

SUPREME COURT OF QUEENSLAND

CITATION: *Lin v Lo & Anor* [2017] QSC 310

PARTIES: **CHIA-YI LIN**
(applicant)
v
SOPHIA JUAN LO
(first respondent)
and
KONRAD LIN
(second respondent)

FILE NO: 10241 of 2016

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 19 December 2017

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: Applegarth J

ORDER: **1. The first respondent pay the applicant's costs of and incidental to the proceeding to be assessed on the indemnity basis.**
2. There be no order as to the costs of the proceeding as between the first and second respondent.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – where final judgment in applicant's favour made by consent – whether costs should follow the event – whether costs should be assessed on the indemnity basis
Westpac Banking Corporation v Jamieson & Ors [2015] QCA 84, cited

COUNSEL: N J Shaw for the applicant
The first respondent was self-represented
The second respondent was self-represented

SOLICITORS: Christie Lawyers for the applicant
The first respondent was self-represented
The second respondent was self-represented

- [1] This proceeding was resolved when, after a lengthy interlocutory process and close to trial, the first respondent withdrew her opposition to the application, and both respondents consented to orders granting the applicant the relief she sought in her amended application. The parties agreed directions about the delivery of written submissions about costs.
- [2] The applicant seeks an order that the first respondent pay her costs of and incidental to the proceeding on the indemnity basis.
- [3] The applicant initially applied for the removal of a caveat lodged against a property of which she was the registered owner at the Gold Coast. The property was very valuable, and the first respondent resided in it. The first respondent refused to vacate the property, and her presence there prevented the applicant from selling it and granting vacant possession to a purchaser. The first respondent justified her remaining in the property on the basis of an alleged gift of the property to her by the second respondent. But the property was owned by the applicant who denied that the second respondent had any interest in it.
- [4] The matter originally came before me in the Applications List. Given that the first respondent was self-represented, I adjourned the matter with the strong suggestion that the parties reach a resolution of the matter which would enable the property to be sold. The alternative was to prejudice the applicant if there was a fall in the value of the property, or if the first respondent stayed in possession of it without paying the market rent.
- [5] The first respondent was initially self-represented. She engaged lawyers at some stage but was self-represented for most of the proceeding. The second respondent did not take an active part in the proceeding after he was subsequently joined. He was self-represented. He was joined because of allegations which the first respondent raised in respect of his alleged interest in a property, and an alleged gift which he made in respect of his interest in the property. The first respondent claims to have been in a de facto relationship with the second respondent, and during the course of the hearing I was told of de facto property proceedings in a Federal Court. However, despite my suggestion that the issues raised in this proceeding be determined as part of the de facto property proceedings with, if necessary, the applicant being joined in that proceeding, this proceeding was not transferred to a Federal Court with jurisdiction in respect of de facto property matters.
- [6] After I adjourned the application to remove the caveat there was a dispute about whether the parties reached an enforceable compromise agreement. The applicant changed legal representatives and the matter proceeded. Eventually, on 29 May 2017, interlocutory orders were made that the caveat be removed, the property be sold and the proceeds of sale held in the applicant's solicitors' trust account pending further order. The applicant then amended her application to seek declaratory relief and consequential orders as to her entitlement to the balance proceeds of sale of the property. The first respondent also was given access to certain funds for her expenses.

- [7] The matter had a rocky interlocutory course. The first respondent issued process for the production of documents by a non-party, the Office of State Revenue. That non-party explained to the first respondent why it was entitled to not produce the documents by reason of a clear statutory provision. The first respondent persisted in seeking the documents and was ordered to pay the non-party's costs. At that point she indicated that she wanted to give up the proceeding. However, she was in such a distressed condition that I did not wish to have her regret her decision, made under pressure and without the opportunity for reflection. She subsequently decided to continue her defence of the applicant's proceeding.
- [8] The proceeding was set down for a trial before me and orders were made for material to be filed. The first respondent filed substantial affidavit material. She only withdrew her opposition to the amended application at a review on 9 August 2017, close to the date of trial.
- [9] The applicant's principal submission is that the costs should follow the event and that the applicant was successful. By the consent order, she succeeded in obtaining the balance proceeds of sale. Had the caveat not earlier been removed, she would have been successful in obtaining an order for its removal. The fact that the final order was by consent does not alter the fact that the event was a final determination in the applicant's favour.
- [10] Costs should follow the event unless there is good reason otherwise.
- [11] In many cases a party, for good reason, elects not to pursue a proceeding to a final hearing. In such a case, in which there has been no determination on the merits, and no unreasonable behaviour by a party, a common order is that there be no order as to costs.¹ However, this is not a case in which a party has discontinued a proceeding after a decision is made by an applicant to not further prosecute the proceeding. Instead, the applicant was forced to continue to prosecute the proceeding, and it was the first respondent who capitulated. The applicant was successful and obtained the orders which she sought, being orders which were made by consent.
- [12] In her written submissions, the first respondent contends that if the applicant is taken to be successful, then the costs should be ordered against the second respondent, who the first respondent characterises as the "wrongdoer". However, I am not in a position to make any determination as to whether the second respondent is in fact a wrongdoer who precipitated the present proceeding. The first respondent did not take the matter to a proceeding in which those issues, as between respondents, might have been determined. If the second respondent lied to her in asserting that he owned the property in question, then the first respondent should have appreciated that the applicant had an entitlement to the property and taken whatever proceedings or actions she was advised against the second respondent, based upon his alleged lie. Instead, her opposition to the current proceeding was on the basis that the second respondent had not lied to her, and had in fact gifted to her a property in which he had a beneficial interest under a trust. The applicant denied this and filed evidence to explain how she came to acquire the

¹ *Westpac Banking Corporation v Jamieson & Ors* [2015] QCA 84 at [32].

property. Eventually, the first respondent chose not to put that issue to the test and instead consented to judgment.

- [13] It is inappropriate that an order as to the applicant's costs in this proceeding be used as the vehicle to determine issues as between the first respondent and the second respondent which were, and quite possibly still may be, the subject of proceedings in another court.
- [14] Where the only issue between the parties relates to costs, it is unnecessary to embark upon a detailed analysis of the affidavit material upon which each party intended to rely. Whilst the first respondent submits that none of the parties can assert any form of certainty of success, and the claims and counter-claims in the affidavits were not tested by cross-examination, in my view the applicant always had good prospects of success in obtaining an order for the removal of the caveat. Whilst the respondent filed voluminous affidavits, my pre-trial review of them did not persuade me that they contained relevant and admissible evidence which would defeat the applicant's claim.
- [15] In any event, the first respondent chose not to seek a judicial determination. She explains her submission to judgment on the basis that the whole process became too difficult for her, and she wished to maintain a normal life. I can accept that defending the proceeding placed the first respondent under great stress. However, that is not a sufficient reason to displace the ordinary rule that costs follow the event. This is especially the case where the applicant was put to substantial costs by the first respondent persisting in opposition to a proceeding where her defence had no real prospect of success.
- [16] I permitted the first respondent time to realise an asset and to obtain legal advice with a view to resolving the matter. If properly advised, the first respondent should have known that she had no real prospect of success. Whilst according her appropriate latitude as a self-represented litigant, she put the applicant to substantial costs with material which contained inadmissible material.
- [17] In my view, costs should follow the event as between the applicant and the first respondent.
- [18] The first respondent's conduct of the case and persistence in defending a proceeding which should not have been defended is such that I am inclined to exercise my discretion to order costs on the indemnity basis. The appropriate order as between the applicant and the first respondent is that the first respondent pay the applicant's costs of and incidental to the proceeding to be assessed on the indemnity basis.
- [19] It is not appropriate that the second respondent pay the applicant's costs which were incurred by the applicant in properly proceeding with a valid claim against the first respondent. Issues between the first respondent and the second respondent are best resolved between them in a court of competent jurisdiction which has jurisdiction over any unresolved de facto property issues between them. The first respondent was given the opportunity to have the issues in this proceeding transferred to such a Federal Court.

She did not apply to transfer this proceeding. She should be responsible for the applicant's costs in this proceeding.

- [20] Finally, had I not adjourned the matter when it first came before me so as to allow the first respondent time to consider her position and resolve the matter, I almost certainly would have ordered the removal of the caveat and ordered the first respondent to vacate possession of the multi-million dollar property that she occupied at Surfers Paradise. During part of the period the matter was awaiting trial, the first respondent had the advantage of occupying the applicant's property rent-free.
- [21] In conclusion, the applicant is entitled to her costs against the first respondent. The order for costs as between them will be assessed on the indemnity basis. I do not propose to make any order as to costs as between the first respondent and the second respondent.