

# SUPREME COURT OF QUEENSLAND

CITATION: *Public Trustee of Queensland v MacPherson* [2011] QSC 169

PARTIES: **PUBLIC TRUSTEE OF QUEENSLAND**

(Applicant)

**V**

**ERIC MACPHERSON**

(Respondent)

FILE NO/S: S608 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING  
COURT: Rockhampton

DELIVERED ON: 16 June 2011

DELIVERED AT: Supreme Court Rockhampton

HEARING DATE: 14 June 2011

JUDGE: McMeekin J

ORDER: **1. Pursuant to s.134 Public Trustee Act 1978 the Court directs the Public Trustee that he should compromise Proceedings No. 23 of 2008 in the Rockhampton District Court on the terms set out in Exhibit SJF-10 to the affidavit of Stephen James Forster filed on 25 May 2011.**

**2. Counsel's opinion tendered on the hearing of this Application be placed in an envelope which is not to be opened without the order of the Court.**

**3. Public Trustee's costs of this Application and of these proceedings be paid on an indemnity basis out of the Respondent's share of the estate of Caroline Mary Macpherson, deceased.**

CATCHWORDS: SUCCESSION – EXECUTORS AND ADMINISTRATORS – RIGHTS, POWERS AND DUTIES – Where Public Trustee seeks directions enabling proper discharge of duties while protecting Respondent's Interests

*Public Trustee Act 1978 (Qld)*

*J A Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691

*Macedonian Orthodox Community Church St Petka*

*Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66

*Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198

*Nick Kritharis Holdings Pty Ltd (In Liq) v Gatsios Holdings Pty Ltd* [2001] NSWSC 343

*Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360

*Re Beddoe* (1893) 1 Ch 547

*Underwood & Anor v Sheppard* [2010] QCA 76

COUNSEL: R Whiteford for the Applicant

Respondent in person

SOLICITORS: Official Solicitor to the Public Trustee of Queensland

Respondent in person

- [1] **McMeekin J:** The Public Trustee of Queensland is the administrator of the estate of Caroline Mary MacPherson, deceased. He applies, pursuant to s 134 of the *Public Trustee Act* 1978, for the opinion and direction of the Court as to whether he should settle family provision proceedings presently pending before the District Court in that estate.
- [2] The deceased had three children – the respondent, Eric MacPherson, Pamela O’Brien and David MacPherson. Pamela and David bring the family provision proceedings and their applications are opposed by the respondent.
- [3] The difficulty that the Public Trustee faces is in obtaining instructions from Mr Eric MacPherson. The Public Trustee has been unable to obtain instructions to enable an affidavit to be filed on the respondent’s behalf or to compromise the proceedings.
- [4] On 6 May 2011 the Public Trustee convened a settlement conference. The respondent was not involved. The family provision applications were settled subject to the Public Trustee obtaining the direction of the Court. Effectively the Public Trustee seeks the advice of the Court as to whether he should compromise the applications on the terms offered or whether he should require the proceedings to be tried.
- [5] There were earlier negotiations. The respondent had previously given instructions to settle on a certain basis. The terms now negotiated are considerably more advantageous than the terms that the respondent had previously advised were acceptable to him.
- [6] The proposed changes to the will are relatively modest. David is prepared to withdraw his application. Pamela is to receive an increase of 15% in her entitlement to the rest and residue of the estate – an amount of about \$15,000 more or less. The respondent’s share of the rest and residue is reduced accordingly – so by about \$15,000.

- [7] Very substantial sums have already been spent on this litigation – I suspect that is behind the compromise reached on terms more advantageous to the respondent. The estate is a very modest one, worth a little over \$500,000 at the time of the deceased's death. The bulk of the value of the estate is in a house property – gifted to the respondent in the deceased's will.
- [8] The Public Trustee's concern is that costs are eroding the estate and that the compromise suggested is eminently reasonable as it is likely that the Court will make an order altering the terms of the deceased's will and if that occurs then it is unlikely that the respondent's position could be any better than the terms proposed and is likely to be considerably worse given the probable costs of trial. I have had the advantage of reading an advice prepared by Mr Whiteford of counsel for the Public Trustee in which Mr Whiteford sets out his response to the applications and his opinions as to the likely outcome. While I will not reveal the contents of the advice the Public Trustee has acted in accordance with the advice of counsel greatly experienced in these matters in reaching the compromise.
- [9] That the Public Trustee is right to be so concerned is plain. In *Re Beddoe* (1893) 1 Ch 547 Bowen LJ said: "If there be one consideration more than any other which ought to be in the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk would be incurred."<sup>1</sup>
- [10] Holmes JA made a similar point in *Underwood & Anor v Sheppard*, a case involving family provision claims:
- "The learned judge's observation that the obligation to consider the impact of costs on the estate applied with greater force to the executors than to the beneficiaries is unimpeachable. Executors bear a fiduciary duty to which they must have regard in conducting litigation affecting the estate; beneficiaries do not."<sup>2</sup>
- [11] It is not easy to understand Mr Macpherson's attitude. He appeared before me in response to service of the proceedings but had great difficulty addressing the issues. It is evident that he considers the affidavits filed by his siblings to be grossly defamatory of him. However he appears to overlook that there is no suggestion that he is guilty of any disqualifying conduct. He was not able to articulate to me why he opposed the compromise save perhaps that it does not reflect his mother's intentions, which of course is not irrelevant, but is only the starting point. I note that he eventually left the court room in the course of the submissions stating that he accepted the compromise reached. It would not be unfair to say that his acceptance did not seem heartfelt or the result of any rational deliberation.
- [12] I proceed on the assumption that his opposition continues and that it is based on the view that any change to his mother's will is inappropriate.
- [13] Four things are clear. First, the parties to the dispute are each of the view that it ought to be compromised on the terms provisionally agreed. The respondent is not a party to the dispute he not having elected to be separately represented.

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<sup>1</sup> At 562.

<sup>2</sup> [2010] QCA 76 at [16].

- [14] Secondly, it is in the respondent's interests that the family provision proceedings be compromised. Continued opposition will waste the limited assets of the estate. It is unlikely that the respondent will get any better result from litigating but even if he did limit the applicants' success it is virtually inevitable that there will be an order for costs out of the estate. By the terms of the compromise he gives up \$15,000 more or less. A fully contested hearing will cost considerably more than that. If formal offers are made the hearing could be entirely at his expense.
- [15] Thirdly, without meaningful instructions from the respondent there is little that the Public Trustee can do to oppose the applications before the District Court. The Public Trustee complains that despite ample opportunity to do so the respondent has consistently failed to provide the Public Trustee with instructions. Having seen the respondent and listened at some length to him I am quite satisfied that there is no point to again give him the opportunity to consult with and provide instructions to the Public Trustee as at one point he seemed to indicate was his wish. As the affidavits show the respondent's concerns appear to centre on matters very much on the periphery of the issues, if indeed those concerns are related to the issues at all.
- [16] Fourthly, the Public Trustee is in an invidious position. If it compromises the suit then the respondent might later complain that the primary task of the administrator is to uphold the terms of the will, that those were his instructions and he was ignored and has suffered loss. Alternatively if the Public Trustee goes forward to trial then one or other party might complain that again he failed to act in the best interests of the estate by accepting a reasonable compromise and seek that the trust fund be replenished. Either suit might well be unlikely to succeed but the Public Trustee should not be at risk of being put to the potential trouble and expense of defending it.
- [17] With those observations in mind I turn to the legislation and principles which govern me.
- [18] Section 134 of the *Public Trustee Act 1978* (Qld) provides:

**“Public trustee may take opinion of court on question arising in course of duties**

(1) The public trustee may, without instituting formal proceedings, take the opinion or obtain the direction of the court upon any question, whether of law or of fact, arising under this Act or in the course of the public trustee's duties.

(3) Any such question shall be submitted to a judge of the court in such manner and at such time as the public trustee may direct, and shall be accompanied by such statement of facts, affidavits, documents, and other information as the public trustee may require and the public trustee or anyone authorised by the public trustee shall, if the judge so desires, attend upon the judge at such time and place as the public trustee may appoint.

(4) The judge may, before giving the judge's opinion or direction, require the attendance of, or communication with, any person interested, but no such person shall have a right to be heard unless the judge so directs.

(5) The judge shall give the judge's opinion or direction to the public trustee and, subject to any order of the court in other proceedings formally instituted, the public trustee, acting in accordance with such opinion or direction, shall be fully indemnified.

(6) The public trustee shall, upon the request in writing of any such interested person, communicate to the person the effect of such opinion or direction.”

[19] In *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 the High Court considered the New South Wales analogue of this section. The plurality<sup>3</sup> made several general points about the provision. For present purposes the one of significance is the emphasis that the provision “operates as ‘an exception to the Court's ordinary function of deciding disputes between competing litigants’; it affords a facility for giving ‘private advice’. It is private advice because its function is to give personal protection to the trustee.”<sup>4</sup>

[20] Thus I am not balancing the two competing arguments of litigating parties. In this case I am asked to provide advice and direction to enable the Public Trustee to properly discharge the duties of his office, one such duty, ironically, being to protect the interests of the respondent as best as can be done in all the circumstances.

[21] A further point made by the High Court in *Macedonian Orthodox Community Church* is relevant here. While the Public Trustee seeks to be personally protected he also seeks to protect the estate which he has the task of administering. The plurality said:

“Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.

It is, therefore, not right to see a trustee's application for judicial advice about whether to sue or defend proceedings as directed only to the personal protection of the trustee. Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust.”<sup>5</sup>

[22] On the basis of the information advanced by the Public Trustee there seems little doubt that the interests of the estate will be protected – by preserving the assets of the estate – if the proposed compromise is adopted. That approach accords with the statement of the High Court and the fundamental principle identified by the Privy Council in *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 at 201:

“[I]n exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties.”

[23] In my view all factors favour the disposition of the family provision proceedings by compromise as proposed. The only factor that occurs to me to put in the balance against advising the Public Trustee to compromise the proceedings is that the

<sup>3</sup> Gummow ACJ, Kirby, Hayne and Heydon JJ

<sup>4</sup> At [64]

<sup>5</sup> At [71]-[72]

respondent will be deprived of the opportunity of testing the applicants' claims or of obtaining a curial determination of them. Given the respondent's refusal to engage meaningfully in the litigation process – principally by way of providing instructions – I cannot give this aspect much weight. For many months now the respondent has had the remedy for this concern within his own power to address.

### **Conclusion**

[24] The Orders will be:

1. Pursuant to s.134 Public Trustee Act 1978 the Court directs the Public Trustee that he should compromise Proceedings No. 23 of 2008 in the Rockhampton District Court on the terms set out in Exhibit SJF-10 to the affidavit of Stephen James Forster filed on 25 May 2011.
2. Counsel's opinion tendered on the hearing of this Application be placed in an envelope which is not to be opened without the order of the Court.
3. Public Trustee's costs of this Application and of these proceedings be paid on an indemnity basis out of the Respondent's share of the estate of Caroline Mary Macpherson, deceased.

[25] I have ordered that the respondent pay the Public Trustee's costs and on an indemnity basis. Ordinarily a trustee or executor is entitled as of right to be indemnified for expenses incurred before paying out the trust funds to anyone else: *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *J A Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691 at [50]; *Nick Kritharis Holdings Pty Ltd (In Liq) v Gatsios Holdings Pty Ltd* [2001] NSWSC 343 at [9] to [11]. Here it would be unfair to saddle the respondent's siblings with these costs. They have been incurred solely by reason of the respondent's approach to the litigation.