SUPREME COURT OF QUEENSLAND

CITATION:	*Johnston & Anor v Johnston* [2003] QSC 075
PARTIES:	**OWEN DAVID JOHNSTON and FRANCIS BRUCE MATTHEW** (Plaintiff) v **KENNETH ERIC JOHNSTON** (Defendant)
FILE NO/S:	135 of 2000
DIVISION:	Trial
PROCEEDING:	Application to Strike Out
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	6 March 2003
DELIVERED AT:	Cairns
HEARING DATE:	25 February 2002; 26 March 2002; 1 May 2002; 20 June 2002; 29 July 2002; 2 September 2002.
JUDGE:	Jones J
ORDER:	**1. That the application for summary judgment be dismissed.** **2. The matter be adjourned to 14 April 2003 for further directions as to its conduct.** **3. Question of costs of this application will be reserved to 14 April 2003.**
CATCHWORDS:	SUCCESSION – WILLS PROBATE AND ADMINISTRATION – PROCEEDINGS AGAINST EXECUTORS AND ADMINISTRATORS – where plaintiff executors seek to propound a will which the defendant asserts is not valid on the grounds of lack of testamentary capacity in the testatrix, her will not being an expression of her true wishes and her having been subject to undue influence in its execution – whether under r 292 *Uniform Civil Procedure Rules* the case has any real prospect of success. PROCEDURE – SUPREME COURT PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – where defendant had failed to comply with the Court order stating a time within which the document was to be delivered – whether order dismissing the proceeding for want of prosecution should be made under r 280 *Uniform Civil*

Procedure Rules.

Swain v Hillman (2001) AllER 91 applied

Three Rivers District Council v Bank of England (No.3) considered

COUNSEL: Mr. J. Henry for the plaintiff
Mr. A. Wrenn for the defendant

SOLICITORS: Mellick & Smith for the plaintiff
Thompson Royds for the defendant

[1] The plaintiffs in this action are the Executors under the will of Mrs Harriet Cecilia Johnston who died on 1 February 1998. One of the plaintiffs, Mr Owen Johnston, is a son of the testatrix and the major beneficiary under her will which was executed on 4 September 1992. The other plaintiff is an accountant.

[2] The defendant 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.

[3] The testatrix died on 1 February 1998. She was survived by five children who, other than the first named plaintiff and the defendant, are Norman Johnson, Beverley Rankin and Helen Roots. For convenience I shall refer to members of the family by given names only. Not only was Owen the major beneficiary under the will, he also benefited from gifts made during the testatrix's lifetime.

[4] The executors seek to propound the will of 4 September 1992. The defendant asserts that the will is not valid on the grounds that, at the time of its execution, the plaintiff was of unsound mind and lacking testamentary capacity; that the document did not express her true wishes and, alternatively, that it was executed whilst the testatrix was under undue influence of the plaintiff, Owen Johnston. The same allegations are made in respect of the earlier wills referred to above. By counterclaim the defendant seeks to propound a will executed on 9 January 1991.

[5] The most recent attempt to lay out the grounds for invalidity of each of the wills executed subsequent to 9 January 1991, is found in the Further Further Amended Defence and Counterclaim which was filed on 22 July 2002.

[6] The plaintiffs wish to invoke UCPR r 280 and have the Court dismiss this latest pleading because of the defendant's failure to comply with the Court order stating a time within which the document was to be delivered. Such an order would have the effect that the plaintiff's claim could not be successfully defended. The plaintiffs further invoke UCPR r 292 seeking judgment against the defendant because he has no real prospect of successfully defending the case on its merits.

Striking out the amended pleading

[7] I should first determine whether to receive the amended pleading out of the time stipulated in the order. It's delivery was 13 days late. The explanation offered for this delay is that the defendant had sought non-party discovery from a number of individuals and organisations and they had not responded within the time required.

In fact some had not yet responded but the defendant has not sought any order to enforce his request.

[8] Whilst not foregoing the right to seek an order dismissing the action for want of prosecution, counsel for the plaintiffs was content to argue the broader application for summary judgment on the basis that the new pleadings and particulars and the affidavit material relied upon do not indicate that the defendant can successfully oppose the claim.

[9] The terms of r 280(2) of UCPR suggest that the Court has a broad and unfettered discretion, similar to that identified in other applications, for striking out for want of prosecution or pursuant to r 374. Given all the circumstances, including the fact that for much of the pre-application period the defendant was self-represented I propose to receive the amended pleading and will determine the plaintiffs' application based upon the relief there sought and the evidence adduced in support of the competing arguments. After hearing of oral argument the plaintiff was given leave to file further material which took the form of a further affidavit by the defendant and 23 exhibits. A further submission from the plaintiffs' counsel was read in connection with this new material.

Testamentary capacity

[10] The defendant's pleading alleges invalidity of the challenged wills because of want of testamentary capacity. I take the view on the evidence of opinions of the number of medical reports that no jury could possibly reach this conclusion in respect of the testatrix at the time she made those wills. The reports of the deceased's general practitioner, Dr. Thurling, dated 20 September 1994 and of the Townsville District Hospital of 18 August 1997 and the file note of the solicitor Mr McInnes (now deceased) dated 5 September 1992 provide evidence that the testatrix did have the relevant capacity at that time. Mr. Wrenn of counsel for the defendant concedes that invalidity cannot be made out on this ground, but seeks to rely upon evidence of the testatrix's subsequent mental state as somehow suggesting an increased vulnerability to undue influence. However, there is no medical evidence to support this contention.

Testamentary intention

[11] A further allegation is made that the subject will and the three prior wills did not reflect the testatrix's intention. The basis for this contention is the fact that the dispository terms of the wills changed and an allegation that this happened in circumstances where the testatrix was unaware of the value of her estate or that of her husband's estate which she was likely to inherit. In this context it is appropriate to set out the details of the wills made and some of the history of the family relationships.

[12] The affidavit of scripts identifies the wills referred to above. On 9 January 1991 the testatrix executed a will at the office of Lilley Grose and Long, solicitors of Atherton. Her testamentary intention, then, was to leave the whole of her estate to her five children in equal shares. Her executors were her daughter, Beverley and her son Owen. As at this date the testatrix lived on a farm property where she had formerly lived with her husband, Eric Johnston. On 26 December 1989 Eric was admitted to a care institution at Herberton suffering from various illnesses including dementia. Eric and the testatrix were members of a partnership with their son Owen

and his wife Dorothy. The partnership (called the Ithaca partnership) had, since 1975, carried on the business of dairy farmers on land owned by Eric Johnston (Lots 70 and 71) and other land owned by Owen and Dorothy (Lots 75 and 77). The testatrix and Owen held a general Power of Attorney from Eric and presumably relied upon the authority of that for business purposes. This Power of Attorney was granted on 29 September 1990.

[13] On 5 September 1991 the testatrix and Owen attended the offices of MacDonnells Solicitors at Cairns for the purpose of her making a new will. The diary note of the solicitor responsible, Mr McInnes, is contained in ex 1. This diary note makes clear that the testatrix was aware that she was the sole beneficiary under her husband's will and that he lacked capacity to change his will and this lack of capacity was likely to be permanent. The diary note records the testatrix's saying of her husband that he "had deteriorated from the day he was admitted to Herberton" (i.e. 26 September 1989). Whatever was the testatrix's level of knowledge of Eric's estate at that time is not established factually. What that level of knowledge was might be inferred from other material such as her involvement in the affairs of the partnership or the financial affairs of her husband. But detail of these matters is quite sparse.

[14] The only change wrought by the new will was to leave to Owen –

(i) the textatrix's interest in the partnership which if Eric predeceased her would include his share as well;

(ii) any interest in portions 70 and 71 (which would come to her only upon the death of Eric).

This latter devise was conditional upon Owen paying the sum of $100,000 into the residuary estate which was to be shared by her children other than Owen.

[15] On 31 August 1992 the testatrix executed a new will as well as an Enduring Power of Attorney. This followed a visit to the same solicitors by the testatrix, Owen and a Mr Albury Dawson who was described as "a family friend". The solicitor's diary note suggests there had been some upset in the family because the testatrix's daughter Beverley and the defendant Kenneth had caused the Power of Attorney granted by Eric previously referred to, to be called into question. As a result The Public Trustee applied for a Court order which was pronounced on 22 May 1992 whereby the Public Trustee assumed control of Eric's affairs. The general Power of Attorney would have ceased to have had validity when Eric lost his capacity to make the grant, which presumably occurred some time well before May 1992. At all events this was given as the reason why the testatrix sought to change her will by which she appointed an accountant, Mr Francis Matthew as a co-executor with Owen in the place of her daughter Beverley.

[16] The nature of her testamentary disposition changed also. It altered in such a way as to affect the benefits of the children other than Beverley and the defendant. By this will the testatrix provided for outcomes in the alternative events that Eric pre-decease her or survive her. If he survived her, the testatrix's estate was small and she decreed that it be shared equally by all of her children. If he pre-deceased her then her children other than Owen and her grandchildren were to receive specific legacies totalling $104,000. Apart from some minor legacies to charities Owen was to receive Lots 70 and 71 subject to the payment of $100,000. Owen was also to receive the residuary estate.

[17] The instructions to the solicitor for this change in testamentary disposition are set out in a note in the handwriting of Mr Dawson which is entitled –

"As Agreed. 29/8/92" [1]

This appears to be a strange notation to describe unfettered instructions for a will. Nowhere in the instructions or in the solicitor's records is there any reference to agreement having been reached or the parties involved in any such agreement. The diary note does contain the following comment:-

> "Mr Dawson said the provision about Portion 70 and 71 were important. He said these were the dry paddocks and it was advisable for these to go to Owen otherwise his farm would [be] out of balance and would have to be disposed of."

The will in these new terms was duly executed at the solicitor's office that day.

[18] On 2 September 1992 the solicitors received a call from Mr Dawson suggesting that the solicitor had misunderstood the instructions upon which the will had been drawn. Precisely why Mr Dawson was involved in this activity is not made clear and no explanation has been offered for it. He was described by another deponent as Owen's business advisor.

[19] The solicitor, Mr McInnes, considered the matter and phoned Mr. Dawson to say a new will will be prepared and sent to the testatrix. There is no record of any instructions being received directly from her. Under cover of letter dated 2 September 1992 the new will and instructions for the signing of it were posted to the testatrix. The will appears to have been executed on 4 September 1992 witnessed by Mr Dawson and by a Mr. Booball.

[20] There were two material changes brought by the new will. Firstly, if Eric survived the testatrix her interest in the partnership would pass to Owen and his wife rather than being shared equally amongst all the children. Secondly, if Eric pre-deceased her then his interest in the partnership and the land passing to the testatrix would now pass to Owen and his wife subject to the payment of $100,000.

[21] The composition of and the value of the testatrix's likely estate, in the event that Eric pre-deceased her, has not been disclosed with any precision which is somewhat surprising given that the defendant's counsel seeks to maintain a ground based upon the testatrix not knowing what was the value of the estate. One estimate of the value of Eric's assets had been relied upon for the purpose of obtaining the Court order in 22 May 1992. The estimated value of those assets including the value of the two parcels land was for $1,500,000. Whether this estimate was accurate was not a matter of importance in the application then being made. For the purpose of this application, the composition of Eric's estate and an accurate valuation ought to have been provided, but the evidence has been left in an unhelpful state.

[22] When Eric Johnston died on 3 September 1994, the testatrix became executrix of his will and the sole beneficiary of his estate. Acting on information from unnamed "family members" the Public Trustee was invited to continue to manage Eric's

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1 See ex 1

estate in a letter from MacDonnells Solicitors dated 14 September 1994.[2] It appears this action prompted the obtaining of a report from Dr. Thurling, that report is dated 14 September 1994[3]. There is no evidence that such report was sent at that time to The Public Trustee but it was sent, some two and half years later, under cover of letter from G.L. Prior & Associates dated 13 March 1997.[4]

[23] On 19 December 1994 the testatrix applied for transmission of Portion 71 into her name. The documentation was prepared by a new firm of solicitors G.L. Prior & Associates[5]. That transmission having occurred Portion 71 was then sold to Davies Road Land Company Pty Ltd on 6 March 1995 for a price of $500,000 on special conditions:-

> 6. The purchase price shall be paid as follows:-
> (a) by the sum of $400,000 on the date of completion;
> (b) the balance, namely $100,000 within ten (10) years from the date of completion."

The obligation to pay the $400,000 was released by deed made on the same date. Thus Portion 71 was removed from the testatrix's estate for a deferred obligation to pay $100,000 in March 2005. Davies Road Land Company Pty Ltd is controlled by Owen.

[24] The next document of record in the material before me is the letter of G.L. Prior & Associates of 13 March 1997 to The Public Trustee enclosing the Thurling medical report and some 1994 Authority which has not been exhibited.[6]

[25] The letter from the Public Trustee in reply dated 22 April 1997[7] indicates there was a concern about the conduct of the testatrix's affairs at that time, (i.e. 1997). Some medical evidence discloses that the testatrix had lost capacity to manage her own affairs in 1996. Her estate was being managed pursuant to an Enduring Power of Attorney granted to the plaintiffs up to the time of her death and since then has continued to be so managed pursuant to her will.

[26] From a consideration of the documents it can be seen that there were significant changes in the testatrix's testamentary intentions. The effect of these were to favour Owen and his wife at the expense of each of his siblings. The former received all of the joint estates of their parents except for the payment of the legacies of $104,000. Whatever debt attached to their purchase of Lots 75 and 77 from Eric in 1985 was also forgiven by the terms of his will. The precise extent by which Owen and his wife were favoured by the changes in the subject wills has not been addressed in the material before me.

[27] The allegation that the testatrix did not intend these changes relies upon her not being aware of the true value of Eric's estate and the further suggestion that, if she were aware, she would not have made those dispositions. There is simply no direct evidence of the level of her awareness and virtually no evidence upon which any such inference could be drawn. Attempts by the defendant to lead evidence of pre-

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2 Ex KJ6 to affidavit of Kenneth Johnston dated 27 March 2001
3 Ex "GRS14" to affidavit of Garth Smith sworn 21 September 2002
4 Ex "GRS14" to affidavit of Garth Smith sworn 21 September 2002.
5 Ex KJ11 to affidavit of Kenneth Johnston dated 27 March 2001
6 Ex "GRS14" to affidavit of Garth Smith 27 March 2001
7 Ibid "GRS15"

testamentary statements by the testatrix failed to have regard to the limitation on the use of such evidence as establishing intention.[8] In an application for summary judgment it is for the applicant to establish a prima facie entitlement to summary judgment. Once done any evidentiary onus shifts to the respondent to adduce evidence of a defence. The defendant has not adduced any direct evidence on this point but, it seems, relies upon general evidence of circumstances from which inferences can be drawn. That general evidence is relied upon also to establish undue influence to which topic I should now turn.

Undue influence

[28] Where a will, apparently regularly executed, by a person of competent understanding is challenged on the ground of undue influence the burden of establishing that its execution was so influenced lies on the person making the assertion. *Winter v Crichton*[9].

[29] To succeed in this part of the claim the defendant must prove the following:-

(a) That the plaintiff had the capacity to influence the complainant;
(b) The influence was exercised;
(c) Its exercise was undue;
(d) Its exercise brought about the transaction.

Bank of Credit and Commerce International v Aboody[10]

[30] There is evidence, if accepted, that Owen Johnston certainly **did have the capacity to influence** his mother. She was an old woman, who had suffered a brain haemorrhage in 1987 from which she recovered, but there is some evidence of aberrant behaviour and of a habit of using alcohol and sleeping pills. Since 26 December 1989, she had been obliged to live alone, her aged husband being confined to a nursing home. The only other member of the family who was living in close proximity to her, after February 1992, was her son, Owen. Her son Norman left the property at that time because of disputes with Owen which also include allegations of assault by Owen and his employees.

[31] The business affairs of mother and son were linked in a commercial, dairy-farming partnership. Owen, together with his mother, had power of attorney over his father's affairs from 29 September 1990 until this power was revoked and authority given to the Office of the Public Trustee following a Court order pronounced on 22 May 1992. The defendant in his affidavit sworn on 25 June 2002 refers to Owen being the sole signatory for cheques on one account used by the Ithaca partnership.

[32] There is also evidence, if accepted, that Owen **did exercise this capacity to influence**. There is evidence that it was Owen who managed his father's and mother's financial affairs even controlling her own small pension. There is some evidence of Owen controlling the testatrix's movements and her visits to other members of the family.

[33] It is also significant that Mrs Johnston was accompanied at the interview prior to the drawing up of the 31 August 1992 will by her son Owen and a Mr Dawson described by another deponent as Owen's "business adviser". Certainly the

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8 *Cross on Evidence Aust Ed* [33325] and *Provis v Reid* 130 ER1129
9 (1991) 23 NSWLR 116 at 121
10 (1990) 1 QB 923

solicitor's note (see File No. 59 exhibit GRS4) reveals that Mr Dawson was vocal in that interview in respect of Owen's interests in Lots 70 and 71.

[34] Questions of whether any influence was **undue** and whether the **exercise of influence brought about changes in the terms of the will** are matters of inference to be drawn from all the circumstances.

[35] The "evidence" relied upon on this point are copy witness statements sent by the defendant's solicitors to the plaintiff's solicitors which statements were exhibited to the affidavit of Mr. Garth Smith. None of these statements have the quality of professionally drawn proofs of evidence. Some are unsigned or undated others take the form of statutory declaration. There are many hearsay references and many irrelevancies. But these statements have been used on this application as the basis of the defendant's case. These statements refer to such matters as observation by Winifred Crowther of Owen's relationship with the testatrix, and other relationships between the family members which include a reference to attacks by Owen on his brother Norman. Other deponents made similar references but Norman in his own statements did not. Others made reference to Owen's aggression towards his mother and of her being affected by the taking of serapax and the consumption of rum. Further, it suggested that Owen was not adverse to applying pressure to have people comply with his wishes in that there is an allegation that he did try to pressure at least one of his two sisters into not contesting the will, by his promising her $25,000 if she did not do so. I do not, by making these remarks, suggest that the evidence should be accepted or that necessary inferences could or should be drawn from the evidence.

[36] Mr. Henry of counsel for the plaintiffs draws attention to the fact that much of the material relies on hearsay and is not admissible. He argues that the admissible evidence might suggest grievance or disappointment, but does not establish undue influence. Both counsel have referred in detail to a number of statements to make these points. I see no point in canvassing the evidentiary issues raised during the course of argument. The deficiencies in the material are obvious and the feeling is inescapable that if the task of obtaining evidence was undertaken competently then a different case would almost certainly be identified.

Summary judgment

[37] The test for a case having no real prospect of success was recently considered by the Queensland Court of Appeal in *Bernstrom v National Australia Bank* (2002) QCA 231. There the approach adopted to the determination of summary judgment applications was the more liberal one taken in *Swain v Hillman* (2001) AllER 91 and recognised in *Alexander v Arts Council of Wales* (2001) 1 WLR 1840. That more liberal approach requires the Court to determine whether there is a realistic prospect of success as opposed to a fanciful one.

[38] What concerns me is the fact that the defendant's case has not been presented in a manner in which a proper assessment can be made of its weight. The defendant represented himself following the institution of these proceedings and for some time thereafter he received advice from a non-lawyer before being represented by his present solicitors and counsel. Whatever is the basis of the retainer of his present legal advisers they have not exercised proper control over the flow of information. Even the further affidavit received after the close of arguments appears to be filed

by the defendant in person. In short, his case has not been presented in a way that allows the proper resolution of this application. Counsel for the defendant conceded that the material relied upon was gathered without "legal expertise" (transcript 63/50). There is difficulty therefore in making an order for summary judgment in such circumstances because it is not clear what are the facts which the defendant might prove at trial and consequently it cannot be said that the defendant is not entitled to his remedy.

[39] The remarks of Lord Hope in *Three Rivers District Council v Bank of England (No.3)*[11] are apposite:-

> "It may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of the court as soon as possible. In other words, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in *Swayne's* case at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

[40] In all the circumstances of the case I am not persuaded that this is a case which is not fit for trial at all. I would therefore dismiss the application for summary judgment.

[41] Having reached this decision on the application for the reasons stated I wish to hear the parties about the future conduct of this litigation and in particular whether the defendant's present pleading can be maintained having regard to the particulars capable of being proved. I propose therefore to adjourn the matter to the next applications day for this purpose.

Orders

[42] I order that –

(i) this application for summary judgment be dismissed.

(ii) the matter be adjourned to 14 April 2003 for further directions as to its conduct.

(iii) Question of costs of this application will be reserved to 14 April 2003.

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11 (2001) 2 AllER 513