IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S270 OF 2017**

BETWEEN:

HOMAYOUN NOBARANI

Appellant

And

THERESA MARICONTE

Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:
I cerity that the outline is in a form suitable for publication on the internet.

Part II:
NOTICE OF CONTENTION

1. The Appellant neither consents nor opposes the filing of the Respondent's proposed Notice of Contention. The Respondent's application did not comply with the requirements of 42.08.1 of the *High Court Rules 2004* (Cth).

GROUND 1: Whether the New South Wales Court of Appeal ("**NSWCA**") should have ordered a new trial in circumstances where it found that the Appellant had been denied procedural fairness.

2. The principles in *Stead v State Government Insurance Commission* (1986) 161 CLR 141 that a party denied a fair trial will not always result in a new trial remains correct where the error only infects a question of law in the proceedings. Where the denial of a fair trial is related to a material fact or facts in contest between the parties, an appellate court should order a new trial principally, because they cannot appreciate how the fact(s) could have affected the matrix of the trial and the decision maker.

3. Whilst there may, in some instances, be a place for a 'backward looking test' i.e. would observance of procedural fairness have inevitably resulted in the same outcome to the impugned trial, a 'forward looking test', i.e. would a new trial inevitably result in the same order, should have been applied by the NSWCA in the circumstances of the Appellant's appeal to the NSWCA. Even if the former test had been applied without error, the 'backward looking test' necessarily required consideration of what would have occurred had the denial of procedural fairness not occurred.

4. If both tests are to be applied by an appellate court and different answers arrived at by different judges then careful consideration of the unfairness complained of must be undertaken.

5. The Supreme Court Rules 1970 (NSW) are designed to allow '*interest suits*' to be determined in advance of a final hearing of an application for a grant of probate. Consistent with that design and practice, the Court (Hallen J.) ordered that the hearing set to commence on 20 May 2015 was to be a hearing limited to a determination of the question whether the caveats lodged by the Appellant should cease to be in force. The following day (24 April 2015) the Respondent filed an Amended Notice of Motion seeking orders that the first caveat and second caveat filed by the Appellant cease to be in force.

6. A hearing in relation to that Amended Notice of Motion required the Appellant to discharge a prima facie case. The onus on the Appellant for the purposes of that Amended Notice of Motion was not a burdensome one.

7. The whole nature of the hearing dramatically changed when the primary judge decided but three (3) clear working days out from the allocated hearing date, to change the nature of the hearing to a final hearing of the application for a grant of probate of the 2013 Will. This had a significant impact on the preparation which would be required, the documentary and other evidence which may be necessary and the standard of proof applicable.

8. The final hearing proceeded on 20 & 21 May 2015. On the following day (22 May 2015) the primary judge found that the Appellant did have standing to challenge the 2013 Will. The primary judge went on to order that probate of the 2013 Will should be granted to the Respondent and ordered the Appellant to pay the Respondent's costs.

9. The Appellant appealed the decision on a basis that there had been a denial of procedural fairness. The NSWCA dismissed the Appeal. A majority (Ward & Simpson JJA) found that the Appellant was denied procedural fairness. Simpson JA was not satisfied that a trial conducted in accordance with the rules of procedural fairness would not yield a different result. Ward JA did not consider that the Appellant had been deprived of the possibility of a different result. Emmett AJA expressed some disquiet as to the way proceedings were brought on for hearing on a final basis before the primary judge but held that the circumstances were not such that the appeal should be allowed.

10. There was a denial of procedural fairness at the hearing on 20 & 21 May 2014 in not less than eight (8) respects:

    a. failure to allow the Appellant to rely on the affidavit of Daniel Lemesle;
    b. failure to adjourn the proceedings to allow Daniel Lemesle to give evidence;
    c. failure to adjourn the proceedings to allow the Appellant time to properly prepare for the hearing of the Amended Statement of Claim, prepare a defence, file evidence, give notice to witnesses, give notice to the Respondent to cross-examine witnesses;
    d. failure to allow cross examination by the Appellant of Rachel Parseghian;

e. failure to adjourn the proceedings to allow the Appellant to obtain expert evidence in relation to the authenticity of the deceased's signature;
f. failure to adjourn the proceedings to allow the Appellant a reasonable time to issue subpoenas and for documents to have been produced; and
g. ruling on objections to the Appellant's affidavit evidence without hearing argument from the Appellant.

11. Given the nature of the procedural unfairness, Ward J was disabled from reaching a sound conclusion that a new trial could make no difference. An order by the NSWCA that there be a new trial would not have been a futility. The NSWCA should have ordered a re-trial.

GROUND 2: What interest must a beneficiary under a prior Will show in order to challenge a grant of probate?

12. The primary judge found that the Appellant had standing to challenge the 2013 Will. The question of the Appellant's standing was not a matter in issue on appeal to the NSWCA. Nor was it the subject of any Notice of Contention in the NSWCA. The primary judge had made a finding that the Appellant had standing. Regardless of the primary judge's finding and the subject of the appeal to the NSWCA, Emmett AJA called into question the interest the Appellant had in the validity of the 2013 Will.

13. The Appellant was a beneficiary under a prior Will of the deceased ("**the 2004 Will**"). It matters not that the monetary value of his legacy may be small for its value is not simply to be measured in monetary terms.

14. The Appellant had a valid interest in the litigation. He was but one of the 24 other beneficiaries named in the 2004 Will. In the event that contests over the grant of probate were not to proceed as provided for under the Supreme Court Rules, then contrary to the overriding purpose of s.56 Civil Procedure Act 2005 (NSW), namely facilitation of the "*just, quick and cheap resolution*" of proceedings, there would be real potential for more litigants agitating on behalf of their personal interest, longer trials and additional costs to estates.

15. Emmett AJA noted that the Animal Welfare League ("**the League**") was "*apparently accepting the validity of the 2013 Will*": **2 AB 650/50**. It was not correct for his Honour to accept or assume that the League accepted the validity of the 2013 Will. The consent orders made affecting the League reflect an election on its part to no longer participate in this litigation: **1 AB 67**. Those consent orders do not preclude the League taking its share of the estate under the earlier Will.

Dated: 17 May 2018

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