

SUPREME COURT OF QUEENSLAND

CITATION: *Merrin & Anor v Cairns Port Authority* [2003] QCA 176

PARTIES: **ANNETTE ELIZABETH MERRIN**
THOMAS WILLIAM MERRIN
(plaintiffs/appellants/applicants)
v
CAIRNS PORT AUTHORITY
(defendant/respondent)

FILE NO/S: Appeal No 11540 of 1999
DC No 153 of 1997

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal - Further Orders

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: Judgment delivered on 15 May 2001
Further Orders delivered on 2 May 2003

DELIVERED AT: Brisbane

HEARING DATE: 23 and 24 April 2001; 24 July 2002

JUDGES: McPherson and Williams JJA and White J
Judgment of the Court

FURTHER ORDERS: **The Court intends that there should be orders for payment giving effect to the calculations in paragraph 11. However, because the assessment proceedings have been conducted under an order made in the Court's inherent jurisdiction, the parties (the Merrins and the solicitors Thompson & Royds) will be allowed an opportunity to make submissions on the subject of these proposed orders:**
(a) in writing;
(b) within 28 days of the delivery of this judgment.

The written submissions, if any, of each party should be forwarded to the Registrar of the Court of Appeal. If the Court requires further assistance on these submissions, the parties will be advised.

Pending consideration of those written submissions (if any), the assessment of the Senior Deputy Registrar (Assessments) made and certified on 10 March 2003 is, subject to such proposed orders or rulings of the Court as appear from these reasons, adopted by this Court. A copy of

the certification made by the Senior Deputy Registrar (Appeals) on 10 March 2003 is annexed to these reasons.

CATCHWORDS: PROCEDURE - COSTS – JURISDICTION - GENERAL - Repeal of Costs Act 1867 - whether Court has jurisdiction to order taxation of solicitor’s bill to client

PROCEDURE - COSTS - DEPARTING FROM THE GENERAL RULE – NATURE OF PROCEEDINGS - INCONCLUSIVE PROCEEDINGS - NEW TRIAL - whether costs of first trial ordered on appeal are owed before new trial concluded

COUNSEL: The appellants appeared on their own behalf
K J McGhee for the respondent
W J Markwell for Thompson & Royds Lawyers by leave of the Court

SOLICITORS: The appellants/applicants appeared on their own behalf
MacDonnells Solicitors (Brisbane) for the respondent

- [1] **THE COURT:** The action by the plaintiffs Thomas Merrin and Annette Merrin out of which this matter of costs arises was heard in the District Court at Cairns (DC 153 of 1997). At the trial the judge directed the jury to return a verdict for the defendant Cairns Port Authority and judgment was given accordingly. An appeal (no 11540 of 1999) against that judgment and verdict succeeded on 15 May 2001 and a new trial was ordered. The Court also ordered that the defendant Port Authority pay the costs of the plaintiffs Merrins of the abortive trial in the District Court.
- [2] Subsequently, the Merrins and the Port Authority agreed the quantum of their party and party costs of that trial in the sum of \$44,727.00. In consequence of a notice claiming an equitable interest for costs given by Thompson & Royds, solicitors for the Merrins at the trial (“the solicitors”), Jones J ordered that that sum be paid into court. An appeal by the Merrins against that order for payment into court was unsuccessful and was dismissed with costs on 9 August 2002. The second of the four orders made on that occasion directed the taxation or assessment of Thompson & Royd’s costs of the trial, for which they had submitted a bill or statement to the Merrins. As appears from the reasons of the Court of Appeal of that date, that order was made in the exercise of the inherent power of the Court to tax, assess or modify charges by solicitors acting in their role as officers of Court.
- [3] **Further order as to costs.** The solicitors’ bill or statement of costs to the Merrins for acting in the trial have now been ascertained by an assessment carried out by the Senior Deputy Registrar (Assessments) of the Supreme Court sitting in Brisbane. The costs hearing took place on the 19 and 20 of December and the assessment was certified by that Registrar (“the Registrar”) on 10 March 2003 and returned to this Court. Several issues arose during the course of the assessment which are addressed here.

[4] ***The order for assessment of costs.*** The order of the Court of Appeal directing the assessment to be undertaken was made as a further order on 9 August 2002 in Appeal no 11540 of 1999. The second of the orders made by the Court of Appeal on that date was:

“That the respondent firm of Thompson & Royds submit the bill or costs statement, referred to in their letter dated 28 August 2001 to the applicants, to the Senior Deputy Registrar (Assessments) of the Supreme Court sitting in Brisbane for taxation or assessment and for certification to this Court of the amount properly claimable by that respondent under that bill or statement of their costs as solicitors for the applicants in the first trial of that action.”

[5] ***The funds in Court.*** The Registrar proceeded on the assumption that UCPR 721, 722, and 723 applied to that assessment of party and party costs. The Court accepts that this was so. The amount paid into court by the Port Authority in settlement of the costs of the trial was \$44,727. The Merrins and the Port Authority agreed that this amount settled the Merrins’ claim for their party and party costs of the trial. In the course of his reasons for the assessment, the Registrar remarked that any money paid into court by the Port Authority that was not payable for the costs of the trial either to Thompson & Royds, or to Legal Aid Queensland, or to the Merrins, must be repaid to the Port Authority. He cites as authority for this proposition the decision in *Gundry v Sainsbury* [1910] 1 KB 645. It, however, was a case where the plaintiff had agreed with his solicitor that the plaintiff would pay the solicitor nothing by way of costs in return for his acting for him in the action. In those circumstances the Court of Appeal held that the primary judge was correct in refusing to order the defendants to pay the plaintiff’s party and party costs, of which there were none. Costs, said the learned Lord Justices of Appeal, are intended as an indemnity and not as a source of profit to the plaintiff. That is not our case. Here the Merrins and the Port Authority agreed on the quantum of their party and party costs. Jones J in the Supreme Court then ordered that amount to be paid into court by the Port Authority. The order for the assessment of the costs as between the Merrins and the solicitors was precipitated by a notice given by Thompson & Royds claiming a lien or equitable interest in or over the fund of costs the amount of which had been settled by agreement between the Merrins and the Port Authority as the Merrins’ party and party costs. Had that notice not been given, the amount of those costs would not have come before this Court for assessment and the Merrins would have been entitled to retain the sum agreed and paid by the Port Authority, whether it was more or less than the amount of costs taxed or assessed between themselves and their solicitors.

[6] ***Set-off in favour of Port Authority.*** Because no claim to an interest in the funds in court has been made by anyone else, the only question that remains was and is how much of the money paid into court by the Port Authority is payable to the solicitors in satisfaction of the lien or equitable interest claimed by them for their professional costs. Payment of the balance of that money to the Merrins is, however, now subject to the further order obtained by the Port Authority on 9 August 2002 for payment to it by the Merrins of the costs of the unsuccessful appeal (no 11540 of 1999) to this Court against the order for payment into court of the sum of \$44,727.00. Under Rule 734 of the UCPR and under the general law, the Registrar is empowered to set off the amount of those costs against the money that was paid into court by the Port Authority. Its bill has been assessed and taxed at an amount of

\$6,150. We consider that there should be a set-off of that amount, and to that extent the money in court should be paid out to the Port Authority.

- [7] **Legal Aid.** In the reasons supporting the assessment the Registrar refers to an amount to be paid to Legal Aid Queensland to reimburse it for trial costs and outlays that were paid or advanced on behalf of the Merrins. Legal Aid disbursed some \$11,672.50 on account of the costs of the first trial. The material before the Registrar includes a letter dated 13 November 2002 from the Attorney General to the Merrins in which the Attorney agrees to the “release of the portion of money held in court (\$14,989.08) that relates to funding provided by the Civil Law Legal Aid Scheme.” The Attorney’s letter confirms that Legal Aid makes no claim to any interest in the money now held in court on account of the costs of this action. The material before the Registrar also contains a letter from Legal Aid to Thompson & Royds instructing them that they are not required to collect the Legal Aid money from the Merrins. For this reason and also because it was no part of the order or direction of the Court to the Registrar to tax the costs of Legal Aid, the amount that was to be or would have been paid to Legal Aid is therefore no longer payable, and should not form part of the amount certified as payable to Thompson & Royds. The Registrar notes on the second last page of his reasons that it would be preferable not to retain the amount of the Legal Aid money in court until the end of the second trial. While accepting that to be so, Legal Aid has now expressed no interest in the amount in court, and in fact has come to an arrangement of its own with the Merrins regarding the sum advanced for costs and outlays. The sum of \$14,989.08 should therefore be paid out, not to Thompson & Royds, who no longer have any obligation to pay that amount to Legal Aid, but to the Merrins who are entitled to it as part of the sum agreed and paid to them by the Port Authority.

- [8] This leaves the question of what, if any, portion of the solicitors’ bill for solicitor and client professional costs is now payable to Thompson & Royds. The Registrar points out that the solicitor and client agreement executed between the Merrins and the solicitors contains a clause under which the firm of Thompson & Royds agree not to seek payment of professional fees “until the conclusion of this matter or until their discharge from acting in this matter”. This Court has already ruled in its reasons given on 9 August 2002 that the “matter” has not yet been concluded, and it has yet to be determined whether or not Thompson & Royds have been “discharged”. Certainly, at the hearing of this matter Mrs Merrin made assertions from the bar table that Mr Royds had terminated the agreement by failing, as she alleged, to perform it. It is not clear whether Thompson & Royds themselves claim to have been discharged. In any event, the question has so far not been decided or determined. Until it is, it remains a matter for the Merrins and Thompson & Royds to settle that question if they can. Professional costs for the trial were allowed by the Registrar at a total of \$9,902.46. This amount will not be payable until it is agreed or determined that they have been discharged from acting in the matter of the Merrins’ claim against the Port Authority, or until the action is determined by trial or otherwise. At the same time, outlays or disbursements made by the solicitors acting on behalf of the Merrins at the trial were assessed by the Registrar at a figure of \$21,036.80. It is a sum which, subject to what follows, is now payable to those solicitors whether or not their retainer from the Merrins has been terminated or discharged.

- [9] **Costs of the Assessment.** Because the assessment was carried out under an order made in the exercise of the inherent jurisdiction of the court, it is not clear that

there is any statutory provision directly regulating payment of the costs of the assessment. The Registrar suggests that, given the Merrins' success in the assessment, they should be awarded costs of it, which would include their or at least Mr Merrin's costs of travelling to the assessment hearing in Brisbane, expenses in the preparation of objections and some attendances by telephone. The Merrins must now present an itemised bill or account to the solicitors Thompson & Royds, which if not agreed, must be assessed and certified by the Registrar.

[10] **Fee.** There remains the question of Court fees for the assessment. Paragraph 9(2) of Schedule 1 (as amended by Justices Legislation [Variation of Fees and Costs] Regulation 2002) requires payment of an assessment fee of \$8.50 for each \$100 allowed in the assessment. The Registrar has calculated that fee on the sum of \$63,830.76 allowed. This would produce a fee of \$5,431.50. The amount of that fee should be set off against the amount of \$21,036.80 assessed and owing by the Merrins to Thompson & Royds on account of outlays and disbursements, leaving a balance sum of \$15,605.30 payable to Thompson & Royds out of the funds in court.

[11] **Proposed orders.** The result of what has been said here is that the amount of \$44,727 standing to the credit of this action should be dealt with as follows:

- (a) the sum of \$6,150 should be ordered to be paid out forthwith to Cairns Port Authority on account of its assessed costs of and incidental to the application the subject of the order of this Court made on 9 August 2002;
- (b) the sum of \$5,431.50 should be ordered to be paid out forthwith to the Registrar of the Supreme Court as the amount payable on account of the court fee for assessment;
- (c) the sum of \$15,605.30 should be ordered to be paid out to Thompson & Royds for disbursements or outlays paid by them at the trial as assessed by the Senior Deputy Registrar (Costs) after deducting the fee of \$5,431.50 referred to in (b) from the disbursements of \$21,036.80;
- (d) the sum of \$9,902.46 should be retained in court until further order to answer the amount of professional costs as assessed by the Senior Deputy Registrar; and, when it is either agreed or assessed and certified, the Merrins' costs of the assessment which has taken place before the Registrar;
- (e) any balance (\$13,069.24) remaining in court of the amount of \$44,727 should be ordered to be paid out of the Court to the plaintiffs Thomas Merrin and Annette Merrin.

[12] **Summary.** In summary the funds in Court will be disposed of as follows:

| | |
|---|--------------------|
| (a) Amount paid into court | \$44,727.00 |
| Less amount payable to Cairns Port Authority for costs ordered on 9 August 2002 | <u>\$6,150.00</u> |
| | <u>\$38,577.00</u> |
| (b) Amount now payable to Thompson & Royds, solicitors, for their disbursements (\$21,036.80, less the court fee for costs assessment \$5,431.50) | \$15,605.30 |

- | | | |
|-----|--|--------------------|
| (c) | Amount to remain in court to answer for (i) professional costs payable to Thompson & Royds, solicitors; and (ii) Merrins' costs of assessment to be determined | <u>\$9,902.46</u> |
| (d) | Balance payable out of court to Merrins | <u>\$13,069.24</u> |

[13] The Court intends that there should be orders for payment giving effect to these calculations. However, because the assessment proceedings have been conducted under an order made in the Court's inherent jurisdiction, the parties (the Merrins and the solicitors Thompson & Royds) will be allowed an opportunity to make submissions on the subject of these proposed orders:

- (a) in writing;
- (b) within 28 days of the delivery of this judgment.

The written submissions, if any, of each party should be forwarded to the Registrar of the Court of Appeal. If the Court requires further assistance on these submissions, the parties will be advised.

[14] Pending consideration of those written submissions (if any), the assessment of the Senior Deputy Registrar (Assessments) made and certified on 10 March 2003 is, subject to such proposed orders or rulings of the Court as appear from these reasons, adopted by this Court. A copy of the certification made by the Senior Deputy Registrar (Appeals) on 10 March 2003 is annexed to these reasons.