Simonetto & Simonetto v Dick (No 2) [2014] NTSC 6

PARTIES:	SIMONETTO, Craig Paul AND SIMONETTO, Louise Jane v DICK, Mary Julienne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	11/2011 (21128762)
DELIVERED:	26 February 2014
HEARING DATES:	24 February 2014
JUDGMENT OF:	HILEY J
ORDER:	No order as to costs.

CATCHWORDS:

SUCCESSION – FAMILY PROVISION – COSTS - Application for provision out of estate unsuccessful – General rule that each party bears own costs – Overall justice of the case - Whether reasonable prospects of success – Size of the estate relevant – Relevance of positions reached at settlement conference - No order as to costs

Bowyer v Wood (2007) 99 SASR 190; *Edgar v Public Trustee for the Northern Territory* [2011] NTSC 21; *Lacey and Fereday v Public Trustee*

for the Northern Territory and McCorry [2010] NTSC 01; *Singer v Berghouse* (1993) 114 ALR 521, applied.

Carey v Robson (No 2) [2009] NSWSC 1199; *Ponder v Burmeister* [1909] SALR 62; *Re Carn; Moerth v Moerth* (No 2) [2011] VSC 275; *Re Morgan* [1999] NSWSC 522, considered.

Family Provision Act 1970 (NT)
Supreme Court Rules (NT) r 26.08 and r 48.12(12)

REPRESENTATION:

Counsel:

First and Second Plaintiffs:	P A Haywood-Smith QC
Defendant:	S D Ower

Solicitors:

First and Second Plaintiffs:	CridlandsMB
Defendant:	Gardiner & Associates

Judgment category classification:	B
Judgment ID Number:	Hil1404
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Simonetto & Simonetto v Dick [2014] NTSC 6
No. 11/2011 (21128762)No.

BETWEEN:

CRAIG PAUL SIMONETTO
First Plaintiff

AND:

LOUISE JANE SIMONETTO
Second Plaintiff

AND:

MARY JULIENNE DICK
Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 26 February 2014)

Introduction

[1] On 14 November 2013 I dismissed the plaintiffs' application under the *Family Provision Act 1970* (NT) (the **Act**) for provision out of the estate of their grandfather, the late Bruno Simonetto. I reserved the question of costs for further argument. The parties subsequently filed written submissions and, in addition, I heard brief oral submissions.

[2] The defendant sought orders that:

(a) the plaintiffs pay the defendant's costs of the action on an indemnity basis;

(b) alternatively, the plaintiffs pay the defendant's costs of the action:

(i) on a party-party basis up to and including 18 March 2013; and

(ii) on an indemnity basis thereafter;

(c) in the further alternative, the plaintiffs pay the defendant's costs of the action on a party-party basis.

[3] The plaintiffs sought orders that:

(a) the defendant, in her capacity as executor of the estate of Bruno Simonetto, pay the plaintiffs' costs of the action on a party-party basis;

(b) alternatively, there be no order as to costs.

[4] The date 18 March 2013 was referred to because that was the date of a settlement conference conducted by the Registrar in Alice Springs, following which the Registrar recorded offers made at the settlement conference under Rule 48.12(12) of the Supreme Court Rules (NT)(the **Registrar's Memorandum**). Because my decision in this matter is

presently the subject of an appeal I do not propose to say anything here about the content of that document, except that I have taken its contents into account in the course of considering the competing applications for costs.

Principles

[5] I have been assisted by the reasons for judgment of Kelly J in two Northern Territory matters, *Lacey v Public Trustee for the Northern Territory*[1] (***Lacey***) and *Edgar v Public Trustee for the Northern Territory*[2] (***Edgar***).

[6] In both matters Kelly J observed that whilst costs usually follow the event in normal circumstances, different considerations apply to applications under the Act. Her Honour quoted the following comments of Gaudron J in *Singer v Berghouse*,[3] a matter involving similar New South Wales legislation:

> "Family provision cases stand apart from cases in which costs follow the event. ...[C]osts 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."

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1 *Lacey and Fereday v Public Trustee for the Northern Territory and McCorry* [2010] NTSC 01 (***Lacey***).
2 *Edgar v Public Trustee for the Northern Territory* [2011] NTSC 21 (***Edgar***).
3 *Singer v Berghouse* (1993) 114 ALR 521 at p 522.

[7] Her Honour also considered the judgment of the Full Court of the Supreme Court of South Australia in *Bowyer v Wood*.[4] In that case Debelle J (with whom the other members of the Court agreed) conducted a review of the relevant authorities (including what Gaudron J said in *Singer v Berghouse)* and concluded (at [69]):

> "There is, therefore, a substantial body of consistent opinion as to the rules which ordinarily operate in relation to an unsuccessful application. The principles are that, generally speaking, there will be no order as to costs of an unsuccessful application. The court may in its discretion make an order in favour of an unsuccessful applicant who makes a reasonable application founded on a moral claim or obligation. While it is unnecessary to decide the issue in this case, 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 applicant has been guilty of some improper conduct in the course of the proceedings."

[8] Debelle J also noted that:

(a) the general rule is that the court will make no order as to costs where an application is unsuccessful, that is to say, the unsuccessful applicant is not liable to pay the costs of other parties (at [65]);

(b) in exercising its discretion not to order costs against an unsuccessful applicant, the court will also consider the effect of an order for costs upon the applicant's financial position (at [66]);

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4 *Bowyer v Wood* (2007) 99 SASR 190.

(c) in some instances the question whether an unsuccessful applicant will be liable for costs will depend on the reasonableness of the application (at [67]).

[9] In *Lacey*, after considering *Bowyer v Wood*, Kelly J said:

> "I do not take *Bowyer v Wood* to be authority for the proposition that the Court may only award costs against an unsuccessful applicant where the claim was frivolous or vexatious or made with no reasonable prospects of success. The Court has an unfettered discretion on the question of costs (which must be exercised judicially) and, as Gaudron J said in *Singer v Berghouse*, '[C]osts in family provision cases depend on the overall justice of the case'."

[10] In *Edgar*, counsel sought to rely upon *Bowyer v Wood* as establishing a "high bar" to be crossed before costs orders may be made. Her Honour stated:

> "I do not accept that there is such a high bar to an application for costs by a successful defendant."

[11] Counsel for the defendant contended that Kelly J's judgments (which are the most recent statements by this Court concerning costs) reflect the position in New South Wales and Victoria.

[12] It seems that in recent years, the most common costs order in New South Wales when an application is dismissed is that the plaintiff pays the defendant's costs, usually on a party-party basis.[5] In *Carey v*

[5] See De Groot, J and Nickel, B *Family Provision in Australia* 4th ed, LexisNexis Butterworths, Sydney, 2012 at [10.6] and cases cited therein.

Robson (No 2),[6] the South Australian Full Court's decision in *Bowyer v Wood* was referred to. Palmer J stated:

> "In South Australia it appears that the present tendency is against applying the usual costs rule in an unsuccessful family provision application. The opposite is the case in New South Wales. I do not know why the same approach to costs orders in family provision cases is not followed throughout Australia but I am not at liberty, nor do I desire, to depart from the current law and practice in this State: it reflects the policy embodied in s 56 Civil Procedure Act that litigation must be conducted responsibly and should only be commenced by a plaintiff after careful evaluation of the costs consequences likely to attend failure ."

His Honour applied the "overall justice of the case" test noted by Gaudron J in *Singer v Berghouse.*

[13] Likewise, it seems that for many years Victoria followed the usual practice of not ordering an unsuccessful applicant to pay costs of the estate.[7] However this changed following and subsequent to an amendment to s 97 of the Victorian legislation in 1997. In *Re Carn; Moerth v Moerth (No 2)*[8] Gardiner AJ concluded that:

> "In the end, the question must be determined on a consideration of what is 'just' in the circumstances of each particular case."

[14] In both *Lacey* and *Edgar*, consistent with what Gaudron J had said in *Singer v Berghouse,* Kelly J considered the "overall justice of the case". This too seems to have been the ultimate test applied in the

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6 *Carey v Robson (No 2)* [2009] NSWSC 1199.
7 See De Groot and Nickel, above n 5, [10.11] and cases cited therein.
8 *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275.

New South Wales and Victoria decisions noted above, despite the reference to particular legislation operating in those States. I see no reason to depart from that principle. Nor do I see any reason to depart from the conclusions expressed by the Full Court in *Bowyer v Wood*.

Consideration

[15] The defendant relied upon the fact that the plaintiffs were wholly unsuccessful, that the plaintiffs abandoned an earlier claim concerning revocation of probate, that the trial was not of short length and involved considerable expense and the matters referred to in the Registrar's Memorandum. The defendant also contended that the financial position of both plaintiffs is such that a costs order would not have a detrimental effect on either of them.

[16] The plaintiffs contended that the claim was not frivolous or vexatious, nor was it made with no reasonable prospects of success. They asserted that the conduct of the testator is also relevant,[9] particularly the intimation by him and his wife in the Deed (in 2000) that they would deal with their assets in a fair and even-handed manner as between their grandchildren, and the fact that wills prior to 1997 would have seen the plaintiffs (or their father prior to his death in 1995)

[9] Citing *Ponder v Burmeister* [1909] SALR 62 at 100 and *Re Morgan* [1999] NSWSC 522at [18].

participate equally with their aunt if the testator was not survived by his widow.

[17] The plaintiffs contended that nothing should be made of the fact that they withdrew their initial challenge to the testamentary capacity of the testator, as this was withdrawn after certain documents had been provided by way of discovery. I do not know anything about that claim or its merits, nor what if any cost that might have involved, but note that some questions were raised during the hearing concerning the testator's mental capacity during the later years of his life.

[18] The plaintiffs also submitted that the length of trial cannot be relevant, and that in any event they cannot be said to have dragged the trial out. I agree that the trial was conducted efficiently by both parties.

[19] The plaintiffs also submitted that a costs order against them would be of serious detriment, particularly to Louise Simonetto.

[20] They also pointed to the significant difference between the defendant executor's original estimate of the value of the estate and its actual value, contending that this could not have generated confidence in the plaintiffs in the bona fides of the executor. I do not accept this contention.

[21] The plaintiffs contended that the Registrar's Memorandum evidences the preparedness of both parties to compromise from their considered

positions. Whilst I have had regard to its contents, I consider there to be a significant difference between the costs consequences that might operate in the present case and those that would normally follow following the service of a formal offer under Rule 26.08 of the Supreme Court Rules or even following a *Calderbank* offer.[10]

[22] Although I dismissed the application I do not consider that it was frivolous or vexatious or that it was made with no reasonable prospect of success. I accept that the plaintiffs might have thought that they had some kind of moral claim upon the estate, notwithstanding their estrangement from the testator, based upon an erroneous assumption that the testator would leave them something in his will additional to what they had already received from the partnership between the testator and their father and other joint assets.

[23] I also consider relevant the size of the estate on the one hand, and the financial situation of the plaintiff Louise Simonetto on the other, and the costs consequences to each, not only to pay their own costs but also in the event that they were required to pay the costs of their respective opponents.

[24] In all the circumstances I consider that the overall justice of the case requires that there be no order as to costs.

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[10] Cf *Edgar* at [15] – [21].