Albany v Albany [2010] NTSC 25

PARTIES:	JOHN PATRICK ALBANY v YVONNE KATHLEEN ALBANY AND MARJORIE DAWN ALBANY AND KEVIN ALEC ALBANY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	NO 7 OF 2009 (20920924)
DELIVERED:	24 MAY 2010
HEARING DATES:	15 & 16 FEBRUARY 2010
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CONTRACTS – deceased estate – mediation – privilege – was a binding agreement reached? – intention of the parties that the agreement be incorporated into a deed – action for specific performance

Family Provision Act 1982 (NSW)
Family Provision Act, s 7(2), s 8, s 8(1), s 17(1), s 17(3), s 21
Supreme Court Rules, O.48 r.(2), O.48 r.13, O.48 r.13(8), O.48 r.13(16)

Supreme Court of the NT Practice Direction Nos 2 of 2008; 1 of 2009

A Dickey, *Family Provision After Death*, 1992, Law Book Co; de Groot & Nichol, *Family Provision in Australia*, 3rd ed

Masters v Cameron (1954) 91 CLR 353; *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310; *Slee v Warke* (1949) 86 CLR 271; applied

Langford v Cleary (No 2) (1998) 8 Tas R 52; distinguished

Admiral Management Services v Para-Protect Europe Ltd [2002] 1 WLR 2722; [2003] 2 All ER 1017 ; *Australian Broadcasting Corporations v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540; *Bartlett v Coomber* [2008] NSWCA 100; *Biala Pty Ltd v Mallina Holidays Ltd* [1990] WAR 174 ; *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631; *Groser v Equity Trustees Ltd* [2008] VSC 163; *Harris v Caladine* (1991) 172 CLR 84; *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* (unreported (2009) QCA 60; BC200901683); *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2009] 1 WLR 2416; *Smallman v Smallman* [1972] Fam 25; *State of Western Australia v Southern Equities Corporation Ltd (in Liq)* (1996) 69 FCR 245; (1996) 142 ALR 597 ; *Taylor v Johnson* (1983) 151 CLR 422; *Tomlin v Standard Telephones & Cables Ltd* (1969) 3 All ER 201; followed

Barns v Barns (2001) 80 SASR 331; *Blunden v Blunden* [2008] SASC 286; *Coomber v Stott* [2007] NSWSC 513; *Daebritz v Gandry* [2001] WASC 45; *Grove v Fisher* [2002] WASC 247; *Guardian Trust & Executors Co of New Zealand v Public Trustee of New Zealand* [1942] AC 115; *In the Estate of Gough, Deceased; Gough v Fletcher* [1973] 5 SASR 559; *In the Will of Lanfear (Deceased)* (1940) 57 WN (NSW) 181; *Legal Practitioners Complaints Committee v Reyburn* [2007] WASAT 29; *Lieberman v Morris* (1944) 69 CLR 69; *McGrath v Queensland Trustees* [1919] St R Qd 169; *Re Burton (Deceased)*[1958] QWN 27; *Re Lanfear* (1940) 57 WN (NSW) 181; *Re S J Hall* [1959] SR (NSW) 219; *Re Wright* [1966] TasSR (NC 1) 287; *Rutter v McCusker (No 2)* [2009] NSWSC 71; *Simson v National Provincial Bank* [1950] Ch 38; *Smith v Smith* (1986) 161 CLR 217; *Vasiljev v Public Trustee* (1974) 2 NSWLR 497; *Wintle v Stevedoring Industry Finance Committee (No 3)* [2002] VSC 369; referred to

REPRESENTATION:

Counsel:

Plaintiff:	A Silvester & T Liveris
First Defendant:	M Liddy
Second & Third Defendants:	M Anderson

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	Bill Piper
Second & Third Defendants:	Cridlands MB

Judgment category classification:	A
Judgment ID Number:	mil10461
Number of pages:	34

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Albany v Albany [2010] NTSC 25
No. 7 of 2009 (20920924)

BETWEEN:

JOHN PATRICK ALBANY
Plaintiff

AND:

YVONNE KATHLEEN ALBANY
First Defendant

AND

MARJORIE DAWN ALBANY
Second Defendant

AND

KEVIN ALEC ALBANY
Third Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 May 2010)

Background

[1] This is an action for specific performance of the alleged terms of settlement of a contract following a mediation between the parties.

[2] On 24 June 2009, the plaintiff filed an Originating Motion against the Public Trustee of the Northern Territory, as executor of the estate of the late Albert

Sydney Albany (the deceased), for provision to be made for him out of the deceased's estate, pursuant to s 8 of the *Family Provision Act*.

[3] On 18 June 2009, the second and third defendants commenced an action by Writ against the Public Trustee seeking similar relief in their favour.

[4] The second defendant is the former spouse of the deceased, having divorced the deceased in 1978. The plaintiff and the other defendants are the only surviving children of the marriage.

[5] By the terms of his Will dated 14 November 2006, the deceased left the entirety of his residual estate, after payment of his debts, funeral and testamentary expenses and any duty or tax payable after his death, to the first defendant. Public Trustee of the Northern Territory was appointed the sole executor and trustee of his estate. Probate of the Will was granted by this Court to the Public Trustee on 27 June 2008.

[6] By order made on 23 July 2009, the plaintiff's claim was consolidated with the action commenced by the second and third defendants, and the first defendant was granted leave to be joined as a defendant to the consolidated action. Thereafter, the first defendant had the conduct of the defence of the consolidated action. The Public Trustee, who was a defendant to both actions, agreed to abide by the outcome of that action.

[7] On 18 September 2009, an order was made in the consolidated action by a Judge directing the parties to attend a mediation as soon as possible after

4 December 2009. The order did not specify who the mediator might be. The mediation was held between the parties on 7 and 8 December 2009. Public Trustee did not attend the mediation. The mediator was Justice Kelly, a Judge of this Court.

[8] The plaintiff claims that, as a result of the mediation, the plaintiff entered into a binding agreement with the first defendant to settle his claim in the consolidated action. It is common ground that no agreement was reached with any of the other parties to the consolidated action.

[9] The plaintiff now seeks specific performance of that agreement. The defendants deny that any binding agreement was reached. In addition, the first defendant says that any agreement reached was vitiated by mistake; that any agreement reached was discharged by abandonment; and that it was otherwise incapable of specific performance. The second and Third defendants submitted that the Court should not enforce any agreement reached on what might be called public policy grounds. The plaintiff seeks this relief by an "alternative cause of action" pleaded in the principal consolidated action in accordance with an order made by the Court on 5 January 2010.

The mediation

[10] The mediation was conducted by Kelly J in accordance with O.48 r.13 and Practice Direction No 2 of 2008. Order 48 r.13(8) provides:

> Except to prove that a settlement was reached between the parties and the terms of the settlement, evidence of things said or admissions made at a mediation is not admissible in either the proceedings or a court without the consent of those parties.

[11] The first defendant submits that the mediation was not governed by the provisions of O.48 r.13 because no direction was made by the Court providing for the mediation to be conducted under that rule. No formal order was made appointing Kelly J as the mediator. Order 48 r.(2) as amended by Practice Direction No 2 of 2008 provides that the mediator may be a Judge. The operational period of this Practice Direction was extended for 12 months by Practice Direction No 1 of 2009. There is no specific requirement in the rules that the mediator must be appointed by the Court. In this case, the parties jointly requested the Chief Justice to allocate a Judge to conduct the mediation. The Chief Justice allocated two days for the mediation commencing 7 December 2009 and appointed Kelly J as the mediator. No written mediation agreement was executed by the parties.

Privilege

[12] The first defendant submits that what occurred during the course of the mediation is privileged and that the privilege has not been waived. At the commencement of the mediation, according to the evidence of Mr Maher, the solicitor for the first defendant, Kelly J said, in the presence of the parties and their legal advisors, words to the following effect:

> Your legal advisors have probably already told you the nature of this mediation. What is said here is without prejudice. That means what

> you say here cannot be repeated later or used against you. That is so you are able to negotiate freely which I encourage.

[13] Mr Gallagher, who was the solicitor for the plaintiff, gave evidence that her Honour's remarks were qualified by words to the effect "if the matter is not resolved". The plaintiff said when cross-examined on this issue, supported by Mr Maher's evidence, that she could not recall Kelly J indicating that what was said might be used if an agreement was reached. Mr Maher was not cross-examined on this topic. The first defendant's evidence on this topic was not reliable. She could not recall precisely what was said. Kelly J was not called as a witness.

[14] Mr Gallagher was quite certain that Kelly J qualified the words in the manner he indicated. I think it is more likely than not that her Honour did exactly that. It would be very unusual for a mediator not to refer to that qualification and even more unusual for the parties to have entered into the mediation on any other basis. Nowhere is it suggested that the parties expressly agreed that nothing said at the mediation could be used to prove a binding agreement reached during the mediation.

[15] In any event, the parties must be taken to have conducted the mediation in accordance with O.48 r.13(8) and if the parties desired to mediate outside of that provision, I would have expected that to have been made very clear. That provision reflects the common law rule which permits a party to "without prejudice" settlement negotiations to prove the terms of a settlement reached orally during negotiations, even though the privilege

attaching to the negotiations does not disappear.[1] The result is that the Court can receive evidence to ascertain whether a binding contract was reached and, if so, what were its terms. If the Court concludes that no binding agreement was reached, the negotiations remain inadmissible in the proceedings or any later proceedings.

[16] Counsel for the first defendant, Mr Liddy, referred me to the judgment of Slicer J in *Langford v Cleary (No 2)*,[2] where his Honour held on the facts of that case that an agreement reached during a settlement conference was not admissible because the parties had explicitly agreed to a confidentiality clause which prevented evidence of any agreement being led unless the agreement was ratified subsequently. However, there was no such explicit agreement in this case.

Was an agreement reached between the plaintiff and the first defendant?

[17] At the mediation, the following persons took part. Apart from Kelly J, the plaintiff and his solicitor, Mr Gallagher; the first defendant and her solicitor, Mr Maher, and the second and third defendants and their solicitor, Mr Whitelum, as well as their counsel, Mr Heywood-Smith QC were all present.

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1 *State of Western Australia v Southern Equities Corporation Ltd (in Liq)* (1996) 69 FCR 245 at 249; (1996) 142 ALR 597 at 601; *Biala Pty Ltd v Mallina Holidays Ltd* [1990] WAR 174 at 180; *Tomlin v Standard Telephones & Cables Ltd* (1969) 3 All ER 201; *Admiral Management Services v Para-Protect Europe Ltd* [2002] 1 WLR 2722 at 2742 [70]-[71]; [2003] 2 All ER 1017 at 1036-1037; *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2009] 1 WLR 2416.

2 (1998) 8 Tas R 52.

[18] According to Mr Maher, on the morning of 8 December 2009, in the mediation room, he put an "all up" proposal to all of the plaintiffs in the consolidated action (which includes the present plaintiff and the second and third defendants). He later made it clear that "even if we did manage to do a deal today, Yvonne said that she won't sign anything today anyway". It was indicated to him later by Mr Whitelum that there were no prospects of settlement with his clients, the second and third defendants. After lunch that day, he put two alternative proposals to Mr Gallagher by saying words to the effect of:

> "… my client has instructed me to put alternatives as follows:
>
> Alternative 1: John is to get sections 235 and 237 plus $70,000, inclusive of costs; or
>
> Alternative 2: John is to get sections 235 and 237 plus $120,000, inclusive of costs, but to then repay $100,000 to Yvonne upon the sale of the first of section 235 or 237."

[19] According to Mr Maher, after a short period of time, Mr Gallagher said words to the effect, "John will take the second alternative. We will have to do up a deed." Mr Maher agreed and said, "Who's going to do the deed?" Mr Gallagher said he would do it and hoped to produce a draft before he left the court precinct that day.

[20] Subsequently, the parties all gathered in the presence of the mediator. According to Mr Maher, Mr Gallagher announced that the plaintiff and the first defendant had reached agreement, subject to the execution of a deed of

settlement and began to recite the "commercial terms of the agreement". Mr Heywood-Smith immediately objected, saying words to the effect that it was not possible for settlement to be reached between the plaintiff and the first defendant only. It necessarily required the consent of the Public Trustee and that any settlement which dealt with any of the estate property was void because it usurped the jurisdiction of the Court. Mr Gallagher said that he would incorporate into the deed "a provision that addressed the issue of not usurping the authority of the Court and the other applicants not agreeing to the settlement". Mr Maher said that this matter had not previously been discussed with Mr Gallagher. Mr Maher said that Kelly J, after expressing some doubts about whether such a settlement could be reached, said that she would record that the plaintiff's claim had been settled by agreement with the first defendant, subject to the execution of a deed of settlement to be prepared by the solicitors. Subsequently, it transpired that the deed to be drafted by Mr Gallagher could not be completed that day. Mr Maher indicated to Mr Gallagher that he would not be able to look at the draft for a couple of days. The draft was received by Mr Maher the next morning. Subsequently on 15 December 2009, acting on the first defendant's instructions, Mr Maher told Mr Gallagher that the first defendant did not wish to sign the deed or proceed with the settlement at all.

[21] Mr Maher's evidence was that one of the proposals he discussed with Mr Gallagher was that the first defendant considered making provision in

her will for the plaintiff's children, but the precise terms of that proposed provision were never articulated or agreed.

[22] In cross-examination, Mr Maher admitted that the terms of the offer made by the first defendant were as set out in paragraph 20 of Mr Gallagher's affidavit in Ext P1, except for sub-paragraph (b). His evidence was that some matters had been put by the plaintiff's solicitor earlier that morning which were not specifically mentioned in his own affidavit, but were included in the counter-offer he made by reference to the words "everything as this morning". This, he accepted, included the following additional terms:

1. Payment of any capital gains tax relating to section 235 and 237 would be the plaintiff's responsibility.

2. The settlement would be in satisfaction of the plaintiff's claims in the proceedings and any liabilities of the estate to him, including in relation to unpaid or future school fees; and

3. There would be no order as to costs, with the parties to bear their own costs.

[23] He added, however, "this paragraph doesn't include the mention of the provision in Yvonne's will, but that was all just taken as – that was unchanged from what had been raised in the morning". I note that the offer as set out in Mr Gallagher's affidavit, does not refer to the repayment of

$100,000 upon the sale of **the first of** sections 235 or 237, but states that $100,000 would be repaid "upon the sale of sections 235 and 237" by the plaintiff.

[24] Mr Gallagher was cross-examined about whether the payment of $100,000 was to be triggered by the sale of one of the blocks or both of the blocks. His recollection was that the offer he accepted referred to the sale of both blocks, although there had been earlier discussion with Mr Maher about "settling around one or other of the two parcels namely 235 or 237 and I came back to him and said my instructions were they really needed to be treated together the way the two blocks were and the fact that they had quarry potential. And he came back to me and said he had spoken to his client who agreed they conceptually needed to be dealt with together". Mr Maher did not give any evidence when called to give oral evidence contradicting Mr Gallagher's evidence on this topic. Further, the wording of the subsequent draft deed, which I will refer to later, did not provide for repayment on the sale of the first of the two lots and Mr Maher gave no evidence that he or his client took exception to the deed on that basis. Mr Gallagher was an impressive witness. His recollection of the relevant events was better than Mr Maher's. Whenever there is a conflict between the evidence of Mr Gallagher and Mr Maher, I have preferred Mr Gallagher's evidence. It follows that I accept evidence on this topic.

[25] In accordance with O.48 r.13(16), Kelly J filed a report to the Court as to the results of the mediation as follows:

> "None of the issues as to the second and third plaintiffs [the second and third defendant in the alternative cause of action] have been resolved.
>
> The claim by the first plaintiff has been settled by agreement subject to entry into a deed of settlement to be prepared by his solicitors."

Was a binding agreement reached?

[26] The next question is whether the agreement reached is incomplete because no agreement had been reach as to the terms of the first defendant's will. The settlement deed prepared by the plaintiff's solicitor contained a clause 1.7 which is in the following terms:

> "The First Defendant agrees for the considerations herein, to make her Will to include (and to retain in any Will hereafter that she may make) a provision that:
>
> (a) Sections 46 and 204 Hundred of Howard, 390 Glenruckie Road, Coomalie Creek in the Northern Territory of Australia will be gifted to the deceased's grandchildren (whenever born) in equal shares and if any such grandchild predeceases the First Defendant that share or interest will be given to his or her issue and if more than one the share his or her parent would have received, will be taken by such issue equally; or
>
> (b) In the event that Sections 46 and 204 Hundred of Howard, 390 Glenruckie Road, Coomalie Creek in the Northern Territory aforesaid has been sold, or partly sold, the net proceeds of such sale will be divided in the same proportions as provided for in paragraph (a) hereof, with the amount of such proceeds to be indexed from the date or dates of sale by the Consumer Price Index (all indices) for Darwin."

[27] According to the evidence of Mr Gallagher, he said to Mr Maher during the mediation that his client might wish to consider making provision in her will for the deceased's grandchildren, given her circumstances [referring

presumably to the fact that the first defendant is a single woman with no children of her own and now about 40 years of age] and that only by so doing would the wealth generated by the deceased in his lifetime and inherited by her remain within the Albany family. Mr Maher said that the first defendant agreed in principle to make a will to include a substantial provision for the deceased's grandchildren, on terms satisfactory to the first defendant to be worked out in due course, once the outcome of the proceedings were known. According to Mr Gallagher, at no stage was it suggested that such a provision in the will was a condition of the settlement of the plaintiff's claim.

[28] Mr Maher's evidence is referred to in para [21] above.

[29] The first defendant's evidence is that she was not present during the discussions between the solicitors concerning her will and that at no stage did she agree to make any specific provision concerning gifts to the grandchildren. She confirmed that the matter was mentioned to the mediator at the time the settlement was announced, but said that all she said is that she would consider it. Mr Gallagher said, during cross-examination, that Kelly J was told that "we also have an agreement in principle that Yvonne will make a will" and that Mr Maher said words to the effect that the deed would cover both matters and he would need to time to consider it.

[30] On the whole of the evidence, it is very clear that no binding agreement was reached about the matter of the first defendant making provision for the

deceased's grandchildren in her will. There was no agreement reached about what provision would be made. It never got beyond an understanding that the first defendant was prepared to consider making some provision, the precise terms of which were to be discussed later. The fact that clause 1.7 of the deed prepared by Mr Gallagher dealt with that subject is consistent with the evidence of Mr Maher that he expected the deed to deal with that subject. Plainly, Mr Gallagher thought so as well. It is clear that agreement about that subject was not a condition of the terms of settlement. It was never specifically stated to be a condition of Mr Maher's counter offer which Mr Gallagher accepted. Further, the way the matter was raised and the lack of importance attached to it during the negotiations, suggests that it was a separate issue unconnected with the settlement of the litigation between the parties, albeit that, for the sake of convenience, it would be negotiated as a term of the deed rather than under a separate freestanding instrument.

[31] I find that it has not been proved that the matter of the will was a condition of the settlement, notwithstanding the evidence of the first defendant that she understood that there was to be no agreement unless she agreed to make provision for the grandchildren under her will on terms yet to be decided. The subjective intentions of the first defendant are unable to be taken into account in deciding whether there was a contract and if so, what its terms were. Except in special circumstances which do not arise here, the Court can only consider the actual words used by the parties during negotiations

and the surrounding circumstances and decide these questions by what a reasonable observer would have concluded.[3] Also of importance is the commercial context in which the dispute arises and a most significant feature of the context is what the parties actually regarded, or what would ordinarily be expected to be regarded, as matters to be covered by their agreement.[4] Here it is plain, in my opinion, that, looked at objectively, neither party regarded agreement about the will as essential to their bargain; nor is such a matter ordinarily to be expected in a dispute of this kind.

The effect of the intention of the parties that the agreement would be incorporated into a deed

[32] I find that it was the intention of the parties that a formal deed of settlement would be entered into between the plaintiff and the first defendant. The question arises whether the case falls into the first, second or third class of cases referred to in *Masters v Cameron*.[5] As was said in that case:

> "…the question depends upon the intention disclosed by the language employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape."[6]

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3 *Australian Broadcasting Corporations v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

4 *Australian Broadcasting Corporations v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548.

5 (1954) 91 CLR 353 at 360.

6 *Masters v Cameron* (1954) 91 CLR 353 at 362.

[33] This is a question of construction, to which the general test of objectivity applies, subject to the commercial circumstances surrounding the exchange of communications and the subject matter.[7]

[34] In the ordinary case, as was said by Gleeson CJ, with whom Hope and Mahoney JJA agreed, in *Australian Broadcasting Corporations v XIVth Commonwealth Games Ltd*:[8]

> "…as a matter of fact and commonsense, other things being equal, the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a Court will be to conclude that they had the requisite contractual intention."

[35] The evidence of Mr Maher to which I have referred above, does not indicate that the bargain was conditional upon entry into the deed. Mr Gallagher's evidence was similar in effect to that of Mr Maher's. After Mr Gallagher accepted Mr Maher's offer, he said that they discussed "the means and mechanisms to give effect to the terms of settlement".

[36] A number of matters were submitted by Mr Liddy for the first defendant as indicating that there was no intention by the parties to be bound until a deed was signed. First, it was submitted that the alleged contract did not deal with how the proceedings were to be disposed of in circumstances where the other parties to the litigation were not parties to the alleged agreement. This was of fundamental importance because any agreement reached is still

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7 *Masters v Cameron* (1954) 91 CLR 353 at 363; *Australian Broadcasting Corporations v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 549-550.

8 (1988) 18 NSWLR 540 at 548.

subject to the Court making an order in terms of the agreement and the parties had not discussed what would happen in the event that the Court did not make any order in terms of the agreement. Mr Liddy referred to the deed prepared by Mr Gallagher which contained a provision dealing with that subject, *viz*, clause 1.4 which provides:

> "In the event that the Court determines that:
>
> (a) the Estate is not sufficient to meet all claims by other Plaintiffs in the Proceedings; and
>
> (b) the property and money provided by clause 1.2 hereof is required to enable the Estate to meet another claim against the Estate in the proceedings
>
> then this Deed will be deemed to only take effect to the extent of any remainder of the property or the money after such other claim has been met and satisfied pursuant to the Order of the Court."

[37] Regard may be had to communications between the parties subsequent to the date of the alleged contract to the extent that those communications throw any light upon the meaning of the language employed for the purpose of deciding whether or not the parties intended to be bound by their earlier agreement.[9] There is no doubt that a clause in the above terms had never been discussed between the parties. The first time it arose occurred when a copy of the deed was e-mailed to Mr Maher. Mr Liddy submitted that this was clear evidence that the original settlement was incomplete and, in his

[9] *Australian Broadcasting Corporations v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 550.

submission, uncertain, or alternatively, that it amounted to a counter-offer which was not accepted by the first defendant.

[38] The next matter Mr Liddy relied upon is that the Public Trustee, who is named as a party to the deed, not only never executed the deed but was not a party to the alleged agreement. It was submitted that, although the Public Trustee indicated that he would abide by the Court's order, he never participated in the mediation and there is no evidence that he agreed to be bound by the settlement.

[39] The next point raised by Mr Liddy was that the oral agreement did not make any sufficient provision for the time for the payment of $100,000 back to the first defendant, i.e. whether the payment would be due on the sale of one or both of the blocks and whether this was meant to survive the first defendant's death. Mr Liddy referred to clause 1.8 of the deed:

> "In the event of sale, transfer or assignment of Sections 235 and 237 Hundred of Howard by the First Plaintiff during the lifetime of First Defendant, the First Plaintiff must pay to the First Defendant the sum of $100,000 at settlement of the sale or the date of the transfer or assignment taking effect."

[40] The clause as drafted differs from the oral agreement in three respects. First, the words "transfer or assignment" have been added after the word "sale". Secondly, the words "during the lifetime of the First Defendant" have been added. Thirdly, the words "at settlement of the sale or the date of the transfer or assignment taking effect" have replaced the words "upon the sale… by the First Plaintiff".

[41] According to Mr Gallagher, on 14 December 2009, Mr Maher telephoned him at his office in Brisbane and:

> "… stated to the effect that he wished to discuss the wording of clauses of 1.7 and 1.8 of the Deed of Settlement. He said his client wanted a five year limit on the payment of $100,000.00 by the First Plaintiff to his client and to recast the Will provision, but that he was happy with the rest. I said I expected the Will provision would require some further consideration, and that remained a matter for his client to decide. Paul Maher said his instructions were to refer to a percentage of the estate, such as five percent per grandchild, rather than to particular assets; he also said he was inclined not to finalise anything regarding Kevin's children while Kevin's claim remained to be resolved. As for clause 1.8, Paul Maher said words to the effect that his understanding was that my client was intending to sell rather than hold the property and by fair implication a reasonable time limit should be included for the $100,000.00 payment to be made to his client. Paul Maher said words to the effect that he thought five years was reasonable. I said to Paul Maher in response that the best way to advance those points would be for him to provide the drafting of those clauses that he proposed and I would then get instructions."

[42] Mr Gallagher's evidence in cross-examination confirms that (1) there was no discussion prior to drafting the deed to change "sale" to read "sale, transfer or assign". That in addition, the agreement did not provide at any time for the repayment to be made on the sale of one of the blocks only.

[43] Evidence was given by Mr Maher that after he received the deed, he had a telephone conversation with Mr Gallagher concerning this clause, in which he said that it was not acceptable in its present form and he raised with him that there ought to be a time limit. He said:

> "… in respect of the provision regarding the payment of $100,000, I pointed out that John had represented to us that he intended to sell the properties fairly quickly, but we thought there should be some specific time limit put on in case he changed his mind which he'd be

> entitled to do and – and then again without – I told him without instructions I put those proposals regarding the – no, they weren't proposals. I raised those suggestions regarding the percentage for the grandchildren and that sort of thing. I was floating ideas. So substantially I agree with Mr Gallagher, but I just wanted to put that in context.

[44] What was discussed, but not agreed, was a clause to the effect that if the plaintiff did not sell the land within five years, the sum of $100,000 would then become payable by the plaintiff to the first defendant. This is a significantly different proposal and is strong evidence that clause 1.8 was not acceptable in the form as drafted and was still to be negotiated.

[45] Next Mr Liddy submitted that it was an important consideration that the contract was to be executed in the form of a deed. Mr Liddy referred to clause 1.3 of the draft deed, which refers to a Deed of Settlement, which is defined by clause 7.1 to mean "the Deed dated 21 January 2002 between the First Plaintiff, the Deceased, the First Defendants and the Third Plaintiff", namely John Patrick Albany, the Deceased, Yvonne Kathleen Albany and Kevin Alec Albany. Clause 1.3 provides:

> "The Deed of Settlement is terminated with immediate effect so far as concerns the Estate which is hereby released from any claims or outstanding liabilities thereunder, including for unpaid schools fees or any failure future liability for school fees."

[46] The Deed of Settlement of 21 January 2002 is not in evidence before me, but I note that, in order to release the Estate, obviously Public Trustee would need to be a party to the deed. Leaving aside the fact that Kevin Alec Albany is not a party to either the deed or the alleged oral agreement, an obligation

under a deed can be released by a subsequent contract. It does not require another deed,[10] provided that there is consideration. So far as the estate was concerned, there was no consideration, hence the need for a deed if the estate were to be released from the terms of the Deed. I think this point may have some substance and may point to the fact that no concluded agreement was reached. Mr Silvester for the plaintiff did not deal with this point in his submissions. I will deal with this point more fully later.

[47] Mr Liddy's next argument was that clause 6.3 of the draft Deed was a provision commonly called a sole or entire agreement clause. I do not think there is any merit in this argument. The authorities have recognised a fourth class of enforceable contract, i.e. where the parties intend to be immediately bound, but the parties also intend that the agreement will be substituted by a written contract which may even contain further terms by consent.[11]

[48] Mr Liddy submitted that the machinery provisions to given effect to the settlement were important because they affected substantively how the rights of the parties were to be resolved. That may be so, but on the facts of this case, the solicitors agreed that Mr Gallagher would draft those provisions. By itself, that does not necessarily point to an assumption by the parties that they intended to carry out further negotiations as to those provisions. In cases where the responsibility for drafting machinery provisions has been

[10] *Slee v Warke* (1949) 86 CLR 271 at 281-282.

[11] *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 317; *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634-635; *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* (unreported (2009) QCA 60; BC200901683).

left to the solicitor for one of the parties, the authority of the solicitor is limited to terms which are reasonable in the circumstances. In the event that there is a dispute as to whether what is eventually drafted is reasonable, that dispute could be resolved by the Court.[12] Moreover, there is an obligation on each party to do everything necessary to enable the other party to have the benefit of any concluded agreement in such a case.[13]

[49] Mr Silvester, for the plaintiff, submitted that the Court should have regard to, amongst other things, that the parties were siblings attending a mediation the purpose of which was to settle their differences. The essential terms were agreed and the agreement was not specifically made conditional upon the execution of a deed. Further, he submitted that both the plaintiff and Mr Maher thought that a binding agreement had been reached because after the mediation concluded and the settlement was announced, the plaintiff and Mr Maher had a conversation lasting between five and seven minutes in the car park outside the courthouse about "inconsequential matters" relating to the deceased and his family generally. Mr Maher said that had the plaintiff commenced to say anything which might have been to his detriment, he would have cut him off because his solicitor was not present. Mr Maher was not cross-examined on that point. I do not consider that this incident is helpful in determining any of the issues in this case.

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[12] *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* (unreported (2009) QCA 60; BC200901683) at [36].

[13] *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* (unreported (2009) QCA 60; BC200901683) at [33] citing McHugh JA in *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 635-636.

[50] It is, however, relevant to note the subject matter of the mediation and the situation of the parties. The plaintiff and the first and third defendants were children of the deceased. The second defendant was the deceased's former spouse. The plaintiff and the second and third defendants were attending a mediation the purpose of which was to see if agreement could be reached with the first defendant to settle their claims for provision out of the deceased's estate. The alleged agreement was reached between the plaintiff and the first defendant only. If agreement had been reached between all of the parties, any such agreement was still subject to the discretion of the Court. The Court's power to make an order under s 8(1) of the *Family Provision Act* requires the Court to be satisfied that the applicants fall within the class of persons entitled to apply for relief under s 7(1) of the Act. In the case of the second defendant, it was necessary for her to satisfy the Court that, immediately prior to the deceased's death, she was "maintained by the deceased".[14] The applicants would have to satisfy the Court that adequate provision was not available under the terms of the will for the "proper maintenance, education and advancement of life" of the applicant. If those criteria are met, s 8(1) confers a discretion, subject to the Act, having regard to all of the circumstances of the case, to order such provision as the Court thinks fit to be made out of the estate of the deceased. These provisions make is abundantly clear that the Court will not always

[14] s 7(2).

simply endorse orders by consent.[15] Leaving to one side for the moment any argument that no agreement is capable of being entered into not involving all of the parties in an action of this kind which I will deal with later, this is all the more so when not all of the applicants have joined in the settlement.[16]

[51] However, that is not to say that no agreement can ever be reached where the Court has a discretion whether or not the grant the relief sought. In such cases, the agreement is binding on the parties, but the operation of the agreement is suspended until the Court approves it and the parties are obliged to bring the agreement before the Court for approval.[17] I therefore do not think that the mere fact that the settlement was subject to the Court's approval, as it must have been, is fatal, or for that matter, necessarily points to the fact that the agreement was conditional upon the execution of the deed or any other written agreement. There is no requirement of which I am aware that in all cases the agreement must be in writing, albeit that the Court would normally expect draft minutes of the orders sought to be presented to it.[18]

[52] I have referred previously to the position of the Public Trustee as the executor of the estate, the fact that he is not a party to the alleged agreement reached and the fact that the alleged agreement purports to release the estate

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[15] *Harris v Caladine* (1991) 172 CLR 84 at 96; 103; 124; 133-134; 165.

[16] See for example, *Wintle v Stevedoring Industry Finance Committee (No 3)* [2002] VSC 369 at [17]-[18].

[17] *Smallman v Smallman* [1972] Fam 25 at 31; *Groser v Equity Trustees Ltd* [2008] VSC 163 at [25].

[18] *Coomber v Stott* [2007] NSWSC 513 at [27].

from the terms of a Deed of Settlement relating to the payment of school fees.

[53] Where an application is made for provision to be made out of an estate under the *Family Provision Act*, the parties to proceedings for such an order are generally just the applicants for the orders and the legal personal representative of the deceased.[19] Beneficiaries may be joined, but this is an exceptional power exercised, usually, only if the legal personal representative is not fulfilling his duty to either compromise the claim or claims, or contest it and seek to uphold the provisions of the will.[20] Such an order was made in this case joining the first defendant as a party to the original consolidated action as a co-defendant with the Public Trustee and it has not been challenged. Why such an unusual order was made is not apparent to me, although there is some authority to the effect that joinder of the sole beneficiary of a will is appropriate in the case of large estates.[21] Following that order, Public Trustee left the conduct of the defence of the original consolidated action to the first defendant and agreed to abide by the outcome of the action. Thereafter, Public Trustee has no role to play,[22] although as Hodgson JA said in *Bartlett v Coomber & Anor*,[23] it did not place the first defendant in the shoes of the deceased's executor.

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[19] *Re Lanfear* (1940) 57 WN (NSW) 181; *Re S J Hall* [1959] SR (NSW) 219; *Vasiljev v Public Trustee* (1974) 2 NSWLR 497; *Bartlett v Coomber* [2008] NSWCA 100 at [70].

[20] *Vasiljev v Public Trustee* (1974) 2 NSWLR 497; *Bartlett v Coomber* [2008] NSWCA 100 at [22], [70].

[21] See *In the Will of Lanfear (Deceased)* (1940) 57 WN (NSW) 181 at 183; *Vasiljev v Public Trustee* (1974) 2 NSWLR 497 at 503; *c.f. Re Burton (Deceased)*[1958] QWN 27.

[22] *Rutter v McCusker (No 2)* [2009] NSWSC 71 at [19].

[23] [2008] NSWCA 100 at [23].

Nevertheless, I do not see why, in principle, an agreement to settle the action could not have been reached if, for example, all of the claimants had reached agreement, even if Public Trustee was not a party to it, as the first defendant was the sole beneficiary of the whole of the deceased's estate. The only difficulties are:

1. The draft deed purported to release the estate from the obligations of a Deed of Settlement to which one of the claimants, who not a party to the settlement, was a party;

2. The agreement did bind all of the other claimants.

[54] None of the counsel were able to find any authorities bearing directly on these matters. As to the first of these problems, if the agreement sought to be enforced was the agreement reached at the mediation, the agreement to forego the liabilities of the estate, in its terms, affected only the first plaintiff. It did not (and could not) affect liabilities of the estate to other claimants. I see no reason why such a term binding only the plaintiff is unenforceable, the consideration for the term being the agreement to settle on the terms indicated.

[55] As to the second problem, it is necessary to consider the submissions of the defendants in more detail. Counsel for the second and third defendants, Mr Heywood-Smith QC and Mr Anderson, in their written submissions argued that the settlement reached was unenforceable because the weight of

authority dictates that the estate should be left intact until the Court has determined the pending applications under the Act.

[56] Further, it was submitted that Public Trustee could not give effect to the alleged settlement because it was prevented from doing so by s 21 of the Act. This provision provides for limited protection to the administrator of an estate from suit if the administrator distributed the whole or a part of the estate before receiving notice of an application under the Act. Reference was made to a number of authorities to the effect that, leaving aside debts and duties,[24] there should be no distribution to the beneficiaries until the claims have been resolved by the Court.[25]

[57] For the reasons I have already expressed in paras [50]-[51] above, these submissions must be rejected, because the agreement, if enforced, would not have the consequence that the estate would be distributed before the trial of the principal action. The agreement is subject to an implied condition that it is subject to the approval of the Court and the Court, before giving its approval, would need to consider, amongst other things, the claims of the other applicants. That can be done at the trial of the principal application when all the claims would be considered. Any such agreement would remain enforceable, as between the parties to it, in the meantime. A similar situation was discussed by the Court of Appeal of New South Wales in

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[24] *In the Estate of Gough, Deceased; Gough v Fletcher* [1973] 5 SASR 559 at 566 per Zelling J.

[25] *Simson v National Provincial Bank* [1950] Ch 38; *Blunden v Blunden* [2008] SASC 286; *Guardian Trust & Executors Co of New Zealand v Public Trustee of New Zealand* [1942] AC 115; *Legal Practitioners Complaints Committee v Reyburn* [2007] WASAT 29; *Grove v Fisher* [2002] WASC 247 at [55].

Bartlett v Coomber.[26] In that case, an agreement was reached between solicitors for the estate and the sole claimant under the *Family Provision Act 1982* (NSW) to settle an infant's claim. The deceased had left his entire estate to his mother, who died 35 days after him. The trial Judge approved the compromise even though it would affect the amounts to be received by the beneficiaries under the deceased's mother's will. The executor of the mother's will had withdrawn from the settlement. The beneficiaries thereof were joined as parties to the principal application and were separately represented thereafter by the executor of the will, Mr Bartlett. The trial Judge found that the agreement to settle the infant's claim was very generous and likely to have been slightly more than twice the amount he would have ordered had the matter gone to a full hearing. After considering the claims of the other beneficiaries, the trial Judge enforced the agreement. On appeal, it was argued that the trial Judge lacked the power to order the enforcement of the agreement, or alternatively, that the trial Judge approached the exercise of the discretion in a way that involved relevant matters not being taken into account and irrelevant matters being taken into account. The nub of the complaint was that the primary Judge failed to take into account the windfall that the compromise agreement gave to the claimant which resulted in injustice to the beneficiaries under the deceased's mother's Will.

[26] [2008] NSWCA 100.

[58] The Court of Appeal dismissed the appeal. In that case none of the beneficiaries of the mother's estate were eligible beneficiaries under the deceased's estate, which is different from the present case, but the Court said that the overriding principle, in deciding whether or not to enforce the agreement, is that the Court is concerned with the interests of justice and cannot allow its processes to become an instrument of injustice or abuse.[27] The trial Judge, before making an order in terms of the compromise, specifically had regard to the claims of the beneficiaries under the mother's estate and any hardship which might flow to them. The Court of Appeal considered that this was appropriate and no error was shown in the approach taken.

[59] This case demonstrates that an order can be made approving a compromise notwithstanding that not all parties have joined in the compromise, if the compromise would work no injustice to the other parties, if approved. As Bryson AJA observed, "it is not simply *pacta sunt servanda*, because such agreements are made subject to the necessity of obtaining the Court's approval".[28]

[60] Whether or not, at the end of the day, the Court will make orders in the form of the compromise will depend on a number of factors, including the legitimate claims of the other parties, including the first defendant, who also falls into the class of being an eligible claimant under the Act. This will

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[27] *Bartlett v Coomber* [2008] NSWCA 100 at [28].

[28] *Bartlett v Coomber* [2008] NSWCA 100 at [91].

depend on a consideration of all of the factors relevant to the exercise of the Court's discretion at the time of trial. The Court would retain a discretion to approve a compromise prior to the hearing of the other claims only in exceptional circumstances. At a minimum, the Court would need to be completely satisfied that the approval would not work any injustice to the other claimants and the first defendant. If this cannot be demonstrated at that stage, the approval would have to sought at the hearing of the remaining claims. The conclusion that I have reached is that the enforcement of the settlement between the plaintiff and the first defendant is not legally impermissible. Any order at this stage would not involve approval of the compromise; that would still have to be determined at a later time.

Conclusion as to whether there was a binding contract

[61] The conclusion I have reached is that there was an intention by the plaintiff and the first defendant to enter into a binding agreement between those parties only. In my opinion, the agreement reached was subject to the approval of the Court, but not conditional upon the entry into a formal deed. The parties intended also that the agreement reached would be substituted by a deed which may even contain further terms by consent. So far as the machinery provisions of the deed were concerned, the plaintiff's solicitor was authorised to draft terms which were reasonable in the circumstances.

[62] My reasons for these conclusions are as follows. First, I am satisfied that there was an offer made by Mr Maher which was accepted by Mr Gallagher. That offer did not include a term or condition relating to the first

defendant's will which was an entirely separate matter for the reasons already stated above in paras [30]-[31].

[63] Secondly, I am satisfied that the agreement was not subject to a condition that the parties enter into a deed. In my opinion, the case does not fall into the third class of cases discussed in *Masters v Cameron*,[29] but rather, what is sometimes referred to as the fourth class. This is because during negotiations it was never suggested that the agreement was conditional upon entry into the deed and the subject of the deed came up in discussions only after Mr Maher's offer had been accepted. The terminology used by Kelly J in her Honour's report to the Court does not use the expression that the settlement was conditional. If the parties did not intend to be bound immediately by the agreement reached, I would have expected that to have been made clear to the Judge. I have not overlooked Mr Anderson's submission that neither solicitor wrote down the terms of settlement and initialled them, nor did the parties request the mediator to note the terms of settlement. It may have been wise for this to have occurred in one form or another, but I am not aware of any universal practice in the Northern Territory about such matters, particularly where the terms of settlement are not complex. No evidence was given about any such practice.[30]

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[29] (1954) 91 CLR 353.

[30] There are possible stamp duty implications in entering into a written agreement which do not necessarily arise if the Court is approached to make an order: see de Groot & Nichol, *Family Provision in Australia*, 3rd ed, para 7.18.

[64] Clearly, the parties contemplated that there would be a deed and that Mr Gallagher would prepare it. In my opinion, the parties authorised Mr Gallagher to prepare a deed reflecting the terms of settlement and he was authorised to include reasonable terms concerning matters needed to be included to give effect to the settlement.[31]

[65] The agreement was subject to implied terms that the agreement was subject to the approval of the Court and that the parties were obliged to bring the agreement to the Court for approval for the reasons discussed in para [51] above.

[66] I do not consider the fact that Public Trustee was not a party to the agreement to be fatal to its enforceability for the reasons discussed in paras [53]-[54] above. In my opinion, the Deed of Settlement could be altered effectively by an oral agreement affecting intended parties, even if not all parties to the Deed were parties to the agreement. The oral agreement would only bind the parties to it. Although that agreement, by itself would not have released the estate, the Court has power to make an order conditional upon the applicant waiving claims against the estate as part of approval of a compromise if the Court sees fit to do so.[32] The Court also has power to order than an applicant received the entire available interest in

[31] See the discussion in para [52] above.

[32] *McGrath v Queensland Trustees* [1919] St R Qd 169; *Re Wright* [1966] TasSR (NC 1) 287.

particular assets of an estate, so the fact that the agreement relates to specific blocks of land is not necessarily fatal.[33]

[67] I do not consider that the fact that the deed drafted by Mr Gallagher contained some terms which had not been previously discussed between the parties, or which purported to vary the terms previously agreed, should override my conclusions. It was open, in my opinion, for the parties to negotiate new terms by consent. The form in which the deed was prepared was not such as to disclose an intention by the plaintiff not to be bound by the oral agreement previously reached and Mr Maher did not react in that manner. The fact that no consensus ad idem was reached on these issues means, simply, that no agreement was reached about them, but it does not otherwise alter the binding nature of the agreement reached. There was, in my opinion, no abandonment of the original agreement.

Should the Court specifically enforce the agreement?

[68] There is no doubt that the Court has power to order specific performance of an agreement to settle a claim made under the *Family Provision Act*.[34]

[69] Counsel for the plaintiff sought specific performance of the agreement the terms of which conform with the findings I have made, with the exception that the draft minutes of order do not reflect the implied terms I have referred to in para [65].

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[33] A Dickey, *Family Provision After Death*, 1992, Law Book Co, p 153.

[34] An order for specific performance was upheld on appeal in *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* (unreported (2009) QCA 60; BC200901683).

[70] In addition, the plaintiff has sought final orders in terms of the agreement reached. So far as final orders are concerned, I decline to make those orders at this stage because I do not know whether it would be fair to the other claimants to make final orders without hearing their applications.

[71] Mr Liddy submitted that specific performance should be refused for two reasons. First, it was submitted that there is lack of mutuality because the plaintiff would not be precluded from making another claim merely because he has contracted out of his entitlement. Reference was made to an assertion that the plaintiff, as part of a previous settlement in other litigation with the deceased during his lifetime, had agreed not to make a claim against the deceased's estate. There is no evidence before me so far that that was so. I accept that any such contract would not prevent him from pursuing his claim in the principal consolidated action.[35] Even if an order is made, the applicant could apply to discharge, vary or suspend the order.[36] However, an order cannot be made increasing a provision made by an order under the Act.[37] I do not consider that this ground is sufficient reason to refuse relief.

[72] The second reason raised was that the first defendant's consent to the agreement was vitiated by mistake. The alleged mistake is that the first defendant believed, based on the conduct of the plaintiff (and his lawyer

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[35] *Lieberman v Morris* (1944) 69 CLR 69; *Smith v Smith* (1986) 161 CLR 217 at 235; 249; *Daebritz v Gandry* [2001] WASC 45; *Barns v Barns* (2001) 80 SASR 331.

[36] *Family Provision Act*, s 17(1).

[37] *Family Provision Act*, s 17(3).

accepting), that anything said in the mediation could not be used against her. I have already found that Kelly J, on the balance of probabilities, qualified those words by using the words "if this matter is not resolved".[38] Mr Liddy submitted that in any event, even if those words were used, there was a unilateral mistake. However, equity will not intervene merely because there was a mistake by one party. It is clear that equity will not intervene if the mistake was not known to the other party, or if the other party was not in a position where a finding could be made that the other party ought to have known of it.[39] There is no evidence that the plaintiff or Mr Gallagher knew, or ought to have known, of this mistaken apprehension by the first defendant. That argument must be rejected.

[73] I see no reason why the contract cannot be specifically enforced subject to the implied conditions referred to above.

[74] The plaintiff is to bring in further minutes of order to reflect these reasons. I will hear the parties as to costs.

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[38] See para [13] above.

[39] *Taylor v Johnson* (1983) 151 CLR 422 at 432-433.