

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

CIV-2008-454-38

IN THE MATTER OF the Law Reform (Testamentary Promises)
 Act 1949

BETWEEN KAY SAUNDERS, CAROL LATIMER
 AND PAULINE BROWN
 Plaintiffs

AND THE NEW ZEALAND GUARDIAN
 TRUST COMPANY LIMITED AS
 TRUSTEE AND EXECUTIVE OF THE
 ESTATE OF CLARICE BARBARA
 GREENBANK
 Defendant

Judgment: 6 November 2009 at 3.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

*This judgment was delivered by Associate Judge Gendall on 6 November 2009 at
3.00 pm pursuant to r 11.5 of the High Court Rules.*

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[1] In a judgment I gave in this proceeding on 24 June 2009 an application by the defendant and certain third parties for further and better particulars of the plaintiff's statement of claim and for inspection orders was successful in the main. Also in that judgment an application for further and better particulars by a third party, Ms. Guy was successful but only in part.

[2] Costs were reserved in that judgment and I indicated that if counsel were unable to agree between themselves on this question, memoranda could be filed and I would decide the issue based on the material before the Court.

[3] Counsel have now advised that they have been unable to agree upon the question of costs. Memoranda from the various parties have been filed. I have now had an opportunity to consider those memoranda and give my decision on the costs question.

[4] The applicants in the first application for further and better particulars were the defendant, certain charities The Cancer Society of New Zealand, New Zealand Society for the Intellectually Handicapped and the New Zealand Heart Foundation and a third party, Ms. Christine Guy. That first application succeeded virtually entirely.

[5] Under r 14.2(a) High Court Rules the starting point in this matter is that the party who fails with respect to an interlocutory application should pay costs to the successful party. In addition under r 14.8 High Court Rules costs on an opposed interlocutory application are to be fixed when the application is disposed of unless there are special reasons to the contrary.

[6] In the present case the applicants noted above as the successful parties in my view are entitled to an order for costs on their application for further and better particulars and inspection on a Category 2B basis together with disbursements. Those costs are to be paid with respect to both the bringing of the application and all incidental matters. This is to include the judicial conferences which took place on 14 October 2008, 11 November 2008, 10 February 2009 and 23 March 2009 where issues concerning the plaintiffs' pleadings and inspection were under consideration.

[7] For the avoidance of doubt, costs on a Category 2B basis are also to be paid to these applicants with regard to memoranda filed by their counsel in response to the plaintiffs request for an adjournment of the 15 June 2009 hearing of the application.

[8] An order is now made for the plaintiff to pay to the applicants on this first application being the defendant, The Cancer Society of New Zealand, New Zealand Society for the Intellectually Handicapped, The New Zealand Heart Foundation and Ms. Christine Guy costs on a Category 2B basis with respect to the application for further and better particulars and inspection and the matters related thereto which I have outlined above. In addition disbursements as approved by the Registrar are to be paid.

[9] Calculation of the awarded Category 2B costs should be a reasonably straight forward exercise, but in the event there is any disagreement or difficulty in making this calculation, leave is reserved for any party to approach the Court further on 24 hours notice for additional directions.

[10] In addition to these matters as I have noted above, my 24 June 2009 judgment dealt with a second application seeking further and better particulars of the plaintiff's statement of claim lodged by Ms. Christine Guy alone.

[11] That second application was partly successful and partly unsuccessful.

[12] In a memorandum dated 13 October 2009 counsel for Ms. Guy seeks costs with respect to that application. This is in addition to the costs on the first application which he joined in seeking from the plaintiff with counsel for the defendant and the charities.

[13] Whilst it is clear that on this second particulars application, Ms. Guy was successful in respect of two of the matters for which further particulars were sought, in my view there is a reasonable argument that this second application could quite reasonably have been included in the first application to which Ms. Guy was noted

as a party. It is instructive that both the first and second applications were filed on the same date 9 April 2008 and signed by Mr. Ryan as counsel for Ms. Guy.

[14] In addition, Mr. Ryan's attendances on behalf of Ms. Guy clearly related not only to her second application for further particulars but also in a joint capacity on the first application for which costs have already been awarded.

[15] In my view there is an appropriate analogy here with r 14.15 High Court Rules which provides that the Court is not to allow more than one set of costs unless there is good reason to do so if several defendants defend a proceeding separately and it appears that all or some of them could have joined in their defence. This rule relates to parties who have a common or overlapping interests and deals with the extent to which one party could have relied upon the evidence or submissions of another.

[16] As McGechan on Procedure at para. HR14.15.01 notes with regard to this rule:

“The rule suggests a policy requiring the Court to exercise some caution before awarding costs, without more, in favour of multiple parties, particularly when there is some overlap or community of interest in the litigation position of those parties ...”.

[17] That said, and given also that the second application by Ms. Guy alone was partly successful and partly unsuccessful, costs on that application are to lie where they fall. There is to be no order made with respect to costs on Ms. Guy's application.

‘Associate Judge D.I. Gendall’