeffes and the estate

[2] Mr Daniel O'Keeffe died in March 2009 aged 85. He had seven children, one of whom has since died. In his will, he appointed his fourth child, Ms O'Keeffe, and his solicitor, Mr Jones, as trustees. His estate consisted of a property in Waitakere, some cash and personal effects. His will forgave a debt to a family trust relating to one of his daughters, and gave a life interest in his estate to his wife, Mrs Mary O'Keeffe (known as Molly). The life interest was on condition their daughter Ms Maria O'Keeffe and her family be allowed to remain living in the dwelling Maria had built on the property. When Mrs Molly O'Keeffe died, Maria was to receive the value of her home from the estate, and the residual estate was to be divided between five of the children. Mrs Molly O'Keeffe died in July 2017. Not all of the siblings, who are in their 50s and 60s, are on good terms.

Problems with estate administration

[3] Mr Jones and Ms O'Keeffe have not seen eye to eye on administration of the estate. Each has accused the other of misconduct. Things came to a head in September 2017 when the trust's bank account became overdrawn and outgoings went unpaid.

[4] On 13 October 2017, Ms O'Keeffe wrote to Mr Jones saying there was a deadlock between them, trust debts were not being met, he was in breach of trust by refusing to make necessary payments and by taking frequent unilateral action without her authority and asking him to step down. In his response of 20 October 2017, Mr Jones rejected the accusations and said any problems had been brought about by Ms O'Keeffe's refusal to carry out the ordinary administration of an estate.

[5] In a letter of 30 October 2017, solicitors for Ms O'Keeffe requested Mr Jones step down as well as take particular actions required for the administration of the trust. and informed him Ms O'Keeffe would otherwise bring proceedings to have him removed as co-trustee and an independent trustee substituted. In his response on 31 October 2017, Mr Jones said "[p]lease feel free to commence proceedings at any time that you wish" and maintained he had "every intention of continuing to act as a Trustee for the Estate in accordance with the Law".

Application to remove trustees

[6] On 16 March 2018, Ms O'Keeffe applied to the High Court to remove Mr Jones as trustee on the basis of alleged misconduct by him and breakdown of the relationship between the two trustees. She alleged the trustees were in deadlock and trust property was being lost, as detailed in a supporting 25-page affidavit. She applied for orders removing Mr Jones as trustee and either appointing another solicitor in his place or replacing both Mr Jones and Ms O'Keeffe as trustees with the Public Trust. She said she "would prefer to remain as a trustee" but accepted the court "may prefer to appoint a new trustee in place of both current trustees". She sought costs against Mr Jones "as a consequence of his misconduct in the administration of the trust".[1]

[7] In response, Mr Jones filed a memorandum supporting the appointment of the Public Trust as sole trustee in substitution for both him and Ms O'Keeffe. He denied misconducting himself in the administration of the trust and alleged Ms O'Keeffe misconducted herself in the administration of the trust. He filed a supporting 23-page affidavit.

---

1 Application of 16 March 2018.

[8] At a judicial conference on 16 April 2018, Muir J commended to Ms O'Keeffe's counsel, Ms Wiseman, careful consideration of Mr Jones' position as, provisionally, an efficient and cost-effective solution. Pending that, he made orders regarding trust property and payments, directed service on the beneficiaries, gave leave, without opposition from Mr Jones, for commencement of the proceedings by way of originating application and made timetabling orders.

[9] On 23 April 2018, Mr Jones filed his notice of opposition to the application. He served it on Ms O'Keeffe's counsel on 24 May 2018. Two of the siblings supported Mr Jones remaining as trustee and Ms O'Keeffe stepping down. The other three endorsed Ms O'Keeffe and wanted Mr Jones to step down.

[10] On 19 June 2018, Ms Wiseman wrote to Mr Jones, copied to the beneficiaries, advising Ms O'Keeffe agreed both she and Mr Jones should retire by consent in favour of the Public Trust. She attached draft orders for agreement including an order for Ms O'Keeffe's legal costs in bringing the proceedings to be paid from the estate. On 21 June 2018, Mr Jones responded to her and to the beneficiaries saying he needed their advice and instructions as to whether they wished the estate to meet Ms O'Keeffe's costs.

[11] There was a further exchange of correspondence between Ms Wiseman and Mr Jones. Ms Wiseman told Mr Jones it was not in the trust's interests to continue with the proceedings if both trustees were willing to step aside and allow the Public Trust to replace them, but Ms O'Keeffe would seek directions from the court as to how best to proceed with them if Mr Jones did not consent to the draft orders. On 25 June 2018, Mr Jones made new allegations, called Ms O'Keeffe's claim for costs "incredible", said "the case should proceed" and indicated views on procedure for the hearing.

[12] On 2 July 2018 Ms Wiseman advised the Court it appeared substantial agreement may have been reached on how the matter could be settled. On 6 July 2018, she filed a further memorandum. Ms O'Keeffe had agreed to resign as trustee, along with Mr Jones. But Mr Jones then refused to consent if Ms O'Keeffe were indemnified for the costs of the application. She applied for directions either appointing the Public Trust in substitution for both of them and reimbursing Ms O'Keeffe for the costs of

the application or continuing the proceedings. The supporting affidavit was nine pages with 32 pages of attached exhibits. In response, on 10 July 2018, Mr Jones filed a memorandum characterising Ms O'Keeffe as discontinuing her claim, submitting she was not eligible for any costs and submitting the Public Trust should be appointed as sole trustee.

[13] On 12 July 2018, Wylie J made consent orders removing Ms O'Keeffe and Mr Jones as trustee, appointing the Public Trust as sole trustee and setting down a hearing on the question of costs.

[14] I heard argument on the issue of costs on 10 August 2018. Mr Jones filed his notice of opposition to costs being awarded to Ms O'Keeffe that morning, before the hearing. Ms O'Keeffe seeks indemnification for the costs she has incurred in bringing the proceedings, to be paid personally by Mr Jones.

Law of costs of estates

Costs generally

[15] It is a fundamental principle of New Zealand civil law that a losing party pays a winning party a contribution towards their legal costs.[2] The question of who has won and who has lost is guided by the interests of justice and must be viewed in terms of "who in reality has been the successful party".[3]

[16] Costs are usually awarded on the basis of scales in the High Court Rules. But r 14.6 of the High Court Rules 2016 provides, relevantly, the court may order a party to pay the successful party's actual and reasonable costs (indemnity costs) if:

> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

---

2 High Court Rules 2016, r 14.2(a) and *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8].

3 *Waihi Mines Ltd v AUAG Resources Ltd* (1999) 13 PRNZ 372 (CA) at [5]. See also *Packing in Ltd (in liq) formerly known as Bond Cargo Ltd v Chilcott* (2003) 16 PRNZ 869 (CA) at [6] (calling for "a realistic appraisal of the end result").

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[17] In *Bradbury v Westpac Banking Corp* in 2009, the Court of Appeal endorsed the following, non-exhaustive, circumstances in which indemnity costs have been ordered:[4]

(a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;

(b) particular misconduct that causes loss of time to the court and to other parties;

(c) commencing or continuing proceedings for some ulterior motive;

(d) doing so in wilful disregard of known facts or clearly established law; or

(e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[18] Rule 15.23 of the High Court Rules provides a plaintiff who discontinues a proceeding must ordinarily pay costs unless the court orders otherwise. The court can displace this presumption where doing so would be just in the circumstances, with regard to the reasonableness of the parties' respective stances up to the point of discontinuance and the history as a whole leading up to the litigation.[5]

---

4 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [29], citing *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 (HC).

5 *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973.

Costs and trusts

[19] The costs of legal applications that benefit trusts can be paid out of trust property or otherwise as seems just to the court in exercising its supervisory jurisdiction over the administration of trusts. Section 71 of the Trustee Act 1956 empowers the court to order the costs of any application under the Act be paid out of the property in respect of which it is made, "or to be borne and paid in such manner and by such persons as to the Court may seem just". As I observed in *Burnside v Burnside,* and as reflected in 14.6(4)(c) of the High Court Rules 2016:[6]

> If a trustee is successful in litigation brought as a trustee, and their position was reasonably taken, costs would ordinarily be payable from the trust property. If a trustee is unsuccessful, and their position was not reasonably taken, they will not be payable from the trust property.

[20] In *Borrell v Tangitu,* Fisher J held costs can be awarded against trustees personally "where it appears that their own deficiencies have been the cause of loss to the estate" including in relation to the costs of bringing proceedings "due to the dilatoriness or lack of cooperation of the original trustees".[7] I applied this in *Aitkenhead v Kooperberg* to the situation where a trustee persistently failed to discharge his duties as trustee, even on notice of the prospect of an application to remove him, until the application was made.[8] I considered the trustee should meet the costs of the application personally, rather than the trust fund bearing the costs, and ordered the trustee to pay the indemnity costs of the application personally.[9]

Who should pay what costs here?

Submissions

[21] Ms Wiseman, for Ms O'Keeffe, submits Ms O'Keeffe has acted honestly and diligently as a trustee, in the interests of the trust and acted properly in bringing the proceedings and seeking directions from the Court. She submits it would be unjust and unreasonable for Ms O'Keeffe to have to meet the costs of the application from her own purse. She submits Mr Jones has known for years the trustees could not agree

---

6 *Burnside v Burnside (No 2)* [2017] NZHC 1678 at [9].
7 *Borell v Tangitu* (1990) 1 NZTR 0-001 (HC) at 5.
8 *Aitkenhead v Kooperberg* [2017] NZHC 3071.
9 At [15].

on administration, he was warned an application would be brought to remove him, he expressly said he would not resign, he invited Ms O'Keeffe to bring proceedings, his acquiescence to stepping down was conditional and he has maintained his opposition without basis. She submits the Court may award costs against Mr Jones either pursuant to trust law or under the Court's discretion to award indemnity costs against an unsuccessful party.[10]

[22] Mr Jones says he is seeking the guidance of the Court. He submits it was obvious something needed to be done to move the estate along and he was pleased with the application for the appointment of the Public Trust. He submits only the costs involved in a consent application for the appointment of the Public Trustee in substitution for the two trustees should be payable out of the estate. He does not accept Ms O'Keeffe had the authority of the estate or trust to issue these proceedings on its behalf. He submits she discontinued the proceedings which is a ground for disentitling her to costs. He submits she is not entitled to costs because she did not give him warning of the application and she continued to pursue it despite his immediate consent. He submits he had an obligation to "get money in" in administering the estate and he considers he complied with his requirements to collect and distribute money and account to his clients. He says he opposed costs because he was putting the case to the Court for directions. He submits if any of Ms O'Keeffe's complaints were justified they would have been dealt with by the Law Society. He submits $60,000 of costs, as Ms O'Keeffe indicated had already accrued by June, are unreasonable. Mr Jones details various statements by Ms O'Keeffe about her attitude towards him. He does not seek costs from the estate.

Decision

[23] Contrary to Mr Jones' understanding, Ms O'Keeffe did not bring the proceedings on behalf of the estate or trust. She did so as trustee. I consider Ms O'Keeffe acted reasonably in bringing the proceedings. It was clear the trustees were in deadlock. Something needed to be done. It was appropriate to seek the Court's directions. There is no reason why Ms O'Keeffe's costs in bringing the proceeding should not be payable from the estate property.

---

[10] *Hunter v Hunter* [1938] NZLR 520 (CA).

[24] I further consider Mr Jones should pay costs to the estate personally. Mr Jones took an antagonistic approach to Ms O'Keeffe. He did not propose any solution to the situation. He had plenty of warning of her intention to commence proceedings. In his letter of 31 October 2017, he practically dared her to take proceedings against him. When she did, he appears initially to have tried to avoid taking a formal position against her application while still requiring her to make the application. Yet he did file a formal notice of opposition to her application and he continued to oppose the costs order sought even when the substance of the application was resolved. There was and is no reasonable basis for Mr Jones' opposition to Ms O'Keeffe's costs being paid by the estate.

[25] Ms O'Keeffe adduced evidence to support her allegations of Mr Jones' misconduct in the administration of the estate. Mr Jones did not offer detailed evidence in rebuttal of that evidence. His submissions did not adequately rebut the allegations against him. I consider aspects of Mr Jones' conduct in dealing with trust funds through his law firm's trust account were highly questionable. These related to the payment of his own fees from trust funds without Ms O'Keeffe's agreement as trustee, using his firm's trust account to hold trust funds against Ms O'Keeffe's wishes, refusing to transfer trust funds from his firm's trust account to other accounts, refusing to pay trust debts, and refusing to act as trustee unless his firm was paid in priority to other debtors.

[26] Mr Jones' response in his affidavit of 6 April 2018 was that Ms O'Keeffe herself was hostile and obstructive in administering the estate, and aware of her sister renting estate property she was entitled to occupy and receiving rent that should have gone to the estate. He added he considered use of the firm trust account standard practice, and he had not seen anything from the New Zealand Law Society upholding any complaint against him. Even if all of this is accepted, none of this explains (or denies) his conduct.

[27] Given the questionable nature of Mr Jones' administration of the estate as a trustee, the deadlock between trustees warranting the application, and his conduct prolonging the proceeding unnecessarily, I consider he should pay actual and

reasonable indemnity costs to Ms O'Keeffe personally. The beneficiaries of the trust should not have to bear these unnecessary costs.

[28] I do not have details of the actual costs incurred. But the overall quantum of costs indicated at trial seemed high to me. I will make the draft orders sought requiring Ms O'Keeffe to provide invoices showing the costs incurred in removing Mr Jones as trustee to a senior barrister for review of their reasonableness.

Result

[29] I grant the application and make the orders sought. Mr Jones is to pay the actual and reasonable costs incurred by Ms O'Keeffe in her application to remove Mr Jones as trustee. The reasonableness of the costs will be assessed by a senior barrister, in accordance with the principles stated in *New Zealand Maori Council v Foulkes,* who is agreed by Ms O'Keeffe and Mr Jones.[11] If they cannot agree, they should each propose three names to me and I will appoint a senior barrister for this purpose. The barrister will advise both parties and the Court of his or her conclusions. The barrister's fees are to be paid from the trust funds. I reserve leave to the parties to apply to this court for further directions if necessary.

Palmer J

---

[11] *New Zealand Maori Council v Foulkes* [2015] NZHC 489, (2015) 4 NZTR 25-003; and see *Financial Markets Authority v Ross* [2014] NZHC 3184.