SUPREME COURT OF QUEENSLAND

CITATION:	*Stylianou v Brownson & Ors* [2010] QSC 300
PARTIES:	**ANN MAREE STYLIANOU** (applicant) v **DIANNE JANET BROWNSON** (first respondent) **JOHN RICHARD BROWNSON** (second respondent) **RICHARD EDWARD BROWNSON** (third respondent) **CONNOLLY SUTHERS LAWYERS (A FIRM)** (fourth respondent)
FILE NO/S:	TS 194 of 2007
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	22 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2010
JUDGE:	Fryberg J
ORDERS:	**1. Application dismissed.** **2. The applicant pay the respondents' costs of the application, assessed on the indemnity basis.**
CATCHWORDS:	Procedure – Supreme Court procedure – Queensland – Procedure under Uniform Civil Procedure Rules and predecessors – Alternative dispute resolution and other matters before trial – Application to restrain opposing parties' solicitors from acting – Whether party alleging conflict of interest has right to seek relief Professions and trades – Lawyers – Duties and liabilities –

Solicitor and client – Generally – Where solicitor is potentially a witness at trial – Whether continued representation creates conflict of interest

Queensland Law Society Legal Profession (Solicitors) Rule 2007, cl 13.4

COUNSEL: R D Peterson with M C Katter for the applicant
D B Fraser QC for the first, second and third respondents
K C Fleming QC for the fourth respondent

SOLICITORS: Geoff Byrne Lawyers for the applicant
Connolly Suthers Lawyers for the first, second and third respondents
Alex Mackay & Co for the fourth respondent

HIS HONOUR: The application before me is for orders that the Court remove the solicitors for the defendants from the record; alternatively, that it restrain those solicitors for acting for the defendants, and consequential relief.

The proceedings are between members of the same family. The plaintiff has been obliged to commence proceedings for probate in solemn form of her father's will and that was by a caveat lodged on behalf of the defendants.

She has brought proceedings against the defendants claiming that certain transfers of land from her father before his death were affected by undue influence and the defendants have cross-claimed, alleging that a payment of some $600,000 to her on the day of her father's death was also procured by undue influence or perhaps made at a time of unsoundness of mind.

The basis for the application is that it has become apparent that there is a conflict of the sort which prevents solicitors from continuing to act. Reliance is placed upon cl 13.4 of the Legal Profession (Solicitors) Rule 2007:

> “13.4 A solicitor must not unless exceptional circumstances warrant otherwise in the solicitor’s considered opinion:
> 13.4.1 appear for a client at any hearing, or
> 13.4.2 continue to act for a client,
> in a case in which it is known, or becomes apparent, that the solicitor will be required to give evidence material to the determination of contested issues before the court.”

There are a number of cases where it has been said that this is not an absolute rule but a guideline of prudence. In an appropriate case, it may well be that a solicitor would be well advised not to continue to act but, in the present case, there seem to be two difficulties in the way of the application.

The first is that no case has been cited to me where an injunction or other relief has been granted to the opposing side. There seems in the cases to which I have been referred little discussion of that aspect of the matter. It is not immediately obvious to me that a party opposing those whose solicitor is alleged to be in breach has the right in all cases to seek this relief. The rule is not designed to confer rights on opposing parties.

It may be that cases could be imagined where an opposing party could seek this relief because it was able to demonstrate a particular damage or prejudice which it suffers, or she suffers, by reason of the solicitors' conduct. However, there does not seem to be anything in the present case which would satisfy such a requirement. Absent authority, I would be reluctant to proceed on that basis in this case. I need not base my ultimate decision, however, on that aspect of the matter.

The rule and the cases where similar ideas have been expressed all are aimed at ensuring the public interest is preserved and that the interest of clients is preserved. In the present

case, the defendants do not want to have their solicitors withdrawn at a late stage of preparation for a large and complex trial and they assert that there is, in fact, no conflict of the sort which would give rise to the invocation of the rule.

The plaintiff says that the conflict arises in this way. She says that Mr Radford, a partner in the solicitors' firm, has made a statement pursuant to directions given for the preparation for trial in which he records a conversation and exhibits a number of documents, particularly affidavits given by other persons who are witnesses to the events in question.

Mr Radford's statement records how he interviewed particularly Mr Petschler, a solicitor, and Mr Hill, a solicitor who died about a year ago. He took a statement from Mr Hill and he made notes of what Mr Petschler told him. The statement and the notes are said to be in conflict with other evidence which Mr Petschler and Mr Hill had provided by way of affidavit.

I will assume for present purposes that there is such a conflict. The point is that there is no challenge to the integrity or accuracy of the evidence of Mr Radford and the other employee of the solicitors, Ms Anderson. Their evidence simply relates to the obtaining of the statements. It is not suggested that the statements were not obtained, nor is it suggested that there has been any tampering with the statements by either of those persons.

Whether the statement of Mr Radford and/or the statement of Ms Anderson will go into evidence at the trial remains an open question. It may be that Mr Petschler, for example, will give evidence in a way which satisfies the defendants and there will be no occasion for the use of Mr Radford's statement. It would seem to be useable only as evidence of a prior inconsistent statement. In the case of Mr Hill, it may be that the statement is admissible under the Evidence Act but, again, the conflict is between the statement of Mr Hill taken by Mr Radford and the earlier affidavit of Mr Hill. The rule is designed to avoid Mr Radford being put into a position of conflict and difficulty. It is not relevant when the conflict and difficulty is that of another witness.

There being no challenge to anything that Mr Radford has said, it seems to me that his evidence is quite uncontroversial. The weight which is given to the hearsay material which he produces, and whether or not it gets admitted, will be issues for the trial judge but it does not seem to me that he is in any position which requires him to stop acting.

For that reason, I dismiss the application.

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HIS HONOUR: In my judgment, this is an appropriate case for an order on the indemnity basis. Not only has the applicant lost, it has lost on precisely the ground that was flagged well in advance by the respondents who were willing, at an

early stage and even at a quite late stage, to allow the application to be withdrawn and without any penalties as to costs at all.

It is, I think, a matter of some concern that there is a flavour of irrational persistence in the application and a history which supports the inference that there was a motivation of delay in the application as well as the issues involving the merits.

The order therefore is application dismissed.

I order the applicant to pay the respondents' costs of the application, assessed on the indemnity basis.

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