IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S270 OF 2017**

BETWEEN:

HOMAYOUN NOBARANI

Appellant

And

THERESA MARICONTE

Respondent

APPELLANT'S SUBMISSIONS IN REPLY

PART I: FORM OF SUBMISSIONS

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

PART II: REPLY

2. These submissions in reply address various factual and legal points raised in the respondent's submissions (**RS**) in turn, and in the order they appear in the respondent's submissions.

Issues on appeal

3. The respondent incorrectly asserts (at [2(i)] RS) the issues on this appeal. There is no issue that there was a miscarriage of justice at the trial (or in the proceedings) and that the appellant was denied procedural fairness. Ground A of the appeal focuses on whether having not been afforded those matters, the appellant is entitled to a new trial.

Was the appellant a defendant/caveator?

4. The procedural confusion that occurred in the proceedings would have been avoided by the legally represented respondent complying with rule 78.72 of the *Supreme Court Rules 1970* (NSW) (**SCR**).

5. The respondent had been served with two caveats against the grant. She had two alternative options available to her. Firstly, to file a notice of motion for an order the caveats cease to be in force or secondly, to commence proceedings by way of Statement of Claim naming both caveators as defendants. The rules did not permit the respondent, as she did, to proceed by both a notice of motion and statement of claim.

6. The Statement of Claim, in breach of 78.72 SCR, only named the other caveator, the Animal Welfare League, as a defendant.

7. It is somewhat curious that the respondent now asserts (at [19] RS) that the appellant was a defendant to the proceedings from 28 January 2015. The parties, least of all the

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respondent, always operated on the belief the appellant was not a defendant. The best example of this is an exchange between Queen's Counsel for the respondent and Hallen J (after 28 January 2015) on 23 April 2015 where at AB 110.19-34 the following was said:

> HIS HONOUR: The other alternative is to give leave to file an amended statement of claim, dismiss the notice of motion (to remove the caveat) and let Mr Nobranie [sic] put on any evidence he wants including a defence and any affidavits he wishes to.
>
> MACONACHIE: I would urge you not to do that. The approach your Honour was considering the notice of motion of February 2014 be amended in the manner in which your Honour suggested and the matter go before the trial judge on that issue. That would be far and away the most expeditious way of dealing with it.
>
> HIS HONOUR: You appreciate in the event the trial judge considers the caveat should cease to be in force or alternatively there is a basis for the matter preceding by way of pleading you will have to proceed by filing an amended statement of claim.
>
> MACONACHIE: I understand.

8. By the end of the directions before Hallen J on 23 April 2015, it was clear that the hearing to take place on 20-21 May 2015 was the hearing of an amended Notice of Motion to remove the appellant's caveat. The hearing therefore:

   a. was to be interlocutory in nature;
   b. would not normally, given the low threshold of the relevant test involved, require cross examination of witnesses (*Mannow v Creagan; The Estate of Ludwig Mannow* (Unreported decision, Powell J, Supreme Court of New South Wales, 19 June 1992), BC9201799); and
   c. would focus on the following issues:
      (i) did the appellant have an interest in the estate concerned, or a reasonable prospect of establishing such an interest; and
      (ii) was there a doubt as to whether the grant of probate or administration should be made?

9. The sudden change of the nature of the hearing to a full contested probate suit on 14 May 2015 was part of the reason, why the Court of Appeal found that Mr Nobarani was denied procedural fairness.

Lapsing Caveat

10. The respondent seeks to make much of the lapsing of the appellant's caveat in her submissions (at [30]-[31] RS and continuing). As observed by Emmett AJA (AB 633.38-60), the issue of the caveat lapsing fell away by the Court of Appeal's finding that the appellant was denied procedural fairness.

11. Indulging the respondent's argument, the respondent at hearing was running double processes, the Amended Notice of Motion to remove the caveat and an Amended Statement of Claim. This is another example of the procedural oddities that occurred in the matter which meant confusion reigned and led there to be a denial of procedural fairness to the appellant.

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12. If the caveat was relevant, the appellant submits that regardless of how rule 78.69 of the *SCR* is interpreted, the primary judge did not hear from the appellant as to whether the appellant would either seek a retrospective extension of his caveat per 78.69(2) or seek leave to file another caveat. The primary judge discussed this briefly with counsel for the respondent (AB154.29-50). When the appellant did seek to speak about the caveat the primary judge stopped him (AB163.5-9).

Adjournment Request

13. The respondent asserts (at [40] RS) that the appellant did not object to the sudden change in the type of hearing on 14 May 2015, nor apply to adjourn the proceedings so he could make an application to the Court of Appeal to appeal the primary judge's decision to change the type of hearing. The submissions ignore the appellant's actual and implied applications to adjourn as identified in the appellant's primary submissions (par [38] of appellant's submissions filed 22 December 2017).

Evidence of unfairness

14. The respondent submits at various points (including at [47], [59], [60] and [71] RS) that the appellant should have sought to call evidence in the Court of Appeal.

15. *Firstly,* the call for evidence by the respondent misconstrues the relevant burden. The appellant does not have to prove a different outcome *would* occur, only that it was possible. Such a threshold does not require the adducing of the evidence called for by the respondent in her submissions.

16. *Secondly,* this submission was available to the respondent in the Court of Appeal. It was not made and should not now be permitted.

*The relevance of rule 51.53 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**)*

17. The respondent criticises (at par [53] RS) the appellant's "scant regard" to 51.53 UCPR. Whilst no doubt binding on the Court of Appeal, this provision does not replace the test in *Stead.* As reflected in Ward JA's reasoning, it is a stand-alone principle to be applied in each instance. It follows that an error in the application of the test, such as that propounded by the appellant on this appeal may be fatal to a decision, notwithstanding the independent operation of 51.53 UCPR. The appellant submits further that the test in *Stead* informs any application of 51.53 UCPR.

Refusal of Adjournment Applications

18. The respondent asserts (at [67]-[70] RS) that the primary judge, using his discretionary powers, appropriately dealt with all the adjournment applications made by the appellant.

19. This submission disregards a number of facts. Critically, that the primary judge was never made aware of the sudden change of the nature of the trial from a motion to a Statement of Claim. For example, the primary judge was not made aware at the pre-trial directions on 14 May 2015 that the only matter listed for hearing was the Amended Notice of Motion. The submission also ignores the real issues of this appeal (as clarified above at par [3]).

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The appellant's defence

20. The appellant was ordered to file a defence for the first time on 14 May 2015 by 18 May 2015. Ward JA at [9] concluded "...a close review of the issues raised by the pleadings and the conduct of the trial has led [...] to a conclusion that no substantial miscarriage of justice was occasioned...".

21. It is of little surprise that a defence, settled by a self-represented litigant in 4 days was less than professionally drafted and may not have properly identified all the issues. Therefore, the close review of the pleadings by Ward JA is problematic (in addition to the reasons identified in the appellant's primary submissions) in so far as it forms a basis for concluding no substantial miscarriage of justice was occasioned.

Declining to allow Mr Nobarani to rely upon Mr Lemesle's Affidavit

22. The respondents rely heavily (at [74]-[79] RS) upon the evidence of Michael Bradstreet and take solace in Ward JA's reasoning that Lemesle's Affidavit was not capable of meeting Mr Bradstreet's "clear evidence". The difficult in this solace is Ward JA did not analyse the appellant's case considering the shifting onus in probate cases.

23. It is trite law, that once a party seeking to challenge the prima facie valid Will raises a doubt about the deceased's testamentary capacity the onus shifts to the propounder of the Will to establish the limbs of the *Banks v Goodfellow* 1870 LR QB 549 test.

24. Mr Lemesle's affidavit was capable of raising a doubt about the deceased's testamentary capacity. Once a trial judge received the affidavit, the onus would have shifted to the respondent to establish the limbs of *Banks v Goodfellow.*

25. In any event, Mr Bradstreet's evidence does not establish at least three of the four limbs of the *Banks v Goodfellow* test. Firstly, there is no evidence the deceased could recall her bounty. Secondly, except the respondent, there is no evidence any other person whom could reasonably be expected to receive from her bounty was recalled by the testatrix despite in her earlier will there being 24 other beneficiaries. Finally, there was no evidence the deceased was able to weigh the relative claims of those persons.

26. The 2013 Will was a substantial departure by the testatrix from her long held testamentary intentions, that her bounty would be shared by many and that the principal beneficiary would be the Animal Welfare League. Taken in this light, the evidence of Mr Bradstreet is not the haven the respondent asserts.

27. The respondent also asserts Mr Lemesle's Affidavit was incapable of surviving objections. Mr Lemesle's evidence was that he was present at the hospital with the deceased on the day of the signing of the Will. Even the Will itself has his name as a witness (crossed out) AB 352.48. This is consistent with his evidence he was present. He did not consider the deceased was able to execute a Will due to her condition. The appellant fails to see how this evidence, by an independent witness, would not be admissible.

Failing to give Mr Nobarani an opportunity to cross-examine Ms Parseghian

28. The respondent also refers to the failure to give Mr Nobarani an opportunity to cross-examine Ms Parseghian ([80]-[83] RS). The appellant was not allowed by the primary

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judge to cross examine Ms Parseghian on the basis no notice had been given that she was required for cross examination. Again, given the plethora of matters the appellant had to attend to after the change of the nature of the hearing on 14 May 2015 it is not surprising that he had not given notice. Had the matter simply proceeded on the Amended Notice of Motion, an interlocutory application, it would be unlikely any person would have been cross examined, as referred to above.

Dated: 19 February 2018

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