SUPREME COURT OF QUEENSLAND

CITATION:	*Rogers v Dempster & Anor* [2012] QSC 415
PARTIES:	**FRANCIS HAMILTON ROGERS** (applicant) **v** **IAN GILBERT DEMPSTER** (first respondent) and **JOYCE OLIVE ROGERS** (second respondent)
FILE NO:	11280 of 2012
DIVISION:	Trial Division
PROCEEDING:	By way of Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	20 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 December 2012
JUDGE:	Applegarth J
ORDERS:	**1. The applicant pay the first respondent's costs of and incidental to the application incurred on and after 1 December 2012 to be assessed on the standard basis.** **2. Otherwise the costs of and incidental to the application be reserved.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – Costs against a solicitor – where the first respondent solicitor acted in relation to a transfer of property from the applicant ("Mr Rogers") to his son – where the second respondent ("Mrs Rogers") held Mr Rogers' enduring power of attorney – where Mr Rogers requested a copy of the file relating to the property transfer from the first respondent – where Mrs Rogers instructed the first respondent that Mr Rogers lacked capacity to give the instruction and she was authorised to give instructions on his behalf – where the first respondent sought advice from a professional ethics committee – where solicitors for Mr Rogers applied for the release of the first respondent's file – where the first respondent's file has been provided to Mr Rogers' solicitors after a change in instructions to the first respondent – whether the first

respondent should pay Mr Rogers' costs of the application

Steindl Nominees Pty Ltd v Laghaifar [2003] 2 Qd R 693, cited

COUNSEL: R J Anderson for the applicant
A W Duffy for the first respondent
No appearance for the second respondent

SOLICITORS: Flehr Law for the applicant
The first respondent on his own behalf
No appearance for the second respondent

[1] The only issue for determination is a question of costs.

[2] The applicant and his wife, the second respondent, have been married for about 52 years. They have four sons. For many years Mr and Mrs Rogers were assisted in the running of a grazing property at Toobrack Station via Longreach by two sons, and then by their eldest son, Neil. The applicant transferred his interest in the property to Neil in 2008. The applicant executed an enduring power of attorney in 2008, appointing the second respondent as his attorney.

[3] In around 2011 disputes broke out between family members, with demands for repayment of loans. The applicant and the second respondent reportedly are now estranged.

[4] The first respondent, a solicitor, acted in respect of the transfer of the property from the applicant to the applicant's son, Neil, in 2008. It may be that the firm of which he was then sole partner, PW Skewes & Dempster (Longreach), acted for both the transferor and the transferee. The first respondent ceased to conduct the practice in August 2010. He was employed as a senior associate with the firm Murdoch Lawyers in Toowoomba. In about March 2012 he left the employ of Murdoch Lawyers and since April 2012 has been employed by Wonderley & Hall Solicitors, Toowoomba.

[5] The applicant sought advice from Murdoch Lawyers about the circumstances of the transfer. More recently, that firm has ceased to act for the applicant due to a potential conflict. In July 2012 Murdoch Lawyers wrote to the first respondent, attaching an authority signed by the applicant which purported to authorise delivery up to Murdoch Lawyers of certain documents in relation to the transfer of his interest in the property to his son Neil in or about 2008. The first respondent recalled that the second respondent held the applicant's power of attorney and considered it prudent to contact her. She informed him that she held grave concerns about the applicant's mental and/or physical health. She instructed the first respondent that the applicant was suffering from impaired capacity and that, in the circumstances, it was her responsibility to act as his attorney pursuant to the enduring power of attorney.

[6] On 10 August 2012 the first respondent, after having sought advice from the Queensland Law Society Ethics Centre, wrote to Murdoch Lawyers declining the request to release the relevant file. Correspondence ensued in which the first respondent contended that there was a need for an independent assessment of the applicant's capacity. On 20 September 2012 Murdoch Lawyers wrote to the first

respondent, enclosing a neuropsychology report from a clinical neuropsychologist, Ms Anderson. Following receipt of that report, the first respondent received instructions for the second respondent to contact Ms Anderson to clarify certain matters and to inform her about other matters. This was done.

[7] On 8 October 2012 the first respondent received what purported to be a revocation of an enduring power of attorney. He again sought instructions from the second respondent and she instructed him that she did not accept that the power of attorney had been validly revoked, as she did not consider the applicant had the capacity to do so. A supplementary report from Ms Anderson was received on 19 October 2012. On instructions from the second respondent, the first respondent requested a report from Professor Gerard Byrne, consultant psychiatrist. He reviewed the reports of Ms Anderson.

[8] The first respondent, having considered the matter carefully and discussed it with professional colleagues, did not think that he had a conflict that prevented him or Wonderley & Hall from continuing to act for the second respondent. Further correspondence ensued.

[9] On 21 November 2012 the first respondent received Professor Byrne's report. It cast doubt on the applicant's capacity and thought it more likely than not that he had impaired capacity to make major financial decisions, principally due to severe memory impairment due to acquired brain disease. The next day the first respondent sent a copy of Professor Byrne's report to Murdoch Lawyers.

[10] On 23 November 2012 Murdoch Lawyers filed an originating application seeking delivery up of certain documents relating to the transfer. Both the first respondent and the second respondent were made respondents to the application, which sought an order that the applicant's costs of and incidental to the application be paid by them on the indemnity basis. After receiving notice of the application on 26 November 2012, the first respondent sought and obtained instructions from the second respondent. These instructions were given on 27 November 2012 and were that the second respondent did not wish to appear on the hearing of the application on 13 December 2012, but that she remained concerned about the applicant's mental capacity. She did not wish to appear to oppose the application due to the financial and emotional stress associated with it.

[11] Steps were then taken to provide copies of the requested documents. There are some complaints about the fact that certain additional documents were delivered later. I was told at the hearing that this consisted of documents which were held electronically, which were not immediately to hand.

[12] The applicant seeks an order that the costs of the application be paid by the first respondent. For reasons which were not explained, he does not seek any order for costs against the second respondent.

[13] The applicant submits that the first respondent was a proper respondent to the application because he held the file. I accept this submission. However, the first respondent became a necessary respondent to the application because he found himself in an invidious position. He was acting on instructions from the second respondent, who claimed to be authorised by the enduring power of attorney to give those instructions. In circumstances in which the second respondent's instructions

could not be said to be without a sound basis, the first respondent properly sought professional ethics guidance and acted on the basis of that advice.

[14] The applicant submits that the second respondent was conflicted because in the dispute between the applicant and her son Neil as to whether the transfer was in accordance with the applicant's instructions, she sides with Neil. However, if the second respondent was not acting properly in giving the instructions which she did to the first respondent, due to such an alleged conflict of interest, then this is a reason as to why any order for costs should be against her. The first respondent was not in a position to conclude that the second respondent was not acting *bona fide* in claiming that her power to act as the applicant's attorney was engaged, and Professor Byrne's report provides some support for the conclusion that the applicant lacked capacity, such that the second respondent was authorised to act as his attorney.

[15] Next, the applicant argues that the first respondent was in a position of conflict because of the allegation made by the applicant that the first respondent acted for both the applicant and his son, and because the applicant claims that the transfer that eventuated was inconsistent with his instructions. I am not satisfied that the first respondent's conduct is explained on the basis of any such alleged conflict. It would be a very serious thing to conclude that he was acting to deprive the applicant of access to the files so as to protect his own interest, rather than acting on the basis of instructions from the second respondent, which he had reasonable grounds to believe the second respondent was authorised to give. Even after Ms Anderson's reports were to hand the first respondent still found himself in an invidious position, on the basis of instructions that Ms Anderson's report was incomplete, and based on inadequate information.

[16] If the second respondent's concerns ultimately prove not to be justified, and if, ultimately, Professor Byrne's opinions are not sustained in any hearing before the Queensland Civil and Administrative Tribunal (QCAT), this does not mean that the second respondent acted unreasonably in not accepting that the applicant had the relevant capacity.

[17] The fact that the second respondent, in the face of legal proceedings commenced on the instructions of her husband, chose not to contest those proceedings and, instead, instructed the first respondent to hand over the requested documents, does not establish that it was unreasonable for the first respondent to act on her instructions. If it was unreasonable for the second respondent not to hand over the documents earlier than she gave instructions for that to occur, that may be a ground upon which the applicant might have sought costs against her. It does not provide a sufficient justification, in my view, for costs to be awarded against the first respondent.

[18] The circumstances under which the Court may make an order for costs against a lawyer acting on behalf of his or her client are limited. They include circumstances in which a case is brought before the Court for an ulterior purpose. A lawyer is not to be penalised for acting on his or her client's instructions.[1]

[19] I am not satisfied that there was a serious dereliction of duty on the part of the first respondent. In any event, had the first respondent withdrawn from the matter, it seems likely that the second respondent would have issued similar instructions to

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1 *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 693 at 692 [41].

the lawyer who was engaged to replace him, and similar costs would have been incurred in any event. In this regard, the first respondent's conduct cannot be said to have caused the applicant to have incurred additional costs.

[20] This is not a case in which the first respondent acted without instructions, or acted on the basis of instructions that he might have disregarded on the basis of his higher duty to the Court. He acted on the basis of instructions that were given to him by the second respondent which asserted matters which could not be said to be without foundation.

[21] I am not satisfied that there is a proper basis to exercise the Court's jurisdiction to award costs against the first respondent.

[22] The capacity of the applicant remains to be determined. If it transpires that he had the relevant capacity so that the second respondent was not authorised to act on his behalf pursuant to the power of attorney in giving the instructions which she did to the first respondent, and if the second respondent gave the instructions which she did for an improper purpose, then the applicant would have a reasonable claim to seek his costs of and incidental to the application against the second respondent. He has not sought to do so. I decline to exercise my discretion to award costs against the solicitor who acted on the instructions of the second respondent in the circumstances that I have described.

[23] The first respondent has successfully resisted the order for costs sought against him. It seems to me that the first respondent should look in the first instance to the second respondent to pay the costs occasioned by his being joined as a respondent to the application. The parties should have settled their differences, including issues as to costs in late November when the relevant documents were delivered. Instead, the applicant pressed for an order for costs against the first respondent. He has been unsuccessful and costs should follow the event. I consider the appropriate order as to costs is that the applicant pay the costs of the first respondent of and incidental to the application incurred on and after 1 December 2012 to be assessed on the standard basis. The costs should otherwise be reserved. This will permit the first respondent to recover the costs incurred by him prior to 1 December 2012 from the second respondent, if so advised, and for any remaining issue as to costs between the parties, and in particular between the applicant and the second respondent to be determined, if necessary, after issues concerning the applicant's capacity are determined in appropriate proceedings.

[24] Accordingly, I order:

1. The applicant pay the first respondent's costs of and incidental to the application incurred on and after 1 December 2012 to be assessed on the standard basis.

2. Otherwise the costs of and incidental to the application be reserved.