# SUPREME COURT OF QUEENSLAND

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| CITATION: | *In The Will of Bruce George Gillespie Deceased (No 2)* [2012] QSC 369 |
| PARTIES: | **GLORIA DAWN GILLESPIE**<br>(Applicant)<br>AND<br>**GEOFFREY BRUCE GILLESPIE**<br>**(First Respondent)**<br>**And**<br>**WILLIAM BRUCE GILLESPIE**<br>(Second Respondent)<br>**And**<br>**MICHAEL PELDAN AND MORGAN LANE as trustees for THE ESTATE OF ANNETTE MIRIAM MAREE GREEN (FORMERLY ROGERS) (A BANKRUPT)**<br>(Third Respondents) |
| FILE NO/S: | S222/2012 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court Rockhampton |
| DELIVERED ON: | 23 November 2012 |
| DELIVERED AT: | Rockhampton |
| HEARING DATE: | On the Papers |
| JUDGE: | McMeekin J |
| ORDER: | 1. The first and second respondents pay the applicant's costs of and incidental to the application on the indemnity basis;<br>2. The third respondents pay the applicant's costs incurred up and until 8 October 2012 of and incidental to the application on the indemnity basis. |
| CATCHWORDS: | PROCEDURE – COSTS – GENERAL PRINCIPLES – where basis on which costs should be awarded in issue<br>*Uniform Civil Procedure Rules* 1999 (Qld) r 681 |

*Blair v Curran* (1939) 62 CLR 464

*Campbell, Campbell & Cannon as Executors of the Will of the Estate of the late Donald Campbell, deceased v Campbell* [2012] QSC 302

*Castillon v P & O Ports Limited (No. 2)* [2008] 2 Qd R 219

*Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248

*Cosgrove & Johns* [2000] QCA 157; *Di Carlo v Dubois* [2002] QCA 225

*Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299

*Frizzo & Anor v Frizzo & Ors (No 2)* [2011] QSC 177

*Gillespie v Gillespie & Ors* [2012] QDC 212

*In The Will of Bruce George Gillespie Deceased* [2012] QSC 335

*John S Hayes & Associates Pty Ltd v Kimberly-Clark Australia Pty Ltd* (1994) 52 FCR 201

*Kuligowski v Metrobus* (2004) 220 CLR 363

*Mitchell v Gard* (1863) 164 ER 1280

*Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 179

*Oshlack v Richmond River Council* (1998) 193 CLR 72

*Paroz v Paroz & Ors* [2010] QSC 157

*Re Estate Late Hazel Ruby Grounds; Page v Sedawie* [2005] NSWSC 1311

*Smeaton Hanscomb v Sassoon I Setty, Son & Co (No 2)* [1953] 1 WLR 1481

COUNSEL: C Heyworth-Smith for the applicant

G Lynham for the first and second respondents

SOLICITORS: Macrossan & Amiet Solicitors for the applicant

SB Wright & Wright and Condie for the first and second respondents

Tucker & Cowen Solicitors for the third respondents

[1] **McMeekin J:** The applicant applied for the removal of two caveats preventing a grant of probate issuing in respect of the Will of Bruce George Gillespie, deceased dated 3 April 2006 in which she was named as executrix. On 8 November 2012 I ordered that the caveat lodged by the first and second respondents be removed and that the grant of probate issue.[1] The third

[1] [2012] QSC 335

respondents had withdrawn a caveat having the like effect about two weeks prior to the hearing.

[2] I gave the parties, including the third respondents, leave to make submissions on costs. They have now done so.

**The Rival Contentions**

[3] The applicant seeks that her costs be paid by the respondents on the indemnity basis.

[4] The first and second respondents submit that the costs of all parties should be paid out of the estate or alternatively that each party should bear their own costs.

[5] The third respondents' primary submission is that their costs should be met by the estate on either a standard or an indemnity basis. Alternatively the third respondents should not be condemned to pay the applicant's costs or in the further alternative any costs order should be limited given the offers that were made.

[6] The respective submissions are based on the offers that passed between the parties.

**The Offers**

[7] On 12 September 2012 the applicant's solicitor wrote to the respondents' solicitors:

> "Would you treat this letter as notice that when this matter proceeds further, and it is established that there was no evidence in your client's possession to support the Caveats lodged on behalf of your clients and your clients have simply acted to advance their own interests, we propose to recommend to our client that an Order for costs be sought on an indemnity basis."

[8] On 20 September 2012 the applicant offered to settle on the basis that the caveats be withdrawn and the respondents pay her costs fixed at $20,000 or alternatively as assessed on the standard basis. On 4 October 2012, and after the third respondents had indicated a preparedness to withdraw their caveat, the applicant indicated to the first and second respondents that she would seek costs on the indemnity basis if they continued to contest her application.

[9] In offers dated 19 September 2012 and 3 October 2012 the first and second respondents offered to withdraw the caveat but did not offer to pay costs to the applicant but rather sought that each party bear their own costs.

[10] The third respondents made four offers dated 12, 17, 25 and 28 September 2012 respectively. In the first each party was to bear their own costs. In the second the applicant's costs were to be met by the estate – effectively the same as the first offer. In the third and fourth offers the third respondents offered to pay one-third of the applicant's costs assessed on the standard basis.

[11] On 8 October the third respondents withdrew their caveat. The hearing took place on 18 October.

**The Litigation History**

[12] The application before this Court is linked to proceedings that were current in the District Court before Samios DCJ until his Honour gave judgment on 14 August 2012.

[13] The applicant was the plaintiff there. Her purpose in bringing the suit was to have transferred to the deceased's estate from the respondents, who were the defendants, a certain house property. The applicant was eventually successful in her suit in those proceedings but initially there was a technical difficulty. Without probate of the last Will the applicant had no standing to bring the suit.

[14] The evidence in the District Court proceedings was heard in early to mid April 2012. Samios DCJ expressed concern about the applicant's standing to bring the suit. On 19 April the applicant gave notice of her intention to apply for probate and on 29 April the first and second respondents sought to prevent her obtaining probate by lodging a caveat.

[15] On 3 May 2012 an order was made in this Court by which the applicant was appointed administrator of the estate of Bruce George Gillespie (Deceased) for the limited purpose of the prosecution of District Court proceedings.

[16] On 11 May 2012 the third respondents lodged a caveat requiring the matter be referred to the Court as constituted by a Judge and requiring proof in solemn form of any Will of the Deceased.

[17] On 21 May 2012 an application for probate was filed. The Registrar of the Supreme Court issued a notice to the caveators and the applicant requiring, inter alia, that within eight days after the service of the notice on the caveator, a notice to support the caveat to be filed setting out the interest claimed in the estate.

[18] A Notice in support of the caveat was filed by the solicitors for the first and second respondents dated 1 June 2012. A Notice in support of the caveat was filed by the solicitors for the third respondents dated 4 June 2012.

[19] This application to remove the caveats was filed on 7 June 2012. It was supported by affidavits by the applicant, Mr Dillon who was a witness to the subject Will, the applicant's solicitor who exhibited relevant material, a psychiatrist Dr Athey, and a Ms Vella who had dealings with the testator in her capacity as a justice of the peace a few weeks before the execution of the subject Will.

[20] It is not irrelevant that in the District Court proceedings evidence was led from three of the significant witnesses who gave evidence before me – Mr Dillon, Ms Vella and the applicant – as well as a psychologist who had tested the testator at one point, and Dr McIntosh, a general practitioner familiar with him in 2002-2003. Samios DCJ also received reports from a psychiatrist Dr Futter

that were before me as well concerning certain mini mental state testing undertaken by him of the testator.

[21] The question of the deceased's capacity to make a Will in 2006 was not central to the issues in the District Court proceedings but it was in issue – see paragraph 3(b) of the Defence of the first and second respondents. I note that Samios DCJ found that "during the period 2002 to about 2007 the deceased had occasional memory loss. However, when he made the Wills on 23 October 2005 and 3 April 2006 and appointed the plaintiff as his executor under those Wills I find he was of sound mind, memory and understanding."[2] The evidence on which that finding was based was led in April 2012.

[22] The application to remove the caveats came on for hearing on 15 June 2012. The applicant, her solicitor and Mr Dillon all travelled to Rockhampton from Mackay for the hearing. Counsel flew up from Brisbane. The respondents each sought an adjournment each arguing that they needed more time to prepare, each asserting that they may need to put evidence before the Court. I adjourned the hearing over the applicant's strong opposition in order to allow the respondents time to advance any evidence that they might be minded to advance. The applicant's point was that in lodging the caveats the respondents ought to have been in a position to readily put before the court the evidence that had caused the concern that prompted the lodgement of the caveats.

[23] On 23 July 2012 an affidavit of Dr Greenhill was filed by the applicant. He was the testator's general practitioner after Dr McIntosh, had had several dealings with the testator prior to and after the relevant time, and had formed the opinion that whilst the testator had mild cognitive impairment his cognitive ability remained intact in 2006.

[24] To this point in time all deponents supported the applicant's position that the testator had capacity to make a will in April 2006. That was plainly the effect of the evidence as Samios DCJ perceived matters in April 2012. That remained so at the date of the hearing before me.

[25] The hearing took place on 18 October 2012 and took the better part of a day. The third respondents took no part having withdrawn their caveat prior to the hearing. No evidence was advanced by the first and second respondents. All deponents were required to be called and were cross examined. It was, in effect, a trial of the matter, albeit in the guise of a determination of the preliminary issue of whether the remaining caveat should be removed.

[26] The only deponent whose testimony was affected by the cross examination was Dr Athey. It emerged that he had mistakenly assumed that the subject Will had been written out by the testator whereas in fact it had been written out by the applicant. Because of that assumption Dr Athey had assumed that the testator had a certain detailed level of knowledge of his own affairs, an assumption that he, Dr Athey, felt he could no longer adopt. He withdrew his opinion that the testator had capacity at the relevant time but did not assert the contrary. He

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2 [2012] QDC 212 at [118]

conceded that a general practitioner with greater familiarity with the testator might well be in a better position than he to assess the capacity of the testator.

**The Relevant Principles**

[27] The parties have identified the relevant principles in their extensive submissions.

[28] Generally speaking a "successful" litigant is entitled to an order of costs and to deprive a successful party of their costs or to require such a party to pay some or all of the costs of the other side is an exceptional measure: *Smeaton Hanscomb v Sassoon I Setty, Son & Co (No 2)* [1953] 1 WLR 1481 at 1484 cited with approval by McHugh J in *Oshlack v Richmond River Council* [1988] HCA 11; (1998) 193 CLR 72 at [66].

[29] This approach is reflected in r 681(1) *Uniform Civil Procedure Rules* 1999 (UCPR) which provides that costs are at the discretion of the court but follow the event unless the court considers another order to be more appropriate. That rule applies to probate actions. Plainly the applicant succeeded in the event.

[30] But it is clear that costs do not always follow the event. In *Oshlack* Gaudron and Gummow JJ rejected a submission that there was such an automatic rule:

> "There is no absolute rule with respect to the exercise of the power conferred by a provision such as s 69 of the [Land and Environment] Court Act [(1979) (NSW)] that, in the absence of disentitling conduct, a successful party is to be compensated by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party."[3]

[31] And it has long been accepted that in probate actions different considerations can be relevant. In *Re Estate Late Hazel Ruby Grounds; Page v Sedawie* [2005] NSWSC 1311 Campbell J discussed those principles:

> "30 In the present case, I have been taken in some detail to the evidence which was filed. Both parties took me to the leading cases concerning costs in probate litigation, *In the Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 709, *Perpetual Trustee v Baker* [1999] NSWCA 244 at [13]-[14] and *Shorten v Shorten (No 2)* [2003] NSWCA 60. The focus of the passages in those cases to which I was taken was the costs order that a court should make concerning a person who had unsuccessfully opposed the making of a grant of probate. **Broadly, those cases recognised that, concerning such an unsuccessful party, there was an exception to the rule that costs follow the event in that where the testator had been the cause of the litigation the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate, and if the circumstances led reasonably to an investigation concerning the testator's will, costs may be left to be borne by those who incurred them.** The Court of Appeal has recognised that there is an

[3] At [40]

> overlap between those two exceptions. If a case for decision falls within that area of overlap, one of the exceptions suggests that the appropriate order concerning costs should be different to the order which is suggested by the other exception. In that area of overlap, the principles which are recognised by the two exceptions are insufficient to produce a result. It is a matter for the trial judge, in light of the circumstances of the particular case before him or her, to decide which costs order better achieves justice.
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> 31 In the present case, a significant area of contest concerned what order for costs should be made in favour of the plaintiff. The plaintiff is not a party who has unsuccessfully opposed an order for probate, so the exceptions which are recognised in *In the Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 and the two Court of Appeal cases simply have no application to that problem.
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> 32 Without needing to expound in detail the way in which this has happened in the caselaw concerning probate litigation, it can safely be said that a consistent theme in the cases is that the principles concerning costs which are applied to a person who seeks probate (whether successfully or not) are not the same as the principles which apply to the costs of a person who opposes probate (whether successfully or not). **In probate litigation, it is not only who succeeds in the litigation which matters – which is the only factor operating in the "costs follow the event" rule. As well, the role which a particular party has played in litigation, whether as plaintiff or defendant, is relevant. Further, facts about the knowledge available to parties, and the reasonableness of their conduct in conducting the litigation, can be taken into account.**" (emphases added)

[32] Similarly, Applegarth J has pointed out that there are established exceptions to the rule that costs follow the event in probate matters: see *Frizzo & Anor v Frizzo & Ors (No 2)* [2011] QSC 177 at [27]. One of those exceptions was that "where the circumstances are such as to afford reasonable grounds for opposing the will, the unsuccessful party, though not usually granted his costs out of the estate, will not be condemned in costs." That exception depends in turn on there being "a suit which was justified by good and sufficient grounds for doubt" per Sir J. P. Wilde in *Mitchell v Gard* (1863) 164 ER 1280 at 1281.

**The Reasonableness of the Respondents' Conduct**

[33] The fundamental issue is the assessment of the reasonableness of the conduct of the parties. Each of the respondents stresses that on the knowledge available to them at the time they acted reasonably in lodging and maintaining the caveats. I reject that submission. I do so on two grounds.

[34] First, each of the respondents well knew at all relevant times that there was no utility in lodging the caveats, at least so far as the grant of probate was concerned.

[35] Second, each of the respondents was sufficiently acquainted with the evidence available to have been able to form a judgment first that they should not lodge

the caveats and second, that once lodged the caveats should be removed. Obviously the third respondents did form that judgment, albeit very late.

**There Was No Purpose**

[36] The fact that the there was no purpose to the dispute was self evident and was explained in my reasons for judgment where I said:

> "There is no love lost between the parties. Unfortunately this has meant that common sense has been discarded. The caveats have no purpose. The Will in question effectively leaves the deceased's estate to the applicant. So does the deceased's second last Will (executed 23 October 2005) and his third last Will (executed 21 November 2003). The 2006 Will and the 2005 Will are identical in terms. The only significant difference between the 2006 Will and the 2003 Will in its effect is that under the earlier Will the Public Trustee is the nominated executor."[4]

[37] It was conceded at the hearing by counsel for the first and second respondents that whatever concerns the respondents had in relation to the deceased's Wills they could not challenge the third last Will. So the end result – that is the distribution of the deceased's estate - would be the same whatever view I took of the issues raised. Thus there was no point to any investigation into the capacities of the testator or the exercise of any influence over him. All this against a background that the only person who could take under any of the last three wills of the testator was the applicant and the only asset that she could take, at best, would be the modest house in which she lived, assuming that the asset did not need to be sold to meet any costs orders.

[38] In these circumstances I was puzzled at the time of the hearing as to why there needed to be a hearing. While I was aware of the difficulty that the applicant had with standing in the District Court and so understood that there was a forensic purpose behind the lodgement of the caveat by the first and second respondents to prevent her gaining standing I assumed initially that there must have been some wider purpose associated with the distribution of the deceased's estate to maintain that opposition. But no such purpose has ever emerged.

[39] It is plain that the respondents had no interest in one Will over the other. The applicant took the deceased's estate. The forensic purpose was gone once the applicant was appointed administrator. I do not accept that the existence of such a forensic purpose without more provided grounds for the lodging of a caveat. Why then continue the opposition? I would have expected that matters would have resolved in May. But far from being resolved the third respondents then entered the fray by lodging their caveat and each of the respondents responded to the Registrar's direction by filing a Notice supporting their caveat.

[40] The onus lies on the respondents to explain their lodgement of the caveats and their continuing opposition. None has been forthcoming. I can only speculate

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4 [2012] QSC 335 at [6]

as to the continued opposition after the grant in May. Presumably the explanation lies in the respondents' perception that preventing the applicant obtaining probate assisted their cause in the District Court, again not a purpose legitimately associated with the administration of the deceased's estate.

[41] The offers that were made show that the respondents recognised that there was no reason to agitate the question raised by the application – all respondents offered to withdraw their caveats prior to the hearing but only on the condition that the applicant acceded to the costs orders nominated in their respective offers.

[42] To say the least it is an unattractive proposition that parties should be held to have acted reasonably where caveats were lodged for a forensic purpose alien to the grant of probate, by parties knowing that the eventual distribution of what, at best, was a very modest estate would be unaffected by the decision of the court on the substantive issue, and knowing too that in pursuing the probate issue they might, by driving up costs, be depriving a widow of the home in which she lived.

**The Respondents Knew the Evidence**

[43] One of the striking things about the matter is that the identities of the witnesses to the relevant issue were generally known to the parties, as indeed was a significant part of the evidence, before the caveats were lodged. Several of the deponents were witnesses before Samios DCJ and were there cross examined. Testimony from medical witnesses, some with expertise in psychiatric and psychological matters, was tendered. Effectively the respondents seek to argue that the evidence which led Samios DCJ to the view that the testator had capacity justified sufficient concern to oppose the granting of probate. That is an unattractive proposition.

[44] It is worth noting that the evidence before Samios DCJ included:

(a) an opinion by a psychologist, Ms Murdoch, who reported in May 2003 that the testator's "general cognitive abilities are intact and there is no evidence of disturbance to his executive functions";[5]

(b) a report by a psychiatrist that mini mental state examinations suggested mild cognitive impairment only in February 2004 and that a prescription of Aricept commencing that month had improved the testator's functioning as shown by repeat testing and as confirmed by the evidence of the applicant;

(c) evidence that the testator's daughter had had the testator execute a Deed discharging a significant debt only weeks before the Will was executed;

(d) evidence from the justice of the peace who witnessed that Deed who made a contemporaneous note that the testator appeared lucid; and

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[5] Report of 8 May 2003 p6

(e) evidence from a friend of 15 years standing who witnessed the Will that the testator seemed "alright" at the time the Will was executed.

[45] Against this background the failure of the first respondent and the testator's daughter, who each had dealings with the testator around the relevant time, is telling.

[46] Further, had the respondents made enquiries, then they would have learned that repeat mini mental state testing in 2005 and 2008 performed by Dr Greenhill had produced much the same results as in 2004.

[47] Putting to one side the ever present reality that there was never any real purpose to the prevention of a grant of probate, and putting to one side that this was a very modest estate, all the information that the respondents had indicated that person after person who had dealt with the testator held the opinion that he had capacity. Presumably the now bankrupt daughter thought so too.

**The Position of the First and Second Respondents**

[48] The first and second respondents argue that their opposition was reasonable because the applicant had the choice of three Wills that she could have advanced and the questions surrounding the 2006 Will did not pertain to the earliest of those three Wills, the 2003 Will. This submission involves a fundamental misconception. An executrix is obliged to advance the last Will of the testator. If there is doubt about the testator's capacity it is for the court to determine. Where the executrix does not entertain a doubt about the testator's capacity, and the Will otherwise appears in order, then she is not permitted to pick and choose which Will she should advance. Effectively the respondents seek to criticise the applicant for doing her duty.

[49] The only other ground advanced by the first and second respondents is that they made reasonable offers to settle by offering to withdraw the caveat they had lodged on the condition that each party pay their own costs. This offer was made on 19 September and repeated on 7 October.

[50] Were these offers reasonable?

[51] In considering the position of the first and second respondents it is relevant to note that no open concession was made that the caveats ought to be removed and that the sole matter left to be argued should relate to costs. As a result substantial costs were incurred by the applicant. She obtained affidavits from every witness who it would appear had evidence to offer about the testator's capacity and functioning at the relevant time. All the affidavits supported her position. As well she effectively prepared for the hearing twice, the need for a second hearing being at the insistence of the respondents.

[52] As mentioned the respondents do not appear to have made any enquiries to establish the legitimacy of their position. The obvious witnesses – the treating general medical practitioners, psychologists and psychiatrists – were not

apparently spoken to. So far as the evidence shows only the applicant made the necessary enquiries.[6]

[53] While Dr Athey changed his position in the course of his evidence that does not assist the respondents greatly – until the day of the hearing they had reason to think that even an expert psychiatrist supported the applicant. That late retraction of his view cannot affect the assessment of the reasonableness of their conduct in the months leading up to the hearing. But at best for the respondents all they managed to achieve was to neutralise the evidence of Dr Athey.

[54] No positive case was forthcoming to explain the respondents' position. And the first respondent and the testator's daughter, Annette Rodgers, were in a position to advance relevant evidence as they had dealings with the testator around the time of the execution of the subject Will. The only conclusion one can draw from their failure to provide any evidence is that whatever they had to say could not assist the respondents' case.

[55] The only possible justification for the respondents' lodgement of the caveat is if they could demonstrate that they reasonably entertained a belief that the third last Will could be set aside and the fourth last Will established. The applicant would not have taken any benefit under that Will. But at no stage have the respondents sought to argue there was any such belief held by them.

[56] The respondents are critical of the applicant's conduct in making the offer to them of 20 September as requiring them to pay significant costs in the sum of $20,000. If they thought those costs excessive the offer included the alternative that the costs be assessed on the standard basis. If it be relevant I see nothing unreasonable in the offer given the circumstances.

[57] Far from acting reasonably the respondents have each acted quite unreasonably throughout. The caveat should not have been lodged. What legitimate interest any of the respondents had in maintaining their opposition escapes me entirely. The respondents advanced no positive case at any stage. They deliberately put the applicant to substantial expense knowing full well that there was never any point to their opposition to probate. They have acted irresponsibly in forcing this suit on the applicant.

[58] Further by the time the offers were made the applicant had already incurred substantial costs by way of preparation and in attempting to have the matter heard. In those circumstances it was hardly reasonable that all that expense be borne by her, as the offers required.

[59] As the third respondents eventually recognised, at least to a degree, the applicant deserved to be protected as to costs. The offers made did not reflect that obvious fact.

[60] I conclude that the respondents' offers were not reasonable.

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[6] As to the duty on a caveator to act responsibly and make enquiries see *Campbell, Campbell & Cannon as Executors of the Will of the Estate of the late Donald Campbell, deceased v Campbell* [2012] QSC 302 per Ann Lyons J

[61] The applicant seeks that her costs be paid on the indemnity basis.

[62] It will be recalled that on 20 September the applicant had offered to settle on the basis that her costs be paid on the standard basis. The applicant submits that her offer satisfies the test in r 360 *Uniform Civil Procedure Rules* 1999 in that she obtained a judgment "no less favourable than the offer to settle" and that she is therefore entitled to an order that costs be assessed on the indemnity basis. The difficulty in that submission, as submitted by the first and second respondents, is the point made by Ambrose J in *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 179 at [29]:

> "In my view an offer to settle within the contemplation of UCPR 353, non acceptance of which will lead to an order for indemnity costs, will not include an "offer" by one party to accept the whole of the relief it seeks in its claim or application – particularly where the nature of the relief claimed is such that it will be either granted or refused unconditionally. The making of a purported offer on the terms of that recorded in para 8 hereof is not designed "to settle" or compromise any issue between the parties. In effect it required the complete capitulation of the defendant. It did not involve anything less than the defendant's abandonment of a critical part of its defence. If the plaintiff's contention be correct, the making of that "offer" had the effect of making the defendant liable for indemnity costs if it failed but entitled only to standard costs if it succeeded. Even if upon its proper construction UCPR 353 would theoretically permit the award of indemnity costs on the basis of the "offer" recorded in para 8 hereof, in my view without something else, it would be "inappropriate" to make such an award."

[63] The applicant cannot avoid that difficulty here. But in my view there is something more here than simply the offer to settle. That is the irresponsibility that I have found existed.

[64] The principles governing the making of an order for indemnity costs have been discussed in a number of cases: *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248; *John S Hayes & Associates Pty Ltd v Kimberly-Clark Australia Pty Ltd* (1994) 52 FCR 201; *Cosgrove & Johns* [2000] QCA 157; *Di Carlo v Dubois* [2002] QCA 225. There is a useful summary of the relevant principles in *Paroz v Paroz & Ors* [2010] QSC 157 (Peter Lyons J).

[65] I am conscious that in *Di Carlo* White J (as her Honour then was) warned that '[i]t is important that applications for the award of costs on the indemnity basis not be seen as too readily available ...' (at [40]). However two well accepted grounds for the awarding of such costs are present here: the proceedings were commenced for some ulterior motive; and the proceedings were commenced and maintained in wilful disregard of known facts. Another way of putting the matter is that espoused by Chesterman JA - that there needs to be something irresponsible about the commencement or continuation of the proceedings to justify the awarding of indemnity costs (see eg *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299; *Lewani Springs Resort*

*Pty Ltd v Gold Coast City Council* [2010] QCA 200). That irresponsibility is evident here.

[66] In my view it is appropriate that the first and second respondents pay the applicant's costs on the indemnity basis.

**The Third Respondents**

[67] The third respondents are the trustees in bankruptcy of the daughter of the testator. They argue that they had a responsibility to act in the interests of the creditors of the bankrupt's estate and that in pursuing their duty they have acted reasonably because:

(a) There was significant doubt as to the testamentary capacity of the testator;

(b) Samios DCJ had not given his decision or made findings concerning the testator's mental capacity;

(c) Evidence had been given at the trial in the District Court that the testator had dementia and Alzheimer's disease, had short term memory problems, needed medication for his condition and the Will had been signed two days after its preparation.

[68] As to the reference to their duty as trustees in bankruptcy I observe that I am unaware of any authority that such trustees are, by virtue of their office, immune from costs orders if they pursue litigation irresponsibly.

[69] The only evidence advanced for the claim that there was "significant doubt" about the testator's capacity is the affidavit of the solicitor acting on behalf of the third respondents, an affidavit not read in the proceedings and from a deponent who, so far as I am aware, had no knowledge of the subject matter. Ms Heyworth-Smith, who appears for the applicant, accurately submits that the third respondents "do not say who held this doubt, whether it was them or the bankrupt; whether the bankrupt, who had seen her father only weeks before [ie before the execution of the subject Will], entertained such doubt, or whether they held that view notwithstanding that she had no doubt that her father had testamentary capacity." This ambiguity in the third respondents' position is telling. It suggests that there is no substance to the point at all.

[70] The difficulty with the reference to the evidence before Samios DCJ is that already mentioned - it led his Honour to the conclusion that the testator had capacity. I too heard much the same evidence and came to a conclusion that there was no point to any investigation of his capacity. The third respondents determined to take a different view for reasons which remain unexplained.

[71] While it is obviously true that the third respondents did not have the advantage of Samios DCJ's findings on the testator's mental health nor his Honour's decision until 14 August I do not see why that is of significance. The parties seem to have assumed that his Honour's decision created no issue estoppel.[7] The decision itself then was always irrelevant to the probate issue. It determined whether there

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[7] See *Blair v Curran* (1939) 62 CLR 464; *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373; *Castillon v P & O Ports Limited (No. 2)* [2008] 2 Qd R 219

was any estate to be distributed, but the bankrupt was not a beneficiary of the estate nor was she ever going to be unless it was intended to establish the fourth last Will. There has been no attempt to show that there was ever a doubt about the third last Will.

[72] Why the third respondents saw it as of any advantage to the creditors of the bankrupt to prevent the applicant obtaining probate of the subject Will escapes me. There was the forensic advantage that I spoke of earlier but even that had ceased to be relevant by the time they lodged their caveat. So much is clear from the third respondents' offers.

[73] In my view the same criticism of irresponsibility in the lodgement of the caveat can be made of the third respondents as I have made of the first and second respondents.

[74] There are two remaining issues. One is that the third respondents did eventually withdraw their caveat. The hearing proceeded only because of the first and second respondents' intransigence. That is not the fault of the third respondents.

[75] The other remaining issue is whether the belated acknowledgment in the two later offers that the applicant deserved to have her costs paid to a limited extent should lead to any different result. On 25 and 28 September the third respondents offered to pay one-third of the applicant's costs.

[76] In my view the third respondents' offers were not reasonable ones. In effect the third respondents' offers either left the applicant to meet the expense of the proceedings which should never have been brought or left her with the risk of extracting the balance of her costs from the other respondents. Why should she bear that risk and not those who have foisted the litigation upon her? Had the matter proceeded I would not have made an order limiting the third respondents' exposure in that way. I cannot see why the third respondents should be entitled to arrogate to themselves such a right. The lodgement of a caveat by any one of the respondents had the result of exposing the applicant to incurring the costs that she has. In my view it was reasonable for the applicant not to accept any of the offers made and it is appropriate that each of the respondents be required to protect the applicant as to those costs.

[77] Given the third respondents' withdrawal of their caveat their exposure should be limited to the costs incurred up and until 8 October 2012.

[78] The orders are:

(a) The first and second respondents pay the applicant's costs of and incidental to the application on the indemnity basis;

(b) The third respondents pay the applicant's costs incurred up and until 8 October 2012 of and incidental to the application on the indemnity basis.