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Date: 16 August, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No BS6304 of 2004

MELISSA RUTH ARNELL, GEOFFREY THOMAS ARNELL AND DONNA ARNELL (as litigation guardian for MITCHELL JOHN ARNELL) — Applicants

and

BRYNLY WHYNFORD THOMAS — Respondent

BRISBANE

..DATE 06/08/2004

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application to remove Mr Brynly Whynford Thomas as the executor of the Will of Thomas John Arnell and to remove him as the trustee of the trusts established under that Will.

Mr Arnell died on 13 February 2004, aged 52. Mr Thomas was appointed as his sole executor and trustee. Mr Arnell had four children, one from his first marriage, who is older than 25, and three from his second marriage, who are 19, 18 and 16. All four of those beneficiaries initially and, more recently three of them, including the youngest through his mother and litigation guardian, Donna Arnell, have regularly sought information about the administration of the Estate and their interests in the trusts under the Estate from Mr Thomas, who is a solicitor of this Court.

Initially, they sought them through another firm of solicitors called Pattison and Barry who engaged in correspondence with Mr Thomas from 10 March 2004 to 26 March 2004. Subsequently, the solicitors acting for the beneficiaries, and who continue to act for three of the beneficiaries, de Groot and Co, commenced writing to Mr Thomas on 5 April 2004. During that period they have certainly received responses from Mr Thomas but it cannot be said that the information that has been provided has, generally speaking, been at all responsive to the questions asked.

There were several letters in particular sent by de Groots starting with their letter of 5 April 2004, continuing with a

further detailed letter of 15 April 2004 and with the most detailed letter of 10 June 2004. To get some flavour of the nature of the correspondence, and of the frustrations attending the beneficiaries in receiving the information to which they were entitled in respect of the Estate and the trusts, it is easiest to incorporate the text of that letter of 10 June 2004 which covers most of the problems associated with obtaining information about the administration from Mr Thomas.

> "We first wrote to you on 5 April 2004 seeking information relating to the estate of the deceased for our clients, the beneficiaries of the estate.
>
> **Assets and liabilities of the estate**
>
> In our letters of 5 April 2004 and 21 April 2004, we requested details of the assets and liabilities of the estate.
>
> Your letter of 7 April 2004 stated:
>
> > "Details of the assets and liabilities of the estate are in preparation."
>
> Your letter of 8 April 2004 (which was also faxed again on 9 April 2004) stated:
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> > "A very rudimentary glance at the liabilities of the estate indicate that there are $60,000.00 - $70,000.000 of debts in arrears and immediately payable and there are no funds or immediately realisable assets available to meet those debts."
>
> Your letter on 9 April 2004 stated:
>
> > "The [TAB] account is not a matter of great moment and may in fact be a credit of the estate. We are investigating and will advise shortly."
>
> Your letter of 10 April 2004 stated:
>
> > ".....request for details of assets and liabilities made by Patterson & Barry on 10, 16 and 19 March 2004. Indeed, there have been many such requests...The schedule of assets and liabilities is currently in preparation."

Your letter of 22 April 2004 stated:

> "The assets and liabilities of the estate have been assessed. And they are now being clarified pending the preparation of a more formal statement of assets and liabilities."

Another letter dated 22 April 2004 (one of six facsimiles from you of that date) states:

> "As advised that [ie. A statement of assets and liabilities] is in preparation, but in view of your insistence, we will forward an interim statement within the next few days...."

We are still awaiting receipt of a statement of assets and liabilities. It is now four months since the date of the deceased's death and despite numerous requests by our clients' former solicitors and this firm, no statement of assets and liabilities has been provided.

Payments and distributions made from the estate

In our letter of 5 April 2004, we requested details of all payments and distributions made from the estate since the date of death of the deceased.

Your letter of 7 April 2004 states:

> "Routine payments have been made as pressing on behalf of the estate but no distribution has been made."

Again, no detail of any payments which have been made from the estate has been provided.

Horse

Our letter of 5 April 2004 provided instructions from the beneficiaries in relation to the disposal of the horse by way of gift to Ms N. Harrison. Your letter of 8 April 2004 acknowledged those instructions and our letter of 15 April 2004 indicted that there would be no need for further correspondence regarding the horse.

Despite that indication, we received further correspondence from you on 18 May 2004 regarding the horse. The correspondence contained no information of interest or benefit to our clients.

Motor Vehicle

One of your five facsimile letters of 8 April 2004 refers to the motor vehicle and the fact that the lease payments were in arrears. The total payout figure for the lease was $5096.76. Certain proposals were suggested in relation to the motor vehicle.

In our letter of 13 April 2004, we sought advice as to the value of the vehicle so that the range of options available to our clients could be considered.

In our letter of 15 April 2004, we indicated that our clients wanted the car to be placed with Freeway Motors at Slacks Creek and for it to be sold on a commission basis.

Your letter of 22 April 2004 indicated that you had contacted Freeway Motors and would use that motor trader. Two of your letters of 23 April 2004 sought further instructions from the beneficiaries in relation to the motor vehicle.

Our letter of 27 April 2004 confirmed that the agreed motor dealer would contact you to progress the sale of the motor vehicle.

Your letter of 9 May 2004 stated:

> "We have no received contact from the motor trader and we are making arrangements with him for the collection of the motor vehicle and its sale on a commission basis and the payout of the lease."

Your letter of 18 May 2004 stated:

> "We have been contacted by the motor trader recommended in this matter. He is willing to undertake a sale on a commission basis. We are seeking to discover his usual terms of engagement."

Our letter of 18 May 2004 again confirmed the instructions of the beneficiaries to place the vehicle with Freeway Motors and for it to be sold on a commission basis at a price between $20,000.00 and $22,000.00.

Your letter of 21 May 2004 stated:

> "We have spoken with the car dealer and mentioned to him the instructions in relation to the price at which the motor vehicle should be sold. He has indicated that a comparable vehicle can be bought new for $16,000.00. We are making arrangements for him to indicate the terms of sale. He will then inspect the vehicle and give an indication of price. If he feels that the asking price is too high, he may decline to accept vehicle onto his forecourt. We will await the development in this matter but there is concern at the obstruction to the administration of the estate."

Your comments about the value of the vehicle are made without the motor dealer ever having seen the vehicle or, as appears from your subsequent correspondence, ever having the opportunity to place the vehicle on the lot to gain some impression of its market value.

The next correspondence we received from you regarding the vehicle was your two facsimiles both dated 8 June 2004 which stated:

> "We have been contacted by the National Australia Bank. They are concerned that the arrears of instalments in relation to the above vehicle. .....the arrears total $2328.55 with a payout of $5167.11.....We have written to the motor trader nominated by the beneficiaries but we have not received a satisfactory response. We are concerned that this matter should be progressed."

> "We have received a notice and unless the arrears of $2328.55 is paid within 7 days.....the Rodeo motor vehicle will be repossessed and sold to meet the arrears without further notice. Our investigation into the market price of the vehicle indicates that it is worth $15,000.00 - $16,000.00 with a maximum of $17,000.00 if in very god (sic) condition."

In our letter of 15 April 2004 (nearly 2 months ago) we indicated that the instructions of the beneficiaries were to place the vehicle with Freeway Motors and for it to be sold on a commission basis.

Your correspondence of April and May (as outlined above) indicated that you were taking steps to comply with the wishes of the beneficiaries. However, your two facsimiles of 8 June 2004 reveal that no steps have been taken to dispose the motor vehicle and, as a consequence, the bank will take action to repossess the vehicle.

Again, the beneficiaries demand the executor take immediate steps to dispose of the vehicle. This should have been done two months ago. As 30 June 2004 approaches, motor dealers of new vehicles engage in price cutting to clear stock. As a consequence, the opportunity for the vehicle to achieve its best sale price has been lost. The advice of the motor dealer today is that the price reductions on new vehicles at this time of the year means a reduction in price of the estate vehicle of $2,000.00.

Our clients will hold the executor liable for any loss which they may incur as a consequence of the failure of the executor to take appropriate steps to dispose of the vehicle (as the beneficiaries suggested occur over two months ago) or to pay out the lease. In the absence of the executor providing a statement of assets and liabilities, the beneficiaries have no knowledge whether estate funds are available to pay the arrears or the balance of the lease.

Property at 98-106 Henderson Road, Jimboomba and Inventory of the household contents and personal effects

Our client's former solicitors attempted, on a number of occasions, to make arrangements for the executor and the beneficiaries to meet at the estate property to make decisions in relation to the property and to distribute the household contents and personal effects.

The executor postponed or cancelled all of the arrangements in respect of the proposed meetings.

In our letter of 5 April 2004, our clients again sought arrangements to meet with the executor or a representative of your firm at the estate property to discuss the property's retention or sale, the manner of sale and the arrangements which may need to be made to ready the property for sale.

It was proposed that at the same meeting, arrangements could be made to effect an amicable distribution of the household contents and personal effects and, if necessary, to make arrangements for the sale or disposal of unwanted items.

Our letter of 5 April nominated two dates for the meeting - 17 April and 24 April 2004.

Our letters of 5 April 2004 and 15 April 2004 requested an inventory of the deceased's household contents and personal effects.

Your letter of 7 April 2004 states:

> ".....[an inventory] will involve very considerable expense and in our view quite an unnecessary expense..... We would request a payment of $1000.000 into our trust account to cover the costs of preparing such an inventory."

Your letter of 14 April 2004 stated:

> "Personal effects of the deceased including his mobile phone, diaries and other items.....are at this office."

In our letter of 15 April 2004, we not having received a response to the proposal for a meeting on 17 April or 24 April (despite having received 11 letters from you between 5 April and 15 April), an urgent request was made for a response to the proposal to meet on either of those dates.

Having received no response by 21 April 2004, a further request was made for an urgent response as to whether Saturday 24 April 2004 was convenient for a meeting.

In one of your six facsimile letters of 22 April 2004, you stated:

> "It would be prudent if the beneficiaries were to attend at a convenient time - probably all together - so that they could agree a distribution of the personal items and progress the administration to the next level which would be the household contents and chattels in the home of deceased at Jimboomba."

No response was received in respect of the proposal to meet on 24 April 2004 at the estate property.

Accordingly, a facsimile letter was sent to you on 22 April 2004 again seeking urgent advice whether the executor would attend a meeting of the beneficiaries at the Jimboomba property on Saturday 24 April 2004. No response was received other than your facsimile of 23 April 2004 which for the first time made it clear that the view of the executor was that:

> "It is appropriate for the belongings at this office to be dealt with before attending at the house".

Our correspondence of 27 April 2004 and 7 May 2004 indicated that there appeared to be no need to have two meetings (one at your office and one at the deceased's property) especially as having one meeting at the estate property would save costs - one aspect which you have repeatedly commented upon in your numerous letters.

Again, two dates, 8 May and 15 May 2004, were proposed by us. We also indicated that the reason for the dates being on a Saturday were that the beneficiaries have school, work and other commitments - one of them living in Toowoomba - which made it preferable to meet on a weekend.

Your letter of 10 May 2004 stated:

> "There is considerable volume of material at this office which needs the attention of the beneficiaries. It is proposed that the beneficiaries attend here and make decisions in relation to the materials stored here. We note that your clients have great difficulty in attending this office during normal business hours. We are prepared to make arrangements during holiday periods or at some other suitable time consistent with usual business practice. The beneficiaries should telephone and speak to Kaye at this office. Certainly it is our concern, that the material which is here should be the subject of beneficiary attention without further delay."

(This letter of 10 May 2004 was again sent by facsimile on a separate occasion on 10 May 2004 and again on 14 May 2004).

Attempts were then made by us on 14 May 2004 to arrange for the items to be collected from your offices on

Saturday, 15 May 2004. The comments in your facsimile of 10 May 2004 and your handwritten facsimile of 14 May 2004 that the personal effects of the deceased held at your offices were taking up an entire office and should be dealt with without further delay lead us to believe that the sooner the items were taken by the beneficiaries, the better. Apparently, we were mistaken in our belief.

Our attempts to achieve the prompt removal of the items were frustrated by your refusal to make arrangements for access by our clients to those items on Saturday, 15 May 2004.

Accordingly, on 18 May 2004, we provided to you written authorities from our clients authorising us or a courier firm to collect the items from your offices on Wednesday, 19 May 2004.

In your letter of 18 May 2004 you indicated that:

> "It is not appropriate for a courier to attend at this office tomorrow morning [Wednesday, 19 May 2004] as suggested by you. We will communicate further in relation to the question of the personal effects."

In the absence of any reason being provided as to why the courier could not collect the personal effects of the deceased (particularly when you indicated that the items were taking up a whole office and should be dealt with without delay) we again indicated that the courier would attend to collect the items.

When the courier attended, he was refused access and no items were provided to the courier.

Your letter of 21 May 2004 indicated that:

> "Personal effects include many items which may relate to business and which should be subject to scrutiny and instructions from the beneficiaries."

It is not the responsibility of the beneficiaries to administer the estate. That task lies with the executor. If there are items which relate to the deceased's business, then such items and matters should be attended to by the executor in the administration of the estate.

The beneficiaries have simply requested that they be provided with the deceased's personal effects so that they may amicably distribute the items amongst themselves. They have also sought access to the deceased's home to collect the remainder of the items. What may remain there is not known as two persons (unrelated to the deceased) but presumably with the authority of the executor, had access to the home allegedly for the purpose of boxing up all of the deceased's personal items. In the absence of an

inventory being completed by the executor prior to that access occurring, the beneficiaries can not be assured that all of the deceased's personal effects have been accounted for.

No reason has ever been given by the executor why the personal effects held at your office must be dealt with first and before access to the home or arrangements regarding the home are considered. So far as we are aware, there is no reason other than the arbitrary decision of the executor. Even when the beneficiaries took steps to comply with this order of events, their attempts were frustrated.

Our clients' former solicitors and this firm have made numerous attempts to organise meetings with the executor or a representative of your firm at the deceased's property for the purposes of discussions regarding the property. Every attempt has been rejected or ignored.

We are instructed that the deceased's property at Jimboomba has been allowed to fall into a state of disrepair, is unkempt and overgrown.

Since we first wrote to you on 5 April 2004, we have received 39 separate pieces of correspondence from you in a period of a little over 2 months.

Despite all of that correspondence:

- the beneficiaries have no statement of assets and liabilities;
- the wishes of the beneficiaries in respect of the disposal of the motor vehicle have been ignored or not been put into effect;
- the personal effects remain undistributed;
- the estate property at Jimboomba remains vacant (with its contents unknown); and
- the arrangements for the security and for the insurance of the estate property remains unknown despite a request in our letter of 5 April 2004 for those details.

At best, the beneficiaries know that the horse has been given away and that the bank is now pressing for payment of the arrears of the motor vehicle lease payments as no action has been taken by the executor to dispose of the motor vehicle."

Since June 2004, in spite of the warning by the solicitors for the beneficiaries of their clients' intention to apply to this Court in respect of the past administration of the Estate and Mr Thomas's ongoing role as executor, little has been done since then to provide the information or access to the assets of the estate capable of being distributed amongst the beneficiaries. There is further correspondence, to which I do not need to refer in detail, which illustrates the continuing nature of the problems associated with the administration.

It has led to the current situation where Mr Thomas swears in his most recent affidavit before me that the following steps need to be taken to finalise the administration:

> "(a) The sale of principal assets, for example, the deceased's home and motor vehicles;
>
> (b) Disposal of personal effects in accordance with instructions of the beneficiaries, including outstanding business debtors.
>
> (c) Payment of liabilities of the estate;
>
> (d) Meeting with accountant to finalise tax matter in relation to the company of the deceased Centlyn Pty Ltd.
>
> (e) Distribution of the proceeds."

As Mr McGowan says in his affidavit, filed by leave today, those matters are in fact nearly all of the work necessary to administer the estate and this in spite of determined attempts by the beneficiaries to discover information which should have been provided to them very much earlier.

The principles relevant to an application of this nature, dealing in particular with the removal of a trustee, are not controversial. As Dixon J said in Miller v Cameron (1936) 54 CLR 572, 580-581:

> "The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee, the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorise the Court to act, the delicate question of whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight."

Reference may also be made to the decision of Ashley J v Monty, Financial Services Pty Ltd v Delmo [1996] 1 VR 65 where his Honour referred to the relevant misconduct of the executor there as being misconduct or neglect constituted by matters such as unwarranted delay in the administration of the estate, failure to communicate with beneficiaries, failure to account and unreasonable delay in paying beneficiaries their entitlement.

It seems to me that Mr Thomas has been guilty of those sorts of problems to a significant extent. He sets up, in his defence, in effect, that he has been delayed in the administration of the estate by persistent requests for information. That would be more persuasive if he had made more efficient attempts to respond to the requests for

information. He also asserts obliquely that there is some threat to the interests of the beneficiaries or perhaps the oldest beneficiary from another person who wishes to marry the mother of the three youngest beneficiaries.

His affidavit material hints at such a view by him but provides no evidence at all on which I could rely to form any such conclusion. He also submits that the proposed substitute trustee may not be an appropriate person and may not be independent of the person whom he suspects of being behind this application. The proposed trustee is a financial planner who has been involved in the financial services industry for the past eight years, is a family friend and has had confidence expressed in him by the youngest three beneficiaries and their mother. He has also said that he will engage the solicitors acting for those beneficiaries to assist him in the administration of the estate. The oldest beneficiary was served with the Court documents but has chosen not to appear.

On the evidence before me, there is no reason to doubt the proposed new trustee's capacity to carry out the straightforward steps involved in the administration of this estate and no reason why he should not be appointed as trustee in substitution for Mr Thomas.

Accordingly, I propose to make the orders sought in paragraphs 1, 2, 3, 4, 5 of the application and I invite further submissions about costs.

...

HIS HONOUR: I will make an order in terms of paragraph 7 of the application and in terms of paragraph 6.

...

HIS HONOUR: I do propose to ask the Registrar of this Court to forward the papers to the Law Society for their consideration. That will, of course, be a matter for them.

...

HIS HONOUR: There will simply be an order in terms of paragraphs 1, 2, 3, 4, 5 and 7 of the application.
