



Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

REVISED COPIES ISSUED
State Reporting Bureau
Date: 5 December, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Claim No 135 of 2000

OWEN DAVID JOHNSTON and
FRANCIS BRUCE MATTHEW

Applicants (Plaintiffs)

and

KENNETH ERIC JOHNSTON

Respondent (Defendant)

CAIRNS

..DATE 02/12/2003

JUDGMENT/ORDER

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The applicants are the executors under the will of Mrs Harriet Cecilia Johnston who died on 1 February 1998. One of the applicants, Mr Owen Johnston, is a son of the testatrix and the major beneficiary under her will, which was executed on 4 September 1992.

1

10

The respondent is also a son of the testatrix and a residuary beneficiary under the will. He contends, however, that this will and also other wills dated respectively 5 September 1991 and 31 August 1992 are invalid.

On 6 March 2003 I dismissed an application by the plaintiffs for summary judgment, and after the hearing gave further directions which included the direction that a proper pleading should be delivered identifying by way of particulars the basis of the defendant's allegations, particularly the allegation of undue influence.

30

A further defence and counterclaim was delivered and objected to. An application was made for leave to file an amended pleading, and argument commenced on 12 June 2003. There was insufficient time to hear full argument on that day and the application was adjourned until 22 July 2003.

40

In the course of argument, I identified certain paragraphs as being irrelevant and indicated that those parts of the pleading would be struck out before leave would be given for the filing of the document.

50

There were other paragraphs which the applicants argued ought to be struck out and I reserved my decisions on those arguments and on the ultimate question of whether leave should now be given for the filing of the further amended defence and counterclaim.

In the course of refusing the application for summary judgment, I made comments about the deficiencies in the evidence relied upon by the defendant to resist the plaintiffs' claim, and the failure on the part of the defendant to address the true issue in the case.

In the preliminary argument on this application I again drew attention to the need for the particulars of the claim to be relevant to the elements of the allegation of undue influence.

A further amended defence and counterclaim was prepared and it is that document which now falls to be considered.

During the course of argument and for the reasons I gave then, I indicated that in paragraph 2B, the following passages would be struck out:

From paragraph 2B(a):

Subparagraphs (i), (ii), (iii), (iv), (v), (vi), (vii) and (xi);

The remaining subparagraphs (xiii), (ix) and (x) would require further extensive particulars if they were to indicate that reliance upon them would result in the desired inference of undue influence being drawn.

From paragraph 2B(b), I indicated that the following subparagraphs would be deleted:

Subparagraphs (iii) and (v) because they are simply repetitive of (i);

10

Subparagraphs (vi)(b), (d), (g) and (h) for the reasons set out in argument;

Subparagraphs (vii), (viii), (ix) and (x) simply because they draw a comparison with the earlier wills and are not relevant to the principal question.

The remaining subparagraphs:

Subparagraphs (iv) and (vi)(a), (c), (e) and (f) might be relevant only if there were more detail as to the facts alleged and more specific facts linking the pleaded remarks to the inferences required to be drawn.

30

Paragraphs 2C and 2D are simply repetitions of the invalidity allegations now being related to will 2 and will 3. These allegations rely on the particulars which have already been commented upon, and thus they require no further comment.

40

Returning then to the parts of the pleadings which have not been deleted, there exist serious shortcomings between the remaining particulars and the circumstances necessary to permit the drawing of an inference of undue influence.

50

In an attempt to establish whether there were facts to the knowledge of the defendant's counsel which could plug that

gap, an exchange occurred between us in argument: see transcript page 41. The gap did not close.

An affidavit by Mr Aubrey Dawson was filed on 29 September 2003, I have presumed as a consequence of that exchange. Were it necessary to do so, I would have invited a further mention of the matter and given to the plaintiff applicants the opportunity to be heard and, if they so wished, to cross-examine Mr Dawson. However, his affidavit does not take the matter beyond what was already alleged, and it does not raise any new fact linking the conduct of himself or of the first-named plaintiff to any allegation of undue influence.

The latest pleading really represents the fourth attempt on the part of the defendant to plead his case. The particulars which remain, after I have considered the arguments, are basic and non-contentious.

1
10
20
30
40
50

What is still missing are facts and circumstances which could
be relied upon for drawing an inference of undue influence.
Rule 150 of the Uniform Civil Procedure Rules requires that,
in cases involving an allegation of undue influence, any fact
relied upon for such an inference must be specifically pleaded
- and this has not happened in this case.

For these reasons I refuse leave to the defendant to file the
fourth amended defence and counterclaim.

Mr Henry of counsel correctly noted that the basis upon which
the summary judgment application made by the plaintiffs was
refused, was the possibility that there may have been facts
which could have been marshalled to support the defendant's
allegation. He argues in circumstances where no such facts
can be particularised after this length of time really
suggests that those facts may not exist. I make no judgment
on this submission, but it is clear there must be a resolution
of the issue about the adequacy of pleadings.

The refusal of that summary judgment application was made in
the expectation that the defendant's case would be properly
investigated and pleaded. This has not happened and it now
seems to me unlikely to happen. Consequently, I need to hear
argument as to the options that exist for the parties for the
resolution of this dispute.

...

MR SMITH: My initial view is that either a revival or a fresh application for summary judgment would have to be made on our part to try and bring the matter to finalisation.

1

...

HIS HONOUR: Well, I will give you both an opportunity to consider my reasons and to come back before me. I will make myself available later this week or early next week to meet your conveniences.

10

...

20

HIS HONOUR: I will adjourn the matter for further consideration to a date to be fixed.

MR SMITH: Could I ask whether your Honour's indication to be available for further argument on the matter include an application for summary judgment before the end of the year?

30

HIS HONOUR: Well, yes, I just think it is a bit unfair to your client if you are forced to pay a new application fee. What I had in mind that there might be an ex-tempore application; in other words, a revival of the old issue which-----

40

MR SMITH: But technically there is no fee.

...

HIS HONOUR: Well, I will leave that to further argument, but that is one of the bases I would hear an ex-tempore application, provided proper notice of it has been given to Mr Wrenn.

50
