SUPREME COURT OF QUEENSLAND

CITATION:	*Quinn v Lovell* [2011] QSC 396
PARTIES:	**MICHAEL MORRISON QUINN** (applicant) **v** **AARON JOHN LOVELL as administrator of the Estate of Evelyn Maud Watkins (Deceased)** (respondent)
FILE NO/S:	BS5806/11
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	16 December 2011
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	20 July 2011
JUDGE:	Douglas J
ORDER:	**(1) Direct, pursuant to s 6(1) of the *Succession Act* 1981 (Qld), that the respondent shall forthwith give a written direction to Johnsons solicitors to pay the sum of $93,178.66 with accretions, if any, to the trust account of the applicant's solicitors;** **(2) Direct that the respondent pay the applicant interest on the sum claimed of $84,493.58 at nine per cent per annum from 22 June 2011 until the date of payment of that sum to the applicant.**
CATCHWORDS:	PROCEDURE – COSTS – SOLICITOR AND CLIENT – LIENS – where action brought by deceased prior to death against her neighbour – where costs agreements relevant to action – where action settled – where neighbour paid $93,178.66 into neighbour's solicitors' trust account – where money held on trust by neighbour's solicitors in anticipation of court order or to pay sum into court – where money found to be subject to solicitor's particular lien – where costs agreements authorised solicitor to receive client's monies and to deduct costs – whether direction sought pursuant to s 6(1) of the *Succession Act* 1981 (Qld) ought be made to enforce lien SUCCESSION – EXECUTORS AND ADMINISTRATORS – PROCEEDINGS AGAINST EXECUTORS AND ADMINISTRATIORS – where respondent appointed as administrator of estate pursuant to limited grant pending grant of probate – where respondent seeking monies held on trust

by neighbour's solicitors to be released to respondent as administrator of estate – where application for direction that respondent give written direction to neighbour's solicitors to pay $93,178.66 into applicant's solicitors' trust account together with interest on $84,493.58 from 22 June 2011 and costs on indemnity basis fixed in sum of $10,000 – whether discretion ought be exercised under s 6(1) of the *Succession Act* 1981 (Qld)

Succession Act 1981 (Qld), s 6(1)

Commissioner of Taxation v Government Insurance Office of NSW (1992) 36 FCR 314, cited
Halvanon Insurance Co Ltd v Central Reinsurance Corp [1988] 3 All ER 857, considered
Ex parte Patience; Makinson v The Minister (1940) 40 SR (NSW) 96, considered
Philippa Power & Associates v Primrose Couper Cronin Rudkin [1997] 2 Qd R 266 considered
Re De Groot [2001] 2 Qd R 359, cited
Watkins v Christian [2008] QSC 345, referred
Worrell v Power & Power (1993) 46 FCR 214, cited

COUNSEL: R J Leneham (solicitor) for the applicant
R S Ashton for the respondent

SOLICITORS: Quinn & Scattini Lawyers for the applicant
Collas Moro Ross for the respondent

[1] **Douglas J**: This is an application pursuant to s 6(1) of the *Succession Act* 1981 (Qld) for a direction that the respondent as administrator of the deceased estate of Evelyn Maud Watkins give a written direction to a firm of solicitors, Johnsons Solicitors and Attorneys, to pay $93,178.66 to the applicant's solicitors' trust account, that of Quinn & Scattini Lawyers, together with interest on $84,493.58 from 22 June 2011 and costs on an indemnity basis fixed in the sum of $10,000.

Background

[2] The amount is said to be payable to the applicant as costs relevant to an action brought by the deceased, Ms Watkins, against her neighbour, Ms Christian. During the course of the action Ms Watkins became incapacitated and her nephew, a Mr Lambert, became her litigation guardian. The applicant, Mr Quinn, was then the principal of Quinn & Scattini, Ms Watkins' solicitors. Each of the two costs agreements executed by Ms Watkins and then by Mr Lambert provided:

> "12) **Trust Account Transfers**
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> You irrevocably authorise and instruct us –
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> a. to receive on your behalf any monies due to you in the course of or as a result of acting on your behalf;

b. to deduct from any monies received by us and to transfer to our own account, such amount or amounts as are necessary to pay our Costs in accordance with this agreement; and

c. to deduct from any monies received by us and to transfer to our own account any Costs owing by you to us in any other matter properly undertaken by us on your behalf at your request (or any business, company, partnership or other entity owned or controlled by you)."

[3] Ms Watkins' action settled on 2 June 2010 on terms that Ms Christian pay her $80,000 and her costs to be assessed by a costs assessor on the indemnity basis where some aspects of the costs were agreed. Ms Christian paid Quinn & Scattini the figure of $80,000 through her solicitors. That sum was applied by Quinn & Scattini to their costs. The costs assessor arrived at the figure of $93,178.66 as the costs payable pursuant to what had become a slightly amended deed of settlement and Ms Christian has paid that figure into her solicitors' trust account. Her solicitors, Johnsons, are holding that sum in anticipation of a court order or, if the occasion arises, to pay the sum into court.

[4] Ms Watkins died on 21 July 2010. On 5 April 2011, Mr Lovell, a solicitor and the respondent to this application, was appointed as the administrator of her estate pursuant to a limited grant pending a grant of probate. There is a dispute in the offing about Ms Watkins' capacity when she executed the most recent will sought to be proved. Mr Lovell is empowered by the order appointing him to collect her assets and pay her debts.

Submissions

[5] The applicant's contention is that the sum held by Johnsons is payable to it pursuant to cl 12 of its costs agreement. The respondent's contention is that the amount should be released to him as administrator of the estate and that the applicant should seek to recover the balance of his costs in the normal fashion, presumably by an action.

[6] The respondent's calculation of the claims for costs and outlays made by the applicant is $171,787.39 where, he points out, the assessed indemnity costs payable were $93,178.66. Mr Lovell says that, on a preliminary view of the material provided to him, he has real concerns as to whether the estate is liable for the full amount of the fees and outlays claimed. On the other hand, the applicant argues that its costs as between solicitor and client are determined by its costs agreement and are not limited to the assessment, even on an indemnity basis, of the costs as between Ms Watkins and Ms Christian.

[7] Mr Leneham, the solicitor for the applicant, submitted the applicant had a contractual right to receive the money enforceable against the estate and subject to the obligation to account to the estate for any amount received by the applicant in excess of his entitlement. He also relied on what has been called the "fruits of the action" lien available to a solicitor. The respondent, on the other hand, asserts that the money is an asset of the estate that he is obliged by this Court's order to collect.

Discussion

[8] No doubt the money held by Johnsons is an asset of the estate but, in my opinion, it is subject to a solicitor's particular lien as part of the subject matter of the action against Ms Christian that can be said to have been recovered or preserved by the work done in the action by the applicant solicitor. That the property is not yet in the possession of the applicant does not prevent the lien from arising as this type of lien does not depend on any proprietary or possessory relationship of the solicitor to the property.[1]

[9] The discussion by Hobhouse J in *Halvanon Insurance Co Ltd v Central Reinsurance Corp* is helpful:[2]

> "They assert what is called a solicitor's particular 'lien', but it is not in truth a lien properly so called at all. It is a right to ask the court to interfere equitably to protect the rights of the unpaid solicitor.
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> In *Mercer v Graves* (1872) LR 7 QB 499 at 503 Cockburn CJ said:
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> > '… there is no such thing as a lien except upon something of which you have possession … although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds that there is a probability of the client depriving him of his costs.'
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> In *Mason v Mason (Cottrell cited)* [1933] P 199 at 214, [1933] All ER Rep 859 at 868 Lord Hanworth MR said: 'It is merely a right to claim the equitable interference of the Court.'
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> It does not depend on any proprietory or possessory relationship of the solicitor to the property. It simply requires that the property must have been in some definable way part of the subject matter of the action (see *Re Wadsworth, Rhodes v Sugden* (1885) 29 Ch D 517) which can be said to have been recovered or preserved by the work done in the action by the solicitor. Where the solicitor has acted for the plaintiff the question ultimately arises at the time of the enforcement or satisfaction of any judgment that the plaintiff has obtained or if the action is settled before judgment at that time. If a plaintiff by a compromise with a defendant seeks to achieve a situation whereby he, the plaintiff, will get the fruits of the action without having to pay the solicitor, the unpaid solicitor may intervene and apply to the court for an order that he nevertheless be paid (see *Wimbourne v Fine* [1952] 2 All ER 681, [1952] Ch 869) and where there has been collusion with the defendant, get an order against the collusive defendant as well."

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1 See the discussion in GE Dal Pont, *The Law of Costs* (2nd ed, 2009, LexisNexis Butterworths) at p 918 par [27.1].

2 [1988] 3 All ER 857, 862-863; see also *Commissioner of Taxation v Government Insurance Office of New South Wales* (1992) 36 FCR 314, 327 and Dal Pont, op cit, pp 917-918 par [27.1].

[10] Jordan CJ also discusses the point particularly clearly in this context in *Ex parte Patience; Makinson v The Minister*:[3]

> "A solicitor has no lien for his costs over any property which has not come into his possession. If, however, as the result of legal proceedings in which the solicitor has acted for the client, the client obtains a judgment or award or compromise for the payment of money, although the solicitor acquires no common law title to his client's right to receive the money or to any part of that right, he acquires a right to have his costs paid out of the money, which is analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor. That is to say, the solicitor has an equitable right to be paid his costs out of the money; and if he gives notice of his right to the person who is liable to pay it, only the solicitor and not the client can give a good discharge to that person for an amount of the money equivalent to the solicitor's costs … If the person liable to pay refuses, after notice, to pay the costs of the solicitor, the solicitor may obtain a rule of Court directing that the amount of his costs be paid to him and not to the client; and payment by the judgment debtor to the client after notice of the solicitor's claim is no answer to an application for such a rule … Further, if the client and a judgment debtor made a collusive arrangement for the purpose of defeating the solicitor's right, the Court will enforce that right against the judgment debtor notwithstanding the arrangement and notwithstanding that no notice of the solicitor's claim had been given to the judgment debtor prior to the arrangement."

[11] The modern justification for the particular lien is said to turn upon two fundamental rights enjoyed by all citizens in a democracy: the right of access to the courts, and the right to legal representation.[4] That right to a lien is enhanced, in this case, by the presence of cl 12 in the costs agreements. Mr Ashton, for the respondent, argued that it was not an agreement to procure the payment of all moneys to the solicitor's trust account but, in my view, it does amount to an agreement to authorise the applicant to receive the money from Johnsons on Ms Watkins' behalf. In the absence of cl 12, and because of the doubts expressed by the respondent about the amount of the fees claimed, I would have been inclined simply to declare that the applicant was entitled to a lien for its costs to be assessed in respect of the fund held by Johnsons[5] but cl 12 justifies the course urged by the applicant.

[12] Mr Ashton also told me from the bar table that there was an issue as to the capacity of Ms Watkins to execute her will which may affect also her capacity to execute the costs agreement or the power of attorney in favour of Mr Lambert. That question was not the subject of the argument before me and there was little evidence of her capacity in the material read before me. An interlocutory judgment of MA Wilson J in *Watkins v Christian*[6] indicates that there was evidence before her Honour of

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3 (1940) 40 SR (NSW) 96, 100 adopted by the Full Court of the Federal Court in *Worrell v Power & Power* (1993) 46 FCR 214, 223 and Muir J in *Re De Groot* [2001] 2 Qd R 359, 367 at [34]. See also *Philippa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266, 271-273.

4 See the discussion in Dal Pont, op cit, at pp 918-919 par [27.2].

5 Compare *Philippa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266 at 271.

6 [2008] QSC 345.

allegations that Ms Watkins was of weakened mental capacity due to old age but there was no direct evidence before me of those allegations.

[13] For that, among other reasons, Mr Ashton submitted that this was not an appropriate case to use the power to give directions under s 6 of the *Succession Act* to achieve this result. Nonetheless, however, the proceedings conducted for Ms Watkins sought the rescission of certain transactions entered into between her and Ms Christian and restitution of a significant sum of money. They succeeded to the extent of the compromise entered into, resulting in a fund recovered or preserved by the work done by the applicant.

[14] In the circumstances, it seems to me that the applicant is entitled to exercise the right to make a claim to payment to it of the fund held by Johnsons and that an appropriate way of enforcing the lien and the costs agreement is to make a direction of the type sought by the applicant. It will then be up to the respondent to exercise his rights to challenge the amount of the fees sought by the applicant by the normal procedures available for an assessment of the costs claimed. In that way the amount of any obligation of the applicant to account to the estate can be calculated.

Orders

[15] I propose to direct, therefore, pursuant to s 6(1) of the *Succession Act* 1981 (Qld), that the respondent shall forthwith give a written direction to Johnsons solicitors to pay the sum of $93,178.66 with accretions, if any, to the trust account of the applicant's solicitors.

[16] As the applicant has been held out of those funds since 22 June 2011 it also seems appropriate to me to direct further that the respondent pay the applicant interest on the sum claimed of $84,493.58 at nine per cent per annum from 22 June 2011 until the date of payment of that sum to the applicant.

[17] I shall hear the parties further as to the form of the proposed order and as to costs.