

SUPREME COURT OF QUEENSLAND

CITATION: *Nolan & Ors v Nolan* [2016] QCA 5

PARTIES: **ANTHONY GERARD NOLAN**
(first respondent/first appellant)
BRIAN KEVIN NOLAN
(second respondent/second appellant)
MAJELLA ANNE NOLAN
(third respondent/third appellant)
NOLAN & SON PTY LTD
ACN 010 567 174
(fourth respondent/fourth appellant)
v
DONNA MAREE NOLAN
(applicant/respondent)

FILE NO/S: Appeal No 385 of 2015
SC No 3338 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – [2014] QSC 218

DELIVERED ON: 2 February 2016

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Gotterson and Morrison JJA and Boddice J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The respondent’s application, filed 21 October 2015, be refused.**
2. Each party bear their own costs of the proceeding.
3. The respondent pay the appellants’ costs of the appeal, cross-appeal and of the application filed on 21 October 2015, to be assessed on a standard basis.

CATCHWORDS: PROCEDURE – JUDGMENTS AND ORDERS – CORRECTION UNDER SLIP RULE – where respondent filed application seeking variation of final orders on basis of slip rule – whether there is a basis for the application of slip rule – whether the figure awarded to the respondent by the Court of Appeal reflected her contribution to the common endeavour, as found by the primary Judge
PROCEDURE – COSTS – INFORMAL OFFERS AND CALDERBANK LETTERS – FAILURE IN PORTION OF

CASE – where respondent received sum significantly less than any of the formal offers to settle made by the respondent – where a reasonable, informal offer was made by the appellants prior to commencement of proceedings – where that informal offer was not re-made during the proceedings – where respondent succeeded at trial, but failed in one aspect of her claim – whether any party is required to pay the other party’s costs of trial

PROCEDURE – COSTS – where appellants substantially succeeded on appeal – where cross-appeal dismissed – where application to vary final orders refused – whether respondent is required to pay the appellants’ costs of appeal, cross-appeal and application to vary final orders

COUNSEL: No appearance for the respondents/appellants, the respondents’/appellants’ submissions were heard on the papers

No appearance for the applicant/respondent, the applicant’s/respondent’s submissions were heard on the papers

SOLICITORS: Russells for the respondents/appellants
Shine Lawyers for the applicant/respondent

- [1] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.
- [2] **MORRISON JA:** Given the decision on the appeal, I agree with the orders proposed by Boddice J in respect of the application filed on 21 October 2015, and costs.
- [3] **BODDICE J:** On 21 October 2015, this Court, by majority, allowed the appellants’ appeal, dismissed the respondent’s cross-appeal, set aside the orders below and made orders that the second, third and fourth appellants pay the respondent the sum of \$319,050. Ancillary orders were made in relation to various properties and caveats.
- [4] Since delivery of those Reasons, the respondent has filed an application seeking a variation to those orders on the basis of the slip rule. The respondent contends the slip rule arises because the sum referred to in the judgment does not accord to 17.5 per cent of the net assets of the farming enterprise. The parties have filed written submission as to costs, both on appeal and at first instance.

Slip rule

- [5] A consideration of my Reasons for Judgment reveals that the expression “the net value of assets” is a reference to the trial Judge’s finding as to the net increase in the assets over the relevant period. As I observed in paragraphs [69] and [75] of the Judgment, an appropriate recognition of the respective contributions of the parties required acknowledgement of the real and substantial effect of the initial financial contribution made by the second and third appellants in purchasing “Kitcombe”.
- [6] That acknowledgement required more than merely deducting the cost of that purchase. It required that the second and third appellants receive an initial entitlement of 30 per cent of the net increase in the assets of the farming enterprise with the

remaining 70 per cent being divided equally between the first, second and third appellants and the respondent. The figure of \$291,550 referred to in paragraph [76] of that Judgment reflected the respondent's contribution of 17.5 per cent of the net increase in the assets of the farming enterprise.

- [7] There is no basis for application of the slip rule. The figure awarded to the respondent reflected her contribution to the common endeavour in respect of the net increase in the assets of the farming enterprise as found by the primary Judge. The application filed by the respondent should be refused.

Costs

Submissions

- [8] The appellants submit the appropriate orders as to costs are that the respondent pay their costs of the appeal and cross-appeal and of the proceeding below, on a standard basis. Although the respondent succeeded at first instance, the respondent received a sum significantly less than the amount offered by the appellants prior to service of the claim and statement of claim and after service thereof. The respondent also failed in an important aspect of her primary claim, and the amount recovered meant the proceedings ought to have been litigated in the District Court.
- [9] The respondent submits the appropriate order for costs is that the respondent pay the appellants' costs of the appeal and of the cross-appeal, on a standard basis, and that the appellants pay the respondent's costs of the proceeding below, also on a standard basis. The respondent was substantially successful in the proceeding below and there is no reason why costs ought not follow the event. Further, the claim was appropriately brought in the Supreme Court.

Discussion

- [10] The sum awarded to the respondent on appeal is less than any of the formal offers to settle made by the respondent. It is also less than the amount the subject of a valid Calderbank Offer. There is no relevant offer from the respondent to be considered on costs.
- [11] The informal offer made by the appellants before commencement of the proceedings was for a higher sum than awarded to the respondent on appeal. That offer was found to be reasonable by the primary Judge. It was not, however, re-made at any time during the proceedings, and notwithstanding offers to settle by the respondent, the appellants never made any formal offer to settle during the proceedings. The respondent ultimately succeeded at trial, although she failed in one aspect of her claim.
- [12] Allowing for these factors, it is not appropriate that any party pay the other party's costs of the trial. Each party should bear their own costs of the proceeding. However, as the appellants substantially succeeded on the appeal, the respondent should pay the appellants' costs of the appeal and cross-appeal, on a standard basis. The respondent should also pay the appellants' costs of the application filed on 21 October 2015, on a standard basis.
- [13] I would order:
1. The respondent's application, filed 21 October 2015, be refused.
 2. Each party bear their own costs of the proceeding.
 3. The respondent pay the appellants' costs of the appeal, cross-appeal and of the application filed on 21 October 2015, to be assessed on a standard basis.