SUPREME COURT OF QUEENSLAND

CITATION:	*Colston v McMullen* [2011] QCA 2
PARTIES:	**DOUGLAS BENJAMIN COLSTON** (appellant/applicant) **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/respondent)
FILE NO/S:	Appeal No 9498 of 2010 SC No 12943 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Judgment; leave to adduce further evidence; order to restrain the retaining of particular counsel and for the further issue of subpoenas
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2011
JUDGES:	Muir JA
ORDER:	**1. Application dismissed with costs** **2. Within 7 days of 4 February 2011 the applicant file and serve an amended notice of appeal which complies with the requirements of Rule 747 of the *Uniform Civil Procedure Rules* 1999 (Qld) and which concisely identifies the findings of fact or law of the primary judge alleged to be erroneous**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN REFUSED – where appeal proceedings instituted – where applicant sought to stay an order dismissing proceedings – where applicant sought relief in relation to the exercise by the respondent trustee of his duties as trustee – where the applicant sought same relief in different proceedings at the same time – where applicant sought leave to adduce further evidence and restraining the respondent's counsel from acting on appeal – where applicant's notice of appeal asserts primary judge relied on false and misleading evidence – where applicant sought subpoenas of 12 non-parties – whether applicant's conduct

constituted an abuse of process – whether court can fetter the exercise of a trustee's discretion

Uniform Civil Procedure Rules 1999 (Qld), r 747

Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 WLR 485, cited
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
Geelong School Supplies Pty Ltd v Dean (2006) 227 ALR 612; [2006] FCA 1404, cited
Kallinicos & Anor v Hunt (2005) 64 NSWLR 561; [2005] NSWSC 1181, cited
Watkins v Christian [2009] QCA 101, cited

COUNSEL: The applicant appeared on his own behalf
G Long SC, with P F Mylne, for the respondent

SOLICITORS: No appearance for the applicant
McCowans Specialist Lawyers for the respondent

[1] **MUIR JA:** The applicant applied by originating application filed 12 December 2008 for an order that the respondent be removed as the executor and trustee of the estate of his late father, Malcolm Colston, as the executor and trustee of the estate of his late mother, Dawn Colston, and as the trustee of, and appointor under, the Dawn Colston Estate Trust ("the Trust").

[2] The application was dismissed on 6 August 2010. Consent orders made in the proceeding on or about 6 January 2009 were discharged.

[3] The applicant appealed on 6 September 2010 against the orders made on 6 August 2010. The applicant's outline of argument was filed on 1 October 2010 and the respondent's was filed on 23 November 2010. On 17 December 2010 the applicant filed an application to this Court seeking orders to the following effect:

1. That the 6 August 2010 orders be stayed;

2. That "the respondent is to be held to comply with undertakings [allegedly given by the respondent on 5 January 2009]" in the manner elaborated in paragraph 2 of the application;

3. The "respondent is to comply with the consent orders … in a manner that is consistent with the [alleged 5 January 2009] undertakings" in the manner specified in paragraph 3 of the application;

4. The applicant have leave to adduce further evidence;

5. The respondent's outline of argument be struck out because the barrister who settled the outline on behalf of the respondent acted for the respondent in conflict with his duty to the applicant;

6. The respondent be restrained from retaining such counsel to act on the appeal;

7. That subpoenas "be produced compelling the production of [specified] … documentation";

8. That the appeal proceedings be stayed "until such time as all relevant material, including witness testimony, has been provided in cogent and related matters before the Supreme Court …".

[4] In her reasons, the learned primary judge noted that there were "numerous disputed issues of fact" between the applicant and the respondent and also between the applicant and his brother, another beneficiary under the Estates and under the Trust. She observed that "the overall impression gained from the material which remains uncontested to date, is that [the respondent] has struggled to administer a very difficult estate and to give effect to the wishes of his sister [the late Mrs Dawn Colston] in making future and secure provision for her two sons [the applicant and Mr David Colston] and their families. Her Honour noted that claims made by the applicant on the respondent as Trustee were "… persistent, demanding and querulous".

[5] The primary judge found that the respondent had been hampered in the administration of the late Mrs Colston's estate and the Trust by the failure of the applicant and "to some limited extent", Mr David Colston to cooperate. She held that the material demonstrated "… a careful and prudent approach to garnering the estate Trust assets and attempting to manage as the circumstances permitted". She held also that, as at the date of hearing, the administration of the Estate was almost completed and that the Trust papers were up to date.

[6] On 8 November 2010, the applicant filed two claims against the respondent in the Supreme Court. In the first of these claims, number 12108/10, the applicant sought relief against the respondent similar to the relief sought in this application. In the other claim, number 12109/10, the applicant sought the taking of accounts in both Estates and also relief similar to but less extensive than that sought in these proceedings.

[7] There are a number of reasons why the application should be dismissed in its entirety. The seeking of the same relief in different proceedings at the same time, particularly in the same jurisdiction, may be an abuse of process.[1] Apart from anything else, it puts the respondent to unnecessary inconvenience and expense. The application was not made in a timely way. The decision appealed against was delivered on 6 August 2010 and the preparation for the appeal is well advanced. It is due to be heard on 21 March 2011. The relevant issues between the parties will then be determined. That is plainly relevant to the exercise of the discretion to grant a stay.

[8] There is a misunderstanding on the applicant's part as to what is involved in a staying of an order. There is usually no point in staying an order dismissing a proceeding. If the appeal succeeds, the order will be set aside. There would be some point in staying the order in relation to costs if sufficient grounds existed. But, in this case, the respondent has informed the Court that it will not seek to enforce the costs orders pending determination of the appeal.

[9] The respondent's counsel pointed out, correctly, that paragraphs 1, 2 and 3 of the consent orders are not amenable to a stay order. They relate to matters which, by now, are of historical interest only. I accept the respondent's submission that it

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1 *Thirteenth Corp Pty Ltd v State & Others* (2006) 232 ALR 491.

would not be an appropriate course to restore consent order four which obliged the respondent, as trustee, to continue to meet "the expenses or reimbursement of expenses of each of the beneficiaries of the type that have formerly been met from the trust fund". A trustee has a duty to beneficiaries which requires the proper exercise of the trustee's discretion based on relevant considerations. It would not be appropriate for this Court, particularly without the consent of beneficiaries, to purport to fetter the exercise of that discretion.

[10] In paragraphs 2 and 3 of the application, the applicant seeks substantive relief in relation to the exercise by the respondent trustee of his duties as trustee as well as mandatory orders and declarations in relation to the Estates and the Trust. They are not matters upon which the primary judge ruled or was invited to rule. Nor are they matters within the grounds of appeal. The latter pronouncement is perhaps overly bold.

[11] The Notice of Appeal consists of a great many paragraphs spread over some 54 pages. It ignores the requirements of Rule 747 of the *Uniform Civil Procedure Rules* 1999 (Qld) in relation to notices of appeal and instead: impugns the ethical standards and conduct of various legal practitioners; traces the history of the proceeding; challenges the correctness of allegations in a number of affidavits filed in the proceeding; discusses dealings between the appellant and his legal advisors; makes factual assertions in respect of Trust assets and dealings and the contents of documents; makes allegations about events and matters after the judgment in the proceeding on 6 August 2010; criticises the conduct of the case at first instance by the applicant's legal representatives; and refers to a great many cases without identifying, except by reference to a broad topic heading, the use to be made of them.

[12] Eventually, the Notice of Appeal turns its attention to the primary judge's reasons and engages in lengthy, argumentative critiques of paragraphs 2, 7, 15, 16, 21, 22, 23-37 and 41-47. The criticisms are replete with allegations that the primary judge relied on deliberately false and misleading evidence given by Mr David Colston and the respondent, in which the respondent's legal representatives were complicit. The many broad allegations of error on the primary judge's part are rarely accompanied by any identification of the actual errors alleged to have been made. The Court is invited to give "consideration of (sic) serious sanctions for the respondent and his legal representatives".

[13] In short, the Notice of Appeal is not recognisable as a notice of appeal. It is prolix, obscure, argumentative and scurrilous. It plainly constitutes an abuse of process. It is surprising that the respondent has not applied to have it struck out.

[14] As for paragraph 4 of the application, the giving of leave by a single judge of this Court for evidence to be adduced on the hearing of the appeal would not bind the appellate court on the hearing of the appeal. More importantly, it does not appear that the evidence sought to be adduced would not have been available for use on the hearing before the primary judge even if the applicant had exercised reasonable diligence to procure it.[2] Parties to a proceeding are expected to prosecute their respective cases fully on the trial of the proceeding and to adduce all the evidence on which they wish to rely. There is a strong public interest in finality in litigation. It was observed in the joint reasons in *D'Orta-Ekenaike v Victoria Legal Aid*[3] that even in appellate proceedings "the importance of finality pervades the law".

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

3 (2005) 223 CLR 1.

[15] In *Chanel Ltd v F W Woolworth & Co Ltd*,[4] the Court observed:

> "Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

[16] The affidavit of Mr Colston contains hearsay material, non expert opinion evidence and is argumentative in part. It is possible that some of it could be relevant to issues raised on appeal, but, as I have said, what those issues are is impossible to determine. I decline to make the order sought. I would, in any event, have refused to permit further evidence to be adduced in the absence of intelligible and reasonably concise grounds of appeal which enable the respondent to ascertain the case he has to meet.

[17] During the applicant's oral submissions it emerged that he was seeking to justify his application on the basis that the respondent had failed to comply with its disclosure obligations. However, no attempt was made to substantiate any such alleged failure and in light of paragraphs [44] to [46] of the primary judge's findings, it is probably unlikely that there was any such failure. If this contention was to be advanced sensibly, it would have been necessary for the applicant to have placed before me evidence of: what disclosure, if any, was required or given at first instance; whether there was any agreement or understanding in relation to disclosure and evidence that there were material documents which should have been disclosed but which were not disclosed. Timely notice should have been given to the respondent's legal advisors.

[18] Paragraphs 5 and 6 concern the striking out of the respondent's outline of argument and an order restraining the respondent's counsel from acting on the respondent's behalf. For both of these claims to succeed, to state matters a little too generally perhaps, the applicant requires a finding that the respondent's counsel has acted or may act in breach of his duty to the applicant. The evidence does not justify such a finding.

[19] It does not appear to me that "a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that [the respondent's counsel] should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice".[5] The evidence does not establish that the respondent's counsel had more than a fleeting and cursory connection with the applicant's complaints against the respondent. That was at a time prior to the filing by the applicant of his originating application on 12 December 2008. It does not appear that the respondent's counsel saw any documents or was privy to any evidentiary materials. Moreover, it is not established that the respondent's counsel is in possession of any information derived in confidence from the applicant which may be used, inadvertently or otherwise, by the respondent's counsel to the applicant's detriment. The respondent's counsel swore to the extent of his involvement in relevant matters through contact with the applicant's former solicitor. The applicant declined an invitation to cross-examine him.

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4 [1981] 1 WLR 485 at 492-493.

5 *Kallinicos & Anor v Hunt* (2005) 64 NSWLR 561 at 582 referred to with approval in *Watkins v Christian* [2009] QCA 101 at [13]; see also *Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404.

[20] It is not appropriate that I make an order such as that contemplated in paragraph 7 of the application concerning the issuing of subpoenas to the 12 non-parties specified. The scope of the material sought on subpoena is far too broad. The material sought by the subpoenas would appear to extend beyond the issues which could properly be raised on the appeal. Paragraph 7 assumes that the Court, on the appeal, will allow further evidence to be adduced. For the reasons already given, that would seem, to me, to be unlikely. It is submitted on behalf of the respondent that the application in relation to subpoenas amounts to a fishing expedition by the applicant in search of evidence to support his complaints at first instance against the respondent. There is substance in that submission. The principal objection to the request for orders relating to subpoenas, however, is that it is founded on a mistaken notion that the appellate process involves a reventilation of all factual and legal issues raised on the trial with a right to adduce any further evidence which may bear on such issues, however remotely.

[21] In paragraph 8 of the application, the respondent seeks a stay of the appeal pending his obtaining the further evidence contemplated by him. As the application has failed in relation to such evidence, the basis upon which the stay was sought no longer has any foundation. No part of the application has succeeded and it is in the interests of both parties that the appeal be dealt with without any further delay, if it is not to be struck out.

[22] There is no reason why costs should not follow the event and it is ordered that the application be dismissed with costs. It is also ordered that within 7 days of today's date the applicant file and serve an amended notice of appeal which complies with the requirement of Rule 747 of the *Uniform Civil Procedure Rules* 1999 (Qld) and which concisely identifies the findings of fact or law of the primary judge alleged to be erroneous.