Sarah Caroline Tapp v Estate of Late Charles William Tapp by its Administrator Ben Tapp and Ben Tapp [1999] NTSC 36

PARTIES:	SARAH CAROLINE TAPP v ESTATE OF LATE CHARLES WILLIAM TAPP by its administrator BEN TAPP and BEN TAPP
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL
FILE NO:	No 161 of 1998 (9816693)
DELIVERED:	19 April 1999
HEARING DATES:	19 February 1999
JUDGMENT OF:	ANGEL J

REPRESENTATION:

Counsel:

Plaintiff:	J B Waters QC
First Defendant:	P Barr
Second Defendant:	P Barr

Solicitors:

Plaintiff:	De Silva Hebron
First Defendant:	Clayton Utz
Second Defendant:	Clayton Utz

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No 161 of 1998 (9816693)

Sarah Caroline Tapp v Estate of Late Charles William Tapp by its administrator Ben Tapp and Ben Tapp [1999] NTSC 36

BETWEEN:

SARAH CAROLINE TAPP

Plaintiff

AND:

THE ESTATE OF THE LATE CHARLES WILLIAM TAPP by its administrator, BEN TAPP

First Defendant

AND:

BEN TAPP

Second Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 19 April 1999)

[1] On 23 November 1998 I ordered that certain issues between the parties be decided before trial.

[2] The history of the matter is this. The plaintiff Sarah Caroline Tapp is a beneficiary in the estate of Charles William Tapp Deceased. The second defendant, Ben Tapp, the plaintiff's brother, is also a beneficiary of the estate. By order of Kearney J dated 6 February 1997 Ben Tapp was

appointed in place of the parties' brother William Tapp as administrator of the estate.

[3] On 13 July 1994 the plaintiff issued Supreme Court proceedings No. 142 of 1994 against William Tapp as administrator of the estate seeking, inter alia, the appointment of a Receiver to administer the estate in lieu of William Tapp, alternatively for the appointment of a new Trustee pursuant to s27 of the *Trustee Act*, for an accounting of the estate and for other relief.

[4] By Supreme Court proceedings No 299 of 1992 William Tapp, in his then capacity as administrator of the estate, commenced proceedings against the Northern Territory of Australia seeking damages arising out of the condemnation and compulsory destocking of livestock on stations owned by the deceased which comprised assets of the estate in the course of the Northern Territory Government's Brucellosis and Tuberculosis Eradication Campaign (BTEC).

[5] By Deed of Settlement dated 22 December 1994 William Tapp and the plaintiff settled proceeding No 142 of 1994. Apart from the usual unconditional release and discharge and indemnity provisions, the operative part of that Deed provided as follows:

> "1. <u>PAYMENT</u>
>
> 1.1 Subject to sub-paragraph 1.3, William will pay Caroline $130,000.00 in full and final settlement of her entitlement to the Estate, to be paid as follows:-

1.1.1 $100,000.00, immediately upon the execution of this Deed; and

1.1.2 $30,000.00 within 14 days of receipt by the Estate of proceeds of the BTEC claim.

1.2 For the purposes of sub-paragraph 1.1.2, William agrees that the sum of $30,000.00 will not come out of the share of Caroline or those beneficiaries set out in the schedule hereto.

1.3 For the purposes of clause 1.1, William acknowledges that the sum of $30,000.00 ranks equally with the costs of the BTEC claim.

1.4 For the purposes of discharging the Estate's outstanding liability to the Australian Taxation Office and other creditors of the Estate and for the purposes of funding the BTEC claim, William has retained on Caroline's behalf the sum of $6,750.00 (in addition to the sum of $130,000.00 specified in paragraph 1.1 hereof) from 25 November 1993.

1.5 William agrees to pay to Caroline 7.5% of any judgment sum or settlement proceeds (less costs) obtained in favour of the Estate in respect of the BTEC claim.

1.6 For the purposes of sub-paragraph 1.5, Caroline acknowledges that the costs of the BTEC claim include, for each potential witness:-

1.6.1 a reasonable daily fee for time spent on the BTEC claim; and

1.6.2 reimbursement from the Estate of reasonable travelling and accommodation costs,

as and when they are incurred.

2. LEGAL COSTS

2.1 William will, upon the execution of this Deed, pay Caroline's legal costs of prosecuting the Court proceeding fixed in the sum of $7,250.00."

Ben Tapp, once administrator, pursued the estate's claim against the Northern Territory of Australia. By Deed of Settlement dated 7 August 1998 Ben Tapp as administrator of the estate settled the action against the Northern Territory of Australia conditional upon payment by the Northern Territory of Australia to Ben Tapp as administrator of the estate the sum of $2.5 million in full and final satisfaction of the estate's claims. That Deed (which is expressed to be governed in all respects by the laws of the Northern Territory) contains a Confidentiality Clause in the following terms:

"4. CONFIDENTIALITY

4.1 Subject to clause 2.2 above, the parties agree that the terms of settlement embodied in this Deed, the negotiations between the parties and between the respective legal advisers to the parties which have preceded and culminated in this Deed, and any other matters or information relating to the settlement or directly or indirectly identifying any term of the settlement (together called "the Confidential Matters") are to be kept strictly confidential to the extent permitted by law.

4.2 The parties acknowledge that the Plaintiff is entitled to disclose the terms of settlement embodied in this Deed to the beneficiaries of the estate of the late Charles William Tapp but agree that such information is not to be disclosed to any other third party. Such disclosure to the said beneficiaries is to be conditional upon each beneficiary agreeing to maintain strict confidentiality of the terms of settlement. Any disclosure by a beneficiary is to be considered a breach of this clause by the Plaintiff.

4.3 The parties agree that the obligation to maintain the confidentiality of the Confidential Matters continues in perpetuity.".

[6] On the 7th day of August 1998 the Northern Territory of Australia paid $2.5 million to Ben Tapp as administrator of the estate. By order dated 8 February 1999 the Master allowed Ben Tapp commission for administering the estate in the sum of $70,750.00.

[7] In the course of the estate's action against the Northern Territory of Australia, on 3 September 1997 Kearney J, consequential upon an adjournment of the trial of the action, ordered the Northern Territory of Australia to "pay the plaintiff's costs and losses of and incidental to the adjournment at a figure to be agreed but not to be disclosed". Although it was not to be disclosed, the amount of the "costs and losses", the evidence now shows, was $90,000.00. The defendant submits that $60,000.00 of that sum was not paid for the benefit of the estate but constituted and was claimed by and paid as losses of three or four beneficiary witnesses to be called in the BTEC action to those witnesses, whereas the plaintiff submits that the $90,000.00 having been ordered to be paid as the estate's costs and losses falls into the general estate and is to be added to the $2.5 million settlement sum. The defendant's argument, if correct, means that only $30,000.00 would fall into the estate to be added to the settlement sum for distribution to the beneficiaries.

[8] On the above undisputed facts there arise three issues for decision. The first issue is whether the bracketed words "less costs" in Clause 1.5 of the Deed of Settlement dated 22 December 1994 between the plaintiff and William Tapp, the then administrator of the estate, includes the administrator's commission or whether it is confined to legal costs incurred by the estate in relation of the BTEC claim ie. whether the administrator's commission for administering the estate is to be treated as costs for the purposes of calculating the plaintiff's entitlement in Clause 1.5 of the Deed of Settlement.

[9] The second issue is whether Ben Tapp as administrator of the estate can require the plaintiff to bind herself in terms of the Confidentiality Clause in the Deed of Settlement dated 7 August 1998 (to which the plaintiff is not a party) as a pre-condition to paying her admitted entitlement to portion of the proceeds of the BTEC claim.

[10] The final question concerns the consequences to the estate of the order of Kearney J of 3 September 1997, namely whether the sum of $90,000.00, ordered payable by the Northern Territory of Australia to Ben Tapp as administrator of the estate as "costs and losses" of the estate constitutes in whole or in part, an estate asset.

[11] As to the first question, I am of the view that the words "less costs" in Clause 1.5 of the Deed of Settlement dated 22 December 1994 means less the legal costs of the estate incurred in respect of the BTEC claim. Clause 1.6 specifically adverts to daily witness fees, a matter outside the general

notion of costs as recognised by the Courts, ie. the Deed expressly makes allowance as a cost item something other than ordinary witness fees. This indicates, I think, that the reference to "costs" in Clause 1.5 means legal costs in the ordinary understood meaning of that expression. It is true that Clause 2.1 refers to "legal costs", but I do not think the absence of the word "legal" in Clause 1.5 means that the costs therein referred to extend to general administration costs of the estate. Nor do I think that the reference to "costs including legal costs" in Clause 4.1 is contrary to my conclusion. Clause 1.5 expressly refers to costs in respect of the BTEC claim whereas Clause 4.1 is a general indemnity provision cast to cover the whole of the administration of the estate, including things other than the conduct of the BTEC claim.

[12] As to the second question, upon receipt of $2.5 million from the Northern Territory of Australia pursuant to the Deed of Settlement dated 7 August 1998 there became payable by the estate to the plaintiff pursuant to Clause 1.1.2 of the Deed of Settlement dated 22 December 1994, $30,000.00 within fourteen days of receipt of the $2.5 million together with the 7.5% interest in the settlement proceeds pursuant to Clause 1.5. The defendant argued that as the condition of confidentiality binding on him was the quid pro quo for the settlement, he therefore had a right to protect himself against any breach by the plaintiff of the confidence, notwithstanding that her right to payment was unconditionally expressed in the Deed of 22 December 1994. There is some dispute in the affidavit evidence as to the precise

circumstances in which the plaintiff first learnt of the settlement sum. However it is clear that she and other beneficiaries were requested to sign an undertaking of confidentiality before being paid their respective shares. Other beneficiaries have signed a confidentiality agreement with Ben Tapp and have received their shares. The plaintiff has refused to sign any such agreement and payment of her share has been withheld. Mr Barr, for the defendant, said he was unable to cite any authority to the effect that in the present circumstances the administrator either had a right of indemnity against the plaintiff in respect of the confidentiality promise he had made to the Northern Territory of Australia as part of the settlement with the Northern Territory of Australia, or that as a condition of distribution of moneys to which the plaintiff is otherwise entitled she could be required to enter into a condition of confidence.

[13] The defendants plead the matter as follows in their defence:

> "14A. Further as to paragraph 14 of the Statement of Claim, the defendants say that the settlement sum of $2.5 million pleaded in paragraph 11 of the Statement of Claim was paid on the condition, inter alia, that the first/second defendant agreed to keep the terms of settlement strictly confidential in perpetuity, save as to disclosure to any beneficiary (including the plaintiff), but that any subsequent disclosure by a beneficiary to a third party

would be deemed a breach by the first/second defendant of the settlement.

14B. In the circumstances, the settlement monies in the hands of the first/second defendant were charged with an obligation as to confidentiality binding on the first/second defendant and the plaintiff as one of the beneficiaries of the deceased's Estate.

14C. The plaintiff has refused and/or failed to agree not to disclose details of the settlement to third parties.

14D. In the circumstances, the defendants say that the plaintiff is not entitled to be paid her entitlements until such time as she acknowledges the confidentiality obligation attaching to the receipt of such monies and agrees to uphold such confidentiality."

[14] In the events that have happened in this case I do not find it necessary to consider these submissions or the efficacy of the pleading. The quantum of the settlement sum paid by the Northern Territory of Australia to the estate is set out in paragraph 11 of the Statement of Claim and paragraph 14A of the Defence filed in this action. The filed pleadings are part of the Court record to which there is public access. They are public documents. There is no Court order (none has been asked for) that the settlement sum be treated as or kept confidential. The settlement sum, as a secret, has ceased to exist,

and the express obligation on the part of Ben Tapp to keep that information confidential ceased on publication of that sum when the pleadings were filed. See the 1928 House of Lords decision in *Mustad & Son v S Allcock & Co* [1963] 3 All ER 416 at 418, per Lord Buckmaster. In that case it was held that an express obligation on the part of an employee in a service agreement not to pass on his employer's trade secret ceased upon publication of the secret in the form of a patent specification. See, also, *Peter Pan Manufacturing Corpn v Corsets Silhouette Pty Ltd* [1963] 3 All ER 403 at 407. In the course of the hearing I invited the parties to consider joining the Northern Territory of Australia to the action. The invitation was declined. As between the present parties before the Court I am of the opinion that the quantum of the settlement figure is not confidential and that the confidentiality covenant by Ben Tapp is unenforceable at the suit of the Northern Territory of Australia. It follows that the defendant has no right to withhold payment of the plaintiff's share in the BTEC claim settlement monies. These conclusions are of course not binding on the Northern Territory of Australia which is not a party to the present proceedings.

[15] As to the third question, the estate having agreed to consent to the adjournment at the trial of the claim against the Northern Territory of Australia on the basis that "the Northern Territory would pay the estate's costs and losses of and incidental to the adjournment in the sum of $90,000.00", as deposed to in paragraph 4 the defendant's solicitor's affidavit of 3 September 1998, and the terms of Kearney J's order, to "pay

the plaintiff's costs and losses", have the consequence that the whole sum of $90,000.00 comprises an estate asset irrespective of whether any part of that sum was paid to witnesses by way of those witnesses' "losses". The whole sum is to be brought into account for the purposes of calculating the plaintiff's 7.5% entitlement as a beneficiary of the estate.

[16] I direct the plaintiff to bring in short minutes of order in light of my rulings on the three preliminary questions,

[17] and shall hear the parties as to costs and as to the disposal of the remainder of the action.