

Constructing a mobile home gift

Assumptions are the termites of... instructions.¹

My aunty and her husband are the epitome of baby boomers.

With caravan in tow they embrace the 'adventure before dementia' lifestyle with gusto, travelling the coastal highways and byways, setting down in all manner of mobile home parks up and down the east coast.

It is an image of retirement that is not unfamiliar. However, the recent decision of *In the Will of Thomas Henry Finch (dec'd)* [2018] QSC 16 (*Finch*) challenges traditional notions of mobile homes, also referred to as relocatable homes, while providing a comprehensive examination of the law in relation to rectification and construction.

Finch, delivered on 13 February 2018, is a decision of Justice Lyons SJA. It traverses 20 pages and is the result of an application pursuant to Divisions 4 and 5 of the *Succession Act 1981* (Qld) seeking rectification and construction of a will.

The issues raised were:²

1. extension of time for rectification – s33(3).
2. whether to grant the application for rectification – S33(1).
3. if so, construction of the offending clause.
4. if not, construction of the offending clause.

In 2012 the testator, Mr Finch, provided instructions for a new will to a then trainee solicitor. Mr Finch's instructions included providing notations on the side of a previous will, where one notation stated "House – Joy Maree Bazley".³

Instead of the term 'house' being used in the will, the relevant clause read: "Any real property owned by me at the date of my death to my Daughter JOY MAREE BAZLEY".⁴

At the time of making the will the testator owned an interest in what was later discovered to be a relocatable home on the Gold Coast. At his death the testator did not own any real property,⁵ but he did still hold his interest in the relocatable home, although he was residing in a retirement village/nursing home in Toowoomba.

The nursing home was a leasehold interest which ceased on death. So the question before the court was the status of both of these interests in the context of the gift to the testator's daughter.

Granting leave to proceed, her Honour considered the rectification and construction matters. As with all litigation, cases rise and fall according to the evidence and in these matters "different rules apply in relation to the admissibility of evidence with respect to the application for rectification and the application for construction".⁶

Accordingly, the rectification application called for an analysis of the application of section 33C – Use of evidence to interpret a will, and its relevance to the application for rectification under s33, the issue there being that s33 falls under Division 4 – Powers of court, whereas s33C falls under Division 5 – Interpretation of wills.⁷

In determining that the 'armchair rule' applied in both rectification and construction matters,⁸ the court noted that the 2006 amendments were in effect the first "significant attempt"⁹ to codify the general rules of construction and they did not "detract from any existing means of interpretation".¹⁰ Further, "there can be no doubt that the provisions of s33 and s33C added to the principles that then existed as to the admissibility of evidence" and "that the 'armchair rule' ... has not been altered".

With that, her Honour explained that what the court "first must determine in relation to the rectification application is to identify the instructions and intention of the deceased ... then determine the effect of the Will and compare the two and ascertain whether the Will gives effect to the instructions or intentions."¹¹

Her Honour then identified the four-stage process of applications for rectification.¹² Through that process, she considered the circumstances of the solicitor's use of the term 'real property' in the will. Her Honour found that the use of that term did not give effect to the testator's instructions and so the circumstances of s33(1)(b) had been made out.

In respect of the construction application, the court was asked to consider if the testator had two homes that could fit within his instructions of leaving "my house" to his daughter. The issue here was whether both properties could be characterised as the testator's house. Having regard to section 33I, her Honour found that, while the provision provides for the inclusion of a leasehold interest as an interest of land,¹³ the sublease terminated on death and "therefore no proprietary interest in the unit remained",¹⁴

and as such the entitlement was a "debt recoverable by the estate".¹⁵ Ultimately, her Honour declared that upon a "proper construction of the Will ... the deceased's relocatable home ... passes under the gift"¹⁶ to the testator's daughter.

A striking feature of this matter was the evidence as to the nature of the testator's home – importantly, it was not real estate but a chattel on a leasehold. The deceased's daughter and his solicitor both gave evidence they had visited the testator at the property and there was very little, if no indication, that it was a relocatable home.

Interestingly, her Honour observed that it was "no doubt unusual for a house not to be attached to a parcel of land and be relocated particularly when it did not have wheels or look at all like a caravan or mobile home. Furthermore it was a substantial dwelling which consisted of two bedrooms, two bathrooms and included wraparound verandahs. It also cost in excess of \$400,000 when purchased in 2007 and is situated in a residential estate in a suburban street."¹⁷

Ten years ago those type of relocatable homes may have been uncommon; however, much has changed in a decade and they have gained in significant popularity. Technically identified as 'manufactured homes', they are governed by the *Manufactured Homes (Residential Parks) Act 2003* (Qld). They are commonly transacted, with the transactions involving the sale of the house as a chattel and the assignment of the lease between the real property owner/park manager, seller, and purchaser.¹⁸

They are increasingly popular with retirees for a number of reasons¹⁹ including exemptions from stamp duty,²⁰ no exit or entry fees, no body corporate fees, lifestyle security and safety, to name a few. In a 2013 manufactured homes survey²¹ it was identified that, at that time, there were some 14,000 home sites in registered parks across Queensland with an estimated 24,200 people living in manufactured homes.

About 88% of occupants are aged 65 plus. While the majority of manufactured homes transact for less than \$100,000, there is a steady increase in price and prestige, with newer parks including golf courses, restaurants, medical facilities and waterside locations. For example, at the time of writing



with Christine Smyth

this column, my firm undertook a conveyance of one such high-end relocatable home which transacted for more than \$600,000. While that is currently unusual, we are regularly engaged to assist in the conveyance of these homes, with average prices of around \$300,000.²²

With the survey identifying some homes selling for as much as \$1.25 million,²³ it is likely that practitioners will increasingly encounter these types of properties in will instructions. To that extent, this decision has brought to our attention that what we once thought as 'usual' cannot be assumed.

Christine Smyth is immediate past president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the Proctor editorial committee, STEP, and an associate member of the Tax Institute. The author gratefully acknowledges the research assistance provided by Robbins Watson property lawyer Brittney-Anne Battelley.

Notes

¹ To adapt a quote originally by Henry Winkler.

² At [18].

³ At [11].

⁴ At [13].

⁵ At [8].

⁶ At [33].

⁷ At [28]-[34].

⁸ At [36].

⁹ At [34].

¹⁰ Ibid.

¹¹ At[38].

¹² At [47].

¹³ At [61].

¹⁴ At [62].

¹⁵ Ibid.

¹⁶ At [63].

¹⁷ At [49].

¹⁸ Which can only occur by way of written agreement, in accordance with Section 44 *Manufactured Homes (Residential Parks) Act 2003* (Qld).

¹⁹ At page five, 'Manufactured Homes Survey Report 2013', hpw.qld.gov.au/SiteCollectionDocuments/ManufacturedHomesSurveyReport2014.pdf.

²⁰ See s138 & s146 *Duties Act 2001* (Qld).

²¹ 'Manufactured Homes Survey Report 2013'.

²² At page five, 'Manufactured Homes Survey Report 2013'.

²³ Ibid.



Our Corporate Programme rewards are engineered around You.

Mercedes-Benz vehicles are the choice of those who demand the best. Our Corporate Programme is designed to make ownership easier for you. As a privileged member of Queensland Law Society the rewards available to you include:

- Reduced dealer delivery fee*
- Complimentary scheduled servicing*
- Total of 4 years Mercedes-Benz roadside care

Take advantage of the benefits today.

Call 1800 888 170 or visit

www.mercedes-benz.com.au/corporate

* Terms and conditions apply. Benefits subject to eligibility.

Mercedes-Benz

The best or nothing.

