Supreme Court

New South Wales

Case Name:	Coote v Coote (No 2)
Medium Neutral Citation:	[2021] NSWSC 461
Hearing Date(s):	On the papers
Date of Orders:	30 April 2021
Decision Date:	30 April 2021
Jurisdiction:	Equity
Before:	Robb J
Decision:	(1) The Court dismisses the defendant's application to vary the costs orders made by the Court on 9 February 2021. (2) Order the defendant to pay the plaintiff's costs of the application.
Catchwords:	COSTS — Succession — Family provision — Deceased estate — Where orders made for further family provision in favour of the plaintiff — Where the plaintiff was given a total legacy of $100,000 — Where the Court made the conventional costs order that the plaintiff's costs be paid out of the estate on the ordinary basis and that the defendant's costs be paid out of the estate on the indemnity basis— Where the defendant had made an offer of compromise whereby the plaintiff would have received a legacy of $101,000 — Where the defendant made an application pursuant to UCPR 42.15 that the plaintiff be ordered to pay the defendant's costs on the indemnity basis from the date of the offer of compromise — Where the defendant had introduced issues into the litigation after the date of the offer of compromise that substantially increased the parties' costs — Where the defendant failed in respect of the issues so introduced — Where the plaintiff at the

time the offer of compromise was made could not reasonably have estimated the final amount of the costs that would be ordered to be paid out of the estate — Where the Court would have made an order for further family provision in the nature of a legacy significantly greater than $100,000 if the costs payable out of the estate on the conventional basis had not been 60% of the value of the estate— Where the application for special costs order is dismissed

Legislation Cited: Succession Act 2006 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: Chan v Chan [2016] NSWCA 222
Connor v Hatgis (No 2) [1995] NSWCA 92
Coote v Coote [2021] NSWSC 59
Croghan v Blacktown City Council (2019) 100 NSWLR 757; [2019] NSWCA 248
EDPI Pty Ltd v Rapdocs Pty Ltd [2007] NSWSC 195
Hillier v Sheather; Sheather v Hillier (1995) 36 NSWLR 414
Houatchanthara v Bednarczyk [1996] NSWCA 253
Macquarie Radio Network Pty Ltd v Arthur Dent (No 2) [2007] NSWCA 339
Maitland Hospital v Fisher (No 2) (1992) 27 NSWLR 721
Philpott v Pantos [2018] NSWSC 852
Sherborne Estate (No 2), Re; Vanvalen v Neaves; Gilroy v Neaves (2005) 65 NSWLR 268; [2005] NSWSC 1003
Sydney Attractions Group Pty Ltd v Frederick Schulman (No 3) [2013] NSWSC 1544
YWCA Australia v Chief Commissioner of State Revenue (No 2) [2021] NSWSC 102

Category: Costs

Parties: Neil William Coote (plaintiff)
Brian Thomas Coote (defendant)

Representation: Counsel: K Morrissey (plaintiff)
C Hodgson (defendant)

Solicitors: Cicero Legal (plaintiff)
Turnbull Hill Lawyers (defendant)

File Number(s): 2019 / 171193

JUDGMENT

1 On 9 February 2021, I published my principal judgment in these proceedings in which I made an order for further family provision in favour of the plaintiff under s 59 of the *Succession Act 2006* (NSW) that he be paid a lump sum of $100,000 in total out of the estate of his deceased mother: see *Coote v Coote* [2021] NSWSC 59 at [198].

2 I will assume knowledge of the principal judgment and will use the same terms and references to names as in that judgment. Accordingly, I will henceforth refer to the plaintiff and the defendant as Neil and Brian respectively.

3 I also made the conventional costs order that Neil's costs, calculated on the ordinary basis, be paid out of the estate of the deceased and that the costs of Brian, the executor, calculated on the indemnity basis, be paid out of the estate of the deceased.

4 I did not know that, on 14 October 2019, Brian had made an offer of compromise under Pt 20 Div 4 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) that Neil receive a legacy of $101,000 out of the estate.

5 As a result of the offer of compromise being in a sum that was $1,000 more than the $100,000 legacy that I ordered be paid to Neil, Neil became liable to an application by the defendant for a special order for costs under UCPR r 42.15.

6 Brian has now moved the Court for the making of the following alternative orders for costs:

> That the costs orders made by his Honour be varied to provide as follows:
>
> (a) Order that the Plaintiff's costs, calculated on the ordinary basis, of the proceedings up to and including 14 October 2019, be paid out of the estate of the Deceased.
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> (b) Order that the Plaintiff pay the Defendant's costs of the proceedings, on the indemnity basis, as and from 15 October 2019.
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> (c) Order that the Defendant's costs of the proceedings, calculated on the indemnity basis, to the extent that they are not recovered under the preceding order, be paid or retained, as the case may be, out of the estate of the Deceased.

7 Brian has also sought an order that the plaintiff pay his costs of the application.

8 The Court, by consent, made directions for the parties to serve written submissions on the application. Submissions were received from Brian on 8 March 2021 and from Neil on 24 March 2021. The application has been decided on the papers.

9 As Hallen J observed in *Philpott v Pantos* [2018] NSWSC 852 at [202]-[207], it is now established that UCPR Pt 42 Div 3 applies to plaintiffs' claims for further provision under s 59 of the *Succession Act* no less than to other types of proceedings. Neil did not challenge Brian's submission that Division 3 applies.

10 Uniform Civil Procedure Rules r 42.15 provides as follows:

> (1) This rule applies if the offer is made by the defendant, but not accepted by the plaintiff, and the plaintiff obtains an order or judgment on the claim no more favourable to the plaintiff than the terms of the offer.
>
> (2) Unless the court orders otherwise—
>
> (a) the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, to be assessed on the ordinary basis, up to the time from which the defendant becomes entitled to costs under paragraph (b), and
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> (b) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on an indemnity basis—
>
> (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
>
> (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

11 Neil did not challenge Brian's claim that the offer of compromise was validly made under UCPR r 20.26. As mentioned, the offer of compromise was made on 14 October 2019, and it was open for acceptance until 5 PM on 12 November 2019 after which it lapsed. Neil did not accept the offer of compromise.

12 Rule 42.15(1) is satisfied in this case because the offer of compromise was made under UCPR r 20.26, it was not accepted by Neil, and Neil obtained an order on his claim that was no more favourable to Neil than the terms of the offer, albeit that it was only $1,000, or 1%, less than the amount of the offer.

13 As such, Brian will be entitled to the costs orders that he seeks unless the Court determines to order otherwise under UCPR r 42.15(2).

14 It will be convenient to begin by setting out an outline of the circumstances in which the Court made the family provision order in favour of Neil.

15 Neil and Brian are brothers and were the only children of their deceased mother who died on 15 June 2018 at the age of 99 years.

16 On 11 March 2019, this Court granted probate to Brian as executor of the deceased's will made on 28 November 2013 when she was almost 95 years of age.

17 In her will, the deceased divided her estate with a value of $508,770.98 between her two sons. Neil was given a legacy of $25,000 and the balance of the estate was given to Brian.

18 Consequently, the dispute as to whether an order for further family provision under s 59 of the *Succession Act* should be made in favour of Neil was a dispute solely between Neil and Brian. To the extent that Brian was successful in upholding the will, that was an outcome for his benefit.

19 Under an earlier will made by the deceased on 17 December 2001, when she was 83, the deceased divided her estate equally between Neil and Brian.

20 By the time of the hearing, Neil had quantified his needs as requiring a fund of some $197,000, including an amount of $45,000 to allow for contingencies.

21 A significant fact for the purpose of the determination of Neil's claim for an order for further family provision was that the amount of legal costs incurred by the parties was such that, if the conventional orders for costs were made, the net distributable estate was estimated to be between $200,424.68 and $210,428.68, if the distribution of the legacy of $25,000 to Neil was added back in: see J [15] and footnote 1.

22 The parties' legal costs had therefore consumed some 60% of the estate. Although for the reasons set out in the primary judgment in which I found that Neil had established an entitlement to an order for further family provision, a fundamental restraint on the amplitude of that order was the substantial reduction in the net distributable estate caused by the legal costs that had been incurred: see J [14]-[16], [181], [191] and [194].

23 Neil submitted that, if the Court made the costs orders now sought by Brian, he would be in a worse position than before the commencement of the proceedings. Neil gave an estimate of the amount of the costs that he would be required to pay to Brian for the period after 14 October 2019 as being the sum of $135,757.58, reduced only by Neil's ordinary costs prior to 14 October 2019 of approximately $23,000. The proceedings would then yield Neil a net deficit of about $112,757.58.

24 Unfortunately for Neil, hardship in the outcome is not by itself a reason for the Court declining to make the costs orders sought by Brian, if Brian satisfies the procedural entitlement to those orders: see for example *Houatchanthara v Bednarczyk* [1996] NSWCA 253 at 3; BC9604998 per Clarke and Handley JJA.

25 It is necessary to consider the principles that govern the decision by the Court to order otherwise for the purposes of UCPR r 42.15(2).

26 I agree with the submission made by Brian that the following reasons of Meagher JA (with whom McCallum JA and Simpson AJA agreed) in *Croghan v Blacktown City Council* (2019) 100 NSWLR 757; [2019] NSWCA 248 are relevant to the approach to be adopted by the Court in applying UCPR r 42.15:

> [11] It is convenient to start with the statement of those principles by Mason P in *Morgan v Johnson* (1998) 44 NSWLR 578 at 581–582:
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> "(1) The purpose of the rule is to encourage the proper compromise of litigation, in the private interests of individual litigants and the public interest of the prompt and economical disposal of litigation: *Maitland Hospital* [(1992) 27 NSWLR 721] (at 725–726); *Hillier* [(1995) 36 NSWLR 414] (at 421, 431).
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> (2) The aim is to oblige the offeree to give serious thought to the risk involved in non-acceptance: *Maitland Hospital* (at 724).
>
> (3) The prima facie consequence of non-acceptance will be that the rule will be enforced against the non-accepting party: *NSW Insurance Ministerial Corporation v Reeve* [(1993) 42 NSWLR 100] (at 102); *Hillier* (at 422). This is because, from the time of non-acceptance 'notionally the real cause and occasion of the litigation is the attitude adopted by [the party] which has rejected the compromise': *Maitland Hospital* (at 724); see also *Hillier* (at 420).
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> (4) Lying behind the rule is the common knowledge that 'litigation is inescapably chancy': *Maitland Hospital* (at 725). For this reason, the ordinary provision is expected to apply in the ordinary case: ibid *NSW Insurance Ministerial Corporation v Reeve* (at 102–103). The mere fact that it was reasonable for the litigant to take the view that he or she did in rejecting the offer is not enough to displace the rule: *NSW Insurance Ministerial Corporation v Reeve* (at 102).
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> …

> (5) The discretion to displace the rule is a judicial one, requiring the private and public purposes of the rule to be borne in mind: *Maitland Hospital* (at 725–726). Reasons must be given for 'otherwise ordering': *Hillier* (at 419); *Quach* [(Court of Appeal, 15 June 1995, unreported)]."
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> …
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> [13] In *Fairall v Hobbs (No 2)* [2017] NSWCA 133, where it was accepted that the presumption in r 42.15 might be displaced "by demonstrating that rejection of the offer was reasonable", the court described the matters relevant to such an assessment as including:
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> > "[15] … where the full parameters of the dispute are still uncertain at the time of the offer: *Equity 8 Pty Limited v Shaw Stockbroking Limited* [2007] NSWSC 503 at [42]; or where the offeror's case changes after the offer: *South Eastern Sydney Area Health Service v King* [2006] NSWCA 2 at [85]; or where all relevant evidence has not been served before the offer: *Vale v Eggins (No.2)* [2007] NSWCA 12 at [22]."

27 Relevantly to the observations made by Meagher JA in par [13] of the above extract, Brereton J (as his Honour then was) said in *EDPI Pty Ltd v Rapdocs Pty Ltd* [2007] NSWSC 195 in a case where the party making the offer of compromise had increased the legal costs incurred by introducing unnecessary or unsuccessful issues into the case:

> [82] The question therefore becomes whether there is sufficient reason for the Court to otherwise order. It has been said that this question should be approached on the basis that exceptional circumstances will be required to justify a departure from the rule (*Morgan v Johnson* (1998) 44 NSWLR 578 581–2 (Mason P); *Hillier v Sheather* (1995) 36 NSWLR 414 422–3 (Kirby P)). One circumstance in which a successful plaintiff offeror may be refused costs under the rule is where the costs are apparently disproportionate to the judgment amount and the proceedings were pursued for an extraneous purpose [*Jones v Sutton (No 2)* (2005) NSWCA 203].
>
> [83] Had the plaintiff limited itself to denying the issue of the unit certificate and asserting a lack of clean hands on the part of the cross-claimants, then there would be no reason whatsoever to "otherwise order". But it has to be said that the costs of the case have been very substantially increased by the plaintiff's denial that the agreement between the parties was to the effect alleged by the cross-claimants. Although I am not sure that the case would have been over in one day had that issue not been pressed, it would certainly have been over in half the time which the hearing ultimately took. At least about half of the costs of the case were attributable to the plaintiff's denial of the agreement, on which issue the defendants succeeded.
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> [84] I do not accept Mr Baran's submission that it is wrong in principle to look at issues on which parties succeeded and failed for the purpose of determining whether the Court should otherwise order for the purpose of r 42.14. The rule does not prescribe or limit the factors to which the Court can have regard in deciding whether or not to otherwise order. Although, as I have said, it has been said that the question should be approached on the basis that exceptional circumstances will ordinarily be required to justify an "otherwise order", even those authorities do not say that exceptional circumstances will

> *always* be required to justify a departure. The decision in *Jones v Sutton*, which proceeded essentially on the basis that costs were unnecessarily incurred and that those unnecessarily incurred costs ought not be visited on the unsuccessful offeree, is analogous to the present circumstances. I do not see why the plaintiff should recover its costs of unsuccessfully denying that there was such an agreement as the defendants asserted.
>
> [85] As I have said, on a rough basis, I think it can be said that the length of the case was roughly doubled by that issue, and in making that assessment I include the costs of the delivery up and the forgery issues in the other half. To my mind the plaintiff ought not, despite its offer of compromise, have the costs of resisting the cross-claimants' argument on the agreement issue. It should have half of its costs of the proceedings, assessed on the ordinary basis up to 22 December 2004, and on the indemnity basis thereafter.

28 In *Sydney Attractions Group Pty Ltd v Frederick Schulman (No 3)* [2013] NSWSC 1544, Sackar J said:

> [18] Although it is my view that the offer of compromise was compliant with the rules, the relevant indemnity cost consequences under rules 42.14 and/or 42.15A of the offer of compromise regime will not flow if the court "orders otherwise". In *Ritchie's* (at [42.14.10]) it is noted that particular instances in which it has been recognised that a court will "order otherwise" include where a party succeeds at trial on a case that significantly changed after the date of the offer, or where costs incurred are wholly disproportionate to the judgment amount and the proceedings were pursued for an extraneous political purpose, or where costs are attributable to the party's own unreasonable conduct.

29 As the judgment of Payne JA in *YWCA Australia v Chief Commissioner of State Revenue (No 2)* [2021] NSWSC 102 demonstrates, there remains a difference in the authorities as to whether exceptional circumstances are required for the Court to otherwise order. His Honour said:

> [23] There is a difference in the authorities about whether r 42.14(2) requires exceptional circumstances for the court to "otherwise order": see *Regency Media Pty Ltd v AAV Australia Pty Ltd* [2009] NSWCA 368 at [15] (Spigelman CJ, Beazley JA and McColl JA); *Barakat v Bazdarova* [2012] NSWCA 140 at [42] –[49] (Tobias AJA, with whom Bathurst CJ and Whealy JA agreed). It is not possible to state the circumstances in which the court's discretion to "otherwise order" might be exercised: *Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) (No 2)* [2014] NSWCA 391 at [48] (McColl JA, with whom Gleeson JA and Sackville AJA agreed). It is not necessary to determine whether a court's discretion to "order otherwise" under r 42.14(2) is confined to "exceptional circumstances": see *Barakat v Bazdarova* at [48]; *Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) (No 2)* at [46] –[48]; *Perisher Blue Pty Ltd v Nair-Smith (No 2)* [2015] NSWCA 268 at [32] –[38] (Gleeson JA and Tobias AJA). To the extent that such circumstances are required, they are present here.

30 In *Sydney Attractions Group Pty Ltd v Frederick Schulman (No 3)* (above), after examining the relevant decisions of the Court of Appeal of this state, Sackar J reached the following conclusions as to the process that the Court is

required to adopt in determining whether to otherwise order and deny the maker of an offer of compromise, in circumstances that satisfy UCPR r 42.15(1), the benefit of the costs orders set out in sub-rule (2):

> [30] The authorities I have cited would appear to indicate that in order for a court to order otherwise, the party against which indemnity costs is sought must show more than that they acted reasonably in refusing the offer or that it was difficult to value the case, or that the case involved "imponderables" and the rejection of the offer was reasonable. The corresponding principle in respect of Calderbank offers is therefore different, as generally, a relevant Calderbank offer will not justify an indemnity costs order in favour of the offeror unless the rejection of the offer was unreasonable (*Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 at [8] per Basten JA with whom McColl and Campbell JJA agreed; *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37] per Giles JA, *Russell v Edwards and Anor (No 2)* [2006] NSWCA 52 at [7] per Ipp JA with whom Beazley JA and Hunt AJA agreed). That may explain why Kirby P observed that there may be reason for "complaint … against the terms of the rules and the apparently narrow provision for exempting orders" (Kirby P in *Hillier v Sheather* at 423).
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> [31] Although it is suggested in a number of authorities that there must be "exceptional circumstances" before a court may order otherwise, I think the use of that expression in the earlier authorities is simply to recognise that there does exist a general rule providing for indemnity cost consequences, and therefore "the case needs in some way to be exceptional … because the general rule is that provided for in the rule itself" (Kirby P in *Hillier v Sheather* at 422). In my view, the words "exceptional circumstances" used in the earlier cases indicate that there must be some reason or ground for a court to make an order departing from the general indemnity cost consequences, but those words do not suggest that the case must be extraordinary, nor do they suggest a particular degree of difficulty in persuading a court to "order otherwise".
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> [32] Putting the debate to one side, it is clear that there are no strictly defined categories within one or more of which a case must fit before a court may order otherwise. It is impossible and imprudent to attempt to exhaustively state all the circumstances in which a court would order otherwise (*New South Wales Insurance Ministerial Corporation v Reeve* at 102), and regard must be had to all the circumstances of the case (*Regency Media Pty Ltd v AAV Australia Pty Ltd* at [15]). If, and to the extent that, "exceptional circumstances" are required before a court may "order otherwise" under r 42.14 and/or 42.15A, the content of that requirement was generally considered in a different statutory context in *San v Rumble (No 2)* [2007] NSWCA 259; (2007) 48 MVR 492 (at [66] per Campbell JA), but has been applied to other statutory contexts (see the numerous cases cited by Gzell J in *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 913 at [12]–[14]), and I think is applicable in this context. In *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290, Campbell JA (with whom Tobias JA and Handley AJA agreed) said (at [66]):
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> > [66] Another question of construction concerned "exceptional circumstances" in r 31.18(4). In *San v Rumble (No 2)* (2007) NSWCA 259 at [59]–[69], I gave consideration to the expression "exceptional circumstances" in a different statutory context to the present. Without

repeating that discussion in full, I shall state such of the conclusions as seem to me applicable in the construction of r 31.18(4).

(a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).

(b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912–913).

(c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No* [2007] FCA 388 (at [26]).

(d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

31 It might seem that it is a good reason to order otherwise because the order made in Neil's favour was only $1,000 or 1% less than the sum offered in the offer of compromise, considering the obviously harsh consequences of the Court making an order under rule 42.15(2). However, decisions of the Court of Appeal suggest that the fact that the order in favour of the plaintiff is no more favourable than the terms of the offer by a relatively minuscule amount is not usually a reason for the Court to order otherwise. As I understand the authorities, however, the fact that the differential is very small is not necessarily irrelevant to the exercise of the Court's discretion. It will still be relevant for the Court to consider whether the difference is real and not trivial, and ultimately the discretion must be exercised by reference to all of the circumstances of the case, and not by applying any fixed mathematical formula.

32 As the Court of Appeal said in *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 725:

> Although the amount of the deficit is small, being only 2.5 per cent of the judgment sum, it is real and not trivial or contemptuous. For a person in the position of the respondent, who was a kitchen maid when injured in the service

> of the appellant, $6,090 is a real sum. Furthermore, the respondent would have been advised (correctly in the event) that she stood very little chance of losing her judgment in the appeal. Lee A-J's reasons were careful. On liability they provided two possible bases for recovery, although only one was considered in this Court. Most of the elements in the damages claim were either conceded or uncontested. The amount awarded for past general damages was regarded as "modest". Thus, even if a re-assessment had been required, it was extremely unlikely that a judgment of much less than that recovered would have been entered. All of this the respondent was probably told. In such circumstances, the offer of compromise was one which realistically assessed the chances of success in the appeal. It offered an inducement (admittedly small) to the appellant against the risks which are inherent in any litigation. Events have borne out the justification of the actual offer made and the wisdom of making it. It is important to stress, however, that a 2.5 per cent compromise is not to be taken as having general precedental significance. The decision to award or withhold indemnity costs where a plaintiff's settlement offer has been made but not accepted, involves a discretion to be exercised by reference to all of the circumstances of the case, not by applying a fixed mathematical formula.

33 In *Connor v Hatgis (No 2)* [1995] NSWCA 92 at 1; BC9501810, Kirby P and Priestley JA said:

> ... It will often be the case that the indemnity cost rule will apply to offers close to the sum eventually recovered. The policy behind the rule is to ensure that parties give full and realistic consideration to offers to compromise litigation. Had the respondent's offer, made in August 1993, been accepted by the appellant a great deal of public and private cost would have been obviated, as events have demonstrated. To refuse the application of the prima facie rule would be to undermine the achievement of the objects of the rule and to send an undesirable signal as to the way in which the rule should be administered.

34 See also *Macquarie Radio Network Pty Ltd v Arthur Dent (No* 2) [2007] NSWCA 339, where Beazley JA (as her Excellency then was) with the agreement of Mason P and Basten JA affirmed the statement of principle by Kirby P and Priestley JA in *Connor v Hatgis (No 2)* and added:

> [18] In that case, although the plaintiff received a verdict amount of only $4,000 more than the offer of compromise, that was not sufficient to displace the operation of the rule. See also *Houatchanthara v Bednarczyk* (Court of Appeal, 14 October 1996, unreported) where there Court refused to make a different order than provided for by the relevant rule in circumstances where the was a difference of $750 and *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 where a difference of 2.5 per cent was deemed to be real and not trivial or contemptuous.

35 A significant difficulty that may be faced by plaintiffs in family provision applications, when considering whether or not to accept an offer of compromise made by the defendant, arises out of the inherent nature of such

applications, which led Palmer J in *Sherborne Estate (No 2), Re; Vanvalen v Neaves; Gilroy v Neaves* (2005) 65 NSWLR 268; [2005] NSWSC 1003 to say:

> [57] However, in a claim under the *Family Provision Act*, the Court has to quantify what provision "ought … to be made" for the applicant out of the deceased's estate "having regard to the circumstances at the time the order is made": s 7. Inevitably, that question involves a large element of subjective assessment by the Judge. Inevitably, on any particular set of facts, there would be a variety of answers given by different judges. The decided cases offer broad parameters as to what provision "ought to be made" in certain kinds of circumstances but there is no formula and there is no yardstick on which the degrees of measurement are not etched by the judge's own experience of life.
>
> [58] ... There will be cases in which the applicant obtains an order for further provision which one judge would regard as appropriate, another would regard as generous and a third would regard as niggardly.

36 Forecasting the outcome of many different types of cases requires an effective crystal ball, but it may be accepted that, because of the nature of the discretion exercised by the Court under s 59 of the *Succession Act*, the exercise is particularly difficult for plaintiffs in claims under that provision.

37 This difficulty will be more acute if small errors of judgment in relation to the quantum of the family provision order may cause successful plaintiffs to be denied the benefit of the conventional costs order that their costs on the ordinary basis be paid out of the deceased's estate, and that they be ordered that they pay the defendant's costs from the date of the offer of compromise on the indemnity basis.

38 That gives rise to the practical risk that meritorious plaintiffs will accept inadequate offers of compromise out of fear arising from their inability to accurately forecast the outcome of the proceedings, and in order to avoid catastrophic costs orders. As "[t]he policy behind the rule is to ensure that parties give full and realistic consideration to offers to compromise litigation", to use the words of Kirby P and Priestley JA in *Connor v Hatgis (No 2)*, the capacity of parties to reliably undertake that consideration should logically be relevant to the issue of whether the Court should otherwise order.

39 This problem was addressed in a different context in *Hillier v Sheather; Sheather v Hillier* (1995) 36 NSWLR 414 at 423, where Kirby P made the following observations:

> Calculating damages verdicts is inescapably inexact because of the many imponderables which must be taken into account … In exercising the discretion, courts will not overlook the particular features of a case and the difficulty of putting an accurate estimate on its value in advance of the litigation. Yet the general considerations of chance and risk would have been known to the rule-maker when Pt 19A, r 9 of the *District Court Rules* was introduced into the *District Court Rules*. Without more, they could not provide a basis for ordering otherwise than as the rule will ordinarily provide. If this puts plaintiffs' legal representatives in an impossible position and, in practice, forces the settlement of cases for sums less than they are worth because the costs of litigation cannot be wagered against their risks, the complaint must be against the terms of the rules and the apparently narrow provision for exempting orders.

40 Although the problem will arise in cases where the plaintiff's claim for further family provision is dismissed, it may not be as acute as in cases where the plaintiff succeeds, but the family provision order that is made by the Court is less by some relatively small margin than the amount in an offer of compromise that was not accepted by the plaintiff. If the plaintiff's claim is dismissed, then the outcome of the case will not have been influenced by evidence given to the Court that establishes the legal costs and disbursements incurred by the parties in the proceedings. The Court will simply have determined that the threshold in s 59(1) of the *Succession Act* has not been established by the plaintiff, or for some other technical reason, the claim must be dismissed.

41 The position will often be different where the plaintiff's family provision claims succeed. As I noted at J [14], by reference to the decision of the Court of Appeal in *Chan v Chan* [2016] NSWCA 222 at [54], the Court should on an application for further family provision consider the diminution of the estate by legal costs, including the diminution caused by the payment of the successful plaintiff's costs.

42 Supreme Court Family Provision Practice Note No. SC EQ 7 in pars 6(c) and 9.5 requires the parties to serve affidavits setting out estimates of their costs and disbursements up to and including the completion of the mediation. The plaintiff's estimate must be on the ordinary basis, while the administrator's estimate must be on the indemnity basis. Paragraphs 17.1 and 17.2 require the parties to serve updating affidavits that estimate their costs and disbursements to the end of the hearing, and in the plaintiff's case any uplift factor must also be identified. The purpose of these requirements is to enable the Court to determine the application for further family provision with knowledge of the

likely distributable estate, after the conventional orders for costs are made and the estate is reduced by the payment of those costs. That is necessary because, in many cases, the Court cannot exercise its discretion under s 59 of the *Succession Act* properly or effectively if it cannot forecast the practical effect of its orders on the distributable estate of the deceased. It is exceptional, compared to other types of proceedings, for the Court to be informed of the parties' costs and disbursements before judgment and be required to take that information into account in determining the proper orders to make.

43 However, the requirement that the parties disclose their costs and disbursements does not extend to a requirement that the parties disclose offers of compromise or *Calderbank* offers. The absence of such a requirement is understandable because the purpose of making such offers might be jeopardised if they were made known to the Court. It is one thing to require the Court to take into account the effect of the conventional costs orders, but entirely another to put the Court in the position where its decision may be determinative of parties' obligations to pay costs at all, or to pay them on the indemnity basis, arising out of privileged attempts to compromise the proceedings.

44 It is conventional for the Court to make an order that the costs of the defendant in defending a family provision application are to be paid out of the estate of the deceased on the indemnity basis in cases where the plaintiff succeeds in obtaining an order for further family provision. That is because the Court recognises that one of the duties of an executor is to defend the deceased's will. The Court's practice assumes that the executor will act even-handedly with respect to the interests of the beneficiaries of the estate.

45 However, it is often the case that the executor has a personal interest in upholding the will, because the effect of the plaintiff in succeeding to obtain an order for further family provision will be to reduce the share of the executor as a beneficiary in the estate. In some cases, such as the present, the executor is the only beneficiary other than the plaintiff, so that, even accepting that the defendant is upholding the will of the deceased, the defendant is in reality conducting the defence in his or her own interests.

46 There will therefore be a risk that, if the defendant disproportionately incurs legal costs and disbursements to defeat the plaintiff's claim for further family provision, the plaintiff will be required to follow suit, and when the Court determines the available distributable estate by allowing for the effect of the conventional costs orders, the amplitude of the family provision order that may fairly be made in favour of the plaintiff will be correspondingly reduced. There may thus be a causal relationship between the cost of the litigious effort of the defendant and the likelihood that the amount of the order for family provision made in favour of the plaintiff will fall short of the amount of the offer of compromise.

47 Consequently, in family provision cases, where the plaintiff ultimately succeeds, the plaintiff's evaluation of the offer of compromise will not simply depend upon a consideration of the evidence then known and the merits of the claim. It will also require an assessment of the possible range of consequences of the additional costs that will be incurred by the parties between the date of the offer of compromise and the end of the hearing, and the likelihood that the additional costs will depress the final family provision order below the amount of the offer. That will require the plaintiff to assess the consequence of a variable that cannot be known.

48 This problem may be more theoretical than real if the evidence is complete when the offer of compromise is made, and it is only necessary for the plaintiff to factor in the estimated costs of the hearing. However, in cases where the costs substantially increase, whether or not as a result of additional evidence or issues, the exercise may become problematic, and the application of UCPR r 42.15 arbitrary, in the sense that the rule requires that the plaintiff "give full and realistic consideration to offers to compromise litigation" when the unknown factor of the future costs prevents the objective of the rule being satisfied.

49 In the present case, for the reasons that follow, I have determined that it is appropriate for the Court to order otherwise and to decline to vary the costs orders already made as sought by Brian.

50 Brian made a submission that the offer of compromise was made after the parties had attended a court-annexed mediation on 30 September 2019, and at a point when the matters in dispute as well as the size of the estate of the deceased were known and both parties had considered settlement and, no doubt, obtained advice regarding settlement, the risks of proceeding to hearing and advice in relation to the proceedings generally. Brian further submitted that both parties were aware of matters of family history and their own personal circumstances and relationship with their late mother at that time.

51 On 9 August 2019, Hallen J made an order that the matter be referred to court-annexed mediation on 30 September 2019. In the period before the mediation, the parties served the evidence upon which they then expected to rely on the final hearing of the application.

52 Neil's solicitor provided evidence on 25 June 2019 that Neil's estimated cost of the proceedings to the conclusion of a court-appointed mediation on the ordinary basis would be $25,000. On 30 July 2019, Brian's solicitor affirmed an affidavit that Brian's costs on the indemnity basis covering the same period would be $40,000. The total amount of the costs incurred by the parties up to the time of the mediation was thus $65,000.

53 In Neil's 28 May 2019 affidavit, he gave the evidence concerning his relationship over the years with Robyn, his former wife, that is set out at J [66]. As I read the evidence served by Brian before the mediation and the date of the offer of compromise, Brian did not make much of the significance of that relationship, and in his 14 September 2019 affidavit he merely said at par 130 that Neil had never mentioned to him that he and Robyn had divorced decades earlier.

54 Brian subpoenaed documents from Robyn under a subpoena that was returnable on 20 September 2019.

55 Robyn did not affirm an affidavit in the proceedings until 29 October 2019, after the dates of both the mediation and the offer of compromise. The evidence does not disclose why Robyn made an affidavit at that time.

56 On 19 December 2019, Hallen J set the matter down for hearing on 17 August 2020 with an estimate of two days.

57 Neil also subpoenaed documents relating to the financial circumstances of Neil and Robyn from a number of banks and financial institutions in the period between 16 October 2019 and 17 December 2019, with a further subpoena to such an organisation that was returnable on 16 July 2020.

58 On 4 July 2020, Neil's solicitor estimated Neil's total legal costs calculated on the indemnity basis to the conclusion of the two day hearing to be about $95,402.90. On 2 July 2020, Brian's solicitor estimated that Brian's total legal costs on the indemnity basis to the conclusion of a two-day hearing would be approximately $119,537.54. The total estimated legal costs of the parties, on the assumption that the hearing would take two days, was $214,940.44.

59 By the time of the hearing, the further amended schedule of agreed assets and liabilities provided by the parties to the Court contained an estimate of Neil's costs on the ordinary basis to the end of the two-day hearing of $100,402.90, and an estimate of Brian's costs on the indemnity basis for the same period of $140,000. At that time, the estimate of the costs that would be paid out of the estate if the Court found in favour of Neil and made the conventional costs orders would be about $240,402.90.

60 As noted above, and explained at J [15] and footnote 1 to the primary judgment, as the hearing took place over four days rather than the two days allowed for, the total amount of the costs that would be required to be paid out of the estate of the deceased, if the conventional costs orders were made, had increased by between $60,000 and $70,000, which had the result that the net distributable estate had been reduced from $508,770.98 to little more than $200,000.

61 I am satisfied that the forensic issue as to the true nature of the relationship between Neil and Robyn and their financial interdependence was substantially introduced into the proceedings by Brian after the date of the offer of compromise, as was Brian’s claim that Neil’s application should be dismissed because he had breached his duty of disclosure to the Court of his real financial resources.

62 Those issues substantially increased the complexity of the litigious effort required from the parties and also the length of the hearing. I dealt with those issues in the primary judgment at J [66]-[122] and reached the following conclusions at J [118]-[122]:

> [118] The evidence therefore establishes that for many years Neil and Robyn have followed a practice of sharing expenses that are mostly joint expenses, in circumstances where they could not be bothered engaging in an intricate accounting process. It may be thought that such an approach was wise, because it would assist in avoiding the potentially catastrophic effect on the tenuous relationship between the two of consistently having arguments about how to properly divide up individual expenses.
>
> [119] The most significant conclusion to be drawn from a minute examination of the bank statements of Neil and Robyn tendered by Brian is that the statements prove that both Neil and Robyn live on their pensions and have almost no funds available as a buffer against vicissitudes.
>
> [120] In his submissions, Brian urged strongly on the Court that it should find that Neil had breached his obligation to the Court to fully disclose the financial resources of Robyn who was his de facto partner from the time of their supposed separation. In my view, on the whole of the evidence, Neil and Robyn did not in any substantial way cohabit as a de facto married couple. The relationship was in substance as explained by Neil and Robyn.
>
> [121] It is true that Neil did not initially disclose in any significant way Robyn's financial resources, or how they paid for their joint expenses and conducted their bank and credit card accounts. Brian decided to make a case that Neil and Robyn were in a long-term de facto relationship, and pursued an attempt to prove that in some way Neil had been supported by Robyn financially, and could look forward to the continuation of that arrangement. He failed. I am satisfied that Neil and Robyn genuinely have considered their relationship to be one of convenience, and on Neil's part, one of necessity. They have cooperated in order to maintain their family relationship with their only son, Nathan, and their grandchildren. Robyn, in particular, fiercely, and I am satisfied genuinely, resisted the claim that she was in a de facto relationship with Neil. It would not go too far to say that she was scornful of the suggestion.
>
> [122] I am satisfied that Neil did not volunteer evidence of Robyn's financial circumstances for two reasons. First, he genuinely believed that he was being cared for by Robyn on sufferance, and that emotionally Robyn considered herself to be a single woman. Secondly, as was made plain by Brian's attempt to prove that, in some way, the finances of Neil and Robyn were intermingled in a manner that would damage Neil's claim for a family provision order, Robyn is dependent upon her pension as much as is Neil on his. They both appear to have lived frugally and carefully, but Robyn needs her own income for her own maintenance. Sharing accommodation and expenses no doubt provides financial benefits to both parties. Those benefits are relatively meagre and depend upon the prudent expenditure of the two pensions.

63 The present case was, to my observation, acutely adversarial, particularly in respect of the introduction by Brian after the date of the offer of compromise of the issue that Neil should be deprived of any entitlement to further provision

that he may have otherwise established by reason of his alleged breach of his obligation to the Court to fully disclose the financial resources of Robyn who was his alleged de facto partner from the time of their supposed separation. Brian not only challenged Neil's claim to have satisfied the criteria for an order for further provision for him out of the deceased's estate, but he sought to deny Neil's right to the benefit of such an order entirely on the basis of Neil's alleged breach of his duty of disclosure.

64 In seeking to secure this result, Brian acted in an adversarial fashion in his own private interests.

65 In this endeavour, Brian failed. The effort substantially increased the length and the costs of the proceedings.

66 The conclusion that I reached in the primary judgment as to the amount of the order for further family provision that should be made in Neil's favour was influenced by the following considerations:

> [181] Given the value of the assets that remain in Mrs Coote's estate, after allowing for the payment of legal costs, the resolution of this matter will not depend in any precise way on a comparison between the respective financial positions of Neil and Brian. In any event, the exercise of the Court's jurisdiction to make a family provision order does not in any way involve an exercise in comparing the financial circumstances of the beneficiaries and redistributing the estate in accordance with the Court's view as to what is a fair outcome.
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> …
>
> [191] The reality is that the scope for the determination by the Court of the family provision that will be adequate and proper for Neil in the circumstances is substantially circumscribed by the value of the estate that will remain after the usual costs orders are made.
>
> [192] The circumstances do not warrant the making of a family provision order in favour of Neil that would give him substantially all of the remaining assets in the estate.
>
> [193] While I consider that Neil has demonstrated that he has physical and financial needs that justify the making of a family provision order under which he will get substantially more than the $25,000 legacy left to him under Mrs Coote's final will, it would not be appropriate for the Court to overturn the testamentary preference of Mrs Coote that would be necessary before the Court could make the family provision order sought by Neil.
>
> [194] Constrained by the circumstances, the best that the Court can do is to make a family provision order that will provide Neil with an additional fund that should assist him in the future depending upon the contingencies that may arise.

> [195] I will make an order that Neil receive a legacy of $100,000 in total (i.e. inclusive of the $25,000 of the legacy that he has already been paid).

67 In the present case, the reason why I made an order that Neil receive a legacy of $100,000 out of the deceased's estate, rather than a legacy significantly more than $101,000, was that the legal costs had consumed 60% of the estate, on the assumption that I made the conventional costs orders. I consider that a substantial proportion of those legal costs related to the issues that Brian introduced into the case after the date of the offer of compromise, and that Brian has substantially failed in respect of those issues.

68 This is where, in my view, the fact that the offer of compromise was only $1,000, or 1%, above the amount of the order for further provision that the Court has made becomes relevant.

69 I am satisfied that, if Brian had not introduced the issues upon which he has failed, the amount of the legal costs that would have had to be paid out of the deceased's estate on the basis of conventional costs orders would have been reduced by an amount that would in fact have led to me making an order for further provision in favour of Neil that was at least a number of tens of thousands of dollars greater than $101,000. In this way, the manner in which Brian conducted the defence, and in particular the introduction of the issues upon which he failed, was the cause of UCPR r 42.15(1) being satisfied.

70 That, in my view, is a proper basis, whether it involves an exceptional circumstance or otherwise, for the Court to decline to make the costs orders in UCPR r 42.15(2).

71 I consider that Brian has acted in his own personal interests in making this application for a special costs order, and that the order for the costs of the application should reflect the fact that Brian has failed in that regard.

72 The orders of the Court are:

(1) that the defendant's application to vary the costs orders made by the Court on 9 February 2021 is dismissed.

(2) that the defendant pay the plaintiff's costs of the application.

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