SUPREME COURT OF QUEENSLAND

CITATION:	*Lewis & another v Lohse & others* [2002] QSC 204
PARTIES:	**ROSMOND ANN LEWIS and AMY BOND** (applicants) **v** **CYNTHIA JUNE LOHSE** (first respondent) **PETER RUTHENBURG** (second respondent) **VIOLET GUSE** (third respondent)
FILE NO:	S 3420 of 2001
DIVISION:	Trial Division
PROCEEDING:	Originating application filed 18 April 2001 by the applicants Originating application filed by leave 18 April 2002 by the second respondent
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2002
JUDGE:	Wilson J
ORDER:	**I shall hear counsel on the form of the orders which would be appropriate in the circumstances.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – where deceased left parcel of land and "all livestock, plant and machinery on this land" to de facto wife and cousin's son as tenants in common in equal shares subject to both accepting liability for discharge of mortgage – where deceased owned other parcels of land – whether bequest referred only to livestock, plant and machinery on the parcel of land bequeathed at date of death or to all livestock, plant and machinery on all land owned by deceased at date of death SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – LEGACIES AND DEVISES – CONDITION – INCLUSION IN RESIDUE –

where deceased left gift to de facto wife and cousin's son on condition that both accept liability – where de facto wife accepted – where cousin's son neither accepted nor declined – where de facto wife withdrew her acceptance – whether de facto wife entitled to withdraw acceptance – whether de facto wife's acceptance of any effect in the circumstances - where no party had materially altered their position in reliance on de facto wife's acceptance – whether a "reasonable time" in which cousin's son could accept gift had passed

Succession Act 1981 (Qld), s 61

COUNSEL: RT Whiteford for the applicants on the application filed 18 April 2001 (respondents to the cross application filed on 18 April 2002)

MP Amerena for the first respondent on the application filed 18 April 2001 (a respondent to the cross application filed on 18 April 2002)

R W Morgan for the second respondent on the application filed 18 April 2001 (the applicant on the cross application filed on 18 April 2002)

No appearance for the third respondent

SOLICITORS: Roberts and Kuskie for the applicants on the application filed 18 April 2001 (respondents to the cross application filed on 18 April 2002)

Morton & Morton for the second respondent on the application filed 18 April 2001 (the applicant on the cross application filed on 18 April 2002)

Hawthorn Cuppaidge & Badgery for the second respondent on the application filed 18 April 2001 (the applicant on the cross application filed on 18 April 2002)

No appearance for the third respondent

[1] **WILSON J**: The Court has been asked to rule upon certain questions arising out of the will of Roy Ruthenberg deceased ("the deceased").

[2] The deceased died suddenly on 2 June 2000, aged 76 years. Probate of his will dated 1 June 2000 was granted on 27 September 2000.

[3] The deceased was a grazier and farmer in the South Burnett area. He never married, and he had no children.

[4] The applicants Rosmond Ann Lewis and Amy Bond are the executrices of the will. Mrs Bond was a sister of the deceased.

[5] The first respondent Cynthia June Lohse asserts that she was the deceased's de facto wife at the time of his death.

[6] The second respondent Peter Ruthenberg is the son of a cousin of the deceased.

[7] The third respondent Violet Guse is another sister of the deceased. Although present in Court, she took no part in the proceedings, indicating that she would abide the order of the Court.

The estate

[8] The deceased held a number of grazing and farming properties, stock, plant and equipment, furniture and personal effects and cash deposits. His only liabilities were a mortgage debt to Elders Rural Services Limited of $700,000 and funeral expenses. For the purposes of these proceedings, the net value of the estate was accepted as approximately $2.27 million.

[9] One of the grazing properties was "Rossgae", which the deceased had purchased (together with certain livestock and plant) very shortly before his death for $1,050,000. For this purpose he had borrowed $700,000 from Elders Rural Services Limited, the loan being secured by a mortgage over all of his real property and all of his livestock.

The will

[10] By clauses 3 - 9 and 11 of his will the deceased left various parcels of land to named beneficiaries.

[11] By clause 10 he disposed of the lands constituting "Rossgae" and certain personal property as follows -

> "10. I give devise and bequeath to CYNTHIA JUNE LOHSE and my cousin's son PETER RUTHENBERG of Proston in Queensland as tenants in common in equal shares, subject to them accepting liability for payment of the balance of any security attaching to the land or personal property:
>
> (a) my land described as:.....[Rossgae] ....;
>
> (b) All livestock and all plant and machinery on this land."

[12] By clause 12 he left his residuary estate to his sisters Amy Bond and Violet Guse as tenants in common in equal shares.

The Application

[13] In the absence of some provision to the contrary, a gift (whether inter vivos or under a will) is presumed to have been accepted by the donee unless and until he disclaims it: *Halsbury's Laws of England* 4th edition vol 50 para 389. However, the gift in clause 10 of this will was expressly "subject to ... [Ms Lohse and Mr Ruthenberg] ... accepting liability for payment of the balance of any security attaching to the land or personal property". On the hearing, the following were common ground –

(i) that unless they both accepted that liability, the property in clause 10 would fall into residue;

(ii) that they had a reasonable time in which to signify their acceptance (although there was disagreement as to what was a reasonable time in the circumstances);

(iii) that the condition that Ms Lohse and Mr Ruthenberg accept liability for the balance of any security attaching to the land or personal property was an expression of contrary intention in terms of s 61 of the *Succession Act*. In other words, it was the deceased's intention that Ms Lohse and Mr Ruthenberg assume liability for the whole of the debt owed to Elders if they were to take the gift in clause 10, rather than its being spread rateably across all the land and personal property in his estate.

[14] On 3 November 2000 Ms Lohse's solicitors wrote to the solicitors for the executrices (inter alia) –

> "We advise that our client accepts the gift set out in clause 10 of the Will and the liability attaching to the gift."

Then on 13 December 2000 Ms Lohse's solicitors wrote to the executrices' solicitors –

> "We refer to the above matter and advise that as Peter Rutherford [sic] has neglected or failed to take up the conditional gift in conjunction with our client our client now takes the view that the conditional gift of Rossgae has failed..."

On 6 June 2001 Ms Lohse's solicitors wrote another letter to the executrices' solicitors in which they said –

> " .... to make matters which should be plain crystal clear, we state the following. Our client has withdrawn or alternatively withdraws her acceptance of the gift set out in clause 10 of the Will and the liability attaching to that gift."

[15] The executrices and Ms Lohse submitted that Ms Lohse was entitled to withdraw her acceptance of the gift, while Mr Ruthenberg submitted that she was not. Her purported acceptance was of no effect in the absence of acceptance by Mr

Ruthenberg. Moreover, there is no evidence that Mr Ruthenberg altered his position to his detriment in reliance on it. In the circumstances, there is no reason why she could not withdraw her purported acceptance. Since December 2001 her attitude has been perfectly clear: she rejects the gift and the liability attached to it.

[16] Mr Ruthenberg has not signified his acceptance or rejection of the gift. There were two reasons put forward for this –

(i) uncertainty whether clause 10 (b) referred to livestock and plant and equipment only on Rossgae or to those on all the deceased's lands; and
(ii) the alleged failure of the executrices to give provide a full and accurate statement of the number of livestock on Rossgae.

In Mr Ruthenberg's submission he is entitled to await the decision of this Court on the meaning of clause 10, and a reasonable time for acceptance will not expire until the time for appeal from this decision has run.

[17] In view of Ms Lohse's rejection of the condition, the gift fails, and so it is unnecessary for me to determine what was a reasonable time for acceptance. I record that I am not persuaded that Mr Ruthenberg was entitled to await a ruling of the Court upon the true meaning of clause 10. Rather, I am inclined to the view that a reasonable time expired when or shortly after the executrices provided him with sufficient particulars of the livestock on Rossgae - which, I find, they did by the end of January 2001.

Cross Application

[18] By his cross application, Mr Ruthenberg has sought a ruling on the true meaning of clause 10. Out of deference to the parties and the submissions of counsel, I shall set out my views on that, although, in the circumstances, this may be strictly unnecessary.

[19] Throughout the will (including clause 10) the deceased used the expression "my land described as..." to identify the subject matter of the various devises. By clause 10 -

> "subject to [Ms Lohse and Mr Ruthenberg] accepting liability for payment of the balance of any security attaching to the land or personal property"

he disposed of -

> "(a) my land described as...[Rossgae];
>
> (b) All livestock and all plant and machinery on this land"

to Ms Lohse and Mr Ruthenberg.

[20] I consider that the clause 10 is clear and unambiguous.

(i) The livestock, plant and equipment in subparagraph (b) were those on this land, namely the land described in the immediately preceding subparagraph (a). A will takes effect at the time of death, and so they are the livestock, plant and equipment actually on Rossgae at the time of death, regardless of whether the deceased had a practice or an intention of moving them around amongst his various properties.

(ii) The words in the introductory part of clause 10 "attaching to the land or personal property" clearly refer to the land and personal property described in subparagraphs (a) and (b) which follow immediately.

Orders

[21] The application and cross application raised a number of specific questions about the construction of the will. Because of the way counsel approached the case in oral argument and concessions made, it seems unnecessary to answer all of those specific questions. I shall hear counsel on the form of the orders which would be appropriate in the circumstances.

[22] The executrices are entitled to their costs out of the estate without the need for an order to that effect. I will hear counsel on whether the first and second respondents should both have their costs out of the estate (assessed on the standard basis), or whether some other order should be made.