Foraging further for fewer funds

with Christine Smyth

Australia is increasingly accused of having a 'blame and claim culture', with some asserting that it is probably second only to the United States when it comes to our penchant for litigation.[1]

Following this theme, it seems succession law is a fresh field for those foraging for fortune.

Mason v Shepherd & Bell [2018] QDC 278 (*Mason*) is an example of how a relatively simple and low-value claim for further provision can morph into an expensive and unnecessary contested litigation. It is one of a number of cases that give us pause for consideration as to how far the pendulum has swung in further provision applications.

The testator died on 2 April 2017 survived by her four children, leaving a will dated 21 June 2002. Apart from a few minor specific bequests, the bulk of the estate fell into the residue to be distributed equally among her four adult children. The net value of the estate was a mere $226,200.[2]

The applicant filed her application for further provision from the estate. Aside from her quarter share in the small estate, she did not specify what amount would be satisfactory provision. The affidavits of the respondents set out the circumstances of each of the remaining beneficiaries. They contended that each of their circumstances were similar to the applicant, save that the applicant did not have superannuation, and this was ultimately acknowledged by the applicant.

Prior to the hearing, the applicant's solicitor wrote to the respondents indicating that his client was willing to resolve the matter on the basis that she receive $30,000 from the estate, in addition to her existing entitlement. A deed of agreement was drawn up to give effect thereto. It was at this point the matter took a problematic turn. The applicant signed the deed of agreement, but added some of her own commentary:

"I am signing this under duress. I have been bullied and treated unfairly. My siblings are stealing from me."[3]

Understandably, the agreement was not accepted by the respondents and they proceeded directly to a hearing for final determination.

> "It is no use to blame the looking glass if your face is awry."
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> – Nikolai Gogol, *The Inspector General (1836)*

Readers may recall the decision of *Charlesworth*,[4] in which Porter QC DCJ discussed the discretion of the court to hear a matter without it being referred to a mediation and the circumstances where that might be suitable. In *Mason*, the applicant claimed that she did not give authority to her solicitor to reach the agreement. She also now claimed she ought to receive the entire estate and that she ought to be granted the opportunity to detail the level of care she claimed she provided to the deceased in support of her position, with that, she insisted the matter be referred for mediation. Despite her protestations, the court did not refer the matter to mediation, instead proceeding to determine final orders. In doing so the focus of the court was on the circumstances of the deed of agreement.

The applicant claimed that she did not authorise her solicitor to reach the agreement and that she only signed the deed of agreement "as a result of pressure applied to her by her solicitor".[5]

The court noted the correspondence clearly demonstrated the solicitor at least believed he had her authority. The respondents argued that they were entitled to rely on the ostensible authority of the solicitor in reaching the agreement. Accordingly, they were entitled to rely upon and enforce it.

The court agreed and found that "[T]he fact of the applicant signing the deed, albeit at the same time registering her protest, seems to me to confirm the solicitor had authority to make the agreement. However, what is incontrovertible is that the respondents were entitled to conclude a valid agreement was reached."[6]

In reaching its conclusion as to enforcing the agreement the court relied on the principle of *Harvey v Phillips* (1956) 95 CLR 23, affirmed by Fraser JA in *Braodbent v Medical Board of Queensland* [2010] QCA 352 citing *Harvey v Phillips*: "The power to decline to enforce a compromise does not arise where the party who seeks to impeach the compromise expressly authorized a compromise, even if that authority was given after considerable equivocation and under pressure. That is so, provided there is no ground sufficient to render the compromise void or voidable, or to entitle the client to equitable relief."

Accordingly, the court concluded an agreement as to the amount of $30,000 was in fact reached and proceeded to determine the application having regard to the principles in *Singer v Berhouse* (1994) 181 CLR 201. In so doing the court particularly noted that "Agreement between the parties, as to an outcome, should be respected by the court in making a determination".[7] With that the court ordered further provision for the applicant of $30,000. However, she was ordered to bear her own costs of the proceedings.

The decision provides insight into the length which some clients will go to press their claims for further and better provision from the estate. In this case the client pressed her position to her detriment, whilst simultaneously impugning the reputation of her legal advisers.

In the financial year 2017-2018 Lexon Insurance claims cost in wills and estates doubled on the years 2003-2017.[8] This is despite the existence and use of numerous Lexon wills and estate checklists, all designed to reduce claims. Perhaps, notwithstanding the extent to which we as professionals go to reduce litigation, some matters are redolent with the inevitability of it.

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Notes

1 Among them American management liability specialist Kevin LaCroix, speaking at the Australian Professional Indemnity Group's conference in Sydney, 2016.
2 *Mason* at [1]-[3].
3 At [8].
4 *Charlesworth v Griffiths & Anor* [2018] QDC 115.
5 At [9].
6 At [16].
7 [20].
8 Page 22 *Proctor* September 2018.