SUPREME COURT OF QUEENSLAND

CITATION:	*Wilson v Orreal* [2012] QSC 315
PARTIES:	**EDGAR WILSON by his Litigation Guardian David Edgar Wilson & Vanessa Berthelsen** (Plaintiff) And **DEBRA ANN ORREAL** (Defendant)
FILE NO/S:	S7/06; 1241/06 and 9490/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	19 October 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	8 October 2012
JUDGE:	McMeekin J
ORDERS:	1. The application brought by Ms Berthelsen and Mr David Wilson is dismissed; 2. Ms Berthelsen and Mr David Wilson are ordered to pay the costs of Ms Orreal and of the Public Trustee of and incidental to the application to set aside the orders of Applegarth J made on 19 August 2011 on the indemnity basis; 3. Ruth Chowdury is appointed to assess, and issue a certificate of assessment, with respect to the costs the subject of the order of Applegarth J made on 19 August 2011 (namely the defendant's costs of and incidental to the proceedings 07/2006) on the indemnity basis; and 4. Ms Berthelsen and Mr David Wilson are ordered to pay the costs of Ms Orreal of and incidental to the application to appoint Ms Chowdury on the standard basis. .
CATCHWORDS:	PRACTICE – SETTING ASIDE ORDER – where service is in issue – where fraud alleged

	Guardianship and Administration Act 2000 ss 26, 239
	Succession Act 1981 s 45
	Uniform Civil Procedure Rules 1999 rr 17, 31, 72, 93, 95, 112, 667
	Almack v Moore (1878) 2 LR Ir 90
	Re Brocklebank (1877) 6 Ch D 358
	South Brisbane Regional Health Authority v Taylor (1996) 186 CLR 541
	Sproule v Long [2000] QSC 232
	Stephenson v Geiss [1998] Qd R 542
	Wentworth v Rogers (No 5) (1986) 6 NSWLR 534
COUNSEL:	The applicant in person
	Mr Madders (solicitor) for the defendant
	Mr Agbejule (solicitor) for the Public Trustee of Queensland
SOLICITORS:	The applicant in person
	Charltons Lawyers for the defendant
	Official Solicitor to the Public Trustee Of Queensland

[1] **McMeekin J:** There are two applications before the court. In one the defendant, Ms Orreal, seeks that Ms Ruth Chowdury be appointed to assess the costs that Applegarth J ordered on 19 August 2011 be paid by the "purported litigation guardians" of the late Mr Edgar Wilson, a reference to Mr David Wilson and Ms Berthelsen. In the other Mr David Wilson and Ms Berthelsen apply, inter alia, to have Applegarth J's orders made on 19 August 2011 in three proceedings set aside on the grounds that the orders were made in the absence of "the Plaintiff" and were obtained by fraud.

[2] I will refer to Mr David Wilson and Ms Berthelsen as the applicants and Ms Orreal as the respondent. Ms Berthelsen appeared. She was not legally represented. Ms Berthelsen informed me that Mr David Wilson has signed the application. Mr David Wilson did not appear, apparently being content to let Ms Berthelsen represent his interests.

[3] If the orders of Applegarth J stand then there is no opposition to the orders sought by the respondent. I will turn then to the question raised by the applicants.

The Issues

[4] The application is brought pursuant to r 667(2)(a) and (b) *Uniform Civil Procedure Rules* 1999 (UCPR). The rule provides, so far as is relevant:

667 Setting aside

….

(2) The court may set aside an order at any time if—

(a) the order was made in the absence of a party; or

(b) the order was obtained by fraud; …"

[5] By the time the subject orders were made Mr Edgar Wilson had passed away. He died on 9 September 2006.

[6] It is accurate to say that the orders were made in the absence of the applicants in the sense that they were not physically present at the hearing at which the orders were made. It is in issue as to whether they were served with the material (consisting of three applications made by the respondent, two of which included applications that they pay her costs, and supporting affidavits and submissions) on which Applegarth J acted. The fraud contended for is that the court was misled into thinking that the relevant application and supporting affidavits had been served when not only they had not been but that the solicitor acting for Ms Orreal knew that service had not been effected.

[7] If the applicants could establish that there had not been proper service, that is service within the rules, of the relevant proceedings, and that the matter went ahead without their knowledge, then I would have no hesitation in setting aside the orders made and order that the application before Applegarth J be reheard. However, I am quite satisfied that the rules were complied with. I am also satisfied that the applicants were aware of the proceedings and chose not to attend. There remains a residuary discretion to set aside the orders which, as will be seen, I decline to exercise. I will explain my reasons.

Background

[8] First, it is necessary to say something of the background to the dispute. Mr David Wilson is the son of the late Mr Edgar Wilson and Ms Berthelsen is a friend of the Wilson family.

[9] At some point the respondent became friendly with Mr Edgar Wilson – Ms Berthelsen says that occurred in 2001. Certain gifts were made by Mr Edgar Wilson to Ms Orreal.

[10] On 16 August 2002 the Guardianship and Administration Tribunal (GAAT) appointed the Public Trustee as administrator for Mr Edgar Wilson for all financial matters.

[11] In March 2004 the GAAT directed that the Public Trustee investigate whether the respondent had unduly influenced Mr Wilson in the making of gifts to her. A joint tenancy then existing in respect of a property at Woodgate between the respondent and Mr Wilson was severed by the Public Trustee.

[12] On 15 February 2006 the Public Trustee filed an originating application (1241/2006) seeking the opinion of the court as to whether the joint tenancy should be reinstated. On 7 March 2006 and subject to certain undertakings provided by the respondent Byrne J ordered by consent that the parties do all

things necessary to reinstate the joint tenancy. Those undertakings substantially restricted the respondent's rights to deal with certain properties.

[13] On 15 March 2006 the GAAT appointed the applicants as administrators for financial matters for Mr Edgar Wilson, except for the carrying out of the orders of Byrne J, replacing the Public Trustee.

[14] On 18 April 2006 the matter (1241/06) returned to the court when Ms Orreal sought to be relieved of the burden of the undertakings that she had provided. Dutney J ordered that she have leave to apply to be relieved of the burden of those undertakings "in the event that no proceedings are commenced in relation to the properties[1] by 17 July 2006".

[15] On 30 May 2006 the Public Trustee advised the respondent's solicitors that the joint tenancy in respect of the Woodgate property had been reinstated.

[16] On the date mentioned in Dutney J's order, 17 July 2006, the applicants as litigation guardians for Mr Edgar Wilson commenced proceedings 07/2006. The Claim and Statement of Claim filed alleged that Mr Edgar Wilson lacked capacity at the time that he made various gifts to Ms Orreal and that Ms Orreal had acted unconscionably in her dealings with Mr Edgar Wilson and had exercised undue influence over him in obtaining these gifts.

[17] I observe that the proceedings were commenced in breach of r 93(3) UCPR which requires that a litigation guardian act only by solicitor. The applicants purported to act personally.

[18] I note that the Claim and Statement of Claim provided an address for service, a telephone contact and an email address in apparent compliance with r17 UCPR. The address for service provided was "36 Kepnock Road Bundaberg". The applicants have not sworn to the significance of that address but it would seem to be the residential address of Mr David Wilson.

[19] Because of the undertakings given by the respondent to the court on 7 March 2006 and the commencement of the proceedings on 17 July 2006 by the applicants the effect of Dutney J's order was that the respondent was not at liberty to deal with the properties the subject of the order.

[20] On 14 August 2006 a Notice of Intention to Defend was filed by the respondent in proceedings 07/2006.

[21] That was the last step taken in those proceedings before the matter came on before Applegarth J on 19 August 2011.

[22] By the present application filed by the applicants on 17 August 2012 they seek, inter alia, that Mr David Wilson be given leave to amend the Claim and Statement of Claim. What amendments are proposed is unknown.

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[1] A reference apparently to properties at Woodgate and 40 Stevenson Street. The Claim later filed by the applicants refers to these properties.

[23] On 11 June 2008 the respondent's solicitors advised the applicants that unless steps were taken to prosecute the proceedings the respondent would apply to strike them out for want of prosecution. It is worth noting that the communication was by letter served personally at the address for service provided for in the Claim and Mr David Wilson was identified as the person on whom the letter was served by the process server.[2]

[24] Ms Berthelsen responded to that communication by email of 26 June 2008.[3] She wrote:

> "Mr Wilson gave me copy of the letter you had served upon him recently, and I wish to advise that there have been some extenuating circumstances which relate to the pursuance of the Claim and Statement of Claim filed on 17th July 2006.
>
> Mr Wilson is now in a position to pursue the matter and would put forth his resonance (sic) if you were to proceed with an application to have the matter dismissed for want of prosecution…"

The Applications Before Applegarth J on 19 August 2011

[25] On 30 May 2011 the respondent filed an application in proceedings 07/2006 seeking that they be dismissed for want of prosecution and that her costs be paid by the applicants on the indemnity basis. Orders were sought by her in two other proceedings as well – 1241/06 and 9490/06.

[26] That last matter was an application brought by the respondent seeking the appointment of the Public Trustee to administer the estate of the late Mr Edgar Wilson. The respondent then thought that she was the executrix appointed under the last will of Mr Edgar Wilson and she wished to be relieved of her office. Subsequent to the filing of the application Mr David Wilson produced a later will in which he was appointed executor. Upon production of the will the respondent had her application adjourned. Before Applegarth J the respondent sought that her application be dismissed and that the applicants pay her costs on the indemnity basis.

[27] In proceeding 1241/06 the respondent again sought to be relieved of the undertakings provided in the hearing before Byrne J and that the application be otherwise dismissed and that her costs be paid by the applicants again on the indemnity basis.

Service of the Documents

[28] An affidavit has been filed by a law clerk in the employ of the respondent's solicitors showing that the documents in each of the three applications were served by posting them to the address for service shown on the Claim and

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2 Affidavit of Mr Madders filed 14 September 2012 para 6(u) and Ex MJM 10

3 Ex MJM 11 to the affidavit of Mr Madders filed 14 September 2012

Statement of Claim.[4] Mr David Wilson has not sworn that the documents were not received by him.

[29] The three applications came before Ann Lyons J on 1 July 2011. On 1 July 2011 Ms Berthelsen wrote to the associate to Ann Lyons J by email advising that she had not been served with any documents in any of the proceedings. The sender's email address displayed on the email was devanjul@bigpond.net.au. I note that that same email address appears on the application filed 17 August 2012 by the applicants.

[30] Ann Lyons J directed that all documents relating to the proceedings before her be served on the applicants at their address for service, at Ms Berthelsen's email address devanjul@bigpond.net.au, and on their residential addresses "as far as they are known".[5] The proceedings were adjourned to 19 August 2011.

[31] The respondent's solicitor, Mr Madders, has sworn[6] that in attempted compliance with the order of Ann Lyons J he served the documents in the various proceedings on the applicants by:

(a) forwarding an email on 28 July 2011 to devanjul@bigpond.net.au attaching the various court documents;[7]

(b) forwarding them by post to the address for service shown on the Claim on 9 August 2011;

(c) forwarding a letter by post enclosing the documents to an address at 3 Apollo Street Bundaberg on 9 August 2011, which address he had located though a search of the White Pages telephone directory, the search revealing that a DE Wilson lived there and Mr Madders thinking that it may be a new residential address of Mr David Wilson as he had heard nothing from the applicants despite service at the address for service prior to the hearing before Ann Lyons J.

[32] It is common ground that the Apollo Street address had nothing to do with the applicants.

[33] Mr Madders swears that in response to the email sent to devanjul@bigpond.net.au an electronic delivery receipt and notification was received indicating that the email had been successfully delivered.[8]

[34] The Public Trustee appeared at the hearing before me and tendered a letter[9] setting out a brief submission and placing before me affidavits that it had caused to be filed following the hearing before Ann Lyons J demonstrating compliance with the orders that her Honour made. Mr Agbejule, a managing lawyer at the Public Trustee's office in Brisbane, swore that he caused to be

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4 Affidavits of Mr Rowan sworn 16 June 2011 – Ex MJM 20 to affidavit of Mr Madders filed 14 September 2012

5 I take the terms of the order from the letter of Mr Agbejule (Ex 1) and the affidavit of Mr Madders filed 14 September 2012 para 6(ad)

6 Affidavit of Mr Madders filed 14 September 2012 para 9(l) and Ex MJM 21

7 While Mr Madders' affidavit reads 2012 and not 2011 at para 9(l)(III) that is clearly a typographical error – see Ex MJM 21

8 Affidavit of Mr Madders filed 14 September 2012 para 9(l)(IV) and Ex MJM 21

9 Ex 1

served on each of the applicants all of the material that was before Ann Lyons J, including the submissions that were handed up, by forwarding the material to the address for service and the email address, devanjul@bigpond.net.au, identified by Ann Lyons J. He also caused the submissions that were subsequently prepared by the respondent for the adjourned hearing to be served. He swore that he spoke with Ms Berthelsen and arranged for the material to be personally delivered to her. Similarly the material was personally delivered to Mr David Wilson. His material shows that each of the applicants signed a receipt form acknowledging the receipt of the documents listed in the letter signed. Those signatures appear over dates of 27 July 2011 (Mr Wilson) and 2 August 2011 (Ms Berthelsen).

[35] Mr Madders deposes, and he exhibits contemporaneous supporting documentation, that on 18 August 2011, the day before the adjourned hearing:

(a) he received a telephone call from Ms Berthelsen, in which she advised that she was unwell and not able to attend the hearing set for the next day. Ms Berthelsen asked that the hearing be "rescheduled". Mr Madders swears that he advised Ms Berthelsen that he had no instructions to adjourn the hearing, that she would need to apply to the court to have the matter adjourned, and that as far as he was concerned the matter was proceeding;[10]

(b) at 4pm he received an email apparently from Ms Berthelsen, her address being displayed on it, advising that neither she nor Mr Wilson would be attending the hearing. Ms Berthelsen expressly mentions matters 1241/06 and 07/2006. She also advised that she required a three month adjournment and that "the matters could possibly be resolved with the utilization of an ADR process";[11]

(c) he received a facsimile transmission apparently from Ms Berthelsen enclosing two medical certificates one each on behalf of Ms Berthelsen and Mr Wilson. The medical certificates relate that they are each "unfit for work" because of a "medical condition" in the case of one from "16/08/11 to 20/08/11" and in relation to the other from "16/08/11 to 22/08/11" without further explanation.[12] Ms Berthelsen swears that those certificates were also sent to the court for the hearing on 19 August 2011.[13]

[36] When the matters came on before Applegarth J on 19 August 2011 the applicants did not appear and final orders were made as sought in the respondent's various applications.

The Applicants' Case and My Response to It

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10 Affidavit of Mr Madders filed 14 September 2012 para 9(m) and Ex MJM 22

11 Affidavit of Mr Madders filed 14 September 2012 para 9(o) and Ex MJM 23

12 Affidavit of Mr Madders filed 14 September 2012 para 9(p) and Ex MJM 24

13 Affidavit of Ms Berthelsen filed 17 August 2012 para 21

[37] Ms Berthelsen swears that "Service was not affected at all".[14] She swears that neither she nor Mr Wilson knew anything of the proceedings, they had not been served with any documents, and knew nothing about the matters that were before the court.[15]

[38] She asserts that the 3 Apollo Street address was not the address of either herself or Mr David Wilson, that Mr Madders was "fully aware that [her] address for service was 937 Burnett Heads Road, Bundaberg", and that her only knowledge of the proceedings came from a phone call from the Public Trustee's office of 1 July 2011 which prompted her email to the court of that date.

[39] If it was intended, as I think it plainly was, to assert that the applicants' only knowledge of the matters before the court on 19 August 2011 came from a phone call on 1 July then the material from the Public Trustee is sufficient to dispose of those allegations as false and misleading.

[40] But there are several points that should be made. First there is no affidavit from Mr Wilson supporting the claims now asserted by Ms Berthelsen. I would expect that he would go on oath to assert his state of knowledge or ignorance if he wishes to have the court order set aside its orders on the ground that he had no knowledge of the proceedings.

[41] Second, 36 Kepnock Road is apparently Mr Wilson's residential address – at least deponents swear to serving Mr Wilson personally at that address in the past.[16] Absent some explanation it is very likely that he did in fact receive the letter and documents posted to him by Mr Rowan and Mr Madders as they have sworn.

[42] Third, there is no attempt made to explain the conversation sworn to by Mr Madders or the email and facsimile of 18 August that Ms Berthelsen sent to Mr Madders. It is clear from the email that Ms Berthelsen was very much alive to the fact that the hearing was to be on the following day. No complaint is made in the email of 18 August that Ms Berthelsen had not received any documents or did not understand what was to take place the following day. Mr Madders prepared a diary note immediately following the conversation of 18 August and he makes no record of any complaint that Ms Berthelsen did not know what was happening in court the following day or had no documents. Ms Berthelsen is recorded as having made a suggestion of settlement by payment of monies to the respondent. The plain inference from these communications is that Ms Berthelsen was very much alive to the issues that were before the court.

[43] Fourth, there is no attempt made to explain the electronic delivery receipt and notification that Mr Madders received upon emailing the various documents to Ms Berthelsen's email address on 28 July 2011. That address was used on 1 July 2011 by her in her communication to the court and is still being used by her. Again, absent some explanation, it is very likely that the documents were seen by Ms Berthelsen on or about the day they were sent.

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14 Affidavit of Ms Berthelsen filed 17 August 2012 para 9

15 Affidavit of Ms Berthelsen filed 17 August 2012 para 13

16 Affidavit of Mr Madders filed 14 September 2012 para 6(u) and Ex MJM 10; see also the affidavit of Mr Urry filed 29 June 2012 re personal service on Mr Wilson 28 May 2012

[44] Fifth, there was no claim made to the court on 19 August 2011 that Ms Berthelsen or Mr Wilson were unaware of the nature of the proceedings or had not been served with documents. It is clear that Ms Berthelsen was not shy about making such complaints – she made precisely that complaint by email to the court on 1 July. I observe that Ms Berthelsen has sworn that she has been to court over 30 times in the last six years[17] – many of those appearances being before me. She is very familiar with the court processes. There is not the slightest prospect of Ms Berthelsen not making such complaint if indeed she had not been served.

[45] Sixth, the inference to be drawn from Ms Berthelsen's own affidavit is that she was in fact in possession of the relevant documents and full well knew the hearing was to proceed on 19 August. At paragraph 17 she asserts that an officer of the Public Trustee provided to her "documents", there being no further explanation of their description, and at paragraph 20 she asserts that the same officer provided her with "certain information" again without any elaboration, and that she then intended to travel to Brisbane for the hearing. The failure to proffer full explanation is telling. Mr Agbejule's letter and affidavits make perfectly clear that the applicants were well aware of the applications, evidence and submissions that were before the court on 19 August 2011.

[46] I have no reason to doubt the sworn testimony of Mr Rowan, Mr Madders and Mr Agbejule.

[47] The following conclusions can be reached. If Ms Berthelsen's claim that service had not been affected "at all" is intended to be an assertion that service has not been affected in accordance with the rules then she is plainly wrong. Personal service of the application was not required (r 31(5) UCPR) and hence posting to the address for service was sufficient: r 112(1)(d) UCPR. Rule 17(6) UCPR provides that a party's address for service is the residential or business address required to be set out in the Claim (r 17(1)(a)(i) UCPR) and which was so provided here, 36 Kepnock Road Bundaberg. The sworn material establishes that service was affected at that address. It is irrelevant that that may not be her residential or business address – it was the address that Ms Berthelsen put forward as complying with the requirement in the rules that she supply such an address for service purposes. Delivery to the Apollo Street address does not reduce the efficacy of the service that was affected at the right address. Thus service has been affected in accordance with the rules.

[48] Service was affected after 1 July 2011 by email on Ms Berthelsen and there is no reason to think that it was not effective.

[49] The order of Ann Lyons J that service be affected at the residential address of the parties "so far as they are known" places no obligation on the respondent to serve any document at the residential address. Self evidently that obligation only arises if the address is known. Mr Madders' attempted service at the Apollo Street address, an address unrelated to the parties as it now turns out, is some proof that he did not in fact know Ms Berthelsen's address.

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17 Affidavit of Ms Berthelsen filed 17 August 2012 para 31

[50] Ms Berthelsen asserts that Mr Madders had previously acted for her and that he then learnt of her addresses (I note without any statement as to what her then addresses may have been).[18]

[51] Mr Madders denies ever having acted for Ms Berthelsen. Upon receiving Ms Berthelsen's affidavit he searched the records of his firm. He discovered that in 1993 another lawyer employed at the firm prepared a will on behalf of Ms Berthelsen, she then being known by her maiden name of Bauer. Also in 1993 another lawyer in the firm prepared a will for a Mr Derek Berthelsen – now Ms Berthelsen's husband. In 2006 another lawyer within the firm was engaged in relation to the conveyance of a commercial property on behalf of a company associated with the Berthelsen's, Devanjul Pty Ltd. Mr Madders swears that he has never acted personally for Ms Berthelsen or her husband in relation to this related entity and was unaware that his firm had ever done so before his search of the records.

[52] Apart from her bare assertion Ms Berthelsen offers no proof whatever that Mr Madders ever did act personally for her or in relation to any of these matters. There is no evidence at all that Mr Madders, still less the respondent, had any knowledge of the residential address of Ms Berthelsen in the period July to August 2011. The order of Ann Lyons J has not been breached. And this is sufficient to dispose of any complaint of Mr Madders acting when in a conflict situation – an argument mentioned before me but not previously raised by the applicants with Mr Madders or the court.

[53] To the extent that Ms Berthelsen claims that she has not in fact received notice of the proceedings, and that is the plain meaning of paragraph 13 of her affidavit, then I do not accept her assertion. If Ms Berthelsen was ignorant on 18 August 2011 of the nature of the matters that were to come before the court on the following day and what documents were before the court then she well knew that she need only contact the solicitor acting for the respondent to be fully informed or make her difficulty known to the court. She did make that contact with the solicitor and sought no such assistance. Her telephone call and email of 18 August suggests that she was alive to the issues that were to come before the court. Her failure to make any complaint of the type she now makes either to Mr Madders or to the court makes it highly improbable that she had not received the relevant documents. Mr Agbejule's material shows that it is plain that she did.

[54] I am satisfied that the applicants had in fact received all relevant documents and were thus well aware of the proceedings before the court on 19 August 2011.

Fraud

[55] As I apprehend the complaint made, the fraud alleged relates to the purported service at the Apollo Street address and the informing of the court that service had been affected at that address. I am satisfied that there was no fraud involved in Mr Madders' conduct.

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[18] Affidavit of Ms Berthelsen filed 17 August 2012 para 28(c)

[56] Before turning to the relevant matters I observe that it is doubtful that an application of this type, at least without further directions, is normally an appropriate vehicle for the disposition of such serious allegations. As Kirby P observed in *Wentworth v Rogers (No 5)*: "As in all actions based on fraud, particulars of the fraud claimed must be exactly given and the allegations must be established by the strict proof which such a charge requires".[19] However here, given what I perceive to be the very limited scope of the argument and the lack of any evidence proffered to support it, I consider that I can and should deal with the issue raised.

[57] Ms Berthelsen's theory is that service was deliberately undertaken at the wrong address in order to keep her in the dark as to the matters before the court.[20] Apart from the lack of any proof to support the theory it falls down at several levels.

[58] First, it conveniently ignores the service that had been affected personally by the Public Trustee and at the address for service and at the email address by both the Public Trustee and the respondent.

[59] Second, Mr Madders would of course have been fully aware that any order made by the court without proper service would be set aside if made in the absence of a party. Given that his client was seeking costs it was inevitable that such a deception would come to light. I suspect that dishonest solicitors, which is the character Ms Berthelsen attributes to Mr Madders, do not like getting caught out. I should say that not a skerrick of evidence was advanced to support that characterisation and there is not the slightest reason to think Mr Madders is anything but honest and diligent.

[60] Third, there is a simple explanation for the service at the Apollo Street address. Mr Madders has sworn to that explanation. The court was advised that a search of the White Pages had shown the address to be that of one "DE Wilson". The initials and name match that of Mr David Wilson. That was the assumption upon which documents were served at that address. Mr Madders did not put the matter any higher in his affidavit.[21] So far as Mr Madders knew that service may have been effective. It was only after the date of posting to that address that any communication was received from Ms Berthelsen. The nature of the communications received from Ms Berthelsen were not such as were likely to alert Mr Madders to there being any continuing difficulty with service. Indeed I am confident that there were no such difficulties.

[61] This alternative basis advanced for the setting aside of the orders has no merit.

The Exercise of the Discretion

[62] The orders were made in the physical absence of the applicants and that is sufficient to ground the jurisdiction of the court to set aside the orders

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19 (1986) 6 NSWLR 534 at 538

20 See affidavit of Ms Berthelsen filed 17 August 2012 paras 13-15 and 25

21 See affidavit of Mr Madders filed by leave 1 July 2011 paras 5 -6

previously made: *Sproule v Long* [2001] 2 Qd R 335; [2000] QSC 232 per Mackenzie J at [7].

[63] The rules are silent as to how that discretion once enlivened, should be exercised. Any such discretion should of course be exercised if the interests of justice require that be done. Presumably the rule was primarily intended to provide relief where a party was unaware of the proceeding at which the orders were made. But the rule by its terms is not so restricted.

[64] Matters relevant to the exercise of the discretion could potentially include whether there was proper service, whether the applicants in fact knew of the proceedings and if so what excuse is given for non attendance, where there is delay what explanation is proffered for it, what impact any delay might have had, and whether it is shown that the orders made work some injustice. It seems to me that a very strong case would need to be shown if the only real purpose of the setting aside of the orders was to avoid the orders for costs originally made.

[65] The fact that there was proper service and that the applicants were aware that the matters were before the court on 19 August 2011 are each against an exercise of the discretion to set aside the orders, but not determinative.

[66] The explanation offered for the non attendance is that neither of the applicants felt well enough to attend. I make two observations. First, no medical evidence has ever been proffered that either of the applicants was so unfit as to be unable to attend court. A certificate that they were "unfit for work" does not do so. No certification was made that either of them was unable to attend court, or attend court by telephone. The certificates provided do not show that any examination was conducted and, if it was, what observations were made by the certifying practitioner.

[67] Ms Berthelsen now asserts that Mr Wilson was attacked by a savage dog on an unspecified date and "was unable to walk properly".[22] Ms Berthelsen does not explain how she can speak of Mr Wilson's condition. Mr Wilson has not sworn an affidavit. No medical records are produced.

[68] Ms Berthelsen says that she was "stricken by a deadly chest virus" that caused an extreme coughing fit on 16 August 2011 leading to retinal detachment and right eye blindness and that by 19 August 2011 she had lost her voice.[23] No independent evidence is advanced to support either statement but her claim to have suffered the retinal detachment was made by her in her email of 18 August 2011.

[69] The second observation I make is, accepting that the applicants were in the physical condition that Ms Berthelsen now asserts, that does not demonstrate that Mr Wilson could not have attended the court on 19 August 2011, at least by telephone, and offers no explanation as to why no material was filed by either applicant beforehand. Given Ms Berthelsen's activities that Mr Madders

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22 Affidavit of Ms Berthelsen filed 17 August 2012 para 20

23 Affidavit of Ms Berthelsen filed 17 August 2012 para 20

could speak of in the days leading up to the hearing she was perfectly capable of writing emails and engaging in telephone calls.

[70] Given my earlier findings as to service each of the applicants could have, if they wished, put before the court affidavit material responding to the applications in the weeks before the hearing. They chose not to do so.

[71] So there was a deliberate choice by the applicants not to defend their position before Applegarth J. That too is against the exercise of the discretion to set aside the orders.

[72] It is relevant that a very long period has passed since the orders were made. The application to set aside the orders was filed almost one year after they were made, on 17 August 2012. There are two points to consider. One is that in the meantime the respondent has incurred further costs in retaining her solicitors to prepare the costs statement and take the necessary steps – of which the application that she has before the court is one - to enforce the orders for costs made in her favour and now sought to be set aside. A prompt response to the making of the orders would have averted the incurring of what may have been unnecessary costs.

[73] The second relevant matter is that any long delay affects the quality of justice. The issues raised by the substantive proceedings (07/2006) concern the capacities of Mr Edgar Wilson in 2001 and the nature of the then relationship between him and the respondent. That the court would have any confidence in determining such questions fairly and accurately more than a decade after the relevant events may be doubted. But it seems inevitable that relevant evidence will almost certainly have been lost in the meantime or now not be ascertainable. It may be that Mr Edgar Wilson was never fit to give evidence of these matters but he has since died and his testimony is not available. The discussion by McHugh J in *South Brisbane Regional Health Authority v Taylor* of the problems inherent in a long delay is apposite:

> "The enactment of time limitations has been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates". Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, "what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be

decided on less evidence than was available to the parties at the time that the cause of action arose."[24]

[74] Allied with that concern about delay is that no good explanation or excuse has been offered for that delay. Despite knowing the matters were before the court on 19 August 2011 the applicants took no steps to discover what occurred at the hearing. The applications made clear by their terms that orders for costs were being sought personally against each of the applicants. That gave the applicants every reason to make enquiry as to the outcome of the proceedings. At best for their case they had sought that the applications be adjourned perhaps for three months, perhaps until their certified incapacities expired. Yet they received no word of any such adjournment. Neither applicant swears as to what they believed the situation to be following the hearing. No attempt was made to contact the respondent's solicitor or the court or the Public Trustee to find out the outcome. The inference is that they appreciated that they had probably been unsuccessful in delaying the matter further.

[75] The only excuse proffered is Ms Berthelsen's claim that she considered that the application was irrelevant to her as she was only a "go-between contact" for the Public Trustee and Mr David Wilson.[25] That excuse is not available to Mr Wilson. And whatever view Ms Berthelsen entertained of her position it was evident to her, given the application that she pay costs personally, that that view was not shared by the respondent. Nor does it seem to have been her view in July and August 2011 – there was no such statement by her to Mr Madders or the court.

[76] The applicants contend that the first they knew of the orders having been made was the service on them of the respondent's costs statement. That occurred on 28 and 30 May 2012 respectively.[26] While not expressly stated Ms Berthelsen seems to advance her health as the reason for the further delay in seeking to set aside the orders. Ms Berthelsen speaks of being hospitalised on four occasions before receiving the respondent's application to have a costs assessor appointed.[27] Mr Wilson offers no explanation.

[77] I note that Ms Berthelsen has appeared before me on 15 May 2012, 5 June 2012, 15 June 2012, 17 August 2012 and 27 August 2012 in relation to other matters as well as this one. While there have been references on occasions to health problems she was fit enough to attend court, file material and argue her cause at least from time to time throughout the period since May.

[78] Ms Berthelsen swears that upon receiving the costs statement she "placed the documents aside and went back to sleep".[28] She noted the parties referred to in the "header" and considered that they did not concern her. Why that is so is puzzling given that she is named in the heading of the costs statement and given that the respondent had gone to the trouble of effecting personal service on her. This is a reference again to her view that because she was litigation guardian

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24 (1996) 186 CLR 541 at 551 (citations omitted)

25 Affidavit of Ms Berthelsen filed 17 August 2012 para 18

26 Affidavit of Mr Urry Ex THR 3 and THR 4 to the affidavit of Mr Rowan filed 16 July 2012

27 Affidavit of Ms Berthelsen filed 17 August 2012 para 22.

28 Affidavit of Ms Berthelsen filed 17 August 2012 para 22

and because Mr Edgar Wilson had passed away, the matter did not concern her. Given her knowledge that the applications before the court in August 2011 had been for a costs order personally against her, Ms Berthelsen's attitude to the service of the costs statement on her is remarkable.

[79] Ms Berthelsen's attitude that she now professes that these proceedings (ie 07/2006) had nothing to do with her is plainly wrong. She points out that upon the death of Mr Wilson her capacity to act for him came to an end. That is so: s 26(1)(e) *Guardianship and Administration Act* 2000. But the operation of that Act does not affect the operation of the rules applicable to litigation guardians: s 239 *Guardianship and Administration Act* 2000. So Ms Berthelsen and Mr Wilson remained as litigation guardians until discharged.[29] The court had power to remove them (r 95(2) UCPR) but no application was ever made to have them discharged.

[80] It is well established that one reason for requiring that a litigation guardian be appointed for a person having an incapacity is so that there would be a person answerable to the defendant for the costs incurred in the proceedings.[30] That is necessary because a person under a legal disability cannot incur liability for charges and expenses: *Fearns v Young* (1804) 10 Ves Jun 184; 32 ER 815 applied by Philp J in *Phillips v Munro* [1957] St R Qd 427 at 431, cited by Lee J in *Stephenson v Geiss* [1998] Qd R 542 at 557. There is nothing in the *Guardianship and Administration Act* 2000 or the rules to suggest that the litigation guardians cease to be responsible for the costs of the proceedings simply upon the death of the plaintiff for whom they act. The proceedings would then be stayed (r 72 UCPR) and the right of action would vest in any executor appointed by the deceased's last will.[31]

[81] A peculiar feature of the case is that neither applicant took any step to have themselves replaced on the record by the executor of the estate – a position that both assert was properly held by Mr David Wilson.[32]

[82] I note that Ms Berthelsen does not swear to her understanding of what were the obligations that she took on when she signed the consent to be litigation guardian, and she expressly does not swear that she was unaware that she became liable personally for the costs incurred.

[83] But assuming that ignorance, at its highest Ms Berthelsen says that she operated under a mistaken view of her obligations to the court and to the respondent and so was unconcerned as to the outcome of the proceedings before Applegarth J

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29 *Almack v Moore* (1878) 2 LR Ir 90 at 93

30 *Re Brocklebank* (1877) 6 Ch D 358; *Farrell v Royal Kings Park Tennis Club* (2007) WASCA 173 at [17]

31 Section 45 *Succession Act* 1981

32 That appears from an email sent on 29 September 2006 by Ms Berthelsen to Mr Madders on behalf of herself and Mr Wilson advising that the respondent was not the executor of the last will of Mr Edgar Wilson (as the respondent then thought) but that "the executor of the 'Last Will' is in possession of all necessary documents etc." (See affidavit of Mr Madders filed 14 September 2012 para 6(x) and Ex MJM 12) This was plainly a reference to Mr David Wilson given the production by him of the claimed last will dated 27 December 2002 shortly thereafter.

and ignored the service on her of the costs statement. Mr David Wilson does not advance this or any excuse at all.

[84] Generally speaking ignorance of the true legal position offers no excuse and I cannot see that it ought to here. Quite apart from the mischief that would be caused if such ignorance were to afford scope for relief the applicants here chose to act personally when the rules expressly provided that they should not. Their ignorance of their true position, if indeed that impacted on any act or omission of theirs, was entirely of their own doing as any solicitor would have made them aware of their obligations in taking on the role of litigation guardian.

[85] As well there appears to have been a complete disregard for their own interests given that orders were sought personally against them.

[86] These aspects of the matter do not require that the discretion be exercised against the applicants but again count against an exercise of the discretion in favour of the applicants.

[87] Against this background the only remaining matter to consider which might justify the discretion being exercised to set aside the orders of the court is if they work some injustice. The only claimed injustice is Ms Berthelsen's assertion that it is unfair that she be exposed to costs, the proceedings having nothing to do with her. That is simply wrong.

[88] Mr David Wilson suggests no basis as to why it would be unjust that the orders stand.

[89] Nor is it apparent that there was ever any merit in the proceedings. It is not irrelevant that in 2004 the Public Trustee was charged with the task of examining the same issue as raised by these proceedings and finally determined to consent to reinstate the joint tenancy previously severed. Thus an independent body, highly skilled in these matters, was unable to conclude that there had been any improper conduct by the respondent at a time much closer to the events.

[90] What injustice there is would seem to lie in permitting the proceedings to go ahead.

[91] Even now the applicants propose to amend the Claim and Statement of Claim, to what end is not revealed. A trial of the proceedings is still some way off. The chances of a fair trial grow ever more remote as each day passes. The only persons potentially adversely affected by the ending of the proceedings would appear to be the beneficiaries of Mr Edgar Wilson's estate. According to the will that the applicants advance Mr David Wilson is the sole beneficiary of that estate.

[92] Nor is it unjust that the applicants protect the respondent for the costs that she has incurred. Both applicants were plainly aware that the respondent was bound by her undertakings that restricted her rights so long as the proceedings remained on foot. Both were aware too that the respondent wished to be

relieved of those undertakings as long ago as 2006. The respondent complained of the lack of prosecution in 2008. That prompted a response that the applicants had their reasons for their delay. Both were well aware that the action was not being advanced. Ms Berthelsen, I note, does not depose to any discussion between her and Mr Wilson following the death of Mr Edgar Wilson as to what the proposed future conduct of the proceedings ought to be. She does not claim that she was under any impression that Mr Wilson was taking any steps to take over the conduct of the proceedings in his capacity as executor. Both were completely unconcerned to progress the action.

[93] The respondent submitted to Applegarth J that he could draw an inference that the proceedings had been commenced for an improper purpose, namely to prevent the respondent exercising her rights in relation to the properties the subject of the undertakings and to enable the applicants to transfer the interest of Mr Edgar Wilson in those properties to another entity and effectively to themselves.[33] According to searches carried out by the respondent's solicitor the applicants severed the previously existing joint tenancy in the Woodgate property a few weeks before Mr Edgar Wilson's death and they then transferred his interest (or perhaps the interest of his estate) to a company under their control, Devanjul Pty Ltd, as trustee for a trust of which they were beneficiaries, two months later.[34] By what authority they did so is not apparent to me.[35]

[94] So far the only practical effect of the institution of the proceedings 07/2006 was to prevent the respondent dealing with her interests in two properties. The actions of the applicants remain unexplained by them. The onus is plainly on them to show that it is unjust that the orders stand. They have not discharged that onus.

Summary

[95] In proceedings 9490/2006 the applicants seek that the orders be set aside but that the application remain dismissed and the respondent pay the costs "of and incidental to that matter". The sole purpose then of setting aside the orders is to saddle the respondent with a burden of costs. It is far from clear that any person other than the respondent incurred any costs in relation to that application. She incurred those costs because, when asked, the applicants did not produce the will of Mr Edgar Wilson that they asserted was his last will. Upon the production of the will after the application was filed it was adjourned and no further step taken. No attempt has been made to show that there is any good reason to impose an order for costs on the respondent, the application having

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33 Submission of Mr Steele of counsel filed by leave 19 August 2011 para 25

34 Affidavit of Mr Madders filed 14 September 2012 para 6(o) Ex MJM 7

35 If the transfer was done while Mr Edgar Wilson was alive then it was plainly a "conflict transaction" requiring the authorisation of the GAAT (s 37 *Guardianship and Administration Act* 2000). If the transfer was done after death then, as already mentioned, the applicants' authority to act on behalf of Mr Edgar Wilson ceased upon his death and they could not have validly acted. And Mr David Wilson's authority to act on behalf of his father's estate would require that he first obtain probate of the will appointing him as executor which he apparently has never done.

been brought apparently in good faith and entirely appropriately. No attempt has been made to show that the orders made were unjust.

[96] In proceedings 1241/2006 the applicants seek that Mr David Wilson be ordered to apply for probate within 28 days, that any monies paid out by the Public Trustee "to any of the parties…get returned to the trust account that the Public Trustee hold (sic) on Mr Edgar Wilson's behalf", and that costs be reserved. There is no need to set aside the orders made to allow Mr David Wilson to apply for probate. If he is of the view that his father had capacity to make the will of 27 December 2002, despite that being four months after the Public Trustee was appointed administrator of his father's affairs, then he should make that application. The distribution of monies by the Public Trustee was not a matter before Applegarth J. If the executor, or administrator, of Mr Edgar Wilson's estate has any concerns about such distributions then that person can bring the necessary proceedings. The applicants have not demonstrated any justice in the initial requirement that the respondent supply the undertakings or in their continuation. She has been put to expense because of allegations yet to be shown to have any merit. Again there is no demonstrated injustice in letting the orders of Applegarth J stand.

[97] With respect to proceedings 07/2006, it was the applicants who brought these proceedings. They did not do so not at Mr Edgar Wilson's behest, he having long before lost capacity, but of their own volition. They deliberately sought to interfere with the respondent's property rights. The only practical effect of the proceedings has been to preserve undertakings that greatly restrict the respondent's rights. They made serious allegations of impropriety against her. In the five years that passed before the matter came before Applegarth J no step had been taken by them to prosecute the action. The respondent has deposed to the stress both financial and emotional that the proceedings have caused her.[36] There is nothing unjust, and much justice, in letting the orders stand that the proceedings be dismissed. There is nothing unjust in making the applicants liable for the costs that they have forced the respondent to incur.

[98] I am quite satisfied that the applicants brought this application on a false basis. They knew full well that they had been served with all relevant material before the matter came on before Applegarth J. They have made serious allegations of gross impropriety against a solicitor which they knew to be wholly unjustified. It is only just that they pay costs of this application on the indemnity basis.[37]

[99] The orders will be:

(a) The application brought by Ms Berthelsen and Mr David Wilson is dismissed;

(b) Ms Berthelsen and Mr David Wilson are ordered to pay the costs of Ms Orreal and of the Public Trustee of and incidental to the application to set aside the orders of Applegarth J made on 19 August 2011 on the indemnity basis;

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36 Affidavit of Ms Orreal sworn 3 May 2011 filed in the Bundaberg registry paras 15-33

37 See the discussion by Sheppard J of the relevant principles in *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248 at 257

(c) Ruth Chowdury is appointed to assess, and issue a certificate of assessment, with respect to the costs the subject of the order of Applegarth J made on 19 August 2011 (namely the defendant's costs of and incidental to the proceedings 07/2006) on the indemnity basis; and

(d) Ms Berthelsen and Mr David Wilson are ordered to pay the costs of Ms Orreal of and incidental to the application to appoint Ms Chowdury on the standard basis.