

SUPREME COURT OF QUEENSLAND

CITATION: *Merrin & Anor v Cairns Port Authority* [2003] QCA 272

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 - Further Orders

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: Judgment delivered on 15 May 2001
Further Orders delivered on 2 May 2003
Further – Further Orders delivered on 4 July 2003

DELIVERED AT: Brisbane

HEARING DATE: 23 and 24 April 2001; 24 July 2002
Heard on the Papers

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

ORDER: **1. The Court adopts the assessment of the Senior Deputy Registrar (Assessments) made and certified on 10 March 2003**
2. The money paid into court be disposed of as set out in paragraph 13 of this judgment

CATCHWORDS: PROCEDURE – COSTS – TAXATION – REVIEW – JURISDICTION – taxation ordered pursuant to courts inherent jurisdiction – whether court has jurisdiction to order “external audit” of taxation

PROCEDURE - COSTS – RECOVERY OF COSTS – client alleges misconduct by solicitors – whether relevant to equitable interest arising when order for costs made

PROCEUDRE – COSTS – SCALES OF COSTS – DISCRETION TO VARY SCALE – whether allowance in excess

of scale available after appeal finalised – whether order of trial judge or Court of Appeal required

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 appeared on their own behalf
MacDonnells Solicitors (Brisbane) for the respondent

- [1] **THE COURT:** This is yet another instalment in the disputes arising out of a decision of this Court setting aside judgment following a directed verdict at the trial of an action between the plaintiffs Mr and Mrs Merrin and the defendant Cairns Port Authority. The decision ordered that the Port Authority pay the costs of the abortive trial in the District Court. Those parties later agreed that the Merrins' party and party costs of the trial be fixed at \$44,727.00. As a result of a notice given by Thompson & Royds, who were the solicitors for the Merrins at the trial, it was ordered that the sum of \$44,727 be paid into court to preserve the solicitors' lien or equitable interest in that fund. An appeal by the Merrins against that order was dismissed with costs on 9 August 2002, but with a further order directing taxation of Thompson & Royds' costs of the trial as distinct from the action, which is still awaiting its second trial.
- [2] That taxation or assessment was duly carried out by the Senior Deputy Registrar (Assessment), who certified the amount of the assessment to this Court on 10 March 2002. In reasons delivered on 2 May 2003, the Court, with some qualifications specified in those reasons, adopted that assessment subject to the parties having an opportunity to make such written submissions as they might be advised. Having read those submissions, we now give the following rulings.
- [3] Thompson & Royds complain that they did not receive the costs certification until 13 May 2003. What consequence flows from this is not spelled out. Their submissions were made on 19 May 2002, which was well within the period of 28 days allowed by the Court order. They have suffered no identifiable prejudice as a result.
- [4] In the reasons delivered on 2 May 2003, Cairns Port Authority was allowed a set-off for its costs of the appeal dismissed on 9 August 2002. Such a set-off is permitted in the exercise of the Court's discretion. Not satisfied with this benefit, the Port Authority has sought set-off of a further amount of costs ordered to be paid by the Merrins in subsequent collateral proceedings in the District Court. No reason has been demonstrated for exercising the discretion, if any, so as to extend a similar benefit or advantage to the costs order in those proceedings. That order can be enforced against the Merrins in the ordinary way. No set-off will be ordered against the amount in court in respect of those further costs against the Merrins in the proceedings in the District Court.
- [5] Returning to the costs certification by the Registrar, the Merrins seek an order that an "external audit" be performed on the Registrar's assessment because of what

they complain are its errors and inadequacies. There is no power to order such an audit; and, if there were, it would not be exercised here. No relevant errors are made out or documented in support of this complaint by the Merrins. No order of the kind sought will be made.

- [6] The Merrins also complain that Thompson & Royds are not entitled to a \$2,000 payment from the money in court because Legal Aid have already paid them. Thompson & Royds claim that the allegation is false. The only reference in the bill of costs to payment of any sum of that amount is in Item 367 of Annexure A. This payment was in fact disallowed by the Registrar as being a professional cost that did not form part of the costs that he was assessing. The complaint is therefore irrelevant at this stage.
- [7] The Merrins submit that Legal Aid ought to receive first priority in the payment of its costs out of the money in court. As appears from para [7] of the Court's reasons delivered on 2 May 2003, Legal Aid has made and makes no claim to any interest in the money now held in court on account of the costs of the action. It should therefore not be given the priority now contended for by the Merrins.
- [8] The Merrins also allege that Thompson & Royds have acted fraudulently or have otherwise misconducted themselves, and so should not be allowed to claim an equitable interest in the money in court. However, a solicitor's equitable interest in a costs fund in court arises when the order awarding costs is made. The order or declaration of the court does not create, but simply recognises, that interest. If there was anything in the point (and we do not suggest there is), it should have been raised as an objection at the time the order was made by Jones J for payment into court of the sum of \$44,727, from which an appeal by the Merrins was dismissed on 9 August 2002.
- [9] The Merrins also appear to be making an application for an order for return of documents relating to the trial that are said to be still in the possession of Thompson & Royds. This is not a matter that arose in the course of the taxation before the Registrar. If there is any substance in this claim, an appropriate application may be made to the Judge in Cairns for a decision determining what right is claimed by Thompson & Royds to retain documents that they are still holding on behalf of the plaintiffs. It is not a matter over which the Court of Appeal should now attempt to exercise a jurisdiction at first instance. The question may be related to the issue, which is still being agitated but has not yet been judicially decided, whether it was the Merrins or Thompson & Royds who determined the retainer and with what, if any, justification. It was not a matter for the Registrar to decide on an assessment or taxation of costs.
- [10] The Merrins now claim an additional amount of costs not considered in the assessment that was undertaken by the Registrar. It was, however, not a taxation of the costs payable by the Port Authority to the Merrins. Those costs have already been agreed by the parties at \$44,727.00. The Registrar's assessment related to the solicitor and client costs payable to the Merrins' solicitors for acting for them at the trial, which are to be paid out of the sum paid into court by the Port Authority to answer the lien or equitable interest claimed by Thompson & Royds. There can be no question now of the Merrins claiming costs over and above the amount of \$44,727 that was agreed with the Port Authority as the quantum of those costs.

[11] Thompson & Royds challenge the order that they pay all of the court's taxing or assessment fee of \$5,431.50. However, the fee is payable by Thompson & Royds because it was their failure to submit a proper bill to the Merrins that resulted in the order for taxation of the costs of the first trial, in which the Merrins were successful in having the solicitors' costs reduced to the extent that they were. Thompson & Royds also submit that they should have been allowed a higher amount for the instructions to brief counsel. But an allowance in excess of the scale fee in the District Court requires an order of the judge at trial or, at latest, from the Court of Appeal in making the order for costs on the appeal when setting aside the judgment of the District Court at trial. Even if we were able and disposed to do so, it would be wrong for the Court to make an order for an additional fee after the Merrins have agreed with the Port Authority on the quantum of those costs at a fixed amount.

[12] Contrary to the Merrins' submission, we have no authority to increase the interest payable on the money in court, which is fixed by statute.

[13] The result, after considering the submission of the parties, is that the Court (1) adopts the assessment of the Senior Deputy Registrar (Assessments) made and certified on 10 March 2003, and (2) orders that the money paid into court be disposed of as follows:

(a)	Amount paid into court	\$44,727.00
	Less amount payable to the Cairns Port Authority for costs ordered on 9 August	<u>\$6,150.00</u> <u>\$38,577.00</u>
(b)	Amount now payable to Thompson & Royds, solicitors for their disbursement (\$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>

There will be no order for costs in respect of the proceedings in this Court arising out of the Registrar's assessment.