IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-005637

UNDER	The Family Protection Act 1955
IN THE MATTER OF	the Estate of Sarah Rogers
BETWEEN	JUDITH ROGERS Appellant
AND	THE ESTATE OF SARAH ROGERS First Respondent
AND	GRACE ROGERS Second Respondent

Judgment: 29 April 2009 at 3:30 pm

RESERVED JUDGMENT OF COURTNEY J
AS TO COSTS

This judgment was delivered by Justice Courtney
on 29 April 2009 at 3:30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date…….

Solicitors: *Gaze Burt, P O Box 91345, Victoria Street West, Auckland 1142*
Fax: (09) 309-3114 – A Clemow
Callaghan & Co, P O Box 1434, Auckland 1001
Fax: (09) 309-3269 – J Burley

Counsel: *L J Kearns, P O Box 1857, Shortland Street, Auckland 1010*
Fax: (09) 377-0220

[1] On 18 December 2008 I allowed the appeal brought by Ms Judith Rogers, against the Family Court's dismissal of her claim under the Family Protection Act 1955. I set aside the decision of the Family Court and made an award of $22,875.00 in the appellant's favour. This equated to ten percent of the value of the estate.

[2] The appellant seeks costs both in respect of the Family Court decision and in this Court. She seeks increased costs in respect of both decisions by way of a fifty percent uplift on scale costs. She advanced three reasons for asserting that increased costs should be awarded. The first was that the will was so obviously one-sided that she was justified in bringing the action. Secondly, she had made an offer to settle the case for $15,000 prior to the hearing of the appeal, which was less than the amount she recovered. Thirdly, the second respondent's evidence included unnecessary allegations aimed at blackening her character.

[3] The second respondent resists an award of costs being made in favour of the appellant and seeks costs herself. She seeks indemnity costs in relation to the Family Court hearing on the basis of a Calderbank offer made by her in June 2008. She also seeks costs on this appeal, with a fifty percent uplift on scale for the same reason.

[4] The principles applicable to the awarding of costs under RR 47 and 48 of the High Court Rules generally, though not always, result in the party who fails paying costs to the party who succeeds. Awards of increased costs or indemnity costs are payable under R 48C in certain circumstances. Of relevance in this case is R 48C(3)(b) which provides that:

> (3) The Court may order a party to pay increased costs if ….
>
> (b) The party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by –
>
> (v) Failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under Rule 48G or some other offer to settle or dispose of the proceeding.

[5] The plaintiffs in the Family Court were Ms Judith Rogers and her siblings, Mrs McKearney and Mr Rogers. It is apparent from the correspondence annexed to

counsels' memoranda that efforts to settle the dispute were ongoing throughout the Family Court proceeding. That proceeding was heard in June 2008. In February 2008 the second respondent offered to settle on the basis of 35/65 split. There was no indication in the Calderbank letter as to how the settlement figure might be divided between the plaintiffs. If, however, it were divided equally, the appellant could have expected to receive one-third of the amount, being 11.66 percent of the estate. This is, of course, very close to the ten percent of the estate she ultimately obtained on the appeal.

[6] Ordinarily, I would regard the rejection of such an offer as significant in the assessment of costs. It is not, however, clear from the memorandum filed by Ms Kearns on behalf of the second respondent, why the settlement offer was not accepted. In the absence of any explanation from counsel or evidence I am unable to conclude that it was the appellant's refusal alone that precluded settlement. I therefore cannot treat this as a basis on which to depart from the usual principle that costs should follow the event.

[7] Nor do I consider that there was merit in the appellant's case to warrant an uplift. Although the case did have merit, evidenced by the outcome, there were allegations made by the appellant that did not succeed and the amount recovered was modest. Nor do I consider that the evidence adduced by the second respondent about the appellant justifies an uplift. I accept that some of the evidence cast the appellant in a very unfavourable light, as it was no doubt intended to do. Some of it went well beyond the bounds of what was either relevant or proper. However, it was only a small part of the evidence overall and did not detract from the merit of the appellant's case. I would not wish to encourage such evidence being included but I do not consider it a case that justifies penalising the second respondent. If anything the message is one for counsel preparing affidavits.

[8] I turn then to the appellant's claim for increased costs, which is also based on a Calderbank offer. Mrs McKearney and Mr Rogers were not parties to the appeal. The correspondence in October and November 2008 leading up to the hearing of the appeal showed attempts being made between the appellant and the second respondent to settle the dispute. In October 2008 the appellant's solicitor advised:

> Our client's offer remains on the same terms as our previous offer of 14 October, but she has reduced the sum she is prepared to accept to $20,000 rather than the $35,000 as originally requested…

[9] There were subsequent telephone discussions between counsel, leading to a further letter from the appellant's lawyer 3 November 2008 offering to settle on the basis of a memorandum prepared earlier by the second respondent's counsel but with amendments to the following effect:

> …Payment to Judith Rogers of $25,000. On receipt of the $25,000 in clear funds, Judith Rogers shall pay (with 7 days) $10,000 to Callahan & Co for the costs of the solicitors for the estate…

[10] It was, however, clear from the correspondence that the parties were both desirous of having any settlement between them agreed to by Mrs McKearney and Mr Rogers, presumably in order to resolve the longstanding dispute between all the siblings over the property in Kaeo that they and the estate owned. However, it was evident from the correspondence that Mr Rogers would not agree to this. In his letter 5 November 2008 (the day before the hearing) the appellant's solicitor said:

> A requirement for Tom and Betty to sign off on any settlement deal makes things horrendously complicated.
>
> If this matter is to be settled in the very limited time we have remaining prior to the fixture tomorrow, then it needs to be done on a very simple basis. Accordingly, our client offers settlement in respect of the High Court appeal as follows:
>
> (a) Judy Rogers is paid $15,000 (net) in cleared funds within seven days. Upon receipt of the $15,000 Judy Rogers will discontinue her appeal, but the first and second respondents must agree (and sign a notice of discontinuance to confirm) that the discontinuance is on the basis that costs for the appeal lie where they fall…
>
> (b) The respondents can choose whether the $15,000 payment comes from the Sarah Rogers estate or from Grace Rogers personally.

[11] Ms Kearns submitted that the $15,000 offer made the day before the hearing of the appeal was, in reality, incapable of being accepted because it required payment within seven days which, as the appellant knew, was impossible to achieve; neither the second respondent nor the estate had sufficient cash to make a payment within that time. She submitted that, as a result, little weight ought to be given to the offer made so late and in these terms. I accept this submission. A Calderbank made

so late is usually of limited value since the costs connected with the hearing will virtually all have been incurred by that stage anyway. This is especially so when the hearing itself is of short duration. An offer made in terms that the party is unable to accept detracts even further from its weight in relation to an assessment of costs. I therefore consider that there is no basis on which to depart from scale costs.

[12] I consider that costs in both the Family Court and this Court should be awarded at scale and reflect the final result. I note that Ms Kearns did not resist Mr Clemow's calculation of the scale costs. I therefore order that there be costs in favour of the appellant:

a) In the Family Court of $5,880

b) In this Court of $5,540.56

[13] Both sets of costs are to be paid from the estate following the sale of the Kaeo property.

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P Courtney J