SUPREME COURT OF QUEENSLAND

CITATION:	*Cowley v Macwood Pty Ltd & Ors* (No. 2) [2015] QSC 344
PARTIES:	**GRAEME CHARLES COWLEY** (applicant) **v** **MACWOOD PTY LTD T/AS HOT STUFF PROPERTY PTY LTD AS/TRUSTEE FRANK ROBERT COWLEY, JOHN WELLESLEY COWLEY, GARY ROY COWLEY & JENELLE MAURENE COOKE** (respondent)
FILE NO/S:	S53/2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	4 December 2015
DELIVERED AT:	Rockhampton
HEARING DATE:	On the papers
JUDGE:	McMeekin J
ORDERS:	**1. The applicant's and the respondents' costs of and incidental to the application filed 9 October 2015 be paid on the standard basis from the proceeds of sale of the trust properties;** **2. The costs incurred by the trustees John Murphy and Jennifer Story of and incidental to the application filed 9 October 2015 be paid on the standard basis from the proceeds of sale of the trust properties but limited to those costs incurred after 20 October 2015.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – REMUNERATION – ALLOWANCE BY THE COURT – PRINCIPLES AND GROUNDS FOR GRANT AND REFUSAL – where trustees usually entitled to have costs paid from the trust fund – where there was no reasonable explanation for the trustees delay in selling the trust property – whether the delay of the trustees was so unreasonable as to deny their costs or require them to pay the costs of the other parties – whether the costs incurred by the trustee in responding to the application can be seen to be reasonably incurred

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – whether costs to be assessed on the indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 700

Adsett v Berlouis & Ors [1992] 109 ALR 100
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225
Coral Vista Pty Ltd v Halkeas [2010] QSC 449
Di Carlo v Dubois [2002] QCA 225
In the Will of Thomas Field; *The Ballarat Trustees, Executors and Agency Co Ltd v Field & Ors* [1931] VLR 37
Quinn Villages Pty Ltd v Mulherin [2006] QCA 500
Northey v Juul [2014] NSWSC 464

COUNSEL:	M Hodge for the applicant
	S Naylor sol for the respondent
	G Smart sol for the statutory trustee
SOLICITORS:	SB Wright, Wright & Condie for the applicant
	Macrossan & Amiet for the respondent
	SR Wallace & Wallace for the statutory trustee

[1] **MCMEEKIN J:** On 21 October 2015 I published draft reasons responding to an application for removal of the statutory trustees.[1] Subsequently the parties reached an agreement as to the form of the orders that were consistent with those reasons. On 4 November 2015, I made orders in accordance with the draft provided. Effectively I left the trustees in place and directed a sale of the subject properties. There remained the issue of costs in respect of which I invited submissions.

[2] I have now received submissions from the applicant, respondent and the statutory trustees each seeking different outcomes.

[3] The applicant contends that the applicant and the respondent are entitled to be paid their respective costs on an indemnity basis from the trust fund. The applicant argues that the usual indemnity that trustees enjoy should be limited here. He submits that the trustees' costs should be met from the trust estate only from 20 October 2015 on, that is from the day of the hearing. It is submitted that this approach would strike a balance between the usual protection afforded trustees and recognition that it was the trustee's delay in fulfilling their duty to exercise the power of sale that brought about the application.

[4] The respondents argue that the applicant should pay the respondents' costs of the application on the standard basis or alternatively an appropriate proportion of the respondent's costs. The respondent points to its success on the application – that is that the trustees were not removed, the lack of communication by the applicant to

the respondent between February and the making of the application in October and the refusal by the applicant to resolve the dispute prior to the hearing. The respondents also point out that the orders sought by the applicant essentially seek to penalise the respondents by making them pay a substantial portion of the applicant's own costs given the proportional beneficial ownership of the trust property.[2] The respondents suggest that my findings as to the inexplicable delay in the marketing and selling of the property from 1 April 2015[3] enliven the jurisdiction to deprive the trustees of their costs.

[5] The statutory trustees propose that each party's costs be paid from the trust on an indemnity basis. They argue that their conduct was, at worst, to mistake the urgency at which they should have progressed the matter and therefore cannot not meet the threshold required to deny the awarding of their costs.

Indemnity Costs

[6] The principles applicable to the awarding of costs on the indemnity basis have been discussed in cases such as *Di Carlo v Dubois*[4]; *Quinn Villages Pty Ltd v Mulherin*[5]; and *Colgate-Palmolive Company v Cussons Pty Ltd.*[6] Effectively special or unusual circumstances and some evidence of unreasonable conduct by the party in the bringing or the defending of an action is required. Such an order should not be seen as too readily available.

[7] I am satisfied in this instance that there is no basis for awarding costs on an indemnity basis against either of the parties or the statutory trustees nor that the costs be paid from the trust fund on an indemnity basis. As stated in my initial reasons, Mr Cowley was justified in bringing this application given the significant delays that had occurred. The respondents did not act unreasonably in responding to it. I have found that delay in selling the trust property by the statutory trustees has not been satisfactorily explained. However, there is no basis for a finding that they acted dishonestly or with the degree of unreasonableness discussed in *Colgate-Palmolive Company* in taking part in the hearing of the application, so as to require them to personally pay the costs of the other parties on the indemnity basis.

The Statutory Trustees

[8] In accordance with Rule 700 of the *Uniform Civil Procedure Rules 1999* (Qld), ("UCPR"), the statutory trustees would usually be entitled to have their costs paid by the trust. Rule 700 provides:

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1 *Cowley v Macwood Pty Ltd & Ors* [2015] QSC 343.

2 The respondents have an 80% interest in the Seaforth property and a 90% interest in the Halliday Bay property. The orders proposed by the applicant would require the respondents to meet 85% of the applicant's costs subject to a concession that the applicant meet 15% of the respondents' costs.

3 *Cowley v Macwood Pty Ltd & Ors* [2015] QSC 343, [22].

4 [2002] QCA 225.

5 [2006] QCA 500.

6 (1993) 46 FCR 225.

1) This rule applies to a party who sues or is sued as trustee.

2) Unless the court orders otherwise, the party is entitled to have costs of the proceeding that are not paid by someone else, paid out of the fund held by the trustee.

[9] Rule 700 reflects the ordinary position that the trustee is entitled to be indemnified from the trust where its costs are properly incurred in the administration of the trust.[7] However, the discretion remains to refuse a costs award both under r 700(2) and under the court's inherent jurisdiction. The test was enunciated in *In the Will of Thomas Field*; *The Ballarat Trustees, Executors and Agency Co Ltd v Field & Ors* [1931] VLR 37 at 52 by Macfarlan J as follows:

> "…before an executor or trustee can be deprived of those costs which he gets from the estate in the nature of an indemnity, it must be shown, and shown affirmatively, that he has lost the right by reason of inequitable conduct or violation or culpable neglect of duty – I do not confine myself to any particular formula – but wrongful conduct which a Court of Equity would consider sufficient to deprive him of the right to indemnity in respect of any money he expended on behalf of the estate, and it must be shown, not merely that he has been guilty of such conduct, but that that conduct either caused the incurring of the expenditure in question – in this case costs – or materially increased it."

[10] More modern authority suggests that the trustee's conduct need not amount to "inequitable conduct or violation or culpable neglect of duty" before being deprived of costs but merely unreasonable conduct might suffice. In *Adsett v Berlouis & Ors* [1992] 109 ALR 100 the Full Court of the Federal Court in a case involving a trustee in bankruptcy, expressed the test in this way (at 109):

> "The critical question, in our view, is whether or not the conduct which gave rise to the burden of costs – whether the costs ordered to be paid or costs incurred by the Trustee in prosecution of the litigation – was proper in the sense explained in *Beddoe*; that is, whether the expenditure was reasonably as well as honestly incurred…It is nether possible nor desirable to attempt to identify all of the situations in which cost expenditure would not be regarded as proper. Nor is it profitable to attempt a detailed rule covering all circumstances. But we issue caution that the language in some authorities, many of which relate to gratuitous Trustees, may mislead. Sometimes that language appears to require a degree of personal misconduct or wilful recklessness, as opposed to mere negligence, mistake or breach of the a Trustee's duty as set out above. We do not think that such a limitation can stand with cases such as *Re Beddoe*, which in our opinion correctly express the law. If the expense is one prudently and

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7 *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [40]-[41] per Margaret Wilson J.

> reasonably incurred in the discharge the trustee's proper duties, there is a right under the general law to be indemnified out of the trust estate. If the expense is not so incurred or is unreasonable or unnecessary, there is no right under the general law to indemnity because the expense is not "properly incurred". The position is no different with a Trustee in bankruptcy. Where the line is drawn, between an expense properly incurred and one not properly incurred, is to be determined on the facts of the particular case in the exercise of judgment."[8]

[11] Slattery J in *Northey v Juul* [2014] NSWSC 464 provided further clarification of the relevant principle (at [96]):

> "The exception to a trustee's rights of reimbursement for the trustee's unreasonable conduct is clear. If a trustee is mistaken or makes a claim against the estate not allowable in law, then the trustee should nevertheless have costs out of the estate that are incurred without impropriety; that is (i) if the trustee has resisted a claim but has been found guilty of breach of trust, the trustee's costs of resisting the action should be paid by the trustee as the penalty for breach of trust; and (ii) if the trustee is found to have been dishonest or to have behaved unreasonably, then the trustee may be deprived of the trustee's costs: *In Re Jones; Christmas v Jones* [1897] 2 Ch 190 at 197, 198 per Kekewich J. A trustee will be indemnified out of the trust estate in respect of costs, charges and expenses properly incurred for the benefit of the trust; and "properly" in this context means **reasonably** as well as honestly incurred, so that whilst trustees ought not be visited with personal loss on account of mere errors in judgment, which fall short of negligence or **unreasonableness**, mere bona fides is not the test: see *Mead v Watson (as liquidator for Hypec Electronics)* [2005] NSWCA 133; (2005) 23 ACLC 718 and *Bovaird v Frost* [2009] NSWSC 917 at [33]."[9]

[12] So the critical question is whether the statutory trustees' conduct in the period between 1 April 2015 and the bringing of this application in October 2015 constitutes unreasonable behaviour such that the trustees ought to be deprived of their costs, or some part of their costs and whether the costs incurred in responding to the application can be seen to be reasonably incurred.

Conclusions

[13] On my findings at least from 1 April 2015 until the bringing of this application the trustees failed to act consistently with their duties. It is clear that there would have been no need for this application if they had taken steps to market and sell the trust properties after 1 April 2015. Their original appointment had been brought about by

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8 Followed in *Meade v Watson as Liquidator for Highpec Electronics* [2005] NSWCA 133; *Macedonia Orthodox Church of Australia and New Zealand v The Macedonia Orthodox Community Church* [2007] NSWCA 287.

9 My emphasis.

the applicant's desire to sell the properties. By April 2015 the need for urgent attention to their duties was plain enough – the applicant had been agitating for years to have the properties sold. The trustees also failed to communicate an explanation for the delay to the applicant and when an explanation was finally provided it was not satisfactory.[10] The inexplicability of the trustees' conduct in causing this delay is only highlighted by the fact that they hastily commenced making enquiries as to the marketing and sale of the property as soon as the applicant gave notice of these proceedings.[11]

[14] I am therefore satisfied that the trustees have acted improperly in the sense that their dilatoriness from 1 April 2015 was unreasonable albeit accepting that it did not involve dishonesty or malicious intention. Further the trustees chose to take an active part in the proceedings. They chose to defend their conduct. In that they failed to a significant extent. Their involvement should not come at the expense of the applicant.

[15] I am satisfied that it is appropriate that the trustees should be deprived of their usual protection of having their costs from the trust fund but only for the period from the filing of the application on 9 October 2015 until the date of hearing on 20 October 2015. It is accepted by the parties that following the hearing of the application and delivery of my reasons the trustees were cooperative in negotiating a scheme for the sale of the properties which lead to the formulation of the directions in the orders made on 4 November 2015.

[16] As between the applicant and the respondents I cannot accept that the applicant should be penalised for bringing matters to a head. While the respondents staved off the attempt to remove the trustees the applicant's purpose in bringing the application was primarily to bring about the orderly and prompt sale of the properties. He had every right to do so. His concerns were reasonable. The respondents had done nothing to urge the trustees into action. What other effective course the applicant could have pursued is not explained.

[17] In my view, given the history of the matter, the appropriate approach here is to allow the applicant and respondent costs on the standard basis to be paid from the trust fund and to deny the trustees their costs from 9 October until 20 October but allow their costs from that date onwards relating to the application. The orders therefore will be:

1. The applicant's and the respondents' costs of and incidental to the application filed 9 October 2015 be paid on the standard basis from the proceeds of sale of the trust properties;

2. The costs incurred by the trustees John Murphy and Jennifer Story of and incidental to the application filed 9 October 2015 be paid on the standard

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10 *Cowley v Macwood Pty Ltd & Ors* [2015] QSC 343, [17]-[18].
11 Ibid, [21].

basis from the proceeds of sale of the trust properties but limited to those costs incurred after 20 October 2015.