

SUPREME COURT OF QUEENSLAND

CITATION: *Mills v Mills (No. 2)* [2008] QSC 334

PARTIES: **EDWARD WILSON MILLS**
(plaintiff)

v

**MARGARET MILLS (AS TRUSTEE OF THE ESTATE
OF JOHN WILLIAM ROBERT MILLS (DECEASED)
ABN 24 009 790 354)**
(defendant)

FILE NO: BS No 5016 of 2006

DIVISION: Trial Division

PROCEEDING: Civil Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 18 December 2008

DELIVERED AT: Brisbane

HEARING DATE: Decision on the papers

JUDGE: Applegarth J

ORDER: **1. It is declared that, for the purposes of the Deed of Partnership dated 29 October 1965, the net value of the deceased's share in the partnership, as at 1 February 2004, is \$118,952.**
2. There be no order as to costs.
3. Exhibit 4 be returned to the plaintiff.
4. There be liberty to apply in relation to the making of consequential orders on the giving of not less than seven days notice.

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – SUBSTANTIAL SUCCESS – judgment in partnership dispute – where amount payable by plaintiff in consequence of judgment less than plaintiff's formal offer to settle – where defendant incurred substantial costs resisting claims not abandoned by plaintiff until shortly before trial – where each party had both a measure of success and a measure of failure – whether any order should be made as to costs

Uniform Civil Procedure Rules 1999, r 360, r 361, r 684

ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No. 2) [2008] FCA 1184, cited

Castro v Hillery [2003] 1 Qd R 651, cited
Colburt v Beard [1992] 2 Qd R 67, cited
Mills v Mills [2008] QSC 249, cited
Mobile Innovations Ltd v Vodafone Pacific Ltd [2003] NSWSC 423, cited
Ruddock v Vadarlis (No 2) (2001) 115 FCR 229, cited
Thiess v TCN Channel 9 Pty Ltd (No 5) [1994] 1 Qd R 156, cited
Todrell Pty Ltd v Finch [2007] QSC 386, cited

COUNSEL: J A Griffin QC for the plaintiff
R J Anderson for the defendant

SOLICITORS: Beven Bowe & Associates for the plaintiff
McInnes Wilson Lawyers for the defendant

- [1] The parties are agreed that, as a consequence of my Reasons for Judgment dated 17 October 2008, the amount the plaintiff is obliged to pay the defendant for the deceased's share in the partnership as at 1 February 2004 is the sum of \$118,952. The parties are also agreed that the amount payable as interest is \$42,823. The total amount that is payable to the defendant, inclusive of interest, is therefore \$161,775.
- [2] The parties have now made written submissions on the question of costs. They indicated that they were prepared to rely upon these written submissions without the need for a further hearing.
- [3] The dispute between the parties commenced in about October 2005 when a letter was sent by the former solicitors for the defendant to the plaintiff expressing an interest in having the deceased's interest in the assets of the partnership quantified.
- [4] The litigation, however, was commenced by the plaintiff by a claim and statement of claim filed 16 June 2006. It is unnecessary to detail the procedural history of the matter. Relevantly, the amended claim filed 3 March 2008 sought a wide range of declaratory relief including declarations:
 - (a) that any partnership that existed between the deceased and the plaintiff ceased to exist prior to the death of the deceased on 1 February 2004;
 - (b) that the deceased retired from the partnership in 1966;
 - (c) alternatively, that he abandoned his interest or any interest in the partnership that he may have held in or about 1966 or on some later date;
 - (d) alternatively, that the estate of the deceased held all or part of its share in the partnership property (including the interest of the deceased) on trust for the plaintiff;
 - (e) alternatively, that if a partnership continued to exist after 1966, it did so only in relation to the Metcash Trading Limited shares belonging to the partnership;

- (f) alternatively that, if there was a partnership as at 1 February 2004, then the Deed of Partnership warranted the payment of an amount calculated in accordance with clause 21 of the Deed of Partnership;
- (g) that if the partnership did continue, then the estate of the deceased owed the partnership a sum of \$313,921.

Declarations were also sought in respect of the defendant's interest in the property at 26 Watson Street, and that the property at 30 John Street, Cunnamulla was partnership property. Further relief was sought in the form of a declaration that the partnership owed the plaintiff's wife the sum of \$160,606 for wages owing to her.

- [5] The defendant's amended defence and counterclaim filed on 26 March 2008 defended the various claims made by the plaintiff and by way of counterclaim sought declarations concerning the defendant's interest in the properties at 30 John Street and 26 Watson Street, a determination that at the time of his death the deceased was, together with the plaintiff, a partner with a 50 percent interest in the partnership and a variety of relief including the appointment of statutory trustees for sale, the appointment of a receiver to the partnership and orders for an account of the plaintiff's activities in respect of the partnership property since the date of the deceased's death.
- [6] Until a week before the trial the plaintiff pursued his claim that no partnership existed at the date of the deceased's death. It was only on or about 23 September 2008 that the plaintiff, in effect, discontinued significant aspects of his claim, and the parties agreed that the only issues remaining in dispute in the litigation were the amount to be paid by the plaintiff as the surviving member of the partnership pursuant to clauses 21 and 22 of the Deed of Partnership, interest (if any) and costs. In practical terms, the defendant became the claimant and the principal issue became the amount that was payable in respect of the net value of the deceased's share in the partnership as at 1 February 2004. This issue was litigated in circumstances in which the Deed of Partnership contemplated the value being determined by arbitration.¹
- [7] There is an issue between the parties concerning the costs that were incurred by the defendant in proving that a partnership existed. Voluminous documents were disclosed. The defendant's solicitor says that, whilst it is difficult to ascertain a definite apportionment of costs incurred in the partnership issue and the partnership interest issue, because there were many documents which were referable to both, his estimate is that at least 80 percent of the fees and costs incurred by the defendant would be attributable to the question of the disputed partnership.² The solicitor for the plaintiff disputes this and says that the essence of the matter as pleaded was the valuation of the business and the partnership interests, and that the plaintiff did not spend an inordinate amount of time on the question of the "abandonment" of the partnership. The defendant submits in reply that the pleadings do not reflect what the plaintiff's solicitor says was the essence of the pleaded case, and that the assertions made by the plaintiff's solicitor about the time spent on the "abandonment" of the partnership does not contradict the evidence about the costs

¹ *Mills v Mills* [2008] QSC 249 at [9].

² Affidavit of Paul McCowan sworn 5 November 2008, paragraph 8.

and fees incurred by the defendant on the disputed partnership issue. I accept the defendant's submissions in this regard.

- [8] I find that one of the issues that existed on the pleadings after December 2007 was the operation of clause 21 of the Deed and that, prior to September 2008, part of the preparation for hearing involved consideration of the net value of the deceased's share in the partnership as at 1 February 2004, if the plaintiff failed in his claim that no partnership existed at that date. I also accept that it is difficult for the litigation solicitors to apportion costs that were incurred in respect of the partnership issues that the plaintiff sought to litigate up until 23 September 2008 and the issue of the net value of the deceased's alleged share in the partnership as at 1 February 2004. Some costs would be incurred in respect of both issues. However, I conclude that substantial costs were incurred by the defendant in resisting claims that were not abandoned by the plaintiff until shortly before the trial.
- [9] For the purpose of litigating the only substantial issue that remained in dispute the defendant became, in effect, the claimant and, by an amended counterclaim sought a declaration that, for the purpose of the Deed of Partnership, the net value of the deceased's share in the partnership as at 1 February 2004 was \$319,864. This figure was based upon acceptance of the defendant's submissions and expert advice concerning the value of the business and the value of the deceased's share in the partnership.
- [10] The proper characterisation of the parties as a claimant or as a respondent is important when regard is had to certain formal offers of settlement. On 7 May 2008 the plaintiff made a formal offer to settle on the basis that in exchange for the transfer of the defendant's interest in the property at 30 John Street (which was later agreed by the parties for the purpose of the hearing in September 2008 to be an asset of the partnership) the plaintiff would pay to the defendant \$180,000 in full settlement of the defendant's claim to entitlements under the partnership. The plaintiff also offered to pay the defendant's standard costs of and incidental to the action.³
- [11] On 16 May 2008 the defendant offered to settle the action on the basis of the transfer of the property at 30 John Street and the payment by the plaintiff of the sum of \$250,000. The offer also provided for the plaintiff to pay the defendant's standard costs of and incidental to the action.
- [12] The sum of \$161,775 which the parties agree should be paid by the plaintiff to the defendant in consequence of my decision of 17 October 2008 is less than the amount of \$180,000 which the plaintiff offered to pay in his formal offer of 7 May 2008.
- [13] The plaintiff contends that the contest at the hearing was as to the amount payable in respect of the deceased's partnership interest pursuant to clause 21, that the plaintiff succeeded in that contest, and, whether by application of what is said to be

³ Affidavit of Bevan Patrick Bowe sworn 26 November 2008, exhibit BPB-1.

“the most apposite rule of court” being r 360 of the *Uniform Civil Procedure Rules* 1999 or otherwise, the plaintiff should have the costs of the action on an indemnity basis from 21 May 2008, being the date of expiration of the offer.

[14] I do not accept the plaintiff’s submission that r 360 is the most apposite rule in the circumstances. The plaintiff was, in effect, responding to the defendant’s claim that money was payable to the defendant pursuant to clauses 21 and 22. The amount that I have determined is payable to the defendant is less than the amount which the plaintiff offered to pay to resolve the litigation in May 2008. If the defendant in her amended counterclaim was to be characterised as, in effect, a claimant for the purpose of pursuing her claim for payment, then the plaintiff was, in effect, a respondent to that claim. The relevant rule⁴ would require him to pay the defendant’s costs up to the date of the offer, following which the defendant would be required to pay the plaintiff’s costs after the date of service of the offer, unless the court considered that another order for costs was appropriate in the circumstances.

[15] The fact that the amount which the defendant is entitled to be paid is less than the amount that she was offered in the plaintiff’s formal offer of 7 May 2008 is a substantial factor in my discretion as to costs. It supports the view that the defendant should pay all or a substantial part of the plaintiff’s costs incurred after May 2008 in relation to the valuation of the defendant’s partnership interest, including the plaintiff’s costs of litigating that issue at the hearing in September 2008. The defendant makes the following submissions in relation to the plaintiff’s offer:

- (a) the context and timing of the offer is important, and it is to be evaluated in the light of the circumstances as they existed at the time that it was made.⁵ The offer was one which valued the partnership interest of the deceased at a time when it was not an issue on the pleadings, and the case changed substantially well after the offer was made;
- (b) the offer was made at a time when the defendant did not have her own expert report addressing the value of the relevant interest and the offer was difficult to judge accordingly;
- (c) the offer of \$180,000 is not greatly above the amount that is agreed as payable, namely \$161,775;
- (d) consistent with the substance of the matter in which the defendant was the claimant, and consistent with the rules in relation to offers made by a defendant, the plaintiff should be required to pay the defendant’s costs up to the date of the offer.

[16] The defendant further submits that the issue of costs should not be determined on the basis that the defendant carried some special onus. The court was asked to reach a conclusion about the value of the partnership interest in lieu of the matter being determined by arbitration and, it is submitted, the defendant did not carry some special onus to prove a particular value. The defendant further submits that neither party advanced a figure that was accepted, although the figure determined by the

⁴ *Uniform Civil Procedure Rules* 1999, r 361.

⁵ *Castro v Hillery* [2003] 1 Qd R 651 at 664.

court is nearer to the plaintiff's position than that of the defendant. The defendant also submits that when the decision is reviewed on an issues basis or "as units of litigation"⁶ it is apparent that both parties had a measure of success. The wages issue had a greater effect on value than any other issue, however, the defendant succeeded in relation to the issue of rent and other issues. The defendant submits that it cannot be said that either party had a dominant success.

- [17] Because of the costs incurred by it in defending partnership issues that were not abandoned until shortly before the hearing, the defendant submits that the plaintiff should pay 80 percent of the defendant's costs, or alternatively, pay the defendant's costs of and incidental to the question of whether or not there was a partnership. Ultimately, the defendant seeks an order for 80 percent of her costs up to 23 September 2009, and that otherwise each party bear their own costs.
- [18] The plaintiff contends that the critical factor for consideration on the issue of costs is that the amount to be paid is less than the plaintiff's formal offer. He acknowledges that he maintained, until shortly before the hearing, that the parties had abandoned the partnership, however, it is submitted that the maintenance of that position did not have the substantial costs consequences submitted by the defendant and that, in any case, the trial itself solely concerned the valuation issue. Put shortly, the plaintiff's submission is that the only reason the hearing occurred was that the defendant declined to accept an offer that exceeded the amount the court determined to be owing. He submits the proper order for costs up to 21 May 2008 must bring into account the fact that major preparation was undertaken on the "valuation issue", an issue upon which the plaintiff ultimately prevailed.
- [19] There are other issues canvassed in the affidavit material concerning costs associated with disclosure and what is described as "the Bunya Road" issue. They are not significant in the determination of an appropriate order for costs.
- [20] The order for costs should reflect the fact that until a week before the hearing the defendant was required to defend the plaintiff's various claims which asserted, amongst other things, that no partnership existed as at the date of the defendant's death with the consequence that the defendant had no entitlement under clause 21 of the Deed of Partnership. In this regard, the defendant has a strong basis to claim all or a substantial part of the costs of defending the plaintiff's claims up to 23 September 2008.
- [21] Certain costs consequences should follow from the defendant's failure to accept the plaintiff's offer dated 7 May 2008. However, I do not consider that the offer justifies an order that the defendant pay the plaintiff's costs of and incidental to the action from the date of service of the offer. At the time the offer was made the valuation issue was not a substantial issue on the pleadings, the defendant did not have her own expert report and, as has been submitted, the amount of the offer does not significantly exceed the amount that was determined.

⁶ *Colburt v Beard* [1992] 2 Qd R 67; *Thiess v TCN Channel 9 Pty Ltd (No. 5)* [1994] 1 Qd R 156.

- [22] The plaintiff, however, did succeed at the hearing on the “wages issue” which was a significant factor in the court’s determination of the value of the business. As against the plaintiff’s success on that issue, account must be taken of the defendant’s success on other issues. Overall, I do not regard the defendant’s failure to accept the offer of \$180,000 as unreasonable.
- [23] It would be possible to make cost orders in relation to issues, however, this often is not an attractive or convenient course.⁷ For instance, it would be possible to make an order for costs in the defendant’s favour to reflect her success on the partnership issue and an order for costs in the plaintiff’s favour to reflect his substantial success on a critical aspect of the valuation issue. However, the assessment of costs on an issues basis is complicated and costly. If possible, the court should avoid making multiple cost orders.
- [24] Ultimately, the defendant succeeded in defending the plaintiff’s claims and succeeded on some issues that were litigated at the hearing. The plaintiff succeeded at the hearing on the wages issue which had a significant impact upon the valuation of the business and, as a result, the net value of the deceased’s interest in the partnership.
- [25] Until 23 September 2008 the defendant was required to litigate her counterclaim in the face of the plaintiff’s persistence in claims that no partnership existed and that, as a consequence, the defendant had no entitlement to payment. Although regard should be had to the plaintiff’s formal offer dated 7 May 2008, that offer should be properly characterised as, in substance, a defendant’s offer to settle. It was an offer to settle in an amount which was only slightly higher than the amount determined by the court in lieu of the arbitration process provided for in the Deed of Partnership. To the extent that it is appropriate to have regard to authorities in which defendants were either wholly successful or partially successful, the defendant was successful in the defence of the plaintiff’s claim.⁸ She succeeded in her amended counterclaim, but in an amount that was substantially less than the amount that she claimed was payable. The amount determined was slightly less than the plaintiff’s offer.
- [26] Having regard to the issues that were litigated, the plaintiff’s claims that were abandoned close to the hearing, the plaintiff’s formal offer, the issues that were litigated at the hearing and the measure of the parties’ success in relation to those issues, each party has had both “a measure of success and a measure of failure”.⁹ The appropriate order is that each party should bear his or her own costs.

⁷ *Thiess v TCN Channel Nine Pty Ltd (No. 5)* [1994] 1 Qd R 156 at 208-210; see also *Todrell Pty Ltd v Finch* [2007] QSC 386 at [11]-[23] in relation to r 684 *Uniform Civil Procedure Rules* 1999, cases in which a plaintiff enjoyed partial success and cases in which a defendant has been completely successful.

⁸ *Todrell Pty Ltd v Finch (supra)* at [18]-[23]; see also *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [11]; *Mobile Innovations Ltd v Vodafone Pacific Ltd* [2003] NSWSC 423 at [4]; *Thiess v TCN Channel 9 Pty Ltd (No. 5) (supra)*.

⁹ *ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No. 2)* [2008] FCA 1184.

[27] The orders of the Court are that:

1. It is declared that, for the purposes of the Deed of Partnership dated 29 October 1965, the net value of the deceased's share in the partnership, as at 1 February 2004, is \$118,952.
2. There be no order as to costs.
3. Exhibit 4 be returned to the plaintiff.
4. There be liberty to apply in relation to the making of consequential orders on the giving of not less than seven days notice.