[2016] WASC 61 (S)

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	BLENKINSOP -v- JEFFREY LAURENCE HERBERT AS TRUSTEE FOR THE BLENKINSOP FAMILY TRUST [No 2] [2016] WASC 61 (S)
CORAM	**:**	ALLANSON J
HEARD	**:**	21 SEPTEMBER 2016
DELIVERED	**:**	7 OCTOBER 2016
FILE NO/S	**:**	CIV 2074 of 2013
MATTER	**:**	Section 77 of the *Trustees Act 1962* (WA)
BETWEEN	**:**	JUDITH ANNE BLENKINSOP Plaintiff AND JEFFREY LAURENCE HERBERT AS TRUSTEE FOR THE BLENKINSOP FAMILY TRUST First Defendant JEFFREY LAURENCE HERBERT AS TRUSTEE FOR THE BLENKINSOP FAMILY TRUST NO 2 Second Defendant SCOTT FREDERICK BLENKINSOP Third Defendant ROSS ALEXANDER BLENKINSOP Fourth Defendant TRACEY ANN JAKOVICH Fifth Defendant KIM ROSINA HOLLAND Sixth Defendant

CHRISTINE MARION THURTELL
Seventh Defendant

Catchwords:

Costs - Application for costs to be paid out of trust estates - Whether application was brought for proper administration of the trust - Turns on own facts

Costs - Assessment of costs - Special costs order - Unusual difficulty, complexity or importance of the matter - Turns on own facts

Legislation:

Supreme Court Act 1935 (WA), s 37
Legal Profession Act 2008 (WA), s 280
Legal Profession (Supreme Court) (Contentious Business) Determination 2014 (WA)

Result:

Costs orders made

Category: B

Representation:

Counsel:

Plaintiff	:	Mr C R Bailey
First Defendant	:	Mr S C M Wong
Second Defendant	:	Mr S C M Wong
Third Defendant	:	Ms M L Coulson
Fourth Defendant	:	No appearance
Fifth Defendant	:	No appearance
Sixth Defendant	:	No appearance
Seventh Defendant	:	Mr P G Donovan

Solicitors:

Plaintiff	:	Williams & Hughes
First Defendant	:	HWL Ebsworth Lawyers
Second Defendant	:	HWL Ebsworth Lawyers
Third Defendant	:	Coulson Legal
Fourth Defendant	:	No appearance
Fifth Defendant	:	No appearance
Sixth Defendant	:	No appearance
Seventh Defendant	:	MDS Legal

Case(s) referred to in judgment(s):

Bremer Landesbank Kreditanstalt Oldenburg v The Ship 'Turakina' [1999] FCA 261; (1999) 161 ALR 587
Latoudis v Casey [1990] HCA 59; (1990) 170 CLR 534
Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72
Re Buckton [1907] 2 Ch 406

ALLANSON J:

The proceedings

1 By originating summons, filed 9 July 2013, the plaintiff applied for orders for the replacement of the trustees of two family trusts, the Blenkinsop Family Trust and the Blenkinsop Family Trust No 2. She also sought orders that the guardians of the trusts be removed.

2 The plaintiff brought the application as a beneficiary of the trusts. The other parties to the proceedings were the two trustee companies, and five members of the Blenkinsop family who, with the plaintiff, were jointly the guardians of each trust, beneficiaries (although not the only beneficiaries), and the directors of both corporate trustees.

3 The plaintiff's application was supported by the seventh defendant. The third defendant gave notice that he would abide the result as to the replacement of the trustees only. He opposed the application to remove the guardians. The other parties chose to abide the decision of the court.

The positions on the removal of the guardians

4 On 14 August 2015, in response to a complaint from the third defendant that the plaintiff's case regarding the removal of guardians had not been clearly stated, I ordered the plaintiff and seventh defendant to file submissions, limited to the application to remove the guardians. Their position was set out in submissions filed on 16 September 2015.

5 The plaintiff and seventh defendant submitted that the court had inherent jurisdiction to control persons in whom fiduciary powers were reposed, including guardians. The court should exercise its power in this case because the guardians had 'improperly exercised' their discretionary powers, and also that it was appropriate to remove individuals 'whose intense personal disagreements have led to the Trusts becoming dysfunctional to the detriment of the beneficiaries as a whole' [2.2]. They submitted that the court should remove all guardians: the requirement that the guardians act jointly and unanimously had led to the position that the trusts could not be properly administered because the guardians were inherently incapable of acting with unanimity [18].

6 The third defendant filed submissions on 29 October 2015. He did not contest that the court had power under its inherent jurisdiction to remove guardians in certain circumstances, either as fiduciaries or if they were found to have exercised their powers fraudulently. The third defendant, however, opposed the removal of all guardians, submitting that

the plaintiff, the fourth defendant and the seventh defendant only should be removed. He submitted that the plaintiff and the fourth and seventh defendants were responsible for the failure of the trust companies to properly manage their affairs, while the third, fifth and sixth defendants had acted to institute proper administration and corporate governance for the trustee companies. Further, the plaintiff and the fourth and seventh defendants were not exercising their duties as guardians in good faith or having regard to the interests of the beneficiaries as a whole [72]. In particular, the plaintiff (and the seventh defendant in supporting her) had a conflict of interest in matters relating to proceedings brought by the plaintiff against the Trustee companies for recovery of loans. The plaintiff's conduct in pursuing that action makes it inappropriate for her to remain as a guardian [78].

7 The third defendant summed up his position in a section headed 'Position advocated by the third defendant'. First, the means by which the court could protect the interests of the beneficiaries and respect the wishes of the settlor would be to remove only the 'recalcitrant fiduciaries' (the plaintiff and the fourth and seventh defendants) [89]. Second, to remove all of the guardians would undermine the wishes of the testator and destroy the substratum of the trust [96].

8 These submissions were the first indication that removal of some only of the guardians, or replacement of some only of them, was in issue.

9 In response, in their submissions for trial, the plaintiff and seventh defendant strongly opposed the removal of some only of the guardians as unworkable and as a proposal 'simply intended to preserve [the third defendant's] power bloc' [111].

10 In submissions at trial, the plaintiff and seventh defendant also questioned the validity of the appointment of the six guardians. They sought no relief directly flowing from a finding that the appointment was invalid even though, on the construction of the two trust deeds, the result would be that the plaintiff, as the survivor of the late Fred Blenkinsop, was the sole guardian. They submitted that, in considering the question of removal of the guardians, the court cannot shut its eyes to the fact that the appointment was invalid (ts 278). Apart from that issue, which did not occupy any significant time at trial, the plaintiff maintained a case that the trust was dysfunctional.

11 At trial, the third defendant maintained his position that some only of the guardians should be removed. In response to the direct question,

'What are you asking me to do?', counsel replied that he was instructed to seek orders that the plaintiff, the fourth defendant and the seventh defendant be removed on the grounds that they were unfit to hold the position as guardians (ts 370).

Should costs be paid out of the estate

12 Costs are in the discretion of the court: *Supreme Court Act 1935* (WA), s 37(1). Under s 37, the court has 'full power to determine by whom or out of what estate, fund, or property, and to what extent such costs are to be paid'. The court's discretion must be exercised judicially, but is otherwise unconfined: ***Oshlack v Richmond River Council*** [1998] HCA 11; (1998) 193 CLR 72, 81 [21] - [22], 120 - 123 [134]; ***Latoudis v Casey*** [1990] HCA 59; (1990) 170 CLR 534, 540, 558, 562, 568.

13 All parties applied for their costs out of the estate. All relied on the principles set out in ***Re Buckton*** [1907] 2 Ch 406, where Kekewich J identified three situations where an issue might arise about the payment of legal costs out of a fund (in that case a deceased estate). First, a trustee may seek guidance from the Court in order to ascertain the interests of the beneficiaries: and see *Rules of the Supreme Court 1971*, O 66 r 9. Second, beneficiaries may apply to the court by reason of some difficulty of construction or administration that would have justified an application by the trustee, but where it was not convenient for the trustee to apply. In both of those situations, the costs of all parties can be characterised as necessarily incurred for the benefit of the estate. Provided the application was not, in substance, unreasonable, the court might direct costs to be taxed as between solicitor and client and paid out of the estate.

14 Later authorities have referred not only to reasonableness in bringing the application, but to the conduct of the party (including, for example, the vehemence with which the proceedings were conducted): see the discussion in ***Bremer Landesbank Kreditanstalt Oldenburg v The Ship 'Turakina'*** [1999] FCA 261; (1999) 161 ALR 587 [28] - [34].

15 The third situation is different in substance: a beneficiary makes a claim adverse to other beneficiaries, seeking to have questions determined which require the determination of rights between adverse litigants.

16 The situations discussed in ***Re Buckton*** provide some guidance to the resolution of these applications. The parties all submitted that they fell within the second situation, so that costs should be ordered to be paid out of the trusts' property. None of the parties sought an order for costs against another party.

17 The relevant factors, in my opinion, are these.

18 First, the trust estates, together, are substantial. But legal costs and costs of an independent trustee have already had an impact.

19 Second, the beneficiaries of the two trusts are not limited to the present parties, but include their children and remoter issue, spouses, and (for Trust No 2) others.

20 Third, the plaintiff brought her application when it could not reasonably be expected that the trustees would apply, and when the administration of the trusts was seriously compromised. Authority on the power of the court to remove a guardian, and the circumstances in which it should act, was limited. There were no directly relevant Australian authorities. Although I did not accept the plaintiff's argument, the application was not unreasonably brought.

21 Fourth, in bringing the application, the plaintiff was not herself attempting to exercise control over the trust and its property, but to remove impediments to the operation of an independent trustee. The seventh defendant, throughout, acted in support of the plaintiff due to the plaintiff's more limited resources.

22 Fifth, although the third defendant did not bring a separate application, his response was, in substance, a competing application. The third defendant may genuinely believe that his approach is the appropriate one to the management of these funds. But the attempt to remove some only of the guardians was calculated to give the third defendant a greater measure of control over the two trust estates, despite the appointment of an independent trustee. I am not satisfied the third defendant's application was made to secure the more effective administration of the trusts; I believe it was made to advantage one group of beneficiaries over the others. It is notable that he described those guardians whom he sought to have removed a 'recalcitrant': he did not identify the authority that they would defy.

23 Sixth, while the plaintiff made her application for the purpose of proper administration of the trusts, when the third defendant threw down the gauntlet the plaintiff and the seventh defendant took up the challenge. After lunch on the second day of trial, counsel for the seventh defendant submitted that, if there had to be a guardian for the proper administration of the trust, it should be the seventh defendant (ts 410). More significantly, the third defendant was cross examined at length to establish that he was unfit to act as a guardian; similarly, the sixth defendant was

cross examined as to her suitability. The seventh defendant was also recalled and cross examined, specifically on the case now put that, if there should be a guardian, it should be her. Much of the third and fourth days, and part of the fifth day of the trial were taken up with this issue. While the plaintiff and seventh defendant proceeded this way only in response to the position advocated by the third defendant, in my opinion, the trust estates should not bear the cost of such a dispute between beneficiaries.

24 I draw these conclusions. First, I am satisfied that the two trust estates should not bear the cost of the third defendant's bid to remove the 'recalcitrant' guardians. Second, the plaintiff and the seventh defendant should have the costs of the application to remove the guardians paid out of the estate, save for costs incurred in the dispute regarding the fitness of the third and fourth defendants to act as guardians. As a global estimate, the issue of suitability added two days to the trial.

The basis for assessment

25 The plaintiff and seventh defendant sought their costs, payable out of the estate on an indemnity basis. Counsel submitted that, in the present case, the difference between indemnity and assessment on a solicitor and client basis was unlikely to be significant. It is, however, significant in two respects.

26 First, it affects who bears the onus of establishing that costs were unreasonably incurred. On an order for indemnity costs, that onus would rest on the paying party - in this case the trustee. The trustee, however, was not involved at the time of the hearing. It would be fairer for the plaintiff and seventh defendant, where necessary, to have the onus of establishing the reasonableness of the costs.

27 The second relates to limits on costs. Under s 280 of the *Legal Profession Act 2008* (WA), the court has power to make a special costs order where it is of the opinion that the amount of costs allowable under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter.

28 I am satisfied that, because of its complexity, the hours fixed by the determination for an application by originating summons is, at least arguably, inadequate. The extent to which costs should be allowed for time beyond that fixed in the determination, particularly having regard to the extent to which those parties have already had their costs met on the application to replace the trustees, should be for the taxing officer.

29 I am not, however, satisfied that either party has shown a reason to raise or remove the rates fixed for counsel or other practitioners. The *Legal Profession (Supreme Court) (Contentious Business) Determination 2014* (WA), current at the time of this trial, continued to adopt the hourly and daily rates charged by law practices as the basis for the rates used in the schedule: cl 4(a).

30 The plaintiff and seventh defendant sought to justify lifting the rate fixed in the scale on the basis that each had entered into a costs agreements which permitted their solicitors to charge above scale rates. None of the material put before the court suggests the agreed rates relate to the difficulty, complexity or importance of the matter. There is nothing to demonstrate that the rates charged were other than the usual rates adopted by the practitioners in question.

31 While the court can act on its own experience and familiarity with the action, I believe that, to the extent to which this matter presented any complex features, the raising of the limit on hours allowable would enable a proper assessment.

Conclusion

32 The plaintiff and the seventh defendant should have their costs, payable out of the trust property and assessed on a solicitor client basis, and without regard to the hours fixed by item 11 in the schedule to the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014.* Those costs should not include the costs for the third and fourth days of the trial.

33 The plaintiff and the seventh defendant have been substantially successful in their application for costs, and should have their costs of the application, payable out of the trust property. I make no special order regarding the costs of the application for costs.

34 The plaintiff and the seventh defendant are to bring in an order to reflect these reasons. The order should follow conferral with the Trustee, and have regard to the stipulation in O 66 r 4(2).