SUPREME COURT OF QUEENSLAND

CITATION:	*Colston v McMullen* [2010] QSC 292
PARTIES:	**Douglas Benjamin COLSTON** (originating applicant) **v** **Brian McMULLEN (as Executor and Trustee of the Estate of Malcolm Arthur Colston, as Executor and Trustee of the Estate of Dawn Patricia Colston, and as Trustee and Appointer of The Dawn Colston Estate Trust)** (originating respondent)
FILE NO/S:	BS 12943 of 2008
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2010
JUDGE:	White J
ORDERS:	**1. The originating application filed 12 December 2008 be dismissed.** **2. Orders by consent filed 6 January 2009 be discharged.** **3. The originating applicant, Douglas Benjamin Colston, pay:** **(i) the respondent's costs of and incidental to the originating application, to be assessed on the standard basis;** **(ii) the respondent's costs of and incidental to the respondent's application to dismiss the originating application, including the hearing on 23 March 2010, to be assessed on the indemnity basis.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – APPOINTMENT, REMOVAL AND ESTATE OF TRUSTEES – RETIREMENT AND REMOVAL – REMOVAL BY THE COURT – GROUNDS FOR REMOVAL – where beneficiary

applied for removal of the executor and trustee of his father's estate, the executor and trustee of his mother's estate and the trustee and appointor of his mother's trust – where applicant says the respondent has failed to administer his father's estate and has poorly administered his mother's estate and trust - where respondent applied to have the originating application dismissed – where applicant seeks general order for disclosure of trust administration documents – where administration accounts have been exhibited to respondent's affidavit - whether the court should order removal of the respondent in the circumstances – whether general order for documents should be made

Succession Act 1981 (Qld), s 6, s 47(1A), s 52(2)
Trusts Act 1973 (Qld), s 5, s 80

Bates v Messner (1967) 67 SR (NSW) 187, cited
Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405, cited
In The Goods of Loveday [1900] P 154, cited
Letterstedt v Broers (1884) 9 AC 371, cited
Miller v Cameron (1936) 54 CLR 572, cited
Re: Whitehouse [1982] Qd R 196, cited
Schmidt v Rosewood Trust Ltd [2003] 2 AC 709; [2003] 3 All ER 76, cited

COUNSEL: A C Barlow for the originating applicant
D J Morgan for the originating respondent

SOLICITORS: Gleeson Lawyers for the originating applicant
McCullough Robertson Lawyers for the originating respondent

[1] By an originating application filed 12 December 2008, Douglas Benjamin Colston ("Douglas") sought the removal of the respondent, Brian McMullen, ("Mr McMullen") as the executor and trustee of his father, Malcolm Arthur Colston and as the executor and trustee of his mother, Dawn Patrician Colston and as the trustee and appointor of The Dawn Colston Estate Trust ("the Trust").

[2] By consent orders made on 6 January 2009 that application was adjourned to enable the parties to engage in mediation, with liberty to re-list the application by either party.

[3] The parties engaged unsuccessfully in a mediation on 18 February 2009.

[4] Mr McMullen has brought an application seeking to have Douglas' originating application dismissed. That application is resisted by Douglas, who has sought to maintain his criticisms of the executor's failure to administer his late father's estate, poor administration of his late mother's estate and of her Trust. He has stepped back, it seems, from his desire for the removal of the executor and seeks a general order for administration documents. He has not discontinued his proceedings

despite request.[1] His counsel, Mr A C Barlow, submitted that the application to dismiss the originating application is premature.

[5] Douglas has not filed any further affidavit to refute allegations made against him by Mr McMullen and his brother, David Colston since his affidavit in support of the originating application, filed 12 December 2008, despite his solicitor suggesting in correspondence that he would do so. No deponent was required for cross-examination.

[6] David Andrew Colston ("David"), the applicant's brother, does not support Douglas' application to remove the executor. He is satisfied that Mr McMullen has acted appropriately and diligently and is satisfied with the amount of information provided about the operation of the Trust and the distributions made from it.

Chronology

[7] Malcolm Arthur Colston ("Malcolm") and Dawn Patricia Colston ("Dawn") had two children, Douglas and David. Malcolm died on 23 August 2003. By his will dated 28 May 2000 he appointed Dawn to be the executor and trustee of his will. Dawn was in poor health and had not applied for probate and Malcolm's estate remained un-administered as at the date of her death on 3 July 2004. By her will dated 28 June 2004 she appointed her brother, Mr McMullen, executor and trustee of her estate and trustee and appointor of The Dawn Patricia Colston Trust. He was granted probate of Dawn's estate on 15 November 2004. He did not seek probate of Malcolm's estate.

Malcolm's will

[8] Malcolm's will is a simple document, presumably drafted by the testator. He left:

> "… an equal share of any moneys which I have advanced to Janfern Proprietary Limited and which are available in cash as at the time of my death and one ordinary share each in Janfern Proprietary Limited [to Douglas and David]"

He left half each to his sons of any other shares or like instruments. He left an identified house property in the ACT and an identified motor vehicle to Douglas and David respectively.[2] The rest and residue of his estate he left to Dawn. Under the heading "Special Instructions", apart from some personal directions about his funeral, he suggested winding up Janfern Pty Ltd and distributing the proceeds. That had not occurred at the time of Dawn's death. Malcolm held a modest share portfolio. Malcolm, Dawn, David and Douglas were directors of Janfern Pty Ltd, which is described in the material as the family company. By resolution of the company of 6 January 2010, Douglas was removed as director, leaving David as the sole director.

Dawn's will

[9] Dawn's will is a much more complex document. She appointed her brother as her executor and trustee and, in default, a friend, Joy Tomlins. She gave specific cash

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1 "BM-10" to the affidavit of Brian McMullen filed 16 March 2010.

2 The house property was no longer part of his estate at the date of his death.

gifts of $25,000 to each of four named grandchildren when they attain the age of 25 years. Her residuary estate she gave upon the trusts contained in cl 5 of her will, described as The Dawn Colston Estate Trust. It is a discretionary trust with a perpetuity period of 80 years. The beneficiaries are Douglas and David and the four named grandchildren, together with any other grandchildren, biological or lawfully adopted, any other trust in which the named beneficiaries have an interest, and any company in existence on the vesting day in which the named beneficiaries are beneficial owners of shares of any type. The accounting period is each period of 12 months ending on 30 June in each year.

[10] By cl 5.2 the trustee is directed to hold the income of the trust fund:

> "absolutely for the beneficiaries or any one or more of them exclusive of the other or others in such shares as my trustees shall in their absolute discretion determine on or prior to the end of the accounting period".

By cl 5.3 the trustee has absolute discretion to accumulate part or all of the income. By cl 5.5 any determination of the trustee pursuant to the terms of the will are directed to "be recorded in a written minute" signed by the trustee. Once such a determination has been so recorded "it shall be effective and irrevocable".

[11] By cl 5.7, with respect to income accruing to the trust fund and vesting in the beneficiaries or being accumulated from time to time:

> "(a) A determination to apply any amount for any beneficiary may be made by placing such amount to the credit of such beneficiary in the books of the trust fund or by drawing a cheque in respect of such amount made payable to or for the benefit of such beneficiary or by paying the same in cash to or for the benefit of such beneficiary."

By cl 5.7(b) the trustee has complete discretion as to the making of any determination and is not bound to assign any reason for doing so. By cl 5.7(d):

> "Any income accruing to the trust fund and vesting in the beneficiaries from time to time shall be held by my trustees as a debt on demand owing to such person absolutely with power (but no duty) to my trustees pending payment over thereof to such person to invest or apply or deal with such fund or any resulting income therefrom or any part thereof in the manner provided for in 5.12 hereof."

[12] In the event the trustee failed to make any determination with respect to income and/or capital distribution then, by virtue of cl 5.8:

> "… such income, capital, or portion of either shall be held –
>
> (a) if my sons **DOUGLAS** and **DAVID** shall be living at the end of the accounting period for which a determination should have been made then **UPON TRUST** for them in equal shares absolutely –

> (b) **PROVIDED HOWEVER** if either **DOUGLAS** or **DAVID** are not so living …
>
> (c) if the trusts in (a) and (b) above both fail then **UPON THE SAME TRUSTS** and for the same beneficiaries as are contained in clause 4.3(c) -"

[13] By cl 5.9 the trustee has power in his absolute discretion:

> "from time to time prior to the vesting day to pay, appropriate, or apply the whole or any part of the income or capital of the trust fund towards the maintenance, education, medical expenses, advancement, or for other general benefit of any beneficiary."

By cl 5.11 the trustee has power to allow any beneficiary to occupy and have custody of or use of any dwelling, property or chattels forming part of the trust fund on such terms and condition as to repair, replacement, insurance, outgoings or otherwise as the trustee thinks fit.

[14] The balance of the will in cl 6 sets out general powers of the trustee.

David's position

[15] David does not regard Mr McMullen as the executor and trustee of Malcolm's estate. He does not agree with Douglas' application. From his perspective, Mr McMullen has acted appropriately and diligently as the trustee of the Trust and the executor and trustee of Dawn's estate. He is satisfied with the amount of information provided to him about the operation of the Trust and the distributions made from it. He is concerned that if Mr McMullen were removed as trustee and appointor of the Trust, any replacement would not be able to preserve the capital of the Trust given Douglas' past demand for "significant distributions to be made from the Trust to him and for the benefit of his children" and to resist threats of "unnecessary and unwarranted litigation" if the trustee failed to comply with his demands.

Executor by representation of Malcolm's estate

[16] Douglas seeks the removal of Mr McMullen as executor of Malcolm's estate and is critical of his failure to administer the estate. Dawn did not obtain probate of Malcolm's estate. Such a grant is a prerequisite to becoming an executor by representation as required by s 47(1A) of the *Succession Act* 1981 (Qld). Neither Douglas nor David sought an order from the court to administer Malcolm's estate. Much of Malcolm's estate devolved to Dawn in any event.

Douglas' concerns

[17] In his only affidavit filed on 12 December 2008, Douglas sets out his version of the relevant history. Mr McMullen has responded that many of those paragraphs are either untrue or inaccurate. Douglas' solicitors obtained a forensic report prepared by Daryl Jones of Pitcher Partners Queensland Accountants, Auditors and Advisors about Mr McMullen's administration of the estate(s) and the Trust, dated 20 October 2008. It was exhibited to Mr Jones' affidavit filed 12 December 2008 and only then provided to Mr McMullen. Mr McMullen's solicitors and the estate

and Trust accountant, Mark Cronin, responded. Douglas' solicitors replied to that response.

[18] Douglas' complaints are many. He complains of Mr McMullen's failure in the early years of the Trust to employ accountants to work on Malcom and Dawn's estates and on the Trust's financial documents; failure to obtain the optimum tax benefits by withholding income distribution; failure to distribute in accordance with minuted determinations; failure to distribute because of default determinations; failure to administer Malcom's estate; failure to provide adequate finance for a property for Douglas; disputed loans to Douglas in the Trust's financial records; failure to distribute gifts to the grandchildren as provided for by Dawn's will; failure to produce financial documents relating to the Trust for Douglas' Family Court costs application and Child Support assessment change; and alleges discrepancies in the Trust's accounts. Overall he complains that the value of the estate has "inexplicably" been diminished from approximately $2.884 million in January 2007 to $1.797 million at June 2008.

[19] On this hearing Mr A C Barlow contended that Mr McMullen had never responded comprehensively to the Pitcher Partners' report. It is necessary, then, to consider that report and the response to it. Douglas' solicitors noted in their letter of instruction to Pitcher Partners a "falling out" between Douglas and Mr McMullen and provided some background information. The solicitors asserted to Pitcher Partners that:

> "1. The Trustee has not distributed income of the Trust pursuant to his written minutes of determination.
>
> 2. The Trust has incurred considerably higher tax liability as a result of non-distribution of income.
>
> 3. The value of the Trust seems to have been diminished without reason.
>
> 4. The financials appear to be false or misleading.
>
> 5. The trust has opened investment accounts for five grandchildren but there is no record of payment of the specific gifts to the four named grandchildren."[3]

The instructions were to provide a report outlining, from the provided material (the solicitor's file):

> "● Any discrepancies in what the trustee has stated he has done compared to what the returns show that he has actually done;
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> ● Any losses you can identify that the trust has suffered due to the trustee's inaction/maladministration;
>
> ● Anyways that tax liability may have been minimised by implementing alternate distributions of income to

[3] Exhibit "DFJ1" to the affidavit of Daryl Francis Jones filed 12 December 2008.

beneficiaries (please provide details of alternate tax payable had proper distributions been made);

- Confirmation by you that based on the financial material supplied the trustee has conducted the affairs of the trust in a manner detrimental to the trust;

- Any other matter that you can identify showing the trustee being negligent, fraudulent or misleading."[4]

[20] Pitcher Partners prepared a report dated 20 October 2008 in reliance upon those instructions and, presumably, the solicitor' file. Mr Jones, the partner who prepared the report, did not seek to obtain further information from his instructing solicitors, from the Trust's accountants, from Mr McMullen's solicitors or from Mr McMullen. The report is lengthy but in Part 3 the author provides a summary which may be further summarised as follows:[5]

Mr Jones was instructed to consider:

(a) Any discrepancies between what the trustee has stated he has done compared with the Trust tax returns, and in summary concluded:

- Signed minutes as to distributions of income in the financial years 2005 to 2007 are not consistent with the distributions recorded in tax returns of the Trust for those years and should have been made in accordance with the trust minutes or to the default beneficiaries.

(b) Any losses suffered by the Trust due to inaction/maladministration by the Trustee, and in summary concluded:

- Taxation penalties were likely to accrue due to the late lodgement of the Trust's income tax returns for the years 2005 to 2007.

- The general interest charge would likely accrue and was estimated at $65,000.

- Potential overpayment of tax in those years because there was no distribution to beneficiaries, and if distributed, tax would have been reduced.

- Loss may have been incurred in respect of the opportunity cost of the Trust property located at Chapel Hill from failure to rent to a third party or not selling the property.

- Failure to notify the tax file number of the Trust with which it holds investments resulting in withholding tax being withheld from those investments.

(c) Ways of minimising tax by implementation of alternate distributions of income to beneficiaries, and in summary concluded:

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4 Exhibit "DFJ1" to the affidavit of Daryl Francis Jones filed 12 December 2008.
5 Exhibit "DFJ2" to the affidavit of Daryl Francis Jones filed 12 December 2008.

- Tax payable for alternative distributions under a number of suggested scenarios with the best scenario of tax payable being $135,546 lower and the worst being $71,628 lower than was incurred.

(d) Whether the affairs of the Trust were conducted in a manner detrimental to the Trust, and in summary concluded:

- Delayed payment of home loan balance leading to overpayment of non-deductible interest and legal costs of dealing with the dispute with Douglas.

(e) Loan accounts of Janfern Pty Ltd, Douglas, David and the Janfern Superannuation Fund, and in summary concluded:

- A material risk that the payments made to Douglas were either an expense of the Trust or against distribution of Trust income as amounts already drawn and thus would not require repayment to the Trust. Thus, there is a material risk that the treatment of these payments is inappropriate.

- Regarding the loan from/to Janfern Pty Ltd, "[t]here is a material possibility that these costs have been recorded correctly and the balance due is a valid debt owed to the Trust."

- The analysis suggests that the loan from the Janfern Superannuation Fund represented expenses paid on the superannuation fund's behalf and more properly should be classified as a debtor as opposed to a loan, with mentioned consequences.

(f) Any other identification of negligence, fraud or misleading conduct by the trustee, and in summary concluded:

- Further investigation required to determine whether initial assets transferred into the Trust were appropriately transferred in accordance with Dawn's will.

- Changes to the ownership of Janfern Pty Ltd not lodged with ASIC to reflect the terms of Malcolm's will.

- Further investigation required into a loan of $33,000 recorded in February 2005 which appears to favour David to the detriment of Douglas.

- Further investigation required to determine whether cash gifts of $25,000 have been made to the grandchildren and whether out of Trust monies rather than estate monies.

- Further investigation required to determine whether sundry deposits of $14,908 are correctly recorded as income of the Trust in the 2005 year.

- Further investigation required to determine whether "Personal expenses" of $81,437 in the 2005 year are valid expenses of the Trust and not personal expenses of the trustee – if the latter, that would be misappropriation.

- Costs of storing Douglas' assets seized under a third party property action will not be costs of the Trust and payment of such costs by the trustee would be "inappropriate".

- Further investigation required into the operation of the Janfern Superannuation Fund but this does not relate to the brief to investigate the Trust and was not discussed further.

- Discrepancy in the value of the Trust assets between January and June 2007 were unable to be determined but the decline in the value of the Trust assets in that period required further investigation.

[21] Mr McMullen responded to Douglas' affidavit and to Pitcher Partners' report in so far as he was able in respect of the report in his affidavit filed 6 January 2009. Given the timing of the provision of the report and the hearing of the originating application on 9 January 2009, the limited response by the Trust's accountant, Mr Cronin, contained in correspondence was not surprising. The complaint is made on behalf of Douglas that there is no forensic report dealing point by point with the matters canvassed by the Pitcher Partners' report. Much has progressed in the administration of the estate since the beginning of 2009 making that course unnecessary and unhelpful. However, in order to address the originating application and the application to dismiss it, it is necessary to revert to that earlier material, if only to deal with some of the allegations in Douglas' affidavit and the report.

[22] Mr McMullen had appointed an accountant, Mark Cronin of Better Accounting, to deal with the financial aspects of the Trust and Dawn's estate. He had the assistance of his solicitors and, in particular, Mr Scott Whittla, an accredited succession law specialist. He opened an account with the National Australia Bank in December 2004 as the transaction account for the estate and the Trust. Dawn had kept poor records and had not filed tax returns for the last few years of her life. Consequently it took Mr McMullen and Mr Cronin some time to collect the necessary data to prepare draft financial statements and to prepare and lodge taxation returns for Dawn, the estate and the Trust.

[23] Douglas, and, it seems, Pitcher Partners, made a number of assumptions about various entities. David, not Janfern Pty Ltd or Dawn or Malcolm, was the trustee of the Janfern Superannuation Fund which had its own accountant. The Trust is a beneficiary. Janfern Pty Ltd was the family company of which the directors were Malcolm, Dawn, Douglas and David. The shareholders are Dawn's estate, David and Douglas. Mr McMullen's only involvement in Janfern Pty Ltd was, and is, as proxy for Dawn's estate. David swears to the difficulty in preparing tax returns and proper accounting of the transactions undertaken by Janfern Pty Ltd because of alleged unauthorised withdrawals by Douglas and his failure to repay a loan of $240,000.

[24] Despite requests, incomplete information was made available by the trustee of the Janfern Superannuation Fund and the fund's taxation advisers. As a consequence,

the financial statements for the estate and Trust were "a work in progress" and the tax returns were prepared and lodged on a conservative basis. Mr Cronin and Mr McMullen had suggested that the accounting duties of the superannuation fund be transferred to Mr Cronin's office so that the reconciliation work as between the fund and the Trust could be better undertaken but that did not occur until February 2009.

[25] Notwithstanding Douglas' assertion, distributions had been made to Douglas and his children and to David and his children. The supporting material exhibited to Mr McMullen's affidavit identifies these amounts over the four years of the Trust. Douglas and his family, Mr McMullen deposes, have received distributions from the Trust in excess of $300,000, more than double the distributions made to David and his family.

[26] Mr McMullen denied that his administration of the trust had caused it significant loss by virtue of the Trust's tax returns. He received advice which, to a large extent, was supported by Pitcher Partners, that an eligible termination payment was income and required to be assessed in the hands of the Trust and there was no discretion to distribute. Furthermore, incomplete eligible termination payment records from the Janfern Superannuation Fund meant that Mr McMullen was unable to deal completely with the income received. Mr McMullen maintained that it was his obligation as trustee to act in the best interests of all beneficiaries of the Trust which would not, necessarily, involve the most tax effective way of managing funds.

[27] Mr McMullen denied that he refrained from providing Douglas with information about the Trust until 2008. He had provided him with an interim report on the assets and liabilities in February 2007. Since Mr McMullen was not the trustee of the Janfern Superannuation Fund, a matter known to Douglas, he had no control over the distributions to the Trust.

[28] A matter which particularly concerned Douglas was distributions allegedly arising from default determinations as provided for in cl 5.8 of the will. Mr McMullen denied that there were default distributions. He exercised his discretion to distribute the income of the Trust amongst the beneficiaries as he deemed appropriate.

[29] Douglas has complained that the Telstra shares owned by Malcolm have not been transferred to the beneficiaries nominated in his will. As Mr McMullen notes, he was not Malcolm's executor and, in any event, he had been unable to arrange for the transfer of those shares because he did not have Malcolm's original will and could not provide the share registry with a certified copy.

[30] Douglas was involved in Family Court litigation including about the custody of his daughter. Mr McMullen had agreed that the Trust would advance him money to deal with the custody dispute but not to pursue any costs orders. Douglas complains about the lack of support by Mr McMullen for his travails in that jurisdiction. Douglas was ordered to make child support payments assessed on a certain income when he was in paid employment. After he ceased paid employment he wished to vary and reduce those payments and to that end sought Trust documents. Douglas complained that material supplied was insufficient and the order was not changed. Mr McMullen responded that the documentation required was never appropriately identified.

[31] Douglas expressed considerable grievance about the want of provision of accommodation for him and his family. Mr McMullen gave him a budget of $55,000 to undertake modest renovations to a property at Chapel Hill, which had been purchased by the Trust for Douglas and his family, near the former family home occupied by David and his family. The budget was for the limited purpose of replacing carpet, curtains and wallpaper. Douglas supervised renovations which were much more extensive and over committed the budget. The amount had been paid into Janfern Pty Ltd's account at Douglas' request. Douglas abandoned the renovations, moved his family to the Sunshine Coast and, according to Mr McMullen, left the property in an unliveable condition.

[32] Douglas' complaint about the merging of the grandchildren's funds with those of the Trust were addressed by Mr McMullen. The financial statements for the Trust include references to the accounts put aside for the grandchildren for convenience only and those legacies are separate trusts which are managed alongside the Trust proper. Mr McMullen has established a trust fund for a fifth grandchild born to Douglas and his partner after Dawn's death, for the same amount as the grandchildren named in Dawn's will. Each fund is in a separate investment account with ABN Amro Morgans.

[33] The "personal expenses" detailed in the 2005 accounts related to Dawn's needs.

[34] In his affidavits filed on 6 January and 16 March 2010, Mr McMullen brought up to date the progress of the administration of the Trust. He deposed that in January and February 2009 Mr Cronin, the estate and Trust accountant, received outstanding documentation and information and assumed control as a tax agent for the Janfer Superannuation Fund from the previous accountants. As a consequence, Mr Cronin and Mr McMullen were able to access the necessary information to finalise and sign off on the financial statements for the estate and the Trust and to revise and amend the estate tax returns. They had previously been filed based on conservative estimates to preserve the estate's position and minimise potential penalties for late lodgement. As at the date of swearing his affidavits all taxation matters were up to date.

[35] Mr McMullen deposed that despite several requests being made of Douglas as a director of Janfern Pty Ltd to provide copies of the financial statements and tax returns so that a proper value could be placed on the estate's interest, Douglas has declined to provide that information. Mr McMullen alleges that Douglas has declined to disclose the dates of birth of his children as eligible beneficiaries of the Trust to assist in dealings with the Taxation Office.

[36] By letter dated 3 April 2009 Mr McMullen's solicitors provided a reply to the affidavit of Mr Jones and Pitcher Partner's report after Mr Cronin and Mr McMullen had reviewed the report in detail. Underpinning the response was the overarching comment that Mr Jones had made assumptions and drawn conclusions which were inaccurate because he had been provided with incomplete management or working accounts prepared for the trustee's personal reference and general accounting purposes. In summary, the response included:

- Mr Jones was briefed with management accounts instead of requesting proper estate administration accounts and audited accounts for the Trust.

- Mr Jones was said, incorrectly, to assume that the minutes signed by Mr McMullen in relation to distributions of income to the beneficiaries related to all income generated by the Trust when they related only to distributions of income which had actually been allocated by the trustee for distribution to the beneficiaries, as opposed to income which had been accumulated or otherwise dealt with by Mr McMullen in each financial year. Clause 5.3 of the will referred to income which the trustee had specifically allocated for distribution to the beneficiaries.

- Mr Jones is said to have made an incorrect assumption that the most tax efficient outcome for dealing with income generated by the Trust will always be in the best interests of the beneficiaries, namely, to allocate all of the Trust's income among the beneficiaries. Tax minimisation will not always be a trustee's first priority in dealing with the income of a trust. The trustee is empowered under cl 5.3 to deal with the income of the Trust in his absolute discretion and could accumulate part or all of the income in any accounting period and distinguish between income of different types and deal with one type of income in a different manner to that of another type of income.

- A trustee is obliged to file tax returns whether complete information is available or not. A trustee may then lodge an amended tax return once the true income position becomes known. The piecemeal nature of information and receipts from eligible termination payments received from the accountants for the superannuation fund, (a major source of income and capital for the Trust) made it likely that tax returns would need to be amended and re-lodged.

- Losses were incurred as a direct result of Douglas' actions in dealing with Trust assets, in particular the wasted expenditure on the house at Chapel Hill; entities in which the estate has an interest such as Janfern Pty Ltd; and through Douglas' failure to liaise with Mr McMullen in a reasonable manner.

- Eligible termination payment documentation from the Janfern Superannuation Fund was incomplete. Such payments were required to be assessed as income in the hands of the Trust and not the beneficiaries.

- Both the estate and the Trust were owed money by or had an interest in Janfern Pty Ltd. Douglas had "inappropriately" dealt with assets of Janfern Pty Ltd through related party loans and unilateral withdrawals estimated to be in excess of $300,000 from company bank accounts.

- There had been no late lodgement penalties imposed by the Australian Tax Office for the 2005 to 2007 financial years.

- General interest charges paid by the Trust were dictated by the necessity to lodge incomplete returns. A submission was to be prepared for the Australian Tax Office to have those interest charges reimbursed given the extenuating circumstances.

- The home loan was repaid as soon as cash reserves became available to discharge the liability.

- Changes to the ASIC register in respect of Janfern Pty Ltd was the responsibility of the directors. Douglas had undertaken to make those changes.

[37] On 22 December 2009 Mr McMullen's solicitors provided Douglas' solicitors with copies of amended tax returns and notices of assessment for the 2005 to 2007 financial years and confirmed the validity and accuracy of the 2008 financial year tax returns. The solicitors noted the continuing failure to provide up to date financial statements and tax returns for Janfern Pty Ltd and the failure to provide all relevant information concerning asset and eligible termination payments for the Janfern Superannuation Fund. The amended tax returns were lodged and assessed and resulted in a refund to the estate of $26,283.04 in the 2005 year, $39,888.42 in the 2006 year and $33,518.73 in the 2007 year. The trustee received a refund for interest on overpaid tax of $8,265.14 and a further $17,371.83 was refunded by the Tax Office.

Removal of an executor and trustee

[38] The jurisdiction to remove an executor of a deceased estate is sourced in s 6 and, possibly, s 52(2) of the *Succession Act* 1981 (Qld) and, with respect to executors and trustees, ss 5 and 80 of the *Trusts Act* 1973 (Qld). The court also has an inherent power to supervise executors since "the real object [of the grant of probate] … is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto";[6] and to supervise trustees in the administration of trusts.[7] The office of executor and the office of trustee are, by virtue of modern statutory intervention, now very similar,[8] although there are also marked distinctions.

[39] The court may remove an executor to whom a grant of probate has been given. This occurs by the revocation of the grant.[9] Such a removal will occur when the court is persuaded that the due and proper administration of the estate in the interest of those beneficiaries entitled has been put in jeopardy, or prevented, by reason of the acts or omissions of the executor or, because of matters personal to him or her, or for some good reason the executor is not a fit and proper person to carry out the executorial duties.[10]

[40] The jurisdiction to remove a trustee is exercised by the court to protect the interests of the beneficiaries. In *Letterstedt v Broers*, Lord Blackburn described the

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6 As per Jeune P in *In the Goods of Loveday* [1900] P 154 at 156, cited by Sugerman JA in *Bates v Messner* (1967) 67 SR (NSW) 187 at 189; see also, Asprey JA in *Bates v Messner* at 191.

7 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709; [2003] 3 All ER 76 at [51] and [66].

8 In Queensland by virtue of the *Succession Act* 1981 (Qld), s 49 and the *Trusts Act* 1973 (Qld), s 5. A comparison of the two offices is discussed in AA Preece, *Lee's Manual of Queensland Succession Law* (2007, 6th ed) at 139-141.

9 *In The Goods of Loveday* [1900] P 154 applied in *Bates v Messner* (1967) 67 SR (NSW) 187 and many cases since, for example, *Porteous v Rinehart* (1998) 19 WAR 495; *Mavrideros v Mack* (1998) 45 NSWLR 80; [1998] NSWCA 286; *Williams v Williams* [2005] 1 Qd R 105; [2004] QSC 269; *Baldwin v Greenland* [2007] 1 Qd R 117; [2006] QCA 293; and *Otto v Redhead* [2009] QCA 147.

10 *Bates v Messner* (1967) 67 SR (NSW) 187 at 191-2 per Asprey JA.

jurisdiction to remove a trustee as "delicate".[11] In *Miller v Cameron*, Dixon J stated:[12]

> "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 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."

That passage was cited with approval by Macrossan J (as his Honour then was) in *Re Whitehouse*.[13] His Honour then said:[14]

> "I appreciate that the disputes between C. M. Whitehouse and his sons should not by themselves be regarded as constituting sufficient ground for removal as trustee. As was pointed out in *Forster v Davies* (1861) 4 De G. F. & J. 133, it would be necessary to enquire further to see who was to blame for any dissension since otherwise *cestuis que trust* would be placed in a falsely powerful position of being able to raise a dispute with their trustee and then apply for his removal."

[41] Whilst it can rightly be said that there are numerous disputed issues of fact between Douglas and Mr McMullen and also Douglas and David, which, for complete resolution would require a lengthy trial, the overall impression gained from the material which remains uncontested to date, is that Mr McMullen has struggled to administer a very difficult estate and to give effect to the wishes of his sister in making future and secure provision for her two sons and their families. In his affidavit filed 16 March 2010, Mr McMullen deposes that his dealings with Douglas from the very early stages in the administration have been difficult to manage:

> "… the administration of the estate and the trust has become unnecessarily litigious due to Douglas' behaviour, causing significant loss to the value of the estate and Trust."[15]

To make good that observation Mr McMullen has set out four pages of text messages received from Douglas to his mobile phone from September 2005 to December 2009. They are not disputed and they are persistent, demanding and querulous, seeking money for rent, loans and medical bills. Evidence advanced by

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11 (1884) 9 AC 371 at 387.
12 (1936) 54 CLR 572 at 580-581. See also Latham CJ at 575 and Starke J at 579.
13 [1982] Qd R 196.
14 Ibid at 206.
15 Para 31 of the affidavit of Brian McMullen filed 16 March 2010.

Mr McMullen, and not refuted by Douglas, concerns suspicious transactions to and from Dawn's several accounts and dealings with the assets of Jansfern Pty Ltd.

[42] Mr McMullen has been hampered in the administration of Dawn's estate and the Trust by the failure of Douglas and, to some limited extent, David, to cooperate over Janfern Pty Ltd and the Janfern Supernnuation Fund as well as the state of Dawn's affairs. The material demonstrates a careful and prudent approach to garnering the estate Trust assets and attempting to manage as the circumstances permitted. At the date of the hearing the administration of the estate was almost completed and the Trust papers were up to date.

[43] The basis for seeking the removal of Mr McMullen was questionable. The appropriate order is to dismiss the originating application filed on 12 December 2008.

Entitlement to Trust documents

[44] Douglas seeks an order that all Trust documents not already provided (excluding working papers) be disclosed. Mr McMullen has exhibited the administration accounts, which have already been sent to Douglas' solicitor, to his affidavit of 16 March 2010. Those accounts:

> "detail every withdrawal and deposit to and from the accounts and investments detailed above [the various administration and investment accounts]. If a statement is missing for a particular account or investment, the details used are from the general ledger prepared by my accountant. The withdrawals and deposits have then been divided into categories to establish a clear picture of the assets, liabilities and distributions made to the financial year ending June 2008."[16]

Mr McMullen added that he and his lawyers and accountants were clarifying "a handful of transactions" and proposed providing final administration accounts "shortly". There are other documents relating to the Trust in earlier affidavits.

[45] It may be accepted that the beneficiaries of a discretionary trust have a general right to documents or information about the Trust from the trustee, if requested, and to have an accounting of the administration of the Trust.[17] When all three of Mr McMullen's affidavits and their exhibits are considered there is a sense that he has provided, as and when able, all appropriately requested documents and information. He has been criticised for not qualifying the initial documents which were provided by Douglas' solicitors to Pitcher Partners as "provisional". The involvement of Douglas in Janfern Pty Ltd, at the very least, would have suggested that that must have been the case.

[46] If Douglas or his advisers are of the opinion that a particular document or documents should be provided or information given after reviewing what has

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16 Para 28 of the affidavit of Brian McMullen filed 16 March 2010.

17 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 per Mahoney JA at 431 and following, citing *Walker v Symonds* (1818) 3 Swans 1; 36 ER 751. The criticism of that decision by the learned authors of *Jacobs' Law of Trusts in Australia* (2006, 6th ed) (Justice JD Heydon and Dr MJ Leeming) at pp 382-3 does not extend to that general proposition.

already been provided, then a request identifying the document or documents or information can be made. There seems no sensible reason to deplete further the assets of the Trust by expensive applications to court. There is no sense that Mr McMullen would decline to provide that material if requested.

Costs

[47] Mr McMullen has sought his costs from Douglas on the indemnity basis. As I have found, there was no real basis, consistently with the authorities, and against the background of the difficulties in administering the estate and Trust, for bringing the originating application. Costs should follow the event. I am not persuaded that the costs of that application should be on any other than the standard basis. However, it was clear to Douglas prior to the matter being re-listed for hearing that there was no basis for maintaining the originating application. Correspondence had been exchanged to that effect and the application and hearing were unnecessary. In that circumstance, Douglas should pay those costs on the indemnity basis.

Orders

1. The originating application filed 12 December 2008 be dismissed.

2. Orders by consent filed 6 January 2009 be discharged.

3. The originating applicant, Douglas Benjamin Colston pay:

    (i) the respondent's costs of and incidental to the originating application, to be assessed on the standard basis;

    (ii) the respondent's costs of and incidental to the respondent's application to dismiss the originating application, including the hearing on 23 March 2010, to be assessed on the indemnity basis.