

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV 2004-485-1657**

BETWEEN

**KIMBERLY BIRKENFELD**  
Plaintiff

AND

**ANTHONY BRUCE KENDALL**  
First Defendant

AND

**YACHTING NEW ZEALAND  
INCORPORATED**  
Second Defendant

Hearing: 3 December 2009

Appearances: Plaintiff in Person  
N A Beadle for Defendants

Judgment: 7 December 2009

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**RESERVED DECISION OF RANDERSON J**  
**On Terms of Trust consequent upon Judgment of 7 June 2007**

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This judgment was delivered by me on 7 December 2009  
at 12 noon, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

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[1] On 7 June 2007 I issued a reserved judgment ordering a permanent stay of this proceeding against both defendants upon terms set out in [50] to [52] of the decision.

[2] On 14 November 2007, after receiving advice that the decision had been appealed by the plaintiff, I issued a minute deferring matters consequential upon my judgment until after the final disposition of the appeal.

[3] On 4 December 2008 the Court of Appeal dismissed the plaintiff's appeal and, on 1 July 2009, the Supreme Court declined leave to appeal from the decision of the Court of Appeal.

[4] On 8 July 2009 the second defendant wrote to the plaintiff offering to pay the amount of the Limitation Fund less costs awarded plus interest to 30 June 2009. The plaintiff has declined to accept the amount tendered.

[5] On 31 July 2009 the defendants filed a joint memorandum of counsel seeking the court's direction as to the terms upon which the Public Trust was to hold the Limitation Fund. This memorandum was filed pursuant to [52] of my reserved judgment of 7 June 2007. At 1 July 2009, the amount of the Limitation Fund (less costs awarded plus interest at 7.5 per cent until 30 June 2009) amounted to \$842,814.03. With the interest which has accrued between 1 July 2009 until a nominal date of 7 December 2009, there is an additional component of \$16,827.84 bringing the total for payment at 7 December 2009 to \$813,889.13. This sum is subject only to payment of any costs awarded by the court to the defendants against the plaintiff in relation to the steps which they have been obliged to take since the last hearing to deal with the consequential matters.

[6] On 21 August 2009, at my direction, the second defendant's solicitors sent to the plaintiff copies of letters from the Public Trust as to its willingness to hold the funds on terms fixed by the court along with advice that it intended to place the funds on call so that the plaintiff could uplift the funds at any time. The solicitors sent to the plaintiff on the same occasion a draft of the order the defendants proposed

to seek from the court for the plaintiff's comments. The letter from the second defendant's solicitors also advised the plaintiff that they would seek their costs and travel expenses if the matter was not agreed within 14 days. No agreement was reached.

[7] The purpose of the hearing on 3 December was to fix the terms upon which the Public Trustee would hold the Limitation Fund along with accumulated interest. The plaintiff opposed the making of any final orders at this stage, substantially on the ground that, in her submission, there had been no final disposition of the appeals, picking up the language of my minute of 14 November 2007. The plaintiff provided to the court a substantial body of material which shows that since the decision by the Supreme Court refusing leave to appeal the decision of the Court of Appeal, the plaintiff has brought a number of applications of various kinds in the Supreme Court seeking a reconsideration of that court's refusal to grant leave.

[8] It is unnecessary to traverse the full history of these applications. It is sufficient to record that:

- a) On 17 July 2009 two judges of the Supreme Court dismissed the plaintiff's "application for reconsideration for reason of miscarriage of justice".
- b) On 27 July 2009 a single judge of the Supreme Court dismissed the plaintiff's application for review of a registrar's decision.
- c) On 21 August 2009, the Registrar of the Supreme Court advised the plaintiff there were no further steps she could take in the Supreme Court.
- d) On 1 September 2009 a single judge of the Supreme Court dismissed the plaintiff's application for review of the decision of the Registrar noting the application to the effect that "there is no basis shown for re-opening the final disposition of the application for leave to appeal which must stand".

[9] The plaintiff informed the court that an application by her for directions as to the correct method of proceeding for an application for review of the decision of the

Supreme Court was filed. The plaintiff informed me that there had been no response from the Supreme Court to this application.

[10] The plaintiff submitted that, for various reasons, the decisions taken by the Supreme Court were invalid. She said she wished to explore in the Supreme Court the need to give reasons. But, as the plaintiff herself accepted, it is not for this court to determine whether decisions of any higher court are valid. It is sufficient to record that the Supreme Court has, in a recent decision given by three judges, declined the plaintiff's application for leave to appeal and has since refused on three separate occasions to permit that application to be reopened.

[11] I am satisfied that the defendants are entitled to finality of judgment and that there has been a final disposition of all appeals from my judgment of 7 June 2007.

[12] The plaintiff did not seek to challenge the terms of the draft order proposed by the defendants or to address some minor changes to it which I discussed with Mr Beadle during the course of the hearing. Nor did the plaintiff challenge any of the defendants' calculations as to the amount of the fund, interest, or costs.

[13] The plaintiff submitted that her ability to challenge the decision of the Supreme Court would be "blocked" if the Limitation Fund were paid to the Public Trust. As I understood her submission this would follow because, until now, any costs awarded against her in the proceeding had been deducted from the amount due to her. Once the fund is transferred to the Public Trust, she would be obliged to access the fund to meet any such future costs. She did not wish to do that since she did not accept the payment which has been tendered to her. As I observed during the course of the hearing, it is a matter for the plaintiff's own choice as to the course she adopts if the payment is made to the Public Trust. In terms of the order proposed, the plaintiff could uplift all or part of the transferred funds at any time at her sole discretion.

[14] I am satisfied that it is now appropriate to bring this matter to a conclusion and I make the following orders accordingly:

a) The defendants shall pay to the Public Trust within 14 days of the date of this decision, the sum of:

- i) \$797,061.29, being the Limitation Fund (less costs awarded against the plaintiff plus interest up to 30 June 2009); plus
- ii) Interest at the rate of 7.5 per cent per annum on the sum of \$511,846.90, from 1 July 2009 to the date of payment to the Public Trust, subject to the deduction of costs ordered in (d) below.

The total of the sums referred to in (i) and (ii) is called “the fund” for the purpose of these orders.

- b) The fund and any interest accrued after the date of payment shall be held on behalf of the plaintiff by the Public Trust and be paid to her or at her direction upon request by her at any time.
- c) The fund shall be invested in the Public Trust in an on-call account or on such other terms as may be agreed between the Public Trust and the plaintiff.
- d) The defendants’ costs (fixed on a 2B basis) of their memoranda of 31 July 2009 and 30 October 2009, the costs of sealing judgment, and the costs of this hearing plus disbursements (as fixed by the Registrar including travelling costs) shall be deducted from the payment to the Public Trust and paid to the defendants.
- e) The permanent stay of this proceeding in respect of both defendants shall take effect immediately upon payment to the Public Trust of the fund less those sums deducted pursuant to (d) of these orders.

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A P Randerson J  
Chief High Court Judge