SUPREME COURT OF QUEENSLAND

CITATION:	*Colston v McMullen* [2011] QCA 164
PARTIES:	**DOUGLAS BENJAMIN COLSTON** (appellant) **v** **BRIAN McMULLEN as executor and trustee of the estate of MALCOLM ARTHUR COLSTON, as executor and trustee of the estate of DAWN PATRICIA COLSTON, and as trustee and appointor of the DAWN COLSTON ESTATE TRUST** (respondent)
FILE NO/S:	Appeal No 9498 of 2010 SC No 12943 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2011
JUDGES:	Margaret McMurdo P, Fraser JA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – ADMISSION OF FRESH EVIDENCE – IN GENERAL – where the appellant filed an application seeking the removal of the respondent as the executor and trustee of the estate of Malcolm Arthur Colston, as the executor and trustee of the estate of Dawn Patricia Colston and as the trustee and appointor of the Dawn Colston Estate Trust – where the respondent was successful in an application striking out the appellant's originating application – where the appellant seeks leave to cause subpoenas to be issued for the production of documents for use on the appeal – where the appellant seeks leave to adduce further evidence at the hearing of the appeal – where all of the material sought was in existence prior to the original hearing – where the assertion that the documents would support the appellant's contentions is unsupported – where, in the context of application proceedings, there is no obligation for disclosure by either party under the *Uniform Civil Procedure Rules* 1999 (Qld) –

where there had been no application by the appellant for any order that there be disclosure – whether leave should be granted to cause subpoenas to be issued for the production of documents for use on appeal – whether leave should be granted to adduce further evidence on appeal

SUCCESSION – EXECUTORS AND ADMINISTRATORS – PROCEEDINGS AGAINST EXECUTORS AND ADMINISTRATORS – where appellant filed an application seeking the removal of the respondent as the executor and trustee of the estate of Malcolm Arthur Colston, as the executor and trustee of the estate of Dawn Patricia Colston and as the trustee and appointor of the Dawn Colston Estate Trust – where the respondent was successful in an application striking out the appellant's originating application – where the appellant alleges the respondent's failure to disclose and present documents for analysis precluded the appellant from providing supplementary material for use in relation to the originating application – where the appellant alleges the respondent made false and misleading representations relied upon by the Court – where the appellant alleges that counsel for the respondent improperly withheld affidavit material – where the appellant alleges the Court relied upon erroneous information – where none of these arguments were raised below – whether the order of the primary judge should be set aside

Uniform Civil Procedure Rules 1999 (Qld), r 766

Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
Colston v McMullen [2010] QSC 292, considered
Colston v McMullen [2011] QCA 2, considered
Colston v McMullen [2011] QSC 60, considered

COUNSEL: The appellant appeared on his own behalf
P F Mylne for the respondent

SOLICITORS: The appellant appeared on his own behalf
McCowans Specialist Lawyers for the respondent

[1] **MARGARET McMURDO P:** I agree with Martin J's reasons for the order made at the hearing of the appeal refusing the appellant's application to adduce further evidence. I also agree with Martin J's reasons for dismissing the appeal with costs.

[2] **FRASER JA:** I agree with the reasons for judgment of Martin J and the order proposed by his Honour.

[3] **MARTIN J:** On 12 December 2008 the appellant filed an application seeking the removal of the respondent as the executor and trustee of the estate of Malcolm Arthur Colston, as the executor and trustee of the estate of Dawn Patricia Colston and as the trustee and appointor of the Dawn Colston Estate Trust. Mediation took place but was unsuccessful. Correspondence ensued between the parties. The appellant was invited to discontinue but did not. The respondent brought an

application seeking to have the appellant's originating application struck out and was successful.

[4] The underlying circumstances of the application were described by the learned primary judge in the following way:

> "[7] Malcolm Arthur Colston ("Malcolm") and Dawn Patricia Colston ("Dawn") had two children, Douglas and David. Malcolm died on 23 August 2003. By his will dated 28 May 2000 he appointed Dawn to be the executor and trustee of his will. Dawn was in poor health and had not applied for probate and Malcolm's estate remained un-administered as at the date of her death on 3 July 2004. By her will dated 28 June 2004 she appointed her brother, Mr McMullen, executor and trustee of her estate and trustee and appointor of The Dawn Patricia Colston Trust. He was granted probate of Dawn's estate on 15 November 2004. He did not seek probate of Malcolm's estate.
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> **Malcolm's will**
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> [8] Malcolm's will is a simple document, presumably drafted by the testator. He left:
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> > "… an equal share of any moneys which I have advanced to Janfern Proprietary Limited and which are available in cash as at the time of my death and one ordinary share each in Janfern Proprietary Limited [to Douglas and David]"
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> He left half each to his sons of any other shares or like instruments. He left an identified house property in the ACT and an identified motor vehicle to Douglas and David respectively. The rest and residue of his estate he left to Dawn. Under the heading "Special Instructions", apart from some personal directions about his funeral, he suggested winding up Janfern Pty Ltd and distributing the proceeds. That had not occurred at the time of Dawn's death. Malcolm held a modest share portfolio. Malcolm, Dawn, David and Douglas were directors of Janfern Pty Ltd, which is described in the material as the family company. By resolution of the company of 6 January 2010, Douglas was removed as director, leaving David as the sole director.
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> **Dawn's will**
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> [9] Dawn's will is a much more complex document. She appointed her brother as her executor and trustee and, in default, a friend, Joy Tomlins. She gave specific cash gifts of $25,000 to each of four named grandchildren when they attain the age of 25 years. Her residuary estate she gave upon the trusts contained in cl 5 of her will, described as The Dawn Colston Estate Trust. It is a discretionary trust with a perpetuity period of 80 years. The beneficiaries are Douglas and David and the four named grandchildren, together with any other grandchildren, biological or lawfully adopted, any other trust in which the named beneficiaries have an interest, and any company in existence on the vesting day in which the named beneficiaries are beneficial owners of shares of any type. The accounting period is each period of 12 months ending on 30 June in each year.

[10] By cl 5.2 the trustee is directed to hold the income of the trust fund:

> "absolutely for the beneficiaries or any one or more of them exclusive of the other or others in such shares as my trustees shall in their absolute discretion determine on or prior to the end of the accounting period".

By cl 5.3 the trustee has absolute discretion to accumulate part or all of the income. By cl 5.5 any determination of the trustee pursuant to the terms of the will are directed to "be recorded in a written minute" signed by the trustee. Once such a determination has been so recorded "it shall be effective and irrevocable".

[11] By cl 5.7, with respect to income accruing to the trust fund and vesting in the beneficiaries or being accumulated from time to time:

> "(a) A determination to apply any amount for any beneficiary may be made by placing such amount to the credit of such beneficiary in the books of the trust fund or by drawing a cheque in respect of such amount made payable to or for the benefit of such beneficiary or by paying the same in cash to or for the benefit of such beneficiary."

By cl 5.7(b) the trustee has complete discretion as to the making of any determination and is not bound to assign any reason for doing so. By cl 5.7(d):

> "Any income accruing to the trust fund and vesting in the beneficiaries from time to time shall be held by my trustees as a debt on demand owing to such person absolutely with power (but no duty) to my trustees pending payment over thereof to such person to invest or apply or deal with such fund or any resulting income therefrom or any part thereof in the manner provided for in 5.12 hereof."

[12] In the event the trustee failed to make any determination with respect to income and/or capital distribution then, by virtue of cl 5.8:

> "… such income, capital, or portion of either shall be held –
> (a) if my sons **DOUGLAS** and **DAVID** shall be living at the end of the accounting period for which a determination should have been made then **UPON TRUST** for them in equal shares absolutely –
> (b) **PROVIDED HOWEVER** if either **DOUGLAS** or **DAVID** are not so living …
> (c) if the trusts in (a) and (b) above both fail then **UPON THE SAME TRUSTS** and for the same beneficiaries as are contained in clause 4.3(c) -"

[13] By cl 5.9 the trustee has power in his absolute discretion:

> "from time to time prior to the vesting day to pay, appropriate, or apply the whole or any part of the income or capital of the trust fund towards the maintenance, education, medical expenses, advancement, or for other general benefit of any beneficiary."

By cl 5.11 the trustee has power to allow any beneficiary to occupy and have custody of or use of any dwelling, property or chattels

forming part of the trust fund on such terms and condition as to repair, replacement, insurance, outgoings or otherwise as the trustee thinks fit.

[14] The balance of the will in cl 6 sets out general powers of the trustee.

David's position

[15] David does not regard Mr McMullen as the executor and trustee of Malcolm's estate. He does not agree with Douglas' application. From his perspective, Mr McMullen has acted appropriately and diligently as the trustee of the Trust and the executor and trustee of Dawn's estate. He is satisfied with the amount of information provided to him about the operation of the Trust and the distributions made from it. He is concerned that if Mr McMullen were removed as trustee and appointor of the Trust, any replacement would not be able to preserve the capital of the Trust given Douglas' past demand for "significant distributions to be made from the Trust to him and for the benefit of his children" and to resist threats of "unnecessary and unwarranted litigation" if the trustee failed to comply with his demands."

[5] When the respondent's application came on in the Applications List the appellant, through his counsel, did not seek to support the originating application but said that he was not satisfied that he had sufficient documents to decide what ought to be done.

[6] The learned primary judge dismissed the appellant's originating application. As to the asserted lack of documentation, her Honour observed:

> "If Douglas or his advisers are of the opinion that a particular document or documents should be provided or information given after reviewing what has already been provided, then a request identifying the document or documents or information can be made. There seems no sensible reason to deplete further the assets of the Trust by expensive applications to court. There is no sense that Mr McMullen would decline to provide that material if requested."[1]

Further evidence

[7] At the hearing of this appeal, the applicant sought leave to:

(a) Cause subpoenas to be issued for the production of documents for use on the appeal; and

(b) To adduce further evidence at the hearing of the appeal.

[8] Leave was refused. These are my reasons for refusing leave.

[9] Rule 766(1)(c) of the *Uniform Civil Procedure Rules* ("UCPR") provides that the Court of Appeal may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit or in another way.

[10] The material which was sought to be obtained by way of subpoena was all material which would, if produced, have been evidence of events occurring before the

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1 *Colston v McMullen* [2010] QSC 292 at [46].

decision below was given. There is a general reluctance to admit such evidence based on the widely accepted policy that there must be an end to litigation.

[11] Ordinarily, an applicant for leave to adduce such evidence must satisfy each of the following tests:

(a) The evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence, if allowed, would probably have an important impact on the result of the case (although it need not be demonstrated that it would be decisive); and

(c) That the evidence is credible though it need not be incontrovertible.[2]

[12] None of the evidence sought to be obtained by way of subpoena or otherwise satisfies the first of those criteria. All of the material sought was in existence prior to the original hearing. The parties sought to be the subject of subpoenas were: banks, a removal company, a superannuation company, a firm of accountants, a firm of solicitors, and the Registrar of Titles. The appellant did not demonstrate that this evidence could not have been obtained in the ordinary way for use at the hearing.

[13] As to the second criterion, the appellant asserted that, if produced, the documents would support his contentions, but there was nothing in either his arguments or in any of the material already before the court which supported that.

[14] Part of the appellant's case for being allowed to adduce further evidence was that he alleged that there had been a failure on the part of the respondent to disclose relevant documents. This was also raised in his argument on the appeal proper. In his "Amended Notice of Appeal" the appellant refers to a number of authorities concerning applications for a new trial where there had been a failure to comply with an order for disclosure. The matter before the primary judge was not a trial but an application by the respondent to dismiss the originating application which had been filed by the appellant. In those circumstances, the *UCPR* do not require disclosure by either party. Further, there had been no application by the appellant for any order that there be disclosure.

[15] The appellant has also started other proceedings against the respondent. In one of them he alleges that the respondent in this appeal owes him $1.083 million, upon the basis that there has been no determination by the respondent as trustee in respect of the distribution of income for any accounting period, beginning with the year ended 30 June 2004. The total said to be owing for the years 2005-2008, which the plaintiff says should have been paid to him, is $1,083,007.68. He makes further claims for 50% of the undeclared income of the trust in the 2009 and 2010 years without quantifying his entitlement.

[16] In the other application the appellant complains that the respondent has not properly administered the estates of his parents.[3]

[17] Of relevance to this application is that those two matters appear to cover much of the same areas of complaint the appellant seeks to advance in this appeal through the subpoenas and the fresh evidence referred to above. Of further importance is

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2 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408.

3 On 31 March 2011, P D McMurdo J struck out a large number of paragraphs in the statement of claim in each of those matters *Colston v McMullen* [2011] QSC 60.

that he has served subpoenas in those other actions. When this appeal was argued he knew that those (or some of the) subpoenas had been answered by delivery of documents to the Registry but he had not inspected them. The other actions substantially overlap with the arguments he raises on this appeal. These facts constitute another reason for refusing his application.

Appeal

[18] In support of his application the appellant filed a number of affidavits. On the hearing of the application before the learned primary judge only two were relied upon: an affidavit by the appellant and an affidavit by Daryl Jones, the purpose of which was to exhibit an accountant's report. No further material was filed by the appellant. The respondent filed three affidavits. In the first he contested the assertions of the appellant and, in the second and third, brought up to date the financial situation of the estates.

[19] The complaints made by the appellant below focused largely on the respondent's actions relating to the Trust. The accountant's report alleged that there were discrepancies between the Trust records and actions taken by the respondent as trustee, and that the respondent had failed to administer the trust in a tax effective manner.

[20] The respondent applied for an order dismissing the originating application on the basis that there were no proper grounds for removing the respondent from the positions he held with respect to the estate and the Trust. The material filed by the respondent was not challenged by the appellant in any replying affidavit nor was the respondent cross examined at the hearing below.

[21] In a careful and detailed decision, the learned primary judge considered each of the matters raised by the appellant in his affidavit and, in particular, the matters which were said to constitute defaults by the respondent and which were identified in the accountant's report. Her Honour was satisfied that the accountant's report did not support the conclusion sought to be drawn by the appellant because, among other things, it was based upon assumptions and conclusions which were inaccurate as a result of the accountant not having been provided with complete accounts and other relevant material. Her Honour also concluded: "The material demonstrates a careful and prudent approach to garnering the estate Trust assets and attempting to manage as the circumstances permitted."

[22] On appeal, the appellant conducted a case which relied upon his establishing that the decision made was based upon fraudulent representations on the part of the respondent, a failure to disclose on the part of the respondent and other errors of law.

[23] The appellant filed an "Amended Notice of Appeal" following a decision by Muir JA striking out his earlier Notice of Appeal.[4]

[24] In the "Amended Notice of Appeal" the appellant combined a set of appeal grounds together with what amounts to a lengthy and detailed written submission. He relies on three grounds.

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4 See *Colston v McMullen* [2011] QCA 2.

An alleged failure by the Respondent and by David Colston (a director of Janfern Pty Ltd) to disclose documents.

[25] David Colston was not a party to the application. There is nothing to suggest that he had any obligation to disclose anything for the purposes of the application. For the reasons given in [14] above, there was no obligation on the respondent to provide disclosure.

False and misleading representations by the Respondent, David Colston and Frances Fredriksen which amounted to fraud

[26] David Colston gave no evidence at the application. Frances Fredriksen (a solicitor employed by the respondent's solicitors) only made an affidavit in which she exhibited some financial statements relating to the estate of Dawn Colston.

[27] As to the assertions against the respondent, the appellant attempted to demonstrate that the decision below was infected by fraud perpetrated by the respondent. His written submissions were based, in significant part, on an assumption that he would be allowed to cause subpoenas to issue and that, upon their return, the documents provided in response to those subpoenas would support his assertions. There was no compelling reason advanced to support a conclusion that the material sought would be so supportive. In the absence of that material (given the refusal of leave referred to above) the appellant relied only upon the material which had been before the learned primary judge. He alleged that there had been fraudulent claims concerning:

(a) That the respondent had made distributions to him of $55,000 in relation to renovations at a home in Chapel Hill;
(b) That non-income related expenditure of the Trust in the 2004-2005 financial year described as "personal expenses" were personal expenses of Dawn Colston when they were not in fact;
(c) That the "distribution registers" referred to in one of the respondent's affidavits were either produced to the appellant or were accurate;
(d) That the respondent had made distributions of income and capital in accordance with the terms of the Trust Deed to the appellant exceeding $300,000;
(e) That the respondent opened an account with the National Australia Bank for the purposes of conducting estate transactions;
(f) That superannuation funds in a named fund were paid to the estate and tax liability accrued to the estate as a result;
(g) That as a consequence of superannuation funds being paid from the named fund to the estate there was an onerous tax burden on the Trust;
(h) That pecuniary legacies for the grandchildren of Dawn Colston were paid from estate funds; and
(i) That Dawn Colston had no dependants at the time of her death.

[28] Each of those matters was the subject of lengthy written submissions. But in no case were any of the matters referred to in support of those assertions raised before the learned primary judge in any material respect. Thus, there was no opportunity below for the respondent to answer such allegations and to call such evidence as it might have been able to adduce. None of the matters which the appellant now seeks to agitate are the subject of facts which were not known to him at the time of the

hearing. He was aware of each of the matters which he now says evidence fraud. But, in any case, the application was not conducted in that way. In fact, the appellant did not press for an order that the respondent be removed but for an order that "the trustee … provide all relevant documents, (excluding working papers) to the trust, not already provided, so that the Report [of the appellant's accountant] may be updated."[5]

[29] The appellant can not, having failed to raise these issues before the learned primary judge, seek to rely upon them now.

Withholding affidavit material

[30] Mr Colston also asserted that affidavit material had been withheld at the hearing as a result of some agreement between his counsel and counsel for the respondent. He was unable to provide any relevant details of the agreement he alleged and could not exclude the prospect that the affidavit was not used because it contained inadmissible or irrelevant material.

[31] He did not assert that there had been any impropriety on the part of his counsel and he did not produce the affidavit which he said had been withheld. Without more it would appear that a forensic decision had been made by his counsel and no compelling reason was advanced to conclude that the appellant should not be bound by that decision.

[32] In summary, the appellant seeks to argue a case which could have been, but was not, raised below. In the light of all the evidence, the learned primary judge's observation "that there are numerous disputed issues of fact between Douglas and Mr McMullen and also Douglas and David, which, for complete resolution would require a lengthy trial"[6] appears to be entirely justified.

[33] The appellant has not made out any of his grounds of appeal. I would dismiss the appeal and order the appellant to pay the respondent's costs.

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5 Written submissions of the appellant at the hearing below, para [20], AR 1035.

6 [2010] QSC 292 at [41].