

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 118/2019
[2023] NZSC 7

BETWEEN LAMBIE TRUSTEE LIMITED
 Appellant

AND PRUDENCE ANNE ADDLEMAN
 Respondent

Court: William Young, Glazebrook, O'Regan, Ellen France and
 Williams JJ

Counsel: D A T Chambers KC for Appellant
 A S Ross KC and R A Rose for Respondent

Judgment: 17 February 2023

JUDGMENT OF THE COURT

- A Mrs Addleman is to receive out of the Lambie Trust her actual costs in relation to the appeal to this Court plus usual disbursements (to be fixed by the Registrar if necessary). We allow for second counsel. Mrs Addleman is to provide a schedule of the costs incurred to Lambie Trustee Ltd within 10 working days of the date of delivery of this judgment. Any issue as to the reasonableness of the costs sought is to be determined by the Registrar.**
- B Lambie Trustee Ltd is not entitled to any indemnity for costs and expenses in connection with the appeal to this Court, including both its own legal fees and any solicitor-client costs and disbursements due to Mrs Addleman.**
- C Lambie Trustee Ltd is to reimburse the Lambie Trust (from funds not sourced from the Trust) the costs awarded by this Court on the appeal.**
- D The orders of this Court at B and C, above, apply to the award of costs in the Court of Appeal.**

E Mrs Addleman is entitled to costs on a 2B basis together with reasonable disbursements in relation to costs in the High Court. Orders B and C, above, apply to the award of costs in that Court.

REASONS
(Given by Ellen France J)

Introduction

[1] In a judgment delivered on 1 June 2021, with one clarification, the Court dismissed an appeal brought by Lambie Trustee Ltd (LTL).¹ The judgment addressed issues arising from the application by the respondent, Mrs Addleman, for disclosure of trust documents. In particular, the judgment dealt with whether LTL could resist disclosure of legal advice on the basis of legal advice or litigation privilege. We reserved costs and sought submissions from the parties if agreement could not be reached.

[2] Submissions for the parties have now been received. Those submissions raise the following questions:

- (a) Whether this is a case where Mrs Addleman should receive her actual costs and disbursements regarding this appeal from the Lambie Trust (the Trust).
- (b) Whether LTL is entitled to any indemnity from the Trust for costs and expenses incurred in relation to the proceeding, including both its own legal costs and any costs due to Mrs Addleman, and whether it should be required to reimburse the Trust (from funds not sourced from the Trust) the costs awarded to Mrs Addleman.
- (c) The approach to costs in the Courts below.

[3] We deal with the first two questions together as they raise similar issues.

¹ *Lambie Trustee Ltd v Addleman* [2021] NZSC 54, [2021] 1 NZLR 307 [SC judgment].

Entitlement to actual costs and ability to have recourse to the Trust funds

[4] Mrs Addleman seeks reimbursement of her actual costs from the Trust and an order that LTL reimburse the Trust, from funds not sourced from the Trust, any amount of costs the Court awards on the appeal.² She also seeks orders that LTL is not entitled to any indemnity for costs or expenses incurred in relation to the proceeding, including both its own legal fees and any costs due to Mrs Addleman.

[5] In supporting these submissions, Mrs Addleman relies on a range of factors. We mention the following points. First, Mrs Addleman notes that the trustees were well aware of the need to give disclosure to Mrs Addleman and that she was a “principal beneficiary” and yet, she says, LTL aligned itself entirely with the interests of Ms Jamieson (her sister and another beneficiary of the Trust). Further, it is said that there were procedures that LTL could have adopted such as seeking directions from the court or a *Beddoe*³ or prospective costs order. Finally, Mrs Addleman relies on LTL’s rejection of a settlement offer and on the general proposition that trustees should not lightly pursue appeals.⁴ In the round, Mrs Addleman’s case is that LTL’s actions were not those of a reasonable trustee and/or litigant.

[6] In disputing the claim for actual costs, LTL relies on the unduly wide request for documentation made by Mrs Addleman. LTL says this was not the approach a reasonable beneficiary would take. LTL makes the point that this Court accepted LTL’s case in this respect in part in excluding some material as protected by litigation privilege. LTL maintains the settlement offer came late in the piece and that Mrs Addleman has not quantified the actual costs.⁵ On these grounds, it is said that an award of costs of \$25,000 plus usual disbursements should be made.

[7] In terms of the approach to an indemnity, LTL points to other proceedings brought in the High Court by Mrs Addleman which claim breach of trust by LTL. The

² Relying on s 71 of the Trustee Act 1956 and by analogy with a trustee’s right of indemnity. Mrs Addleman cites, for example, Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol 2 [*Lewin*] at [48-041], [48-047] and [48-061]; *The Cats’ Protection League v Deans* (2010) 20 PRNZ 584 (HC); and *Goodman v Campbell* [2015] NZHC 2780, [2016] NZAR 78.

³ *Re Beddoe* [1893] 1 Ch 547 (CA).

⁴ Citing *Lewin*, above n 2, at [48-049] for the latter proposition. See also at [48-047]–[48-048].

⁵ In reply submissions, Mrs Addleman has provided a schedule of costs in the Courts below.

submission is that those proceedings are the appropriate forum to determine what is, effectively, an unpleaded claim in the present proceedings for breach of trust. LTL also makes a number of points to support the submission that it acted reasonably in pursuing the appeal. Of these matters, we note first that LTL reiterates the breadth of Mrs Addleman’s application. Second, it argues the fact it did not seek court directions or a *Beddoe* order does not disentitle its indemnity. Third, emphasis is placed on the vulnerability of Ms Jamieson whose interests LTL appropriately sought to protect. Fourth, LTL also makes the point it had some success in the various hearings and, fifth, that there was a sufficient basis for this Court to grant leave to appeal on the question of the proper approach to litigation privilege in this context. Finally, it is submitted that any doubts should be resolved in favour of LTL.

Our assessment

[8] Dealing first with the issue of LTL’s indemnity, there is no real dispute between the parties as to the relevant principles applicable to costs awards in a case such as the present.⁶ In the circumstances it is sufficient to refer to the recent discussion of those principles by the Court of Appeal in *McCallum Jnr v McCallum*.⁷ Relevantly, the Court in that case noted, first, that the right of the trustee to an indemnity for costs and expenses incurred in the course of office is “recognised as an incident of trusteeship”.⁸ The Court continued:⁹

It is to an indemnity for reasonable costs and expenses incurred in the administration of the trust. The entitlement is against the trust itself, and a current trustee is entitled to deduct reasonable costs and expenses incurred in the administration of the trust from trust assets, in exercise of a right of exoneration.

...

The editors of *Lewin on Trusts* observe that a trustee’s indemnity out of the trust fund extends both to his [or her] own costs and any costs he [or she] is ordered to pay other parties, unless the court orders otherwise ...

⁶ In order to resolve this matter the parties did not focus on, and nor is it necessary for us to determine, in which category of trust litigation the present case falls. See, for example, the summary in David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at [4.4]–[4.5]; and *Lewin*, above n 2, at [48-033].

⁷ *McCallum Jnr v McCallum* [2021] NZCA 237, (2021) 32 FRNZ 851. See also Trustee Act, ss 38 and 71.

⁸ At [30].

⁹ At [30] and [32] (footnotes omitted).

[9] The second relevant aspect of costs discussed in *McCallum Jnr* is recognition of the supervisory role of the court to review the costs and expenses incurred. In this respect, we note that the right to indemnity applies to costs “properly incurred”.¹⁰ It is not disputed that “careless and unreasonable conduct in the conduct of litigation” may deprive a trustee of the indemnity.¹¹ Further, as the Court of Appeal noted in *McCallum Jnr*, “[a] trustee partisan in his [or her] own interests or the interests of only some beneficiaries likewise may be deprived of indemnity”.¹²

[10] Applying these principles, on the approach to be taken to costs in this Court, we accept the submissions for Mrs Addleman and agree essentially that the factors identified in those submissions support her position. We reach this outcome primarily because, as we said in the judgment on the appeal, LTL had “aligned itself entirely with Ms Jamieson”.¹³ The Court also made reference in the judgment on appeal to what we saw as the “possibly inappropriate decision” of LTL “to align itself so closely with the interests of Ms Jamieson”.¹⁴ We interpolate here that reliance on the latter’s vulnerability is mis-directed in terms of how we should assess the position on costs. That is because her vulnerability does not detract from the fact that Mrs Addleman was a beneficiary to whom duties were owed.

[11] In terms of the approach to the indemnity, what comprises disqualifying conduct in this context may be “broadly construed” and can, as we have noted above, capture the unreasonable conduct of litigation.¹⁵ Further, it must have been apparent to the trustees that on the authorities some further disclosure, at least, had to be made to Mrs Addleman. We acknowledge the points made by LTL about the width of the disclosure request and the fact that LTL had some, rather limited, success on the appeal. As against those points, albeit it was late, the settlement offer made by Mrs Addleman corresponded closely to the result we arrived at. Acceptance of the

¹⁰ At [31] citing *New Zealand Māori Council v Foulkes* [2015] NZHC 489, (2015) 4 NZTR ¶25-003 at [31]. See *Lewin*, above n 2, at [48-004]–[48-008]; and *Re O’Donoghue* [1998] 1 NZLR 116 (HC) at 120–122.

¹¹ *McCallum Jnr*, above n 7, at [32]. See *Lewin*, above n 2, at [48-007]; and *Bullock and Mullins*, above n 6, at [4.5].

¹² At [32] citing *Lewin*, above n 2, at [48-008]; and see [48-061].

¹³ SC judgment, above n 1, at [97].

¹⁴ At [97]. As is apparent, given the circumstances of this case, we consider this Court can appropriately deal with the question of indemnity.

¹⁵ *McCallum Jnr*, above n 7, at [32].

offer would have reduced the costs incurred. The content of the offer and LTL's abrupt rejection of it removed any reservations there may otherwise have been about Mrs Addleman's suggested approach to costs and indemnity.

[12] Turning to the issue of Mrs Addleman's costs, in this case the factors relevant to whether Mrs Addleman is entitled to her actual costs from the Trust and whether LTL is entitled to an indemnity, overlap. Given our conclusions on the latter issue, it suffices to say we agree with Mrs Addleman that this is an appropriate case to award her actual costs. Although not necessarily conclusive, we also emphasise that LTL could have sought to resolve any doubts about the status of Mrs Addleman and its disclosure obligations to her by commencing a directions application.

[13] Mrs Addleman is to provide a schedule of the costs sought to LTL within 10 working days of the delivery of this judgment. Any issue as to the reasonableness of the costs sought is to be determined by the Registrar.

Costs in the Courts below

[14] The Court of Appeal ordered LTL to pay Mrs Addleman's costs for a standard appeal on a band A basis and usual disbursements.¹⁶ The High Court directed that costs on a 2B basis were to follow the event and provided for memoranda to be filed if counsel were unable to agree.¹⁷

[15] Mrs Addleman notes that the Court of Appeal did not deal with LTL's entitlement to an indemnity nor whether Mrs Addleman is entitled to be reimbursed from the Trust the difference between the amount due to her on a party-and-party basis and her total costs/expenses in the proceeding. She does not wish to have to incur further costs in revisiting these arguments in the Courts below. Mrs Addleman seeks "orders directing any recourse to the Trust's trust fund for costs/expenses related to the information proceeding be consistent with this Court's orders". Quite what that

¹⁶ *Addleman v Lambie Trustee Ltd* [2019] NZCA 480, (2019) 5 NZTR ¶29-016 (Cooper, Clifford and Gilbert JJ) [CA judgment] at [67].

¹⁷ *Addleman v Lambie Trustee Ltd* [2017] NZHC 2054, (2017) 4 NZTR ¶27-016 (Woolford J) [HC judgment] at [75].

means in terms of the quantum of costs sought is not entirely clear but we proceed on the basis actual costs and the removal of LTL's indemnity are sought.

[16] LTL maintains that the lower Courts, and the Court of Appeal in particular, were best placed to assess the submissions on costs on the basis of the arguments before those Courts with the result that the costs orders should stand.

[17] In terms of costs in the Court of Appeal, to the extent that Mrs Addleman seeks to recoup from the Trust the difference between the costs awarded to her and her actual costs, we agree with LTL that the lower Courts were better placed to assess this. However, we accept Mrs Addleman's submission that, given the way LTL has conducted the litigation, it would be unduly onerous for us to refer the matter back to the Court of Appeal and for her to have to reargue the issues about the source of reimbursement of costs or as to the indemnity in that Court. Instead, the approach taken to those matters in this Court should apply, in particular, requiring that Mrs Addleman be reimbursed the costs awarded by the Court of Appeal from the Trust (which LTL must then reimburse the Trust for) and to remove the indemnity for LTL.

[18] The position in the High Court is less clear cut. We agree with Mrs Addleman that it would not be fair to require her to re-litigate issues about costs in that Court but, on the other hand, there are issues about the process followed in that Court that may cast a different complexion on the appropriate approach to costs in that Court. We note, for example, that the High Court in dismissing Mrs Addleman's case accepted LTL's argument that the Trust was in substance a "sole purpose" trust for the benefit of Ms Jamieson and was funded with her money.¹⁸ These issues assumed importance in the High Court decision to dismiss Mrs Addleman's case. In terms of the latter issue, the Court of Appeal in its judgment made the point that the non-disclosure to Mrs Addleman of documents showing the Trust's assets and the way in which they were administered left her "at a considerable disadvantage in her ability to contest" LTL's claims about the source of funding of the Trust.¹⁹ It is not, however, possible for us to resolve such questions about the process followed in the High Court.

¹⁸ HC judgment, above n 17, at [67] and [73].

¹⁹ CA judgment, above n 16, at [45].

[19] Ultimately, given the uncertainties, we have concluded that the best way of resolving the question of costs in the High Court is to let the assessment that costs be set on a 2B basis stand and simply reverse the High Court costs award and remove the indemnity for LTL. That means Mrs Addleman is entitled to costs on a 2B basis and reasonable disbursements from the Trust. LTL must reimburse the Trust for these costs.

Result

[20] For these reasons, we make the following orders:

- (a) Mrs Addleman is to receive out of the Lambie Trust her actual costs in relation to the appeal to this Court plus usual disbursements (to be fixed by the Registrar if necessary). We allow for second counsel. Mrs Addleman is to provide a schedule of the costs incurred to Lambie Trustee Ltd within 10 working days of the date of delivery of this judgment. Any issue as to the reasonableness of the costs sought is to be determined by the Registrar.
- (b) Lambie Trustee Ltd is not entitled to any indemnity for costs and expenses in connection with the appeal to this Court, including both its own legal fees and any solicitor-client costs and disbursements due to Mrs Addleman.
- (c) Lambie Trustee Ltd is to reimburse the Lambie Trust (from funds not sourced from the Trust) the costs awarded by this Court on the appeal.
- (d) The orders of this Court at (b) and (c), above, apply to the award of costs in the Court of Appeal.

- (e) Mrs Addleman is entitled to costs on a 2B basis together with reasonable disbursements in relation to costs in the High Court. Orders (b) and (c), above, apply to the award of costs in that Court.

Solicitors:
Dyer Whitechurch, Auckland for Appellant
Bell Gully, Auckland for Respondent