IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA634/2018
[2019] NZCA 222

BETWEEN	DAIL MICHAEL JOHN JONES Appellant
AND	ANGELA O'KEEFFE Respondent

Hearing: 7 May 2019

Court: Courtney, Venning and Lang JJ

Counsel: J W H Little and J K Grimmer for Appellant
C E Wiseman for Respondent

Judgment: 13 June 2019 at 2.30 pm

JUDGMENT OF THE COURT

A The order that Mr Jones is to pay the actual and reasonable costs incurred by Ms O'Keeffe in her application to remove him as trustee is set aside.

B Ms O'Keeffe is to be reimbursed from the trust for the actual and reasonable costs incurred by her in relation to her application to remove Mr Jones as trustee.

C Mr Jones is to reimburse the trust for the costs incurred by Ms O'Keeffe in relation to all steps in the proceedings after, but not including, the amended application for interlocutory orders dated 6 July 2018, including the costs of the hearing. Those costs are to be calculated on an actual and reasonable solicitor/client basis and are to include disbursements.

D **The reasonableness of the above costs is to be assessed by a senior barrister in accordance with the direction of the Judge at [29] of the judgment under appeal.**

E **Mr Jones is not entitled to be reimbursed from the trust for any costs associated with his opposition to the application to have him removed as trustee.**

F **Costs on the appeal are to lie where they fall. Neither party is to be reimbursed out of the estate for the costs associated with this appeal.**

REASONS OF THE COURT

(Given by Venning J)

[1] Angela O'Keeffe and Dail Jones were appointed executors and trustees of the estate of Daniel O'Keeffe. Issues arose between Ms O'Keeffe and Mr Jones as to the administration of the trust under the will. Ultimately Ms O'Keeffe applied to the High Court to have Mr Jones replaced as trustee.

[2] During the course of the proceedings both Ms O'Keeffe and Mr Jones agreed to their replacement as trustees by the Public Trust. The only remaining issue was costs. After hearing from both parties Palmer J ordered Mr Jones to pay the costs Ms O'Keeffe had incurred on an indemnity basis with the reasonableness of the costs to be assessed by a senior barrister.[1]

[3] Mr Jones appeals that decision.

Background

[4] Daniel O'Keeffe and his wife Mary (known as Molly) had seven children. Ms O'Keeffe is one of their daughters. Daniel died on 27 March 2009 aged 85. His estate consisted of a large property at Waitakere, cash of $130,000 and personal effects. He left a life interest in his estate to Molly on condition that she allow another

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[1] *O'Keeffe v Jones* [2018] NZHC 2482, (2018) 4 NZTR 28-030 [High Court judgment] at [29].

daughter, Maria to live in a separate dwelling Maria built on the Waitakere property. He appointed Ms O'Keeffe and Mr Jones, his solicitor, as his executors and trustees. Upon Molly's death Maria was to receive the value of her dwelling as a specific bequest. The residue was then to be divided between five of the seven children, including Ms O'Keeffe.

[5] One of the children, Patrick, who was entitled to a share of the residue of Daniel's estate, died intestate on 20 January 2012. As he left neither partner nor children his estate went to his mother, Molly.

[6] Molly died on 17 July 2017. Under her will she left her estate to be divided equally between all her children. The main asset of her estate was the interest in Daniel's estate she received following Patrick's death.

[7] The combined effect of Daniel's and Molly's wills was that, after the specific bequest to Maria, four children (Maria, Angela, Dennis and Daniel Jnr) were each to receive 23.33 per cent of the net assets remaining. The other two surviving children (Catherine and Margaret) were each to receive 3.33 per cent.

[8] From an early stage and shortly after Daniel's death issues arose between Ms O'Keeffe and Mr Jones regarding the approach to be taken to the administration of Daniel's estate. The issues came to a head in 2017.

[9] On 13 October 2017 Ms O'Keeffe wrote to Mr Jones, copying her letter to all the beneficiaries. She said there was a deadlock between them, trust debts were not being met, and Mr Jones was in breach of trust by refusing to make payments and by taking unilateral actions without her agreement. On 20 October 2017, Mr Jones replied with a letter to all beneficiaries in which he rejected the accusations. He blamed Ms O'Keeffe for refusing to carry out the ordinary administration of an estate.

[10] The family were not united in their support of Ms O'Keeffe's position. While Maria, Margaret and Daniel Jnr supported Ms O'Keeffe, Dennis and Catherine

supported Mr Jones and considered that Ms O'Keeffe should be the one to step down rather than him.

Procedural background

[11] As the issues remained unresolved, on 16 March 2018 Ms O'Keeffe filed proceedings. She sought a preliminary order permitting the application to be brought as an originating application. She then sought a substantive order removing Mr Jones as trustee and either appointing Ivan Vodanovich or another solicitor of the Court's choosing in his place or, in the alternative, replacing both Mr Jones and Ms O'Keeffe with the Public Trust.

[12] Ms O'Keeffe also sought orders requiring Mr Jones to pay all or part of the costs of the application on a solicitor/client basis and for any of her costs not paid by Mr Jones to be met by the trust.

[13] The application was supported by an affidavit and memorandum of counsel. In the memorandum Ms Wiseman confirmed that Ms O'Keeffe sought to remove Mr Jones as a trustee and replace him with an alternative solicitor trustee and that costs were sought against Mr Jones personally.

[14] Mr Jones responded by a memorandum of 6 April 2018. He said he supported the appointment of the Public Trustee as the sole trustee in replacement for both Ms O'Keeffe and himself. He denied misconducting himself in the administration of the trust and set out a number of grounds upon which he alleged Ms O'Keeffe had misconducted herself as trustee. Mr Jones also filed an affidavit in reply to Ms O'Keeffe's affidavit.

[15] In an updating memorandum of 11 April 2019 Ms Wiseman, for Ms O'Keeffe, repeated her position that she believed it was in the trust's best interests for her to continue as trustee together with a new trustee, noting that the Public Trust was a last resort alternative.

[16] The matter came before the High Court in a duty judge list on 16 April 2018. In the course of that conference Muir J recorded:

> [3] I have commended to Ms Wiseman careful consideration of Mr Jones' position given that retirement of both trustees and appointment of the Public Trust seems to me (provisionally) to be an efficient and cost effective means of dealing with the various difficulties that have thus far arisen in the administration of the Trust. Ms Wiseman will discuss that issue further with her client. …

[17] The Judge then went on to make a number of other orders to advance the proceeding, including directions as to service. He granted leave for the proceedings to be commenced by way of originating application (Mr Jones not opposing) and made orders timetabling the substantive application towards a hearing if necessary. Orders were also made by consent in relation to a number of practical issues that Ms O'Keeffe sought to have addressed relating to the operation of the bank account and payments. The Judge also recorded Mr Jones was prepared to actively co-operate to ensure the payment of accounts.

[18] In accordance with the timetable set by the Judge, Mr Jones filed and served a formal notice of opposition on 23 April 2018 confirming his support for the appointment of Public Trust in substitution for both himself and Ms O'Keeffe.[2]

[19] The Court allocated a fixture for 10 August 2018.

[20] On 2 July 2018 Ms Wiseman advised the Court that it appeared the parties may have reached substantial agreement. An extension of the timetable was sought.

[21] On 6 July 2018 Ms O'Keeffe filed an amended interlocutory application for directions. In that she sought orders removing her and Mr Jones as trustees and appointing Public Trust. In terms of costs she sought orders that:

> 5. Public Trust is directed to pay the following from Trust funds when funds become available:
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> (i) Reimbursement to Angela O'Keeffe of the solicitor/client costs incurred by her as a trustee in bringing these proceedings, such costs to be first vetted by the Court or Public Trust for reasonableness;
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> …

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[2] The respondent takes issue with the notice of opposition not being served on her counsel at the same time. Nothing turns on that as the notice was served on the respondent's solicitor's address for service as required by the High Court Rules 2016, r 6.1(1)(b).

In the alternative to the above orders Ms O'Keeffe sought an amended timetable to the fixture.

[22] The amended application was accompanied by a further memorandum of counsel and a further affidavit in reply to Mr Jones' affidavit.

[23] Mr Jones filed a memorandum dated 10 July 2018 confirming that he had always consented to the appointment of Public Trust as sole trustee but submitting that, as Ms O'Keeffe was apparently discontinuing her claim which could have been withdrawn when the matter was called before Muir J, she should not be eligible to recover the costs she had incurred either from the estate or any other party.

[24] On 11 July 2018 counsel for Ms O'Keeffe filed a further memorandum seeking the Court's directions. She proposed consent orders leaving the issue of costs to be dealt with on a contested basis. Counsel noted that Ms O'Keeffe may seek an order Mr Jones pay the costs "personally, whether directly or by way of indemnity to the estate".

[25] The matter came before Wylie J on 12 July 2018. The Judge issued a minute in which he recorded matters had been largely resolved. He noted that Mr Jones accepted that all the orders sought in the amended application could be made with the exception of Ms O'Keeffe's application to be reimbursed her solicitor/client costs. The Judge directed Ms O'Keeffe to file a draft consent order and made directions for a hearing in relation to Ms O'Keeffe's application for solicitor/client costs, noting the application was to be heard at 10.00 am on 10 August 2018 (with an estimate of one hour). The Judge noted the hearing would be of a narrow compass. No orders were made for the exchange of submissions in advance.

[26] Mr Jones then filed an opposition on 18 July 2018 which set out the grounds upon which he opposed Ms O'Keeffe's application to recover her solicitor/client costs from the trust on an indemnity or other basis.

[27] On the same day the Court also approved the consent orders presented to it.

[28] Although Ms O'Keefe and Mr Jones were not required to, they did exchange submissions. Ms O'Keeffe submitted Mr Jones should pay the costs personally while Mr Jones argued only the costs relating to a consent application for the appointment of the Public Trust should come out of the estate and Ms O'Keeffe should bear the rest of the costs.

Palmer J's decision

[29] Palmer J considered Mr Jones had taken an antagonistic approach to Ms O'Keeffe.[3] He accepted it was appropriate for Ms O'Keeffe to have sought the Court's directions.[4] There was no reason why her costs in bringing the proceeding should not be payable from the estate.[5]

[30] The Judge referred to the principles derived from the High Court Rules 2016 including that a losing party pays a winning party a contribution for costs and also referred to the provisions relating to indemnity costs. The Judge also noted that s 71 of the Trustee Act 1956 provided the Court with a broad discretion in relation to costs referring to previous decisions of his and the decision of *Borell v Tangitu*.[6]

[31] The Judge considered Mr Jones should personally pay the actual and reasonable costs Ms O'Keeffe had incurred.[7] He summarised his reasons for coming to the view as:

> [27] Given the questionable nature of Mr Jones' administration of the estate as a trustee, the deadlock between trustees warranting the application, and his conduct prolonging the proceeding unnecessarily, I consider he should pay actual and reasonable indemnity costs to Ms O'Keeffe personally. The beneficiaries of the trust should not have to bear these unnecessary costs.

[32] The Judge then noted the overall quantum of the costs sought seemed high.[8] He made orders requiring Ms O'Keeffe to provide invoices showing the costs incurred

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3 High Court judgment, above n 1, at [24].
4 At [23].
5 At [23].
6 At [19]–[20]; citing *Burnside v Burnside (No 2)* [2017] NZHC 1678 at [9]; *Aitkenhead v Kooperberg* [2017] NZHC 3071 at [15]; and *Borell v Tangitu* (1990) 1 NZTR 0-001 (HC) at 27.
7 At [27].
8 At [28].

in removing Mr Jones as trustee to a senior barrister for review of their reasonableness.[9]

The appeal

[33] Mr Jones says the Judge was plainly wrong to require him to pay Ms O'Keeffe's costs on an indemnity basis. He seeks an order setting aside the judgment and awarding him costs on the appeal.

Issues

[34] The principal issue is whether Mr Jones should be required to personally pay the costs (or part thereof) incurred by Ms O'Keeffe in relation to the application to remove him as trustee, and, if so, whether it should be on an indemnity basis.

[35] There is a related issue as to whether the costs order is made under s 71 of the Trustee Act or Part 14 of the High Court Rules (and whether there is a difference between the two).

Mr Jones' case

[36] Mr Little submitted the Judge fell into error in a number of ways. First, he conflated two questions, namely:

(a) whether Mr Jones should be required to pay Ms O'Keeffe's costs personally as opposed to them being met from the estate; and

(b) if so, whether he should be required to pay those costs on an indemnity basis as opposed to scale costs with any remaining costs to be met from the estate.

[37] Second, the Judge was wrong to make and rely on findings of questionable conduct in relation to Mr Jones' administration of the trust prior to the proceeding for the purposes of justifying his decision to award indemnity costs. If a trustee has acted

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9 At [29].

badly prior to a proceeding and been in breach of their duty as trustee, then the appropriate course is to bring an action for breach of trust. In such a case the allegations can be properly tested and any loss occasioned properly quantified. Because Mr Jones consented to the Public Trust's appointment and Ms O'Keeffe agreed to that during the course of the proceeding there was never a defended hearing in which Mr Jones' conduct could be properly examined.

[38] Related to that, Mr Little submitted it was wrong for the Judge to have apparently drawn an adverse inference from the fact Mr Jones did not offer detailed evidence in rebuttal of Ms O'Keeffe's allegations. Mr Jones never sought to lead evidence in response because the allegations became irrelevant to the proceeding. From the earliest point Mr Jones agreed that he should go. His focus was on whether Ms O'Keeffe should remain as trustee and whether her costs should be paid by the estate.

[39] Next, Mr Little submitted the Judge was wrong to find that Mr Jones prolonged the proceedings unnecessarily. Mr Jones had always consented to the Public Trust's appointment. On the other hand, Ms O'Keeffe only accepted the Public Trust option as a last resort. While accepting that Mr Jones' opposition to the cost orders sought by Ms O'Keeffe contributed to the length of the proceeding, Mr Little submitted that Mr Jones' opposition to the payment of the costs was reasonable in the circumstances.

[40] In summary, Mr Little submitted no order should have been made against Mr Jones; Mr Jones' conduct prior to the proceeding was not relevant to the issue of costs and Ms O'Keeffe was not successful in remaining a trustee as she had initially sought.

[41] Alternatively, if a personal costs order against Mr Jones was appropriate for any part of the proceedings, Mr Little submitted costs should be awarded on a scale basis with Ms O'Keeffe to look to the trust for the remainder of her reasonable and actual costs. Mr Jones' conduct fell well short of the threshold required for an indemnity costs award.

Respondent's submissions

[42] Ms Wiseman submitted that Ms O'Keeffe had incurred legal costs in her capacity as trustee in bringing the proceedings to remove Mr Jones. She was entitled to be indemnified for those costs.

[43] Ms Wiseman then submitted that it was Mr Jones' conduct before the proceedings which caused the costs to be incurred. Mr Jones' conduct had made the proceedings necessary. In her submission the heart of the problem was Mr Jones' insistence that trust funds be transferred to his firm's trust account. She submitted that the evidence as to what she characterised as Mr Jones' misconduct was not contested by Mr Jones.

[44] Ms Wiseman submitted the Court should not accept the submission for Mr Jones that he would have agreed to retire voluntarily had Ms O'Keeffe proposed the Public Trust as an option prior to proceedings being brought. She noted that, as Palmer J had put it, Mr Jones "practically dared" Ms O'Keeffe to bring the proceedings.[10]

[45] Next Ms Wiseman submitted that Mr Jones' conduct during the proceedings increased the costs. She characterised his agreement to resign and to the appointment of the Public Trust as conditional. She noted that Mr Jones took the position Ms O'Keeffe should resign as well and should not receive any reimbursement for her costs.

[46] Ms Wiseman submitted that whether Mr Jones should be required to compensate the trust for costs caused by his unreasonable conduct was a question to be determined under trustee law rather than the High Court Rules. She referred to s 71 of the Trustee Act, and also to *Butterfield v Public Trust*.[11] In that decision this Court had noted the right to indemnity from trust assets for administration of the trust is not the same as an award of indemnity costs in litigation.[12] She submitted that

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10 At [24].
11 *Butterfield v Public Trust* [2017] NZCA 367, [2017] NZAR 1439.
12 At [21].

the application of relevant trustee law principles supported the order of costs against Mr Jones.

[47] In the alternative Ms Wiseman submitted that if the High Court Rules applied, Mr Jones met the threshold for indemnity costs under the rules. Mr Jones was on clear notice from counsel's reply memorandum that Ms O'Keeffe would be seeking an order that he pay the costs personally.

[48] Ms Wiseman submitted the appeal should be dismissed together with costs.

Approach to the appeal

[49] The appeal is against a decision made in the exercise of a discretion. Mr Jones has to show an error of law or principle, or that the Judge took account of irrelevant considerations, failed to take account of a relevant consideration or was plainly wrong.[13]

The scope of the Part 19 proceedings

[50] We consider the Judge fell into error in finding that Mr Jones' administration of the estate was of a "questionable" nature,[14] and relying on that finding and his pre-proceeding conduct to impose indemnity costs against him.

[51] The context of the application and the ambit of the hearing before Palmer J are important. This was an originating application under pt 19 of the High Court Rules rather than a proceeding under pt 18. Applications under the Trustee Act are generally required to be brought under pt 18 of the High Court Rules, and to be commenced by way of statement of claim.[15]

[52] The originating application procedure under pt 19 is normally limited to cases where particularised pleadings and interlocutory steps such as discovery are not

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13 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
14 High Court judgment, above n 3, at [27].
15 High Court Rules 2016, rr 18.1(b)(xiii) and 18.4(1)(a). See also the discussion in *Public Trust v Kain* [2018] NZHC 1547, (2018) 4 NZTR 28-012 at [12]–[21].

necessary for the proper determination of issues. It is not appropriate where factual issues are in dispute.

[53] While Muir J granted leave for the proceeding to be commenced by way of originating application under pt 19 of the High Court Rules, that was in circumstances where Mr Jones did not oppose that procedure and, importantly, Mr Jones had also confirmed he would stand down in favour of Public Trust. The only substantive issue remaining before the Court was whether one or both trustees should be replaced.

[54] Where the issue is limited to whether a trustee should resign or be replaced the approach that should be taken was explained in *Letterstedt v Broers* by Lord Blackburn as follows:[16]

> [I]f it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; …

[55] While there will need to be some consideration of the background to the relationship between the trustees and with the beneficiaries, as the Full Court of this Court said in *Hunter v Hunter*:[17]

> But, in any event, it is of no value to enter upon a meticulous examination of the evidence without first ascertaining the principle upon which the Court acts in a proceeding for the removal of trustees. And when that principle is ascertained, … the case is essentially one, … to be considered … in macroscopic and not microscopic fashion.

[56] And later, after referring to *Letterstedt v Broers*:[18]

> It is said that the jurisdiction is merely ancillary to the principal duty of the Court to see that the trusts are properly executed, and that, therefore, though it should appear that the charges of misconduct are either not made out, or are greatly exaggerated, so that the trustees are justified in resisting

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16 *Letterstedt v Browers* (1884) 9 App Cas 371 at 386.

17 *Hunter v Hunter* [1938] NZLR 520 (CA) at 528 (citation omitted); citing *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57 (HL) at 62.

18 At 529.

> them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustees would prevent the trusts being properly executed, the trustees may be removed.

[57] The issue of removal was resolved before the hearing in front of Palmer J. It was unnecessary for the Judge to make findings that Mr Jones had acted in a questionable way and thus effectively in breach of trust to determine the only issue before him which was the issue of costs. The Judge fell into error in making such a finding, particularly without Mr Jones having the opportunity to respond to proper pleadings, to obtain and provide discovery, or to cross-examine Ms O'Keeffe.

[58] To support his conclusion that Mr Jones should pay the costs personally the Judge referred to his previous decision of *Burnside v Burnside (No 2)*.[19] However, in *Burnside* there had been a three-day hearing during which the parties had litigated about a number of aspects of the administration of the estate.[20] The case can be distinguished from the confined nature of the application and hearing in the present case.

[59] The Judge also referred to the decision of *Borell v Tangitu*.[21] In that decision Fisher J observed that, in appropriate cases, orders can be made that costs be awarded against trustees personally where it appears that their own deficiencies have been the cause of loss to the estate and considered that must extend also to the costs of beneficiaries who, due to the dilatoriness or lack of cooperation of the original trustees, are put to the trouble of having to bring proceedings.[22] In general terms that must be correct. But each case must of course turn on its own facts. In *Borell* itself there was no suggestion the costs awarded were other than the costs of the proceedings. Further, the reference to plaintiffs in the decision suggests that the proceedings were brought under pt 18 of the rules rather than pt 19.

[60] None of this is to suggest that in an appropriate case costs will not be awarded against a trustee who is removed. But neither the form of the proceedings nor

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19 *Burnside v Burnside (No 2)*, above n 6.
20 *Burnside v Burnside* [2017] NZHC 595.
21 *Borell v Tangitu*, above n 6.
22 At 26.

the matter at issue in the hearing before the Judge supported any detailed inquiry into Mr Jones' pre-proceeding conduct in this case.

The High Court Rules

[61] When considering costs under the High Court Rules the focus is on how parties acted during the litigation, not before it. In *Paper Reclaim Ltd v Aotearoa International Ltd* this Court set aside a costs judgment where, in awarding costs, the Judge had relied on conduct prior to the issue of the proceedings:[23]

> [160] Our third reason for setting aside the costs judgment is that the judge was wrong to take into account Paper Reclaim's conduct generally from 1999 through to February 2001. If that conduct was wrongful, then the remedy is damages. Aotearoa did not plead any breach of contract relating to that period, save for sales to Carter Holt, which we have found not to have been in breach of the joint venture agreement. So the reasoning of the Judge on this topic was doubly unfair to Paper Reclaim: His Honour not only took into account conduct which had never been pleaded as wrongful, but also took it into account with respect to costs, to which it could never have been relevant.

[62] The Supreme Court upheld that approach.[24] That reinforces our conclusion that if Ms O'Keeffe wished to pursue allegations of breach of trust or mishandling of trust finances against Mr Jones, the proper procedure would have been to bring a claim for breach of trust. The pre-proceedings' conduct of Mr Jones was not relevant to costs in this case.

[63] In *Kain v Hutton* this Court considered the issue of costs following an application to remove trustees for breach.[25] It rejected the application insofar as it focused on past conduct.[26] As the Court observed, the decision in regard to costs was more related to the parties' conduct in the litigation and their success in the substantive appeal rather than whether the trustees should have been removed for breach.[27] Again, in that case the first instance hearing which dealt with the removal issue involved a fully contested hearing involving extensive cross-examination.

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23 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA).
24 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [40]–[41].
25 *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349.
26 At [265].
27 At [265].

[64] Once Mr Jones accepted that it was appropriate he and Ms O'Keeffe should be removed as trustees and replaced by Public Trust, the only issues left were whether Ms O'Keeffe would agree to be replaced by the Public Trust and costs. As to costs, the only issue was the conduct of the parties in relation to the application. Mr Jones' pre-proceeding conduct was not relevant.

The Trustee Act

[65] Do the provisions of the Trustee Act affect that position?

[66] There are two provisions of the Trustee Act relevant to the issue of costs in this case. Section 38(2) confirms that a trustee is entitled to be indemnified or reimbursed for all expenses reasonably incurred in the administration of the trusts. It is one of the fundamental rights of an honest trustee that the costs and expenses properly incurred in the administration of the trust are payable out of the assets of the trust.[28]

[67] The trustee's entitlement to indemnity is, in the first instance against the trust and its assets.[29] Taking unnecessary proceedings or unnecessary procedural steps may mitigate or eliminate the right to be indemnified.[30] Excessive or unreasonable costs also lie beyond the scope of indemnity.

[68] As noted, Ms Wiseman referred to the case of *Butterfield*, to make the point that the right to indemnity under the Trustee Act is not the same as an award of indemnity costs in litigation. That is correct, a trustee's right to indemnification from the trust assets is quite different to the discretion residing in the Court to order party and party costs under the High Court Rules including, in appropriate cases, on an indemnity basis. But with respect, that point does not assist with determining whether the provisions of the Trustee Act require a different approach to costs in the present case.

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28 *Butterfield v Public Trust*, above n 11, at [20].

29 *Re Grimthorpe* [1958] Ch 615 at 623; and *Butterfield v Public Trust*, above n 11, at [21].

30 *New Zealand Māori Council v Foulkes* [2015] NZHC 489, (2015) 4 NZTR 25-003 at [31]. See also Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet & Maxwell, 2014) at [27–113]; *Patterson v Wooler* (1876) 2 Ch D 586; *Re Chapman* (1895) 72 LT 66 (CA) at 68; and *Re O'Donoghue* [1998] 1 NZLR 116 (HC) at 121–122.

[69] While s 38 provides for reimbursement of all expenses reasonably incurred in or about execution of the trusts or powers, s 71 provides the Court may make orders relating to the costs and expenses of and incidental to any application for an order under the Act. The Court may order the costs be raised and paid out of the trust property or be borne and paid in such manner and by such persons as to the Court may seem just.

[70] Section 71 is broader in scope in relation to costs than the High Court Rules. The rules provide generally for costs inter partes (although costs can in an exceptional case be ordered against a non-party),[31] whereas s 71 provides both for the source of the payment and also expressly confirms the costs and expenses may be paid by any person the Court deems it just to fix with costs.

[71] Both s 71 and r 14.1 refer to costs of and/or incidental to an application or proceeding.[32] In *Braeburn Dairies Ltd v McGregor & White Electrical Ltd* the phrase "incidental to a proceeding" under the High Court Rules was considered by French J to require a proceeding to be extant before costs could be incidental to it.[33]

[72] The reference to "costs and expenses of and incidental to any application" under s 71 may enable the Court to award or provide for costs incurred prior to but necessarily incidental to the issue of the application. In *Newall v North-Lewis* the High Court of England and Wales considered the meaning of "costs of and incidental to all proceedings" under s 51(1) of the United Kingdom Supreme Court Act 1981 and accepted that such costs could extend to work required to investigate the affairs of the trust prior to making an application to remove a trustee.[34] Briggs LJ referred to *Re Gibson's Settlement Trust* and the principle enunciated therein that the Court should investigate whether the product of the relevant expenditure constituted "materials ultimately proving of use and service in the action".[35]

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31 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [7] and [25]. See also Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HRPt14.09(1)(a)]

32 Trustee Act 1956, s 71: "costs and expenses of and incidental to any application"; and High Court Rules, r 14.1 "costs… of a proceeding; or …incidental to a proceeding".

33 *Braeburn Dairies Ltd v McGregor & White Electrical Ltd* HC Dunedin CIV-2009-412-668, 16 December 2011 at [14].

34 *Newall v North-Lewis* [2008] EWHC 910 (Ch).

35 At [45]; citing *Re Gibson's Settlement Trust* [1981] Ch 179 at 186.

[73] In *Butterfield v Public Trust* this Court also acknowledged that the jurisdiction to award costs may be broader under s 71 of the Trustee Act.[36] When considering whether the Judge was right to reject the former trustee's application for costs this Court said:

> [19] Reliance might instead have been placed on s 71 of the Trustee Act. It is not confined to an award of litigation party and party costs, but extends to an indemnity for expenses of and incidental to an application. Permitted applicants are not confined to express trustees. However the provision was not relied on here. Perhaps that was because the appellants had in mind seeking costs other than in relation to the three applications. If so, that was no longer their position before us.

[74] Even if s 71 may support a broader approach in some cases, in the present case there is little practical difference in the outcome between the application of the High Court Rules or the Trustee Act. Clearly, some investigation and background work was required before the application to remove Mr Jones as trustee could be filed. The High Court Rules provide for this by making an allowance for time allocations in relation to the commencement of proceedings.[37] That allowance necessarily includes time for the applicant to take advice and for the preparation of the application. That is all that was required in the present case because Ms O'Keeffe, as the other trustee, was fully aware of the background facts. There was no need for the type of detailed investigation discussed in *Newall's* case. So far as s 71 of the Trustee Act provides for the recovery of costs of and incidental to the application it does not add anything in this particular case.

[75] Further, where the issue is whether indemnity costs should be awarded against a trustee because of their actions during the course of a proceeding, it is unlikely a court would order indemnity costs under s 71 unless the trustee had acted in a way which would also support an award of indemnity costs under r 14.6(4).

The costs of the proceedings

[76] Against that background, we approach the issue of costs afresh.

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[36] *Butterfield v Public Trust*, above n 11.

[37] Schedule 3 to the High Court Rules provides for a time allocation for commencement of proceedings.

[77] Ms O'Keeffe's application to replace Mr Jones, or for both Mr Jones and her to be replaced, was a proper application for her to have brought. The relationship between the two had broken down. It was affecting the administration of the trust. The beneficiaries were divided as to which one of them should retire. Unfortunately, the application was complicated by the costs order she sought at the outset, namely that Mr Jones should personally pay the costs of the application.

[78] Mr Jones acted reasonably in response to the application by immediately agreeing to his removal and replacement by Public Trust on the basis Ms O'Keeffe resigned as well. It was also reasonable for Mr Jones to oppose the aspect of the application that sought an order he pay the costs personally. At that stage of the proceedings an order that Ms O'Keeffe's costs be met out of the estate would have been appropriate. An order that Mr Jones be required to pay the costs could not have been justified, particularly given the division between the beneficiaries and the support by some of them for Mr Jones.

[79] Unfortunately, Ms O'Keeffe did not accept that. In counsel's memorandum of 11 April 2018, she confirmed her preference to remain as trustee and persisted with the allegation that Mr Jones had misdirected himself in the administration of the trust. Her counsel said that misconduct had caused loss to the trust. For the reasons given above, the originating application before the Court was not the appropriate vehicle for such an allegation.

[80] Further, despite Muir J's indication, Ms O'Keeffe still, for some time thereafter, continued to oppose the suggestion she be replaced as trustee.

[81] Ultimately however, Ms O'Keeffe agreed that she and Mr Jones should be replaced by Public Trust and brought the amended application on 6 July 2018 seeking such an order. The amended application accepted both trustees would resign in favour of the Public Trust. Ms O'Keeffe sought reimbursement of her costs in bringing the proceedings with the costs first to be "vetted by the Court or Public Trust for reasonableness".

[82] Mr Jones' opposition to that amended application was itself unreasonable. He opposed the order in its entirety and on a number of irrelevant and argumentative grounds. That opposition meant the costs hearing before Palmer J was required.

[83] Mr Jones should bear the costs of the proceedings after (but not including) the amended application dated 6 July 2018. Those costs are to be on an indemnity basis (actual and reasonable) as a consequence of Mr Jones' unreasonable opposition to the proposal in the amended application and his unreasonable refusal to accept (until belatedly in his submissions for the hearing) that Ms O'Keeffe should have any costs at all from the trust.

Result

[84] The order that Mr Jones is to pay the actual and reasonable costs incurred by Ms O'Keeffe in her application to remove him as trustee is set aside.

[85] Ms O'Keeffe is to be reimbursed from the trust for the actual and reasonable costs and disbursements incurred by her in relation to her application to remove Mr Jones as trustee.

[86] Mr Jones is to reimburse the trust for the costs incurred by Ms O'Keeffe in relation to all steps in the proceedings after, but not including, the amended application for interlocutory orders dated 6 July, including the costs of the hearing. Those costs are to be calculated on an actual and reasonable solicitor/client basis and are to include disbursements.

[87] The reasonableness of the above costs is to be assessed by a senior barrister in accordance with the direction of the Judge at [29] of the judgment under appeal.

[88] Mr Jones is not entitled to be reimbursed from the trust for any costs associated with his opposition to the application to have him removed as trustee.[38]

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[38] Mr Jones would have been entitled to seek costs as a practising solicitor: *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

Costs of the appeal

[89] Given that both parties have had a measure of success in relation to this appeal costs on the appeal are to lie where they fall. To clarify, neither party is to be reimbursed out of the estate for the costs associated with this appeal.

Solicitors:
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