CITATION:	*Spry v McKenzie & Anor (No.2)* [2019] NTSC 57
PARTIES:	SPRY, Anne Margery v MCKENZIE, Katrina Jane and BURKE, Jessica Ann (as Executors of the Will of James Taylor Lindsay, deceased)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	101 of 2017 (21752453)
DELIVERED:	16 July 2019
HEARING DATES:	Determined on the papers
JUDGMENT OF:	Barr J

CATCHWORDS:

SUCCESSION – Family provision – Costs – unsuccessful application by de facto spouse of testator – plaintiff failed to establish that adequate provision was not available under will of deceased – claim dismissed – "the usual order as to costs" – "the overall justice of the case" – plaintiff unreasonably rejected defendant's *Calderbank* offer – parties to bear their own costs up to and including the expiry date of the Calderbank offer – plaintiff to then pay the defendants costs on the indemnity basis.

Family Provision Act 1970 (NT) s 7(1)(a), s 8(1)

Singer v Berghouse (1994) 181 CLR 201; *Bowyer v Wood* (2007) 99 SASR 190; *Simonetto and Simonetto v Dick* [2014] NTCA 4; *Spry v McKenzie & Anor* [2019] NTSC 25.

REPRESENTATION:

Counsel:

Plaintiff:	R Williams
Defendants:	S Chapple

Solicitors:

Plaintiff:	Darwin Family Law
Defendants:	Maleys Barristers & Solicitors

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

Spry v McKenzie & Anor (No. 2) [2019] NTSC 57
No. 101 of 2017 (21752453)

BETWEEN:

ANNE MARGERY SPRY
Plaintiff

AND:

KATRINA JANE MCKENZIE and JESSICA ANN BURKE (as Executors of the Will of James Taylor Lindsay, deceased)
Defendants

CORAM: BARR J

DECISION IN RELATION TO COSTS

(Delivered 16 July 2019)

Introduction

[1] The plaintiff was unsuccessful in proceedings brought pursuant to s 8 of the *Family Provision Act 1970*. The plaintiff failed to establish that adequate provision for her proper maintenance, education and advancement in life was not available under the terms of the will of the deceased.[1]

[2] At the time judgment was delivered, I made an order for filing and serving of submissions in relation to costs and directed that the question of costs

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1 *Spry v McKenzie & Anor* [2019] NTSC 25.

would then be determined on the papers. I have now received the parties' written submissions.

[3] This Court has an unfettered discretion in relation to costs orders in respect of claims under the *Family Provision Act 1970*, as in all civil litigation. However, costs issues in family provision cases are often determined differently than in other civil litigation, as explained by Debelle J in *Bowyer v Wood*.[2] The so-called "usual order as to costs" may give way to what has been described as "the overall justice of the case".[3] That principle has been acknowledged and applied in costs decisions of this Court.[4]

The defendants' *Calderbank* offer

[4] In the present case, the question of costs is complicated by the fact that the defendant executors, by solicitor's letter dated 9 May 2018, offered to settle the plaintiff's claim on the basis that she receive further provision from the estate of the deceased in the sum of $175,000, inclusive of legal fees (which at that stage were about $65,000), to be paid from the deceased's share of the property at 71 Fisher Road Virginia.[5] The offer was a '*Calderbank*' offer, expressed to be "without prejudice save as to costs", and made some

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2 *Bowyer v Wood* (2007) 99 SASR 190 at [68], per Debelle J; Nyland and Anderson JJ agreeing at [71] and [72] respectively.

3 See, for example, the observations of Gaudron J in *Singer v Berghouse* [1993] HCA 35; 114 ALR 521 at 522.10.

4 *Lacey & Anor v Public Trustee for the Northern Territory & Anor* [2010] NTSC 01; *Edgar v Public Trustee for the Northern Territory & Anor* [2011] NTSC 21 at [11].

5 The letter contained a further two alternative offers of settlement. One involved the payment of $50,000 cash, and a $200,000 low-interest loan to enable the plaintiff to purchase a replacement property, subject to the plaintiff paying her own legal fees. A second alternative proposed a *Crisp* order under which the plaintiff would receive 50% of the net proceeds of sale of 71 Fisher Road Virginia (i.e., the proceeds of the deceased's interest in the property) but on the basis that any replacement property be held in joint ownership with the defendants. It can be seen that the offer referred to in par [4] above was the simplest and arguably the easiest of the three offers for the plaintiff to assess at the time, as for the Court to assess in retrospect.

five months before the trial commenced. The plaintiff was given 21 days within which to accept the offer but, by letter dated 5 June 2018, the defendants' solicitor extended the offer to Friday, 29 June 2018.

[5] The response of a party to an offer of settlement is a matter relevant to the exercise of the costs discretion.[6] It is a factor to be considered in determining the "overall justice of the case". In that context, the unreasonable or imprudent refusal of an offer of settlement may be significant.[7]

[6] The defendants' offer was very reasonable. The court's post-trial adjudication of the plaintiff's claim was far less favourable to the plaintiff than if she had accepted the sum of $175,000 offered some five months before trial. By not accepting the offer, the plaintiff received no additional provision from the estate of the deceased, and disadvantaged herself further in that she continued to incur significant costs from May or June 2018 onwards, including the costs of the trial in October 2018. Moreover, she put the defendants to the considerable expense of continuing to defend her claim.

[7] I did not consider that the plaintiff's claim was entirely frivolous or vexatious, or that she clearly had no reasonable prospects of partial success. Indeed, the plaintiff's case was arguable, and required careful analysis.

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6 *BHP Billiton Ltd v Parker* (2012) 113 SASR 206 at 265 [264]-[265] per Doyle CJ and White J; *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 per Sheppard J.

7 *Simonetto and Simonetto v Dick* [2014] NTCA 4 at [81], per Riley J; Southwood J agreeing at [86].

However, her claim for an additional amount of $450,000 for contingencies, in addition to a lump sum to move home, was close to reckless. Counsel for the defendants characterise the claim for an additional $450,000 as "an ambit claim for which no evidence was provided".[8] I agree. The corollary of course is that no evidence was required to refute the ambit claim, and the trial was not prolonged. However, the fact that it was made and pursued suggests that the plaintiff's approach to the litigation was not entirely reasonable.

The plaintiff's offers of settlement

[8] The plaintiff also made an offer of compromise, an open offer contained in her solicitors' letter dated 16 May 2018.[9] That offer was open for acceptance until 30 May 2018. The plaintiff sought the outright transfer to her of the deceased's interest in 71 Fisher Road, valued at $372,500, in return for which she would renounce the testamentary gifts of the Port Germein property ($89,000) and the Jayco caravan ($27,000). She also sought the legal costs of the proceedings incurred to that time in an amount just under $65,000, plus an estimated $4,000 costs to finalise the matter. The net amount sought by the plaintiff (after crediting the estate with the gifts renounced) was thus $325,500, close to double the amount offered by the defendants. It is not possible to compare the offers with complete accuracy because the plaintiff was asking for an outright transfer of the deceased's

8 Defendants' submissions on costs, 14 May 2019, par 18.

9 Court Book, pp. 184-185.

half share in the Virginia property, whereas under the will she had been given a right of residence in respect of the deceased's half share. I referred in [71] of the principal judgment to the difficulty in assessing the value of the plaintiff's right to reside at the Virginia property.

[9] The plaintiff later made what was described as a "final offer of compromise", an open offer contained in her solicitor's letter dated 29 June 2018.[10] That letter makes very little sense in that, because of an error in indentation of one of the sub-paragraphs, the plaintiff sought that the defendants transfer unspecified property to her in lieu of, inter alia, her interest in the property at 71 Fisher Road Virginia. The offer made little sense and in any event was rejected.

[10] Counsel for the plaintiff contends that the plaintiff made reasonable efforts to resolve her disputed claim prior to trial, putting forward three offers of compromise. In my opinion, however, the plaintiff's offers do not stand out as particularly reasonable. Of greater significance, the plaintiff has not advanced any explanation or justification for not accepting the defendants' offer referred to in [4]. My conclusion is simply that the plaintiff wanted a lot more. Whether the plaintiff's attitude would have been affected by participation in a mediation will never be known. However, given that she was legally represented by competent lawyers at all times, I would have to assume that she received realistic advice as to the potential outcomes and

10 Affidavit Julius Titus Barry sworn 4 June 2019, par 4 and exhibit 'JTB3'.

her prospects of obtaining – or not obtaining – a better outcome than that which the defendants had offered.

Consideration and decision

[11] Counsel for the plaintiff submits that the principle of the "overall justice of the case" should result in there being no order as to costs.[11] Counsel relies on the first instance costs decision (Hiley J) in *Simonetto v Dick*.[12] However, that decision was successfully appealed to the Court of Appeal,[13] which held that the trial judge had erred in determining the overall justice of the case by failing to give due weight to: (1) the fact that the respondent had been wholly successful in the proceedings below, and (2) the appellants' imprudent and unreasonable rejection of an offer of settlement. The costs order made at first instance was set aside.

[12] Notwithstanding that the present plaintiff ultimately failed to establish that adequate provision was not available under the terms of the deceased's will, I would have ordered that each party bear their own costs of the litigation, based on the overall justice of the case, but for the plaintiff's rejection of the defendants' *Calderbank* offer. The offer was very reasonable, not only because of the amount offered but because of the extended period of time allowed for careful consideration and acceptance. Had the plaintiff accepted the offer she could have paid all of her legal costs (approximately $65,000-

11 Plaintiff's costs submissions, par 2.

12 *Simonetto and Simonetto v Dick* [2014] NTSC 6 at [24] per HileyJ.

13 *Simonetto and Simonetto v Dick* [2014] NTCA 4 at [84], per Riley CJ; Southwood J agreeing at [86].

$69,000 at that time) and still been left with more than $100,000 (in addition to her entitlements under the deceased's will). I consider that the plaintiff imprudently and unreasonably rejected the offer.

[13] In the circumstances found by me, the plaintiff should bear her own costs of the proceeding. She is not entitled to a costs order in her favour against the estate or the defendants.

[14] I consider that the defendants should bear their own costs up to and including 29 June 2018. I appreciate that they were sued as the executors of the estate of the deceased, and so the residuary estate would be liable to pay or indemnify them against those costs. However, because they are the only residual beneficiaries, they would have paid those costs one way or the other.

[15] I propose to order that the plaintiff pay the defendants' legal costs incurred on and from 30 June 2018 on the indemnity basis.[14] It would be unjust for the estate/defendants not to be indemnified against costs which, in my opinion, were incurred unnecessarily in the sense that the matter should have been resolved on or before 29 June. I have fixed 30 June 2018 as the relevant date because the defendants' offer acknowledged that the period within which the plaintiff could reasonably consider and come to a decision about the defendants' offer should not expire until 29 June 2018.

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14 Under the Supreme Court Rules, SCR 63.27, where costs are taxed on the indemnity basis, all costs are allowed except to the extent that they are of an unreasonable amount or have been unreasonably incurred, and any doubts which the Taxing Master may have – as to whether the costs were reasonably incurred or were reasonable in amount – is to be resolved in favour of the receiving party.

Further matters

[16] In her most recent affidavit, sworn 4 June 2019, the plaintiff refers to having incurred total legal costs and disbursements in an amount of $125,923.83. Her brother has paid those costs and she remains indebted to him for a balance of $67,223.83 (having paid him $53,468). Clearly, the value of the plaintiff's assets has been reduced as a result of her decision to reject the defendants' offer and continue with the litigation.

[17] I note that the proposed costs order will probably require the plaintiff to pay some $60,000, or approximately 30% of her MLC pension account, although she may agree to a partial set-off in respect of the $20,000 cash legacy which has not yet been paid to her by the estate. The proposed costs order represents an unfortunate outcome for the plaintiff. The fact remains, however, that she was legally represented at all times and made a decision to 'roll the dice' when she rejected the defendants' *Calderbank* offer. That decision caused significant further depletion of the residual estate as a result of ongoing legal costs, in respect of which the estate is entitled to an indemnity.

Orders

[18] I make orders as follows:

1. That the plaintiff bear her own costs of the proceeding.
2. That the defendants bear their own costs of the proceeding up to and including 29 June 2018.
3. That the plaintiff pay the defendants' costs incurred on and from 30 June 2018 on the indemnity basis.

[19] I direct that the solicitor for the defendants prepare and file a draft order in the Registry for settling.
