SUPREME COURT OF QUEENSLAND

CITATION:	*Colston v McMullen* [2011] QCA 227
PARTIES:	**DOUGLAS BRIAN COLSTON** (appellant) **v** **BRIAN McMULLEN as executor and administrator (by representation) of the estate of MALCOLM ARTHUR COLSTON, as executor and administrator of the estate of DAWN PATRICIA COLSTON and as trustee and appointor of the DAWN COLSTON ESTATE TRUST** (respondent)
FILE NO/S:	Appeal No 3549 of 2011 Appeal No 3550 of 2011 SC No 12108 of 2010 SC No 12109 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2011
JUDGES:	Chesterman JA and Margaret Wilson AJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 3549 of 2011:** **Appeal dismissed with costs.** **In Appeal No 3550 of 2011:** **Appeal dismissed with costs.**
CATCHWORDS:	SUCCESSION – EXECUTORS AND ADMINISTRATORS – PROCEEDINGS AGAINST EXECUTORS AND ADMINISTRATORS – where the appellant's principal claim in relation to action 12108 of 2010 was that the respondent had made no determination in respect of the distribution of income for any accounting period since the year ended 30 June 2004 – where the appellant sought an order, in action 12109 of 2010, that the estate of the late Malcolm Colston be administered and an account taken of the administration against the respondent on the basis of wilful default – where the appellant sought the same orders with respect to the estate of Dawn Colston – where the respondent filed an application

in each proceeding for orders that parts of each statement of claim be struck out – where the primary judge ordered that several paragraphs be struck out in each statement of claim – where the appellant has appealed against the abridgement of the statements of claim – whether the orders of the primary judge should be set aside

Uniform Civil Procedure Rules 1999 (Qld), r 670, r 671(h), r 772

Mbuzi v Hall & Ors [2010] QCA 356, cited
Melville v Craig Nowlan & Associates Pty Ltd (2001) 54 NSWLR 82; [2002] NSWCA 32, cited

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] **CHESTERMAN JA:** The applicant's father, Malcolm Arthur Colston, died on 23 August 2003. His will dated 28 May 2000 appointed his wife, the applicant's mother, Dawn Patricia Colston to be executor and trustee of his will, which left "an equal share of any moneys which I have advanced to Janfern Proprietary Limited (a family company) and which are available in cash as at the time of my death and one ordinary share each in Janfern …" to his two sons, the appellant and his brother. As well he left each of his sons an equal entitlement to the shares in what was described as "a modest share portfolio". An identified house property in the ACT was devised to the appellant and a specified motor vehicle bequeathed to the appellant's brother. The rest and residue of the estate went to his widow.

[2] Mrs Colston survived her husband by only 11 months, dying on 3 July 2004. By her will dated 28 June 2004 she appointed her brother, the respondent, executor and trustee of her estate and trustee and appointor of the Dawn Colston Estate Trust. The respondent obtained a grant of probate of Mrs Colston's will on 15 November 2004. There has been no grant with respect to the late Mr Colston's will.

[3] The appellant has commenced two actions in the Supreme Court, Nos 12108 and 12109 of 2010, in both of which the respondent is defendant. In the first action he is sued as trustee of the Dawn Colston Estate Trust. In the second he is sued as executor of the estate of Malcolm Arthur Colston and executor of the estate of Dawn Patricia Colston.

[4] The terms of the will which give rise to the first action were summarised by the primary judge in these terms:

> "[4] Dawn Colston's will gave $25,000 to each of four nominated grandchildren, provided they turned 25. She gave the rest of her estate to be held on a discretionary trust called the Dawn Colston Estate Trust ("the Trust"). The defendant is the trustee of the Trust. The beneficiaries of the Trust include the plaintiff, the plaintiff's brother, Dawn Colston's grandchildren or any children of any of them as well as any company or other trust associated with those beneficiaries.

> [5] By cl 5.2 of her will, the income of the trust fund is to be distributed as the trustee determines, in his absolute discretion, on or prior to the end of each accounting period, which is a year ending 30 June. By cl 5.3(a), the trustee may accumulate part or all of the income derived in any accounting period, in which case it will form part of the capital of the trust fund.
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> [6] By cl 5.4, on the vesting day the trustee is to hold the capital of the trust fund upon trust for the beneficiaries or any one or more of them exclusive of the other or others as the trustee in his absolute discretion determines.
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> [7] Clause 5.5 provides that any determination of any trustee is to be recorded in a written minute to be signed by the trustee, upon which "it shall be effective and irrevocable".
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> [8] By cl 5.7, a determination to apply any amount of income for any beneficiary may be made by placing the amount to the credit of the beneficiary in the books of the trust fund, by drawing a cheque for the amount made payable to or for the benefit of the beneficiary or by paying the amount in cash to or for the benefit of that beneficiary. Clause 5.7(d) provides that any income accruing to the trust fund and vesting in a beneficiary is to be held by the trustee "as a debt on demand owing to such person absolutely …".
>
> [9] Importantly for the plaintiff's case, cl 5.8 of the will provides that in the event that the trustee fails to make a determination in respect of income distribution (or capital distribution), then such income is to be held for the plaintiff and his brother in equal shares absolutely.
>
> [10] Clause 5.9 permits the trustee to apply the whole or any part of the income or capital of the fund towards the maintenance, education, medical expenses, advancement or for the general benefit of any beneficiary." (footnotes omitted)

[5] The principal claim made in action 12108 is that the respondent made no determination in respect to the distribution of income for any accounting period since the year ended 30 June 2004 so that, pursuant to cl 5.8 of the will, the appellant was entitled to half the estate's income in each period. He claims for the years 2005 to 2008 the sum of $1,083,007.68 and further unquantified amounts being half the undeclared income of the trust in the two succeeding years, 2009 and 2010.

[6] In action 12109 of 2010 the appellant seeks an order that the estate of the late Malcolm Colston be administered and an account taken of the administration against the respondent on the basis of wilful default; and the same orders with respect to the estate of Dawn Colston. With respect to that estate the appellant seeks particular orders: the payment of $1,203,518.04 "as compensation for the equitable Death Benefit distribution that remained unremitted following his mother's death and which would otherwise have been made to him equitably as his

mother's sole Dependant at the time of her death …"; and further, a conveyance to the appellant of the "residence he shared with his mother" in which he lived as her sole dependent.

[7] On 12 December 2008 the appellant applied for an order that the respondent be removed as executor and trustee of the estates of both his parents. The respondent denies that he has ever been executor of the late Malcolm Colston's estate, or trustee of the assets of that estate. The application was dismissed by White J (as her Honour then was) on 6 August 2010. An appeal against her Honour's orders was dismissed on 15 July 2011.

[8] On 28 January 2011 the respondent filed an application in each proceeding for orders that parts of each statement of claim be struck out. On 31 March 2011 McMurdo J ordered:

> (1) In action 12108 that paragraphs 6 to 13, 15 to 18, 36 to 41, 52 to 57 and 104 to 109 be struck out.
>
> (2) In action 12109 that paragraphs 8, 10 to 18, 22, 24, 27 and 28, 32 and 33, 42 and 43, 49 to 54, 58, 61, 63(ii), 63(iii), 64 to 82, 85, 86, 88 to 120, 122, 125 to 131, 134 to 150, 152 to 178, 180 to 186, 191 to 195, 206 to 210, 212 to 216 and 222 to 231 be struck out.

The appellant was ordered to pay the respondent's costs of each application.

[9] The appellant has appealed against the abridgement of the statements of claim. He has not appealed against the removal of paragraphs 10 to 13, 36, 56 and 57 of the statement of claim in action 12108 of 2010. Nor has he appealed against the striking out of paragraphs 32 and 33, 58, 115 to 120, 122, 144 to 149, 180 to 183, 191 to 195, 206 to 210, or 226 to 231 of the statement of claim in action 12109 of 2010.

[10] As well the appellant complains that the primary judge did not deal with applications he made. None of these was reduced to writing; nor was the respondent given notice of them prior to the hearing on 10 March 2011. Nevertheless the appellant contends that he made the applications orally and that the primary judge was wrong not to have made the orders asked for.

[11] It is necessary to deal separately with the six applications which the appellant says he made and which were refused.

[12] The first order requested was one removing Mr McMullen from his appointments as trustee and executor. It is not apparent that an application for that order was made in plain terms but, notwithstanding that difficulty, and the absence of notice, the judge was plainly right not to make the order. The applicant had applied for that relief in accordance with the *UCPR* and White J had refused it on 6 August 2010. When the respondent's application was before McMurdo J an appeal against that order was pending. The appeal was the proper proceeding to determine whether the respondent should have been removed. In addition, on 5 July 2011, after judgment in this proceeding, the appellant again applied for the respondent's removal. Douglas J dismissed that application on 19 July 2011.

[13] The second order which the appellant submits should have been made was one prohibiting all solicitors and counsel then acting or who had acted for the

respondent, from continuing to represent the respondent. The submission went so far as to include counsel who appeared for the appellant on the appeal but who had not previously been retained. Putting aside the absurdity of complaining that the primary judge should have prohibited the professional involvement of counsel who had not then been engaged and whose retainer was not, so far as the material shows, contemplated, the claim that the respondent's present and past representatives should not act for him was unfounded.

[14] The appellant appears to attribute every failure of his proceedings to the dishonesty of those representing the respondent. He is not troubled by the seriousness of the aspersions he makes. He has not produced coherent evidence to support his claims which, in the absence of such evidence, must be regarded as scurrilous and scandalous. If the appellant does have evidence of misconduct by legal practitioners he can, and should, put the evidence before the Legal Services Commission.

[15] The nature of the allegations made and the peculiar nature of the orders sought would require the making of an application in accordance with the rules of court, on notice and supported by unequivocal evidence.

[16] The appellant did refer to one instance of what he submitted was established dishonesty. Counsel who appeared for the respondent at the hearing, though not on the appeal, swore two affidavits in response to an earlier intimation that he should not accept the brief. The second affidavit accepted that the date of a conversation asserted confidently in the first affidavit may have been wrong. The appellant disregards the possibility of honest mistake or faulty recollection, and propounds the deponent's subsequent qualification to the date as proof of fraud. It clearly is not, by itself.

[17] The primary judge was right not to make any such order without a proper application.

[18] The third order which the appellant says was refused was one which would have allowed him to inspect substantial numbers of documents which he had subpoenaed from a number of solicitors and financial institutions.

[19] Again the appellant does not appear to have applied in clear terms for such an order but the primary judge proceeded on the basis that the appellant did seek that relief. His Honour refused it on the ground that the production of documents on subpoena was premature. What was in issue was whether some paragraphs of the statements of claim were irrelevant so that their continued inclusion would raise false issues at the trial adding to its length, complexity and expense. The case was not one in which it was alleged that the facts alleged in the statements of claim were insufficient to establish a cause of action so that further information, which might be supplied by the production of documents, was necessary. Nor did the appellant apply to amend his statements of claim, whether by reference to the subpoenaed documents or otherwise.

[20] The primary judge correctly pointed out that the issue of subpoenas was premature and that, logically, the status of the impugned paragraph should first be determined before the appellant considered whether amendments were necessary and if so whether the documents were necessary for the purpose of amending.

[21] A further answer to the appellant's complaint is that he re-issued some subpoenas for the hearing on 19 July 2011. Douglas J made an order permitting the appellant to inspect the documents, or some of them, produced.

[22] The fourth refusal was to order the respondent to produce documents relevant to the administration of the appellant's parents' estates. This is a particular point of contention. Counsel for the appellant informed the court, on instructions, that the respondent has provided the appellant with the financial accounts for the Dawn Colston Estate Trust for each year up to and including June 2009 and has, in addition, provided the documentary records of the respondent's determinations of income distribution in each financial year. The appellant denies receipt of any such documents and accuses counsel and instructing solicitors of deliberate falsehood. It is not possible for this Court to resolve such a dispute (on a subject matter about which there should be no possibility of disagreement) which appears to have been raised for the first time on appeal. Subsequent to the hearing counsel for the respondent, sent also to the appellant, informed the Court that the appellant had not in fact been given the financial accounts for the year ended 30 June 2009, but had received them, as earlier intimated, for the preceding years. This unfortunate misstatement, which I accept was the result of innocent mistake, will no doubt increase the appellant's mistrust of his opponent but is irrelevant to the merits of the appeal. The Court was not at the hearing, and is not now, in a position to resolve a dispute of fact (what financial information was given to the appellant) which arose for the first time at the hearing.

[23] The manner in which this point was argued before the primary judge makes it doubtful that the appellant sought any particular order, though he did complain in general terms that the respondent had not provided him with documents he wanted. But the appellant sought documents, described at length and in detail, in his applications filed 5 July 2011. Douglas J refused to order their production.

[24] The fifth order sought was for leave to amend the Statement of Claim. No such leave seems to have been sought. Certainly there was no articulation of what amendments the appellant wished to make. In any event the applications of 5 July 2011 sought *inter alia* the joinder of additional defendants and leave to amend the Statement of Claim "upon receipt of a final report by (forensic accountants) investigating negligence, default, breach of trust and theft matters … such amendments to be filed within 28 days of … receiving that report." This relief was also refused.

[25] Lastly there is a complaint that the primary judge did not make an order that the respondent comply with consent orders made on 6 January 2009. These were made in the proceeding heard by White J which sought the removal of the respondent. On 6 January 2009 the court ordered, by consent, that the application be adjourned to a date to be fixed to allow participation in a mediation on or before 18 February 2009, and that pending resolution or determination of the application, the respondent was 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 mediation was duly held but was unsuccessful. As mentioned already on 6 August 2010 White J dismissed the appellant's application. Her Honour ordered that the consent orders of 6 January 2009 be discharged. It was not, obviously, thereafter necessary for the respondent to comply with the consent orders. When that was pointed out to the appellant his contention became that he sought compliance with the order between the date of its making and the date of its discharge.

[26] In this case, too, it is not clear that any such application was made to the primary judge. If it was his Honour was clearly right not to entertain it in the absence of an

application on notice allowing the respondent to reply. It is apparently his position that he did make the payments required by the order. The appellant's own material accepts that some payments were made.

[27] The appellant informed the court that he has appealed against the dismissal of his 5 July 2011 applications. There is clearly no substance in his complaints that the primary judge did not entertain his obliquely made oral applications for relief when the appellant subsequently sought that relief in applications made regularly by way of written notice to the respondent. The complaint that the appellant did not obtain the relief he sought should properly be confined to the appeal against the rejection of his applications filed 5 July 2011. It has no place in this appeal.

[28] It is now necessary to turn to the matters that were properly before the primary judge and were determined by him, namely the challenge to the statements of claim. It is necessary to consider them separately.

Action 12108 of 2010

[29] The primary judge said of paragraphs 15 to 18:

> "[17] Paragraphs 15 through 17 plead the facts of the income (not from the Trust) which the plaintiff did receive in 2005 and subsequently. Paragraph 18 pleads that his means tested Centrelink benefits received since 2005 have not been affected by any distributions from the Trust. The implication from that seems to be that there was no distribution to him. That does not follow and his Centrelink payments do not matter in this context. The matters in paragraph 15 through 18 are irrelevant and should be struck out."

[30] These paragraphs contain irrelevant assertions about income received by the appellant in 2005 financial year, and subsequently. The appellant's argument to retain those paragraphs confuses evidence with material facts. They were properly struck out.

[31] Paragraphs 37 to 41 were struck out. The primary judge said of them:

> "[25] Paragraph 37 alleges that a firm of lawyers involved in the 2008 case then knew that the reconstructed accounts were false. Paragraph 38 asserts that concerns in that respect have also been raised in the plaintiff's notice of appeal in the 2008 case. Paragraph 39 alleges that the Legal Services Commission has begun an investigation into the activity of that firm in relation to those matters. Paragraphs 40 and 41 allege that the plaintiff has had certain discussions with the Legal Services Commission upon this subject. Paragraphs 37 through 41 are irrelevant and should be struck out."

[32] The point in relation to these paragraphs is the same as that which arises with respect to paragraphs 52 to 55 and 104 to 109, about which the judge said:

> "[31] Paragraphs 52 through 54 allege that the defendant's then solicitors aided him in breaching the undertaking or

> undertakings and that the plaintiff has communicated with the Legal Services Commission about that matter. They are irrelevant allegations and those paragraphs will be struck out.
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> [32] Paragraph 55 has the same defect, as well as other irrelevant material as to what the plaintiff proposes to do as the appellant in the 2008 case. It will be struck out.
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> [33] Paragraphs 56 and 57 seem to do no more than foreshadow possible further claims, including for orders "providing for the formalisation of those undertakings". They are irrelevant and will be struck out.
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> [34] Paragraph 104 alleges that the defendant gave false evidence in the 2008 case. This seems to be related to the relief claimed in paragraphs (i), (ii) and (iii), which seek orders which would have some impact upon the 2008 case. Presumably this claim of false evidence has been raised in the appeal in the 2008 case. Paragraphs 105 through 109 again plead complaints about the defendant's solicitors in the 2008 case and the plaintiff's communications with the Legal Services Commission about that matter. They are irrelevant allegations and will be struck out."

[33] In general these paragraphs contain irrelevant assertions about complaints the appellant has made to bodies such as the Legal Services Commission concerning actions of the respondent and his lawyers in the proceedings to remove the respondent. The appellant's argument to retain these paragraphs confuses evidence with material facts, and asserts they were relevant to orders intended to be sought by oral application to the Judge, rather than to the statement of claim itself. The assertion shows why the paragraphs should not be in the pleading. The point has also been dealt with earlier when rejecting the appellant's contention that the primary judge should have made orders prohibiting the respondent's lawyers from acting for him.

[34] The primary judge was, with respect, right, for the reasons his Honour gave for striking out the impugned paragraphs. There is no substance in the appeal in action 12108 of 2010.

Action 12109 of 2010

[35] Paragraph 8 of this statement of claim is in identical terms to paragraph 9 of the statement in claim in action 12108 and should be struck out for the same reason as led to the striking out of that paragraph, against which there was no appeal.

[36] The primary judge explained why he struck out paragraphs 10 to 12. He said:

> "[38] Paragraphs 10 and 11 allege that he has asked the defendant for all details and documents related to the defendant's administration of Malcolm [Colston's] estate. The defendant says that these are irrelevant because the plaintiff does not seek an order in that respect. I accept that submission.

> [39] Paragraph 12 should be struck out because its vague and meaningless assertion that "shareholdings … have yet to be fully administered"."

[37] Paragraphs 10 and 11 assert the respondent failed to provide the appellant with certain documents when requested. They were struck out because the statement of claim did not seek an order in that respect. The argument to retain the paragraphs is based, not on relief sought in the statement of claim, but on relief which the appellant proposed to seek by oral application to the judge. Accordingly, the decision to strike out the paragraphs was correct.

[38] Paragraph 12 asserts that shares "associated with (the appellant's) beneficial interest in my father's will … have yet to be fully administered" by the respondent. It was properly struck out because it was vague and meaningless. The argument to retain the paragraph is that it is "relevant to proceedings of Willful (sic) Default as the Defendant has made representations to accountants and share registries and others relating to his claimed role as administrator and executor of the Estate of Malcolm Arthur Colston for the purposes of establishing beneficial ownership of those share and administering same in accord with the Defendant's understanding of the relevant Wills". This also is vague and meaningless.

[39] Paragraphs 13 to 18 allege that the respondent and his lawyers gave misleading evidence in previous proceedings between the parties and that the appellant has complained, inter alia, to the Legal Services Commission about that. They were struck out as irrelevant. The appellant seeks to retain these paragraphs as being relevant to:

(a) his claim for indemnity costs, but does not demonstrate how misconduct in earlier proceedings entitles him to indemnity costs in the current proceedings;
(b) an oral application made for the removal of the respondent as executor of the two estates. The statement of claim does not seek the respondent's removal.

There was no error in striking out the paragraphs.

[40] Paragraphs 49 to 54 are repetitions of paragraphs 13 to 18. That is a separate reason for striking them out, as the primary judge did.

[41] The striking out of paragraphs 22, 24, 27 and 28 were dealt with by the primary judge:

> "[45] The next challenges relate to what the defendant describes as the plaintiff's detinue claim. The plaintiff complains that some of his goods have been placed in storage by the defendant, who has refused to return those goods to him. However, there is no claim for relief for the return of the goods, except in this indirect way: the plaintiff pleads that pursuant to a consent order in the 2008 case, the defendant was obliged to return that property to him and, that the defendant having failed to do so, the plaintiff has now "been served with a Rule 444 letter and other correspondence noting extensive failures in relation to the Consent Orders

> delivered on 6 January 2009". The prayer for relief seeks, in paragraph (vi), "[d]irections for ongoing compliance with those Consent Orders", but only "until such time as the related Appeal [in the 2008 case] has been determined". So in that indirect way, there seems to be a claim for the return of goods. But it is not pleaded as a claim in detinue. Rather, it is a claim for the enforcement of an order in the 2008 case, and only until the determination of the 2008 case. Subject to the outcome of the appeal, the 2008 case appears to have been dismissed. The relief claimed is therefore devoid of any effect and I would have been disposed to strike out nearly all of paragraphs 19 through 33 had that been sought by the defendant. But I will confine myself to those paragraphs which are challenged.
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> [46] Paragraph 22 should be struck out as an irrelevant allegation. It is not to the point that in proceedings in the Family Court, to which the defendant was not said to have been a party at that stage, there was some determination that the plaintiff was the owner of the property.
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> [47] Paragraph 24 contains an irrelevant allegation that the defendant's solicitors advised the Family Court that they no longer represented the defendant in those proceedings. It will be struck out.
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> [48] Paragraphs 27 and 28 pleads that the plaintiff has asked the defendant to produce the relevant contract for the storage of the goods and that the defendant has refused to do so. These will be struck out as irrelevant." (footnotes omitted)

[42] Indirectly the statement of claim seeks the return of certain chattels. Paragraph 22 asserts that in Family Court proceedings between the appellant and his former wife, in respect of which the respondent is not alleged to have been a party, findings were made about the ownership of those chattels. The primary judge struck this paragraph out as being irrelevant. The appellant seeks to retain it on the basis that the Family Court ruling is "evidence (which) will be relied upon to demonstrate that the Defendant, whilst not technically a party to Family Court proceedings, was intermeddling in same and was known to by the Court to be doing so …". The concession that the allegation is evidence shows why the argument fails. In any event, the opinion of another Court, in proceedings to which the respondent is not alleged to have been a party, is an irrelevant allegation in the claim in these proceedings for return of the chattels.

[43] Paragraph 24 asserts that the respondent's former solicitors notified the Family Court that they no longer acted for the respondent. It was struck out as irrelevant. The appellant seeks to retain it saying that those solicitors ceased "representation to ensure they are not in breach of Court rulings", which the appellant says is "relevant to significant breach of trust issues that would otherwise compel the Court to replace the Defendant in relevant roles and make orders for indemnity costs …".

However:

(a) the statement of claim does not seek removal of the respondent as executor; and

(b) in any event, neither the statement of claim nor the appellant's outline of argument says why the respondent's former solicitors ceasing to act in other proceedings would be reason for his removal as executor, or justify an order for indemnity costs in these proceedings.

[44] Paragraphs 27 and 28 allege that the respondent had refused the appellant's request to produce a contract relating to the storage of the chattels that he wants returned. The grounds advanced by the appellant for retaining these paragraphs are unintelligible.

[45] The judge said of paragraphs 42 and 43:

> "[42] Paragraphs 42 and 43 seem to raise a case to the effect that more than $100,000 remains in one estate or the other which relate to "legal costs". He complains that the defendant has not provided any explanation for those funds and, in particular, any information as to whether they are relevant to the estate of Malcolm Colston. The allegations are unintelligible and embarrassing. They should be struck out."

[46] These paragraphs appear to assert that the appellant has been told that more than $100,000.00 remains unadministered in one of the two estates, that this money relates to "legal costs" and that the respondent has not explained to which estate they belong. The matters advanced by the appellant to retain these paragraphs merely reiterate the substance of what is in the statement of claim and do not demonstrate any error in the order striking them out. It is impossible to know what point the paragraphs are meant to make.

[47] Paragraphs 61, 63(ii), 63(iii), 64 to 82, 85, 86, 88 to 114, 125-131, 134 to 143, 150 to 170 and 184 were dealt with by the primary judge in these terms:

> "[54] There are several challenges to paragraphs dealing with Dawn Colston's superannuation death benefit. This was the subject of cl 2.7 of her will. She there recorded that she may have an entitlement for amounts payable under a policy of insurance and she requested that, if practicable, the benefits would be paid to the trustees of her will for distribution pursuant to it.
>
> [55] The plaintiff's case as to the death benefit is that it should have been applied by the defendant in his favour. He pleads that he was her sole dependant (paragraph 61) and that the defendant has failed "to consider and make equitable and tax-effective distributions of superannuation assets consolidated in the Estate to my mother's sole Dependant" (paragraph 63(ii)). Paragraphs 64 through 79 seem to be directed only to the point that the plaintiff was a dependant of his mother. Beginning with paragraph 121 there is a number of allegations under the heading "Failure to consolidate superannuation assets in the Estate and make equitable and tax-effective distribution to sole Dependant as noted in paragraph 63(i)-(ii) above". Paragraph 121 pleads, apparently correctly, the effect of cl 2.7 of Dawn Colston's

will. Not surprisingly, there is no challenge to paragraph 121 because it demonstrates the flaw in this part of the plaintiff's case.

[56] Paragraph 122 alleges that the defendant gave false evidence in the 2008 case, specifically in the respect that his mother had no dependant at the time of her death. He pleads in paragraph 125 that he was his mother's sole dependant. He alleges that the defendant has failed to consolidate his mother's superannuation assets within her residual estate (paragraph 123) but then alleges that the defendant has also "failed to exercise his discretion in respect of the payment of superannuation to my mother's Dependant" (paragraph 124). This appears to be a complaint as to the defendant's performance as trustee of the Trust. The defendant is sued in this proceeding as executor of the estate of Dawn Colston (as well as the supposed executor or the estate of Malcolm Colston). And there is no apparent basis for the allegation that the discretion had to be exercised in the way asserted in paragraph 124.

[57] For these reasons the allegations, at least in paragraphs 61, 63(ii), 64 through 79, 125 through 131 and 134, are embarrassing as they are inconsistent with the case pleaded by the plaintiff that by cl 2.7 of the will the superannuation and death benefits were to be part of the residuary estate and thereby the Trust. They will be struck out.

[58] The plaintiff also pleads, in paragraphs 136 through 143, that the assets of a superannuation fund, described as the Janfern Super Fund, should have been first paid into the estate but then paid to him as "my mother's sole Dependant". For the same reason, these paragraphs should be struck out. Paragraph 135 is not specifically objected to, but it should be struck out as part of that same case.

[59] Paragraphs 80 through 82, 85, 86 and 88 through 114 are challenged on the basis that they are part of the case for the application of the death benefit in the plaintiff's favour. But it is far from clear that they are part of that case: they are allegations to the effect that the plaintiff was a dutiful son, in recognition of this Dawn Colston intended to make substantial gifts to him in her will and that the will provided for the Trust only to put property beyond the reach of the plaintiff's former de facto partner. These matters do not affect the defendant's duties according to the terms of the will and the Trust. They are irrelevant and will be struck out.

[60] A further case sought to be raised by this pleading is that the plaintiff was "displaced" from his mother's house, although he was dependent upon her. Paragraph 63(iii) alleges that this was a breach of trust committed by the defendant. The house became part of the residual estate and is now an asset

> of the Trust. There is no pleaded basis for the plaintiff to be entitled to live there. Accordingly, paragraphs 63(iii), 150 through 170 (including paras 151, 165, 166 and 167 which were not specifically challenged but which are part of the same case) and paragraph 184 will be struck out."

[48] With respect the reasoning appears impeccable. As the primary judge noted, by clause 2.7 of Mrs Colston's will her superannuation death benefits fell into her residuary estate and became part of the Dawn Colston Estate Trust, the assets of which were to be dealt with in the respondent's discretion. Moreover in this action the respondent has sued as executor of the estate, not as trustee of the trust. There is as well no pleaded basis for the allegation that the respondent was bound to exercise his discretion in the appellant's favour. The most telling point is that noted by the primary judge, that this claim is inconsistent with the appellant's own case that the superannuation moneys form part of the trust assets.

[49] The appellant seeks to retain the paragraphs by submitting that the respondent was bound to exercise his discretion according to his mother's "testamentary intent" that "income to … be dealt with in the most tax effective manner possible." But Mrs Colston's testamentary intention is to be found in her will which created the trust and gave the respondent discretion as to the distribution of trust assets.

[50] The appellant also asserts that he has evidence that the respondent "never consolidated the superannuation assets within the relevant Estate" and that the respondent "failed to consider the distribution of superannuation assets". Whether that is so or not those matters are not the subject of complaint in the Statement of Claim. The evidence may support the claim for an order that the estate be administered on the basis of wilful default, but the administration of the estate will not necessarily result in the transfer of assets representing the superannuation moneys to the respondent.

[51] The appellant also submits that the claim is one properly brought against the respondent as executor because, as executor, the respondent was obliged to pay the superannuation moneys to him. No basis for that obligation is pleaded. It appears wrong.

[52] Paragraphs 63(iii), 150 to 170 and 184 allege that the respondent, in breach of trust, "displaced" the appellant from a house which was part of Mrs Colston's residuary estate and, therefore, an asset of The Dawn Colston Estate Trust. They were struck out because no basis was pleaded for the appellant's entitlement to reside in the house. The appellant seeks to retain these paragraphs arguing that the respondent:

> (a) was acting as Mrs Colston's executor, not as trustee of the Dawn Colston Estate Trust, when he "displaced" the respondent from the house. No basis is pleaded in the statement of claim for this assertion; and
>
> (b) as executor, "has no entitlement to exercise [a] discretion to displace the (appellant)" from the house, which, however, was not left to the appellant, but formed part of the residuary estate, so that the appellant has no proprietary interest in it. It is not alleged that any term of the will required the respondent, as executor, to permit the appellant to reside in the house.

[53] The appellant also argues that he has evidence that the respondent has "disposed (of) the property to an entity other than the Dawn Colston Estate Trust" and that this is relevant to his claim for an account on the footing of wilful default. The statement of claim does not allege:

(a) this disposal of the property; or

(b) that Dawn Colston's estate suffered loss as a result of this disposal of the property.

Accordingly, there was no error in ordering the paragraphs struck out.

[54] The primary judge's reasons for striking out paragraphs 180 to 183, 207 to 210 and 226 to 231 were:

> "[61] In his pleading in relation to Dawn Colston's estate, the plaintiff repeats several times his assertions that the defendant adduced false evidence in the 2008 case, that the defendant's solicitors were complicit in that misconduct and that the plaintiff has corresponded with the Legal Services Commission about that matter. These matters are irrelevant and will be struck out. They involve paragraphs 115 through 120, 122, 144 through 149, 180 through 183, 207 through 210 and 226 through 231."

[55] The reasons are self-evidently correct. The paragraphs are properly struck out.

[56] Next one deals with paragraphs 171 to 178, 185 and 186. The judge said about these:

> "[62] Next there is a case to the effect that the defendant breached an undertaking given in the 2008 case to "cease all trust activity". He said that this was to include activity "related to the administration of my mother's Estate" (paragraph 173). In paragraphs 174 and 175, he alleges that in December 2009, the defendant conspired with the plaintiff's brother to breach that undertaking, by convening a meeting of Janfern Pty Ltd to alter that company's constitution and to remove him as a director. The defendant submits that there is no pleading of anything which was done which was in breach of the undertaking or of any other obligation owed by the defendant. The plaintiff seeks relief by way of "nullification of any activity otherwise undertaken by [the defendant] in breach of the undertakings …" (paragraph (ii)(c) of the prayer for relief). However, he could not obtain relief to restore the constitution of Janfern Pty Ltd or to reinstate him as a director without at least joining that company and the others involved in the company, such as his brother. And I accept the submission that the pleading is deficient for not revealing the facts by which the alleged activity of the defendant in relation to this company was in breach of the undertaking. The result is that paragraphs 171 through 178, 185 and 186 will be struck out."

[57] These paragraphs allege that:

(a) in the proceedings heard by White J, the respondent undertook to "cease all trust activity", including administration of Dawn Colston's estate; and

(b) in breach of that undertaking, the respondent conspired with others to convene a meeting of the company, Janfern Pty Ltd (in which Dawn Colston owned shares) to alter that company's constitution and remove the appellant as a Director.

The Judge struck out those paragraphs because they did not allege how that activity breached any undertaking to cease administration of Dawn Colston's estate; and the company and others involved in it were not joined as defendants to seek the appellant's reinstatement as a director, or to change the company's constitution.

[58] The Appellant seeks to retain those paragraphs. He argued that:

(a) acting to remove him as a director of Janfern Pty Ltd "pertains to (the) administration of the Estates". But the statement of claim does not plead any material facts establishing why acting to remove the appellant as a director of the company or to change the company's constitution has anything to do with the administration of Dawn Colston's estate; and

(b) the Court could "cojoin other parties". The statement of claim contains no allegations establishing any basis for relief against other parties.

Accordingly, no error in the Judge's decision is demonstrated.

[59] The penultimate paragraphs to consider are 212 to 216 which were discussed by the primary judge:

> "[66] Paragraphs 212 through 216 appear to make a number of complaints upon the basis that the defendant acted in breach of consent orders made in January 2009 in the 2008 case. The conduct complained of appears to be that in relation to the plaintiff's personal property which was allegedly dealt with by the defendant. That appears from the fact that these paragraphs are under a heading which refers back to paragraph 63(vii), which complains of the defendant's "making claims against my personal property and retaining same … in the same activity identified in paragraphs 18-32 above". As at least much of those paragraphs will be struck out, so should these paragraphs which are dependent upon them. There are other problems with them which it is unnecessary to discuss. Paragraphs 212 through 216 will be struck out."

[60] Paragraph 215 alleges only that the appellant may seek a stay of judgment in the proceedings for the respondent's removal as trustee. The allegation was irrelevant and in any event has been made more so by the dismissal of the appeal in those proceedings. Paragraph 216 refers to another application the appellant may make,

to enforce the consent orders. That too is irrelevant. The other paragraphs are repetitious of what was pleaded in paragraphs 19 to 33, much of which was struck out.

[61] Lastly paragraphs 222 and 223 were struck out. They:

> "… plead that the plaintiff has asked the defendant "to provide details and all documents related to his administration of my mother's Estate, including, but not limited to those tasks undertaken by McCullough Robertson" and that the defendant has not provided that information. But production of such documents is not sought in the proceedings. These paragraphs are irrelevant and will be struck out."

[62] The appellant seeks to retain the paragraphs by saying that he intended to seek that relief by oral application to the judge. This point has already been dealt with. An application for that relief was made to Douglas J and was unsuccessful. The paragraphs were properly struck out.

[63] This appeal fails also. Both must be dismissed with costs.

[64] It is a concern that the litigation between the parties is expanding unreasonably and may develop a tendency to vexation. There have been frequent applications, applications for stays of judgment, and appeals from every unsuccessful interlocutory application. The appellant appears for himself and may be unaffected by the orders for costs so far made against him. The respondent's costs, to the extent that they are not paid by the appellant, will come from the estate and diminish the assets available for the beneficiaries. The parties, or one of them, may consider it appropriate to have the litigation put on the supervised case list where directions may be made controlling the frequency of applications. Alternatively further applications or appeals may be met by a request for security for costs.[1] These are matters for the parties.

[65] **MARGARET WILSON AJA:** I agree with the orders proposed by Chesterman JA and with his Honour's reasons for judgment.

[66] **NORTH J:** I agree with the orders proposed by Chesterman JA and with his Honour's reasons for judgment.

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[1] *Uniform Civil Procedure Rules* 1999 (Qld) r 670, r 671(h), r 772; *Mbuzi v Hall & Ors* [2010] QCA 356 at [17]; *Melville v Craig Nowlan & Associates Pty Ltd* (2001) 54 NSWLR 82 at [135] - [138].