

SUPREME COURT OF QUEENSLAND

CITATION: *S v W* [2004] QSC 282

PARTIES: **S**
(plaintiff)
v
W
(defendant)

FILE NO/S: 628 of 2004

DIVISION: Trial Division

PROCEEDING: Claim – Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 3 September 2004

DELIVERED AT: Brisbane

HEARING DATE: Written Submissions

JUDGE: White J

FURTHER ORDER: **No order as to costs.**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where defendant appeared on her own behalf – where defendant represented by solicitors for a period – whether the defendant should have her legal costs incurred prior to trial

Uniform Civil Procedure Rules, r 689, r 691

R v Police Magistrate at Hughenden; Ex Parte Cumming [1915] St R Qd 147, cited

SOLICITORS: Schultz Toomey O’Brien Lawyers for the plaintiff
The defendant made written submissions on her own behalf

[1] The plaintiff, S, brought proceedings against his former de facto wife and the mother of their four children, W, for declaratory and other orders relating to three parcels of real property. The trial took place on 16 July 2004. S was represented by counsel instructed by solicitors. W appeared for herself unassisted by any legally qualified, or other person.

[2] Judgment was given on 23 July 2004 and these reasons need to be read in conjunction with those reasons. The following orders were made:

I declare that

1. (i) the plaintiff has a 20 per cent interest and the defendant has an 80 per cent interest in real property, described in these reasons as the Blackbutt land.

(ii) the plaintiff has a 48.8 per cent interest and the defendant has a 51.2 per cent interest in real property, described in these reasons as the Diamond Valley land.

(iii) the plaintiff has no beneficial interest and the defendant has the whole of the beneficial interest in real property, described in these reasons as the Mt Julian property.
 2. Subject to other order, or agreement between the parties, I order that the property mentioned in Order 1(ii) above to be vested in statutory trustees to be held by them on trust for public sale and to hold the proceeds of sale in the proportions set out in Order 1(ii). The costs of the sale are to be borne proportionally by the parties. A successful party may off-set the party's declared interest in the land against the purchase price.
 3. Liberty to apply on the question of the appointment of trustees mentioned in Order 2.
 4. Liberty to make submissions as to costs in writing within 7 days.
- [3] W availed herself of order 4 and made written submissions on 28 July 2004 seeking professional costs incurred by her in defending S's claim in the sum of \$20,758.40 because for a period W was represented by solicitors. W's submissions were sent by the court to S's solicitors by facsimile transmission dated 3 August 2004. Submissions in response as to why the order sought about costs by W ought not be made were received by the court by facsimile transmission on 31 August 2004.
- [4] In his claim S sought orders which would give him a 50 per cent interest in each of the three properties and in the chattels in each party's respective possession. W in her counterclaim sought a 100 per cent interest in all three properties and did not seek any orders against chattels in S's possession. In the course of the trial S discontinued his claim for a share of W's chattels.
- [5] W raised a number of matters in her recent submissions, not all relating to costs.
- [6] W alleges that Ms Leisa Toomey, S's solicitor at Boyce Garrick (now of Schultz Toomey O'Brien Lawyers) "harassed" her into becoming Grevell McLean's client and that by her conduct unnecessarily caused W to become indebted to her solicitors in an amount greater than might otherwise have been the case. It is not clear whether the costs rendered by Grevell McLean concern only property matters or include Family Court and Magistrates Court matters relating to the children and domestic violence proceedings. They include pre-litigation negotiations.
- [7] W contends that S "refused to release the caveat [over the Blackbutt land] unless he was given all of the money!"

- [8] W complains that the valuations put on the properties by S were too low, that she complained of this and, as a consequence, the District Court at Maroochydore, on the morning of the trial, transferred the matter to the Supreme Court. New valuations obtained by S indicated that the jurisdiction of the District Court was exceeded and his Honour Judge Robertson was not inclined to allow a litigant in person to decide to consent to an increased jurisdiction.
- [9] W makes reference to two matters not concerned with costs. She is concerned about what she describes as S's untruthful testimony at trial. If she reads the reasons carefully she will see that that evidence was not accepted and in any event did not affect the outcome. She explains that she had in her possession all of the bank statements which, I noted in the reasons, had not been tendered to the court because, in her costs submissions she says was "totally confused and abused at the time". At the trial W was invited to give further evidence about financial contributions at the end of her evidence-in-chief and again after cross-examination, t/s 82 and 95.
- [10] W expresses concerns about how S has financed his legal representation. Mr Read, S's counsel, said in court at the trial that the retainer was such that payment was deferred until after the property matters were concluded. This was confirmed in Ms Toomey's submissions that his legal costs will be paid when S refinances any property which he acquires or receives as property settlement. Since the property at Diamond Valley, which both parties want, is to be sold at public auction with the parties entitled to bid it may be, in achieving the best price, that neither party will acquire that property and the proceeds of sale will be divided in the proportions ordered.
- [11] In order to deal with W's submissions that she should have her legal costs incurred prior to trial it is necessary to consider the contemporaneous evidence, such as it is, contained in the correspondence. On 30 November 2001 S instructed his solicitors to open negotiations with W with a view to property settlement. The solicitors wrote to her personally. The value nominated for the Blackbutt property was \$40,000, for the Diamond Valley property \$125,000 and for the Mt Julian property \$120,000. The rates on the Blackbutt property were estimated at \$5,000 and the joint mortgage on the Mt Julian property at \$87,000.
- [12] Ms Toomey denies that she harassed W into retaining solicitors and it is to be noted that Grevell McLean instructed by W responded promptly on 4 December 2001 to the effect that W disagreed with some of the values contained in the letter of 30 November and was obtaining market appraisals for the real estate. The solicitors indicated that they would communicate again when those appraisals were to hand.
- [13] W's solicitors wrote again on 20 December. There is no suggestion that there had been other correspondence in the intervening two weeks. The letter in part read
- "Our client has obtained market appraisals for the three items of real estate referred to in your letter and has made an estimate of the value of the contents in your client's possession. Our client has also received correspondence from the Nanango Shire Council regarding rates on the Blackbutt property."

Based on that information the valuation for the Blackbutt property was \$20,000, for the Diamond Valley property \$178,000, for the Mt Julian property \$90,000 and the value of furniture and effects in the possession of S was estimated at \$20,000. The joint mortgage was noted to be \$87,000 and the rates on the Blackbutt property at \$4,815. W's proposal was that all three properties be transferred to her and she retain the chattels in her possession. She proposed that she would refinance the mortgage over the Mt Julian property in her name and assume responsibility for the balance of the outstanding rates on the Blackbutt property. The solicitors noted the caveat over the Blackbutt property and added "our client wishes to sell that property and retain the proceeds of sale."

- [14] On 14 January 2002 S's solicitors wrote contesting the valuation of his chattels, which need not be considered further, and, on the basis of what was described as the current offer by "Graham & Nola" estimated the value of the Blackbutt property at \$35,000; the Diamond Valley property at \$120,000 (noting that it was believed that W's valuer had valued the wrong property in Diamond Valley) and the Mt Julian property at \$120,000. The mortgage liability and the rates amounts were accepted.
- [15] The offer was that the liabilities would be divided evenly, that S would retain the Diamond Valley property and W the Blackbutt and Mt Julian properties. With respect to the caveat the solicitors wrote

"We advise our client at this stage he is not prepared to release the Caveat on Blackbutt but if your client does have a Contract of Sale in relation to that property then our client will of course release same for the purposes of settlement provided those monies are paid to our trust account and invested until such time the parties have reached agreement in relation to distribution of those funds and property settlement."

Other matters not relevant to costs were then raised.

- [16] The valuations agreed by both parties at trial were, the Blackbutt land \$37,500 with rates of \$8,000; the Diamond Valley land \$250,000; and the Mt Julian property \$135,000 with a mortgage of \$84,000.
- [17] The general rule about litigation costs is set out in r 689 of the *Uniform Civil Procedure Rules*

"Costs of a proceeding ... are in the discretion of the court but follow the event, unless the court considers another order is more appropriate."

Rule 691 provides that

"A party to a proceeding cannot recover any costs of the proceeding from another party other than under these rules or an order of the court"

S does not seek any order for costs against W and resists any order that he should pay her costs or any part of them. As a general proposition, in litigation costs are

awarded as an indemnity to the successful party, *R v Police Magistrate at Hughenden; Ex Parte Cumming* [1915] St R Qd 147 at 155, 156.

- [18] Costs can be awarded in respect of a particular question or, where there is a claim and a counter claim, there can be an order for a proportion of the costs in each and the less set off against the greater.
- [19] In light of the correspondence to which reference has been made there is nothing which would attract an order for costs about the steps which took place prior to proceedings being instituted and prior to trial. The valuations varied between the parties it is true, but a much higher valuation for the Diamond Valley property was produced at trial than either that of W or S previously and S's assertion that the Blackbutt property was worth \$20,000 in 2001 was contradicted by the valuation at trial and also by the assertion by S that an offer of \$35,000 had been made for it in 2002.
- [20] Neither party achieved what each party had claimed in the claim and counter claim and, more particularly, with respect to the costs sought by W, in the offers put by each to the other in the course of negotiations in 2001 and 2002 (without considering the application of the rules of court to offers).
- [21] I have not been persuaded that there ought to be any order made about the costs of the proceedings including the particular costs to which W refers and which, in respect at least of some of them, are unlikely to be associated with these proceedings.
- [22] The order is that there be no order as to costs.