

# SUPREME COURT OF QUEENSLAND

CITATION: *Loughnan v McConnell* [2006] QSC 359

PARTIES: **WILLIAM RAINSFORD LOUGHNAN**  
(applicant)  
**AND**  
**NADIA EVELYN McCONNEL**  
(first respondent)  
**AND**  
**ALWYN LINDSAY PEFFER**  
(second respondent)

FILE NO/S: BS 7840 of 2006

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 29 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 24 October 2006

JUDGE: Atkinson J

ORDER: **The court directs that the applicant, on behalf of the estate, can and ought to commence proceedings in this court against Nadia McConnel in her personal capacity, and against Duckett Pty Ltd and NEM Investments Pty Ltd for relief in respect of steps taken by those persons on or about 30 June 2006 and in or about August 2006, concerning the McConnel Family Trust**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO THE COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – where the applicant is an executor who seeks directions under s 96 Trusts Act 1973 – whether the applicant executor should commence proceedings against the first respondent

EQUITY – FIDUCIARY OBLIGATIONS – CONFLICT OF INTEREST AND DUTY – where the first respondent as co-executor of the estate took steps to remove the assets of the estate from the control of the executors jointly and place the assets under her effective control – where the first respondent claims that these steps were taken to secure independent control of the family assets for the family – where there is a clear conflict of interest – whether there has been a breach of fiduciary duties

*Succession Act 1981* ss 6, 49

*Trusts Act 1973* ss 76, 96

*Luke v South Kensington Hotel Co* (1879) Ch D 122, cited

*Re Atkinson deceased* [1971] VR 612, discussed

*Re Billington* [1949] St R Qd 102, cited

*Re JS Mitchell Deceased* (1973) 30 WN (NSW) 137, cited

*Union Bank of Australia v Harrison Jones and Devlin Ltd*  
(1910) 11 CLR 492, cited

*Watson v Yore* [2004] QSC 339, discussed

*Williams v Williams* [2005] 1 Qd R 105; [2004] QSC 269,  
discussed

*Youyang P/L v Minter Ellison* (2003) 212 CLR 484,  
discussed

COUNSEL: K A Barlow for the applicant  
H B Fraser QC with G Diehm for the first respondent  
S Farrell for the second respondent

SOLICITORS: Thynne & Macartney for the application  
De Groots for the first respondent  
Brian Bartley and Associates for the second respondent

- [1] This application was made under s 96 of the *Trusts Act 1973* which provides that any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of the property, or respecting the exercise of any power or discretion vested in the trustee. The directions sought by the applicant were whether the applicant, on behalf of the estate, could and ought to commence proceedings in this court against any or all of Nadia McConnel, in her personal capacity, Duckett Pty Ltd (“Duckett”) and NEM Investments Pty Ltd (“NEM Investments”) for relief in respect of steps taken by those persons on or about 30 June 2006 and in or about August 2006, concerning the McConnel Family Trust; and what other steps the applicant, or the applicant and the second respondent, ought to take in respect of the further management and administration of the property of the estate.
- [2] The applicant and the first respondent are the remaining executors of the estate of Alexander Ross McConnel who died on 6 February 2006 at the age of 64. They are also named in Mr McConnel’s will as the trustees of his estate. Probate was granted of the will and three codicils on 27 March 2006.
- [3] The applicant, Mr Loughnan, is a solicitor and a member of the firm Thynne & Macartney. He was Mr McConnel’s solicitor for the last few years of his life but did not draw the will which was executed on 21 September 2001. He did however draft the last two of the three codicils to the will. The codicils were executed on 20 December 2002, 12 September 2004 and 12 December 2005 respectively.
- [4] The first respondent, Nadia McConnel, is Mr McConnel’s widow. She and Mr McConnel were married on 16 January 1995 and have two children, Henry aged 10 and Madeleine aged 9. Henry was born on 3 April 1996 and Madeleine on 1

August 1997. Both Mr and Mrs McConnell had previously been married but neither of them had any other children. Mrs McConnell is 39 years old.

[5] It was said in the written submissions that the applicant, Mr Loughnan, sought the direction of the court as to whether he could and ought to take any steps to attempt to recover control of the family trust for the estate. In particular he sought guidance as to whether he could and should commence an action on behalf of the estate and perhaps on behalf of Duckett seeking orders:

- (1) that NEM Investments be removed as trustee, pursuant to s 80 of the Trusts Act, and be replaced by Duckett or by the executors personally or another company controlled by them; and
- (2) that the Grant of Probate to Mrs McConnell be revoked on the ground that she has been guilty of gross misconduct.

[6] Mr Loughnan asserted that he did not regard the revocation of the grant to Mrs McConnell as desirable or necessary but sought the court's guidance on the matter.

[7] The utility of an application for the opinion of the court and the role of the court on such an application were referred to by Gillard J in *Re Atkinson deceased*<sup>1</sup> in terms which I respectfully adopt as follows:

“Where an executor or trustee is in doubt as to the course of action it should adopt, it is always entitled to take the opinion of the court as to what it should do. If in doubt as to whether or not it should take legal proceedings, then it is entitled to apply to the court for directions on the matter: see *Halsbury's Laws of England*, 3<sup>rd</sup> ed., vol. 38, pp. 946 and 1023-1024; in *Re Brogden* (1888), 38 Ch D 546, at p. 556; [1886-90] All ER Rep 927; *Chettiar v Chettiar* (No. 2), [1962] 2 All ER 238, at p. 245. If the executor or the trustee then followed the direction of the court, it would be protected from any claim by a beneficiary or creditor arising from its action or inaction in accordance with the court's direction: see *Underwood v Hatton* (1842), 5 Beav. 36; 49 ER 490; *Smith v Smith* (1861), 1 Dr & Sm 384; 62 ER 426. In cases of real doubt, the proper course for a personal representative or trustee to adopt is to seek the court's decision as to whether or not action should be brought, otherwise the representative or trustee might find itself paying the costs of any proceedings which a court might subsequently say were not 'properly incurred': see *Re Beddoe*; *Downs v Cottam*, [1893] 1 Ch 547, at pp. 558 and 562. On an originating summons seeking such direction, however, a court is not bound to investigate the evidence in order to make a finding that on the material before it the proposed proceedings will or will not be successful. It has merely to determine whether or not the proceedings should be taken: *Fitzgerald v Smith* (1889), 15 VLR 467, at p. 473; *Re Kay's*

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<sup>1</sup> [1971] VR 612 at 615-616.

*Settlement*, [1939] Ch. 329, at p. 339; [1939] 1 All ER 245. On the other hand the matter should be sufficiently investigated to determine whether or not the proceedings would be fruitless: cf. *Re Brogden* (1888), 38 Ch D 546; [1886-90] All ER Rep 927.”

- [8] In dealing with an application for directions under s 96 of the *Trusts Act* Holmes J (as her Honour then was) held in *Watson v Yore* [2004] QSC 339 at [15]:

“Essentially, what must be determined on this application is whether retention of funds to enable an action against the first respondent is in the interests of the beneficiaries of the estate as a whole. There are a number of competing considerations: the prospects of success, the potential for substantial depletion of the estate in costs should the action be unsuccessful, the proportions of what might be gained if it were to succeed, and, particular to this case, the fact that there is at present no cause of action ...”.

- [9] In submissions, counsel for the applicant said that he was also relying upon s 6 of the *Succession Act 1981* which relevantly provides:

**“6 Jurisdiction**

- (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

...

- (4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.”

- [10] These powers are expressed in the widest terms. As Wilson J held in *Williams v Williams*<sup>2</sup> at [13]:

“The Court is given extremely wide powers under s 6 subsection (1) ‘to hear and determine all testamentary matters and to hear and determine all matters relating to the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every respect’. Those powers include powers to make any order in relation to the administration of property in a deceased estate which the Court

<sup>2</sup> [2005] 1 Qd R 105; [2004] QSC 269.

could make in relation to the administration of trust property under the *Trusts Act 1973 (Succession Act s 6(4))*. Under s 80 of the *Trusts Act* the Court has power to appoint a new trustee in substitution for an existing trustee or trustees when it is expedient to do so and is inexpedient, difficult or impracticable to do so without the assistance of the Court. Although s 80 does not itself confer a power to appoint an executor or administrator (subsection (4)), I consider that the Court may do so under s 6 subsection (4) of the *Succession Act*, as it would be an order it would have jurisdiction to make in relation to the administration of trust property under the *Trusts Act*.”

### **The estate**

- [11] Mr McConnell’s affairs were divided between assets owned by him personally, assets owned by companies he controlled, assets in a discretionary family trust, the trustee of which was a company controlled by him, and assets owned in partnership with Mrs McConnell, divided 90 per cent to him and 10 per cent to her. The total value of the assets of the estate was in the order of \$30,000,000 of which about \$10,000,000 was in the family trust.
- [12] The family trust is the McConnell Family Trust. The trustee of the family trust was Duckett. The sole shareholder of Duckett was Mr McConnell, who held two shares, and he and Mrs McConnell were its directors. Upon Mr McConnell’s death, his estate became the only shareholder in Duckett. The principal asset of Duckett, as trustee of the family trust, was 9,998 of the 10,000 shares in Inverstanley Holdings Pty Ltd (“Inverstanley Holdings”) which owns farming land in the Brisbane Valley near Esk, known as “Inverstanley”, valued at about \$8,000,000. The other two shares in Inverstanley Holdings were held by Mr McConnell personally. The directors of Inverstanley Holdings were Mr and Mrs McConnell. Since his death, Mrs McConnell has been the sole director. The family home is at “Inverstanley”. Duckett as trustee of the family trust also owned several other investment properties: residential units at 24 Dunmore Terrace, Auchenflower, Lot 59 BUP 4236 (“the Auchenflower unit”) and at 84 “The Spit”, Parkyn Parade, Mooloolaba, Lot 7 BUP 1638 (“the Mooloolaba unit”); and commercial units at 19 Thompson Street, Bowen Hills, Lots 1, 2 and 3 on Survey Plan 123661, County of Stanley, Parish of North Brisbane, Title Reference 50282130, 50282131 and 50282132 (“the Bowen Hills units”).
- [13] Another grazing property, “Nukinenda” is owned by NKNDA Pty Ltd (“NKNDA”) as trustee for Mr McConnell. The shareholders of NKNDA are the estate of Mr McConnell and the estate of his late mother, Grace Duckett McConnell. The directors were Mr and Mrs McConnell. Mrs McConnell has been the sole director since Mr McConnell’s death.
- [14] The business carried on at “Inverstanley” and “Nukinenda” was operated by a partnership, known as the “Inverstanley Pastoral Company” and the “Nukinenda Pastoral Company”, which was owned 90 per cent by Mr McConnell and 10 per cent by Mrs McConnell. The partnership was formalised in a Deed of Partnership dated

31 May 2001. The deed provided that the assets of the partnership were the stock and plant at the properties known as “Inverstanley” and “Nukinenda”. It acknowledged that the land which formed the property known as “Nukinenda” was owned by a company on trust for Mr McConnell and that the land which formed the property known as “Inverstanley” was owned by Mr McConnell personally.

- [15] The deed envisaged that the partnership might continue between a surviving partner and the executors of the estate of a deceased partner. It provided that the death of a partner did not of itself dissolve the partnership. Clause 19 of the deed provided:

“19.1 If a partner dies, the surviving partner/s will continue to carry on the Partnership in accordance with this Deed for the benefit of the surviving partner/s and the estate of the deceased partner.

19.2 The executors of the estate of the deceased partner will stand in place of the deceased partner and may exercise all the rights, powers and privileges previously held by the deceased partner.”

The managing partner was Mr McConnell and upon his death his estate stood in his place.

- [16] Mrs McConnell deposed in these proceedings to the many tasks she undertook working with Mr McConnell on the property “Inverstanley” and doing the bookkeeping for the businesses. She also attended to household duties and care of their children.

- [17] In addition Mr McConnell personally owned units in Fort Knox Investment (Qld) Unit Trust (the “Fort Knox units”) and shares in Fort Knox Investments (Qld) Pty Ltd (the “Fort Knox shares”). The McConnell Superannuation Fund also had an investment in Fort Knox units. Mr McConnell also had fund management deposits in the sum of \$200,000.

### **The Will**

- [18] The effect of the last will and three codicils of Mr McConnell, were summarised by Mr Loughnan for the benefit of the other executors on 15 February 2006. It has not been suggested by any party that that summary was incorrect. It was a very complicated disposition of his property.

- [19] On the return date of the hearing of this application I permitted Alwyn Peffer to renounce his position as executor under the will and trustee of the estate. I shall therefore refer to Mr Loughnan’s summary deleting references to the third executor, Alwyn Peffer, where they are no longer relevant.

- [20] The executors and trustees appointed under the will were Mr Loughnan, Mrs McConnell and Mr Peffer. However there were a number of provisos. If Mrs

McConnel should renounce or otherwise not act or continue to act or die before Mr McConnell's estate was completely administered, then David Hart was appointed in her place.<sup>3</sup> If Mr Loughnan should renounce or otherwise not act or continue to act or die before Mr McConnell's estate was completed administered, then a partner of Thynne & Macartney or its successor was appointed as executor in his place.<sup>4</sup> Mr McConnell expressed the wish that the trustees should never be less than two in number and it was his intention that at least one of his trustees from time to time should be engaged in professional practice or business and that, when his trustees for the time being so determined, his children, Henry and Madeleine, should be appointed as trustees.<sup>5</sup> A majority of the trustees were to prevail.<sup>6</sup>

- [21] The testamentary documents provided for some absolute bequests to Mrs McConnell. They were Mr McConnell's shares in Suncorp-Metway Ltd ("Suncorp Metway"), his Fort Knox shares and his Fort Knox units. These bequests were subject to Mrs McConnell's taking responsibility for any debts attaching to the Fort Knox shares and Fort Knox units. Mr McConnell also bequeathed to Mrs McConnell the proceeds of any life insurance that he held at the date of his death. He also expressed the wish that Duckett as trustee for the McConnell Superannuation Fund transfer any units it owned in the Fort Knox units to Mrs McConnell subject to Mrs McConnell taking responsibility for any debt attaching to that interest.<sup>7</sup> The shares in Suncorp Metway are estimated to be worth approximately \$776,000; the net value of the Fort Knox units in excess of \$500,000; and the proceeds of the life insurance at \$120,000. The absolute bequests to Mrs McConnell were worth, therefore, approximately \$1,400,000.
- [22] In addition to those bequests Mr McConnell bequeathed his furniture and personal effects to Mrs McConnell subject to certain conditional bequests. The conditional bequests were the use of the furniture at "Inverstanley" (until Mrs McConnell no longer lived there) and the Auchenflower unit to Mrs McConnell until she died, surrendered part or all of the gift or the date of any other event which terminated her entitlement, following which all the items at "Inverstanley" (except those in the sitting room) would pass to Henry McConnell if he was then living (or his children who survived him and attained the age of 21: clause 2.4) and as to the items in the sitting room and the items at the Auchenflower unit to Madeleine McConnell on the same conditions.<sup>8</sup> Clause 2.4 made provision for such of Mr McConnell's beneficiaries' children who survived and attained 21 years of age.
- [23] Mr McConnell bequeathed his shares in Inverstanley Holdings and Duckett upon trust for Henry McConnell if he was living on 1 August 2021 (with clause 2.4 applying).<sup>9</sup> Those gifts were charged with the obligation on the trustees to ensure that the gift in clause 7.1 was made on or before 1 August 2021 and the gift in clause 7.2 was made on or before 1 August 2027 to Madeleine McConnell, with clause 2.4 applying. If necessary, the gifts in clauses 7.1 and 7.2 could be satisfied

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<sup>3</sup> Will Clause 1, First Codicil Clause 1.2.

<sup>4</sup> First Codicil Clause 1.2.

<sup>5</sup> Will Clause 1.5; First Codicil Clause 1.5.

<sup>6</sup> Will Clause 1.4; First Codicil Clause 1.4.

<sup>7</sup> Third Codicil Clause 1.1.

<sup>8</sup> Will Clause 5.

<sup>9</sup> Will Clause 6.1.

by distributions from the family trust. Once Madeleine McConnell had attained the age of 18 years, she had the discretion to disclaim this charge whereupon the gifts in clause 7.1 (but not clause 7.2) were to be free of this charge.<sup>10</sup>

- [24] Clauses 7.1 and 7.2 of the will dealt with conditional bequests to Madeleine McConnell. Mr McConnell directed his trustees to conduct valuations of his residuary estate, the assets of the family trusts, and of his entitlements under the McConnell Superannuation Fund as at 1 August 2021 for the purposes of clause 7.1 and as at 1 August 2027 for the purposes of clause 7.2. Mr McConnell's trustees were to assume that all liabilities, including any capital gains tax, had been discharged and Mr McConnell then, under clause 7.1 of the will, gave Madeleine McConnell, if she survived him and attained the age of 24 years, free of all duties, one twenty-fourth of his total estate at that date and under clause 7.2 of the will gave Madeleine McConnell, if she survived him and attained the age of 30 years, free of all duties, five twenty-fourths of his total estate at that date.
- [25] Mr McConnell bequeathed his interest in Lot 19 on registered plan CA 31292, being the quarry on "Nukinenda" (the "Nukinenda quarry") to pay the net income arising to Mrs McConnell, Henry and Madeleine (with clause 2.4 applying) until the nominated distribution date provided that if the net income was insufficient, then the trustees might have recourse to the capital. Until the distribution date, the net income could be allocated by the trustees as they saw fit but in default of unanimous determination, then 20 per cent was to be paid to Mrs McConnell and the remaining 80 per cent on trust for such of Henry and Madeleine then living, with clause 2.4 applying.<sup>11</sup> The distribution date was to be the earliest of Mrs McConnell's death, the surrender by Mrs McConnell of all or part of this gift, or the date of any other event which terminated Mrs McConnell's entitlement, whereupon one half share was to be held upon trust for Henry McConnell, with clause 2.4 applying, and the remaining half was to be held upon trust for Madeleine McConnell, with clause 2.4 applying.<sup>12</sup>
- [26] The will provided, in clauses 7.3 to 7.6, for discretionary gifts of the residuary estate. Mr McConnell bequeathed the balance of his residuary estate to pay the net income to Mrs McConnell, Henry McConnell and Madeleine McConnell (with clause 2.4 applying) until the nominated distribution date with power for the trustees to have recourse to capital. Until the distribution date, the trustees might allocate the net income arising as they thought fit but in default of a unanimous determination, then as to one half for Mrs McConnell, and as to the remaining one half upon trust for Henry McConnell and Madeleine McConnell then living (with clause 2.4 applying).
- [27] The distribution date was to be the earliest of 1 August 2021, the date of death of the last to survive of Mrs McConnell, Henry McConnell and Madeleine McConnell, the date when all of Mrs McConnell, Henry McConnell and Madeleine McConnell

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<sup>10</sup> Will Clause 6.2.

<sup>11</sup> Will Clauses 6.3-6.4.

<sup>12</sup> Will Clauses 6.5-6.6.



surrendered part or all of the gift, or the date of any other event which terminated the entitlement of Mrs McConnell, Henry McConnell and Madeleine McConnell.

- [28] At the distribution date, the remainder of the residuary estate passed in accordance with clauses 7.7 to 7.10 which provided as follows. Mr McConnell then bequeathed the residuary estate to pay the net income to Mrs McConnell, Henry McConnell and Madeleine McConnell (with clause 2.4 applying) until the nominated distribution date, with the trustees having recourse to capital and until the distribution date, the net income was to be apportioned by the trustees as they thought fit but in default of a unanimous determination, then as to 50 per cent upon trust for Mrs McConnell, as to 30 per cent upon trust for Henry McConnell (with clause 2.4 applying), and as to the remaining 20 per cent on trust for Madeleine McConnell (with clause 2.4 applying).
- [29] The distribution date was to be the earliest of 1 August 2027, the date of death of the last to survive of Mrs McConnell, Henry McConnell and Madeleine McConnell, the date when all of Mrs McConnell, Henry McConnell and Madeleine McConnell surrendered part or all of the gift, or the date of any other event which terminated the entitlement of Mrs McConnell, Henry McConnell and Madeleine McConnell.
- [30] At the distribution date, 60 per cent was to be held upon trust for Henry McConnell if he was then living (with clause 2.4 applying) and if not, upon trust for Madeleine McConnell (with clause 2.4 applying) and as to the remaining 40 per cent upon the trusts set out in clause 8.
- [31] Clause 8 dealt with bequests to Mrs McConnell. It dealt with the remaining 40 per cent share just referred to. It was bequeathed upon trust to pay the net income to Mrs McConnell until the nominated distribution date with the trustees having power to have recourse to capital. The distribution date was to be the earliest of Mrs McConnell's death, the date when Mrs McConnell surrendered all or part of the gift, or the date of any other event which terminated Mrs McConnell's entitlement. From the distribution date, the trustees should hold the share of the residuary estate upon the following trusts: if Henry McConnell was then living, upon trust for him (with clause 2.4 applying); provided that if his gift failed to take effect, then upon trust for Madeleine McConnell (with clause 2.4 applying); and if both those gifts failed to take effect, then the residuary estate was to be held upon the trusts set out in clause 11 of the will.
- [32] If Mrs McConnell survived, but Henry and Madeleine failed to gain a vested interest,<sup>13</sup> the residue of Mr McConnell's estate was given to the trustees upon trust to pay the net income to Mrs McConnell until the nominated distribution date, with the trustees having power to have recourse to capital. The distribution date was to be the earliest of Mrs McConnell's death, the date when Mrs McConnell surrendered all or part of this gift or the date of any other event which terminated Mrs McConnell's entitlement.

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<sup>13</sup> Will Clause 9.

[33] As from the distribution date, the trustees were to hold Mr McConnell's residuary estate:

- (1) as to his crested silver for Robert John McConnell;
- (2) as to "Nukinenda" together with any unsold livestock and/or plant and equipment to be divided into two equal shares with one share to the Salvation Army; and one share to Brisbane Legacy;
- (3) as to the livestock and plant at "Inverstanley", upon trust from James Rogers (with clause 2.4 applying): and
- (4) as to the shares in Inverstanley Holdings and Duckett, upon the trust as set out in clause 11.3 upon a testamentary trust (the "Ross McConnell Estate Trust") for such of James Rogers, his children and the children of Eric John William McConnell as the trustees determined and on the vesting date (80<sup>th</sup> anniversary of Mr Connel's death or earlier if determined by the trustees) to such of James Rogers and his children as the trustees determined and if none were living then to such of the children of Eric John William McConnell as the trustees might determine;<sup>14</sup>
- (5) as to the remainder of his residuary estate for Mrs McConnell.<sup>15</sup>

#### **Actions by executors and trustees**

[34] Shortly after Mr McConnell's death on 6 February 2006, Mr Loughnan wrote to the other executors enclosing copies of the will, the three codicils and a memorandum of wishes dated 12 September 2004, and a summary of the will and codicils. He suggested that as the nominated executors, they would need to meet in the near future to determine their course of action. A meeting of the executors took place on 17 February 2006. They agreed that both farming properties could continue to be run "as is". Mrs McConnell said that "Inverstanley" was easy to run and they had a manager on "Nukinenda". Mrs McConnell deposes that she was given authority to deal with the day to day business activities of "Inverstanley" and "Nukinenda". The partnership which carries on those businesses is now owned 10 per cent by Mrs Connel and 90 per cent by the estate of Mr McConnell.

[35] The application for probate was made and it was determined to withhold any distribution to beneficiaries for six months in case a claim was made against Mr McConnell's estate. Mr Loughnan suggested to Mrs McConnell that she and the children obtain independent legal advice as to the possibility of a family provision application.

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<sup>14</sup> Will Clause 11.3.

<sup>15</sup> Second Codicil, Clause 9.4.

- [36] Probate was granted on 29 March 2006 and Mr Loughnan confirmed that Mrs McConnell had sought legal advice on behalf of herself and the children and Mr Loughnan said that he recommended that no distribution of assets take place until after 6 August 2006 (six months from the date of death) and only then if a claim had not been made against the estate. On 1 June 2006 Mr Loughnan raised with the other executors his concern that decisions should not be made by the executors which purported to be binding on all of them without consultation between them. This was precipitated by Mrs McConnell's retaining another firm of solicitors to do legal work regarding the property "Nukinenda". A second meeting of executors took place on 22 June 2006 during which it was agreed that Mrs McConnell would be paid a salary of \$60,000 per annum back dated to Mr McConnell's death, to be funded by the family trust as to 20 per cent and by the Inverstanley Pastoral Company as to 80 per cent.
- [37] As previously mentioned, Duckett was the trustee of the family trust. The beneficiaries of the trust were the persons specified in Schedules B and C of the trust deed. The beneficiaries listed in Schedule B were Mr McConnell and his children; those listed in Schedule C were "the spouse of the said Alexander Ross McConnell", the issue of his children and Grace Duckett McConnell (his mother). A number of variations were made to the trust deed which increased the categories of beneficiaries under Schedule C. The sole shareholder of Duckett was Mr McConnell and so after his death the estate of Mr McConnell became its shareholder. According to the terms of the will, those shares were to be held on trust for Henry McConnell. Mr and Mrs McConnell were the directors until Mr McConnell's death whereupon Mrs McConnell became the sole director.
- [38] At the end of June 2006, Mrs McConnell undertook a number of actions without reference to the other executors and trustees under the will. She deposed that prior to taking the steps she did on 30 June 2006, she received legal advice from a number of solicitors and senior barristers. She did not however disclose what she was doing to the applicant, Mr Loughnan, as she expected that, if she did, he would try to take steps to stop her from securing control of the assets.
- [39] On 30 June 2006 Mrs McConnell appointed herself as chairman of Duckett pursuant to clause 16.7 of Duckett's constitution and then appointed her mother, Lyneve Elizabeth Poole, as an additional director of Duckett. She asserts that she did this under the power given to her by clause 16.6 of the constitution of Duckett to appoint another director so as to enable a quorum to be constituted.
- [40] Following the appointment of Mrs Poole as a director, Duckett exercised the power under clause 9(b) of the Deed of Trust of the McConnell Family Trust to vary the trust by deleting the existing clause 9(c)(i) and replacing it with a new clause 9(c)(i). It also made an amendment to Schedule C.
- [41] Clause 9(b) of the Deed of Trust provided as follows:  
"The Trustee may by Deed revoke add to release or vary all or any of the trusts or powers hereinbefore declared or any trusts or powers declared by any variation, alteration or addition made hereto from

time to time and may by the same or any other Deed declare any new or other trusts or powers concerning the Trust Fund or part or parts thereof but so that the Trustee shall not have any power to revoke, add to or vary any of the trusts or powers hereof so that the Settlor may acquire a beneficial interest in the Trust Fund or any part thereof nor to effect the beneficial entitlement of any Beneficiary to any amount applied for him prior to the date of revocation or alteration and any other person or persons upon whom any power is conferred by this Trust may release and revoke any power or powers so conferred on him or them PROVIDED ALWAYS that the Trustee shall prior to exercising the power contained herein give twenty-one (21) days' written notice of its intention so to do to Alexander Ross McConnell if living. Upon the exercise of any release and revocation pursuant to this Clause the power or trusts so released and revoked shall be absolutely and irrevocably determined. The expression 'trusts or powers' where used in this subclause shall be deemed to include all the provisions of this Trust Deed or of any other Deed varying or altering of adding to such Trust Deed."

[42] Clause 9(c)(i) provided:

"Alexander Ross McConnell may at any time and from time to time without the consent of any person by Deed remove any Trustee from its office and may also at any time and from time to time and without the consent of any person by Deed appoint any person or company to be a Trustee hereof either alone or jointly with any continuing Trustee. Upon the death of the said Alexander Ross McConnell this power of removal and appointment may be exercised by his executors, administrators or trustee."

[43] Clause 9(c)(i) was deleted and replaced with the following:

"9(c)(i) Alexander Ross McConnell may at any time and from time to time without the consent of any person by Deed remove any Trustee from its office and may also at any time and from time to time and without the consent of any person by Deed appoint any person or company to be a trustee hereof either alone or jointly with any continuing trustee. Upon the death of the said Alexander Ross McConnell this power of removal and appointment may be exercised by Nadia Evelyn McConnell during her lifetime and upon her death may be exercised by Henry Alexander McConnell and Madeleine Grace McConnell jointly or the survivor of them provided the younger of them or the survivor of them has attained the age of twenty-five (25) years."

[44] Schedule C was amended by inserting immediately after (a) under the Schedule of Beneficiaries the following:

"For the avoidance of doubt 'spouse' means any present spouse, former spouse or widow of the said Alexander Ross McConnell."

This might have been intended to ensure that Mrs McConnell did not lose her position as a beneficiary if she were to remarry as she would remain the former spouse of Mr McConnell.

- [45] NEM Investments was incorporated on 30 June 2006. It had 12 issued shares all of which were held by Mrs McConnell. Its only director was also Mrs McConnell.
- [46] Under the trust deed as amended, Mrs McConnell by deed removed Duckett as trustee and in its place appointed NEM Investments. Actions were then taken to transfer legal title to the assets of the family trust from Duckett to NEM Investments, including a share transfer of 9,998 shares in Inverstanly Holdings; transfer of the Mooloolaba unit; transfer of the Auchenflower unit and transfer of the Bowen Hills units. Transfers for the change of the registered title of each of those properties were tabled at a meeting of the Board of Directors of NEM Investments. Mrs Poole was appointed a director of Inverstanley Holdings. Inverstanley Holdings then resolved to transfer 9,998 ordinary shares from Duckett to NEM Investments. This was done in the absence of the company's register and a new register was tabled. By 8 August 2006 the original register had been found and another meeting of the directors of Inverstanley Holdings was convened where the original register was used and new register cancelled.
- [47] On 3 August 2006 Mrs McConnell gave formal notice from her solicitors, de Groot, that she would be making a claim against Mr McConnell's estate for family maintenance. Mrs McConnell's solicitor told Mr Loughnan, at a meeting which took place on 30 August 2006 to discuss the family provision application, that Mrs McConnell had assumed control of the family trust "with a view to protecting the children" and that the corporate trustee had been replaced by a company of which Mrs McConnell was the sole director and shareholder, whose identity was not revealed. It was not until a letter from her solicitors dated 8 September 2006 that Mr Loughnan was fully informed of the actions that Mrs McConnell had undertaken. Mr Loughnan deposed that he was concerned as Mrs McConnell had taken this action without reference to the co-executors and that it might involve her promoting her own interests to the detriment of the estate. He was also concerned that her action might involve a breach of fiduciary duties on her part and have had the effect of removing substantial assets from the executors' control. In her solicitors' letter of 8 September 2006, Mrs McConnell asserted that the estate had no interest in the family trust being only the shareholder of the company that was the trustee of the family trust holding the legal, but no beneficial, interest in the assets of the family trust.

### **Duties of executors and trustees**

- [48] Wilson J in *Williams v Williams* [2004] QSC 269 at [4] set out the respective functions of executors and trustees as explained in Meagher and Gummow, *Jacobs' Law of Trusts in Australia* (6th ed, 1997) at [241]. The relevant passage in the 7<sup>th</sup> edition of *Jacobs' Law of Trusts in Australia* published in 2006 edited by JD Heydon and MJ Leeming is found at [240].

“The origin of the offices of trustee and executor are quite different, but in modern times, largely as the result of statute, the two offices have a greater similarity than heretofore. An executor, like a trustee, is in a fiduciary relation with the beneficiary and the essential elements of a trust are all present in executorship. However, although there are great similarities between the two offices, it is not possible to identify the position of an executor with that of a trustee. Their respective powers and duties differ in important respects. The principal duties of an executor are to get in the assets of the deceased, to pay debts, to pay the legacies given by the will, and to distribute the assets.<sup>16</sup> If a testator appoints the same person as executor and trustee, which is usual nowadays, then that person acts as executor when performing executorial duties, and thereafter while continuing to hold the property is a trustee.”

- [49] In this case the same people were appointed both executors and trustees. The powers given by s 49 of the *Succession Act 1981* to an executor are now co-extensive with those given to a trustee. Furthermore, although at common law executors could act severally<sup>17</sup> they are now obliged, as are trustees, to act jointly.<sup>18</sup> Section 49 of the *Succession Act 1981* provides, in part:

**“49 Particular powers of personal representatives**

- (1) Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the power hitherto exercisable by an executor in relation to personal estate and all the powers conferred on personal representatives by the *Trusts Act 1973*.
- ...
- (4) The powers of personal representatives shall be exercised by them jointly.”

### **Breach of fiduciary duties**

- [50] The complaint in this case is not a failure to exercise the necessary degree of care and diligence required of a trustee but rather for breach of the fiduciary duties of loyalty and fidelity to the trust. The appropriate remedy in any litigation for such breach would be restitutionary. It would appear that such a remedy would be in the interests of the estate to make good the loss.
- [51] Mrs McConnell’s actions which come into question are her actions in removing Duckett as trustee of the McConnell Family Trust when the shares in Duckett were held by Mr McConnell’s estate on trust for Henry McConnell and where the trust deed had provided that the power of removal of the trustee could only be exercised

<sup>16</sup> *Succession Act* s 52(1).

<sup>17</sup> *Union Bank of Australia v Harrison Jones and Devlin Ltd* (1910) 11 CLR 492 at 499.

<sup>18</sup> *Luke v South Kensington Hotel Co* (1879) 11 Ch D 122 at 125-126; *Re Billington* [1949] St R Qd 102 at 115.

by Mr McConnell's executors or trustees. Mrs McConnell was in a situation of conflict which was almost certainly intractable. By her actions she arrogated to a company which she owns and controls, the power to distribute the assets of the trust to herself. Her actions are such that they are capable of being characterised as preferring her own interests over the duties she owes as executor and trustee of Mr McConnell's estate, her duties as a director of Duckett and her duties as a partner in the Inverstanley Pastoral Company. Those duties are necessarily characterised as fiduciary. That conflict might have been able to be resolved with the informed consent of the other executors and trustees but that consent was neither sought nor obtained. Rather she deliberately failed to disclose her actions as she expected there would be objection to them at least by the applicant.

- [52] It is the duty of a trustee to adhere rigidly to the terms of the trust.<sup>19</sup> In *Youyang P/L v Minter Ellison*<sup>20</sup> this was described as perhaps the most important duty of a trustee. However the court also referred to the fact that the rigour of the rule was alleviated in England by s 3 of the *Judicial Trustees Act 1896* and in various States of Australia by comparable provisions. In Queensland the relevant section of the *Trusts Act 1973* is s 76 which provides:

**“76 Power of court to relieve trustee from personal liability**

If it appears to the court that a trustee, whether appointed by the court or otherwise, is, or may be, personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from personal liability for that breach.”

## Conclusion

- [53] There is at least a prima facie case that Mrs McConnell has acted in breach of her fiduciary duties as executor, trustee, director and partner. It is therefore appropriate to advise Mr Loughnan that he can and should commence action that NEM Investments be removed as trustee and be replaced by Duckett or by the executors personally or by another company controlled by him. Such advice is consistent with the duty of a court when advice is sought under s 96 of the *Trusts Act* to give conservative advice.<sup>21</sup> It is possible that a court might relieve Mrs McConnell for her breaches; but that is a discretionary remedy and is not a reason for Mr Loughnan to refrain from commencing proceedings to protect the funds and assets over which he is executor and trustee.
- [54] Mr Loughnan asserts, however, that he does not wish to have the grant of probate to Mrs McConnell revoked on the ground of gross misconduct. Her actions do not

<sup>19</sup> JD Heydon and MG Leeming *Jacobs' Law of Trusts in Australia* (7<sup>th</sup> edition) at [1704].

<sup>20</sup> (2003) 212 CLR 484 at [32].

<sup>21</sup> *Re JS Mitchell Deceased* (1913) 30 WN (NSW) 137.

appear to have been motivated by a desire to exhaust the estate or a deliberate intention to prefer her own interests over that of her son. It was the testator's desire to have her as one of the executors and trustees of the estate. Both parties have assured the court that they will be able to work together in future. In those circumstances, it is not necessary or desirable for Mr Loughnan to seek, at this stage, revocation of the grant of probate to Mrs McConnell.

- [55] The applicant, on behalf of the estate, can and ought to commence proceedings in this court against any or all of Nadia McConnell in her personal capacity, Duckett Pty Ltd ("Duckett") and NEM Investments Pty Ltd ("NEM Investments") for relief in respect of steps taken by those persons on or about 30 June 2006 and in or about August 2006, concerning the McConnell Family Trust.