SUPREME COURT OF QUEENSLAND

CITATION:	*Eustace & Anor v Beystar Pty Ltd & Ors* [2010] QSC 270
PARTIES:	**TIMOTHY STEPHEN EUSTACE** (first applicant) **DAVID ANDREW EUSTACE** (second applicant) v **BEYSTAR PTY LTD** ACN 056 401 999 (first respondent) **MICHAEL ANTONY EUSTACE** (second respondent) **PETER GREGORY EUSTACE** (third respondent)
FILE NO/S:	BS 5124 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2010
JUDGE:	Fryberg J
ORDERS:	**1. Application dismissed.** **2. The applicants pay the second and third respondents' costs for the application to be assessed.**
CATCHWORDS:	Equity – Equitable remedies – Injunctions – Interlocutory injunctions – Relevant considerations – Balance of convenience generally – Application to restrain beneficiary's solicitors from drawing funds for payment of legal expenses – Knowledge of allegation of misappropriation of trust funds Equity – Trusts and trustees – Powers, duties, rights and liabilities of trustees – Miscellaneous other powers, duties and liabilities – Other particular cases – Whether trustees have power to interfere with beneficiary's use of funds distributed

COUNSEL:	A Crowe SC with M Wilson for the applicants No appearance for the first respondent M P Amerena for the second and third respondents
SOLICITORS:	Quinn & Scattini for the applicants No appearance for the first respondent Tobin King Lateef for the second and third respondents

HIS HONOUR: This is an application for an interlocutory injunction and for abridgment of time. The parties to the application are four brothers, two are the applicants, two are the respondents. The applicants seek to restrain their brethren from authorising their solicitors to draw upon a payment of $30,000 made to the solicitors' trust account on account of the respondents' legal costs.

The $30,000 was paid to the solicitors by the two brothers, whom I shall call the respondents, as a result of a payment to them of that amount from the funds of a trust. The trust is an operating business trust of which the four brothers are the only named beneficiaries. It is a discretionary trust as to income and the first respondent, which was unrepresented before me today, is the corporate trustee of the trust.

The money, the $30,000, was paid to the two respondents pursuant to a resolution of directors of the trustee company. The applicants were given notice of the relevant meeting of directors and chose not to attend. No point is taken on behalf of the applicants that there was any procedural deficiency in the calling of the meeting such as to invalidate the meeting as such.

The relevant resolution which was passed at the meeting was that Michael Eustace is authorised to draw a cheque in the sum of $30,000 upon the bank account of the trustee made payable to Peter Eustace on behalf of the second and third respondents for the payment of legal expenses associated with Supreme Court matter 5124 of 2010. The submissions on behalf of the

applicants rely on the line of cases that establish impropriety on the part of directors in applying corporate funds to the private purposes of shareholders or directors, including payment of their lawyers.

Whether or not it is open to a corporation properly to resolve to pay a director's legal fees was raised but I do not think I need to resolve that question. In my judgment the line of cases relied on by the applicants has nothing relevant to do with the situation which is before the Court now.

The relevant trust deed authorises a distribution of funds by the trustee to the four beneficiaries out of income. In fact, there was another resolution authorising an equal distribution to the applicants. They have refused to accept the distribution to them. They seek to prevent the monies paid to the respondents being used and I infer they seek to do it in order to deprive the respondents of legal representation. There is nothing in the trust deed which empowers the trustee to inquire as to the purposes which a beneficiary to whom a distribution is made intends to put distributed funds and I see no reason to think that a trustee would have an inherent right to control or inquire about that matter.

It is true that the words of the resolution refer to the purpose of the funds. In my judgment that is not enough to show that the payment was effective to create a new trust for a purpose with the respondents being the trustees. It is my judgment that the payments were plainly properly to be treated as distributions albeit that the wording of the

resolution is not adequate. I reject the applicants' submission on this point.

That leaves aside the question of distributions only being permitted from income. Neither side is in a position to definitively establish what the accumulated income of the trust was at the time of the payment. The accounts are considerably behind and the evidence does not establish whether there is unappropriated income in the hands of the trustee.

The respondents urge that I should infer from the size of the bank account and other factors, that there is such income. I do not regard that evidence as sufficient to draw that inference. However, the onus is on the applicants to show a good arguable case and in the absence of any evidence to show that the payments were not properly made, I see no reason to draw a conclusion that they were improperly made.
That is particularly so given the fairly informal way in which the accounts of the trust seemed to have been managed.

I have therefore come to the conclusion that the applicants do not demonstrate an arguable case. If I be wrong in that regard, in any event I am not satisfied that the balance of convenience favours the granting of an injunction.

The $30,000 has been paid into the solicitor's trust account. The counsel for the applicants invited his opponents to inform me from the bar table of the provisions of the solicitors' retainer and that has been done. The solicitors are entitled

under the retainer to demand money in advance to be paid into trust and to terminate the retainer if that money is not paid. That clause, therefore, puts the respondents at risk that the solicitors will terminate their retainer and although they have not indicated what their intention would be in that regard, it is, I think, an important factor in weighing the balance of convenience to take into account the risk of termination.

There is another aspect to it. That is, that the amount of the $30,000 held in trust is alleged by the applicants to have been, in effect, misappropriated even if they do not allege there has been any skulduggery. I would not expect that if the solicitors do draw upon that money that the applicants would be unable to recover it should they be right. One would expect that if the applicants are ultimately found to be correct in the assertion that the money should not have been paid to the solicitors, that the solicitors will voluntarily return it, given the notice they have of the claim already made.

In all the circumstances therefore, I do not think this is a case for an injunction. The application is dismissed.

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The successful respondents ask for an order for costs on the indemnity basis. I have taken into account the three factors which Mr Amerena urged in support of that submission. Two of those three I do not think point specifically towards

indemnity costs. The third, that is the motivation of the applicants seems to have been to deprive the respondents of legal representation may point in that direction to some extent but is not, in my judgment, sufficient to warrant indemnity costs.

The applicants resist any order for costs. In my judgment this is an appropriate case to make an order for costs. The application has been unsuccessful. It has resulted in significant expense. It is not a case where a judge in the future will be any better placed than I am today to make an assessment of the appropriateness of a costs order and, indeed, I suspect any judge in the future will be in a worse position than I am presently to make such an order.

The order will, therefore, be that the applicants pay the respondents' costs of the application to be assessed.
