SUPREME COURT OF QUEENSLAND

CITATION:	*Warwick v Tankey* [2004] QSC 274
PARTIES:	**FRANCIS MELTON WARWICK** (applicant) **v** **PATRICIA ROSALYN TANKEY as executrix of the estate of the late JACK WARWICK deceased** (respondent)
FILE NO:	SC No 7115 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	31 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2004
JUDGE:	Chesterman J
ORDER:	**1. Judgment for the applicant** **2. The respondent in her personal capacity, to pay forthwith to the applicant the sum of $325,000** **3. The respondent should pay the applicant's costs of and incidental to the application to be assessed on the standard basis**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – PROCEDURE, ORDERS AND OTHER MATTERS – where the applicant made application under Part 4 of the *Succession Act* 1981 (Qld) for provision under the testator's will – where the terms of settlement were agreed upon between the applicant and the respondent executrix – where it was a condition of settlement that there be no family provisions made or threatened to be made against the testator's estate prior to the specified times for payments – where the solicitor of the testator's natural son subsequently wrote to the respondent notifying her that their client was contemplating making an application for provision from the estate – where the respondent refused to pay the applicant the whole amounts agreed to under the settlement on the grounds that the threatened application rendered the agreement 'null and void' – whether the letter sent by the testator's son's solicitor in fact amounted to a 'threatened' application for provision – whether the settlement agreement

between the applicant and respondent was null and void

Succession Act 1981 (Qld), Part 4
Uniform Civil Procedure Rules 1999 (Qld), r 658

Prince PLC v Prince Sports Group Inc (1997) 39 IPR 225, followed
C. & P. Development Coy. (London) Ld. v. Sisabro Novelty Coy. Ld. LXX RPC 277, followed

COUNSEL: Mr D G Mullins SC, with Mr D J Morgan, for the applicant
Mr A B Crowe SC, with Mr GD Beacham, for the respondent

SOLICITORS: Cartwright Tebbett & Ostwald for the applicant
Sykes Pearson & Miller for the respondent

[1] The late Jack Warwick died on 6 May 2003. By his last will, dated 20 June 2001, he appointed his step-daughter, Patricia Tankey, the respondent, to be his executrix. Relevantly his will gave a pecuniary legacy of $250,000 to his step-son, Francis Warwick, the applicant, and the residue of the estate (with the exception of some small pecuniary legacies to charities and distant family members) to the respondent. The major asset in the estate was the testator's home located as Mossman Court, Noosa, valued at $2,500,000. The testator married four times. He had a natural son, Brian Warwick, and a number of step-children from his various marriages. The applicant and the respondent are brother and sister, being step-children of the testator by virtue of one of his marriages.

[2] By clause 5 of his will the testator explained that he had 'deliberately excluded [his] son Brian Warwick … as [their] relationship has broken down.'

[3] The applicant was dissatisfied with the provision made for him by the testator's will and adumbrated an application pursuant to Part 4 of the *Succession Act* 1981 (Qld) against the estate. In response the respondent's solicitors invited the applicant to outline the basis of his claim and proposed that a formal meeting be 'convened to ascertain if the matter is capable of resolution.'

[4] The invitation was accepted and the parties attended a mediation on 12 December 2003. The mediator was experienced Junior Counsel. Both applicant and respondent were represented at the mediation by Senior Counsel.

[5] Agreement was reached at the mediation and the terms were reduced to writing:

> '1. ... [The respondent] shall, as executor and as part of the administration of the deceased's estate:-
>
> (a) forthwith take all steps reasonably available … to sell the deceased's property …
>
> (b) complete the administration of the deceased's estate following the sale of the Property, including payment of all gifts provided for in the Will.
>
> 2. [The respondent] shall pay to [the applicant]:-

> (a) [the applicant's] pecuniary legacy of $250,000, as provided for in the Will, and
>
> (b) by way of gift from [the respondent] to [the applicant] the sum of $325,000,
>
> by the following instalments:-
>
> (c) the sum of $200,000 by 29 December 2003;
>
> (d) the sum of $375,000 immediately on completion of the sale by [the respondent] of the Property.
>
> ...
>
> 3. This settlement is subject to and conditional upon there being no family provision claims by any person made or threatened against the deceased's estate prior to the times for the payments referred to in clause 2.
>
> 4. This settlement is in full and final satisfaction of any and all claims which [the applicant] … may have against [the respondent]...'

[6] By a letter dated 15 December 2003 the respondent's solicitors asked the applicant's solicitors for a letter 'confirming that, given the terms of the Deed, your client is not proceeding with his threatened family provision application and no such application will be filed.' By a letter of 16 December 2003 the applicant's solicitors gave the confirmation requested. On 22 December 2003 the respondent paid the applicant the first instalment of $200,000.

[7] By a letter dated 29 January 2004 a solicitor acting for the testator's son, Brian Warwick, wrote to the respondent:

> '… My client is contemplating making a claim for provision from his late father's estate. He is aware that the time limit prescribed by the Succession Act within which to give notice of claim has now expired. However he has only in the last few days learned of his father's death, and he is confident that should it be necessary … he would be successful in obtaining … leave to apply for provision … notwithstanding the delay …
>
> In the circumstances would you please let me have the following information by return:
>
> - full detail of the assets and liabilities in the estate …
> - the current position with the administration of the estate
>
> If I do not receive this information within seven days … I expect my client will instruct me to prepare an application for provision from the

> estate and in that event this letter will if necessary be used on the question of costs.'

[8] The respondent's solicitors replied by letter of 4 February 2004:

> '… [Y]ou would be aware that in paragraph 5 of the will the deceased deliberately excluded your client …
>
> Given this specific exclusion and the background which led to it, the threat of a family provision application … is surprising. … [I]t appears to us there is no basis for such an application and we ask you to outline the basis of your client's claim and, in particular, outline why you contend such an application would succeed …'

The letter went on to provide details of 'the assets at the time of death'. The information was to the effect that almost all of the assets, including the house, had been realised, distributed or transferred to the respondent who was, of course, the residual beneficiary.

[9] Nothing further was heard from Mr Brian Warwick. The respondent did not tell her brother, the applicant, that she had received the letter or that its receipt constituted the fulfilment of the condition subsequent in their agreement, which had, as a consequence, come to an end.

[10] The respondent sold the testator's house on 3 August 2004. Between 16 March and 2 August 2004 the applicant's solicitors wrote to the respondent, or her solicitors, requesting information as to the progress of attempts to sell the house. The replies were non-committal until 4 August 2004 when the respondent wrote:

> 'I … take this opportunity to advise you that the property … has sold.
>
> Settlement was effected on 3 August 2004 and I am currently waiting for funds to clear through the bank.
>
> Please find attached a letter from Steven Colville, Solicitor, dated the 29th of January 2004, who states he represents Mr Brian … Warwick in a threatened action to seek provision from the estate …
>
> Clause 3 of the Terms of Settlement … states that "This settlement is subject to and conditional upon there being no family provision claims by any person … prior to the times for the payments referred to in Clause 2".
>
> Therefore, in accordance with the Terms of Settlement and in light of the threatened family provision action by Brian Warwick, I consider that the agreement as written and read is null and void.
>
> Accordingly, once funds have cleared, I will forward to you a bank cheque in the sum of Fifty Thousand $50,000.00 Dollars in full and

> final settlement of the legacy from the estate of the Late Jack Warwick to Francis … Warwick.'

[11] On 6 August 2004 the respondent wrote to the applicant's solicitors enclosing a bank cheque in the sum of $50,000 'as final settlement of [the applicant's] legacy' and requested the applicant to sign an acknowledgment that he received the money 'as final settlement of the legacy … from the estate of the Late Jack Warwick.'

[12] The sharpness of the respondent's conduct needs no comment. The question I am asked to determine is whether clause 3 of the agreement operates, in the circumstances described, as the respondent contends so as to obliterate the obligation to pay the applicant the second instalment of $325,000.

[13] The answer depends upon whether Mr Colville's letter, properly construed, was a threat to bring a 'family provision claim' against the deceased's estate, and on the proper construction of clause 3 of the agreement.

[14] Mr Crowe SC, who appeared with Mr Beacham, for the respondent helpfully drew my attention to cases decided under the patent legislation in which the courts have had to determine whether there have been threats to commence proceedings for an infringement. I accept, as the appropriate proposition, that the meaning of the letter has to be decided in accordance with how it would be understood by an ordinary reader who read it in the normal course of business (see *Prince PLC v Prince Sports Group Inc* (1997) 39 IPR 225 at 231. Equally helpful is the brief formulation of the question by Jenkins LJ in *C. & P. Development Coy. (London) Ld. v. Sisabro Novelty Coy. Ld.* LXX RPC 277 at 282:

> '… in order to make out a case of threats … it is not necessary to show that the person charged with making the threats has said … in so many words "I will take proceedings against you". It is enough if the language used is such as would convey to any reasonable man that the person using the language intended to bring proceedings …'

[15] Mr Colville's letter fails this test. Relevantly it intimated that Mr Brian Warwick was 'contemplating making a claim for provision from his late father's estate' and asked for information concerning the assets and liabilities of the estate and the extent to which it had been administered. The letter went on 'If I do not receive this information within seven days … I expect my client will instruct me to prepare an application for provision from the estate …'

[16] The clear tenor of the letter is that Mr Brian Warwick wondered whether he should bring an application for provision, and in order to make the decision, required to know what had been in the estate and what was available to satisfy an application if one were brought. It is clear that Mr Warwick did not, at the end of January 2004, intend to bring proceedings pursuant to the *Succession Act*. His position was clear: he did not know whether he should bring proceedings or not and asked for information to allow him to make the decision. The letter does not convey, and indeed is not capable of conveying, to any reasonable reader that he intended to bring proceedings or was threatening to do so.

[17] This conclusion is enough to dispose of the respondent's resistance to making the payment due under the agreement but there is a further answer. The agreement was subject to 'there being no family provision claims … threatened … prior to the

times for the payments referred to in cl 2.' There is, I think, a temporal limitation in the phrase 'prior to the times for the payments'. It does not mean at any time prior to the specified times. It means shortly before those times, or 'at' those times. The condition would operate only if there was at the time for either of the payments a claim, or threat of a claim, against the estate. If Mr Colville's letter constituted a threat, contrary to my opinion, it had been successfully seen off by the respondent by 3 August 2004. Six months had elapsed in which nothing had been heard from Mr Colville. The letter in reply had clearly been meant to discourage Mr Brian Warwick from making any application and had obviously succeeded. At the time for the second payment there was no claim or threat of a claim against the estate for provision.

[18] For these reasons the settlement agreement remained in force in August 2004 and by its terms the respondent should have paid the applicant $375,000. She has paid only $50,000.

[19] The relief sought by the applicant in his originating application was for an injunction requiring the respondent to do all things necessary to carry to effect the terms of settlement of 12 December 2003. The applicant was joined not in her personal capacity, but in her capacity as executrix. What is required to do justice between the parties is a money judgment. Notwithstanding the deficiencies in the procedure adopted by the applicant, which were occasioned largely by his ignorance of the respondent's dealings with the estate, the parties are agreed that I should give judgment for the amount owing under the agreement if I concluded that it remained binding on the parties, as I have. *UCPR* 658 appears to confer ample power on the Court to give the appropriate judgment notwithstanding the form of the proceedings.

[20] Accordingly I order the respondent, in her personal capacity, to pay forthwith to the applicant the sum of $325,000, and I give judgment in such terms. The respondent should pay the applicant's costs of and incidental to the application to be assessed on the standard basis.