IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S270 OF 2017**

BETWEEN:

HOMAYOUN NOBARANI

Appellant

And

THERESA MARICONTE

Respondent

APPELLANT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. We certify that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES OF APPEAL

2. The issues on appeal are:

   a. Whether after unanimously finding that the appellant, a self-represented litigant, was denied procedural fairness, the NSW Court of Appeal should have ordered a new trial?

   b. What interest must a beneficiary under a prior will show in order to challenge a grant of probate?

PART III: NOTICE

3. We certify that the appellant has considered that notice should not be given in compliance with section 78B of the *Judiciary Act 1903* (Cth).

PART IV: REASONS FOR JUDGMENT

4. The reasons of the Supreme Court primary judge are contained: **In the Estate of Iris McLaren; Maricontе v Nobarani** [2015] NSWSC 667.

5. The reasons of the NSW Court of Appeal appellate judges are contained in: **Nobarani v Maricontе (No.2)** [2017] NSWCA 124.

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

PART V: RELEVANT FACTS

6. On 12 December 2013 the late Iris McLaren ("**the Deceased**") died.[1]

7. On 5 December 2013, i.e. one week before she died, the Deceased made a will ("**the 2013 Will**").[2] The Deceased named Teresa Ann Mariconte ("**the Respondent**") as executrix. The 2013 Will purports to be witnessed by Ms Rachel Parseghian and Mr Chen Yuanun.[3] By the 2013 Will, the Deceased gave the whole of the estate to the Respondent.[4] At the time the 2013 Will was made, the Deceased had been in hospital for some weeks and was suffering from the final and very painful stages of oesophageal cancer.[5]

8. Homayoun Nobarani ("**the Appellant**") claimed he had an interest in opposing the grant of probate to the Respondent.[6] The Appellant sought to cast doubt on, the execution of the 2013 Will, the Deceased's knowledge and approval that the 2013 Will was a testamentary instrument and also her capacity to execute the 2013 Will.[7]

9. On 23 January 2014 the Appellant filed a caveat under r.78.66 Supreme Court Rules ("**the Rules**") against the grant of probate in the estate of the Deceased, without notice to him ("**the First Caveat**").

10. On 5 February 2014 the Animal Welfare League of New South Wales ("**the League**") also lodged a caveat under r.78.66 against the grant of probate in the estate of the Deceased without notice to the League ("**the League's Caveat**"). The League claimed an interest as beneficiary named under a Will of the Deceased dated 12 August 2004.[8]

11. On 11 February 2014 the Respondent filed a Summons for probate of the 2013 Will.[9] The affidavit in support of the Summons asserted that the Deceased's estate had a gross value

---

[1] NSW Court of Appeal ("**CA**") Reasons [57]; Primary judgment [23]

[2] Primary judgment [2]

[3] CA Reasons [57]

[4] CA Reasons [57]; Primary judgment [23]

[5] Primary judgment [19]

[6] Primary judgment [12]

[7] Primary judgment [12]

[8] CA Reasons [69]. A document bearing the title "12th August, '004" was in evidence before the primary judge ("**the 2004 document**"). The 2004 document gave directions for a bequest to the Respondent in the sum of $10,000 together with certain items of jewellery, as well as bequests of chattels to other persons. After the description of some jewellery, the 2004 document provided that certain unspecified jewellery was to be shared between the Appellant as well as Mr Bradstreet, Ms Couzner, Mrs Nixon, Mrs Powell, Mrs Rosenthal and the Respondent. The 2004 document stated that Mr Bradstreet was to "adjudicate". CA Reasons [70], [72], [73].

[9] CA Reasons [75]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

of $2,121,598.82 and a net value of $2,106,958.82.[10] The Summons did not join the Appellant or the League.[11]

12. On 14 February 2014 the Respondent filed a Notice of Motion under r.78.71, seeking orders that the First Caveat and the League's Caveat cease to be in force ("**the Caveat Motion**"). Both the League and the Appellant were joined as Respondents to that motion.[12]

13. On 24 February 2014 the Appellant swore an affidavit, in relation to the Caveat Motion in which he said, inter alia, that he had filed a caveat as he was a beneficiary under the Deceased's "previous wills" and said that he had visited the Deceased on 5 December 2013 for over an hour and that she was not alert but sleepy and barely spoke.[13]

14. On 15 May 2014 the Respondent filed a Statement of Claim seeking an order that she be granted probate of the 2013 Will. The League was the only defendant named in that Statement of Claim.[14]

15. On 21 August 2014 the Respondent filed an affidavit made on 23 July 2014 by Ms Rachel Parseghian. Ms Parseghian said that she witnessed the 2013 Will on 5 December 2013 when she was visiting her mother who was a patient in the same hospital as the Deceased.[15]

16. By 23 July 2014 the Appellant's first caveat had expired with the effluxion of time (six (6) months). He filed another caveat against the grant of probate of the Deceased's estate on 15 September 2014 ("**the Second Caveat**").

17. On 24 November 2014 a deputy registrar of the Supreme Court made orders that the Respondent serve on the beneficiaries named in an earlier Will made in 2004, notice of proceedings under r.78.57 of the Rules.[16] On the same day, another deputy registrar of the Court fixed the proceedings commenced by the Respondent for hearing before the primary judge on 20 and 21 May 2015.[17]

---

[10] CA Reasons [75]

[11] CA Reasons [75]; NSWCA Red Book pg. 1-2.

[12] CA Reasons [76]

[13] CA Reasons [77]

[14] CA Reasons [78]

[15] CA Reasons [82]

[16] CA Reasons [84]

[17] CA Reasons [84]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

18. On 21 December 2014 the League filed a Defence to the Statement of Claim as well as a Cross-Claim.[18] On 10 February 2015 the League elected to take no further part in the proceedings.[19]

19. On 14 January 2015 the Respondent served on the Appellant a notice of proceedings together with a copy of her affidavit of 31 January 2014 and a copy of the Statement of Claim.[20]

20. On 19 March 2015 the Respondent filed a Notice of Motion seeking an order that judgment be entered against the Appellant with costs ("**the Summary Judgment Motion**"). It is difficult to understand what purpose was intended by the Summary Judgment Motion as the Appellant had not been named as a defendant in the Statement of Claim.[21]

21. On 30 March 2015 the proceedings came before Hallen J., for directions. His Honour asked the Appellant why he had not put on a Defence to the Statement of Claim and told the Appellant that a Statement of Claim had been served and that he had 28 days to file a Defence but had not done so.[22] At this stage the Respondent had not yet named the Appellant as a defendant in the Statement of Claim.

22. On 23 April 2015 the matter came before Hallen J. again, at which time no order had been made extending the operation of the First Caveat or the Second Caveat. Both caveats had lapsed by effluxion of time.[23] Hallen J. indicated that he was disposed to give the Respondent leave to amend the Caveat Motion identifying the caveats and he would then give the Appellant an opportunity to put on any evidence in response to the amended motion. He also said he would leave "the entire issue" of the determination of whether the caveat should cease to be in force for the primary judge to deal with on 20 May 2015.[24] Hallen J. said that if the primary judge determined that the caveat should not cease to be in force, the primary judge could make directions as to the further conduct of the proceedings. His Honour also observed that the undetermined Summary Judgment Motion was a "waste of time" particularly when the Appellant had not been named as a defendant in the Statement of Claim.[25]

23. Hallen J. then said that the alternative was to give the Respondent leave to file an Amended Statement of Claim naming the Appellant as a defendant, dismiss the Caveat Motion and let

---

[18] CA Reasons [81]

[19] CA Reasons [81]

[20] CA Reasons [85]

[21] CA Reasons [88]

[22] CA Reasons [89]

[23] CA Reasons [98]

[24] CA Reasons [99]

[25] CA Reasons [99]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

the Appellant put on any evidence he wanted to, including a defence and any affidavits on which he wished to rely. Senior Counsel for the Respondent urged Hallen J. not to adopt that course and suggested that the most expeditious way of dealing with the matter would be for the Caveat Motion to be amended and for the matter to go before the primary judge "*on that issue*".[26] Hallen J. said that in the event that the primary judge considered the caveat should remain in force or alternatively, that there was a basis for the matter proceeding by way of pleadings, the Respondent would have to proceed by filing an Amended Statement of Claim. Senior Counsel for the Respondent accepted that proposition.[27]

10 24. Hallen J. granted leave to the Respondent to file and serve an amended Caveat Motion by 24 April 2015 and directed that the hearing before the primary judge on 20 and 21 May 2015 be limited to determination of the question of whether the caveats lodged by the Respondent should cease to be in force.[28]

25. On 24 April 2015 the Respondent filed an amended motion seeking orders that the First Caveat and the Second Caveat cease to be in force.[29] The caveats continued to drive the conduct of the proceedings.[30]

20 26. The proceedings came before the primary judge for directions on 14 May 2015. The Appellant was unrepresented. The primary judge sought to understand what was the nature of the hearing commencing the following week. His Honour indicated that he was inclined to let "*it all happen as though it were a kind of final hearing*". Senior Counsel for the Respondent urged his Honour to do so.[31] That approach on the part of Senior Counsel for the Respondent appeared to be inconsistent with the stance adopted before Hallen J when it was said by him that the most expeditious way of dealing with the matter was that it go before the primary judge on the issue raised by the Caveat Motion.[32] The primary judge was proposing a final hearing of the grant of probate of the 2013 Will which was a significant
30 change from the hearing proposed by Hallen J. which was to be limited to the hearing of the amended Caveat Motion.[33]

27. The trial judge ordered the Appellant to file and serve a Defence by Monday, 18 May 2015. He also gave directions for the serving of subpoenas and sought to confirm the affidavits upon which the Appellant sought to rely.

---

[26] CA Reasons [100]

40

[27] CA Reasons [100]

[28] CA Reasons [101]

[29] CA Reasons [102]

[30] CA Reasons [102]

50 [31] CA Reasons [105]

[32] CA Reasons [105]

[33] CA Reasons [110]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

28. The Appellant identified affidavits of 24 February 2014, 5 May 2015 and 13 May 2015. The primary judge directed the Appellant to serve any supplementary evidence on which he sought to rely no later than 18 May 2015.[34]

29. At the hearing commencing 20 May 2015 the Respondent was represented by Senior and Junior Counsel. The Appellant appeared in person. At the commencement of the hearing the primary judge granted the Respondent leave to file an Amended Statement of Claim which added the Appellant as the second defendant and claimed an order, for the first time, that the Appellant pay her costs.[35] Up to that time the Appellant had not been joined as a second defendant.[36] Prior to that he was a caveator against the grant of probate to the Respondent.[37]

30. The primary judge delivered Reasons for Judgment *ex tempore* on 22 May 2015. The primary judge found that the Appellant did have standing to challenge the 2013 Will.[38] He ordered that probate of the 2013 Will should be granted to the Respondent in solemn form and ordered the Appellant to pay the Respondent's costs of the whole proceedings.[39]

31. The Appellant appealed to the New South Wales Court of Appeal on the basis that he had been denied procedural fairness for the reasons set out below at paragraph 37 of these submissions.

32. The NSW Court of Appeal dismissed the appeal. Ward and Simpson JJA found that the Appellant was denied procedural fairness.[40] Simpson JA was not satisfied that a trial conducted in accordance with the rules of procedural fairness would not yield a different result.[41] Ward JA did not consider that the Appellant had been deprived of the possibility of a different result.[42] While Emmett AJA thought it was "*a matter of some concern*" that the nature of the proceedings had "*changed dramatically*" between the directions hearing before Hallen J. on 23 April 2015 and the directions hearing before the primary judge on 14 May 2015 and there was a basis for "*some disquiet as to the way proceedings were brought for*

---

[34] CA Reasons [107]

[35] CA Reasons [112]

[36] Primary judgment [2]

[37] No Defence to the Amended Statement of Claim was filed. It appears to have been accepted that the Defence filed by the Appellant on 18 May 2015 would stand as a defence to the Amended Statement of Claim.

[38] Primary judgment [21]. That finding was not the subject of a Notice of Contention in the NSW Court of Appeal.

[39] Primary judgment [88]

[40] CA Reasons [9], [39]

[41] CA Reasons [38]

[42] CA Reasons [7]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

hearing on a final basis", he did not consider that the circumstances were such that the Court of Appeal should uphold the Appellant's appeal.[43]

PART VI: ARGUMENT

Ground 1: Whether after unanimously finding that the appellant, a self-represented litigant, was denied procedural fairness, the NSW Court of Appeal should have ordered a new trial?

33. The NSW Court of Appeal should have ordered a new trial. Simpson JA considered there ought to be a new trial.[44] Ward JA reached a contrary conclusion and in doing so erred in her application of the test in *Stead v State Government Insurance Commission* (1986) 161 CLR 141 ("***Stead***") in finding that notwithstanding the denial of procedural fairness, the appellant should be denied the relief sought. For his part, Emmett AJA did not engage with *Stead* but concluded the circumstances were such that the Court should not intervene.[45]

34. Ward JA erred for the following reasons:

    a. In circumstances where the procedural fairness denied meant that matters of fact were not before the primary judge and therefore were not known, her Honour could not conclude that compliance with procedural fairness could not possibly have yielded a different result in the trial before the primary judge;

    b. In the alternative, by not applying what has come to be referred to as the "forward-looking" version of the test in *Stead*; and

    c. Further, by not considering all bases of denied procedural fairness on which it was contended the outcome of the trial could have been different.

35. These submissions detail the nature of the procedural unfairness before addressing each of the above.

The nature of the procedural unfairness

36. Both Ward and Simpson JJA found that the Appellant was denied procedural fairness.[46] While Emmett AJA made no explicit finding regarding such a denial, his Honour's "disquiet" and "concern" regarding the dramatic change in how the proceedings were brought on for hearing are not inconsistent with these findings of Ward and Simpson JJA.[47]

---

[43] CA Reasons [116]

[44] CA Reasons [56]

[45] CA Reasons [124]

[46] CA Reasons: Ward JA at [2], Simpson JA at [39]; see comments of "disquiet" by Emmett AJA at [116] and [122]-[124].

[47] CA Reasons [124]; [116]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

37. It is implicit from Ward JA's reasons that her Honour accepted all of the matters that the Appellant complained of, detailed by Simpson JA, and outlined in the Appellant's Notice of Appeal.[48] Specifically, these matters were that the primary judge had:

    a. failed to allow the Appellant to rely on the affidavit of Daniel Francois Lemesle sworn 31 March 2014 (primary judgment at [30], [31] and [82]);

    b. failed to adjourn the proceedings to allow Daniel Francois Lemesle be called as a witness to give evidence (primary judgment at [82]);

    c. failed 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 and to become familiar with the rules and procedures of a hearing of a statement of claim (primary judgment at [42] and [43]);

    d. failed to allow cross examination by the Appellant of Rachel Parseghian (primary judgment at [50]);

    e. failed to adjourn the proceedings to allow the Appellant to obtain expert evidence in relation to the authenticity of the Deceased's signature (primary judgment at [69]);

    f. failed to adjourn the proceedings to allow the Appellant to obtain expert evidence in relation to Michael Bradstreet's diary;

    g. failed to adjourn the proceedings to allow the Appellant a reasonable time to issue subpoenas (primary judgment at [82]) and for the documents to have been produced to the court in relation to the subpoena issued to Dr Margaret Kearns, FOCUS Eye Centre filed 15 May 2015 (primary judgment at [79]);

    h. ruled on objections to the Appellant's affidavit evidence (being the Affidavits of Homayoun Nobarani dated 24 February 2014 and 20 April 2015) without hearing argument from the Appellant.

38. The denials of procedural fairness occurred in circumstances where the Appellant had, on at least four occasions at the pre-trial directions hearing before Slattery J (on 14 May 2015), and on at least three occasions during the course of the hearing itself (which commenced on 20 May 2015), requested an adjournment.[49] These requests included a request for time to obtain legal representation for the hearing.[50]

39. The affidavit of Mr Lemesle was not admitted into evidence in circumstances where on at least four occasions the Appellant had indicated a desire to rely on that affidavit.[51]

40. More generally, the above identified failures occurred against a backdrop where:

    a. The Rules were designed to allow what are called 'interest suits' to be determined in advance of a final hearing of an application for a grant of probate.

---

[48] CA Reasons at [7].

[49] Transcript of directions before Slattery J on 14 May 2015, T13/10-30; T17/44-50; T19/19-20; Transcript of hearing before Slattery J on 21 May 2015 at T91/29-40; T162; T167/33-50.

[50] Transcript of references of directions hearings before Slattery J on 14 May 2015, T13/19-20.

[51] Transcript of references of hearing before Slattery J on 20 May 2015 at T48/15-21; on 21 May 2015, T91/45-50; T116/30-45; T118/33-40; T119-121.

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

b. Consistent with the Rules, Hallen J had ordered that the hearing set to commence on 20 May 2015 was a hearing of the amended Caveat Motion. Specifically, the hearing of the amended Caveat Motion only required the Appellant to establish a prima facie case of invalidity of the 2013 Will.[52]

c. While for the purpose of the amended Caveat Motion the Appellant as caveator was required to discharge the prima facie burden of invalidity,[53] the test was not a burdensome one.[54]

d. The nature of the hearing and the standard and burden of evidence for the hearing had dramatically changed, just 4 working days prior to the hearing commencing.

41. Therefore, the nature of the legal test and evidentiary burden on the Appellant was significantly transformed when the hearing was changed to a fully contested trial concerning a grant of probate.

The application of *Stead* by the NSW Court of Appeal

The test

42. Of relevance to the question of whether a new trial should be ordered is the passage in *Stead* where the High Court said (at 145-146):

> *The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker L.JJ.) in Jones v. National Coal Board (1957) 2 QB 55, at p 67, in these terms:*
>
> > *"There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it."*
>
> *That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.*
>
> *For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.*
>
> *Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is*

---

[52] *Azzopardi v Smart* (1992) 27 NSWLR 232, 238 (Powell J).

[53] *Chew v Waddy; Estate Cowley* (Unreported decision, Hodgson J, Supreme Court of New South Wales, 16 August 1996), BC9604174 at 5.

[54] For example, in *Mannow v Creagan; The Estate of Ludwig Mannow* (Unreported decision, Powell J, Supreme Court of New South Wales, 19 June 1992), BC9201799) despite the affidavit evidence before the Court being inappropriate as to form, none of the deponents having been cross-examined and the judge being of the view that the evidence, as a whole, was (at 7) "tenuous and suspect", this was sufficient to discharge the onus of raising a "prima facie case".

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact (Supreme Court Rules O.58 rr.6 and 14). However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial.

The scope and onus of the test

43. *Stead* itself concerned a denied opportunity to make submissions on an issue of fact. The facts going to that issue were already in evidence before the trial judge. As is apparent from the above quoted passage, the Court in *Stead* cautioned that in such circumstances care needs to be taken and relief refused only if there is no possibility of a different outcome. In the circumstances of the Appellant's case where there was a plethora of facts which were not before the primary judge, that vigilance about which this Court spoke of in *Stead* inevitability leads to a result that it cannot be said there was no possibility of a different outcome.

44. In *Etri v District Court of NSW* [1996] NSWCA 174 counsel was denied the opportunity to make reference to facts that were not before a trial judge.[55] Simos AJA stated in those circumstances: "...it is impossible to conclude that compliance with the rules of procedural fairness could have made no difference to the result".[56] The unknown facts giving rise to the impossibility referred to in *Etri* pails into relative insignificance when compared to the circumstances under present consideration.

45. Having regard to the factors identified above at paragraph 37, the fact is, as stated by Simpson JA, the Appellant "...had virtually no opportunity to prepare or present his case".[57] The procedural fairness denied to the Appellant was such that it is impossible to conclude that compliance could have made no difference to the result having regard to the facts which were not before the primary judge and which might have affected the significance of the facts which were before her Honour. Where as here, relevant facts were unknown the Court of Appeal was disabled from reaching a sound conclusion that a new trial could make no difference.[58] An appeal court cannot determine what is possible if it is lacking the different facts that need be considered. In those circumstances, a court of appeal is incapable of concluding that there is no possibility of a different outcome. It follows that a respondent would fail to discharge its onus that a new trial would be futile.[59]

---

[55] (20 December 1996, NSW Court of Appeal, BC9607771 (***Etri***), Simos AJA at pg 8, Giles AJA agreeing at pg 1).

[56] *Etri* at pg 9

[57] CA Reasons at [42]

[58] Adopting words from Stead at [146]

[59] *Stead* at [147]; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at [60] (Gageler and Gordon JJ); cf. *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353 at [29] (Basten JA, Giles JA agreeing at [1], Young CJ in Eq at [118]).

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

46. In all events, the possibility and reality of appellate judicial opinions arriving at different results after undertaking the impressionistic exercise of determining whether a denial of procedural fairness could or could not possibly make a difference, necessitates the appellate court erring on the side of the relief sought so that the matter may be properly considered on remittal.[60]

The forward and backward-looking tests

47. The test in *Stead* has been considered to raise two different approaches to determining whether a new trial should be ordered. First, a "backward looking test" that involves consideration of whether a denial of procedural fairness would have made any difference to the actual result at the impugned hearing (*Stead* at 147). Second, a "forward looking test" that involves consideration of whether relief would be futile because a new hearing would inevitably result in the same order (*Stead* at 145).[61]

48. As stated by Merkel J in *Giretti*, "[a]lthough in most cases the answer will be the same, determining which of the two approaches is the correct one, may involve an important issue of principle".[62] In his Honour's view, the issue was framed in *Stead* in terms of whether an order for a new trial will inevitably result in the making of the same order, rather than whether procedural fairness would have made a difference to the result of the impugned hearing.[63]

49. Since *Stead*, both the backward and forward-looking tests have been applied by courts.[64]

50. As detailed above, Simpson JA found in favour of the Appellant. Specifically, at par [38] her Honour considered the forward-looking version of the test in *Stead* and concluded it did not assist the Respondent.

51. In contrast, Ward JA appears to have applied the backward-looking test. This is clear from the reference to "would have" in par [3] and par [8] of her reasons. In paragraph [8] her Honour's reasons focus on the evidence of Michael Bradstreet and whether the affidavit of Mr Lemesle, if allowed, would raise a genuine doubt about the validity of the 2013 Will.[65] Her Honour does not appear to have considered the other instances of

---

[60] *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at 88-89 per Gleeson CJ, 109-110, 116-117 per Gaudron and Gummow JJ, 130-132 per Kirby J, 144 per Hayne J & 153-158 per Callinan J; *Wu v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 23 at 33-36; *Federal Commissioner of Taxation v La Rose* (2003) 129 FCR 494 at 513; *WAFV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 280 at 283, 289-290; *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCER 346 at 352, 360-361 & 369.

[61] *Lourey v Legal Profession Complaints Committee* [2012] WASCA 112 at [112] (Murphy JA, Pullin JA agreeing at [1], Buss JA agreeing at [22]); see also *Giretti v Commissioner of Taxation* (1996) 70 FCR 151 (***Giretti***) at 164-165 (Lindgren J, Jenkinson J agreeing at 152) and at 175-177 (Merkel J).

[62] *Giretti* at 176 (Merkel J), see also Lindgren J at [165].

[63] *Giretti* at 510.

[64] See *Lee v Minister for Immigration & Citizenship* [2007] FCAFC 62; (2007) 159 FCR 181 for an example of the application of a forward-looking test and *Kaur v Minister for Immigration and Anor* [2016] FCCA 1730 for consideration of cases applying a backward-looking test.

[65] CA Reasons at par [8]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

procedural fairness that were denied and their possible effect on the outcome. Further, her Honour has not considered the shifting onus in probate.[66]

52. There is scope for operation of both the forward-looking and backward-looking tests. In the context of the Appellant's case the test to be applied is a forward-looking test.

The application of the test

53. A forward-looking test should be applied for the nature of the procedural fairness that was denied relates to the *preparation*, as much as the conduct, of the hearing. It is nonsensical, in the present circumstances to hypothesise whether a denial of procedural fairness would have made any difference to the actual result at the impugned hearing. This is because, but for the denied procedural fairness, the hearing would not have been conducted when it was, having the nature that it did, without the opportunity to gather evidence, the nature of which is unknown.

54. In essence, when the procedural fairness that is denied includes matters in the lead up to the hearing, the forward-looking test should be applied. Ward JA's failure to consider the forward-looking test was an error.

55. Irrespective of which view of the test in *Stead* is adopted, it would appear uncontroversial that the counterfactual (past or present) entails consideration of a hypothetical devoid of the procedural fairness that was denied. It therefore follows that application of either test requires consideration of what would occur/would have occurred if the aspects constituting a denial of procedural fairness had not taken place.

56. As indicated earlier, the Appellant submits the onus for satisfying the Court that there would be no difference, lies with the Respondent.[67]

57. In her reasons, Simpson JA had regard to various aspects of the matters complained of in the Appellant's Notice of Appeal, including the circumstances around the change in the nature of the hearing, the absence of Ms Rachel Parseghian for cross examination, and, earlier, the affidavit of Mr Lemesle.[68]

58. Further, her Honour noted that although the Appellant's interest in the application for the grant of probate was limited, there was a public interest component in the resolution of the doubts raised by Mr Lemesle's affidavit as to the validity of the 2013 Will. This reflects the fact that in challenging the proceedings the Appellant represents not just himself, but a class of beneficiaries from the Deceased's earlier wills.

59. In contrast, Ward JA's reasoning only had regard to Mr Lemesle's affidavit without reference to the other matters which she implicitly accepted at par [7] were instances of denied procedural fairness. The failure to consider individually and cumulatively the effect of these matters on the possible outcome was an erroneous application of the principles in *Stead*.

---

[66] *Bailey v Bailey* (1924) 34 CLR 558; *Fulton v Andrew* (1875) LR 7 HL 448.

[67] *Stead* at [147]; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at [60] (Gageler and Gordon JJ); cf. *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353 at [29] (Basten JA, Giles JA agreeing at [1], Young CJ in Eq at [118]).

[68] CA Reasons at par [15], [32], [40] and [41]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

60. Moreover, her Honour considered at par [8] whether the "plethora of matters" raised by the Appellant as to the validity of the 2013 Will were capable of meeting "the clear evidence of the deceased's solicitor". This failed to account for the fact that, but for the denial of procedural fairness, the hearing would have been different in nature and the onus would not have required more than raising a prima facie doubt. It also did not account for the fact that even at a hearing of the grant of probate issue, the affidavit of Mr Lemesle would have sufficed to upset the presumption of regularity, thereby altering the onus to the Respondent in any event.

61. It follows that both in the matters considered and the manner of consideration Ward JA erred in applying *Stead.* In all of the circumstances, Ward JA's conclusion that the denied procedural fairness could not possibly have made a difference was grounded on speculation of incomplete factors.

Conclusion on Ground 1

62. It was not possible given the nature of the denials of procedural fairness, for Ward JA to conclude there was no possibility of a different outcome.

63. The nature of the procedural fairness denied required an application of the forward-looking test, to properly take account of the changes in the preparation of the hearing at any re-trial. Ward JA erred in not applying the forward-looking test of *Stead.*

64. Consideration of the question posed by this Ground of Appeal must take into account each of the aspects that were established and found to constitute a denial of procedural fairness. Ward JA failed to consider all these aspects in the particular case.

65. Having regard to all the relevant considerations, the Appellant submits that but for the procedural unfairness, amongst other things, the nature of a re-hearing would be limited to the hearing of the amended Caveat Motion, such that the affidavit of Mr Lemesle would satisfy the Appellant's onus.

66. In the alternative, the hearing on the grant of probate issue would be conducted in circumstances where the Appellant would have been afforded the opportunity to prepare evidence for the hearing and obtain legal representation.

67. On any view, this is not a case where notwithstanding the denied procedural fairness the result is obvious from the start. The caution expressed by Megarry J in *John v Rees* [1970] Ch 345 at 402 is pertinent:

> *As everybody who had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.*

68. The Appellant is entitled to natural justice and a new trial according to law. Ward JA erred in finding otherwise.

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

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

69. The Respondent had raised at trial that the Appellant had no standing to challenge the 2013 Will. The trial judge found the Appellant had standing[69]. Ward JA considered that the Appellant had standing[70] while Simpson JA referred to the standing the Appellant had to change the Will.[71] The question of the Appellant's standing was not a matter in issue in the Appellant's appeal to the NSW Court of Appeal.

70. Despite 'standing' not being the subject of the appeal and no Notice of Contention having been filed by the Respondent, Emmett AJA considered that "*[a]n important question...*" is whether the Appellant had any valid interest in the validity of the 2013 Will[72]. It is not clear whether his Honour's remarks were directed to the Appellant's standing or perhaps a reference to r. 51.53 *Uniform Civil Procedure Rules* 2005 (NSW) ("***UCPR***"). On either basis Emmett AJA seems to suggest the limited monetary value of the Appellant's legacy in the jewellery and share in personal effects meant that the Appellant did not have a valid interest.

71. Emmett AJA reasoning does not engage with two important considerations:

    a. that in probate litigation the Appellant represents a class of people; and

    b. that the substantial wrong or miscarriage referred to in r.51.53 UCPR goes beyond the Appellant's interest in the estate.

72. Turning to the first of those considerations. Probate litigation has always been interest litigation. A party seeking to challenge a Will, obtain a benefit in a construction or rectification suit is required to show they have an interest in the litigation[73].

73. Once probate litigation has commenced, interested parties who are affected by the outcome are required to be served with relevant notices of the proceedings[74]. That party can then elect to participate in the litigation or remain a non-party. If the party elects not to participate they do not forgo their interest in the estate but they are bound by the decision[75].

74. Although Emmett AJA refers to the compromise with the League[76], he overlooks the difference between electing to no longer take part in the litigation and forgoing their

---

[69] Primary judgment [21].

[70] CA Reasons [8]

[71] CA Reasons [34]

[72] CA Reasons [120] and [124]

[73] *Re Devoy; Fitzgerald and Pender v Fitzgerald* [1943] St R Qd 137

[74] See for example the Rules, r.78.42

[75] *Young v Holloway* [1895] P 87 Probate Division at [89]

[76] CA Reasons [81], [120] and [124]

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

interest in the estate. The orders entered between the Respondent and League reflect the League electing not to participate any further in the litigation[77]. There is no evidence to suggest the "resolution or compromise" meant that in the event the Appellant is successful that the League would not take their share of the estate under an earlier will.

75. Under the 2004 Will there is reference to 24 other potential beneficiaries including the League. If the Appellant is successful, each beneficiary may take their respective entitlements.

76. Given the way the hearing was approached the Appellant never filed a Cross Claim propounding either the potential lost Will[78] or the informal 2004 Will[79]. At the hearing he represented a class of people who would have benefited by the Court pronouncing against the 2013 Will either under the 2004 Will or otherwise.

77. Parties with an interest in the litigation will often elect not to join for a variety of reasons. Cost implications is one. Commonly, another party is already pursuing relief and there is no need for there then to be 2 or 24 parties actively seeking the same relief. The Appellant in effect represents those 24 parties.

78. If the Court limits this class approach, then it will potentially require all interested parties to join the litigation. The length of trials and costs to estates of such an approach would be counter-productive.

79. Turning to the second point, the r.51.53 *UCPR*[80] provides the court must not in certain circumstances, order a re-trial unless a substantial wrong or miscarriage has been occasioned. Emmett AJA makes no reference to the rule but his finding[81] that there is no basis had been established for a new trial perhaps was meant to be an engagement of the rule.

80. His Honour may have been inferring that as the Appellant's interest in the estate is of limited monetary value no substantial wrong or miscarriage occurred. There are at least three reasons why in the circumstance of this case such reasoning fails.

81. *Firstly*, the substantial wrong is a document which the Deceased may not have intended to be her last will and testament has been admitted to probate in solemn form. Reference is made in the case law of the public interest in seeing that the last will of a free and capable testator is recognised and enforced. It is often said that, in a sense, the decision in such a suit operates *in rem* and binds all the world[82].

---

[77] Consent Minute of Judgment, NSWCA Blue Book, pg. 148.

[78] CA Reasons at [19]

[79] The 2004 Will only has one witness, George Kaloudis. Notwithstanding the Appellant could propound the Will as an informal Will.

[80] *UCPR*, r.51.53

[81] CA Reasons at [124]

[82] *Gray v Hart: Estate of Harris (No 2)* [2012] NSWSC 1562 at [5] (White J). As to the decree being binding on all the world, see *Concha v Concha* (1886) 11 App Cas 541 at 551-552 and 571-572 and *Beardsley v Beardsley* [1899] 1 QB 746.

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

82. *Secondly*, if a monetary value is the key to a fair trial when is a person entitled to procedural fairness? When their interest in the litigation is $50, $100 or $100,000? The monetary value of the interest should be irrelevant to the question of substantial wrong or miscarriage. In this case, monetary consideration for the Appellant might be modest but not infrequently personal effects of a deceased cannot have a price. This should not have denied the Appellant a procedurally fair trial.

83. *Thirdly*, the approach did not take into account that in a new trial it is not just the Appellant's interest in the estate, but the class of persons affected. As such, the monetary amount in issue is the whole value of the estate not just the Appellant's personal interest.

Conclusion on Ground 2

84. If Emmett AJA is correct, probate litigation will potential require all beneficiaries to join into the litigation rather than allowing the class approach. It is the Appellant's submission that if the approach of Emmett AJA is adopted then it would lengthen trial times and increase costs.

85. The current case law should not be disturbed, Emmett AJA erred.

PART VII: CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

a. Supreme Court Rules 1970 (NSW), r. 78.

b. Probate and Administration Act 1898 (NSW) s.144.

c. Uniform Civil Procedure Rules 2005, r.51.53.

d. Succession Act 2006 (NSW), s.6, 8.

PART VIII: ORDERS

86. The Appellant seeks the following orders:

a. That the orders of the New South Wales Court of Appeal of 5 June 2017 be set aside.

b. That in lieu thereof, the appeal be allowed.

c. That the orders made by Slattery J on 22 May 2015 be set aside.

d. That the proceedings be remitted to the Equity Division of the Supreme Court of New South Wales for a new trial.

e. That the respondent pay the appellant's costs of and incidental to the trial and of the appeal in the Court of Appeal, and of the application for special leave to appeal and of this appeal.

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123

PART IX: ESTIMATE OF ORAL ARGUMENT

87. It is estimated that 2 hours will be required for the presentation of the oral argument of the Appellant.

Dated: 22 December 2017

.....

Michael Windsor SC
Thirteen Wentworth Selborne
Telephone: 02 9235 1027
Facsimile: 02 9232 4071
Email: mwindsor@selbornechambers.com.au

.....

J E F Brown
Thirteen Wentworth Selborne
Telephone: 02 9235 1027
Facsimile: 02 9232 4071
Email: justinbrown@selbornechambers.com.au

.....

M E Hall
Banco Chambers
Telephone: 02 9376 0674
Email: m.hall@banco.net.au

Filed by: Alexander Atic, Remedy Law, Suite D3, Level 1, 674-678 Old Princes Highway, Sutherland, NSW 2232. Tel: 0435 120 160; Fax: 02 8539 7255; Email: alex@remedylegal.com.au, Ref: AA00123