SUPREME COURT OF QUEENSLAND

CITATION:	*Watson v Yore & Ors* [2004] QSC 339
PARTIES:	**MARY ANN WATSON** **AS EXECUTOR OF THE ESTATE OF** **VERONICA FRANCIS YORE DECEASED** (applicant) **v** **THOMAS JOHN YORE** (first respondent) **SHIRLEY FRANCIS BEATY, LYNETTE KATHRYN ZIPF AND JUDITH ANN WILSON** (second respondents) **ELAINE VERONICA CRAWFORD, JENNIFER MARY TOOHEY AND CARMEL THERESE YORE** (third respondents) **MARK YORE, ANNE STANFIELD AND JOHN YORE** (fourth respondents)
FILE NO/S:	SC No 7149 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2004
JUDGE:	Holmes J
ORDER:	**The questions are answered as follows:** **(a) Should the Applicant as Executor of the Estate of Veronica Francis Yore Deceased retain any part of the Estate to commence and prosecute a proceeding against the First Respondent in relation to any proceeds from any sale of the property known as "Spiddal"?** **No.** **(b) Should the Applicant proceed to distribute the balance of the said Estate to the Respondents pursuant to the last Will of the Deceased, subject to retaining sufficient funds to pay remaining costs and expenses to complete the administration of the Estate?** **Yes.** **The application for remuneration of the applicant is**

refused.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO THE COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE - where the applicant is an executor who seeks directions under s 96 *Trusts Act* 1973 – whether the applicant executor should proceed to distribute the balance of the estate or whether the fund should be retained for the bringing of an action against the first respondent

SUCCESSION – EXECUTORS AND ADMINISTRATORS – whether the applicant has authority to charge remuneration as executor pursuant to s 101 of the *Trusts Act*

Trusts Act 1973, s 96, s 101
Uniform Civil Procedure Rules 1999, r 644

Re Beddoe [1893] 1 Ch 547, cited
Re Lack (1983) 2 Qd R 613, distinguished

COUNSEL: N E Ulrick for the applicant
B J Clark for the first and second respondents
The third respondent Elaine Veronica Crawford appeared on her own behalf
M K Stunden for the third respondent Carmel Therese Yore and the fourth respondent
No appearance for the third respondent Jennifer Mary Toohey

SOLICITORS: Bartels Lawyers for the applicant
Keith Scott & Associates for the first and second respondents
Lang Hemming & Hall for the third respondent Carmel Therese Yore and the fourth respondents

The application

[1] The applicant executor seeks directions under s 96 of the *Trusts Act* 1973, as to whether she should retain funds from the estate for the bringing of a prospective action against the first respondent, Thomas John Yore. The directions sought are framed as follows:

(a) Should the Applicant as Executor of the Estate of Veronica Francis Yore Deceased retain any part of the Estate to commence and prosecute a proceeding against the First Respondent in relation to any proceeds from any sale of the property known as "Spiddal"?

(b) Should the Applicant proceed to distribute the balance of the said Estate to the Respondents pursuant to the last Will of the Deceased, subject to retaining sufficient funds to pay remaining costs and expenses to complete the administration of the Estate?

The applicant also seeks remuneration for her services as executor, pursuant to s 101 of the *Trusts Act*.

[2] There are 10 respondents to the application, grouped into four groups. Seven of them are, like the applicant, the children of the deceased, Veronica Frances Yore, and Thomas Patrick Yore. Of those respondents, five opposed the bringing of any action, one did not appear, and one supported it. The remaining three respondents are the children of a son of the deceased, who predeceased her. They support the retention of funds for litigation.

The application for directions

[3] The background to the prospective litigation is as follows. As at June 1966, Thomas Patrick Yore owned a property called "Spiddal", consisting of 450 acres of land on the Albert River near Tamborine Village. The property had been in the Yore family for generations. In that year, Mr Yore senior (as I shall refer to him) transferred it to the first respondent. In an affidavit sworn in September 2001 and filed in the Family Court in matrimonial property proceedings, the first respondent deposed his father had sold him the farm for $30,000, although its market value was about $90,000. Mr and Mrs Yore senior wanted the $30,000 to buy a hotel business; when the first respondent could raise only $16,000 of that amount, they borrowed the balance of $14,000 themselves, and treated it as part of the purchase price.

[4] In that affidavit the first respondent says this,

> "there was a clear understanding between my father and myself that the property would stay in the family ... [For many years] my father said to me that if I sold the property I would have to pay him a lot of money. There was a clear understanding that, if I sold the property I would have to repay my mother and father the discounted percentage of any sale proceeds as this was an understood inherited property."

(The copy of the affidavit, which is exhibited to the applicant's affidavit, is not clear; the section in square brackets represents my best guess as to words which are in part obscured.)

[5] In October 1973, a 56 acre block of land was transferred by Mr Yore senior to the first respondent for an amount of $32,500, which the latter was to pay when he could. On 4 October 1981, Mr and Mrs Yore and the first respondent entered a deed of release, by which the first respondent was released from a debt of $31,000, said to be owed to both his parents, and a further debt of $10,450 owed to his father. (According to a later affidavit of the deceased, those amounts reflected what was owed in respect of the 1966 and 1973 transfers.) Mr Yore senior died on 25 January 1983, and his estate passed to his wife.

[6] It is clear that in 2001 there was concern, not confined to the first respondent, as to the prospect of a property order in favour of his estranged wife. The applicant and a number of the respondents lent funds to Mrs Yore senior to enable her to seek leave to intervene in the proceedings; the first respondent, having filed the affidavit already referred to, also gave support to the intervention proceedings. Carmel Yore, one of the respondents, swore an affidavit to support the application for leave to intervene. In it, she said that while the first respondent, her brother, was preparing his affidavit they had discussed its content. In that context, the first respondent had said "the family is entitled to a lot of money before Dallas [his estranged wife] gets

any." On later occasions, the first respondent had alluded to owing the family "a lot of money", but had also said that he would not give them any money; they would have to fight for it and they could not afford to do so.

[7] In a similar vein, the applicant, in a recently sworn affidavit, said that in 1986 the first respondent, facing a possible resumption of the property had told her that if he were forced to sell, he would not have to pay his family anything; it was only if he chose to sell the property that he had to pay. On other occasions he had said that his sisters would have to force him to pay, and none of them had the money to fight him.

[8] On 28 March 2002, Mrs Yore senior swore an affidavit for the Family Court proceedings, dealing, *inter alia,* with the decision to sell the farm to the first respondent. Although in it she says that she and her husband wished to see the farm kept in the family name, she makes no reference to any obligation attaching upon the sale. However, a report from Dr Lim, a physician and geriatrician, suggests that as at March 2002 Mrs Yore was suffering dysphasia consequent on a stroke, and it was improbable that she could have understood the contents of the document.

[9] The application for leave to intervene was heard on 24 March 2003. The first respondent seems by this stage to have had a change of heart: his counsel took the position that he did not recognise any interest contended for by the proposed intervenor, his mother. In granting leave to intervene, Warnick J recognised, firstly that a possibility existed that Mrs Yore senior would be adversely affected if an obligation to her was not recognised in the division of property, and secondly, that it was preferable that there be recognised, in such a division, an obligation which might later be asserted against the parties. However, Mrs Yore died on 10 April 2003 and the intervention went no further.

[10] In a later affidavit, filed in the Family Court in November 2003, the first respondent put the arrangement for the transfer of "Spiddal" rather differently from the way in which he earlier described it. His father had told him the price of $30,000 was far short of the true market value; it was his and Mrs Yore's intention that the property should always remain in the family; but, the first respondent asserted, "My father did not place restrictions upon me as to what I chose to do with the property once it was transferred into my name."

[11] The first respondent says now that his first affidavit was drawn at a time when he was depressed and not thinking clearly because of the recent separation from his wife, and a report from his general practitioner lends some support to that being his state. And, he says, although he objected to the inclusion of the sentence referring to an obligation to repay a discounted percentage of sale proceeds, because it was not in fact accurate, his solicitor advised that it be left in; it would make matters more difficult for his estranged wife. The affidavit was not, in the event, relied on in the Family Court proceedings.

[12] On 31 March 2004, orders were made in the Family Court which required, *inter alia,* that one part of the Spiddal property be transferred to the first respondent's estranged wife, and that on or before 30 June 2004 the sum of $1,225,538.00 be paid to her. In the event that the payment was not made, immediately upon default the Spiddal property (including, oddly, the piece to be transferred to the first respondent's former wife) was to be sold by public auction. That order has been

appealed, and a stay of it granted. There is no indication as to when the appeal might be heard.

[13] The action which the applicant suggests might be brought against the first respondent is one in contract, on this basis: there was an agreement pursuant to which Mr Yore senior transferred the property to the first respondent for much less than its value, on the condition that the first respondent would, if he sold the property outside the Yore family, pay his parents "the discounted percentage of any sale proceeds". That expression ought, it is said, be taken in context to mean that he would pay to them the proceeds discounted by the percentage of the purchase price he had contributed; that is to say, that he would pay two thirds to them.

[14] I was provided with opinions of counsel furnished to the applicant. It was proposed that those opinions be considered by me without disclosure to the other parties, and that an order be made for their sealing thereafter. Counsel for the respondents did not take issue with that course, which seems appropriate in the circumstances; I will make, therefore, an order with that effect. I might say, however, that while all the opinions are helpful in raising a number of issues, I should have reached my view independent of them.

[15] Essentially, what must be determined on this application is whether retention of funds to enable an action against the first respondent is in the interests of the beneficiaries of the estate as a whole. There are a number of competing considerations: the prospects of success, the potential for substantial depletion of the estate in costs should the action be unsuccessful, the proportions of what might be gained if it were to succeed, and, peculiar to this case, the fact that there is at present no cause of action, because there has been no sale of the property.

[16] A number of features of the foreshadowed case suggest that its prospects of success are not strong. Firstly, it depends on an acceptance of the version given by the respondent in the first of his affidavits filed in the Family Court as accurately reflecting the agreement made with his father in 1966. But it is clear that the first respondent resiles from the statements in that affidavit. While his explanation as to how he came to give a false account of what took place might be unconvincing, one can readily see, in the context of the interests involved in the Family Court proceeding, why it might be regarded as unreliable. And that earlier version seems to be unsupported by any other evidence, although reliance is placed on the statements by two of the first respondent's sisters that he admitted at times to owing the family money. On the applicant's affidavit he made an admission to that effect as long ago as 1986. But an admission along those lines does not seem to accord with the terms of the agreement as advanced; because it is acknowledged that no sale of the property having taken place, no debt has yet come into existence. And those statements, if made by the first respondent, are capable of being interpreted as no more than an acknowledgement of a sense of obligation, because of the financial advantage he had enjoyed over his siblings, rather than as reflecting any actual legal obligation.

[17] Secondly, if the nature of the agreement between Mr Yore senior and the first respondent were as suggested by those arguing for litigation, it seems remarkable that nothing appears to have emanated from either of his parents to that effect. The deed of release makes no reference to any promise to pay, although one might have expected, if Mr and Mrs Yore had wished to formalise the position in relation to

their assistance to the first respondent, the creating of the deed was an appropriate opportunity to record a continuing obligation.

[18] Even if a court were to accept that what is contained in the first respondent's first affidavit represents the agreement between him and his father, there remains considerable difficulty in establishing and construing the terms of that agreement. Was the "clear understanding" that the first respondent would pay a part of the sale of proceeds to his parents a condition of the sale of the property to him, or merely a shared belief as to what would be appropriate in the circumstances? If there was a condition that part of any sale proceeds be paid over, because "this was an understood inherited property", did that requirement continue to exist after the deaths of the parents? Is the obligation to pay triggered by a sale pursuant to Family Court order (which is the only sale presently in prospect)? What meaning can be given to the expression "the discount of percentage of any sale proceeds"? And what were contemplated as the "sale proceeds"; gross proceeds or the balance after discharge of any liabilities secured on the property? The attempt at interpretation is beset with uncertainty.

[19] Those difficulties are to be seen against the background that no sale has actually taken place, so the executor has no existing claim. It is not known how long it will take for the first respondent's appeal to be heard, nor whether he will be successful; if he is successful, whether a new trial will follow, or how long that might take; if he is unsuccessful, whether he will nevertheless be able to pay his former wife the amount ordered (perhaps by mortgage of the property or by sale of the 56 acres, which seem not to be subject to any condition) so that no sale under the Family Court order ensues.

[20] There are so many uncertainties as to whether the executor could, on the balance of probabilities establish the existence and content of an obligation, together with the further uncertainty as to what would amount to a breach of it, that I think the prospects of a successful action are very dim indeed. Those problems are compounded by the doubt as to whether any sale will actually occur and the unknown length of time before that question is resolved. It is true, as Mr Stunden says, that the value of the property is likely to be substantial - it was said on the application for leave to intervene that Spiddal was worth about $1 million, and one could readily believe in light of the Family Court's orders that that was a marked understatement – but that factor does not, I think, outweigh the many doubts and difficulties attending the prospective litigation.

[21] In short, the risk entailed seems to me too great for it to be concluded that an action would be in the interests of the beneficiaries. They are better served by distribution of the estate now, rather than holding off on the slender prospect of success in a cause of action which may never come to life. That conclusion does not, of course, preclude the executor from proceeding in the event it does, subject to the costs risk identified in *Re Beddoe*[1]*;* nor does it prevent any of the beneficiaries from indemnifying her for that purpose.

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1 [1893] 1 Ch 547

The application for remuneration

[22] The applicant sought remuneration for the time spent to date carrying out her duties as executor. She proposed payment of $10,000, representing 2.5% of the estate. The work done is set out in her affidavit in very general terms. She says that she has liaised with solicitors, spent "much time" taking steps connected with the sale of the deceased's house, collected and invested monies and kept the beneficiaries informed. She estimates that in those and "associated" tasks she has spent more than 400 hours, and has thus lost money she might have earned as a bookkeeper.

[23] Five of the respondents opposed the making of any such order. Mr Clarke, for four of them, said that it was not yet determined whether his clients would require the accounts to be examined and passed pursuant to r 644 of the *Uniform Civil Procedure Rules* 1999, so that the application was premature; it ought to be made to the Registrar at that stage. The case was, he said, to be distinguished from *Re Lack*[2] in which it was not expected that the beneficiaries would require the executors to pass their accounts. Mr Clarke also took issue with the size of the commission and the 400 hours said to have been involved in the executor's carrying out of her functions, given what he described as a relatively simple estate administration.

[24] In circumstances where the payment of remuneration in the amount sought is challenged, and the work undertaken by the executor is dealt with only in the broadest of terms, it would be inappropriate to make an order for commission at this time. That is not to say that another application may not be made; but I do not think I should proceed to fix remuneration over the objections of some of the beneficiaries before the estate's administration is completed.

Orders

[25] The questions are answered as follows:

(a) Should the Applicant as Executor of the Estate of Veronica Francis Yore Deceased retain any part of the Estate to commence and prosecute a proceeding against the First Respondent in relation to any proceeds from any sale of the property known as "Spiddal"?

No.

(b) Should the Applicant proceed to distribute the balance of the said Estate to the Respondents pursuant to the last Will of the Deceased, subject to retaining sufficient funds to pay remaining costs and expenses to complete the administration of the Estate?

Yes.

[26] The application for remuneration of the applicant is refused. I will hear the parties on the question of costs.

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[2] [1983] 2 Qd R 613