

SUPREME COURT OF QUEENSLAND

CITATION: *Wallerstein v Bedington* [2012] QSC 71

PARTIES: **RENEE WALLERSTEIN**
(First Plaintiff)

and

**CHANELLE WALLERSTEIN (BY HER FATHER AND
LITIGATION GUARDIAN JOHN WALLERSTEIN)**
(Second Plaintiff)

and

**JACOB WALLERSTEIN (BY HIS FATHER AND
LITIGATION GUARDIAN JOHN WALLERSTEIN)**
(Third Plaintiff)

v

BRYAN CHARLES BEDINGTON
(Defendant)

FILE NO/S: BS 5534 of 2010

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING
COURT: Supreme Court

DELIVERED ON: 29 March 2012

DELIVERED AT: Brisbane

HEARING DATE: 6, 7 and 20 March 2012

JUDGE: McMurdo J

ORDER: **(1) The defendant pay the following amounts:
to Renee Wallerstein the sum of \$42, 564.92 and
to Chanelle Wallerstein the sum of \$36, 093.25.**

**(2) The defendant be removed as trustee for the plaintiff
Jacob Wallerstein and that Jenny Power be appointed as
sole trustee for him.**

**(3) The defendant pay to Jenny Power as trustee, the sum
of \$62, 858.01 and transfer to her 98 shares in the
Commonwealth Bank of Australia presently held by the
defendant as trustee.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – PROCEEDINGS
BETWEEN TRUSTEES AND BENEFICIARIES OR

THIRD PARTIES – where the first and second plaintiff beneficiaries under a will claim the balance under their trust fund – where the defendant trustee of the fund claims that certain expenses paid amounted to advances of the trust funds – whether the expenses paid amounted to advances under the trust fund and what, if anything remains to be paid to the first and second plaintiffs under the trust

EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – ACCOUNTS – LIABILITY OF TRUSTEES AND ENTITLEMENT OF CESTUI QUE TRUST – where the defendant trustee failed to keep up-to-date records of the balance of the trust fund, in particular when the trust funds had been loaned to his business – whether the defendant has failed to comply with his duties as a trustee

EQUITY – TRUSTS AND TRUSTEES – APPOINTMENT, REMOVAL AND ESTATE OF TRUSTEES – APPOINTMENT OF NEW TRUSTEES – where the third plaintiff seeks to have the current defendant trustee removed and a new trustee appointed – whether the trustee’s actions in administering the trust to date justify his removal as trustee and the appointment of a new trustee

Succession Act 1981 (Qld), s52

Trusts Act 1973 (Qld), s80

COUNSEL: C. J. Fitzpatrick for the plaintiffs
M Lawrence for the defendant

SOLICITORS: Aitken Wilson Lawyers Pty Ltd for the plaintiffs
PM Lee & Co for the defendant

- [1] The plaintiffs are three grandchildren of the late Williamina Bedington who died in 1996. Under her will they were each left one-fourth of a small parcel of shares in the Commonwealth Bank and a sum of \$5,000, to be held on trust until she or he turned 18. The defendant, Mr Bedington, is the executor and trustee. Now some 16 years later, from those small bequests is this litigation, tried over three days. Renee and Chanelle Wallerstein have turned 18 and claim what they say is the balance of their trust fund. Jacob will soon turn 18, and applies for the vesting of his fund in a new trustee.
- [2] The claims by Renee and Chanelle are resisted upon essentially two grounds. The first comes from the fact that each was paid amounts in the guise of wages by a company which, under Mr Bedington’s control, conducted a photography business. He says that, in truth, these were advances of some of their trust funds. Secondly, Mr Bedington relies upon payments made by that company to the plaintiffs’ father, Mr John Wallerstein, to reimburse him for his payment of some of their school fees. Mr Bedington says that these payments also were advances under the trusts and should be brought into account. It is undisputed that some other moneys were paid as trust distributions to Renee and Chanelle in 2011. But Mr Bedington does not

concede that anything further need be paid to either of them. And he does not consent to be replaced as Jacob's trustee.

- [3] The testatrix's first husband, who was the father of John Wallerstein and the grandfather of the plaintiffs, died in 1967. Subsequently, the testatrix and Mr Bedington conducted a photography business. From about 1977 until 1988, the business was operated by their company, Bryna Pty Ltd ("Bryna"). From then the business was conducted by a wholly-owned subsidiary of Bryna, which was New Image Photographics Pty Ltd ("New Image"). At all times the majority shareholder in Bryna was Mr Bedington. The business prospered and Bryna acquired several real properties around Brisbane.
- [4] Mr Wallerstein became employed full time in the business in 1982 at the age of about 21. He had undertaken but not completed university studies in commerce and law. He became the financial controller of the business in 1987 and continued as such until 5 December 2006. At various stages he was a director of one or more of the companies controlled by Mr Bedington.
- [5] Mr Bedington has a daughter, who is Ms Ostarjas. At the time of Mrs Bedington's will, Ms Ostarjas had one daughter, Sarah. She had another daughter, Angela, born after Mrs Bedington's death.
- [6] Under the will, Mrs Bedington left her shares in Bryna to Mr Wallerstein and made a number of relatively small gifts, including \$5,000 to Ms Ostarjas. She left her shares in the Commonwealth Bank of Australia, which at her death numbered 392, to the plaintiffs and Sarah Ostarjas in equal shares, and each of those four children was also left the sum of \$5,000, the property of each child being held on trust until turning 18. Mr Bedington was appointed as the sole executor and trustee. In default of his acting, the will appointed a friend of Mrs Bedington, Ms Jenny Power, to be the executor and trustee. It is now proposed that she will act as Jacob's trustee and consents to doing so.
- [7] I go now to the relevant movements of money. Until late in 2006, when Mr Wallerstein left the photographic business in acrimonious circumstances, he seems to have had most to do with these transactions. A bank account was opened in 1996 to deal with estate moneys. It was in Mr Bedington's name with Suncorp. The balance in early January 1997 was \$76,733. On 14 February 1997, \$28,000 was paid from that account to Mr Wallerstein for his personal benefit. On the same day \$12,000 was paid for his benefit, to reduce his loan account with New Image. Mr Wallerstein was entitled to the residuary estate, although it does not appear that the specific legacies had been paid at that stage. Allowing for two small debits for withholding tax, that left a balance of \$37,147.29 when the account was closed on 9 April 1997.
- [8] From that point, Mr Bedington failed to keep the estate funds separate from those of his companies. When the Suncorp account was closed, its balance of \$37,147.29 appears to have been paid to a bank account of New Image. According to a document created by Mr Wallerstein, those moneys were paid to Bryna on 10 April

1997. In June 1997, New Image paid the expenses of Mrs Bedington's funeral (\$6,300) and two specific legacies (each of \$5,000). This meant that something slightly more than \$20,000 remained held by New Image, representing the respective trust funds of the four grandchildren. On the evidence of both Mr Wallerstein and Mr Bedington, this application of the trust funds represented a loan (or more precisely loans) to New Image.

- [9] Mr Wallerstein caused to be recorded this and subsequent dealings with the moneys of the trusts within the electronic accounting records of New Image. The record of dealings, at least until 31 December 2006, is within the four page document described as a journal history for an account named "W Bedington Est Trus". This document records the accrual of interest, compounding at 10 per cent per annum at monthly rests. It also records a payment of \$5,000 in October 2004 and one of \$12,200 in December 2004, which, it is common ground, were payments for shares acquired for these four trusts. And it records the receipts of dividends from those shares and from the Commonwealth Bank shares which had been left to the grandchildren. According to this document, there was a balance on this account of \$45,041.10 as at 31 December 2006. Mr Wallerstein says that this document is an accurate representation of the application and extent of the trust moneys throughout this period. If that is correct, then as at the end of 2006, each of the plaintiffs was entitled to one quarter of that balance of \$45,041.10 together with one quarter of the Commonwealth Bank shares and the shares which were purchased in 2004.
- [10] Mr Bedington says that the document is an inaccurate record in three respects. The first is that it does not account for the so-called wages paid to Renee and Chanelle. Secondly, it does not account for the school fees which were effectively paid by New Image. The third is that although he agrees that interest accrued and at monthly rests, Mr Bedington says that the correct rate was not 10 per cent but what he called the "market rate".
- [11] The so-called wages were paid to Renee from the beginning of 2004 and to Chanelle from 2005. Mr Wallerstein's evidence was that he was told by Mr Bedington that the plaintiffs, together with Sarah and Angela Ostarjas, should be assisted by payments from the business whilst they were at secondary school and university. He said that in November 2003, Mr Bedington said that Mrs Bedington had wanted the children to receive a good education and to that end, each child should receive \$50 a week from the commencement of grade 8, increasing by \$50 each year, and that the amounts were to be increased by CPI adjustment of three per cent. He says that Mr Bedington asked him to create a spreadsheet to let Mr Bedington know how much all of that was going to cost.
- [12] Mr Wallerstein did create such a spreadsheet at about the beginning of 2004. Mr Bedington does not dispute that he did so and at that time. But he denies seeing the document until after Mr Wallerstein's departure from the business, when he said it was found on the floor of what had been Mr Wallerstein's office. The spreadsheet set out payments to be made to each of the five children, beginning with Renee in 2004. The all-up cost was there shown as \$648,724.84. The amounts to be paid to the four children taking under Mrs Bedington's will were then likely to exceed, in each case, the amount of the trust funds. For example, in Renee's case, she was to

receive a total of \$117,000. The document made no reference to these payments being distributions of trust moneys. In that respect, notably it provided for payments also for Angela who was not a beneficiary under the will.

- [13] Mr Wallerstein sent an email to Ms Ostarjas on 16 January 2004 under the subject “Kids” where he wrote:

“As the monkeys start high school Bryan is putting them on the payroll, up until 4 years at Uni.

Basically its

Year	Per week
8	\$50
9	\$100
10	\$150
11	\$200
12	\$250
Uni 1	\$300
Uni 2	\$350
Uni 3	\$400
Uni 4	\$450

It will be indexed at 3% per year

Renee is the first cab of the week starting high school this year.

My understanding is that you have a family trust. I’m not sure if this will affect your income distributions in anyway.

A bit bloody generous I reckon!”

- [14] New Image proceeded to make payments to Renee and subsequently to Chanelle according to that spreadsheet. Each payment was recorded as wages, although it is clear that neither was employed. In his evidence Mr Wallerstein seemed to be untroubled by the fact that the payments were recorded as wages. Mr Bedington claimed to be alarmed by it, that he had not agreed to the payments being recorded as wages.

- [15] However, there is documentary evidence at least strongly suggesting that Mr Bedington did know that the payments were being so recorded. New Image paid its employees by electronic transfer from a certain account with the National Australia Bank. Each week a person from New Image would authorise the list of transfers to be made, and that authorisation was recorded within the electronic records of the business. The list set out the names and amounts for each recipient. For the most part these payments were authorised by Mr Wallerstein. But sometimes in his absence the payments were authorised by Mr Bedington. That occurred several times during the period of payments to Renee and later Chanelle. The fact that Mr Bedington authorised the payments appears from some of the documents within exhibit 8, as explained by Mr Wallerstein in evidence in chief. There was no challenge to that part of his evidence.

- [16] New Image filed tax returns which included these payments amongst its wages expenses. Mr Bedington is unable to say whether the returns have been corrected

for what he says was the error which he discovered after Mr Wallerstein's departure. The only contemporaneous records of these payments consistently record them as wages. The payments are not referred to in the journal history for the estate or in any other document to do with the trusts. Mr Bedington's attempt to explain this was unconvincing. In his evidence in chief, he conceded that the payments of these wages appeared each week in the company's records and that "I saw them there, from time to time", although he added "I didn't know how they were being accounted for until 2006 when we commenced our audit ...".¹

[17] At this point, mention must be made of the litigation between Bryna, New Image and Mr Wallerstein. The proceedings commenced in this Court in 2007.² The companies claim amounts totalling more than \$800,000 from Mr Wallerstein for what they say was the unauthorised use of their funds, before his departure from the business in 2006. They claim that he withdrew substantial amounts of cash, transferred funds for his own share trading, paid his own creditors from company funds, made payments on his house from their funds and otherwise misapplied their money. Importantly for the present proceedings, within these claims are the amounts paid to Renee and Chanelle as wages and for their school fees. As recently as 6 February 2012, on the instructions of Mr Bedington those companies filed an amended statement of claim which includes claims for school fees totalling \$27,610.72 and the wages paid from January 2004 through November 2006 totalling \$26,266.09. This pleading, which was settled by counsel appearing here for Mr Bedington on the instructions of his solicitors in the present case, is irreconcilable with his defence here, which is that the so-called wages payments were correctly made but wrongly described. When that inconsistency was put to Mr Bedington, he claimed ignorance of that allegation in the 2007 proceedings, saying that the claim for wages should not have been included.

[18] It is for Mr Bedington to establish that these wages payments were in truth interim distributions of trust funds. He has not established that matter. Firstly, there is the absence of any document recording these as payments of trust moneys. Secondly, there is the evidence that the plan was to have the company pay not only the four children who were entitled under Mrs Bedington's will, but also Angela. Thirdly, the amounts of the payments to be made were disproportionate to what was then the small size of each trust estate. Subsequently, these trusts have very considerably benefited from the investments in shares, but they were not made until the end of 2004. As at January 2004, when these wages payments commenced, according to the journal history each trust fund was worth a little over \$11,000. Fourthly, there is the documentary evidence that on occasions he authorised the payment of wages to a list of employees where the names of Renee and Chanelle appeared.

[19] Had Mr Bedington's intention been to make distributions of trust moneys by these payments, it is probable that he would have caused some record to be kept, showing what had been and what remained to be distributed to each of Renee and Chanelle at any time. Those distributions would have affected the amount or amounts upon which interest was accruing. As I have said, he concedes that the trust moneys had been loaned to New Image at interest.

¹ Transcript 2-37.

² No 5338 of 2007.

- [20] I come then to the school fees. The school was paid by the use of Mr Wallerstein's own credit card. He explained that he was reimbursed for that expenditure, as well as for certain other items such as his overseas travel, by New Image. Mr Bedington says that such payments, which Mr Wallerstein caused to be made to himself, were simply misappropriations of the company's money, made without his knowledge. Mr Bedington's position here is different from that in respect of the wages payments. In this proceeding, he says that he meant the wages payments to be made but not recorded as wages. But as for the school fees, his evidence was that he was unaware of the payment of these fees until late 2006, long after the school had been paid. And he accepted that he had not been asked to pay the fees from the trust.
- [21] Mr Bedington said that in late 2006 he confronted Mr Wallerstein about, amongst other things, the use of company funds for these fees and the way in which the transactions had been recorded. He said that Mr Wallerstein suggested "Well I think we should put them to mum's loan account",³ to which he then agreed. By "mum's loan account", he explained was meant [Mrs Bedington's] estate account. So on his own evidence, he did not exercise any discretion as a trustee to make these payments for the benefit of Renee and Chanelle. Instead, well after the event, he agreed with Mr Wallerstein to have them recorded as such. It is not explained in Mr Bedington's argument how that agreement with Mr Wallerstein, if made, could have affected the property of Renee and Chanelle in their trust funds. I reject the case from Mr Bedington that the school fees should now be treated as distributions of trust.
- [22] The next issue involves interest. Mr Bedington's evidence is that interest had been wrongly recorded at 10 per cent, because his instructions were to have interest accrue at "market rates", meaning "what we would normally have to pay for money if we borrowed it on the open market". But he led no evidence to show at what rate that was at any time or to otherwise demonstrate that it was less than 10 per cent. When asked to recall what was the "market rate for the company at 1997 for borrowings", he responded:
- "I am only guessing. It was continually around the 8 per cent. It might have gone to 7.9, 8.5, but I think it was – generally we had fairly good rates."⁴
- [23] The instructions which Mr Bedington said he gave to Mr Wallerstein about the interest rate would have been difficult to implement. It is possible that those instructions were given to but disregarded by Mr Wallerstein. But more probably, they were not given. The only contemporaneous document recording what interest was to be paid is the journal history, applying a rate of 10 per cent. I prefer Mr Wallerstein's evidence that this was the rate which he was instructed to apply.⁵ Particularly where Mr Bedington, as the trustee, was causing trust funds to be lent to a company controlled by him, it was incumbent upon him to record the terms of the loan. The only record of that kind which the company made is the journal, showing a rate of 10 per cent. If in truth the transaction was less advantageous for the

³ Transcript 2-40.

⁴ Transcript 2-35.

⁵ Transcript 1-39.

beneficiaries, the true rate should have been recorded. In any case, it is inherently more probable that he instructed Mr Wallerstein to have interest accrue at 10 per cent, given the convenience of using that rate rather than a variable “market rate” and where the practical difference, given the small amount of each trust fund, would have been minimal.

- [24] It follows that each of the matters raised by Mr Bedington in response to the claims by Renee and Chanelle must be rejected. The remaining task is to determine what amounts should be paid to them. It was suggested that some accounts could be taken by the Registrar or that the accountant called in Mr Bedington’s case, Mr Hallahan, could perform that exercise. In my view, it is preferable that the amounts be determined within this judgment. The small sums involved do not justify the expense of some further proceeding or another accountant’s report.
- [25] A schedule to the amended statement of claim sets out a calculation which is appropriate, with a few qualifications. It uses an interest rate of 10 per cent compound, calculated at six monthly rests from the balance in the journal history as at 30 June 2006. The journal had recorded interest compounding at monthly intervals. But I will use the six monthly calculations from June 2006 according to this schedule. After 2006, there was no document of the borrower company which recorded the accrual of interest. For Mr Bedington, it was argued that the prescribed rate of interest on legacies⁶ was an appropriate rate. In my view, the rate of 10 per cent compound should still be applied, absent evidence that by some means that rate became inappropriate. It is appropriate to charge him with compound interest, rather than simple interest, as he is a trustee who has employed the trust funds for his own business.⁷
- [26] I will adopt the calculation in the schedule to the amended statement of claim as far as 30 June 2011. The various receipts of dividends and capital from the sale of shares, as set out in that schedule, are not in dispute. That schedule shows the 30 June 2011 balance, for the four trusts in aggregate, as \$234,039.85. Payments were made to Renee and Chanelle on 18 July 2011. These were made by Mr Bedington pursuant to a consent order made only after Renee and Chanelle applied for some interim distribution of their property. Their Commonwealth Bank shares were then transferred to them together with payments to Renee of \$18,982.51 and to Chanelle of \$25,036.23.
- [27] As at 18 July 2011, the balance across the four trusts can be assessed at \$235,194.01.⁸ Dividing that sum by four, the amount then required to be restored to each trust fund was \$58,798.50. After the payments to Renee and Chanelle, the amounts required to be restored to their trust funds were, respectively, \$39,815.99 and \$33,762.27.

⁶ Eight per cent according to s 52 of the *Succession Act 1981* (Qld).

⁷ Heydon and Leeming, *Jacob’s Law of Trusts in Australia*, 7th ed (2006) at [2209] and the cases there cited.

⁸ Being the balance as at 30 June 2011 together with interest at 10 per cent per annum for 18 days (\$1,154.17).

[28] In each case, interest at 10 per cent per annum should be applied to the 18 July 2011 balance to the date of this judgment. That is an amount of \$2,748.93 on Renee's fund, \$2,330.98 on Chanelle's fund and \$4,059.51 on Jacob's fund.

[29] Accordingly, the amounts which Mr Bedington must pay to restore the trust funds are as follows:

Renee	\$42,564.92
Chanelle	\$36,093.25
Jacob	\$62,858.01.

[30] There remains the application for the appointment of a new trustee for Jacob. There is a clear case for a new trustee. Mr Bedington came to this trial still without a reliable set of accounts for these trusts and with the trust funds mixed with his own moneys in a personal bank account. That is not to say that he was attempting to hide the funds. But it shows that there can be little confidence that Mr Bedington will now diligently apply himself to the trusteeship of Jacob's fund. Ms Power is willing and able to act in his place and she will be appointed to do so.

[31] There will be orders that the defendant pay to the plaintiff Renee Wallerstein the sum of \$42,564.92 and the plaintiff Chanelle Wallerstein the sum of \$36,093.25. Pursuant to s 80 of the *Trusts Act 1973* (Qld) it will be ordered that the defendant be removed as trustee for the plaintiff Jacob Wallerstein under the will of the late Williamina Bedington and that Jenny Power of 222/90 Wynnum Road, Norman Park be appointed as sole trustee for him. It will be ordered that the defendant pay to her as trustee the sum of \$62,858.01 and transfer to her 98 of the shares in Commonwealth Bank of Australia presently held by the defendant as trustee under that will.

[32] I will hear the parties as to further orders including costs.