EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT HAMILTON

CIV-2015-019-001028
[2016] NZDC 4995

IN THE MATTER	ON AN APPLICATION FOR SUMMARY JUDGMENT
IN THE MATTER	OF AN APPLICATION BY THE EXECUTOR FOR INDEMNIFICATION FROM BENEFICIARIES OF AN ESTATE
BETWEEN	IAN WILLIAM COMER EXECUTOR AND TRUSTEE OF THE ESTATE OF NEIL EDWIN FORBES Plaintiff
AND	LINDA JANE ABBOTT and BRENT ALEXANDER FORBES Defendant

Hearing: 22 March 2016

Appearances: DM O'Neill for Plaintiff
RJ Hollyman and AJ Steel for Defendants

Judgment: 29 April 2016

RESERVED JUDGMENT OF JUDGE D M WILSON QC

Introduction

[1] Neil Edwin Forbes died by his own hand in mid-October 2012. The exact date is not known. By his will dated 24 February 2006, Mr Forbes left the bulk of his estate to a nephew (who however pre-deceased him) and appointed an old friend, Ian William Comer, the executor of his estate.

[2] The executor seeks Summary Judgement claiming that he is entitled to be indemnified by defendant beneficiaries for legal work incurred by the estate. The defendants say, inter alia, that the costs were not reasonably incurred.

[3] Shortly after Mr Forbes died, Mr Comer engaged Chartwell Law to act in the estate. Ms Tarrant, a principal in that firm, was the solicitor acting. Mr Comer and Ms Tarrant agreed that she would carry out not only the legal work associated with the winding up of the estate but also duties outside the normal requirements of an estate administrator. This was because Mr Comer lived at a distance from the principal asset of the estate, a farm property, and was busy with his own affairs.

[4] By letter dated 22 October 2012 after inspecting the property, Ms Tarrant advised Mr Comer that "the cost to administer this estate will be somewhere between $50,000 to $70,000 plus GST and disbursements".[1] These circumstances become relevant to the reasonableness of the charges rendered by Chartwell Law for administering the estate. The estimate was not given to the defendants until annexed to a reply affidavit sworn on 9 March 2016 filed herein. Indeed, much correspondence between the parties proceeded on the assumption that funds in the solicitor's trust account would cover all costs.

[5] The defendants are respectively the daughter and son of the late Mr Forbes. They had been estranged from him prior to his death[2] and were limited beneficiaries under the will as to $10,000 each. They took on the intestacy and subject to a minor bequest to their aunt, were entitled to the benefit of the estate.

[6] The defendants understood that Mr Comer wished to relinquish the role of executor. Much correspondence between the parties turned on whether that was going to happen. Ultimately it did not. There was unfortunate friction between Mrs Abbott, who wanted to take over the administration of the estate and Ms Tarrant, who was the solicitor acting for the executor. Mrs Abbott took a significant number of complaints to the Standards Committee of the Waikato Bay of Plenty District Law

[1] Bundle of documents at 305.
[2] See para 7 of Mr Forbes' will in Bundle of documents at 22.

Society concerning Chartwell Law and failed in all of them. The Standards Committee in its decision of 10 July 2015 described her complaints as "vexatious".[3]

[7] Through her solicitors, Bison & Moss, Mrs Abbott made it clear that she was holding Mr Comer to account for his actions.[4] She expressed concern about the proposal to sell the farm property or parts of it off at what she saw as being undervalued.

[8] Her solicitors wrote to Mr Comer forcefully proposing that he resign as executor so that Mrs Abbott could be appointed. Further, they called for the distribution of the farm property to the defendants so that they could do what they wished with it. Ultimately the land was transferred to the defendants as beneficiaries on or about 11 December 2013. They took over the mortgage and met the bequest to their aunt. The property was sold by the defendants ten months later in October 2014 for $910,000.

[9] At about that time Mrs Abbott applied to the High Court for an Inventory and an Account of the administration of her late father's estate. On 18 February 2015 on Mr Comer's instructions, Chartwell Law sent an invoice for the cost of administering the estate in the amount of $59,793.40 to the defendants who declined to pay. Ultimately on 20 October 2015 the plaintiffs sought summary judgment against the defendants for a total of $91,787.51, including legal fees of $68,716.06 plus interest and costs on a solicitor/client basis.

[10] The statement of claim alleged the executor was entitled to indemnity from the defendants in respect of those sums. In paragraph 16, the grounds for that entitlement were stated to be:

> [11] By letter dated 14 January 2013 from Bison & Moss, solicitors, Napier on behalf of the defendants to the plaintiff. The defendants proposed that in return for the transfer of the property they agreed to cover any shortfall to meet estate commitments.

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[3] Paragraph 24 in Bundle of documents at 63.
[4] Letter Bisson & Moss to Mr Comer, 14 January 2013.

[12] By a letter dated 21 January 2013 from Bison & Moss to the plaintiff's solicitors, the defendants agreed to inject funds to cover any liability.

Submissions at the hearing

[13] At the summary judgment hearing, Mr O'Neill submitted that there was an equitable doctrine that the trustee had a right to be indemnified by beneficiaries flowing from the trust relationship and the fact that Mr Comer, in paying the legal bills of the estate, had been compelled to discharge an obligation to it.[5]

[14] The head note in *Hardoon v Belilois* captures what is said at p 127 of the report of the Advice of the Privy Council in these terms:

> A party who is sui juris and beneficially entitled to shares which it cannot disclaim, is personally bound, in the absence of contract to the contrary, to indemnify the registered holder thereof against calls by them. It is immaterial whether the beneficiary owner originally created the trust by which the registered holder was plainly affected or accepted a transfer of the beneficial ownership with knowledge of the trust.

[15] Mr O'Neill accepted that, for the purposes of the summary judgment application, he was limited to the grounds pleaded for the right to indemnity. He therefore had to make the case that the letters mentioned in the statement of claim created an express undertaking by the defendants to indemnify the plaintiff for the disputed legal costs.

Summary Judgment Principles

[16] Rule 12.2(1) of the District Courts Rules provides that:

> The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[17] Courts have clarified the Rule and its predecessor. I adopt the following principles:

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[5] *Hardoon v Belilois* [1901] AC 118; Bundle of authorities tab 4.

- The Court must be satisfied that the defendants have no defence to the claim; that is that there is "no real question to be tried". [6]

- The onus rests on the plaintiff to show that there is no defence.

- The Courts should not attempt to resolve material conflicts of evidence or to make findings as to credibility. The Court must not be left with any real doubt or uncertainty.

[18] While it is appropriate for a Court to take a robust approach when determining whether the defences offered have any arguable validity, there are limits. A defendant should not be deprived of the opportunity of a full trial unless the plaintiff clearly demonstrates that there is no reasonable possibility of the defence succeeding.[7]

Scope of Indemnity

[19] Mr O'Neill argued that the letters established a clear indemnity. With respect, my examination of the two letters on which the plaintiff relies (and the subsequent correspondence) leaves it at least arguable that negotiations had moved on from the early context to the point at which the defendants declined to complete a Deed of Indemnity in favour of Mr Comer.[8] By letter dated 30 November 2013, Bison & Moss stated that no indemnity would be provided unless administration of the estate was handed over to the defendants.[9] Chartwell Law did not pursue the request for indemnity or any suggestion that costs would have to be met.

Decision

[20] Matters of interpretation are generally best left for full trial when the whole circumstances can be properly investigated. It is at least arguable that the letters do not amount to the indemnity for which Mr O'Neill argued.

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[6] *Krurznener v Hanover Finance Ltd* (2008) 19 PRNZ 162 (CA) at [26]; citing *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
[7] Per Topping J in *Lindale Financial Services Ltd v Colonial Mutual Life Assurance Society Ltd* (1997) 12 PRNZ 320 at 322.
[8] Chartwell Law letter to Bisson & Moss, 23 October 2013; Bundle of documents at 168.
[9] Bundle of documents at 173.

[21] Those findings are a sufficient basis on their own for declining Summary Judgment. For the sake of completeness and because I have heard argument on the point, I turn to the issue whether the costs claimed in this case were reasonably and properly incurred.

Quantum issues: Were the disputed costs reasonably and properly incurred?

[22] At the hearing, Mr O'Neill argued that the decision of the Standards Committee of the Waikato Bay of Plenty District Law Society ("the Standards Committee") that the costs were reasonably incurred, is binding on this Court.[10]

[23] At the conclusion of the argument on 22 March 2016, I set a timetable for counsel to file written submissions on whether that was a sound submission in law.

[24] Those submissions have now come to hand. It is common ground between counsel, and I accept, that the decision is not binding as to liability.

[25] Mr Hollyman submitted for the defendants[11] that the decision is not binding on any issue, including in particular :

(i) whether the plaintiff's solicitors carried out "unnecessary work";

(ii) whether the fees are reasonable in the circumstances of an alleged indemnity; and

(iii) The quantum of the invoices.

[26] That was because:

(i) The decision of the Standards Committee was a decision not to proceed further, under s 138 of the Lawyers and Conveyancers Act 2006. It was not a final determination under s 152 of the Act.

(ii) A Standards Committee decision is only final and binding under s 161 if it is a final determination under s 152 of the Act.

[10] *Wynn Williams v Kain* [2011] 3NZCR 709.
[11] From Para 2 of his submissions.

[27] He argued that a decision under s 138 is different from a final determination. It is only where a "*final determination*" is made on a complaint that the Standards Committee must *certify the amount it finds to be due*.[12] Section 161(3) then confers conclusive status on the sum set out in the certificate.[13]

[28] I accept this submission. The intention of the legislation was to allow the Standards Committees as experts in the field to settle quantum issues in challenged legal bills. There is no apparent reason why a decision that the Committee would take no action on the complaint would be cloaked with that effect and bar the Court from enquiring into an area where the Standards Committee has no specialist experience.

[29] The Committee did not investigate whether Mr Comer's instructions and the cost of meeting them were costs reasonably or properly incurred. This is a complicated area. As an example, the contribution of Mrs Abbott to the costs of the estate by her frequent correspondence and complaints about the actions of the law firm cannot be assessed on the current information. As Mr Hollyman submitted:

> The legal relationship between an executor and his legal advisor, and the right to recover from the estate was explained by the Court of Appeal in *Hanson v Young*[14] as follows:
>
> Executors and trustees may retain a solicitor to act for them in matters in which they are concerned in that capacity. Generally the executors and trustees are personally liable to pay the costs of the retainer but will be entitled to an indemnity from the estate in respect of costs properly incurred.

[30] I have found that the ruling of the Standards Committee is not binding on this Court. This opens up the issue of quantum which falls to be decided by the Court, on evidence heard in this Court uninfluenced by that ruling.

[31] In this respect the defendants point to the responsibly qualified opinion of the very experienced solicitor Mr Eades. He deposed that no more than $10-$15,000

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[12] It may order a reduction an any bill : s 156 (1)(e).

[13] Mr Hollyman also submitted, and I accept, that where there is a decision not to take the matter further under s 138; a review by the Legal Complaints Review Officer does not elevate a decision under s 138 into a final determination under s 152.

[14] [2004] 1 NZLR 37 (CA) at [32].

should have been incurred and that an executor is not entitled to delegate all matters to the law firm he engages. No doubt this evidence will be challenged at trial which is the proper forum for determining this case.

Decision and directions

[32] I am not satisfied that the defendants have no defence to the claim. I am not satisfied that there is no real question to be tried. I am left with real doubt and uncertainty as to the interpretation of the letters on which the plaintiff relies on for indemnity of legal costs, on whether the costs were reasonably or properly incurred and as to quantum.

[33] Accordingly summary judgment is declined.

[34] I direct that the Registrar convene a telephone conference with counsel and that counsel prior to the telephone conference, confer and file a memorandum as to costs (on which I expect they might well agree) and the orders now required to direct the further course of these proceedings.

D M Wilson QC
District Court Judge