

SUPREME COURT OF QUEENSLAND

CITATION: *Zevering v Callaghan & Ors; Callaghan & Anor v Zevering*
[2011] QCA 254

PARTIES: **CORNELIA ELLEN ZEVERING**
(appellant/respondent)
v
**LYNNE CALLAGHAN and YVONNE SHIRLEY
RAYMONT as trustees of THE OUTLOOK ESTATE
TRUST**
(respondents/applicants)

FILE NO/S: Appeal No 10552 of 2010
SC No 10480 of 2009

DIVISION: Court of Appeal

PROCEEDINGS: General Civil Appeal - Further Orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered 29 July 2011
Further order delivered 23 September 2011

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

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

ORDERS:

- 1. The appeal be allowed.**
- 2. Order 2 of the orders for costs made on 14 September 2010 be set aside, and in lieu thereof it be ordered that the respondents pay the appellant one-half of her costs of her cross-application, to be assessed on the standard basis.**
- 3. Notwithstanding the orders made on 15 October 2009, the appellant be authorised to charge the respondents the sum of \$150,000 as remuneration for her services as trustee of the Outlook Estate Trust (inclusive of remuneration which the trustees are authorised by the order of 15 October 2009 to pay the appellant); and the trustees are authorised to pay that sum (less an amount of \$19,000 being uncorroborated expenses received by the appellant), out of the Outlook Estate Trust.**
- 4. The respondents be authorised to recover their costs of the appellant's cross-application, on the indemnity basis, and the appellant's costs of the cross-application paid pursuant to this order, out of the Outlook Estate Trust.**
- 5. The appellant and the respondents are to be paid their costs of the appeal out of the Outlook Estate Trust, on the indemnity basis.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – REMUNERATION – ALLOWANCE BY THE COURT – JURISDICTION GENERALLY – OTHER STATES AND TERRITORIES – where reasons for judgment delivered – where parties invited to make submissions regarding form of orders to be made – where appellant sought an order directing payment of money by respondents-trustees to her – where former solicitors for appellant claimed an equitable lien over any amount payable to her consequential to an order of the Court – where respondents sought an order under inherent jurisdiction of the Court and s 94 *Trusts Act 1973* (Qld) authorising payment to appellant

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where appellant sought costs of her cross-application at first instance on the indemnity basis as she was claiming remuneration as a former trustee – where respondents submitted appellant had failed on a number of issues, which unduly prolonged the hearing – where respondents sought an order for their costs of the appellant’s cross-application, to be paid by the estate on an indemnity basis – where respondents submitted the appellant’s costs of the appeal should be awarded on the standard basis only, by reasons of delay in conduct of the appeal and failure on most grounds argued

Trusts Act 1973 (Qld), s 94

EMI Records Ltd v Ian Cameron Wallace Ltd [1983] Ch 59, cited

Re Postle and Hodsdon’s Application [1991] 1 Qd R 160, cited
Zeveering v Callaghan & Ors; Callaghan & Anor v Zeveering [2011] QCA 180, cited

COUNSEL: No appearance by the appellant; the appellant’s submissions were heard on the papers
No appearance by the respondents; the respondents’ submissions were heard on the papers

SOLICITORS: The appellant/respondent appeared on her own behalf
Macrossans Lawyers for the respondents/applicants

- [1] **FRASER JA:** I agree with the reasons of Peter Lyons J and the orders proposed by his Honour.
- [2] **WHITE JA:** I agree with the orders proposed by Peter Lyons J for disposing of this appeal for the reasons which he gives.
- [3] **PETER LYONS J:** On 29 July 2011, the Court delivered reasons for judgment (*July reasons*), inviting submissions as to the orders to be made. The parties have made submissions as to the form of order intended to give effect to the appellant’s success on the appeal, and on some cost issues.

- [4] The order proposed in paragraph 64(c) of the July reasons authorised the appellant to charge the respondents \$150,000 for her services as trustee. The appellant seeks an order directing payment of that sum. The respondents oppose the order directing payment, but seek other orders, namely, that they be authorised to pay that sum; and that they be authorised to deduct from that sum an amount of \$19,000, described as “uncorroborated expenses taken by the appellant.” In her written submissions in reply, the appellant, who represents herself, has not dealt in any meaningful way with the other orders sought by the respondents.
- [5] The respondents oppose an order that they be directed to pay money to the appellant on the basis (communicated to the Court by a facsimile transmission of 10 August 2011 and to the appellant by an email on that date) that they have received notice from the appellant’s former solicitors that those solicitors claim an equitable lien over any amount otherwise payable to the appellant as a consequence of this Court’s orders. It would be inappropriate to make an order directing payment by the respondents, without requiring notice to be given to the appellant’s former solicitors that the appellant seeks such an order; and without giving those solicitors the opportunity to be heard in relation to the order. Nor has any real ground been identified for directing the respondents to pay money to the appellant.
- [6] The respondents’ underlying application, which resulted in the appellant’s cross-application, was made under the Court’s inherent jurisdiction and under s 94 and s 101 of the *Trusts Act 1973* (Qld). Section 94 confers broad powers on the Court in relation to the expenditure of moneys, and other transactions. The language of the section supports the view that a court might, under the section, authorise a payment to be made to a trustee. It is implicit in the submissions made on behalf of the respondents that they seek the protection which the making of such an order would provide, and accordingly there seems to be no reason not to make such an order.
- [7] As the submissions for the respondents point out, Counsel who appeared on behalf of the appellant in the proceedings at first instance expressly accepted, on behalf of the appellant, that the sum of \$19,000 should be deducted from remuneration otherwise to be paid to the appellant. It is appropriate to recognise this in the orders of this Court.
- [8] On 14 September 2010, the learned primary Judge made some orders as to costs. He ordered that the costs of each party (other than the respondents, who had the benefit of an earlier order) of the application made by the respondents were to be paid out of the estate on the indemnity basis. With respect to the appellant’s cross-application (which had been dismissed), his Honour ordered that she pay the costs of the respondents on the standard basis. The July reasons proposed that the latter order be set aside. The appellant seeks an order that she be awarded the costs of her cross-application. She submits that she should be awarded these costs on the indemnity basis, as she was claiming remuneration as a trustee. The appellant relies on *Re Postle and Hodsdon’s Application*¹ and *EMI Records Ltd v Ian Cameron Wallace Ltd*.²
- [9] The respondents submit that no order should be made in favour of the appellant for the costs of her cross-application. They refer to her substantial failure on a number of issues, where the raising of those issues significantly lengthened the proceeding,

¹ [1991] 1 Qd R 160.

² [1983] Ch 59 at 71.

and resulted in substantial additional material being introduced into evidence. It is submitted on behalf of the respondents that these issues were improperly and unreasonably raised. They make reference to findings at first instance adverse to the appellant's credit. They also note the disproportion between the amount claimed (which is \$686,600) and the extent to which the appellant ultimately succeeded (which is \$150,000). They also submit that if the appellant had sought remuneration at the level ultimately obtained, there is a reasonable prospect that the matter could have been resolved at the hearing of the respondent's application in October 2009.

- [10] In reply, the appellant submits that the respondents contributed to the length of the hearing at first instance; and that the submissions made by the respondents amount to an attempt to re-argue the appeal.
- [11] By October 2009, the relationship between the appellant on the one-hand and the respondents and many of the other unit holders on the other, had deteriorated substantially. It is therefore difficult to accept that, if the appellant had then sought a substantially lower level of remuneration than she contended for at first instance, the proceedings were likely to have been resolved in the applications list at that time. Further, the appellant has the benefit of success in her cross-application; and because the costs were incurred as a consequence of her former position of trustee, she had some prospect of an award on the indemnity basis.
- [12] However, the matters raised by the respondents' submissions show that this is a case where the appellant should not have the benefit of an order for costs on the indemnity basis of the hearing of her cross-application at first instance. As the July reasons demonstrate, the hearing was unduly prolonged by attacks upon the appellant's fellow trustees, which did not advance her case. While other orders are within the scope of a sound exercise of the discretion to make orders in respect of these costs, the competing factors which have been raised would make it appropriate that the appellant be awarded one-half of those costs, assessed on the standard basis.
- [13] The respondents seek an order that they be paid their costs of the appellant's cross-application, to be paid out of the estate, and assessed on the indemnity basis. The appellant has not identified any reason why such an order should not be made. It was appropriate for the respondents, as trustees, to oppose the orders sought by the appellant. Accordingly, an order should be made in their favour for the payment of these costs out of the trust fund.
- [14] The respondents submit that the appellant's costs of the appeal should be awarded only on the standard basis, by reason of her delay in the conduct of the appeal; and because she failed on most of her grounds of appeal.
- [15] Reasons for judgment at first instance were given on 1 September 2010. The appellant's notice of appeal was filed on 29 September 2010. The appeal was heard on 20 April 2011. None of this suggests delay in the conduct of the appeal by the appellant which would affect any costs order to be made in her favour. The appellant's submissions focused appropriately on the ground on which she was successful. The respondents actively contested the appeal. The appellant was seeking remuneration to which she claimed to be entitled as a consequence of acting as a trustee of the trust over a long period of time. The order proposed in the July reasons is appropriate.

- [16] In view of the submissions, and for the reasons set out earlier, the orders of this Court will be as follows:
- (a) The appeal be allowed;
 - (b) Order 2 of the orders for costs made on 14 September 2010 be set aside, and in lieu thereof it be ordered that the respondents pay the appellant one-half of her costs of her cross-application, to be assessed on the standard basis;
 - (c) Notwithstanding the orders made on 15 October 2009, the appellant be authorised to charge the respondents the sum of \$150,000 as remuneration for her services as trustee of the Outlook Estate Trust (inclusive of remuneration which the trustees are authorised by the order of 15 October 2009 to pay the appellant); and the trustees are authorised to pay that sum (less an amount of \$19,000 being uncorroborated expenses received by the appellant), out of the Outlook Estate Trust;
 - (d) The respondents be authorised to recover their costs of the appellant's cross-application, on the indemnity basis, and the appellant's costs of the cross-application paid pursuant to this order, out of the Outlook Estate Trust;
 - (e) The appellant and the respondents are to be paid their costs of the appeal out of the Outlook Estate Trust, on the indemnity basis.