# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Jones v Jones* [2012] QSC 342 |
| PARTIES: | **LAURENCE LLEWELLYN JONES**<br>(Applicant)<br>**v**<br>**TREVOR JOHN JONES (as executor of the Will of George Howard Jones deceased)**<br>(Respondent) |
| FILE NO/S: | S3484 of 2003 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court Rockhampton |
| DELIVERED ON: | 14 November 2012 |
| DELIVERED AT: | Rockhampton |
| HEARING DATE: | 3 October 2012 |
| JUDGE: | McMeekin J |
| ORDERS: | 1. The applicant is given leave to discontinue;<br>2. The applicant pay the costs of the respondent limited to the sum of $185,000;<br>3. The parties have liberty to apply within seven days. |
| CATCHWORDS: | PROCEDURE – COSTS – FAMILY MAINTENANCE AND PROVISION APPLICATION – where family maintenance and provision application withdrawn – whether and on what basis costs should be awarded<br><br>*Succession Act* 1981 (Qld)<br><br>*Uniform Civil Procedure Rules* 1999 (Qld) rr 307, 361, 681, 702<br><br>*Bowyer v Wood* [2007] SASC 327<br><br>*Carey v Robson and Anor; Nicholls v Robson and Anor (No 2)* [2009] NSWSC 1199 at [27]-[37<br><br>*Coombes v Ward (No 2)* [2002] VSC 84<br><br>*Dobb v Hackett* (1993) 10 WAR 532<br><br>*Emanuel Management Pty Ltd (in liquidation) v Foster's* |

*Brewing Group Ltd & Ors* [2003] QSC 299

*Giumelli v Giumelli* (1998) 196 CLR 101

*Hughes v National Trustees Executors & Agency (A/asia) Co Ltd* (1979) 53 ALJR 249

*Johnson v Clancy* [2010] NSWSC 1301

*Jvancich v Kennedy (No 2)* [2004] NSWCA 397

*Kozak v Matthews* [2007] QSC 204

*McCusker v Rutter* [2010] NSWCA 318

*Morse v Morse (No 2)* [2003] TASSC 145

*Nicholls v Hall* [2007] NSWCA 356

*Oshlack v Richmond River Council* [1988] HCA 11; (1998) 193 CLR 72

*Powell v Monteath* [2006] QSC 46

*Re Bodman* [1972] Qd R 281

*Re Klease* [1972] QWN 44

*Re Lack* [1981] Qd R 112

*Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622

*Re Sitch* [2005] VSC 383

*Reddie v Cornock* [2005] NSWSC 187

*Riches v Hogben* [1985] 2 Qd R 292

*Sherborne Estate (No 2): Vanvalen v Neaves* (2005) 65 NSWLR 268

*Singer v Berghouse* (1993) 67 ALJR 708

*Smeaton Hanscomb v Sassoon I Setty, Son & Co (No 2)* [1953] 1 WLR 1481

*Stanley v Phillips* (1966) 40 ALJR 34

*Todrell Pty Ltd v Finch (No. 2)* [2008] 2 Qd R 95

*Underwood v Underwood* [2009] QSC 107

COUNSEL: The applicant in person

Ms R Treston and Ms C Brewer for the respondent

SOLICITORS: The applicant in person

Rees R & Sydney Jones for the respondent

[1] **McMeekin J:** In April 2003 Mr Laurence Jones filed an application for further and better provision out of his late father's estate under Part IV of the *Succession Act* 1981 (Qld). His father had died on 18 July 2002. The trial in the matter was set to commence on 9 October 2012. On 3 October 2012 Mr Jones asked that his application be struck out. At issue is the question of costs.

[2] The dispute is of some considerable significance. The respondent's costs and outlays are estimated to be in the order of $430,000.

[3] The applicant asks that each party be ordered to pay their own costs.

[4] The respondent executor (the applicant's brother) contends that the costs in these proceedings should follow the event[1] and be paid on the indemnity basis from the time of an offer made by the respondent in compliance with Pt 5 of Ch 9 of the *Uniform Civil Procedure Rules* 1999 ("UCPR").

[5] The applicant recently terminated the retainer of his legal advisors and appears unrepresented.

## The Applicant's Case

[6] The applicant's submissions as to why each party should pay their own costs may be summarised, with some license in interpreting his statements and not, I hope, ungenerously to him, as follows:

(a) his claim for further provision was not an unreasonable one;

(b) the imposition of a costs order would be a significant financial detriment to him;

(c) the respondent executor had acted unreasonably in his approach to the negotiations between them;

(d) his lawyers had not served him well and the lawyers on each side had manipulated the proceedings for their benefit;

(e) if he was ordered to pay costs then he would be effectively paying them twice as the executor's costs have so far been met out of the estate, depriving him of his just entitlements under the Will;

(f) substantial debts have been incurred in a partnership subsisting between him and the estate over the last five years or so because of the way the estate has conducted a grazing business;

(g) he has worked on the principal asset of the estate, a grazing property, over the last 10 years since his father's death, but without any reward or return;

(h) The motivation for his father's change in heart (in not leaving the principal asset of the estate to the applicant) came about because of his rejection of the applicant's wife, a rejection based on the grounds of race – she is a Thai.

[7] As to the complaint in (c) I have paraphrased Mr Jones somewhat and he may not have intended the submission to sound like such a complaint, but that is my understanding of the effect of his assertions. If I have understood Mr Jones'

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[1] See r681 *Uniform Civil Procedure Rules* 1999 (Qld)

complaint properly then I reject it. As Ms Treston, who appeared with Ms Brewer for the respondent, submitted the material demonstrates that the executor was attempting to resolve the matter and made a number of offers in an endeavour to do so. He acted properly in doing so. That the offers were decreasing in their value to Mr Jones, as I think is not really disputed, does not mean that they were unreasonable or evidence unreasonable conduct.

[8] The complaint about the legal representatives in (d) may be put to one side. There is not the slightest evidence of any misconduct. The complaints are prompted by an apparent degree of bitterness on the part of the applicant which seems to have its genesis in the circumstance that he rejected an offer of compromise from the executor that was not only not later renewed by him but was followed by ever decreasing offers over the years. The applicant complained about the competence of those then representing him. The rejection may or may not have been on legal advice. Whether it was or not is irrelevant but I observe that the applicant admits to then wanting a larger share of the estate than was offered. The solicitors may have been guilty of no more than seeking to comply with the instructions of their client.

[9] The submission in (e) is wrong. It is common ground that the applicant has not received his entitlements under the Will but the executor has not yet administered the Will as he is presently awaiting the outcome of this application as he is obliged to do.[2] Whatever be Mr Jones' entitlements under the terms of the Will they will remain unaffected by any order for costs. If the applicant has a complaint about the executor's discharge of his duties then he has his remedies and they are not encompassed by these proceedings.

[10] As to the submissions in (f) and (g) while the existence of the debts are not in issue the cause of them is, as is the extent of work performed, and I can make no relevant findings on such contested issues of fact.

[11] The submission in (h) may explain the testator's rather peculiar provision in cl 3(m)(A) of the Will which I will come to but the testator's statements are inadmissible as to their truth: *Hughes v National Trustees Executors & Agency (A/asia) Co Ltd* (1979) 53 ALJR 249 at 254-256.

[12] That leaves the matters in (a) and (b) to consider. Both are potentially relevant.

## Background

[13] The testator died aged 76 years. He had been a grazier. He left a widow and seven surviving children.

[14] The estate is worth in the order of $11million.[3] It consists largely of grazing properties, cattle, and associated plant and equipment.

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2 Section 44(3) *Succession Act* 1981. For some reason no direction was ever sought that the applicant be paid his entitlements under the Will. There seems no reason why such an application would not have been looked on favourably.

3 Ex TJJ1 to the affidavit of Trevor John Jones filed 23 January 2011

[15] The applicant was aged 46 years at the date of the testator's death and is now aged 56 years having been born on 3 July 1956. The applicant left school at age 14 with a grade seven education but with difficulties in reading and writing. He commenced work on his father's property. He was paid a small wage of $40 per week from then until he was aged about 22 years. Thereafter he earned what income he could from the sale of heifers that he had purchased with those small wages. He worked on his father's property for 32 years. He claims that he substantially assisted his father in attaining significant wealth by his efforts. The applicant maintains that he also worked on the properties of his brothers. He rarely left the properties. His affidavits and submission[4] effectively assert that he based his life on the expectation that the principal property of "Malo" would be left to him by the testator.

[16] Under the terms of the Will the testator devised and bequeathed to the applicant his interest in a grazing partnership that he carried on with the applicant which included a half interest in a grazing property known as "Forest Hills" and plant, equipment and livestock on that property.[5] This half interest had a value of about $977,000 as at December 2010 according to an affidavit of the executor, which seems to be the most recent attempt at valuation.[6] The applicant also received a right to payment of the proceeds of the farming operations on "Malo" after payment of certain outgoings for a period of 20 years and thereafter he became entitled to the plant and livestock then existing on "Malo".[7]

[17] The applicant's financial position is not entirely clear but his assets consist chiefly of the interest in the grazing partnership that he conducted with his father mentioned above. The net assets of the partnership and the property Forest Hills would amount to about $1.85M in value. The gift of the income from Malo has produced approximately $688,000 over 10 years, in theory at least. There has been no distribution. One area of dispute relates to the extent that the income is produced by the efforts of the applicant, he claiming that he receives no adequate managerial salary.

[18] The testator had a spouse and six children apart from the applicant. The parties are in dispute as to the relative value of the benefits received under the Will. The applicant contends that the executor and his family have benefited to a significantly greater degree than him. The executor contends the converse is so.

[19] To the extent that the executor points to salary and profits going to the applicant[8] that seems to me no more than the reward for his work over the years, and a fairly modest reward at that.

**The Offer of Compromise**

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4 Treating the applicant's letter to the Court of 2 October 2012 (Ex 2) as a submission. Ms Treston took objection to significant parts of the affidavits filed by the applicant on the costs issue. Generally I accept that the material proffered was objectionable as establishing the facts contended for but admissible to at least alert me to the areas of dispute between the parties.

5 Cl 3 (l)

6 Ex TJJ1 to the affidavit of Trevor John Jones filed 23 January 2011

7 Cl 3 (m)(A)

8 Para 10.4 of the executor's submission of 9 October 2012

[20] The offer that the respondent relies on was made on 19 July 2005. In terms it complied with the provisions of r361 UCPR. The offer made two significant concessions that favoured the applicant. First he was to receive 40% of the net proceeds of sale of the principal property “Malo”. He had no entitlement to the proceeds of sale of “Malo” at all under the Will. This was worth about $1.9 million.[9]

[21] Second, he was to receive the plant and livestock presently on “Malo” that was owned by the estate. His interest was thus accelerated by 17 years and made considerably more certain. I do not have the evidence to ascertain the value of that acceleration, if indeed it is ascertainable. The only evidence of value is at December 2010 where a value of $325,000 is ascribed by the executor to the plant, equipment and livestock on “Malo”.

[22] The offer provided that the applicant was to meet his own costs.

## Principles

[23] Rule 307 UCPR provides:

> **Costs**
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> (1) A party who discontinues or withdraws is liable to pay—
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> (a) the costs of the party to whom the discontinuance or withdrawal relates up to the discontinuance or withdrawal; and
>
> (b) the costs of another party or parties caused by the discontinuance or withdrawal.
>
> (2) If a party discontinues or withdraws with the court’s leave, the court may make the order for costs it considers appropriate.

[24] The applicant appeared and indicated that he wished to discontinue. I will treat that request as an application for leave to discontinue so enlivening the discretion under r 307(2) to make such order as it seems to me appropriate.

[25] Generally speaking a “successful” litigant is entitled to an order of costs and to deprive a successful party of their costs or to require such a party to pay some or all of the costs of the other side is an exceptional measure: *Smeaton Hanscomb v Sassoon I Setty, Son & Co (No 2)* [1953] 1 WLR 1481 at 1484 cited with approval by McHugh J in *Oshlack v Richmond River Council* [1988] HCA 11; (1998) 193 CLR 72 at [66]. This approach is reflected in r 681 UCPR on which the respondent relies.

[26] Reasons of fairness and policy lie behind that usual approach. Costs are not awarded to punish an unsuccessful party but to indemnify the successful party. The relevant point is that if the litigation had not been brought by the unsuccessful party then the successful party would not have incurred the expense which it did.[10]

[27] However that is only generally speaking. There are exceptions, if that is the right word, to the rule. In *Oshlack* the trial judge’s decision to make no order as

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[9] Adopting the valuation of Mr Lyons of “Malo” of $4,750,000 as at November 2003 which is set out in annexure PJL2 at p 40 to his affidavit filed 12 January 2004

[10] *Oshlack* v *Richmond River Council* (1998) 193 CLR 72 per McHugh J at [67]

to costs despite the Council's success was affirmed on appeal to the High Court. Gaudron and Gummow JJ rejected a submission that there was an automatic rule that costs always follow the event:

> "There is no absolute rule with respect to the exercise of the power conferred by a provision such as s 69 of the [Land and Environment] Court Act [(1979) (NSW)] that, in the absence of disentitling conduct, a successful party is to be compensated by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party.
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> If regard be had to the myriad circumstances presenting themselves in the institution and conduct of litigation, and to the varied nature of litigation, particularly in the equity jurisdiction, it will be seen that there is nothing remarkable in the above propositions."[11]

[28] This is a family provision application. It has long been accepted that unsuccessful parties in family provision applications are not necessarily subjected to costs orders. Gaudron J's judgment in *Singer v Berghouse* is usually cited:

> "In most cases, costs follow the event in the sense that, save in special or extraordinary circumstances, costs are awarded in favour of the successful party and against the unsuccessful one. ... Even so, decisions [in family provision matters] involve a discretionary judgment of a very broad kind made by reference to the circumstances of the particular case and not by reference to a rule or rules which direct a decision one way or the other.
>
> Family provision cases stand apart from cases in which costs follow the event ... costs in family provision cases generally depend on the **overall justice of the case**. It is not uncommon, in the case of unsuccessful applications, for no order to be made as to costs, **particularly if it would have a detrimental effect on the applicant's financial position**. And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate." [12] (emphasis added)

[29] The significant point that Gaudron J's judgment stands for is that in family provision applications it is the "overall justice of the case" that is the determining factor. An order that costs follow the event can of course be consistent with the overall justice of the case: *Jvancich v Kennedy (No 2)* [2004] NSWCA 397 per Giles JA.

[30] The reasons that have been identified to justify that approach have included "a perceived desirability of minimising post-litigation conflict in family disputes, the availability in some cases of a significant fund the use of which could alleviate hardship on a losing party, and the circumstance that in some cases the

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11 (1998) 193 CLR 72 at 88 [40]–[41] (footnote omitted). Cited with approval in *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 at [26] per Gleeson CJ, Gummow, Hayne and Crennan JJ

12 (1993) 67 ALJR 708 at 709; [1993] HCA 35

decision was a marginal discretionary decision on which reasonable minds could differ" (*Nicholls v Hall* [2007] NSWCA 356 per Mason P, Hodgson and McColl JJA at [57]). That last point ie the difficulty in determining the likely outcome of the dispute, was mentioned by Gaudron J in *Singer* and has been often stressed eg see *Sherborne Estate (No 2): Vanvalen v Neaves* (2005) 65 NSWLR 268 per Palmer J.

[31] There has been some discussion as to whether that approach to unsuccessful applicants continues to be followed. In Victoria Gillard J thought that "[t]he old rule which, as I say, was a common practise not to award costs against the plaintiff who failed, can no longer be accepted as a general proposition.": *Re Sitch* [2005] VSC 383 at [4].

[32] While the Court in *Nicholls* did not decide the point it was informed that the Equity Division of the Supreme Court of NSW no longer followed that former practise. Palmer J thought that former practise was "thoroughly discredited": *Carey v Robson and Anor; Nicholls v Robson and Anor (No 2)* [2009] NSWSC 1199. His Honour's comment was made in the context of the rules in New South Wales which have no direct counterpart in Queensland.

[33] The later decision of *McCusker v Rutter* [2010] NSWCA 318 suggests that the reticence to order costs against an unsuccessful applicant remains. In commenting on the order made below in that case that there be no order as to costs Young JA observed[13] "the authorities show that it is relatively rare that a court should make such an order"[14] but that "[a] series of decisions at first instance show that there is some more flexibility where there has been an unsuccessful claim made under the *Family Provision Act*".[15] After citing Gaudron J's judgment in *Singer* Young JA said:

> "[34] Examples of situations where courts have thought no order should be made against an unsuccessful plaintiff are afforded by *Sherborne Estate (No 2): Vanvalen v Neaves* (2005) 65 NSWLR 268 per Palmer J and *Moussa v Moussa* [2006] NSWSC 509 per Barrett J. Whilst it is clearer in a case where if an order for costs is made against an unsuccessful plaintiff he or she will instantly become impecunious and so may be able to make a fresh application under the Act so that it is counter-productive to make an order as to costs against such a plaintiff, what Gaudron J said in *Singer* shows that it is not only in such cases that it may be inappropriate to make an order for costs against an unsuccessful plaintiff under the Act."

[34] In *Bowyer v Wood* [2007] SASC 327 after an extensive review of the authorities Debelle J concluded[16] that the "usual order" will be that there is no order as to costs where the application is unsuccessful and while the point was left undecided "the cases also suggest that the court may in its discretion order an unsuccessful applicant to pay costs where the claim was frivolous or vexatious or made with no reasonable prospects of success or where the

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13 With Campbell JA and Handley AJA agreeing with the exposition of principles but disagreeing as to the orders

14 At [29]

15 At [33]

16 At [68] Nyland and Anderson JJ agreeing

applicant has been guilty of some improper conduct in the course of the proceedings".

[35] The approach spoken of by Gaudron J in *Singer* has been followed not only in South Australia, as Debelle J's judgment in *Bowyer* recognised, but in Tasmania (*Morse v Morse (No 2)* [2003] TASSC 145 per Slicer J) and Queensland (*Re Bodman* [1972] Qd R 281 per Hoare J; *Re Klease* [1972] Q.W.N. 44, *Re Lack* [1981] Qd R 112, *Kozak v Matthews* [2007] QSC 204 per Helman J noting the reservations expressed by Mackenzie J in *Powell v Monteath* [2006] QSC 46).

[36] The approach in New South Wales has been governed by the rules and legislative provisions there in place. Debelle J's analysis in *Bowyer*, albeit that it is obiter dicta, reflects my understanding of the approach in Queensland over a long period. The only qualification that I would place on that approach is that there is now more weight given to the expectation that parties will endeavour to resolve disputes exemplified by the philosophy in rule 5 UCPR and the requirement in the practice direction governing family provision applications[17] that the matter be subject to alternative dispute resolution. See *Powell v Monteath* (supra). Due regard, of course, must be had to all the competing factors that touch on the "overall justice of the case".

[37] Those factors that might justify a more sympathetic approach to an unsuccessful applicant include how close one gets to the borderline of a successful application, the nature of the relationship between the testator and the applicant, the basis on which the claim is brought, and the potentially crippling effect of any costs orders particularly where the orders will have relatively lesser effect on the estate: *Sherborne Estate* (supra) per Palmer J; *Coombes v Ward (No 2)* [2002] VSC 84; *Reddie v Cornock* [2005] NSWSC 187. In my view each of those factors are relevant here.

[38] Here there is the additional factor that an offer of settlement was made. The significance of the refusal of a reasonable offer was well explained in *Dobb v Hacket* (1993) 10 WAR 532 by Murray J (at 540):

> "The courts should preserve in the minds of litigants, the conscious consideration that their behaviour may place the matter at risk as to costs if they refuse reasonable offers of settlement. The court should be careful not to foster the proposition that obstinacy and unreasonableness will not be punished by orders as to costs."

[39] To similar effect is the decision of Jones J in *Underwood v Underwood* [2009] QSC 107:

> "The rejection of a reasonable offer of settlement is now more commonly seen as a basis for either denying a successful applicant some part of his or her costs or indeed, ordering payment to the estate of part of its costs."[18]

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17 Practice Direction No 8 of 2001

18 At [34]

[40] In that case Jones J was influenced by an applicant's "lack of appreciation of the extent of her true entitlement" and "reckless indifference to the rights of others" in requiring that the applicant pay costs, she having rejected an offer of compromise more favourable than his Honour's decision.

[41] It is relevant to note that the offer here does not in fact meet the conditions of r361 which regulates offers to settle made by defendants. That is so because the rule proceeds on the premise of partial success by the plaintiff. That is evident from the terms of r361 which provides that if a defendant makes an offer to settle which is not accepted by the plaintiff **who then obtains a judgment no more favourable than the offer**, then the defendant is entitled to its costs from the date of the offer on the indemnity basis. Here the applicant has not obtained a judgment. Hence the entitlement to indemnity costs is not the default position provided for under the rule.

[42] Helman J thought that such offers were best treated as Calderbank offers and so the offer is relevant but not decisive - *Kozak v Matthews* [2007] QSC 204. I intend to follow that approach. The relevant issue in this form of litigation would seem to be whether the rejection of the offer was unreasonable.[19]

[43] The lack of any curial determination of the merits is obviously a complicating feature of the case. McHugh J considered the principles applicable in this situation in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin*[20]:

> "In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.
>
> In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action by which settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.
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> …
>
> If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became

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19 While the dispute before him was unrelated to family provision applications see the discussion by Chesterman J in *Emanuel Management Pty Ltd (In Liq) v Foster's Brewing Group Pty Ltd* [2003] QSC 299 at [37]-[39].

20 (1997) 186 CLR 622 at pp624-625

> futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases."

[44] A comprehensive summary of the considerations that should influence the exercise of the discretion in a case where one party withdraws can be found in *Johnson v Clancy* [2010] NSWSC 1301. Hallen AsJ was there dealing with r 12.1 and r 42.19 of the *Uniform Civil Procedure Rules* 2005 of New South Wales which included a provision that "unless the Court otherwise orders" a plaintiff will be required to pay the defendant's costs in the event of a discontinuance. His Honour stated at para 21:

> "The following principles may be regarded as relevant in determining who is to bear the burden of costs in a case where the proceedings are discontinued before a final hearing:
>
> (a) Costs discretions are truly discretionary: see *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 84 and there are no absolute rules; the discretion must be exercised "judicially".
>
> (b) The purpose of a costs order is to compensate, or indemnify, the person in whose favour it is made, not to punish the person against whom it is made: *Ohn v Walton* (1995) 36 NSWLR 77 at 79 per Gleeson CJ.
>
> (c) Rule 42.19 of the UCPR does not give rise to a presumption that costs will be ordered against the plaintiff: *Fordyce v Fordham* [2006] NSWCA 274 ; (2006) 67 NSWLR 497; *Foukkare v Angreb Pty Limited* [2006] NSWCA 335 at [65]; *Pentroth Pty Ltd v Kirschild Pty Ltd* (2006) 96 SASR 129; *Australiawide Airlines Ltd v Aspirion Pty Ltd* [2006] NSWCA 365 at [53]; *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWCA 32. However, the rule does create a starting point by requiring "*… the plaintiff must pay such of the defendant's costs …*" unless that outcome is displaced by a discretionary decision ("*unless the court orders otherwise*").
>
> (d) The rule makes it clear that a court may order otherwise; but the burden is on the party who seeks to persuade the court that some other consequence should follow. Generally, there must be some proper justification, sound positive ground, or a good reason, for departing from the ordinary position: *Fordyce v Fordham* at [2] per Santow JA; *Australiawide* at [54] per Bryson JA; circumstances in which it has been held appropriate to depart from the ordinary position include where the proceedings have been rendered unnecessary by circumstances beyond the plaintiff's control; where the plaintiff achieved practical success in the proceedings, or where costs have been significantly increased by the unreasonable conduct of the defendant. If there is to be a departure it should be done in a particularized, and principled way.
>
> (e) The plaintiff should be the moving party on an application for an alternative costs order: *Bitannia* at [70] per Basten JA. If facts are to be

relied upon to found the court making a different order, the plaintiff will bear the onus of proving the relevant facts.

(f) Where the proceedings are discontinued prior to any hearing on the merits, "the Court cannot try a hypothetical action between the parties" to determine the question of costs: *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194 at 201; *Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624; *Metro Chatswood Pty Ltd v CRI Chatswood Pty Ltd* [2007] NSWSC 1120 at [35]. At the time of discontinuance, usually it will be impracticable to assess the eventual prospects of success in the action.

(g) It may be necessary to analyze the whole of the proceedings to determine the appropriate costs order: *Fordyce* at [67] per McColl JA. A relevant consideration is whether the plaintiff acted reasonably in commencing the proceedings and whether the defendant acted reasonably in defending them: *Australian Securities Commission v Aust-Home Investments Ltd* at 201 (cited with approval in *Foukkare*); all the relevant circumstances, and not just the fact of discontinuance, should be considered; thus, the reasons for the discontinuance can bear heavily on the exercise of the discretion as to costs: *McClure v City of Stirling (No 3)* [2009] WASC 247 [4]; *O'Neill v Mann* [2000] FCA 1680; *Beeson v Carrello (as liquidator of Gecko Management Pty Ltd (in liq))* [2010] WASCA 155 at [13].

(h) In a particular case, it might be appropriate for the Court, in its discretion, to consider the conduct of the defendant prior to the commencement of the proceedings where such conduct may have precipitated the litigation: *Foukkare* at [66] per Beazley JA;

(i) It is also important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event, or settlement, so removes, or modifies, the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the court's discretion otherwise than by an award of costs by the successful party. It is the latter type of case that usually creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs: *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548 at 553; cited with approval in *Edwards Madigan Torzillo Briggs Pty Ltd v Stack* [2003] NSWCA 302 per Davies AJA (with whom Mason P and Meagher JA agreed) at [5].

(j) The distinction between the two categories referred to above is often helpful in exercising the costs discretion, notwithstanding that neither category can be precisely defined, the boundary between them is unclear and other factors may be relevant: *Bitannia* per Basten JA at [79]–[81]; *Perre v New South Wales* [2009] NSWLEC 51 at [49].

(k) Where the proceedings are discontinued after interlocutory relief has been granted, the court may take into account the fact that that interlocutory relief has been granted: *Australian Securities Commission v Aust-Home Investments Ltd* at 201.

(l) There is a risk that the subjective motivations of the plaintiff in discontinuing may be put forward as a basis for some other order. Except to the extent that such views may have been put before the defendant, for example as a basis for settlement, and are established as such on the evidence, subjective considerations of one party will generally be immaterial, so that the discretion will be exercised on the basis of the objective circumstances established on the evidence: *Bitannia* at [81].

(m) The court is required to make such order as it thinks just in the particular circumstances of the case."

[45] I observe that the Queensland rule is in different terms to that considered by Hallen AsJ – there is no automatic starting point laid down although obviously r 307(1) does provide some guide. The rule is silent as to the onus.

[46] With those principles in mind I turn to the arguments in this case.

**Discussion**

[47] The difficulty in the case is that the executor argues from the assumption that the late discontinuance by the applicant demonstrates a lack of merit in the bringing of the proceedings, but I am by no means persuaded of that.

[48] There has been no curial determination here of the matters in issue. That circumstance presents some difficulty in judging the reasonableness of the conduct of the applicant. I am considerably hampered too by the fact that the applicant was incapable of advancing arguments in his own cause in any logical or relevant way.

[49] McHugh J's approach in *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* was that where the court could not determine the merits of the application it needed to be shown that one party had acted "so unreasonably" as to justify an order for costs being made in favour of the other party.

[50] Despite the withdrawal of the application what does seem clear is that it was not necessarily without merit and that the applicant has not necessarily behaved "so unreasonably" in commencing the suit.

[51] Ms Treston submitted that the applicant's case was doomed to fail pointing out the significant benefits that he received under the Will, his not inconsiderable wealth, the competing claims by the numerous other beneficiaries, and the fact that he is an able adult son of the testator – see *Re Sinnott* [1948] VLR 279 at 280 per Fullagar J and his oft repeated dictum that some "special need" or "special claim" had to be shown by an adult son.

[52] There are a number of difficulties with that submission. One principal difficulty is that the executor and beneficiaries, who I understand were all *sui juris* at the

relevant time, plainly thought that there was some considerable merit to the application. It is common ground that the executor made a number of offers to settle. One apparently involved an offer of 55% of the net proceeds of sale of Malo – an offer worth $2.7 million if the valuation as at November 2003 applies. I do not know what other conditions, if any, applied to that offer. The formal offer that the executor has put before me was plainly worth at least $2 million. These offers were not commercial offers designed to proffer the likely and inevitable costs that would be incurred following a successful defence. They recognise substantial merit in the claim. At the very least they encouraged the applicant to go on.

[53] Ms Treston pointed out that the beneficiaries affected by the proposed settlement in a sense achieved gains as well from the offer by reason of the acceleration of their interest. That may well be so but it does not detract from the point that I have made.

[54] I can well understand why a responsible executor (and the beneficiaries affected) would have taken that approach to the litigation. If the applicant made good his claim that he had assisted the testator to accumulate substantial wealth with his work over 32 years with little reward and that he had based his life on the expectation that the property "Malo" would be devised to him upon the testator's death, an expectation engendered by the testator's promises, then there was every prospect that the applicant would be successful and perhaps to a greater degree than a 40% interest in "Malo". Prima facie it would be inequitable not to recognise his claim: see *Riches v Hogben* [1985] 2 Qd R 292 at 300 per McPherson J; *Giumelli v Giumelli* (1998) 196 CLR 101; *Hughes v National Trustees Executors & Agency Co (A/asia) Ltd* (1979) 53 ALJR 249.

[55] That there are competing beneficiaries is of course relevant but those favoured to receive the proceeds of the sale of the property "Malo" 20 years after death were the testator's grandchildren and it is difficult to conceive how they could have anything like the moral claim on the testator that the applicant asserts.

[56] Nor am I particularly persuaded by the arguments that the applicant was well off or well provided for in the Will. The applicant is a grazier, a calling that he has followed all his life. From his affidavits and my brief dealings with him it seems unlikely that he would be suited to any other calling by his training or experience. Substantial capital costs are involved in establishing and conducting a successful grazing business. The valuations that have been advanced show that the approximate $1 million left to the applicant under the Will – the half of his partnership with his father which he has in any case worked to create over a long period - will not enable him to obtain a property anything like the one that he has worked all his life and which he says that he expected one day to receive as his reward, even bringing into account his own capital.

[57] I am not in a position to make any findings. But there is at least the possibility that the beneficiaries of the estate might well be some millions of dollars better off by the applicant abandoning his suit. That abandonment does not seem to have been brought about by any change of heart by the applicant as to the merits of his complaint that he was not fairly dealt with under the Will. The

applicant speaks of a wish to continue to negotiate with his brother without the intervention of lawyers. That is, I suspect, a forlorn hope. But I had the strong impression that the abandonment of the suit comes about because of the applicant's considerable disillusionment with his legal advisors whom he perceives to have failed or abandoned him, rather than any concession that the Will was fair in its treatment of him.

[58] In these circumstances I am quite unable to conclude that the applicant has behaved unreasonably or improperly in some way in bringing the suit. That is not to say that he would have succeeded - I am in no position to determine the merits of the matter and that is not my intention or function.

[59] But that absence of any determination has two effects. One is that it is not clear, given the competing affidavits, that the claim was not without merit. A second is that the formal offer does not have the effect that the respondent contends for. To qualify for indemnity costs the respondent must show more than the rejection of the offer. Chesterman J has suggested that to justify an order for costs on the indemnity basis it needs to be shown that the party paying costs has behaved irresponsibly: *Emanuel Management Pty Ltd (in liquidation) v Foster's Brewing Group Ltd & Ors* [2003] QSC 299; *Todrell Pty Ltd v Finch (No. 2)* [2008] 2 Qd R 95. Here the test might be that the rejection of the offer was sufficiently unreasonable to require that the executor be indemnified.

[60] Because there has been no determination of the merits of the case I cannot so conclude. As well the offer required the applicant to meet his own costs - if he had succeeded in his claim to the extent that the offer envisaged it would be a peculiar result for the applicant to be deprived of his costs. Alternatively one could say the offer was an "all up" offer. But the effect is the same. The executor must show that its rejection was unreasonable and to do that must demonstrate the merits of their position. In all the circumstances I am not persuaded that the rejection of the formal offer was necessarily unreasonable.

[61] Nor am I persuaded that there was the element of "reckless indifference" to the rights of others that Jones J thought justified the orders he made in *Underwood.*

[62] A further factor here is that the costs order would have a significant effect on the applicant – he informed me that he has no money available and has the responsibility of caring for a young child.

[63] That concern is heightened by the amount of costs involved. The applicant must meet his own costs on any view and he told me they were in the order of $185,000. It is surprising that the parties could spend over $600,000 on the proceedings and still not have had a trial. I am in no position to judge the appropriateness of the costs incurred but I draw attention to the remarks of Palmer J in *Carey v Robson and Anor; Nicholls v Robson and Anor (No 2)* [2009] NSWSC 1199 at [27]-[37] and his emphasis on the need for "focus and economy" in the presentation of material.

[64] It is clear that an imposition of a costs order would have a seriously adverse effect on the applicant's financial position. Given the substantial value of the

estate it is in a much better position to absorb the costs, significant though they are.

[65] One factor mentioned by Hallett AsJ as potentially relevant in [44](h) above is whether the defendant has promoted the litigation. That applies here. The executor is not at fault but I think it can be said that the litigation has been promoted by the rather peculiar provisions in the Will dealing with the applicant's entitlements. They are, at least in my experience, well out of the ordinary. The applicant is effectively tied to the property "Malo" for 20 years. He either manages it himself or has a third party do so. There is the obvious potential for disputes with the executor as to a suitable salary whoever manages the property. More significantly, if the applicant managed the property, as he has done, that commitment limits his own ability to develop some other property and a property that might provide better prospects for his security. His ability to provide for the long term interests of his family is potentially seriously affected. If he lets another manage the property then there is the potential for significant disputes as to the proper management. As well the applicant's interests might well conflict with those who take when his interest in the income expires. Effectively the Will placed the applicant in a 20 year long relationship that one could reasonably anticipate would not be to his liking at all. That is the testator's doing.

[66] Far from acting unreasonably in bringing suit I am not at all surprised that the applicant did so.

[67] There are obviously factors favouring the respondent. There has been no change in circumstances that apparently justify the discontinuance. This is more a case of the applicant leaving the field with the estate the winner. The subjective reasons for discontinuing do not merit any great sympathy. The offer made years ago is probably, and perhaps almost certainly, a better result for the applicant than is the withdrawal now. And the estate is significantly out of pocket for expenses that it would not otherwise have incurred had the proceedings not been brought.

[68] Despite these factors I am concerned that to award costs against the applicant would not meet the overall justice of the case.

[69] In the end result it is the approach that the cases suggest applies to unsuccessful applicants in this form of litigation in close cases, particularly where the impact of an order for costs is likely to be significant, that I think is crucial.

[70] Applying those principles that I have earlier identified it seems to me that the onus lay on the executor to show that the estate's costs should be met. In my view that onus has not been discharged. The principal argument advanced was that the discontinuance demonstrated the unreasonableness of bringing and maintaining the suit. In the circumstances pertaining here I do not accept that is so.

[71] Ms Treston has referred me to the decision of Young CJ in Eq, as his Honour then was, in *Singh v Singh* [2008] NSWSC 715 but that decision involved somewhat different considerations. There Young CJ held that while it was

reasonable to commence the litigation a point was reached well before the hearing where a reasonable litigant would have appreciated the true merits of the case and discontinued. His costs would then have been met by the estate. While that approach has some relevance here it is still not clear to me that this litigation was without merit.

[72] My mind has fluctuated as to the order that best meets the justice of the case. Initially I was attracted to the position that there be no order as to costs. However the applicant's decision to discontinue so late in the process must have some impact. For present purposes I will assume that it indicates that at some point in time, acting reasonably, the proceedings should have been discontinued. Up to then the estate might well have been liable to pay the applicant's costs. Thereafter the continued incurring of costs was due to the applicant's persistence in the suit when he should not have. While it is somewhat arbitrary I propose to determine that point as being reflected by an order that the applicant be responsible for the estate's costs to the extent of his own.

[73] In all the circumstances I consider the appropriate order should be that the applicant pay the costs of the estate limited to the sum of $185,000.

[74] This determination makes it unnecessary for me to decide the question of whether I should certify for two counsel as Ms Treston requested. Had I needed to do so then I would not have acceded to the request. In my experience it is relatively rare that two counsel are required in family provision applications. While the estate was substantial and the provisions of the Will not straight forward, the issues for determination do not seem to me to have been so complex that the extra costs were "necessary or proper for the attainment of justice".[21]

[75] I will give the parties liberty to apply within seven days in case they wish to be heard on the formal orders that ought to be made in the light of these reasons.

[76] Subject to the receipt of any further submission the orders will be:

(a) the applicant is given leave to discontinue;

(b) the applicant pay the costs of the respondent limited to the sum of $185,000;

(c) the parties have liberty to apply within seven days.

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[21] See r 702(2) UCPR and *Stanley v Phillips* (1966) 40 ALJR 34 at 36-37 per Barwick CJ