IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-717

UNDER	the Trustee Act 1956 and Part 18 of the High Court Rules
IN THE MATTER OF	the Trustee Act 1956
BETWEEN	LEIGH ELEANOR FINLAYSON, MEGAN HEATHER TWIST AND NENAGH ANTOINETTE SCEATS Plaintiffs
AND	JAMES ANTHONY YOUNG, DENIS FRANK WOOD AND HEATHER ALICE RUBY DRAPER First Defendants
AND	SHAUN VICTOR ANTHONY DRAPER First Defendant

Hearing: 9 July 2009

Counsel: H Rennie QC and D McDonald for the Plaintiffs
I Millard QC for First Defendants
J Standage for Second Defendant

Judgment: 31 July 2009

JUDGMENT OF JOSEPH WILLIAMS J

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 5:00 pm on the 31st day of July 2009.

[1] The plaintiffs apply for orders that the Ngakau Family Trust (the Trust) pay the plaintiffs' actual and reasonable costs in the present proceeding (either wholly on an indemnity basis or subject to a condition as to contribution of a specified sum by any of the plaintiffs); and/or that this court exercise its powers under the Trustee Act

1956 to order the trustees to pay to the plaintiffs, by way of advance or distribution from the Trust:

(a) such sums as the court shall fix; or

(b) $100,000 in respect of the costs they have incurred and will incur in bringing these proceedings.

[2] The substantive fixture is set down to commence on 10 August 2009.

[3] The Trust was established from the farming and other assets of Tony Draper. It was settled by his lawyer, James Young who has also been a trustee from the outset. Tony Draper and his wife Heather were also original trustees and were together described as the "primary beneficiary" of the Trust. The estimated gross value of the Trust assets is $16.1 million excluding the potential of a proposed windfarm development. It is unnecessary for present purposes to go into the detailed Trust assets.

[4] The "discretionary beneficiaries" include the primary beneficiary, the children or remoter issue of the primary beneficiary together with the spouses, widows or widowers of the primary beneficiary and their remoter issue.

[5] The date of distribution in the Trust is 31 July 2059 or such earlier date as the trustees may determine.

[6] Clause 3.1 of the Trust Deed is the advancement provision. It enables the trustees to:

> Pay apply or appropriate the whole or any part of the corpus of the Trust Fund (either in addition to or in substitution for any share of income) to or for or towards the maintenance, education, advancement or otherwise how so ever for the benefit of all or such one or more to the exclusion of others or other of the Discretionary Beneficiaries in such shares (whether equal or unequal) and in such manner as the trustees in their absolute discretion may think fit.

[7] Clause 3.3 provides for distribution prior to 2059. It says:

> Notwithstanding anything herein contained and independently of the powers of advancement herein contained or implied and the discretionary powers conferred by clause 3.1 hereof, [the trustees may] elect by instrument in writing under their hands to vest indefeasibly in any of the Draper children freed from the other trusts herein contained the whole or any part of the then contingent share of that one of the Draper children in the Trust Fund and in every such case the contingent share of that one of the Draper children or part thereof so dealt with shall upon the execution of such instrument vest absolutely and indefeasibly in that one of the Draper children as fully and effectually as if the Date of Distribution had then arrived **PROVIDED ALWAYS** that the contingent share of the Trust fund of that one of the Draper children or the part of which is to be so dealt with shall be computed having regard to the number of the Draper children who at the date of that instrument are then living or have died leaving a child or children or grandchild or grandchildren then living ….

[8] The power of advancement in clause 3.1 and the power of early vesting in clause 3.3 are said to be available to the trustees "at their absolute and uncontrolled discretion at any time or times".

[9] Tony Draper died on 24 February 2004. He signed a memorandum of wishes three days prior to his death which set out his views about administration of the Trust. All of this followed a full family meeting held on 17 February 2004.

[10] The memorandum said Tony expected:

(a) that Heather would be taken care of. She could stay at the farm homestead or move into town to a home purchased by the trust and either way would be entitled to an adequate income for her lifetime;

(b) Shaun would take over the farm operation as manager but would receive 100,000 shares in the Draper Land Company – which would own all the farm assets other than the large Claremont Block;

(c) Leigh would be entitled to a guarantee of up to $350,000 from the Trust or the company to assist her to purchase a farm property of her own;

(d) each child would receive a payment of $350,000 on attaining the age of 60 years;

(e) at the expiry of the "sunset period" the assets would be disposed of and a distribution made;

(f) the trustees to be even-handed as between the children in light of their needs.

[11] On 19 November 2008, the children were advised that the trustees, James Young, Heather Draper and Denis Wood (who was appointed to replace Tony Draper) had reached various conclusions as to early distribution of the Trust's assets.

[12] The proposals are complex and it is not necessary to go into the details of them in this decision. It is sufficient that the three daughters of Tony and Heather – Leigh, Megan and Nenagh claim that their effect is to favour Shaun unfairly and illegally.

[13] The plaintiffs argue that the effect of the decision was to vest the majority of the Trust assets in Shaun free of any life interest liability in favour of his mother Heather, and to add to that a future right to acquire further assets much later but at 2008 values. The remaining assets, according to the plaintiffs, come to them only on the expiry of their mother's life interest – perhaps 20 or more years from now.

[14] The plaintiffs mount eight causes of action attacking both the legality of the trustees decisions and the propriety of their actions.

[15] Mr Rennie QC arranged the causes of action under four broad headings as follows:

(a) **No power to act** - in which it is argued that the advancement clause which makes express provision for unequal distribution for the advancement of beneficiaries must be read subject to the distribution clause which provides for early vesting of the Trust corpus. The distribution clause proceeds on the basis that the "contingent share" (to use the phrase in the clause) of each child is an equal share with all of the other children;

(b) **Wrong question** - in which the plaintiffs argue that the trustees have confused the object of advancing sufficient benefits to Shaun to allow him to be a farmer in his own right (itself an objective which the plaintiffs accept is legitimate) with a final distribution of the Trust asset. The effect of this confusion, according to the plaintiffs, is that the trustees have allocated assets to Shaun which are far greater than that needed for Shaun to farm on his own account. The distortion they say is so great as to exceed the powers of the trustees;

(c) **Irrational decision** - in which the plaintiffs say that the decision was so irrational that no independent trustee properly informed and acting prudently could make it. Mr Rennie QC, in oral argument, focused particularly on the allegation that the evidence exchanged for the purpose of this application showed that the trustees falsely assumed that Megan was independently wealthy. This demonstrated, he said, that the trustees were not properly informed of material facts;

(d) **Legitimate expectation** - in which the plaintiffs relied on the terms of Tony's memorandum, other statements made by him during his lifetime, and statements and actions by the trustees after Tony's death, to argue that they have a legitimate expectation that distribution, however it occurs, will be on the basis of equal sharing.

[16] The application relies on rules 14.1 and 14.6 of the High Court Rules and s 71 of the Trustee Act. The relevant rules are as follows:

> **14.1 Costs at discretion of court**
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> (1) All matters are at the discretion of the court if they relate to costs -
>
> (a) of a proceeding; or
>
> (b) incidental to a proceeding; or
>
> (c) of a step in a proceeding.
>
> (2) Rules 14.2 to 14.10 are subject to subclause (1).
>
> (3) The provisions of any Act override subclauses (1) and (2).

14.6 Increased costs and indemnity costs

(1) Despite rules 14.2 to 14.5, the court may make an order -

(a) increasing costs otherwise payable under those rules (**increased costs**); or

(b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (**indemnity costs**).

(2) The court may make the order at any stage of a proceeding and in relation to any step in it.

….

(3) The court may order a party to pay indemnity costs if –

….

(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

…

(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] Section 71 of the Trustee Act provides as follows:

71 **Power of Court to charge costs on trust estate**

The Court may order the costs and expenses of and incidental to any application for any order under this Act, or of and incidental to any such order, or any conveyance or assignment in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

[18] During the hearing, Mr Rennie's argument came down to the question of whether a definite sum should be advanced to the plaintiffs out of the Trust Fund (presumably under clause 3.1). Without it, Mr Rennie argued, they could not afford legal representation. He made it clear that, in the absence of a pre-emptive costs, his instructions would be at an end.

[19] Whether pursued as a pre-emptive cost application or as an application for early access to trust funds, the discretion contained in the relevant statutory wording is broad. Section 71 of the Trustee Act makes it possible to award costs from trust funds, but in the end, whatever the source of the authority, this application falls to be determined pursuant to first principles. The general principle is that set out in Rule 47(a) - the unsuccessful party should pay costs to the party that succeeds. In the vast majority of cases this will require the costs to be fixed after the outcome is determined. At issue in this application is whether a departure from that principle is justified in this case.

[20] On the question of indemnity and pre-emptive awards, the cases in my view resolve themselves into two streams of authority. The first relates to public interest litigation for which the leading case is *Berkett v Cave* [2001] 1 NZLR 667 (CA). The second is private trust litigation in which the leading decision is that of Kekewich J in *Re Buckton*; *Buckton v Buckton* [1907] 2 Ch 406, although it is necessary also to refer in this category to *McDonald v Horne* [1995] 1 All ER 961 – a decision of the English Court of Appeal.

[21] *Berkett* related to a local electricity trust. The plaintiffs were consumers purporting to represent the interests of all of the electricity consumers in the locality. They applied for pre-emptive costs because they said they lacked the funds to continue the litigation.

[22] The Court of Appeal held that such orders are exceptional. Three threshold requirements had to be met before an application would be entertained. They are:

(a) the case must be clearly arguable;

(b) there must be a substantial public interest in obtaining a decision in the substantive proceeding;

(c) it would be unduly onerous for the plaintiff to be expected to fund the litigation.

[23] Even if these three requirements are satisfied, it was held that the court retains a discretion as to whether an order for pre-emptive costs is to be made.

[24] There is no doubt that the challenge in this case is a private dispute between beneficiaries and between certain beneficiaries and the trust from which they are to benefit. There is no public interest in the result. *Berkett* therefore provides the application here with no support.

[25] There is however a line of trust based cases in which the courts have accepted that while they related to private litigation, either pre-emptive or indemnity costs (or both), could be paid to one or other party to the litigation.

[26] Kekewich J in the decision in *Re Buckton* identified three classes of trust litigation. The first two classes relate to applications by trustees or beneficiaries to the court to clarify some issue that has arisen in the construction of the trust deed or the administration of the trust. He considered this was essentially friendly litigation and the costs of those seeking the assistance of the court should generally be provided out of the trust fund. Although *Re Buckton* was an application after the event, it is clear that these principles would also support pre-emptive awards.

[27] The third class is a claim by a beneficiary which is adverse to other beneficiaries and is essentially hostile litigation. Kekewich J said:

> It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rightly enforced in adverse litigation, and order the unsuccessful party to pay the costs.
>
> (At p415)

Accordingly in hostile litigation in a trust context, the usual principles are to be applied to any question of costs.

[28] *Alsop Wilkinson v Neary* [1995] 1 All ER 431 related to an attempt by a firm of solicitors to set aside a trust established by the defendant, a former partner in the firm, rendering certain of the latter's assets out of their reach. In that case, Lightman J found that a "beneficiary's dispute is regarded as ordinary hostile

litigation in which costs follow the event and do not come out of the Trust estate." (At p435).

[29] That decision relied on an earlier extensive treatment of the subject by the English Court of Appeal in *McDonald v Horne* [1995] 1 All ER 969. The court focussed on the applicable rule in England (RSC Ord 62, r3(3)) which directed that costs must follow the event "except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs".

[30] This rule according to Hoffmann LJ was "a formidable obstacle" to any pre-emptive costs order as between adverse parties in ordinary litigation. His Lordship accepted that there are well settled exceptions in the area of the costs of trustees, fiduciaries, and occasionally beneficiaries where the litigation is not hostile. In hostile trust litigation however, he found:

> I think that before granting a pre-emptive application in ordinary trust litigation or proceedings concerning the ownership of a fund held by a trustee or other fiduciary, the Judge must be satisfied that the Judge at the trial could properly exercise his discretion *only* by ordering the applicant's costs to be paid out of the fund. Otherwise the order may indeed fetter the Judge's discretion under Ord 62, r3(3). (my emphasis)

[31] There can be no question that this case involves hostile litigation both among beneficiaries and between certain beneficiaries and the trustees. Mr Rennie QC sought to distinguish this decision by reference to the particular wording of the applicable English rule. I do not think there is such a distinction in substance. The New Zealand rules provide also that:

> The primary principle is that the unsuccessful party should pay costs (r14.2(a)).

[32] This primary principle informs and is intended to inform the broad discretion contained in r14.1. I do not think there is a material distinction between the way in which the English and New Zealand rules are cast here, and there is certainly no distinction in the way these principles are applied.

[33] Thus, while I am prepared to accept that the plaintiffs have a case which is at least arguable; that their conduct in this proceeding has been reasonable; and that they are, on the evidence, of modest means, it is clear that the authorities treat pre-emptive cost awards as very exceptional indeed.

[34] Under the principles in *Berkett v Cave*, the plaintiffs must fail in this application because the litigation is essentially private. Under the principles applicable to private trust funds, the plaintiffs must also fail: this is hostile litigation, and the facts and circumstances of the case do not in any way drive me to conclude that the trial Judge would have no choice but to award costs of any kind (let alone indemnity costs) in their favour at the conclusion of the case.

[35] The application for a pre-emptive costs award must fail accordingly.

"**Joseph Williams J"**

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