SUPREME COURT OF QUEENSLAND

CITATION:	*Arrowsmith v Micallef & Ors* [2013] QCA 169
PARTIES:	**CHEVONNE ELIZABETH ARROWSMITH** (appellant) **v** **ROBERT JAMES MICALLEF** (first respondent) **ADRIANO ALFREDO MICALLEF** (second respondent) **SILVANO FRANK MICALLEF** (third respondent) **MATTHEW JAMES DUMESNY** (fourth respondent) **LAURETTA CANDIDA DUMESNY** (fifth respondent)
FILE NO/S:	Appeal No 9069 of 2012 SC No 5922 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	White and Gotterson JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The orders and direction made on 3 September 2012 be set aside.** **2. The fifth respondent pay the appellant's costs of and incidental to the appeal, to be assessed on the standard basis.** **3. There be no order, whether in favour or against the second and third respondents, as to the costs of the appeal.** **4. The costs of the hearing at first instance be reserved, pending the final determination of those proceedings.** **5. All applications for orders for payment of costs of the appeal out of the estate be refused.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – OTHER CONDUCT – where the appellant appealed on the basis that she was denied an adjournment at first instance to adduce evidence relevant to construction of terms of settlement in relation to a will – where the appellant failed at first instance but succeeded on appeal – where it was submitted that the appellant succeeded on a point not raised at first instance – where it was submitted that the appellant succeeded on a basis not sufficiently articulated at first instance – whether the point was raised at first instance –whether the point was sufficiently articulated at first instance – whether the appellant should be deprived of costs because the argument on which the appellant succeeded was not articulated as fully as it might have been at first instance

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OUT OF A FUND – WHEN COSTS ALLOWED OUT OF FUND – LITIGATION CAUSED BY TESTATOR, EXECUTOR OR BENEFICIARY – where all parties were beneficiaries under a will – where the fifth respondent submitted that her costs of the appeal be paid out of the estate – where the dispute arose out of an agreement which the fifth respondent entered into with the appellant and second respondent, as executors, of her own account – where the fifth respondent was litigating in her own interest – whether the fifth respondent should be paid her costs out of the estate

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OUT OF A FUND – WHEN COSTS ALLOWED OUT OF FUND – LITIGATION CAUSED BY TESTATOR, EXECUTOR OR BENEFICIARY – where all parties were beneficiaries under a will – where the second and third respondents renounced their interests under the will in favour of the fifth respondent – where the second and third respondents submitted that their costs at first instance be paid out of the estate – where the second and third respondents submitted they had no alternative but to seek the assistance of the Court – whether the second and third respondents should be paid their costs at first instance out of the estate

Appeal Costs Fund Act 1973 (Qld), s 15

Kitson v Franks [2001] WASCA 134, distinguished
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Sheehy v Mitchell Crane Hire Pty Ltd (1991) 102 ACTR 1; [1991] ACTSC 25, cited

COUNSEL:	No appearance by the appellant, the appellant's submissions were heard on the papers No appearance by the second and third respondents, the second and third respondents' submissions were heard on the papers No appearance for the fourth respondent No appearance by the fifth respondent, the fifth respondent's submissions were heard on the papers
SOLICITORS:	Van de Graaff Lawyers for the appellant Gleeson Lawyers for the second and third respondents No appearance for the fourth respondent Quadrio Lee Lawyers for the fifth respondent

[1] **WHITE JA:** I have read the reasons for judgement of Peter Lyons J on the issue of the costs of the appeal and at first instance. I agree with his Honour's reasons and the orders which he proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by P Lyons J and with the reasons given by his Honour.

[3] **PETER LYONS J:** The issues in this appeal, save those relating to costs, were determined by reasons for judgment delivered on 4 June 2013 (*earlier reasons*). The parties have since made submissions about orders for costs, both in relation to the appeal and the hearing at first instance. It is convenient to deal with the two hearings separately. Relevant background is to be found in the earlier reasons, and has not been repeated here. For consistency, the parties are referred to by their names used in the earlier reasons.

Costs of appeal

[4] Chevonne submitted that by reason of her success on the appeal, she should be awarded the costs of the appeal against Adriano, Silvano and Lauretta, the respondents who actively opposed the appeal. She also made a submission that no party's costs should be paid out of the estate.

[5] Adriano and Silvano submitted that no order for costs should be made against them, unless they are indemnified for those costs out of the estate. They submitted that they had no alternative but to file and serve their application, determined at first instance; and that they should have their costs paid from the estate on an indemnity basis. A less satisfactory alternative would be the grant of a certificate to them under s 15 of the *Appeal Costs Fund Act* 1973 (Qld).

[6] For Lauretta, it was submitted that Chevonne should be ordered to pay the costs of all of the respondents of the appeal, and that she should not be entitled to an indemnity out of the estate for those costs. Alternatively, it was submitted that the costs of all respondents of the appeal should be paid out of the estate on an indemnity basis, and that Chevonne should bear her own costs of the appeal, without indemnity out of the estate. It was submitted that Chevonne succeeded on a point not raised at first instance. That submission seemed to develop into a submission that Chevonne succeeded on a basis not sufficiently articulated at first instance. It was also submitted that Chevonne failed on two of the three substantive points advanced on her behalf at first instance. It was submitted that the conduct of those representing Chevonne contributed to the failure properly to advance her case

at first instance. It was submitted that although Chevonne was an executor, she was not entitled to be indemnified for costs out of the estate, as she was in truth acting in her own interest. However, it was submitted that Lauretta should be entitled to recover her costs out of the estate, being a beneficiary seeking to uphold a decision in her favour at first instance. Reliance was placed on *Kitson v Franks*[1]. It was also submitted that a beneficiary seeking to uphold a favourable decision at first instance is to be treated similarly to a trustee seeking to uphold such a decision.

[7] It is convenient to commence with the submissions made on behalf of Lauretta. The appeal succeeded because, on the basis of the material and submission made at first instance, it was erroneous for the learned primary judge to refuse Chevonne's application for an adjournment. It is clear that she sought the adjournment in order to investigate the availability of evidence which the conduct of other parties had very recently made admissible, relevant to the construction of the Terms of Settlement. For Lauretta, it was submitted that Chevonne had not argued at first instance that the Terms of Settlement were ambiguous, suggesting thereby that no basis for the admissibility of such evidence was raised. However, once it was accepted that a construction of the Terms of Settlement was available, other than that for which Chevonne contended, it is clear that the basis for her application was that the document was ambiguous, and that there was likely to be available evidence relevant to its construction. In my view, the point on which Chevonne succeeded on the appeal was raised at first instance.

[8] For Lauretta it was contended that at first instance, Chevonne had advanced a "raft" of "insupportable" reasons for the admission of evidence of what occurred at the mediation. One was said to be that the Terms of Settlement were clear. That could not have been, and was not, advanced as a reason to justify the admission of the evidence. Another was that there was no meeting of the minds. Although a statement to that effect was made by Chevonne's Counsel, this point was not ultimately relied upon. She disavowed the position that Chevonne should apply to set aside the Terms of Settlement. Another such argument was said to be the possibility of a rectification of the document; but again, the position taken by Chevonne's counsel was that, properly construed, the Terms of Settlement had the effect for which she contended. Finally, reference was made to the possibility of an estoppel. It is correct to say that an estoppel argument was advanced on behalf of Chevonne at first instance. It is by no means clear that it is an insupportable position. Evidence of the events which occurred at the mediation might well demonstrate a basis for it.

[9] Two substantive issues on which, so Lauretta submitted, Chevonne failed at first instance were whether Adriano, Silvano and Robert had assigned their residuary interests in the estate to Lauretta; and whether Adriano and Silvano had standing to bring their respective applications. The third substantive issue was the effect of cl 6 of the Terms of Settlement, not yet determined. Chevonne's lack of success on the question of whether Adriano and Silvano had standing to bring their application might be relevant to costs orders on the appeal, so far as they affect Adriano and Silvano. It does not seem to me to be of significance in determining what orders should be made in favour of, or against, Lauretta. In any event the appeal was ultimately fought on the question whether an adjournment should have granted, in respect of which Chevonne was successful.

---

1 [2001] WASCA 134.

[10] It may be accepted that the basis on which Chevonne succeeded on the appeal could have been more fully articulated at first instance. Nevertheless an adjournment was sought for the purpose of seeking further evidence relevant to the construction of the Terms of Settlement. No authority was cited for the proposition that an appellant should be deprived of costs because the argument on which the appellant succeeded was not articulated as fully as it might have been at first instance. It does not seem to me to be a sufficient reason to refuse Chevonne her costs of the appeal; less still, to make an order in favour of Lauretta.

[11] Likewise, the fact that Chevonne's Counsel did not object to the receipt of late affidavit material does not seem to me to be a matter of significance, when determining the costs of the appeal. It does not alter the fact that the refusal of Chevonne's application for an adjournment, which application was opposed by Lauretta, Adriano and Silvano, was erroneous.

[12] As between Chevonne and Lauretta, there seems to me to be no reason not to apply the ordinary rule that costs follow the event[2]. Accordingly, I would order that Lauretta pay Chevonne's costs of the appeal, to be assessed on the standard basis.

[13] Lauretta sought an order that her costs be paid out of the estate. Her submission acknowledged that, in probate matters, the position on appeal may differ from that at first instance, although it was said that that would only be so of a party who was unsuccessful both at first instance and on appeal, relying on *Sheehy v Mitchell Crane Hire Pty Ltd*[3]. However, it was submitted that *Kitson v Franks* demonstrated that a beneficiary who was an unsuccessful respondent in an appeal might nevertheless have his or her costs paid from the estate.

[14] The reasons in *Kitson* are very brief. It would appear that on appeal, it was held on an unexplained jurisdictional basis that the second respondent was not entitled to a share in the estate[4]. However, he had been successful at first instance; and on that basis it was considered not unreasonable for him to have opposed the appeal, and thus to be entitled to have his costs paid from the estate. Similar orders were made in favour of the other parties to the appeal. That case dealt with circumstances which are quite different to the present case, which is concerned with whether an adjournment was erroneously refused.

[15] While the present dispute arose ultimately out of matters relating to the estate of the deceased, the primary issues between Lauretta and Chevonne relate to the effect of the Terms of Settlement, and in particular cl 6. That is a document which Lauretta entered into on her own account. Difficulties about it cannot be attributed to the deceased testator, and are accordingly unlike cases which arise out of the poor drafting of a will, or other conduct of the testator[5]; or those where there is an arguable case that the testator failed to make proper provision for a claimant[6]. It seems to me that the approach taken in such cases is not appropriate here. Moveover, Lauretta could only be said to be litigating in her own interest. Accordingly, it does not seem to me to be a case where an order should be made that her costs should be recovered from the estate.

---

2 See *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [66], per McHugh J.

3 (1991) 102 ACTR 1, 11, 13.

4 See at [3].

5 See Dal Pont, Law of Costs (2nd Ed), LexisNexis Butterworths, pages 289 – 290.

6 See Dal Pont at [10.33].

[16] Although the reasons for judgment at first instance concluded that Adriano and Silvano had standing to make their application, no consequential order was made. Nevertheless, the notice of appeal included a ground that the learned primary judge erred in finding that they (and, somewhat curiously, Robert) had standing to bring application 5922/2012. Chevonne's outline of argument, filed on 19 November 2012, appropriately acknowledged that in light of the joining of Lauretta to that application, the standing of Adriano and Silvano "became academic", and that Chevonne did not intend to pursue this ground of her appeal: see para 32. The outline of argument also stated that Chevonne did not challenge the finding at first instance that Adriano and Silvano had assigned their interest in the estate to Lauretta: para 10.

[17] Nevertheless, Adriano and Silvano maintained their opposition to the appeal. In essence, they supported the position taken by Lauretta as to the effect of the Terms of Settlement. They supported the refusal of Chevonne's application for an adjournment at first instance. In those circumstances, it seems to me that it would be open to make an order that they, too, pay Chevonne's costs of the appeal. Their conduct after the receipt of Chevonne's outline of argument might be said to indicate their likely attitude, even if the notice of appeal had not put their standing to bring application 5922/2012 in issue. Nevertheless, there was some justification, at least until that time, for their opposition to the appeal.

[18] Although other orders might be made, in my view it would not be unjust in the present case to make no order whether in Chevonne's favour against Adriano and Silvano, or in their favour against her, in respect of the costs of the appeal.

[19] The submissions made on behalf of Adriano and Silvano did not identify any question of law which might be said to bring the matter within s 15 of the *Appeal Costs Fund Act*. However it is not necessary to consider whether, and if so in what circumstances, an appeal against an exercise of a discretion might be said to have succeeded on a question of law. The continued opposition of Adriano and Silvano to the appeal, discussed earlier, makes it inappropriate to grant an indemnity certificate under this section. Moreover, at the hearing, Adriano and Silvano opposed the application for an adjournment.

[20] So far as payment of their costs out of the estate is concerned, their position is no better than Lauretta's. Accordingly, I would not make an order for payment of their costs of the appeal out of the estate.

Costs at first instance

[21] For Chevonne it was submitted that the application for the adjournment was occasioned by the late receipt of material from Robert and Lauretta. That submission is consistent with the earlier reasons. It was also submitted that it would be appropriate to reserve the costs of each party until the substantive disposition of the matter.

[22] For Lauretta it was submitted that Chevonne should pay the costs thrown away of all respondents; or alternatively that the costs at first instance be reserved to the final determination of the proceedings at first instance. The former submission seemed to draw on the submissions made about the conduct of the hearing at first instance on behalf of Chevonne. Again, it was submitted that Lauretta should be entitled to recover her costs out of the estate.

[23] For Adriano and Silvano it was submitted that they should have their costs from the estate on an indemnity basis. As has been mentioned, they submitted that they had no alternative but to seek the assistance of the court. Their submissions also indicated that it would be unlikely that would need to play any further active role in the proceedings in the Trial Division.

[24] The application brought by Adriano and Silvano turned on the effect of the conduct of themselves and Robert in relation to their interest in the estate, and on the Terms of Settlement. As previously indicated, that seems to me to be different to cases involving litigation about the effect of a will; or about whether proper provision has been made for a particular claimant. I do not find convincing, the submission that they were compelled to commence litigation. Having renounced their interest in favour of their mother, they could have left it to her to bring proceedings if she wished to do so. I do not consider it appropriate to make an order that their costs of the hearing at first instance should be paid out of the estate.

[25] There is some force in the submission made on behalf of Chevonne that the application for an adjournment was occasioned by the late receipt of material. There is also some force in the submission made on behalf of Lauretta that the proceedings at first instance could have been conducted more effectively by Chevonne's legal representatives. However, it seems to me that the final hearing of these proceedings might shed significant light on the appropriateness of Chevonne's application for an adjournment; and the appropriateness of the opposition to it.

[26] In those circumstances, I would propose that the costs of all parties thrown away at the hearing at first instance be reserved, pending the final determination of the proceedings. For clarity, I would also propose that the orders and the direction made at first instance be set aside.

Conclusion

[27] In my view, the following orders should be made:

1. The orders and direction made on 3 September 2012 be set aside.
2. The fifth respondent pay the appellant's costs of and incidental to the appeal, to be assessed on the standard basis.
3. There be no order, whether in favour or against the second and third respondents, as to the costs of the appeal.
4. The costs of the hearing at first instance be reserved, pending the final determination of those proceedings.
5. All applications for orders for payment of costs of the appeal out of the estate be refused.