SUPREME COURT OF QUEENSLAND

CITATION:	*Lewis & another v Lohse & others (No 2)* [2002] QSC 232
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:	8 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2002
JUDGE:	Wilson J
ORDER:	**In respect of the originating application filed by the applicants on 18 April 2001:** **1. That upon the proper construction of the will of Roy Ruthenburg, deceased, dated 1 June 2000, and in the events which have happened, the gift contained in clause 10 of that will has failed and the property the subject of that gift falls into the residuary estate of the said deceased.** **2. That the costs of the first respondent of and incidental to the application be paid out of the estate by the applicants on an indemnity basis.** **3. That there be no order as to the costs of the second respondent of and incidental to the applicatioin.** **In respect of the originating application filed by the second respondent on 18 April 2002:** **1. That there be no order on the construction questions.** **2. That the application be dismissed.** **3. That there be no order as to costs.**

CATCHWORDS: SUCCESSION – PROCEEDINGS BY EXECUTORS OR ADMINISTRATORS – where executrices brought application to determine whether gift had failed – where the second respondent brought a cross application for the construction of the meaning of term used in the will – where second respondent had counsel's opinions substantially to same effect as judge's decision – where the second respondent made late concessions – whether the second respondent's costs should be paid out of the estate – whether second respondent should be ordered to pay costs

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**: On 23 July 2002 I gave reasons for judgment in matters which came before me by way of an originating application filed by the executrices on 18 April 2001 and a further originating application filed by leave by Peter Ruthenberg on 18 April 2002.

[2] At the conclusion of those reasons for judgment I said that the executrices were entitled to their costs out of the estate without the need for an order to that effect, but that I would hear counsel with respect to the costs of the first and second respondents.

[3] The question of costs was argued before me this morning. It was common ground at the Bar table that the costs of the first respondent, Ms Lohse, of and incidental to the application filed on 18 April 2001 should be paid out of the estate on the indemnity basis.

[4] The dispute before me this morning was with respect to the costs of the second respondent to that application, Mr Ruthenberg. The issues were whether there should be an order for costs in his favour, or whether he should be ordered to pay costs and, if so, on what basis.

[5] In the originating application filed on 18 April 2001 the following relief was sought in paragraph 6,

> "That the costs of all parties to this application to be assessed on an indemnity basis be paid out of the estate of the deceased."

No contrary order with respect to costs was sought until after the delivery of my reasons.

[6] At the time that originating application was filed on 18 April 2001, unbeknown to the applicant executrices, the second respondent, Mr Ruthenberg, had seen a copy of the advice of Mr Amerena of counsel which had been given to the first respondent, Ms Lohse, and he had himself received advice from Mr Wilson SC.

[7] Both of those advices were put before the Court. On the principal issue, both counsel had expressed views similar to the one I expressed in my judgment. And Mr Wilson had also dealt with the construction of clause 10 of the Will, reaching a conclusion, expressed in terms of probability, similar to the one I ultimately reached.

[8] It is apparent from a perusal of that originating application filed on 18 April 2001 that at the time there were a number of specific live questions with respect to the construction of the will. However, as I have recorded in paragraph 13 of my reasons for judgment, on the hearing a number of concessions were made by Mr Ruthenberg which reduced the issues for determination. It is significant that those concessions were not made until shortly before the commencement of the hearing.

[9] On an application for the construction of a will, it is usually the case that the Court orders that the costs of all parties should be paid out of the estate and that they should be assessed on what used to be the solicitor and client basis, now called the indemnity basis.

[10] In the present case, counsel for the executrices and counsel for the first respondent, Ms Lohse, submitted that this is an exceptional case, that Mr Ruthenberg had proceeded with the litigation in defiance of counsel's advice and had thereby depleted the estate.

[11] The case was unusual in that the fact of and the content of the advice of counsel were before the Court. It must often be the case that a party receives adverse advice but nevertheless proceeds and is unsuccessful. However, because that advice is privileged and the privilege is not waived, it never comes before the Court. On one view, Mr Ruthenberg was very open in disclosing the advice of Mr Wilson in the circumstances.

[12] Also, he was entitled to assume that the only costs order sought would be that set out in the originating application.

[13] However, this is not just a case of his proceeding in defiance of advice; it is also a case of late concessions.

[14] In all the circumstances, I have concluded that the fair order would be that he not have to pay the costs of the other parties, but that he not receive any costs himself.

[15] I have had two draft orders put before me. Referring to the one headed "Amerena Draft", it is appropriate on the originating application filed on 18 April 2001 to make orders in terms of paragraphs 1 and 3 of the draft. I delete paragraph 2 of the draft. I further order that there be no order as to the costs of the second respondent of and incidental to that application.

[16] With respect to the originating application filed by leave on 18 April 2002, I make no order on the construction questions. I make no order as to costs and I dismiss the application.