TRUSTEES ARE BEING MADE PERSONALLY LIABLE TO PAY FOR THE COSTS OF LITIGATION

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1. My talk today is directed particularly at people who act as professional trustees.

2. It is commonly thought that when they incur costs on behalf of a Trust they are entitled to be reimbursed out of Trust assets. The Courts are saying that trustees can quite readily be made personally liable to pay costs to beneficiaries and others.

3. I believe it is also commonly thought that if there is a conventional limitation of liability clause in the Trust Deed, which confines liability to gross negligence or wilful misconduct or other such formulation, they will not be personally liable for any actions that they have taken or which it is said they ought to have taken, but this may not be so.

4. Three cases in particular are being used to defined the circumstances in which trustees may be personally liable to pay costs.

Alsop Wilkinson v Neary

5. One of them is *Alsop Wilkinson* (*a firm*) *v Neary* [1996] 1 WLR 1220, a decision of Lightman J.

6. In this case Lightman J said there are three broad categories of disputes involving trustees.

Category 1

7. He described the first category as a "*Trust dispute*." These are usually technical disputes concerning, for example, the construction of the Deed of Trust. In these cases the Trust pays the trustee's expenses.

Category 2

8. He described the second category as "*beneficiary disputes*" being disputes concerning the proprietary of any action taken or to be taken by trustees. He said that disputes in this category are commonly regarded as hostile litigation and costs should commonly follow the event and not be paid out of the Trust assets. Typical disputes in this category are applications to remove trustees and disputes over actions that trustees propose to take in respect of beneficiaries.

Category 3

9. He called the third category "*third party disputes*." These are disputes with people, other than in their capacity as beneficiaries, in respect of the Trust. In respect of this category he said:

> *"Trustees (express and constructive) are entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the Trust and having a lien on the Trust's assets to secure such indemnity. Trustees have a duty to protect and preserve the Trust's Estate for the benefit of the beneficiaries and accordingly to represent the Trust in a third party dispute."*

10. Lightman J said that beneficiary disputes are regarded as ordinary hostile litigation with costs following the event and not being payable out of the Trust Estate.[1]

Re O'Donoghue

11. A second case which sets out principles concerning the cost consequences of a trustee's actions is *Re O'Donoghue* [1998] 1 NZLR 16, a decision of Hammond J. He said:

> *"The essential concept in both the United Kingdom, and New Zealand, is that of reimbursement. The trustee discharges costs, expenses and even liabilities and then recovers them from the trust property. This is not to suggest that a trustee must always meet these expenses; in practice trustees routinely make payments out of funds readily available from the trust. But of course, all such payments have to be justified on the indemnification principle. The consequence of this general principle is that it is the beneficiaries who are meeting the trustee's expenses. It follows that it is critical that there be a check on those expenses and costs incurred by a trustee.*
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> *The classical Chancery principle was, from the outset, that it is only expenses which are 'properly incurred' which are the subject of a trustee's indemnity. The authority most often cited for this is Re Beddoe [1893] 1 Ch 547 at p 558; but principle still obtains today – see Holding and Management Limited v Property Holding and Investment Trust plc [1990] 1 All ER 938 (CA). The direct consequence of this principle is that improperly incurred expenses fall upon a trustee personally. In that sense, a trustee is always at risk when he or she incurs expenses.*
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> *There is a respectable volume of case law authority around in the British Commonwealth as to what may be regarded as 'not improperly incurred expenses.' Necessarily, given the principle, these cases all appear*

[1] Page 1224

> *to be determinations on the factual position arising in a particular case. But the principle that expenses must be properly incurred necessarily requires a trustee, if called upon, to demonstrate that the expenses arose out of an act falling within the scope of his trusteeship; whether it was something that his or her obligations required the trustee to undertake; and whether the expense incurred was, in all the circumstances, 'reasonable.'*
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> ....
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> *The notion that a trustee must act 'reasonably' is necessarily qualified in various ways. First, it has never been thought unreasonable for a trustee to hire a properly qualified person to carry out work which the trustee is not qualified to undertake. Second the trustee does not have a limitless ability to resort to the law: his function is to assert the interest of the beneficiaries only to a point where there is a judicial ruling on something that is properly required, such as the construction of a fairly debatable point in an instrument, or whether the trustee ought to take a certain course... Third, a trustee is not entitled to expenses arising out of his own misconduct."*[2]

Butterfield v Public Trust

12. The New Zealand Court of Appeal has recently spoken on this topic: see *Butterfield v Public Trust* [2017] NZCA 367. In this case, the Court said:

> *"[20] It is one of the fundamental rights of an honest express trustee that costs and expenses properly incurred in the administration of the trust are compensable out of the assets of the trust. As Danckwerts J explained in Re Grimthorpe:*
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> > *It is commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they have had to pay out.*

[2] At pages 121-122

> *[21] The proposition is so fundamental that it need not be justified. It is a right, probably proprietary in nature, recognised by equity as an incident of trusteeship. The right is to an indemnity for reasonable costs and expenses incurred in the administration of the trust. That is not the same as in an award of indemnity costs in litigation. The entitlement in the first instance is against the trust and its assets. A current trustee may therefore deduct reasonable costs and expenses incurred in the administration of the trust from the trust assets, in exercise of a right of exoneration. Former trustees may claim such costs and expenses from their successors, or failing satisfaction, via the court. Exercising its supervisory jurisdiction the court will review costs and expenses incurred to ensure they are both necessarily incurred in the interests of the trust and reasonable in extent. The limitation was set out in New Zealand Maori Council v Foulkes [2016] 2 NZLR 337:*
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> *The limitation on a trustee's right of indemnity is, however that the expense is 'properly incurred.' The duty to seek advice does not extend, for instance, to pose questions the answers to which are perfectly obvious. Nor where no real and substantial dispute exists. Unnecessary proceedings or the taking of unnecessary procedural steps needlessly increasing costs, may mitigate (or eliminate) the right of indemnity. Again, excessive costs lie beyond the scope of indemnity. Every dollar paid in trustees' expenses is a dollar denied to beneficiaries of the Trust."*

13. Although these judgments tend to start with a general and reassuring proposition that trustees can have their costs paid by a Trust, they end with the threat that the trustees will be personally liable for all the costs they incur for various actions.

So much for the principles. How have the Courts applied them?

***Triezenberg & Another v Mason & Another* [2018] NZHC 186, 19 February 2018**

14. In this case the plaintiff said that the actions of a Mr Mason, the first defendant, had led to a stalemate in the administration of the Trust. Venning J said

> *"On the face of the evidence which I acknowledge is contested, the plaintiff trustees have acted reasonably in initiating and pursuing these proceedings…. At present, on the information before the Court the first defendant fails to satisfy the onus on him that the plaintiffs have*

> *acted unreasonably in taking such advice and pursuing these proceedings."*[3]

15. Venning J made an order that moneys held at the ANZ Bank under the name of one of the two Trusts that were in contention, were

> *"to be made available to the plaintiffs and defendants for the payment to their respective counsel and instructing solicitors' outstanding fees and disbursements and for ongoing fees and disbursements in these proceedings…"*[4]

16. The Judge declined to make an order in the terms sought by the first defendant for him to have "*access to a similar sum*." He said that "*what may be reasonable in terms of quantum for the plaintiffs may not be reasonable for the defendants*."[5] The Judge reserved "*the issue of reasonableness of the quantum of the costs incurred and the steps taken by all parties for determination and adjustment, if necessary, following a substantive hearing*."

The Cats Protection League v Deans **(2010) 20 PRNZ 584**

17. In this case Osbourne A J found that trustees had acted unreasonably in withholding information requested by the sole income beneficiary. He adopted the Judgment of Hammond J in *Re O'Donoghue* where Hammond J said:

> *"I can see no proper reason for the trustee having adopted the obdurate position he did. He acted unreasonably in the sense that I can discern no proper justification, or even a reasonably arguable one, for his having persisted in forcing Health Waikato up to a full defended hearing, and a delayed distribution of some years of the estate. It cannot be right that he should then seek to offload his costs of the proceeding onto the residuary beneficiary. There will therefore, be an order that the trustee is not entitled to indemnity from the estate for his costs or disbursements in these proceedings."*[6]

Davis & Another v White **[2017] NZHC 500**

18. After referring to *The Cats Protection League* case, Osbourne A J said that:

> *"I... find that the applicants did act unreasonably by pursuing an argument... which was lacking merit. While it is appropriate for trustees to seek directions from the Court, in this case the applicants not only sought to have the [Trust] declared a valid trust by*

[3] Paragraph 12
[4] Paragraph 13
[5] Paragraph 14
[6] *Re O'Donoghue* [1998] 1 NZLR 116 at page 122.

> *relying on a draft document, they also took the position that the whole of the trust fund should be paid to Freemasons New Zealand. This was an entirely untenable proposition.... This put Mrs White [the beneficiary] to considerably more expense than would otherwise have been the case..."*[7]

19. The Judge did not impose a full costs burden on the trustees because they had relied on legal advice. He said "*In these circumstances, I do not consider it appropriate to make an award of indemnity costs*."[8]

20. The Judge gave the following decision on the trustees' claim for costs:

> *"In the circumstances of this case, and to recognise that the applicants have in my view contributed unnecessarily to the expense of the proceeding by pursuing arguments that lacked merit, and also to recognise the consequences of their failing to accept the proposal for settlement and resolution of the matter as proposed in the open letter sent to them by the respondent's Australian solicitors, I consider that an increase of 50 per cent on the scale 2B costs is appropriate."*[9]

These costs amounted to $34,119 with disbursements of an additional $1,928.

21. Then, relying on the *O'Donoghue* decision, the Judge said:

> *"I consider that the applicants' behaviour in relation to the [Trust] and the manner in which they brought and conducted this proceeding, together with my finding that the trust is void, leads me to conclude that this [is] a case where the trustees should be ordered to pay costs personally."*[10]

22. The amount that the trustees were to pay was $34,119 plus the disbursements of $1,928.

23. It might be thought that acting on legal advice would exonerate a trustee from having to pay an award of costs but that is not so. The High Court judge ordered the trustee to pay 50% of his costs and, as you will hear, the Court of Appeal indicated that he should have been ordered to pay 100% of them.

24. The Judge also said it was not appropriate that the trustees should get their costs from the Trust. He said that an order that would allow this outcome would mean that the beneficiary was having to pay the costs herself.

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[7] Paragraph 18
[8] Paragraph 19
[9] Paragraph 21
[10] Paragraph 25

25. Notwithstanding this, the Judge allowed the trustees to get 50% of their own legal fees from the Trust.[11]

This decision went on appeal.

***Davis & Another v White* [2017] NZCA 585**

26. In giving Judgment for the Court of Appeal, Venning J said:

> *"While the Judge accepted that it was appropriate for the trustees to have sought directions from the Court, he considered they had acted unreasonably by pursuing an argument as to existence of the [Trust] which was lacking in merit. It was based on a draft deed which contained several defects. Further, they also took the position [that] the whole of the trust fund should be paid to Freemasons New Zealand which the Judge found to be an entirely untenable proposition."*[12]

27. Then, in reliance on the *O'Donoghue* case, Venning J said:

> *"The issue is whether the Judge was correct to find the trustees' actions were so unreasonable in this case they should pay both the costs award to [the beneficiaries] and 50 per cent of their own legal costs personally."*[13]
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> ....
>
> *"We also agree with the Judge's finding that what made the trustees' actions unreasonable was in seeking to rely on a plainly defective document as evidence of the trust and, more relevantly, taking the untenable position that the whole of the trust fund should be paid to Freemasons New Zealand which was in direct conflict with [the lawyer trustee's] earlier written advice to [the beneficiary]."*[14]

He held that:

> *"... there were a number of additional aspects of the matter which support the Judge's conclusion [that] the trustees had acted unreasonably and should personally bear the costs."*[15]
>
> ....

[11] Paragraph 29
[12] Paragraph 13
[13] Paragraph 21
[14] Paragraph 23
[15] Paragraph 25

> *"We are satisfied the Judge was right to find that this was a proper case to deny the trustees indemnity for costs from the trust funds. The award of costs in favour of [the beneficiary] (uplifted to reflect the unreasonable approach of the trustees) would be of no practical value to [the beneficiary] if the trustees were able to resort to the trust funds to pay it. [The beneficiary] would effectively be paying the costs award herself. That would defeat the purpose of the award and the reasons which led to it in the first place."*[16]

28. Venning J went on to say that the trustees should "*consider themselves fortunate*" that the Judge directed that they only had to pay half of their own costs.[17]

29. This was a clear indication that the Court of Appeal considered that not only should the trustees have paid the beneficiary's costs but they also should have paid all of the costs they incurred themselves – and not just half of those costs.

***Jellyman v Jellyman* [2018] NZHC 210, 21 February 2018**

30. In this case Mrs Jellyman was one of two trustees of a Trust that was established up by her late husband. The other trustee was her son Maurice. Mrs Jellyman said she wanted the Trust to sell the house in which she lived and buy a house for her in Hastings. Maurice opposed the request. The Judge recorded the following explanation for Maurice's objection to the sale of the house.

> *"[9] In a document entitled Response and Statement of Defence, filed on 17 January 2018, Mr Jellyman states:*
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> > *I agree entirely I have been negative and non responsive in much that involves the sale of this Home. However, while the Land Agents are welcome to express their opinions on values, I still have the rights, as my Father's Executor, to attempt to get the best price, in my view.*
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> *[10] Furthermore, Mr Jellyman does not believe that his mother wishes to move to Tauranga. He is of the view that his sister, Mrs Jenkins, has instigated the "push" to shift their mother to Tauranga knowing she is in no fit state of mind to make a rational decision of her own.*
>
> *[11] He says that from the time his mother has lived in Hastings she has expressed to him in no uncertain terms many times "Maurice, whatever happens, do not let me go back to the Bay of Plenty, I do not want to live there". Mr Jellyman says his mother has often spoken*

[16] Paragraph 34
[17] Paragraph 35

> *of the fact that her husband had other women during their time living in that region and that it held many bad memories. Mr Jellyman states that if his mother's home must be sold, "it has always been my wish and intent to have her placed in Mary Doyle Retirement Village, Havelock North"."*

31. Mrs Jellyman sought an order to remove Maurice as a trustee. Woolford J ordered that he should be removed and that he must personally pay costs to Mrs Jellyman on a 2B basis.

***Ash v Singh & Others* [2018] NZHC 224, 26 February 2018**

32. In this case there were a number of different causes of action. The first was concerned with "*the validity of a Deed of Variation*." It was held that this required a determination for the benefit of the trustees and the beneficiaries. It was proper to have applied to the Court for directions once there was a question as to the validity of the Deed of Variation and the costs of this aspect of the Application were recoverable from the Trust.[18]

33. The second and third causes of action sought removal and replacement of the trustees and damages against the trustees for mismanagement of the Trust's assets. In the third cause of action there were allegations of fraud, breach of fiduciary duty, a failure to act with due diligence and prudence, and a failure to act in good faith and for the benefit of the beneficiaries. It was held that under Lightman J's classification in the *Alsop Wilkinson* case, this was a classic beneficiaries' dispute in which costs should follow the event and not come out of the Trust estate.

34. The fourth cause of action sought disclosure of Trust records. This was held to be "*a beneficiaries' dispute*" in which costs should follow the event.[19]

35. The plaintiff, a beneficiary, succeeded on her application for security for costs and for a judicial settlement conference. It was held that he was entitled to an award of costs and that the trustees must pay them personally and not out of the trust's estate. Even an application for a judicial settlement conference resulted in the trustees having to pay the costs of the application personally.

36. The trustees sought to recover their own costs from Trust assets. They failed, with the Judge saying:

> *"... the trustees undertook the defence to the plaintiff's summary judgment application on the merits, instead of taking a neutral stance. Their approach was partisan throughout. That can be seen in their stonewalling the plaintiff in supplying the information reasonably requested, in [Mr Singh's] abusive correspondence to the plaintiff and in stalling tactics such as the application for security for costs. For the trustee*

[18] Paragraph 9
[19] Paragraph 12

> *dispute, the validity of the deed of variation, it can be seen in the threats that the plaintiff would have to bear all those costs himself. The trustees' stance was the opposite of recognising that there was a serious issue, on which there may be differing views and on which they should be neutral. The proper course was for them to abide the decision of the court and to leave the other beneficiaries... to oppose the summary judgment application. Significantly, the trustees did not make any application under In Re Beddoe. In the absence of any advice or direction from the court, they took a risk as to costs while electing to proceed in a partisan manner."*[20]

37. The Judge held that:

> *"Trustees are under a duty to act impartially among beneficiaries."*[21]

38. Far from acting impartially:

> *"Here, the trustees knowingly aligned themselves with Darsan Singh and supported her as a beneficiary and opposed the plaintiff. <u>They knowingly did that in breach of trust</u>. In these circumstances, they are not entitled to be indemnified out of the trust assets."*[22]

39. One of the arguments on which the trustees relied was a limitation of liability clause. This provided that:

> *"No Trustee hereunder shall be liable for any loss suffered by the Trust Fund or by any beneficiary... arising from any action taken by him as Trustee hereunder <u>PROVIDED ALWAYS that such action is not attributable to his own dishonesty or to the wilful commission by him of an act known to him to be a breach of trust</u> and no Trustee shall be bound to take any proceedings against a co-Trustee or former Trustee for any breach or alleged breach of trust committed.... AND each of the Trustees shall be entitled to a full and complete indemnity from the Trust Fund and every part hereof for any personal liability he may incur in any way arising out of or in connection with his acting or purporting to act as a Trustee hereunder..."*[23]

[20] Paragraph 20
[21] Paragraph 22
[22] Paragraph 22
[23] Paragraph 21

40. This clause gave no protection to the trustees and it was held that they were not entitled to have recourse to trust assets "*to meet or reimburse their costs*."[24]

41. The Judge said:

> *"[22] That [clause] does not protect the trustees here. Trustees are under a duty to act impartially amongst beneficiaries. In a case such as this, where there is a dispute as to entitlements under a trust deed, trustees comply with that duty by taking the neutral stance required under Alsop Wilkinson v Neary. Here, the trustees knowingly aligned themselves with Darsan Singh and supported her as a beneficiary and opposed the plaintiff. They knowingly did that in breach of trust. In these circumstances, they are not entitled to be indemnified out of the trust assets."*

The liability of a director of a corporate trustee to pay costs personally

42. In *Guest v Guest and Others* [2019] NZCA 64, 223.19 the Court of Appeal unanimously held that Mr Livingstone, the director of a corporate trustee which had no assets or income, was personally liable pay costs in respect of Trust litigation.

43. The Company was a typical corporate trustee, with minimal assets, which had been formed to insulate the director from personal liability.

44. This is the reasoning that the Court applied when it held that Mr Livingstone could not hide behind the Company but was fully exposed to a personal liability to pay costs:

> "*There is no doubt Mr Livingstone has been heavily involved. He swore several affidavits and has given evidence. He advanced at least $260,000 to the Trust and has been involved in many of the key decisions along the way. Through his Company, Guest Trustee Limited (the 2nd respondent), Mr Livingstone acted as a trustee of the Trust. Guest Trustee Limited is a corporate shell with no assets or income and it exists solely to be a trustee of the Trust, and Mr Livingstone accepted he had formed it solely to insulate himself from liability as a trustee*." [27]
>
> "*He is a significant creditor of the Trust, and is aligned with the other trustees who are also beneficiaries. There can be no doubt he is interested in the matter in all respects. That of recent times he formally acts through a corporate entity should not in all these circumstances insulate him from a costs liability he would bear if a*

[24] Paragraph 23

> *trustee in his name. We accordingly consider it is appropriate to include him in the costs liability."* [28]

45. The Court held that when determining whether a non-party should pay costs:

> "*Important considerations are the extent to which the non-party stands to gain from the litigation, and the level of involvement of the non-party in the litigation*." [26]

46. It was held that Mr Livingstone was "*jointly and severally*" liable with the human trustees to pay costs of $104,367. [30 and 34].

***Sunde v Sunde* [2019] NZCA 552, 13.11.19**

47. Duffy J gave the judgment for the Court of Appeal in this case. Three siblings and their mother settled money on a Trust on terms that the moneys were repayable on demand.

48. In 2016 two of the siblings and their mother made demand for repayment but they were opposed by a brother.

49. The two siblings and their mother began summary judgment proceedings which the brother opposed but ultimately he abandoned his opposition to the application. Costs were ordered against the brother on a 2B basis and he was ordered to pay them personally. He appealed on the grounds that he was entitled to be indemnified from the Trust and there was an express provision authorising trustees to be paid except where the:

> "*Trustee is liable for any loss incurred by the Trust fund or by any beneficiary not attributable to that trustee's own fraud, dishonesty or wilful commission or omission by that trustee of an act known to be a breach of trust."*

50. The clause also provided that the trustee was entitled to an indemnity when he or she "*purported in good faith to exercise as trustee any function, duty or power which is not authorised or which may be a breach of this Trust*."

51. The Court of Appeal held that, following the *O'Donoghue* decision, payments were only justifiable if they were properly incurred and it was held that the brother's opposition had not been "*properly incurred*."

> "*The presence of an indemnity clause will not oust the court's supervisory jurisdiction to review whether costs and expenses incurred by a trustee have been necessarily incurred in the interests of the beneficiaries and are reasonable in amount."* [13]

52. The Court quoted with approval the following statement from *New Zealand Maori Council v Foulkes*[25]:

[25] [2016] 2 NZLR 337

> "*The limitation on a trustee's right of indemnity is, however, that the expenses are 'properly incurred.' The duty to seek advice does not extend, for instance, to pose questions the answers to which are perfectly obvious. Nor where no real and substantial dispute exists. Unnecessary proceedings or the taking of unnecessary procedural steps needlessly increasing costs, may mitigate (or eliminate) the right of indemnity. Again, excessive costs lie beyond the scope of indemnity. Every dollar paid in trustees' expenses is a dollar denied to beneficiaries of the trust."* [14]

53. It was held that the proper course for the trustees to have adopted was to have sought a Beddoe order. [16]

54. The Court said that the brother "*had realised the debts [to his mother and siblings] were properly due and payable and, therefore, opposing the demands was futile*." [18]

55. The brother's opposition was based on the Trust's lack of liquid assets:

> "*That is no excuse for the stance Kevin took. The reasonable approach in such circumstances would have been for Kevin to file an admission of claim and then negotiate with [the mother and two sisters] about the means of payment*." [19]

The personal liability of directors of corporate trustees – the principles for assessing liability

56. I suspect that many of you will be shocked to learn that when you act as a director of a corporate trustee you can nevertheless be made personally liable to pay costs. The circumstances in which non-parties (ie the directors) can be made liable for costs were summarised in a recent English case – *The Creative Foundation v Dreamland Leisure Limited & Others* [2016] EWHC 859 (Ch). Arnold J ordered a non-party to pay costs and he stated the principle factors that are relevant to the exercise of the Court's discretion when deciding whether or not to order that a non-party should pay costs. Interestingly, from a New Zealand perspective, the leading case was the Privy Council's decision in the New Zealand case *Dymocks Franchise Systems NSW Pty Ltd v Todd & Others* [2004] UKPC 39.

57. These were the principles that the Court said were applicable in determining whether a non-party should be made personally liable to pay costs.

- Costs orders against non-parties are "*exceptional*."
- The ultimate question in any case is whether in all the circumstances it is just to make the order.
- Generally speaking the discretion will not be exercised against "*pure funders*" ie "*those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course*."
- "*Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice*

will ordinarily require that if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes."

- "*The non-party may be 'the real party' to the litigation, but it is not necessary that he be 'the only real party' to a litigation provided he is 'a real party in… very important and critical respects*."
- "*Generally speaking where a non-party promotes and funds proceedings by an insolvent Company solely or substantially for his own financial benefit, he should be liable for the costs of his claim or defence or appeal fails*."
- "*There is no need for an applicant to establish impropriety, though its presence may per se support the making of an order*."

58. The principles for determining whether directors of a Company should be personally liable to pay non-party costs were addressed in *Minister of Education v H Construction North Island Limited* (in liquidation) [2019] NZHC 1459. Hawkins Construction North Island Limited (Hawkins) was liable in negligence for the construction of a school. Hawkins was a subsidiary of a McConnell Company. When Hawkins was unable to pay its own legal fees a related Company called Hawkins Group Limited paid its legal fees. That Company fell behind in payments and the Court considered that McConnell had authorised Hawkins to vigorously defend the claim that should have been settled and was complicit in using Hawkins' likely insolvency as a weapon, and guaranteed representation when Hawkins would otherwise have been unrepresented. McConnell was the 'real party' to the proceeding. Hawkins Group Limited was therefore ordered to pay costs. Non-party costs were not awarded against the McConnell directors personally as there was no evidence that they would benefit personally as they did not inject any of their own money into the dispute and there was no evidence that they would benefit personally from refusing settlement in favour of a trial.