SUPREME COURT OF QUEENSLAND

CITATION:	*Brown v Jones & Ors* [2014] QSC 162
PARTIES:	**MAXWELL GLENDON BROWN** Plaintiff **v** **DEARNE LEE JONES** First Defendant **And** **RAYMOND MAXWELL BROWN** Second Defendant **And** **DEARNE LEE JONES as the Executor of the Estate of DOROTHY RUTH BROWN** Third Defendant **And** **CATHY MAY BROWN** First Defendant added by Counterclaim
FILE NO/S:	S677/2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	22 July 2014
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	On the papers
JUDGE:	McMeekin J
ORDERS:	**1. The application is to be heard by way of an oral hearing at a date to be fixed.** **2. Parties are given leave to appear by telephone at the hearing of the application.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – JURISDICTION – GENERALLY – where the parties seek orders by consent – where the orders sought vary the will of the deceased – where the order does not provide which clauses of the will are to be varied - whether the Court has the power to make the orders sought

Succession Act 1981 (Qld)

Bartlett v Coomber and Anor [2008] NSWCA 100 cited
Morrison v Abbott [2012] NSWSC 320 cited
Schaechtele v Schaechtele [2008] WASC 148 cited

SOLICITORS: Bressington & Partners for the plaintiff
David Hand for the first defendant
ABKJ Lawyers for the second defendant
Bressington & Partners for the first defendant added by counterclaim

[1] **McMeekin J:** I am asked by the parties to make certain orders by consent. The draft orders agreed on are set out in a document which purports to finalise proceedings 677 of 2009 filed in the Rockhampton registry of the Court. I have several concerns about the orders sought and am not prepared to make them in their present form.

[2] The first order reads "By way of further and better provision for the proper maintenance and support of the Plaintiff, the First Defendant and the Second Defendant in accordance with Part IV of the *Succession Act 1981*" and there then follows two provisions dealing with repayment of a partnership loan and the making of a loan to the "partnership business", a direction that the partnership between the first defendant by counterclaim and the third defendant make a distribution to the estate of Dorothy Ruth Brown, and a direction that the executrix of that estate make certain distributions. There are at least six difficulties.

[3] The first difficulty is that proceedings 677/2009 do not involve an application under Part IV of the *Succession Act*.

[4] The second difficulty is that the various directions about paying and repaying loans and paying monies to the estate can have nothing to do with an application for further provision under the *Succession Act* as the opening words of the order suggest. They appear to be related to partnership affairs, affairs which are in dispute in the proceedings.

[5] The third difficulty is that the orders do not set out what is to happen to the proceedings that are pending. I assume that they are to be dismissed once the terms agreed are carried out.

[6] The fourth difficulty is that the order for costs that has been agreed is ineffective, at least on the face of the order, save in relation to the costs of proceedings 677/2009. I assume that the order is intended to cover all outstanding proceedings of which there are several.

[7] The fifth difficulty is that if the parties intend by these orders to resolve the various family provision applications brought by them against the estate of Dorothy Ruth Brown[1] then they do not have that effect. The orders that are sought do not in any way deal with the provisions of the Will of Dorothy Ruth Brown. If the executrix is

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1 I gather that applications are brought by Dearne Lee Jones and Raymond Maxwell Brown as well as by Maxwell Glendon Brown

to be relieved of the trusts imposed on her by that Will then she will need orders to that effect.

[8] The sixth difficulty is a jurisdictional one.

[9] The first, third and fourth difficulties can be overcome fairly simply. The first and fourth arise because insufficient regard has been had to the effect of the consent order made on 23 November 2010 in proceedings 621/2010[2] (proceedings brought by Dearne Lee Jones as executrix of the estate of Dorothy Ruth Brown, seeking that the Court declare for the force and validity of the Will dated 13 April 2005 in solemn form of law) that proceedings 130/2008 (a caveat claimed by Maxwell Glendon Brown requiring proof in solemn form of any will of Dorothy Ruth Brown), 410/2008 (an application for further provision from the estate of Dorothy Ruth Brown brought by Maxwell Glendon Brown), and 677/2009 (a claim by Maxwell Glendon Brown, *inter alia*, for damages for breach of a testamentary promise by Dorothy Ruth Brown) be "consolidated and heard together." Any order resolving those consolidated proceedings must have as its heading a title encompassing all previous headings and proceeding numbers. A precedent for that heading appears at Precedent 410.15 of *Court Forms Precedents and Pleadings (Queensland)* (Butterworths 1996) under the tab "Judgments and Orders" authored by a senior deputy registrar of this Court, ER Kempin. Mr Kempin's precedent is in accord with my understanding of the practise of the Court. It makes plain to the parties, the registrar and the world at large what disputes the order of the Court resolves. It is a simple matter to amend the heading.

[10] The second difficulty too can be simply overcome by deleting the opening words or perhaps moving them to commence the proposed paragraph c. Such orders are appropriate, assuming the parties are agreed, given the issues raised in proceedings 677/2009.

[11] Similarly an amendment to the draft can cure the third difficulty.

[12] The fifth and sixth difficulties are of more concern. I have located what I believe to be the last Will of Dorothy Ruth Brown. I assume the reference in paragraph one of the draft orders is to her estate, albeit that it is not mentioned. The Will is dated 13 April 2005 and is disputed by Maxwell Glendon Brown as the last Will in various proceedings including 677/2009.[3] On 31 January 2011 the Court pronounced for the will of 13 April 2005, presumably with the consent of all parties as there was no hearing.

[13] Under the heading "Gift of Whole Estate" the testatrix directed that the whole of her estate was to go to her trustee (Dearne Lee Jones) on the following trusts: 10% to Raymond Maxwell Brown; 45% to Maxwell Glendon Brown; and 45% to the executrix, Dearne Lee Jones. Presumably what the parties seek is that in substitution for that provision the terms that they have agreed on be put in place. Those terms include that Raymond Maxwell Brown receive the sum of $255,000, Dearne Lee Jones receive the sum of $900,000 and Maxwell Glendon Brown receive the assets

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2 See document 8 on 621/10. To complicate matters there are two files, one numbered 621/2009 and one 621/2010. 621/2009 is again a caveat claimed by Maxwell Glendon Brown requiring proof in solemn form, this time of the will of Dorothy Ruth Brown dated 13 April 2005. By proceedings 666/09 Dearne Lee Jones sought probate of the Will of 13 April 2005.

3 See document 16 of 666/09.

(and incur the liabilities) of the previously existing partnership between the deceased and other family members. While I do not have a complete picture of the affairs of the estate I am reasonably confident that those amounts bear no relationship to the percentages mentioned in the Will. For example if Raymond Maxwell Brown is to receive the sum of $255,000 and that represents 10% of the estate then Dearne Lee Jones is entitled to more than the sum of $900,000 and conversely.

[14] In the normal course parties seeking such a variation would ask that the relevant clause of the Will be deleted and that in substitution for that clause another be inserted setting out the terms agreed.

[15] That brings me to the sixth and crucial difficulty – the jurisdictional issue. In family provision applications parties cannot, strictly speaking, consent to variations in the terms of the will. In *Bartlett v Coomber and Anor* [2008] NSWCA 100 Mason P said in relation to a disputed settlement of such an application:

> "[37] In the context of claims under the Act, one often encounters references to the court's "jurisdiction" to make a particular order in a particular estate. Thus, to give an example of present relevance, de Groot & Nickel, *Family Provision in Australia* 3rd ed, Lexis Nexis Butterworths, Chatswood, 2007 at §8.7 states that:
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> > 'The court's jurisdiction depends not upon the agreement of the parties but upon the court's view of the question whether the deceased has made adequate provision for the applicant.'
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> The learned authors cite three authorities which support this proposition and do so in the language of "jurisdiction" (*Mudford v Mudford* [1947] NZLR 837 at 838; *Re Archibald* [1950] QWN 3; *Re Julso* [1975] 2 NZLR 536 at 538).
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> [38] In my opinion, "jurisdiction" and "power" are concepts that should not be blurred or subjected to ecthlipsis in the present context (see, *Harris v Caladine* (1991) 172 CLR 84 at 136). Macready AsJ had undoubted jurisdiction to entertain the application before him. The critical question in the appeal relates to the scope of his Honour's power to reject the settlement.
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> [39] In *McMahon v McMahon* (New South Wales Supreme Court, Young J, 2 August 1985, Young J said:
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> > 'An order [under the relevant NSW Family Provision Act] does not follow just because all the parties to the proceedings have agreed between themselves that such an order should be made. Whilst in general if a Court is asked by consent of all parties to make an order it will make an order, as I said in my judgment in *Kalyk v Whelan* 31 July 1985 where the legislature casts on the Court the duty of seeing that an order is only made in appropriate circumstances the Court is not bound to make any order tendered by all the parties by consent.

> Because of this it is necessary for me to look into the facts and circumstances of the plaintiffs and the defendant so far as they are relevant to a possible claim under the Family Provision Act.'"[4]

[16] I have not had explained to me the various matters that would justify the making of the orders sought. My satisfaction that the "jurisdiction" to make the orders is enlivened seems to me to be a pre–condition of the making of the orders. I do not mean to say that I have any concerns about the matter. The parties are of full age and are legally represented. But it seems to me that at least a submission outlining the relevant matters, perhaps supported by an appropriate affidavit, is required to justify my making the orders sought.

[17] I direct that there be an oral hearing of the application for the making of the orders sought by the parties on a date to be fixed by the registrar. As I am unsure of where or when the application will be heard I give the parties leave to appear by telephone, assuming that their legal representatives are not resident in the place where the application is eventually heard.

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4 See also *Schaechtele v Schaechtele* [2008] WASC 148; *Morrison v Abbott* [2012] NSWSC 320