

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
GENERAL LIST

Revised
(Not) Restricted
Suitable for Publication

Case No. CI-18-05240

ANDREA CALLUS

Plaintiff

v

K.B. INVESTMENTS (VIC) PTY LTD (ACN 098 168 239)
(as trustee of the O'Neil Family Trust)

First Defendant

and

MARK O'NEIL

Second Defendant

JUDGE: HER HONOUR JUDGE MARKS

WHERE HELD: Melbourne

DATE OF HEARING: On the papers

DATE OF RULING: 1 May 2020

CASE MAY BE CITED AS: Callus v KB Investments (No 2)

MEDIUM NEUTRAL CITATION: [2020] VCC 455

REASONS FOR RULING

PRACTICE AND PROCEDURE – COSTS – two distinct claims made in proceeding – plaintiff successful on claim which took most of time, unsuccessful on the other – whether costs should be apportioned – *Hancock v Rinehart (Costs)* [2016] NSWSC 11 – general discretion on costs – turns on own facts

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr J D Catlin

Marshalls + Dent + Wilmoth

For the Defendants

Mr P Crofts

McKean Park

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HER HONOUR:

Background

- 1 On 26 February 2020, I delivered reasons for judgment in this proceeding: *Callus v KB Investments* [2020] VCC 135 (the principal judgment).
- 2 These reasons deal with the appointment of a new trustee of the trust the subject of the dispute, and costs of the proceeding. These reasons should be read together with the principal judgment, and use the same definitions.
- 3 Andrea (the plaintiff) provided written submissions as to the appropriate trustee, and what cost orders should be made. KB and Mark (the defendants) filed written submissions on the same issues, as well as reply submissions. This decision is made after consideration of those submissions, without any hearing.

Appointment of new trustee

- 4 In the principal judgment, I decided that KB should be removed as trustee of the O’Neil Family Trust. A new trustee is therefore required. Although a few legal practitioners were put forward by the parties as possible trustees, there was just one who was agreed to by both – Ian Morrison. I am satisfied he is an appropriate appointment. He has the necessary qualifications and experience, and his letter produced to the Court demonstrates he has given careful consideration to how he will approach his role if appointed.

Costs issues

- 5 Andrea seeks orders that Mark pay her costs of the proceeding on the standard basis. She also says that KB should not be indemnified for its costs from the trust estate.

6 Mark and KB seek orders that:

- Andrea pay her own costs (that is, each party bear their own costs);
- Or (if the Court is against them on this) Andrea's costs should be offset against their costs, and any costs due to her:
 - be borne out of the trust estate; or
 - be paid by KB.

7 The starting point for any costs order is that costs are in the Court's discretion, and the rule that costs follow the event unless otherwise ordered ought not be construed as fettering the discretion of the Court.

Costs should be apportioned

8 Andrea was successful in obtaining the major aspect of the relief she sought: to have KB removed as trustee, and an independent trustee appointed. She was not successful in seeking relief arising from the alleged misappropriation of Venus Bay. She seeks all her costs of the proceeding.

9 I accept Mark and KB's submission that it is appropriate costs be apportioned in this case.

10 Often where a plaintiff is successful, costs of the entire proceeding are ordered against the defendant, on the basis that costs follow the event. However, in some circumstances where distinct claims have occupied a significant amount of time in the proceeding on which the plaintiff has not been successful, costs may be apportioned. As stated in *Hancock v Rinehart (Costs)* [2016] NSWSC 11 at [7]:

In considering liability for costs as between parties to litigation, although the "ordinary rule" is that a successful plaintiff is entitled to its costs, a successful plaintiff who has failed on certain issues may be deprived of costs in respect of those issues, or even ordered to pay the defendant's costs of them. This is particularly so where a clearly definable and severable issue on which the otherwise successful party failed has occupied a significant part of the trial. The following propositions, of

particular relevance in the present context, were stated by Toohey J in *Hughes v Western Australian Cricket Association*, and have been repeatedly cited with approval:

1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order.
2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed.
3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, "issue" does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. (references omitted).

[footnotes omitted]

11 This is a case that I am satisfied calls for the apportionment of costs, principally because Andrea made two distinct claims and was not successful on one of them.

12 The authorities make clear that in apportioning costs the Court should do it primarily as 'a matter of impression and evaluation', 'rather than with arithmetical precision, having considered the importance of the matters upon which the parties have been successful or unsuccessful, the time occupied and the ambit of the submissions made, as well as any other relevant matter': see *Chen v Chan* [2009] VSCA 233 at [10(5)] citing *Major Engineering Pty Ltd v Helios Electroheat Pty Ltd (No 2)* [2006] VSCA 114 at [5].

13 As stated in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 at 152-154, the Court should not be too ready to disallow costs against a successful party who has failed on an issue, unless it is in relation to a separate and distinct issue or there is element of unreasonableness or inappropriate conduct in relation to that issue.

14 Andrea made two distinct claims in this case, seeking separate relief:

- That the title to Venus Bay be transferred back to the trust, alternatively, Mark pay compensation equal to the value of Venus Bay (this claim was unsuccessful).
- That KB be removed as trustee (this claim was successful, and Andrea has obtained the relief she sought).

15 Andrea was successful in relation to the removal of trustee claim. This aspect took most of the time in submissions and at trial. I take this success into account in relation to liability for costs.

16 Although they were distinct claims (seeking separate relief), Andrea also included the allegation that KB had wrongfully transferred Venus Bay to Mark as one of the reasons that she said KB should be removed as trustee. Andrea submits that because she was successful in having KB removed as trustee, and as one of the reasons she pleaded this should occur was the alleged wrongful transfer of Venus Bay, she should have her costs of the entire proceeding paid, including in relation to both claims. However, Andrea was unsuccessful in establishing the wrongful transfer of Venus Bay. She was successful in her claim to have KB removed as trustee for other reasons. It is not appropriate that she have her costs of the entire proceeding.

17 Andrea argues that had KB agreed to be replaced as trustee, she might not have proceeded with the trial only dealing with the issue of whether Venus Bay was misappropriated. I find it unlikely, in light of Andrea's long-standing conviction that she was entitled to a 'share' of Venus Bay, that this issue would not have been pursued at trial in any event. Further, she chose to pursue the Venus Bay claim, as well as the removal of the trustee claim. The fact that Andrea was unsuccessful on the Venus Bay claim should be taken into account in assessing liability for costs. This claim took up a significant proportion of the preparation for trial, and the trial itself.

18

I accept Mark and KB's submissions that two other matters should be taken into account, as against Andrea, in assessing liability for costs:

- Andrea was unsuccessful in relation to one of the reasons she said that KB should be removed as trustee (namely, that KB should be removed as trustee because its director, Mark, was living in Thailand). There was significant pre-trial discovery and detailed written submissions relating to this issue, although not much time was taken up at trial on these arguments.
- Andrea opened the case on the basis that the trustee had an obligation to consider the competing claims of beneficiaries when it decided to transfer Venus Bay. This issue was abandoned by the end of the trial in the face of clause 10 of the Trust Deed.

19

I do not accept Mark and KB's submission that, in assessing costs, I should take other matters into account as against Andrea, including:

- The fact that she was not successful on other issues, such as her allegation that the hostility between her and Mark was of longer standing than I ultimately found. (These other issues were fairly minor and much of the background of the relationship between the parties required consideration in any event).
- That she caused costs to be incurred by issuing subpoenas which were set aside at an objections hearing. (These costs have already been dealt with in the order that was made at the objections hearing on 23 August 2019).
- That it was necessary to spend time narrowing and clarifying issues put on behalf of Andrea, particularly on the first and second days of trial. (This was a complex trust dispute, spanning many years of family history. Not all relevant matters were easily reduced to clear pleadings. Clarifying those issues saved significant time at trial).

20 In considering all of those matters, and taking a broad brush approach to the costs issues, I am satisfied that Andrea should be paid 70% of her costs of the proceeding on the standard basis.

Andrea is entitled to costs

21 Andrea was successful in obtaining an order that KB be removed as trustee.

22 Mark and KB first submit that Andrea should meet her own costs, because ‘the purpose of the litigation and the outcome was to benefit her not the Estate’. I reject that submission. She was entitled to bring the proceeding and was successful in her claim to have a new trustee appointed. There is no reason to depart from the ordinary rule that costs follow the event.

Andrea’s costs should not be borne from the trust estate

23 Mark and KB next submit that the Court should ‘be cautious’ about awarding Andrea costs from the trust estate. But they go on to say that if the Court is against their submission that Andrea should meet her own costs, then her costs should be paid from the trust estate.

24 I will not make an order that costs payable to her be borne by the trust estate. She does not seek that order. No authority is given by Mark and KB in support of their submission that order should be made. I do not see why the trust estate should be diminished in paying her costs in those circumstances. And as discussed below, I consider Mark should pay her costs.

Trustee should not be indemnified from the trust estate

25 Rule 63A.26 of the *County Court Civil Procedure Rules 2018 (Vic)* provides:

A party who sues or is sued as trustee or mortgagee shall, unless the Court otherwise orders, be entitled to the costs of the proceeding out of the fund held by the trustee or out of the mortgaged property in so far as the costs are not paid by any other person.

26 KB was sued as trustee in this case.

27 I will order that KB is not entitled to costs of the proceeding out of the trust estate held by the trustee.

28 As Andrea submits:

10. *Jacobs* provides very clear guidance at [1586] that costs in a proceeding to remove a trustee are normally payable by the Trustee personally.

"When a trustee is removed from the trust, the trustee is not allowed his or her costs out of the trust estate, and may be ordered to pay all the costs involved in the action" citing *Palairet v Carew* [1863] EngR 300; (1863) 32 Beav 564; 55 ER 222 also *AG v Murdoch* [1856] EngR 502; (1856) 2 K & J 571; 69 ER 910 at 573 or 911.

11. In *Palairet Romilly* MR at ER 224 said:

"I have endeavoured to arrive at a conclusion which might relieve me from the necessity of making the defendant bear the costs of the suit, but I am of the opinion that the defendant has rendered this suit necessary, and that he must pay the costs of it up to and including the hearing."

12. In *Murdoch Page Wood* VC said at ER 911:

"If a trustee voluntarily retires from a trust like the present on account of difference of opinion, he pays no costs, whether he will receive costs is a question for the discretion of the Court, and may depend upon the circumstances of his retirement. But here all the proceedings in the suit have been occasioned by the trustees' refusal to retire from their trust. They took what the Court considered an improper and perverse view as to the duties imposed upon them, and the suit for their removal and all the proceedings consequent thereon have been occasioned by their taking that view."

13. *Palairet* has been applied in *Hancock v Rinehart (Costs)* [2016] NSWSC 11 (2 February 2016) by Brereton J who stated:

"Where a trustee unsuccessfully resists removal - even in the absence of proven misconduct - the trustee may be ordered to pay the costs of any proceedings required to secure the removal and consequent upon it" at [17].

...

18. Both *Palairet's* case and *Murdoch's* case were referred to with approval

by the High Court in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 at [151]

29 Andrea's submissions state that Mark's conduct does not merit indemnification of *his* costs by the trust. As discussed below, Andrea refers to Mark on occasion in her submissions as the trustee. Andrea argues that 'Mark should have no interest in continuing as trustee', and says that 'it was appropriate for him to step down' as trustee, but 'he had to be forced to do so'. In fact, KB was trustee. I treat Andrea's submission as being a submission to the effect that the costs incurred by KB (at Mark's behest) should not be indemnified from the trust estate.

30 Mark and KB argue that the power to order a trustee not be indemnified is discretionary, and that discretion should not be exercised here. They say that this case is distinguishable from cases where trustees have been held not to be entitled to be indemnified from the trust fund. They refer, in particular, to the word 'may' used by Brereton J in *Hancock v Rinehart (Costs)* [2016] NSWSC 11 at [17] where His Honour observed:

Where a trustee unsuccessfully resists removal – even in the absence of proven misconduct – the trustee may be ordered to pay the costs of any proceedings required to secure the removal and consequent upon it.

[footnote omitted]

31 However, this proceeding was adversarial in nature, it was not reasonable for KB to refuse to step aside as trustee when asked to do so and I do not consider that KB's costs of defending the proceeding were properly incurred: see *Di Benedetto v Kilton Grange Pty Ltd* [2017] VSCA 119 at [66].

32 As stated in the leading case of *Letterstedt v Broers* (1884) 9 App Cas 371 at p 386:

...if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, ... the trustee is always advised by his own counsel to resign, and does so.

33 The fact that an additional director was appointed to KB shortly prior to trial is irrelevant. Counsel for KB and Mark made clear at trial that this was only in case

Andrea's argument was upheld concerning whether KB could be trustee, in circumstances where its sole director was living overseas: see principal judgment at [157]. It did not affect the reality that Mark continued to be the controlling mind of KB.

34 Andrea sought to have an independent trustee appointed to the trust, and had valid reasons for doing so. KB – with Mark at its helm as its controlling mind – was unsuccessful in defending Andrea's claim that it should be removed as trustee. KB should have agreed to stand down as trustee in the face of Andrea's requests given Mark's hostility and ongoing refusals to answer reasonable questions about the trust (see [192] of the principal judgment). I am not satisfied that there was any benefit to the beneficiaries of the trust as a whole – as opposed to a benefit to *Mark* – in Mark continuing as the controlling mind of the trustee instead of a new, independent, trustee being appointed.

35 I do not consider that KB should be entitled to have recourse to the assets of the trust for its costs of defending the proceeding.

Mark should pay costs

36 Andrea seeks to have Mark pay her costs. KB and Mark say any costs payable should be paid by KB.

37 I am satisfied that Mark should pay the costs due to Andrea.

38 Mark has throughout the relevant time been KB's sole director (with the exception of a period commencing shortly before trial as set out above), its sole shareholder and its controlling mind. He was protecting his own position in resisting Andrea's reasonable request that an independent trustee be appointed. It was his misconduct in not answering reasonable questions about the trust and his hostility that led to KB being removed as trustee. Not answering those questions was also a breach of KB and his overarching obligations under the *Civil Procedure Act 2010* (Vic) (though I accept that with the filing of the defence, that misconduct ceased).

39 KB and Mark were represented throughout the proceedings by the same solicitor and barrister. KB and Mark's costs submissions state that other than seeking costs against Andrea, they do not seek orders for costs as Mark has loaned KB money and 'cost will accordingly be resolved between them'.

40 Their submissions refer to what costs they say the two of them (jointly described as 'the defendants') unnecessarily incurred as a result of Andrea's approach to the trial. They submit that Andrea could expect to have to pay 'the defendants' costs' with respect to the Venus Bay issue, the allegations of 'misconduct arising from Mark spending most of his time in Thailand', and the costs of other aspects relevant to the application to remove KB as trustee.

41 Mark and KB submit that:

The defendants (or one of them) could expect to have to pay the plaintiff's costs of prosecuting the claim that the trustee should be removed because of hostility and failing to disclose material on a standard basis limited to recognize that even on these issues the plaintiff's arguments on many aspects were unsuccessful or eventually conceded.

42 They do not distinguish between their positions on costs as between themselves, until the very end of their initial costs submissions where they set out the orders they seek. These include seeking:

- An order that KB should pay Andrea's costs of and incidental to her claim for removal of KB as trustee, on the basis of Mark's antagonism to her since 2015, and KB's failure to make disclosure requested by her after 2015 on the standard basis.
- To have any order that KB pay Andrea's costs set-off against the costs orders they say Andrea should be ordered to pay both defendants.

43 They submit that in order to award costs personally against Mark, I must find that Mark's hostility was 'so unreasonably held that it should have been evident to Mark that it impaired his ability to act as trustee'. I reject the submission that it is

necessary for me to find that. Further, whether Mark's hostility towards his siblings was reasonable or not is not to the point. What is relevant is the level of hostility it demonstrated. Failing to answer questions about the trust also demonstrated hostility (see [190] and [192] of the principal judgment). Given that Mark had accused his siblings of murdering his (and their) father, and continued to harbour suspicion around whether Andrea was responsible for his father's death (even at trial) it ought to have been clear to him that KB should accede to Andrea's request for an independent trustee.

44 I will order that Mark pay the costs due to Andrea.

Settlement offers

45 The parties referred to various settlement offers that were made in support of submissions that different costs orders should be made. None of those offers are relevant to the costs orders to be made, as no-one did better in the end than an offer made by another party.

Costs of costs argument

46 My preliminary view is that the costs of the submissions on costs should be dealt with as part of the costs of the proceeding (that is, Mark pay 70% of Andrea's costs of the submissions on costs). However, if the parties wish to argue otherwise, they should email my chambers by 4 pm on Wednesday 6 May 2020, and in that event I will list the matter for a brief hearing to be conducted that the following week via Zoom.

Orders

47 I will make the following orders:

1. Pursuant to section 48(1) of the *Trustee Act 1958* (Vic), Ian Redvers Morrison

(the new Trustee) is appointed as trustee of the O'Neil Family Settlement (the Trust) created by Deed dated 18 July 1985 in substitution for the first defendant, KB Investments (Vic) Pty Ltd.

2. All property, assets and liabilities of the Trust as and from these orders vest in the new Trustee.
3. The parties do all acts and things and sign all documents to give effect to Orders 1 and 2.
4. The new Trustee shall be:
 - a. Remunerated by the Trust at the rate of \$400 per hour plus GST for his professional services reasonably rendered.
 - b. Empowered to retain appropriate professionals to provide necessary advice at the expense of the Trust.
5. The first defendant is not entitled to costs of the proceeding out of the trust estate.
6. The second defendant pay 70% of the plaintiff's costs of the proceeding on the standard basis, to be assessed by the Costs Court in default of agreement.

Certificate

I certify that these 13 pages are a true copy of the reasons for ruling of Her Honour Judge Marks, delivered on 1 May 2020, revised 5 May 2020.

Dated: 1 May 2020

Zeinab Ali
Associate to Her Honour Judge Marks

