SUPREME COURT OF QUEENSLAND

CITATION:	*Hempseed v Ward & Anor* [2013] QSC 348
PARTIES:	**EARL KEVIN HEMPSEED as executor of the will of the Late Kevin Patrick O'Brien** (Plaintiff) **v** **GLENDA MARGARET WARD** (First Defendant) AND **JOYCE NARELLE WIESENDANGER** (Second Defendant)
FILE NO/S:	S507/12
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	18 December 2013
DELIVERED AT:	Rockhampton
HEARING DATE:	12 December 2013
JUDGE:	McMeekin J

ORDERS:

1. **The Public Trustee be appointed as Administrator *pendente lite***
2. **The Administrator is directed as follows:**

    (1) The Administrator collect and get in the proceeds of:

    (i) all accounts of the deceased held with any financial institution including, but not limited to, the three accounts held with the Rock Building Society; and

    (ii) all policies of superannuation due to the deceased including, but not limited to, the policy with the Queensland Local Government Superannuation scheme.

(2) **That the Administrator cause all monies received on behalf of the estate of the deceased to be deposited in a trust account and, save for those monies authorised to be expended by these orders, invested in an interest-bearing account until judgement or earlier order in these proceedings.**

(3) **That the Administrator be authorised to pay all monies owing from time to time by the deceased, or by the estate of the deceased, to the Rockhampton Regional Council, the Australian Taxation Office and Suncorp Insurance.**

(4) **If no objection in writing be received from the defendants, by themselves or their solicitors, within 14 days hereof the administrator be authorised:**

- **(i)** **to reimburse Errol Kevin Hempseed the sum of $11,112.54 in respect of insurance premiums and improvements to the property of 12 McLeod Street Emu Park;**
- **(ii)** **to incur reasonable expenses to replace the hot water system at 12 McLeod Street in Emu Park;**
- **(iii)** **to pay the sum of $33,000 to Robert Harris Rivett solicitors on account of professional costs and out-of-pocket expenses in connection with the administration of the estate of the deceased and these proceedings;**

(5) **that the Administrator not expend any estate monies other than those authorised by these orders without the consent in writing of the solicitors for the plaintiff and the solicitors for the defendants or further order of the Court;**

(6) **that until judgement or earlier order in these proceedings the Administrator file and serve upon the plaintiff and the defendants a quarterly administration account within 30 days of the end of each quarter, the first such account being due**

on or before 31 January 2014.

3. **Robert Harris Rivett Solicitors be restrained, and an injunction issued restraining the firm, from continuing to act for the Plaintiff.**
4. **Costs of the parties on each application are reserved.**
5. **The parties and the Administrator have liberty to apply.**
6. **The Solicitor for the defendants is directed to bring in short minutes of Order reflecting these reasons.**

CATCHWORDS:

SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – LIMITED, SPECIAL AND CONDITIONAL GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – ADMINISTRATION WHILE LITIGATION PENDING –where the defendants contend the testator lacked testamentary capacity at the time of the making of the final will or alternatively that the plaintiff exercised under influence over the testator– where the final will is preceded by 2 others – where the plaintiff is the executor of the second last and final will – whether the Public Trustee should be appointed administrator *pendent elite* – whether further directions should be made to control the administrator's actions

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INJUNCTIONS FOR PARTICULAR PURPOSES – TO RESTRAIN PLAINTIFF'S SOLICITORS FROM CONTINUING TO ACT FOR THE PLAINTIFF – where the plaintiff's solicitors took instructions for the preparation of the final will for which the plaintiff contends – where the plaintiff's solicitors will most likely be a material witness in the proceedings - whether the plaintiff's solicitors should be restrained from continuing to act for the plaintiff

Australian Solicitors Conduct Rules, r 27

Legal Profession (Solicitors) Rule 2007 (Qld), r13.4

Uniform Civil Procedure Rules 1999, r 429G – 429P, r 638, r 992

Bowen v Stott [2004] WASC 94, cited

Bufalo Corporation Pty Ltd (rec & mngr apptd) (in liq) v Lendlease Primelife Limited (formerly Primelife Corporation Limited) [2010] VSC 672, cited

Chapman v Rogers [1984] 1 Qd R 542, cited

Clay v Karlson (1997) 17 WAR 493, cited

Garde-Wilson v Corrs Chambers Westgarth [2007] VSC 235, cited

Grimwade v Meagher & Ors [1995] 1 VR 446, cited

Henderson v Executor Trustee Australia Ltd [2005] SASC 477, cited

J A Pty Ltd v Jonco Holdings Pty Ltd (2000) 33 ACSR 691, cited

Kallinicos v Hunt (2005) 64 NSWLR 561, cited

Michael v Freehill Hollingdale & Page (1990) 3 WAR 223, cited

Mitchell v Burrell [2008] NSWSC 772, followed

Newman v Phillips Fox (1999) 21 WAR 309, cited

Nick Kritharas Holdings Pty Ltd (In Liq) v Gatsios Holdings Pty Ltd [2001] NSWSC 343, cited

Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360, cited

Premier Capital (China) Ltd v Sandhurst Trustees Ltd [2012] VSC 611, cited

Scallan v Scallan [2001] NSWSC 1078, cited

Tomkinson v Hersey (1983) 34 SASR 181, followed

Re Griffin [1925] P 38, cited

Watkins v Christian [2009] QCA 101, followed

Wright v Rogers (1869) LR1P&D 678, cited

COUNSEL:	SJ Deaves for the Plaintiff
	P Duffield (solicitor) for the First and Second Defendants
SOLICITORS:	Robert Harris Rivett for the Plaintiff
	Duffield and Associates for the First and Second Defendants

[1] **McMeekin J:** The plaintiff is the executor appointed under the last and second last wills of the late Kevin Patrick O'Brien. By the claim brought in these proceedings he seeks a grant of probate in solemn form of law of the last will dated 6 March 2012.

[2] The defendants are the sisters of the late Kevin Patrick O'Brien. They oppose that grant of probate and ask that probate be granted in respect of the second last will of

their brother, a will dated 13 December 2011, or alternatively in respect of the third last will dated 24 May 1978. The defendants contend that the Will the plaintiff advances should not be admitted to probate because the testator lacked testamentary capacity at the time of the making of the Will or alternatively that the plaintiff exercised undue influence over him then.

[3] There are three applications before the court, one brought by the plaintiff executor and two brought by the defendants. The applications deal, broadly, with three issues:

(a) Who should be appointed administrator *pendente lite*?

(b) Whether the executor's solicitors, Robert Harris Rivett Solicitors, should be restrained from acting;

(c) What further directions are required to expedite the resolution of the matter?

Appointment of Administrator *pendente lite*

[4] The parties are agreed an administrator *pendente lite* should be appointed pursuant to r 638 of the *Uniform Civil Procedure Rules* 1999, the only dispute being as to the identity of the person so appointed.

[5] The plaintiff asks that he be appointed or in the alternative that Roy Charles Ware be appointed, the latter being an experienced solicitor in the employment of the firm presently acting for the plaintiff. The defendants ask that the Public Trustee be appointed.

[6] The plaintiff submitted that whilst it may be more normal not to appoint a party to the litigation, save and unless all parties consented, nonetheless there was no rule to the effect that such a party cannot be appointed and the courts should do so "if circumstances make it advisable".[1]

[7] The appointment of an administrator pending determination of a probate claim is not made as a matter of course. There needs to be some reason for the appointment. Here assets need to be got in and debts attended to. The plaintiff being the executor appointed under the last two of the Wills could attend to these duties. The usual reasons why someone else should be appointed would include if there was some concern about potential conflicts, or if there was concern that the person having control over the estate might dissipate the assets, or can be shown to have not acted appropriately in discharging his or her function up to the time of the application.

[8] Here the complaint that is made, somewhat curiously, is that the plaintiff has expended monies inappropriately by cladding a dwelling house, a major asset of the estate. He did so on advice from a builder that it required cladding to prevent water entry. The defendants led no evidence from a qualified person to suggest that the advice was wrong, or the plaintiff ill advised to follow it, or that the property has in any way been adversely affected by the expense. They have had ample time to gather such evidence, they having flagged the issue themselves in correspondence from their solicitors in August.

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[1] See *Williams Mortimer and Sunnucks on Executors, Administrators and Probate* 19th edition at para 24/50 citing *Re Griffin* [1925] P 38; and *Wright v Rogers* (1869) LR1P&D 678

[9] I say curiously as there is not the slightest doubt that if the plaintiff had not clad the property after receiving such advice and water did enter the dwelling then he would have been criticised for not taking steps to preserve the assets of the estate, presumably by cladding the home. I note that the plaintiff met the expense out of his own pocket. In my view his actions are to be commended. They are not shown to be to the detriment of the estate at all. Quite to the contrary.

[10] The only other complaint made against the plaintiff is that he is in a position of conflict, he being a creditor of the estate. The only sums that he claims are due to him from the estate are amounts in respect of which he has incurred a liability to pay when acting, or endeavouring to act, as the executor – legal fees and the costs of the cladding I have mentioned.

[11] In my view no criticism can be levelled at the plaintiff for his actions when acting as executor, nor is there any legitimate basis for a concern that he is in any position of conflict.

[12] The executor argues that there is good reason here why he should be appointed and no good reason why he should not. The following points are made:

(a) He is the executor under both wills, that is, whether the last or second last will is propounded, he will have the obligation to administer the estate;
(b) He has already taken steps to discharge his duties, has demonstrated that he takes his duties seriously and no legitimate complaint can be made about his actions. They have preserved the estate;
(c) While the estate is worth a reasonable sum – a little under one million dollars – it is comprised of a limited number of assets. There is a dwelling house, three bank accounts and one insurance policy. The affairs are not complex and the need for a professional person to carry out the duties of administration are not obvious;
(d) He is quite willing to act at no cost to the estate. If the Public Trustee is appointed there would be a cost of between $6,500 and $7,200. The directions that he proposes be made as a condition of his appointment severely curtail his capacity to take any action adverse to the interest of the defendants.

[13] In the alternative the executor advances Mr Ware as an administrator. The last two matters that I have referred to are applicable as much to Mr Ware as to the executor. Mr Ware has the advantage of being a solicitor of great experience, undoubted integrity, long known to the Court and of course very conscious of the obligations that he owes as an officer to the court. The advantage that Mr Ware has over the Public Trustee is that he is willing to have his costs of acting fixed at $1,500. There is thus a saving to the estate. The defendant's objection to Mr Ware is that he is a solicitor associated with the plaintiff's side of the case and that is thought, I take it, sufficient to disqualify him. No authority was cited for that latter proposition.

[14] The object of the grant of administration pending determination of the claim "is to ensure that the estate of the deceased is managed and preserved for the benefit of

those found to be entitled thereto".[2] I am satisfied that the appointment of either the plaintiff or Mr Ware would achieve that object. However there is a long line of authority against the appointment of a person in the position of the plaintiff.

Should the Plaintiff be Appointed?

[15] The most comprehensive examination of the question of whether a party to the dispute ought be appointed administrator *pendente lite* that I have been referred to is to be found in the judgement of Cox J in *Tomkinson v Hersey* (1983) 34 SASR 181. Cox J concluded:

> "It is hardly surprising that the textbooks and the few reported decisions on the question are generally opposed to the notion of appointing as an administrator *pendente lite* someone who is personally and actively involved in the *lis* itself. The desirability of having the estate administered by someone who stands quite outside the litigious battle is obvious. The cases support the Acting Master's conclusion that, as a general rule, a person unconnected with the action is the most suitable person to be appointed as administrator *pendente lite*".[3]

[16] Cox J determined that the circumstances would need to be "quite exceptional" for a party to the *lis* to be appointed as administrator. In response to the arguments put to him Cox J said:

> "To follow the established and, in my view, sound practice of not making such an appointment unless the case is an exceptional one is not to prejudge the issue between litigants or to reflect in any way upon the good name of the applicant. It is merely to ensure that the administrator remains aloof from the court proceedings and indifferent to the outcome."[4]

[17] As Cox J observed the two decisions cited in the texts where executors have been appointed as administrators *pendente lite* - *Re Griffin*[5] and *Wright v Rogers*[6] - do not necessarily contradict this approach. The plaintiff here did not advance any other examples to support his application.

[18] *Re Griffin* involved a timber business. The testator's widow had been managing the business as receiver under a lunacy order prior to the testator's death. It was necessary for someone to carry on the business until the action could be disposed of. The widow was appointed administrator *pendente lite* even though she was a party to the action. Cox J pointed out that the decision "may be interpreted, at least in part, as an application of the principle stated in *Northey v Cock*, namely the Court will not generally, by an administration order, take property out of the hands of a litigant party who was actually and lawfully in possession of it."[7]

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2 *Williams Mortimer and Sunnucks on Executors, Administrators and Probate* 19th edition at para 24/49 p356
3 At p 184
4 At p 187
5 [1925] P 38
6 (1869) LR1P&D 678
7 At p 185

[19] In *Wright v Rogers* there was no positive opposition to the appointment of executors as administrators. Here there is opposition to the appointment of executor. As well in *Wright*, the appointment was sought after determination of the issue by the primary judge and so the executor had established a right to take in the assets and deal with them. That right was in question by reason of an appeal of the primary decision and it was only in respect of the period pending determination of the appeal that the executor was expected to act as administrator. The circumstances were very different to those here.

[20] Cox J's decision was referred to with approval by Anderson J in *Henderson v Executor Trustee Australia Ltd* [2005] SASC 477 at [122]. So far as I am aware it has never been disapproved. I accept his Honour's exposition of the law as accurate.

[21] The question then is whether the various matters that the executor relies on for his appointment put this case into the category of "quite exceptional". In my view they do not, whether taken singly or together. I point out that in some respects the same factors were relevant in *Tomkinson v Hersey* and Cox J took the same view there. A modest increase in expense and the fact that the executor was executor under each of the disputed wills were not considered sufficient by him to justify the appointment of a party to the litigation as administrator *pendente lite*.

Should Mr Ware be Appointed?

[22] To a degree, similar considerations apply to Mr Ware. While Mr Ware is not a party to the litigation and not "personally and actively involved" in the litigation, nor is he someone who "stands quite outside the litigious battle". As an employee of the firm acting on behalf of the executor he is identified with that side of the litigation.

[23] However Mr Ware's long experience in estate matters, undoubted integrity, and willingness to act on behalf of the parties for a modest sum thus saving the estate something in the order of $5,500 are each relevant matters. I am confident that in his hands the assets of the estate would be preserved. The fundamental reason for the appointment of an administrator *pendente lite* would therefore be met by his appointment.

[24] The only argument advanced against Mr Ware's appointment is that, because of his employment, "there is an automatic appearance of a conflict of interest … as his firm has an obligation to act in the best interests of the plaintiff".[8] While the obligation on the firm to act in the best interests of the plaintiff may be assumed, what was not shown is that there is any conflict between the best interests of the plaintiff and the best interests of the defendants in the management of the estate, pending resolution of the proceedings. Depending on which will is admitted to probate, each has a substantial interest in preserving the assets of the estate. Nor was any submission made against the argument that directions could be given to Mr Ware that would remove any possibility of any such conflict impacting on the interests of the defendants.

[25] The principle that Cox J identified, namely that the circumstances need to be "quite exceptional" for a party to the litigation to be appointed as administrator *pendente*

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8 The Defendants' submission at para 14

lite, does not apply here. Mr Ware is not a party to the litigation. Partisanship is not to be assumed. The reasons for that caution in appointment are not present.

[26] However there is one good reason why Mr Ware would not be an appropriate appointment. A major issue between the parties, at least potentially, is the plaintiff's request that the Administrator be authorised to pay out $33,000 to Robert Harris Rivett for professional costs and out-of-pocket expenses in connection with the administration of the estate of the deceased and these proceedings. It may be that payment of those fees is entirely appropriate and it may be that an Administrator would quickly come to that view. But Mr Ware is not the person who should be making that judgment. In that regard he is plainly conflicted.

[27] On balance, while it is an attractive course to save the estate several thousand dollars, there is every prospect of more than that being expended in disputes promoted solely by the defendants' concerns that a person not independent of the plaintiff and his solicitors is making decisions about significant sums of money going to those solicitors' costs and outlays.

[28] It is necessary that the Public Trustee be appointed subject to conditions which I discuss below.

The Removal of the Plaintiff's Solicitors

[29] The next issue concerns the defendants' application for an injunction restraining Robert Harris Rivett ("the firm") from continuing to act for the plaintiff.

[30] The basis for the application is that Mr Robert Harris is the principal of the firm and took instructions for the preparation of the Will for which the plaintiff contends.

[31] It can be accepted that Mr Harris will be a material witness in the proceedings. He has provided an affidavit detailing his account of his taking instructions for the last Will and his observations both on the apparent capacity of the testator and on the relationship between the plaintiff and testator at that time. His evidence will go beyond formal matters and is likely to be contentious.

[32] The issue is whether Mr Harris's involvement as a material witness is sufficient to found the basis for an order restraining his firm from further acting in the matter on the plaintiff's behalf.

[33] The *Australian Solicitors Conduct Rules* provide the starting point to any examination of the basis for restraining solicitors from further acting for a party. Those rules provide at rule 27 as follows:

> **"Solicitor as material witness in client's case**
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> 27.1 in a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.
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> 27.2 in a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court be solicitor, an associate of the solicitor or a law practice of

> which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice."

[34] It is important to appreciate that rule 27.2 is materially different to the rule that previously applied. Previously rule 13.4 of the *Legal Profession (Solicitors) Rule* 2007 (Qld) provided: "A solicitor must not unless exceptional circumstances warrant otherwise in the solicitors considered opinion… Continue to act for a client in a case in which is known, or becomes apparent, that the solicitor will be required to give evidence material to that the determination of contested issues before the court."

[35] There are two material differences. Previously the onus was plainly on the solicitor wishing to continue to act, or more accurately perhaps the client, to justify the decision. Secondly, that solicitor had to show that "exceptional circumstances" applied. The presumption was clearly against continuing to act.

[36] Now the presumption is in favour of continuing to act. There is an onus on the person seeking to restrain the solicitor from continuing to act to show that, if that solicitor does so, their continued acting "would prejudice the administration of justice".

[37] The rule picks up the test that is usually applied in these cases, that is "whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process in the due administration of justice, including the appearance of justice": *Kallinicos v Hunt*.[9]

[38] The defendants cite the decision in *Chapman v Rogers*[10] and Campbell CJ's statement "that it is generally unwise for a solicitor, who is not himself appearing as advocate or as instructing solicitor in court but who is aware that it is likely that he will be called as a material witness (other than in relation to formal or non contentious issues), to continue, either personally or through his firm, to represent the client if this can be reasonably avoided."

[39] That broad statement was advanced by the defendants as a universal principle. It is not and probably was never meant as such. It certainly does not accurately represent the law in Queensland.

[40] Muir JA, with whom Fraser JA and White J agreed, observed in *Watkins v Christian*[11] in relation to that passage that "the Chief Justice was not purporting to propound any universal principle", that there was "no such principle" and "what is or is not proper or permissible will depend in each case on a careful analysis of the relevant facts".[12]

[41] Pertinent to this case Muir J went on to observe[13] that "it is not unusual for solicitors acting contested probate proceedings to give evidence of facts relevant to

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9 (2005) 64 NSWLR 561; [2005] NSWSC 1181 per Brereton J
10 [1984] 1 Qd R 542 at 545
11 [2009] QCA 101
12 At para [37]
13 At para [38]

the instructions for execution of a will" citing Windeyer J's remarks in *Scallan v Scallan*.[14] Brereton J made the same point in *Mitchell v Burrell*.[15]

[42] In that latter decision Brereton J identified, with respect, accurately, the approach that I should adopt here:

> "[20] That said, I do not accept that the mere circumstance that a solicitor will be a material witness, even on a controversial matter, of itself justifies restraining the solicitor from continuing to act. As Windeyer J pointed out in *Scallan v Scallan* [2001] NSWSC 1078, it is, for example, not unusual for instructing solicitors in contested probate proceedings to give evidence of facts relevant to instructions for and execution of a Will. Similarly, in contested conveyancing proceedings, it is not unusual for solicitors who have acted on the conveyance to continue to act in the proceedings for specific performance or rescission and to give evidence in those proceedings. Accordingly, despite Rule 19 of *The Law Society of New South Wales Professional Conduct and Practice Rules*, which imposes a professional obligation (as distinct from a private right), I do not accept that in every case where a solicitor acting for a party is a material witness even on a controversial matter, the Court will restrain the solicitor from continuing to act. Although some observations of Campbell CJ in *Chapman v Rogers; ex parte Chapman* [1984] 1 Qd R 542, 545, may go somewhat further, the cases indicate – as Campbell CJ did in that case itself – that **the line is crossed only when the solicitor has a personal stake in the outcome of the proceedings or in their conduct, beyond the recovery of proper fees for acting, albeit that the relevant stake may not necessarily be financial, but involves the personal or reputational interest of the solicitor, as will be the case if his or her conduct and integrity come under attack and review in the proceedings**. The presence of such circumstances will be a strong indication that the interests of justice – which in this field involve clients being represented by independent and objective lawyers unfettered by concerns about their own interests – require the lawyer to be restrained from continuing to act.
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> [21] The point is illustrated, in Windeyer J's judgment in *Scallan* (at [10]), by his Honour's reference to the difference between the case where the (mere) interest of a solicitor is one that arises simply in supporting the success of his or her client (for example, in connection with advice about discovery or the commencement or continuation or abandonment of proceedings), and the case where the solicitor has an interest in the result of an action 'additional to his interest in doing his best for a client to have success in an action'. Similarly, in *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587, Thomas J recognised the distinction between the situation where solicitors were, in effect, called on to defend their own actions or advice on the one hand – in which case it was inappropriate that they act – and other cases (at 589-590):
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> > 'What I have said, of course, does not apply where the advice given is unrelated to liability or the question in dispute. Advising a client to prosecute or defend a claim does not attract these observations. **They**

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14 [2001] NSWSC 1078

15 [2008] NSWSC 772 at [20]

> **are restricted to the situation where the acts or omissions of the solicitors are an integral part of the other party's complaint or the client has been sued in circumstances where he or she was acting on the advice of their solicitors and it is effectively that advice which is in issue**. In such cases, apart altogether from the position of the client, the Court is not receiving the assistance of counsel who are observably independent. Independence is a function of counsel. The Court is entitled to assume that solicitors and counsel appearing before it possess that independence.'" [16]

[43] It is important to appreciate too that the plaintiff has rights that merit respect and that need to be brought into account. Pagone J has essayed a summary of the various considerations that can impact on the exercise of the Court's jurisdiction to restrain a solicitor from acting in a particular case in *Premier Capital (China) Ltd v Sandhurst Trustees Ltd* [2012] VSC 611. They include[17]:

(a) the exercise of the Court's jurisdiction is exceptional and must be exercised with caution: *Grimwade v Meagher & Ors* [1995] Vic Rp 28; [1995] 1 VR 446, 450, 452 (Mandie J); *Kallinicos v Hunt* [2005] NSWSC 1181; (2005) 64 NSWLR 561, 582 (Brereton J); *Bowen v Stott* [2004] WASC 94, [54] (Hasluck J);

(b) The jurisdiction to restrain a practitioner from acting for a client in judicial proceedings is an incident of the Court's inherent jurisdiction over its officers to control its process in aid of the administration of justice: *Grimwade v Meagher & Ors* (*supra*) at 455-6 (Mandie J); *Garde-Wilson v Corrs Chambers Westgarth* [2007] VSC 235; (2007) 27 VAR 271, 277-8 (Bell J); *Bowen v Stott* [2004] WASC 94, [47] (Hasluck J); *Kallinicos v Hunt* (*supra*) at 582 (Brereton J); *Clay v Karlson* (1997) 17 WAR 493, 497 (Templeman J); *Newman v Phillips Fox* (1999) 21 WAR 309, 315 (Steytler J).

(c) An important consideration against the exercise of the jurisdiction is that a litigant should not be deprived of his or her choice of lawyer without good cause: *Bowen v Stott* (*supra*) at [51] (Hasluck J); *Garde-Wilson v Corrs Chambers Westgarth* (*supra*); (2007) 27 VAR 271, 278 (Bell J); *Grimwade v Meagher & Ors* (*supra*) at 452 (Mandie J).

(d) Applications by opposing parties for the removal of their opponent's lawyers should not be made lightly and need scrutiny. The applicant who has no personal interest to protect (such as in the preservation of confidential information from a previous retainer) needs to show that the removal is necessary.

(e) A party seeking the removal of an opponent's legal practitioner is not seeking to exercise a right but moving the Court to exercise its power over its own officers (compare *Michael v Freehill Hollingdale & Page* (1990) 3 WAR 223, 233 (Seaman J) but doing so against the wishes of the opponent in adversarial proceedings and in a context in which a successful

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16 In each case my emphasis

17 With citations as in the original

application may cause inconvenience to the opponent and a forensic advantage to the moving party.

(f) An applicant may have obligations to the Court when making such applications to satisfy the Court that the application is necessary and not made for collateral advantage. Care must be taken to ensure that applications for removal of practitioners do not become a means by which opposing parties obtain forensic advantages which detract from, rather than advance, the policy for which the jurisdiction is properly to be exercised.

(g) It is, therefore, essential that an injunction to restrain a practitioner from acting on behalf of a client be firmly based upon the need for that to occur in the administration of justice: *Grimwade v Meagher & Ors* (*supra*) at 455 (Mandie J).

(h) The test to be applied in the exercise of this jurisdiction was: "The objective test to be applied ... is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that [the lawyer] be ... prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of [lawyer] without good cause": *Grimwade v Meagher* ibid 452 (Mandie J); *Garde-Wilson v Corrs Chambers Westgarth* (*supra*) at 278 (Bell J); *Bufalo Corporation Pty Ltd (rec & mngr apptd) (in liq) v Lendlease Primelife Limited (formerly Primelife Corporation Limited)* [2010] VSC 672, [6]-[7] (Judd J).

(i) In application of the test, sight should not be lost of the severity of the consequence of such an order for the client. The conclusion to be reached is that justice "requires" a client to be deprived of his or her choice of lawyer and that has been said by one writer to require the Court's inquiry into whether the fair-minded reasonably informed person "would find it subversive to the administration of justice to allow the representation to continue": GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2012 at [17.20].

[44] As the defendants rightly point out the "the vice of a lawyer acting as a witness and instructing solicitor (or counsel) in a case is that he may be tempted to tailor his evidence to support his client" citing *Pittorino v Meynert* [2001] WASC 245 at [10]. It is not that it is assumed that any practitioner would do so – Mr Duffield who appeared for the defendants stressed that he was not making any such allegation - but rather whether there is the prospect of the appearance of that temptation and hence whether the fair-minded reasonably informed person "would find it subversive to the administration of justice to allow the representation to continue".

[45] The question here then is whether, in the context of the issues in this case, there is that risk, and whether that risk appears sufficiently cogent to require the Court's intervention.

[46] The allegations made in the Amended Defence and Counterclaim are:

(a) As at 5 March 2012 the testator was suffering from terminal cancer, tumours having spread to his lungs and brain; that he required treatment with various prescribed pharmaceuticals which included strong opiate-based painkillers that rendered him confused; and that he was under the care and control of the plaintiff;

(b) that the plaintiff, without the knowledge of the defendants, took the testator to his (the plaintiff's) then solicitors, Robert Harris solicitors, and his will was changed bequeathing $100,000 to each of the defendants and the remainder of the estate to the plaintiff;

(c) this was done against the background that about three months before, on 13 December 2011, the testator executed a Will with his long standing solicitors, Messrs Rees R & Sydney Jones, in which he bequeathed $25,000 to the plaintiff and the remainder of his estate (approaching $1 million) to the defendants equally;

(d) that there is no explanation for this sudden change of testamentary direction nor an explanation as to why the testator attended upon Robert Harris solicitors rather than his long-standing solicitors;

(e) that sometime prior to 3pm on 6 March 2012 the plaintiff wrote instructions for the change in the material terms of the will on a piece of paper gave it to the testator and then drove the testator to the office of Mr Harris;

(f) that at 3pm on 6 March 2012 the deceased, the plaintiff and Mr Harris participated in a conference at the office of Mr Harris during which:

    (ii) the testator indicated that he wished the plaintiff to be his executor;

    (iii) the testator provided the handwritten note, previously prepared by the plaintiff, to Mr Harris;

    (iv) Mr Harris read out the provisions set out in the handwritten note and the testator confirmed the matters there set out;

    (v) Mr Harris asked the testator whether the testator had a previous will and the testator confirmed that he had; and

    (vi) an appointment was made for the next day for the testator to execute a Will.

(g) At 4:30pm that afternoon the deceased, the plaintiff and Mr Harris participated in a conference at which the deceased executed the contested will in the presence of the plaintiff, Mr Harris and a legal secretary employed by Mr Harris;

(h) that the testator did not inform Mr Harris that he had been suffering from cognitive dysfunction including memory loss; and

(i) Mr Harris did not ask the testator any questions concerning:

(i) his age, occupation, marital status or family;

(ii) the "size and constitution of his assets and liabilities";

(iii) "the nature of the act of executing a will or the operation of a will";

(iv) whether there were any individuals at the testator considered a claim on his estate;

(v) whether he had been suffering from memory loss or other cognitive dysfunction;

(vi) about the date or terms of his existing prior will;

(vii) why the deceased wanted to make a new will to replace his existing will;

(viii) the relationship between the testator and the plaintiff; and

(ix) who had written the handwritten note.

[47] The amended pleading was served on the morning of the hearing of the application and the plaintiff has not had the chance to respond to all of the allegations. But whatever the response it is evident that Mr Harris' professional conduct is the subject of scrutiny and criticism.

[48] *Clay v Karlson*[18] provides an example of a case, there involving the drawing of a codicil to a Will, where the practitioner was required to withdraw. It was not simply that the solicitor was required to give evidence in the proceeding on behalf of a client. Rather the solicitors' conduct was criticised in that it was alleged that the codicil was prepared by them without contact with the testator prior to its execution and "as solicitors acting for and on the instructions of the second defendant". In those circumstances Templeman J concluded that the solicitors had "an interest in the outcome of the action" because "their professional conduct in the preparation and execution of the codicil [was] the subject of serious criticism".[19] Like here, the testamentary instrument in question had been challenged on grounds which included that the testator on executing the codicil was not of sound mind, memory and understanding and that no medical practitioner was present when the codicil was executed. While the interest of the solicitors coincided with interests of the client in that each wished to support the codicil the solicitor's interests went beyond that and that circumstance created "the conflict between the firm's interests and the duty to the court".[20]

[49] In my view it is impossible not to reach the view that "the acts or omissions of the solicitors are an integral part of the other party's complaint" as Thomas J found to be sufficient in *Kooky Garments Ltd v Charlton*,[21] and Mr Harris' professional conduct is the subject, or potentially the subject, of serious criticism which Templeman J thought sufficient in *Clay v Karlson*, to justify the Court's exercise of

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18 (1997) 17 WAR 493

19 *Ibid* 496

20 *Ibid*

21 [1994] 1 NZLR 587

its inherent jurisdiction over its officers to control its process in aid of the administration of justice.

[50] There is another problem. While I have not detailed the various matters pleaded, the Amended Defence contains allegations concerning the plaintiff's conduct and his interaction with Mr Harris. This creates the potential for a conflict between the plaintiff's evidence and Mr Harris' evidence. It will not be known until the evidence is given whether that potential is realised. If it is realised then that would leave the instructing solicitor at trial with the impossible task of instructing counsel as to the submission that should be made as to which witness the Court should accept.[22]

[51] In my view a fair-minded reasonably informed member of the public would conclude that the proper administration of justice requires that Robert Harris Rivett Solicitors be prevented from continuing to act.

[52] In reaching that conclusion I am conscious of the exceptional approach taken to solicitors giving evidence in probate matters and I bear in mind that the exercise of the Court's jurisdiction is in any case exceptional and must be exercised with caution, that a litigant should not be deprived of his or her choice of lawyer without good cause, that the decision may, and probably will, cause inconvenience to the plaintiff, and may give a forensic advantage to the defendants.

[53] In my view there are no discretionary considerations' that militate against the decision. The litigation is still at a relatively early stage - the pleadings are not yet closed. There will be some expense incurred but not out of proportion to the amounts involved in the dispute or at least that is not shown. And Robert Harris Rivett Solicitors do not claim any particular knowledge or expertise that requires their retention in the matter.

[54] I will therefore order that Robert Harris Rivett Solicitors be restrained from continuing to act for the plaintiff. Obviously it will be necessary for the plaintiff to take steps to arrange alternative representation. Until a notice of change of solicitors is filed the plaintiff's residential or business address will be his address for service.[23]

Directions

[55] There remains the issue of what directions ought to be made controlling the administrators' actions.

[56] The plaintiff has proposed a set of directions. The only controversial ones relate to the payment out of monies in relation to the matters that I have mentioned earlier - the reimbursement of the expenses that the plaintiff has incurred in cladding the property; and the payment of $33,000 to the solicitors for the plaintiff on account of professional costs and out-of-pocket expenses in connection with the administration of the estate. No evidence was advanced to show that the costs and out of pocket expenses ought not be paid but then no itemised costs bill has been prepared.

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22 Cf. *Mitchell v Burrell* [2008] NSWSC 772 per Brereton J at [23]

23 *Uniform Civil Procedure Rules* 1999, r 992

[57] There is of course a distinction between costs that the plaintiff has incurred in attempting to preserve the estate and costs that he has incurred in attempting to propound the Will he advances. As the executor under the last will, in general terms he has a duty to advance that Will and the costs reasonably incurred will be paid out of the estate.[24] But those costs are in a different category to the other expenses. As the defendants point out, without some greater detail it is impossible for them to know, or the Court to know, whether the costs claimed are reasonably owing. It may be that the defendants have some legitimate basis for complaint about these expenditures and if so they should have the opportunity to detail and support those complaints. It may be that on reflection the defendants accept the legitimacy of some or all of these expenses. I do not mean to promote needless disputes.

[58] The directions will be as follows.

(1) The administrator collect and get in the proceeds of:

(i) all accounts of the deceased held with any financial institution including, but not limited to, the three accounts held with the Rock Building Society; and

(ii) all policies of superannuation due to the deceased including, but not limited to, the policy with the Queensland Local Government Superannuation scheme.

(2) That the administrator cause all monies received on behalf of the estate of the deceased to be deposited in a trust account and, save for those monies authorised to be expended by these orders, invested in an interest-bearing account until judgement or earlier order in these proceedings.

(3) That the administrator be authorised to pay all monies owing from time to time by the deceased, or by the estate of the deceased, to the Rockhampton Regional Council, the Australian Taxation Office and Suncorp Insurance.

(4) If no objection in writing be received from the defendants, by themselves or their solicitors, within 14 days hereof the administrator be authorised:

(i) to reimburse Errol Kevin Hempseed the sum of $11,112.54 in respect of insurance premiums and improvements to the property of 12 McLeod Street Emu Park;

(ii) to incur reasonable expenses to replace the hot water system at 12 McLeod Street in Emu Park;

(iii) to pay the sum of $33,000 to Robert Harris Rivett solicitors on account of professional costs and out-of-pocket expenses in connection with the administration of the estate of the deceased and these proceedings;

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[24] Ordinarily a trustee or executor is entitled as of right to be indemnified for expenses incurred before paying out the trust funds to anyone else: *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; *J A Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691 at [50]; *Nick Kritharas Holdings Pty Ltd (In Liq) v Gatsios Holdings Pty Ltd* [2001] NSWSC 343 at [9] to [11]

(5) that the administrator not expend any estate monies other than those authorised by these orders without the consent in writing of the solicitors for the plaintiff and defendants or further order of the Court;

(6) that until judgement or earlier order in these proceedings the administrator file and serve upon the defendants a quarterly administration account within 30 days of the end of each quarter, the first such account being due on or before 31 January 2014.

[59] As I indicated in the course of the hearing I am not prepared to make the orders that the parties seek in relation to the provision of expert reports. If the parties wish to take advantage of the rules relating to the obtaining of an independent expert report,[25] and they would be well advised to, then they will need to make the necessary application.

[60] The parties and the Administrator will have liberty to apply generally.

[61] I reserve the question of costs on all applications.

[62] The solicitor for the defendants is directed to bring in short minutes of Order reflecting these reasons.

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[25] See rules 429G – 429P of the *Uniform Civil Procedure Rules* 1999