**[2016] QCA 286**

**COURT OF APPEAL**

**FRASER JA**
**PHILIP McMURDO JA**
**HENRY J**

**Appeal No 6430 of 2016**
**SC No 2404 of 2016**

**JANIS ANN WHITE** **Appellant**

**v**

**KEITH WILLIAM MOFFAT** **Respondent**

**BRISBANE**

**THURSDAY, 10 NOVEMBER 2016**

**JUDGMENT**

**FRASER JA:** The appellant filed an application in the Trial Division to challenge the will of the late Gary Rowley White. The respondent sought probate of the will, and cross-applied to remove a caveat against the grant of probate, which the appellant had lodged. The primary judge ordered that the caveat lodged by the appellant be set aside, and that probate in common form of the will be granted to the respondent, subject to any formal requirements of the registry.

The appellant filed a notice of appeal seeking: an order for the reinstatement of the caveat; an order for the "detention of 'prior to death' concealed final will" referred to in a schedule of assets and liabilities, which was in evidence in the Trial Division; an order for a subpoena to give

evidence to be issued to the respondent, a sister of the appellant, and Mr King, the solicitor acting for the respondent; and an order to disregard the will if the deceased's "masterful final will effort has been destroyed".

The only ground of the appeal stated in the notice of appeal is "seeking evidence of final will; original will does not support my caveat." The appellant's arguments and affidavits in the Trial Division, and again on appeal, make it clear that the only basis for the claim by the appellant that there is a later will is a statement in the schedule of assets and liabilities that the payment out of the deceased's superannuation fund "of this death benefit assumes that Irene White was neither a financial dependent or interdependent of Gary when he died, and that the nomination of Irene as a reversionary beneficiary of his super pension just prior to his death cannot operate."

As the primary judge explained in his Honour's reasons, that statement does not support the appellant's claim that the deceased made a later will. The primary judge also explained that there was no evidence that the deceased executed a will after the will in relation to which probate was sought. Unfortunately, it appears that the appellant has formed a fixed but patently incorrect belief to the contrary.

The appellant sought to rely upon new evidence in the appeal. Most of that evidence repeated arguments which the appellant had advanced before the primary judge. In addition, the appellant has sworn affidavits asserting that the respondent is the name of a deceased person, and that an unnamed lawyer is using the name of the respondent as an alias. The appellant asserts that she has been told that the respondent died. No evidence has been adduced to support the appellant's assertions. They must be disregarded.

The appellant's notice of appeal itself acknowledges that there is no basis for her caveat other than her claim that there is a later will. That claim lacks any support in the evidence, and the evidence otherwise does not raise any doubt that a grant of probate of the will should be made. The grant of probate was, therefore, properly made; see *Uniform Civil Procedure Rules*, rule

626(2)(b). Accordingly, I would dismiss the appeal. It follows that an application filed by the appellant seeking very similar orders to those sought in the notice of appeal should also be refused.

**PHILIP McMURDO JA:** I agree.

**HENRY J:** I also agree.

**FRASER JA:** The affidavits filed by the appellant on the 14th of September and the 12th of October this year are to be placed in an envelope, sealed, and marked that the envelope is not to be opened except by order of the Court.

The three affidavits filed on the 21st of September should also be included in that order.

The respondent seeks an order that the appellant pay the respondent's costs of and incidental to the appeal on an indemnity basis, to be deducted from the appellant's legacy. In circumstances in which there was no arguable basis for the appeal whatever, and no attempt even at a logical challenge to the reasons by the primary judge which explained as much, it is appropriate to make that order. I would make that order.

**PHILIP McMURDO JA:** I agree.

**HENRY J:** I agree.

**FRASER JA:** Accordingly, the order of the Court is that the appellant pay the respondent's costs of and incidental to the appeal on an indemnity basis, to be deducted from the appellant's legacy.