SUPREME COURT OF QUEENSLAND

CITATION:	*Watkins v Christian* [2009] QCA 101
PARTIES:	**EVELYN MAUD WATKINS** (plaintiff/respondent) **v** **DEBORAH JOY CHRISTIAN** (defendant/appellant)
FILE NO/S:	Appeal No 593 of 2009 SC No 7821 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2009
JUDGES:	Muir and Fraser JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	MENTAL HEALTH – GUARDIANS, COMMITTEES, ADMINISTRATORS, MANAGERS AND RECEIVERS – OTHER MATTERS – where respondent commenced proceedings in the Supreme Court claiming relief, including equitable compensation, restitution or, alternatively, damages in the sum of $314,960 and an account of all dealings by the appellant with the respondent's monies – where the respondent was given leave to amend her claim to name a litigation guardian – where the appellant applied for an order to remove the respondent's litigation guardian and to restrain the respondent's solicitors from acting – where the application was dismissed – where it was alleged the litigation guardian's interests were adverse to those of the respondent – whether the primary judge erred in not making findings as to whether a new Power of Attorney or Will existed, in failing to hold that the litigation guardian's interests were adverse to those of the respondent and in failing to hold that the proper administration of justice required the respondent's solicitors to be restrained from continuing to act *Legal Profession (Solicitors) Rule* 2007 (Qld), r 13.4 *Powers of Attorney Act* 1998 (Qld), s 41 *Uniform Civil Procedure Rules* 1999 (Qld), r 94(1), r 95(2)

Breen v Williams (1996) 186 CLR 71; [1996] HCA 57, cited
Chapman v Rogers; ex parte Chapman [1984] 1 Qd R 542, considered
Holborow & Ors v Macdonald Rudder [2002] WASC 265, cited
In Re the Will of FB Gilbert (decd) (1946) 46 SR (NSW) 318, cited
Louth v Diprose (1992) 175 CLR 621; [1992] HCA 61, cited
Mitchell v Burrell [2008] NSWSC 772, cited
Scallan v Scallan [2001] NSWSC 1078, cited
Timbury v Coffee (1941) 66 CLR 277; [1941] HCA 22, cited

COUNSEL: J D Johnson (*sol*) for the appellant
F G Forde for the respondent

SOLICITORS: Johnsons Solicitors for the appellant
Quinn & Scattini for the respondent

[1] **MUIR JA:** The respondent commenced proceedings in the Supreme Court claiming relief, including equitable compensation, restitution or, alternatively, damages in the sum of $314,960 and an account of all dealings by the appellant with the respondent's monies. It is alleged in an amended statement of claim that:

(a) The respondent is 92 years of age and is the neighbour of the appellant;

(b) The respondent, to the knowledge of the appellant, was of weakened mental capacity due to old age, reliant on the appellant and susceptible to suggestion and persuasion;

(c) The appellant was under a fiduciary duty to the respondent to protect the respondent's interests and not to obtain a profit for herself in conflict with the interests of the respondent;

(d) In breach of the appellant's duties, she induced the respondent to draw cheques in favour of the appellant totalling $154,960 and to provide them to the appellant for her use;

(e) On or about 14 February 2007 the respondent executed an Enduring Power of Attorney appointing the appellant her attorney for financial and personal/health matters;

(f) From the time of execution of the Power of Attorney the appellant was under a fiduciary duty and/or duties under the *Powers of Attorney Act* 1998 (Qld) to protect the respondent's interests, to exercise the powers vested in her honestly and with reasonable diligence and not to obtain any profit for herself in conflict with the interests of the respondent;

(g) In breach of such duties, the appellant induced the respondent to draw and provide her with cheques in the appellant's favour totalling $160,000;

(h) The monies obtained by the appellant from the respondent were obtained by reason of undue influence exerted over the respondent and/or the unconscionable conduct of the appellant.

[2] On 29 October 2008 the respondent was given leave to amend her claim to name Peter Lambert as the respondent's litigation guardian. By application filed on 13 November 2008, the appellant applied for an order that Mr Lambert be removed as litigation guardian and that Quinn & Scattini, the respondent's solicitors, be restrained from acting for the respondent in the proceedings. The application was heard on 27 November 2008 and was dismissed with costs on 22 December 2008.

[3] The appellant appeals against the orders made on 22 December 2008. Before addressing the primary judge's findings and the arguments advanced by the parties on appeal, it is desirable to say something about the evidence.

The appellant's evidence

[4] The appellant swore to the following effect in affidavits read at first instance. Although she had known the respondent since September 2002 and had provided her with care and support for about five years, the appellant was unaware of any visit to the respondent by Mr Lambert until his arrival in February 2007. Mr Lambert stayed with the respondent for a couple of weeks and returned in about April 2007, this time to stay. She suggested to Mr Lambert that the respondent should have a full-time carer. Mr Lambert rejected the suggestion and requested a copy of the respondent's Will. She spoke to the respondent who gave her a copy of her Will, which she provided to Mr Lambert. Mr Lambert became "very aggressive and angry about the contents of the … Will" and said words to the effect that he would have the respondent change it.

[5] On about 30 May 2007 the appellant was told by Mr Lambert that he had arranged for the respondent to change her Will and that Quinn & Scattini had prepared a new Will which left the respondent's estate to him. Exhibited to the appellant's affidavit was a receipt of Quinn & Scattini's in the sum of $370 which stated that the sum had been received on account. The appellant swore that the receipt was "with respect to the preparation and execution of a new will" for the respondent.

[6] In early July 2007 Mr Lambert visited the appellant and told her that the respondent had revoked the Power of Attorney in her favour and that he was now the respondent's "Power of Attorney" (sic).

The other evidence before the primary judge

[7] Mr Johnson, a member of the firm representing the appellant, swore that the respondent changed her Will in about May 2007 and that the new Will was prepared by the respondent's solicitors.

[8] On 24 September 2008 the appellant's solicitors wrote to the respondent's solicitors stating an understanding that Mr Lambert held an Enduring Power of Attorney prepared by the respondent's solicitors on the respondent's instructions and that "a new Will may well have been prepared at the same time, naming Mr. Lambert as the sole beneficiary …". The letter requested a copy of the Enduring Power of Attorney and a copy of any Will or Wills which may have been prepared on the instructions of the respondent.

[9] The respondent's solicitors, in a facsimile of 1 October 2008 to the appellant's solicitors, stated:

> "There is no basis for your request for a copy of the Enduring Power of Attorney and/or any Will or Wills of Mrs Watkins as they are of no relevance to the issues in dispute."

[10] On 29 September 2008, the appellant's solicitors wrote to the respondent's solicitors stating inter alia that they had information which led them to believe that the respondent "entered into a new Will at or about the same time" the Enduring Power of Attorney was prepared by the respondent's solicitors and executed. On 2 October 2008 the respondent's solicitors, in a facsimile to the appellant's solicitors stated:

> "We confirm that the writer, who has the conduct of this matter, did not prepare any Power of Attorney or Will for Ms Watkins."

[11] On 14 October 2008 the appellant's solicitors wrote to the respondent's solicitors stating, "We can only assume from recent correspondence that your firm did prepare a new will and Enduring Power of Attorney in or around December 2007." The response of the respondent's solicitors, given on 16 October 2008, was that "any Will or Power of Attorney of Evelyn Watkins" was "not relevant to any issues raised in the pleadings."

[12] A solicitor in the employ of the respondent's solicitors swore to having a lengthy consultation with the respondent on 24 November 2008 in order to assess her capacity to give instructions in relation to the appellant's application. It is apparent from the affidavit that, at least at the time of the consultation, the respondent lacked capacity to give instructions.

The primary judge's reasons

[13] The primary judge made no findings as to whether a new Power of Attorney or Will existed. She concluded that the existence of a new Will in the terms asserted by the appellant and/or a new Power of Attorney in favour of Mr Lambert would not give rise to "a conflicting interest" in the litigation. Her Honour added:[1]

> "There may be a possibility of conflict in the sense that his personal interest in maximising the estate and so pressing ahead with the litigation may be at odds with his obligation to the plaintiff to assess her prospects and decide whether to proceed, compromise or discontinue the litigation – but that is purely speculative."

[14] Regarding the application to restrain the respondent's solicitors from continuing to act, her Honour concluded that whether the Will and Power of Attorney were executed and whether there would be proceedings in which their validity was in question, were matters of "pure speculation". She observed that the appellant's arguments overlooked the different tests applicable to mental capacity to execute a Will and Power of Attorney on the one hand and those relevant to claims of undue influence. Her Honour, however, acknowledged that the tests may overlap to a degree. She accepted a submission made on behalf of the respondent that although a solicitor may be obliged to make appropriate inquiries as to a client's capacity to execute a document, the question of whether such capacity existed was one for the Court adjudicating the validity of the document.

The submissions made by the appellant's solicitor

[15] The substance of the submissions made on behalf of the appellant was as follows. On the evidence before the primary judge, she should have found, in the absence of a denial on behalf of the respondent, that the respondent executed a new Will in

---

1 *Watkins v Christian* [2008] QSC 345 at [12].

favour of Mr Lambert. She should also have found that in about July 2007 the respondent revoked the Power of Attorney given to the appellant in February 2007 and executed a new Power of Attorney in favour of Mr Lambert.

[16] If the respondent made a new Will in Mr Lambert's favour, he has an interest in not investigating or challenging the validity of the new Will and in "positively maintaining that the [respondent] had the necessary capacity to know what she was doing and was not unduly influenced by him in making those changes." Similar considerations apply to the revocation of the Power of Attorney in favour of the appellant and the granting of the Power of Attorney in favour of Mr Lambert.

[17] It is reasonable to expect and highly probable that evidence of the respondent's state of mind and mental capacity would be given by Mr Lambert on any trial of the proceedings. His interest in showing that the respondent had mental capacity when executing her new Will and Power of Attorney conflicts with the respondent's interest in establishing the matters necessary to prove her claims against the appellant.

[18] The appellant's argument that the respondent's solicitors should be restrained from acting depends on the probability that the persons who took instructions for the new Will and the new Power of Attorney in May and July 2007 are likely to be required to give evidence as to the capacity of the respondent at that time. It is asserted that if they are not called on behalf of the respondent they would be called on behalf of the appellant and that their evidence would be contentious.

[19] Contrary to the primary judge's finding, the giving of evidence by such persons would not be dependent on establishing that the new Will and new Power of Attorney had been executed. Their evidence would concern the mental and physical condition of the respondent at the time instructions were taken. It is clear from the evidence that a new Power of Attorney was executed.

[20] Attention was drawn to s 41 of the *Powers of Attorney Act* 1998 (Qld) which prescribes that a person may make an enduring power of attorney only if the person understands its nature and effect. The section specifies, non-comprehensively, matters which must be understood by the maker.

[21] On the principle stated in *Kallinicos v Hunt*,[2] the solicitors should be restrained from acting.

Consideration of the application to remove the litigation guardian

[22] The appellant's contentions are curious. Their thrust is that Mr Lambert should be removed as litigation guardian because of the existence of a conflict of interests which may lead him not to prosecute the respondent's claim against the appellant as resolutely and effectively, as he may have done had the alleged conflict not existed. Success on either or both aspects of the application will not give the appellant any legitimate benefit or advantage in the litigation. On the other hand, the removal of Mr Lambert and/or the solicitors has the potential to increase costs and disrupt the conduct of the litigation. These matters, of themselves, are sufficient to justify the exercise of the primary judge's discretion against the appellant on both limbs of her application.

---

[2] (2005) 64 NSWLR 561.

[23] They also lead to the conclusion that the appeal should be dismissed as does the fact that the matters determined by the primary judge are properly to be regarded as questions of practice or procedure. The following oft repeated observations of Jordan CJ in *In re the Will of FB Gilbert (decd)*[3] are apposite:

> "… it is only in the most exceptional circumstances that a Court of Appeal could regard itself as justified in interfering with the exercise of a discretion by a judge of first instance—only where he has misapplied the law, or his order is likely to lead to a miscarriage of justice: *Evans v Bartlam*. In this connection, however, I am of opinion that, as was pointed out by this Court in *In re Ryan*, there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal. But an appeal from an exercise of a so-called discretion which is determinative of legal rights stands in a some-what different position. In this class of case, too, a Court of Appeal submits itself to self-imposed restraints, but restraints which, though strict, are some-what less stringent than those adopted in matters of practice or procedure." (footnotes deleted)

[24] The discretions exercised by the primary judge were not ones which determined substantive rights and it has not been shown that she acted on a wrong principle of law or mistaken material fact or that she took into account something irrelevant or failed to take into account something relevant.

[25] However, I think it desirable to make some observations about the general merits of the arguments advanced on behalf of the appellant.

[26] Mr Lambert was a person eligible to be the respondent's litigation guardian. Rule 94(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

> " **94 Who may be a litigation guardian**
>
> (1) A person may be a litigation guardian of a person under a legal incapacity if the person—
>
> (a) is not a person under a legal incapacity; and
>
> (b) has no interest in the proceeding adverse to the interest in the proceeding of the person under a legal incapacity."

[27] Mr Lambert's interest in the proceeding, as the primary judge found, was not adverse to that of the respondent. They are both interested in ensuring that the respondent's claim succeeds and that the monies claimed are recovered from the appellant.

---

[3] (1946) 46 SR (NSW) 318 at 322 – 323.

[28] If the allegations about the new Will and Power of Attorney in Mr Lambert's favour prove to be correct and, if there is evidence that at the time of their execution by the respondent she lacked relevant capacity, or that undue influence or unconscionability was involved, there may well be grounds for Mr Lambert to be removed as litigation guardian and replaced under rule 95(2)[4]. It provides:

> "(2) If the interests of a party who is a person under a legal incapacity require it, the court may appoint or remove a litigation guardian or substitute another person as litigation guardian."

[29] However, as the primary judge recognised, there is little to be served by speculating about these matters at this stage of the proceedings. Precisely what is in issue is unknown: a defence has not been filed. There are solicitors acting who are ethically bound to act in the respondent's interests. Mr Lambert himself must act in the respondent's interests and strong evidence has already been adduced of the respondent's limited mental capacity as at 27 November 2008. That does not suggest a desire on the part of those having carriage of the litigation on the respondent's behalf to minimise the extent of her mental deterioration. Even if the appellant had a genuine concern to ensure that the respondent presented the strongest case possible against her, it would not follow that the appellant had a legally recognised interest in the appointment or removal of the respondent's litigation guardian. The litigation guardian's duties are to the party he or she represents and the litigation guardian is answerable to that party.

[30] The primary judge heard argument on whether a copy of her reasons for judgment should be provided to the Adult Guardian with a view to the Adult Guardian exercising powers under the *Guardianship and Administration Act* 2000 (Qld). She ordered that the reasons be so provided. That, with respect, was appropriate.

[31] In relation to Mr Lambert's possible interest adverse to that of the respondent, the matters to be proved in the subject proceedings may be substantially different to those relevant to proceedings challenging the new Will and the new Power of Attorney, should such proceedings eventuate.

[32] One of the more useful explanations of what needs to be shown to establish testamentary capacity is to be found in the reasons of Dixon J in *Timbury v Coffee*,[5] where his Honour accepted the explanation of testamentary capacity propounded by Hood J in *In the Will of Wilson*.[6]

[33] In the proceedings the respondent in her amended statement of claim relies on the existence of a fiduciary relationship, undue influence and unconscionable conduct. The reasons of Gaudron and McHugh JJ in *Breen v Williams*,[7] describe the circumstances which suggest the existence of a fiduciary relationship and the reasons of Brennan J in *Louth v Diprose*[8] contain a discussion of the differences between unconscionable conduct and undue influence as well as an explanation of matters relevant to the proof of both.

---

4 *Uniform Civil Procedure Rules* 1999 (Qld).
5 (1941) 66 CLR 277 at 283.
6 (1897) 23 VLR 197 at 199.
7 (1996) 186 CLR 71 at 107.
8 (1992) 175 CLR 621.

[34] It is unnecessary for present purposes, however, to give more than cursory consideration to such questions. It is sufficient to note that the evidence likely to be led on the trial of the proceedings will focus on the relationship between the appellant and the respondent, the personalities and characters of both and on matters suggesting that the respondent was in a position of disadvantage or vulnerability. The respondent's mental capacity is a relevant consideration. Depending on the evidence, it could even be critical to the outcome of the proceedings, but it is far too early to tell. It is also too early to know who will be called as witnesses in the proceedings, despite the appellant's solicitor's protestations to the contrary. Plainly, that cannot be determined until the matters in issue are known and what is in issue will depend on the pleadings.

The restraint of the respondent's solicitors

[35] It is unnecessary to devote much time to this point. For reasons already given, it cannot succeed. Rule 13.4 of the *Legal Profession (Solicitors) Rule* 2007 (Qld) provides:[9]

> "A solicitor must not unless exceptional circumstances warrant otherwise in the solicitor's considered opinion:
>
> 13.4.1 appear for a client at any hearing, or
> 13.4.2 continue to act for a client,
>
> in a case in which it is known, or becomes apparent, that the solicitor will be required to give evidence material to the determination of contested issues before the court.
>
> **Guidelines**
> Given the great variety of circumstances in which the problem addressed by rule 13.4 may arise, it is desirable to provide some guidance as to the reasons for the rule, and hence as to the proper course in the circumstances which have arisen. The reasons for the rule include:
>
> (i) the concern that the solicitor's performance as an advocate or the Court's assessment of credibility of the solicitor as a witness may be affected by the suggestion that the solicitor's evidence is tainted by the desire to assist the client, and even by the possibility of avoiding a complaint by the client as to the solicitor's performance as such in the matters which gave rise to the litigation;
>
> (ii) a concern that the client's prospects of frank and disinterested advice may be diminished by reason of the solicitor's involvement in the matters which have led to the litigation."

[36] In *Chapman v Rogers; ex parte Chapman*,[10] Campbell CJ said:[11]

> "… for the reason that it is desirable to avoid any suggestion of real or apparent conflict between the duty to the court and the obligation

---

9 *Woolworths v Shine Lawyers* [2007] QSC 234.
10 [1984] 1 Qd R 542.
11 [1984] 1 Qd R 542 at 545.

> to the client, I consider that it is generally unwise for a solicitor, who is not himself appearing as advocate or as instructing solicitor in court but who is aware that it is likely that he will be called as a material witness (other than in relation to formal or non-contentious issues), to continue, either personally or through his firm, to represent the client if this can be reasonably avoided."

[37] Plainly, the Chief Justice was not purporting to propound any universal principle that a solicitor or an employee of a solicitor could not act in a matter in which it was likely that he, or she, a partner or employee, may be called as a material witness. There is no such principle, although, as Rule 13.4 of the *Legal Profession (Solicitors) Rule* 2007 shows, it will normally be inappropriate for a solicitor to continue to act for a party in litigation if he or she is likely to be a material witness in respect of a contentious matter. What is or is not proper or permissible will depend in each case on a careful analysis of the relevant facts.

[38] Windeyer J remarked in *Scallan v Scallan*[12] to the effect that it is not unusual for solicitors acting in contested probate proceedings to give evidence of facts relevant to the instructions for execution of a will.[13] A similar practice exists in conveyancing disputes. In *Mitchell v Burrell*,[14] Brereton J stated that, "in contested conveyancing proceedings, it is not unusual for solicitors who have acted on the conveyance to continue to act in the proceedings for specific performance or rescission and to give evidence in those proceedings." I refer to these decisions merely to further illustrate the folly of attempting to decide a question such as that under consideration before the relevant facts can be ascertained.

[39] But what business is it of the appellant to police the ethical obligations of the respondent's solicitors? As EM Heenan J pointed out in *Holborow & Ors v Macdonald Rudder*:[15]

> "The duty of the legal practitioner is not to his client's opponent and he is not answerable to his client's opponent. His duty is to the court and he is certainly answerable to the court and to his or her professional and disciplinary bodies."

[40] No facts have been identified which might indicate that if the respondent's solicitors continued to act in the proceedings, any rights or interests of the appellant may be infringed. If all of this were not enough, it is unnecessarily speculative to attempt to predict before a defence has been filed, what witnesses will be called and the materiality of their evidence.

Conclusion

[41] For the above reasons I would order that the appeal be dismissed with costs.

[42] **FRASER JA:** I agree with the orders proposed by Muir JA and with his Honour's reasons.

[43] **WHITE J:** I have read the reasons for judgment of Muir JA and agree with them and the orders which he proposes.

---

12 [2001] NSWSC 1078.

13 See the observations in this regard of Brereton J in *Mitchell v Burrell* [2008] NSWSC 772 at [20].

14 [2008] NSWSC 772 at [20].

15 [2002] WASC 265 at [30].