SUPREME COURT OF QUEENSLAND

CITATION:	*Colston v McMullen & Ors* [2012] QCA 109
PARTIES:	**DOUGLAS BENJAMIN COLSTON** (appellant) **v** **BRIAN MCMULLEN as Trustee and Appointor of the testamentary discretionary trust known as "THE DAWN COLSTON ESTATE TRUST"** (first respondent) **DAVID ANDREW COLSTON** **[In his personal capacity and as Trustee of JANFERN SUPER FUND (and as it is also known, JANFERN SUPERANNUATION FUND), Director of JANFERN PTY LTD and Trustee of the DAVID COLSTON FAMILY TRUST]** (second respondent) **JOANNE LITTLE** (third respondent)
FILE NO/S:	Appeal No 7261 of 2011 Appeal No 7263 of 2011 SC No 12108 of 2010 SC No 12109 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2012
JUDGES:	Chief Justice and P Lyons J and Dalton J Judgment of the Court
ORDER:	**1. That the appeal be allowed;** **2. That leave be granted to adduce additional evidence;** **3. That the orders made in the Trial Division on 19 July 2011 (other than the refusal to add David Colston and Joanne Little as defendants and the costs order in their favour) be set aside, and that in lieu thereof it be ordered:** **a. That the application for removal of the first respondent as trustee be adjourned to a date to be fixed;** **b. That the application for removal of the first respondent as trustee be heard as a claim for final**

relief and leave as necessary is granted so that the application may proceed;

c. That the hearing of the application for removal of the first respondent as trustee be expedited; and

d. That the costs of the hearing on 19 July 2011 otherwise be reserved;

4. That the costs of and incidental to this appeal be reserved.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where appellant brought application, inter alia, to remove first respondent as trustee which was refused – where appellant did not, at original application, have evidence to warrant removal – where affidavit material subsequent to original application disclosed that trust accounts had not been prepared for several years and raised other questions as to the making of substantial disbursement from the trust and loans to it by trustee – where questions raised as to liquidity of trust – whether leave be granted to adduce additional evidence – whether appeal should be allowed

Colston v McMullen [2010] QSC 292, considered
Miller v Cameron (1936) 54 CLR 572; [1936] HCA 13, cited

COUNSEL: The appellant appeared on his own behalf
P F Mylne for the first respondent
The second respondent appeared on his own behalf and on behalf of the third respondent

SOLICITORS: The appellant appeared on his own behalf
McCowans Specialist Solicitors for the first respondent
The second respondent appeared on his own behalf and on behalf of the third respondent

THE COURT:

Introduction

[1] The appellant is the son of deceased parents, Malcolm Arthur Colston and Dawn Patricia Colston. His sibling is David Andrew Colston. His father died on 23 August 2003 and his mother died on 3 July 2004.

[2] By his will, the appellant's father left each of his sons one share in a company named Janfern Pty Ltd, together with some other property, with the residue going to his widow.

[3] By her will, the appellant's mother established a discretionary trust. The beneficiaries included the appellant and his brother and others including grandchildren. The terms of the trust reserved to the trustee (her brother, the first respondent) a discretion as to distribution. Should the trustee not make a determination with respect to income or capital distribution by 30 June in any particular year, then the brothers would become entitled, in equal shares, to the

relevant amounts. The trustee nevertheless retained an absolute discretion to apply the funds towards the maintenance etc of any beneficiary.

[4] The appellant's mother appointed the first respondent as executor and administrator of her estate and as trustee and appointor of The Dawn Colston Estate Trust, which is the discretionary trust.

Primary application

[5] The appellant appeals against the disposition by Douglas J on 19 July 2011 of two applications, numbers 12108 and 12109 of 2010.

[6] By those applications the appellant sought a range of orders, including adding two respondents, his brother David and Ms Joanne Little (David's wife, in her capacity as trustee of The David Colston Family Trust); leave to deliver an amended statement of claim within 28 days of the appellant's receipt of a report from BDO Australia (to be paid for by a proposed "interim trustee") on "negligence, default, breach of trust and theft matters" concerning the first respondent, the appellant's brother and Ms Little; the replacement of the first respondent as trustee on an interim basis; directions to the interim trustee to restore property said to belong to The Dawn Colston Estate Trust; and directions directed towards BDO Australia's being given access to documents in relation to The Dawn Colston Estate Trust and The David Colston Family Trust.

[7] It is convenient to mention at this stage that in his written outline, the appellant referred to claims which were not included in his applications and were not therefore dealt with by Douglas J. One instance is a claim for "prohibition to apply to McCullough Robertson, McCowans Specialist Lawyers, Mr Mylne and Mr Whiteford from further involvement for the (first respondent)".

[8] It would be irregular to make determinations on those matters on appeal, when they were not raised in a regular way in the applications before the primary Judge, that is, as claims advanced in the form of the applications proper. It is those applications which must dictate the scope of the proceeding. There is risk the regularity of the process may be derailed if the proceeding is allowed to proceed less formally, in that the first respondent would not be appropriately apprised of the case he has to meet and the scope of the court's obligation would not be clear.

Relevant previous proceedings

[9] On 12 December 2008 the appellant applied (BS 12943/08) for an order removing the first respondent as executor and trustee of the estate of each of his parents and as trustee and appointor of The Dawn Colston Estate Trust. One of his many complaints, and the one Douglas J described as the most critical, was that the first respondent had failed to make distributions to him (and his brother) consequent upon failure to make determinations by 30 June in particular years. The first respondent swore that he had exercised his discretion to distribute among beneficiaries, so that no situation of "default distribution" arose. White J (as she then was) dismissed that application on 6 August 2010, delivering comprehensive reasons ([2010] QSC 292). The Court of Appeal dismissed an appeal against Her Honour's orders, on 15 July 2011.

[10] Her Honour was apparently satisfied that the first respondent was doing his honest, competent best, saying he had "struggled to administer a very difficult estate and to give effect to the wishes of his sister in making future and secure provision for her two sons and their families".

[11] On 31 March 2010 P McMurdo J ordered that large sections of the appellant's statements of claim be struck out. The Court of Appeal dismissed an appeal against His Honour's orders, on 9 September 2011.

[12] There have been other proceedings, but they do not bear directly on the disposition of this appeal.

Primary Judge's reasons

[13] As to the application for removal of the first respondent as trustee, Douglas J pointed out that on 6 August 2010 White J refused to remove the first respondent following, as His Honour said, a trial. It would be odd, Douglas J observed, to contemplate removal, even on an interim basis, upon an interlocutory application. In fact there was no trial as such before White J: it was a substantial interlocutory hearing, as reflected by Her Honour's reasons, in which she dealt comprehensively with most of the points raised before Douglas J, including, in detail, the content of the Pitcher Partners report on the administration of the Trust, on which the appellant relied. But that point of characterization is, in the end, of no moment.

[14] Douglas J observed that the forensic accountant's report from BDO (Qld) Pty Ltd, on which the appellant relied before him, was based on assertions by the appellant, and not on primary evidence, and drew on material which founded the Pitcher Partners report which was before White J.

[15] It is convenient to record at once that the forensic accountant's report, from BDO (Qld) Pty Ltd, which was directed towards supporting the appellant's pursuit of documentation, adds little to the Pitcher Partners report. The author, Mr Williams, expressly says that he "cannot comment upon the accuracy or otherwise of the issues raised by Pitcher Partners". That report could not possibly have justified the removal of a trustee, even on any so-called "interim" basis.

[16] The appellant's own evidence, His Honour said, generally bore the character of assertion rather than admissible material.

[17] Insofar as the appellant alleged a failure by the first respondent to account for his administration, Douglas J referred to the imprecise nature of requests made by the appellant for information, and concluded that there was no basis to say that the first respondent had failed to make proper account.

[18] As to the application for provision of documentation, Douglas J referred to the broad and imprecise description of the documents when sought, and the inadequate state of the pleadings (following the orders made by P McMurdo J), and characterized the application for orders for production as a "fishing expedition". He left the appellant to request the provision of particular documents said to be relevant, as had White J, with Her Honour expressing confidence that particular relevant documents would be produced if requested. His Honour was referred to requests for documentation in broad and arguably oppressive form, such as "all documents…relating to The Dawn Colston Estate Trust for each financial year of the Trust's operation".

[19] As to the application for joinder, Douglas J noted the absence of evidence providing a proper basis for joinder, the absence of any draft pleadings making allegations against the proposed additional respondents, and the circumstance that the affidavit material did not surpass the obscure and confusing.

Grounds of appeal

[20] The amended notice of appeal (for which we granted leave to amend) is a lengthy document more akin to a set of written submissions. The appellant there identifies suggested errors made by Douglas J: as to whether White J disposed of the appellant's application (her orders indicate she did); as to whether the appellant was relying on the "default provisions" in his late mother's will; as to whether the appellant was seeking the removal of the first respondent as executor of the estates (rather than as trustee); as to whether the appellant's allegations were supported by admissible evidence; as to whether the appellant had requested the first respondent to provide an account of his administration; and as to whether there was a basis for joinder of additional respondents. The appellant contended the errors which led to His Honour's judgment warrant the court's now receiving "fresh evidence", as referred to in paragraph 6 of the amended notice of appeal.

Analysis

[21] It is appropriate to consider the matter, first, without reference to the proposed additional evidence. Our view is that absent the additional material, the appeal would fail, but that the additional material warrants reconsideration of the application for removal of the trustee.

[22] Douglas J dismissed the application to remove the first respondent as trustee on the basis that it was substantially an attempt, on an interlocutory basis, to revisit the basis upon which White J, about one year before, had refused that very relief. There had not subsequently been a "significant change of circumstances" (*Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 WLR 485, 492-3). The thrust of the criticism of the first respondent remained the same – the alleged failures identified in the Pitcher Partners report, which the first respondent had explained to the satisfaction of White J. The Judge observed that the further evidence from the appellant was imprecise, confusing and generally unsatisfactory, and that the report by the forensic accountant was largely based on assertion from the appellant (as was the Pitcher Partners report), and not admissible primary material. In that matrix, His Honour's discretionary determination that there was no basis for the removal of the first respondent as trustee, particularly on an "interim" basis, was justified and would not be vulnerable on appeal.

[23] The appellant has referred to cases dealing with the breadth of the court's discretion to remove a trustee or executor. It is pertinent to add reference to *Miller v Cameron* (1936) 54 CLR 572, 581, to which White J referred in her reasons for judgment. Dixon J (as he then was) said this:

> "But in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight."

[24] The appellant's problem before Douglas J, however, was that he had not established, by evidence, a sufficiently arguable case that the first respondent had breached and was breaching his trust obligations. The appellant sought to rely on the first respondent's not having, on oath, gone into the detail of his administration, or responded to the appellant's allegations. It was not incumbent on the first respondent to do so where, as Douglas J found, those allegations amounted substantially to no more than assertion, and where so far as there was an attempt to support them, the affidavit material was imprecise and confusing.

[25] Douglas J refused to join the appellant's brother and Ms Little because no sufficient basis justifying their joinder had been advanced. There was no draft pleading raising relevant allegations against them, for example, or any adequately sworn justification. There would be no basis for departure from that discretionary approach on appeal. (They were represented before Douglas J, who ordered the present appellant to pay their indemnity costs.)

[26] Finally, as to His Honour's dismissal of the application for directions for the production of documents, there is also no reason to doubt His Honour's characterization of that part of the application as amounting to no more than a fishing expedition, especially so when pleadings had not yet reached any satisfactory, operative condition.

[27] The appellant sought the setting aside of a transfer of the 43 Steptoe Street property effected in December 2009. He also sought revocation of changes to the constituting documents of Janfern Pty Ltd effected in January 2010. In his written outline, the appellant suggests that some of these matters would be progressed after the "comprehensive audit of estate and trust activity" which he proposes to be funded from The Dawn Colston Estate Trust, and he envisages amending his statement of claim after that report is to hand.

[28] The appellant's fundamental problem is that the primary Judge's conclusion, consistently with the earlier determination of White J, was that the appellant had not established a sufficiently arguable basis for concluding that the first respondent had breached his duties as executor of the estate and trustee of the trust. Unless that approach was wrong, and for reasons earlier expressed it was not, it would be completely inappropriate for the court to burden the estate and the trust with the carrying out of such an audit, and to require an apparently unnecessary audit at the cost of the trust would compound that insupportability.

Application to rely on additional evidence

[29] The appellant seeks to rely, in this appeal, on material not before Douglas J, as indicated by aspects of paragraphs 14 and 15 of his amended outline, and through his direct application to adduce "fresh" evidence. That evidence consists of affidavits sworn by the first respondent in the proceedings in the trial division, and the exhibits thereto which include the accounts from the Trust for the financial years 2009, 2010, and 2011. In the circumstances, it would have been difficult for the respondents to contend that this new evidence was not credible, and they did not do so.

[30] Much of the proffered additional evidence came into existence after the hearing before Douglas J. Affidavits of the first respondent sworn 31 October 2011 and 16 February 2012 disclosed four such matters on which the appellant placed substantial reliance:

A. that the accounts for the Trust for the years ended 30 June 2009, 2010 and 2011 were not prepared before November 2011, nor provided to the beneficiaries before 23 December 2011;

B. a distribution to Mr David Colston of an amount substantially in excess of $500,000 in the year ended 30 June 2010, reflecting the transfer to his wife and him of a property at 43 Steptoe Street (there are inconsistencies between the 2010 and 2011 accounts in relation to the amount transferred);

C. questions about the solvency of the Trust and associated issues as to the timing of financial transactions made by the trustee; and

D. the sale of another property at 45 Steptoe Street in November 2011 for an amount of $400,000 as against a valuation made three months earlier in the amount of $460,000.

[31] The appellant contended that the failure of the first respondent to prepare the accounts referred to in paragraph A above – as acknowledged before us – would have influenced the judgment of Douglas J had His Honour been aware that the accounts had not been prepared at all, rather than simply not furnished on request. The accounts for the year ended 30 June 2008 had previously been prepared. The hearing before Douglas J occurred on 19 July 2011. By that time, the accounts for the years ended 30 June 2009 and 2010 had not been prepared (also, for 2011, but just ended). Absent explanation, that circumstance plainly could bear on the question of the suitability of the trustee.

[32] The appellant advanced the matter in paragraph B as a serious instance of maladministration by the first respondent as personal representative and trustee. It is apparent from the 2010 and 2011 accounts that the estate assets no longer include a major asset of the Trust, the 43 Steptoe Street property. It seems that the first respondent transferred this property to David Colston and his wife. The appellant's evidence at first instance made reference to the transfer. The first respondent's Counsel referred to the transfer as an exercise of the discretion conferred on the trustee of a discretionary trust; and the matter was not referred to in the reasons at first instance. The accounts, however, suggest that the transfer may have been funded by drawings for which Mr David Colston remains liable. The state of the material is unsatisfactory, particularly because there is an element of opaqueness to the accounts, and there are unexplained discrepancies between the 2010 accounts and those for 2011. However, the first respondent has not had an opportunity to respond to these concerns. In the circumstances, it is not possible to reach a firm conclusion whether, so far as they relate to 43 Steptoe Street, the 2010 and 2011 accounts may have had an important impact on the outcome at first instance.

[33] The appellant also advanced the matter in paragraph C as a serious instance of maladministration by the first respondent as personal representative and trustee. In his affidavit sworn 31 October 2011 (after the hearing before Douglas J), the first respondent swore that in August 2011, the Trust "ran out of liquid funds…". The first respondent then lent the Trust $70,000, essentially, one infers, to keep it afloat. On 18 November 2011, the first respondent determined to "suspend distributions of all beneficiaries" because of concern as to the costs of the ongoing litigation. Yet in a declaration of 30 November 2011, the first respondent affirmed the solvency of the Trust.

[34] The first respondent subsequently made a payment to himself from the proceeds of sale of the 45 Steptoe Street property. Settlement of that sale occurred on 9 December 2011, the property apparently being the only substantial asset of the Trust by that time. The material suggests the first respondent then paid himself more than $70,000, in fact, amounts totalling up to $130,000. The reason is unexplained. While the Trust retains an amount approximating the balance of the proceeds of sale, the first respondent deposed to the fact that the Trust has incurred legal costs of $473,893.01 in the current litigation.

[35] These matters call for explanation. If not adequately explained, they could bear on the suitability of the first respondent as trustee.

[36] As to the matter in paragraph D above, it is difficult to conceive that a difference of that order would materially have affected the primary determination.

[37] In the circumstances, we give leave to the appellant to rely upon the fresh evidence which was marked "A" and "B" during the hearing. The new material covered in sub-paragraphs A and C above, if before Douglas J, could not properly have been explored then, allowing for the necessary limitations on interlocutory hearings. Had that material been presented, and responded to, and in the event it emerged the necessary hearing could have been lengthy, the proper course would have been to adjourn the application to a date when sufficient time could have been allotted to it. While we are not satisfied on the material before us that the matter referred to in sub-paragraph B above may have had an important impact on the outcome of the proceedings below, if a further hearing is to take place, this matter should also be considered.

[38] But for the additional evidence, this appeal should have been dismissed.

[39] The appropriate course now, however, is to allow the appeal and set aside the orders made by Douglas J (save for the refusal to add David Colston and Joanne Little as defendants and the costs order in their favour), with an order that the application for removal of the first respondent as trustee be adjourned for hearing on an expedited and final basis before a Judge of the Trial Division. While Mr David Colston will have a right to be heard on that application (as a beneficiary), there is no need formally to add him as a respondent.

[40] The costs of the hearing before Douglas J, and of this appeal, should be reserved to await the outcome of that hearing.

Orders

[41] There will be orders:

1. that the appeal be allowed;

2. that leave be granted to adduce additional evidence;

3. that the orders made in the Trial Division on 19 July 2011 (other than the refusal to add David Colston and Joanne Little as defendants and the costs order in their favour) be set aside, and that in lieu thereof it be ordered:

    (a) that the application for removal of the first respondent as trustee be adjourned to a date to be fixed;

    (b) that the application for removal of the first respondent as trustee be heard as a claim for final relief and leave as necessary is granted so that the application may proceed;

    (c) that the hearing of the application for removal of the first respondent as trustee be expedited; and

    (d) that the costs of the hearing on 19 July 2011 otherwise be reserved;

4. that the costs of and incidental to this appeal be reserved.