[2006] QSC 212

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

LYONS J

No BS7676 of 2005

CHARMAINE VIVIAN DAVISON (As Personal Representative of the Estate of PHYLLIS HILDA STAINES, Deceased) — Plaintiff

and

ALLAN GORDON WILKINSON — Defendant

BRISBANE

..DATE 14/07/2006

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: These are the reasons in the matter of Davison and Wilkinson.

By way of background, the applicant is the executor of the last will of Phyllis Hilda Staines, which is dated the 27th of October 2003, and is the deceased's daughter. The respondent is the deceased's widow of her second marriage, such marriage taking place on the 8th of July 2000 when the deceased was 64 and the defendant 67. The marriage was short with the defendant leaving the marriage in May 2003.

The deceased died of cancer on the 8th of February 2004 at Tweed Heads and probate in common form of the October 2003 Will was granted to the applicant by the Supreme Court of New South Wales on the 8th of April 2004.

The estate included two parcels of realty, namely, a unit at Dutton Street, Coolangatta, which she left to her five daughters in equal shares and a house and land at Sunshine Avenue, Tweed Heads, which she left to the respondent and her five daughters as tenants in common in equal shares. The respondent had lodged a caveat against the October 2003 Will in the Supreme Court of Queensland and a Real Property Act caveat over the Sunshine Avenue land in New South Wales. The respondent remained in possession of the Dutton Street unit and he stored property at the Sunshine Avenue property.

The applicant commenced proceedings in Queensland on the 12th of September 2005 to (a) have the grant of probate resealed;

(b) to recover damages for trespass or, alternatively, mesne rent as a consequence of the refusal by the defendant to deliver up possession of the Dutton Street unit; and (c) relying on the cross-vesting regime, obtain an order that the defendant remove the caveat on the New South Wales property.

The respondent lodged a defence and counterclaim on 4th November 2005 alleging the October 2003 Will was invalid on the basis that the deceased lacked testamentary capacity, it was procured by undue influence, that she did not know the contents of the Will and that it was in breach of an agreement in relation to mutual Wills.

The plaintiff filed her reply and answer on 25th November 2005 and on 2nd February 2006 brought an application that the cross-vested proceedings be determined in the Queensland Supreme Court and injunctions requiring the respondent vacate and deliver possession of the Dutton Street property.

The application was heard before Justice White on 23rd February 2006 and consent orders were made in accordance with the application. Costs were reserved.

The applicant's submission, which was provided to the respondent on 23rd February 2006, pointed to a number of fundamental flaws in the respondent's case including that the claim in relation to the mutual Wills, even if established, did not constitute a defence in the probate action.

On 6th March 2006 the respondent filed an amended defence and counterclaim which, while abandoning the challenge to the validity of the October 2003 Will on the ground of undue influence, did not however unequivocally abandon the challenge on the grounds of lack of knowledge and the ground of lack of capacity. The amended pleading also maintained the challenge on the ground of a breach of the agreement to make mutual Wills.

On 23rd March 2006 the applicant forwarded a letter in accordance with Rule 444 of the Uniform Civil Procedure Rules setting out in detail why the amended defence and counterclaim disclosed no reasonable defence or a cause of action, was vexatious, was an abuse of process of process and ought to be struck out. The respondent did not respond in the required time and has not since responded.

On 5th May 2006 an application was heard before Justice Chesterman for orders that the defence and counterclaim be struck out essentially on the grounds that it did not disclose an arguable basis for the relief claimed and for orders removing the caveat against proving the Will in Queensland and the removal of the caveat preventing dealing with the land in New South Wales. Justice Chesterman found that there was no evidence led by the respondent to make good his claim that the deceased lacked capacity to make a will or that she was unduly influenced to make it by the plaintiff.

His Honour also found that the respondent's claim that the October 2003 Will was invalid due to the deceased's promise to make a Will giving him a life interest in the Tweed Heads property was wrong as a matter of law. Justice Chesterman further found that the defendant's claim did not support a caveat over the land at Tweed Heads or against proving the Will in Queensland.

His Honour concluded, at page 4 of the order, that the respondent "has not behaved well with respect to the estate." His Honour also refused an application for an adjournment. Justice Chesterman further determined that the justice of the case would be met by striking out the defence and counterclaim, by ordering the removal of the caveat over the land in New South Wales and removal of the caveat against proving the Will in Queensland on the basis of the applicant's undertaking not to distribute any part of the estate until 7th July 2006. This was to give the defendant sufficient time, if he wished, to put together a claim on a legally defensible basis to assert a constructive trust over the property at Tweed Heads.

On 13th July there was an adjourned hearing of the outstanding issues remaining in relation to the application which was heard on 5th May 2006.

The outstanding issues are, (a) summary judgment for damages for trespass to an estate asset, namely, the unit at Dutton Street or, alternatively, mesne rent together with interest

and, (b) an application for an order that the respondent pay the applicant's costs of and incidental to the proceedings including reserved costs to be taxed on an indemnity basis in accordance with r 704 UCPR.

The respondent argues that the claims for mesne rent and damages for trespass can not be maintained as the applicant needs to establish on the balance of probabilities that the estate has suffered the damage in the sum of $300 per week. The respondent relies on the fact that there is no independent evidence as to the rental market value of the Dutton Street unit and that the allegations in paragraph 31 of the amended statement of claim have not been proved. The respondent further relied on the fact that as the whole of the pleadings have been struck out there was no admission of any facts.

I am satisfied that summary judgment may follow the striking out of a pleading. I am also satisfied that in reliance on r 166(5) there has been no proper denial or non-admission of the facts alleged in the statement of claim and that those facts are therefore deemed to be admitted.

Whilst the claim for summary judgment seeks damages under two alternative heads, namely damages for trespass or main rent, those heads are in substance the same. The correct measure of damages is the rental value for the period of wrongful occupation. Under either head of damage the amount claimed is the same. The rental deemed to have been admitted is $300 per week. The defendant was required to vacate the premises by

letter dated 20th February 2004 by the applicant's then solicitors. The applicant claims rent from 11th April 2004, which is some six weeks after the notice to vacate. In any event I am satisfied that the respondent should pay the sum of $300 per week and that this should be calculated from 11th April 2004 to 25th March 2005. The total damages claimed is therefore $30,600. Interest on this amount at 4.5% to the 25th of March is $2,701. Interest from 26th March to 13th July at 9% is $830.

Mr Conrick, do you wish to claim the interest on the extra day?

MR CONRICK: No.

HER HONOUR: Thank you.

This gives a total claim of $34,131.

In relation to the issue of indemnity costs the respondent has argued that normally in probate actions the costs should come out of the estate. He also argues that the respondent's conduct has been reasonable in the circumstances as he was not aware of a clear picture of the circumstances of the Will until the evidence of Mr Piper was presented at the Court on 23rd February 2006. The respondent submits that once he was aware of the circumstances he acted promptly in amending his defence and essentially abandoning a challenge to the Will. He alleges that it was his action that has allowed for a speedy conclusion to the proceedings.

I am not satisfied that this is the case. Probate in common form of the October 2000 Will was granted by the Supreme Court of New South Wales on 8th April 2004. The respondent's conduct has not been reasonable and Justice Chesterman made a finding to this effect.

The respondent's marriage to the deceased was short and had broken down by May 2003. The objective evidence is that, whilst the respondent was living with the deceased for a number of months prior to her death, he was seeking payment as a carer for this care and was not providing this care to her on the basis that he was her husband.

Furthermore, on 20th June 2003, the deceased had made a new Will and on 12th July 2003 the deceased and the respondent had signed a financial agreement for the purposes of the Family Law Act. This agreement specifically provided that the deceased's assets, including the two parcels of real property, remained her sole and absolute property, that she was fee to deal with them as she saw fit and that the respondent would not make any claim to any share of the deceased's assets. Furthermore the agreement specifically stated that there was no agreement or understanding between the deceased and the defendant that either party would confer any interest or contingent interest on the other.

In addition the allegation of undue influence was totally baseless and there was simply no evidence of improper conduct by the applicant. The deceased had given instructions by

letter to change the Will whereby she had in fact included the respondent in a one-sixth share of the Sunshine Avenue property and she attended a loan at the solicitors to execute the Will. There was furthermore no evidence of lack of testamentary capacity. Furthermore the claim that the Will was invalid due to an agreement to make mutual Wills was always legally unsustainable.

Costs must be decided in accordance with Part 2 of Chapter 17 of Uniform Civil Procedure Rules and, whilst costs are always in the discretion of the Court, they normally follow the event unless the Court considers under r 689 that another order is more appropriate.

In this case the respondent has put the estate to completely unnecessary legal costs without any real basis for his actions. There is nothing in the evidence that would indicate that "the circumstances lead reasonably to an investigation of the matter" as discussed by her Honour Justice Mullins in Harrison v. Peterson [2000] QSC 415. It is also not correct that the respondent, when confronted with all of the facts on 23rd February, acted promptly. The respondent in fact put in amended pleadings and did not deliver up the key until some five weeks later.

I find no basis in the respondent's argument that his actions should be excused because there was some conflict in the relationship between him and the executor.

In the circumstances I am satisfied that the actions of the respondent are such that the he should pay the applicant's costs of and incidental to the proceeding including reserved costs on an indemnity basis. This is in accordance with the principles set out in Colgate Palmolive v. Cussons Pty Ltd (1993) 46 FCR225. This case established that normally a court ought not make an order in relation to the payment of costs on a basis other than on the party and party basis unless there was some special or unusual feature to justify the court departing from the usual practice.

Such unusual circumstances could be established by the making of irrelevant allegations of fraud, misconduct which causes loss of time to the parties, the making of allegations which ought never to have been made, undue prolongation by groundless contentions and the fact that the proceedings were commenced or continued in wilful disregard of the clearly established law. I am satisfied that these special circumstances are present in this case.

Accordingly, I make an order as per the draft which has been initialled by me and placed with the file.

Are there any further issues?

MR CONRICK: No, your Honour, other than in the course of your Honour's judgment - I may have misheard but I understood your Honour to have said that the parties separated in 2005.

HER HONOUR: No, I'm sorry. At the beginning I said "May 2003" - I may have said "2005".

MR CONRICK: Yes, I was going to say your Honour may wish to check in the editorial but I misheard then that it was "May 2003". I think your Honour also referred to the injunction

running until the 7th of July. My recollection, although I don't have it in front of me, is that it was the 3rd of July. There's nothing turns on it, your Honour.

HER HONOUR: Thank you. Yes. I'll look at his Honour's order.

MR CONRICK: If your Honour still has my submissions it's conveniently flagged.

HER HONOUR: It says "7 July" in the order.

MR CONRICK: I'm sorry, your Honour.

HER HONOUR: So I've got the sealed copy.

MR CONRICK: Yes. In that case your Honour is correct and I thought I heard-----

HER HONOUR: It says, "Upon the undertaking not to make any distribution of the estate before 4 p.m. on 7 July."

MR CONRICK: Thank you, your Honour. I apologise.

HER HONOUR: Thank you. Did you want to comment on that, Mr Blumen?

MR BLUMEN: No, thank you, your Honour.

HER HONOUR: So we don't need to alter that. It's simply that it's quite clear the marriage was short, with the defendant leaving the marriage in May 2003.

MR CONRICK: Thank you. Your Honour.

HER HONOUR: Thank you for that clarification.
