

**CITATION:** Hockley v. Moy and Agar 2011 ONSC 3707  
**COURT FILE NO.:** CV-10-401117  
**DATE:** 20110614

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** James Hockley v. Joanne Moy and Helen Agar, Estate Trustees of the Estate of Dorothy Madeline McKillop

**BEFORE:** Madam Justice Corrick

**COUNSEL:** Michael F. Kacaba for James Hockley

David M. Lobl for Joanne Moy and Helen Agar

**HEARD:** Written Submissions

**COSTS ENDORSEMENT**

[1] Dorothy McKillop died in January 2010. Joanne Moy and Helen Agar are the Estate Trustees of Ms. McKillop's estate. In April 2010, James Hockley commenced an action for, among other things, dependant's support and a declaration that he was entitled to Dorothy's estate pursuant to a constructive or resulting trust.

[2] On November 24, 2010, Mr. Hockley delivered to the Estate Trustees the affidavit of Lesley Burns, a non-party. He sought the consent of the Estate Trustees to have the affidavit admitted as evidence at the trial. At the time, Ms. Burns was terminally ill and was only expected to live a few months. She died on December 27, 2010.

[3] Immediately upon receipt of the affidavit, counsel for the Estate Trustees asked that Ms. Burns be produced for cross-examination. Despite offers to accommodate Ms. Burns in every way possible, she was not produced for cross-examination. As a result, the Estate Trustees moved before me on December 20, 2010 for an order that Ms. Burns attend at a *de ben esse* examination, or, alternatively, that the Estate Trustees be granted leave to examine Ms. Burns at such time and place as directed by the court.

[4] By endorsement dated December 21, 2010, I adjourned the motion and ordered that Ms. Burns be served with notice of it. Subsequently, Mr. Hockley agreed that the affidavit should be struck and declared inadmissible, and I ordered accordingly.

[5] The parties have filed written submissions on the issue of costs. In their submissions, they advance the following positions:

- a. The Estate Trustees submitted that they are entitled to costs on a full indemnification basis in the amount of \$33,397.21, with costs on a substantial indemnity basis of

\$29,020.72 to be paid by Mr. Hockley personally or from his share of Ms. McKillop's estate, payable forthwith and the balance of \$4,376.49 to be paid out of the estate.

- b. Mr. Hockley submitted that since the merits of the action have not yet been determined, it is premature to assess costs of the motion. If costs are assessed now, Mr. Hockley submitted that they should be payable in the cause. In any event, Mr. Hockley submitted that the amount of costs sought should be reduced.

[6] There is no doubt that trustees are entitled to be indemnified for all costs they reasonably incur. Reasonable costs include the costs of a motion reasonably brought: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353. As I indicated in my December 21, 2010 endorsement, this motion was reasonably brought. It was precipitated by the irregular manner in which Mr. Hockley produced Ms. Burns' affidavit. This endorsement deals only with the matter of the costs between the parties. The reasonableness of the total amount paid by the Estate Trustees for bringing the motion will be determined on the Estate Trustees' passing of accounts.

[7] The Estate Trustees seek costs from Mr. Hockley on a substantial indemnity basis for the following reasons:

- a. Mr. Hockley served the affidavit without regard for the procedure set out in the *Rules of Civil Procedure*, and with no intention of producing Ms. Burns for cross-examination.
- b. The tone of the correspondence to counsel for the Estate Trustees from Mr. Kacaba, counsel for Mr. Hockley, was uncivil and inappropriate, accusing Mr. Lobl of engaging in inappropriate and uncivil tactical conduct because he sought to cross-examine Ms. Burns.
- c. Mr. Hockley persisted in his efforts to have the affidavit admitted despite stating the position that the evidence in the affidavit, "could be proved easily otherwise."

[8] I am unable to conclude that Mr. Hockley had no intention of producing Ms. Burns for cross-examination when he served the affidavit. It is obvious that Ms. Burns was gravely ill at the time. Although the tone of Mr. Kacaba's correspondence was uncivil and unwarranted, the conduct of the plaintiff in this motion falls short of the "reprehensible, scandalous or outrageous conduct" necessary to warrant an award of costs on a substantial indemnity basis: *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722.

[9] The overriding principle in the fixing of costs is reasonableness. It is not simply a mathematical exercise multiplying the number of hours spent by the counsel's hourly rate. The amount must be a fair and reasonable one. The court must consider the reasonable expectation of the unsuccessful party.

[10] The bill of costs for the Estate Trustees indicates a total of 75 hours of legal work billed at the maximum rate for a lawyer called less than ten years as set out by the Costs Subcommittee of the Civil Rules Committee in its Information for the Profession. Partial indemnity costs of the

Estate Trustees are \$19,948.11 including taxes and disbursements. Not all of the hours billed relate to the motion. Hours spent on the case before receiving the affidavit and spent preparing questions for the cross-examination of Ms. Burns, which did not occur, are included in the bill of costs.

[11] Having regard to all of the factors set out in rule 57.01 of the *Rules of Civil Procedure*, and the principles articulated in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 72 O.R. (3d) 291 (C.A), I award costs to the Estate Trustees in the amount of \$11,000.00 inclusive of disbursements and applicable taxes.

[12] Mr. Hockley submits that costs should be payable to the Estate Trustees in the cause. I do not agree. This motion was a discrete interlocutory step made necessary by the irregular production of an affidavit. The fact that the underlying issue in the litigation has not yet been addressed is of no consequence. There is nothing in this case to warrant departing from the general principle that the unsuccessful party pays. Mr. Hockley shall pay the costs award personally or from his share of Ms. McKillop's estate within 30 days.

---

Corrick J.

**Date:** June 14, 2011