IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2009-441-230

BETWEEN	JULIA LYNNE MARTIN Plaintiff
AND	WENDY LORRAINE WILSON Second Plaintiff
AND	MAREE ALISON PATERSON Third Plaintiff
AND	ROBERT JAMES BURNSIDE First Defendant
AND	ALEXANDER CRAIG BURNSIDE Second Defendant

Judgment: 29 September 2009 at 3.30 pm

JUDGMENT AS TO COSTS
OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 29 September 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] On 7 July 2009 I gave judgment in this proceeding granting summary judgment against the defendants in favour of the plaintiffs.

[2] In that judgment costs were reserved. Counsel were given an opportunity to agree on the question of costs and failing this, I directed that they were to file memoranda sequentially on this issue and in the absence of either party indicating that they wished to heard on the matter, I indicated that I would decide the question of costs based upon the material before the Court.

[3] Counsel have advised that they are unable to agree on the issue of costs, and have filed memoranda.

Summary Judgment

[4] This proceeding involved a dispute between siblings over the will of their late father, William James Burnside ("the deceased"). Subsequent to the deceased's death, disagreements arose within the family as to the provisions of his will and a related codicil. These issues were resolved by a Deed of Family Arrangement ("the Deed") entered into between all affected family members. This Deed was effectively approved by the Family Court in Napier.

[5] The plaintiffs, who are three sisters, were successful in this application for summary judgment. They sought distribution to them and a brother as beneficiaries of funds which were acknowledged to be assets of the deceased's estate, and which had been held in a solicitor's trust account for over three years. They also sought the conveyance of a 20 acre property to the second plaintiff, in accordance with provisions outlined in the Deed. The first and second defendants are trustees of their father's estate. The first defendant opposed the summary judgment application, but his brother, the second defendant, did not oppose the application. In fact, he appeared to support his sisters in their application.

[6] The essential facts in this case are discussed in some detail in my 7 July 2009 judgment, and I do not propose to rehearse them in detail here. Suffice to say, with regard to the first cause of action in the plaintiffs' statement of claim, the will and Deed clearly required the defendants to distribute part of the sum of $450,000.00 to

the plaintiffs, an amount which they had received as trustees of the estate as a shareholder dividend. The first defendant is also a director of the company which had made the payment.

[7] The first defendant agreed that the $450,000.00 was required to be distributed in the way requested in the plaintiffs' statement of claim. However, he refused to make the distribution without execution of an indemnity by the plaintiffs in his favour. In my 7 July 2009 judgment, I found that what the first defendant sought was not an "indemnity" from liability as trustee, but that he was demanding a complete release from any claim which might be made against him in his capacity as director of the related company, and relating to different monies. To seek, in his capacity as trustee, an indemnity from the beneficiaries of any separate liability he may have as director of the company and with regard to different claims, was completely inappropriate in my view. This did not give rise to any defence against the plaintiff's application, or any reason to refuse to exercise the discretion to award summary judgment.

[8] It was also submitted for the first defendant that it was in the interests of justice that all matters regarding the distribution of the deceased's estate be dealt with together and not in a piecemeal fashion, and that summary judgment should therefore be denied. I found this submission to be without substance. I noted that the defendant trustees could have applied to the Court for resolution of the dispute, but they had not. After waiting for some years for the proper distribution of the $450,000.00, it was left to the plaintiffs to initiate action by bringing the present action for summary judgment.

[9] Pursuant to the second cause of action in the plaintiffs' statement of claim, the first defendant accepted that he was required to transfer a block of land known as "Thistle Paddock" to the second plaintiff. He stated, however, that he had refused to do this because of an outstanding dispute regarding a water right easement. On this, I found the first defendant's argument with regard to the water easement to be spurious and summary judgment was granted in this regard to the second plaintiff.

Costs

Quantum

[10] The plaintiffs as the successful parties, seek costs here and submit that although the starting point for a calculation of costs is category 2B, there are good reasons in this case for an award of increased costs. These reasons are as follows:

- The summary judgment application concerned two distinct claims: one for distribution of the $450,000.00 and the other for transfer of the Thistle Paddock. The plaintiffs submit that each required a substantial amount of work which combined, exceeded band B.

- The first defendant had no defence to the claims and High Court Rule 14.6(3)(b)(iii) therefore applies. The first defendant also had no reasonable grounds here for arguing that the Court should exercise its residual discretion to refuse summary judgment.

- The first defendant was effectively the trustee of the plaintiffs and should have acted in their interests. Instead, he acted solely in his own interests by refusing to distribute the money which the plaintiffs were clearly owed and refusing to transfer the Thistle Paddock until he was personally released from further claims.

[11] As such, the plaintiffs seek an increase of 25 per cent on 2B scale costs here, which amounts on their calculation to $11,200.00 plus disbursements of $640.00. Counsel for the first defendant in response submits that, despite the contrary being found by the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897, para 43, granting increased costs by providing for an uplift from scale costs is not appropriate as this may allow a party to receive more than their actual costs. The plaintiffs in their reply memorandum, however, provide invoices indicating that their actual costs were $15,147.05, plus an additional $4,300.00 in unbilled work to date. As such, this aspect of the first defendant's submissions is not persuasive.

[12] The first defendant then goes on to submit that there is no valid reason for departing from 2B costs in this case. Addressing the argument that the first defendant had no reasonable defence, counsel for the first defendant endeavours to

contend that the same argument would be applicable to every unsuccessful summary judgment defendant. Counsel submits that just because a summary judgment application has succeeded, does not necessarily mean that there was no reasonable justification for defending the proceedings. It is submitted that the first defendant's motivation was to resolve all issues between himself and other family members.

[13] I do not view the first defendant's arguments regarding his allegedly genuine motivations, or his suggestion that the plaintiffs' conduct here was "unbecoming" to be particularly persuasive. It is clear that these proceedings have arisen out of an unfortunate and rather nasty family dispute. This context however does not make the position taken by the first defendant, as trustee, before and at the summary judgment application, reasonable. Counsel for the first defendant submits that the first defendant's attempt to obtain an indemnity was not unreasonable. I have already found that the first defendant was not entitled to the "indemnity" that he was seeking and that rather than protecting himself as trustee of the estate, as counsel makes out, he was endeavouring to protect his private interests over and above his clear and obvious legal obligations as trustee. The first defendant in my view stubbornly pursued an argument which lacked merit (r 14.6(3)(b)(ii)) and failed, without reasonable justification, to accept the legal argument that he was obligated to act in accordance with the Deed (r 14.6(3)(b)(iii)).

[14] In those circumstances, there is merit in the plaintiffs' claim for increased costs. However, as I have found (and will outline at paras. 19-21 of this judgment) that the first defendant's liability for payment of costs will be increased with regard to the full costs of the second defendant – a result which will benefit the plaintiffs' as beneficiaries of the estate – I am satisfied that Category 2B costs in favour of the plaintiffs are sufficient in this case.

Payment by First Defendant Personally

[15] Normally, a trustee who acts reasonably in incurring expenses for an estate/trust is entitled to be reimbursed from the estate/trust assets. The plaintiffs here submit that the first defendant should be denied his costs out of the trust fund, as they say he has acted unreasonably. They submit that the costs of these proceedings have been incurred by the first defendant acting solely for his own

benefit, rather than for the benefit of the trust: *Morgan v Morgan* HC AK CP576/98 18 May 1999 Salmon J.

[16] Counsel for the first defendant in reply suggests that, although the Court has found that the first defendant was not justified in the course that he took, he was not acting in his own interests. Counsel reiterates the claim that the first defendant was acting simply in an attempt to resolve together all outstanding matters regarding the estate, and that he was himself a beneficiary who would have benefited from distribution of the $450,000.00. Counsel in submissions stated:

> "[The first defendant] was acting with a commendable motive of proposing that all family members sign a deed which would resolve all matters and put the family disharmony at an end."

[17] This submission however as I see it was clearly at odds with what the first defendant was actually seeking from the plaintiffs. But, in any event the authorities establish that a trustee who takes unreasonable steps in the honest belief that they are reasonable, is still to bear the burden of that unreasonableness: *Re Chapman: Freeman v Parker* (1985) 72 LT 66, 67; cited in *Morgan v Morgan*. Counsel for the first defendant recognises this authority and says that in any event, the first defendant should not be held personally liable for the plaintiffs' 2B costs, because his behaviour in this case was not as bad as that which was exhibited by the Trustee in *Morgan v Morgan*. That the first defendant's conduct was not of the worst type is already recognised by my rejection of an award of increased costs.

[18] However, the first defendant's conduct here with regard to the distribution of the $450,000.00, the transfer of the Thistle Paddock, and the summary judgment application, was clearly in my view quite unreasonable. The beneficiaries of the estate should not have to bear the burden of this unreasonable conduct. As such, the first defendant should be required to pay his own costs on defending this proceeding personally, and he also should meet the plaintiffs' costs award noted above personally, without reimbursement from the estate.

Second Defendant's Costs

[19] The plaintiffs and the second defendant submit that the arguments noted above also apply to the costs incurred by the separately represented second defendant here.

It was required for him to be named as a defendant and served. He did not oppose the plaintiffs' application, and his costs in these proceedings in my view were reasonably incurred. An invoice from the second defendant's lawyers indicate that these costs amount to $4,641.80. As it was reasonable for the second defendant to incur these costs, he would normally be entitled to reimbursement from the estate, which would be to the disadvantage of the beneficiaries of the estate.

[20] The plaintiffs and the second defendant submit that the second defendant only incurred these costs because of the first defendant's unreasonable and unjustified refusal to distribute the $450,000.00 and transfer the Thistle Paddock. I agree.

[21] The same arguments as I have noted above apply here. Had the first defendant properly performed his duties as trustee of the deceased's estate, then litigation would not have been necessary and the second defendant's costs would not have been incurred. In those circumstances, it is appropriate that the first defendant should pay the whole of the second defendant's costs personally, to prevent depletion of the estate assets.

Draft Deed

[22] The plaintiffs also state that a draft deed to transfer Thistle Paddock to the second plaintiff has been approved by all the transferees. The plaintiffs seek an order that the deed referred to in para 72(c) of my 7 July 2009 judgment shall be in the terms of the draft Thistle Paddock deed enclosed in the letter of 14 July 2009 from Carlile Dowling to GW Calver.

[23] The first defendant has not objected to the draft deed or the order sought by the plaintiffs. The second defendant agrees that the order is appropriate.

Result

[24] I now make the following orders:

(a) The deed referred to in paragraph 72(c) of my 7 July 2009 judgment shall be in terms of the draft Thistle Paddock deed enclosed with the letter of 14 July 2009 from Carlile Dowling to GW Calver and attached hereto;

(b) The first defendant shall pay the plaintiffs' costs on this summary judgment application on a 2B basis fixed at $8,960.00 and disbursements of $640.00;

(c) The first defendant shall pay the second defendants' costs fixed at $4,641.80;

(d) The first defendant shall pay the costs and disbursements in [24](b) and (c) above personally, and shall not be reimbursed from the estate of WJ Burnside either for those costs and disbursements or for his own costs and disbursements of and incidental to this proceeding.

'Associate Judge D.I. Gendall'