

SUPREME COURT OF QUEENSLAND

CITATION: *Jee v Jee* [2011] QSC 202

PARTIES: **DIANA MARIA JEE**
(applicant)
v
THOMAS JEE as the executor of the estate of FOOK
NENG JEE deceased
(respondent)

FILE NO: BS4145 of 1999

DIVISION: Trial Division

PROCEEDING: Hearing on costs

DELIVERED ON: 9 February 2011

DELIVERED AT: Brisbane

HEARING DATE: 9 February 2011

JUDGE: Mullins J

ORDER:

- 1. The envelope containing documents 28, 29, 30, 32, 33 and 34 be opened and the documents returned to the file.**
- 2. The applicant's costs of the proceeding (including reserved costs) are to be assessed on an indemnity basis and paid out of the estate of Fook Neng Jee the deceased (the deceased).**
- 3. The costs of the respondent beneficiary Dennis Meng Kit Jee of the proceeding (including reserved costs) to and including November 2010 are to be assessed on an indemnity basis and paid out of the estate of the deceased.**
- 4. The executor is not entitled to an indemnity from the deceased's estate for the costs of the sanction application filed on August 2010.**
- 5. Leave to each of the executor and the respondent beneficiary to appeal against the decision on costs.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – unnecessary parties and appearances – application for family provision – where executor settled applicant's family provision claim subject to the sanction of the court – where executor did not provide the court with accurate statement of assets and liabilities of estate on the sanction application – where respondent beneficiary opposed the sanction

application and the family provision application proceeded to a contested hearing – where respondent beneficiary maintained position that applicant was not entitled to receive transfer of house – where applicant successful in family provision application in obtaining transfer of house – where executor prevented from obtaining an indemnity from the deceased's estate for the costs of the sanction application – where respondent beneficiary obtained indemnity costs order from the estate up to the time when the respondent beneficiary should have accepted that the applicant would succeed in her application

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COUNSEL:

C Newton for the applicant
RD Peterson for the respondent executor
DR Murphy SC and GR Dickson for the respondent beneficiary
Dennis Meng Kit Jee

SOLICITORS:

James Watt & Co for the applicant
Hatzis Lawyers for the respondent executor
Gleeson Lawyers for the respondent beneficiary
Dennis Meng Kit Jee

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HER HONOUR: The order that I make is that the envelope containing documents 28, 29, 30, 32, 33 and 34 be opened and the documents returned to the file.

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HER HONOUR: I am going to now make some orders for costs and give some reasons. I made an order this morning in relation to the opening of an envelope that was on the file. That was the first order that I've made.

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The second order that I make is the applicant's costs of the proceeding (including reserved costs) be assessed on an indemnity basis and paid out of the estate of Fook Neng Jee deceased (the deceased).

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The third order is the costs of the respondent beneficiary Dennis Meng Kit Jee of the proceeding (including reserved costs) to and including 16 November 2010 be assessed on an indemnity basis and paid out of the estate of the deceased.

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The fourth order that I make is that the executor is not entitled to an indemnity from the deceased's estate for the costs of the sanction application filed on 10 August 2010.

On 23 December 2010, I published my reasons in relation to the applicant's family provision application: *Jee v. Jee* [2010] QSC 485. Today, I heard submissions from the parties on the appropriate orders as to costs.

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It was uncontested that the applicant had succeeded in her application and was therefore entitled, in the circumstances, to an order for indemnity costs of the proceeding from the estate.

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The questions that have occupied the time for submissions are the extent to which any costs order is made in favour of the respondent beneficiary Mr Dennis Jee and whether the executor should have the unqualified right of indemnity for all costs incurred by the executor in relation to the proceeding out of the deceased's estate.

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The executor was conscious that some of his siblings did not agree with his proposal to settle the applicant's family provision application. The basis on which the executor was willing to dispose of the application was probably more favourable to the estate at the time that it was agreed with the applicant than the order that was subsequently made after the contested proceeding.

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The sanction was brought before the Court on an application made by the executor filed on 10 August 2010. Prior to that, Mr Dennis Jee, had engaged solicitors to assist him in his quest for information from the estate to enable him to form a view about whether he should oppose the proposed settlement.

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Affidavits were filed for the purpose of the sanction application and it seems that, at least, three of them that

contained critical information were not served on Mr Dennis Jee until within a couple of days of the application.

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There remained outstanding inquiries as far as Mr Dennis Jee was concerned that related to the administration of the estate and the current value of assets of the estate. Not all the information that was sought by Mr Jee could be justified for the purpose of making a decision about the applicant's provision application.

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Because the issue of costs was contested, it has been necessary for me to read all the material that was before her Honour Justice Philippides when the application for sanction was heard by her Honour on 20 August 2010.

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Her Honour did not make the orders sought because of the opposition and dates were given which were, ultimately, used for the purpose of the hearing of the applicant's family provision application.

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I became concerned when I started looking at the material that was before her Honour Justice Philippides that the information put by the executor for the purpose of enabling the Court to exercise the discretion under section 41 subsection 1 of the Succession Act 1981 was incomplete. I had been alerted to this by the content of the written submissions filed today on behalf of Mr Dennis Jee.

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Although I do not accept that every point that's made in those

written submissions reflected the state of the material as at 1
20 August 2010, it is clear that the Court was not informed
about the need to allocate assets and administration costs
against clauses 4 and 5 of the Will. In fact, submissions
were made to her Honour Justice Philippides that suggested
that the balance then standing in the bank accounts was the 10
subject of the gifts under clause 4 of the Will where no
allowance had been made for crediting back to those bank
accounts, the costs of an earlier Probate action that were
paid out of the bank accounts but, in reality, should have
been charged against the residuary estate. 20

I have formed the view that the executor did not fulfil his
obligation in providing the Court with an accurate statement
of the assets and liabilities of the estate at the time of the
application in August 2010 and that, even though it can be 30
said that there was strong indication that the applicant's
offer to settle was reasonably entertained by the executor,
the Court was not given material that enabled it to properly
exercise its obligation under section 41 subsection 1 of the
Succession Act 1981. 40

After that application was unsuccessful, the parties then
proceeded with the preparation for the hearing. It became
apparent that Mr Dennis Jee was seeking information from the
executors that related, more properly, to queries about the 50
administration of the estate rather than information that was
essential for equipping Mr Dennis Jee to make a decision about
the applicant's family provision application.

By the time Mr Dennis Jee received the applicant's affidavit filed on 3 November 2010, he could be in no doubt that, upon advice being obtained on it, that the applicant was going to succeed in her application. In fact, Mr Dennis Jee had obviously obtained advice to enable him to make a decision, as he unreservedly made an offer to settle on 16 November 2010.

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The attitude of Mr Dennis Jee to the applicant's application in that offer to settle reflected the entrenched position that he conveyed during the hearing of the family provision application that the applicant was not entitled to receive what she was seeking which was a transfer of the house at Robertson plus a lump sum.

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There is no issue, in my mind, that that entrenched position could no longer be justified by reference to the applicant's material in the light of advice obtained on that and the extent to which the executor had provided further information by the time Mr Jee made his offer to settle on 16 November 2010.

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I have therefore decided that any order for costs in Mr Dennis Jee's favour in relation to the proceeding should stop on that date. Up until that time, the state of the material may have justified his attitude to the applicant's application. After that date, it could not.

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Then it becomes a question of the executor's costs of the

sanction application. Because of the deficiencies in the material that was placed before the Court, the sanction application was wasted and the matter ended up proceeding to a full hearing.

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In the circumstances, after having reviewed the correspondence and the content of the material, I've decided that it is appropriate in this family provision application to prevent the executor from obtaining an indemnity from the deceased's estate for the costs of the sanction application filed on 10 August 2010.

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HER HONOUR: I should make a fifth order, leave to each of the executor and the respondent beneficiary to appeal against the decision on costs.

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