Supreme Court of New South Wales

Smith v Smith [2017] NSWSC 408 (13 April 2017)

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Supreme Court
New South Wales

Case Name:	Smith v Smith
Medium Neutral Citation:	[2017] NSWSC 408
Hearing Date(s):	24, 25 and 26 November 2015; 2 and 3 February 2016; and written submissions culminating in written submissions dated 1 December 2016
Decision Date:	13 April 2017
Jurisdiction:	Equity
Before:	Lindsay J
Decision:	Subject to allowing the parties an opportunity to be heard as to orders to be made:

(1) The First Defendant (the holder of an enduring power of attorney on behalf of her husband, an incapable person, now deceased) held liable to account to the estate of the deceased for her mismanagement of his property in breach of fiduciary obligations.

(2) The second defendant (executor of the deceased's estate) held not liable, in devastavit, for wilful default in performance of his duties, for a failure or refusal to institute proceedings against the first, third and fourth defendants.

(3) Declaration to be made that the first, third and fourth defendants hold on trust for the estate of the deceased (prima facie, for the benefit of the plaintiffs as beneficiaries of the estate) property acquired by them in the names of the third and fourth defendants, using funds of the deceased applied by the first defendant in breach of fiduciary obligations she owed to the deceased as his attorney

(4) Further consideration to be given to questions of remedy, and consequential relief, to be granted.

Catchwords:

FIDUCIARY DUTIES — Scope of power of attorney – Absence of authority to give gifts or to confer benefits on others– Attorney bound to act in best interests of principal without unauthorised personal benefits – Attorney bound to act within limits of authority as defined by instrument of appointment.

EQUITY — Equitable remedies — Accounts and inquiries — Whether enduring attorney of incapacitated person should be ordered to account to his deceased estate — Whether attorney acting under power of attorney after the principal has become incapable has any, and if so what, obligation to account.

EQUITABLE DEFENCES – Laches and acquiescence – Management of incapable person's estate — Obligation of enduring attorney to account — Failure to apply for management orders to clarify limits of authority — No defence to order for account where attorney fails to confirm own authority and actively delays and dissuades enquiries.

PROTECTIVE JURISDICTION — Law of agency – Enduring power of attorney.

Legislation Cited:

Civil Procedure Act 2005 NSW

Conveyancing Act 1919 NSW

Evidence Act 1995 NSW

Guardianship Act 1987 NSW

Law Reform (Miscellaneous Provisions) Act 1944 NSW

Married Persons (Equality of Status) Act 1996 NSW

Married Persons (Property and Torts) Act 1901 NSW

Trustee and Guardian Act 2009 NSW

Powers of Attorney Act 2003 NSW

Probate and Administration Act 1898 NSW

Real Property Act 1900 NSW

Relationships Register Act 2010 NSW

Supreme Court Act 1970 NSW

Succession Act 2006 NSW

Uniform Civil Procedure Rules 2005 NSW

Cases Cited:

Abela v Public Trustee [1983] 1 NSWLR 308

Angelina Spina v Permanent Custodians Limited [2008] NSWSC 561

Armory v Delamirie (1722) 1 Stra 505; [1722] EWHC KB J94; 93 ER 664.

Ashton v Pratt (No 2) [2012] NSWRSC 3

Balfour v Balfour [1919] 2 KB 571

Barnes v Addy (1874) 9 Ch App 244

Bird v Bird (No 4) [2012] NSWSC 648

Black v S Freedman & Co [1910] HCA 58; (1910) 12 CLR 105

Brady v Stapleton [1952] HCA 62; (1952) 88 CLR 322

Bridgewater v Leah [1998] HCA 66; (1998) 194 CLR 457

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Brown v Smith (1878) 10 Ch D 377

Bryson v Bryant (1992) 29 NSWLR 188

Byrnes v Kendle [2011] HCA 26; (2011) 243 CLR 253

C v W (No. 2) [2016] NSWSC 945

Chan v Zachara [1984] HCA 36; (1984) 154 CLR 178

City Bank of Sydney v McLaughlin [1909] HCA 78; (1909) 9 CLR 615

Clay v Clay (2001) 202 CLR 410

Commonwealth v SCI Operations Pty Limited [1998] HCA 20; (1998) 192 CLR 285

Consul Development Pty Limited v DPC Estates Pty Limited [1975] HCA 8; (1975) 132 CLR 373

Corin v Patton (1990) 169 CLR 540

Coshott v Sakic (1998) 44 NSWLR 667

Countess of Bective v Federal Commissioner of Taxation [1932] HCA 22; (1932) 47 CLR 417

Crescendo Management Pty Limited v Westpac Banking Corporation (1988) 19 NSWLR 40

Crossingham v Crossingham [2012] NSWSC 95

Daily Telegraph Newspaper Co. Limited v McLaughlin [1904] UKPCHCA 1; (1904) 1 CLR 479

Darnanin v Cowan [2010] NSWRSC 1118

Dart Industries Inc. v The Décor Corporation Pty Limited [1993] HCA 54; (1993) 179 CLR 101

Downie v Langham [2017] NSWSC 113

Drew v Nunn (1879) 4 QBD661 at 665-666

Edward v Cheyne (No 2) (1888) 13 App Cas 371

Estate Polykarpou; re a Charity [2016] NSWSC 409

Farah Constructions Pty Limited v Say-Dee Pty Limited (2007) 230 CLR 89

Fistar v Riverwood Legion and Community Club Limited [2016] NSWCA 81; (2016) 91 NSWLR 732 at 746

Gibbons v Wright [1954] HCA 17; (1954) 91 CLR 423

Ghosn v Principle Focus Pty Limited (No. 2) [2008] VSC 574

Hawksford v Hawksford [2005] NSWSC 463

Helou v Nguyen (with Addendum) [2014] NSWSC 22

Heperu Pty Ltd v Belle [2009] NSWCA 252; (2009) 76 NSWLR 230

Hepworth v Hepworth (1963) 110 CLR 309

Hoddinott v Hoddinott [1949] 2 KB 406

Hospital Products Limited v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41

Houghton v Immer (No. 155) Pty Limited (1997) 44 NSWLR 46

Hungerfords v Walker [1989] HCA 8; (1990) 171 CLR 125 at 148

In re Allingham [1932] VicLawRp 66; [1932] VLR 469

In the marriage of Wagstaff (1990) 14 Fam LR 78

In the matter of Anglican Development Fund Diocese of Bathurst (Receivers and Managers Appointed) [2015] NSWSC 440 at [22]- [30]

Keith Heney & Co Pty Limited v Stuart Walker & Co Pty Limited [1958] HCA 33; (1958) 100 CLR 342

Lamru Pty Ltd v Kation Pty Ltd (1998) 44 NSWLR 432

Maguire v Makaronis [1997] HCA 23; (1997) 188 CLR 449

Marshall v Crutwell (1875) LR 20 EQ 328

McLaughlin v Daily Telegraph Newspaper Co. Limited [1904] HCA 51; (1904) 1 CLR 243

McLaughlin v Fosbery [1904] HCA 55; (1904) 1 CLR 546

McLaughlin v Freehill [1908] HCA 15; (1908) 5 CLR 858

McLaughlin v the City Bank of Sydney [1912] HCA 16; (1912) 14 CLR 684

O'Malley v The Public Trustee [1956] VicLawRp 30; [1956] VLR 194

Orr v Ford (1989) 167 clr 316 AT 337-341; [1989] HCA 4; (1989) 167 CLR 316 at 337-341

Plunkett v Bull [1915] HCA 14; (1915) 19 CLR 544

Pollard v Wilson [2010] NSWCA 68

Protective Commissioner v D [2004] NSWCA 216; (2004) 60 NSWLR 513

R v Heyde (1990) 20 NSWLR 234

Ramage v Waclaw (1988) 12 NSWLR 84

Rasmanis v Jurewitch (1969) 70 SR (NSW) 407

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Re Dawson (Deceased) [1966] 2 NSWR 211; 84 WN (Pt 1) (NSW) 399

Re Eve [1986] 2 SCR 388 at 408; (1986) 31 DLR (4th) 1

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Ronald Allen Smith and Anor v Joyce Smith and Ors [2014] NSWSC 582

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Scott v Scott [2009) NSWSC 567

Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) [1992] HCA 15; (1992) 175 CLR 218

Sprott v Harper [2000] QCA 391

Steinberg v Federal Commissioner of Taxation [1975] HCA 63; (1975) 134 CLR 640

Sze Tu v Lowe [2014] NSWCA 462; (2014) 89 NSWLR 317

Szozda v Szozda [2010] NSWSC 804 at [40]

Taheri v Vitek [2014] NSWCA 209; (2014) 87 NSWLR 403 at 425

The City Bank of Sydney v McLaughlin [1909] HCA 78; (1909) 9 CLR 615

The Trustees of the Property of Cummins v Cummins ([2006] HCA 6; 2006) 227 CLR 278

Vadasz v Pioneer Concrete (SA) Pty Limited (1995) 184 CLR 102

Warman International Limited v Dwyer [1995] HCA 18; (1995) 182 CLR 544

Williams v Hensman [1861] EngR 701; (1861) 1 J&H 546

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Youyang Pty Limited v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 CLR 484

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Category: Principal judgment

Parties: First Plaintiff: Ronald Allen Smith

Second Plaintiff: Neville Roland Smith

First Defendant: Joyce (Joy) Smith

Second Defendant: Michael Bingham (Executor)

Third Defendant: Rosemary Ann Danby

Fourth Defendant: Derek George Danby

Representation: Counsel:

Plaintiffs: A Bulley

Defendants: J Mitchell

Solicitors:

Plaintiffs: Andreyev Lawyers

Defendants: Low Doherty & Stratford Solicitors

File Number(s): 2012/00276891

JUDGMENT

INTRODUCTION

The Core Case

1. These proceedings focus upon claims by the two surviving adult children (sons) of a testator's first marriage (each of whom is a residuary beneficiary of the testator) that his second wife (his widow, also a residuary beneficiary) should account to his deceased estate for her dealings with his property *inter vivos*, purportedly pursuant to an enduring power of attorney, or otherwise with his authority, during the last four years or so of his life (2008-2012), after the time, suffering dementia, he became incapable of managing his affairs.

2. In that period the widow (the first defendant) dealt with the deceased's property, and mixed it with her own, as if entitled to deal with it as she wished. She rushed, headlong, into the cash economy, liquidating all property owned by the deceased or in which he had an interest; dissipating the deceased's property as if entitled to do so in disregard of his interests, having entrusted his primary care to a nursing home; and taking refuge, in these proceedings, in an absence of auditable records necessary for her to be called fully to account.

3. She was not an unattentive wife, before or after the deceased's entry into nursing home accommodation. She personally cared for him until the necessity for such accommodation forced itself upon them both. Thereafter, she continued to be, according to her own lights, a dutiful wife. She visited her husband regularly and, so far as she was able or required,

attended to his needs, most of which were, however, attended to by professional carers apparently funded by his pension entitlements.

4. As the deceased moved towards the nursing home world, she prevailed upon him to allow her to control his affairs and, increasingly, she did, *de facto* at least, control them.

5. A core difficulty of the parties' present situation is that she did so without due authority for what she did, and what she did routinely sacrificed the deceased's property interests to her own agenda. Freed, in fact, from a financially conservative mindset exhibited by her husband when he was mentally competent, she kicked her heels up more than a bit after he became incompetent. At his expense, she enjoyed holiday cruises with her side of the family, bought an expensive car and expensive jewellery, gambled and enjoyed regular entertainment.

6. Critically to any practical outcome of the present proceedings, she used her husband's money to fund the purchase of a residence in the names of her daughter by an earlier marriage and the daughter's husband, her son-in-law (the third and fourth defendants) and, a little later, to fund the construction of a granny flat for herself on that property.

7. The plaintiffs, products of the deceased's first family, have taken objection to the first defendant's dissipation of their father's wealth, and her diversion towards her side of the family of so much of that wealth that remains, on their case, identifiable: the present residence of the first, third and fourth defendants.

8. This is a case which requires both close attention to detail, and a broader perspective of the legal framework, because the outcome, whatever it might correctly be, bears heavily upon the lives of all parties, all of them in their senior years. It is, in every sense, a hard case that has been bitterly fought. Despite a simple story-line, it bristles with complexity.

9. In justification of her dealings with property in the deceased's name, the first defendant relies upon: (a) a written authority dated 1 November 2007 executed by the deceased authorising her to sell shares and securities held by him; (b) an enduring power of attorney dated 10 January 2008 granted in her favour by the deceased; (c) a Will made by the deceased on 10 January 2008 substantially, but not exclusively, in her favour; (d) an instrument dated 18 January 2008 executed by the deceased appointing her, for limited purposes, his enduring guardian, governed by the *Guardianship* Act 1987 NSW; (e) a transfer of the matrimonial home of the deceased and herself (a home unit at Emu Plains), on or about 14 February 2008, from the name of the deceased into the names of the deceased and herself as joint tenants; (f) private conversations allegedly had by her with the deceased contemporaneously with particular transactions in 2008 and 2010; (g) her channelling of proceeds of sale of property through a joint account, in the names of the deceased and herself, opened with the Commonwealth Bank on 26 October 2007; (h) entitlements alleged to flow from the fact of her marriage to the deceased; (i) a financial contribution of approximately $120,000 she alleges she made to the acquisition of property in the name of the deceased, in 1998, shortly after her marriage to him in 1997; and (j) her provision of care for the deceased in his years of declining health.

10. The plaintiffs do not challenge the validity of the documents executed by the deceased on 10 and 18 January 2008 with the first defendant's encouragement: a Will that favoured her interests over those of the plaintiffs; an enduring power of attorney in her favour; and an enduring guardianship appointment.

11. Nor do they challenge the validity of the transfer of the matrimonial home into the names of the first defendant and the deceased as joint tenants on or about 14 February 2008.

12. They allege breaches of fiduciary obligations by the first defendant; a failure by the executor of the deceased's Will (the second defendant) to discharge the duties of his office by suing the first defendant; and a knowing receipt of trust property by the third and fourth defendants, as volunteers. Underlying all claims are the plaintiffs' claims for family provision relief under chapter 3 of the *Succession Act* 2006 NSW.

13. They do not challenge the effectiveness, *at law*, of any transaction purportedly entered by the first defendant as attorney for the deceased with any third party. They seek to enforce obligations said to arise in equity.

Context of the Case

14. Unlike *Taheri v Vitek (*[2014] NSWCA 209; 2014) 87 NSWLR 403 at 425 at [105]-431[131], this case is not concerned with a power of attorney which expressly includes authority to do an act as a result of which a benefit would be conferred on the attorney: 87 NSWLR 413[41] and 426[106].

15. In that case the Court of Appeal concluded that an instrument which included a "benefits clause" (in accordance with section 163(2)(b) of the *Conveyancing Act* 1919 NSW) authorised the attorney to act other than in the interests or for the benefit of the donor of the powers. In the present case, the power of attorney is subject to restrictions on the extent of the attorney's authority found in sections 11(1), 12(1) and 13(1) of the *Powers of Attorney Act* 2003 NSW. Section 12(1), relevantly, provides that "[a] prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on the attorney...".

16. In the context of a prescribed, enduring power of attorney governed by sections 8-13 of the *Powers of Attorney Act* 2003 (rather than that of a prescribed, enduring power of attorney governed by section 163B of the *Conveyancing Act* 1919), it is necessary to focus fresh attention on questions such as "What are the metes and bounds of an attorney acting 'for the benefit of' the principal?" and "What is a 'moral obligation' to provide support for a family member who happens to be an attorney?"

17. These questions were put to one side by the Court of Appeal in *Taheri v Vitek*. In a different context, they must be confronted in the current proceedings.

18. As recognised in *Downie v Langham* [2017] NSWSC 113, they are questions which reflect issues that arise on an exercise of the Court's protective jurisdiction, the nature of which is authoritatively explained in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* [1992] HCA 15; (1992) 175 CLR 218 at 258-259 by reference to *Wellesley v Duke of Beaufort* [1827] EngR 268; (1827) 2 Russ 1 at 20; [1827] EngR 268; 38 ER 236 at 248, *Wellesley v Wellesley* (1828) 2 Bli NS 124 at 131, 136 and 142; 4 ER 1078 at 1081, 1083 and 1085 and the historical exposition of the jurisdiction found in in *Re Eve* [1986] 2 SCR 388 at 407-417; (1986) 31 DLR (4th) 1 at 14-21.

19. The law of agency (an amalgam of common law rules and equitable principles) needs to accommodate the protective jurisdiction when, a principal having lost the mental capacity requisite to managing his or her own business, an enduring power of attorney (not known to

the general law of agency) comes into operation as such. Until that time, an enduring power of attorney may operate in a manner indistinguishable from other forms of agency. After that time, allowance generally has to be made for the physical presence, but mental absence, of a principal who, unable to make independent decisions, needs empathetic protection.

20. The following observations of White J (now a justice of appeal) in *Downie v Langham* [2017[NSWSC 113 at [8]- [12] mark out territory occupied by these proceedings:

> "[8] The question as to whether an attorney in these circumstances should be required to provide an account is not a straightforward issue. Whilst it can be said that generally because the relationship between principal and attorney under power is that of principal and agent, where the agent is required to act for the principal's benefit, it should follow that money that comes into the attorney's hands must be applied exclusively for the benefit of the principal, and the principal can be required upon to account. However, as Lindsay J explained in *C v W (No 2)* [2016] NSWSC 945, there are attorneys and attorneys. An attorney who acts under an enduring power of attorney after the principal has become incapable, undoubtedly stands in a fiduciary relationship with the principal. But that is not a relationship of trustee and
>
> beneficiary and the law does not always impose an obligation on such a person to account.
>
> [9] The principles expounded by Dixon J in *Countess of Bective v FCT* (1932) 47 CLR 417 ; [1932] HCA 22 at 420-421 and 422-423, and *in Brown v Smith* (1878) 10 Ch D 377, may well mean that no account from an attorney should be required. Moreover, even where an account is required, it will not necessarily follow that an attorney who is unable to give an account of particular items of expenditure, because, for example, receipts may not have been kept, will necessarily be required to account to the principal or the principal's estate for such expenditure.
>
> [10] But in the present case the defendant, as I understand her submissions, accepts that she did spend money for her own benefit that she should not have spent. It does seem that there will be some money payable by her to the estate. If that did not appear, then that would be a ground in itself for not imposing an obligation to account (*Woodward v Woodward* [2015] NSWSC 1793 at [9]). But in this case there were numerous withdrawals, some of which at least could be classified as being substantial, from which it can be inferred, at least in the light of the defendant's admission, that the moneys were not applied for the deceased's benefit.
>
> [11] It follows that an account should be ordered. As I have said, it will not necessarily follow that the defendant will be required to pay moneys to the estate if she is unable to identify how particular withdrawals were applied. Nonetheless,

she should make an affidavit on oath or affirmation that, to the best of her ability, will state how the moneys withdrawn from the accounts were applied. That will require her to prepare a list of the items which are asterisked on the bank statements which are an exhibit to the plaintiff's affidavit and to say, as best she can, how the moneys withdrawn were applied.

[12] Particularly as the defendant is self-represented, I would add that her affidavit can also include any matters in relation to things which she has done for the deceased on the basis of which she might be entitled to claim an allowance, or to claim relief, in what Lindsay J has said in *C v W (No 2)* is the inherent jurisdiction of the Court analogous to relief available to a trustee, to be excused from breaches of trust if the trustee, or in this case fiduciary, has acted honestly and reasonably and ought fairly to be excused".

Foundations of the Plaintiffs' Case

21. The plaintiffs have built a case grounded upon:
. (a) a contention that the deceased's appointment of the first defendant as his attorney on 10 January 2008 imposed upon her the fiduciary obligations owed by an agent to his, her or its principal: GE Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, Australia, 2nd ed, 2015), [8.31]-[8.44] and [8.48]-[8.58]; and
. (b) a contention that the deceased lacked any capacity to acquiesce in the first defendant's dealings with his property from at least 13 May 2008, upon which date:
. (i) at the request of the first defendant, the deceased's general medical practitioner (Dr Dixon) certified that the deceased was no longer able to conduct his financial affairs and needed a registered power of attorney to oversee the safe management of his funds; and
. (ii) for her part, the first defendant proceeded to deal with the deceased's property on the basis that he had been "declared as of unsound mind" and was unable to sign cheques on his own behalf.

Foundations of the Defendants' Case

22. The defendants' general denials of liability include, at their core, a contention that the relationship between husband and wife, where it involves the sharing of income or capital (as they contend is here the case), does not ordinarily, or here, give rise to an obligation to account in one spouse *vis-a-vis* the other: *Edward v Cheyne (No 2)* (1888) 13 App Cas 371 at 398; *O'Malley v The Public Trustee* [1956] VicLawRp 30; [1956] VLR 194 at 197.
23. The defendants reinforce this contention by reference to:
. (a) a rebuttable presumption against a finding of an intention to affect legal relations in intra-family dealings: *Balfour v Balfour* [1919] 2 KB 571 at 578-579; *Hoddinott v Hoddinott* [1949] 2 KB 406 at 411 and 414; *Ashton v Pratt (No 2)* [2012] NSWRSC 3 at [32]; *Darnanin v Cowan* [2010] NSWSC 1118 at [206];
. (b) the qualified obligation to account applied to guardians and the like appointed to manage the person or property of a member of their household under their care: *Countess of Bective v Federal Commissioner of Taxation* [1932] HCA 22; (1932) 47 CLR 417 at 420-423;

Clay v Clay (2001) 202 CLR 410 at 428-430; *Crossingham v Crossingham* [2012] NSWSC 95 at [15]- [36]; and

. (c) an obligation they contend the deceased had (arising from section 72 of the *Family Law Act* 1975 Cth and "the law of lunacy") to maintain her as his wife, dependent upon him.

24. **An Intention to Affect Legal Relations.** There is no factual basis for a conclusion that the deceased did not intend, by the enduring power of attorney he executed on 10 January 2008, to affect legal relations between the first defendant and himself. The instrument was prepared, and subsequently registered, by a solicitor. It was prepared in a form, with attendant formality, governed by the *Powers of Attorney Act* 2003. In accordance with the Act, the first defendant formally endorsed her acceptance of her appointment on the instrument the same day it was executed by the deceased.

25. Execution of the instrument was accompanied by the execution of a Will on the same day. Both documents were followed up, a month later, by the deceased's transfer of his matrimonial home into the names of himself and the first defendant as joint tenants, a transaction consistent with the terms of the Will.

26. A more deliberate course of conduct designed to have legal effect, or to affect legal relations between the first defendant and the deceased, would be difficult to imagine.

27. **The Liability of a Guardian to Account.** More difficult questions attend an assessment of the first defendant's liability to account to the deceased, and his estate, as his attorney. The *Countess of Bective* Case lies at the heart of those questions.

28. Except in a general way, as confirmation of the deceased's conferral of authority on the first defendant to make decisions affecting his person (as well as his estate), little independent significance attaches to the first defendant's appointment as enduring guardian. The instrument of appointment did not confer on the first defendant authority to deal with the deceased's property. It authorised her to exercise functions specifically enumerated as relating to where the deceased lived, what health care he received, what kinds of personal services he received, and consents for medical or dental treatment. The guardianship appointment is an important *contextual* fact, but primary focus is on the enduring power of attorney.

29. The defendants contend that the purpose of the first defendant's appointments as an enduring attorney and enduring guardian was to facilitate "the care and maintenance of the deceased *and* the first defendant to the standard to which they had become accustomed prior to the deceased's incapacitation".

30. Even if the purpose of the instruments were to be characterised as facilitation of the care and maintenance of the deceased *and* the first defendant (a debateable proposition), a flaw in the defendants' case is that the first defendant engaged in a pattern of expenditure more extravagant than can be justified by reference to the deceased's lifestyle. The first defendant's extravagance extended to lavish expenditure on jewellery, for example. The defendants concede that that expenditure, at least, went beyond anything enjoyed during the deceased's capacity.

31. Properly understood, the purpose of the enduring power of attorney executed by the deceased on 10 January 2008 is to be inferred from its character and text (including explanatory notes incorporated in the instrument), in the factual context in which the

instrument was executed, including the fact that the deceased then anticipated his descent into dementia and death.

32. That he anticipated death, and was mindful of claims upon his estate other than those of the first defendant, is confirmed by the limitations of authority for which the text of the power of attorney provided and the deceased's execution of a Will contemporaneously with his execution of the power of attorney.

33. Although post-dating those instruments, the deceased's execution of an enduring guardianship instrument on 18 January 2008 and his execution of a memorandum of transfer on 14 February 2008 are not inconsistent with the intention of the deceased manifested in the instruments he executed on 10 January 2008. In combination, the documentation he signed in January - February 2008 might, not inappropriately, be characterised as evidencing an estate planning scheme designed by the deceased to make provision for management of his estate during incapacity and distribution of it upon death.

34. So viewed, the purpose of the power of attorney was not, as the first defendant would have it, to empower her to treat the deceased's property as her own or, without express authority otherwise duly granted, to subvert the deceased's formally declared intention. Its purpose was to empower the first defendant to manage the deceased's estate for *his* benefit during his incapacity for self-management. Any benefit she might derive from her management of his estate could not, without a breach of duty on her part, be anything more than incidental.

35. The first defendant's appointment as the deceased's enduring attorney did not empower her, during any period of incapacity on the part of the deceased, to deal with the deceased's property in a manner not specifically authorised by the terms of the instrument pursuant to which she was appointed to that office.

36. As an *enduring* power of attorney, the instrument was protective in character. Subject to its terms, it existed for the benefit of the deceased as donor.

37. **Section 72 of the *Family Law Act* 1975**, upon which the defendants rely, is in the following terms:

> "**72. Right of spouse to maintenance**
>
> (1) A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:
>
> (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
>
> (c) for any other adequate reason;

having regard to any relevant matter referred to in subsection 75(2).

(2) The liability under subsection (1) of a bankrupt party to a marriage to maintain the other party may be satisfied, in whole or in part, by way of the transfer of vested bankruptcy property in relation to the bankrupt party if the court makes an order under this Part for the transfer."

38. Section 72 appears in Part VIII of the *Family Law Act* (entitled "Property, Spousal Maintenance and Maintenance Agreements") as a precursor to express statutory powers to award maintenance, determine property rights and enforce agreements relating to maintenance. Outside the framework of the Act, it adds little, if anything, to a resolution of the current proceedings. No claim is, or ever has been, made by the first defendant against the deceased, or his estate, under the Act.

39. As an enduring power of attorney, the power of attorney dated 10 January 2008 became fully operative when the deceased became incapable of managing his own affairs, substantially the same point at which the Court's protective jurisdiction (and analogous legislative provisions) became engaged. That jurisdiction, rather than jurisdiction under the *Family Law Act* not invoked, may bear upon the first defendant's claimed "entitlement" to "maintenance" at the expense of the deceased's estate.

40. **The Protective Jurisdiction : Maintenance of an Incapacitated Person's Family.** Independently of section 72 of the *Family Law Act*, the defendants rely upon the jurisdiction of the Court, grounded in the protective jurisdiction (formerly known as the lunacy jurisdiction) or analogous equity jurisdiction:

. (a) to make provision for maintenance of the family of an incapacitated person out of his or her estate, whether by way of an allowance or by an *ex gratia* payment for past care (H S Theobald, *The Law Relating to Lunacy* (London, 1924), chapters 52 and 65; *Protective Commissioner v D* [2004] NSWCA 216; (2004) 60 NSWLR 513 at 540-542);

. (b) to protect from a liability to account a fiduciary who, for the benefit of an incapacitated person, has without authority done an act which he or she might have done with authority of the Court if sought in advance of the act (*McLaughlan v City Bank of Sydney* [1912] HCA 16; (1912) 14 CLR 684 at 698-699 and 704); or

. (c) to excuse a fiduciary from a personal liability to account arising from an act done by the fiduciary in the interests, and for the benefit, of an incapacitated person in circumstances in which the fiduciary ought fairly to be relieved, in whole or part, from personal liability (*C v W (No. 2)* [2016] NSWSC 945 at [45]- [47]; *Trustee Act* 1925 NSW, section 85).

41. The defendants have not formally applied for relief under section 85 of the *Trustee Act* 1925, but an invocation of that section is implicit in their submissions, particularly those made by reference to *C v W (No. 2)* [2016] NSWSC 945.

42. The *Trustee Act*, section 85 empowers the Court to relieve a trustee, wholly or partly, from personal liability for a breach of trust for which the trustee is or may be liable. A grant of relief requires that it appear to the Court that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the direction of the Court in the manner in which the trustee committed the breach. Section 5 of the Act

defines “trustee” as having a meaning corresponding with that of “trust” and including a “legal representative”, separately defined as an executor or administrator. Subject to an exception not presently material, section 5 also defines a “trust” as including “implied and constructive trusts, and cases where the trustee has a beneficial interest in trust property, and the duties incident to the office of legal representative of a deceased person”.

43. Although there are nuanced differences between the various heads of jurisdiction relied upon by the defendants, the case sought to be made by them by reference to alternative heads of jurisdiction is very similar to the case sought to be made by them by reference to the *Countess of Bective* case.

44. The defendants contend that, if the first defendant would otherwise be held liable to account to the estate of the deceased for breaches of fiduciary duty, in the process of accounts being taken an allowance should be made in the first defendant’s favour for:

. (a) her claimed entitlement, as the wife and widow of the deceased, to maintenance from his estate;

. (b) effort expended by her in caring for the deceased during his incapacity; and

. (c) benefits said to have accrued to the plaintiffs from her, rather than them, having to bear the burden of caring for the deceased during his incapacity.

45. The last category of these claims does less than justice to the plaintiffs, whose willingness to bear burdens associated with the deceased’s care and maintenance in his final years was thwarted by warnings of the first defendant to stand aside from him and her management of his affairs. In deference to him, and resigned to (misplaced) reliance on her goodwill, they gave the deceased and his wife space. At no time did they abandon their father or any familial obligation owed to him. No material benefit can be said to have accrued to them from their being relieved of a burden of caring for the deceased.

46. The case at hand not being a commercial one, it does not lend itself to a discussion of “just allowances” in quite the same terms as those in which *Warman International Limited v Dwyer* [1995] HCA 18; (1995) 182 CLR 544 discussed a fiduciary’s liability to account for profits. Nevertheless, if and to the extent that the deceased or his estate benefited from conduct of the first defendant or was under an unfulfilled obligation to the first defendant, justice and equity might require an allowance to be made in favour of the first defendant. Seeking equity, the estate ought to do equity, or recognition of the broader operation of the Court’s protective jurisdiction might be required.

47. In substance, the defendants contend that, the first defendant having discharged her wifely duties to the deceased, she should, by one means or another, be excused from any breach of fiduciary attending her dealing with his property. They submit that, having ensured that his needs were catered for in a nursing home environment, she was at liberty to apply his property as her own whether or not she consulted him in her disposition of it .

48. Viewed thus, alternative formulations of the defendants’ case are substantially the same as the case sought to be made by reference to the *Countess of Bective* case.

49. Implicit in the defendants’ case generally, at some level, is a contention that, upon a determination, now, of whether (and, if so, to what extent) the first defendant should be held liable to account as a fiduciary, the Court can, and should, protect the first defendant from any liability which she could have avoided had she, during the lifetime of the deceased,

sought and obtained the authority of the Court, upon an exercise of protective jurisdiction, to manage the affairs of the deceased as she did.

50. That contention is grounded in the fact that a determination of what, if any, orders are to be made to enforce a liability to account that the first defendant may have as a defaulting fiduciary (or that the third and fourth defendants might have as constructive trustees) falls to be considered, in accordance with general principles, at the time of judgment, taking into account all the circumstances of the case then known material to whether, and to what extent, she (or they) should be held to account: *Helou v Nguyen (with Addendum)* [2014] NSWSC 22 at [139]; LI Rotman, *Fiduciary Law* (Thomson, Canada, 2005), page 729.

51. An impediment to the defendants' case is, however, that upon an exercise of protective jurisdiction the Court generally has to measure what is done, or not done, by reference to an assessment whether it is in the interests, and for the benefit, of the incapable person, in this case the deceased, under protection (*GAU v GAV* [2014] QCA 308; [2016] 1 Qd R1 at [48]), a hurdle not insurmountable but necessarily to be approached with caution after the death of the incapable person and engagement with the separate interests of beneficiaries of his or her deceased estate.

A hint of a "Community of Property" in Marriage?

52. The defendants' submissions have expressly disclaimed any suggestion that Australian law embraces the civil law concept of "community property" embedded in some European systems of family law, although, at times, their submissions appear only barely to have stopped short of embracing the concept.

53. The civil law concept of community of ownership arising from marriage has no place in Anglo-Australian common law: *Hepworth v Hepworth* (1963) 110 CLR 309 at 317-318; *Bryson v Bryant* (1992) 29 NSWLR 188 at 195-196.

54. In a report that canvassed the law in "community of property regimes", the Australian Law Reform Commission in 1987 recommended against the introduction of such a regime in Australia, preferring to maintain (with statutory modifications, embracing discretionary powers, where required) the system of "separate property during marriage" characteristic of the English tradition: Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (1987), recommendation 24 and paragraphs 53 and 508 *et seq.* In doing so, the Commission recognised that, under the separate property regime operative in Australia, each spouse may own and deal with property in exactly the same way as an unmarried person.

55. A summary of Australian law, strengthened by subsequent legislative developments, may be taken from a paper published by Rosalind Atherton as chapter 11 in Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives of Law in Australia* (Oxford University Press, 1995) at page 168:

> "In Australia today there is no legal concept of 'family property' as such, in the sense of assets that are considered to be owned jointly in some way between or among individuals because of their being related to each other as a 'family'. While such a concept exists in European jurisdictions, jurisdictions which have their legal roots in English law have generally preferred an individualistic system

> of property ownership, expressed in such principles as 'freedom of contract', 'freedom of property' and its offshoot, 'freedom of testation'. Generally speaking, this has meant that ownership of things is determined, not by virtue of the relationship between people, but because of purchase, gift or inheritance by individuals...."

56. This orientation of the law is reinforced, in the context of the present proceedings, by enactment of the *Married Persons (Equality of Status) Act* 1996 NSW.

57. A mixing of funds in a stable, nuclear family, in which the parties to a domestic relationship are each in full command of their faculties and consent to, or acquiesce in, informal transactions affecting property owned jointly or severally, lends itself (as the defendants contend) to an analysis of the law resistant to the imposition of an obligation to account as between family members.

58. Such an analysis might be thought less authoritative, however, in a case, such as the present, in which:

. (a) one of the parties to a relationship executes in favour of the other, and the other accepts, an enduring power of attorney, with all the formality (including involvement of a solicitor in the provision of a statutory certificate) that that entails;

. (b) the power of attorney is granted to authorise the donee, on specific terms that include limitations on the powers of the attorney, to effect business affecting property the legal title to which is held in the name of the donor alone;

. (c) the donor of the power then descends into mental incapacity, the fog of dementia; and

. (d) the donor's family is not simply a stable, nuclear family but, rather, a blended family in which different sides (extending beyond a single household) are openly in conflict, with divergent loyalties on display.

59. The principles to be applied are sufficiently flexible to accommodate what are, generally, fact-sensitive cases that require *transactional* analysis, albeit informed by empirical observations about personal relationships.

The Nature of Principles Applicable

60. In a case such as the present, the principles to be applied may draw upon diverse branches of the Court's jurisdiction (at Law, in Equity and upon an exercise of Protective jurisdiction), the general law and legislation.

61. This can be demonstrated by reference to *McLaughlin v The City Bank of Sydney* [1912] HCA 16; (1912) 14 CLR 684 at 698-699 and 704 (per Griffith CJ and Barton J respectively in the majority) and 716-718 (per Isaacs J in dissent).

62. That judgment is the culmination of a string of cases in the High Court of Australia involving a solicitor who was temporarily insane and who, upon regaining his sanity, challenged the validity of transactions effected by his wife in reliance upon a power of attorney later found to have been invalid. The principal related judgments are *McLaughlin v Daily Telegraph Newspaper Co. Limited* [1904] HCA 51; (1904) 1 CLR 243 and *The City Bank of Sydney v McLaughlin* [1909] HCA 78; (1909) 9 CLR 615. Other judgments to which reference might also be made to place the litigation in context are *Daily Telegraph*

Newspaper Co. Limited v McLaughlin [1904] UKPCHCA 1; (1904) 1 CLR 479; *McLaughlin v Fosbery* [1904] HCA 55; (1904) 1 CLR 546 and *McLaughlin v Freehill* [1908] HCA 15; (1908) 5 CLR 858.

63. In *McLaughlin v The City Bank of Sydney* [1912] HCA 16; (1912) 14 CLR 684 the majority held, *inter alia*, that:

. (a) a wife charged with the burden of maintaining the family of a husband of unsound mind might, by reason of the necessity of the case and the relationship of husband and wife, have authority to transact business on behalf of the husband as an "agent of necessity"; and

. (b) in Equity, where a person (had he or she applied to the Court in its Protective jurisdiction for authority to transact particular business on behalf of an incapable person) would have been granted that authority, the Court might protect that person from personal liability arising from having transacted the business without authority.

64. In dissent, Isaacs J insisted that a wife, without the express or implied authority in fact of her husband, cannot deal with his property; and that the common law should not be enlarged beyond the principle that, where a husband is insane, the wife, if not otherwise provided for by him, has authority by law to pledge his credit for her necessary maintenance.

65. More than caution is required in dealing with older cases about "agency of necessity" in the context of family relationships, a point made by SJ Stoljar in *The Law of Agency*: *Its History and Present Principles* (Sweet and Maxwell, London, 1961), chapter 7. Changes in law and practice have been too large to accommodate a direct application of earlier statements of principle to current factual scenarios. As Professor Stoljar observed at page 160:

> "We can see now that to express the relevant rules in terms of agency only obscures the true reasons for [the rights of a wife]. In fact..., to speak of her as an agent [of her husband] is merely a survival from the time when the courts were committed to the concepts of agency and authority because of the exigencies of the forms of action under which the husband would, at common law, have to be made liable in contract if he was to be made liable at all. Of course, there was in this an element of agency in the sense that one person would become vicariously liable for the price of goods bought by another. But this was at best an agency *sui generis*, which did not derive from normal agency principles, but was founded upon a separate duty that bids a husband to support and maintain his wife and his family."

66. Still, more recently than the observations of Professor Stoljar, section 7 of the *Married Persons (Equality of Status) Act* 1996 NSW abolished, as between spouses, what might be called (as it was called in *Hawksford v Hawksford* [2005] NSWSC 463 at [73]) "the (common law) doctrine of agency of necessity".

67. The tendency of the modern law, towards *transactional* rather than *relational* analysis of the rights and obligations of marriage partners, can be observed in *Part* 2 (sections 4-13) of the *Married Persons (Equality of Status) Act* 1996 NSW, a contemporary update of the *Married Persons (Property and Torts) Act* 1901 NSW, which the 1996 Act repealed and replaced.

68. Sections 4-13 are in the following terms:

"**Part 2 - Equality of status**

Division 1 General rule

4 Spouses have legal capacity as if they were not married

(1) A married person:

(a) has legal capacity for all purposes and in all respects as if that person were unmarried, and

(b) has a legal personality that is independent, separate and distinct from that of the person's spouse.

(2) This section does not affect any specific laws in relation to a minor.

Division 2 - Specific examples

5 Spouses can sue each other in tort

A husband and wife each has a right of action in tort against the other as if they were not married.

6 Criminal and civil action in respect of spouse's property

A married person is entitled to civil and criminal redress against the person's spouse for the protection of his or her property as if that person were not married.

7 Married person has no authority to act as agent of necessity

A married person does not, by reason only of the person's status as a spouse, have the authority to pledge the credit of the other spouse for necessaries or to act as agent for the other spouse for the purchase of necessaries.

8 Married person not liable for debts of spouse incurred before marriage

Subject to any agreement to the contrary, a married person is not liable for any debt incurred by the person's spouse before their marriage.

9 Spouses as beneficiaries

A husband and wife are to be treated as two separate persons for the purposes of the construction of a will, trust, or other instrument in relation to a gift or other disposition of real or personal property to the husband and wife, unless a contrary intention appears.

10 Instruments restricting anticipation or alienation are void

An instrument executed after the commencement of this section is void to the extent that it purports to attach any restriction on anticipation or alienation to the enjoyment of property by a woman that could not have been attached to the enjoyment of property by a man.

11 Effect of Division

Nothing in this Division affects the generality of Division 1.

Division 3 - Other matters

12 Housekeeping payments and allowances held as joint tenants

If a married person makes a payment or allowance to the person's spouse to pay their joint household expenses or for similar purposes, any property bought with the payment or allowance and any money not spent from the payment or allowance is, in the absence of any agreement to the contrary between the person and his or her spouse, taken to belong to the person and the person's spouse as joint tenants.

13 Fraudulent investment of spouse's money

(1) If a married person invests money belonging to the person's spouse without obtaining the consent of the spouse, the spouse can apply to the Supreme Court to have the money transferred to him or her.

(2) The Supreme Court has jurisdiction to order such a transfer and to make any ancillary orders."

69. The parties have not directly engaged any of these provisions in the current proceedings. The plaintiffs have not, for example, framed a cause of action in tort for conversion based on section 6 of the 1996 Act (relied upon by Young J in *Richardson v Gill* (1997) 141 FLR 314 at 319-320) and section 2 of the *Law Reform (Miscellaneous Provisions)* Act 1944 NSW, governing survival of a cause of action on death. Their core claims, rather, invoke principles of equity attaching to the execution and deployment of an enduring power of attorney governed by the *Powers of Attorney Act* 2003 NSW.

70. Nevertheless, the realignment in the legal incidents of a marriage effected by legislation such as the *Married Persons (Equality of Status) Act* 1996 may render a spouse who becomes an enduring attorney more amenable to a finding of fiduciary obligations than otherwise.

71. Greater significance, in the present proceedings, may attach though to an interplay between the Court's Protective and Equity jurisdictions.

72. Griffith CJ cited, as an instance of that interplay, the judgment of the English Court of Appeal in *Brown v Smith* (1878) 10 Ch D 377, a case also cited with approval by the High Court in *Countess of Bective v Federal Commissioner of Taxation* [1932] HCA 22; (1932) 47 CLR 417 at 421.

73. *Brown v Smith* involved the maintenance of an infant rather than a lunatic, but both types of case are generally regarded as exemplars of *parens patriae* jurisdiction, the principles governing which have been largely assimilated: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218 at 258-259, citing *Re Eve* [1986] 2 SCR 388 at 408; (1986) 31 DLR (4th) 1 at 14-15.

74. When engaged, directly or (as suggested by Griffith CJ in *McLaughlin v The City Bank of Sydney*) by analogy, the Protective jurisdiction empowers the Court (and, in some cases, may require it) to allow from the estate of an incapable person an allowance for the past or present care of an incapable person or for the maintenance of his or her family. That jurisprudence has been approved by the Court of Appeal, in this State, in *Protective Commissioner v D* [2004] NSWCA 216; (2004) 60 NSWLR 513 at 540 [149] - 542 [156]. It is dealt with in HS Theobald's classic text, *The Law Relating to Lunacy* (Stevens and Sons, London, 1924) under the rubric of "Past Maintenance" (chapter 52) and "Gifts and Allowances" (chapter 65).

75. In the present judgment a distinction is drawn, for analytical purposes, between the Court's equity and protective jurisdictions. That is not only analytically useful, but historically correct: see, for example, *Estate Polykarpou; re a Charity* [2016] NSWSC 409 at [138]- [158] and [161]-[164] and [166]-[181].

76. However, an acknowledgement needs to be made, consistently with current administrative arrangements for conduct of the business of the Court, that, in modern parlance, the protective jurisdiction is generally seen to have been absorbed within, so as to become a subset of, the Court's equity jurisdiction.

77. So too, when section 7(1) of the *Powers of Attorney Act* 2003 declares that the Act "does not affect the operation of any principle or rule of the common law or equity in relation to powers of attorney except to the extent that [the] Act provides otherwise, whether expressly or by necessary intention."

78. Historically, different lines of demarcation can be discerned; but the expression "any principle or rule of the common law or equity" can reasonably be taken as intended to preserve, and to call in aid where necessary, that branch of jurisdiction known by a variety of names other than "the common law" or "equity": the protective jurisdiction, the lunacy jurisdiction, *parens patriae* jurisdiction.

79. In short, section 7(1) preserves the general (non-statutory) law administered by the Court, and the jurisdictional categories by reference to which it is administered, so far as they bear upon powers of attorney.

Accounting for management of funds in "Guardianship" cases

80. In presentation of their case the defendants laboured the point (not conceded by the plaintiffs) that the first defendant was attentive in her care for the deceased before he entered nursing home accommodation, and hardly less so afterwards.

81. In part, this reflects an endeavour to attract attention to the following statements of principle found in the *Countess of Bective* Case at 47 CLR 420-421 (with emphasis added):

> "... An obligation to apply moneys in the maintenance of children or others does not involve the liability which arises from an ordinary trust. *It is a general rule that guardians of infants, committees of the person of lunatics, and others who are entrusted with funds to be expended in the maintenance and support of persons under their care are not liable to account as trustees. They need not vouch the items of their expenditure, and, if they fulfil the obligation of maintenance in a manner commensurate with the income available to them for the purpose, an account will not be taken. Often the person to be maintained is a member of a family enjoying the advantages of a common establishment; always the end in view is to supply the daily wants of an individual, to provide for his comfort, edification and amusement, and to promote his happiness. It would defeat the very purpose for which the fund is provided, if its administration were hampered by the necessity of identifying, distinguishing, apportioning and recording every item of expenditure and vindicating its propriety*."

82. It is as well to record, however, that the quotation continues (again with emphasis added):

> "*Although these considerations furnish an independent foundation for the general rule, yet, after all, it is a doctrine regulating the application of moneys payable under an instrument, whether a will, a settlement or an order of a Court of equity, and the operation of the doctrine must depend upon the provisions contained in the instrument, both express and implied. But the effect of the instrument will often be governed by the circumstances in which it was intended to apply*, and, in particular, by a consideration of the nature of the actual abode, the condition of the household and the state of the family of the infant or other person to be maintained. *Courts of equity have not disguised the fact that the general rule gives to a parent or guardian dispensing the fund an opportunity of gaining incidental benefits, but the nature and extent of the advantages permitted must depend peculiarly upon the intention ascribed to the instrument.... Statements to be found in some authorities that any surplus remaining after adequate maintenance has been provided belongs to the person having the care of the infant or of the lunatic cannot be safely used unless careful attention is given to the scope and purpose of the instrument under which the moneys arise and the conditions to which its operation is directed*.... [The] difficulty relates to the application rather than to the nature of the rule, and in any

> case it is evident that to reach the conclusion that savings belong to the guardian is much easier if the allowance is meant to include some inducement to the recipient to undertake the care of the person to be maintained, or if the intention is that the guardian should be associated with a child in a mode of life, or standard of living or in the enjoyment of pursuits which, otherwise, he would not adopt. The conclusion is less easy when the fund is meant simply to provide the proper charges of the infant.
>
> *A guardian is not permitted to receive moneys for maintenance without liability to account except upon the condition that he discharges his duty adequately to maintain and not otherwise*. Upon his default the Court will administer the fund or intercept the payments and has jurisdiction to order an account or an inquiry.... *Where, however, the condition is performed the Court does not inquire whether the money has been completely expended or whether the recipient has spent small sums for his personal benefit, but, nevertheless, it remains an allowance to a person in a fiduciary capacity and for a definite purpose*."

83. The plaintiffs, in their submissions, emphasise contentions that: (a) the first defendant did not confine herself to a deployment of the deceased's funds for his maintenance and only, incidentally, for her own benefit; (b) neither were the sums applied for her personal benefit small; and (c) much of her dissipation of the deceased's property occurred after he entered nursing home accommodation, no longer in her day-to-day care.

84. The principles expounded in the *Countess of Bective* Case do not, in terms, contemplate a situation in which a person manages "the estate" (property) of an incapable person under an enduring power of attorney or "the person" of such a person under an appointment as an enduring guardian.

85. The concept of an "enduring" appointment as an attorney or guardian was introduced by statute in an era that post-dates the *Countess of Bective* Case, and the English case law upon which it stands. But for the intervention of Parliament, the common law would, ordinarily, have held that such an appointment lapses upon the appointor's loss of mental capacity: *Drew v Nunn* (1879) 4 QBD 661 at 665-666; *Ghosn v Principle Focus Pty Limited (No. 2)* [2008] VSC 574 at [36]. The concept of "enduring" appointments entered NSW law in the 1980s (with the benefit of recent English experience with law reform) after reports of the NSW Law Reform Commission: *Report on Powers of Attorney* (LRC 18, August 1974); *Report on Powers of Attorney and Unsoundness of Body or Mind* (LRC 20, February 1975); *Angelina Spina v Permanent Custodians Limited* [2008] NSWSC 561 at [162]- [163]; *Szozda v Szozda* [2010] NSWSC 804 at [40].

86. The concept of an "enduring" appointment as an attorney or guardian needs to be viewed in the context of the protective regime it serves. The Court and various statutory authorities exercise jurisdiction which, historically, was known by various names including, at a high level of abstraction, the *parens patriae* jurisdiction of the Crown.

87. In NSW, enduring powers of attorney are presently governed by the *Powers of Attorney Act*, and the appointment of an enduring guardian is governed by the *Guardianship Act* 1987 NSW. Both types of instrument are actively promoted by government agencies, including the

NSW Trustee, as a "self help" alternative to more formal regulatory appointments of an office holder to manage the affairs (the estate and/or the person) of a person who, unable to manage his or her own affairs, is in need of protection.

88. When of sound mind (as *McLaughlin v Daily Telegraph Newspaper Co Limited* [1904] HCA 51; (1904) 1 CLR 243 cautions), individuals in our community are entitled, to execute an instrument appointing an attorney or a guardian of choice on the basis that an appointee to that office will occupy it, with a continuing authority, beyond a loss of mental capacity by the appointor. The appointment, thus, "endures".

89. The nature of the office of an enduring attorney or an enduring guardian is such that it is likely, if not bound, to be a fiduciary one: *Taheri v Vitek* [2014] NSWCA 209; (2014) 87 NSWLR 403 at 427[115]; *Downie v Langham* [2017] NSWSC 113 at [8]. It is difficult to imagine the holder of an office designed to manage the affairs, and to protect the interests, of a person lacking capacity for self-management that would not, in an appropriate case, attract the intervention of equity.

90. Under current law and practice in NSW, the appointment of an enduring attorney is an alternative to:

. (a) the appointment of a "financial manager" by the Guardianship Division of the Civil and Administrative Tribunal of NSW ("NCAT"), formerly the Guardianship Tribunal, under the *Guardianship Act* 1987; or

. (b) the appointment of a protected estate "manager" by the Court under section 41 of the *NSW Trustee and Guardian Act* 2009 NSW or, exceptionally, the appointment by the Court of the general law equivalent, a "committee of the estate", upon an exercise of the Court's inherent jurisdiction (*IR v AR* [2015] NSWSC 1187 at [100]- [117], especially [113]).

91. Under current law and practice in NSW the appointment of an enduring guardian is an alternative to:

. (a) the appointment of a "guardian" by the Guardianship Division of NCAT under the *Guardianship Act*; or

. (b) exceptionally, the appointment by the Court of the general law equivalent, a "committee of the person", upon an exercise of the Court's inherent jurisdiction (*IR v AR* [2015] NSWSC 1187 at [100]- [117], especially [114]).

92. An appointment of a financial manager or of a protected estate manager engages an administrative regime, which empowers the NSW Trustee and Guardian (also known, simply, as the NSW Trustee) to manage or supervise management of an incapable person's estate, under the *NSW Trustee and Guardian Act* 2009: *M v M* [2013] NSWSC 1495 at [11]- [14]; *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [25]- [41].

93. This does not happen, without more, if an incapable person's estate is managed under an enduring power of attorney.

94. Another difference is that, whereas the making or revocation of a management order is a formal act by a public institution, recorded as such, as and when required, and justified by an examination of the capacity for self-management of a person in need of protection, the appointment or removal of an attorney under an enduring power of attorney may be an entirely private act in the absence of intervention by the Court, NCAT or the Mental Health Review Tribunal, the institutions in which a power to intervene is or may be vested. The

validity of an appointment or revocation of a power of attorney generally falls, then, to be determined *ex post facto* in private litigation.

95. Three practical consequences may flow from this, particularly when families are in conflict over care for, or control of, the person or estate of a person in need of protection:

. (a) in the absence of a financial management order or a protected estate management order: As a person descends into incapacity for self-management, there may be a free-for-all in the execution of enduring powers of attorney (and/or enduring guardianship appointments) as competing interests persuade, or impose upon, a person in need of protection to execute a competing instrument;

. (b) where an incapable person's estate is managed by an enduring attorney, rather than a financial manager or a protected estate manager, there is no systemic regime for an insistence upon, or supervision of, prudential accounting practices on a day-to-day basis; and

. (c) third parties who deal with an enduring attorney (or an enduring guardian) on the basis of a private instrument, albeit one that may have been registered with the Land Titles Office of the Registrar General to facilitate dealings in land, have no assurance (as they have if dealing with an order of the Court, NCAT or the MHRT) that there is no competing appointee lurking in the shadows to challenge or interfere with transactions effected on behalf of the appointor.

96. The management of an incapable person's estate by an enduring attorney is, however, subject to review:

. (a) on an application for review made to the Guardianship Division of NCAT, or to the Court, under the *Powers of Attorney Act*, sections 35-36, in circumstances which may enliven the respective, broader powers that NCAT and the Court have to make other protective orders; or

. (b) on an application to the Court for an exercise of its protective, *parens patriae* jurisdiction or the general jurisdiction of the Court.

97. Had they chosen to do so, it would have been open to any of the parties to these proceedings (particularly the first plaintiff and the first defendant, those most actively engaged in care of the deceased) to make, during the lifetime of the deceased, an application for a review of the powers of attorney granted by him (or an application for a manager of his estate or for the appointment of a guardian) in order to clarify his status and the authority of each person involved in management of his affairs. Such an application could have served as the equivalent of a trustee's application for judicial advice, protective of all concerned: confirming, extending or limiting powers according to what might be required in the best interests of the deceased.

98. An appointment of a guardian by the Guardianship Division of NCAT engages an administrative regime which permits NCAT, on a routine basis, to review the needs of a person in need of protection, and to call upon the services of the Public Guardian, with whom the NSW Trustee works in close proximity and generally in harmony.

99. The present proceedings involve references to both enduring powers of attorney and the appointment of enduring guardians. The primary focus is on powers of attorney because the proceedings involve a dispute about the property, not about the person, of the deceased. Whether under the care of the first defendant, in hospital or a nursing home, or in contact with the plaintiffs, there is no suggestion that "the person" of the deceased was otherwise than safe and secure.

100. An enduring power of attorney needs to be located in the context of the general protective jurisdiction of the Court if its nature and limitations are to be properly understood. An enduring attorney can, by the nature of his, her or its office, comfortably fit within the "general rule" (of which the *Countess of Bective* Case and *Clay v Clay* speak) "that guardians of infants, committees of the person of lunatics, and others who are entrusted with funds to be expended in the maintenance and support of persons under their care are not liable to account as trustees".

101. If they are to do so, however, care needs to be taken to notice the High Court's warning that the terms and purpose of the appointment of a "guardian" (using that expression generically) must be consulted in deciding whether such a person should be called upon to account for dealing with the property of a person under protection.

102. Locating an enduring power of attorney in this world may require recognition that:

. (a) the protective jurisdiction (and, *semble*, depending the terms of the instrument, an enduring power of attorney engaged after a donor's loss of mental capacity) exists for the benefit of the person in need of protection, the donor, but takes a large and liberal view of what that benefit is: Theobald, *The Law relating to Lunacy* (1924), page 380; but

. (b) parties need to understand that, in a case involving any doubt, the means exist for the protection of all concerned *by* a timely application (usually, most cost-effectively) to the Guardianship Division of NCAT, or (exceptionally) to the Court, for a review of the case *or by* engagement with the NSW Trustee.

103. Although *the Court* (or, exercising statutory jurisdiction, NCAT or the NSW Trustee) may take a "liberal" view of what is for the benefit of an incapable person on an exercise of protective jurisdiction, that, of itself, provides no licence for a fiduciary to enjoy (in, and for, the due performance of his or her fiduciary obligations towards an incapable person) anything other than a *small* benefit *incidental* to the incapable person's enjoyment of his or her own property. Upon an exercise of protective jurisdiction, the Court is always mindful (as must be NCAT and the NSW Trustee) of preserving the estate of a person under its protection for the use and enjoyment of that person: *W v H* [2014] NSWSC 1696 and *JPT v DST* [2014] NSWSC 1735, citing *Ex parte Whitbread in the Matter of Hinde, a Lunatic* [1816] EngR 868; (1816) 2 Mer 99; 35 ER 878.

104. Ultimately, in the interplay between the Court's protective and equitable jurisdictions, the scope of a fiduciary duty attaching to the performance of the office of an enduring attorney must be moulded according to the nature of the relationship between principal and attorney and the facts of the case: *Clay v Clay* (2001) 202 CLR 410 at 432-433[46], citing *Hospital Products Limited v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 102 and *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449 at 463-464; *Downie v Langham* [2017] NSWSC 113.

The central point: A fiduciary and accounting obligations

105. Without losing sight of other issues in the proceedings, the central focal point of the proceedings is upon the questions:

. (a) whether (as the deceased's attorney, in the particular circumstances of this case) the first defendant owed to the deceased (and, now, to his deceased estate) the obligations of a

fiduciary, including an obligation to account for dealings with his property; and

. (b) if so, whether the first defendant, as a fiduciary, should account for her use of the deceased's property to the extent that it has been applied, in whole or part, otherwise than for his benefit or, more particularly, for her own benefit.

Another focal point: an allegation of accessorial liability

106. Contingent upon affirmative answers to these questions, the plaintiffs' claims against the third and fourth defendants depend upon those defendants being:

. (a) characterised as volunteers in receipt of trust money paid to them or at their direction by the first defendant in breach of trust (*Black v S Freedman & Co* [1910] HCA 58; (1910) 12 CLR 105 at 109 and 110); or

. (b) brought within the first limb of *Barnes v Addy* (1874) 9 Ch App 244 at 251 (as expounded in *Consul Development Pty Limited v DPC Estates Pty Limited* [1975] HCA 8; (1975) 132 CLR 373 and *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at [111]-[113]) by proof on the part of the plaintiffs that:

. (i) funds acquired by the first defendant through a breach of fiduciary duty have been received by the third and fourth defendants; and

. (ii) the third and fourth defendants received those funds with "knowledge" that they were received in breach of a fiduciary duty.

107. These proceedings have been conducted upon an assumption (which I accept as correct) that, in the circumstances of this case, the first limb of *Barnes v Addy* ("knowing receipt" of trust property) applies to receipt of property of the deceased by the third and fourth defendants if they received it with notice that the first defendant's transfer of it to them was in breach of fiduciary obligations owed by her to the deceased: *Cf, Say-Dee* at 230 CLR 141 [113].

108. There is no dispute between the parties that (in accordance with principles articulated in PW Young, C Croft and ML Smith, *On Equity* (Law Book Co, Australia, 2009), paragraphs [6.890] and [6.910] and in *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at 163 [174]-164 [178]) the element of "knowledge" may be satisfied by proof of:

. (a) actual knowledge;

. (b) wilful blindness, shutting one's eyes to the obvious;

. (c) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make; or

. (d) knowledge of circumstances which would indicate the facts to an honest and reasonable man.

109. Having regard to the observations of the High Court in *Say-Dee*, it is not sufficient, to establish constructive notice of a breach of fiduciary obligations, that the third and fourth defendants simply had "knowledge of circumstances which would put an honest and reasonable man on inquiry". Nevertheless, as the High Court put it, the fourth category of knowledge (derived from *Baden's Case* [1993] 1 WLR 509 at 575-576) accommodates "the proposition that the morally obtuse cannot escape by failure to recognise an impropriety that would have been apparent to an ordinary person applying the standards of such persons".

110. In judging the existence and nature of knowledge in the third and fourth defendants of any breach of fiduciary obligations owed by the first defendant to the deceased, a notable feature of the case is that the defendants say that any funds of the deceased found to have been received by them *via* the first defendant were received by them in circumstances in which they were engaged in taking up the mantle of carers for the first defendant, at a time when she claims to have occupied the office of "carer" *vis-a-vis* the deceased. The third and fourth defendants were intimately involved in the day-to-day affairs of the first defendant and the deceased as, and consequentially upon, the deceased transitioning to nursing home accommodation.

111. The focus of the plaintiffs' claims against the third and fourth defendants is upon an alleged use of funds by the first, third and fourth defendants:

. (a) in June-July 2008, to acquire in the names of the third and fourth defendants (for a purchase price of $347,500) a residence at Emu Plains, closer to where the first defendant then lived; and

. (b) in March-June 2010, to construct as an adjunct to the third and fourth defendants' Emu Plains residence (for $124,800 plus fit out and ancillary expenses about $200,000 in total) a "granny flat" addition as living quarters for the first defendant.

112. The $124,800 figure for construction of the granny flat comes from paragraph 24(a) of the first defendant's defence (filed 3 July 2013); it is said to have been paid to "a builder, for the purposes of constructing" the granny flat. The $200,000 figure comes from paragraph 8 of the first defendant's affidavit sworn 13 July 2015, and paragraphs 43 and 45(c) of her affidavit sworn 28 October 2013.

113. The plaintiffs contend that the third and fourth defendants "received" as volunteers the funds of the deceased used for their acquisition of the residence. The defendants contend that funds provided to them by the first defendant for the purpose of the acquisition were provided to them by way of a bridging loan, pending their sale of their former residence, and that they, substantially, repaid the loan (with interest neither sought nor paid) on or about 23 March 2009.

114. The first defendant, for her part, includes in her justification for the provision of funding for the third and fourth defendants' acquisition of the Emu Plains residence, and for construction of the granny flat, contentions that the funds applied for those purposes comprised mixed funds of herself and the deceased, and that he voluntarily acquiesced in her use of the funds as a means of fulfilment by him of a spousely duty to provide and care for her. She contends that, notwithstanding his descent into dementia, he retained capacity sufficient (upon an application of the law stated in *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423 at 434-438), contemporaneously with events, to consent to, and thereby to authorise, what was done.

115. Although the parties' written submissions have canvassed broader territory, both sides of the record have insisted that the other adhere to their pleadings, without amendment to accommodate submissions beyond the pleadings. I note, accordingly, that the defendants have not pleaded reliance upon section 42 of the *Real Property Act* 1900 NSW (causing the plaintiffs to invite the Court to proceed in disregard of it, as the Court of Appeal did in *Heperu Pty Ltd v Belle* [2009] NSWCA 252; (2009) 76 NSWLR 230 at 268 [167]) and, in their submissions, the defendants have objected to the plaintiffs endeavouring to circumvent

section 42 by relying upon the "fraud" exception to indefeasibility. In the ultimate, the case must live within the pleadings.

116. It is common ground that a person (such as the third and fourth defendants) who has an indefeasible title, by virtue of section 42, may nevertheless hold title subject to "personal equities", rights *in personam* as distinct from rights *in rem*: *Hillpalm Pty Limited v Heaven's Door Pty Limited* [2004] HCA 59; (2004) 220 CLR 472 at 491[54]. It is common ground that, on the pleadings as they stand, it is open to the plaintiffs (suing on behalf of the deceased's estate) to establish that the third and fourth defendants hold their legal title to the Emu Plains residence subject to *in personam* equitable obligations owed to the estate.

A defence of laches, acquiescence and delay

117. The defendants also contend that the plaintiffs should be denied any entitlement they might otherwise have to equitable relief because, the defendants contend, the plaintiffs have been guilty of laches, acquiescence and delay in asserting those entitlements.

118. This contention is based upon the plaintiffs' reluctant deference to the first defendant's management of the affairs of the deceased (when warned off by the first defendant from interfering with her management of the deceased's person and property) and their alleged failure to apply for guardianship and financial management orders under the *Guardianship Act* as a means of challenging her control of the deceased's affairs.

119. Having warned the plaintiffs off any dealings with their father save through her, and having failed herself to obtain financial management or other orders designed to confirm her authority to manage the deceased's estate as she did, it does not lie in the mouth of the first defendant (or the third and fourth defendants, whose interests she shares) to complain of laches in these proceedings.

120. I leave to one side delays in prosecution of the plaintiffs' claims associated (as they were) with an inability or unwillingness on the part of the defendants to provide discovery bearing upon their dealings, *inter vivos*, with property of the deceased.

121. If, as I determine, the plaintiffs are otherwise entitled to relief, the defendants' "laches defence" provides no impediment to a grant of relief. It lacks any substantial factual foundation: see *Orr v Ford* [1989] HCA 4; (1989) 167 CLR 316 at 337-341; [1989] HCA 4; (1989) 167 CLR 316 at 337-341; *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253 at [79]-[80]. The plaintiffs cannot be said to have engaged in calculated (deliberate and informed) inaction in the face of an open assertion by the first defendant of an entitlement to dispose of the deceased's property at will. Nor can they be said to have encouraged her in a belief that she could exercise such a power of disposition. At no time did she keep the plaintiffs informed of her intentions, or her conduct, in management of their father's estate. On the contrary, she kept them in the dark as she sought pre-emptively to spend their inheritance.

Questions of credit

122. A determination of the questions in dispute involves large questions relating to the credit of the principal witnesses: the first plaintiff, the first defendant, the third defendant and the fourth defendant.

123. In the nature of the questions in dispute, this is especially the case upon an assessment of: (a) the evidence of the first defendant, who deposed to private conversations with the deceased, and to informal, undocumented dealings with the third and fourth defendants; and (b) the evidence of the third and fourth defendants about those informal dealings and their knowledge of the source of funds applied for their benefit by the first defendant.

124. The evidence of the first, third and fourth defendants about their informal arrangements and knowledge of the source of funds applied for the benefit of the third and fourth defendants presents particular difficulties because it lacks reliable, independent corroboration; their supposed recollections of events, including extraordinary cash transactions, appear, at the highest, to be a reconstruction of events; their explanations of events require an acceptance that large amounts of money were held, or dealt with, by them in cash; their figures cannot be reconciled; and their presentation of accounting information, such as it is, patently involves guesswork.

125. I have substantial reservations about the truthfulness, and reliability, of the evidence of the defendants, other than the second defendant. Each of the first, third and fourth defendants gave evidence in what appeared to be a defensive manner. Making allowance for their ages – none of them are young – and the nature of the criticism directed at them, I nevertheless harbour doubts about the quality of their evidence such as to require it to be closely scrutinised.

126. Doubts about the credit of the first, third and fourth defendants are such that a reminder is required, that non-acceptance of the evidence of a witness does not, of itself, establish the opposite of that evidence: *Steinberg v Federal Commissioner of Taxation* [1975] HCA 63; (1975) 134 CLR 640 at 694-695; *Raso v NRMA Insurance Limited* (Court of Appeal, 14 December 1992, unreported) BC 9201418; *R v Heyde* (1990) 20 NSWLR 234; *Bird v Bird (No 4)* [2012] NSWSC 648 at [46].

127. My reservations about the quality of the testimony on the defendants' side of the record do not extend to similar doubts on the plaintiffs' side. The first plaintiff may, at times, have allowed himself to get too close to events to be entirely objective as they unfolded, but his evidence was given in a measured, credible and dispassionate manner.

128. Insofar as the parties (as each of the first plaintiff and the first defendant do) give uncorroborated evidence of personal conversations with the deceased, that evidence must be scrutinised very carefully because of the unavailability of evidence from the deceased: *Plunkett v Bull* [1915] HCA 14; (1915) 19 CLR 544 at 548-549.

129. In weighing each party's case, upon a consideration of questions of credit no less than disputed questions of fact, and mindful of the importance to the parties of the issues to be determined, I remind myself of the need to take into account the gravity of matters alleged: *Evidence Act* 1995 NSW, section 140; *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-363. In particular, I am conscious that it is no small thing to disbelieve a widow's testimony, and that of her family, bearing upon ownership of their home.

THE PLAINTIFFS' CASE AGAINST THE DECEASED'S EXECUTOR, A DIVERSION FROM THE MAIN GAME

130. Although he chose to be represented by the same solicitors and barrister as his co-defendants, the second defendant's role in the proceedings is one step removed from that of the first, third and fourth defendants.

131. He served as the deceased's accountant for about 23 years prior to the deceased's death. The plaintiffs have joined him in the proceedings because: (a) they contend that he has failed in performance of his executorial duties, by reason of his refusal to pursue the first defendant for breaches of fiduciary obligations, and, they say, he is personally liable in *devastavit (Bird v Bird (No 4)* [2012] NSWSC 648 at [104]- [105]); and (b) as executor of the deceased's estate, he is, in a representative capacity, a necessary party.

132. He is a necessary party for two reasons. First, because, as beneficiaries, the plaintiffs seek to recover estate property from the first, third and fourth defendants in circumstances in which he has declined to do so: *Bird v Bird (No 4)* at [15]; *Re Atkinson, deceased* [1971] VicRp 73; [1971] VR 612 at 616-617; *Ramage v Waclaw* (1988) 12 NSWLR 84 at 91; *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 436-437. Secondly, because the relief they seek includes claims for family provision relief against the estate (and notional estate) of the deceased.

133. I am not satisfied that the second defendant has been guilty of "wilful default" in his administration of the deceased's estate (so as to render him personally liable in *devastavit*) by reason of his failure to sue the first, third and fourth defendants. The small size of the deceased's estate at the time of death, and the complexity of the current proceedings, suggest that it would have been imprudent for the second defendant to have embarked on hazardous litigation on his own responsibility. The proceedings can be, and have been, conducted by the plaintiffs in a derivative suit to which the second defendant is a formal party.

134. I am not persuaded against dismissal of the plaintiffs' *devastavit* claim by the fact that, during the deceased's lifetime, the second defendant was his accountant and, in that capacity, familiar with at least some of the first defendant's property dealings. She held an enduring power of attorney and was, apparently, a wife of the donor in good standing. The second defendant's retainer as an accountant did not call upon him to supervise her performance of her functions as an attorney, still less to interfere with *intra*-family domestic arrangements.

THE DECEASED'S ESTATE

135. Ronald James Smith ("the deceased"), known to his widow as "Ronnie", died on 17 May 2012, aged 90 years, leaving a Will dated 10 January 2008, probate of which was granted by this Court to Michael Bingham (the second defendant) on 6 December 2012.

136. The second defendant was one of two executors named in the Will. The other, Mr Denis Low, a solicitor in the firm that acts for the defendants in the current proceedings, renounced probate.

137. Excluding any property recoverable in these proceedings on behalf of his estate, the deceased died with a gross distributable estate valued at about $75,000, subject to the costs of these proceedings.

138. For practical purposes, there is little, if anything, in the estate of the deceased beyond the claims for recovery of property asserted by the plaintiffs on behalf of the estate in these

proceedings.

PERSONAL RELATIONSHIPS

The Deceased's side of the family

139. The deceased was twice married.
140. His first marriage, to Sheleagh Dulcie Smith (nee Dale), in September 1943, lasted 52 years until Sheleagh's death, at the age of 70 years, in December 1994.
141. There were three children of that marriage:
. (a) Ronald Allen Smith (the first plaintiff), born in April 1944 and now aged 73 years.
. (b) Maurice John Smith, born in April 1946, who died in November 2003 aged 58 years.
. (c) Neville Roland Smith (the second plaintiff), born in August 1955 and now aged about 61 years.
142. The deceased's second marriage, in August 1997, was to Joyce Smith (formerly Joyce Bunt), the first defendant, also known as "Joy".
143. There were no children of this marriage, which lasted 14 years or more.
144. At the time of their marriage, the deceased (born in February 1922) was aged 75 years, and the first defendant (born in November 1929) was aged 67 years.

The Widow's side of the family

145. The first defendant had been married twice before she met the deceased. She was married, first, to Harry Nicholls between 1945-1974, a marriage that ended in divorce. Her second marriage, to John Bunt, between 1976-1985, ended with John's death from cancer.
146. Over a period not clearly identified in the evidence, she appears also to have been in a relationship with Martin Charles Jones of sufficient longevity that they acquired property together and she was known as "Joy Jones".
147. The first defendant had three children from her first marriage. Of those children, one (Terry) has died and the remaining two (Rosemary and Paul) are mature adults.
148. The daughter, Rosemary Ann Danby, is the third defendant in these proceedings. Her husband, Derek George Danby, is the fourth defendant. They play a central role in the proceedings because, in mid-2008, they purchased a residential property at Emu Plains with funds provided by the first defendant, sourced from the deceased's property; contracts for the purchase were exchanged on 14 June 2008 and settled on or about 7 July 2008. Furthermore, in about March 2010 the third and fourth defendants built a granny flat on the property – also with funds provided by the first defendant, sourced from the deceased's property.
149. The plaintiffs contend that: (a) the deceased's estate has, in equity, a proprietary interest in the Emu Plains property; or (b) the property is available for designation as notional estate in aid of their family provision claims.
150. The third defendant was born in August 1947 and is presently aged 69 years. The fourth defendant was born in March 1945 and is presently aged 72 years. They were married in March 1965. They have four children, I assume now adults. Both defendants are retirees. The

third defendant retired from her occupation as a cook in 2000 or thereabouts. The fourth defendant retired as a fuel tank driver in 2009.

THE DECEASED'S (IN)CAPACITY FOR SELF-MANAGEMENT, 2008-2012

151. On 13 May 2008 the first defendant obtained from the deceased's general medical practitioner (Dr Dixon) a letter, a medical certificate of sorts, in the form of a reference addressed "To whom it may concern". Omitting formal parts, it was in the following terms:

> "Thank you for considering Ron Smith [the deceased], aged 86 yrs, who has moderately advanced Alzheimer's, confirmed by specialists. He is no longer able to conduct his financial affairs, and needs a registered power of attorney to oversee the safe management of his funds."

152. Having obtained the doctor's letter, the first defendant on the same day (13 May 2008) sought access to funds of the deceased invested with Macquarie Bank. She did so *via* a handwritten note expressed in the following terms:

> "Mr Ronald James Smith (Husband) has now been declared as of unsound mind due to a mini stroke two weeks ago. Please find papers filled in as requested by you [Macquarie Bank]. Also powers of attorney made on 10th January 2008. I shall now need to sign cheques on his behalf. He is at the moment in aged care and unable to do so.
>
> J Smith (Mrs)"

153. With this handwritten note, the first defendant delivered to Macquarie Bank (as the source of her authority) a copy of the Enduring Power of Attorney dated 10 January 2008: Transcript page 202.

154. Notwithstanding the emphatic terms in which this correspondence of 13 May 2008 was expressed, the first defendant maintained in her evidence that the deceased was able to acquiesce, and did acquiesce, in her dealing with his property, both before and after 13 May 2008.

155. In his evidence, Dr Dixon demonstrated sympathy for the first defendant's position as a conscientious carer for a husband in decline: Transcript pages 130 and 133. Nevertheless, he was satisfied that, by 13 May 2008, the deceased had lost his capacity for self-management, and irretrievably so: Transcript pages 131, 131-132 and 135.

156. He accepted that it was "possible" that the deceased might have periods of lucidity after 13 May 2008, but he could offer no opinion as to the probability or otherwise that that might occur: Transcript page 131.

157. He accepted that, to the extent that the deceased may have had a lack of capacity, his capacity may have varied depending upon the nature of what he was asked to do, and his relationship with the person or persons with whom he communicated: Transcript pages 133-134.

158. In summary, he described the deceased, as the deceased was in May 2008, as a person who was so ill that he was not capable of making consistently rational decisions regarding his finances: Transcript page 135.

159. The plaintiffs contend that the correspondence of 13 May 2008 presents a bright line in the first defendant's management of the deceased's affairs. They submit that it does not lie in the first defendant's mouth to disclaim the incapacity for self-management that she then proclaimed.

160. Forensically, there is much force in this. Nevertheless, the Court cannot act on the basis that the correspondence is conclusive or that it is not necessary for the Court to examine primary facts bearing upon the deceased's capacity.

161. In my assessment, by reason of dementia, the deceased was, and remained, incapable of managing his own affairs from a time *no later than* 13 May 2008, and there are reasonable grounds for conjecture as to the time of commencement of his incapacity.

162. The deceased's health was in a state of decline for, at least, several months before 13 May 2008. Dr Dixon's opinion was that the deceased's mental state deteriorated significantly after October 2007: Transcript page 128. He suffered what the first defendant describes as a "mini stroke" in the early days of May 2008, a trigger for progress from hospital to nursing home accommodation. Dr Dixon described this as "not a minor event": Transcript page 132. If, thereafter, he had any capacity to understand transactions relating to use of his property, it came to him only in lucid moments, a finding in support of which depends upon an acceptance of the first defendant's evidence of alleged conversations with him.

163. The deceased's mental health, and his health generally, declined progressively, and patently, throughout 2007 and in the early months of 2008. He was in and out of hospital in this period. He waxed and waned in support for one side or the other of his blended family. He appears to have been genuinely perplexed, and susceptible to family pressure on both fronts. The mini stroke he suffered in early May 2008 justified Dr Dixon's medical assessment of 13 May 2008. The first defendant's coincident characterisation of him as of "unsound mind" may have been motivated, in whole or part, by a desire to take control of his affairs. It was, nevertheless, factually well founded, and confirmed by his subsequent rapid transition to nursing home accommodation. As a general proposition, it should be accepted as correct.

164. Confirmation of the correctness of this assessment can be found in three pieces of evidence. First, on 29 May 2008 the first defendant signed on behalf of the deceased an application for him to be assessed by an Aged Care Assessment Team at Nepean Hospital. The Hospital staff who allowed her to do so recorded that the deceased was unable himself to sign because of "confusion/dementia". Secondly, the ACAT assessment, which occurred on 2 June 2008, diagnosed the deceased as suffering from "Alzheimer's Disease" and in need of "dementia specific", "residential aged care service -high level care". Thirdly, the first defendant gave evidence, in cross examination, that after 2 June 2008 she alone operated the joint account held with the Commonwealth Bank in the names of the deceased and herself because the deceased was unable to do so: Transcript page 207.

165. The possibility that the deceased, exceptionally, experienced lucid moments after 13 May 2008 should not be excluded without reference to the circumstances said to have attended those moments; but evidence of occasional moments of lucidity requires cautious attention.

166. Judging by the anxiety displayed on either side of the record to have the deceased sign competing Wills, enduring powers of attorney and the like, one cannot exclude the possibility that his capacity for self-management (or, at least, his Will to resist family pressure) commenced to decline as far back as mid-2005. That is when his wife (the first defendant) and the elder of his sons (the first plaintiff), wittingly or otherwise, commenced a competition for control of the deceased's affairs. He was first diagnosed with dementia in 2006.

167. The plaintiffs' claims for relief, calling upon the first defendant to account for her dealings with property of the deceased, focus primarily upon transactions effected on or after 13 May 2008.

168. Ironically, one of the reasons Dr Dixon acquiesced in the first defendant's request for a medical certificate on that date was that she reported to him that the deceased had exhibited "a change in character, that normally he was quite tight with his money but at that stage he was trying to give his money away in hospital": Transcript pages 130-131.

169. There is agreement between the parties presently before the Court that, ordinarily, the deceased was a person not given to extravagant expenditure.

A BATTLE OF THE FORMS

Introduction

170. The nature and course of a competition, between the first plaintiff and the first defendant, for control of the deceased's affairs that can, in retrospect, be discerned to have occurred between mid-2005 and mid-2008 supports an inference that, when the deceased executed documents favouring the interests of the first defendant in January-February 2008, he did so advisedly, striking a balance between what he allowed to his first family (the active protagonist for which was the first plaintiff) and what he allowed to the second (personified in the first defendant).

171. The enduring power of attorney granted to the first defendant on 10 January 2008 was narrower in scope than a similar instrument he executed in her favour on 3 June 2005. The Will made by the deceased on 10 January 2008, in conjunction with the power of attorney granted on that date, expressly excepted from a gift to the first defendant the deceased's share portfolio, property implicitly to be divided between the plaintiffs and the first defendant as residuary beneficiaries. The transfer of the deceased's matrimonial home into the co-ownership (joint tenancy) of the first defendant and himself in February 2008 was consistent with the terms of the Will, which specifically left that property to the first defendant.

172. This scheme of things bears upon two areas of contest in these proceedings: first, an assessment of the authority and entitlements of the first defendant in her dealings with property of the deceased during his lifetime; and secondly, consideration of whether the plaintiffs were guilty of *laches*, acquiescence or delay in allowing the first defendant to manage the deceased's affairs as she did after 13 May 2008.

173. The deceased's state of mind is ultimately to be inferred from the documentation he signed, in the context in which he signed it.

174. In my assessment, the plaintiffs are entitled to be taken at their word when they say that they left the first defendant to manage the deceased's affairs after 10 January 2008 because, having been expressly warned-off by her, they assumed (and accepted) that the deceased's

affairs would be managed in a manner consistent with the Will and power of attorney dated 10 January 2008, and not until after the deceased's death did they discover otherwise.

A Starting Point: One Family Merges into Another

175. In the aftermath of his first wife's death, and before he met the first defendant (she says, in January 1997), the deceased made a Will dated 19 January 1996 in favour of his three sons (in which the plaintiffs were appointed executors and trustees), and he granted a power of attorney dated 29 January 1996 to the first plaintiff.

176. As evidenced by the Will, the deceased had by this time retired from his occupation as a refrigeration consultant. Apart from his residence, his principal asset (until it came under the first defendant's management a decade or so later) was a portfolio of shares.

177. Between January 1996 and June 2005 the deceased appears to have executed no new wills, powers of attorney or the like. It was during this time, however, that the deceased met, cohabited with and married the first defendant: a change in direction, away from a first family, towards a new one, at an advanced age, that created tensions and engendered in the plaintiffs (especially the first plaintiff) suspicions about the first defendant's motivations.

178. Those suspicions, and perhaps those the first defendant harboured in return, became self-fulfilling as the deceased's sons and his wife allowed themselves to be drawn into a competition for control of the deceased's affairs.

The First Defendant Favoured

179. On 3 June 2005, at the urging of the first defendant, the deceased made a Will, substantially in favour of the first defendant, and executed an enduring power of attorney, also in her favour.

180. The Will did not wholly exclude the plaintiffs (whose brother, Maurice had died about 20 months earlier); but it did give the bulk of the deceased's estate (including the property at Glenmore Park at which he and the first defendant resided) to the first defendant; reduce the plaintiffs' respective shares of the estate to one quarter each; displace the plaintiffs as their father's executors; and (contentiously, in the eyes of the plaintiffs) confer on the first defendant authority to dispose of his ashes after cremation.

181. The Will introduced the deceased's accountant (the second defendant) and Mr Low (a principal of the defendants' firm of solicitors) as his prospective executors. Mr Low had acted as the deceased's solicitor before the events of 2005-2008 to which attention must be given in these proceedings.

182. The powers conferred on the first defendant by the power of attorney dated 3 June 2005 included specific powers, identified by reference to sections 11(2) and 12(2) of the *Powers of Attorney Act* 2003 NSW, to make gifts of the deceased's property and to confer benefits on his attorney (the first defendant) to meet her reasonable living and medical expenses.

The Pendulum swings back to the Plaintiffs

183. On 18 January 2006 the deceased executed, in favour of the first plaintiff, an appointment as enduring guardian and an enduring power of attorney. Those documents

were prepared by a solicitor (Mr JP Dominello) arranged by the first plaintiff, he says, at the request of the deceased. Mr Dominello had previously acted for the first plaintiff.

184. The functions conferred on the first plaintiff as guardian included authority to make decisions about the deceased's accommodation, health care, medical treatment and personal services. The power of attorney conferred on the first plaintiff the specific power, identified by reference to section 11(2) of the *Powers of Attorney Act* 2003, to make gifts; but it excluded the section 12 (2) power to confer benefits on the first plaintiff as attorney, and the section 13 power to meet the reasonable living and medical expenses of persons other than the deceased.

185. No new will was made by the deceased in or about January 2006.

186. In February 2007 the deceased, in conjunction with the first plaintiff, conferred with Mr Dominello about his affairs, for which purpose he sought and obtained a copy of the Will and power of attorney dated 3 June 2005 from Mr Low on terms, in effect, that Mr Low not disclose this to the first defendant. According to Mr Dominello, the deceased indicated an intention to review his Will after (and only after) completion of conveyancing transactions then in train.

And Back towards the First Defendant

187. On 8 June 2007 the deceased did make a new Will, maintaining the general structure of his 2005 Will, using the services of Mr Low as his solicitor. The occasion for a new will appears, primarily, to have been the deceased's sale of his residence at Glenmore Park and his purchase of a home unit at Emu Plains. In the new Will, as in the old one, provision was made for the deceased's residence to pass to the first defendant.

188. On 26 October 2007, in the wake of a recent medical assessment that the deceased had been suffering from a progressive cognitive impairment over the preceding 18 months (likely, it was thought, to be an early stage of Alzheimer's disease with prominent memory impairment), he and the first defendant opened a joint bank account with the Commonwealth Bank.

189. On 1 November 2007 the deceased executed, in favour of the first defendant, a direction to his stockbroker (Andrew West) authorising the first defendant to act as his agent in operating his accounts with the broker. The terms of the authority made no reference to the *Powers of Attorney Act*. Its validity, or otherwise, was governed by the common law.

190. Having regard to the deceased's mental decline in 2007, it is at best doubtful whether this document conferred any actual authority on the first defendant to act as the deceased's agent. In any event, if it did, that authority was revoked by the deceased's loss of capacity, an event which occurred (I find) no later than 13 May 2008.

Then Towards the Plaintiffs Once More

191. Between 26 November and 4 December 2007 or thereabouts the deceased, in conjunction with the first plaintiff, arranged for the provision to Mr Dominello by Mr Low of copies of the documents that held by Mr Low, on behalf of the deceased, in safe custody: the deceased's Will dated 8 June 2007, his power of attorney dated 3 June 2005 and the

certificate of title relating to the Emu Plains home unit (recording the deceased as the registered proprietor).

192. On 18 December 2007 the deceased executed a new Will, prepared by Mr Dominello, on instructions provided by a letter dated 10 December 2007 (prepared by the first plaintiff, he says, at the request of the deceased) signed by the deceased. Mr Dominello was satisfied that the deceased possessed testamentary capacity at that time: Transcript page 121.

193. The Will appointed the first plaintiff (or, should he predecease the deceased, the second plaintiff) as executor. It did not, on its face, greatly alter the testamentary provision to be made for the first defendant – she was still to receive the defendant's residence, car and proceeds of a bank account – but it did provide for the plaintiffs to receive all proceeds of the deceased's portfolio account with Macquarie Bank and to be his residuary beneficiaries. All else being equal, his largest asset (his portfolio of shares and securities) would have passed to the plaintiffs to the exclusion of the first defendant.

A "Final" Solution Takes Shape

194. The first defendant appears to have been alerted to this Will when, in company with the deceased, she attended upon the office of Mr Low on 7 January 2008 to discuss financing the purchase of a new car. Mr Low noted that he had earlier sent the deceased's papers to Mr Dominello, as in writing directed by the deceased to do, and he invited the deceased to consider whether he (the deceased) wanted him (Mr Low) or Mr Dominello to act for him. After an argument between husband and wife the deceased, in the presence of the first defendant, bowed to her preference for Mr Low.

195. On 10 January 2008 the deceased executed two documents prepared by Mr Low. One was a new Will, reverting to the structure of the earlier Wills (respectively dated 3 June 2005 and 8 June 2007) prepared by Mr Low. The other was an enduring power of attorney granted in favour of the first defendant.

196. The power of attorney (which, by clause 4, expressly revoked all previous powers of attorney) differed from that granted in favour of the first defendant on 3 June 2005 in that it did not confer on the first defendant the specific powers granted by the 2005 instrument by reference to sections 11-12 of the *Powers of Attorney Act*.

197. The new power of attorney was registered on 17 January 2008 as Book 4535 No 885.

198. On 18 January 2008 the deceased executed three further documents prepared by Mr Low. One expressly revoked the power of attorney dated 18 January 2006 granted to the first plaintiff. Another revoked the first plaintiff's appointment of the same date as an enduring guardian and appointed the first defendant as the deceased's enduring Guardian. The third expressly revoked the Will dated 18 December 2007.

199. Curiously, the third document records an assertion by the deceased that the Will dated 18 December 2007 was made "without [his] consent and full understanding". That statement is accompanied by a statement that the deceased's "last will and testament is held with [Mr Low' firm] and dated 10th January 2008."

200. Under cover of a letter dated 18 January 2008 Mr Low sent to Mr Dominello copies of the revocation documents. The letter included the following paragraphs:

> "Please advise your client, Ronald Allen Smith [the first plaintiff], of the revocations and also advise him that our instructions are there is to be no communication between your client and our client without the consent or presence of his wife, Joyce Smith.
>
> Our client is most unhappy with the way documentation affecting him has been executed.
>
> Please acknowledge receipt of this letter and the annexures and confirm that you have forwarded copies of all revocations to your client, Ronald Allan Smith."

201. Not unnaturally, Mr Dominello took offence at these observations. By a letter dated 4 February 2008, he responded as follows (omitting formal parts):

> "It is not clear as to what you imply by the second last paragraph of your letter. However, rest assured that any document signed by Mr Smith [the deceased] was signed by him voluntarily and following instructions obtained directly from him. Any imputation to the contrary is rejected.
>
> Copies of your letter and the documents have been forwarded to Mr Ronald Allen Smith [the first plaintiff]. No doubt Mr Smith will make his own arrangements regarding contact with his father."

202. Mr Dominello swore an affidavit and was cross examined. Mr Low gave no evidence. Contemporaneous records of both men were in evidence.

203. I do not intend, by this judgment, to call into question the professional competence or integrity of either Mr Low or Mr Dominello.

204. I do notice, however, what is arguably an implicit assumption in the defendants' camp, in particular, that the deceased's incapacity for management of his own affairs (or, at least, his exposure to exploitation) commenced no later than 18 December 2007. For his part, Mr Dominello was satisfied of the deceased's mental capacity on 18 December 2007, but formed an impression that the deceased was fearful of the first defendant.

Events Play Out

205. Courtesy of evidence given by Dr Dixon, there is evidence of the results of "mini mental state examinations" conducted upon assessments of the deceased's mental capacity: Transcript page 129. On 7 January 2007 he scored 26/30. On 29 March 2007, he scored 24/30. On 23 October 2007, he scored 22/30. I take this evidence as confirmation, at least, of concerns about the deceased's mental capacity reaching back to the beginning of 2007. Throughout that year, and into the next, the deceased was frequently a hospital patient, with his frailty on open display to both sides of his family.

206. The first defendant complains that, in their father's final years, the plaintiffs were not as attentive to him as loving sons should have been. I do not accept that there was any deterioration in the relationships between members of the deceased's first family unrelated to

the deceased's deteriorating health and the first defendant's increasing control of his person and property.

207. Accepting that she was generally an attentive wife, she nevertheless progressively took control of his affairs from mid-2005. Reminded in January 2008 of what she appears to have perceived as a competitive threat from the plaintiffs, she took decisive steps to secure her control of the deceased's affairs, an incident of which was warning the plaintiffs off personal contact with their father unsupervised by her. They, for their part, albeit with reluctance, deferred to the social reality in which the deceased lived domestically. They backed off.

208. Tensions flared within the family (principally between the first plaintiff and the first defendant) in early May 2008 at a time when the deceased was hospitalised and rapidly drifting into a mental fog. He was discharged from hospital on 12 May 2008. The following day the first defendant attended upon Dr Dixon who (based upon his last consultation with the deceased on 2 May 2008 and the first defendant's representations) provided the "reference" letter which the first defendant used to access the deceased's Macquarie Bank account on 13 May 2008.

209. Tensions between the first plaintiff and the first defendant flared again as the deceased was re-admitted to hospital on 25 May 2008 and, over ensuing days, as he transitioned into nursing home accommodation.

210. From early June 2008 until his demise the deceased lived in a nursing home, with periods of hospitalisation. It took a little while for suitable accommodation to be located, but his fate was sealed. He no longer lived with the first defendant, although she continued to visit him regularly. This was his final phase of life: the seventh of the seven ages of man (Shakespeare, *As You Like It*, Act II Scene vii).

THE FIRST DEFENDANT'S WRITTEN AUTHORITY TO DEAL WITH PROPERTY OF THE DECEASED: THE TERMS OF THE AUTHORITY, POWER OF ATTORNEY, AND WILL EXECUTED BY THE DECEASED IN FAVOUR OF THE FIRST DEFENDANT

211. The defendants rely in these proceedings on an enduring power of attorney executed by the deceased, in favour of the first defendant, on 10 January 2008.

212. The plaintiffs contend that the true nature and scope of that instrument require its terms to be contrasted with the terms of the enduring power of attorney granted by the deceased, to the first defendant, on 3 June 2005.

213. There are two striking features of this contrast. First, the 2008 instrument did not include the specific powers found in the 2005 instrument authorising the first defendant, as donee, to confer benefits on others than the deceased. Secondly, both instruments included as an addendum to their text formal notes (in a prescribed form found in the Powers of Attorney Act) that spoke to the nature of the obligations of an attorney. Read jointly or severally, the instruments clearly circumscribed the first defendant's rights and obligations as an attorney, and instructed her in the art of good management of the property of an incapable person.

214. The first defendant appears to have acted in disregard of limitations on her authority, preferring to see: (a) the Authority dated 1 November 2007 addressed to the deceased's stockbroker; and (b) her own prospective entitlements under the deceased's Will dated 10

January 2008, as more accurate reflections of her present entitlements and personal authority.

215. For that reason, the terms of both the Authority and the Will need to be brought into view upon an assessment of the first defendant's rights and obligations *vis-a-vis* the deceased and his estate.

216. The first defendant received a copy of the Will, from Mr Low, shortly after the deceased signed it: Transcript page 189.

The Power of Attorney dated 3 June 2005

217. The text of the 2005 power of attorney was in the following terms (with an address omitted):

> "**GENERAL POWER OF ATTORNEY**
>
> **Part 1 General**
>
> This power of attorney is made on the 3rd day of June 2005
>
> by **RONALD JAMES SMITH** (*the principal*)
>
> of ....., Glenmore Park NSW 2745
>
> 1. I appoint my wife **JOY SMITH** (also known as JOY BUNT) to be my attorney(s). My attorney may exercise the authority conferred on my attorney by Part 2 of the *Powers of Attorney Act 2003* to do on my behalf anything I may lawfully authorise an attorney to do. My attorney's authority is subject to any additional details specified in Part 2 of this document.
>
> 2. I give this power of attorney with the intention that it will continue to be effective if I lack capacity through loss of mental capacity after its execution.
>
> 3. This power of attorney operates:
>
> immediately
>
> when my attorney accepts (or as each of my attorneys accept) the appointment
>
> on and from up to and including
>
> when my attorney considers that I need assistance managing my affairs
>
> other.....

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate immediately or, if clause 2 is not crossed out, when my attorney accepts, or as each of my attorneys accept, the appointment.

4. If I appoint more than one attorney, then I appoint them jointly and severally.

Part 2 Additional powers and restrictions

5. I authorise my attorney to give reasonable gifts as provided by section 11(2) of the *Powers of Attorney Act 2003*.

6. I authorise my attorney to confer benefits on the attorney to meet the attorney's reasonable living and medical expenses as provided by section 12(2) of the *Powers of Attorney Act 2003*.

7. I authorise my attorney to confer benefits on *[insert name(s) and address(es) of each third party]* to meet their reasonable living and medical expenses as provided by section 13(2) of the *Powers of Attorney Act 2003*.

8. This power of attorney is subject to the following conditions and limitations:"

218. No "conditions" or "limitations" were specified in clause 8.
219. The instrument was "signed, sealed and delivered" by the deceased in the presence of Mr Low as a witness to his signature.
220. Incorporated in the instrument were a certificate given under section 19 of the *Powers of Attorney Act* by Mr Low (certifying, *inter alia*, that he had explained the power of attorney to the deceased before it was signed and that the deceased appeared to understand the effect of the instrument) and an endorsement by the first defendant of her acceptance of her appointment as an attorney under the instrument. Both the certificate and the endorsement were dated 3 June 2005.
221. As an addendum, the instrument also incorporated the following, standard form, prescribed notes (with emphasis added):

"**Important information for principals and attorneys**

(1) A power of attorney is an important and powerful legal document. You should get legal advice before you sign it.

A power of attorney gives the attorney the authority to buy and sell real estate, shares and other assets for the principal, to operate the principal's bank accounts, to spend the principal's money on behalf of the principal and to exercise many other powers. It is not to be used after the principal dies.

(2) A power of attorney cannot be used for health or lifestyle decisions. The principal should appoint an enduring guardian under the *Guardianship Act 1987* if the principal wants a particular person to make these decisions. For further information, contact the Guardianship Tribunal (toll free 1800 463 928 or www.gt.nsw.gov.au) or the Public Guardian ((02) 9265 3184 or 1800 451 510 or www.lawlink.nsw.gov.au/opg).

(3) *Part 2 of the power of attorney will permit the attorney to use the principal's money and assets for the attorney or anyone else as provided by clauses 5, 6 and 7. If the principal does not want this to happen, then the principal should delete the powers from Part 2 that the principal does not want to give the attorney.*

(4) *An attorney must always act in the best interests of the principal. Unless the attorney is expressly authorised, the attorney cannot gain a benefit from being an attorney*.

(5) This power of attorney is for use in New South Wales only. If you need a power of attorney for interstate or overseas, you may need to make a power of attorney under their laws. The laws of some other States and Territories in Australia may give effect to this power of attorney. However, you should not assume this will be the case. You should confirm whether the laws of the State or Territory concerned will in fact recognise this power of attorney.

(6) *An attorney should keep the attorney's own money and property separate from the principal's money and property, unless they are joint owners, or operate joint bank accounts. An attorney should keep reasonable accounts and records about the principal's money and property*.

(7) If the attorney is signing documents that affect real estate, the power of attorney must be registered at Land and Property Information NSW.

For information on powers of attorney, the attorney's duties and registration,

contact Land and Property Information NSW ((02) 9228 6666 for a fact sheet

or www.lpi.nsw.gov.au) or a solicitor, a trustee company or the Public Trustee

(www.pt.nsw.gov.au)."

222. In the years since the 2005 instrument was executed, the Guardianship Tribunal has been replaced by the Guardianship Division of NCAT, and the Public Trustee has been replaced by the NSW Trustee. References to "Land and Property Information NSW" can be

taken as a reference to the office of the Registrar General, responsible for maintenance of the General Register of Deeds kept under the *Conveyancing Act* 1919 NSW.

223. Section 52(1) of the *Powers of Attorney Act* 2003 provides that a conveyance or other deed affecting land under a power of attorney has no effect unless the instrument creating the power has been registered by the Registrar General in that Register.

224. The 2005 instrument had no operative effect after 10 January 2008. If it survived the deceased's execution of a competing power of attorney on 18 January 2006, it was expressly revoked by clause 4 of the 2008 instrument.

The Power of Attorney dated 10 January 2008

225. The enduring power of attorney dated 10 January 2008 was a "prescribed power of attorney" within the meaning of section 8 of the *Powers of Attorney Act* (as was the instrument dated 3 June 2005) in that it was in or to the effect of the form set out in Schedule 2 of the Act and duly executed.

226. In 2008 (as now) sections 9, 11, 12 and 13 of the *Powers of Attorney Act* (in Part 2 of the Act) were in the following terms (reproducing in italics marginal notes incorporated in the Act as published):

> "**9 Powers conferred by prescribed power of attorney**
>
> (1) Subject to this Act, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.
>
> (2) A prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power.
>
> **11 Prescribed power of attorney does not generally confer authority to give gifts**
>
> (1) A prescribed power of attorney does not authorise an attorney to give a gift of all or any property of the principal to any other person unless the instrument creating the power expressly authorises the giving of the gift.
>
> *This subsection restates a rule of the general law. Accordingly, whether a gift of all or any of the property of a principal is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.*
>
> (2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to give the kinds of gifts that are specified by that

Schedule for that expression.

12 Prescribed power of attorney does not generally confer authority to confer benefits on attorneys

(1) A prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on the attorney unless the instrument creating the power expressly authorises the conferral of the benefit.

This subsection restates a rule of the general law. Accordingly, whether the conferral of a benefit on an attorney is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.

(2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to confer on the attorney the kinds of benefits that are specified by that Schedule for that expression.

13 Prescribed power of attorney does not generally confer authority to confer benefits on third parties

(1) A prescribed power of attorney does not authorise an attorney to execute an assurance or other document, or to do any other act, as a result of which a benefit would be conferred on a third party unless the instrument creating the power expressly authorises the conferral of the benefit.

This subsection restates a rule of the general law. Accordingly, whether the conferral of a benefit on a third party is expressly authorised by a prescribed power of attorney is to be determined by reference to the general principles and rules of the common law and equity concerning the interpretation of powers of attorney.

(2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to confer on a third party the kinds of benefits that are specified by that Schedule for that expression."

227. An appreciation of the effect of sections 11, 12 and 13 requires reference to Schedule 3, which set out "prescribed expressions" for the purposes of sub-section (2) of each of those sections, and the authority conferred on an attorney given powers using those expressions.

228. Schedule 3 was entitled “Prescribed Expressions and Authorisations for Prescribed Powers of Attorney”. It contained three parts: one relating to an authority to give gifts, the second relating to an authority to confer benefits on an attorney, and the third relating to authority to confer benefits on third parties.

229. In 2008 the Schedule was in the following terms (since amended, in an immaterial way, to accommodate enactment of the *Relationships Register Act* 2010 NSW):

> “**1 Authority to give gifts**
>
> (1) The prescribed expression for the purposes of section 11 (2) is as follows:
>
> I authorise my attorney to give reasonable gifts as provided by section 11 (2) of the Powers of Attorney Act 2003.
>
> (2) The prescribed expression authorises an attorney to give a gift only if:
>
> (a) the gift is:
>
> (i) to a relative or close friend of the principal, and
>
> (ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage), or
>
> (b) the gift is a donation of the nature that the principal made when the principal had capacity or the principal might reasonably be expected to make,
>
> and the gift’s value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal’s financial circumstances and the size of the principal’s estate.
>
> (3) In this clause:
>
> "**close friend**" of a principal means another individual who has a close personal relationship with the principal and a personal interest in the principal’s welfare.
>
> "**relative**" of a principal means:
>
> (a) a mother, father, wife, husband, daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother or grandchild of the principal, or
>
> (b) if the principal is a party to a domestic relationship within the meaning of the Property (Relationships) Act 1984 , any person who

is a relative, of the kind mentioned in paragraph (a), of either party to the relationship.

2 Authority to confer benefits on attorney

(1) The prescribed expression for the purposes of section 12 (2) is as follows:

I authorise my attorney to confer benefits on the attorney to meet the attorney's reasonable living and medical expenses as provided by section 12

(2) of the Powers of Attorney Act 2003 .

(2) The prescribed expression authorises an attorney to confer a benefit on the attorney only if:

(a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the attorney in respect of any of the following:

(i) housing,

(ii) food,

(iii) education,

(iv) transportation,

(v) medical care and medication, and

(b) the benefit is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate.

3 Authority to confer benefits on third parties

(1) The prescribed expression for the purposes of section 13 (2) is as follows:

I authorise my attorney to confer benefits on [insert name(s) and address(es) of each third party] to meet their reasonable living and medical expenses as provided by section 13 (2) of the Powers of Attorney Act 2003 .

(2) The prescribed expression authorises an attorney to confer a benefit on a named third party only if:

(a) the benefit meets (whether in whole or in part) any expenses incurred (or to be incurred) by the third party in respect of any of the following:

(i) housing,

(ii) food,

(iii) education,

(iv) transportation,

(v) medical care and medication, and

(b) the benefit is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and the size of the principal's estate."

230. These provisions are here set out, in part, for the purpose of noticing their absence from the enduring power of attorney dated 10 January 2008. As can be seen from the text of that instrument (read with sections 11, 12 and 13 of the *Powers of Attorney Act*), it did not confer upon the first defendant authority to give gifts or to confer benefits on the first defendant or others.

231. The general language found in section 9(1) was expressly qualified by its introductory words, "subject to this Act", sufficient to pick up sections 11(1), 12(1) and 13(1). The instrument was not simply a grant of authority "to do (on behalf of the deceased) anything that (the deceased) may lawfully authorise an attorney to do."

232. Even if (contrary to the fact) the "prescribed powers" for which sections 11(2), 12(2) , and 13(2) and Schedule 3 of the *Powers of Attorney Act* provided had been engaged in the 2008 instrument, they were much more modest in their reach than the first defendant's assumption that she could deal with the deceased's property as her own.

233. The text of the instrument was in the following terms:

"**GENERAL POWER OF ATTORNEY**

Part 1: General

This power of attorney is made on the 10th day of January 2008

by **RONALD JAMES SMITH** ("the principal") of 3/9 Mackay Street, Emu Plains.

1. I appoint **JOY SMITH (ALSO KNOWN AS JOY BUNT)** of 3/9 Mackay Street, Emu Plains to be my attorney. My attorney may exercise the authority conferred on my attorney by Part 2 [materially, sections 8-13] of the *Powers of Attorney Act 2003* to do on my behalf anything I may lawfully authorise an attorney to do. My

attorney's authority is subject to any additional details specified in Part 2 of this document.

2. I give this power of attorney with the intention that it will continue to be effective if I lack capacity through loss of mental capacity after its execution.

3. This power of attorney operates -

immediately

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate immediately or, if clause 2 is not crossed out, when my attorney accepts, or each of my attorneys accepts, the appointment.

4. I hereby revoke all powers of attorney, registered or unregistered, previously signed by me in favour of any person or persons prior to the date of this power of attorney.

Part 2: Additional powers and restrictions"

234. This instrument was also "signed sealed and delivered" by the deceased in the presence of Mr Low as a witness to his signature.
235. The instrument was blank under the heading "Part 2: Additional powers and restrictions". That is, no details whatsoever were "specified in Part 2", to paraphrase clause 1 of the instrument.
236. The instrument incorporated, as did the 2005 instrument, a section 19 certificate signed by Mr Low and an endorsement of the first defendant's acceptance of her appointment as an attorney under the instrument. Both the certificate and the endorsement were dated 10 January 2008.
237. As an addendum, the instrument included prescribed notes of the type incorporated in the 2005 instrument. Following their legislative pattern, those notes were virtually identical with the 2005 notes. They differed only in minor, inconsequential clerical respects.
238. The notes in the 2008 instrument also referred to "clauses 5, 6 and 7" in connection with "Part 2" even though clauses bearing those numbers were wholly omitted from the document (under the "Part 2 heading") rather than simply deleted as *per* the notes.
239. Both sets of notes followed the prescribed form of an Enduring Power of Attorney found in Schedule 2 of the *Powers of Attorney Act.*
240. Each set of notes squarely put the first defendant on notice that, as an attorney for the deceased:
. (a) she was bound to act in his best interests, without any unauthorised benefit to herself;
. (b) she should keep her and the deceased's property separate; and
. (c) she should keep reasonable accounts and records about the deceased's money and property.

241. The essence of the plaintiffs' case against the first, third and fourth defendants is that the first defendant acted in disregard of these, her imperative (fiduciary) duties as the deceased's attorney.

242. In cross examination, she conceded that: (a) before she accepted her appointment as the deceased's attorney pursuant to the power of attorney dated 10 January 2008, Mr Low explained the document to her; and (b) at or about that time, she read and understood the printed notes forming part of the instrument: Transcript pages 187-188.

243. In formal terms, the 2008 power of attorney relied upon by the first defendant as a source of authority for property transactions affecting the deceased itself confirmed that, as his attorney, she occupied the office of a fiduciary *vis-a-vis* the deceased, with the ordinary obligations of a fiduciary inherent to that office.

244. By her express, formal acceptance of her appointment as the deceased's attorney (endorsed on the instrument of appointment itself) the first defendant must be taken to have accepted that, insofar as she might act on the authority of the office of attorney to which she was appointed by the instrument, she would be bound to act within the limits of her authority as defined by the instrument.

The Authority dated 1 November 2007

245. The authority dated 1 November 2007 executed by the deceased, in favour of the first defendant, addressed to the deceased's stockbroker was described as an "Authority to Operate [a] ... Stockbroking Client Account". It was signed by the deceased as the "client/account holder" and by the first defendant as his "authorised agent".

246. The text of the instrument was in the following terms (with editorial adaptation):

> "**Authorisation**
>
> The Client notifies .... (the Broker) that the Client appoints [the first defendant] as an Authorised Agent of the Client pursuant to the published terms and conditions of the Broker (General Terms). This appointment is effective from the date the Broker receives this authority. (Terms defined in the General Terms have the same meaning in this authority.)
>
> The Client authorises the Authorised Agent to operate all existing and future Bank Accounts, Cash Accounts and Client Accounts in respect of which the Client is listed in the Broker's records as an account holder (whether solely or jointly) (together the Accounts) and to do and execute all acts, documents and things in connection with the Accounts, including, without limitation:
>
> 1. to make withdrawals;
>
> 2. to receive statements in respect of the Accounts;
>
> 3. to pay money, cheques, notes, drafts and other documents to credit the

Accounts;

4. to operate and enter into agreements to operate the Accounts on behalf of the Client;

5. to open and close Accounts on behalf of the Client;

6. to acquire, buy deal with, dispose of or sell any financial products, including, without limitation, shares, interests in managed investment schemes, warrants, options and Low Exercise Price Options (LEPOs) (together the Financial Products);

7. to make and receive payment for any Financial Product transactions (including ASX Transactions) and attendant expenses by any means whatsoever and to give good receipts and discharges for the proceeds of sales of Financial Products;

8. to execute all contracts and other documents necessary or proper for the custody, dealing and transfer of Financial Products and related matters;

9. to receive, hold and arrange custody of and deliver share certificates, holding statements and other evidence of title to Financial Products;

10. to exercise all rights and privileges and perform all duties and obligations which may now or in future pertain to the Client as holder of the Financial Products; and

11. to accept and act upon any instructions issued by the Authorised Agent as contemplated by this authority.

Acknowledgements and Undertaking

The Client acknowledges that:

1. any operation of any of the Client's Accounts will be binding on the Client;

2. this authority in relation to the Client's Accounts will bind the Client until the Client expressly revokes it in writing and the revocation is received by the Broker;

3. the Broker may rely on any communication from the Authorised Agent without further enquiry. If it is given, or apparently given, by the Authorised Agent.

4. the Client remains solely liable and responsible for all acts and omissions of

the Authorised Agent notwithstanding the act or omission of the Authorised Agent was-

(a) outside the Client's actual or ostensible authority; or

(b) in error, fraudulent, negligent, in breach of the Authorised Agent's fiduciary duties or criminal;

5. the Client agrees not to make, and releases the Broker from any right the Client may have to make, any Claim against the Broker for any Loss Incurred or suffered by the Client which may arise in connection with any act or omission by the Authorised Agent.

The Client undertakes to ratify whatever the Authorised Agent will lawfully do

or cause to be done in accordance with this authority."

247. I do not read the revocation clause of the 2008 enduring power of attorney as intended to revoke such, if any, authority the first defendant may have had under the authority dated 1 November 2007. The revocation clause revokes "all powers of attorney" in the context of a like document executed with the *Powers of Attorney Act* expressly in mind. As a matter of construction, I proceed on the basis that the deceased did not intend his execution of the 2008 power of attorney to revoke the Authority dated 1 November 2007.

The Will dated 10 January 2008

248. Leaving aside substitutional gifts, the scheme of the deceased's 2008 Will was to give the whole of his estate to his executors and trustees (on the face of the Will, the second defendant and Mr Low) upon trust to pay all just debts, funeral and testamentary expenses and all probate, estate, death or other duties, and thereafter to effect the following gifts:
. (a) Gifts to the first defendant in the form of:
. (i) the Emu Plains home unit of the deceased, in fact transferred to the deceased and the first defendant as joint tenants in 2008 and sold by the first defendant in 2010;
. (ii) all the furnishings and kitchenware within the Emu Plains home unit;
. (iii) any motor vehicle owned by the deceased;
. (iv) all proceeds of the deceased's Commonwealth Bank Savings Account No. 26015005442 and the proceeds of the balance of the deceased's Portfolio Account with the Macquarie Bank, *expressly not including any shares owned by the deceased at the time of his death*; and
. (v) one half of the deceased's residuary estate.
. (b) a gift to the third defendant of all the deceased's porcelain dolls and ornaments and all his personal jewellery.
. (c) a gift of one half of the deceased's residuary estate to the plaintiffs as tenants in common in equal shares.

249. On the case for which the plaintiffs contend, the express exclusion from the first defendant's primary testamentary "entitlements" of any shares owned by the deceased at the date of his death provides, in part at least, an explanation for the first defendant's sales of shares beyond immediate needs of the deceased, and her failure to replace the deceased's share portfolio. Against this, one must note that, by this Will, the first defendant received one half of the deceased's residuary estate, into which shares held at the time of death would have fallen.

250. Four particular aspects of the first defendant's evidence bear upon how she viewed the Authority dated 1 November 2007 and the Will dated 10 January 2008 as informing how she approached her rights and obligations in dealing with the deceased's property during the last years of his life.

251. First, she insisted, more than once, that, in selling shares and securities held in the name of the deceased, she acted on the basis of the Authority, not a power of attorney: eg, first defendant's affidavit sworn 13 July 2015, paragraph 11. She appears to have viewed the Authority as more extensive than the 2008 power of attorney.

252. To this, the plaintiffs respond, correctly, that, even if the Authority authorised a *sale* of the deceased's shares and securities, it did not entitle the first defendant to appropriate the proceeds of a sale to herself, and neither did it relieve her of an obligation to account to the deceased.

253. Secondly, the first defendant appears to have proceeded on the basis that, because the Emu Plains home unit had been transferred into the names of herself and the deceased as joint tenants in 2008, and, had the property been retained in their joint ownership at the time of the deceased's death (2012), it would then have passed to her by right of survivorship, she was entitled to sell the property in 2010 without accounting to the deceased (as the plaintiffs contend she should) for a one half share of the sale proceeds or, indeed, at all.

254. Thirdly, in attempting in the course of these proceedings to explain what she did with large amounts of money she apparently appropriated to herself from the estate of the deceased, the most that she could evidently do was to provide *global estimates* of her expenditure, admittedly incomplete: first defendant's affidavit sworn 13 July 2015, paragraphs 3-10.

255. On her own analysis, even after making generous allowances in favour of personal expenditure, she was unable to account for the whole of the proceeds of her sales of the deceased's shares and securities in June 2008 and March -April 2010 and her sale of the Emu Plains home unit in June 2010 (a total sum of $1,219,000). Nor did her calculations take into account pension moneys received by the deceased and herself (including, the plaintiffs point out, the deceased's Air Force pension) or interest received on a multitude of term deposits.

256. Furthermore, if she did receive cash from the third and fourth defendants in reimbursement of moneys paid by her for her purchase of their Emu Plains residence, what became of that cash is not the subject of any clear explanation.

257. The first defendant's apparent inability to account for money of the deceased passing through her hands is consistent with an assumption on her part that she was entitled to deal with his property as and when she wished, and for her own personal benefit, unconstrained by any obligation to account to him or his deceased estate.

258. Her evidence is to the effect that when the proceeds of sale of property of the deceased came into her hands she routinely retained them (sometimes, but not always, passing them through an account in the joint names of the deceased and herself controlled and operated by her alone), keeping large amounts at home, in cash, for which, she says, she cannot now account: Transcript pages 230-231, 232-233 and 235-236. Having withdrawn money from the deceased's Macquarie Bank account for her own purposes, she did not ever reimburse the account: eg, transcript pages 218 and 221.

259. Fourthly, in her response to a forensic accountant's report dated 20 May 2015 soon to be specifically reviewed, the first defendant (in paragraph 36 of her affidavit sworn 13 July 2015) rationalised her "entitlements" *vis-a-vis* the plaintiffs' "entitlements" in the following terms:

> "... there is no acknowledgement in the report of Mr Dumbrell [the Forensic Accountant], as to what my legacy was, in any event, under [the deceased's] last Will of 10 January 2008. When viewed in light of the sales the subject of Mr Dumbrell's report, my entitlement [versus] the entitlement of the plaintiffs was:
>
> To [the first defendant]:
>
> (a) The entirety of [the Emu Plains Home Unit] (joint tenancy): $400,000.00
>
> (b) One half of the rest and residue, including:
>
> (i) 50% of the June 2008 security sales ($442,183.15): 221,091.57
>
> (ii) 50% of the March & April 2010 security sales ($377,610.13) 188,805.06
>
> Less 50% of the Capital Gains Tax $ 57,272.00
>
> **TOTAL: $752,624.00**
>
> To [the first plaintiff]:
>
> (a) One quarter of the rest and residue, including:
>
> 25% of the June 2008 security sales ($442,183.15): $110,545.78
>
> 50% of the March & April 2010 security sales ($377,610.13) 94,402.53
>
> Less 25% of the Capital Gains Tax: [$ 28,636]
>
> **TOTAL $176,312.31**
>
> To [the second plaintiff]:

(b) One quarter of the rest and residue, including:

25% of the June 2008 security sales ($442,183.15): $110,545.78

50% of the March & April 2010 security sales ($377,610.13) 94,402.53

Less 25% of the Capital Gains Tax: [$ 28,636]

TOTAL $176,312.31"

260. This approach to the case is, again, consistent with a state of mind on the part of the first defendant that she was entitled to deal with the deceased's property as her own from 10 January 2008 or thereabouts.

261. The figures here used by the first defendant involve an element of rounding out; but, so understood, they are consistent with the observation that, between 10 January 2008 and 17 May 2012, the first defendant caused asset sales affecting the deceased that realised, in fact, $1,219,952.27. The sum of the parties' respective, notional "shares" of the deceased's property and the amounts allowed for Capital Gains Tax ($1,219,792.62) approximate that amount.

Findings as to the First Defendant's Written Authority as an Agent for the Deceased

262. During the period the subject of transactions under challenge by the plaintiffs in these proceedings (13 May 2008 – 17 May 2012) the only operative, written authority the first defendant had to deal with property of the deceased was the enduring power of attorney dated 10 January 2008.

263. The Authority dated 1 November 2007 was revoked by the deceased's loss of mental capacity (no later than 13 May 2008), a condition from which he never recovered. There is no basis, in fact, upon which it might be said to have been revived during periods of lucidity.

264. The enduring power of attorney dated 3 June 2005 was no longer operative by 13 May 2008, a fact confirmed by the express terms of the enduring power of attorney dated 10 January 2008.

265. The deceased's Will dated 10 January 2008 conferred on no person authority to deal with property of the deceased in his lifetime. It took effect only upon his death and, then, it might be said, subject to a condition precedent that it be proved as his last expression of testamentary intent evidenced by a grant of probate: GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, Australia 2013), paragraph [1.4]; RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration in NSW* (LBC, Sydney, 1996), paragraphs [3.01]-[3.03] and [3.05]; *Probate and Administration Act* 1898 NSW, section 6.1.

266. The terms of the Will might be material to the Court's determination of the nature and scope of any relief to be granted in these proceedings, but the Will itself conferred no authority on the first defendant, or indeed on any other person, to manage the deceased's affairs, or to deal with his property, during his lifetime.

THE FIRST DEFENDANT'S EVIDENCE THAT SHE HAD THE DECEASED'S EXPRESS ORAL AUTHORITY TO DEAL WITH HIS PROPERTY

267. The first defendant contends that she remained consistently engaged in conversation with the deceased about her dealings with property in his name, both before and after that fateful day on 13 May 2008 when she sought, and obtained, Dr Dixon's certification that the deceased was "no longer able to conduct his financial affairs" and in need of "a registered power of attorney to oversee the safe management of his funds".
268. In her primary affidavit (sworn on 28 October 2013) she deposed to three sets of conversations between herself and the deceased in which, she says, he approved particular property dealings. On the face of the affidavit, each of those conversations was between the two of them alone. In cross-examination, she specifically confirmed that each of the second and third sets of conversations was between them alone, without any other person present: Transcript pages 224 and 236. She was not specifically asked about the first conversation. However, I infer from the terms of the affidavit that it was no different from the other alleged conversations relied upon by the defendants.

The First Defendant's Sale of Shares on 2 June 2008 and Application of Proceeds of Sale

269. The first conversation relates to her sale of shares on 2 June 2008, producing proceeds totalling $442,183.15.
270. In paragraph 23 of her affidavit, the first defendant says that this sale transaction was effected by her using the Authority dated 1 November 2007 addressed to the deceased's stockbroker. If (as Dr Dixon and the first defendant herself then believed) the deceased had irretrievably lost capacity for self-management by 13 May 2008, the Authority dated 1 November 2007 could not have authorised the sales effected on 2 June 2008 and, despite her anxiety to attribute her authority to the Authority rather than the Power of Attorney dated 10 January 2008, her authority depended, in substance, on the Power of Attorney.
271. Whatever the source of any authority residing in the first defendant on and about 2 June 2008, she acted as an agent for the deceased and, as such, occupied a fiduciary office *vis-à-vis* him.
272. In paragraph 24 of her affidavit she deposes to the following:

> "[The deceased] and I discussed the sale of these shares whilst [the deceased] was in hospital, before they were sold. The shares were sold because [the deceased's] health had deteriorated and he need[ed] to go into Minchinbury Manor Nursing Home as I was no longer able to care for him. The sale of the shares was to fund the nursing home bond.
>
> I said: '*We'll need to get some money together to pay for the nursing home bond, the bond is $350,000.00*'.
>
> [The deceased] said words to the following effect:

'OK, speak with [the second defendant] about which shares to sell, I leave it in your hands. I gave you the authority, do what you have to do.'"

273. In subsequent paragraphs of her affidavit the first defendant says that she does not know why the shares sold at this time raised $450,000 or thereabouts, rather than merely the $350,000 bond required.
274. Neither does she explain, with any clarity, what happened to the sale proceeds when Minchinbury Manor Nursing Home declined to accept the deceased as a resident (because he required more intensive, dementia-specific care than that institution could provide) beyond saying that a $50,000 deposit paid to Minchinbury Manor was returned to her.

The First Defendant's Financial Assistance for the Third and Fourth Defendants in June-July 2008

275. A second conversation with the deceased deposed to by the first defendant is said by her to relate to assistance she gave to the third and fourth defendants at about the time that their Emu Plains residence was purchased in their names.
276. Her evidence is that the decision that such assistance would be given was made by her in a conversation with the fourth defendant which did not involve the deceased: Transcript page 213. When asked in cross-examination to comment on the absence of any reference to the deceased in that conversation, she responded (at Transcript page 215): "Well, no, I didn't refer to Ronnie. Why would I?"
277. This is but one illustration of the first defendant's confident assumption that she could deal with the deceased's property without reference to his interests.
278. The agreement allegedly made between the first, third and fourth defendants for the first defendant to provide financial assistance to the third and fourth defendants was wholly oral and undocumented: Transcript pages 154 and 216-217.
279. Contracts for that purchase were exchanged on 14 June 2008 and completed on or about 7 July 2008. A 10% deposit was paid by the first defendant in two instalments, one on the contract date and the second on 20 June 2008. Between 23 June 2008 and 1 July 2008 or thereabouts the first defendant funded the balance of purchase price required to be paid on completion.
280. The defendants say that, although the first defendant paid for the purchase of the property, she was, at or about the time of the purchase, given about $150,000 in cash by the third and fourth defendants who, on 23 March 2009, paid her a further $200,000 or thereabouts in cash as repayment of what the first, third and fourth defendants all characterised as a "bridging loan" designed to assist the third and fourth defendants pending sale of their former (Medlow Bath) residence. In fact, the first defendant bought the property in the names of the third and fourth defendants; but, the defendants say, the third and fourth defendants funded part of the purchase price at the time of the purchase and, substantially, repaid the first defendant the balance nine months later.
281. The first defendant says that the third and fourth defendants' move from Medlow Bath to Emu Plains was a response to her hospitalisation after a fall and their desire to be closer to her in order to provide her with care.

282. In that context, paragraph 39 of the first defendant's affidavit is to the following effect:

> "[The deceased] was aware that I had been in hospital because I hadn't visited him for two or three days and when I did I had my thumb in a cast. He was also aware of my previous falls at [the Emu Plains home unit] because on two occasions I broke my nose and this was obvious when I visited [him]. I recall having a conversation to the following it effect:
>
> [The deceased] said to me: *'I am pleased that [the third defendant] has*
>
> *come down [from Medlow Bath] to look after you.'*
>
> I said to [the deceased]: '*They have to wait for the money from this army fellow for their house in Medlow Bath. So I have to help them Ronnie so they can get this house around the corner from me. They have got some money but they need some more so they can do the deal and they will give it me back [sic] when they get their money from the sale of the property.'*
>
> [The deceased] said: *'That's okay no problem.'"*

The First Defendant's 2010 Transactions

283. The third piece of evidence of conversations deposed to by the deceased relates to what is claimed to have been a series of conversations said to have taken place in 2010.

284. Those conversations are said to relate to: (a) sales of securities of the deceased on 8 March 2010 and 19 April 2010 yielding $377,610.13 in total proceeds; (b) the sale of the Emu Plains home unit, the last residence of the first defendant and the deceased, effected by a memorandum of transfer dated 16 June 2010, resulting in sale proceeds of about $400,000; and (c) construction of a granny flat at the rear of the third and fourth defendants' Emu Plains residence in the months following execution of a building contract for that purpose on 18 March 2010.

285. In paragraphs 41-44 of her affidavit, the first defendant deposes to the following, under the heading "April 2010":

> "[41] In April 2010, I caused further shares to be sold, utilising the authority that was granted to me [meaning the Authority dated 1 November 2007], in the amount of around $377,610. Before the sale of these shares, I had a conversation with [the deceased] (who was in a wheelchair at that stage) to the following effect:
>
> I said: *'Ronnie the ACAT [Aged Care Assessment Team] have come to see me. They asked me about living on my own after the falls. They said to me I shouldn't be living on my own because it is dangerous. It looks like I am going to come and get in your bed with you. I am not going to go to a nursing home on my own.*

We [that is, the first, third and fourth defendants] have come up with an idea that I build a granny flat behind [the third defendant]. I am going to sell [the Emu Plains home unit] and build a granny flat.'

He said: *'OK. If that is what you want to do no problem.'*

I said: *'I need to sell some more of the shares as I want to go on a holiday, and I need money to get by.'*

He said: 'Sell some more shares, do whatever you think is necessary. It's up to you. Their yours now do what you like.'"

[42] In around mid-[2010], I underwent an Aged Care Assessment via the Aged Care Assessment Team (ACAT). I was 81 years old at this time. On their assessment they determined that I was no longer able to reside by myself. I had a conversation with [the second and third defendants], [to] the following effect:

I said: *'ACAT won't let me live by myself any more.'*

[The third defendant]: '*You can't go into a nursing home, how would you feel about building a granny flat on our property and you can live in there?'*

I agreed.

[43] In mid-2010, I sold [the Emu Plains home unit], to fund the building of the granny flat, on [the second and third defendants'] property. I paid for the building of the granny flat, [the third and fourth defendants'] property.

[44] I had conversations with [the deceased], every day, in relation to my need for accommodation, the sale of [the Emu Plains home unit], and building of the granny flat. [The deceased] was aware of what was occurring and was happy for me to do these things. We had conversations as the granny flat was being constructed and as to the alterations to it after it was completed. Those alterations consisted of a ramp on the patio, cutting a tree down in the backyard, erecting awnings on the back windows, tiling, erecting safety rails, installing air-conditioning and replacing the kitchen with a new kitchen."

286. These various conversations were, naturally enough, the subject of cross examination but, as set out here, they provide the structure of the defendants' contention that the first defendant acted at all times with the knowledge and authority of the deceased.

Findings as to the First Defendant's Oral Authority as an Agent for the Deceased

287. I do not accept that the conversations by which the first defendant says the deceased conferred upon her oral authority to deal with his property as she wished occurred in anything like the way she suggests.

288. I accept that she may, from time to time, have mentioned to him what she proposed to do, or what she had done, with his property; but not that she did so in a manner capable of obtaining a grant of authority from him, a person then very much enfeebled and, more likely than not, incapable of appreciating the nature or implications of any such business.

289. I do not accept the first defendant's uncorroborated evidence of private conversations between herself and the deceased, presented as if the deceased was in full command of his faculties when plainly he was not.

290. I do not accept that the deceased knowingly uttered words of approval – although the possibility that he appeared to acquiesce in whatever may have been suggested to him cannot be excluded in a dementia patient.

291. Still less do I accept that he gave, or was capable of giving, a fully informed consent to the first defendant's dealings with his property.

292. On 10 January 2008, as his faculties were fast fading, the deceased made a Will that accommodated the competing claims made on his bounty by his first and second families, and granted a fresh power of attorney which implicitly denied powers earlier (in 2005) allowed to the first defendant as his attorney. On or about 14 February 2008 he conferred upon the first defendant joint tenancy co-ownership of their matrimonial home, the Emu Plains home unit.

293. Each of these things was done in a formal way, by the execution of legal instruments, with the benefit of legal advice and assistance from Mr Low.

294. I do not accept that, without further assistance from a solicitor, the deceased, in a series of undocumented private conversations with the first defendant, after further deterioration in his mental capacity, set at nought the arrangements carefully made through Mr Low.

295. If the first defendant was authorised to deal with the deceased's property as she did, her or authority did not, on the facts of the case, derive from oral statements attributed to the deceased.

WHAT, IF ANY, AUTHORITY DERIVED FROM JOINT OWNERSHIP OF PROPERTY BY IMPLICATION OF FACT OR LAW?

296. In two contexts a question arises as to what, if any, "authority" the first defendant may have had to deal with property held in the joint names of the deceased and herself.

297. One of those relates to the Emu Plains home unit, the last matrimonial home of the first defendant and the deceased, registered in their co-ownership as joint tenants (in February 2008), and her sale of the unit utilising the power of attorney dated 10 January 2008 (in 2010).

298. The other relates to her channelling of funds of the deceased through the Commonwealth Bank "joint account" opened by her and the deceased in October 2007.

Proceeds of Sale of the Emu Plains Home Unit

299. At law, a sale of the Emu Plains home unit by both co-owners (each competent) would not, *of itself*, have severed the parties' co-ownership of property in the land as joint tenants, a

form of co-ownership which, without more, would have subsisted in the proceeds of sale of the land: *In re Allingham* [1932] VicLawRp 66; [1932] VLR 469; *Abela v Public Trustee* [1983] 1 NSWLR 308 at 314C; *Scott v Scott* [2009] NSWSC 567 at [59]- [61]; P Butt, *Land Law* (6th ed, Law Book Co., 2010), paragraph [1472]. Contrary to Professor Butt, I do not read *Crescendo Management Pty Limited v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46-G as expressing any different view of the law. That was a case in which a sale of land by joint tenants was accompanied by a division between co-owners of the sale proceeds. The Court of Appeal expressly applied *Re Allingham*.

300. Although a sale of land by joint tenants, each of full capacity, does not, of itself, sever their joint tenancy, this case involves more than a mere sale by co-owners. It involves a sale by one of two joint tenants in two capacities: in her personal capacity and, purportedly, in her capacity as an attorney for the other joint tenant, an incapacitated person.

301. Although the first defendant and the deceased, at law, may have (as I assume) remained joint tenants of the proceeds of sale of the home unit, the first defendant was not entitled, in equity, to treat the proceeds as her own, unqualified by the deceased's interest in that money as a co-owner or by the fiduciary obligations she owed him as his attorney. She was not entitled, merely by exercise of her power as his attorney, to sell the land and to appropriate the proceeds of sale for her own benefit in purported enjoyment of the whole of the property, or in anticipation of a right of survivorship as a joint tenant, without coming under an obligation to account for his share of the property.

302. The first defendant sold the home unit, not for the benefit of the deceased, but for her benefit alone.

303. She did so without the authority of a court order (under section 66G of the *Conveyancing Act* 1919 NSW or by an invocation of the Court's protective jurisdiction), or any similar order within the jurisdiction of NCAT to grant, relying upon the power of attorney for a purpose beyond that for which it was granted. Had she applied to the Court for an order for sale it would probably have been granted, but on terms designed to protect the deceased's interests. Instead, she purported to sell the land on her own authority, such as it was.

304. At that point, or at least when she applied proceeds of sale for her own benefit, not for the benefit of the deceased, she was in breach of her obligations to the deceased as a fiduciary, and liable to equitable intervention (by way of a constructive trust) to prevent her from acting against good conscience: *Keith Heney & Co Pty Limited v Stuart Walker & Co Pty Limited* [1958] HCA 33; (1958) 100 CLR 342 at 350; *Chan v Zachara* [1984] HCA 36; (1984) 154 CLR 178 at 198-199; *Hospital Products Limited v United States Surgical Corp.* [1984] HCA 64; (1984) 156 CLR 41 at 107-108..

305. Co-ownership of property in joint tenancy is characterised by "the four unities" (of title, interest, possession and time), the absence of any one of which requires the parties' co-ownership to be characterised as that of tenants in common, without the right of survivorship that attends only a joint tenancy: Butt, *Land Law* (6th ed, 2010), paragraphs [14.05]-[14.09]; BA Helmore, *The Law of Real Property in New South* Wales (2nd ed, Law Book Co., Australia, 1966), pages 267-268.

306. A joint tenancy may be severed (so as to convert it into a form of co-ownership between tenants in common) by any event that destroys the four unities including, it is commonly said by reference to *Williams v Hensman* [1861] EngR 701; (1861) 1 J&H 546 at 557-558; [1861]

EngR 701; 70 ER 862 at 867, severance by agreement between co-owners, severance by conduct such as to justify imputation to co-owners of an intention to sever, and severance by a unilateral alienation of a joint tenant's interest: Butt, *Land Law* (6th ed, 2010), paragraphs [14.75]-[14.92]; *Corin v Patton* (1990) 169 CLR 540 at 546-548, 565-566, 584 and 587; *Sprott v Harper* [2000] QCA 391 at [7]- [8].

307. A joint tenant's interest must be capable of accommodating a right of survivorship on the death of one or another of the joint tenants: one co-owner's interest evaporating with his or her demise, another's expanding to absorb that which has evaporated.

308. Where, as here, a joint tenant acts on his or her own responsibility (without the authority of a court order) both personally and as the enduring attorney of an incapable person in the sale of land held in co-ownership, the fiduciary obligations of an attorney (to account to the principal, not to receive or accept any unauthorised gain at the expense of the principal, and to act only for the benefit of the principal) preclude the operation of a right of survivorship in equity. Without the fully informed consent of the principal (not possible in the case of an incapable person), or the authority of a court order capable of operating in lieu of such consent, the attorney cannot obtain a personal benefit from the sale.

309. The effect, in equity, is that if and to the extent that a court of equity may impose on the attorney a constructive trust designed to enforce his or her liability to account to the principal, then, to that extent, the joint tenancy may be taken to have been "severed".

310. An illustration of this reasoning, by analogy, can be found in the operation of the forfeiture rule, under the general law, in a case in which one joint tenant feloniously kills another. By operation of law, the felon is not permitted to benefit from the crime and, accordingly, equity may require the interest taken by the felon to be held by him or her upon a constructive trust which will ensure that the interest is held in the same way as it would have been if there had been, on the death of the joint tenant, no enlargement of the interest of the felon: *Rasmanis v Jurewitch* (1969) 70 SR (NSW) 407 at 411-412. Where there are only two joint tenants, there may be no difference in result between severance and the imposition of a constructive trust.

311. The analogy is not entirely complete because, by its very nature, an application of the forfeiture rule in these circumstances is predicated upon an existing death of a joint tenant whereas, in the present case, the joint tenant whose interests need protection is incapacitated, not dead; and the right of survivorship of a joint tenant arises upon death, not upon the mere incapacity, of a joint tenant.

312. Nevertheless, where, as in the present case, a joint tenant alienates co-owned property in breach of a fiduciary obligation owed to a co-owner then, to the extent that equity is able and willing to intervene, a joint tenancy may be spoken of, in equity, as having been "severed".

313. This analysis may be rationalised by saying that, in the eyes of equity, one or another of the four unities no longer attends the co-ownership of the property concerned; that severance has been effected by conduct or alienation; or that it is simply a case of equity intervening to restrain, or counter, unconscionable conduct.

314. In the present case, whatever be the correct explanation, the first defendant cannot, against good conscience, retain an unauthorised benefit from her sale, and application of sale proceeds, of jointly owned property without accounting for that benefit. In this case, for

practical purposes, the whole of the proceeds of sale of the parties' Emu Plains home unit were expended by the first defendant before the deceased's death.

315. A separate, but related question arises as to whether any part of the sale proceeds to which the deceased was entitled can be traced into the land on which the first, third and fourth defendants reside following construction of the first defendant's granny flat.

316. Subject to a resolution of that question, the parties' joint tenancy may be taken, in equity, to have been "severed" by: the first defendant's sale of the home unit utilising the power of attorney for her own benefit and her appropriation of sale proceeds otherwise than for the benefit of the deceased.

317. A question that requires closer attention upon consideration of any remedies to which the estate of the deceased may be entitled is whether the proceeds of sale must be taken to have been expended by the first defendant on the basis that each of the first defendant and the deceased was entitled (as a tenant in common) to a one half share. If so, that left the first defendant to deal with her share in her own interests, under a continuing obligation to deal with the deceased's share only for his benefit.

318. Quantification of the parties' respective shares at one half each reflects a customary attribution of equality of shares as between joint tenants whose interests have been severed: *The Trustees of the Property of Cummins v Cummins* [2006] HCA 6; (2006) 227 CLR 278 at 298[56].

The Commonwealth Bank Joint Account

319. In determining the respective property rights of the first defendant and the deceased in the Commonwealth Bank joint account opened by them, in their joint names, in October 2007, the Court does not have evidence from the bank about the terms upon which the account was opened and operated. Nor does it have primary evidence about the intention of the deceased. Essentially, what is available is a statement by the first defendant (in paragraph 144 of her affidavit sworn 28 October 2013) that the account was a joint account, in the names of both the deceased and herself, and it "reverted into my name" on the deceased's death.

320. The parties have conducted the proceedings upon a common assumption that, at law, this is a correct summary of the terms upon which the account was operated.

321. Where a bank account is a joint account and one party dies, ordinarily, the survivor is entitled to the whole amount, either: (a) under the law of devolution between joint owners; (b) by the custom of bankers; or (c) by express or implied agreement: *Paget's Law of Banking* (LexisNexis, UK, 14th ed, 2014), paragraph [5.21]; A L Tyree *Banking Law in Australia* (LexisNexis Butterworths, Australia, 8th ed, 2014), paragraph [4.7.2]; *Weerasooria's Banking Law and the Financial System in Australia* (LexisNexis Butterworths, Australia, 6th ed, 2006), paragraphs [21.95]-[21.97]; *Russell v Scott* [1936] HCA 34; (1936) 55 CLR 440 at 450-451 and 453-455.

322. The factual matrix of the current proceedings bears some similarity to that encountered in *Marshall v Crutwell* (1875) LR 20 Eq 328 where Sir George Jessel MR held that a joint account established by a husband in failing health was established with the intention, not of making provision for his wife, but merely as a mode of conveniently allowing her to manage

his affairs. In that case it was held that, on his death, money standing to the credit of the account belonged to the husband, not to the wife.

323. The plaintiffs have relied upon a similar line of reasoning in the present proceedings. However, they have focused, primarily, upon a contention that the first defendant, having breached her fiduciary obligations to the deceased in selling his shares and applying proceeds of sale otherwise than for his benefit, cannot escape a liability to account for the deceased's property by her conduct in passing the proceeds of sale through a joint account. With that contention, I agree. It is not necessary to pursue the *Marshall v Crutwell* analogy.

324. This is not a case in which there is a substantial contest about competing entitlements, at law and in equity, to a credit balance remaining in a joint account at the time of death of an account holder. It is a case, rather, about the liability of an attorney, in equity, to account to her principal for property dealt with in breach of fiduciary obligations.

Findings as to the First Defendant's "Authority" as a co-owner to deal with property of the Deceased during his lifetime

325. The first defendant's co-ownership of property with the deceased conferred upon her no relevant authority to deal with his interest in that property. She was entitled, at law, to exercise rights of property arising from her own ownership interest in jointly held property. But that entitlement did not include a right to rise above the terms of the enduring power of attorney dated 10 January 2008 or a right to deal with property unqualified by the obligation of a fiduciary to account that she assumed when she accepted, and acted upon, her appointment as the deceased's attorney.

THE NATURE AND SCOPE OF THE FIRST DEFENDANT'S AUTHORITY IN OVERVIEW

326. By a process of elimination, the only authority the first defendant had to deal with the deceased's property in the period under review (13 May 2008 – 17 May 2012) was the enduring power of attorney dated 10 January 2008 and, in the absence of any order of the Court or the Guardianship Tribunal, that authority was bound to be exercised, if at all, only for the benefit of the deceased.

327. On and after 13 May 2008, the deceased lacked the mental capacity to deal with, or to approve dealings with, his property. He experienced no lucid intervals after 13 May 2008 that might justify a contrary finding.

328. There is no general rule of agency as between married, or cohabiting, couples; whether there is a relationship of agency between such couples depends on the facts of the particular case: *Pollard v Wilson* [2010] NSWCA 68 at [113].

329. There is no basis for a finding that considerations of "necessity" grounded an authority in the first defendant to deal with property of the deceased. Section 7 of the *Married Persons (Equality of Status) Act* 1996 may not exclude the possibility of an agency of necessity arising from a combination of factors beyond the mere fact of marital status, but neither it nor the Act generally can be read as lending encouragement to an expansive view of a concept (agency of necessity) generally regarded as exceptional and to be confined within strict limits.

330. In any event, no concept of "necessity" could easily operate in favour of the first defendant over the extended period during which she liquidated, and dissipated, the

deceased's property (without availing herself of any opportunity to seek relief that could have been obtained, on terms protective of the deceased, on an application to the Court or the Guardianship Tribunal) in circumstances in which the deceased, before his final descent into incompetency, left her secure in their matrimonial home, with an entitlement to a pension. Nor could the first defendant's application of the deceased's property for her own indulgent purposes, not for his benefit, be justified by any concept of an agency of necessity.

DIMINUTION OF THE DECEASED'S ESTATE

331. At the time of making his Will on 10 January 2008 the deceased held property worth, in total, nearly $1.5 million or thereabouts, comprising:

. (a) a share portfolio worth approximately $952,000 (second defendant's email dated 4 June 2012, annexure 49 to first plaintiff's affidavit sworn 10 September 2013; Transcript page 272, lines 32-34);

. (b) his Emu Plains home unit, worth approximately $400,000;

. (c) a Commonwealth Bank account, with a credit balance of approximately $14,500; and

. (d) a Macquarie Bank account, with a credit balance of approximately $90,000.

332. The parties do not appear to be in dispute about these figures or about the fact that, between 10 January 2008 and 17 May 2012, the first defendant caused asset sales that realised $1,219,952.27.

333. As explained with greater particularity elsewhere in this judgment, those asset sales comprised: (a) sales of securities from the deceased's Investment Portfolio in June 2008, in the sum of $442,183.15; (b) sales of further securities from that portfolio in March-April 2010, in the sum of $377,610.00; and (c) sale of the Emu Plains home unit, realising $400,159.12.

334. The inventory of property attached to the grant of probate issued to the second defendant disclosed property said to have a total value of approximately $60,400. In the course of these proceedings, the second defendant valued the deceased's gross distributable estate at about $75,000.

335. A core complaint of the plaintiffs in these proceedings is that, in the period between the deceased's making of his Will dated 10 January 2008 and his death on 17 May 2012, the bulk of his estate appears to have been applied by the first defendant on expenditure of no benefit to the deceased personally, but apparently for the personal benefit of the first defendant herself and the third and fourth defendants, members of her own family, not in any sense members of the deceased's household.

336. The plaintiffs' complaint is underwritten by the fact that, from mid-2008 until his death, the deceased was resident in a nursing home with his material needs substantially met, I infer, from the proceeds of a pension.

337. In short, the plaintiffs complain that the first defendant took control of the deceased's property in early 2008 and thereafter liquidated and dissipated it for her own purposes and (it might be inferred) to deprive them of any substantial inheritance from their father's estate.

A FORENSIC ACCOUNTANT'S REPORT : THE SOURCES AND APPLICATIONS OF FUNDS USED BY THE FIRST DEFENDANT

338. The evidence adduced by the plaintiffs in support of their claims for relief included a comprehensive, forensic accounting report dated 20 May 2015 prepared by Mr Carl Dumbrell as a report to the Court.

339. It was prepared pursuant to orders made by Sackar J on 13 May 2014, for reasons explained by his Honour in a judgment published as *Ronald Allen Smith and Anor v Joyce Smith and Ors* [2014] NSWSC 582.

340. By reference to rule 46.3 of the *Uniform Civil Procedure Rules* 2005 NSW (which provides that "[the] Court may make orders for the taking of any account or the making of any inquiry"), his Honour proposed that an independent accountant provide a report to the Court on particular transactions. The plaintiffs embraced that proposal, the defendants opposed it. The orders were made.

341. So far as presently material, the orders made by Sackar J were to the following effect (incorporating a clerical correction):

> "(1) Order that there be an accounting and report back to the Court as to where the following proceeds have gone (up to the date of these orders) from the following transactions made by the first defendant:
>
> > (a) the proceeds of sales of securities made from the [deceased's] Investment Portfolio in June 2008 in the amount of [$458,852.55];
> >
> > (b) the proceeds of sales of securities made from the Investment Portfolio in March and April 2010 in the amount of $377,610; [and]
> >
> > (c) the proceeds of the sale of [the Emu Plains home unit of the deceased] transferred on 24 June 2010 in the amount of $400,000....
>
> (2) Order that, in the absence of the parties reaching an agreement as to the [identity of the] accountant within a particular time frame, then, for the purposes of order 1, the parties jointly apply to the President of the Society of Certified Practising Accountants (NSW Branch) to nominate an independent person to act as the accountant to undertake the accounting and prepare the report.
>
> (3) Order that all parties co-operate in the process of accounting, including promptly responding to any reasonable requests for information or documentation by the accountant in such manner as the parties may be advised ....
>
> (6) Order that the costs of the process of accounting and preparation of the report of the court be borne equally by the plaintiffs on the one hand and the defendants on the other hand. At the conclusion of the account and report, the parties are at liberty to apply to the Court on the question of costs of the account and report...."

342. References in Order 1 to the deceased's "Investment Portfolio" are references to the "share portfolio" which, at the time the deceased made his Will dated 10 January 2008, was worth approximately $952,000.

343. Over the year or so following the orders made on 13 May 2014, Sackar J case managed the proceedings for the purpose of facilitating the preparation of the accountant's report. At the end of that process, the proceedings were listed for hearing before me.

344. At a directions hearing on 6 November 2015, I ordered, subject to further order, that the question of costs of the accountant's report be reserved for consideration at such time as the question of costs in the proceedings falls to be determined, and I reserved to the accountant liberty to apply for a variation of that order should he be so advised. No variation has been sought.

345. At the final hearing: (a) the parties agreed that one factual statement in the report should be corrected; (b) subject to that correction, the defendants indicated that they did not, in large measure, challenge the accountant's evidence about where moneys went; (c) by a series of orders made under section 136 of the *Evidence Act* 1995 NSW to overcome particular objections to the accountant's report by the defendants, the point was made that the object and purpose of the report was to make quantitative statements about money flows, not qualitative statements about motives particular parties may have had in giving effect to particular transactions; and (d) the parties agreed that the accountant was not required for cross examination by either side of the record.

346. The formal correction the subject of the parties' agreement was to the effect that a Commonwealth Bank account referred to in paragraph 4 on page 15 (and on the first page of appendix H) in the report was an account which was in the joint names of the deceased and the first defendant, notwithstanding that the report (erroneously) described it as being in the name of the first defendant only. Allowance needs to be made for this correction in references to the account in other passages of the report.

347. Neither the correction nor the necessity for it invalidates the factual analysis of money flows found in the report.

348. The parties' agreed correction having been made, the report's description of money flows can be, and is, adopted by the Court.

349. However, in the nature of the case sought to be made on behalf of the defendants, the report does not deal with all questions that need to be determined by the Court.

350. That is because:

. (a) acknowledging that the first defendant provided funds for the purchase of a residential property at Emu Plains in the names of the third and fourth defendants in June-July 2008, the defendants contend that those funds were provided as a loan by the first defendant to the third and fourth defendants which, in large measure, was repaid, or funded by the third and fourth defendants themselves, in cash;

. (b) the accountant expressed himself as unable to reconcile repayments that the third and fourth defendants claim to have made to the first defendant;

. (c) independently of any payments or "repayments" that might have been made to her by the third and fourth defendants, banking records inspected by the accountant evidence substantial withdrawals of cash by the first defendant; and

. (d) the first defendant contends that shortly after her marriage to the deceased she (in 1998) contributed "around $120,000" to his acquisition of a property at Quakers Hill and shares, the proceeds of sale of which (in 2000) helped to fund the purchase of a property at Faulconbridge, the proceeds of sale of which property (in 2003-2004) helped to fund purchase of the property at Glenmore Park, the proceeds of sale of which (in 2007) helped to fund purchase of the Emu Plains unit.

351. With this qualification, and subject to separate consideration of the defendants' evidence about pooling of funds and cash transactions, I am comfortable with findings to the following effect (about the source and application of funds) based upon the accountant's report, read in the light of the whole of the evidence adduced at the final hearing:

. (a) the whole of the proceeds of sales of securities made from the deceased's Investment Portfolio in June 2008 (in the sum of $442,183.15) and in March-April 2010 (in the sum of $377,610) were, directly or indirectly, paid to or at the direction of the first defendant;

. (b) the whole of the proceeds of the sale of the Emu Plains home unit of the deceased (then in the names of the deceased and the first defendant as joint tenants) in June 2010 ($400,159.12) was paid to or at the direction of the first defendant; and

. (c) the Emu Plains residential property purchased for a price of $347,500 in the names of the third and fourth defendants, in June-July 2008, was acquired using the proceeds of sale of securities from the deceased's Investment Portfolio.

352. Although Order 1(a) of the orders made on 13 May 2014 refers to sales effected in June 2008 as having a total value of $458,852.55, the accountant's report demonstrates that that amount refers to a sale of securities on 13 August 2007 in the sum of $16,669.40 and sales on 2 June 2008 totalling $442,183.15.

353. The sales effected in March-April 2010 in the total sum of $377,610.13 comprised: (a) sales effected on 8 March 2010 in the total sum of $118,644.81; and (b) sales effected on 19 April 2010 in the total sum of $258,965.32.

354. The fact, and quantification, of these transactions can be confirmed, in substance, by reference to the first defendant's evidence: eg, in her affidavit sworn 18 October 2013, paragraphs 23, 37 and 41.

355. In their statement of claim (filed 30 April 2013) the plaintiffs sought orders, under section 36(4)(b) of the *Powers of Attorney Act*, that the first defendant furnish accounts of her dealings with property of the deceased pursuant to the power of attorney dated 10 January 2008. That claim for relief was abandoned in the plaintiffs' written submissions dated 4 December 2015 in light of admission of the accountant's report into evidence.

356. It is not necessary, in these circumstances, to consider: (a) whether, as the defendants contend in their written submissions dated 14 December 2015, the death of the deceased terminated such, if any, operation section 36 of the Act might otherwise have had; or (b) whether, as residuary beneficiaries of the deceased's estate, the plaintiffs can be said to have a sufficient "interest", within the meaning of section 35 (1)(d) of the Act, to give them standing to apply for relief under section 36(4) if relief is otherwise available.

357. Although a fair inference from financial data set out in the accountant's report may be that all money paid to or at the direction of the first defendant from the proceeds of sales of securities from the deceased's Investment Portfolio was (with the exception of $10,000 drawn from the deceased's Macquarie Bank account on 6 June 2008) applied by the first defendant

for her own personal benefit, and otherwise than for the benefit of the deceased, a finding to that effect cannot be made without separate consideration of the defendants' evidence.

REAL PROPERTY TRANSACTIONS OF THE FIRST DEFENDANT ON THE DECEASED'S ACCOUNT

358. Nevertheless, on a review of the whole of the evidence: in and from January 2008, the first defendant appears to have wasted no time in taking control of the deceased's property, applying most of it for the benefit of herself and her side of the family (specifically, the third and fourth defendants) and dissipating what she feared might otherwise be the plaintiffs' inheritance from their father's deceased estate.

The Deceased's Emu Plains Home Unit

359. On or about 14 February 2008 (by a memorandum of transfer AD780158 bearing that date) the deceased's Emu Plains home unit (the residence of the first defendant and himself) was transferred by the deceased, for a consideration of one dollar, to himself and the first defendant as joint tenants. The deceased and the first defendant each signed the Transfer. Mr Low witnessed their signatures.

360. On or about 16 June 2010 (by memorandum of transfer AF577800 bearing that date) the unit was sold to a third party for $400,000. The first defendant signed the Transfer both in her personal capacity and as the deceased's attorney (pursuant to the power of attorney registered as Book 4535 No. 885, the instrument dated 10 January 2008). The amount received as sale proceeds ($400,159.12) represents the sale proceeds, subject to customary adjustments.

361. The plaintiffs contend that the first defendant did not account to the deceased, and has not accounted to his estate, for any part of the proceeds of sale of the unit.

362. The first defendant says that she sold the unit to fund the building of the granny flat on the land at Emu Plains acquired in the names of the third and fourth defendants. She says that she paid for construction of the granny flat, its fit-out and ancillary expenses in the total sum of "around $200,000". Accepting that evidence as accurate, it accounts for only about one half of the sale proceeds.

Purchase of the Third and Fourth Defendants' Residence

363. By a contract dated 14 June 2008, the third and fourth defendants contracted to purchase a residence at Emu Plains for $347,500. The purchase was completed on or about 7 July 2008 or, at least, 11 July 2008, the date upon which memorandum of transfer of AE82486 in favour of the third and fourth defendants was registered. They became registered proprietors, as joint tenants, without any mortgage, registered or unregistered: Transcript page 167.

364. The first defendant paid the whole of the purchase price of this property with funds sourced from the deceased's account with the Macquarie Bank.

365. The 10% deposit of $34,750 was paid in two instalments: $868.75 on the date of contract and the balance of $33,881.25 on 20 June 2008. Both amounts were paid by the first

defendant out of the deceased's Macquarie Bank account. The evidence includes a cheque for the larger amount drawn on the deceased's "Portfolio Account" with Macquarie Bank, a cheque signed by the first defendant as the deceased's attorney.

366. Subject to consideration of the third and fourth defendants' contention that they made (re)payments of cash to the first defendant, the balance of the purchase price ($312,750), subject to adjustments, was also funded by the deceased. On 23 June 2008 the first defendant transferred $365,000 from the deceased's Macquarie Bank account to the Commonwealth Bank joint account of the deceased and herself. On 1 July 2008 she withdrew $364,751.07 from that account, the same date upon which she drew a succession of cheques on the deceased's Macquarie Bank account to facilitate settlement of the purchase.

367. A letter dated 30 June 2008 addressed to the third and fourth defendants by the conveyancer acting for them on the purchase requested $325,469.06 for the purpose of payment of the balance of the purchase price (as adjusted), stamp duty and costs on the purchase, settlement of which was then anticipated to occur on 7 July 2008.

368. The conveyancer requested "personal cheques" in favour of Penrith City Council, Sydney Water and the conveyancer's firm, as well as bank cheques in favour of the National Australia Bank (the vendor's mortgagee) and the Office of State Revenue (in payment of stamp duty).

369. In response, the first defendant provided as the "personal cheques" several cheques, each dated 1 July 2008, drawn on the Macquarie Bank "Portfolio Account" of the deceased, signed by her as the deceased's attorney.

370. The cheques dated 1 July 2008 signed by the first defendant were written out and signed by her, in the presence of the third defendant and possibly the fourth defendant, in the office of the conveyancer: Transcript page 212. The third defendant concedes her presence: Transcript pages 260-263. The fourth defendant does not concede his: Transcript page 161. In the absence of evidence from the conveyancer, I proceed on the basis that the third defendant was present, but the fourth defendant was not.

371. The bank cheques were also provided by the first defendant, funded by cheques drawn by her on the deceased's Macquarie Bank "Portfolio Account" on 2 and 23 June 2008, deposited in the Commonwealth Bank joint account of the deceased and the first defendant.

372. The first defendant's contribution also extended to the payment of $299.75 for insurance incidental to the purchase. That amount, like the provision of other funds, was funded by a cheque drawn on the deceased's Macquarie Bank "Portfolio Account", signed by the first defendant as his attorney.

373. In cross-examination each of the third and fourth defendants conceded that the whole of the amount required to effect the purchase was provided by the first defendant: Transcript pages 160, 161, 164-165 and 264.

374. The first, third and fourth defendants' evidence, in substance, is that, pursuant to an oral agreement made between them at the time of purchase, by cash payments made to the first defendant personally, the third and fourth defendants contributed $145,000 - $150,000 (they contend, $150,000) to the purchase price at the time of the purchase, and a further $200,000 on 23 March 2009 following upon sale of their former (Medlow Bath) residence: first defendant's affidavit sworn 28 October 2013, paragraphs 36 and 40; third defendant's

affidavit sworn 28 October 2013, paragraphs 12-13; fourth defendant's affidavit sworn 16 October 2013, paragraphs 19-20 and 24-26.

375. The fourth defendant's evidence is that the first of these payments (he says, $150,000) was made, in mid-2008, from the balance of the proceeds of a superannuation entitlement that he had withdrawn, in cash, in about July 2002 and had retained, in cash, for the ensuing six years: affidavit sworn 16 October 2013, paragraphs 9-12 and 19; Transcript pages 158-160 and 184.

376. His evidence is that the second payment ($195,000 plus a further $5,000, $200,000 in total) was, to the extent of $195,000, withdrawn, in cash, from a bank account of the third defendant and himself on 23 March 2009. He produced a bank statement consistent with that withdrawal: Affidavit sworn 16 October 2013, Annexure E.

377. A controversial receipt dated 23 March 2009 (receipt number 11) purports to record a receipt, by the first defendant, from the third and fourth defendants of the sum of "$195,000 plus $5,000" ($200,000) for an undisclosed purpose. The original receipt, signed by the first defendant, remains in a receipt book (Exhibit P3), said to belong to the fourth defendant. A carbon copy of the original is so faint as to be unreadable.

378. The receipt book appears not to have been regularly used, but retained over decades. The first receipt is dated 12 November 1989. It purportedly records the first defendant's receipt from the third and fourth defendants of $5,000 as a deposit on land at Nundle, near Tamworth, purchased by the third and fourth defendants from the first defendant (then known as "Joy Jones") and her then partner, Martin Charles Jones. Subsequent receipts (numbered 2-10 respectively) bear dates between 19 October 1990 and 29 August 1994. Receipt No. 2, dated 19 October 1990, appears to have been signed by "MC Jones". The receipts numbered 3-10 appear to have been signed by the first defendant as "J Jones". The fourth defendant says, and their appearance is consistent with his statement, that those receipts relate to the third and fourth defendants' payments to the first defendant of instalments on the purchase price of the Tamworth land. Those payments total $25,500. How that amount squares with the fourth defendant's evidence (in paragraph 7 of his affidavit sworn 16 October 2013) that the purchase price for the land was $20,000 is not explained in the evidence.

379. The receipt book appears not to have been used between 29 August 1994 and 23 March 2009.

380. Immediately following receipt number 11 are two further receipts dated 23 March 2009, each purporting to record a receipt of money by the first defendant from the third and fourth defendants. Receipt number 12 is for an amount of $149,735 "being balance of house and costs". Receipt number 13 is for the sum of $11,131.50 being for "Office of State Revenue 'stamp duty'".

381. The fourth defendant's affidavit offers no explanation for receipts 12 or 13. In cross-examination, he described receipt number 12 as relating to the $150,000 he deposed to having given the first defendant nine months or so earlier than the date it bears: Transcript pages 178-179.

382. The signature of the first defendant on the copy of receipt number 11 annexed to the fourth defendant's affidavit appears to be different from that which appears on the original receipt in Exhibit P3.

383. Apart from the signature(s) on the two versions of the receipt, the handwriting is that of the third defendant: Transcript pages 170-171.

384. The only other receipts in Exhibit P3 (a book of 100 receipt forms) are unrelated receipts respectively numbered 15 (dated 11 September 2014), 39 (dated 17 November 1994) and 75 (dated 18 June 1992). The book appears not ever to have been part of a regular accounting system, but rather a record of convenience for occasional use.

385. The authenticity, or otherwise, of the receipts dated 23 March 2009, and the probative value of the defendants' evidence that the third and fourth defendants paid the first defendant $350,000 or thereabouts by two or three instalments, ultimately depends in large measure on the credibility of the first, third and fourth defendants.

Construction of a Granny Flat for the First Defendant

386. On 18 March 2010 the third and fourth defendants entered a building contract for the construction of a "granny flat" addition to their Emu Plains residence for $124,000. The contract disclosed the source of funds for payment of the contract price to be "cash", available otherwise than from the third and fourth defendants or a lender.

387. By her Defence, the first defendant admits that she paid $124,800 to the builder for that work. By her evidence, she deposes to having paid a total of about $200,000 for the construction, fit out and ancillary expenses relating to construction of the granny flat, funded by sales of the deceased's shares and securities and by her sale of the Emu Plains home unit.

388. The third defendant's evidence is that she and her husband allowed the first defendant to build a granny flat at the rear of their residence on the agreed basis that the first defendant would pay for its construction, as she did: affidavit sworn 28 October 2013, paragraphs 16-17. The fourth defendant's affidavit evidence is to similar effect insofar as he records an agreement with the first defendant that she would pay the cost of construction: affidavit sworn 16 October 2013, paragraph 29. In cross-examination, he agreed that she paid for all the building costs associated with the granny flat: Transcript page 180.

389. On the whole of the evidence, the correct inference appears to be that, using funds of the deceased, but possibly also her share of the proceeds of sale of the Emu Plains home unit, the first defendant paid for the whole of the costs of construction of the granny flat, unqualified by any contention that the third and fourth defendants made a financial contribution to the construction costs.

390. Although the defendants have expressly elected to be represented by the same legal team in these proceedings, the interests of the first defendant (on the one hand) and (on the other hand) the interests of the third and fourth defendants are here ostensibly in conflict.

391. The third and fourth defendants are registered as proprietors of the Emu Plains property, including the granny flat occupied by the first defendant. The property has not been subdivided in any way. The third defendant's evidence is to the effect that she and her husband own the whole property, unencumbered by any interest of the first defendant. The first defendant's evidence is that she owns the granny flat in her own right, a proposition which (if correct) translates into a claim to an (indeterminate) equitable entitlement *vis-a-vis* the third and fourth defendants, holders of legal title to the property. In paragraph 47.3 of her

affidavit sworn 28 October 2013 she asserts an entitlement to an "(informal) life interest (or residency agreement) in" the property.

392. The third and fourth defendants' claim to full ownership of the property is predicated on assertions by them that, in substance, they funded, or repaid, the first defendant sums applied by her towards their acquisition of the property.

393. On 11 March 2011 each of the third and fourth defendants made a Will providing for the first defendant to have "the use and occupation and enjoyment of the granny flat during her lifetime", paying a proportion of rates, taxes and outgoings and being responsible for its maintenance.

The Plaintiffs' caveat on the title to the Emu Plains residence of the first, third and fourth defendants

394. The title to the Emu Plains residence acquired in the names of the third and fourth defendants remains in their names (without any formal acknowledgement of such, if any, right, title or interest the first defendant may have referable to the property), subject to a caveat lodged (as Dealing No. AH815182) by the plaintiffs against the title on or about 24 June 2013.

395. The "estate or interest" claimed by the caveat is that of "an interest in the land as equitable mortgagee".

396. That estate or interest is said, in the caveat, to have been claimed "by virtue of" the following statement of facts:

> "The purchase moneys for the land being from the incapacitated estate of the Caveators' father, now deceased, which was not authorised to be applied towards the purchase of the land and which was to pass to the Caveators under the deceased's Will, the purchase moneys being currently the subject of [the present proceedings, identified by the Court's allocated case number] for equitable tracing and account."

397. The defendants have not filed a cross claim in the proceedings seeking an order, under section 74MA of the *Real Property Act* 1900 NSW, that the caveat be withdrawn.

398. Nevertheless, the question whether an order should be made for withdrawal of the caveat is a live one in the proceedings, having regard to:

. (a) the direction in section 63 of the *Supreme Court Act* 1970 NSW that "[the] Court shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, so far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided"; and

. (b) the provisions of section 90 of the *Civil Procedure Act* 2005 NSW and rule 36.1 of the *Uniform Civil Procedure Rules* 2005 NSW, which authorise the Court to give such judgment, or to make such order, "as the nature of the case requires".

399. The plaintiffs take no point about the absence of a cross claim. They accept that, if the deceased's estate is found to have no proprietary interest in the Emu Plains residence, an order for withdrawal of their caveat should be made.

400. The form of the caveat correlates closely with the form of the statement of claim filed by the plaintiffs on 30 April 2013. See paragraphs 7-10 of the prayers for relief and paragraphs 45-48 of the allegations of fact, read in the context particularly of paragraphs 19-20 (which recite the third and fourth defendants' purchase of their Emu Plains residence with funds of the deceased), paragraph 24 (which recites the first defendant's funding of construction of the granny flat on the property with funds of the deceased), paragraphs 40-41 (which allege that the first defendant used funds of the deceased in breach of her fiduciary duties), paragraph 46 (which recites the third and fourth defendants' receipt of the deceased's funds) and paragraph 47 (which alleges that the third and fourth defendants received those funds with actual or constructive knowledge that, in paying the funds, the first defendant was acting in breach of her fiduciary duties").

401. The caveat was admitted into evidence *via* an affidavit sworn by the fourth defendant (on 16 October 2013) in which, in effect, he denied that the plaintiffs have a caveatable interest in the property registered in the names of the third defendant and himself.

DID THE DISPUTED TRANSACTIONS FOR WHICH THE DEFENDANTS CONTEND OCCUR?

402. The case for which the first, third and fourth defendants contend depends, in varying degrees, upon an acceptance of evidence given by them about particular transactions.

403. That evidence is, on the whole, uncorroborated in any reliable way and, in any event, dependent upon acceptance of each of the first, third and fourth defendants as a reliable witness of truth.

404. After anxious consideration, I have concluded that I cannot accept their evidence as conforming to that standard.

405. I proceed on the basis that the plaintiffs bear the onus of proving the character of payments made to the third and fourth defendants funded by property of the deceased but, insofar as the third and fourth defendants contend that they repaid money the subject of those payments, they bear an onus of proving the fact of repayment: *Coshott v Sakic* (1998) 44 NSWLR 667 at 671D-672C. At the end of the day, however, my determination of these issues is not dependent upon location of the onus. I am comfortably satisfied with the factual findings made.

The First Defendant's Alleged, Initial Contribution of Around $120,000.00

406. In support of a general contention that she was entitled to treat herself as having a proprietary interest in property held in the name of the deceased, the first defendant deposes to having made a financial contribution of "around $120,000" to the purchase by the deceased of a property at Quakers Hill that was their first joint residency: first defendant's affidavit sworn 28 October 2013, paragraphs 9-16.

407. I do not accept that any such contribution was ever made by the first defendant.

408. Apart from general reservations, elsewhere noted, about the reliability of the first defendant's evidence, my reasons for this are as follows:

. (a) The first defendant's evidence rises no higher than general assertions, coupled with references to a chain of property dealings that falls far short of even a rudimentary tracing exercise.

. (b) There is no evidence that the deceased ever acknowledged having received a capital contribution to his wealth from the first defendant.

. (c) Consistently with that, the evidence of the first plaintiff is that his father never mentioned such a contribution to him, despite complaints by him to his father about his perception that the first defendant was out to exploit his wealth without herself making any substantial contribution to it.

. (d) The third defendant, who was at all times very close to her mother, gave evidence that, to her knowledge, the first defendant had no independent financial means (other than the pension) when she met the deceased, and the deceased had been looking after her financially: Transcript pages 256-257.

Funding the Purchase of the Third and Fourth Defendants' Emu Plains Residence

409. In their denials that the estate of the deceased has any interest in, or referable to, their residence at Emu Plains, the first, third and fourth defendants deposed to the third and fourth defendants having paid to the first defendant cash sums of:

. (a) $150,000.00 or thereabouts, in mid-2008, at the time of purchase of the property in the names of the third and fourth defendants; and

. (b) $200,000.00, on 23 March 2009, following the third and fourth defendants' sale of their former (Medlow Bath) residence.

410. I do not accept that either payment was made.

411. Apart from general reservations about the reliability of the evidence of the first, third and fourth defendants, I do not accept that a sum of $150,000.00, or thereabouts, was paid by the third and fourth defendants to the first defendant in mid-2008 because:

. (a) There is no contemporaneous, corroborative record of any payment by the third or fourth defendants to the first defendant of $150,000 in or about mid-2008: Transcript pages 216-217.

. (b) There is no independent witness to the alleged payment.

. (c) The alleged payment is said to have been made in cash in circumstances unverifiable upon an independent review.

. (d) The source of the payment is said to have been the balance of superannuation funds withdrawn by the fourth defendant six years earlier and held by him, in cash, over the intervening years, professedly without any desire to earn interest in the meantime: Transcript pages 159-160.

. (e) The fourth defendant's evidence about the payment was expressed in the language of reconstruction, not recollection: such and such "would have" or "could have" happened, not that it did happen: Transcript pages 154-155 and 158.

. (f) In his cross examination, the fourth defendant initially deposed to having received a receipt from the first defendant for his payment of the $150,000, but he retracted that

evidence (Transcript page 157) and appeared to be at a loss to explain the receipt dated 23 March 2009 signed by the first defendant for a sum of $149,735.00 (Transcript pages 178 – 179; Exhibit P3).

. (g) Although the third and fourth defendants asserted that the fourth defendant paid to the first defendant $150,000.00, the first defendant's evidence was initially that the sum was $145,000 (Affidavit sworn 28 October 2013, paragraphs 36-37), which evidence she endeavoured in cross-examination to explain away by saying that she had been given an extra $5,000.00 in cash (Transcript page 214).

. (h) Records of the first defendant, so far as they exist, do not provide any evidence of her receipt of $150,000.00 from the third and fourth defendants *or a tracing of any such money in her hands*.

. (i) The first defendant (Transcript page 215) and the fourth defendant (Transcript page 155) were unable to recollect with any confidence where they were when the payment was allegedly made.

. (j) Although allegedly intended as a means of partially funding the first defendant's payment of the purchase price for the third and fourth defendants' Emu Plains residence, no part of the $150,000.00 allegedly paid by them was deposited by the first defendant in a bank account of the deceased to fund the payments she made to acquire the property: Transcript page 218.

412. Apart from general reservations about the reliability of the evidence of the first, third and fourth defendants, I do not accept that a sum of $200,000.00, or thereabouts, was paid by the third and fourth defendants to the first defendant on or about 23 March 2009 because:

. (a) Although there is a bank statement that purports to record a withdrawal of $195,000 from a joint account of the third and fourth defendants on 23 March 2009 (fourth defendant's Affidavit sworn 16 October 2013, Annexure E) and a receipt bearing that date signed by the first defendant (Exhibit P3, receipt number 11), there is no necessary connection between the two documents.

. (b) There is no contemporaneous, corroborative record that evidences a connection between the two documents: Transcript, page 219.

. (c) There is no independent witness to the alleged payment.

. (d) The alleged payment is said to have been made in cash in circumstances unverifiable upon an independent review.

. (e) The fourth defendant exhibited uncertainty as to where he and the first defendant were when the alleged payment was made: Transcript page 169.

. (f) The form of the receipt signed by the first defendant (Exhibit P3, Receipt number 11) invites suspicion, not only because of differences in the appearance of her signature on different copies of the receipt, but because the receipt itself records a receipt of "$195,000 plus 5,000" (an unusual form of entry) rather than simply $200,000.00, and there is no description of the character or purpose of the payment recorded on the face of the receipt.

. (g) In her affidavit account of the alleged payment of $200,000 to her (Affidavit sworn 28 October 2013, paragraph 40), the first defendant made no reference to her provision of a receipt: *Cf*, Transcript page 220.

. (h) In her affidavit evidence about the payment (Affidavit sworn 28 October 2013, paragraph 13), the third defendant deposed to a payment of "around $200,000" and said that the fourth defendant "looked after the finances and repayment". For his part, the fourth defendant

identified the writing on Receipt number 11 (Exhibit P3), other than the signature, as writing of the third defendant: Transcript pages 170-171.

. (i) The first defendant expressed herself (at Transcript pages 221-222) as unable to explain precisely how she dealt with the $200,000 cash she is supposed to have received, some of which she said she kept at home just to use it as she needed it.

. (j) Although the $200,000 is said to have been a repayment of a loan (funded, in fact, from the deceased's property) no part of any such payment was returned to the deceased's Macquarie Bank account: Transcript page 221.

413. I do not accept that the purchase of the Emu Plains residence in the names of the third and fourth defendants in 2008 was attended by any agreement between the first, third and fourth defendants for the first defendant to provide to the third and fourth defendants nothing more than a "bridging loan" pending sale of their Medlow Bath residence.

414. Apart from general reservations about the reliability of their evidence, this is because:

. (a) There is no contemporaneous, corroborative record of any such agreement, the witnesses to which are said only to have been the first, third and fourth defendants (close relatives, one and all).

. (b) There is no independent witness to the alleged agreement *or its implementation*.

. (c) Although funding for acquisition of land in the names of the third and fourth defendants came entirely from property of the deceased, the defendants' evidence is that their agreement involved no reference to the deceased *or the source of funds*.

. (d) This is despite the defendants' characterisation of about $200,000.00 of that funding as a "bridging loan".

. (e) Despite the first, third and fourth defendants' engagement with a conveyancer on the purchase of the Emu Plains residence (and the third and fourth defendants' use of a solicitor on the sale of their Medlow Bath property, allegedly the source of funds to repay the first defendant), the defendants have produced no conveyancing record that evidences the existence of a "loan" or any protection for either the first defendant as "lender" or the third and fourth defendants as "borrowers".

. (f) The payments allegedly made by the third and fourth defendants to the first defendant have not been reconciled with available documentation and, one can reasonably conclude, cannot be so reconciled.

415. On my findings, the Emu Plains residence was acquired in the names of the third and fourth defendants in 2008 using only funds of the deceased to which the first defendant had no personal, beneficial entitlement.

416. The first defendant did not acquire any beneficial entitlement to funds of the deceased used in the acquisition of the Emu Plains residence merely by channelling them through a bank account held in the joint names of the deceased and herself. At all material times she remained liable to account to the deceased, or his estate, for her dealings as his attorney with his property.

THE FIRST DEFENDANT: ASSUMPTION OF FIDUCIARY OBLIGATIONS, BREACH, REMEDIES

The Status of a Fiduciary

417. By accepting, and acting upon, her appointment as the deceased's attorney on the terms set forth in the Enduring Power of Attorney executed by both the deceased and herself on 10 January 2008, the first defendant accepted, *vis-à-vis* the deceased, the obligations of a fiduciary governed by those terms.

418. A relationship of principal and agent is ordinarily recognised as an established category of fiduciary: *Hospital Products Pty Limited v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 68, 96 and 141.

419. Viewing the relationship between the deceased and the first defendant in substance, not merely form, its fiduciary character can readily be seen. It has all the indicia of a fiduciary relationship: At, and at all times after, the time the power of attorney dated 10 January 2008 was executed, the first defendant occupied a special relationship of trust and confidence *vis-a-vis* the deceased, a vulnerable man who, through encroaching mental infirmity, was progressively unable to manage his own affairs and increasingly, then (no later than 13 May 2008) totally, dependent upon her (as she undertook) to protect his interests, legal and practical. She bound herself, in conscience, to act in his best interests, not to subordinate those interests to her own. The power of attorney, fully engaged as an *enduring* power of attorney after the deceased's loss of mental capacity, imposed upon the first defendant all the attributes of a fiduciary when she acted, or was called upon to act, within the realm within which it operated; namely, management of the estate (property) of the deceased as a person incapable of managing his own affairs.

420. The first defendant acknowledged her obligations as a fiduciary when she actively deployed the power of attorney in dealing with the deceased's property after he lost the mental capacity required to transact business on his own behalf.

421. Her deployment of the power of attorney was overtly on display when, for example:

. (a) she provided a copy of the instrument to Macquarie Bank under cover of her handwritten note dated 13 May 2008.

. (b) in funding the purchase of the Emu Plains property in the names of the third and fourth defendants, in June-July 2008, she drew cheques on the deceased's Macquarie Bank "Portfolio Account" expressly signed "J Smith for RJ Smith".

. (c) in selling the Emu Plains home unit in 2010, she executed Memorandum of Transfer AF5778005 dated 16 June 2010 on behalf of the deceased.

422. Her deployment of the power of attorney was also implicitly on display when, having warned the plaintiffs off "interfering" with the deceased's affairs after 10 January 2008, she provided Dr Dixon's medical certificate dated 13 May 2008 to the first plaintiff that same day.

423. She was no less the deceased's agent, constrained by the terms of the power of attorney, if, as she suggests, she deployed the written Authority dated 1 November 2007 in the sale of shares and securities of the deceased after 13 May 2008. Her authority, if she had any at that time, was grounded in, and dependent on, the power of attorney.

424. She was no less the deceased's agent, constrained by the terms of the power of attorney, because she was the deceased's wife.

425. The defendants' reliance upon *Edward v Cheyne (No 2)* (1888) 13 App Cas 371 at 398 and *O'Malley v Public Trustee* [1956] VicLawRp 30; [1956] VLR 194 at 197 (fact-specific decisions about fully functional, one dimensional relationships between a husband and wife in which a wife was found to have surrendered her income and property to her husband as

the head of their household) offers little assistance in the current context beyond a reminder that law and practice, in each generation, need to consult considerations of convenience in the preservation of peace within families. An object of the power of attorney granted by the deceased to the first defendant on 10 January 2008 was to provide a mechanism, with an identifiable legal framework, for the orderly management of the estate of a person in need of protection.

The Nature and Scope of the First Defendant's Obligations as a Fiduciary

426. "The terms of the power of attorney" incorporated the limitations expressly acknowledged in sections 11(1), 12(1) and 13(1) of the *Powers of Attorney Act*, unqualified by the extensions of authority for which sections 11(2), 12(2) and 13(2) provide but which the deceased did not embrace.

427. The express warnings given to the first defendant in the prescribed notes forming part of her instrument of appointment can reasonably be taken as informing an assessment of the nature and scope of her obligations as a fiduciary. As the deceased's attorney:

. (a) she was bound to act in his best interests, without unauthorised benefit to herself.

. (b) she should keep her and the deceased's property separate.

. (c) she should keep reasonable accounts and records about the deceased's money and property.

428. The first defendant does not suggest that the reference to "joint" ownership or "joint" bank accounts in the sixth paragraph of the notes in any way influenced her conduct, or justifies or excuses her conduct, of the deceased's affairs.

429. As between principal and agent, the first defendant was a fiduciary and was required not to place herself in a position of conflict, nor to obtain a benefit from her position as the deceased's attorney, without first obtaining "fully informed consent": *Taheri v Vitek* [2014] NSWCA 209; (2014) 87 NSWLR 403 at 427[115].

430. In the context of the current case (in which the deceased made deliberate, formal arrangements defining the nature and scope of the first defendant's authority, conscious of tensions within his blended family, and in contemplation of his mental faculties rapidly failing), there is less scope for a departure from these standards than (as *Hospital Products Limited v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 102-104 instructs) might be appropriate in another setting.

431. Given the deceased's mental incapacity at all material times (that is, on and after 13 May 2008), the first defendant was *unable* to obtain "fully informed consent" *from him*. It would have sufficed had she obtained authorisation *via* an order of the Court, or the Guardianship Tribunal, exercising protective jurisdiction, in effect, on behalf of the deceased. This she did not do.

432. However, even now, in deciding whether (and, if so, to what extent) the first defendant should be held to account for a breach of her fiduciary obligations, the Court needs to consider the interplay between its protective and equity jurisdictions as illustrated by *Countess of Bective v Federal Commissioner of Taxation* [1932] HCA 22; (1932) 47 CLR 417 at 420-423, *McLaughlin v The City Bank of Sydney* [1912] HCA 16; (1912) 14 CLR 684 at 698-699 and 704 and *Downie v Langham* [2017] NSWSC 113.

433. In this case, this is best done in logical sequence, considering: (a) whether the first defendant was a fiduciary, as has been found; (b) the nature and scope of her obligations as a fiduciary in the particular factual setting, here done; (c) what, if any, findings of breach of fiduciary obligations are apt, the topic next to be addressed; and (d) an appropriate remedial response to any finding of breach, a topic that requires an holistic review of the case.

Breaches of Fiduciary Obligations

434. There was an element of "breach" in almost everything the first defendant did in management of the deceased's affairs, in reliance on the power of attorney dated 10 January 2008, after 13 May 2008. She routinely preferred her own interests over those of the deceased. She did not consistently act only for his benefit, save to the extent that she saw benefit to him through the prism of benefit to herself. She generally treated his property as her own. Without authority, she appropriated his property for her own benefit, and for that of her side of the family, with the intent of diminishing any prospective inheritance of the plaintiffs from the estate of the deceased.

435. She never kept any auditable records, preferring, as she did, to live within an opaque cash economy.

436. She was not unmindful of a need to ensure that the first defendant was comfortable in his nursing home accommodation but, financially, she proceeded upon an assumption that, provided his nursing home bills were paid, she was free to do as she wished with his property without exposure to any liability to account for it.

437. Illustration of this can be found in her realisation of capital assets in June 2008, March-April 2010 and June 2010; in her pattern of expenditure between mid-2008 and mid-2012; and in her approach to record-keeping.

438. In June 2008 the first defendant realised the sum of $442,183.15 from sales of securities made from the deceased's Investment Portfolio.

439. In March-April 2010 the first defendant realised the sum of $377,610.00 in sales of securities made from the deceased's Investment Portfolio.

440. In June 2010 the first defendant realised the sum of $400,159.12 from sale of the Emu Plains home unit of the deceased and herself.

441. In an affidavit sworn (on 13 July 2015) for the purpose of providing reconstructed estimates of income and expenditure the first defendant expressly recorded that she did not include estimates of pension money received by the deceased and herself, or interest received on term deposits. Even with broad, uncorroborated estimates of her expenditure, she professed herself unable to account for $58,655.00 of moneys received from asset sales.

442. Without independent corroboration her reconstructed accounts are not reliable. On her own admission, they are incomplete.

443. During the period she managed the deceased's affairs as his enduring attorney (13 May 2008-17 May 2012) the first defendant's pattern of expenditure (as summarised by her, without corroboration, in her affidavit sworn 13 July 2015) included substantial expenditure on jewellery, holidays, poker machines and other entertainment.

444. The payments made by the first defendant in June and July 2008, at the direction of the third and fourth defendants, for purchase of the Emu Plains residence in their names, using

funds of the deceased, were made by way of a gift, not a loan by the first defendant to the third and fourth defendants as a means of diverting funds away from any prospective inheritance of the plaintiffs from the deceased's estate. They were not made for the benefit of the deceased or in his interests.

445. The payments made by the first defendant in 2010, at the direction of the third and fourth defendants, for construction of a granny flat on the Emu Plains property, were likewise made by way of a gift by the first defendant to the third and fourth defendants, as a means of cutting out the plaintiffs, but with an expectation common to the first, third and fourth defendants that the first defendant would reside in the granny flat. The payments were not made for the benefit of the deceased or in his interests.

446. I am not satisfied that the first defendant expended any of her own funds in acquisition of the Emu Plains residence or construction of the granny flat. The funds she used were funds of the deceased. She used his funds without any authority to do so.

The First Defendant's Failure to Account

447. During her period of ascendancy, in *de facto* management of the deceased's affairs, on and after 13 May 2008, the first defendant appears to have eschewed record-keeping of any kind that might facilitate a chapter and verse review of her activities.

448. Where an accounting party fails to keep proper accounts, and thereby renders problematic any exercise of accounting by the Court, the Court generally proceeds on a presumption against that party, resolving doubtful questions against the party whose actions have made an accurate determination problematic: *Houghton v Immer (No. 155) Pty Limited* (1997) 44 NSWLR 46 at 59D, applying *Armory v Delamirie* (1722) 1 Stra 505; [1722] EWHC KB J94; 93 ER 664. This principle may require moderation in its application to the facts of the particular case in order to serve the interests of justice; but, in a case in which an accounting party has deliberately put it out of the power of an adversary to obtain an accounting to which there is an entitlement, the accounting party cannot complain if the Court presumes the worst against him, her or it.

449. Pointing in the same direction is the principle that, where a fiduciary has mixed trust funds with his, her or its own so as to render identification impossible, the whole fund will be treated as trust property except so far as the fiduciary may be able to distinguish what is his, her or its own: *Brady v Stapleton* [1952] HCA 62; (1952) 88 CLR 322 at 336-337; *Hospital Products Limited v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 109-110; *Warman International Limited v Dwyer* [1995] HCA 18; (1995) 182 CLR 544 at 561-562; *Cf, In the marriage of Wagstaff* (1990) 14 Fam LR 78 at 86. The accounting party bears the onus of proving what, if any, part of a mixed fund is his, her or its own.

450. It is for the errant fiduciary to establish that it would be inequitable for the Court to make against the fiduciary an order for an account of the entire profits, gain or benefits derived by the fiduciary from a breach of fiduciary obligations: *Warman International Limited v Dwyer* [1995] HCA 18; (1995) 182 CLR 544 at 556-562, especially 559 and 561-562.

451. An application of these principles requires that the first defendant bear the onus of proving (which she has not done) that, insofar as the proceeds of the sale of the Emu Plains home unit funded the construction of her granny flat, that funding was provided by her (so

that she might hold a personal, beneficial interest in her current residence) rather than by the deceased (on whose behalf she might be found, if she spent his share of the home unit sale proceeds on construction work, to hold whatever interest she may have in the land at Emu Plains registered in the names of the third and fourth defendants).

452. A need for flexibility in the application of a strict accounting standard is recognised in *Countess of Bective v Federal Commissioner of Taxation* [1932] HCA 22; (1932) 47 CLR 417 at 420-423 where, for example, a "guardian" and a person under the care of the guardian are members of the same household and care is provided on a day-to-day basis. Different considerations may apply to such a case than apply, for example, in a case such as the present where the guardian has placed the person under care in nursing home accommodation, guardian and patient occupy separate residences and the patient is not under the day-to-day care of the guardian.

453. What marks these examples out as potentially different is not necessarily membership of a single household or responsibility for the day-to-day care of an incapable person, but considerations of the purpose for which property is placed under the management of a fiduciary and whether the purpose has been fulfilled: *Crossingham v Crossingham* [2012] NSWSC 95 at [18] *et seq*, citing *Countess of Bective*, *Jodrell v Jodrell* [1851] EngR 781; (1851) 14 Beav 397; 51 ER 339, *Brown v Smith* (1878) 10 Ch D 377 and *Clay v Clay* (2001) 202 CLR 410 at 430.

454. The relaxed, purposive approach in *Countess of Bective* to the accounting obligations of a "guardian" can be applied to the first defendant as the deceased's attorney and guardian (*Downie v Langham* [2017] NSWSC 113), but it does not operate retrospectively as a licence for the first defendant to disregard the deceased's interests. Her appointment to fiduciary office was for the purpose of management of the deceased's estate for his benefit, not for her own benefit, during his incapacity for self-management. Her dissipation of his property for her own benefit deprives her of any entitlement she might otherwise have had, by reference to *Countess of Bective*, to escape an order for an accounting: *Woodward v Woodward* [2015] NSWSC 1793 at [56].

455. In the absence of proper accounting records, the parties appear to have approached accounting questions: first, by recording in the aggregate the first defendant's receipts from realisation of property of the deceased ($1,219,952.27, the sum of $442,183.15, $377,610.00 and $400,159.12); secondly, by allowing in favour of the first defendant one half of the proceeds of sale of the Emu Plains home unit ($200,079.56, one half of $400,159.12); and thirdly, by testing, so far as practicable, the veracity of the first defendant's estimates of how it was that she expended the balance ($1,019,872.71), recognising that this process will not have brought to account interest that was, or ought to have been, earned on the deceased's investments or his pension entitlements.

456. Accepting this methodology, rough though it is (*Warman International Limited v Dwyer* [1995] HCA 18; (1995) 182 CLR 544 at 556-557, 558 and 567), and for the time being leaving interest and pension entitlements unaccounted for, the first defendant has an obligation to account for not less than $1,019,872.71 of the deceased's funds insofar as not applied for his benefit.

457. The first defendant's *expost facto* rationalised, reconstructed estimates of expenditure provide no reliable basis for an assessment of the amount of money expended by her on the

maintenance of, and care for, the deceased in the period between 13 May 2008 and 17 May 2012. On her own admission, she has not accounted for all of the property of the deceased under her management. She says she is unable to do better than she has done and, through current impecuniosity, she says she is unable from her own resources to make good any property of the deceased which she might be held liable to restore to his estate.

458. Unable to accept the veracity and reliability of her evidence, I conclude that any application by her of the property of the deceased towards his care and maintenance, or otherwise for his benefit, was *de minimus*, sufficiently covered by her failure to account for his pension entitlements and interest earned on bank deposits funded by his estate.

459. Having regard to the quantum of property involved in the first defendant's dealings with the deceased's property, and her failure to account for significant components of the deceased's income, I am not satisfied that it is appropriate, in these proceedings, to bring to account against the deceased's estate (or the plaintiffs) capital gains tax liabilities the first defendant says she paid, on the deceased's account, from her sales of his assets, assuming that those payments can properly be characterised as having been made for his benefit.

460. All in all, the first defendant has not discharged the onus she bears to prove that she applied the deceased's property for his benefit.

461. Furthermore, I am not satisfied that the first defendant used any of her own funds, as distinct from funds of the deceased, in acquisition of the Emu Plains residence or in construction of the granny flat on that property. I find that the property was acquired, and developed, using funds of the deceased which the first defendant was not authorised by the deceased to expend.

462. The financial circumstances of the first defendant are ostensibly such that, but for any interest she has in the Emu Plains residence, she has no resources to meet a judgment for the payment of compensation to the estate of the deceased.

463. Unless some allowance is to be made for the first defendant upon an exercise of the Court's Protective Jurisdiction or by analogy with it (by reference to *McLaughlin v The City Bank of Sydney* [1912] HCA 16; (1912) 14 CLR 684 at 698-699, Theobald, *The Law Relating to Lunacy* (1924), chapters 52 and 65 and *Protective Commissioner v D* [2004] NSWCA 216; (2004) 60 NSWLR 513 at 540-542; *C v W (No. 2)* [2016] NSWSC 945 at [45]- [47], *Downie v Langham* [2017] NSWSC 113 or the like), there presently appears to be no basis upon which, in defining the unauthorised benefit for which the first defendant must be held liable to account to the estate of the deceased, there should be a "just allowance" made in her favour. There is no allowance that should be made by the deceased's estate in favour of the first defendant simply on the footing that one who seeks equity should do equity: Meagher, Gummow & Lehane's *Equity: Doctrines and Remedies* (5th ed, 2015), pages 185-186.

The first defendant's liability to account

464. Unattended by any application to the Court or NCAT to grant her enhanced authority to deal with the deceased's estate or to apply it for her own maintenance or benefit, the first defendant's wilful breaches of fiduciary obligations owed by her to the deceased as his attorney (in combination with her inability to account for her management of his property, and her dissipation of it, for the benefit of herself and her side of the family), after the deceased's

full-time care was entrusted to a nursing home, stand in the way of any grant to her of relief dispensing, in whole or part, with her liability to account. She cannot reasonably be allowed such a dispensation, whether presented as an allowance for past care or maintenance or purely as relief against personal liability.

465. She cannot be found to have acted honestly or reasonably so as to warrant an order (upon an exercise of protective jurisdiction or under section 85 of the *Trustee Act*) that she ought fairly to be excused from personal liability for her misapplication of the deceased's property.

466. Crystallisation of the plaintiffs' entitlements under the Will of the deceased, on his death, provides a further obstacle to any dispensation in favour of the first defendant. She cannot be granted, or allowed, such a dispensation except at the expense of the plaintiffs. They cannot, in justice, be called upon to bear that burden in circumstances in which part of her object in dissipation of the deceased's property, in breach of her fiduciary obligations, was to diminish, if not extinguish, their rights of inheritance.

The rule in Cherry v Boultbee

467. Notwithstanding any failure to account on the part of the first defendant, the defendants contend that, should the Court order that the defendants' Emu Plains residence or any interest in it be restored to the estate of the deceased, the first defendant should enjoy a beneficial one half share in that property as a residuary beneficiary under the deceased's Will.

468. However the rule in *Cherry v Boultbee* might be formulated (*In the matter of Anglican Development Fund Diocese of Bathurst (Receivers and Managers Appointed)* [2015] NSWSC 440 at [22]- [30]; SR Derham, *Setoff* (Oxford, 1987), Chapter 9; PW Young, C Croft and ML Smith, *On Equity* (Law Book Co, Sydney 2009), paragraphs [15.560]-[15.600]), the first defendant cannot, in conscience, participate in the deceased's residuary estate unless and until she has fulfilled her duty to restore property to the estate or borne the financial consequences of her failure to do so.

469. Given her professed inability to restore to the estate property which she diverted from the estate for her own purposes, and the quantum of her liability to the estate, the practical effect of an application of the rule in *Cherry v Boultbee* appears (upon an assumption that no executorial duties attend administration of the deceased's estate after recovery of the Emu Plains residence on behalf of the estate) to be that, if and to the extent that the defendants' Emu Plains residence is held beneficially for the estate of the deceased, it will be held for the plaintiffs, as tenants in common in equal shares, to the exclusion of the first defendant. Any entitlement she has to participation in the deceased's estate as a residuary beneficiary will be taken, upon an application of the rule in *Cherry v Boultbee*, to have been satisfied from that part of the deceased's estate for which she has not, and says she cannot, account.

Remedies : Provisional Observations

470. *Prima facie*, the first defendant's obligation as a defaulting fiduciary is to restore the deceased's estate: *Re Dawson (Deceased)* [1966] 2 NSWR 211; 84 WN (Pt 1) (NSW) 399;

Maguire v Makaronis [1997] HCA 23; (1997) 188 CLR 449 at 461; *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] HCA 15; (2003) 212 CLR 484.

471. Before making a determination about what is required, by way of equitable relief, to do what is "practically just" between the parties (*Vadasz v Pioneer Concrete (SA) Pty Limited* (1995) 184 CLR 102 at 113-114; *Bridgewater v Leahy* [1998] HCA 66; (1998) 194 CLR 457 at 493-494), attention needs to be given to the position of the third and fourth defendants.

THE THIRD AND FOURTH DEFENDANTS: RECEIPT OF TRUST PROPERTY AS VOLUNTEERS, KNOWLEDGE, REMEDIES

472. In June-July 2008 the third and fourth defendants received from the first defendant, by way of gift, a combination of bank and private cheques, using funds of the deceased (which the first plaintiff was not authorised by the deceased to expend), to pay for the whole of the cost of acquisition of the Emu Plains residence in the names of the third and fourth defendants.

473. The third defendant knew that the first defendant had no financial means of her own (other than a pension) and that the deceased had maintained her financially. She knew that the first defendant had agreed to fund, and had funded, the whole of the purchase price, an amount beyond the first defendant's personal resources. She was present when, at the request of the conveyancer who acted on the purchase, the first defendant drew cheques on the Macquarie Bank "Portfolio Account" of the deceased in anticipation of settlement of the purchase. She knew that the deceased was transitioning from hospital to nursing home accommodation, no longer capable of independent living. She had a close relationship with the first defendant as her mother and imagined herself in the role of a carer for her mother. A fair inference from the facts is that the third defendant shared the first defendant's belief, that, the deceased having been consigned to a nursing home, the first defendant, as his wife, was morally entitled to treat his property as her own without consultation with him.

474. In this factual setting the third defendant must be taken, at least, to have had knowledge of circumstances which would indicate to an honest and reasonable person that the first defendant was using funds of the deceased without the deceased's authority in circumstances in which he was incapable of authorising any such usage. If and to the extent that the third defendant did not have actual knowledge that the first defendant was using the deceased's funds without authority, she wilfully and recklessly failed to make inquiries which an honest and reasonable person would have made.

475. The evidence stops short of support for a finding that the third defendant had *actual* knowledge of the first defendant's unauthorised use of the deceased's funds. However it supports a finding (which I make) that she had *constructive* knowledge.

476. The fourth defendant also had constructive knowledge of the first defendant's unauthorised use of the deceased's funds, for much the same reasons. However, his evidence (involving calculated denials) bears the character of wilful blindness, a deliberate shutting of his eyes to the obvious. If he did not have actual knowledge of the first defendant's unauthorised use of the deceased's funds, it may have been because he deliberately eschewed that knowledge.

477. He was not at the office of the conveyancer when the first defendant drew settlement cheques on the deceased's Macquarie Bank "Portfolio Account" in anticipation of settlement of the purchase of the Emu Plains residence. However, he knew that the first defendant had agreed to fund, and purportedly funded, the whole of the purchase price of the property. He knew, or had the means of knowledge readily to hand, that the first defendant had no financial means of own (other than a pension) and that she had been maintained by the deceased. He knew that the deceased was transitioning from hospital to nursing home accommodation, and was no longer capable of independent living. He was, as he remains, on close terms with the first defendant as his mother-in-law, as he is with the third defendant as his wife. His knowledge of the personal circumstances of the first defendant and the deceased was, in substance, no less than that of the third defendant.

478. An ordinary person in the position of the third and fourth defendants could not have failed to recognise impropriety in the first defendant's disposition of a substantial amount of the deceased's property, whether by way of gift or unsecured interest-free loans, without reference to the deceased as he, enfeebled by dementia, transitioned to full-time care in nursing home accommodation.

479. As volunteers, with constructive notice of the first defendant's unauthorised use of the deceased's funds and her breach of fiduciary obligations giving rise to a constructive trust over those funds (*Keith Heney & Co Pty Limited v Stuart Walker & Co Pty Limited* [1958] HCA 33; (1958) 100 CLR 342 at 350; *Chan v Zachara* [1984] HCA 36; (1984) 154 CLR 178 at 198-199; *Hospital Products Limited v United States Surgical Corp* [1984] HCA 64; (1984) 156 CLR 41 at 107-108), the third and fourth defendants are bound in conscience to recognise the deceased's estate's equitable entitlement to those funds (*Black v S Freedman & Co* [1910] HCA 58; (1910) 12 CLR 105 at 109 and 110; F Jordan, *Chapters on Equity in NSW* (6th ed, 1947), pages 65-67).

480. As they had constructive notice of the deceased's beneficial entitlement to the funds at the time of their receipt of the funds (before settlement of their purchase and their registration as proprietors of the Emu Plains property, section 42 of the *Real Property Act* (if pleaded) would not operate to confer an indefeasible title upon them upon registration, to the exclusion of their *in personam* equitable obligation to the estate of the deceased: *Sze Tu v Lowe* [2014] NSWCA 462; (2014) 89 NSWLR 317 at 345[141] - 346 [150] and 361[238]-[243]; *Fistar v Riverwood Legion and Community Club Limited* [2016] NSWCA 81; (2016) 91 NSWLR 732 at 746[64] and 749[82].

481. The third and fourth defendants' liability to the estate of the deceased in equity is essentially the same, in the present factual setting, whether the claim made by the plaintiffs on behalf of the estate is articulated by reference to *Black v Freedman* [1910] HCA 58; (1910) 12 CLR 105 or the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244. As recipients of trust property (otherwise than as *bona fide* purchasers for value without notice), they were, and are, bound in conscience to account for that property, not to apply it to their own use: *Fistar* [2016] NSWCA 81; (2016) 91 NSWLR 732 at 742[44]-[45].

REMEDY

482. Having made findings as to liability, I propose to allow the parties an opportunity to make further submissions about a remedial response, with such assistance as may be available in the provisional observations which here follow.

483. The Court is required to do what is practically just in the grant of equitable relief to the plaintiffs: *Vadasz v Pioneer Concrete (SA) Pty Limited* (1995) 184 CLR 102 at 113-114. Once the Court has determined upon the existence of a necessary equity to attract relief, its moulding of relief may produce a final result not exactly representing what either side would have wished, balancing competing interests to justice: *Bridgewater v Leahy* [1998] HCA 66; (1998) 194 CLR 457 at 494.

484. The object of the Court's orders enforcing obligations to account is not to punish the defendants, but to prevent their unjust enrichment at the expense of the deceased's estate, approaching that task with due regard to substance over form: *Dart Industries Inc. v The Décor Corporation Pty Limited* [1993] HCA 54; (1993) 179 CLR 101 at 111 and 114.

485. All things considered, I am inclined to the view that the first defendant's liability to account should be quantified in the sum of $1,019,872.71, with interest to accrue from a date no later than the date of the deceased's death (17 May 2012) at the Court's usual rates for pre-judgment interest, calculated by reference to the *Civil Procedure Act* 2005 NSW, section 100. *Prima facie*, interest should accrue from the dates of particular asset sales in 2008 and 2010, compensating the deceased's estate for being kept out of funds consequent upon those sales. Section 100 does not authorise an award of compound interest. As presently advised, there appears to be no occasion to resort to independent, equitable jurisdiction to award compound interest; *cf*, *Hungerfords v Walker* [1989] HCA 8; (1990) 171 CLR 125 at 148; *Commonwealth v SCI Operations Pty Limited* [1998] HCA 20; (1998) 192 CLR 285 at 316.

486. This quantification may fall short of what the first defendant might be compelled to do if, by deployment of compulsory processes, additional factual inquiries were to be made. However, there appears to be little utility in insisting upon such inquiries in circumstances in which the evidence before the Court is that, absent a lottery win, the first defendant cannot, from her own resources, restore to the deceased's estate anything more than a nominal amount of the property she misapplied in the period between 2008-2012.

487. To the extent that quantification of the first defendant's liability to account at $1,019,872.71 (plus interest) falls short of what might be required of her, the difference may be justified as a margin for error in the Court's determination that she failed to establish that she had misapplied property of the deceased for his benefit.

488. The primary focus of the parties on a remedial response to the first defendant's misapplication of the deceased's property is upon beneficial entitlements to the defendants' Emu Plains residence. It provides the only known "fund" against which the plaintiffs can enforce a proprietary remedy.

489. To the extent that property of the deceased, misapplied by the first defendant in breach of her fiduciary obligations, can be traced into the Emu Plains residence, the first defendant's liability to account is enforceable by way of a constructive trust in favour of the deceased's estate over the residence.

490. The deceased's property is readily traceable into the residence, purchased as it was with funds paid to the third and fourth defendants by the first defendant in breach of her obligations. As they received those funds as volunteers, and with constructive notice of the

first defendant's breach of duty, the third and fourth defendants have no defence to the estate's claim that they hold their interest in the residence on trust; they did not acquire their title to the residence as *bona fide* purchasers for value without notice.

491. They should, however, be allowed an opportunity to claim an allowance for any capital improvement they have effected to the property with their own funds: *Cf, In the marriage of Wagstaff* (1990) 14 Fam LR 78 at 86.

492. Counterbalancing allowances may need to be made relating to the defendants' use, occupation and maintenance of the residence, together with orders for delivery up of possession, and sale, of the property. All this lies in the realm of "consequential relief", predicated on a declaration, or declarations, of right.

493. *Prima facie*, the estate of the deceased (represented by the plaintiffs in their derivative suit, with the deceased's executor, the second defendant, bound as a party to the proceedings) is entitled to a declaration that the Emu Plains residence is held on trust for the estate, with consequential relief designed to vest title to the land in the estate or perhaps, in circumstances in which the estate has been administered, the beneficiaries of the deceased entitled to it.

494. It is open to the Court to mould the relief to be granted in these proceedings without requiring that there be a separate administration suit to accommodate the fact that property recovered from the defendants is recovered by the plaintiffs, in the first instance, on behalf of the estate of the deceased; and on behalf of themselves personally, as beneficiaries of the estate, only after due consideration is given to what is required to finalise administration of the estate.

495. The proceedings having been conducted on the basis that: (a) the deceased's estate is, in substance, devoid of property save for what might be recoverable against the defendants in the proceedings; and (b) the only beneficiaries of the deceased with an interest in the estate so far as it has not been distributed are the plaintiffs and the first defendant as residuary beneficiaries, the operation of the rule in *Cherry v Boultbee* may work out as follows:

. (a) as residuary beneficiaries in the estate of the deceased (each with a one quarter share), the plaintiffs should be found beneficially entitled, as tenants in common in equal shares, to the Emu Plains residence, with little or no further recourse against the estate of the deceased in equity; and

. (b) as a residuary beneficiary of the deceased (with an entitlement to a one half share in the residue), the first defendant's share in the residue should be taken to have been satisfied from the property of the deceased which she has misapplied and not accounted for.

496. The arithmetic underlying this conclusion is imprecise but it may be near enough to correct to meet the justice of the case. The Emu Plains residence was purchased, with the deceased's funds, in 2008 for $347,500.00. In 2010, the first defendant applied a further $124,000.00 of the deceased's funds in the construction of her granny flat. With fit-out costs on top of the $124,000.00 paid to a builder, she says that she spent about $200,000.00 in total. Not all of that larger sum represented the acquisition of a capital asset, the real property presently available for distribution to the plaintiffs. Leaving aside any change in the value of the land, in historical cost terms the amount of the deceased's funds "invested" in the land is

somewhere between $471,500.00 ($347,500.00 plus $124,000.00) and $547,500.00 ($347,500.00 plus $200,000.00).

497. This is, or may be, near enough to one half of the amount for which the first defendant must be held liable to account ($1,019,872.71 plus interest).

498. I do not propose to act upon any such calculations without allowing the parties an opportunity to make submissions about the form of orders to be made in final disposition of the proceedings. However, they are indicative of my preliminary assessment of what orders might reasonably be made.

499. There is no utility in a close examination of the plaintiffs' claims for family provision relief, under chapter 3 of the *Succession Act* 2006 NSW, in circumstances in which there is, for all practical purposes, no estate or notional estate against which an order for provision can be made. The family provision claims should be formally dismissed.

500. *Prima facie*, with costs following the event, the first, third and fourth defendants should pay the plaintiffs' costs of the proceedings, with an allowance referable to the plaintiffs' failed claim against the second defendant.

501. Having published these reasons for judgment, I propose to direct that the plaintiffs bring in short minutes of orders designed to give effect to them and, *via* that process, to allow each party to be heard on orders to be made. If further inquiries must be made, directions can be given for that purpose.

ADDENDUM (23 May 2017)

502. Having allowed the parties an opportunity to make further submissions, on 23 May 2017 Lindsay J made the following orders in final disposition of the proceedings:

. (1) DECLARE that the first defendant is indebted to the Estate of Ronald James Smith ("the deceased") in the sum of $1,602,595.81, representing:

. (a) a principal sum of $1,019,872.71; plus

. (b) an award of interest under section 100 of the *Civil Procedure Act* 2005 NSW in the sum of $582,723.16.

. (2) ORDER that the first defendant pay the sum of $1,602,595.81 to the second defendant as the legal personal representative of the deceased.

. (3) ORDER, pursuant to section 101 of the *Civil Procedure Act* 2005, that interest accrue on that sum ($1,602,595.81), or any unpaid balance of that sum, from 1 August 2017 if not earlier paid.

. (4) DECLARE that each of the first defendant, the third defendant and the fourth defendant holds on trust for the estate of the deceased any right, title or interest he or she has in the property (contained in Folio Identifier 32/708555) known as 85 Brougham Street, Emu Plains in the State of New South Wales ("the land").

. (5) ORDER that the land vest in the second defendant as legal personal representative of the deceased.

. (6) ORDER that the first defendant, the third defendant and the fourth defendant, no later than 1 August 2017, deliver up vacant possession of the land to the second defendant as the legal personal representative of the deceased.

. (7) ORDER, subject to further order, that the second defendant, as legal personal representative of the deceased, sell the land by public auction.

. (8) ORDER, subject to these orders and to any further order of the Court, that the proceeds of sale of the land be applied as follows:

. (a) first, in payment of the costs of sale of the land;

. (b) secondly, in reduction of the indebtedness of the first defendant to the estate of the deceased; and

. (c) thirdly, in distribution of the estate of the deceased to those beneficially entitled thereto under the Will of the deceased dated 8 January 2008.

. (9) ORDER that the solicitors for the defendants (Low Doherty & Stratford), no later than 30 May 2017, pay to the second defendant, as the legal personal representative of the defendant, all funds held by them being property of the estate of the deceased.

. (10) DECLARE that the first defendant is not entitled to participate as a beneficiary in any distribution of the estate of the deceased unless and until she pays or allows to the estate the full amount of her indebtedness to the estate.

. (11) RESERVE to all parties liberty to apply for directions concerning the implementation or working out of these orders.

. (12) ORDER that the first defendant, the third defendant and the fourth defendant jointly and severally, pay all costs associated with preparation of the Report of Mr Carl Dumbrell of DFK Laurence Varnay dated 20 May 2015.

. (13) RESERVE to Mr Carl Dumbrell liberty to apply for orders for the payment of his costs by the plaintiffs in the event that those costs are not paid by the first defendant, the third defendant and the fourth defendant.

. (14) ORDER that the first defendant, the third defendant and the fourth defendant, jointly and severally, pay the plaintiffs' costs of these proceedings, on the ordinary basis until 4 October 2013 and on the indemnity basis thereafter.

. (15) ORDER that the plaintiffs pay the second defendant's costs of these proceedings.

. (16) RESERVE to the second defendant liberty to apply for orders for the payment out of the estate of the deceased of his costs or commission.

. (17) ORDER that exhibits and subpoenaed material may be returned forthwith; any exhibits returned must be retained intact by the party or person that produced the material until the expiry of the time to file an appeal, or until any appeal has been determined.

. (18) ORDER that these orders be entered forthwith.

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Amendments

18 April 2017 - Coversheet, Solicitors for the Plaintiffs changed from Andreyev Doman to Andreyev Lawyers.

Para. 61 Griffiths CJ changed to Griffith CJ; Isaccs J changed to Isaacs J.

Para 64 Isaccs J changed to Isaacs J.

Para 65 the SJ Stoljar changed to SJ Stoljar

Para 91(b) nswsc 1187 changed to NSWSC 1187

Para 469 Baultbee changed to Boultbee.

23 May 2017 - Addendum (23 May 2017)

Orders.