

# SUPREME COURT OF QUEENSLAND

CITATION: *Colston v McMullen* [2011] QSC 60

PARTIES: **DOUGLAS BENJAMIN COLSTON**  
(plaintiff)

v

**BRIAN McMULLEN**  
(defendant)

FILE NO/S: 12108 and 12109 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 31 March 2011

DELIVERED AT: Brisbane

HEARING DATE: 10 March 2011

JUDGE: McMurdo J

ORDER: **In proceeding BS 12108/10, paragraphs 6 through 13, 15 through 18, 36 through 41, 52 through 57 and 104 through 109 of the statement of claim filed 8 November 2010 be struck out.**

**In proceeding BS 12109/10, paragraphs 8, 10 through 18, 22, 24, 27 and 28, 32 and 33, 42 and 43, 49 through 54, 58, 61, 63(ii), 63(iii), 64 through 82, 85, 86, 88 through 120, 122, 125 through 131, 134 through 150, 152 through 178, 180 through 186, 191 through 195, 206 through 210, 212 through 216 and 222 through 231 of the statement of claim filed 8 November 2010 be struck out.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADINGS – STATEMENT OF CLAIM – where there is an application to strike out parts of the statement of claim – whether parts of the statement of claim are irrelevant – whether parts of the statement of claim contain evidence by which material facts are to be proved

*Uniform Civil Procedure Rules 1999 (Qld)*, r 149, r 171

COUNSEL: The plaintiff appeared on his own behalf  
RT Whiteford for the defendant

SOLICITORS:           The plaintiff appeared on his own behalf  
                              McCowans Solicitors for the defendant

- [1] In each of these proceedings, there is an application to strike out parts of the statement of claim. For the most part, the defendant's argument is that those parts are irrelevant and that whilst they remain they will affect the expeditious determination of the case.<sup>1</sup> They are also said to offend the requirement that a pleading be as brief as the nature of the case permits and contain a statement of the material facts upon which the plaintiff relies but not the evidence by which those facts are to be proved.<sup>2</sup>

### **Background**

- [2] The plaintiff is the son of Malcolm Colston, who died in 2003, and Dawn Colston, who died in 2004. Malcolm Colston made a will appointing Dawn Colston as his executor and trustee and leaving all his property to her. She was quite ill by the time of his death and did not apply for probate. Malcolm Colston's estate remains unadministered.
- [3] Dawn Colston made a will appointing her brother, the defendant, as executor. Probate was granted of this will on 15 November 2004.
- [4] Dawn Colston's will gave \$25,000 to each of four nominated grandchildren, provided they turned 25. She gave the rest of her estate to be held on a discretionary trust called the Dawn Colston Estate Trust ("the Trust"). The defendant is the trustee of the Trust. The beneficiaries of the Trust include the plaintiff, the plaintiff's brother, Dawn Colston's grandchildren or any children of any of them as well as any company or other trust associated with those beneficiaries.
- [5] By cl 5.2 of her will, the income of the trust fund is to be distributed as the trustee determines, in his absolute discretion, on or prior to the end of each accounting period, which is a year ending 30 June. By cl 5.3(a), the trustee may accumulate part or all of the income derived in any accounting period, in which case it will form part of the capital of the trust fund.
- [6] By cl 5.4, on the vesting day the trustee is to hold the capital of the trust fund upon trust for the beneficiaries or any one or more of them exclusive of the other or others as the trustee in his absolute discretion determines.
- [7] Clause 5.5 provides that any determination of any trustee is to be recorded in a written minute to be signed by the trustee, upon which "it shall be effective and irrevocable".
- [8] By cl 5.7, a determination to apply any amount of income for any beneficiary may be made by placing the amount to the credit of the beneficiary in the books of the trust fund, by drawing a cheque for the amount made payable to or for the benefit of the beneficiary or by paying the amount in cash to or for the benefit of that beneficiary. Clause 5.7(d) provides that any income accruing to the trust fund and

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<sup>1</sup> *Uniform Civil Procedure Rules 1999* (Qld), r 171.

<sup>2</sup> *Uniform Civil Procedure Rules 1999* (Qld), r 149.

vesting in a beneficiary is to be held by the trustee “as a debt on demand owing to such person absolutely ...”.

- [9] Importantly for the plaintiff’s case, cl 5.8 of the will provides that in the event that the trustee fails to make a determination in respect of income distribution (or capital distribution), then such income is to be held for the plaintiff and his brother in equal shares absolutely.<sup>3</sup>
- [10] Clause 5.9 permits the trustee to apply the whole or any part of the income or capital of the fund towards the maintenance, education, medical expenses, advancement or for the general benefit of any beneficiary.
- [11] These two proceedings were commenced in 2010. There was an earlier case brought by the plaintiff against the defendant<sup>4</sup> (‘the 2008 case’) in which the plaintiff sought orders for the removal of the defendant as executor and trustee. In that matter, the originating application was dismissed by an order on 6 August 2010. The plaintiff has appealed against that decision and the judgment of the Court of Appeal is presently reserved. Neither side suggests that the outcome of the appeal should affect the present applications. But as I will discuss, the 2008 case is relevant to parts of the pleadings in these two cases.

### **BS 12108 of 2010**

- [12] The principal complaint in this proceeding is that the defendant owes the plaintiff \$1.083 million, upon the basis that there has been no determination by the defendant as trustee in respect of the distribution of income for any accounting period, beginning with the year ended 30 June 2004. The total said to be owing for the years 2005-2008, which the plaintiff says should have been paid to him, is \$1,083,007.68. He makes further claims for 50% of the undeclared income of the trust in the 2009 and 2010 years without quantifying his entitlement.
- [13] He also seeks an order that the defendant pay what he says should have been paid pursuant to an undertaking given, and a consent order made, in the 2008 case.
- [14] The defendant does not challenge the pleading insofar as it seeks that relief. It does not seek to have the whole of the case or the statement of claim struck out. But he challenges most of the pleading on one or more of the bases to which I have referred.
- [15] Paragraphs 6 through 13 of the statement of claim are challenged upon the same ground, which is that they plead the sources of the income of the Trust and thereby plead irrelevant facts. That submission must be upheld and nothing which Mr Colston said in the course of his lengthy address suggested otherwise. They will be struck out.
- [16] There is no objection to paragraph 14, which pleads, in effect, that the plaintiff received no income or capital distribution from the Trust in the 2005-2010 years. But then there is an objection to paragraphs 15 through 24 upon the ground that they are irrelevant.

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<sup>3</sup> Upon condition that each is living at the end of the accounting period.

<sup>4</sup> BS 12943/08.

- [17] Paragraphs 15 through 17 plead the facts of the income (not from the Trust) which the plaintiff did receive in 2005 and subsequently. Paragraph 18 pleads that his means tested Centrelink benefits received since 2005 have not been affected by any distributions from the Trust. The implication from that seems to be that there was no distribution to him. That does not follow and his Centrelink payments do not matter in this context. The matters in paragraph 15 through 18 are irrelevant and should be struck out.
- [18] Paragraphs 19 and 20 plead that tax returns for the Trust showed no income distributions being made to any beneficiary in the 2005, 2006 and 2007 financial years. Paragraph 21 alleges that those tax returns were based upon a set of accounts which have not been provided to the beneficiaries. Paragraphs 22 and 23 allege that on 3 March 2008, the trustee's accountant prepared profit and loss statements and balance sheets showing that there were no distributions of capital or income to any beneficiary in those three years. Paragraph 24 alleges that in December 2008, the defendant's accountant produced correspondence indicating that there had been no valid determinations relating to income or distributions for the four years 2005-2008.
- [19] Those paragraphs 19 through 24 are arguably evidence, rather than allegations of material facts. However, I am not persuaded to strike them out. There will not be any further disclosure or other steps required by their remaining in the pleading, and at least they would avoid the defendant being taken by surprise by those matters.
- [20] Paragraphs 29 through 41 are pleaded under the heading "False and misleading accounts of recent invention". The defendant argues that they are irrelevant. Paragraph 29 pleads that throughout 2009 and 2010, the defendant produced and relied upon "numerous faulty accounts pertaining to the operation of the discretionary testamentary trust", including accounts relied upon in affidavits in the 2008 case.
- [21] Paragraph 30 alleges that there was an attempt by the defendant's accountant to "retrospectively adjust the accounts" of the Trust by producing new profit and loss statements and balance sheets purporting to show distributions of capital and income to all beneficiaries other than the plaintiff. Paragraph 31 alleges that tax returns were filed showing such purported distributions as well as "at least one distribution to me – in the 2005 financial year".
- [22] I am not persuaded to strike out paragraphs 29 through 31. It seems to me that the alleged reconstruction of the accounts is clearly relevant to the plaintiff's case. Again, there is the question of whether this is a pleading of material facts or, instead, evidence. There should be no extra legal costs from these paragraphs remaining.
- [23] Paragraphs 32 through 35 allege that there was another set of accounts, this time prepared in March 2010, which were inconsistent with other accounts insofar as they represented that there were certain capital or income distributions. Again, these appear to be relevant to the plaintiff's case, in the sense that he will rely upon them as indicating that in truth, there were no determinations by the defendant within the accounting period and the apparent distributions are the result of accounting reconstructions. They will not be struck out.

- [24] Paragraph 36 alleges that concerns which arise from the reconstruction of the accounts “are currently among the issues that are raised in the Notice of Appeal” that has been filed in the 2008 case. The content of that notice of appeal is irrelevant to the present claim. Paragraph 36 will be struck out.
- [25] Paragraph 37 alleges that a firm of lawyers involved in the 2008 case then knew that the reconstructed accounts were false. Paragraph 38 asserts that concerns in that respect have also been raised in the plaintiff’s notice of appeal in the 2008 case. Paragraph 39 alleges that the Legal Services Commission has begun an investigation into the activity of that firm in relation to those matters. Paragraphs 40 and 41 allege that the plaintiff has had certain discussions with the Legal Services Commission upon this subject. Paragraphs 37 through 41 are irrelevant and should be struck out.
- [26] The challenge to paragraphs 60, 67, 74, 81, 88, 89, 90, 94, 95 and 96 involve a single point. Each contains an allegation that the plaintiff has asked the defendant for payment of what he says is his entitlement to 50% of the income of the Trust for a particular year, and that the defendant has failed to make that payment or to provide details of the income of the Trust. Different paragraphs are referable to different years of income. The defendant’s argument is that all of this is irrelevant to the existence or otherwise of a right in the plaintiff to be paid. The plaintiff’s claimed entitlement depends upon whether there was a determination by the required date, year by year, and if so what was that determination, rather than upon whether the plaintiff has made a demand, or the defendant has rejected it. That is undoubtedly correct. But the allegations are relevant because they demonstrate the need for the Court’s intervention by way of enforcing the Trust. They will not be struck out.
- [27] In paragraph 101 (to which there is no objection), the plaintiff pleads that the total of his claims for the 2005, 2006, 2007 and 2008 financial years for “compensation for Default Determinations that have been withheld” is \$1,083,007.68. In paragraph 102, he pleads that he has additional claims for 50% of the income of the Trust for the 2009 and 2010 years, as well as for interest. Then there is paragraph 103, to which there is an objection. It states that the plaintiff expects that some revision of his claims may be necessary upon an analysis of the relevant documents by a firm of accountants which the plaintiff intends to engage for the task. The defendant says that last allegation is irrelevant. Strictly speaking, that is correct. But the statement is no different from that commonly found in a pleading, which is to foreshadow the provision of further particulars after some investigation is undertaken. It will not be struck out.
- [28] Next there are challenges to paragraphs which complain of a breach of an undertaking and a consent order in the 2008 case. The pleading of this part of the case begins with paragraphs 25 through 28, to which no objection is taken. The plaintiff there alleges that the parties reached agreement in the 2008 case that there would be a cessation of “all Trust activity”, including any distribution of income.
- [29] Paragraph 42 alleges that the defendant undertook “to distribute income-related Trust documents” and paragraph 43 pleads that he has subsequently refused to do so. Paragraph 49 alleges that the plaintiff has asked the defendant to distribute copies of Trust documents. Paragraph 50 alleges the defendant’s refusal to do so. The defendant argues that these four paragraphs are irrelevant because no order is

sought in the proceedings for the production of these documents. However, an order is sought for compliance with the undertaking,<sup>5</sup> and I therefore reject the defendant's submission.

- [30] Paragraph 44 pleads that the plaintiff was advised by his solicitors in January 2009 that the defendant had also undertaken "to make payment of beneficiary expenses of the type that had been formerly met from the Trust". Paragraph 45 (to which there is no objection) pleads that there were consent orders providing for the payment of those expenses. In paragraph 46 (also not objected to), it is said that the defendant failed to comply with that order. But there is an objection then to paragraphs 47 and 48 which plead the sending of a r 444 letter in respect of those breaches and a failure to comply with the demands within that letter. The defendant submits that those paragraphs 47 and 48 are irrelevant. However, the relief claimed includes an order for the making of payments "identified in the r 444 letter served on the defendant". So again the matters pleaded are relevant to some relief which is claimed.
- [31] Paragraphs 52 through 54 allege that the defendant's then solicitors aided him in breaching the undertaking or undertakings and that the plaintiff has communicated with the Legal Services Commission about that matter. They are irrelevant allegations and those paragraphs will be struck out.
- [32] Paragraph 55 has the same defect, as well as other irrelevant material as to what the plaintiff proposes to do as the appellant in the 2008 case. It will be struck out.
- [33] Paragraphs 56 and 57 seem to do no more than foreshadow possible further claims, including for orders "providing for the formalisation of those undertakings". They are irrelevant and will be struck out.
- [34] Paragraph 104 alleges that the defendant gave false evidence in the 2008 case. This seems to be related to the relief claimed in paragraphs (i), (ii) and (iii), which seek orders which would have some impact upon the 2008 case. Presumably this claim of false evidence has been raised in the appeal in the 2008 case. Paragraphs 105 through 109 again plead complaints about the defendant's solicitors in the 2008 case and the plaintiff's communications with the Legal Services Commission about that matter. They are irrelevant allegations and will be struck out.
- [35] The outcome in proceeding BS 12108/10 is that paragraphs 6 through 13, 15 through 18, 36 through 41, 52 through 57 and 104 through 109 of the statement of claim will be struck out.

### **BS 12109 of 2010**

- [36] The defendant is sued in this proceeding as the so called executor of the will of Malcolm Colston and the executor of Dawn Colston.
- [37] There are several objections to that part of the pleading which complains that the defendant has failed to administer the estate of Malcolm Colston. The first is paragraph 8, which I accept should be struck out because of its irrelevant allegation as to the defendant's own business experience.

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<sup>5</sup> See (iv) of the prayer for relief.

- [38] Paragraphs 10 and 11 allege that he has asked the defendant for all details and documents related to the defendant's administration of Malcolm Colton's estate. The defendant says that these are irrelevant because the plaintiff does not seek an order in that respect. I accept that submission.
- [39] Paragraph 12 should be struck out because its vague and meaningless assertion that "shareholdings ... have yet to be fully administered".
- [40] Paragraphs 13 through 18 (again) allege that the defendant gave false evidence in the 2008 case, that his solicitors were involved in that misconduct and that the plaintiff has been corresponding with the Legal Services Commission about the matter. All of that is irrelevant to this proceeding also. Those paragraphs will be struck out.
- [41] Paragraph 35 alleges that on 31 May 2005, an ASIC gazette issued which showed the defendant acting for Malcolm Colston's estate and controlling a related superannuation fund. I will not strike this out. Arguably it is relevant to the case that the defendant has acted as an administrator of the estate of Malcolm Colston.
- [42] Paragraphs 42 and 43 seem to raise a case to the effect that more than \$100,000 remains in one estate or the other which relate to "legal costs". He complains that the defendant has not provided any explanation for those funds and, in particular, any information as to whether they are relevant to the estate of Malcolm Colston. The allegations are unintelligible and embarrassing. They should be struck out.
- [43] There is an objection to paragraphs 45 and 46 as irrelevant assertions about what the Australian Taxation Office has said about the responsibilities of an administrator of a deceased estate. But in context, it can be seen that this is relevant to the complaint made in paragraphs 47 and 48 (to which there is no objection), which is that the defendant has not finalised the accounts and tax returns for the estate of Malcolm Colston for the 2004-2010 financial years. Paragraphs 45 and 46 will not be struck out.
- [44] Paragraphs 49 through 54 are repetitions of paragraphs 13 through 18 and so will be struck out.
- [45] The next challenges relate to what the defendant describes as the plaintiff's detinue claim. The plaintiff complains that some of his goods have been placed in storage by the defendant, who has refused to return those goods to him. However, there is no claim for relief for the return of the goods, except in this indirect way: the plaintiff pleads that pursuant to a consent order in the 2008 case, the defendant was obliged to return that property to him and, that the defendant having failed to do so, the plaintiff has now "been served with a Rule 444 letter and other correspondence noting extensive failures in relation to the Consent Orders delivered on 6 January 2009". The prayer for relief seeks, in paragraph (vi), "[d]irections for ongoing compliance with those Consent Orders", but only "until such time as the related Appeal [in the 2008 case] has been determined". So in that indirect way, there seems to be a claim for the return of goods. But it is not pleaded as a claim in detinue. Rather, it is a claim for the enforcement of an order in the 2008 case, and only until the determination of the 2008 case. Subject to the outcome of the appeal, the 2008 case appears to have been dismissed. The relief claimed is therefore devoid of any effect and I would have been disposed to strike out nearly all of

paragraphs 19 through 33<sup>6</sup> had that been sought by the defendant. But I will confine myself to those paragraphs which are challenged.

- [46] Paragraph 22 should be struck out as an irrelevant allegation. It is not to the point that in proceedings in the Family Court, to which the defendant was not said to have been a party at that stage, there was some determination that the plaintiff was the owner of the property.
- [47] Paragraph 24 contains an irrelevant allegation that the defendant's solicitors advised the Family Court that they no longer represented the defendant in those proceedings. It will be struck out.
- [48] Paragraphs 27 and 28 pleads that the plaintiff has asked the defendant to produce the relevant contract for the storage of the goods and that the defendant has refused to do so. These will be struck out as irrelevant.
- [49] Paragraph 30 pleads the service upon the defendant of the r 444 letter and other correspondence. This is said to be irrelevant, as is the allegation that the defendant has failed to pay or reimburse "removal expenses to provide for the repatriation of [the plaintiff's] property held in his name [in storage]". But that allegation is relevant to his claim for the defendant to comply with the consent orders in the 2008 case. I will not strike out paragraph 30.
- [50] Paragraph 32 pleads that the plaintiff has told the defendant that he will be seeking a stay of the judgment at first instance in the 2008 case "to provide for ongoing compliance with the Consent Orders delivered on 6 January 2009". Paragraph 33 pleads that he has informed the defendant, that should he continue to refuse to make reimbursement or payment for expenses "of the type that have been formerly met by the Trust, as identified in the Rule 444 letter and other correspondence", then he will "pursue enforcement action in the Supreme Court". I am unable to see the relevance of these allegations even to his claims for enforcement of an order made in the 2008 case. Those paragraphs will be struck out.
- [51] The remaining challenges are to parts of the statement of claim which complain of the defendant's performance in the estate of Dawn Colston.
- [52] Paragraph 58 (again) irrelevantly pleads the defendant's own business experience and will be struck out.
- [53] Paragraph 59 pleads that the assets of the estate of Dawn Colston were expected to include certain property. There is no objection to that paragraph. But the defendant objects to paragraph 60, which alleges that the assets of that estate were expected to include also those that were left to Dawn Colston under the will of Malcolm Colston. That is said to be an irrelevant allegation because no relief is sought in respect of those assets. But it is arguably relevant because the pleading alleges that the defendant has wilfully defaulted in administering the estate of Dawn Colston. Paragraph 60 will not be struck out.
- [54] There are several challenges to paragraphs dealing with Dawn Colston's superannuation death benefit. This was the subject of cl 2.7 of her will. She there recorded that she may have an entitlement for amounts payable under a policy of

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<sup>6</sup> Save for paragraph 30 which is discussed below.



insurance and she requested that, if practicable, the benefits would be paid to the trustees of her will for distribution pursuant to it.

- [55] The plaintiff's case as to the death benefit is that it should have been applied by the defendant in his favour. He pleads that he was her sole dependant (paragraph 61) and that the defendant has failed "to consider and make equitable and tax-effective distributions of superannuation assets consolidated in the Estate to my mother's sole Dependant" (paragraph 63(ii)). Paragraphs 64 through 79 seem to be directed only to the point that the plaintiff was a dependant of his mother. Beginning with paragraph 121 there is a number of allegations under the heading "Failure to consolidate superannuation assets in the Estate and make equitable and tax-effective distribution to sole Dependant as noted in paragraph 63(i)-(ii) above". Paragraph 121 pleads, apparently correctly, the effect of cl 2.7 of Dawn Colston's will. Not surprisingly, there is no challenge to paragraph 121 because it demonstrates the flaw in this part of the plaintiff's case.
- [56] Paragraph 122 alleges that the defendant gave false evidence in the 2008 case, specifically in the respect that his mother had no dependant at the time of her death. He pleads in paragraph 125 that he was his mother's sole dependant. He alleges that the defendant has failed to consolidate his mother's superannuation assets within her residual estate (paragraph 123) but then alleges that the defendant has also "failed to exercise his discretion in respect of the payment of superannuation to my mother's Dependant" (paragraph 124). This appears to be a complaint as to the defendant's performance as trustee of the Trust. The defendant is sued in this proceeding as executor of the estate of Dawn Colston (as well as the supposed executor of the estate of Malcolm Colston). And there is no apparent basis for the allegation that the discretion had to be exercised in the way asserted in paragraph 124.
- [57] For these reasons the allegations, at least in paragraphs 61, 63(ii), 64 through 79, 125 through 131 and 134, are embarrassing as they are inconsistent with the case pleaded by the plaintiff that by cl 2.7 of the will the superannuation and death benefits were to be part of the residuary estate and thereby the Trust. They will be struck out.
- [58] The plaintiff also pleads, in paragraphs 136 through 143, that the assets of a superannuation fund, described as the Janfern Super Fund, should have been first paid into the estate but then paid to him as "my mother's sole Dependant". For the same reason, these paragraphs should be struck out. Paragraph 135 is not specifically objected to, but it should be struck out as part of that same case.
- [59] Paragraphs 80 through 82, 85, 86 and 88 through 114 are challenged on the basis that they are part of the case for the application of the death benefit in the plaintiff's favour. But it is far from clear that they are part of that case: they are allegations to the effect that the plaintiff was a dutiful son, in recognition of this Dawn Colston intended to make substantial gifts to him in her will and that the will provided for the Trust only to put property beyond the reach of the plaintiff's former de facto partner. These matters do not affect the defendant's duties according to the terms of the will and the Trust. They are irrelevant and will be struck out.
- [60] A further case sought to be raised by this pleading is that the plaintiff was "displaced" from his mother's house, although he was dependent upon her.

Paragraph 63(iii) alleges that this was a breach of trust committed by the defendant. The house became part of the residual estate and is now an asset of the Trust. There is no pleaded basis for the plaintiff to be entitled to live there. Accordingly, paragraphs 63(iii), 150 through 170 (including paras 151, 165, 166 and 167 which were not specifically challenged but which are part of the same case) and paragraph 184 will be struck out.

- [61] In his pleading in relation to Dawn Colston's estate, the plaintiff repeats several times his assertions that the defendant adduced false evidence in the 2008 case, that the defendant's solicitors were complicit in that misconduct and that the plaintiff has corresponded with the Legal Services Commission about that matter. These matters are irrelevant and will be struck out. They involve paragraphs 115 through 120, 122, 144 through 149, 180 through 183, 207 through 210 and 226 through 231.
- [62] Next there is a case to the effect that the defendant breached an undertaking given in the 2008 case to "cease all trust activity". He said that this was to include activity "related to the administration of my mother's Estate" (paragraph 173). In paragraphs 174 and 175, he alleges that in December 2009, the defendant conspired with the plaintiff's brother to breach that undertaking, by convening a meeting of Janfern Pty Ltd to alter that company's constitution and to remove him as a director. The defendant submits that there is no pleading of anything which was done which was in breach of the undertaking or of any other obligation owed by the defendant. The plaintiff seeks relief by way of "nullification of any activity otherwise undertaken by [the defendant] in breach of the undertakings ..." (paragraph (ii)(c) of the prayer for relief). However, he could not obtain relief to restore the constitution of Janfern Pty Ltd or to reinstate him as a director without at least joining that company and the others involved in the company, such as his brother. And I accept the submission that the pleading is deficient for not revealing the facts by which the alleged activity of the defendant in relation to this company was in breach of the undertaking. The result is that paragraphs 171 through 178, 185 and 186 will be struck out.
- [63] The next of the objections is to paragraphs which allege that the defendant, as executor of Dawn Colston's estate, failed to make distributions to all of her grandchildren. As I have noted, the will provided for a gift of \$25,000 to her grandchildren, but more precisely to four named grandchildren. One of those four is a child of the plaintiff. He pleads in paragraph 62 that he is the legal guardian of "three minor beneficiaries nominated in her Will", being his *three* children whom he names. His case relies upon the meaning of grandchildren, as defined in cl 2.5 of the will to be "those children who are the biological and/or adopted children of [Dawn Colston's] children". Accordingly, he says that there was a gift of \$25,000 to each of his children, not just the one who was named in the bequest. This is a point of construction of the will which was not properly raised by the present application. In particular, there was no oral argument for the defendant which addressed this question. Instead, the objections to this part of the case are that the pleading establishes no standing for the plaintiff to sue on behalf of his children, that the plaintiff has irrelevantly referred to the fact that this subject will be raised in his appeal in the 2008 case and that it has been the subject of his complaints to the Legal Services Commission. In that last respect, the pleading will be struck out but otherwise not in relation to this subject. More precisely, paragraphs 191 through 195 will be struck out. But the point about standing does not warrant the striking

out of other paragraphs on this subject, which could be relevant to the more general complaint that the defendant has failed to administer this estate.

- [64] Paragraphs 196 through 203 allege that the defendant has failed to administer the estate insofar as it included his mother's car. Paragraph 198 is singled out as irrelevant. In context however, it is relevant to this complaint and will not be struck out. Paragraphs 202 and 203 are challenged. They allege that the plaintiff has asked the defendant to do what is necessary in respect of the car and he has refused. I do not think that the paragraphs are so vague that they are embarrassing and largely unintelligible. They will not be struck out.
- [65] There is an objection to paragraph 205 which, read with paragraph 204 to which there is not an objection, alleges that the defendant has failed to consolidate Dawn Colston's shares in Janfern Pty Ltd as part of the estate. If paragraph 204 is not challenged, paragraph 205 should stand. Paragraph 206 asserts that the defendant's failure in respect of assets such as those shares and the car will be relevant to the appeal in the 2008 case. Paragraph 206 will be struck out.
- [66] Paragraphs 212 through 216 appear to make a number of complaints upon the basis that the defendant acted in breach of consent orders made in January 2009 in the 2008 case. The conduct complained of appears to be that in relation to the plaintiff's personal property which was allegedly dealt with by the defendant. That appears from the fact that these paragraphs are under a heading which refers back to paragraph 63(vii), which complains of the defendant's "making claims against my personal property and retaining same ... in the same activity identified in paragraphs 18-32 above". As at least much of those paragraphs will be struck out, so should these paragraphs which are dependent upon them. There are other problems with them which it is unnecessary to discuss. Paragraphs 212 through 216 will be struck out.
- [67] The plaintiff alleges in paragraph 63(vii) (the second of the subparagraphs so numbered) that the defendant failed to "prepare relevant accounts and comply with taxation obligations for the Estate in the 2005, 2006, 2007, 2008, 2009 and 2010 financial years". There is some pleading of that case in paragraphs 217 through 221. The defendant challenges paragraphs 218 and 219, which plead that the defendant has been responsible for lodging tax returns for the estate whilst it has not been fully administered, upon the basis that this obligation was "defined by material issued by the Australia (sic) Taxation Office". The reference to that material, I accept, is irrelevant. But it is not so serious as to warrant those paragraphs being struck out.
- [68] Paragraphs 222 and 223 plead that the plaintiff has asked the defendant "to provide details and all documents related to his administration of my mother's Estate, including, but not limited to those tasks undertaken by McCullough Robertson" and that the defendant has not provided that information. But production of such documents is not sought in the proceedings. These paragraphs are irrelevant and will be struck out.
- [69] Paragraphs 224 and 225 repeat paragraphs 42 and 43 and will be struck out.
- [70] The outcome in proceeding BS 12109/10 is that paragraphs 8, 10 through 18, 22, 24, 27 and 28, 32 and 33, 42 and 43, 49 through 54, 58, 61, 63(ii), 63(iii), 64

through 82, 85, 86, 88 through 120, 122, 125 through 131, 134 through 150, 152 through 178, 180 through 186, 191 through 195, 206 through 210, 212 through 216 and 222 through 231 will be struck out.

[71] I will hear the parties as to costs.