SUPREME COURT OF QUEENSLAND

CITATION:	*McGrath v Macrossan & Amiet* [2007] QSC 305
PARTIES:	**MARY ANN McGRATH** (applicant) **v** **MACROSSAN & AMIET (a firm)** (respondent)
FILE NO:	BS 4413 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	26 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2007
JUDGE:	Mackenzie J
ORDER:	**The application is refused with costs to be assessed**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – DOCUMENTS – where applicant's late husband wished for their joint interests in property to go to their sons – where applicant signed transfer severing joint tenancy – where applicant claims she did not understand the nature or effect of the documents – where applicant wishes to avoid the transfer – where applicant seeks access to the respondent's file notes relating to the extent of legal advice given to her – whether the file notes are the property of the solicitor – whether the file notes are in a category which the respondent was obliged to disclose *Breen v Williams* (1996) 186 CLR 71, cited *Doyles Construction Lawyers v Harsands Pty Ltd* (SCNSW (Equity Division) No 3007 of 1996, unreported, 18 February 1997, McLelland CJ in Eq), cited *Re Thomson* (1855) 20 Beav 545; 52 ER 714, considered *Wentworth v De Montfort* (1988) 15 NSWLR 348, cited
COUNSEL:	D Mullins SC, with R Whiteford, for the applicant S Anderson for the respondent
SOLICITORS:	Beckey, Knight & Elliot Solicitors for the applicant Macrossan & Amiet Solicitors for the respondent

[1] **MACKENZIE J:** This is an application by a former client of the respondent relating to the preparation of the applicant's will and severing of joint tenancies between her and her husband. Before the application was brought, her husband had passed away in November 2006 aged 79. She was 78 at the time. The application is founded on the court's inherent jurisdiction.

[2] The facts relied on by the applicant are that, over the years they were married, she and her husband bought a number of rural properties as joint tenants. They were also joint tenants as between themselves in a one-half interest in another property. Two of their sons (who became executors of his will) and their wives held one-quarter share each, as joint tenants *inter se*, but as tenants in common with the applicant and her husband.

[3] Her husband had expressed a wish, not shared by her, to give their interest in all the properties to the sons. Nevertheless, she attended two appointments, arranged by her husband, at the offices of the respondent where she signed an enduring Power of Attorney, a will and a transfer severing the joint tenancies. She says, in essence, that she heard and remembers little of what happened at either appointment. At the second appointment, two months before her husband's death, she was given documents to sign but their nature and effect were not described to her. She signed the documents where the solicitor indicated. Under the will her husband made that day, she did not inherit her husband's interest in the properties, to which she would have been entitled by survivorship had the joint tenancy not been severed.

[4] The applicant wishes to take advice with a view to avoiding the transfer which severed the joint tenancies and to have the properties reconveyed to her so that she may take them by survivorship. For this purpose she wishes to have access to file notes maintained by the respondent because they will or may record the extent of legal advice given to her and of any input she had concerning severance of the joint tenancy. She sent an authority to the solicitors to release "all files documents, papers, etc held on my behalf." Initially, the solicitors required a written authority from the executors of her husband's will before they would release the documents. The two sons who became executors objected to the respondent providing a copy of the file to the applicant. The issue of the necessity for the executors' permission and another concern with whether there is an obligation to provide the file itself or only a copy, are not now contentious. The only issue is whether there is an obligation to provide a copy of the file notes prepared by the solicitors. By the time the hearing commenced, it had further narrowed to an argument about sufficiency of proof that the file notes were the property of the solicitors and not documents of which the applicant was entitled to request a copy, at least at this point.

[5] The affidavit of the managing partner of the respondent discloses that, within the file, there are 11 documents (file notes) prepared by the solicitors who attended on Mr and Mrs McGrath and a trainee solicitor that, it is deposed, were prepared to assist in the performance of their professional duties, with respect to which privilege was claimed. No fees were charged to the clients with respect to the production of those notes.

[6] Given the applicant's absent or limited recollection of what was discussed, it would no doubt be of great assistance to her to know, before seeking legal advice, anything recorded as having been said, or not said, to or by her in the course of the consultations. It was expressly conceded in the applicant's written outline of argument that the respondent does not have to provide the original of any

documents on the file which are its property. It was submitted that the class of documents which are its property are those brought into existence solely or predominantly for the respondent's own benefit or information in the course of performing its retainer and for which the clients were not charged (*Wentworth v De Montfort* (1988) 15 NSWLR 348; *Doyles Construction Lawyers v Harsands Pty Ltd* (SCNSW (Equity Division) No 3007 of 1996, unreported, 18 February 1997, McLelland CJ in Eq)).

[7] The sole issue remaining was whether the affidavit of the respondents' managing partner laid a sufficient basis to prove that. The day before the hearing, there was correspondence between the applicants and the respondents' solicitors in which the applicant's solicitors wrote as follows:

> "We note that you object to providing copies of documents 'made by solicitors in (your) office to assist in the performance of their duties'. Having perused the List of Documents which you have supplied we note, for example, that there is no mention of file notes made by (the solicitors) of their attendances on Mr and Mrs McGrath. We assume this is because you assert those documents were prepared to 'assist in the performance of their duties'. There may be other such documents not mentioned in your list.
>
> Leaving aside the question of your obligation to provide copies of such documents, we respectfully submit that the originals will only be your intellectual property, if:
>
> - They were created solely or predominately for your benefit; and
> - The clients were not charged for them.
>
> So that the documents in dispute can be clearly identified please:
>
> - Identify the documents you claim to be your property. Please do this by stating the date thereof, the identity of the solicitor who prepared the same and (in general terms) to what the document relates (such as: notes of a meeting with the clients or as the case may be); and
> - Provide a short statement of the basis upon which it is contended that those documents were:
>
> (i) Made predominately for your information and benefit as opposed to being for the benefit of the clients; and
>
> (ii) Not charged to and paid for by the clients."

[8] The respondents' solicitors replied as follows:

> "The file notes that were made by solicitors to assist in the performance of their duties include notes made (by the solicitors) as to work done or to be done.
>
> The writer has prepared an affidavit which has been sent to Counsel for settling which includes the following paragraph:-

> *'No fees have been charged to Mr and Mrs McGrath with respect to the production of these notes.'*."

[9] The reference to documents made by the solicitors to assist in the performance of their duties resembles words used by Gaudron and McHugh JJ in *Breen v Williams* (1996) 186 CLR 71 at 101 concerning notes made by a medical practitioner (cf Brennan CJ at 80). Mr Mullins SC pointed out the fiduciary nature of the relationship between solicitor and client, which was absent from the relationship between a medical practitioner and patient. He referred to Hope JA's reference in *Wentworth v De Montfort* at 358-359 to questions of degree probably being involved in situations that fell between the case where documents belong to the client and those where the record is solely for the benefit of the solicitor and not charged to the client. He relied on the observation that, probably, such cases involved consideration of what was the predominant purpose.

[10] There was also some focus on *Re Thomson* (1855) 20 Beav 545; 52 ER 714. That was a case where the solicitor involved offered to provide copies, at the client's cost, of certain letters transcribed by him into a journal, and original letters received by him in the course of representing the applicant from the other solicitors. The original letters were held to have been received as the client's agent. The case may not be as helpful as the applicant's submission suggests on relevant issues in this case (see last sentence of Brennan CJ's footnote [31] in *Breen*).

[11] Returning to the mainstream of the argument, the view I take of the correspondence is that the respondents' solicitor was asserting that the documents fell within a category which the respondent was not obliged to disclose. The point taken on the applicant's behalf is a narrow one. It is concerned with the issues in the letter quoted in paragraph [7] above. If there is ambiguity in the letter, there was no application for leave to cross-examine the deponent on the letter. It is true that, as he was not the person who had prepared the documents, his consideration of the issue would have been based on the documents, perhaps supplemented by oral information from those who were. For that reason, his capacity to respond to some lines of questioning may have been limited. But if he had been cross-examined, it would have revealed whether he had applied proper principles. Further, I was urged by the respondent's counsel to peruse the notes, but that course was objected to on the applicant's behalf, so I did not.

[12] One of the risks of a party taking this kind of minimalist approach is that if there is an ambiguity in the position stated by the respondent, the apparent intent of the statement as a claim that the documents are the solicitors alone may be sufficient in the absence of other evidence, and, in particular, of availing of an available opportunity to establish that a wrong principle was relied on in making the claim. On balance, I am satisfied that this is the case in this matter. The application is therefore refused with costs to be assessed.