SUPREME COURT OF QUEENSLAND

CITATION:	*Daley v Barton & Anor; Barton v Daley* [2008] QSC 322
PARTIES:	**PETER GEOFFREY DALEY** (plaintiff) **v** **WILLIAM ADAM BARTON** (defendant/plaintiff) and **BAISCO RESERVE PTY LTD** (defendant by counter-claim) **WILLIAM ADAM BARTON** **(Under Part IV, Section 40-44, *Succession Act* 1981)** (applicant) **v** **PETER GEOFFREY DALEY (As Executor of the Will of William Anthony Barton, Deceased)** (respondent)
FILE NO/S:	SC No 10471 of 2005 SC No 3735 of 2006
DIVISION:	Trial Division
PROCEEDING:	General Claim; Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2008
JUDGE:	Lyons J
ORDER:	**1. That the defendant to the contested probate proceeding (CPP) (William Adam Barton) be paid his costs of and incidental to the CPP on an indemnity basis out of the estate up to 2 May 2007.** **2. That the defendant to the CPP pay the plaintiff's costs of and incidental to the CPP on the standard basis from 7 February 2008.** **3. That there be no order as to the defendant's costs in the CPP from 2 May 2007 to 7 February 2008.** **4. That William Adam Barton pay the plaintiff's**

costs of and incidental to the Equity Claim (EC) on the standard basis up to 7 February 2008.

5. **That William Adam Barton pay the plaintiff's costs of and incidental to the EC on an indemnity basis after 7 February 2008.**

6. **That the applicant for the Family Provision Application (FPA) have his costs of and incidental to the FPA assessed and paid out of the estate on an indemnity basis up to 7 February 2008.**

7. **That the applicant for the FPA pay the costs of the respondent on an indemnity basis from 7 February 2008.**

8. **The plaintiff is otherwise entitled to indemnity costs for the entirety of all of the actions out of the estate.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CALDERBANK LETTER – COSTS ON INDEMNITY BASIS – CONDUCT OF THE DEFENDANTS – plaintiff sent defendant letters containing Calderbank offer – offer rejected – whether it was appropriate in the circumstances for the defendant to continue to contest the claims – whether conduct of the defendant justified an indemnity costs order

SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – PROCEDURE, ORDERS AND OTHER MATTERS, OTHER PROCEDURAL MATTERS – Family Provision Application successful – Calderbank offer exceeded the amount ordered by the Court to be paid to the applicant – whether the costs of the application should be paid on an indemnity basis by the applicant or the respondent

Succession Act 1981 (Qld), s 41
Trusts Act 1973 (Qld), s 80

Calderbank v Calderbank [1975] 3 All ER 333, cited
John S Hayes & Associates Pty Limited v Kimberly-Clark Australia Pty Limited (1994) 52 FCR 201, cited
Gilroy v Neaves & Anor [2005] NSWSC 1003, cited
Koorneef v Lewkowicz [2001] ACTSC 81, cited
Nautilas Australia Ltd v The Ship "Rossel Current" (Unreported, Supreme Court of Queensland, Ambrose J, 26 March 1999), distinguished
Powell v Monteath [2006] QSC 46, cited
Sherborne Estate (No2): Vanvalen & Anor v Neaves & Anor; Theophanus v Gillespie [2001] QSC 177, distinguished

Trustee for the Salvation Army (NSW) Property Trust & Anor v Becker & Anor [2007] NSWCA 136, cited

COUNSEL: D Mullins SC for the plaintiff/respondent
RM Treston for the defendant/applicant

SOLICITORS: John Nagel & Co for the plaintiff/respondent
Biggs and Biggs for the defendant/applicant

LYONS J:

This application

[1] The current applications relate to the costs orders that should be made in relation to three inter-related proceedings which were heard together during a five day trial. Those proceedings related to the estate of the late William Anthony Barton who was a recently married, 67 year old millionaire when he died of a brain tumour on 23 August 2005. On 28 July 2005, the day after he was told the tumour was inoperable, he executed a Will which left his entire estate to his new wife. The Will made no provision for his 31 year old son from his first marriage. The three interrelated proceedings involved:

1. a contested probate proceeding in relation to the validity of his Will dated 28 July 2005 ("the CPP"),
2. a Family Provision Application by his son Adam Barton ("the FPA"), and
3. an equity claim ("the EC") in relation to the ownership of a unit disposed of by the Will.

The background

[2] The hearing was held from 26 May to 30 May 2008. Extensive written submissions were then received dated 30 May, 12 June, 15 July, and 24 July 2008.

[3] On 24 September 2008 judgment was delivered. Orders were made:

1. pronouncing for the full force and validity of the Will dated 28 July 2005,
2. that probate in solemn form be granted to the plaintiff, the executor named in the Will,
3. dismissing the defendant's amended counter claim, and
4. that pursuant to s 41 of the *Succession Act* 1981 (Qld) further provision should be made out of the estate for the proper maintenance and support of Adam Barton by the payment of a lump sum of $560,000.

[4] On 9 October 2008 oral and written submissions were made in relation to costs and further written submissions were then received on 22 October 2008.

The offer prior to the hearing

[5] A relevant factor in relation to this issue of costs is that on 18 January 2008 the plaintiff had written to the solicitors for the defendant in the following terms:

> "It is now in excess of 2 years since the death of Mr Barton. Pleadings in each of the three proceedings have closed. The disclosure process has been completed. The necessary valuations of the assets have been procured. The evidence in chief of the relevant

witnesses has been confirmed in affidavits all of which have been filed and exchanged. The disputes are ready for adjudication by a Judge.

…

We refer to the recent Without Prejudice discussions between our respective Counsel. We note those discussions have yet to produce any proposal or offer from your client. We have instructions from our client to propose a compromise of all of the litigation. The trial and its preparation will be expensive. We think that the costs, for both sides, will be in excess of $300,000. In our view the time and expenditure incurred in preparation, as well as one or two days of the hearing, could be reduced or saved if you were to abandon your contentious probate proceeding (CPP) which seeks to impugn the testamentary capacity of the deceased. On a review of the evidence upon which you rely, there is, in our view, little or no prospect of success. We invite you to discontinue that proceeding. If you did so now, we would not seek any order against your client as to costs. We also put you on notice that if the CPP is unsuccessful we will invite the Trial Judge to visit the burden of the costs, to be assessed, of that part of the trial, on your client and on an indemnity basis. We concede that, arguably, having regard to, at least, the brief report of Dr Konkoly, your client was entitled to commence the CPP. However, having regard to the evidence as a whole and our assessment of your client's prospects of success, that report does not warrant the continued prosecution of that claim in the expectation that all of the costs will be borne by the estate irrespective of the outcome of your CPP.

We make similar observations as to your client's prospects of success in his Family Provision Application (FPA) On our assessment of the evidence upon which he relies to assert an entitlement to an order for provision from the estate his demonstrable financial need is modest.

The equity claim in relation to the Kangaroo Point unit is in a different category. The burden of the costs associated with the prosecution of that claim will follow the event. We remain confident of successfully defending your claim that the unit is not, in truth, an asset of the estate. We observe, however if your claim succeeds then, on any view that would, in the result, extinguish any entitlement to provision through the FPA."

[6] That letter then set out what can properly be characterised as a Calderbank offer.[1] That is the offer was made on the basis that it was without prejudice save as to costs and the letter made clear that the plaintiff would "....rely on this correspondence at trial in relation to costs." That offer was then replaced by a further offer by letter dated 22 January 2008. The plaintiff's offer was essentially:

(a) to transfer ownership of the estate's 9/20th share (valued at $900,000.00) in the Coominya property, which would have provided a substantial income stream;

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1 *Calderbank v Calderbank* [1975] 3 All ER 333.

(b) The estate agreed to forgive any debt owed to the estate by the Family Trust which amounted to $400,000.00; and
(c) to pay $100,000.00 towards the defendant's costs.

[7] The essential question is, therefore, what costs orders should be made in relation to those three proceedings? Whilst costs are clearly in the discretion of the court the usual rule that costs follow the event applies. As Williams, Mortimer and Sunnucks comment in their text on "Executors, Administrators and Probate"[2] "…costs in probate actions are at the discretion of the court. It is the general rule in probate, as in other actions, that costs follow the event." However, there are some exceptions to this rule. These exceptions include situations where the litigation has been caused by the conduct of the testator, where litigation has been caused by the conduct of the principal beneficiaries, and where the circumstances afford reasonable grounds for opposing a Will.[3]

The issues in relation to the CPP

[8] In relation to the CPP, in summary the plaintiff's claim as executor, filed on 9 December 2005 (BS 10471/05) was for a declaration for the full force and validity of the Will dated 28 July 2005. On 4 January 2006 Adam Barton filed a Notice of Intention to Defend alleging that at the time the instructions for that Will were provided, the testator was not possessed of sound mind, memory, and understanding and he was not capable of knowing and approving the contents of the third Will.

[9] In a contested probate proceeding, therefore, where testamentary capacity is in issue usually the costs follow the event unless it can be demonstrated that the particular circumstances of the case warrant a different outcome. The defendant argues that the circumstances called for the investigation to be made in relation to the testators' capacity to execute the Will and therefore they should not be required to pay costs.

[10] The defendant's counsel submits that the position the defendant took in relation to the CPP claim was a reasonable decision which was taken after consideration of the evidence available. I accept that in this regard the question is not whether it is sufficient for the defendant to point to issues that originally led to the investigation, but whether the defendant continued to contest the claim in circumstances in which it was appropriate to do so. The plaintiff submits that the defendant knew or should have known that the prospects of the Will being declared invalid were hopeless or that the action instituted was brought for a collateral purpose or had no chance of success. The plaintiff submits that on no objective assessment of the evidence available to the defendant after 2 May 2008 could it be said that the defendant had a reasonable basis for continuing to press his objection to the grant of probate.

[11] In the written submissions on costs, counsel for the defendant has set out the circumstances which, in her submission, demonstrated the reasonableness of the decision.

[12] Having considered that material I consider that Adam Barton, properly advised, would have reasonably concluded that investigation was initially called for in relation to the making of his father's Will because of the following factors:

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2 John Martyn and Nicholas Caddic (eds.), *Williams, Mortimer and Sunnucks Executors, Administrators and Probate*, (2008), 478.

3 Ibid.

1. the nature of the testator's illness, namely an aggressive brain tumour;
2. Dr Konkoly's evidence in a report to Mr Daley shortly after the testator's death to the effect that the testator did not have capacity;
3. the testator's word finding difficulty on 28 July;
4. Mr Daley's handwritten notes describing the testator as "very forgetful" and that he "kept repeating himself";
5. the affidavit evidence of Mr Daley advising the testator to change his bank accounts into joint names and the testator advising him that he had attended to that in circumstances where in fact he had not; and
6. the evidence that the testator told Mr Daley he had been unable to find his old Will where in fact he had collected it the day before.

[13] I consider in the circumstances that an investigation into the testator's capacity was initially justified and it was appropriate to commence the proceedings. The real question is whether it was appropriate to continue the proceedings after 2 May 2007 when the plaintiff submits it was clear that there was medical and lay evidence which did not support that approach.

[14] The plaintiff submits that there was never, after 2 May 2007, a defence which was conducted on the basis of merely testing the claim for the validity of a Will. The plaintiff submits that the defendant continued with the CPP despite the fact that he did not have any material evidence of his own to support his case that the deceased lacked testamentary capacity. The plaintiff submits that the facts of the current case are similar to those in *Theophanus v Gillespie*[4] where Ambrose J ordered the defendant pay the plaintiff's costs of and incidental to the action on an indemnity basis because the defendant had converted what should have been a relatively inexpensive application in common form to a very expensive solemn form application without any reasonable cause. In Ambrose J's view the defendant in that case properly advised should have known that he had no real prospect of success. The decision in *Theophanus* referred to the decision in *Nautilas Australia Ltd v The Ship "Rossel Current"*[5] where his Honour summarised the position in relation to the award of indemnity costs as follows:

> "where an action has been commenced or continued in circumstances where the Defendant properly advised should have known that he had no real prospect of success, then it is appropriate to presume that the action must have been commenced or continued for some ulterior motive or because of some wilful disregard of the known facts on the evidence clearly available. Sometimes courts will make orders for indemnity costs to prevent or to make it known that it will not accept readily that the Court's time and litigants money can be wasted on totally frivolous or thoroughly unjustified defences."

[15] In this regard the plaintiff submits that the defendant was unable to put forward any additional evidence at the hearing in support of his opposition to probate and that the court made adverse findings of credit against both the defendant's mother and the defendant.

[16] Whilst I do not make a finding that the defendant continued the action with some ulterior motive I consider that he must have disregarded some of the known facts.

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4 [2001] QSC 177.

5 (Unreported, Supreme Court of Queensland, Ambrose J, 26 March 1999).

In particular the evidence of Mr Daley in relation to the circumstances surrounding the execution of the Will was particularly strong as was the evidence of the testator's close friends who had seen him at the time of the making of the Will. Furthermore, Dr Konkoly's opinion was based on a single consultation where he had not conducted any assessments and the medical specialists who subsequently treated the testator had not expressed any concerns about capacity.

[17] In all of the circumstances, I consider that the facts reasonably called for an initial investigation to be made particularly given the strength of Dr Konkoly's evidence. I consider that the defendant should have his costs in relation to the CPP paid on an indemnity basis up to 2 May 2007. However, I consider that given the nature of the other evidence that became known in 2007 the evidence in support of the continuation of the action was not strong after May 2007. In particular an analysis of the evidence in existence at that time would have indicated that there was in fact a compelling case for capacity to execute the Will.

[18] However, I am not satisfied that there has been an improper purpose such as was established in *Theophanus v Gillespie*. I do not consider that the circumstances surrounding the CPP after May 2007 were such that that the conduct of the defendants called for the sanction of an indemnity costs order. I do not consider that the circumstances are in fact sufficiently similar to those in *Theophanus v Gillespie*[6] where there was clear evidence of an improper purpose as the defendant held irrational beliefs and there was no medical evidence that the deceased lacked capacity.

[19] If it were not for the Calderbank Offer I consider that the appropriate order would be that the plaintiff pay the defendant's costs up to and including 2 May 2007 on an indemnity basis and that after that there be no order as to the defendant's costs.

[20] However, the further question that arises is whether the Calderbank offer which was essentially made in relation to the FPA should have an impact on the question of costs with respect to the CPP. The plaintiff argues that this offer should still be taken into account because where an offer of settlement is made by a Calderbank letter the question is whether the defendant's decision to reject the offer was reasonable.

[21] In this regard the plaintiff relies on the decision of *Trustee for the Salvation Army (NSW) Property Trust & Anor v Becker & Anor*[7] where Ipp JA held that there was a role for Calderbank offers in contested probate proceedings. In that case the offer was made on day three of the trial when the person against whom the allegations of fraud and undue influence in relation to the Will had been made had given evidence. It was held that the plaintiffs:[8]

> "…were well positioned to assess prospects with regard to the substantial body of tested evidence already before the court, including that of Ms Abel which, in large measure, was left unchallenged and uncontradicted."

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6 [2001] QSC 177.

7 [2007] NSWCA 136.

8 *Trustee for the Salvation Army (NSW) Property Trust & Anor v Becker & Anor* [2007] NSWCA 136 at [130].

[22] In particular Ipp JA agreed with the trial judge that had the plaintiffs in that case "…carried out a reasonable evaluation of the strengths and weaknesses of their case at that time, it would have become clear 'that they were without any reliable evidence to prove the grounds upon which their opposition was based.'"[9]

[23] The question is whether the Calderbank offer made in January 2008 should affect the order as to costs in the CPP and if so how? Should the defendant pay the plaintiff's costs from 7 February 2008 when the offer was rejected and should the costs be paid on an indemnity basis as submitted by the plaintiff?

[24] I consider that the offer of 22 January 2008 was a genuine offer of compromise and substantially better than the defendant obtained at trial. It is clear that there is a role for offers of compromise in probate proceedings and this was objectively a very generous offer. In *Powell v Monteath*[10] Mackenzie J analysed a number of Queensland cases and discussed the implications of a Calderbank offer. In particular he stated that there had been an approach where penalising failure to accept reasonable offers of compromise had not been as great and he continued that this approach to costs "…peculiar to this kind of case appears to still have some currency in an era when non-litigious resolution of matters and costs disincentives for failure to do so reasonably is given more prominence than in the past."[11] In that case his Honour concluded:[12]

> "However, from the date of the offer, it is not appropriate in my view, that the applicant have his costs from the estate. The offer made by the respondent was objectively well within the range that the applicant might reasonably have expected to recover. Rejection of it must, even allowing for the special approach to costs traditionally adopted in this category of cases, have consequences for the respondent. Otherwise, there would be no disincentive against unwillingness to settle on reasonable terms in the hope that a better outcome might eventuate, or for less justifiable reasons."

[25] In the circumstances of that case Mackenzie J ordered that the applicant be paid his costs of and incidental to the application, on an indemnity basis, out of the estate up to and including the date of the offer. However, with respect to the applicant's costs after the date of the offer the order was that there be no order as to costs after the date of the Calderbank offer. In this regard reliance was placed on the decision of Palmer J in *Sherborne Estate (No2): Vanvalen & Anor v Neaves & Anor; Gilroy v Neaves & Anor*:[13]

> "The fact that a plaintiff has recovered judgment in an amount less than an offer of settlement contained in a Calderbank letter does not automatically warrant the making of an order that the plaintiff pay the defendant's costs as from the date of refusal of the offer on an indemnity basis. While that circumstance undoubtedly has weight, all of the facts and circumstances of the case must still be taken into account in the exercise of the Court's discretion as to costs."

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9 *Trustee for the Salvation Army (NSW) Property Trust & Anor v Becker & Anor* [2007] NSWCA 136 at [131].

10 [2006] QSC 46.

11 *Powell v Monteath* [2006] QSC 46 at [9].

12 *Powell v Monteath* [2006] QSC 46 at [9].

13 [2005] NSWSC 1003 at 54.

[26] However, I consider that in the circumstances of this case given the offer of compromise contained in the Calderbank offer together with the knowledge of the evidence even at that stage, the decision to refuse to compromise was unreasonable. In my view this must have consequences and I consider that after the rejection of the offer on 7 February 2008 the defendant should pay the plaintiff's costs. The defendant was on notice as to the costs consequences from January and still rejected the offer which was in fact far better than the judgment he received some eight months later. There must be some disincentive to the rejection of such a generous offer and in the circumstances of this case that is not simply an order that there be no order as to the defendant's costs after 7 February 2008.

[27] However, I am not satisfied that the actions of the defendant in relation to the CPP were such as to require an order that the defendant pay the plaintiff's costs on an indemnity basis.[14]

[28] Accordingly, in relation to the CPP I consider that appropriate orders are:

1. That the defendant to the contested probate proceeding (CPP) (William Adam Barton) be paid his costs of and incidental to the CPP on an indemnity basis out of the estate up to 2 May 2007.
2. That the defendant to the CPP pay the plaintiff's costs of and incidental to the CPP on the standard basis from 7 February 2008.
3. That there be no order as to the defendant's costs in the CPP from 2 May 2007 to 7 February 2008.
4. The plaintiff is otherwise entitled to indemnity costs in relation to the action out of the estate.

The issues in relation to the EC

[29] Adam Barton also sought a declaration that the unit disposed of by the Will was held by the testator on trust for the Family Trust and that the deceased's wife Vitita Sukrod had no interest in the unit under the testator's Will. Further orders were also sought including the appointment of a new trustee pursuant to s 80 of the *Trusts Act* 1973 (Qld).

[30] I consider that this issue did demand exploration and resolution by the Court because of the uncertainty surrounding the ownership of the unit which was largely caused by the conduct of the deceased in the way he ordered his financial affairs. There did need to be a determination as to whether the unit was in fact a trust asset because the unit was described as an asset of the Family Trust in the tax returns after 1997.

[31] However the Calderbank offer was of considerable relevance to the EC because the estate offered to forgive the debt of $400,000 owed by the Family Trust to the estate and was made to maximise the financial position and advantage of the Family Trust if the claim by Adam Barton failed.

[32] The claim by William Adam Barton has, however, failed and I do not consider there is any reason why the usual rule as to costs should not apply. That is William Adam Barton should pay the plaintiff's costs of and incidental to the EC on a standard

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[14] *John S Hayes & Associates Pty Limited v Kimberly-Clark Australia Pty Limited* (1994) 52 FCR 201, 206.

basis up to 7 February 2008. However after that date given the rejection of the Calderbank offer the costs should be paid on an indemnity basis. In terms of what occupied the five days of hearing I consider that taking a broad brush approach the CPP and the FPA each occupied two days of the trial and the EC one day.

[33] Clearly, the executor is otherwise entitled to all his costs of and incidental to the EC on an indemnity basis to be paid out of the estate.

[34] Accordingly in the EC I consider that the appropriate orders are:

1. That William Adam Barton pay the plaintiff's costs of and incidental to the EC on the standard basis up to 7 February 2008.
2. That William Adam Barton pay the plaintiff's costs of and incidental to the EC on an indemnity basis after 7 February 2008.
3. The plaintiff is otherwise entitled to indemnity costs in relation to the action out of the estate.

The issues in relation to the FPA

[35] On 5 May 2006 Adam Barton also filed an application (BS3735/06) that adequate provision be made for his proper maintenance and support out of the estate. He has been successful in that application and ordinarily he would be entitled to his costs of and incidental to the application out of the estate. However, he has failed to beat the Calderbank offer which was made on 22 January 2008. The offer which was made would have represented a record award in Queensland and its rejection will accordingly have costs consequences.

[36] Whilst noting that there are some differences in the various jurisdictions in relation to cost orders I consider the 2001 decision of the Australian Capital Territory Supreme Court in *Koorneef v Lewkowicz*[15] neatly encapsulates the relevant issues which arise when a Calderbank is made with respect to a Family Provision Application. In that case Chief Justice Mills stated:[16]

> "12. In my view, the executor has shown that he was correct in defending the testamentary intentions of his father and there is no reason why the estate should be burdened by having to pay the costs of those who unsuccessfully sought to challenge the dispositions of the will.
>
> 13. The defendant sought an order that the costs of defending the action be paid out of the estate on a solicitor and client basis. There are many cases recorded in which such an order has been made. In the present case there is one overriding reason for it. The solicitor for the defendant wrote to the solicitor for the plaintiffs on 15 July 1999 a letter marked "Without prejudice save as to costs". The letter contained an offer to pay the plaintiffs' costs to date up to a maximum of $4,000.00 and, in effect, that otherwise the estate be distributed according to the provisions of the will. The letter explicitly warned, in measured terms, of the possibility of an order for costs against the plaintiffs personally. The offer was rejected by letter dated 28 July 1999.

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15 [2001] ACTSC 81.

16 *Koorneef v Lewkowicz* [2001] ACTSC 81, at [12]-[15].

> 14. It was submitted on behalf of the plaintiffs that the offer and its rejection should not be taken into account for the purpose of costs, partly because it was not a true "Calderbank" letter. I do not know what this submission means. In any event, there is, in my view, no profit to be found in addressing the issue. The principles to be applied are set out in the decision of the Full Court of this Court in *Quirk v Bawden* (1992) 111 FLR 115. They are well known. They extend to family provision cases.
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> 15. I do not accept that the defendant failed to carry out his duty by resisting the plaintiffs' claim. The plaintiffs all knew about their respective situations, and after the offer was made they took a chance in continuing the litigation that cannot be justified by their apparent assumption that the costs would eventually come out of the estate. I do not accept that the costs order proposed by the defendant constitutes an "aggressively partisan" attempt to load the costs onto the daughter, even if she is the most needy of all of the children. However, costs on a solicitor and client basis should be restricted to costs incurred after the rejection of the offer. The orders I make are:
>
> 1. The costs of the defendant on a party and party basis up to and including 28 July 1999 as taxed or agreed are to be paid by the plaintiffs.
>
> 2. Subject to order 1, the costs of the defendant on a solicitor and client basis as taxed or agreed are to be paid as follows:
>
> (a) costs incurred up to and including 28 July 1999 out of the estate; and
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> (b) costs incurred after 28 July 1999 by the plaintiffs.
>
> 3. Costs include disbursements."

[37] In relation to the FPA Adam Barton has in fact been successful but he has failed to beat the offer contained in the letters of 18 and 22 January 2008. I consider that Adam Barton should have his costs of the FPA on an indemnity basis up to 7 February 2008 and thereafter he should pay the costs of the plaintiff on an indemnity basis given that the offer made was in fact an offer which would have been a record award for a FPA.

[38] Accordingly the appropriate orders in the FPA are:

1. That the applicant for the Family Provision Application (FPA) have his costs of and incidental to the FPA assessed and paid out of the estate on an indemnity basis up to 7 February 2008.
2. That the applicant for the FPA pay the costs of the respondent on an indemnity basis from 7 February 2008.
3. The respondent is otherwise entitled to indemnity costs for the entirety of the action.

Orders

1. That the defendant to the contested probate proceeding (CPP) (William Adam Barton) be paid his costs of and incidental to the CPP on an indemnity basis out of the estate up to 2 May 2007.

2. That the defendant to the CPP pay the plaintiff's costs of and incidental to the CPP on the standard basis from 7 February 2008.

3. That there be no order as to the defendant's costs in the CPP from 2 May 2007 to 7 February 2008.

4. That William Adam Barton pay the plaintiff's costs of and incidental to the Equity Claim (EC) on the standard basis up to 7 February 2008.

5. That William Adam Barton pay the plaintiff's costs of and incidental to the EC on an indemnity basis after 7 February 2008.

6. That the applicant for the Family Provision Application (FPA) have his costs of and incidental to the FPA paid out of the estate on an indemnity basis up to 7 February 2008.

7. That the applicant for the FPA pay the costs of the respondent on an indemnity basis from 7 February 2008.

8. The plaintiff is otherwise entitled to indemnity costs for the entirety of all of the actions out of the estate.