Supreme Court

New South Wales

Case Name:	Michael John Askew v John Paul Askew
Medium Neutral Citation:	[2015] NSWSC 192
Hearing Date(s):	20, 21, 24 November and 11 December 2014
Date of Orders:	4 March 2015
Decision Date:	4 March 2015
Jurisdiction:	Equity Division
Before:	Rein J
Decision:	At [119]-[121] and [138]
Catchwords:	EQUITY - Succession - claim for family provision order under Succession Act s 59 - Where applicant is an adult child of deceased - Where deceased did not make provision for applicant in will - Whether adequate provision made for proper maintenance, education and advancement in life of applicant - Consideration of matters under Succession Act s 60(2) - Disentitling conduct alleged - Value of the estate's property in dispute - Extent of debts in dispute - Issues in respect of the plaintiff's and defendant's circumstances - Question of right to reside or life interest in favour of deceased's brother - Plaintiff's right to costs challenged - Order for cost capping sought by defendant - Application by plaintiff to reopen - Provision as a lump sum or percentage of net real estate proceeds.
Legislation Cited:	Civil Procedure Act 2005 (NSW) Crimes Act 1900 (NSW) Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009 (NSW) Succession Act 2006 (NSW)

Cases Cited:

Alexander v Jansson
Andrew v Andrew [2012] NSWCA 308
Aubrey v Kain [2014] NSWSC
Australian Securities and Investments Commission v Rich [2006] NSWSC 826
Baychek v Baychek [2010] NSWSC 987 [22]
Bouttell v Rapisarda
Brown v Grosfeld
Burke v Burke [2014] NSWSC 1015
Chapple v Wilcox [2014] NSWCA 392
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225
Dalton v Paull (No 2) [13]
Dinnen v Terrill [2007] NSWSC 1405
Dodds v Dodds [2013] NSWSC 1933
Dolman v Palmer
Edgar v Public Trustee for the Northern Territory 2011 NTSC 5
Evans v Levy [2011] NSWCA 125
Feeney v Feeney [2008] NSWSC 890
Foley v Ellis [2008] NSWCA 288
Goldberg v Landerer [2010] NSWSC 143
Goodman v Windeyer [1980] HCA 31
In the Estate of the Late Anthony Marras [2014] NSWSC 915
McCosker v McCosker [1957] HCA 82
Michele Firriolo v Bruno Firriolo & Anor [2000] NSWSC 1039
Moore v Moore [2004] NSWSC 587 [43]
Nichols v Hall [2007] NSWCA 356
Nudd v Mannix [2009] NSWCA 327
Palmer v Dolman [2005] NSWCA 361
Pontifical Society for the Propagation of the Faith v Scales
Re Keenan (1913) 30 WN (NSW) 214
Sergi (bnf Solowiej) v Sergi [2012] WASC 18
Shakespeare v Flynn [2014] NSWSC 605
Sherbourne Estate (No 2); Vanvalen v Neaves (2005) 65 NSWLR 268
Singer v Berghouse [1994] HCA 40; 181 CLR 201
Slack v Rogan; Palffy v Rogan [2013] NSWSC 522
Stern v Sekers; Sekers v Sekers [2010] NSWSC 59
Taylor v Farrugia [2009] NSWSC 801

	Underwood v Gaudron [2014] NSWSC 1055 Urban Transport Authority of New South Wales v Nweiser Vigolo v Bostin Walker v Walker [1996] NSWSC 188 Wheatly v Wheatly [2006] NSWCA 262 White v Arizon Pty Ltd [2003] NSWSC 1051 Zagame v Zagame
Category:	Principal judgment
Parties:	Michael John Askew (Plaintiff) John Paul Askew (Defendant)
Representation:	Counsel: L Doust (Plaintiff) R Askew (Defendant's wife, with leave to appear) Solicitors: P Stimson (Plaintiff)
File Number(s):	2012/380753
Publication Restriction:	No

JUDGMENT

1 These proceedings concern the estate of the late Minna Olive Askew. The defendant, one of her children, was appointed executor under the will dated 18 May 2005 ("**the will**") and is the principal beneficiary. Probate was granted on 30 November 2012.

2 By her will the testatrix relevantly provided:

> "(a) I grant a right to live in my said property in the flat he presently occupies at the rear of 38 Dravet St Padstow for so long as he desire to my dear brother Colin Barry Liddy
>
> (b) I give the rest and residue of my estate to my said adopted son John Paul Askew absolutely. But should my said adopted son die before attaining a vested interest but leaving children then those children of my said adopted son shall on attaining 21 years take equally the share which their parent would otherwise have taken."

3 Clause 5 of her will was expressed in the following terms:

> "I have made no provision in this my will for my other beloved children because I and my husband have during our lifetimes given substantial advances and assistance to them and helped them acquire their homes

whereas it has been the reverse with our adopted son John. Written particulars of the assistance we have already provided to them have been given to my solicitor Martin Otto Waterhouse".

4 The "particulars of the assistance" to which reference is made appear to be handwritten letters signed by the testatrix and her husband Elliott Frederick Askew who made a similar will and died in 2005. The contents of those letters are as follows:

> "We Elliot Frederick Askew and Minna Olive Askew confirm these are the reasons why we have made no further provisions for our children Jennifer, Gaye, Michael and Glenn in our will and are the reasons why we have left our estate to our son John Paul Askew.
>
> John Paul Askew 4-7-72
>
> My wife Minna and I Elliot would like John to have our house and contents. We hope that the will we have made out will not be contested. His brothers and sisters have all worked very hard and all have their own homes, car etc.
>
> John came to us as a baby. He has been loved and accepted into our family. My wife and I gave John like his brothers and sister the best we could. He grew into a young man and respected us. In his older years John went to Technical College Bankstown for 5 years and passed his building licence. He also passed his exams for a security guard.
>
> John worked hard during the week as a builder. The weekend he would do security work. We can honestly say that John was well liked he has never ever said a bad word to his mother and I his father. There was only 3 of us left in the house as time went by we started to get a few problems regarding electrical appliances, furniture, lawn mower, bathroom leaking upstairs.
>
> My wife and I are pensioners and cannot afford much these days but battle on. The only one that has stuck to us all our lives is our daughter Gaye and John. The others had to look after their own families. Glenn in Queensland, Michael Shell Harbour, Jennifer Menai all working.
>
> John has bought and paid cash for all the numerous items below,
>
> 2 washing machines, 2 stoves, bedroom suite, light fittings, 2 bathroom renovations, costing thousands due to builders not putting in drip traps upstairs causing the ceiling below to collapse, 2 lawn mowers, 2 built in wardrobes, 2 lounge suites, car tyres and rego insurance every year.
>
> This is only a few things that John has done for his mother and I. He has never hesitated in buying and helping us all his life even to-day he will walk in and bring groceries etc to us. He always kisses his mum and says hello sexy.
>
> I and John now over a few years has been courting a lovely girl Rebecca who he loves very dearly. My wife and I love her also and welcome her into the family.
>
> Rebecca is very popular with all John's brothers and sisters and is invited to all our turnouts.

My wife and I feel that John is worthy of the house and should have it, his brothers and sisters are all in good financial positions. They all worked very hard during their married lives working 2 jobs in each family.

Michael John Askew 23-3-56

3rd Child 1st Son

Michael was our first son. My wife was most concerned as he grew older that had hearing problems. We had him tested many times with specialists and at the conclusion tests showed that he was deaf. As he grew older he attended a deaf school at Kogarah. He was very clever in lip reading and handled life very well. We taught him everything skating, bike riding, swimming etc.

Michal's job when he left school was a grinding job in a factory. He worked very hard and like to work. He then passed his test for a motor car licence and bought a station wagon car.

He then left the factory and I secured him a job with the Water Board where worked for 20 years. Michael met a girl Robyn and married they had 2 children, Melanie and Michaela.

Michael was a black-belt karate instructor and still teaches. We were very concerned about him competing in tournaments. After being married a few years he developed cancer and only as we were told by the doctors in hospital he only had 2 weeks to live. We took him to St George hospital to a Indian doctor Fadki. Dr Fadki immediately put him on Kemo therapy. For 2 years we looked after Michael and family and he pulled through after a lot of treatment and specialist Dr Stevenson from Bankstown hospital. He performed miracle operations on Michael who went down to 6 stone.

There is so much to tell over these 2 years. I could not write as it would never end.

Michael lived for a short time in our caravan down at Shell Harbour. The weather conditions were very cold and we decided to sell our caravan and give him the money for a house.

All our children have been tops in every way and we have given our last 20c to them many times which we don't regret.

Michael now has lovely home at Barrack Heights and has two cars.

His eldest daughter Melanie stayed with us for 2 years while she worked for Dulux (indecipherable).

My wife did not take any board money and helped her on her feet. She now lives in Melbourne and just returned from a world trip. She has a brand new car RAV4.

We payed for Michael's wedding held at home $3000, caravan $4000.

Michael is now on his feet financially and we wish them well but will always be there for them.

John our son has been very good to Michael and has helped and stuck to them all the way."

(Underlining in original.)

5 Mr Liddy is no longer living in the flat at the rear of the Padstow property mentioned in the will ("**the Property**") he having been transferred to a nursing home in 2012. The circumstances of his transfer are in contention and I shall return to that topic later in these reasons.

6 The testatrix and her late husband had five children: Jennifer, Gaye, Michael, Glenn and John (the Defendant). Glenn and John were adopted at an early age but the testatrix and her late husband treated them, and they felt themselves to be, as much their children as the biological children.

7 In these proceedings Michael, the plaintiff for whom Ms Doust of counsel appears, seeks a provision from the estate pursuant to section 59 of the ***Succession Act 2006*** ("**the Act**").

8 S 59 of the Act provides:

> (1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:
>
> (a) the person in whose favour the order is to be made is an eligible person, and
>
> (b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of eligible person in section 57— having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and
>
> (c) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.
>
> (2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.
>
> Note. Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 73). Part 3.3 sets out property that may be designated as part of the notional estate of a deceased person for the purpose of making a family provision order.
>
> (3) The Court may make a family provision order in favour of an eligible person in whose favour a family provision order has previously been made in relation to the same estate only if:
>
> (a) the Court is satisfied that there has been a substantial detrimental change in the eligible person's circumstances since a family provision order was last made in favour of the person, or

(b) at the time that a family provision order was last made in favour of the eligible person:

(i) the evidence about the nature and extent of the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) did not reveal the existence of certain property (the undisclosed property), and

(ii) the Court would have considered the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) to be substantially greater in value if the evidence had revealed the existence of the undisclosed property, and

(iii) the Court would not have made the previous family provision order if the evidence had revealed the existence of the undisclosed property.

(4) The Court may make a family provision order in favour of an eligible person whose application for a family provision order in relation to the same estate was previously refused only if, at the time of refusal, there existed all the circumstances regarding undisclosed property described in subsection (3) (b).

9 S 60 of the Act provides:

(1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:

(a) whether the person in whose favour the order is sought to be made (the applicant) is an eligible person, and

(b) whether to make a family provision order and the nature of any such order.

(2) The following matters may be considered by the Court:

(a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,

(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,

(c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,

(d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,

(e) if the applicant is cohabiting with another person—the financial circumstances of the other person,

(f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,

(g) the age of the applicant when the application is being considered,

(h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,

(i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,

(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,

(k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,

(l) whether any other person is liable to support the applicant,

(m) the character and conduct of the applicant before and after the date of the death of the deceased person,

(n) the conduct of any other person before and after the date of the death of the deceased person,

(o) any relevant Aboriginal or Torres Strait Islander customary law,

(p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

10 The following issues arise:

(1) What is the net value of the estate? – this has these elements:

(a) The value of the Property which is the estate's only significant asset;

(b) Did the will grant to Mr Liddy a life estate or only a right to reside;

(c) If the will granted a right to reside only has that right been terminated;

(d) If the right to reside given by the will has been terminated has it been terminated by some impropriety on the part of the plaintiff or by persons for whose actions he is responsible; and

(e) If the answer to (d) is yes what is the consequence of that fact.

(2) What is:

(a) The financial position and earning capacity of the plaintiff (including his wife); and

(b) The state of the plaintiff's health (and his wife's health).

(3) What is:

(a) The financial position and earning capacity of the defendant (including his wife); and

(b) The state of the defendant's health.

(4) What significance is to be placed on the express indication of the deceased that of her children only the defendant was to benefit from her will?

(5) What financial assistance did the deceased and her husband give to the plaintiff whilst they were alive?

(6) Has the plaintiff engaged in disentitling conduct?

11 The defendant is dyslexic. An application was made by the defendant before Hallen J on12 November 2014 that his wife Rebecca Askew be allowed to appear on his behalf. Leave was granted. Mrs Askew, as I shall refer to her, conducted the case throughout the hearing although she did explain that she was receiving advice from her father (see T 17.44 and T 204.17- 31), Mr Martin Waterhouse who is a solicitor. Mr Waterhouse was a witness in the proceedings and was cross-examined. He is the solicitor who drew the deceased's will.

12 I received written opening submissions from Ms Doust ("**POS**") and detailed written submissions from the defendant ("**DOS**") prepared by Mrs Askew but co-signed by the defendant. I received detailed written closing submissions from Ms Doust ("**PCS**") and from the defendant (again prepared by Mrs Askew and co-signed by the defendant) ("**DCS**"). I received written submissions in reply dated 10 December2014 ("**PSR**").

Value of the Estate

Mr Liddy's interest

13 The first matter affecting the value of the estate is the question of Mr Liddy's occupation of the flat on the Property, and whether what was granted to him was a life interest or merely a right to reside.

14 The defendant by his submissions contended that:

(a) Even though the words in the will did not grant a life estate "in the technical meaning of those words" **Re Keenan** makes it clear that he only had a right to occupy the flat until his death.

(b) Mr Liddy was in occupation of the flat for 37 years without paying rent.

(c) He was removed from the flat against his wishes.

(d) He was removed without Mr Stimson giving Mr Liddy advice. Mr Stimson is the plaintiff's solicitor who also acted for Jennifer and Gaye.

(e) ***Re Keenan*** (1913) 30 WN (NSW) 214 ("**Re Keenan**") does not authorise the Court to "tear up Mr Liddy's provision" under s 66(2) of the Act or to tear up any equitable right Mr Liddy may have.

(f) The provision under the will remains an impediment on title.

(g) Mr Liddy's provision cannot be removed without his participation in these proceedings – the only person who can give consent for it to be extinguished is Mr Liddy himself or a financial manager appointed by the Court or the Guardianship Tribunal.

(h) That therefore the Court has no power to "make an order".

(i) That "there exists a *prima facie* breach by the plaintiff or those for whom he is responsible of s 178BA of the ***Crimes Act 1900*** (NSW)" (see DCS para 165).

15 In my view what was given to Mr Liddy did not amount to a life interest. What is granted to him is not expressed to be for his life and the phrase "right to use and occupy", indicative of a life interest, is not used: see **Re Keenan**. There is a reference in the will to Mr Liddy "occupying" the flat but the grant is not expressed as right to use and occupy. There are a number of authorities following **Re Keenan** demonstrating the difference between a life interest and a right to reside: see also ***White v Arizon Pty Ltd*** [2003] NSWSC 1051 at [17] per Young CJ in Eq (as his Honour then was); ***Michele Firriolo v Bruno Firriolo & Anor*** [2000] NSWSC 1039 at [26] per Bergin J (as her Honour then was); and ***Feeney v Feeney*** [2008] NSWSC 890 at [27] per White J.

16 Mr Liddy therefore had a right to reside "for so long as he desires to do so". This raised two questions. The first is whether Mr Liddy, although perfectly able to reside in the flat was, against his will, forced out of the flat as the defendant contends, and the second is whether if Mr Liddy was not able to look after himself and stay alone in the flat (as the plaintiff contends) an impractical wish by Mr Liddy to stay in the flat is sufficient to meet the requirement of the bequest, and prevent it coming to an end.

17 There is no disagreement that Mr Liddy has for many years been intellectually handicapped. There is evidence from Gaye that Colin is not able to care for himself. He is 80 years of age and has been admitted to an aged care facility

(Exh A1, p 166 and see T87.45-89) following a series of falls. His general practitioner stated that he:

> "has diagnosed dementia and is not mentally capable to self-care for himself in his home".

(Exh A1, p 168).

18 In addition to this the defendant himself applied for an order in respect of Mr Liddy: see Exh A1 pp 266-279, stating by his completion of boxes that no one disputes Mr Liddy's disability or incapacity, that Mr Liddy is not making decisions for himself and that Mr Liddy has an intellectual disability. It is relevant that the defendant agreed that Mr Liddy would soon "be unable to reside in the premises due to his ill-health": see Exh C.

19 The defendant asserts that Mr Liddy was taken out of the flat against his will. The defendant was not present or involved in Mr Liddy's admission to hospital and subsequent placement in care. The only evidence before the Court on the topic of Mr Liddy supports the plaintiff's contention that Mr Liddy has had to go into care because of his many falls and general condition, including his inability to walk unassisted, and the fact that the flat had no hot water and no bathroom facilities or shower: T88-89 and see T 100.5-.11. I accept that Mr Liddy is not able to reside in the flat.

20 I accept that Mr Liddy may not have been keen to leave the flat and often talks about moving home: T98.29-98.49 and 99.15, but I think the words of the will must be interpreted as meaning that the wish to reside in the flat must be one based on realistic objective considerations. Even assuming absolute mental competence, a person who is too frail to look after himself might say he would prefer to live in a flat independently but the clause ought not be interpreted as meaning that the right to reside continues notwithstanding that it is not possible for the grantee to reside. The fact that some of Colin's possessions remain in the flat does not mean that he is continuing to reside there as the defendant contended.

21 In his affidavit as executor the defendant deposed that all of the persons listed in para 10 of his affidavit had been notified of the proceedings.

22 At no point prior to or during the hearing did the defendant seek to have the proceedings adjourned in order for Mr Liddy to be represented. The defendant as executor has at all times sought to uphold the provisions of the will including the bequest to Mr Liddy, and as Ms Doust points out that is the role of the executor. She also points out that the value of the interest, if treated as a life interest, has been valued at $16,000 (CB 2, p 33).

23 The question of Mr Liddy's claimed life interest has been put in issue by the defendant in the proceedings and must be determined. I do not think it is open to the defendant to rely on Mr Liddy's absence to defeat the plaintiff' claim if the plaintiff is otherwise entitled to a provision being made pursuant to s 59.

24 S 178BA of the ***Crimes Act 1900*** (NSW) prohibited obtaining money by deception, although, it should be noted, it was repealed by the ***Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009*** (NSW), Sch 2 [10]. The claim that there is *prima facie* evidence of a crime by the plaintiff or his sisters is without any factual foundation and I reject it.

25 I conclude therefore that the right to reside has terminated and the estate is not encumbered with an obligation to provide a residence to Mr Liddy.

The value of the Property

26 There are before the Court a number of reports relating to the Property namely:

(1) A property valuation dated 27 February 2013 by Mr Colin Constantinou of AAPI, valuing the property at $580,000 ("**the first AAPI valuation**").

(2) A property valuation by Mr Constantinou of 10 December 2013 valuing the property at $725,000 ("**the second AAPI valuation**").

(3) A valuation of what is described as a "life tenancy" (being Mr Liddy's interest) and ascribing a value of $16,000 ("**the life tenancy valuation**").

(4) A letter dated 5 September 2014 from Mr Ben Feltham of Right Choice indicating an opinion that the property should yield a sale price of between $760,000 and $790,000 ("**the sale appraisal**").

(5) A building report from Mr Paul Simon of Multi Construction identifying problems with the property at pp 187-208 ("**the Multi report**").

(6) A report from Mr Peter Goodman of Paragon Projects Pty Ltd ("**Paragon**"), assessing the cost of works to bring the property to a reasonable standard of $185,350 ("**the Paragon report**").

27 The second AAPI report and the Multi report both contain a reference to the expert code of conduct. The other reports/letters do not.

28 I set out the terms of Practice Note Eq 7- Family Provision Claims:

> "Unless the court orders otherwise, or notice is given that strict proof is necessary, parties may give evidence as follows:
>
> A kerbside appraisal by a real estate agent of any property;
>
> Internet or other media advertisements of the asking price of real estate;
>
> The plaintiff's or beneficiary's best estimate of costs or expenses of items the plaintiff or beneficiary wishes to acquire;
>
> The plaintiff's or beneficiary's best estimate of costs or expenses of any renovation or refurbishment of property the plaintiff or beneficiary wishes to incur;
>
> A description by the plaintiff or beneficiary of any medical condition of which it is alleged the plaintiff or beneficiary is suffering."

29 There are some aspects of these reports, particularly the first AAPI report and the second AAPI, report to which attention needs to be drawn, and reference also needs to be made to what occurred shortly before and during the hearing:

(1) The first AAPI report contains the following statement:

> "we note that the subject property may have the potential for residential dual occupance [sic] and redevelopment subject to council approval but our instructions are to value the subject property on an ''as is' basis'."

I shall refer to this as "the valuation restriction".

(2) The second AAPI report contains a specific reference to the "development potential": see p 5. It says:

> "Residential Dual occupancy is considered to be the highest and best use of the subject property. Clause 11 of Bankstown LEP 2001 – "Development which is allowed or prohibited within a zone", gives consent to the development of dual occupancy under a residential 2A zoning.
>
> The subject allotment exceeds the minimum requirements under Bankstown Local Environment Plan 2001 which requires a minimum allotment of 500 square metres and a minimum allotment width of 15 metres, for the purposes of dual occupancy development.
>
> These requirements are current as at the date of this valuation however, as implemented in other Council areas, these requirements can change should Council consider there to be an excessive amount of residential development of dual occupancy sites."

(3) There is in the second AAPI report a warning that council's requirements can change. It does contain evidence of comparables which offers support for the view that it is an update of the previous valuation and it says in relation to the comparables:

"All the sales detailed in the table below have the same potential as the subject property to be developed as dual occupancy being the highest and best use. The sale price achieved for the sales detailed in the table below reflect this potential."

At page 12 included in general comments is the following:

"Any potential purchaser would need to take into consideration the presentation and also the potential for dual occupancy development."

(4) The second AAPI report then removes the valuation restriction.

(5) The second AAPI report refers to observed defects at pp 6-7 and at p 7 says:

"There is evidence of water penetration from the roof which has resulted in a cracked ceiling in the upstairs area of the dwelling. A number of wall tiles in the bathrooms have fallen off and detracts from the overall presentation. As we are not qualified building inspectors, we recommend that a qualified building inspector inspect the damage and prepare an updated report on the severity of any water penetration and damage. We reserve the right to deduct the cost of repairs from our determined value of the subject property."

(6) The second AAPI report was obtained by the plaintiff following orders on 22 November 2013 that the plaintiff serve any affidavit in reply by 6 December 2013 and that:

"The defendant to do all things reasonable to facilitate the plaintiff obtaining from Colin Constantinou a further expert valuation report in relation to 38 Dravet Street, Padstow including a valuation of the property for sale as a residential dual occupancy development."

(7) The second AAPI report, it is clear, was served as a result of the order of Hallen J and was permitted to include, but was not therefore limited to a valuation of the property for sale as a residential dual occupancy development.

(8) On 14 November 2014 this matter was listed before Hallen J for pre-trial directions. One of the matters addressed by his Honour was the question of value. The following exchange occurred between Mrs Askew, Mr Stimson and his Honour:

HIS HONOUR: Is there an agreed value of the property as at now?

MRS ASKEW: The last valuation we had done it was $580,000. If they were no life estate. However, we have had a life estate valuation calculated as well following your orders early last year. The plaintiff was given approval to get a further valuation and that was if they were DA approved and that one came in at $725,000.

HIS HONOUR: Do you accept if they was no life tenancy and if it was DA approved then it would be worth $725,000?

MRS ASKEW: I suppose so. But there is no money in the estate for DA approval.

HIS HONOUR: That is understandable. What was the value you say the property was worth with the life estate and in its present state?

MRS ASKEW: We were told by the valuer because of the life estate it was encumbered. He has gone through and done a detailed calculation of what the remainder is and what the life estate is.

HIS HONOUR: Is that in an affidavit?

MRS ASKEW: In the executor's affidavit.

HIS HONOUR: Is there any dispute that if in its present state with a life interest and another [sic] DA approval that it would be worth what the valuer said it is?

STIMSON: No, there is no dispute.

HIS HONOUR: What is that amount?

STIMSON: There is a problem of identifying the real nature of the so called life estate. On one view it is a right of occupancy but that might depend on the trial judge. On our view it is a mere right of occupancy. That is a matter for submissions.

HIS HONOUR: There is no dispute if it is a life estate it has been valued and there is no dispute about that.

STIMSON: No.

HIS HONOUR: So that is clear.

(9) On the first day of the hearing:

(a) Mrs Akew said at T6.42-45:

ASKEW: It was agreed with Mr Stimson, the plaintiff's solicitor, last week at the last directions hearing that the valuation is the 580,000 and the 725,000 was based on a DA approval. However, there are no funds in the estate for that.

(b) Ms Doust in answer to my questions as to the amount of the estate said at T6.15- 6.24:

DOUST: Somewhere between 725 and 790, your Honour.

(c) There was the following exchange at T15.40-15.50:

ASKEW: I don't agree with what Ms Doust has said in that she doesn't agree with our valuation because their solicitor—

HIS HONOUR: Okay, but that means it's an issue, doesn't it?

ASKEW: Yes.

HIS HONOUR: If she says the valuation is this and you say it's not, then that's an issue.

ASKEW: Okay. It's an issue, yes.

(10) On the second day of the hearing, T112-115, there is discussion concerning the first AAPI report and the second AAPI report and at T114.44-48 Ms Doust said of the first AAPI report:

DOUST: I'm not sure why it's not in the court book, I suspect because the later valuation was obtained following an order by Hallen J and that was the more up-to-date valuation on the property, but we have no objection to the earlier valuation going before your Honour and your Honour can assess it.

30 The plaintiff seeks to rely on the second AAPI report to establish a value of the property at December 2013 of $725,000 and the sale appraisal to arrive at a proposed figure of $760,000 for the property as at the date of hearing.

31 The defendant relies on the first AAPI report and submits that the figure of $580,000 should be adopted as the value of the property. The defendant further submits that:

(a) The plaintiff should not be permitted to rely on the second AAPI report as evidence of the value of the property without a DA approval because of what he describes as a "binding agreement" entered into by Mr Stimson and Mrs Askew that the value of the property was $580,000 without a DA approval and $725,000 with a DA approval.

(b) The sales appraisal should be given no weight at all and not only because of the matter referred to in (a).

(c) If the plaintiff were free to rely on the $725,000 valuation as evidence for more than its value with DA approval he would want to rely on the Paragon report to reduce that value by the cost of the building works. The Paragon report would, when deducted from the $725,000 that would yield a net figure of less than $580,000 for the house.

32 Following the hearing on Thursday 18 December 2014 at which Mrs Askew sought to tender some further documents including the transcript of what had transpired before Hallen J on 14 November 2014, (which was tendered without objection and became Exh 6) the plaintiff by notice of motion filed 15 January 2015 sought leave to reopen the case. That motion was heard on 12 February 2015.

33 In support of the application to reopen the plaintiff relies on the affidavit of Mr Stimson of 13 January 2015. Mr Stimson deposes to the following matters:

(1) That by the exchange before Hallen J he did not agree that the present value of the property was $580,000 (without development approval).

(2) That his statement that there was no dispute "was made on the basis that the valuation of $725,000 was made in a Court appointed valuation, in response to which the defendant had not provided any further valuation."

(3) He has contacted Mr Counstantinou who has informed him that the property has increased in value since 10 December 2013 by about 20%.

(4) That Mr Counstantinou's evidence will be that his valuation of $725,000:

(a) was based on the potential of the property not on the assumption that it was approved for development

(b) was based on the condition of the improvement of the property "as is"

34 The defendant opposed the application to reopen. In support of that opposition the defendant relied on his affidavit of 11 February 2015. Much of the affidavit is really in the nature of submissions and was received as such. There are several strands to the defendants opposition to leave being granted and they are

(1) that the plaintiff, by the conduct of his solicitor and Ms Doust, have put him in the position that he had an understanding as to the character of the second AAPI report and its reception into evidence

(2) that that understanding led Mrs Askew not to seek to cross examine the valuer on the second report (and not to oppose its receipt)

(3) that there was a binding agreement by Mr Stimson on behalf of the plaintiff that the value of the property without a DA was $580,000 and with a DA was worth $725,000

(4) that the understanding which Mrs Askew and he had was induced by what was said by Mr Stimson and what was not said by Mr Stimson on 14 November 2014 and by what was not said by Ms Doust in Court on 20 and 21 November 2014

(5) that the order made by Hallen J on 22 November 2013 did not permit the plaintiff to obtain a report of the kind which the plaintiff wants to contend is contained in the second AAPI report

(6) that if the defendant were permitted to rely on the second AAPI report as a valuation that did not presume DA approval had been or would be granted the defendant would want to:

(a) lead evidence about claimed defects in the property which the valuer has not taken into account

(b) investigate and possibly lead evidence about value of the property from a different valuer

(c) investigate and possibly lead evidence about the plaintiff's own property and its potential for development and its current value and properties that the plaintiff could purchase

(d) obtain an update on his medical condition

35 It was agreed at the conclusion of the hearing of the motion that it would be appropriate for me to give my determination on the application of the plaintiff to reopen and reasons for that at the same time as my judgment in the

substantive proceedings if I formed the view that the plaintiff's application should be denied.

36 The conclusion I have reached is that the plaintiff should not be given leave to reopen his case, and what follows ([36] to [44]) are my reasons for that conclusion.

37 Ms Doust relied on ***Urban Transport Authority of New South Wales v Nweiser*** (1992) 28 NSWLR 471http://www.lexisnexis.com/au/legal/search/enhRunRemoteLink.do?A=0.33239168902064486&service=citation&langcountry=AU&backKey=20_T21453136719&linkInfo=F%23AU%23NSWLR%23vol%2528%25sel1%251992%25page%25471%25year%251992%25sel2%2528%25decisiondate%251992%25&ersKey=23_T21453136700 where the Court of Appeal stated that the guiding principle for a Court in determining whether to grant an application for leave to reopen is whether the interests of justice are better served by allowing, or by rejecting, the application: at 478 D-E per Clarke JA with whom Mahoney JA and Meagher JA agreed. In the subsequent case of ***Australian Securities and Investments Commission v Rich*** [2006] NSWSC 826 Austin J summarised nine matters to which regard should be had in determining the outcome of an application to reopen:

> "(i) the nature of the proceeding003B
>
> (ii) whether the occasion for calling the further evidence ought reasonably to have been foreseen;
>
> (iii) the consideration of fairness that the defendant is entitled to know all of the evidence he has to meet in taking forensic decisions as to cross-examination and the nature and extent of the evidence he will himself adduce on the matters in question;
>
> (iv) the extent to which the plaintiff has embarked upon calling evidence on the issue in question in its case in chief;
>
> (v) the importance of the issue on which the further evidence is sought to be adduced to the pleaded issues in the case;
>
> (vi) the degree of relevance and probative value of the further evidence sought to be adduced and its potential to involve an undue waste of time;
>
> (vii) the prejudice to the defendant in terms of delay in the completion of the proceeding and the consequential costs;
>
> (viii) the public interest in the timely conclusion of litigation;

(ix) what explanation is offered by the plaintiff for not having called the evidence in chief."

38 Attention also needs to be given to the terms of ss 56-60 of the *Civil Procedure Act 2005.* The overriding purpose of the Act and rules of Court in their application to civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. The Court is obliged to give effect to that purpose when it exercises any power given to it by the CPA or by rules of Court (and when it interprets any provision of the Act or of any such rule). S 60 is relevant too because it requires attention to be given to the object of resolving the issue in a way that the cost to the parties is proportionate to the importance and complexity of the matter in dispute.

39 In my view the second AAPI report cannot fairly be read as a report which assumes that DA approval has in fact been, or will definitely be, obtained. That this is so is confirmed by reference to the passages I have set out earlier, although it does seem clear that the valuer has considered that the prospects of redevelopment are good and hence that prospective purchasers would be aware of the potential. The substantial difference in value between the first and second AAPI report can be accounted for not only by an increase in value due to a general trend but also by reason of the removal of the restrictions which the defendant had imposed in respect of the first AAPI report. The first AAPI report was clearly based on instructions given to the valuer by Mr and Mrs Askew to the effect that the potential for dual occupancy should be disregarded.

40 I have read the transcript of what was said before Hallen J on 14 November 2014 a number of times. I make the following observations:

(1) Mrs Askew did not inform Hallen J that the first report was based on no development potential as dual occupancy.

(2) She did tell his Honour that the second AAPI report's figure of $725,000 was if the property was "DA approved". That statement was, on the view I take, inaccurate.

(3) Mrs Askew appears to have thought that the question of whether the estate had money was relevant to the question of whether DA approval could be taken into account by the Court.

(4) I think it is unfortunate that Mr Stimson did not point out to Hallen J (and Mrs Askew) that the second report was strictly not based on DA

approval being obtained but the second AAPI report does clearly proceed upon the basis that the property met the requirements for DA approval and inferentially that the prospect of DA approval was good, and it could be described in a short hand manner as being one based on DA approval.

(5) I am not persuaded that there can be said to have been any binding agreement between the plaintiff and the defendant arising out of the exchange. Quite apart from the context His Honour did not ask Mr Stimson if he agreed with Mrs Askew's statement but asked him a different question. In one sense the problem has arisen because Mrs Askew has read the second AAPI report too narrowly and Mr Stimson has read the second AAPI report too widely.

41 In relation to the hearing before me, I think it is unfortunate that Ms Doust did not attempt to correct or challenge Mrs Askew when she said at T 6.41-45

> ASKEW: It was agreed with Mr Stimson, the plaintiff's solicitor, last week at the last directions hearing that the valuation is the $580,000 and the $725,000 was based on DA approval. However there are no funds in the estate for that.

Ms Doust's comment that the property had a value of somewhere between $725,000 and $790,000 (T6.15-24) and later at T112-115 flagged the plaintiff's position but Ms Doust did not expressly state that there had not been an agreement as Mrs Askew had asserted.

42 I do not accept the defendant's contention that the second AAPI report did not comply with the Court Order, and no objection was taken to admission of the report on that (or any other) basis.

43 In my view the plaintiff ought not be precluded from relying on the second AAPI report as evidence of the value of the property as at December 2013. Unfortunate as the misunderstanding was I do not think it can fairly produce the result for which the defendant contends. If I am wrong in concluding that no estoppel should operate against the plaintiff then it in my view it is relevant that Ms Doust offered to make the valuer available for cross examination and that would, if accepted by the defendant, have put the defendant in the position he says he should have been in if the plaintiff's solicitor and Ms Doust had made clear to him that they did not accept the second AAPI report was a report that assumed or was predicated on a DA being approved. I should also note that even if the report were treated as one in which was predicated on a DA being approved the evidence from the valuer indicates that on the balance of probabilities the DA would be approved. The question is not whether the

defendant could afford the cost of obtaining approval but whether a purchaser would be able to obtain DA and hence be willing to pay a higher amount for it than what it would yield if no approval was possible or likely. If the valuer had been called it would have been open to the plaintiff to ascertain whether there had been any further increase in the property value since December 2013. It is likely that his answer would have been that there has been. I mention this because I am far from persuaded that had the valuer been called for cross examination it would have been of assistance to the defendant's case on value.

44 It follows in my view that the evidence which the plaintiff wishes to call from the valuer and Mr Stimson will not advance the plaintiff's case, a critical matter going to items (v) and (vi) in the enumeration in [36] above and to the broader question of the interests of justice, which also must be informed in the present case by regard being had to the critical problem in this case that the costs to date are high in relation to the size of the estate.

45 The first AAPI report does not take into account the potential for development as a dual residency and the second AAPI report does. It is also more recent then the first AAPI report. Although I think it would have been desirable for there to have been an update to the second AAPI report, particularly in the climate of a rising market, the parties have chosen not to obtain an update of that report. I proceed on the basis that the second AAPI report establishes that the property is worth $725,000 subject to consideration of the defendant's claim that that valuation does not pay appropriate regard to the defects in the building.

46 I have referred to the sale appraisal. Whilst I accept that such an informal estimate might be appropriate in cases of this kind I do not think that it can be appropriate to place any weight on such an estimate where both sides have retained a valuer and that valuer is not called to give an update. I proceed therefore on the basis that the property has a value of $725,000. I recognise that that figure is likely to be less than the true current value of the property as at today's date but I have no reliable evidence which would enable me to assess what the increase is likely to be (even for example generalised evidence as to the movement of property prices in Padstow or even Sydney).

Defects in the Property

47 I think the second AAPI report does establish that defects have been taken into account. It acknowledges that there may be hidden defects of which the valuer is not aware which might affect the value of the property and that a structural survey has not been carried out. Establishing defects does not of itself establish that the valuation should be reduced or if so by what amount. The building report relied on by the defendant is expressed to be an estimate "based on instructions given by Mr John Askew for required repairs and maintenance to bring the above mentioned property to a reasonable standard". There is no indication of what repairs are structural and what are not and many of them would have been visible. There is no means of discerning what amount is estimated for what item. I am not able to accept that any amount should be deducted from the second AAPI valuation.

Debts owed by the Estate

48 The defendant identifies a number of debts which he says need to be taken into account in assessing the net value of the estate (taken from p 236, B2) which total $128,496.82. That amount includes legal costs incurred at a time when the defendant had representation and include an amount of approximately $9,000 which is owed to the NSW Trustee and Guardian. Some of the legal fees (totalling almost $13,000) have not yet been invoiced but there was no suggestion that he has not incurred the obligations to the persons mentioned or that the amounts claimed are unreasonable (for example $4000 for probate costs).

49 The plaintiff does not dispute that the defendant paid the claimed amounts of nursing home fees, or that the defendant paid out monies for the benefit of the deceased, but places emphasis on the fact that the deceased and her husband did not agree to pay interest on these amounts, and claims that they should be treated as gifts by the defendant to the deceased and her husband, and further that since interest was not discussed or agreed no interest should be credited to the defendant.

50 I accept that the absence of an agreement about repayment and the absence of a discussion about interest are relevant to a strict contractual arrangement

but in a context where the defendant was the sole residuary beneficiary (and aware of that fact) and the contest is not between himself as beneficiary and the estate but between himself and a claimant under s 59 it is appropriate to take in to account as a circumstance that the residuary beneficiary has paid the monies he has paid for the benefit of the deceased or the estate and in so doing make an allowance for interest. There was no challenge to the rate of interest sought.

Value of the Estate

51 It follows in my view that the $128,498.82 must be deducted from the value of the property ($725,000) to arrive at a net figure for the estate of $596,501.18 which I shall round up to $597,000.

52 I note that the plaintiff's costs as billed or estimated by Mr Stimson are $76,000 (which amount was based on an estimated hearing of 3 days). If the plaintiff were successful in his claim and if his costs were not excluded or capped (as the defendant contends they should be) the estate would be worth $521,000.

53 The plaintiff claims that he should be given a legacy of $250,000 out of an estate of $597,000. The residuary estate (after deduction of the plaintiff's legal costs of $76,000) would be $271,000 ie just over 50% of the estate.

The plaintiff's situation

54 By his affidavits the plaintiff deposes to the following matters:

(1) That he was born in 1956 and is therefore now 58 years old.

(2) He was born deaf but has, with the assistance of hearing aids and lip reading, been able to compensate.

(3) He worked as a storeman with the Water Board in 1973 and was transferred to Wollongong in 1982.

(4) In 1984 he was diagnosed with testicular teratoma. He had to have surgery and chemotherapy. The treatment concluded in November 1984.

(5) Because of the cancer treatments he has lost sensation in his hands and feet. He has high blood pressure and recurring skin cancers.

(6) He and his wife Robyn were given a Housing Commission home in Wollongong in the mid-1980s. They were able to buy that house in 1989 for $62,500.

(7) He was prone to fall and exhausted by work and applied successfully for a pension which he has received since 1990, a fact corroborated by Robyn.

(8) He and Robyn have two adult daughters: Melanie and Michelle.

(9) He has difficulty walking and becomes exhausted.

(10) His property is in a very rundown condition and they have few other assets.

(11) The mortgage on their house was paid off from his wife Robyn's inheritance. They receive about $570 per week (in pensions). They live frugally.

(12) He received a 1984 Toyota Corona from his mother in 2007 as a gift. He and Robyn now own a Mitsubishi Magna and Hyundai Excel.

(13) He and Robyn do not have to pay income tax and own no real estate except the Barrack Heights property. There is evidence that the Barrack Heights property is worth, as at 21 March 2014, $315,000. He received 100 shares from the NRMA float which he sold. He has received no gift in excess of $1000 in the last 5 years from anyone.

(14) Robyn says that she has concerns about the plaintiff's mental health but he has been resistant to the idea of seeing a doctor about this.

55 It would appear from his evidence that he is not able to work and a very modest home is his and his wife's only substantial asset.

56 His wife Robyn's circumstances deposed to by her affidavits dated 6 December 2012 and 15 October 2014.

(1) She received a payout as a result of a motor vehicle accident in about 2000.

(2) Their home is in a poor state of repair.

(3) She suffers from Graves Disease, diverticulitis and irritable bowel syndrome, and has also suffered from bladder infections; she has had surgery on her bladder.

(4) She says she has suffered from debilitating medical conditions for many years and gave up her work as a sales assistant at David Jones. A report of Dr Andrew Murray a general practitioner, dated 27 October 2014 confirmed that, p160 at Exhibit A, Robyn suffers from severe irritable bowel syndrome, recurrent urinary tract infections and that she has multiple food intolerances, suffers abdominal cramps, bloating and diarrhoea. She also suffers from Graves disease. The conditions according to her general practitioner are suffered on a daily basis and "impact on her ability to function both at home and with regards to employment".

(5) Robyn is 55 years of age (see Exh A1, p 96).

57 The defendant challenged much of the evidence concerning the plaintiff's and Robyn's medical condition and their financial circumstances. The attack has a number of strands as I discern them and which I shall summarise:

(1) The plaintiff and his wife have grossly exaggerated their medical conditions (DCS, p 34).

(2) The plaintiff has put on reports that are either old (Dr Phadke) or if more current are from general practitioners, not specialists (DCS, p 36). The general practitioners have not signed the expert witness code of conduct.

(3) The plaintiff was "heavily involved physically in martial arts at least up until the will was written in 2005". Mrs Askew relies for this on the letter from the deceased and Glenn's evidence para 7 (DCS, p 39) and also defendant's affidavit B para 6 and Mrs Askew's affidavit dated 15 November 2013 para 5.

(4) The report of 1990 should be treated with caution because it "was written purely for the purposes of getting the plaintiff" a disability pension: DCS, p 41. Two pages of the report are missing.

(5) The report in 1990 from the plaintiff's neurologist had a prognosis of improvement but the plaintiff claims he is worsening. That report indicated a negative test result for balance yet the plaintiff claims his balance is now affected (DCS, p 43).

(6) The Medicare records "paint a different picture of the plaintiff and his wife's condition": DCS, p 45. They do not support him having skin cancers removed (DCS, p 47).

(7) The plaintiff says he takes one tablet daily for blood pressure but his last prescription was 18 November 2013, with 5 repeats (DCS, p 48). The defendant says that this is not enough to enable the plaintiff to continue with the medication and therefore inferentially, it is submitted, that I should not accept his evidence.

(8) The plaintiff's claim to loss of sensation around his heart and lungs is not supported by any evidence (DCS, p 49).

(9) The plaintiff has been performing casual work mowing lawns: see defendant's affidavit B, para 9. He received a truck from the defendant for that work (DCS, p 50).

(10) The plaintiff's "exaggerated health complaints are inconsistent with many of the activities he has admitted being able to do", he admits to being able to build an extension onto his home with the assistance of friends: see para 13.1 and DCS, p 51.

(11) The plaintiff has provided no "acceptable evidence as to why his wife is unable to work". She is 54 "and could earn an income for another 10 years from now" (DCS, p 52). She claims to have irritable bowel syndrome but has not sought any treatment over the last 5 years from a

gastroenterologist, even though the plaintiff says her condition has worsened.

58 Before addressing these matters I need to deal with the questions of credibility of witnesses.

Credit of the plaintiff

59 The cross-examination did not establish that the plaintiff was dishonest or shake his credibility. It was not suggested to him that he did not suffer from any of the significant medical conditions which he claims to suffer and of which there is evidence nor was it suggested to him that he could work. It was not put to him that he has any other source of income than the pension.

60 There was a clear challenge of the plaintiff's account of the conversation (dealt with at para 26 of defendant's Affidavit A) with the defendant in which, according to the defendant, the plaintiff threatened him. The defendant also gave evidence that his mother had had a conversation with him concerning a call she had just received from the plaintiff, and that the deceased had said that the plaintiff was very angry about the will. The plaintiff did not deny that he had such a conversation with his mother.

61 I do not think that the defendant has succeeded in impugning the credit of the plaintiff. I proceed on the basis that the plaintiff has endeavoured to tell the truth about the events with which he has dealt and as to his and his wife's financial circumstance and their medical conditions. The only matter for which there was no documentary support was the removal of small skin cancers over an extended period but there was evidence (see Exh A1 p 104) of removal of a carcinoma from his back.

Credit of the defendant

62 The defendant made, in the witness box, concessions about matters that concerned his siblings that were appropriate and he did not in the witness box, except for two matters which I deal with below, appear to be lacking in credibility. He does however, through the DOS and DCS, and through Mrs Askew's oral submissions make submissions that are intemperate and which exhibit an attitude that was not discernible in the witness box but was more consistent with the attitude of Mrs Askew both in her evidence and in her oral

submissions. His affidavits contain much material of this kind as well (much of which was objectionable in form but to which objection, as matters transpired, was not taken having regard to the fact that neither the defendant nor Mrs Askew were legally qualified). I comment on Mrs Askew's credibility below. I accept Ms Doust's submissions that the DCS (which are signed by the defendant) exhibit exaggerated claims which suggests the need for caution in respect of the defendant's evidence. The manner in which the defendant dealt with the letter of 12 February 2012 from Mr Scali, his solicitor in relation to Mr Liddy (Exhibit C) and see T 188- 190, reinforces the need for caution. According to the letter the defendant agreed that Mr Liddy could not stay at the property but the defendant would not accept that he had given Mr Scali those instructions. I find on the balance of probabilities that he did give those instructions. All of the evidence points to that understanding being correct. Also he was prepared to deny (at T179.35) the deceased suffered from dementia notwithstanding hospital notes that indicated that is what she had. His explanation at T179-180 appears to be that he was not told that she was suffering from dementia which, even if true, does not support his denial.

63 The DCS contain in many instances explanations from the defendant and his wife about the medical conditions of the plaintiff and his wife that neither are qualified to give and of which there is no evidence. In some instances the defendant through the DCS makes submissions on the basis not of evidence before the Court but material that the defendant says could have been put before the Court: see for example DCS 57 and DCS 108.

64 The DCS also contain many examples of exaggeration and hyperbole. Several examples of them follow:

(1) "Ms Doust is completely false in saying that Mr Waterhouse never identified the documents (i.e. the handwritten letters at pp … of Exh A2) as being prepared by the deceased. I would like to remind her about para 8 of Martin Waterhouse's affidavit (b) p 258. In addition there were clarification questions by your Honour on this point".

(2) Ms Doust is false in stating that there was a diagnosis of dementia at this time (i.e. January 2005).

(3) The assertion of criminal offences having been committed.

(4) The assertion that Mr Liddy was forcibly removed from the flat.

(5) That Ms Doust had not challenged Rebecca's medical conditions "perhaps because it is obviously visually observable". (See DCS 88)

65

(1) As to 63(1) the fact is that Mr Waterhouse did not in his affidavit identify hand written letters as the letters provided to him by the deceased. In answer to questions by me at T245 he said that the deceased and her husband had provided him with handwritten notes that he asked them to write, that they brought them back with the executed will and he put then in a file which he gave to the defendant. I accept that on the balance of probabilities the handwritten letters at Exh A1 pp 139-141, are those notes but Ms Doust was correct in saying that Mr Waterhouse had never identified the documents (relied on by the defendant) as those which he (Mr Waterhouse) was handed.

(2) As to 63(2) there is evidence of a diagnosis of dementia: see p 74(44) of Exh A (as at 16 January 2005) and see also pp 74(36) and (39) (at other dates).

(3) As to 63(3) there is no evidence of any criminal offences.

(4) As to 63(4) there is no evidence that Mr Liddy was forcibly removed from the flat.

(5) As to 63(5) there was nothing demonstrated to be observable as to Mrs Askew's condition.

Credit of other witnesses

66 I have no reason to doubt the veracity of Robyn, Jennifer or Gaye.

Credit of Mrs Rebecca Askew and Mr Martin Waterhouse

67 I will deal with Mrs Askew's credit and that of her father when dealing with their evidence.

Credit of Glenn

68 The ambit of Glenn's evidence was quite narrow. Unfortunately he presented very much as an advocate in the defendant' claim see T228.1-9, 228.31-41, 229.6-19 although he would not agree that there were two camps of siblings: T 230.1-4. I accept however that the plaintiff was angry about his exclusion from his mother's will and that he expressed that anger either directly to Glenn or through Robyn.

The Plaintiffs Circumstances

69 In respect of the matters identified in [56](1)-(11) and using the same sub-paragraphs:

(1) and (2) I am not satisfied that the plaintiff or his wife has grossly exaggerated their medical conditions. For reasons indicated earlier I accept the evidence of the plaintiff and his wife. Whilst there is little in the way of up to date expert specialist reports the conditions from which the plaintiff suffers occurred long ago and he has been assessed as eligible for a disability pension. I pay no regard however to Robyn's assessment of the plaintiff's mental health.

(2) See (1).

(3) The plaintiff does not dispute that he was, before the onset of cancer, heavily involved in martial arts nor that he tried to return to this after he recovered from the cancer but his evidence is that he was not able to continue by 1990 and that whilst he has maintained an interest in the sport he has not been a participant or teacher and there is no credible evidence that he has done so. The only evidence at all on this is the assertion by his parents in the letter that he was teaching karate but the plaintiff denies that assertion and no other evidence has been led to establish that his denial is false. Glenn's evidence at para 7 and the defendant's evidence at para 9 of Affidavit B p 118, Exh A2, is not inconsistent with the plaintiff having returned to the sport after his illness since no time frame is put in Glenn's affidavit or the defendant's affidavit (para 6).

(4) The medical report found as F to the plaintiff's affidavit (pp 46-49 of Exh A1) was accepted by the Tribunal and is a report that has not been successfully undermined by any other evidence.

(5) It is true that the 1990 report of Dr McKenzie indicates a prognosis of improvement but there are further reports of 3 April 1991 (see p 43 Exh A1) and 8 October 1991 (see p 45) which explain what Dr McKenzie meant and the plaintiff's evidence of what occurred supports his contention and is not inconsistent with the earlier medical reports. The cross-examination did not lead me to disbelieve the plaintiff's evidence.

(6) The medicare records do not show visits to have cancerous cells removed but there is evidence that the plaintiff did have a carcinoma removed from his back Exh 1A p 104.

(7) I am not prepared to reject the plaintiff's testimony on the basis of medication records and the defendant's own calculations of what medication is required.

(8) The claim that the loss of sensation is not supported by evidence is not correct: see Dr McKenzie's reports at pp 42, 43 and 45.

(9) The defendant did give evidence that "to his own knowledge he (the plaintiff) uses it (the Hiace work van) for casual work mowing lawns". The defendant does not state what the basis for that knowledge was. There was no cross-examination of the plaintiff suggesting that he was earning an income from lawn mowing, or that he was using a Hiace van that the defendant claimed to have given him as a "gift" and which the plaintiff does not deny he had received – see para 9 of the defendant's Affidavit B p 118. Whilst there is some room for speculation that the

plaintiff may have earnt money there is no clear evidence that he has done so and no evidence of his having done so in recent years.

(10) The assertion of inconsistency in the evidence of the plaintiff is not based on any medical report. The plaintiff has admitted that he can carry out activities and this tends to support his credibility rather than undermine it.

(11) Robyn Askew has explained why she is unable to work. The medical report of Dr Murray supports her claim to suffer from irritable bowel syndrome, bladder problems and Graves disease (a thyroid problem according to Robyn's evidence at T76.20) and that her problems have caused her considerable problems over the years and prevent her from working: T78-79. I accept that there may be a possibility that the symptoms and the effect on her ability to work are exaggerated but this has not been demonstrated by cross-examination impugning her credit or by other contrary evidence. There is no evidence that she has been working at all.

The evidence of what financial assistance the deceased and her husband gave to the plaintiff in his lifetime

70 The letter set out at [4] above refers to the following matters as assistance provided to the plaintiff:

(1) They sold a caravan for $4,000 and gave the plaintiff the money for a house.

(2) They paid for the plaintiff's wedding held at home for a cost of $3,000.

(3) The plaintiff's daughter Melanie stayed with them for 2 years and no board was paid.

71 The plaintiff received (after the will was executed) a Toyota Corona 1984 model from his mother which he says was worth $1,000 and which figure was not disputed. He deals with this at para 1.3 of his affidavit of 31 May 2013, p 69 Exh A1.

72 The plaintiff says that the caravan was not his parents and that he bought it with the proceeds of a personal loan (affidavit of 23 April 2013, p 68). He says that Robyn's parents paid for the wedding – which was mainly self-catered.

73 He also points out that there are a number of other inaccuracies in the letter including his date of birth and that he and his wife were not as at 2005 working – they had become pensioners, see p 68 of his affidavit. He says that he was not teaching karate, and that he never held a black belt in karate. I do not think that free board provided the defendant's daughter who was working at the time should be treated as a gift to the plaintiff.

74 I should note that as part of that he deposes to having had a conversation in which Mrs Askew told him that she was arranging to sell the car in order to but some furniture “for our unit”: see 1.3 p 69 Exh A1. Mrs Askew denies having had such a conversation asserting that it is a complete fabrication. A conclusion on that contested fact is not necessary for the determination of the case.

Disentitling conduct

75 The starting point in relation to this issue is the fact that the deceased did not in her will express any negative sentiments towards the plaintiff (or indeed any of her children). Nor did she do so in the handwritten letter which I have earlier set out. Indeed the will and the letter gives as the sole reason for not providing for the plaintiff (or his other siblings save the defendant) the fact that he has, according to the letter, been given financial assistance in the past and is working and, inferentially, well established. I have referred to the plaintiff’s evidence of what was received from the deceased (and his father) later. The deceased appeared to have been fond of the plaintiff and proud of how he dealt with his deafness and cancer.

76 The defendant in the DCS relies on a number of matters said by him to establish disentitling conduct on the part of Michael:

(1) That he “bestowed grief upon his mother for leaving him out of the will”. She refers to Affidavit A para 26, and see Glenn’s affidavit para 10 and Affidavit B para 10.

(2) A Toyota Corona 1985 model was taken from the deceased see DCS 108 and 112.

(3) Gaye and Jennifer sought to prevent funds coming into the estate, see DCS 113.

(4) The plaintiff and Gaye and Jennifer “joined together in a common purpose to carve out their mother’s estate a provision for each of themselves” DCS 120.

(5) The plaintiff and his sisters tried to prevent the provision for Mr Liddy and the defendant coming into effect and put Matthew (Jenny’s son) into the Property and locked the defendant out: DCS 121.

(6) Mr Stimson acted for the plaintiff and his two sisters – therefore conduct of the solicitor is to be taken as his conduct and in part she relies on Mr Stimson’s cost agreement with them: DCS 125-126, reinforced by the

plaintiff saying that he feels a moral obligation to pay Mr Stimson's invoices addressed to Jennifer if able to do so: DCS 127.

(7) The defendant submits that the plaintiff's conduct was much worse than the disentitling conduct in cases such as ***Underwood v Gaudron*** [2014] NSWSC 1055 and ***Burke v Burke*** [2014] NSWSC 1015 (see DCS para 27).

77 Dealing with these points of claimed disentitling conduct:

(1) The defendant deposes to his mother being very upset following a phone call from Michael after which she said "Michael is very angry about the will". That conversation and Glenn's affidavit at para 10 does point to the plaintiff being very upset about his receiving nothing under the will.

(2) The plaintiff's said his mother gave him the Toyota Corona and I accept that she did.

(3) There is no evidence that Gaye and Jennifer sought to prevent funds coming to the estate and it has not been shown that the plaintiff had had anything to do with the arrangement for Matthew to reside at the property or in respect of the terms on which Matthew was allowed to reside at the property.

(4) The plaintiff, Gaye and Jennifer were each considering making a Family Provision Act claim but only the plaintiff did so. They were each entitled to consider whether they wished to make a claim and cannot be criticised for having engaged a solicitor to represent and advise them. Although they were using the same solicitor I do not think that this means that conduct of Jennifer or Gaye is to be ascribed to the plaintiff.

(5) Even were there scope for criticism of Mr Stimson's conduct in relation to his dealings with the estate on behalf of Jennifer or Gaye (on which I express no view) I do not think that anything done by Mr Stimson on instructions from Jennifer or Gaye can be attributed to the plaintiff for the purposes of ascribing disentitling conduct to the plaintiff. Mr Stimson's evidence was that he obtained instructions concerning Mr Liddy from Jennifer and occasionally Gaye T154.16-24.

(6) Leaving aside the plaintiff's anger at being excluded from the will I am not persuaded that there has been any conduct on his part that would disentitle him to a provision from the will if provision were otherwise appropriate.

(7) I note that the plaintiff led evidence that the deceased was suffering from dementia in 2005. The plaintiff does not seek to use that fact to establish a lack of capacity but rather submits that that fact, and the fact that the will was drawn by the defendant's father in law, and without the plaintiff, Jennifer and Gaye being informed about it is relevant to the plaintiff's (and his sister's) considerable dissatisfaction and suspicion as to what had occurred. The defendant conceded in cross-examination that his siblings had a reason to feel "hurt and betrayed": T 168.17-168.40.

(8) The defendant also accepted that Gaye and Jennifer had not acted inappropriately in relation to the Guardianship Tribunal, except that he was not told in advance of the 2009 application (see T 183) but in any event the plaintiff was not involved in this other than by attending the Tribunal hearing.

78 This leaves only the question of the anger displayed by the plaintiff apparently to his mother and on the defendant's evidence to the defendant (Affidavit A para 26) and expressed to Glenn. In relation to the conversation alleged by the defendant at para 26 the plaintiff denies that it occurred. He also denies speaking to Glenn about this. I accept that the plaintiff did ring his mother and express to her his anger over the fact that she had made no provision for him in the will. So far as the threat to the defendant is concerned, I am not able to accept the defendant's evidence in preference to the plaintiff's evidence. It may be that something was said by the plaintiff to the defendant that the defendant understood was in the nature of a threat but I am not prepared to find that whatever was said was meant by the plaintiff and understood by the defendant to be a serious threat to the defendant. Even accepting however that the defendant did say what the defendant claims he said and accepting that such a comment was reprehensible, I do not think that, of itself, could amount to conduct which would prevent the plaintiff from obtaining a provision to which he was otherwise entitled. I do not accept that there is any evidence of estrangement of the plaintiff from his mother after the will was prepared – there is no evidence in support of the contention and evidence from the plaintiff and Gaye and Jennifer to the contrary.

79 The decisions in ***Andrew v Andrew*** [2012] NSWCA 308**, Underwood** and **Burke** establish that conduct by an eligible person can lead to rejection of any claim for a provision even where the circumstances of the person would otherwise justify the making of a provision, but in my view disentitling conduct on the part of the plaintiff has not been established in this case.

80 There is a theme in the defendant's submissions to the effect that the expression of intentions by a testator/testatrix are determinative of the outcome. As Ms Doust pointed out that view cannot be accepted- the legislation does not make the testator's intention paramount. I accept that the testator's intentions are an important matter and even more so where there is

an explanation for a lack of provisions for persons whom, it might be expected, would be the object of bequests and legacies.

81 Having regard to the fact that the deceased wanted her brother to be able to continue to live in the flat for as long as he wished and having regard to the fact that the property (of which the flat was a part) was the only substantial asset in the estate the decision of the testatrix to provide for the residue to go to the defendant only was logical – since any legacy to a third person might require sale of the property, which sale would have disturbed the right of occupation given to Mr Liddy. I note that under the previous will the only residual beneficiary additional to the defendant was Gaye not the plaintiff. It is true that the Court is required in considering the adequacy of the provision to the plaintiff to take into account the circumstances as at the hearing but I do not think that is irrelevant in considering the provisions of the will to have regard to the rationality of the will. However on the basis of my finding that Mr Liddy's limited interest has now ended the need for protection of that interest has now ended.

82 The size of the estate is clearly a matter of significance (as many of the cases demonstrate) and I think that it is a very significant matter in this case that if a provision of the size sought by the plaintiff were made it could only be made by leaving the defendant with approximately only half of the residuary estate and which would be likely require him to mortgage or even sell the property.

The defendant's health and circumstances

83 The defendant's evidence concerning his health and ability to earn can be summarised as follows:

(1) He was born in July 1972 and is therefore now 42 years of age. He left school during year 9. He is dyslexic.

(2) He completed a construction carpentry course at TAFE and started working for himself in 1998 as a contractor in the building industry and obtained a carpenter contractor's license (para 11 of Affidavit A). He has worked for various builders on residential and commercial sites.

(3) He has had worsening back and knee pain and has been diagnosed with rheumatoid arthritis: see Affidavits C, E and F. The arthritis has prevented him from working full time for extended periods and he is on medications to reduce his symptoms to manageable levels. He says that the medication lowers his immune system making him more prone to sickness and infections (Affidavit A, para 13).

(4) He is concerned about the future progress of his arthritis as an active construction worker and particularly because due to dyslexia he cannot work in administration.

(5) He did own a unit at Narrabeen with his wife. His evidence is that he and his wife were forced to sell this unit due to this reduced income, and that out of the proceeds he repaid a loan made to him by Mr Waterhouse of $90,000.

(6) His wife is an accountant, currently not working because she has two young children.

(7) According to the notice of assessment from the Australian Taxation Office pp 150, 151, 152 Exh A2, the defendant has earnt very little money in the years of 1 July 2009 to 30 June 2012, although according to p 211 there is a notice requiring Panel Vision to pay $28,1766.33 (which the defendant treats as his own debt see paragraph 64 of his affidavit of 4 November 2013) and which he says at p 234 of A2 was reduced by the ATO to $8562, following his representations to the ATO.

(8) The defendant has suffered from depression. A report from Dr Garrity a consultant psychiatrist (see annexures I and J to his affidavit of 4 November 2013) described the defendant as suffering from an agitated major depression when she first met him in April 2009 referring to a background of several years of significant family stress. Dr Garrity explained that she had prescribed medication but had been able to wean him off that and that when she saw him again on 5 April 2013 he had not relapsed.

84

(1) to (4). In response to (1)- (4) I accept the defendant's evidence

(2) See (1)

(3) See (1)

(4) See (1)

(5) in relation to the Narrabeen unit the evidence is that he and his wife paid $90,000 out of the $110,000 net proceeds to Mr Waterhouse

(6) and (7). The picture that emerges as to the defendant's actual or likely earnings is opaque to say the least but there was no cross-examination of the defendant on the topic of his current or past earnings. Copies of the defendant's tax returns were apparently provided by the plaintiff's solicitor (see T299) but were not tendered by either side. However the defendant accepts that he will be able to work (T216.10-25) but that there is really little to enable me to determine, what realistically might be expected as his likely earnings.

(7) See (6)

(8) The absence of any relapse is demonstrated by Dr Garrity's report of 9 April 2013 Exh A2 p 159 which states: "he does not appear to have had a depressive relapse at present". The absence of any further medication

since November 2010, and this notwithstanding the fact that there having been continuing stress on the defendant as a result of these proceedings and because of his arthritis, also supports the conclusion that relapse is unlikely.

The defendant's wife and father in law

85 Mrs Rebecca Askew is now 37 years old. She holds a Bachelor of Business degree. She has a diploma in travel and tourism from TAFE. She has worked for a magazine in a management role: see T252-253. She worked as an accountant for an IT company but does not hold a CPA or CA qualification. She has worked as a travel agent: T251 prior to having her first child she had earnt a maximum of $73,000 per annum: T257.20 – 257.37.

86 On the face of matters Mrs Askew is likely to be able to return to the workforce in the near future and has good prospects of earning a very reasonable income.

87 The defendant accepts that Mrs Askew will need to return to the workforce "earlier than expected" see DCS 86, but says that she has a debilitating medical condition "which greatly impacts" on her efficiency at work. The evidence for that is contained not in Mrs Askew's affidavit but in the defendant's Affidavit F paras 13-15 and Annexure B to that affidavit. I am unable to accept the defendant's assessment.

88 Mrs Askew has demonstrated extraordinary commitment to her husband's case. In one sense it is commendable and impressive but her direct interest in the outcome of the case, her role as advocate, in effect in her own cause, and the sometimes hyperbolic content of the submissions, encourages a special need for caution in assessing her evidence. This need is only amplified having regard to the role of her father in this litigation: he not only drew the will of the deceased and arranged for the letters earlier extracted but also gave evidence about matters that go directly to the financial position of his daughter and the defendant because:

(a) He claims that the property in which Mrs Askew was recorded as a one third owner was held by her and her sister in trust for him;

(b) His company has been paid money out of the sale of the Narrabeen unit.

I deal with Mr Waterhouse's evidence below but I do not accept his evidence concerning the Brown Street Property which Mrs Askew has embraced.

89 I think Mrs Askew was coy about her employment and qualifications as Ms Doust submitted. That is not based solely on the fact that Mrs Askew said she could give no indication of when precisely she obtained her qualifications.

90 It is somewhat surprising that the evidence of Mrs Askew's medical condition would be given not by her but by the defendant. The irony is that Mrs Askew has launched an attack on the quality of the plaintiff's medical evidence to which I have earlier referred, and yet she does not give evidence herself of her medical condition. The defendant, it is true, does annex to his affidavit a letter of Dr Nguyen of 20 October 2014 (Annexure B to Affidavit F, p 288) addressed to Dr Nammuni, noting that Mrs Askew had suffered from hyperhidrosis since childhood. No report from Dr Nammuni was tendered. I accept that Mrs Askew suffers from hyperhydrosis affecting hands maxilla and feet but I am not persuaded that that condition has prevented, or is likely to, prevent her from working in accounting, management or travel agent role, or that she is likely to earn any less on a proportionate level for hours worked than she was earning before her children were born.

91 I have already touched on Mr Waterhouse's role. Mr Waterhouse gave evidence that the property at Brown Street, Mosman had always been beneficially held by him. His explanation for having put the property in the name of daughters to in effect rebut the presumption of advancement was not credible. I set out a portion of the transcript dealing with this topic: T235.17-236.40:

> DOUST
>
> Q. I will just ask you this. For what purpose did you have to have a property registered in your children's name when you were in fact the owner of the property?
>
> A. I was thinking I might do some estate planning then.
>
> Q. Thinking you might do some estate planning?
>
> A. Yes. I thought I would put it in the names of my three children and I thought no, I will keep the title deed and keep the property.

Q. Just explain to me what you mean by estate planning, by that. What benefit, if any, were you looking to achieve by having the property in a name other than your own?

A. Well lots of people put--

HIS HONOUR

Q. No, please. It's not what lots of people do. What did you have in mind?

A. Well I didn't want to be the registered owner of it.

Q. Why not?

A. Because just in case.

Q. Just in case of what?

A. I wanted to give it away to my children later on.

DOUST

Q. So is this the case--

A. I was getting separated and divorced at this time.

Q. And at that stage you would be conscious, wouldn't you, that there would be a question in Family Court proceedings as to what assets were yours?

A. No. I had settled with my wife beforehand back in the 90s.

Q. Why did you just raise the question of separation and divorce, Mr Waterhouse?

A. Because I was single and I might have got in with another - I might have remarried. I was dating women at that time.

Q. So is this the case that one of the things that you wanted to achieve by putting that property in another name was to make sure that no other partner that you took on would be able to access that record and understand precisely what property you owned?

A. That might have been. You know, you think about these things, yes. It's part of that.

Q. Is that seriously what you thought at that stage?

A. I was single and I was going out with women. I didn't want to have another messy property dispute.

Q. But that couldn't ever arise until such point in time as you had been in a relationship with someone for at least two years, could it?

A. That's right.

Q. And it would be open to you in the event of--

A. I wasn't in a relationship, a steady relationship at that time.

Q. Yes, precisely, Mr Waterhouse. It would be open to you in the event that there was any relationship that began to develop that you could enter into an agreement with the prospective partner about the separation of assets.

A. There was no partner. I was going out with women. I wasn't against a future re-marriage and I didn't want my children losing out later on in a family property dispute or matrimonial property dispute. I had all sorts of reasons.

Q. What were the other reasons apart from the fact that you were dating?

A. The same as what anybody else does.

Q. What are they?

A. They put property in their children's names or trustee's names.

HIS HONOUR

Q. But why? That's what you are being asked - why?

A. Well I wanted to have some protection against claims against it later

and see also T238.24- 239.26, and T244.12- 47.

92 I am not satisfied that Mrs Askew did not hold beneficially a one third interest in the Brown Street property as the certificate of title records. Whilst that interest would not have been readily available to her and the defendant, had her father not disposed of it, it is a factor in considering the financial position of the defendant and his wife. We know that the property yielded a net figure of $502,408 to Waterhouse Four Pty Ltd out of which $125,000 was paid to another daughter of Mr Waterhouse (see Exh F and T244).

93 Somewhat unusually, Mr Waterhouse did not treat the preparation of the deceased's will as a file of his office and gave what he had done at the time to the defendant, the main beneficiary (T245).

94 Mr Waterhouse asserts that he required the repayment of his loan to Mrs Askew and the defendant out of the proceeds of the Narrabeen unit. He was not cross examined on that topic and no evidence was tendered to contradict his claim that he was in financial difficulty and hence needed the money repaid. Whilst as a result of his evidence, and particularly in respect of Brown Street there may be reason to doubt his veracity on this point as well, I am not able to conclude that his evidence on this point was false, and I will disregard the Narrabeen unit and its proceeds.

The needs of the plaintiff

95 The PCS summarises the provisions out of the estate for which the plaintiff contends. It is made up of:

(1) $176,000 (Southern Additions report- pp 154-159)

(2) $20,000 - $25,000 (new car)

(3) $50,000 (buffer)

i.e. a total of $250,000.

96 The defendant attacks the evidence submitted by the plaintiff in connection with the defects in the Barracks Heights property (Safe House- ExhA pp 112-142). The defendant attacks the Safe House report on the basis that the report "is a false and misleading document and Shawn Moore from Safe House who prepared this document does not hold a builder's licence" (DCS para 57). The defendant submits that the Court should accept the valuer's evidence that repairs costing $5,000 - $10,000 are required. He draws attention to the fact the valuer engaged by him has agreed to adhere to the expert witness code of conduct (DCS para 58), in contrast to Mr Moore.

Mr Moore I should note does not claim to hold a builder's license – what he says he holds is a Builders Consultancy License (see p 11 Exh A1).

97 In relation to the cost of the renovations proposed for renovation of the plaintiff's home, there are several comments to be made:

(a) It is true that the author of the report has not referred to the expert code of conduct. I have already referred to Practice Note Eq 7. The renovations of both the plaintiff's property and the estate property fall within the practice note, no notice was given to the plaintiff's solicitor that strict proof of these matters was required. Given the size of the estate, the practice note and the absence of timely notice, I do not think strict proof is required.

(b) The defendant adduced no evidence that the author of the report is not licensed and it was too late at the hearing to attack the credit of the author as Mrs Askew sought to do.

98 I accept the evidence of defects identified in the Safe House report but there is no direct correlation between the defects identified by Safe House and the quotation from Southern Additions, which includes a new sunroom and kitchen. I accept the plaintiff and Robyn's evidence concerning the state of their house (see for example para 70.2 – 70.7 of the plaintiff's first affidavit) and the Safe House report and I accept that the plaintiff is in need of financial assistance in order to renovate his home but I do not think the testatrix had any obligation to provide him with the means to achieve any particular standard of house. I accept that a new car would be desirable and that a buffer of some sort would

be appropriate particularly given the poor state of health of both the plaintiff and Robyn.

The law in relation to ss 59 and 60 and similar statutory provisions

99 There have been many cases dealing with claims for provisions out of the estate of a deceased person. The High Court and the Court of Appeal have reiterated that every case must be assessed on its own facts and that the decision as to whether a provision should or should not be made is not a precedent for later cases: see **Andrew**; **Underwood**; and see ***Aubrey v Kain*** [2014] NSWSC; ***In the Estate of the Late Anthony Marras*** [2014] NSWSC 915.

100 The defendant referred to the following cases:

(1) ***Dodds v Dodds*** [2013] NSWSC 1933
(2) ***Andrew v Andrew*** [2012] NSWCA 308
(3) ***Underwood v Gaudron*** [2014] NSWSC 1055
(4) ***In the estate of the late Anthony Marras***]2014] NSWSC 915
(5) ***Burke v Burke*** [2014] NSWSC 1015
(6) ***Singer v Berghouse*** [1994] HCA 40; 181 CLR 201
(7) ***Nichols v Hall*** [2007] NSWCA 356
(8) ***Evans v Levy*** [2011] NSWCA 125
(9) ***Wheatly v Wheatly*** [2006] NSWCA 262
(10) ***Walker v Walker*** [1996] NSWSC 188
(11) ***Palmer v Dolman*** [2005] NSWCA 361
(12) ***Foley v Ellis*** [2008] NSWCA 288
(13) ***Goldberg v Landerer*** [2010] NSWSC 143

101 The plaintiff referred to the following cases:

(1) ***Andrew v Andrew*** (2012) 81 NSWLR 656
(2) ***Re Keenan*** (1913) 30 WN (NSW) 214
(3) ***White v Arizona Pty Ltd*** [2003] NSWSC 1051
(4) ***Shakespeare v Flynn*** [2014] NSWSC 605
(5) ***Taylor v Farrugia*** [2009] NSWSC 801

102 Both Ms Doust and the defendant accepted that the two stage approach identified in **Singer v Berghouse** and approved by Barrett JA in **Andrew v**

Andrew (and it would seem by the Court of Appeal in ***Chapple v Wilcox*** [2014] NSWCA 392) is the appropriate test.

103 In **Dodds**, Hallen J has helpfully reiterated the matters to be taken into account in approaching the tasks required of the Court by ss 59 and 60 of the Act. Rather than repeat all of the many citations found in his Honour's judgment I shall extract the key points in that decision to which reference in made (generally without repeating the citations) supplementing them below with some additional comments derived from the cases, but excluding the issue of disentitling conduct with which I have already dealt, and excluding the extensive citations of authority dealing with the two stage approach.

104 The guidance from earlier cases is (assuming, as here, that the claimant is an eligible person) and paragraph numbers are, unless otherwise stated, taken from **Dodds**:

(1) "[31] The language of the relevant section is expressive of the person's status, as well as his relationship to the deceased. There is no age limit placed on a child making an application."

(2) "[32] It is only if eligibility is found, that the Court must determine whether adequate provision for the proper maintenance, education or advancement in life of the applicant has not been made by the Will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both (s 59(1)(c)). It is this mandatory legislative imperative that drives the ultimate result and it is only if the Court is satisfied of the inadequacy of provision, that consideration is given to whether to make a family provision order (s 59(2)). Only then may 'the Court ... make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made'."

(3) The first step is to consider whether there has been adequate provision for the eligible person for his/her "proper maintenance, education or advancement in life".

(4) If the view is that there was not the next step is to consider what if any provision ought be made having regard to all of the circumstances enumerated in s 60(1).

(5) A determination that s 59(1) is satisfied does not automatically lead to provision being made – conduct disentitling or extensive provisions whilst the deceased was alive may lead to the Court refusing to make any order. The size of the estate and the financial position of the

beneficiaries may also lead to an otherwise legitimate claim being rejected.

(6) Intestacy rules are treated as to the same effect as provisions of a will.

(7) In considering whether the provision made for the eligible person is inadequate the Court is required by s 59(1)(c) to consider the position at the time of the hearing.

(8) In relation to s 60(2) the Court can consider circumstances in existence at the time of the deceased's death or at the time the application is being considered: see s 60(2)(p).

(9) The words 'advancement in life' have a wide meaning and are not confined to the earlier period of life (see [46] of **Dodds**). They mean the material or financial advancement – anything which will improve the material situation of the claimant, and can include a capital payment.

(10) Adequate connotes something different from 'proper'. 'Proper' requires consideration of the size of the estate and all of the competing claims so that:

> "If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent."

per Dixon CJ and Williams J in ***McCosker v McCosker*** [1957] HCA 82; (1957) 97 CLR 566, cited in **Dodds** at [53].

(11) The Court is left to form opinions "upon the basis of its own general knowledge and experience of current sound conditions and standards" per Gibbs J in ***Goodman v Windeyer*** [1980] HCA 31; (1980) 144 CLR 490 at 502.

(12) "[90] The section does not prioritise the catalogue of matters that may be taken into account. No matter is more, or less, important than any other. The weight of such of the matters specified in the section, which may be taken into account, will depend upon the facts of the particular case. There is no mandatory command to take into account any of the matters enumerated. None of the matters listed is, necessarily, of decisive significance and none differentiate, in their application, between classes of eligible person. Similarly, there is no distinction based on gender."

(13) "[91] The Act does not say how the matters listed are to be used to determine the matters identified in s 60(1). Considering each of the relevant matters does not prescribe a particular result, and whilst there is likely to be a substantial overlap in the matters that the Court may take into account when determining the answers to what is posed in s 60(1), those matters are not identical. For example, when considering

eligibility under s 60(1)(a), many of the matters in s 60(2) will be largely, if not wholly, irrelevant."

(14) "[92]There is no definition in the Act of "financial resources" (which term is referred to in s 60(2)(d)). However, there is a definition of that term in s 3 of the Property (Relationships) Act 1984, which I consider helpful:

> "'financial resources' ... includes:
>
> (a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided,
>
> (b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the parties ...,
>
> (c) property, the alienation or disposition of which is wholly or partly under the control of the parties to the relationship or either of them and which is lawfully capable of being used or applied by or on behalf of the parties to the relationship or either of them in or towards their or his or her own purposes, and
>
> (d) any other valuable benefit.""

(15) "[107] Bryson J noted in Gorton v Parks (1989) 17 NSWLR 1, at 6, that it is not appropriate to endeavour to achieve "an overall fair" disposition of the deceased's estate. It is not part of the Court's function to achieve some kind of equity between the various claimants. The Court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity. Nor is the purpose of the jurisdiction conferred by the Act to correct the hurt feelings, or sense of wrong, felt by an applicant. Rather, the Court's role is of a specific type and goes no further than the making of "adequate" provision in all the circumstances for the "proper" maintenance, education and advancement in life of an applicant."

(16) "[108] In Cooper v Dungan (1976) 50 ALJR 539, Stephen J, at 542, reminded the Court to be vigilant in guarding "against a natural tendency to reform the testator's will according to what it regards as a proper total distribution of the estate rather than to restrict itself to its proper function of ensuring that adequate provision has been made for the proper maintenance and support of an applicant". Freedom of testamentary disposition is not to have "only a prima facie effect, the real dispositive power being vested in the court": Pontifical Society for the Propagation of the Faith v Scales [1962] HCA 19; (1962) 107 CLR 9, at 19."

(17) In a number of cases the Courts have said that the Court should not seek to remake the will but only alter it to the extent that adequate provision is to be made for the eligible person; see ***Alexander v Jansson*** [2010] NSWCA 176http://www.lexisnexis.com/au/legal/search/enhRunRemoteLink.do?A=0.07196482620906708&service=citation&langcountry=AU&backKey=20_T21549278716&linkInfo=F%23AU%23NSWCA%23sel1%252010%2

5page%25176%25year%252010%25&ersKey=23_T21549277888 at [20] per Brerton J with whom Basten JA and Handley AJA agreed.

(18) "[109] In Stott v Cook (1960) 33 ALJR 447, Taylor J, although dissenting in his determination of the case, observed, at 453-4, that the Court did not have a mandate to rework a Will according to its own notions of fairness. His Honour added:

> "There is, in my opinion, no reason for thinking that justice is better served by the application of abstract principles of fairness than by acceptance of the judgment of a competent testator whose knowledge of the virtues and failings of the members of his family equips him for the responsibility of disposing of his estate in far better measure than can be afforded to a Court by a few pages of affidavits sworn after his death and which only too frequently provide but an incomplete and shallow reflection of family relations and characteristics. All this is, of course, subject to the proviso that an order may be made if it appears that the testator has failed to discharge a duty to make provision for the maintenance, education or advancement of his widow or children. But it must appear, firstly, that such a duty existed and, secondly, that it has not been discharged.""

(19) "[110] Also, in Vigolo v Bostin, Gleeson CJ pointed out that the legislation did not confer new rights of succession and did not create legal rights of inheritance. Rather, his Honour stated, at [10], that it "preserved freedom of testamentary disposition, but subjected that freedom to a new qualification" (and see ***Slack v Rogan; Palffy v Rogan*** [2013] NSWSC 522 at[127] per White J)."

(20) What is adequate provisions for the proper maintenance, education and advancement in life of an applicant is a flexible concept "the measure of which should be adopted to conform with what is considered to be right and proper according to contemporary community standards" (see **Dodds** at [112] citing ***Pontifical Society for the Propagation of the Faith v Scales***, at 19; ***Walker v Walker*** (NSWSC, 17 May 1996, unreported); ***Vigolo v Bostin***, at 199 and 204; ***Stern v Sekers; Sekers v Sekers*** [2010] NSWSC 59). This is fact specific.

(21) An applicant does not need to be destitute to succeed in obtaining an order.

(22) "[115] Where the Court is satisfied that provision ought to be made, then it is no answer to a claim for provision under the Act that to make an order would be to defeat the intentions of the deceased identified in the Will. The Act requires, in such circumstances, the deceased's intention in the Will to be displaced: Kembrey v Cuskelly [2008] NSWSC 262, per White J, at [45]."

(23) "[117] The size of the estate is a significant consideration in determining an application for provision. In a small estate, as this one is, it is important to remember what Salmond J said in In re Allen (Dec'd); Allen v Manchester [1922] NZLR 218, at 221:

> "Applications under the Family Protection Act for further provision of maintenance are divisible into two classes. The first and by far the

> most numerous class consists of those cases in which, owing to the smallness of the estate and to the nature of the testamentary dispositions, the applicant is competing with other persons who have also a moral claim upon the testator. Any provision made by the Court in favour of the applicant must in this class of case be made at the expense of some other person or persons to whom the testator owed a moral duty of support. The estate is insufficient to meet in full the entirety of the moral claims upon it, in the sense that if the testator possessed more he would have been bound to do more for the welfare of his dependants. In such a case all that the Court can do is to see that the available means of the testator are justly divided between the persons who have moral claims upon him in due proportion to the relative urgency of those claims.""

(24) [118] "…(c) … where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise, they would be left destitute: Taylor v Farrugia, at [58]." "(e) There is no need for an applicant adult child to show some special need or some special claim: McCosker v McCosker; Kleinig v Neal (No 2), at 545; Bondelmonte v Blanckensee [1989] WAR 305; and Hawkins v Prestage (1989) 1 WAR 37, per Nicholson J, at 45." "(f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: MacGregor v MacGregor [2003] WASC 169 (28 August 2003), at [179] - [182]; Crossman v Riedel [2004] ACTSC 127, at [49]. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life, is relevant: Marks v Marks [2003] WASCA 297, at [43]. In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased: Christie v Manera [2006] WASC 287; Butcher v Craig [2009] WASC 164, at [17]." "(i) There is no obligation on a parent to equalise distributions made to her, or his, children so that each child receives benefits on the same scale as the other: Cooper v Dungan, at 542."

(25) The principles enumerated are not rules of law.

(26) The task for the Court is an evaluative judgment.

105 Both the PCS and the DCS referred to the following passages from ***Edgar v Public Trustee for the Northern Territory*** 2011 NTSC 5 per Kelly J at [46] cited in **Dodds** at [119]:

> "There is no onus on the ... residuary beneficiary under the will to show that she is entitled to be treated as such - or to prove what may be necessary for her proper maintenance and support. Rather the onus is on the plaintiff to show that proper provision is not available for him under the terms of the will. In determining whether this is the case the Court must have regard to all relevant circumstances including the size of the estate and the nature of the competing claim by the widow. In

> performing this task the Court must have due regard to the will of the testator and should interfere only to the minimum extent necessary to make adequate provision for the proper maintenance, education and advancement in life of an applicant who has passed the first jurisdictional hurdle. As Dixon CJ said in the passage from Scales quoted above, due regard must be had to 'what the testator regarded as superior claims or preferable dispositions' as demonstrated by his will. (Omitting citations)"

106 The defendant draws comfort from [57] of my judgment in **Burke** set out here:

> "[57] In my view the deceased was entitled, notwithstanding the fact that the plaintiff was her son, to regard him as a person undeserving of any benefit from her estate whatever his financial circumstances at the time of his application. Having regard to the approach required by Court of Appeal authorities referred to in [36] above, I do not think that members of the community would regard such a view by the deceased as not right or as inappropriate even were the deceased to be aware that her son had fallen on hard times following the failure of his business. Accordingly, notwithstanding the poor financial circumstances and taking all matters favourable to him into account including the size of the estate I think no provision ought be made out of the estate for him."

107 The defendant also refers to and seeks to have the Court rely on **Dodds** and **Underwood** and also passages from **Evans v Levy** and **Dolman v Palmer** cited in **Underwood**.

108 I will now address each of the matters identified in s 60(2) of the Act by reference to my findings of fact using the subsections (a) to (p):

(a) The plaintiff is the son of the deceased.

(b) The deceased owed no obligations or responsibilities to the plaintiff and nor to the defendant.

(c) The estate is not extensive and has a value of $597,000 before deduction of the plaintiffs cost if the plaintiff is successful with deduction of $76,000 for costs, the net value of the estate for distribution would be $521,000.

(d) There is no notional property of the estate.

(e) The plaintiff and his wife, whilst having an unencumbered home, have few other assets and very limited income. The plaintiff does not have, on the evidence before me, any earning capacity beyond the pension, and in the case of Robyn, very limited earning capacity beyond the pension. Having regard to Robyn's age I do not think that the very limited capacity she has is realistically likely to yield a sufficiently significant income to be taken into account in the matter.

(f) The plaintiff is deaf and has some physical incapacity, in part as a consequence of having suffered from, and being treated for,

testicular cancer many years ago. He suffers from loss of sensation in his legs and problems with his wrists and hands (see Exh A1 p 47), described as "significant peripheral neuropathy" in Dr Murray's letter of 8 March 2013 (see Exh A1 p 54) and he also has hypertension (see p 54).

(g) The plaintiff is 58 years of age.

(h) The plaintiff made no contribution to the acquisition, conservation or improvement of the deceased's estate.

(i) The deceased made no provision from her estate for the plaintiff but gave him an old Toyota Corona.

(j) I have referred to the testamentary intentions of the deceased.

(k) The plaintiff was not being maintained by the deceased.

(l) No other person is liable to support the plaintiff.

(m) There is no character or conduct of the plaintiff that would preclude provision being made for the reasons I have identified.

(n) There is no relevant conduct of any other person.

(o) This has no relevance in this case.

(p) I have earlier referred to the matters relevant to the deceased's considerations.

109 I have set out the above principles of law which assist in considering cases such as this. I will now summarise the respective cases of the plaintiff and defendant endeavouring to bring together the relevant threads.

110 The plaintiff submits that:

(1) He and his wife are disabled pensioners who receive an amount of $570 per week by way of pension.

(2) Their only substantial asset is the Barrack Street property valued at $315,000.

(3) They own two early model vehicles worth very little.

(4) They have not worked or earned money since 1990.

(5) They are in poor health.

(6) They have no spare money to fund renovations which their house badly needs.

(7) That he has been guilty of no conduct that would prevent him as an adult son receiving a provision out of the estate of his late mother.

(8) He does not seek to deprive the defendant of any benefit from their mother's will but contends that he is a deserving beneficiary of his

mother's bounty because of the circumstances in which he now finds himself (along with his wife).

(9) The cost of the proposed renovations and other items for which he seeks financial assistance would warrant a provision of $250,000 to the plaintiff out of the estate.

(10) The plaintiff also claims that the defendant and his wife have an earning capacity that would preclude the Court from denying the plaintiff a provision merely because the plaintiff (and his wife) own their own home and the defendant (and his wife) do not, but for the defendant's entitlement to the residuary estate.

(11) The interest of the defendant and Mrs Askew in the Narrabeen and Brown Street properties should be taken into account.

111 The defendant's case has the following elements (other than those with which I have already dealt):

(1) The estate is small and there is a particular need to consider the effect a provision would have on the principal beneficiary under the will (DCS, paras 8 and 9).

(2) In this connection the defendant has two very young infants and a wife for whom he must provide a home (DCS, para 8).

(3) The defendant is in difficult financial circumstances and has serious health issues "which can only be expected to get worse". He does not own his own home in comparison to the plaintiff who with his wife owns a home with no mortgage and has been living successfully on a disability pension for 25 years (see DCS para 9).

(4) The consequence is that there are insufficient assets in the estate to meet all claims on the deceased's bounty (DCS para 10).

(5) The defendant cannot borrow money secured on the home given:

(a) His earnings; and

(b) Mr Liddy's interest

(c) (see DCS para 11).

(6) To grant the plaintiff a provision would have "the effect of extinguishing any order for provision" for the defendant (DCS para 13).

(7) There is no automatic entitlement for a son or daughter to obtain a provision (DCS para 15).

(8) The plaintiff is "currently being maintained at a standard he has become accustomed to over the last 25 years" (DCS para 16).

(9) The plaintiff "wants the Court to make a provision order that would compel the defendant to sell his home out from under his wife and infant children to give it to him" (DCS para 17).

(10) There is no moral duty on the deceased to provide for the plaintiff and the community standards would not have expected her to do so (DCS, para 20).

(11) In relation to the sale of the Brown St property the defendant submits that the sale was

> "Nothing more than the sale of a property he owned to raise finance to pay out pressing creditors of the company. His own finance being under stress, having earlier sold his house to pay off debts" (DCS paras 65 and 67)

(12) Loss of the property will lead to the defendant suffering further depression (see DCS para 72).

(13) Refers to Dr Garrity assessment that the defendant "carries a significant risk" (DCS para 75) of depression.

(14) There is clear evidence of rheumatoid arthritis: DCS paras 76 and 78.

(15) In relation to the Narrabeen unit the defendant submits that he had to sell it because he could not afford to live in it to pay off his debts (DCS para 82). Rent would be needed to service the debt (DCS para 83).

(16) It is denied that Mrs Askew had any interest in Brown Street.

(17) In relation to the will it was witnessed by Mrs Patricia Simpson (DCS para 134).

(18) The note of Concord Hospital that indicates that the deceased was suffering from dementia in 2005 can be explained: see defendant's explanation in cross-examination (see DCS 137 and T179-180).

112 I accept, based on the hospital notes, that the deceased was suffering from dementia at the commencement of 2005 and notwithstanding the witness to the will's evidence that the deceased appeared fully competent to her. The plaintiff did not contend, however, that that fact deprived the deceased of testamentary capacity.

113 As I have already indicated I accept that the following matters are relevant and support the defendant's position:

(1) The net value of the estate is small.

(2) The Court must have regard to the effect that the provision sought would have on the beneficiary's financial welfare.

(3) The fact that he has two young children and currently is supporting his wife (although how he does so, on the evidence, has not been made clear).

(4) The fact that he has health issues which restrict his earning capacity to some degree (see p 144, 146, 147-148, Exh A2 at p 223-224 re rheumatoid arthritis and Exh A2 p 144 re his spinal condition).

(5) The fact that the plaintiff and his wife own their own home without the burden of a mortgage.

(6) I accept that the plaintiff has no automatic right to a provision merely because he is a son of the deceased.

114 I think that the degree to which the defendant and Mrs Askew would be able to obtain a loan if that were necessary to make a provision to the plaintiff without forcing a sale of the property, is also a relevant, but not decisive matter. The defendant asserts that the life interest of Mr Liddy is an obstacle to his obtaining a mortgage and that his earnings are not sufficient- he refers to evidence in support from a mortgage broker see para 4 of the defendant's affidavit B and p 128 of the Exh2 letter from the broker provides support for the former contention but not the latter. I have already determined that Mr Liddy's interest is at an end and hence it is not an obstacle to a loan. I accept that it may not be possible to obtain a loan but I do not accept that the defendant and his wife will necessarily be unable to obtain one.

115 There are however countervailing considerations which must be taken into account:

(1) It is not the defendant's evidence that he is unable to work and can never work again: see T216.9-21.

(2) There is evidence of earning capacity on the part of Mrs Askew with a prospect of a reasonable income even if not on a full time basis.

(3) Whilst the plaintiff may seek $250,000 as a provision the Court can determine that some other amount is in all the circumstances appropriate.

(4) The defendant points to the fact that the plaintiff's adult daughter has lived with the plaintiff and his wife without making any contribution to the household, notwithstanding that she earns a substantial salary. The plaintiff's response to this is that if the daughter did contribute this would have to be advised to the Department of Social Services with consequent reduction of the pension. I am not aware of whether this is correct but it seems likely to be so.

(5) The fact that the plaintiff and his wife have been living at the same level for 25 years is not destructive of the plaintiff's claim.

(6) The fact that the plaintiff and his wife have made do on the disability pension is not destructive of the plaintiffs claim as the defendant contends.

(7) I do not accept the defendant's contention that the validity of an order in favour of the plaintiff would have the effect of "extinguishing" the order for provision in favour of the defendant (DCS para 13).

(8) In relation to this and [110](16) I am not satisfied on the evidence that a forced sale of the property will lead to depression on the part of the defendant. Were it the case that it would, its relevance would be that it would affect his earning capacity. Dr Garrity does point out that "roughly 50% of people who have an episode of major depression have another depressive episode down the track" but he had not had another episode since she saw him in April 2009, he has not had one since she saw him in April 2014, and it cannot be concluded that even were he to have one that it would be so severe and continuing that he would not be able to work again.

(9) The plaintiff has established that his house is in a state of disrepair and that he and his wife have very little money or assets. I am satisfied that he has no prospects of gainful employment due to his medical condition and age and that his wife has hardly any better prospects due to her medical conditions and age.

(10) Brown Street yielded $502,408 to Waterhouse Four Pty Ltd a company controlled by Mr Waterhouse and $125,807 to one of his three daughters (see Exh F and T244) so that there should have been at least $125,000 available to Mrs Askew as well.

Conclusion

116 In my view the plaintiff has established that he is deserving of consideration by his mother for a provision out of her estate and I do not accept that any conduct disentitling him to a provision has been established.

117 For reasons I have indicated I do not think that Mr Liddy's position needs to be considered further.

118 The very difficult question here is whether having regard to the small size of the estate the plaintiff ought be provided with a bequest notwithstanding his mother's express rejection of him as a beneficiary albeit on the basis as I have noted of some incorrect assumptions. That is to say does the size of the estate and financial position of the defendant and his wife (and their earning capacity) impel the conclusion that no provision should be made in favour of the plaintiff? Would the community expect that the deceased as a loving parent of beloved son whose circumstances were very limited be expected by the community to make some provision for that son?

119 In my view the failure to make any provision for the plaintiff was inadequate for the maintenance and advancement of the plaintiff. I think that the deceased's wishes must be accorded considerable weight but it appears to me that the deceased was confused about what had actually been provided to the plaintiff in prior years. I think she may also not have appreciated the fact that the plaintiff and his wife had very little margin between the pensions they received and their expenditure. The confusion may have been a reflection of her mental condition (whether characterisable as dementia or not) but certainly her decision not to give the plaintiff anything was not motivated by any ill will or feeling that the plaintiff had done anything deserving her disapprobation.

120 I accept that the deceased was well disposed to the defendant and to the defendant's wife (then girlfriend or fiancée) and that she would want to see the majority of her estate go to him but viewing the matter now (as the Court is required to do) and considering whether the community would expect the deceased to make some provision (as opposed to none) for the benefit of the plaintiff I am of the view that it would.

121 The view that I have come to is that the plaintiff should be provided with an amount out of the estate but for less than he has sought having regard to the very dramatic impact the amount he seeks would have on the beneficiary's interest in the estate. In my view a figure representing 30% of the net estate after provision to the defendant for the amount claimed by the defendant, is appropriate. On the net estate of $521,000 (ie including deduction of the $128,498.82 referred to a [50] and the $76,000 for costs) that produces a figure of $150,000. I shall say more about this aspect after I have dealt with the costs of the hearing. In coming to that view I have taken into account the possibility that in order to make a payment of the provision the defendant will be required to sell the property in which he and his family have been residing rent free since the deceased's death.

Costs

122 The defendant seeks an order that if the plaintiff is successful in obtaining a provision out of the estate that there be no costs in the plaintiffs favour or alternatively that the costs be capped.

123 In relation to the contention that there be no costs order made in favour of the plaintiff this seems to be based on an attack on the conduct of the plaintiff's solicitor, the number of affidavits filed and a claim that the affidavits of Jennifer were multiple, unnecessary and vexatious. There is also a theme that somehow the plaintiff was raising unnecessary matters to which the defendant was forced to respond. Whilst it is true that there were a large number of affidavits from the plaintiff I do not accept that they were unnecessary. It was the defendant who raised the alleged disentitling conduct and the plaintiff was required to respond to that and other matters raised by the defendant. I do not think there is any basis to deny the plaintiff his costs other than in relation to the application to reopen with which I will deal separately.

124 I turn now to the issue of whether the plaintiff's costs should be capped. In relation to this contention the defendant relies on the size of the estate and the size of the costs sought $76,000 in addition to the complaints which I have already referred. I should note that given the fact that the $76,000 was estimated when the case was due to last only two days it would seem highly unlikely that the plaintiff's actual costs will not exceed $76,000 but $76,000 is what is sought.

125 The following questions arise:

(1) Is there a power in the Court to cap costs?

(2) If so at what point should consideration be given to exercising the power. This has two aspects (a) should an application be made early in the litigation; (b) if not made early in the litigation should the Court determine the question of whether costs should be capped as part of the determination of what amount the plaintiff if successful should recover?

(3) What is the rationale for capping?

(4) What are the factors to which regard should be had in determining whether or not costs should be capped?

126 There is clearly power in the Court to make an order capping costs: see UCPR Part 42.4(1), ***Nudd v Mannix*** [2009] NSWCA 327, ***Brown v Grosfeld*** [2011] NSWSC 1429http://www.lexisnexis.com/au/legal/search/enhRunRemoteLink.do?A=0.07373166759580041&service=citation&langcountry=AU&backKey=20_T2138075

0573&linkInfo=F%23AU%23NSWSC%23sel1%252011%25page%251429%25year%252011%25&ersKey=23_T21380750553 and ***Sherbourne Estate (No 2)***; ***Vanvalen* v *Neaves*** (2005) 65 NSWLR 268. Practice Note No. SC Eq 7 says:

> "24. Orders may be made capping the costs that may be recovered by a party in circumstances including, but not limited to, cases in which the net distributable value of the estate (excluding costs of the proceedings) is less than $500,000."

The rule clearly seems to regard the value of the estate as of particular relevance although it does not preclude cost capping where the value of the estate exceeds $500,000. I proceed on the basis that I do have power to cap the costs, if it is otherwise appropriate to do so.

127 The cases demonstrate that Courts are concerned about the effect of extensive legal costs on estate, and also a related concern that litigants are bringing unmeritorious or unmeritoriously large claims and using the prospect of a costs order coming out of the estate is a significant pressure to obtain an outcome that is not warranted: see **Sherbourne** and ***Sergi (bnf Solowiej) v Sergi*** [2012] WASC 18 [49] per Heenan J.

128 Views have been expressed that the costs awarded have to be proportionate to the amount awarded. If a plaintiff obtains an amount of say $50,000 he/she should not, ordinarily, be awarded costs of $100,000 for example: see **Sherbourne** [30], ***Moore v Moore*** [2004] NSWSC 587 [43], ***Baychek v Baychek*** [2010] NSWSC 987 [22] and ***Dalton v Paull (No 2)*** [2007] NSWSC 803http://www.lexisnexis.com/au/legal/search/enhRunRemoteLink.do?A=0.9427740018415 13&service=citation&langcountry=AU&backKey=20_T21408816640&linkInfo=F%23AU%23NSWSC%23sel1%252007%25page%25803%25year%252007%25&ersKey=23_T21408814044 [13].

129 It is accepted that a costs capping order can be applied to all parties: see **Sherbourne** [26] and ***Dinnen v Terrill*** [2007] NSWSC 1405 [35].

130 In **Sherbourne** Palmer J seemed to take the view that an application for cost capping should be heard and defended early in the proceedings as part of case management. That view does not seem to have prevailed, there being several

cases where capping orders were made at the end of the hearing, and no cases where the order was refused because of the lateness of the application.

131 In determining the size of an estate available for distribution the Court's practice is to require details of the costs of both sides not only actually incurred but estimated to be incurred till the end of the hearing. A successful plaintiff is usually entitled to costs and the projected costs of both plaintiff and estate can be estimated to enable a clear picture of the net estate available to the estate for distribution to be determined. In this context it makes sense for the question of whether costs should be capped to be taken into account in order to arrive at the amount of the estate available for distribution.

132 Obviously a very important factor is determining whether costs should be capped is the size of the estate. The size of the prospective award to the plaintiff (if any is to be made) and the proportionate relationship between the two are relevant. It is also relevant to have regard to the conduct of a party- has that party contributed to the incurral of costs by ranging too wide in its evidence, calling evidence of no relevance to the case and matters of that kind. The approach to these questions may not be precisely the same as the test to be applied in considering whether a party should be deprived of his or her costs because of misconduct (see for example ***Colgate-Palmolive Co v Cussons Pty Ltd*** (1993) 46 FCR 225) but there is an overlap. There are other factors which may be relevant.

133 I do not accept the defendant's contention that the conduct of the case by the plaintiff's solicitor is such to warrant a costs capping order. I regard much of the time spent on affidavits of the plaintiff and time in cross examination by the plaintiff's counsel as required to deal with the defendant's assertions. I do not think that a defendant who raises charges of misconduct against a plaintiff has any cause for complaint about the time taken to deal with those charges.

134 The defendant tendered (Exh 5) the costs agreement between the plaintiff and his solicitor. It was directed to a contention that the plaintiff will not have to pay any costs if unsuccessful. The plaintiff has not been unsuccessful and the relevance beyond this point has not been demonstrated.

135 In this case the defendant had ceased to incur legal costs for representation. The estate was not burdened by the increased costs to itself as the case dragged on, with the consequence that it was only the plaintiff who was forced to expend money on solicitors and barristers and not the defendant. A costs capping order affecting both sides would have no effect on the defendant here.

136 Whilst I think it is most unfortunate that the plaintiff has expended so much to recover a fairly modest provision I do not think it is in all the circumstances of this case appropriate to cap the plaintiff's costs.

Other costs

137 I have not dealt with the issue of costs of the application to reopen. In the ordinary course of events an unsuccessful party is required to pay the costs of the successful party. I am presently minded to order that if the defendant has incurred any costs by reason of the plaintiff's motion those should be offset against the plaintiff's costs of the defendant's unsuccessful motion for disqualification but I will hear the parties on this issue should either contend for a different result.

Further aspects of the order for provision

138 Returning to the question of the precise orders to be made, the defendant may be able to obtain a loan of that amount from his father in law (as previously occurred in relation to Narrabeen) or from some other person. It is more likely that the defendant will need to mortgage the property to pay the $150,000 and the $76,000 (or such amount as is agreed or assessed) and it is possible, I accept, that the defendant will have to sell the property in order to pay the plaintiff a total of $226,000. Should the defendant be unable, within two months, to pay the $226,000 due to be paid to the plaintiff the property will have to be sold and in that circumstance I think it appropriate to apply the same percentage of 30% to the net proceeds of sale available after payment of all selling costs and the $128,498.82 referred to at [50] above whether the sale price is $725,000 or a higher or lower amount is achieved. There will need to be some means of protection of the plaintiff's interest in the property both in respect of the provision, whether $150,000 or 30% of the net proceeds, and for costs. It may be that the Court will need to ensure that a solicitor and selling

agent mutually acceptable to the defendant and the plaintiff are engaged for the sale and if agreement cannot be reached that trustees for sale are appointed. Hopefully that course will not be necessary since it will reduce the amount available to both parties.

139 S 61 does not constrain the Court as to the form of orders that can be made and I note that Hallen J in ***Zagame v Zagame*** [2014] NSWSC 1302http://www.lexisnexis.com/au/legal/search/enhRunRemoteLink.do?A=0.32859691534404156&service=citation&langcountry=AU&backKey=20_T21519822265&linkInfo=F%23AU%23NSWSC%23sel1%252014%25page%251302%25year%252014%25&ersKey=23_T21519822249 has made an order of a percentage share of the property when sold (although in ***Bouttell v Rapisarda*** [2014] NSWSC 1192http://www.lexisnexis.com/au/legal/search/enhRunRemoteLink.do?A=0.21903542313214674&service=citation&langcountry=AU&backKey=20_T21529113026&linkInfo=F%23AU%23NSWSC%23sel1%252014%25page%251192%25year%252014%25&ersKey=23_T21529113018, McDougall J did not regard such an order as appropriate). In the present case I am making the percentage order as an alternative provision, and I think that is an appropriate means of dealing with the uncertainty of whether the property will need to be sold.

140 I direct that the plaintiff prepare short minutes of order reflecting these reasons and provide a copy to the defendant within three days of todays date. The matter will be listed next week for the making of formal orders.