

# SUPREME COURT OF QUEENSLAND

CITATION: *Johnston & Matthew v Johnston* [2004] QSC 137

PARTIES: **OWEN DAVID JOHNSTON and FRANCIS BRUCE MATTHEW**  
(Plaintiff)  
v  
**KENNETH ERIC JOHNSTON**  
(Defendant)

FILE NO/S: 135 of 2000

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 6 May 2004

DELIVERED AT: Cairns

HEARING DATE: 25 February 2002; 26 March 2002; 1 May 2002; 20 June 2002; 29 July 2002; 2 September 2002; 2 February 2004; 3 February 2004

JUDGE: Jones J

ORDER: **1. That the application for summary judgment be dismissed.**

**2. That the defendant have leave to file and deliver a Third Further Amended Defence and counterclaim in accordance with the draft exhibited to the affidavit of William Royds filed on 19 December 2003.**

**3. That the defendant pays the plaintiffs' costs of and incidental to both applications to be assessed on the standard basis.**

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 293 *Uniform Civil Procedure Rules* the case has any real prospect of success.

*Three Rivers District Council v Bank of England (No.3)*  
(2001) 2 AllER 513 considered

*Uniform Civil Procedure Rules (UCPR)*

COUNSEL: Mr J. Henry for the Applicant

Mr A. Wrenn for the Respondent

SOLICITORS: Mellick & Smith for the plaintiff

Thompson Royds for the defendant

- [1] Before me are two applications. The first is by the plaintiffs seeking summary judgment and the second is by the defendant seeking leave to file a Third Further Amended Defence and Counterclaim.
- [2] It is appropriate that I recount the troubled history of this proceeding which commenced on 4 December 1998. The plaintiffs are the executors of the will of Harriett Johnston who died on 1 February 1998. The proceedings were instituted to prove in solemn form of law the last will of the testatrix. That will was executed on 4 September 1992. The defendant opposes the grant of probate of that will and of two earlier wills which were executed within the previous four days namely on 31 August 1992 and 2 September 1992. He alleges that these three wills were executed in consequence of undue influence on the testatrix by the first named plaintiff, Owen Johnston. By his counterclaim, the defendant seeks to propound a will executed on 9 January 1991.
- [3] The defendant has sought to file no less than five amended defences but on each occasion the plaintiffs have successfully had the pleading either struck out or caused the defendant to abandon the pleading and seek further time to file a new one.
- [4] The plaintiffs on an earlier occasion made an application for summary judgment. That application was dismissed on 6 March 2003. Although the defendant had not made out a convincing response to that application, the plaintiffs was not able to satisfy the court that the case was one which was “not fit for trial at all”. *Three Rivers District Council v Bank of England (No. 3)*<sup>1</sup>.
- [5] At the time of the dismissal of that application, directions were given that the defendant deliver a Further Amended Defence and Counterclaim. He attempted to do so on a few occasions but each time was met with objections from the plaintiffs. The objections were properly raised because of the lack of particulars and a lack of admissible evidence to support some of the allegations or the inferences which necessarily had to be drawn. The first attempt to file an Amended Defence and Counterclaim after the summary judgment application was struck out by order of the court on 2 December 2003. It is not necessary to rehearse the reasons for this since the focus of the renewed summary judgment application has been directed more to the question of whether any further concessions should be given to the defendant to deliver new pleadings. In short, the plaintiffs submit that the defendant’s repeated failure properly to plead his case arises out of the absence of facts to support it. Added to that the defendant, through his legal advisors, failed to

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<sup>1</sup> (2001) 2 AllER 513

comply with the court's directions as to the delivery of any further amended pleading and the filing of affidavits to support it.

- [6] On the resumed hearing of these applications, Mr Wrenn of counsel representing the defendant, sought leave to adduce further evidence and to file a Further Amended Defence and Counterclaim. Despite the defendant's failure to comply with directions that such material be filed by 16 January 2004 I have, over the plaintiffs' objection, granted leave to file the further material which I have now considered. The issue which arises from the two applications must now centre on whether the latest attempt at pleading identifies the basis for the allegation of undue influence and whether there is evidentiary support for that allegation.
- [7] Rule 150(1)(q) of the *Uniform Civil Procedure Rules* (UCPR) requires that allegations of undue influence must be specifically pleaded. Rule 150(2) requires that every fact from which undue influence is to be inferred also must be specifically pleaded.
- [8] The pleading under consideration (Third Further Amended Defence and Counterclaim)<sup>2</sup> alleges, in summary, that the first named plaintiff –
- (i) Had the capacity to influence the testatrix because of her circumstances;
  - (ii) Had the capacity to influence the testatrix because of his position and his control over the testatrix' financial affairs;
  - (iii) Did in fact exercise influence through the intervention of Mr Aubrey Dawson by discussing changes to the earlier will and bringing about further changes to the wills executed on 31 August 1992 and 2 September 1992;
  - (iv) Did exercise influence by –
    - a. Making arrangements for the execution of the will through his solicitors rather than the usual solicitors of the testatrix;
    - b. not ensuring that the testatrix was fully informed of the value of the her estate including the value of her husband's estate which the testatrix was likely to inherit;
    - c. Acting in such a way as to reduce the contact between the testatrix and her children and belittling, insulting and denigrating them in the presence of the testatrix.
- [9] The direct evidence which the defendant claims goes to the first plaintiff's capacity to influence the testatrix is provided by affidavits of other children of the testatrix, by the affidavit of her grandson, Kevin Roots and other affidavits which were filed earlier in the proceedings.
- [10] The question of whether undue influence was in fact exercised must be inferred from the facts set out in paras 2B(iii) and (iv) which are identified in paragraph [8] above. Evidence is available which, if accepted, will prove those facts. Whether the required inference will be drawn is a matter for the trier of the facts whilst the facts are of very limited scope it could not be said that they are insufficient to support that inference.

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<sup>2</sup> See ex "A" to affidavit of William Royds sworn 19 December 2003

- [11] To allow an application for summary judgment pursuant to r 293 of the UCPR the court must be satisfied that –
- (a) The plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim; and
  - (b) There is no need for a trial of the claim or part of the claim.
- [12] In the light of the new proposed pleading and the additional evidence filed in support of it I am not satisfied of either of these requirements of the rule has been met. The scope of the facts upon which the defendant proposed to rely are quite limited but they satisfy the test identified in *Three Rivers District Council* to which I made reference in support of my ruling on 6 March 2003. This case is one of some complexity. Whilst I continue to have concerns about the limited scope of the pleaded allegations from which inferences are to be drawn and the limited evidence by which the allegations are supported, it cannot be said that the case is one that is “not fit for trial at all”.
- [13] I am compelled therefore to refuse the application for summary judgment and to grant the defendant leave to file and deliver the Defence and Counterclaim in accordance with the draft exhibited to the affidavit of William Royds sworn on 19 December 2003.

### **Orders**

- [14] I order that –
- (i) the application for summary judgment be dismissed.
  - (ii) the defendant have leave to file and deliver a Third Further Amended Defence and counterclaim in accordance with the draft exhibited to the affidavit of William Royds filed on 19 December 2003.
  - (iii) that the defendant pay the plaintiffs' costs of and incidental to both applications to be assessed on the standard basis.