IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA151/2022
[2023] NZCA 426

BETWEEN	ROMILEY CHANTAL GORRINGE AND ASHLEY SHAYLIN GORRINGE Appellants
AND	JUDITH ANNE POINTON AND SUSAN RUTH HENDERSON AS EXECUTORS OF THE ESTATE OF JOAN BLAIR GORRINGE Respondents

Court: Brown, Mallon and Downs JJ

Counsel: J R Hosking and C J Drought for Appellants
K J Catran for J A Pointon as beneficiary
S T Scott for S R Henderson

Judgment: (On the papers) 6 September 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The High Court costs orders with respect to the appellants and the first-named respondent are set aside. The High Court costs orders with respect to the second-named respondent are undisturbed.

B The first-named respondent must pay the appellants costs in the High Court of $73,093.75 and reasonable disbursements as fixed by the Registrar of this Court.

C The first-named respondent must pay the appellants costs in this Court of $16,730 and reasonable disbursements as fixed by the Registrar of this Court.

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellants challenged the testamentary capacity of Joan Gorringe, alleged undue influence by Judith Pointon concerning Joan's wills made in 2015 and 2016, and asserted a breach of fiduciary obligations by Joan's executors. All three claims were dismissed in a judgment delivered on 3 March 2022.[1] In a separate costs judgment the appellants were directed to pay costs to both the respondents, with some of the appellants' costs and all of Judith's reasonable costs being met from Joan's estate.[2]

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1 *Gorringe v Pointon* [2022] NZHC 342 [High Court substantive judgment].
2 *Gorringe v Pointon* [2022] NZHC 1621 [High Court costs judgment].

[2] The appellants' appeal, which was confined to the undue influence cause of action, was successful and both the 2015 and 2016 wills were declared invalid.[3] The issue of costs, both in this Court and in the High Court, was reserved.[4] This judgment addresses costs in both Courts consequent upon the reversal of the High Court's finding on the undue influence cause of action.

[3] While the computation of costs in this Court is reasonably straightforward, the analysis is more complex for the High Court proceeding given the multiple causes of action, separate representation of the respondents, allegations of impropriety and the service of *Calderbank* letters.[5] The complexity has been compounded by the appellants seeking to revisit rulings in the costs judgment concerning the executors' exposure to costs.

Overview

Costs in the High Court

[4] The appellants submit that Judith should meet their costs and disbursements on an indemnity basis in the sum of $289,492 from her share in the estate. In the alternative they submit that Judith should pay them scale costs of $111,908 on a 2B basis with a 50 per cent uplift, as shown in the schedule below, and disbursements of $20,853.

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3 *Gorringe v Pointon* [2023] NZCA 42.
4 At [114].
5 Settlement offers expressed as being without prejudice except as to costs, in accordance with the principles articulated in *Calderbank v Calderbank* [1975] 3 WLR 586 (CA) at 596.

Item	Description	Date	Time	Cost	Amount
1	Commencement of Proceedings	07.07.2020	3	$2,390	$7,170
37	Originating Application	07.07.2020	2	$2,390	$4,780
10	Preparation for 1st Case Management Conference	24.08.2020	0.4	$2,390	$956
11	Filing Memorandum for 1st Case Management Conference	24.08.2020	0.4	$2,390	$956
13	Appearance at 1st Case Management Conference	24.08.2020	0.3	$2,390	$717
11	Filing memorandum for case management conference	08.12.2020	0.4	$2,390	$956
13	Appearance at case management conference	08.12.2020	0.3	$2,390	$717
11	Filing memorandum for case management conference	30.03.2021	0.4	$2,390	$956
13	Appearance at case management conference	30.03.2021	0.3	$2,390	$717
16	Notice to answer interrogatories	26.03.2021	1	$2,390	$2,390
20	List of Documents on Discovery	16.10.2021	2.5	$2,390	$5,975
21	Inspection of Documents	2020/2021	1.5	$2,390	$3,585
30	Preparation of Affidavits		5	$2,390	$11,950
31	Allowance for bundle preparation		0.5	$2,390	$1,195
32	Preparation for Hearing		5	$2,390	$11,950
34	Appearance	19.07.2021	4	$2,390	$9,560
27	Second Counsel	19.07.2021	2	$2,390	$4,780
24	Costs Submissions High Court	31.03.2022	1.5	$3,530	$5,295
	TOTAL HIGH COURT		**29**		**$74,605**
	Uplift 50%				$37,303
	COSTS CLAIM				**$111,908**

[5] Judith submits that there is no justification for either indemnity costs or a 50 per cent uplift on scale costs. Indeed she argues that there should be a reduction from scale costs having regard to the substantial emphasis during the trial on her control of and expenditure from Joan's bank account and on the unsuccessful allegation of a breach of fiduciary duty on the part of the executors. Finally, it is submitted that both the costs awarded to the appellants and Judith's own costs should be met from the estate "in the normal way".

[6] As against Ms Henderson as executor, the appellants seek an order that 90 per cent of the legal costs which the executors incurred should be borne by them personally.[6]

Costs on appeal

[7] The appellants seek scale costs on a band B basis with a 50 per cent uplift as elaborated upon in the schedule below:

Item	Description	Band A	Band B	Amount	Band A	Band B
14	Notice of Appeal	1.5	2	$2,390	$3,585	$4,780
15	Case on Appeal	1	2	$2,390	$2,390	$4,780
16	Case Management	.3	.3	$2,390	$717	$717
17	Preparation	3	6	$2,390	$7,170	$14,340
18	Appearance	1	1	$2,390	$2,390	$2,390
19	Second Counsel	.5	.5	$2,390	$1,195	$1,195
8	Costs Submissions	.5	1	$2,390.	$1,195	$2,390
	TOTAL COA COSTS	**7.3**	**11.8**		**$17,447**	**$28,202**
	Uplift 50%				$8,724	$15,296
	COSTS CLAIM				**$26,171**	**$45,888**

They submit that Judith should meet her own costs without recourse to the estate.

[8] Judith accepts that the appellants are entitled to costs in relation to the successful appeal but takes issue with items 16, 19 and 8 in the appellants' schedule. She submits there is no justification for a 50 per cent costs uplift. Consequently she contends the costs award should be $15,535. She submits the appellants' costs should be met from the estate "in the usual way" but that she should bear her own costs herself, also in "the normal way".

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[6] They also seek an order that certain fees rendered should be excluded: see [42] below.

Relevant principles

[9] In *Manukau Golf Club Inc v Shoye Venture Ltd*, the Supreme Court explained the limits on the discretion to award costs:[7]

> [7] Although r 53 of the Court of Appeal (Civil) Rules, like r 14.1 of the High Court Rules, renders costs decisions discretionary, the discretion has never been unfettered and must be exercised judicially. Particularly since detailed costs regimes were introduced in the High Court (in 2000) and the Court of Appeal (in 2008), the general discretion has been held to be qualified by the specific rules. As the Court of Appeal said in *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt Ltd*), the overall structure of the costs regimes now means "there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary".

The Court observed that a fundamental principle applying to the determination of costs in all the general courts of New Zealand is that costs follow the event.[8]

[10] However in probate matters, the principles articulated by Stringer J in *In re Paterson (Deceased)* have been consistently applied:[9]

> The Court has a general discretion as to costs in all actions and proceedings before it, but there are certain well-established principles upon which that discretion should be exercised in cases of contested wills. They are as follows: (i) If the litigation originates in the fault of the testator—e.g., by the state in which he left his testamentary writings, or by his eccentric or irrational habits and mode of life—or of those interested in the residue, the costs may properly be paid out of the estate. (ii) If there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. (iii) Unless the circumstances of the case are such as to bring it within one of the foregoing exceptions, the general rule that costs should follow the event ought to prevail …

Paterson was applied in the High Court costs judgment, both in favour of the appellants and Judith, and is relied upon by Judith in this Court.

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7 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 (footnotes omitted).

8 At [8].

9 *In re Paterson (Deceased)* [1924] NZLR 441 (SC) at 442–443, citing *Mitchell v Gard* (1863) 3 Sw & Tr 275 and *Spiers v English* [1907] P 122.

[11] Also material to the appellants' costs claim is r 14.6 of the High Court Rules 2016, which relevantly states:

> **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**).
>
> (2) The court may make the order at any stage of a proceeding and in relation to any step in it.
>
> (3) The court may order a party to pay increased costs if—
>
> (a) the nature of the proceeding or the step in it 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 it by—
>
> …
>
> (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
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> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or 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
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> …
>
> (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
>
> …

[12] For her part Judith relies on r 14.7, which relevantly states:

14.7 Refusal of, or reduction in, costs

Despite rules 14.2 to 14.5, the court may refuse to make an order for costs or may reduce the costs otherwise payable under those rules if—

…

(d) although the party claiming costs has succeeded overall, that party has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs; or

…

(f) the party claiming costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

…

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

…

…

Preliminary observations

[13] Walker J commenced her discussion in the costs judgment by observing:

> [26] The extent of disagreement between the parties about costs is a further reflection of the irretrievable break-down in the familial relationship. They do not agree who is entitled to costs and what costs, if any, ought to be borne by the Estate.

Although there was some measure of agreement concerning costs on the appeal, the Judge's observations are an accurate description of the parties' current submissions on costs, which are both extensive[10] and somewhat strident.

[14] Particularly in view of the third cause of action of breach of fiduciary obligations by Joan's executors, unsurprisingly Ms Henderson had her own representation in the High Court. Both the liability judgment and the costs judgment record Mr Catran as appearing for Judith "as beneficiary" and Mr Scott as appearing for the "second named defendant", namely Ms Henderson. On the face of it there

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[10] The appellants' submissions were 24 pages; Judith's submissions were 21 pages; submissions of Ms Henderson were 11 pages; and submissions of the appellants in reply were 8 pages.

was no representation of Judith in her capacity as an executor.[11] Mr Scott did not appear on the appeal but he did file written submissions on costs. It is appropriate that we record how that came about.

[15] The notice of appeal named Judith and Ms Henderson, in their capacity as executors of Joan's estate, as the respondents to the appeal. Mr Catran filed an appearance on behalf of Judith in her capacity as a beneficiary and Mr Scott filed a notice of appearance on behalf of Ms Henderson. Security for costs was set at $14,120, reflecting the participation of two respondents.

[16] On 6 April 2022 counsel for the appellants wrote to Mr Scott enquiring whether he would be actively participating in the appeal, pointing out that the undue influence allegation did not affect the estate and that case law was clear that executors should take a neutral approach to such claims. Mr Scott took the position[12] that unless the appellants were abandoning certain of the grounds of appeal[13] it was anticipated that the Court would wish to hear from the estate's solicitors.

[17] Some five months later Mr Scott sought leave to be excused from the hearing of the appeal, explaining that he had sighted the appellants' submissions and that Ms Henderson abided the decision of the Court. Leave to be excused was granted on 3 October 2022. On 18 October 2022 counsel for the appellants filed a memorandum seeking a refund of half the amount of security for costs. It stated that the estate was no longer participating in the appeal.

[18] However when Mr Scott became aware of the contents of the appellants' submissions on costs with reference to Ms Henderson, Mr Scott filed a submission on her behalf.

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11 In submissions of Mr Scott for Ms Henderson on the issue of costs in this Court, it was stated that Ms Henderson was separately represented in the High Court trial as an executor as a consequence of different claims being made against each executor, in particular the allegation of undue influence being made against Judith alone.

12 In a memorandum to the Court concerning security for costs.

13 Including that in respect of the 2015 will there were no reasons given by Joan for the significant departure from the previous pattern of will-making and that there was no legal advice or discussion with a qualified person. And that, in respect of the 2016 will, Ms Henderson gave incorrect advice as to the effect of the gift over clause in the 2015 will.

[19] We first address the appellants' claim for costs against Judith before turning to address the contentions in relation to Ms Henderson.

High Court costs: the claim against Judith

Computation of scale costs in accordance with rr 14.3 to 14.5

[20] There was a significant measure of agreement on the computation of scale costs. The appellants claimed $74,605 while Judith proposed $56,404. The points of difference between the appellants' schedule[14] and the schedule annexed to Judith's submissions were as follows:

Description	**Date**	**Appellants**	**Judith**
Commencement of proceedings	07.07.2020	$7,170	$2,390
Originating application	07.07.2020	$4,780	-
Bundle preparation	Various	$1,195	-
Preparation of submissions	Various	-	$3,585
Preparation for hearing	Various	$11,950	$9,560
Second counsel	19.07.2021	$4,780	-
Costs submissions High Court	31.03.2022	$5,295	-

[21] We determine those points of difference as follows:

- The appellants sought to maintain an entitlement to commencement costs for both a statement of claim (item 1) and an originating application (item 37). We consider that the latter is not recoverable. The time allocation for commencement of proceedings of three days (as the appellants claim) is correct.

- The claim for bundle preparation is accepted.

[14] See [4] above.

- As we consider that this was an affidavit hearing (notwithstanding cross-examination),[15] the correct amount for preparation for hearing is the larger amount of $11,950.

- We certify for second counsel.

- We accept that costs submissions in the High Court were necessary.

[22] Consequently we calculate scale costs on a 2B basis to be $69,825.

A reduction under r 14.7(d) and (f)

[23] Mr Catran identified an extensive list of matters which were said to support a reduced award, many of which concerned the criticisms made of the executors, the burden of the interlocutories and discovery pursued by the appellants, and the late filing of evidence of Dr Malone. While acknowledging that the quantum of any reduction is for this Court, he submitted that a reduction of 20 per cent in respect of the preparation of affidavits, discovery and trial allowances would be reasonable.

[24] In reply the appellants submitted that there was no basis for reduced costs. They contended that Judith's costs submissions largely sought to relitigate the appeal and findings made. They took issue with the criticisms in respect of discovery and Dr Malone's evidence.

[25] The appellants were ultimately the successful party. While they did not succeed on all their causes of action, nevertheless, as this Court stated in *Weaver v Auckland Council*, success on more limited terms is still success.[16]

[26] However, as in that case, we consider it is appropriate that the costs awarded to the appellants should be reduced in accordance with r 14.7(d) because of the time and resources necessary for Judith to successfully resist the other grounds of claim. In particular we consider that there is force in Mr Catran's submission that the attacks

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15 We note that Judith's calculation included $11,950 for item 30 (preparation of affidavits, issues, authorities).

16 *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].

on Joan's testamentary competence lacked an evidential basis and the claim for breach of fiduciary duty on the part of the executors had little prospect of success either in law or on the facts. We allow a reduction of 15 per cent from the scale costs computation.[17]

Increased costs

[27] The appellants seek either indemnity costs or in the alternative an uplift on scale costs. While we will address that claim on its merits, in the context of this rancorous litigation it is perhaps unsurprising that the appellants seek indemnity/increased costs given that in the High Court Judith sought indemnity costs for the period subsequent to her *Calderbank* letter and, in addition, an uplift of 25 per cent.[18]

[28] The claim for increased costs is advanced on two fronts: first, on account of the failure by Judith to accept proposals in the appellants' *Calderbank* letters; second, on the grounds of alleged impropriety on the part of the respondents in various respects including the approach to probate, the conduct of the litigation and the conflicted position of the executors.

Settlement proposals

[29] A number of settlement offers were made prior to the High Court hearing. An offer by Judith dated 18 June 2021 had implications for the costs award made by the Judge.[19] However, the appellants having been successful on appeal, two offers made by them now assume significance.

[30] The first letter was sent on 14 February 2020, more than four months before the commencement of proceedings. It proposed that the appellants receive a cash settlement payment of a one-half share of the estate, said to reflect Joan's will dated 7 June 2011. It stated that if litigation proved necessary the letter would be produced in support of an uplift on costs. The offer was rejected, the point being made that it

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17 A reduction totalling $10,473.75.
18 High Court costs judgment, above n 2, at [6(a)].
19 At [48] and [53]–[54].

did not involve any element of compromise or settlement and that acceding to it would constitute a complete acceptance by Judith of a return to the 2011 will.

[31] A second letter was sent on 2 June 2021. The appellants' counsel proposed a settlement whereby the estate would be divided into five shares. Judith would retain three-fifths (which she could share with her children as she saw fit) and the appellants would retain two-fifths. We infer the response to that letter was Judith's offer of 18 June 2021 proposing that the appellants receive a 20 per cent share in the residue after deduction of the estate costs and the specific gifts to Judith's three children.[20]

[32] To be effective for costs purposes pursuant to r 14.10 of the High Court Rules, an offer needs to be:[21]

(a) clearly and unambiguously stated;

(b) capable of contractual acceptance; and

(c) more beneficial (or close in benefit) to the other party than the judgment actually obtained.

The relevant question is whether the offeree failed to accept the settlement offer without reasonable justification. As Mr Catran submitted, the assessment of reasonableness requires the Court to consider the position at the time the offer was made rather than by reference to the end result.

[33] He submitted that the first *Calderbank* offer was at a very early stage, before proceedings had been issued and before any evidence had been provided. The offer was effectively that Judith concede the foreshadowed claim, accept that her mother's 2015 and 2016 wills should be disregarded, and "grant the appellants 50% of Joan's estate". He submitted that at that stage there was no reasonable basis for Judith to accept the matters claimed by the appellants and that, as stated in the letter rejecting it, the offer was not a reasonable one.

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20 At [46].

21 *Body Corporate S73368 v Otway* [2018] NZCA 612, (2018) 20 NZCPR 477 at [80].

[34] In reply the appellants submitted:

> 21. It is not accepted that the first *Calderbank* offer was not reasonable. It provided Ms Pointon with the ability to enter a Deed of Family Arrangement confidentially without the need to recall probate on the 2016 Will. Its rejection, including the allegation that Joan thought of the appellants as "greedy" entrenched matters. The offer was the same as the outcome following the appeal. All parties would have been spared the expense of a trial and appeal if she had taken it.

[35] We decline to treat the first letter as a relevant settlement offer for two reasons. First, we do not consider that the letter painted as complete a picture of Joan's statements to the appellants as the full version in the evidence which Romiley subsequently gave, as recorded in our judgment.[22] The 14 February 2020 letter refers back to a letter of 11 December 2019 which merely sets out three excerpts from an email but does not annex it. We do not accept that the first letter put Judith sufficiently on notice of the peril which she faced.

[36] Secondly, the letter was not in substance an offer of compromise. It simply proposed an outcome that equated with total success on a foreshadowed claim. We do not view a letter served with or prior to the proceeding which requests the entirety of the relief sought as a settlement offer within the spirit of r 14.6(3)(b)(v) of the High Court Rules.

[37] By contrast, the second letter was explicit, not only putting Judith on notice of the costs consequences but also notifying Ms Henderson that her alleged partisan approach would have costs consequences for her personally. As the appellants submitted, there is no doubt that Judith would have been significantly better off if she had accepted that offer.

[38] Mr Catran submits that the second *Calderbank* offer should not be effective. He observes that it was premised on a number of allegations of lying and dishonesty by Judith and it was eminently reasonable for her not to accept the offer. We are unable to accept that proposition. By the time of the second settlement offer the evidence of the appellants was clear and the risks for Judith of proceeding to trial were palpable. That is reflected in the fact that shortly thereafter Judith made her

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22 *Gorringe v Pointon*, above n 3, at [12].

own offer in response. An uplift is warranted on account of Judith's not having accepted the second settlement proposal.

Alleged impropriety

[39] Although in the circumstances where the appellants had been unsuccessful at trial the criticisms of their conduct were the focus of the Judge's consideration in the costs judgment, the Judge also made observations about the respondents' conduct:[23]

> [52] On the other side of the coin, I expressed concerns in my substantive judgment about the manner in which the defendants conducted the defence of the proceedings, including the lack of openness about the Wills, the probate process and impact on costs and the unfortunate late disclosure of an Enduring Power of Attorney executed by Joan on the same day she executed her 2015 Will.

[40] The appellants revisited those criticisms in their submissions, contending that Judith deliberately obstructed the provision of disclosure in the lead-up to the proceedings and that the conduct of both respondents in respect of discovery fell within r 14.6(3)(b)(iv) of the High Court Rules. They also placed emphasis on Judith's refusal to disclose the identity of the person who kept Joan company during her son's funeral. They submitted:

> 43. In her evidence Mrs Pointon maintained that a friend sat with Joan during Peter's funeral. That person may have been able to provide useful information to the Court. Mrs Pointon was asked repeatedly to provide the name of that person and, in answer to the interrogatory, took a technical approach relying on HCR 8.40(d) even though she had no intention of calling the person as a witness herself.
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> 44. It was only under cross-examination that she disclosed, for the first time, that the person had apparently lost capacity and even then she did not reveal the name out of purported concern for their wellbeing. The appellants were deprived of any opportunity to make inquiries of that person (including in consultation with their family and carers). The name of the person (if such a person ever existed) was never revealed. Mrs Pointon's conduct in steadfastly refusing to name this person even when served with an interrogatory was improper under HCR 14.6(3)(b)(iii) (uplift) and HCR 14.6(4)(a) (indemnity).

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[23] High Court costs judgment, above n 2. See also at [40(d)].

They also claimed to have been deprived of the ability to make further inquiry as to how the enduring power of attorney was signed and witnessed by a person who did not see Joan.

Conclusion

[41] While there is justification for the appellants' criticisms of some features of the respondents' conduct in the proceeding, it is not as significant a factor with reference to the consideration of increased costs as the failure to accept the appellants' second settlement offer. In combination we consider that these matters warrant an uplift of 50 per cent[24] in respect of most of the steps taken subsequent to 2 June 2021, namely items 31, 32, 34 and 27 in the appellants' schedule.[25]

High Court costs: Ms Henderson

[42] The terms of the costs order sought in this Court in respect of Ms Henderson were as follows:

> (ii) The present executors should be entitled to no more than 10% of their actual fees already deducted from the estate – the balance should be met by them personally;
>
> (iii) The amount in (ii) should not include the fees rendered by [Ms] Henderson for appearing in Court but should be confined to Mr Scott's fees as rendered and the fees of Mr Patterson who, in July 2020 shortly before proceedings were issued advised Ms Henderson not to distribute the estate.
>
> (iv) Ms Hipkiss' fees should not have been rendered to the estate and should also be excluded under (ii) also.

It was this claim for costs that prompted Mr Scott to file submissions notwithstanding his not having appeared on the appeal.[26]

[43] In order to fully comprehend the parties' position on this issue and the reasons for our decision it is necessary to briefly review what transpired in the High Court.

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24 $13,742.50, being 50 per cent of $27,485.
25 At [4] above. Items 20 and 24 are not included.
26 See [17]–[18] above.

Costs claimed below

[44] Ms Henderson sought from the appellants 2B costs totalling $66,203. The appellants opposed her application and sought an order that Ms Henderson meet two thirds of the estate's actual costs to restore the estate.[27]

[45] The Judge's summary of the appellants' criticisms of Ms Henderson included the following:[28]

> [18] Ms Hosking [counsel for the appellants] submits that various minutes and memoranda make it clear that there was significant non-compliance by Ms Henderson with court directions. She says that Ms Henderson's approach to discovery was also a significant source of frustration and entrenched the distrust held by the [appellants] and that Ms Henderson did not act as a neutral provider of information but took a partisan stance in the litigation as a whole.
>
> [19] … The [appellants] instead found themselves in a position where they had concerning disclosures from their grandmother and no independent evidence of her reasons to contradict what she said. Had there been thorough file notes, capacity testing and some indication that Joan received proper legal advice, this whole situation might have been avoided. The [appellants] should not be punished for taking steps to challenge the Wills in these circumstances.

[46] For Ms Henderson, Mr Scott:

(a) rejected the proposition that her position was partisan;

(b) noted that there was a potential costs consequence between Judith and Ms Henderson given that the latter was acting in a dual capacity as executor and her firm was responsible for advancing the probate application; and

(c) submitted that but for the "novel" breach of duty cause of action, counsel for the estate could have simply have been present to lead the evidence of Ms Henderson and Ms Hipkiss (the legal assistant who played a significant role in the preparation and execution of the

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27 Relying on *Public Trust v Dollimore* [2019] NZHC 607, [2019] 2 NZLR 901.
28 High Court costs judgment, above n 2.

> 2015 will), answer any questions in respect of estate assets and abide the decision of the Court.[29]

[47] The Judge accepted that Ms Henderson had a limited role in the proceeding as framed and that, but for the allegation of breach of fiduciary duty, her role would have been strictly limited to placing all relevant factual matters before the Court.[30]

[48] The Judge had earlier made reference to her observations in the liability judgment concerning the way the respondents had conducted the defence of the proceedings, including the lack of openness about the wills, the probate process and the impact on costs.[31] However with reference to the costs claim against Ms Henderson, the Judge explained:[32]

> [57] There is merit to Ms Hosking's submission that the lack of adequate processes at the time that Joan made the 2015 and 2016 Wills was a significant contributor to the dispute. Ms Hosking urges me to direct that the Estate should only be liable for one-third of the reasonable costs incurred by Ms Henderson instead of an indemnity for reasonable costs. I am not persuaded that this is open to me in the present circumstances. It is necessary to distinguish between Ms Henderson's position as executor and as the supervising partner for the drafter of the 2016 Will. Any potential claim in respect of the drafting of the Will involves Ms Henderson in a different capacity altogether. Those different capacities ought not be conflated.
>
> [58] This is factually different from the position in *Farn v Loosley* because there the Public Trust sought approval for payment of costs by the Estate. In this case, Judith has the only interest in the residue. While I am sympathetic to the proposition that she should be relieved of some of the cost burden arising in these circumstances (and the [appellants] likewise should their appeal succeed) Judith has not supported the submission that only one-third of Ms Henderson's costs be met by the Estate, even as an alternative.

[49] The Judge concluded:

> [59] Properly seen, Ms Henderson had a limited role in the proceeding directed only to the defence of the allegation of breach of fiduciary obligation. As discussed above, this ended up playing a distinctly minor role legally yet the actions of the executors in the probate process undoubtedly coloured all that followed.

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29 At [25].
30 At [55].
31 At [52].
32 Footnote omitted.

> [60] For this reason, and because this claim to 2B costs is duplicative, I make an order for 30 per cent of 2B costs in favour of Ms Henderson against the [appellants] for the steps after 22 June 2021 only. Based on Mr Scott's schedule this is the sum of $6,453.00 (30 per cent of $21,510.00).

The recovery now sought from the executors

[50] The order now sought is more severe than that claimed in the High Court proceeding. The reason for the change in stance was not explained but may be occasioned by the fact that, subsequent to the release of the High Court's costs judgment, the appellants have ascertained that legal fees were rendered to the estate of $166,814.68, a figure which they contend is extraordinarily high.[33] They argued that the estate had been significantly depleted by fees incurred, which they presume were authorised by Judith as co-executor. They contended that it would be grossly unfair for them to have to effectively pay for half of the estate's costs, which are not only excessive but were incurred acting outside of the proper scope of an executor's role in a case of this kind.

[51] They submitted that the negligent processes in the will-making at Fenton McFadden (the law firm at which Ms Henderson was a partner) were relevant and should be considered, placing reliance on *Public Trust v Dollimore* where the role played by the Public Trust in the will-making was viewed as a relevant factor.[34] They contended that the present case is much worse than the scenario in *Dollimore* because Ms Henderson actively supported Judith and provided untrue information about the records held by Fenton McFadden, including reasons for the will change that were not recorded anywhere and which could only have come from Judith. They criticised the conduct of Mr Scott, in particular his adoption of the role of defending Ms Henderson in respect of her conduct in the will-making process.[35] They submitted that Mr Scott should not have supported Judith and should not have sought to defend Ms Henderson in her capacity as Joan's lawyer.

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33 The appellants' written submissions explained that they requested details of the estate's fees at the time the High Court costs were considered but that, consistent with the obstructive approach taken with respect to discovery generally, the request was declined on the basis that on the High Court findings the appellants were only specific legatees.

34 *Public Trust v Dollimore*, above n 28, at [36] and [38].

35 Noting the position taken in his memorandum of 21 April 2022, set out at [16] above.

[52] In his detailed submissions on behalf of Ms Henderson in response, Mr Scott submitted that, although the grounds on which the appellants sought orders against the executors were not clearly set out, they appeared to be based on criticisms of Ms Henderson. He contended that the majority of these criticisms related to the conduct of Fenton McFadden in obtaining instructions from Joan and in relation to the preparation of the 2015 and 2016 wills, criticisms which he stated were not relevant to Ms Henderson's role as executor, which only commenced on Joan's death in October 2019.

[53] Mr Scott noted that the starting position is that an executor is entitled to costs from the estate, citing *Loosley v Powell*.[36] He emphasised that he was engaged as counsel for Ms Henderson because of the need for separate representation concerning the third cause of action for breach of fiduciary duty, which sought special damages against the executors and costs payable by the executors personally on an indemnity basis. He sought to distinguish *Dollimore* on the grounds that there the Public Trust took an active role in arguing there was undue influence, whereas in this case Ms Henderson had been defending herself against an allegation made against her in her personal capacity as executor. In circumstances where that cause of action was rejected and was not appealed to this Court, he submitted there could be no question that the costs of representation were reasonably incurred by Ms Henderson in her capacity as executor and hence were payable out of the estate.

[54] Drawing attention to the distinction drawn by the Judge at [57],[37] Mr Scott submitted that the only criticisms of Ms Henderson which could be relevant to the present costs application were those relating to her in her capacity as executor, almost all of which were the subject of the judgments in the High Court. Mr Scott observed that Ms Henderson as executor was never in a position to accept the second *Calderbank* offer.

[55] Although the submissions timetable did not provide for a reply, counsel for the appellants filed a reply submission "[d]ue to the complexity of the matter". The appellants took issue with the suggestion that it was necessary to separately

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36 *Loosley v Powell* [2018] NZCA 3, [2018] 2 NZLR 618.
37 High Court costs judgment, above n 2. See [48] above.

appeal the costs consequences of a first instance judgment, citing rr 48(4) and 53J of the Court of Appeal (Civil) Rules 2005. While acknowledging that there had been no appeal against the rejection of the breach of fiduciary duty claim, they nevertheless maintained that the basis for that claim was relevant to costs.

[56] Challenging the proposition that most of the criticisms of Ms Henderson related to the making of the 2015 will, they submitted that their criticisms included her actions as executor both before and after proceedings were filed. In particular they submitted that Ms Henderson's failure to follow Court directions concerning the filing of evidence and provision of discovery was expensive and frustrating for the appellants. Noting that Judith had changed her position on the issue of the responsibility of Fenton McFadden for costs, the appellants adopted a neutral stance on the division of the executors' costs liability.

Conclusion

[57] We consider there is substance in Mr Scott's contention that to a substantial degree the criticisms of Ms Henderson focus on her role as Joan's solicitor. We further consider that the Judge was correct to draw the distinction between Ms Henderson's dual capacities.[38] The appellants' stance on that issue was inconsistent. At the commencement of their primary submissions they accepted that the conduct of Ms Henderson as Joan's solicitor was a separate matter to her conduct as executor for Joan's estate. However in the course of their submissions they departed from that position,[39] and in their reply invoked *Dollimore* for the proposition that the deficits in the Public Trust's will-drafting processes were relevant to the exercise of discretion as to what litigation costs incurred by the Public Trust should be reimbursed from the estate.

[58] In our view *Dollimore* is distinguishable. The Public Trust there brought the proceedings, alleging both testamentary incapacity and undue influence. While accepting that the Public Trust was correct to place the two wills before the Court, the Judge considered that it then adopted an incorrect approach and took too active

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38 At [57]. See [48] above.
39 See [51] above.

a role.[40] He ruled that it should receive some costs as it would have needed to initiate proceedings, assess whether the other parties were presenting the Court with the right information and attend.[41] However the approach adopted was too adversarial and led to an improper incurring of expenditure.[42] The scenario in the present case is different and was compounded by the cause of action pleaded against the executors.

[59] If the appellants did not accept the Judge's ruling on the conflation of capacities, then, as Mr Scott argues, they should have lodged an appeal against the costs judgment. Success on an appeal confined to the undue influence cause of action against Judith, in which the estate was not a participant, does not result in a revisitation of all aspects of the High Court's costs judgment. Allowing the appellants' appeal on the undue influence claim necessitates a reconsideration of the costs outcome in the lower court to reflect that that cause of action should have succeeded.

[60] We accept there was no requirement for the appellants to file a separate notice of appeal against the costs judgment, simply for the purpose of revisiting costs on the undue influence cause of action in the event that their appeal on that cause of action was successful. However success on an appeal in respect of one cause of action does not mean that costs are at large in respect of all matters, including those on which the appellants failed at first instance and did not appeal. As this Court explained in *Parsot v Greig Developments Ltd*:[43]

> If a party wishes to challenge a costs judgment in the absence of success on the substantive judgment, it must:
>
> (a) include the grounds of challenge in its substantive appeal, if that appeal is not already filed; or
>
> (b) seek to amend the notice of appeal to incorporate a challenge to the costs judgment, with the grounds of challenge; or
>
> (c) commence a new appeal against the costs judgment, which appeal will then be heard at the same time as the substantive appeal.

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40 *Public Trust v Dollimore*, above n 28, at [38].
41 At [39].
42 At [38].
43 *Parsot v Greig Developments Ltd* [2009] NZCA 241, (2009) 10 NZCPR 308 at [33].

[61] Similarly we are unable to accept the appellants' submission that, notwithstanding the absence of any appeal from the dismissal of the breach of fiduciary duty cause of action, "[t]he conduct that was the basis for it is relevant to costs". We agree with the tenor of Mr Scott's submission that:

> The complaints against Ms Henderson's conduct, were all pleaded, were the subject of evidence, submissions and are the subject of the High Court decision which has not been appealed. It is submitted the appellants cannot attempt to relitigate those issues through this costs application.

[62] In the absence of appeals against either the dismissal of the breach of fiduciary duty claim or the costs rulings in respect of the executors' liability, we do not consider that the claim in respect of costs against Ms Henderson is able to be revived as an adjunct to revisiting the costs implications of success on the undue influence cause of action alone. Consequently we leave undisturbed the orders in the costs judgment with reference to Ms Henderson. To the extent that the appellants consider that the costs rendered to the estate were excessive, their avenue for redress is via the procedures in the Lawyers and Conveyancers Act 2006.[44]

Costs in this Court

[63] The appellants claim costs of $45,888 said to be calculated on a "Band B" basis and incorporating an uplift of 50 per cent.

[64] Judith submits that costs should be calculated as for a standard appeal in terms of r 53B(1)(a) of the Court of Appeal (Civil) Rules. She challenges items 16, 19 and 8 in the appellants' schedule at [7] above.

[65] We do not consider that this appeal was a complex one as defined in r 53B(1)(b). Nor is an uplift warranted. There does not appear to have been a case management conference. We certify for second counsel.

[66] So far as the costs submissions are concerned, in the normal course costs should be addressed in the submissions on appeal. We recognise that it is necessary to defer aspects of costs where there are *Calderbank* letters. However we do not

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[44] Sections 132(2) and 160.

accept that it is necessary or appropriate in this instance to make a discrete award of "costs on costs" as the appellants propose. Having regard to the outcome of this judgment we consider that costs should lie where they fall on the costs determination.

[67] Hence, the appellants are entitled to costs in this Court of $16,730.

Should Judith recover costs from the estate?

[68] In the High Court Mr Catran for Judith submitted that the first *Paterson* ground[45] was not made out, explaining:[46]

> [22] First, Joan was not at fault because there is no irrational habit attributed to her or her writings. The only "fault" may be that she is claimed to have told the [appellants] that she was bullied into changing her will. But the effect of any such fault was spent and is not relevant to the bringing or conduct of the litigation. The litigation was brought only to undo the financial detriment to the [appellants] brought about by the Will change.

[69] In accepting that submission the Judge stated:

> [31] The first principle plainly does not apply because there was no eccentric or irrational habit on behalf of Joan which prompted the [appellants'] challenge. Her conversation with the [appellants] where she disclosed having changed her Will, albeit soon after Peter's death, falls well short of this threshold.

We agree with that conclusion. There was no attempt by Judith to resile from her stance in the High Court.

[70] With reference to the second *Paterson* principle,[47] the judgment recorded:

> [23] Secondly, Mr Catran contends that the second ground is not made out because Judith did not possess the requisite knowledge. I consider this submission misapprehends the principle in *Paterson* because it is the knowledge of the challenger to a Will which is relevant and not the knowledge of the person said to have unduly influenced the will-maker.

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45 *In re Paterson (Deceased)*, above n 9, at 442. The first principle is that where the litigation originates in the fault of the testator or of those interested in the residue of the estate, costs may properly be paid out of the estate.

46 High Court costs judgment, above n 2.

47 *In re Paterson (Deceased)*, above n 9, at 442–443. The second principle is that if there is sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of their successful opponent.

That conclusion is also correct. It was not the subject of challenge in the current submissions. The Judge determined that the appellants had objectively reasonable grounds for concern within the second *Paterson* principle which justified an order for their costs to be met (in part) from the estate.[48]

[71] The appellants' submissions on this issue are puzzling to the extent that they appeared to assume an obligation to justify their challenge to the 2015 and 2016 wills. However they then proceeded to submit that the circumstances of this case fall within category three of *Paterson*,[49] with the consequence that costs should follow the event.

[72] By contrast, the submission for Judith was that "costs should be met from the estate in the normal way". The import of that proposition appears to be that, to some degree at least, costs of both the appellants and Judith should be met from the estate. This can be seen from the concluding paragraph of Judith's costs submission:[50]

> 58. Accordingly, Mrs Pointon's position is that:
>
> (a) Her costs on the appeal be met by her. But her costs in the High Court continue to be *met by the estate*, as earlier ordered;
>
> (b) The appellants' costs on the appeal be scale and *met from the estate* in the sum of $15,535 as set out in the schedule annexed marked A. There be no uplifts or indemnity costs and no allowance for second counsel.
>
> (c) The [appellants'] costs in the High Court be as ordered by the High Court and *met by the estate* already, but with them retaining the bequests under the now overturned wills as part of a revised costs award. In the alternative, the [appellants] be awarded costs in line with the schedule marked C, but with a discount of 20% for the reasons set out in paragraph 46. Any such costs to be *met by the estate*.
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> …

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48 High Court costs judgment, above n 2, at [38].

49 *In re Paterson (Deceased)*, above n 9, at 443. The third principle is that unless the circumstances of the case are such as to bring it within the first or second principles, the general rule that costs should follow the event ought to prevail.

50 Emphasis added.

[73] The submission for Judith appears to misapprehend the *Paterson* principles. In our view the appellants' contention, that the third principle applies here, is sound. Hence costs follow the event and Judith may not have recourse to the estate for reimbursement of the costs which she is required to pay.

Conclusion

[74] Mr Catran mounted a strong submission to the effect that it was unfair for the costs implications of this Court's judgment to be visited solely on Judith. He submitted:

> 55. In this [C]ourt, again there was no finding of specific improper behaviour by Mrs Pointon. The decision was based on an inability to explain Joan's reported statement that she had been bullied. This is not to deny this Court's finding of undue influence. Mrs Pointon has to bear the shame and reputational consequences of that finding. But it is submitted that is not sufficient reason to 'punish' Mrs Pointon by allocating all costs responsibility to her. The case is most unusual in having a statement from beyond the grave as its primary evidence, only made public when it was too late to test it.

[75] It is certainly unusual for evidence in an undue influence case to derive from the testator. In resisting the appellants' claim Judith had to assess whether the appellants' evidence about Joan's statements would be accepted and, if so, whether it would be determined that Joan's statements were truthful. The Judge accepted that the appellants' account was generally truthful but considered that "in their context" the statements were more equivocal than the bare words suggested.[51]

[76] On the evidence we reached a different conclusion on the latter issue. As we explained in our judgment, the undue influence issue was to be answered solely by reference to the evidence adduced in the case. The case was not about whether Judith was a dutiful daughter.[52]

[77] It is important to dispel any notion that an award of costs against Judith is to be viewed as punishment. Unlike claims for general damages, the outcome in this litigation was binary: Joan's 2015 and 2016 wills were either valid or they were not.

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51 High Court substantive judgment, above n 1, at [180].
52 *Gorringe v Pointon*, above n 3, at [105].

Unfortunately for Judith, her assessment of the outcome of the appellants' claim was not accepted by this Court on the basis of the evidence. As the Supreme Court explained in *Shirley v Wairarapa District Health Board*:[53]

> [19] Rule 47(a) reflects the longstanding principle that, unless there are exceptional reasons, costs should follow the result. That is, the loser, and only the loser, pays. Miller J's order departs from that approach. The English Court of Appeal discussed the issue of good cause to depart from the ordinary course in *Forster v Farquhar* where Bowen LJ said:
>
> > "We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success."

[78] In the absence of any exceptional reasons for a departure from the ordinary course, costs in this case should follow the result.

Result

[79] The High Court costs orders with respect to Judith and the appellants are set aside. We leave undisturbed the High Court costs orders with respect to Ms Henderson.

[80] Judith must pay to the appellants:

(a) Costs in the High Court of $73,093.75.[54]

(b) Costs in this Court of $16,730.

Judith must also pay to the appellants reasonable disbursements in both Courts as fixed by the Registrar of this Court.

Solicitors:
Phillips & Co Law Ltd, Rotorua for Appellants
Cooney Lees Morgan, Tauranga for J A Pointon
Rejthar Stuart Law, Tauranga for S R Henderson

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53 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 (footnote omitted). Rule 47(a) was the predecessor to the current rr 14.1 and 14.2(1)(a) in the High Court Rules.

54 Being $59,351.25 plus $13,742.50.