

SUPREME COURT OF QUEENSLAND

CITATION: *Alexander & Alexander v Oliver & Anderson as Executors of the Estate of Nicholas Charles Feros, deceased* [2017] QSC 224

PARTIES: **MAROULA ALEXANDER**
(first applicant)

ESTHER ELIZABETH ALEXANDER
(second applicant)

v
**GARY GAVIN OLIVER & ROBERT JOHN ANDERSON
AS EXECUTORS OF THE ESTATE OF NICHOLAS
CHARLES FEROS, DECEASED**
(respondents)

FILE NO: BS 8921 of 2017

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 25 September 2017 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 25 September 2017

JUDGE: Atkinson J

ORDERS: **Upon the respondents undertaking to forego any claim or entitlement to executors' commission:-**

- 1. The originating application filed 1 September 2017 (Doc. 1) is dismissed.**
- 2. With respect to the application filed 19 September 2017 (Doc. 6) the Court advises the respondents as follows:-**
 - (a) They would be justified in giving notice to Maroula Alexander pursuant to clause 3(c) of the agreement dated 21 February 2017 between them and Maroula Alexander that:**
 - (i) the sum they require to be paid as "Maroula's contribution", within the meaning thereof, is an amount to be calculated taking into account the estimated tax liability of the estate of Nicholas Charles Feros, deceased, in the sum of \$95, 647.20 (notice amount);**
 - (ii) they require the notice amount to be paid by**

her to them within a period of not less than three (3) months (date for payment);

- (b) failing the payment of the notice amount by Maroula Alexander to the respondents by the date for payment, they would be justified in selling the property of the deceased situated at 669 Old Cleveland Road, Camp Hill, more properly described as Lot 14 on RP55131, Title Reference 12144241;**
- (c) they are justified in taking no further steps to:**
 - (i) ascertain the existence of any interest of the deceased in real property situated in Greece;**
 - (ii) cause any interest of the deceased in any real property in Greece to be transferred to Michael Alexander and Esther Alexander.**

CATCHWORDS: SUCCESSION – ADMINISTRATION OF ESTATE – DISTRIBUTION – GENERALLY – where the first applicant was the residuary beneficiary under the will of the deceased – where an agreement was reached between the first applicant and the respondents after the settlement of family provisions claims made by the sons of the deceased – where the first applicant agreed to contribute to the further provision for one of the sons – where the respondents were to notify the first applicant of the sum that was required to be paid for her contribution – where the respondents and their solicitors did not foresee a tax liability arising out of the payment of superannuation funds into the estate – whether the respondents acted honestly and reasonably – whether the first applicant’s contribution should take account of the tax liability

Trusts Act 1973 (Qld), s 76

COUNSEL: K N Wilson QC for the applicant
D J Morgan for the respondents

SOLICITORS: Hillhouse Burrough McKeown Lawyers for the applicant
McCullough Robertson for the respondents

[1] There are two applications before the court. One is an originating application by Maroula Alexander and her daughter, Esther Elizabeth Alexander, applying for the following orders: that within three business days the respondents, who are the executors of the estate of the late Nicholas Charles Feros (a) transfer all rights, title and interest in the properties situated at 669 Old Cleveland Road, Camp Hill in the State or Queensland, more properly described as lot 14 on RP55131, title reference 12144241, and at 26 Opal Street, Emerald, more properly described as lot 1 on RP606052, title reference 30224238 in the State of Queensland, to the first applicant, Maroula

Alexander, and (b) pay the second applicant, Esther Elizabeth Alexander, the sum of \$37,947.65.

- [2] Those orders are sought to give effect to an agreement that was made on 21 February 2017 between the executors and Maroula Alexander after a settlement of family provision claims made by Mr Feros' two sons. Maroula Alexander is the residuary beneficiary under a will made by her brother, Nicholas Feros, on 10 October 2014.
- [3] The agreement between Maroula Alexander and the executors first recites the terms of settlement of the same date with Charles Feros for further provision for him from the estate, Charles being one of the two sons for whom further provision was made by agreement from the estate and later ordered by the court.
- [4] The agreement sets out how the settlement sum to Charles Feros is to be made from cash available in the estate less various expenses which include the executor's commission in the sum of \$30,000, the payment of which Maroula Alexander agreed to, various other legal costs and payment to the other son, administration costs, pecuniary legacies and payment by Maroula Alexander sufficient to meet any difference between the cash available and the settlement sum. I should note that the executors have at this hearing offered and, indeed, undertaken to forego the payment of \$30,000 to them in commission. The executors were to notify Maroula Alexander of the sum they required to be paid as her contribution.
- [5] She agreed to pay that contribution within seven days of the court making the final order in the family provision application, failing which the executors would be at liberty to sell the property at Camp Hill. The agreement also recited that upon receipt of a written direction from Esther Alexander to the executors authorising and directing them to do so, they might pay the amount of Maroula's contribution from the pecuniary legacy payable to Esther under the will of the deceased.
- [6] The agreement then provided that once the court had made final orders in the proceeding, that is, the family provision proceeding, the executives would proceed forthwith to finalise the administration of the estate and "subject to the due administration of the estate and this agreement" the executors would transfer the Camp Hill property and the deceased's interest in the property situation at 26 Opal Street, Emerald, to Maroula in specie.
- [7] A problem occurred which was not then foreseen by the residuary beneficiary, her solicitors, her legally qualified relative who was giving her informal advice, the executors or the solicitors then acting for the executors. Prior to that settlement, a different firm of solicitors had been retained by the executors to get in the net assets of the estate. This can be seen from the fact that they got in a large sum of money in superannuation payment into the estate. Any competent solicitor, who practices in this area, could be expected to know that the payment of superannuation funds into an estate rather than to certain specified relatives or dependents of a deceased would be likely to give rise to a tax liability.
- [8] The executors are not themselves legally qualified. They retained solicitors. The solicitors took advice from accountants, but failed to take advice as to the tax liability of the superannuation fund. The executors acted honestly and they acted reasonably by retaining solicitors to do those more complex tasks on their behalf. I do not accept that

in those circumstances they had a personal duty, notwithstanding that they had retained professionals to do it for them, to nevertheless themselves contact the trustees of the superannuation fund and find out what was the taxable and non-taxable component of the fund, and then to seek, themselves rather than through their solicitor, advice from an accountant as to the tax payable.

- [9] Indeed, if one took that to the logical extreme, if the accountant they had retained gave them advice, were they to presume that the advice was wrong and find out for themselves what was the appropriate tax payable? Even if they did have that personal duty I would be satisfied that the way in which they acted meant that they had discharged the onus of showing that their conduct was honest and reasonable and, in all the circumstances of the case, ought fairly to be excused pursuant to s 76 of the *Trusts Act 1973*.
- [10] Accordingly, I would not grant the orders sought in the application made by the applicants, but to avoid any doubt I would order, in accordance with the application made by the respondents, that the notice they give to Maroula Alexander pursuant to clause 3C of the agreement dated 21 February 2017 should take account of the tax liability of the estate which is always to be paid out of the residuary estate, and that once that amount is properly ascertained they should give a reasonable period of time, certainly no less than three months', for the applicant to raise that money to pay into the estate if she wishes to avoid the property at Camp Hill being sold. If, however, she is unable to make payment within the reasonable period of time, once it is ascertained to the executors, then the executors would be justified in selling the property located at 669 Old Cleveland Road, Camp Hill.
- [11] I ask that the parties give me minutes of an order to give effect to these reasons.