IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S270 of 2017

BETWEEN:

HOMAYOUN NOBARANI
Appellant

and

TERESA ANNE MARICONTE
Respondent

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RESPONDENT'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 ON APPEAL

20 2. The issues on appeal are:

i. whether there occurred a miscarriage of justice at the trial, and whether the Court of Appeal should have ordered that a new trial take place;

ii. whether or not Mr Nobarani was denied procedural fairness;

iii. whether, if it be found that Mr Nobarani was denied procedural fairness, that denial had any effect on the outcome of the trial.

30 ## PART III: NOTICE

3. The Respondent considers that notice is not required to be given in pursuance of s 78B of the *Judiciary Act* 1903 (Cth).

PART IV: MATERIAL FACTS

4. A summary of the procedural history is as follows.

5. By Statement of Claim filed on 15 May 2014 (Appeal Book ('AB') 6), Ms Mariconte sought
40 an order that she be granted probate of the testatrix's December 2013 Will.[1]

6. By Defence filed on 18 May 2015 (AB 11), Mr Nobarani advanced defences, including that:

a. on 5 December 2013, the testatrix was under the influence of unprescribed hypnotic medicine;

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[1]An Amended Statement of Claim was filed in Court on 20 May 2015, which formally listed Mr Nobarani as second *defendant, and sought that Mr Nobarani pay the costs of the proceedings (**AB 15**).*

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b. on 5 December 2013, the testatrix was under the influence of hypnotism;

c. Mr Chen Yuanun, one of the witnesses to the December 2013 will was not available at his home address;

d. the "other witness" in her affidavit changed her words that she told to Mr Lemesle *"in a few days passed after 12 Dec 2013"*;

e. the testatrix had dual vision and had difficulty reading and could be tricked easily;

f. the testatrix told Mr Nobarani that Ms Mariconte hated cats, and the testatrix would never let the future of her pets and animals be under the care of Ms Mariconte by her will; and

g. the testatrix cried badly on 10 December 2013, and tried to tell Mr Nobarani something, but could not do it.

7. On 23 January 2014, Mr Nobarani filed a caveat under Rule 78.66 of the *Supreme Court Rules* 1970 ('SCR') against a grant of probate of the December 2013 Will ('First Caveat') (AB 29). The caveat disputed (in respect of the December 2013 Will) the testatrix's testamentary capacity and the authenticity of her signature.[2]

8. On 5 February 2014, the Animal Welfare League ('AWL') lodged a caveat under Rule 78.66 against a grant of probate of the December 2013 Will (AB 33).

9. On 11 February 2014, Ms Mariconte filed a Summons seeking an order that she be granted probate of the December 2013 Will (AB 2). Mr Nobarani was not named as a party. Ms Mariconte then filed a Notice of Motion on 14 February 2014 (AB 37) seeking orders that the caveats lodged by Mr Nobarani and AWL cease to be in force.

10. On 15 May 2014, Ms Mariconte filed a Statement of Claim (AB 6) seeking an order that she be granted probate of the December 2013 Will. Mr Nobarani was not named as a party. Mr Nobarani, however, filed an Appearance in the proceedings on 27 June 2014 (AB 46).

11. On 8 August 2014, AWL filed a Defence and Cross Claim.

12. On 15 September 2014, Mr Nobarani filed a second caveat under Rule 78.66 ('Second Caveat') (AB 49). The interest claimed was: "justice".[3] The Second Caveat was thus defective in form, for want of compliance with the requirements of SCR 78.66 – 78.68.

13. On 8 October 2014, Ms Mariconte filed a Defence to AWL's Cross Claim.

14. On 24 November 2014, Senior Deputy Registrar Studdert made orders, including that Ms Mariconte serve notices of proceeding on the beneficiaries under the August 2004 Will. Mr Nobarani's interest under the August 2004 Will was limited to his sharing four (4) items of jewellery with six (6) other beneficiaries (AB 495.40).

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[2] Unless extended by the Court, the First Caveat lapsed by effluxion of time on 23 July 2014: SCR Rule 78.69(1).

[3] Unless extended by the Court, the Second Caveat lapsed by effluxion of time on 15 March 2015: SCR Rule 78.69(1).

15. On the same day, Acting Senior Deputy Registrar Bellach fixed the proceedings for hearing before the primary judge on 20–21 May 2015, gave leave for Mr Nobarani to file and serve any further affidavit evidence by 6 March 2015, and for Ms Mariconte to serve reply evidence by 1 April 2015.

16. On 14 January 2015, Ms Mariconte served the following documents on Mr Nobarani, in accordance with Rule 78.42 of the SCR:

    a. Notice to Affected Persons dated 23 December 2014;

    b. Affidavit of Executor sworn 31 January 2014; and,

    c. Statement of Claim filed 15 May 2014.

17. The Notice to Affected Persons stated, relevantly:

    1. An application for grant of probate has been made by me in respect of the estate of the above named deceased. Copies of the Statement of Claim and Affidavit of Executor are annexed and marked "A" and "B" respectively.

    ...

    4. Unless the prescribed form of notice of your appearance is received in the Registry within 14 days after service of this notice upon you... the Court may hear and determine the proceedings in your absence with such consequences as may ensue according to law.

    ...

    6. Upon filing an appearance you will become a defendant to the proceedings in so far as they relate to the declaration by the Court as to the effect of the document referred to in paragraph 2.

18. On 28 January 2015, Mr Nobarani filed a further Appearance (AB 64). Upon entering that appearance:

    a. Mr Nobarani became a defendant in the proceedings: SCR Rule 78.44(2); and,

    b. the proceedings continued as if:

        i. Mr Nobarani had been joined as a defendant by the application for the grant of probate or administration: SCR Rule 78.44(2)(a); and,

        ii. Mr Nobarani had been served with that application on the day on which he was served with the prescribed notice: SCR Rule 78.44(2)(b).

19. Thus, from 28 January 2015, Mr Nobarani became the second defendant to Ms Mariconte's proceedings for the grant of probate of the December 2013 Will, and was required to file a defence to the Statement of Claim within 28 days: by 25 February 2015: UCPR Rule 14.3(1). It was, accordingly, unnecessary for Ms Mariconte to file and serve an Amended Statement of Claim naming Mr Nobarani as second defendant – in any event, this appears to have been done on 20 May 2015.

20. On 10 February 2015, AWL and Ms Mariconte filed consent orders resolving the probate proceedings as between Ms Mariconte and AWL (AB 67).

21. On 30 March 2015, the matter was listed for directions before Hallen J, who identified that Mr Nobarani had been joined as a defendant to the proceedings.[4] Hallen J then questioned Mr Nobarani as to why he had not put on a defence to the Statement of Claim[5], and recommended that he obtain legal advice.[6]

22. Hallen J adjourned the proceedings until Monday, 20 April 2015 in order for Mr Nobarani to obtain legal advice. On 8 April 2015, Mr David Colman of Lawyers and Legal Services Sydney Pty Ltd filed a Notice of Appointment of Solicitor on Mr Nobarani's behalf (AB 73).

23. On 20 April 2015, the matter was again listed before Hallen J for directions. Mr Colman appeared for Mr Nobarani. Hallen J adjourned the proceedings until 23 April 2015 to allow an inspection at the testatrix's premises to occur – with a view to delivering to Hallen J's chambers a will that had purportedly been executed by the testatrix in September 2013 (the 'September 2013 Will'). Pursuant to that will, Mr Nobarani alleged that he was entitled to payment of $100,000 from the testatrix's estate, together with all items to assist Mr Nobarani to write a book about the testatrix's father: Defence filed 18 May 2015, paragraph 3 (AB 13.40). For reasons which are not relevant to this appeal, the inspection was not carried-out and the September 2013 Will was never located, and has never been produced by Mr Nobarani.

24. On 23 April 2015, the matter was yet again listed before Hallen J for directions. Mr Colman informed the Court that his retainer had been terminated, and was granted leave to withdraw.[7] Neither counsel for Ms Mariconte nor Mr Nobarani alerted Hallen J to the fact that an order had not been made extending the operation of the First Caveat or Second Caveat, with the result that by effluxion of time, each caveat had lapsed. Hallen J made some observations about the future conduct of the proceedings, including as to whatever directions might be made by the trial judge as to its conduct.[8]

25. Hallen J then made orders and directions (AB 113), including:

    a. leave to Ms Mariconte to file and serve an Amended Notice of Motion (in respect of the Notice of Motion filed 14 February 2014) by 4:00pm, Friday 24 April 2015;

    b. the hearing before the primary judge on 20 and 21 May 2015 was limited to the determination of the question whether any caveats lodged by Mr Nobarani should cease to be in force;

    c. Mr Nobarani file and serve by 4pm on Thursday, 7 May 2015, any affidavit upon which he intended to rely in opposition to the amended notice of motion;

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[4] AB 503.8-9
[5] AB 507.15-20.
[6] AB 508.47-50 – 509.1-28.
[7] AB 527.25.
[8] AB 109.38-50 – 110.1-6).

d. each party to serve upon the other, and to provide to the primary judge, by 4:00pm on Wednesday 13 May 2015 an index of affidavits upon which they intended to rely in relation to the Amended Notice of Motion; and,

e. granted liberty to either party to apply to the primary judge on two days' or such other notice as the Court saw fit.

26. Hallen J once again gave Mr Nobarani a strong warning that he needed to obtain legal advice in relation to the proceedings.[9]

27. On 24 April 2015, Ms Mariconte filed an Amended Notice of Motion (AB 87) which sought orders including that the First Caveat and the Second Caveat cease to be in force.

28. On 13 May 2015, Mr Nobarani swore an affidavit entitled "Index of the list of Affidavits of Homayoun Nobarani" (AB 387). Mr Nobarani relied on his affidavits sworn 24 February 2014, 5 May 2015 and 13 May 2015. No reference was made to an affidavit sworn by Mr Daniel Lemesle on 31 March 2014 (which had been prepared on behalf of AWL; AB 460) (Lemesle Affidavit).

29. On 14 May 2015, the matter was listed before Slattery J (the 'primary judge') for directions. Counsel for Ms Mariconte (it is submitted correctly) informed the primary judge that that the First Caveat and the Second Caveat had expired due to the effluxion of time (AB 120.20).

30. Rule 78.69 of the *Supreme Court Rules* 1970 provides, relevantly:

> 78.69 Duration of caveat
>
> (1) A caveat under this Division takes effect when it is filed and, unless the Court otherwise orders, lapses after 6 months.
>
> (2) The Court may extend the duration of a caveat.
>
> (3) Despite subrules (1) and (2), in any proceedings on an application for the grant of probate or administration in relation to a will that comprises or includes an informal testamentary document, a caveat concerning the informal testamentary instrument lapses when the caveator becomes a party to the proceedings.

31. The effect of Rule 78.69 is that, unless the Court extends the duration of the caveat, the caveat lapses after 6 months from the date it was filed. This construction is consistent with sub-rule (2), which empowers the Court to extend the duration of the caveat. In the present case, no order was sought nor made that the First Caveat or Second Caveat be extended. On the lapsing of a caveat, the position *stricto sensu* is as if no caveat had been lodged, and the court may grant probate without requiring notice to be given to the caveator[10].

32. In these peculiar circumstances, the primary judge was thus faced with how appropriately to case-manage the proceedings in circumstances where: (i) the caveats lodged by Mr Nobarani prohibiting the grant of probate had both expired; and (ii) Mr Nobarani, the second defendant (who by that time was the only remaining defendant in the probate

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[9] (AB 113.42-50 – 114.1-7).

[10] *Re Byrne* [1937] VLR 33 (Martin J).

proceedings), had not filed a defence to the Statement of Claim, despite being joined in January 2015.

33. The primary judge sought to elicit just how Mr Nobarani wished to proceed. It is apparent that Mr Nobarani intended to advance a case as to the existence of the September 2013 Will, and that the December 2013 Will had not been validly executed. The following relevant exchange then occurred: [11]

SLATTERY J	What I am not following, Mr Nobarani, is there might have been a will which you are talking about that you assisted the deceased to hide in the house, but it is a will which you didn't keep a copy of safely somewhere, even though it favoured you, you alleged. Secondly, it is a will before the will that the plaintiff is not putting forward. It would have been revoked, I assume there is a revocation clause in the current will?
MACONACHIE	Yes, there is.
SLATTERY J	What are we doing? Why are we wasting our time, because it would have been revoked anyway.
NOBARANI	The 2000 will, the previous will, the 2000 will is still valid, we have the have the handwritings of Iris. The 2000 will is available. If we show to the Court that –
SLATTERY J	It sounds like you are challenging the current will as not being validly executed, is that what you are doing?
NOBARANI	Yes.

34. The primary judge then gave the following warning to Mr Nobarani: [12]

SLATTERY J	Mr Nobarani, let me just say this to you. There are court procedures that have to be followed. You cannot just, in effect, complain about things without any order in what you do, because I have to be fair. The Court has to be fair to both sides. This case is on before me next Wednesday, there are only three clear working days before now and then. All I can say to you is that it would be good if you got some legal advice and someone was able to appear for you on that day. Even if you can't, the matter is going to go ahead on Wednesday next week, do you follow?
NOBARANI:	Yes.
SLATTERY J	I am not inclined, on what you have said to me, to make any further interlocutory orders about searching the house. That process, I think, has taken place. I am not confident that there is any point to that from anything you have said to me.
...	
SLATTERY J	Mr Nobarani, I have to say to you I am having a lot of trouble following the order in which you are putting things and events and the reasons why they add up to a case that there is a problem with the plaintiff's

[11] (AB 129.14-33).

[12] (AB 130.7-50 – 131.1-7).

will. I strongly urge you to get some sort of legal assistance before next Wednesday. I am not currently minded to adjourn the case or make any further orders other than the matter will proceed on Wednesday…

35. In the circumstances, the primary judge decided that it was appropriate for the hearing on 20–21 May 2015 to proceed in the following manner: [13]

SLATTERY J	The only thing I just want to understand is what the nature of the hearing is going to be, Mr Maconachie. I think we need to work out now what both sides are going to be expecting to happen and whether there has been any misunderstanding about that. I have to say I am inclined to, in effect, let it all happen as though it were a kind of final hearing.
MACONACHIE	That's what we would be urging your Honour to do.
SLATTERY J	I think, in a case like this, where there are a lot of things in play, that is probably a good way of getting everything ventilated.
…	
SLATTERY J	That's why I am asking you this question; what is the state of the pleading. What I am minded to do is to allow you to attempt to prove, through witnesses, the will that you are relying on. For Mr Nobarani to cross-examine those people and for him to call any person he wants as well. The trouble is we are running a bit short on time.
…	
SLATTERY J	All right. So there is a statement of claim and there has been no appearance, but no defence?
MACONACHIE	Appearance, no defence, no cross claim. There are two affidavits by him.
SLATTERY J	It is an old fashioned Common Law case of the general issue and we will see what happens.

36. Not long after that exchange, the primary judge had the following exchange with Mr Nobarani[14]:

SLATTERY J	Mr Nobarani, it is all going to happen next Wednesday
NOBARANI	Yes.
SLATTERY J	You will need to be ready to produce everything you are relying on. What is going to happen is there is going to be a hearing in which Mr Maconachie's side will advance all the evidence that they rely upon to support the will that they rely upon and you will have to advance whatever case you have got to say that that is not the deceased's last will, all right?
NOBARANI	Yes, your Honour.

[13] (AB 131.34-50 – 132.24).
[14] (AB 136.5 – 15).

37. The primary judge then made case-management orders for the hearing of the proceeding (AB 560) including:

    a. Mr Nobarani file and serve his defence to Ms Mariconte's Statement of Claim by 5pm on Monday, 18 May 2015;

    b. List the proceedings for final hearing on that Statement of Claim in addition to such procedural issues as are raised by the plaintiff's motions commencing on Wednesday, 20 May; and

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    c. Liberty to apply to both sides. Should they require an opportunity to serve subpoenas, any subpoenas returnable before 20 May.

38. The primary judge then informed Mr Nobarani that he needed to subpoena any witnesses that he intended to rely upon at the hearing, as follows:[15]

SLATTERY J	Mr Nobarani, the effect of those orders I have just made is that if you have any witnesses that you want to rely upon to answer anything that has been served upon you, then you need to issue subpoenas to those
20	witnesses returnable for next Wednesday, do you follow?
NOBARANI	Yes, your Honour.
SLATTERY J	You won't be able to get leave from the registry to subpoena those people, you will have to come back to me. That is why I have granted liberty to apply, because there is not enough time for that to happen. All right, I think they are the only orders I need to make.

39. The primary judge then sought to confirm upon which what affidavits Mr Nobarani sought
30 to rely. The affidavits were identified as being Mr Nobarani's affidavits of 24 February 2014, 5 May 2015 and 13 May 2015 (AB 562). The primary judge granted leave to Mr Nobarani to file in court his affidavit of 13 May 2015, and also directed that Mr Nobarani serve any supplementary evidence that he sought to rely on by 5pm, 18 May 2015.

40. Mr Nobarani did not object to the hearing proceeding as explained by the primary judge, nor did he apply to the primary judge to adjourn the proceedings so that an application could be made to the Court of Appeal against the primary judge's decision that the hearing proceed on the probate issue on 20 May 2015.

40 41. On 15 May 2015, Mr Nobarani caused a Subpoena to Produce Documents to be issued to Dr Margaret Kearns of Focus Eye Centre with a return date of 29 May 2017. Mr Nobarani did not apply to the primary judge for abridged service and production, despite the primary judge's informing Mr Nobarani as to the process to be followed (AB 560.45 – 561.8).

42. On 18 May 2015, Mr Nobarani filed his Defence (AB 11). Attached to the Defence was the Lemesle Affidavit and an affidavit of Ms Maghsoodi (Mr Nobarani's wife) sworn 13 May 2015.

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[15] (AB 138.48-50 – 139.1-8).

43. The hearing commenced on 20 May 2015 and concluded the following day. Mr Nobarani appeared for himself. Ms Mariconte was represented by Mr Maconachie QC and Mr Hickey. At the commencement of the hearing, the primary judge granted Ms Mariconte leave to file an Amended Statement of Claim which formally added Mr Nobarani as a defendant, together with a prayer for costs.[16]

44. The primary judge found that it was unnecessary for Ms Mariconte to move on the Amended Notice of Motion because the First Caveat and Second Caveat had lapsed: (AB 573 [8]), and proceeded to hear Ms Mariconte's application for the grant of probate.

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45. The primary judge delivered an *ex tempore* judgment on 22 May 2015, granting to Ms Mariconte probate in solemn form of the December 2013 Will, with costs.

46. The primary judge recorded in his reasons (AB 583 [42]) that Mr Nobarani had on various occasions sought an adjournment of the proceedings. It should again be noted that Mr Nobarani did not request that the primary judge adjourn the proceedings so that he could urgently apply to the Court of Appeal for leave to appeal against the refusal of the adjournments.

20 47. The proceedings in the Court of Appeal (Ward and Simpson JJA and Emmett AJA) were heard on 4 April 2017. Mr Nobarani had engaged solicitors, and was represented by counsel. At no point before, during or after the hearing in the Court of Appeal did Mr Nobarani seek to put before the Court either any evidence as to what further forensic steps (including additional evidence, either lay or expert) he would take in the event that a new trial were ordered, or the additional evidence itself.

48. The Court of Appeal delivered its judgment on 5 June 2017 (AB 615). By majority (Ward JA and Emmett AJA) the appeal was dismissed.[17]

30 49. Simpson JA dissented, concluding that Mr Nobarani had been denied procedural fairness[18], and that it was not possible to say that a trial according to the rules of procedural fairness would not have yielded a different result.[19] Simpson JA concluded that the appeal should be allowed, and that the proceedings be remitted to the Equity Division for a new trial.[20]

50. Ward JA agreed with Simpson JA that there had been procedural unfairness[21] and shared Emmett AJA's "disquiet"[22], but concluded that a new trial would not have yielded any different result and that no substantial miscarriage of justice was occasioned by the denial of procedural fairness.[23]

40 51. Emmett AJA, while expressing "concern" that the nature of the proceedings changed on 14 May 2015, concluded that the circumstances on that point were not such that Court should intervene on Mr Nobarani's part[24]; that Mr Nobarani had been given ample opportunity to

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[16] (AB 183.37-38).
[17] AB 653 [125]; 620 [10].
[18] AB 629 [43].
[19] AB 628 [38]
[20] AB 632 [56]
[21] AB 628 [38]-[39].
[22] AB 617 [2].
[23] AB 617 [3], 619 [9].
[24] AB 652 [124].

challenge the validity of the 2013 will[25], and that no basis had been established for the grant of a new trial on the issue of the validity of the 2013 will.[26]

PART V: ARGUMENT

Ward JA's reasons

52. Mr Nobarani contends that Ward JA erred:

i. by concluding that compliance with procedural fairness could not possibly have yielded a different result;

ii. by not applying to *Stead v State Government Insurance Commission*[27] a 'forward-looking test';

iii. (as to *Stead*):

a. by concluding that there could be no certainty of a different outcome, because there was a plethora of facts not before the trial judge;

b. by applying a backward-looking test, and should have applied a forward-looking test, because a forward-looking test properly takes account of changes that would ensue in the preparation for the hearing of a new trial; and,

iv. by failing to consider all bases of the asserted procedural unfairness on which it was contended that the result of a new trial would have been different.

53. Mr Nobarani's submissions pay very scant regard to the effect of *Uniform Civil Procedure Rules* Part 51 r 51.3.

54. As Ward JA correctly observed (at [6]), it was necessary to consider whether it appeared to the Court that some substantial wrong or miscarriage had been occasioned by the denial of procedural fairness.

55. A number of propositions are germane to that task:

i. the Court of Appeal must itself decide whether a substantial wrong or miscarriage has occurred;

ii. the Court's assessment is an objective one, and is performed on the basis of the material before the Court; and,

iii. the question is decided according to the balance of probabilities, at the time of the appellate court's assessment.

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[25] AB 651 [119].
[26] AB 652 [124].
[27] (1986) 161 CLR 141.

56. Ward JA correctly carried-out the task required by r 51.53. At [7], she concluded that, in the face of the evidence given by Mr Bradstreet, she was not satisfied that the procedural matters about which Mr Nobarani complained were such that he had been deprived of the possibility of a different result (even with the benefit of legal representation in a re-trial).

57. Next, Ward JA adverted (at [8]) to the 'public interest' issues raised by Mr Nobarani, and concluded that he had standing to be heard on the question of the 2013 will. The judge concluded, however (at [8]) that:

10 i. none of the "plethora of matters" raised by Mr Nobarani (such as his dispute as to the authenticity of the deceased's signature; allegations of impaired eyesight; hypnosis; drugs and psychological problems allegedly rendering the deceased susceptible to undue influence) operated to raise a genuine doubt about the validity of the 2013 will in the face of Mr Bradstreet's evidence; and,

ii. nor did Mr Lemesle's affidavit meet "the clear evidence of the deceased's solicitor as to the circumstances in which he prepared the impugned will and attended its execution."

20 58. Those considerations justified Ward JA's conclusion that Mr Nobarani had not been deprived of the possibility of a different result.

59. To demonstrate that Mr Nobarani would have taken certain forensic steps had the denial of procedural fairness not occurred, is (in a case like the present) part of establishing that Mr Nobarani has in fact been denied a reasonable opportunity to be heard.[28] At no stage did Mr Nobarani put before the Court of Appeal (despite the passage of two years between the date of the primary judge's orders and the hearing of the appeal) the further evidence upon which he would have relied better to present his case. A *Jones v Dunkel* inference is open, and should be drawn, that none of that material would have assisted Mr Nobarani.

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60. When assessing the 'possibility' of a different result, the court must have some sure ground for saying that the aggrieved party was deprived of the possibility of a different result[29]; speculation or guesswork as to matters not suggested by the evidence or by the parties is an impermissible substitute for that objective evidence.

61. In these circumstances, it was impermissible for the Court (as Simpson JA did at [55]) to speculate upon the (unknown) nature of the further material that *might* have been adduced by Mr Nobarani in aid of a different result, and Ward JA refrained from doing so.

40 62. Ward JA concluded that ([9]) "a close review of the issues raised by the pleadings and the conduct of the trial has led [...] to the conclusion that no substantial miscarriage of justice was occasioned by the unfortunate denial of procedural fairness that occurred when the matter proceeded to a final hearing rather than, as had been foreshadowed, a hearing on the motion relating to Mr Nobarani's caveat."

63. It cannot avail Mr Nobarani to say ([53]) that – but for the denied procedural fairness – "the hearing would not have been conducted when it was, having the nature that it did, without

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[28] *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at 324 [59] (Gageler and Gordon JJ).

[29] *Balenzuela v De Gail* [1959] HCA 1; (1959) 101 CLR 226 at 232 (Dixon CJ).

the opportunity to gather evidence, the nature of which was unknown". That approach is tantamount to replacing ascertainable facts with speculation. For that reason, Mr Nobarani has been unable to demonstrate that there was a substantial miscarriage of justice, warranting a new trial.

64. When close attention is given to the specific instances of denial of procedural fairness upon which reliance was placed below, it will be apparent that none of those matters could have resulted in any miscarriage of justice (or, for that matter, any denial of procedural fairness). In order for that to be demonstrated, it is necessary to address the specific instances of denial of procedural fairness upon which reliance was placed[30], as recorded by Simpson JA in her reasons (AB 627 [36]):–

i. declining to adjourn the proceedings to allow Mr Nobarani adequate time to prepare for the hearing;

ii. declining to allow Mr Nobarani to rely on the affidavit of Mr Lemesle;

iii. failing to adjourn the proceedings to allow Mr Lemesle to be called as a witness;

iv. failing to give Mr Nobarani an opportunity to cross-examine Ms Parseghian;

v. failing to adjourn the proceedings in order to allow Mr Nobarani the opportunity to call expert evidence;

vi. failing to adjourn the proceedings to enable Mr Nobarani an opportunity to issue subpoenas (designed to produce evidence with respect to Ms McLaren's eyesight); and,

vii. ruling on senior counsel's objection to Mr Nobarani's affidavit evidence without giving him an opportunity to be heard.

65. It is tolerably clear from Simpson JA's reasons (AB 628 [39], [43]) that she treated each of the seven matters set out above as individual components of the whole allegation of procedural fairness (which was referred to by Ward and Simpson JJA in their respective judgments as the "procedural fairness ground"). While Simpson JA concluded that the "procedural fairness ground is made out" (AB 628 [39]), she did not pay close attention to each of the matters, and failed to give sufficient reasons for judgment on each of the instances referred to by her at [36] of her reasons.

Refusal of adjournment applications

66. Matters (i), (iii), (v) and (vi) are each concerned with the primary judge's declining to adjourn the proceedings, and may conveniently be dealt-with together.

67. At [42] – [43] (AB 583) of his judgment, the primary judge recorded:

> [42] On various occasions Mr Nobarani has sought an adjournment of these proceedings. The matter had been set down for hearing before me for some time, 20 March 2015, preceded by a number of pre-trial applications before the Registrar and before Hallen J on 30 March 2015 and 20 April 2015. I also held a directions hearing on 14 May 2015, the week before the hearing. Mr Nobarani was warned on that occasion that he needed to have all his evidence ready for this hearing. He and Ms Mariconte were given liberty to apply on 24 hours' notice in case any urgent subpoenas needed to be issued for the purposes of

[30] See, e.g., *Chaina v Alvaro Homes Pty Ltd* [2018] NSWCA 353 at [29] (Basten JA).

> presenting their full evidentiary cases. Two days were set aside by the Court. Apart from the lack of any proper basis being demonstrated for an adjournment, given the vagueness with which Mr Nobarani had presented many of the procedural issues and the disorder in which his case appeared, the Court had no confidence that even if an adjournment were granted any part of the case he was presenting was likely to become more precise.
>
> [43] At the end of the day, two principal matters were in play guiding the Court in deciding upon no adjournment. One was the dictates of *Civil Procedure Act 2005*, s 56 requiring the *"just, quick and cheap resolution of the real issues in the proceedings"*, which in this case in my view strongly suggested an adjournment should not be granted and that the case should be dealt with in the time set aside and that was available. Secondly, learned Senior Counsel for the plaintiff, Mr Maconachie, referred the Court to authorities in relation to the way that the Court should rights of the parties where litigants in person such as Mr Nobarani appear before the Court: *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129; *Malouf v Malouf* [2006] NSWCA 83. The essence of those judgments is that the Court must be even-handed between the parties notwithstanding that one of them is a litigant in person. Were Mr Nobarani legally represented in these proceedings he would have had no prospect of an adjournment in the circumstances. I do not see why he should have one, simply because he is unrepresented.

68. The primary judge's decisions on the adjournment applications were discretionary and concerned matters of practice and procedure. An appellate court will be slow to intervene. The grounds upon which such decisions may be challenged are confined to those identified in *Re Will of F B Gilbert (dec)*[31] and *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc.*[32] Mr Nobarani's submissions do not assert that the primary judge's exercise of discretion is open to question on that basis. Very close constraints must be kept on appeals on such points, and the primary judge must be granted a great deal of discretion, a margin of appreciation and deference; particularly when he might have been actuated by factors and concerns not apparent from his reasons for judgment.

69. Mr Nobarani has not demonstrated any error on the primary judge's part, or how his exercise of discretion is said to have miscarried or resulted in a denial of procedural fairness.

70. The discretionary factors which supported the refusal of Mr Nobarani's applications for adjournments included:

    a. Mr Nobarani was joined as second defendant to the probate proceedings on 28 January 2015 (upon filing an Appearance, as set out above at [18]); however he did not file a Defence until 18 May 2015;

    b. Mr Nobarani was repeatedly warned by the Court (including on 30 March 2015, 23 April 2015 and 13 May 2015) that he needed to obtain legal advice or representation in relation to the proceedings, but he failed to do so (except for the limited period between 8 April 2015 and 23 April 2015).

    c. Mr Nobarani was not under a special disability, and it had not been suggested that he was indigent to the extent of being unable to afford to pay for legal representation.[33] He was a clearly intelligent man who had decided to represent himself;

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[31] (1946) 46 SR (NSW) 318 at 323 (Jordan CJ).

[32] (1981) 148 CLR 170 at 177 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

[33] AB 651 [117].

d. Mr Nobarani was represented by a solicitor during the period 8 April 2015 – 23 April 2015 and properly advised, if Mr Nobarani wished to advance a viable defence to the probate claim, he should have done so within that time. The only issue advanced by Mr Colman at the 20 April 2015 directions hearing was the location of the September 2013 Will – which in any event was liable to revocation by the December 2013 Will;

e. At no time prior to the hearing did Mr Nobarani seek the production of Mr Bradstreet's diary by serving a Notice to Produce. It was by then simply too late for Mr Nobarani to seek to obtain expert evidence concerning authenticity of the diary entry during the course of the entry. In any event, the date of execution of the December 2013 Will was confirmed by the independent witness, Ms Parseghian. Mr Nobarani did not put to Mr Bradstreet that the execution of the will did not take place on 5 December 2013 (AB 590 [71]);

f. At no time before the hearing did Mr Nobarani inform the Court that he sought to obtain expert evidence in respect of the testatrix's signature. Nor has it been demonstrated to what rational end that expert evidence might have been directed. In any event, the handwriting evidence was not put before the Court of Appeal. A *Jones v Dunkel* inference is open, and should be drawn, that none of that material would have assisted Mr Nobarani; and,

g. Mr Nobarani failed to seek abridged service of the subpoena issued to Dr Margaret Kearns of Focus Eye Centre on 15 May 2015, despite the primary judge expressly informing him of the procedure for him to do so. Mr Nobarani must have understood the primary judge's advice, as a subpoena was issued – but the return date was expressed after the date of the hearing. In any event, Mr Nobarani had already taken steps to obtain this information by causing a subpoena to be issued to Focus Eye Centre on 10 April 2015[34].

71. The difficulty confronted by Mr Nobarani on the subpoena question is manifold. First, Mr Nobarani's argument is that had the proceedings been adjourned to permit him to issue subpoenas on the eyesight question, that exercise might well have garnered some material that might have affected the possibility of a different result. The difficulty is that Mr Nobarani has taken none of the steps required to prove that; no subpoenas were served in the proceedings in the Court of Appeal, nor was any other evidence put before the Court on that question. A *Jones v Dunkel* inference is open, and should be drawn, that none of that material would have assisted Mr Nobarani.

72. The primary judge refused to adjourn the proceedings to allow Mr Lemesle to be made available for cross-examination: AB 580 [30]; 594 [82]. That was in circumstances where Mr Lemesle's affidavit was annexed to Mr Nobarani's defence, but did not appear in his list of affidavits, and where no attempt was made by Mr Nobarani to have Mr Lemesle present in court.[35] Nor did Mr Nobarani attempt to tender the affidavit despite the primary judge's intimation that he should do so (AB 198.16-32); a matter of some significance.

73. In the circumstances, it was a correct exercise of discretion for the primary judge to refuse Mr Nobarani s applications for an adjournment. Accordingly, not only did this ground of

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[34] AB 273.30.

[35] See, e.g., the consequences referred to in *Vella v Wah Lai Investment (Australia) Pty Ltd* [2004] NSWSC 583 at [7] (Campbell J).

appeal have no prospects of success, but cannot be said to have resulted in a miscarriage of justice, nor a denial of procedural fairness.

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

74. Mr Nobarani sought to rely upon an affidavit sworn on 31 March 2014 by Mr Daniel Lemesle (AB 460), filed by the AWL in support of its caveat. Mr Lemesle gave evidence in his affidavit that, *inter alia*, he "was not certain" that the signature on the 2013 will was the testatrix's signature and that "it [was] possible that the signature is not that of [the testatrix]" (AB 465 [44]).

75. Mr Lemesle's affidavit was stapled to Mr Nobarani's defence, but did not appear in his list of affidavits. Mr Lemesle was not present at court during the hearing.[36] Mr Nobarani failed to tender the affidavit, despite the primary judge's intimation that he should do so (AB 198.16-32), and despite his having tendered other material during the trial.

76. Mr Lemesle's affidavit was inadmissible. It was an admixture of reminiscence, inadmissible or impermissible opinions and speculations. Mr Nobarani has not identified how it was admissible – and on what points relevant to the proceedings. Nor has Mr Nobarani identified how Mr Lemesle's affidavit would have survived scrutiny under s 135 of the *Evidence Act* 1995 (NSW). For Mr Nobarani to say that it was somehow relevant to the caveat issue is not to the point; the caveat issue was spent.

77. No error of discretion on the primary judge's part has been identified in his declining to permit Mr Lemesle's affidavit to be relied-upon.

78. Ward JA was correct to conclude that Mr Lemesle's affidavit was not capable of meeting Mr Bradstreet's clear evidence of the circumstances of in which he prepared the 2013 will and attended its execution (AB 619 [7]-[8]).

79. It follows that, for the reasons correctly stated by Ward JA, the primary judge's declining to allow Mr Nobarani to rely upon Mr Lemesle's affidavit cannot be said to have resulted in a miscarriage of justice nor a denial of procedural fairness.

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

80. Ms Parseghian was a bystander in hospital; an independent witness who had met the testatrix about a week before witnessing the 2013 will, and who had never before met Ms Mariconte: AB 585 [53] . The primary judge accepted the uncontested evidence given by Ms Parseghian on affidavit[37]: AB 585 [50] Judgment.

81. No error has been identified by Mr Nobarani on this point; nor did Simpson JA identify the error in the primary judge's treatment of this question.[38] Mr Nobarani contended in the Court of Appeal that the proceedings should have been adjourned to allow Mr Nobarani an opportunity to cross-examine Ms Parseghian. That contention has no prospect of success. Ms Parseghian was not in court. Mr Nobarani failed to give notice, in accordance

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[36] See, e.g., the consequences referred to in *Vella v Wah Lai Investment (Australia) Pty Ltd* [2004] NSWSC 583 at [7] (Campbell J).

[37] AB 353.

[38] AB 629 [41].

with UCPR, 35.2(1) to Ms Mariconte's legal representatives that he required Ms Parseghian for cross-examination. Mr Nobarani did not apply for an adjournment of the hearing when Ms Parseghian's affidavit was read[39] or at any other time.[40] It was only during the course of final submissions that Mr Nobarani intimated to the primary judge that he wished to question Ms Parseghian.[41]

82. No basis has been demonstrated for challenging Ms Parseghian's evidence on the question of execution of the 2013 will. There was no evidence before the Court of Appeal as to what Mr Nobarani could conceivably have put to Ms Parseghian in the course of cross-examination.

83. All of the matters set out above demonstrate that no miscarriage of justice was occasioned (nor procedural fairness denied) by the course adopted by the primary judge in failing to give Mr Nobarani the opportunity to cross-examine Ms Parseghian.

The primary judge denied procedural fairness by ruling on objections to Mr Nobarani's evidence without hearing argument from Mr Nobarani

84. The primary judge ruled inadmissible (AB 234) the following portions of Mr Nobarani's affidavits:

i. 24 February 2014 (AB 358): paragraphs 20, 21;
ii. 20 April 2015 (AB 364): paragraphs 7, 8, 9, 10;
iii. 5 May 2015 (AB 372): paragraphs 13, 14, 15;
iv. 13 May 2015 (AB 383): paragraphs 8, 9, 10, 11.

85. Mr Nobarani's evidence was otherwise admitted.

86. It was open to the primary judge to adopt the course that he did. A judge is not obliged to hear from a party when dealing with objections to evidence. Nor can it be suggested that there was any error in dealing with the objections without hearing from Mr Nobarani.

87. Moreover, every ruling that the primary judge made was defensible; nor does Mr Nobarani submit otherwise. None of the matters in the rejected paragraphs was capable of rationally affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding: s 55(1) *Evidence Act* 1995 (NSW). It has not been demonstrated by Mr Nobarani how any of the rejected portions could have affected the result of the trial.

88. There was no evidence before the Court of Appeal as to what Mr Nobarani's response would have been to the primary judge's rulings on the admissibility of the rejected portions of his affidavits. No submissions have been directed to the question of the admissibility of the rejected paragraphs, nor that the judge's discretion miscarried in his rejecting them.

89. It follows that not only did this ground of appeal have no prospects of success below, but cannot be said to have resulted in a miscarriage of justice at the trial, nor a denial of procedural fairness.

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[39] AB 189.1-20.
[40] AB 324.23-27.
[41] AB 324.23-27.

90. For the reasons outlined in paragraphs 84-88, above, it follows that Ward JA's conclusion was correct, that there was no miscarriage of justice, and that a new trial could not have produced any different result.

Emmett AJA's reasons

91. For similar reasons, Emmett AJA was correct to conclude that the Court of Appeal should not intervene at the behest of Mr Nobarani, and that (impliedly pursuant to UCPR Pt 51 r 51.53) no basis had been established for the grant of a new trial.

92. A number of reasons are advanced by Mr Nobarani to attack Emmett AJA's conclusion that there was no substantial wrong or miscarriage of justice.

93. It is said that the "substantial wrong" to be engaged by r 51.53 was the admission to probate of the 2013 will, and that there is a public interest in seeing that the last will of a free and capable testator is recognised. The majority of the Court of Appeal recognized that public-interest principle and proceeded upon that the footing. However, the "substantial wrong" here cannot be the admission to probate of the 2013 will. That is an incorrect premise for at least two reasons: first, that the case for Mr Nobarani in the Court of Appeal was not presented on that basis, and secondly, that to label the admission to probate of the 2013 will as the substantial wrong is an impermissible division – in the discourse of denials of procedural fairness – of the outcome from the process.[42].

94. Another reason is that Emmett AJA is said to have proceeded upon the supposed value of Mr Nobarani's interest in the estate; for the reasons outlined in paragraph 109 below, neither Ward JA nor Emmett AJA based their disposition of the appeal upon "monetary value."

95. Another criticism advanced by Mr Nobarani is that Emmett AJA's approach failed to take into consideration the fact that in a new trial it was not Mr Nobarani's interest in the estate that required to be considered, but that of all other potential beneficiaries .

96. The submissions made in paragraphs 101-105 below are sufficient to dispose of the third criticism. In circumstances where the majority had concluded that no other person had been demonstrated to have any interest in the estate, it is erroneous to submit that the Court was nonetheless bound to order a new trial by dint of imagined or supposed interests.

97. Mr Nobarani contends that Emmett AJA, in concluding that the Court should not intervene to order a new trial, erred by:

    i. failing to "engage" with the consideration "that in probate litigation the Appellant represents a class of people", with the supposed consequence that "if the Court limits this class approach, then it will potentially require all interested parties to join the action"; and by

    ii. failing to "engage" with the consideration "that the substantial wrong or miscarriage referred to in r.51.53 UCPR goes beyond the Appellant's interest in the estate."

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[42] See, e.g., *Nudd v The Queen* [2006] HCA 9; (2006) 80 ALJR 614 at [7] (Gleeson CJ).

98. The errors posed by Mr Nobarani are factitious ones, and the doubts adverted to by Mr Nobarani as to the state of the law of probate are artificial issues. Emmett AJA's reasons have not cast the law into any doubt.

99. It is clear that Emmett AJA's reasons, culminating in the matters at [120]-[124] (AB 651-52), were directed at his conclusion that the circumstances were such that the Court of Appeal should not intervene at the behest of Mr Nobarani, and that (impliedly pursuant to UCPR Pt 51 r 51.53) no basis had been established for the grant of a new trial.

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100. It is, moreover, clear that Emmett AJA neither intended to – nor did– cast any doubt upon settled principles concerning the nature of the interest that must be demonstrated by a person seeking to challenge the validity of a will.

101. In any event, Emmett AJA's observations are without significance because they were inessential to his reasoning, as the primary judge's finding that Mr Nobarani had standing was not challenged on appeal. Emmett AJA did not, in any event, express a final view on the sufficiency of Mr Nobarani's interest, nor did he express any view on the primary judge's analysis of the law, nor did he conclude that decisions like *Re Devoy; Fitzgerald &*
20 *Pender v Fitzgerald* (1943) St R Qd 137would not be applied in New South Wales.

102. As to the first criticism of Emmett AJA's reasons recorded in paragraph 97(i) above, it is clear that the judge appreciated that probate litigation is 'interest' litigation. In [120], he referred to the Animal Welfare League's interest in the 1997 will, and its apparent acceptance of the validity of the 2013 will.

103. In [121], the judge recorded that Mr Nobarani had referred to a will made shortly before the 2013 will, and correctly observed that had such a will been found, then an application for a grant of probate "could have been made by any executor named. Alternatively, an
30 application for the grant of Letters of Administration cta. could have been made by a person who had an interest under that will, as [Mr Nobarani] claimed to have." Emmett AJA concluded: "however, for whatever reason, nothing else has been propounded as a valid will."

104. At [122], Emmett AJA observed that if there were any basis for challenging the integrity of proceedings resulting in a grant of probate, it would be undesirable for the grant to stand, but at [124], concluded that "[n]o other person has been shown to have any interest in the estate of the Deceased."

40 105. The foregoing matters clearly show that Emmett AJA appreciated the 'interest' dimension to probate litigation.

106. While it is correct to say that, had Mr Nobarani been able successfully to oppose the grant of probate of the 2013 will, the likely consequence would have been the admission to probate of an anterior will (with the result that the beneficiaries of that will would have taken), it does not follow that Mr Nobarani "in effect represents" those beneficiaries. Nor does it follow that there is anything in Emmett AJA's reasons that compels the absurd conclusion that "if the Court limits this class approach, then it will potentially require all interested parties to join the action."

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107. As to the second criticism of Emmett AJA's reasons recorded in paragraph 97(ii) above, that criticism depends upon the correctness of the premise that Emmett AJA proceeded on the footing that "as the Appellant's interest in the estate is of limited monetary value no substantial wrong or miscarriage occurred."

108. An examination of Emmett AJA's reasons will reveal that the premise is incorrect; the judge's conclusion that no basis had been demonstrated for a new trial was based upon the facts including that the validity of the 2004 will *qua* Mr Nobarani was *ex facie* doubtful [120]; Mr Nobarani had not been able to gainsay the evidence given by Mr Bradstreet and Ms Parseghian, the attesting witness [123]; the Animal Welfare League (which had a "vital interest" in the validity of the 2013 will) had reached a compromise with Ms Mariconte [124]; and, that "no other person ha[d] been shown to have any interest in the estate of the Deceased [124]."

109. It will be apparent that the monetary value of Mr Nobarani's interest was not a factor in Emmett AJA's conclusion. Nor was there any evidence before the primary judge or the Court of Appeal as to the value of that interest. Moreover, the matters adverted to by Ward JA at [8] and [9] (AB 619-620) demonstrate that Ward JA did not premise her conclusion that no substantial wrong or miscarriage of justice had occurred upon the apparently limited nature of Mr Nobarani's interest in the estate.

PART VII: NOTICE OF CONTENTION

110. For the reasons set out in paragraphs 52-90, above, there was no breach of procedural fairness. Secondly, even if it were to be found that some of the asserted instances did amount to a breach of procedural fairness, those instances did not cumulatively amount to a substantial miscarriage of justice; nor has Mr Nobarani been able to establish that. The specific instances of denial of procedural fairness upon which reliance was placed[43], as recorded by Simpson JA (AB 627 [36]) were:

i. declining to adjourn the proceedings to allow Mr Nobarani adequate time to prepare for the hearing;

ii. declining to allow Mr Nobarani to rely on the affidavit of Mr Lemesle;

iii. failing to adjourn the proceedings to allow Mr Lemesle to be called as a witness;

iv. failing to give Mr Nobarani an opportunity to cross-examine Ms Parseghian;

v. failing to adjourn the proceedings in order to allow Mr Nobarani the opportunity to call expert evidence;

vi. failing to adjourn the proceedings to enable Mr Nobarani an opportunity to issue subpoenas (designed to produce evidence with respect to Ms McLaren's eyesight); and,

vii. ruling on senior counsel's objection to Mr Nobarani's affidavit evidence without giving him an opportunity to be heard.

111. In order successfully to invoke the principles in *Stead*, Mr Nobarani must first demonstrate that any of these impugned procedural rulings was capable of preventing a trial according to law.

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[43] *Chaina v Alvaro Homes Pty Ltd* [20018 NSWCA 353 at [29] (Basten JA).

112. That exercise requires a consideration of the extent to which the alleged procedural unfairness might have had an impact on the outcome.

113. For the reasons set out in paragraphs 52-90 above in connexion with miscarriage of justice, none of the alleged instances of procedural unfairness had the requisite impact on the outcome of the trial. To the extent that any of Mr Nobarani's submissions about procedural unfairness are made-out, there was, nonetheless, no substantial miscarriage of justice.

114. The appeal should be dismissed, with costs.

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PART VIII: TIME REQUIRED FOR PRESENTATION OF ORAL ARGUMENT

115. The Respondent estimates that two hours will be required for the presentation of her oral argument.

Dated: 5 February 2018

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