SUPREME COURT OF QUEENSLAND

CITATION:	*Trinder v Ciniglio (No 2)* [2020] QSC 257
PARTIES:	**CRAIG GRAEME TRINDER** (Plaintiff) **v** **JULIE ANN CINIGLIO & SHANE STUART ELLIS** (Defendants)
FILE NO/S:	BS 6320 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. That the Plaintiff pay the Defendants' costs of the proceeding on a standard basis up until 4 March 2019 and on an indemnity basis from 4 March 2019 save in respect of the claim with respect to the 27 September 2017 gift.** **2. That the Plaintiff pay the Defendants' costs in respect of the claim with respect to the 27 September 2017 gift on the standard basis.** **3. The Grant of Probate be returned to the Defendants as Executors of the Estate under the Will of Steven Thomas Trinder dated 15 August 2016 propounded in solemn form of law.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – COSTS OUT OF FUND OR PROPERTY – LITIGATION CAUSED BY TESTATOR, PERSONAL REPRESENTATIVE OR BENEFICIARY – RELATING TO EXECUTION OR REVOCATION OF WILL – COSTS OF PERSONAL REPRESENTATIVE OR APPLICANT – where deceased made will in March 2016 and August 2016 – where Plaintiff propounded March 2016 of which he was executor – where dispute over testamentary capacity – where August 2016 Will held to be last will and testament of deceased – where Plaintiff commissioned expert report which suggested lack of

testamentary capacity at August 2016– where plaintiff expert changed opinion to suggest testamentary capacity on eve of trial – where Defendants made UCPR and *Calderbank* offers – where Plaintiff rejected offers – where Defendants wholly successful in defending plaintiff's claims at trial – whether Plaintiff reasonably propounded March 2016 Will – whether costs follow the event – whether Plaintiff should pay Defendants costs on indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 361

Emmanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Pty Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 299, cited
Frizzo v Frizzo (No 2) [2011] QSC 177, applied
Kozac v Matthews [2007] QSC 204, considered

COUNSEL: D Morgan for the Plaintiff
I Erskine for the Defendants

SOLICITORS: Michael Dwyer Solicitor for the Plaintiff
Cronin Miller Litigation for the Defendant

[1] The Defendants were wholly successful in defending the claims made by the Plaintiff in this matter.

Principles

[2] The principles relevant in this context have been set out by Applegarth J in *Frizzo v Frizzo (No 2)*[1] (***Frizzo***). While costs normally follow the event, as Applegarth J has pointed out in *Frizzo*,[2] the court may exercise its discretion to depart from the general position in cases involving wills, particularly where:

(a) The testator has been the effective cause of the litigation, such as the state of testamentary papers and habits and mode of life or where his own statements have brought about the litigation, the costs of unsuccessful parties may be ordered to be paid out of the estate; and

(b) Secondly, where the circumstances are such as to afford reasonable grounds for opposing the will, the unsuccessful party, though not usually granted his costs out of the estate will not be condemned in costs.[3]

[3] In *Frizzo*, Applegarth J further commented that where a will is opposed without proper inquiry into the facts or without reasonable grounds so as to make the opposition unjustifiable, there is no reason to depart from the usual rule that costs ought to follow the event.[4]

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1 [2011] QSC 177.
2 [2011] QSC 177 at [25]–[39].
3 *Frizzo v Frizzo (No 2)* [2011] QSC 177 (***Frizzo***).
4 *Frizzo* at [27] referring to G E Dal Pont, *Law of Costs*, 2nd ed (Chatswood: LexisNexis Butterworths, 2009) at 287, [10.17].

[4] In the exercise of its discretion, the Court should also bear in mind that it is of public importance that doubtful wills should not pass easily into the proof by reason of the cost of opposing them, but similarly it is of equal importance that the parties should not be tempted into fruitless litigation by the knowledge that their costs will be defrayed by others.[5]

Submissions

[5] In this case, the Plaintiff submits that the circumstances were such that it was appropriate for the Plaintiff who was the executor of the March Will to bring the proceedings which was also in the interests of the Deceased's three children who had directly benefited under the March Will. The Plaintiff also submitted the August Will was made when the Deceased's terminal condition was more advanced and that it was a more complex document. The Plaintiff submits that the proceedings were due to the failure of the solicitor who prepared the August Will, who had not taken or sought a medical opinion or documented the process and did not provide a *Larke v Nugus* statement until after the proceedings had been commenced. The Plaintiff also relies on the fact that there was an expert report of Dr Berry which stated that, in her opinion, the Deceased probably lacked capacity. The Plaintiff submits that Dr Berry only changed her view after reviewing her report in preparation for giving evidence on the eve of the commencement of trial. The Plaintiff submitted that both parties' costs should be paid from the estate or alternatively that there should be no adverse costs order against the unsuccessful party in favour of the successful party, the latter of whom will be entitled to their costs from the estate as the proving executor.

[6] The Defendants submit that the present case is not one where the testator was the effective cause of the litigation, or that there were reasonable grounds for opposing the August Will, or that the August Will was opposed after making proper enquiry into the facts and with reasonable grounds as to make the opposition justifiable. The Defendants submit that there is no demonstrated reason for the Court to depart from the usual order as to costs and that, accordingly, costs should follow the event.

[7] The Defendants further submit that Plaintiff should pay the Defendants costs on an indemnity basis from either:

(a) 26 October 2018, being 14 days after an expiry of the first offer (the **First Offer**);

(b) 4 March 2019, being 14 days after expiry after the second offer (the **Second Offer**);

(c) No later than 31 May 2019, being a juncture in the proceeding where it was evident that the Plaintiff ought to have abandoned his claim (the **Relevant Junctures**); or

(d) 24 January 2020 on the basis of a *Calderbank* offer made in correspondence from the Cronin Miller litigation dated 24 January 2020 (the ***Calderbank* Offer**).

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5 *Frizzo* at [28] referring to *Mitchell v Gard* (1863) 164 ER 1280 at 1281-2.

[8] The First Offer and Second Offer were formal offers under Chapter 9, Part 5 of the *Uniform Civil Procedure Rules* 1999 (***UCPR***). Rule 361 *UCPR* regulates offers to settle made by Defendants where the Plaintiff subsequently obtains a judgement no more favourable than the offer. However, where no judgment was obtained by a plaintiff r 361 *UCPR* does not apply.[6] In the present case the Defendants submit that each of the offers represented an outcome more favourable to the Plaintiff than the judgement now obtained against him and his exposure to costs. By reference to the comments of Chesterman J in *Emmanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Pty Ltd & Ors and Coopers & Lybrand & Ors*,[7] the Defendants submit that r 361 does not, by implication, prevent an order for indemnity costs being made in favour of a Defendants, save in the particular circumstances covered by the rule.

[9] The Defendants submit that at the time of the First Offer being made, which was prior to the close of the pleadings but upon third party disclosure of medical records and financial records, all of which had been provided to the Plaintiff and should have been sufficient to allay the Plaintiffs' concerns. By the time of the Second Offer further evidence had been filed including the *Larke v Nugus* statement of Mr Ellis and the medical records of Dr Matos annexed to the affidavit of Ms Ciniglio. Further evidence was filed by Ms Ciniglio. Ms Daniels, Mr Dimon, Ms Harris, and the Deceased's nurse relevant to capacity in January 2019.

[10] The *Calderbank* Offer was made shortly before trial and proposed that:

(a) The court pronounced for the force and validity of the will of the Deceased dated 15 August 2016 in the solemn form;

(b) Julie Ann Ciniglio is discharged from the undertakings given on 30 November 2018 and 6 August 2019 and the Defendants are to deal with and dispose of the assets of the estate in accordance with the 15 August 2015 will;

(c) The 27 September 2017 deed of gift is set aside and the assets referred to therein are deemed to be assets of the estate;

(d) As to the costs of the parties:

(i) The Plaintiff bear his own costs in respect to the claim and the counterclaim in the proceedings;

(ii) The costs of the Defendant being paid out of the estate on an indemnity basis.

[11] In the alternative, the Defendants submitted that if the Court was not minded to award indemnity costs on the basis of the offers made prior to January 2020, the Court should have regard to the Relevant Junctures at which the Plaintiff ought to have considered it reasonable to abandon his challenge to the August Will. That contention is based on *Frizzo*, but in a different context, insofar as his Honour was examining whether costs should be paid out of the estate.

[12] The Defendants submit that by no later than 31 May 2019, the Plaintiff had the benefit of evidence from the attesting witnesses, Mr Ellis' *Larke v Nugus* statement,

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6 *Kozac v Matthews* [2007] QSC 204.

7 [2003] QSC 299 at [37].

medical evidence of the Deceased's condition during the period which was the subject of contest in these proceedings, the unchallenged evidence of a care nurse as to the Deceased's capacity, evidence of Ms Ciniglio, Ms Daniels and Mr Dimon, and evidence of testamentary intent dating back to 2009 in terms of his previous wills. There was additional evidence of attesting witnesses, as well as that of Ms Harris, deposing to evidence relevant to the Deceased's capacity and the lack of undue influence.

[13] The size of the estate was not substantial, a matter of which was brought to the Plaintiff's attention by the Defendants. Although, the Plaintiff appeared to raise issues about the comprehensiveness of the assets disclosed in the estate, albeit that was not ultimately pursued in any serious way at trial.

[14] The Defendants also raise discretionary factors which it contends favour an order for indemnity costs. Those matters are:

(a) The manner in which the case was conducted by, or on behalf of, the Plaintiff;

(b) The motive of the Plaintiff in commencing and continuing the claim and lack of justification for such continuation; and

(c) The significant financial impact that the proceeding has had on the Estate which is modest.

[15] In that regard as to the first matter the Defendant's refer to an application by the Plaintiff for the appointment of an administrator which was adjourned to the registry and not pursued. That application included allegations of missing assets to which the Defendants provided considerable evidence and in circumstances where the Plaintiff sought to rely on a forensic accountant's report very late on the eve of trial, which was refused. The Defendants also refer to the fact that the Plaintiff put the Defendants to considerable expense in leading evidence which was not ultimately controversial.

[16] The Defendants also contend that given the evidence provided to the Plaintiff, the Plaintiff should have perceived that there was no reasonable basis upon which to pursue its challenge to the August Will. The Plaintiff places reliance on Dr Berry's report, which originally concluded that the Deceased lacked capacity at the time of making the August Will. The Defendants however contend that no known effort had been made by the Plaintiffs to seek such a report to address the medical evidence until a considerable time after the proceedings had been commenced.

[17] In that regard, the Defendants contend that there was an adjunct failure due to the Plaintiff failing to properly brief and instruct Dr Berry. The Defendants solicitor also sent a comprehensive letter to the Plaintiff's solicitors on 28 October 2019 after receiving a copy of the report of Dr Berry pointing out a number of errors in the report and the lack of information that had apparently been provided to Dr Berry.

[18] The Defendant's contend that the Plaintiff put the Defendants to unnecessary expense to prove matters that should have been uncontentious, including pursuing an argument that the Deceased died assetless. The latter argument could not be said to have added significant expense to the litigation since it essentially only added time involved in cross-examination of that issue of Mr Ellis and Mr Dimon.

[19] The Defendants sought to contend that the Plaintiff brought the action as a result of mala fides intent. While I consider that there is evidence of antagonism towards Ms Ciniglio and Mr Daniels and that the Plaintiff instigated the action to a significant degree on the basis of his own misplaced belief as to the Deceased's capacity (in particular as to the Deceased's drug and alcohol use) and, at least in part, the Plaintiff acted out of self-interest[8], the evidence is not such that I can conclude that the bringing of these proceedings was the result of mala fides or an abuse of process. I do however consider that the Plaintiff's antagonism led to the litigation being enlarged by his approach that required extensive evidence to be led, much of which was ultimately uncontroversial and the witnesses were not cross-examined, notwithstanding the onus of proof in cases such as the present.[9]

[20] There was considerable evidence showing that the size of the estate was not large and significant costs have been incurred over the period of this litigation both in terms of legal costs and incidental expenses of the estate. While the Plaintiff purported to be concerned about his nephews and niece in bringing these proceedings, the conduct of the action was not consistent with someone seeking to preserve as much of the estate for those beneficiaries, including any family provision application made by them. That is particularly so in circumstances where the size of the estate was not large.

Consideration

[21] While the estate planning undertaken by the Deceased, which included the August Will, had some complexity and occurred within some six months of the March Will, I consider that the Plaintiff pursued these proceedings on a fairly tenuous basis without a proper enquiry into the facts and reasonable grounds to do so. In particular, the Defendant did not properly enquire into the Deceased's capacity at the time of the August Will, even accepting the lack of access to medical records of the Deceased. The allegations of lack of capacity pleaded were largely based on the Deceased's terminal illness which was not an affliction of the mind per se, the fact that he was taking medication which included opioids, the Plaintiff's evidence that the Deceased had relapsed since completing the March Will and that he was drinking excessive amounts of alcohol and taking illicit drugs, which was not accepted. The Plaintiff had also engaged in negotiations and transacted with the Deceased in relation to resolving mutual business interests after the execution of the August Will. The Plaintiff also alleged that the Deceased held an irrational and delusional belief that he was "ripping" him off, notwithstanding that their relationship had soured particularly in relation to their common investments and business interests.

[22] While the Plaintiff contends that the litigation was appropriate given the treatment of the Deceased's children in the August Will that was explained by the Deceased himself in his statutory declaration and directions to the trustees. Further the Plaintiff was well aware of the estrangement of the Deceased from his children as was apparent from his evidence.

[23] While the Plaintiff, in his submissions, seeks to attribute blame for the necessity to bring the case upon the Deceased's solicitor and the lack of file notes, of which

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8 Given he owed a debt to the estate which remained unpaid at the start of the trial

9 *Tolbin v Ezekiel* [2012] NSWCA 285 at [44]-[48]

there were some criticisms that could be made, I do not consider that gave the Plaintiff reasonable grounds to pursue the litigation. For the reasons outlined in the judgment, this was not a case where 'red flags' were present such that the solicitor should have been on notice about any lack of capacity on behalf of the Deceased. Other matters relied upon by the Plaintiff, such as the timing of the Deceased's admission to hospital, were ill-based or trying to attach great significance to matters that were readily explicable when considered in their context.[10] That was similarly the case in terms of the suspicious circumstances which the Plaintiff sought to raise.

[24] Although the Plaintiff did obtain a report from Dr Berry in September 2019 which originally supported the Deceased's lack of capacity, she was not briefed until July 2019 after evidence had already been provided to answer the concerns raised as to the Deceased's capacity. Further, Dr Berry's report was provided in circumstances where she had not been fully briefed which resulted in her change of opinion on the eve of the commencement of trial. The Defendants' had written a detailed letter to the Plaintiff's solicitors on 28 October 2019 outlining the inaccuracies in Dr Berry's report.

[25] At the start of the trial, Dr Berry's opinion changed largely as a result of her review of additional medical records and the realisation that certain facts upon which her report was based were incorrect.

[26] Even having reference to the position of the Plaintiff with respect to evidence available at different points in time, not just the findings of fact made in the judgment, in the circumstances of the present case the evidence did not establish either that the testator had been the cause of the litigation or that there were circumstances affording reasonable grounds for opposing the August Will.

[27] While doubtful wills should not pass easily into proof by reasons of their costs, parties should not be tempted into fruitless litigation by the knowledge that their costs will be defrayed by others.[11]

[28] In the circumstances, costs should follow the event and I do not accept the Plaintiffs submissions that both parties' costs should be paid out of the estate or that there should be no order as to costs.

[29] As to whether the Court should award indemnity costs to the Defendants, I have considered the status of the evidence available to the Plaintiff in considering whether it was unreasonable for the Plaintiff not to accept the offers made..

[30] While the Plaintiff obtained no judgement in the present case, such that rule 361 *UCPR* does not apply, it is still a relevant matter for this Court's consideration, as are the various stages of evidence in the proceedings in determining costs and does not preclude an order as to indemnity costs being made.[12]

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10 For instance, the Deceased not referring to his daughter in discussions with Mr Dimon where he had not seen her for some years in circumstances where the Plaintiff knew of the family dynamics and the Deceased's estrangement from his daughter.

11 *Frizzo* at [35]

12 See *Emmanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Pty Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299*;* and *Kozac v Matthews* [2007] QSC 204referred to above and discussed in *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)* [2008] QCA 398.

[31] While I consider that there was evidence as at October 2018 which had been traversed by the Defendants in their First Offer, which largely addressed the matters raised by the Plaintiff in his statement of claim, I do not consider it was unreasonable for the Plaintiff not to accept the offer given that the *Luke v Nugus* statement had not been provided by Mr Ellis.

[32] However, by December 2018 the evidence that had been provided to the Plaintiff at that stage including from Ms Harris, the Deceased's nurse who was present at the time of the making of the September 2017 gift, in circumstances where there was a presumption of undue influence, as well as the *Larke v Nugus* statement of Mr Ellis. By January 2019 the Plaintiff had the evidence of Ms Ciniglio, Ms Daniels and Mr Dimon as to the events leading up to the Deceased making the August Will. The evidence of Mr Dimon was evidence of a professional who dealt not only with the Deceased through the estate planning phase and was involved in the meetings with the Deceased, Mr Ellis and Ms Ciniglio, but with the Plaintiff in the negotiations in relation to Biomagnetic Therapy and Biomagnetic. In addition, the Plaintiff had the benefit of the Deceased's medical records.

[33] The question in relation to the Second Offer by the Defendants is whether it was unreasonable for the Plaintiff not to accept the offer, particularly without the benefit of an expert medical report. In my view, the evidence that had been provided by the Defendants at that stage supported the fact that the August Will had been made by the Deceased as a free and capable testator who knew and approved the content of the will. Any concerns that there may have been regarding any suspicious circumstances should also have been allayed by the evidence. While the medical records did not address the question of capacity, particularly testamentary capacity, a proper review of those records and consideration of the evidence of those present at the time the August Will was made should have demonstrated to the Plaintiff that there were no 'red flags' raised in relation to his testamentary capacity. The subsequent evidence provided by the Defendants after that date only strengthened the fact that it was likely that the Grant of Probate in relation to the August Will would be maintained.

[34] A point of consideration however is that the Plaintiff did not have the benefit of an expert medical report as to the Deceased's testamentary capacity. However, while that would not normally weigh in favour of not accepting an offer pending such a report being obtained, it does not carry any significant weight in the present circumstances. I consider that it was not reasonable because the Plaintiff had instigated the proceedings, as I have stated above, on very scant grounds that the Deceased lacked capacity or had signed the August Will without knowledge and effect, even accepting that the onus that lay on those propounding the August Will. The Plaintiff had had the medical records of the Deceased since October 2018. Further, medical records of Dr Matos were also annexed to Ms Ciniglio's report in January 2019. Yet the Plaintiff still had not obtained an expert report and indeed did not brief Dr Berry until July 2019. Even then, the Plaintiff's position was not vindicated by the report of Dr Berry. While Dr Berry did originally provide an opinion that the Deceased lacked capacity that was not obtained on a proper factual basis and that was obtained with an incomplete brief. In the context of r 5 of the *UCPR* and the circumstances above, I do not consider the fact that the Plaintiff had

not obtained an expert medical report when the Second Offer was made resulted in the rejection of the offer being reasonable.[13]

[35] While the Second Offer did not offer a significant amount to the Plaintiff in terms of legal costs, the Plaintiff must have appreciated the risk that the Court would consider that the proceedings had been commenced without proper factual inquiry and without reasonable grounds in the circumstances described and that he had exposure to legal costs.

[36] I consider that it was unreasonable not to accept the Second Offer and the Plaintiff should pay the Defendants' costs on an indemnity basis from 4 March 2019.

[37] The claim in respect of the September 2017 gift was not raised by the Plaintiff until August 2019. In relation to that claim, the Defendants bore the onus of proof to rebut the presumption of undue influence. It is not appropriate that an indemnity costs order should be made in respect of that claim. Costs should follow the event but be paid on the standard basis.

Conclusion

[38] I consider that the appropriate costs order is therefore that the Plaintiff pay the Defendants' costs on a standard basis up until 4 March 2019 and on an indemnity basis from 4 March 2019 save in respect of the claim with respect to the September 2017 gift.

[39] The Defendants also seek an order that the Grant of Probate should be returned to them as the Executors of the Estate under the August Will propounded in solemn for of law. Such an order is proper and consistent with my reasons for judgement given on 16 June 2020.

Orders

[40] The orders I make in this matter are:

1. That the Plaintiff pay the Defendants' costs of the proceeding on a standard basis up until 4 March 2019 and on an indemnity basis from 4 March 2019 save in respect of the claim with respect to the 27 September 2017 gift.

2. That the Plaintiff pay the Defendants' costs in respect of the claim with respect to the 27 September 2017 gift on the standard basis.

3. That the Grant of Probate be returned to the Defendants as Executors of the Estate under the Will of Steven Thomas Trinder dated 15 August 2016 propounded in solemn form of law.

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[13] I note the Plaintiff did not seek to provide reply submissions putting forward any other circumstances which the Court should consider in relation to the offers made and why it was reasonable not to accept them.