IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-7103

IN THE MATTER OF	THE ESTATE OF THE LATE CHRISTIAN FRANZ RIPSKI of Auckland, Businessman, Deceased
BETWEEN	EVA ELISABETH CAROLINE MUELLER Applicant
AND	HELEN GLYNDWR HENDREN Caveator

Hearing: 3 June 2009

Counsel: D A Watson for Applicant
D R F Gardiner for Caveator

Judgment: 16 June 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 16June 2009 at 3.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
McDonald Law, PO Box 28624, Remuera, Auckland
Clendons, PO Box 305-349, North Shore City
N G Cooke, PO Box 47-016, Ponsonby Auckland
Counsel:
D A Watson, PO Box 3886, Shortland Street, Auckland 1001
D R F Gardiner, PO Box 47-016, Ponsonby, Auckland 1001

The application

[1] Ms Mueller seeks indemnity or increased costs from Ms Hendren, arising out of the latter's unsuccessful attempt to oppose probate of the last Will of the late Mr Ripski being granted in Ms Mueller's favour.

Introduction

[2] Christian Franz Ripski died on 14 October 2007. At the time of his death, he and his wife (Ms Mueller) were separated. Although Mr Ripski and Ms Mueller maintained good relations, Mr Ripski had formed a relationship with Ms Hendren.

[3] Mr Ripski left a Will dated 31 May 2003, supplemented by a Codicil dated 30 October 2006. Under that Will, Ms Mueller was appointed sole executrix and trustee. She was also entitled to receive one-half of the residuary estate.

[4] Ms Mueller applied for probate. Ms Hendren lodged two caveats challenging the grant of probate. The first was dated 12 November 2007 and was based on an allegation that Ms Hendren was in a *de facto* relationship with Mr Ripski. After that caveat was withdrawn, a second was lodged, on 28 November 2007, alleging not only the *de facto* relationship but also prospective claims under the Property (Relationships) Act 1976, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.

[5] Once a caveat was lodged, the application for a grant of probate had to proceed on notice, if necessary to a defended hearing. When the proceeding, in that form, was first called before Rodney Hansen J on 19 December 2007 the Judge recorded that counsel for the caveator "[recognised] that his grounds for maintaining the caveat may be suspect". While attempts at consensual resolution of issues between the parties followed, Ms Hendren persisted with her opposition to the probate application, on the grounds recorded in the second caveat.

[6] The defended application was set down for hearing before Priestley J, on 5 December 2008. On 4 December 2008, the second caveat was withdrawn. By then, Ms Mueller had incurred significant costs in preparing for a defended hearing.

[7] On 5 December 2008, Priestley J, without opposition from Ms Hendren's counsel, granted probate of the last Will and Codicil of the late Mr Ripski in favour of Ms Mueller.

[8] In making the order, Priestley J expressed surprised that caveats had been lodged, saying:

> [7] I am puzzled as to why the caveats were lodged in the first place. The caveat device, which has both significance and value, is to avoid an *ex parte* grant of probate in situations where there may be some question about the validity of the will, the testamentary capacity of a testator, or where undue influence may be operative. The caveat procedure is normally the first step along the path where an executor would have to seek an order *nisi* and/or seek a grant of probate in solemn form. Those procedural mechanisms enable the issues to which I have just referred to be examined by the Court.
>
> [8] On their face the caveats lodged by Ms Hendren raise none of those issues. There is nothing in her affidavit which forms a basis for that sort of challenge. Accepting as I do that Ms Hendren may well have some basis to seek relief under the three statutes to which I have referred, the normal route would be for her to begin claims under those statutes, probably in the Family Court, against the Estate itself.
>
> [9] However, it is not appropriate at this stage to inquire further or make further comment as to the efficacy or otherwise of the caveats. Fortunately most matters have now been resolved with the exception of the Estate's costs.

[9] When the order granting probate was made, counsel for Ms Mueller sought costs. Costs were opposed. Priestley J made directions for the exchange of memoranda, culminating in a hearing before me on 3 June 2009.

[10] At that hearing, I concluded that an adjournment was required to enable counsel for Ms Hendren to put additional submissions before the Court. I indicated that, after all submissions were in, I would determine issues of costs on the papers.

Submissions

[11] Ms Watson, for Ms Mueller, seeks indemnity or increased costs. Indemnity costs, will, if ordered total $43,079.68. Fees incurred for attendances unconnected to the defended probate application have not been included in the calculation. In addition, costs are sought in respect of the substantive costs arguments, on a 2B basis.

[12] Indemnity or increased costs are sought on the grounds that Ms Hendren acted "vexatiously, frivolously, improperly or unnecessarily" in opposing the application for probate. A secondary ground is that Ms Hendren failed, without reasonable justification, to accept a proposal to dispose of the proceeding.

[13] Mr Gardiner for Mrs Hendren, submits that, if costs were to be ordered, they should be on a 2B basis only. He refers to correspondence while the caveats were extant, suggesting that some "arrangement" could be entered into to ensure the estate "will not be dissipated given the concerns that Ms Hendren has".

[14] In essence, I perceive the opposition to costs as being based on the need to obtain some negotiated arrangement. In support of the proposition that caveats may be lodged in respect of claims going beyond those challenging testamentary capacity, Mr Gardiner relies on the general way in which s 60 of the Administration Act 1969 is expressed:

> **60 Caveat may be lodged**
>
> (1) Any person may lodge with the Registrar a caveat against any application for administration at any time previous to the granting of administration, and every such caveat shall set forth the name of the person lodging it, and an address within New Zealand at which notices may be served on him.
>
> (2) Every such caveat shall, unless application for administration is sooner made, lapse upon the expiration of one year from the date of the lodging of the caveat.
>
> (3) Any such caveat may be withdrawn by the caveator at any time by notice in writing lodged with the Registrar. A copy of every such notice shall

be served on any person who has applied for administration or to whom an order *nisi*, under the provisions of section 61 of this Act, has been granted.

(3A)Where any such caveat has lapsed or has been withdrawn, the Court may, on the application of the administrator of the estate and after giving the caveator a reasonable opportunity to be heard, make an order for the payment of costs by the caveator.

(4) Nothing in this section shall prevent any person who has lodged a caveat from lodging a subsequent caveat, whether or not any caveat previously lodged has lapsed or been withdrawn.

Analysis

[15] There are no special rules for costs in probate proceedings. Section 60(3A) of the Administration Act 1969 must be read subject to the general costs principles set out in the High Court Rules. In determining questions of costs, the Court is entitled to have regard to all matters connected with or leading up to the litigation.

[16] The circumstances in which either increased or indemnity costs may be ordered are set out in r 14.6 of the High Court Rules. Rules 14.6(3) and (4) provide:

14.6 Increased costs and indemnity costs

…

(3) The court may order a party to pay increased costs if—

(a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

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

(4) The court may order a party to pay 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

(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] The purpose of a caveat is to ensure that a grant of probate or letters of administration is not made without notice to the caveator. The general terms of s 60 of the Administration Act do not touch on the grounds on which a caveat may be lodged. While not exhaustive in nature, the usual defences are of a similar type; all going to questions of testamentary capacity.

[18] The usual defences are want of due execution, want of sound disposing mind, want of knowledge and approval, undue influence and fraud: see Laws NZ, *Administration of Estates, Vol 1*, at para 94.

[19] Ms Hendren's caveats were based on prospective claims under the Property (Relationships) Act 1976, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949. Such claims are brought against an executor and trustee, on behalf of the deceased's estate. They have nothing to do with the appropriateness of the person seeking a grant of probate or the capacity of the testator to appoint that person.

[20] One of two conclusions flow from that analysis. The first is that the caveats were lodged for collateral purposes in order to pressure Ms Mueller to enter into some "arrangement" satisfactory to Ms Hendren. Second, the caveats were lodged without appreciation from Ms Hendren's counsel of their hopeless prospects of success.

[21] The observations made by counsel for Ms Hendren at the hearing before Rodney Hansen J on 19 December 2007 suggest that the former is the correct inference to draw. I proceed on that basis.

[22] Ms Watson, for Ms Mueller, relied on *Bradbury v Westpac Banking Corporation* (2008) 18 PRNZ 859 (HC), as authority for the proposition that indemnity costs should be paid. That decision was recently upheld by the Court of Appeal: *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

[23] Delivering the judgment of the Court of Appeal, in *Bradbury v Westpac Banking Corporation*, Baragwanath J considered the differences among the three approaches to the award of costs. His Honour said:

> [27] The distinction among our three broad approaches: standard scale costs; increased costs; and indemnity costs may be summarised broadly:
>
> (a) standard scale applies by default where cause is not shown to depart from it;

(b) increased costs may be ordered where there is failure by the paying party to act reasonably; and

(c) indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[24] In *Bradbury v Westpac Banking Corporation*, an award of indemnity costs was upheld on the basis that it must have been (objectively) obvious to the plaintiff that the claims could not be substantiated. That conclusion was reached, notwithstanding the plaintiff's reliance on advice from a Queen's Counsel who had conducted proceedings in the High Court until final argument: see para [73](b) of the Court of Appeal judgment.

[25] In my view, Ms Hendren's conduct in maintaining a (legally) unsupportable caveat for a collateral purpose brings the case squarely within the category of proceeding for which indemnity costs might be ordered under r 14.6(4). I consider that she acted "improperly or unnecessarily" in opposing the application for probate when no proper grounds to do so existed. In reaching that conclusion, I accept that the use of the word "unnecessarily" in r 14.6(4)(a) involves a connotation of "distinctly bad behaviour": see *Bradbury v Westpac Banking Corporation* (CA) at para [26].

[26] While indemnity costs *may* be ordered, I retain a discretion to award something less.

[27] The factors I consider are most important to the exercise of the discretion are:

a) The pursuit of a hopeless defence to the application for a grant of probate;

b) The modest size of the estate;

c) The ability for Ms Hendren to pursue claims of the type mentioned in the caveats, even after probate was granted;

d) The possibility of some duplication of costs incurred by Ms Mueller, in relation to the general administration of the estate (on the one hand) and the application for probate (on the other).

[28] As a matter of discretion, I prefer to make an order for increased costs to ensure no double counting of costs occurs. In doing so, I adopt the approach taken in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [40]-[42], in which the Court emphasised that the rates set by the Rules Committee should be the appropriate starting point for increased costs, rather than the actual costs charged by counsel for the successful party to their client. See also *Bradbury v Westpac Banking Corporation* (CA) at para [25].

[29] A broad assessment of costs is required. I consider that an appropriate global award is $37,000 plus reasonable disbursements. In broad terms, that equates to a 75% uplift on costs that would have been ordered if the 2B scale applied. That global award encompasses attendances in relation to the costs application itself, which was defended stoutly.

Result

[30] Costs are ordered in favour of Ms Mueller in the sum of $37,000, together with reasonable disbursements. Disbursements shall be fixed by the Registrar. The balance of any costs incurred by Ms Mueller shall be paid out of the estate.

P R Heath J

Delivered at 3.00pm on 16 June 2009