

SUPREME COURT OF QUEENSLAND

CITATION: *Stephens & Anor v Chee; Chee v CBC Properties (Qld) Pty Ltd in its own capacity and as Trustee of Chee Family Trust & Ors* [2015] QSC 269

PARTIES: **In SC No 11140 of 2014:**
DAVID CHARLES STEPHENS
(first applicant)
STUART CHARLES LESLIE BENJAMIN
(second applicant)
v
TIMOTHY HOCK LING CHEE
(respondent)
KAY LING CHEE
(not a party to the application)
LOIS PUI LAU AND ELIZABETH SUN LING WHITE
(not parties to the application)

In SC No 11055 of 2014:
KAY LING CHEE
(applicant)
v
**CBC PROPERTIES (QLD) PTY LTD in its own capacity
and as trustee of CHEE FAMILY TRUST**
(first respondent)
STUART CHARLES LESLIE BENJAMIN
(second respondent)
LOIS PUI LAU AND ELIZABETH SUN LING WHITE
(not parties to the application)

FILE NO/S: SC No 11140 of 2014
SC No 11055 of 2014

DIVISION: Trial Division

PROCEEDING: Application for costs
Application to vary an order for costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 September 2015

DELIVERED AT: Brisbane

HEARING DATE: 2 September 2015

JUDGE: Philip McMurdo J

ORDER:

In SC No 11140 of 2014:

- 1. The applicants' costs of the proceeding be paid from the trust fund.**
- 2. One half of the costs of Timothy Chee be paid from the trust fund.**

In SC No 11055 of 2014:

- 1. The application to vary the order for costs made in favour of the applicant on 5 March 2015 is refused.**

CATCHWORDS:

Stephens & Anor v Chee [2015] QSC 138

EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – INDEMNITY, LIEN AND REIMBURSEMENT – LEGAL COSTS AND COMMISSION ENTITLEMENT – whether the applicant trustees should be indemnified from the trust assets for the costs of their *Beddoe* application – where the trustees were partially successful in the principal judgment – where there was no demonstrated basis for depriving the trustees of their costs from the trust fund where the *Beddoe* application was, in respect of all potential claims, reasonably made

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OUT OF A FUND – WHEN COSTS ALLOWED OUT OF FUND – OTHER CASES – whether the applicant trustees should have recourse to the trust fund for the costs of their *Beddoe* application – where the trustees had only partial success in the principal judgment – where the trustees argued costs should be reserved for the trial judge in proceedings which they were advised to commence in the principal judgment, or alternatively, that there be no order as to costs – where the respondent was one of four beneficiaries of the trust – where the respondent argued the trustees should not have their costs out of the fund because their application was only partially successful, or that the trustees' indemnity for costs should be limited to funds held by the trustees on trust for certain other beneficiaries – where the respondent argued any costs awarded to the trustees should only be paid once there was an outcome in proceedings the trustees were advised to commence in the principal judgment – where there was no demonstrated basis for depriving the trustees of their costs from the trust fund where the *Beddoe* application was, in respect of all potential claims, reasonably made – where the applicant trustees' costs were ordered to be paid from the trust fund – where the respondent was unsuccessful in certain submissions but where a major submission made on his behalf was accepted within the principal judgment and was therefore awarded one half of his costs of the proceeding to be paid from the trust fund

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING VARYING AND SETTING ASIDE – application to have the order for costs sought in an earlier hearing set aside or varied, so that the applicant’s costs of the application be paid on the indemnity rather than the standard basis – where *UCPR* r 668 did not apply as the applicant was not a person against whom an order was made – where *UCPR* r 667(2)(e) did not apply because the applicant, entitled to the benefit of the order, consented only upon the condition that a further more favourable order was made in her favour – where the order for costs was not set aside because, first, the applicant did not demonstrate some new fact or circumstance arising since the order was made which required the basis for the assessment of costs to be reconsidered and, secondly, matters raised by the applicant would have required the court to consider the merits of her case for the removal of the trustees – courts will not usually undertake any substantial assessment of the merits of a case which is not pursued, merely for the purpose of determining a question of costs – application refused

COUNSEL:

In SC No 11140 of 2014:

M P Amerena for the applicants
 R I M Lilley QC, with D J Morgan for the respondent
 A P Phillips, with G Slater for Kay Ling Chee
 E K Simeoni for Lois Pui Lau and Elizabeth Sun Ling White

In SC No 11055 of 2014:

A P Phillips, with G Slater for the applicant
 M P Amerena for the respondents
 E K Simeoni for Lois Pui Lau and Elizabeth Sun Ling White

SOLICITORS:

In SC No 11140 of 2014:

Broadley Rees Hogan for the applicants
 Synkronos Legal for the respondent
 Lloyd & Lloyd for Kay Ling Chee
 Paxton-Hall Lawyers for Lois Pui Lau and Elizabeth Sun Ling White

In SC No 11055 of 2014:

Lloyd & Lloyd for the applicant
 Broadley Rees Hogan for the respondents
 Paxton-Hall Lawyers for Lois Pui Lau and Elizabeth Sun Ling White

[1] This judgment concerns the costs of the proceeding which I determined on 22 May 2015 (which I will call the principal judgment).¹ This judgment also determines an application to vary an order for costs which I made in a related proceeding.²

¹ *Stephens & Anor v Chee* [2015] QSC 138.

² BS 11055 of 2014.

- [2] In the proceeding determined by the principal judgment, the applicant trustees sought advice from the court as to whether to bring proceedings. They also applied for a direction that they should not provide certain documents of the trust to one of the beneficiaries, Timothy Chee. He was to be the principal defendant in the trustees' proposed litigation for which the advice was sought.
- [3] Timothy Chee was made a respondent to the trustees' application. He is one of four beneficiaries, the others being his siblings. Two of them were not represented at the hearing, although they were notified of the application. The other beneficiary, Kay Ling Chee, was represented at the hearing. She was represented also as an applicant in the related proceeding, in which she had sought the removal of Mr Benjamin and the company which had been his co-trustee.
- [4] At the commencement of the two day hearing for these applications, that which was brought by Kay Ling Chee was withdrawn. Timothy Chee sought to be substituted as the applicant, in order to seek the removal of the trustees but upon markedly different grounds from those which were to have been argued for Kay Ling Chee. The trustees objected to that course and I dismissed her application, leaving it for Timothy Chee to bring his own case for the removal of the trustees. (It appears that this has not occurred.)
- [5] At the hearing, counsel for Kay Ling Chee sought an order that her costs of her application, assessed on the standard basis, be paid from the trust estate. I made that order for the reason that her application to remove the trustees was a meritorious one at least whilst CBC Properties (Queensland) Pty Ltd was a trustee. It was in no position to consider whether it should bring proceedings for the benefit of the trust against defendants which included itself as a defaulting trustee (albeit when under the control of Timothy Chee). The company had resigned as a director by the time of the hearing. Nevertheless Kay Ling Chee's application, when filed and until that event, was well made. I did not consider the merits of any other arguments which she had proposed in support of her application and nor was I asked to do so.
- [6] Counsel for Kay Ling Chee, who appeared at the original hearing, now seeks to have the order which he sought set aside or varied so that her costs of her application would be paid on the indemnity rather than the standard basis. At first he suggested that this could be done under the *Uniform Civil Procedure Rules* 1999 (Qld) r 668. But as was conceded, this rule could not apply because Kay Ling Chee is not a person against whom the relevant order was made. Counsel then referred to r 667(2)(e), arguing that although the relevant period under r 667(1) has expired, the court may set aside the order in her favour because, as the party entitled to the benefit of the order, she consents. But she consents only upon the condition that a further order is made in her favour which is yet more favourable to her. In my conclusion, for two reasons, the order for her costs in her proceeding should not be varied or set aside. The first reason is that she has not demonstrated that some new fact or circumstance has emerged since the order in her favour was made which, in the interests of justice, requires the basis for the assessment of her costs to be reconsidered. The matters which she wishes to argue are relevant to this question are matters which, if relevant, could have been raised at the time the order was made. The second reason is that these matters would have required the court to consider the merits of her case for the removal of the trustees, beyond the point about the trustee wanting to sue itself. Courts will not usually undertake any substantial assessment of the merits of a case which is not being pursued merely for the purpose of determining a question of costs. Consequently,

in proceeding 11055 of 2014, the application to vary the order for costs made in favour of the applicant on 5 March 2015 is refused.

- [7] I turn then to the question of costs of the trustees' *Beddoe* application which occupied almost all of the two days of hearing. When I delivered the principal judgment, the trustees' solicitor appeared as did senior and junior counsel for Timothy Chee. There was no appearance for Kay Ling Chee. I directed that any submissions as to costs arising from the principal judgment be made in writing by 10 June 2015 and not exceed five pages in length. The parties ought to have been able to provide submissions within those constraints. Unfortunately what followed was a lengthy rally of extensive submissions and affidavits, commencing on 10 June and extending until 26 August, at which point I re-listed the case in order to bring some finality to the arguments.
- [8] At the most recent hearing, counsel for the trustees and for Timothy Chee made some oral submissions but not beyond the substance of what, by that stage, had become their extensive written submissions. (The submissions for the trustees totalled 40 pages.) The most recent hearing was occupied mainly by submissions on behalf of Kay Ling Chee. Some of those related to her application to vary the costs order in her own proceeding. In the *Beddoe* application, in which she had not been a respondent or a substantial participant at the two day hearing, she sought to rely upon several affidavits which post-dated the two day hearing and a 20 page written submission which her counsel had not previously provided to the court or to the other parties. In circumstances where the court had made orders for the delivery of written submissions on costs within a certain time and two sets of written submissions³ had been provided on behalf of Kay Ling Chee, there was no explanation for why this 20 page document was being produced only at the most recent hearing and why it was not unfair to the other parties that the court should receive it. I said that I would reserve my decision on whether I should consider that written submission. I have not done so. It was provided too late and without an opportunity for the other parties to respond to it. Kay Ling Chee had already provided written submissions. She had not been a party to the *Beddoe* application. No order for costs was sought against her. And her counsel was able to make oral submissions at the most recent hearing. Those oral submissions were to the effect that the trustees should not have their costs, or at least all of their costs, from the trust fund because they had not conducted sufficient investigations for the purpose of putting the relevant facts before the court on the *Beddoe* application. To determine whether the trustees had done so would require a substantial factual inquiry, again only to the end of deciding a question of costs.
- [9] In the principal judgment I advised the trustees that they could and should bring certain proceedings. I declined to advise the trustees on whether they should bring certain other claims, because they were claims which should be brought or at least funded by the beneficiaries other than Timothy Chee. I made no finding as to the likely merit of those other claims. The costs of the *Beddoe* application should be determined upon the findings and conclusions expressed within the principal judgment. Had I considered that insufficient inquiries had been made by the trustees about their proposed claims (other than the claims which I did advise them to bring), still the outcome would have been the same. Therefore the further evidence which Kay Ling Chee sought to adduce at the most recent hearing is irrelevant.

³ Dated 14 and 17 August 2015.

- [10] In the principal judgment, the trustees had only partial success. My refusal to advise the trustees on most of the claims for which the advice sought was a discretionary judgment. In doing so I upheld a submission for Timothy Chee. His counsel had conceded that I could advise the trustees in relation to the claims on which I did advise them. But they argued that those claims were so problematical that my advice should be not to pursue them. In that respect the submissions for the trustees prevailed.
- [11] The application by the trustees in relation to the provision or non-provision of documents to Timothy Chee was ultimately dismissed. It occupied very little of the hearing and, I would infer, little of the costs of the application overall. It is not of any present significance.
- [12] The original written submission for the trustees was to the effect that the costs of the application should in all respects be reserved for the trial judge in the proceedings which I advised should be commenced by them. Alternatively they submitted that there should be no order as to costs. That alternative submission did not address the operation of *UCPR* r 700 which provides that where a party sues or is sued as a trustee, then unless the court orders otherwise, the party is entitled to have its costs of the proceeding, that are not paid by someone else, paid out of the fund held by the trustee. If that alternative submission for the trustees were accepted, the result would be that the trustees would have their costs from the trust fund. But that is one of the questions for present determination.
- [13] Subsequent submissions for the trustees explained that their right of recourse to the trust fund was not a matter which they thought would be determined until the court had ruled upon what costs orders between the parties were made. In my opinion the trustees should have understood that their right of indemnity from the trust assets for the costs of the *Beddoe* application was something which they had to address according to the directions I made when delivering the principal judgment. They could not have been fairly surprised by a submission from Mr Chee that they should not have at least all of their costs from the trust fund, given that their *Beddoe* application was partially successful.
- [14] The initial submissions from Mr Chee relied upon a without prejudice communication made on his behalf to the then trustees in June 2014. At first the trustees objected to my receiving evidence of this communication, upon the basis that it was a without prejudice communication and not made with an express reservation of Mr Chee's right to use it in relation to costs. This brought submissions from Mr Chee, by reference to authority as well as to *UCPR* r 700A(2)(c), that the communication was admissible. Subsequently, the trustees agreed to the tender of this communication.
- [15] The communication was in the form of a proposal for the settlement of all issues between the then trustees, Mr Chee, his siblings and "all relevant associated entities". It was not in the form of an offer capable of immediate acceptance. For example, it proposed that all parties would take their own accounting, taxation and legal advice with respect to anything associated with the proposal before "formal documentation". Most importantly, it was not a proposal which could have resulted in a concluded agreement between the then trustees and Mr Chee without the concurrence of all of those other parties. The trustees cannot be fairly criticised for not agreeing to the proposal.
- [16] Although the trustees were not advised by the court upon other claims for which they sought the court's advice, I accept that it was reasonable for them to seek that advice.

Other beneficiaries, including Kay Ling Chee, were urging the trustees to make claims of this kind against Timothy Chee. Extensive factual material had been procured by the trustees which was relevant to those claims. A very lengthy written advice from counsel had been given to the trustees. I concluded that these other claims should be made, if at all, by the other beneficiaries or by the trustees with an indemnity from those beneficiaries. But these claims are ones that relate to the assets of the trust and, on the present evidence, it was not inappropriate for those claims to be investigated and to be the subject of advice by counsel. In turn, it was reasonable for the trustees to ask the court as to whether those claims should be made. In a sense the court answered that question by advising that the claims should not be brought by the trustees, absent an indemnity from the other beneficiaries.

- [17] There were submissions for Timothy Chee that the applicants' indemnity for costs should be limited to funds held by the trustees on trust for Lois Pui Ling Lau and Elizabeth Sun Ling White, upon the basis that they were the instigators of the application. However, this is a discretionary trust as to income and the date for the vesting of capital has not been reached. There is no separate fund against which such an order could operate. Moreover that would place a burden upon those parties when it is far from demonstrated that they controlled the conduct of this *Beddoe* application.
- [18] It was also submitted for Timothy Chee that the trustees should have any costs which are awarded to them paid now from the trust fund only once there is an outcome in the proceedings which I advised the trustees to commence. That is not persuasive. Whether the debt claims do succeed, the trustees acted reasonably in seeking the court's advice about them.
- [19] In my conclusion there is no demonstrated basis for depriving the trustees of their costs from the trust fund where the *Beddoe* application in respect of all of the potential claims was reasonably made. It will be ordered that the applicants' costs of proceeding 11140 of 2014 be paid from the trust fund.
- [20] As for the costs of Timothy Chee, there should be some recognition of the fact that a major submission made on his behalf was accepted within the principal judgment, namely that it would not be appropriate for the trustees to be advised in relation to those other claims. That submission was made, of course, out of self-interest. But he was made a respondent to this application and by that submission he provided a helpful and significant contradiction of the trustees' case. Therefore he ought to have some of his costs. On the other hand he was unsuccessful in his submissions as to the merits or otherwise of the claims upon which the trustees were advised to sue. This suggests that he should not have all of his costs.
- [21] In my conclusion, justice can be done by awarding Timothy Chee one half of his costs of proceeding 11140 of 2014 to be paid from the trust fund.
- [22] There will otherwise be no order for costs in proceeding 11140 of 2014.