

# SUPREME COURT OF QUEENSLAND

CITATION: *Underwood & Anor v Sheppard* [2010] QCA 76

PARTIES: **ANNETTE UNDERWOOD** (as executor and trustee of the will of PETA CHANEL UNDERWOOD, deceased)  
(first applicant/not a party to the appeal)  
**DEREK JOHN UNDERWOOD**  
(second applicant/not a party to the appeal)  
**SCOTT UNDERWOOD**  
(third applicant/not a party to the appeal)  
**ANNETTE SHEPPARD**  
(fourth applicant/respondent)  
v  
**LOUIS JOHN UNDERWOOD AND MARK WEDRAT**  
(as executors and trustees of the will of PETER CHARLES UNDERWOOD, deceased)  
(first respondent/appellants)  
**GREGORY PETER UNDERWOOD**  
(second respondent/not a party to the appeal)

FILE NO/S: Appeal No 11171 of 2009  
SC No 55 of 2007

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 30 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 4 March 2010

JUDGES: Holmes and Fraser JJA and P Lyons J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Appeal allowed**  
**2. Set aside the decision below**  
**3. Leave to appeal the costs order refused**  
**4. Respondent to be awarded the costs of the appeal from the estate of Peter Charles Underwood**

CATCHWORDS: SUCCESSION – EXECUTORS AND ADMINISTRATORS – RIGHTS, POWERS AND DUTIES – OTHER CASES – where appellants executors of an estate – where respondent sought further provision – where trial judge held that the appellants’ defence of the claim was overzealous – where trial judge made a less favourable costs order against the

appellants – where trial judge noted that the obligation to consider the impact of costs of litigation on an estate applies with greater force to executors than beneficiaries – where appellants sought leave to appeal the costs order – where leave denied – whether trial judge’s statement of the obligation correct – whether trial judge erred in making the less favourable costs order – whether trial judge erred in denying leave to appeal the costs order – whether trial judge’s discretion to refuse leave should be re-exercised – whether leave to appeal against the costs order should be granted

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE’S FINDINGS OF FACT – INTERFERENCE WITH DISCRETION OF COURT BELOW – FUNCTIONS OF APPELLATE COURT – IN GENERAL – where appellants executors of an estate – where respondent sought further provision – where trial judge held that the appellants’ defence of the claim was overzealous – where trial judge made a less favourable costs order against the appellants – where trial judge’s conclusion based on findings of fact – where appellants contested the findings of fact – where appellants sought leave to appeal the costs order – where leave denied – whether findings of fact accurate – whether trial judge erred in making the less favourable costs order – whether trial judge erred in denying leave to appeal the costs order – whether trial judge’s discretion to refuse leave should be re-exercised – whether leave to appeal against the costs order should be granted

*Supreme Court Act 1995 (Qld), s 253*

COUNSEL: A P J Collins for the appellants  
G Coveney for the respondent

SOLICITORS: Williams Graham Carman for the appellants  
Murphy Schmidt for the respondent

- [1] **HOLMES JA:** The appellants are the executors of the estate of the late Peter Underwood, which was the subject of a number of applications for further provision. They appeal against the trial judge’s refusal to give leave to appeal a costs order made upon the determination of those applications. That leave was necessary pursuant to s 253 of the *Supreme Court Act 1995*, which provides:

“No order made by any judge of the said court by the consent of parties or as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order.”

### **The costs order**

- [2] Annette Sheppard, the respondent here, was one of two claimants who were successful in obtaining orders for further provision from the estate; but in each of their cases the amount awarded was less than a Calderbank offer made by the

executors. The other two claimants were unsuccessful. The learned primary judge ordered that the two successful claimants should have their costs on an indemnity basis up to the date of the Calderbank offer, and that all four claimants should pay the executors' costs after that date, assessed on the indemnity basis. As between the claimants, his Honour apportioned the amount to be paid at 10 per cent for each of the unsuccessful claimants while the balance was equally divided between Ms Sheppard and the other successful claimant at 40 per cent each. However, his Honour reduced that figure in each case to 30 per cent. His reasons for doing so in respect of Ms Sheppard identified three matters concerning the executors' conduct, in relation to, respectively, a pre-trial directions application, an application for a re-opening, and cross-examination at trial of Ms Sheppard's family members.

### **The application for directions on 6 December 2007**

- [3] Ms Sheppard had filed an affidavit in which she deposed to not having any interest in real property and to receiving her income by way of a salary. Directions were made pursuant to which any further affidavits had to be filed by 7 December 2007. In correspondence in November 2007, the solicitors for the executors noted that Ms Sheppard had not disclosed any income tax returns for the previous seven years, and asked for them. Her solicitors responded by saying first, that she relied on her material already filed, and, then, in response to a further letter on the topic, that she had not lodged tax returns for the previous seven financial years. That drew a letter from the executor's solicitors demanding a sworn affidavit from Ms Sheppard deposing to:

- “(a) her failure to provide income tax returns to the Australian Tax Office for the financial years 2000-2007 (and any previous years) inclusive;
- (b) the reasons why she has not attended to same;
- (c) the date she lodged her last income tax return; the financial year it related to, and annexing a copy of same; and
- (d) whether in the period in which she states she was in a de facto relationship with the deceased, she received income from any other source including interest.”

The letter advised that the matter had been listed for further directions on 6 December 2007.

- [4] On 4 December 2007, the executor's solicitors provided a draft consent order, the first paragraph of which was in terms of the letter already set out, and the second of which required Ms Sheppard to provide copies of bank statements for any account in which she had had an interest since 1992. Failing agreement to the consent order, the executors said, they would seek the costs of the application. Ms Sheppard's solicitors replied, pointing out that her further affidavit evidence was due to be filed and served on 7 December, and refusing to consent to the proposed orders.
- [5] At the directions hearing, counsel for Ms Sheppard informed the court that her sources of income and her property had already been the subject of one affidavit, and another would be filed the following day deposing to the fact that no tax returns had been lodged. The learned judge declined to make the orders sought and adjourned the application.

### **The cross-examination of Ms Sheppard's family members**

- [6] The hearing of the applications for further provision proceeded in February 2008. Ms Sheppard's daughter, son and daughter-in-law had sworn affidavits. They were cross-examined about the financial assistance given to them by Ms Sheppard. She had lent \$150,000 to her daughter and had contributed \$110,000 to the acquisition of a property with her son and daughter-in-law; she had subsequently transferred her interest in it to them. They had since bought another property on which she was living with them, and they confirmed that she was welcome to do so indefinitely. This evidence was reflected in the judgment, when his Honour noted that Ms Sheppard's gifts to her son, his wife and her daughter had left her "somewhat lacking in financial security"; but that they, particularly the son and daughter-in-law, had confirmed their support.

### **The re-opening application on 20 May 2008**

- [7] In March 2008, while judgment was reserved, Ms Sheppard lost her position as a local government councillor, with consequences for her financial position and, in turn, her application for further support. She filed an affidavit explaining her limited prospects of employment and the need for her to undertake further education. In response, the executors filed an affidavit setting out possible avenues of employment for her. The matter was brought back before the court on 20 May 2008. Ms Sheppard's counsel sought leave to re-open, which was not opposed by the executors. As well as relying on her affidavit, Ms Sheppard's counsel explored with her, in oral evidence, the details she had given in it and asked for her response to what was contained in the affidavit relied on by the executors. She was cross-examined, relatively briefly, on the same matters.

### **The costs judgment**

- [8] In his judgment in relation to the costs issue ("the costs judgment"), the learned judge explained his reasons for reducing the portion to be borne by Ms Sheppard:

"Annette also seeks to be protected from costs incurred by meeting the partisan and aggressive conduct of the respondents. She points firstly to the hearing on 6 December 2007 in which the respondents brought a pre-emptive application suggesting a lack of good faith in her presenting a claim and in circumstances where she was not obliged to file any further material until 7 December 2007. Secondly, the reopening of the trial in May 2008 to canvas the consequence of Annette's loss of her local government position was unreasonable and unnecessary.

Both these complaints are, in my view, completely justified. There was no useful purpose to be served by the first application and the reopening rehearsed issues that had been raised at the trial and the material new facts ought to have been dealt with by a simple affidavit. Further, the opposition to Annette's claim was undertaken with greater intensity than was really necessary, having regard to the nature of her claim. This resulted in members of her family being called unnecessarily to answer queries about the intra-family dealings. The remarks I made earlier about the obligation on claimants to consider the nature of the estate and the impact of costs on the entitlements of beneficiaries apply with greater force to executors and those who advise

them. Where, as a consequence of over zealous defence of a claim or partisan behaviour by executors, claimants are forced to incur unnecessary costs then adjustments to costs orders may be required in the pursuit of “overall justice” which must inform discretionary decision making.

Turning then to the competing consideration, I regard Annette’s pursuit of her claim as not being as straightforward and cooperative as it ought to have been. However, that did not, in my view, justify her being put to the additional expense of meeting the two unnecessary applications brought by the executors. I regard her rejection of the Calderbank offer as unreasonable in the circumstances and for this reason, she should not have her costs paid after the date of that offer. She should however recover indemnity costs up to that date and contribute to the executors’ costs thereafter. The contribution, which I would have assessed at 40% of the total, will be reduced to 30% to take account of the unnecessary costs occasioned by over zealous conduct of the respondents...”<sup>1</sup>

### **The application for leave to appeal the costs judgment**

- [9] The basis of the application for leave was error said to have been made in the first two of the paragraphs quoted above from the costs judgment. In their submissions to the learned primary judge, the executors queried the correctness of his observation that the obligation to consider the impact of costs on the estate applied with greater force to executors, describing it as involving a matter of principle which required determination by this Court. And, they said, the criticisms made of the executors in the judgment were unfounded in fact. In particular, the application to re-open the trial was made by Ms Sheppard, not the executors; Ms Sheppard’s family members were properly cross-examined, since the level of their support was relevant to her need for provision; and the application of 6 December 2007 was necessary because that was the only applications day prior to trial on which directions could be made. Those matters warranted a grant of leave.

### **The leave judgment**

- [10] The learned judge delivered a further judgment on the leave question (“the leave judgment”). He preceded his consideration of the issue by saying that he had not found, nor did he believe that there was, any personal animosity on the part of the executors towards any claimant. He accepted their denial by affidavit of any partisan or aggressive approach and their explanation of the considerable efforts they had made to resolve the claims as soon as they could. His Honour reiterated the obligation to consider the impact of costs on the estate, and observed that its application with “greater force” to executors merely recognised that they were usually in a better position to control the litigation.
- [11] In relation to the application of 6 December 2007, his Honour said:

“The respondents did initiate the application on 6 December 2007. The issue they seek to raise now is whether they were justified in so doing. The push to gain production of the documents was the ostensible reason for the application, but the part that clearly was not

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<sup>1</sup> *Underwood v Underwood* [2009] QSC 107 at [60]-[62].

justified was the attempt to strike out Annette's claim. It was this quest which attracted my adverse comment. The application to reopen the case on 9 April 2008 was in fact made by Annette based upon the change in her financial circumstances occurring after the close of the evidence. She had lost her position (and the income therefrom) as a local government councillor. The details were sufficiently set out in affidavits filed on 9 April 2008 and 12 May 2008. What followed was a re-litigation of Annette's capacity to earn income involving substantial cross-examination. Even if it was erroneous to say the respondents initiated the application, the force of my remarks about the manner of its execution, remain valid."<sup>2</sup>

- [12] In refusing leave to appeal, the learned judge referred also to the following considerations: the effect of his judgment, which was merely to reduce the contribution by one of the litigants; the relatively small amount involved in the appeal, some \$10,000; the lack of any bar to the executors' recovering their costs from the estate; and the desirability of finalising the matter.

### **The parties' submissions on this appeal**

- [13] Here, the executors argued again that the learned primary judge had made a wrong statement of principle when he said that the duty to consider the impact of costs on the entitlements of beneficiaries applied with greater force to executors, there being no authority to support that proposition. His Honour's qualification in the leave judgment, that his observation merely recognised that executors were usually in a better position to control the litigation, was wrong as a matter of fact; in the present case, the executors were compelled to proceed to trial because the claimants had rejected their offers.
- [14] The executors submitted that the costs judgment was wrong in treating the two applications of 6 December 2007 and 20 May 2008 as unnecessary. In the leave judgment the learned judge had referred to the earlier application as involving an attempt to strike out Ms Sheppard's claim, a statement involving further error, since no such application had been made. His characterisation of the application of 20 May 2008, as involving a re-litigation of Ms Sheppard's capacity to earn income with substantial cross-examination, was inaccurate; in fact, the executors said, they had facilitated the process. The taking of evidence on 20 May 2008 took only 20 to 30 minutes, and Ms Sheppard had herself adduced further oral evidence.
- [15] For Ms Sheppard, counsel pointed out that the executors sought review of an exercise of discretion. Even had his Honour made some errors, he had, in his leave judgment, correctly observed that they were only part of the considerations which informed the exercise of his discretion. This court should be reluctant to undertake an independent review of the various matters concerned, and it was not, in any case, in a position to consider the learned judge's exercise of his discretion without reviewing the entire trial transcript, which was not in the appeal record.

### **Error affecting the primary judge's decision**

- [16] The learned judge's observation that the obligation to consider the impact of costs on the estate applied with greater force to the executors than to the beneficiaries is

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<sup>2</sup> *Underwood v Underwood*, unreported, Jones J, SC No 55 of 2007, 9 September 2009 at [11]-[12].

unimpeachable. Executors bear a fiduciary duty to which they must have regard in conducting litigation affecting the estate; beneficiaries do not. His Honour made no error in this respect. No other error as to principle is alleged. What remains are complaints of wrong findings of fact.

- [17] The submission for Ms Sheppard that the court is not in a position to consider the claimed errors of fact is not well-founded. The learned judge clearly identified in his costs judgment the three matters which he regarded as warranting the reduction of Ms Sheppard's contribution to costs. They were, that the application of 7 December 2007 was unnecessary, that the re-opening in May 2008 rehearsed issues raised at the trial and that any new facts should have been dealt with by affidavit; and that members of Ms Sheppard's family had unnecessarily been cross-examined. The leave judgment added these qualifications: that what was not justified about the 6 December 2007 application was the attempt to strike out Ms Sheppard's claim; and that although his Honour accepted that the application to re-open was made by Ms Sheppard, the executors undertook a "re-litigation" of her income earning capacity with "substantial cross-examination". There is nothing in either judgment to lead one to think that there was any other factor taken into account by the learned judge. All of the material relevant to those matters was, with one exception, before the court.
- [18] The exception was in relation to the cross-examination of Ms Sheppard's children. Because not all of Ms Sheppard's affidavit material was in the appeal record, it was not possible to determine whether there was, in fact, a dispute as to whether she could rely on her children for continued support. Consequently, it is not possible to reach any view as to whether the learned primary judge was correct in his observation about her family members being called unnecessarily. But his findings in relation to the two applications can be reviewed.
- [19] In respect of the necessity for the hearing of 6 December 2007, it may immediately be remarked that Ms Sheppard was not in default of any disclosure obligation, because she had no tax returns. The executors' demands that she depose on oath to, not only her failure to lodge them, but the reasons for not doing so, and that she give the date of her last return and provide a copy of it (regardless of its age or relevance) over-reached anything they were entitled to require under the relevant practice direction.<sup>3</sup> Therein lay a basis for saying that their insistence on the directions hearing was unwarranted. On the other hand, the learned judge clearly mistook the history of the matter when he referred to an attempt to strike out Ms Sheppard's claim. None of the relief sought by the executors in their application, nor any submission made on its hearing, could bear that characterisation.
- [20] Nor could what occurred on the re-opening of Ms Sheppard's case properly bear the description of "a re-litigation of [Ms Sheppard's] capacity to earn income involving substantial cross-examination". Ms Sheppard had raised various obstacles which, she deposed, stood in the way of her obtaining employment; the executors had put on an affidavit in response proposing alternatives; it was appropriate and proper that those matters be put to her. There was nothing excessive about the cross-examination that was conducted; and the factor that tells most strongly against his Honour's conclusion that the hearing was unnecessary is that Ms Sheppard's own counsel took further evidence from her orally on the hearing.

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<sup>3</sup> Practice Direction No. 8 of 2001.

- [21] Those findings seem to me to constitute significant mistakes of fact as to matters which the learned judge identified as relevant in the exercise of his discretion to refuse leave to appeal. The executors are, consequently, entitled to succeed on their appeal against that decision. But that, of course, leaves the question of how this court should re-exercise the discretion.

### **Considerations relevant to the re-exercise of the discretion**

- [22] The executors emphasised that none of their proceedings in this court - this appeal or any further appeal for which they might be granted leave - would be at the expense of the estate, because they would not seek to recover their costs; indeed, their solicitors undertook to meet any costs order made against them. But there is no point of principle involved in the proposed appeal. Insofar as the executors may have had an interest in rectifying the description of them as “partisan and aggressive”, that has already occurred in the learned primary judge’s disavowal in the leave judgment of any finding of personal animosity and his acceptance that they had made considerable efforts to bring about an early resolution of the claims. That position has been reinforced, to some extent, by what has been said in this judgment about factual errors relating to their conduct of the relevant applications.
- [23] The amount involved is small, approximately \$10,000. The executors were denied recovery of it from Ms Sheppard, but they remain entitled to recoup it from the estate. That, of course, will be a further expense to the estate, but it will be borne across its beneficiaries. And as the learned primary judge observed, finality is desirable, particularly in a matter such as this, which has, to say the least, been somewhat protracted. The balance of those considerations, in my view, falls heavily against granting leave.

### **Orders**

- [24] I would allow the appeal against the leave judgment, set it aside and re-exercise the discretion by refusing leave to appeal against the costs judgment. The executors’ victory in having the leave judgment set aside has a Pyrrhic quality. Ms Sheppard should have her costs of the appeal paid from the estate.
- [25] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.
- [26] **P LYONS J:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with her Honour’s reasons, and with the orders which she proposes.