TRUSTS & ESTATES LAW

Prospective Costs Orders in estate litigation

By Anthony Grant, Trusts & Estates Litigator

A legal right is only as good as a rights-holder has money to enforce it. So, for example, a patentee with a good patent has no remedy if he or she lacks the moneys to sue a well-resourced defendant.

In trust litigation, a poorly-resourced beneficiary can ask the court for a "Beddoe Order", but Beddoe Orders are extremely hard to get and, for most practical purposes, they can be disregarded as a source of litigation funding.

That leaves a "Prospective Costs Order" or – as I will call such orders in this article – a "PCO". These orders can be made in trust litigation.

In *Hiliau & Another v Tu'ilotolava* [2018] NZHC 2286 (31.8.18), Andrew AJ has held that PCOs extend to litigation about estates too. That is a sensible extension of the principles that underlie PCOs. However, the hurdles that exist in obtaining a PCO are daunting.

In the *Hiliau* case, a woman made a number of wills. The plaintiffs were appointed executors of her final will and they applied for probate of it.

The defendants opposed the application, saying they were appointed executors of a previous will and that the deceased had lacked testamentary capacity, or alternatively was unduly influenced when she made her final will.

In general, the court will not make PCOs in "hostile" litigation. A litigant who fights and loses should expect to pay his or her own costs and part of the other side's costs.

In the *Hiliau* case, the applicants said they should get a PCO because they were "independent ... professional executor/trustees with no personal financial interests in the estate", and that they were "neutral and independent". Andrew AJ held that "the dominant nature of their claims" was hostile and he made a preliminary assessment of their claims, saying they were unlikely to succeed in showing either lack of testamentary capacity or undue influence.

He said that, while the applicants "may have no direct financial interest in the estate, they are not ... truly independent, neutral parties". "This is essentially a family dispute where the [applicants], with close personal ties to the deceased, claim that they are carrying out the wishes of the deceased." (para [34])

Even though his Honour accepted that the applicants had "no improper motive" and that they sought to defend the proceedings "out of genuine concern", he nevertheless held the litigation should be characterised as "hostile".

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A lesson that can be taken from this case is that a PCO is conditional on "the Court [being] satisfied that the Judge at the trial could properly exercise his or her discretion only by ordering that the applicants' costs be paid out of a trust estate". (para [42])

This is a very high hurdle and few litigants will reach it.

The procedures that the English gave to their colonies for solving legal disputes have proven in the 21st century to be financially unworkable for most people. It has led throughout the common law world to an explosive growth of what are now called "self-represented litigants", i.e. people who can't afford to pay a lawyer to represent them.

Judges don't like this development, as it makes their work more complicated and difficult, but these difficulties will persist so long as our current methods of resolving civil disputes remain unchanged.

The advent of the computer has led to two major trends. First, most disputes – even small ones – are buried in a mass of computer-generated documentation, all of which has to be considered in detail. Second, the current practice of making every judicial decision available for consideration means that the law is more complex and the task of researching it is more expensive.

In the civil law system, a judge will determine what lines of evidence are to be examined, but in the common law system of justice, that is left to the parties' lawyers. As the lawyers can be sued for negligence if they have omitted some relevant research or submission, they will naturally be inclined to plead more claims and produce more evidence than might be needed.

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At a Bar Association Conference a few years ago, it was said that the legal costs in the civil law system were about half the costs that New Zealand litigants would be likely to incur. That sounds very promising. But it was said that the reduction in costs for litigants was achieved at the cost of appointing twice as many judges as the common law system typically requires.

The cost of more judges will be resisted by politicians as an unnecessary expense, and it must be assumed that their opposition will prevail.

That leaves the need for changes to existing procedures.

Before his retirement, Justice Alan McKenzie seemed to have been given a specialist role with estates. He adopted sensible, practical and efficient procedures that simplified disputes and made them much cheaper to resolve. Another path that the Government might consider is to engage him as a consultant to devise simplified procedures for the resolution of many typical disputes.