

New Guidance on Costs in Solicitors' Negligence Cases

The High Court recently confirmed the legal basis for clients trying to recover legal fees as damages in solicitors' negligence cases.

Former clients often seek damages for the consequences of a transaction gone wrong (such as the lost value of a property). But there has been a question mark over whether clients can claim wasted legal costs as damages, particularly where no other losses are claimed. The High Court has confirmed that they can.

The case in question, *Peters v Peters* [2013] NZHC 1061, involved a claim by Angela Peters against her former husband's family trust (the Peters Family Trust) for money provided by Angela to the Trust. Angela said the money was a loan; the Trust said it was a gift. A settlement in the main claim was reached on the basis that there was a loan.

The solicitors acting for Angela and the Trust at the time of the transaction did not (among other things) put in place any documentation to explain the nature of the advance from Angela. The Trust claimed from their former solicitors for their actual legal costs incurred in defending the proceedings brought by Angela.

The basis was that if their former solicitors had documented the nature of the transaction as being a loan, then there would never have been a dispute about whether the money had to be paid back. The trustees also claimed damages for the distress suffered. The Trust did not claim for any other damages – for example, Mr and Mrs Peters senior did not make any claim for financial loss occurring from the sale of their house, which had to be sold to satisfy the settlement.

The Court confirmed the general rule that wasted legal fees cannot be recovered as damages. There are two exceptions to this however:

1. Where the costs were incurred in proceedings between third parties; and
2. Even where the claim is between the same parties, where the plaintiff (the Trust) is relying on an independent cause of action.

This case was found to fall within both exceptions:

1. The costs claimed were for the costs of the proceedings between Angela and the Trust; and
2. The proceedings between Angela and the Trust were about proof of the nature of the advance, but the claims of the Trust against its former solicitors were for breaches of contract or tort. The solicitors' duties arose independently of any obligations owed by the Trust to Angela.

The former solicitors were required by the Court to pay damages of \$55,000, comprising the legal fees paid by the Trust to its current solicitors in the claim made by Angela against the Trust. The claim had been for \$65,860 for legal fees, and the former solicitors accepted that \$45,868 related solely to attendances in the High Court proceedings. The Court took a broad assessment and awarded \$55,000.

The Court had also, in a separate judgment, ordered that the Trust pay costs to Angela in the substantive proceedings. The Court ordered the Trust's former solicitors to pay this sum to the Trust also.

Lastly, the Court ordered that Mr and Mrs Peters senior each be paid damages of \$25,000 for the distress suffered by them. They had sold their home to meet the settlement, because, as there was no documentation for the loan, there was no limitation of liability to the assets of the Trust. This adversely affected their retirement.

No distress damages were awarded to Scott Peters (the third trustee, and Angela's former husband) as the Court found it unlikely that Scott would have acted differently even if he had been advised differently.

While this case no doubt confirms the basis on which many solicitors' negligence cases have been settled in the past, it may also lead to more claims as former clients may bring claims that they would not otherwise have been confident to bring.

If you would like further information about this judgment or have any other please questions please contact Frazer Barton or Taryn Gudmanz in Litigation.

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