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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2022-070-000153
[2024] NZFC 6427

IN THE MATTER OF	THE ESTATE OF [MARK INNES]
AND	
IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
BETWEEN	[BETH INNES] Applicant
AND	CHRISTOPHER DARLOW in his capacity as executor of the Estate of [MARK INNES] First Respondent
AND	[ISABELLE BOYLE] [LUKE INNES] [RUBY DAY] [SOPHIE HOOPER] [NICK INNES] [DOUG INNES] Second Respondents
AND	[HANNAH INNES] Third Respondent
AND	[CARLA INNES] Fourth Respondent

Appearances:	J McDougall and S Mason for the Applicant The First Respondent abides the decision of the Court and did not appear A Cavanaugh for the Second Respondents Third and Fourth Respondents appear in Person
Judgment:	6 June 2024

RESERVED CHAMBERS DECISION OF JUDGE S J COYLE
[IN RELATION TO INTER PARTES COSTS]

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[1] On 11 April 2024 I issued a reserved decision in relation to a claim by [Beth Innes][1] in relation to a claim under the Family Protection Act 1955 against the estate of her father [Mark Innes]. For the reasons set out in that judgment her application was dismissed, and [Mark]'s Will is to be implemented without alteration. At the conclusion of that judgment, I made directions for the filing of submissions in relation to the issue of costs. Ms Cavanaugh has filed her submissions on behalf of the siblings for whom she acts, and Mr McDougall has filed his submissions in response on behalf of [Beth]. Ms Cavanaugh, on behalf of her clients, seeks an award of costs on a 2C basis, and seeks that either indemnity or uplift costs be awarded. Mr McDougall, on behalf of [Beth], accepts that a costs award should be made against [Beth], but submits that it should be on a 2B basis, and only in accordance with scale costs. Accordingly, I need to determine the issue of inter partes costs given that they are disputed.

Legal Principles

[2] The Family Protection Act 1955 does not have an express provision addressing the power to award costs. The power is found in r 207 of the Family Court Rules 2002 and states that a decision in relation to costs is a discretionary decision and can be made with reference to the provisions of the District Court Rules 2014.[2]

[3] Justice Duffy in *Van Selm v Van Selm* undertook a thorough review of the principles applicable for an award of costs in the Family Court.[3] At [41] of her Honour's judgment she recorded:

> I am satisfied, therefore, that the recent cases in [the High Court] dealing with costs awards in the Family Court consistently support costs awards being made in the Family Court in accordance with general costs principles.

[4] A further statement of the relevant principles is set out by Mander J in *Bowden v Bowden*.[4] Notwithstanding the wider applicability of the District Court Rules,

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1 As per the substantive judgment, for the purposes of this cost decision, it is easier, given that a number of parties share the surname "[Innes]" to refer to the parties by their first name.
2 Family Court Rules 2002, r 207(2).
3 *Van Selm v Van Selm* [2015] NZHC 641, (2015) FRNZ 163.
4 *Bowden v Bowden* [2017] NZHC 1841, [2017] NZFLR 910 at [13].

guidance is still found in the common law.[5] In *S v I*[6] the High Court endorsed the comments on his Honour Judge Callinicos in *AS v JM* (Costs) where the Judge held:[7]

> While there may be some difference in philosophy as to whether a more civilly oriented approach is taken to costs matters in the Family jurisdiction, there remains a constant thread through the decisions when the Court is considering a party who has been unreasonable. All the decisions make it clear that where a party has acted unreasonably, prolonged the proceedings, or has been the recipient of adverse credibility findings then they cannot expect to escape close attention when the Court exercises its discretion on costs issues.

[5] I have also considered the approach of her Honour Judge Smith in *JJF v AJH*.[8] I adopt her reasoning and the approach set out at [13] to [15] inclusive and [31] of that decision. Like her Honour, in terms of fixing quantum, it is my view that the use of the scale costs contained in the District Court Rules provide for a more transparent and predictable rationale. Justice Duffy held as much in the *Van Selm v Van Selm* decision.

[6] The relevant principles of the DCR 2014 are those referenced in r 207(2)(a)-(k) inclusive of the FCR 2002. Rule 14.2 of the DCR 2014 sets out the general principles which must apply to the determination of costs; of relevance to this case are the following:

> **14.2 Principles applying to determination of costs**
>
> (1) The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:

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5 *R v S* [*Guardianship*] [2004] NZFLR 207; (2003) 22 FRNZ 1017 (HC).
6 *S v I* (2009) 28 FRNZ 13 (HC).
7 *AS v JM* [2004] NZFLR 57 (FC) at [17].
8 *JJF v AJH*, FC Christchurch, FAM-2008-009-3326, 13 January 2011.

(d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:

(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:

(f) an award of costs should not exceed the costs incurred by the party claiming costs:

(g) so far as possible the determination of costs should be predictable and expeditious.

[7] Rule 14.6 of the DCR is also relevant given that the second respondents seek increased costs or indemnity costs. Rule 14.6 states as follows:

14.6 Increased costs and indemnity costs

(1) Despite rules 14.2 to 14.5, the court may make an order—

(a) increasing costs otherwise payable under those rules (*increased costs*); or

(b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (*indemnity costs*).

[8] The basic principle that costs should follow the event was confirmed by the Supreme Court in *Manukau Golf Club Inc v Shoye Venture Ltd*[9] and the Court of Appeal in *Glaister v Amalgamated Dairies Ltd*.[10]

[9] As set out above the cost regime contained in the FCR 2002 empowers the Court to order increased costs. Relevant to this proceeding, increased costs may be ordered if the Court considers that a party opposing costs contributed unnecessarily to the time and expense of the proceeding, or towards a step in the proceeding by failing, without reasonable justification, to accept an offer of settlement, or to otherwise dispose of the proceedings.[11] In *Holdfast NZ Ltd v Selleys Pty Ltd* the Court of Appeal

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9 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305.
10 *Glaister v Amalgamated Dairies Ltd* (2003) 16 PRNZ 840 (CA).
11 Rule 14.6(3)(b)(v) of the DCR 2002.

provided guidance on the correct approach to an award of increased costs.[12] Those steps are as follows:

(a) The Court must firstly categorise the proceeding (DCR 14.3).

(b) The Court then needs to work out a reasonable time for each step in the proceeding (DCR 14.5).

(c) As part of the step 2 exercise, a party can claim extra time for a particular step (DCR 14.6(3)(a)).

(d) The applicant for costs should then step back and look at the costs award that he or she is entitled to, and can then argue for additional costs under DCR 14.6(3)(b), noting that any increase on scale costs above 50 per cent is unlikely.

[10] Ms Cavanaugh in her submissions references Patterson's *Law of Family Protection and Testamentary Promises* commentary in which it is noted that where an unsuccessful applicant has acted unreasonably, not only may an order of costs be made, but it may be at a level above the scale. An uplift of 50 per cent is becoming increasingly common or even on a full indemnity basis if the circumstances described in r 14.6.4 of the DCR exist.[13] As Ms Cavanaugh further sets out in her submissions, where irrelevant or unnecessary material is included in affidavits the Court may take this into account in determining costs.[14] Finally, the Court can also direct that any costs award should be deducted from an unsuccessful party's share of the estate.[15]

[11] Mr McDougall in his submissions also referred to the decision of *Fry v Fry*.[16] In that decision the Court observed that whilst previously, it was common practice for

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12 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA).

13 Bill Patterson, Law of Family Protection and Testamentary Promises (5th ed) LexisNexis at p 356 and associated references at footnote 315, including *Talbot v Talbot* [2017] NZHC 257 and *Bean v Bean (Costs)* [2019] NZHC 545.

14 Bill Patterson, Law of Family Protection and Testamentary Promises at p 358 and *re: Hill (Dec'd)* [1999] NZFLR 268 (HC).

15 *Moleta v Darlow (Costs No. 2)* [2022] NZHC 1330 and *Re: Wills (Dec'd)* [1999] NZFLR 134 (HC).

16 *Fry v Fry* [2015] NZHC 2716, [2016] NZFLR 2716.

the cost of all parties to the proceedings to be paid by the estate, that that was no longer the position. Rather, *Fry v Fry* held that an unsuccessful applicant may be required to contribute to the costs of the other parties.

[Beth]'s Position

[12] Mr McDougall accepts on behalf of [Beth] that it would be appropriate for costs to be awarded against [Beth] given the outcome of the proceedings, and the fact that she was entirely unsuccessful. In Mr McDougall's submission the proceedings are of average complexity, requiring counsel of average skill and experience, and therefore can be appropriately categorised on a 2B basis. In his submission, increased or indemnity costs should not be awarded on the basis that:

(a) Whilst [Beth]'s application was unsuccessful, in his submission it was not entirely without merit.

(b) [Beth]'s claim was supported by another beneficiary of the estate, [Hannah].

(c) Although Mr McDougall accepts that the evidence filed by [Beth] was lengthy and at times irrelevant and inflammatory, in his submission the evidence was no more "unrestrained that [*sic*] of the other parties".[17]

[13] Further, Mr McDougall submits there is no evidence that [Beth] contributed unnecessarily to the time and costs of the proceedings through either a meritless claim and/or unjustified conduct.

[14] Furthermore, he submits the estate is not a small estate, and thus costs can be met, as I apprehend his submission, from the estate, with there still being an amount available to be distributed to each of the beneficiaries. It is his submission that it would not be unfair on the other beneficiaries for costs to be paid by the estate.

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[17] Mr McDougall's submissions of 9 May 2024 at [13](c).

[15] Mr McDougall concludes his submissions arguing that it is appropriate to award:

(a) 2B costs to the successful siblings, payable by the estate.

(b) That the executor's costs are to be met from the estate.

(c) [Beth] to bear her own legal costs.[18]

[16] I can say at the outset I do not accept that costs, if awarded against [Beth], should be payable by the estate. The consequence of such an order is that the costs are effectively met by the estate, contrary to the position espoused by the High Court in the *Fry v Fry* decision. Additionally, if the Court determines that [Beth] should pay costs, then effectively she is only paying a ninth of those costs, with the remaining eight ninths being paid by the other siblings out of their share of the estate as their shares would fall for division after payment of the costs from the estate. In the circumstances of this case that would be an entirely unjust outcome.

Submissions of Ms Cavanaugh

[17] Ms Cavanaugh's submissions dated 9 May 2024 are filed on behalf of those siblings for whom she acts.

Categorisation

[18] Ms Cavanaugh sets out in her submissions as annexure "A" a calculation of the scale costs on a 2B basis. The total permitted on that calculation amounted to $21,296.50 plus disbursements. Then annexed to the submissions and marked "B" is a calculation of the scale costs on a 2C basis. The total permitted on that calculation is $38,295.50 plus disbursements. The opposing siblings' actual costs amount to $93,732.97 plus GST and disbursements.

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[18] Mr McDougall's submissions of 9 May 2024 at [15].

[19] Ms Cavanaugh submits that the 2C calculation is appropriate, and that the areas in which additional time is permitted under the 2C calculation accurately reflect the areas in which additional time was in fact spent in this proceeding. That is, in relation to procedural memoranda (the reasons for which she sets out further in her submissions) and in the preparation of extensive affidavit evidence. In her submission this is appropriate in a case such as this where there were six siblings acting together, but where each of the six siblings filed separate affidavit evidence. That they needed to file separate affidavit evidence is clearly explained in my decision, principally around different lived experiences of each of the siblings.

[20] The categorisation of proceedings is governed by r 14.3 of the DCR 2014. Category 2 proceedings are defined as "proceedings of average complexity requiring counsel of skill and experience considered average". The bands are determined, however, with reference to r 14.5(2) of the DCR 2014. Band B applies "if a normal amount of time for the particular step is considered reasonable", and band C applies "if a comparatively large amount of time is considered reasonable".[19]

[21] The Court of Appeal in *Paper Reclaim Ltd v Aotearoa International Ltd* held that:

> If a party seeks a band other than band B, it must demonstrate why a normal amount of time for a particular step is insufficient."[20]

[22] In the Family Court, 2C costs have been awarded on occasions. For example, Judge Grace awarded costs on a 2C basis in circumstances where a respondent was uncooperative with the attempts to settle the proceedings, and what was described as a novel argument advanced at hearing was held to be unrealistic and not sustainable.[21]

[23] Applying that law, I agree with Ms Cavanaugh that the costs in the preparation of the affidavits should be 2C. A similar approach was adopted by Judge Russell in *PNJ v CF* where his Honour held that the nature and content of the affidavits in that case justified the application of band C in relation to the preparation of those affidavits.

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19 Rule 14.5(2)(b) and (c), DCR 2014.
20 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZCA 544, (2007) 18 PRNZ 743 at [35].
21 *PRDW V JNW* [2013] NZFC 627; see also *S v Y*, FAM North Shore, FAM-2007-044-1338, 3 July 2009 and *PNJ v CF* [2012] NZFC 4545.

But I do not accept that the remainder of the costs should be anything other than a 2B basis. Thus, in terms of Schedule A, r 16.3 should be on a 2C basis, with the sum being $5,730. The total scale costs therefore amount to $23,206.50.

Should uplift or indemnity costs be awarded?

[24] Rule 14.6(3) sets out the circumstances in which the Court may exercise its discretion to order a party to pay increased costs. The rule states as follow:

> **3. The court may order a party to pay increased costs if—**
>
> (a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
>
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
>
> (i) failing to comply with these rules or a direction of the court; or
>
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or
>
> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules; or
>
> (v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
>
> (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or
>
> (d) some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[25] Then r 14.6(4) sets out when indemnity costs can be considered with the rule stating as follows:

> **(4) The court may order a party to pay indemnity costs if—**
>
> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> (b) the party has ignored or disobeyed an order or a direction of the court or breached an undertaking given to the court or another party to the proceeding; or
>
> (c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or
>
> (d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding; or
>
> (e) the party claiming costs is entitled to indemnity costs under a contract or deed; or
>
> (f) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[26] Considering these issues, it is important to note that there were two sets of proceedings; proceedings under the Family Protection Act 1955 which [Beth] sought to vary the terms of her late father's Will, and proceedings in the High Court seeking equitable remedies against the trustees of the [Innes] Property Trust ([IPT]). [Beth] sought to transfer the FPA proceedings to the High Court, but for the reasons issued by me in my 3 July 2023 judgment, I declined to transfer the FPA proceedings to the High Court.[22] Given that [Beth] was wholly unsuccessful, she was ordered to pay Ms Cavanaugh's clients the sum of $4,011 following a subsequent chambers decision by me in relation to the issue of inter partes costs made on 10 August 2023.

[27] Notwithstanding that there were separate proceedings, in separate Courts, [Beth]'s affidavits and evidence in the FPA proceedings conflated evidence in relation to two distinct and separate proceedings. At [5] of my reserved judgment in relation to the FPA claim I recorded:

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22 *[Beth Innes] v [Beth Innes] & [Hannah Innes] et al* [2023] NZFC 6755.

> Much of [Beth]'s evidence is irrelevant, inflammatory and contains a number of statements of opinion. The evidence in her affidavit in reply, at times appear to not be evidence but thinly veiled legal submissions. The intermingling of the evidence about the estate and trust issues into the Family Court affidavits in relation to the FPA, when there are separate pleadings and causes of actions in the High Court has, for example, been entirely unhelpful. [Beth]'s affidavits in the Family Court should only have contained evidence of relevance to the FPA.

[28] Because of the conflating of the two causes of action, settlement offers that were made were offered on the basis that both sets of proceedings would be settled. [Doug] has provided an affidavit sworn 8 May 2024 in relation to the cost applications. In that affidavit he sets out the various settlement offers that were made. The offers were made "without prejudice save as to costs". The first was made on 20 December 2021. This is attached as exhibit [DI]1 to [Doug]'s affidavit of 8 May 2024. It was an offer to pay [Beth] an additional $50,000 to settle both her claims in relation to the estate and trust prior to the proceedings being filed. The proposal was that [Beth] would receive an *ex gratia* payment of $50,000 from the trust funds when the estate and the trust were finally distributed. That offer was rejected by the then solicitor acting for [Beth], and the rejection letter dated 3 February 2022 is exhibit [DI]2 to [Doug]'s most recent affidavit.

[29] A second offer of settlement was made on 13 June 2022. It was again without prejudice save as to costs, and proposed that [Beth] would receive an additional $200,000 in full and final settlement of the claim against the estate and her interest in the trust. This offer was made at a point of the FPA litigation where [Doug] and his siblings were about to file their affidavits in response to the evidence filed by [Beth]. The offer was made, therefore, on the basis that the affidavits, and the consequent time in preparing them, would not be needed if the settlement was accepted.

[30] Of significance the letter recorded:

> As indicated by the heading to this letter,[23] if your client does not accept this offer and is either unsuccessful in her Family Protection Act claim, or is successful to an extent less than $200,000, a copy of this letter will be provided to the Court in support of an application for costs to be awarded in favour of our clients.

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[23] Estate [Mark Innes] – *[Innes] v [Innes]* – FAM-2022-070-000153.

[31] It is clear from the letter that whilst the body of the letter refers to the estate and trust litigation, the offer of $200,000 was made in order to settle the FPA litigation. The implication was that if that offer was accepted, the trust litigation would be discontinued, and the trust assets simply distributed equally between the parties. But leaving that aside, this was an offer to settle the estate litigation by way of an additional payment to [Beth] of $200,000.

[32] As set out in my judgment, [Beth]'s remedy in relation to the FPA litigation evolved from an initial position that the [street A] property vest in her, to a remedy suggested at the hearing on the basis the estate is divided into tenths (not ninths as the Will stipulated), with [Beth] receiving two-tenths, and her other eight siblings receiving a tenth each.[24] If [Beth]'s suggested remedy had been accepted by the Court, she would have received $173,275.94 more than she would have received pursuant to [Mark]'s Will. That is, on [Beth]'s proposal as advanced at the hearing, if she had been successful, she would have received $26,724.06 less than the offer of $200,000 which was rejected by her in her then solicitor's letter of 16 June 2022.[25] That is, if she had accepted that offer at that time, she would have been $26,724.06 better off than her best-case outcome at the hearing before me.

[33] What has occurred as a consequence of that decision by [Beth] and her then solicitor is that all parties have incurred substantial additional costs in filing their affidavit evidence and attending the hearing. I agree with Ms Cavanaugh's submission that the opposing siblings have acted responsibly in making the offers of settlement, particularly the second offer, and that the cost to all parties, along with the additional damage caused to family relationships by the filing of the affidavit evidence, could and should have been avoided by [Beth] acting reasonably and accepting the second offer of settlement.

[34] Ms Cavanaugh further submits that [Beth] has made the proceedings unnecessarily complex and protracted because of what Ms Cavanaugh describes as "stalling tactics or procedural ploys" adopted by [Beth]. Ms Cavanaugh sets out by way of an example [Beth]'s then counsel repeatedly indicated that [Beth] intended to

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24 At [9] of my judgment.
25 Exhibit [DI]4 to [Doug]'s affidavit of 8 May 2024.

apply for leave to cross-examine[26], notwithstanding that it is usual practice in FPA Act claims for them to be heard on a submissions only basis. Judge Cook set a timetable for the filing of an application for leave to cross-examine, but [Beth] then failed to file that application in accordance with the timetable directed. This led to a delay in resolution of the proceedings of some five months and additional costs associated with follow-up memoranda that could have been avoided.

[35] The proceedings were then further delayed when [Beth] filed her interlocutory application in the Family Court to have the FPA proceedings transferred to the High Court so as to be heard with the proceedings against the trustees of the [IPT]. As set out above, that application was unsuccessful and resulted in a separate costs award against [Beth]. But as Ms Cavanaugh submits, between the time that [Beth]'s then counsel indicated that a transfer application would be made, and this matter then being transferred to the ready-for-event-list for a substantive hearing, there had been a further delay of seven months.

[36] Taken together, both of the above unmeritorious decisions by [Beth] and her then counsel led to a combined delay in the matter progressing to a hearing of around 12 months.

[37] Ms Cavanaugh further submits that [Beth] has filed a significant volume of affidavit evidence that was irrelevant and inflammatory and prolonged the preparation and hearing time. I referred to this at [5] of my substantive judgment. The Court of Appeal in *Fisher v Kirby* made it clear that conduct of this nature is improper and should be taken into account in costs awards.[27] [Beth]'s second affidavit in particular contained extensive evidence relating to the [IPT], evidence that was entirely irrelevant to the FPA claim. It appeared to have escaped [Beth] and her then counsel that the gateway for admissibility is that contained in s 7 and s 8 of the Evidence Act 2006. I agree with Ms Cavanaugh's submission that that affidavit also contained a number of inflammatory statements and adverse comments that have served only to

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[26] As recorded in the minutes of her Honour Judge Cook dated 3 October 2022, 21 November 2022 and 13 February 2023.

[27] *Fisher v Kirby* [2012] NZCA 310, [2013] NZFLR 463 at [151]–[153].

cause hurt and harm to the family. Indeed, I noted at [5] of my substantive judgment that:

> [Beth] appears to have no insight into the hurt and harm she has caused through the, at times, unhelpful content of her evidence.

[38] That she has done so is frankly egregious when, as set out at [17] and at exhibit [DI]6 of [Doug]'s May 2014 affidavit, the filing of that affidavit evidence from [Beth] followed an earlier email from [Beth]'s then counsel asking the opposing siblings to delete parts of their affidavit. Her then counsel foreshadowed that if the opposing siblings did not, then [Beth] would make an application to strike the affidavits out. It is ironic therefore that [Beth]'s subsequent affidavit contained inadmissible and inflammatory evidence. The Courts have repeatedly warned parties (and counsel) to FPA proceedings against "trawling through material of this kind".[28]

[39] One of the issues I need to consider is the means of the parties. As recorded at [56] of my substantive judgment, [Beth] will receive in excess of $720,000 from the estate and trust irrespective of her being unsuccessful in the FPA Act claim, and if she is also unsuccessful in the claim against the trust in the High Court. I agree with Ms Cavanaugh's submission that [Beth] is in a position to meet a costs award whether that be on a scale, uplift or indemnity basis out of her share of the estate/trust assets.

Discussion

[40] [Beth] has rejected a settlement offer in relation to the estate litigation which would have resulted in her receiving more than that which [Beth] was claiming at the hearing. As a consequence of her rejecting that offer, the opposing siblings have had to incur significant and substantial costs. In those circumstances [Beth]'s rejection of the settlement offer was entirely unreasonable and has directly led to significant ongoing litigation costs in terms of preparing for and attendance at, a hearing in which [Beth] was ultimately unsuccessful. Additionally, the proceedings have been prolonged because of a litigation stance adopted by [Beth].

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28 *Fisher v Kirby* above n 27 at [151].

[41] I put aside the transfer application component of that delay as that has been resolved by way of a separate judgment and a separate costs award against [Beth]. But the continued insistence on cross-examining the opposing siblings, and a foreshadowed intention to file an application for leave to do so, proved to be no more than illusory, but had the consequence of prolonging the proceedings, and led to Ms Cavanaugh's increased costs in having to file the appropriate memoranda.

[42] Additionally, [Beth] has filed evidence which was inflammatory, irrelevant, and unnecessary. She did so when there has been clear direction from the Higher Courts warning against such conduct.[29] [Beth]'s filing of such evidence has required the opposing siblings to respond to that evidence, and increased the hurt amongst the siblings. Furthermore, as set out in my judgment, aspects of [Beth]'s affidavit evidence in reply were no more than thinly veiled legal submissions. It again occasioned increased costs for the opposing siblings as Ms Cavanaugh had to address those issues in her submissions.

[43] I reiterate, as I did in my substantive judgment, that Mr McDougall was not counsel acting for [Beth] at the stage of these proceedings when the settlement offers were rejected, and nor was he responsible for the drafting of her affidavits. Indeed, he conceded at the substantive hearing that aspects of [Beth]'s evidence were unhelpful.

[44] Despite these identified issues of concern, I am not persuaded that the grounds for an award of indemnity costs are made out by the opposing siblings. While [Beth]'s conduct is egregious, I am not satisfied that it has been such that the grounds in r 14.6(4) have been established.

[45] In the alternative, Ms Cavanaugh submits that [Beth] should pay increased costs which she submits should be by way of a 75 per cent uplift. In relation to uplift costs the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Ltd* held at [46]:[30]

> Where subcl (3)(b) conduct is made out, the court's normal response should be to provide an uplift on scale costs to what the rules contemplate a reasonable fee for that step to be.

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29 For example, the Court of Appeal in *Fisher v Kirby* above n 27.
30 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897.

[46] For the reasons set out at [47] the Court of Appeal determined that an increase of 50 per cent on scale costs should be sufficient by way of increased costs, but went on to state at [48]:

> We are not to be taken as saying that an uplift of more than 50% can never be justified under r 48C(3)(b), as there may be circumstances where the court considers a higher award to be justified.

The Result

[47] It is my determination that due to a combination of the factors referred to under the heading "Discussion" above, that this is such a case in which increased costs should be awarded, and in excess of the "50%" referenced by the Court of Appeal. The combined totality of the rejection of a settlement offer, which would have resulted in a payment to [Beth] of more than her best-case scenario during the hearing, together with her conduct in the litigation and the content and tenor of her affidavits, are such that an uplift of 75 per cent is warranted as sought by Ms Cavanaugh. This decision should serve as a "warning" to future litigants and counsel that there are real and tangible costs consequences in adopting a similar litigation stance akin to that advanced by [Beth].

[48] Thus, for the reasons set out above I determine that the opposing siblings are entitled to costs on a 2B basis, with the exception of r 16.3 – opposing siblings preparation of affidavits which should be on a 2C basis. Accepting the schedule as set out by Ms Cavanaugh, with that adjustment, the costs are $23,206.50.

[49] I decline to award indemnity costs.

[50] I award uplift costs in the sum of 75 per cent over and above scale costs, namely $17,404.87.

Order Made

[51] Therefore, I make an order that [Beth] is to pay the opposing siblings' costs in the sum of $40,611.37 plus disbursements.

[52] Further, this is to be paid by [Beth] personally, and is to come out of her one-ninth share of the estate assets, as should the earlier costs award I made against her in relation to her unsuccessful application to transfer proceedings to the High Court being the sum of $4,011.

[53] I invite Ms Cavanaugh to file a draft order for sealing, including the relevant disbursements for approval and sealing.

S J Coyle
Family Court Judge

Signed this 6th day of June 2024 at am / pm