

NOBARANI v MARICONTE (S270/2017)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 124

Date of judgment: 5 June 2017

Special leave granted: 17 November 2017

This matter concerns the grant of probate of the last will (“the 2013 Will”) of Ms Iris McLaren who died on 12 December 2013. The 2013 Will, which is dated 5 December 2013, names Ms Teresa Mariconte (“Ms Mariconte”) as Executrix. In it, Ms McLaren gives her the whole of her estate. On 22 May 2015 the primary judge dismissed Mr Homayoun Nobarani’s challenge to the grant of probate and ordered that Ms Mariconte be granted probate instead.

Upon appeal, Mr Nobarani submitted that the primary judge had denied him procedural fairness. He also complained about the way in which his Honour had dealt with Ms Mariconte’s application for the removal of certain caveats.

On 5 June 2017 the Court of Appeal (Ward JA & Emmett AJA; Simpson JA dissenting) dismissed Mr Nobarani’s appeal. While all Justices shared concerns about the procedural fairness issue, the majority concluded that an order for a re-trial was not warranted. Justice Ward held that there was no possibility that any re-trial would yield a different result. Her Honour noted that Ms McLaren’s long standing solicitor had given evidence concerning her alert testamentary capacity. He also gave evidence on how Ms McLaren signed that will in his presence. In the face of such evidence, Justice Ward was not satisfied that any procedural irregularities complained about by Mr Nobarani had deprived him of any realistic possibility of a different result. Justice Emmett also held that neither Mr Nobarani nor anyone else appeared to have a sufficient interest in the validity of the 2013 Will, so as to warrant a new trial on its validity.

Justice Simpson however disagreed. Her Honour held that while Mr Nobarani’s financial interest in the application for the grant of probate was admittedly limited, it was however sufficient. He was therefore entitled to a hearing that accorded with the rules of procedural fairness, the denial of which resulted in a substantial miscarriage of justice. Justice Simpson also found that there was a public interest dimension in a grant of probate that went beyond the interests of the immediate parties. In this respect her Honour noted that there was evidence capable of raising doubts about the validity of the 2013 will. Mr Nobarani’s inability to explore those doubts also resulted in a substantial miscarriage of justice.

The grounds of appeal include:

- The Court unanimously having found that Mr Nobarani, a self-represented litigant, was denied procedural fairness, the majority erred in not ordering a re-trial because:

- a) Ward JA erred in determining that an intermediate appellate court could make an assessment that a re-trial would not have yielded a different result in circumstances where the denial of procedural fairness was Mr Nobarani not being entitled to:
 - i. Call evidence;
 - ii Find witnesses;
 - iii. Obtain an expert;
 - iv. Issue a subpoena on relevant factual issues;
 - v. Be given time to prepare pleadings; and
 - vi. Be given time to prepare properly for the hearing.

- b) Emmett AJA erred in determining Mr Nobanani had no interest in the estate sufficient to challenge the validity of the 2013 will.

On 9 February 2018 the Respondent filed a summons, seeking leave to rely upon a notice of contention filed out of time, the grounds of which include:

- The Court of Appeal erred in finding that there was a denial of procedural fairness in any respect.