

SUPREME COURT OF QUEENSLAND

CITATION: *Kebbell v Reynolds & anor* [2012] QSC 88

PARTIES: **NICHOLAS DAVID JOHN KEBBELL**
(Applicant)
v
DEBBIE REYNOLDS
(First Respondent)
TRACEY SHORTEN
(Second Respondent)

FILE NO/S: 96 of 2012

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 30 March 2012

DELIVERED AT: Cairns

HEARING DATE: 30 March 2012 (ex tempore)

JUDGE: Henry J

ORDER:

1. Pursuant to s 106(5) of the *Powers of Attorney Act 1998* (Qld) the time in which an application for compensation pursuant to s 106 of the *Powers of Attorney Act 1998* can be made by the estate of the deceased, Lilian Joan Kebbell, is extended until Thursday, 19 July 2012 4:30pm; and
2. that the applicant's costs of and incidental to this application be paid from the estate of the deceased on an indemnity basis; and
3. there be liberty to apply on the giving of two days notice in writing.

CATCHWORDS: ESTATE AND SUCCESSION LAW – POWERS OF ATTORNEY – IN GENERAL – where an extension of time was sought for the making of an application for relief under s 106(5) of the *Powers of Attorney Act 1998* (Qld) – whether time should be extended – where respondents delayed in providing a copy of the power of attorney to the applicant

Powers of Attorney Act 1998 (Qld) ss 87, 106

Moylan v Rickard [2010] QSC 327.
Smith v Glegg [2004] QSC 443.

HIS HONOUR: In this matter the applicant seeks an order pursuant to section 106(5) of the *Powers of Attorney Act 1988* (Qld) that the Court extend the time in which an application for compensation pursuant to section 106 of the *Powers of Attorney Act 1998* can be made by the estate of the deceased. The application seeks an extension till the end of this year.

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Section 106 of the *Powers of Attorney Act* relevantly provides:

"(1) An attorney may be ordered by a Court to compensate the principal (or, if the principal has died, the principal's estate) for a loss caused by the attorney's failure to comply with this Act in the exercise of a power...

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(3) If the principal or attorney has died the application for compensation must be made to a Court within six months after the death ...

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(5) A Court may extend the application time..."

The nature of an application of this kind was considered with some convenient overview by Lyons J in *Moylan v. Rickard* [2010] QSC 327. In that particular matter I note his Honour at paragraph 116 said:

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"I also consider the following factors to be relevant:

(a) the PA Act is plainly concerned to ensure that attorneys comply with their duties to their principal;

(b) the PA Act seeks to create remedies where attorneys fail to comply with those duties;

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(c) the applicant has established a right of relief under section 106 subject to an extension of the time for

making the application;

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(d) the respondents themselves were the beneficiaries of their failure to comply with the duties imposed on them as attorneys;

(e) as was pointed out in Ede, a Court should not readily exercise its discretion to enable a fiduciary who was in breach of his fiduciary duty to avoid accounting for that breach to the fiduciary's principal."

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It is submitted by the applicant that considerations of a similar kind, although not identical, arise here.

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The deceased died on the 7th of October 2011, so the section 106 application would presumably need to be made in the normal course by either the 6th or the 7th of April 2011, depending on the actual count of the six month period. In any event, it is at approximately that time.

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The material suggests that the deceased entered into a power of attorney in favour of her daughter, Debra Reynolds. The executor did not have a copy of the power of attorney, but was generally aware of its existence. The executor properly sought to obtain a copy of the power of attorney. It did so through correspondence with the solicitors for Ms Reynolds. It requested the power of attorney on the 16th of December 2011, the 23rd of December 2011, the 6th of March 2012 and the 14th of March 2012. The power of attorney was not ultimately provided until its annexure to a letter, dated the 21st of March, received by the applicant's solicitors on the 22nd of

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March, by which time they had filed this application, and
there remained only 11 working days until the expiration of
the time to comply with the period identified in section 106.

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The failure to provide a copy of the power of attorney earlier
is, on the materials before me, unexplained. Indeed, no
evidence is filed on Ms Reynolds' behalf. There is, however,
some correspondence properly filed by the applicants, written
by solicitors for Ms Reynolds, which makes reference to her
state of ill-health. However, there is insufficient material
in that correspondence to divine a sensible explanation for
the prolonged period during which there was a failure to
respond to the perfectly reasonable request of the solicitors
for the executor for a copy of the power of attorney.

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That placed the applicant at a clear disadvantage in having
its house in order, in order to properly determine whether or
not it ought make an application for compensation under
section 106 and, moreover, meant it was completely unrealistic
that it could arrive at an informed decision as to whether to
make such an application by the expiration of the six month
period, a period which is now due to lapse in approximately a
week's time.

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One of the submissions, as I apprehend it, made on behalf of
Ms Reynolds appears to be that there is no difficulty in not
bringing the application for an extension prior to a lapse of
the period. While it is probably correct that a party would
not be prohibited from bringing an application for an

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extension after the expiration of the six month period, that party's position in delaying until till then would obviously be weakened by reason of that passage of time.

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The aspect of delay as a consideration weighing against extension is not an aspect that the solicitor for Ms Reynolds alone can waive. At this point it is unknown whether or not a delay in the making of the application might prejudice persons other than Ms Reynolds.

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A representation was made in correspondence by solicitors for Ms Reynolds that, in effect, the applicants did not need the power of attorney to make the inquiries necessary in order to determine whether they should bring their application for compensation. I disagree. It is self-evident that they would need information of the kind which would be contained in the power of attorney in order to make any final determination of what further inquiries are necessary to properly inform themselves as to the true state of affairs and, in turn, based on that information, whether they should bring an application.

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Another submission appeared to be advanced on behalf of Ms Reynolds that *Moylan's Case* presents as authority for the proposition that an application of this kind ought not be made, in effect, until there is sufficient material to know whether or not the substantive application will be pursued and, indeed, to know that there is substance to such a substantive application.

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I do not read *Moylan* that way. True it is *Moylan* was a case where more was known than here about the conduct of the attorney, but I do not read Justice Lyons' decision as suggesting that, knowing less, the applicant would have been precluded from making the application.

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That said, some information is to hand here which in my view has, at least on the evidence before me, provided prima facie evidence of a right to relief under section 106. I make no finding beyond that and stress that this is in no way an analysis of the true merits of any substantive application, if it ever is to be brought.

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In any event, on the materials before me, transactions of concern appear to be regular and significant household expenses that have been paid in full by the deceased, and the acquisition of a part interest in real property by the deceased wherein Ms Reynolds' daughter was both transferor and transferee. Section 87 of the Act creates a presumption of undue influence in any transaction between the principal and the attorney, or a relation of the attorney. The presumption is not limited to transactions where the attorney exercised the power of attorney - see *Smith v. Glegg* [2004] QSC 443.

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Having regard to those considerations and, on the face of the evidence before me, the flagrant failing of the attorney to provide a copy of the power of attorney, as she was in my view obliged to do, to the executor in a timely way on request, satisfy me that my discretion under section 106(5) to extend

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the application time ought be granted.

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The question arises as to how long the extension should be for. Section 106 impliedly contemplates as the norm that six months ought be enough, the exception being where there is a need to extend time. That is by no means evidence that in the present era executors can typically obtain the information necessary in a case like this within a six month period, if properly armed with the information from the start.

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That said, and bearing in mind that it remains to be seen whether a substantive application will actually be advanced, I am troubled by the submission on behalf of the applicant that I ought extend time until the end of the year, about another nine months away. That, it seems to me, is a period of time which might objectively be considered unfair from the point of view at the very least of Ms Reynolds, given the potentially serious consequences of the substantive application should it be brought and the presumption inherent in the section that ordinarily such a long period ought not be required.

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Further to those considerations it is simple enough to give liberty to apply in imposing an earlier timeframe than that, such that in the event there are legitimate reasons why that earlier timeframe cannot be met, the applicant can make application for a further extension.

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But for the delay in the provision of the power of attorney document, a period of roughly three months would not have been

lost here. It seems to me a reasonable exercise of my discretion as a starting point, at least, to allow roughly another three months; in this case, slightly more, in order to make the deadline I intend to impose coincide with the end of an applications day.

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So, the extension that I propose to order will be until Thursday, the 19th of July at 4.30 p.m. That day is an applications day. It would only be necessary, under a liberty to apply order I will make, to bring the matter back on on two days' notice prior to then, if it becomes necessary.

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I have, in the draft order with which I have been provided, deleted in paragraph 1 the words "31 December 2012" and inserted the words "Thursday, 19 July 2012, 4.30 p.m.". I have added at the end of the existing paragraph 2, the word "and" and a new paragraph 3 which reads: "There be liberty to apply on the giving of two days' notice in writing."

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The applicant also seeks its costs of and incidental to this application be paid from the estate of the deceased on an indemnity basis. Given its position, such an order is, in my view, uncontroversial and I intend to make it.

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In all of the circumstances then I order as per the amended draft, initialled by me and placed with the papers.

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