SUPREME COURT OF QUEENSLAND

CITATION:	*Lewis & Anor v Lohse & Ors* [2003] QCA 199
PARTIES:	**ROSMOND ANN LEWIS** **AMY BOND** (applicants/first respondents) **v** **CYNTHIA JUNE LOHSE** (first respondent/second respondent) **PETER RUTHENBERG** (second respondent/appellant) **VIOLET GUSE** (third respondent)
FILE NO/S:	Appeal No 7631 of 2002 SC No 3420 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2003
JUDGES:	de Jersey CJ, Williams JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed with costs to be assessed on the standard basis;** **2. Order that the costs of the first respondents and the second respondent of and incidental to this appeal be assessed on an indemnity basis and that the first respondents and the second respondent recover from the estate of the testator the difference between the costs so assessed and any costs paid by the appellant pursuant to this order**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ASCERTAINMENT OF TESTATOR'S INTENTION AS EXPRESSED OR IMPLIED BY WORDS OF WILL – where gift of land, livestock, plant and machinery devised to appellant and second respondent subject to them accepting

associated liability – where second respondent first accepted bequest but later withdrew acceptance – where appellant neither accepted nor rejected bequest – whether testator intended that both devisees must accept liability before the gift could take effect – whether a bequest may be disclaimed after initial acceptance – whether words used constituted a "contrary intention" for purposes of s 61 *Succession Act* 1981

Succession Act 1981 (Qld), s 61

In re Young; Fraser v Young [1913] 1 Ch 272, cited
Re Cranstoun (decd); Gibbs v Home of Rest for Horses [1949] Ch 523, cited

COUNSEL: The appellant appeared on his own behalf
R T Whiteford for the first respondents
M Amarena for the second respondent
No appearance for the third respondent

SOLICITORS: The appellant appeared on his own behalf
Roberts & Kuskie for the first respondents
Morton & Morton for the second respondents
No appearance for the third respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Williams JA. I agree with those reasons, and with the orders His Honour proposes.

[2] **WILLIAMS JA:** This appeal essentially depends upon the proper construction of a clause in a will. The clause in question provides as follows:

> "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."

[3] The appellant, Peter Ruthenberg, who appeared on his own behalf before this court, challenges the construction placed on that clause by the learned trial judge. At first instance it was conceded by counsel who then appeared for the appellant that the acceptance in question had to be by both beneficiaries. That was the submission addressed to the trial judge and this court by counsel for the executrices (Lewis and Bond) and the other beneficiary (Lohse).

[4] Given the way the matter was argued before the learned trial judge she recorded in her reasons that "unless they both accepted that liability, the property in clause 10 would fall into residue." The principal argument addressed to this court by the appellant was that her Honour was wrong in concluding that "both" had to accept the devise and bequest, by accepting the associated liability, before it took effect. He submitted that the relevant word in the clause was "them", and that indicated that either could accept; if one accepted, there was a tenancy in common between

that beneficiary and the executrices (because the other half of the property fell into residue).

[5] In my view that construction is not tenable and the concession made at trial by counsel for the appellant was correct. Before the devise and bequest could take effect both beneficiaries (Lohse and Peter Ruthenberg) had to accept the associated liability, and on both of them accepting that liability they held the property in question as tenants in common. If both did not accept then the whole of the property in question fell into residue. In my view it was clearly not the intention of the testator that there could be a tenancy in common between one of the named beneficiaries accepting the liability and the executrices with respect to the other half which fell into residue.

[6] The testator, Roy Ruthenberg, died on 2 June 2000 and his will was admitted to probate on 27 September 2000. The appellant has not yet indicated acceptance or otherwise with respect to the devise and bequest. He asserts that because of some dispute as to the number of cattle the subject of the devise and bequest, and as to the terms on which the relevant liability was to be discharged, he is not in a position to make a decision whether or not to accept.

[7] By letter dated 3 November 2000 the solicitors for the beneficiary Lohse accepted the gift provided for in clause 10. But by her solicitor's letter of 13 December 2000 she withdrew that acceptance. By that letter the solicitor advised "that as Peter Ruthenberg 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". That position was reiterated in a letter of 6 June 2001; therein it was said that Lohse "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."

[8] The learned trial judge effectively held that Lohse was entitled to withdraw her acceptance and that the matter had to be determined on the basis that there was no acceptance by Lohse of the devise and bequest. In her reasons the learned trial judge stated that there was "no evidence that Mr Ruthenberg altered his position to his detriment in reliance" on the earlier acceptance. Before this court an attempt was made to suggest that the appellant had incurred some legal costs subsequent to the purported acceptance and that amounted to an altering of his position to his detriment. In the circumstances the incurring of that expense is not a detriment in the relevant sense.

[9] The law seems clear that a bequest may be disclaimed after initial acceptance provided that no prejudice has been occasioned to another. So much would appear to be consistent with statements of principle found in Laws of Australia, Vol 36 para 232, Halsbury, 4th edition, Vol 50 paras 390-392, *In re Young*; *Fraser v Young* [1913] 1 Ch 272 at 276 and *Re Cranstoun (decd)*; *Gibbs v Home of Rest for Horses* [1949] Ch 523 at 527-8.

[10] A subsidiary question argued before the learned trial judge and again in this court was whether or not the appellant had a reasonable time within which to make a decision whether or not to accept. The appellant's contention is that he is entitled to await the decision on appeal and thereafter to have a reasonable time to consider his position. The learned trial judge said: "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." That conclusion is, in my view, supported by the evidence.

[11] In any event nearly three years has elapsed since the death of the testator, and it is clear that the beneficiary Lohse is not prepared to accept the devise and bequest. It is clear that the devise and bequest has failed and the property in question falls into residue.

[12] Two further points were raised by the appellant and they can be disposed of briefly.

[13] Firstly, he submitted that his counsel at trial was wrong to concede that the words of clause 10, in particular the words "subject to them accepting liability for payment of the balance of any security attaching to the land or personal property", constituted a "contrary intention" for purposes of s 61 of the *Succession Act* 1981. The loan of $700,000.00 obtained to acquire Rossgae was secured by a charge over all of the testator's real property. Unless the testamentary disposition evidenced a "contrary intention" the discharge of that liability would be spread proportionately over the whole of the testator's real property. In my view the learned trial judge was correct in her conclusion. Particularly given the absence of such wording when other lands owned by the testator were devised by the will, the words in question clearly indicated a "contrary intention".

[14] The final issue was as to the meaning of the words "All livestock and all plant and machinery on this land". The contention of the appellant is that the testator intended the devise to be of a grazing property as a going concern and that in consequence the devise and bequest carried with it such plant and machinery as would be necessary to carry on those grazing activities. The learned trial judge held that the livestock plant and equipment in question "were those on this land, namely the land described in the immediately preceding subparagraph . . . at the time of death . . ." In my view she was clearly correct in so concluding. It is not without significance that Rossgae had only been acquired by the testator a month or so before his death and the property then acquired, apart from the real estate, included only livestock and a molasses mixer. In my view it is clear that all the testator intended to devise and bequeath by clause 10 was the livestock and machinery actually on Rossgae as at the date of death.

[15] It follows that the learned trial judge was correct in answering all the issues raised before her. The formal order made was that on the proper construction of the will, 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". In my view that order is correct.

[16] It follows that the appeal should be dismissed.

[17] The orders of the court should be:

(i) Appeal dismissed with costs to be assessed on the standard basis;

(ii) Order that the costs of the first respondents and the second respondent of and incidental to this appeal be assessed on an indemnity basis and that the first respondents and the second respondent recover from the estate of the testator the difference

between the costs so assessed and any costs paid by the appellant pursuant to this order.

[18] **HOLMES J:** I agree with the reasons for judgment of Williams JA and the orders he proposes.