IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-000334
[2013] NZHC 3032

IN THE MATTER	of the Estate of MURRAY ALTON DEAN
BETWEEN	ALLEN ANDREW DEAN, KERRY JAMES DEAN AND BRETT LANG DEAN Applicants
AND	GREGORY JAMES MOYLE AND WENDY MAY DEAN Defendants

On the papers

Date: 15 November 2013

JUDGMENT OF JUSTICE GILBERT

This judgment was delivered by me on 15 November 2013 at 11.30 am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:……..

Introduction

[1] The applicants, who are the deceased's sons from his first marriage, applied in this proceeding for an order pursuant to s 44 of the Administration Act 1969 requiring the respondents, who were appointed executors under the Will, to provide an inventory and account of the estate. This has now been provided and the only outstanding issue concerns costs.

[2] The respondents accept that the applicants are entitled to costs calculated on a 2B basis because they have succeeded with their application. The respondents also accept that they should meet these costs personally.

[3] However, the parties are unable to agree on what should happen in relation to the respondents' own costs, which amount to $20,659.86, including GST. The respondents submit that they should be indemnified for these costs by the estate. The applicants contend that the respondents should also meet these costs personally because they were incurred solely as a result of the respondents' failure over an extended period to provide basic information regarding the administration of the estate.

Background

[4] Probate was granted on 11 December 2003 to the respondents, Mrs Dean and Mr Moyle, as the executors named in the Will.

[5] Mrs Dean, who was the deceased's second wife, has since remarried and is now Mrs Russell. In terms of the Will, she is entitled to the net annual income from the residue of the estate during her lifetime but has no entitlement to the capital of the estate. After her death, the residue is to be distributed to the applicants in equal shares. The applicants therefore have an interest in how the capital of the estate is invested.

[6] Mr Moyle is a financial planner who advised Mr Dean during his lifetime. Mr Moyle has managed the investment of the capital of the estate through his company, New Zealand Financial Planning Company Limited.

[7] On 19 May 2005, the applicants' solicitors wrote to Mr Moyle seeking advice regarding the intended investment of the proceeds following the sale of the farm that has passed to the estate following Mr Dean's death. They also drew attention to the provision in the Will which stipulates that Mrs Russell is not entitled to any of the capital of the estate. Mr Moyle did not reply to this letter.

[8] The solicitors sent a further letter on 1 August 2006 asking to be kept informed regarding the investment of the capital of the estate. Mr Moyle responded to this letter on 7 August 2006 saying that he was not sure what his obligations were in respect of consulting or reporting to residuary beneficiaries but that he was prepared to provide the information so long as his fellow trustee approved. It appears that Mr Moyle did not seek approval from Mrs Russell. In any event, no information was provided.

[9] The applicants' solicitors wrote to the respondents' solicitors on 13 December 2006 again asking how the proceeds of sale of the farm had been invested. They also asked for a statement detailing how the estate had been administered to date. A copy of this letter was sent to Mr Moyle. The respondents' solicitors replied on 15 December 2006 confirming that the farm had sold. They said they had not been advised of the trustees' plans for the investment of the funds and were endeavouring to find out where the money had been invested. They said that they would urge the trustees to provide details.

[10] The respondents' solicitors wrote again on 25 January 2007 attaching a copy of a letter Mr Moyle had sent to Mrs Russell on 26 October 2006 setting out his recommendations for the investment of the farm proceeds in various asset classes. The solicitors concluded their letter by saying that Mr Moyle should have written the letter himself since he was responsible for the investments and would be aware of the details but that he was away until May 2007.

[11] No further information was provided to the applicants over the next five years. The applicants' solicitors wrote again on 18 September 2012 seeking a report regarding the estate's assets and a copy of the settlement statement relating to the sale of the farm property. They suggested that the applicants, as the capital beneficiaries, should be given copies of all reports received by the trustees on the performance of the portfolio. This letter was copied to Mr Moyle.

[12] The respondents' solicitors wrote back the next day saying that they had not had anything to do with the estate since 2006 and had sent the file to archives. A short time later they wrote again with current contact details for Mr Moyle's financial planning business.

[13] It was not until 6 December 2012 that Mr Moyle sent a portfolio report covering the period from 1 April 2012 to 30 September 2012. This showed that Mr Moyle's company was charging in excess of $1,000 per month as a portfolio monitoring fee and that the capital of the estate had decreased by some $230,000 from $1.403 million as at 31 March 2007 to $1.168 million as at 30 September 2012. This decrease is partly explained by the fact that the respondents made an unauthorised distribution of capital of $51,770 to Mrs Russell, despite the provision in the Will to which the applicants' solicitors drew attention at the outset. The respondents acknowledge that this capital distribution should not have been made and Mrs Russell accepts that she must repay this.

[14] The applicants' solicitors wrote to Mr Moyle on 7 December 2012 asking for the portfolio reports from the time the estate capital was placed with his company for investment and copies of the estate tax returns since probate was granted. They suggested that this information should be readily available in electronic form and asked that it be sent by email as soon as possible.

[15] Mr Moyle did not respond to this letter so the solicitors wrote to him again on 20 December 2012 advising that if the information was not sent by 14 January 2013, the applicants would consider making an application to the Court. This prompted Mr Moyle to write the following day saying that he was waiting for legal advice as to whether the trustees were obliged to provide the information and if so, who should

pay for it. He stated that he considered the threat of court action was "inappropriate and unhelpful" and that the applicants would be entitled to their share of the estate "when the life tenant dies but not before". He indicated that the trustees would be prepared to meet in the New Year to discuss any concerns. The applicants' solicitors replied that day saying that they would prefer to receive the requested disclosure before deciding whether there was any benefit in meeting.

[16] In the absence of any response from Mr Moyle, the applicants' solicitors wrote to him again on 30 January 2013 requesting that the information be provided by 8 February 2013. Mr Moyle did not respond to this request.

The application

[17] On 22 March 2013, the applicants filed their application under s 44 of the Administration Act for an order requiring the respondents to provide an inventory and account of the estate. Following service of the application, Mr Moyle indicated that he would file the requested inventory and account, verified by affidavit, within six weeks of the initial mention date of 11 April 2013. The proceeding was adjourned accordingly to 29 May 2013.

[18] On 29 May 2013, the matter was adjourned for a further two weeks to allow more time for Mr Moyle to complete his affidavit. Mr Moyle's affidavit was then filed on 11 June 2013. This was the day before the adjourned mention date and, as a result, the matter was further adjourned until 29 July 2013 to enable the applicants to consider the information supplied. The parties hoped to reach an overall settlement during this period. No settlement was reached and accordingly the matter was further adjourned until 9 September 2013.

[19] In a memorandum dated 25 September 2013, the applicants advised that they had been unable to achieve a settlement. They recognised that they would have to issue separate proceedings to seek further relief including the removal of the respondents as trustees. Accordingly, the only issue left to be resolved in the current proceedings is the question of costs.

Should the respondents be indemnified for their costs out of the assets of the estate?

[20] Counsel for Mrs Russell states that she had no knowledge that the applicants' requests for information had not been answered adequately. She says that she relied on Mr Moyle to provide the information. He held the information and he and his company were paid to manage the investments on behalf of the estate. She acknowledges that the applicants were entitled to the information and that they should not have been put to the expense and trouble of applying to the Court to obtain it. She is willing to meet half of the scale costs payable to the applicants out of her own funds.

[21] Counsel for Mr Moyle submits that he is entitled to be indemnified for all costs he and Mrs Russell have incurred in relation to the present application. He submits that this is because these expenses were reasonably and properly incurred in the discharge of their duties as trustees. He submits that Mr Moyle has been "co-operative and obliging", has not obstructed the progress of the proceeding in any way and has consented to all adjournments. He further submits that Mr Moyle's conduct prior to the issue of the proceedings is not relevant.

[22] I do not consider that Mrs Russell should pay from her own funds the costs she and Mr Moyle incurred in dealing with the application. She is in a different position to Mr Moyle for the reasons she has given. The application was only required because Mr Moyle persistently failed, over many years, to provide information to which he had ready access and to which the applicants were clearly entitled. The applicants sought the information from Mr Moyle because he and his company were being paid to manage the investment of the capital. It appears that Mrs Russell was not involved in this and the applicants did not seek the information from her.

[23] The costs Mr Moyle and Mrs Russell incurred in engaging solicitors and counsel to deal with the application would have been avoided if Mr Moyle had responded appropriately to the applicants' reasonable requests for information. The information the applicants requested was readily available and they were clearly

entitled to it. There would have been no additional cost in sending them copies of the same periodic reports sent to the trustees regarding the performance of the portfolio.

[24] In these circumstances, I consider that the costs were not reasonably and properly incurred in the performance of the respondents' duties as trustees. If the respondents' costs in dealing with the application are paid from the estate, this would result in the applicants paying for Mr Moyle's failure to perform his duties as a trustee to provide full and accurate information regarding the investment of the capital of the estate. I do not consider that they should have to do so.

[25] The costs have been incurred solely as a result of Mr Moyle's conduct and I therefore consider that he should meet the estate's costs in dealing with the application personally.

Result

[26] The applicants' are entitled to their costs in relation to the application calculated on a 2B basis. The respondents are jointly and severally liable for these costs, as they have acknowledged.

[27] The respondents' costs for dealing with the application are to be paid by Mr Moyle personally, not from the assets of the estate.

M A Gilbert J