CITATION:	*Cutting v Public Trustee for the Northern Territory (No 2)* [2018] NTSC 51
PARTIES:	CUTTING, Phillip Frederick v PUBLIC TRUSTEE FOR THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	45 of 2016 (21627074)
DELIVERED:	26 July 2018
HEARING DATES:	26 February 2018; Written submissions 16 April, 28 May and 31 May 2018
JUDGMENT OF:	Hiley J

CATCHWORDS:

SUCCESSION - Family provision and maintenance - application for extension of time to bring a claim under s 8 of the *Family Provision Act* (NT) refused - delay of more than seven years - evidence and other factual material no longer available - Application dismissed.

SUCCESSION - Family provision and maintenance - agreement between husband of deceased testatrix and executors under the testatrix's will - approval of Court required - approval would not be given.

Family Provision Act (NT) ss 7, 8, 9; *Family Provision Act 1982* (NSW) s 7; *Inheritance Act* (WA); *Land Title Act* (NT) s 191; *Supreme Court Rules* (NT) r 15.08, r 25.03*; Trustee Act* (NT) ss 14, 15, 21

Affoo v Public Trustee of Queensland [2011] QSC 309; *Albany v Albany* [2010] NTSC 25; *Bartlett v Coomber* [2008] NSWCA 100; *Coates v National Trustees Executors & Agency Co Ltd* [1956] HCA 23; *Brown v Northern Territory of Australia & Brown* [2005] NTSC 26; *Cutting v Public Trustee for the Northern Territory* [2017] NTSC 6; *Edgar v Public Trustee of the Northern Territory & Anor* [2011] NTSC 05; *Hore v Perpetual Trustee Co Ltd* [2009] NSWSC (8 June 1995); *Lieberman v Morris* (1944) 69 CLR 69; *Masters and Anor v Cameron* [1954] HCA 72; *Morrison v Abbott* [2012] NSWSC 320; *Re Guskett* [1947] VLR 212; *Re Newton* (1950) 76 WN (NSW) 479; *Re Salmon, Deceased* [1981] Ch 167; *Simonetto v Dick* [2014] NTCA 4; *Smith v Smith* (1986) 161 CLR 217, applied.

Wheatley v Wheatley [2018] WASCA 34, distinguished.

Andre v Perpetual Trustees WA Ltd as Executor of the Will of Barbara Helen Owen Stewart [2009] WASCA 14; *Application of Scali* [2010] NSWSC 1254; *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1; *Beattie v Beattie* [2005] WASC 85 [3]; *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; *Clayton v Aust* (1993) 9 WAR 364; *Coomber v Stott* [2007] NSWSC 51; *Daebritz v Gandy* [2001] WASC 45; *Drover v Northern Territory of Australia & Ebatarinja* [2004] NTCA 11; *Goodman v Windeyer* [1980] HCA 31; *White v Barron* [1980] HCA 14; *Pontifical Society for the Propagation of the Faith and St. Charles Seminary, Perth v Scales* [1962] HCA 19; *KR & LAR v Public Trustee of the Northern Territory* [1996] NTSC; *McMahon v McMahon* [1985] NSWSC (2 August 1985); *Re Nassim (dec'd)* [1984] VR 51 at 55; *Re Hatte* (1943) St R Qd 1; *Richardson v Pedler* [2001] NSWSC 221; *Singer v Berghouse* [1994] HCA 40; *Spata v Tumino* [2018] NSWCA 17, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	M Crawley SC
Defendant:	J Ingrames

Solicitors:

Plaintiff:	Paul Maher Solicitors
Defendant:	HWL Ebsworth Lawyers

Judgment category classification:	B
Judgment ID Number:	Hil1809
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Cutting v Public Trustee for the Northern Territory (No 2)
[2018] NTSC 51
No. 45 of 2016 (21627074)

BETWEEN:

PHILLIP FREDERICK CUTTING
Plaintiff

AND:

PUBLIC TRUSTEE FOR THE NORTHERN TERRITORY
Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 26 July 2018)

Introduction

[1] On 16 July 2006 the late Janette Kathleen Cutting (the **Testatrix** or **Janette**) died leaving a will which she had made on 2 December 2003 (the **Will**). No provision was made in the Will for her husband, Phillip Frederick Cutting, the plaintiff (or **Phillip**).

[2] Janette and Phillip Cutting had been married since 1990 and lived together in a house at 6 Elliston Court, Anula (the **Anula property**), which Janette had purchased in 1987.

[3] Janette had six children from her previous marriage, Wayne Griffin, Nardene Griffin, Dale Griffin, Stewart Griffin, Nicole Huysse and Amanda Ruzsicska. Under the Will the Testatrix left her Estate to those six children and their children. The main assets of her Estate were:

(a) the Anula property;

(b) her (50 per cent) share in a company Philjan Nominees (NT) Pty Ltd (**Philjan**), the other (50 per cent) share being held by Phillip; and

(c) a debt of $53,757 owing by Philjan (the **Philjan debt**).

[4] Janette appointed as executors and trustees two of her sons in law, Peter Ruzsicska (husband of her daughter Amanda) and Frederick Huysse (husband of her daughter Nicole) (the **Executors**). Probate was granted to them on 4 June 2008. The total value of the Estate was stated not to exceed $1,052,524.77 based upon the affirmations of the Executors.[1] On 8 April 2008 the Executors had sworn the Affidavit of Assets and Liabilities valuing the total assets at $1,052,524.77 and estimating liabilities of $14,277.75, resulting in a net value of $1,058,247.02.[2]

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1 Folder containing affidavits and entitled "Defendant's Evidence for Hearing" (***D Bundle***) at p 22.

2 D Bundle at pp 138 – 144.

[5] On 11 April 2007 Paul Maher, solicitor for Phillip Cutting, wrote to Maleys, solicitors for the Executors, foreshadowing a claim pursuant to the *Family Provision Act* (NT) (**FPA**).[3] Negotiations took place between those parties over the ensuing 18 months or so. On 1 August 2008 Mr Maher proposed a settlement which involved the sale of the Anula property to Phillip for about $100,000 less than its market value, the transfer of Janette's share in Philjan to Phillip and the assignment of the Philjan debt to Phillip.[4] (I shall refer to these as the **Settlement Assets**.) On 16 September 2008 Maleys replied that the Executors had decided to accept that proposal. The plaintiff contends that this amounted to a binding agreement (the **Purported Agreement**).

[6] On 12 December 2008 the Executors wrote a letter to Janette's son Dale Griffin, also copied to Janette's other four children who were still alive, and the Estate of her deceased son Stewart Griffin. The letter attached a number of documents including an "Agreement and Acknowledgement by Beneficiaries" to be signed by each beneficiary acknowledging their consent to the terms set out in a draft Deed which reflected the Purported Agreement.[5]

[7] Dale Griffin, Wayne Griffin, Nardene Griffin and the Executor of the Estate of Stewart Griffin (who, together with their infant children, I

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3 Book containing affidavits and entitled "Plaintiff's Evidence for Hearing" (***P Bundle***) at p 74.

4 P Bundle at pp 98 – 99.

5 D Bundle at pp 29 – 39.

shall refer to as the **Majority Beneficiaries**) engaged solicitors Murphy Schmidt. Murphy Schmidt wrote back to the Executors on 4 February 2009 seeking more information about the assets and liabilities of the Estate, expressing concern about the fact that no provision had been made in the proposed agreement for the deceased's grandchildren[6] and proposing that any settlement achieved be approved by the Court.[7]

[8] In fact the plaintiff had already asserted ownership of Janette's Philjan share on 29 February 2008 when he signed a Form 484 notifying the Australian Securities and Investments Commission (**ASIC**) that he had become the owner of that share.[8] There was some delay in executing the rest of the Purported Agreement. This was partly to do with the plaintiff's inability to provide the agreed purchase monies for the Anula property and partly to do with difficulties ascertaining the financial position of Philjan. The title to the Anula property was transmitted into the names of the Executors on 2 October 2012, and a transfer to Philip was registered on 7 December 2012.

[9] Meanwhile there was much correspondence between Murphy Schmidt and Maleys, the former frequently seeking more information, demanding that the Executors distribute the Estate according to the

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6 In relation to the grandchildren clause 6 of the Will required the Anula property to be sold and the net proceeds to be held in trust for Janette's grandchildren, and cl 5(ii) directed that half of her share in Philjan, in other words one quarter share in that company, be given to her grandchildren.

7 D Bundle at p 135.

8 D Bundle at pp 9 – 20.

Will and complaining about the conduct of the Executors. Eventually, on 12 December 2012, Maleys wrote three letters, one to Murphy Schmidt advising that the Executors would be renouncing their executorships, one to Paul Maher advising that Phillip Cutting should consider filing a claim under the FPA, and one to the Public Trustee requesting it to take over as Executor of the Estate. On 8 August 2013 this Court made orders removing the Executors and appointing the Public Trustee as substitute executor and trustee of the Estate.

[10] On 14 May 2014 Murphy Schmidt, then representing most of the beneficiaries, wrote to the Executors, Maleys and Phillip Cutting a detailed letter setting out claims against each of them in relation to what had happened.

This proceeding and relief sought

[11] Following a considerable amount of uncertainty on the part of Phillip Cutting's solicitors as to whether the Court's approval of the Purported Agreement was required, and if so whether that could only be achieved once proceedings had been brought under the FPA, this proceeding was commenced by Originating Motion filed 6 June 2016 (the **Application**).

[12] In his Amended Originating Motion Between Parties filed 20 July 2016 (**Originating Motion**) the plaintiff seeks the following orders:

1. The time permitted for the making of the plaintiff's application under s 8 Family Provision Act be extended to the date of the filing of the originating motion in the preceding.
2. Provision be made for the plaintiff out of the estate of the late Janette Cutting on the terms agreed between the plaintiff and the executors of the estate of the late Janette Cutting on or about 16 September 2008.
3. Further, or in the alternative, a declaration that the agreement made on or about 16 September 2008 between the plaintiff and the executors of the estate of the late Janette Cutting, relating to making provision out of the estate for the plaintiff, is valid and binding on the parties.

[13] An application for joinder to this proceeding was made by a number of the beneficiaries of the Estate, namely three of the six children and 11 of the 13 grandchildren of the Testatrix. That Application was dismissed by Master Luppino on 17 November 2016.[9]

[14] The initial and main focus of counsel for the plaintiff in his submissions was the contention that the Purported Agreement is valid and binding and does not require the approval of the Court. Although this seems to be contemplated by the third of the orders sought in the Originating Motion it is clear that the parties and the Master were under the impression that these proceedings are intended to invoke the Court's jurisdiction under s 8 of the FPA.[10] During discussions with counsel at the end of the hearing I requested both parties to clearly identify in their final written submissions what orders they are seeking.

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9 *Cutting v Public Trustee for the Northern Territory* [2017] NTSC 6 (***Cutting No 1***).

10 See *Cutting No 1* at [29], [31], [39] and [42].

[15] In his written submissions counsel for the plaintiff did not state what orders the plaintiff is seeking but identified the following issues for determination:

(a) Does the Purported Agreement require the approval of the Court?

(b) If so:

(i) Does the Court have jurisdiction to approve the Purported Agreement?

(ii) Should it be approved?

(c) What costs order should be made including in relation to the beneficiaries?

[16] At the end of the submissions counsel referred to the first of the orders sought in the Originating Motion and stated that "as there is no substantive application being brought under s 8 of the Act, the limitation question simply does not arise."

[17] In his written submissions counsel for the defendant submitted that the Court should find that:

(a) the Purported Agreement is not an agreement that is binding on the defendant;

(b) the terms of the Purported Agreement would only become binding if the Court exercises its discretion under s 8 of the FPA by

making a family provision order in terms of the Purported Agreement; and

(c) the plaintiff has not made out his Application for an extension of the limitation period in which to bring his Application and, consequently the Application should fail;

(d) if the Court is satisfied an extension of the limitation period is appropriate, then the Court should find:

(i) the plaintiff has not sufficiently evidenced his need for provision from the Estate under s 7 of the FPA, based on his circumstances at the time of the Testatrix's death in 2006, and the existence of a "moral duty" being owed to him by the Testatrix is not guaranteed in light of the plaintiff's own substantial assets;

(ii) if the Court is satisfied the plaintiff as at 2006 was in need of provision from the Estate for the purposes of s 8(1) FPA, the plaintiff has not sufficiently evidenced:

1. the relative value of the Purported Agreement between the plaintiff and the Former Executors to satisfy the Court of its appropriateness; nor

2. why the Purported Agreement between the plaintiff and the Former Executors represents the appropriate

provision to be made in light of his current circumstances.

[18] At the end of his submissions counsel for the defendant submitted that the Application should be dismissed. Counsel also contended that consequential orders should be made:

(a) Declaring null and void the transfers and assignment of the Estate Assets; namely the:

(i) Philjan Share, on 29 February 2008 and/or 27 February 2009;

(ii) Anula property, on 7 December 2012;and

(iii) Philjan Loan, on 25 February 2009; and

(b) Directing the Registrar-General to cancel the indefeasible title of the plaintiff over the Anula property and create indefeasible title in the Public Trustee as Executor of the Estate of Janette Cutting;[11]

(c) Directing the transfer of a ½ share in Philjan Nominees (NT) Pty Ltd to the Public Trustee as Executor of the Estate of Janette Cutting; and

11 Pursuant to s 191(1) *Land Title Act*.

(d) Directing the re-assignment of the debt of $53,757.00 owed by Philjan Nominees (NT) Pty Ltd, from the plaintiff to the Public Trustee as Executor of the Estate of Janette Cutting.

[19] Both parties agreed to defer their submissions on costs pending the provision of these reasons.

Additional Facts

[20] The plaintiff, Phillip Frederick Cutting was born on 30 December 1938.[12] In 1987 he met his future wife, Janette Kathleen Griffin,[13] who was born on 5 October 1942. Phillip had four adult children from a previous marriage; Janette had six children, the youngest, Amanda Jane Ruzsicska (**Amanda**) then being about 14 years old.[14]

[21] In January 1988, Phillip and Janette commenced living together.[15] Amanda was living with them while she was still at school.[16] Phillip and Janette married on 1 December 1990.[17] They enjoyed a loving and loyal relationship[18] and continued to live happily together[19] until Janette's death on 16 July 2006.[20]

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12 P Bundle at p 250.

13 P Bundle at p 14.6.

14 P Bundle at p14.6.

15 P Bundle at p 14.7.

16 Transcript at p 38.

17 P Bundle at p 14.10.

18 P Bundle at p 2.6.

19 P Bundle at p 14.10.

20 P Bundle at p 16.18.

[22] Unfortunately most of the records regarding the respective financial contributions of Phillip and Janette, particularly in relation to the Anula property and Philjan, no longer exist.

The Anula property

[23] At the time of their marriage, Janette owned the Anula property. It was mortgaged at the time.[21] Phillip sold his home and some vacant land in Kalgoorlie, Western Australia and some shares, and moved in with Janette. He said that at that time he had about $1.5 million.[22]

[24] Janette had purchased the Anula property on 15 May 1987 for $73,000, apparently with the assistance of funds received from a Commonwealth Government Superannuation fund and a bank loan secured by mortgage.[23]

[25] In his affidavit, Phillip deposed that when he and Janette married, the mortgage debt was about $50,000. He said he made capital payments towards the mortgage as and when he had cash available[24] and that he paid off the majority of that debt. He also made improvements to the Anula property, including replacing the carpets with quarry tiles and replacing all of the windows, at his own expense.[25] Until her

21 P Bundle at p 14.9.

22 P Bundle at p 14.9.

23 D Bundle at p 248.

24 P Bundle at p 6.2; transcript at p 22.7.

25 P Bundle at p 6.2.

retirement Janette's more modest income was used substantially for her personal use and to assist financially her adult children.[26]

[26] Janette retired from her part-time administration officer position in September 1999 and received amounts of $103,000 and $12,291 from the Northern Territory Superannuation Office[27] some of which she used to pay out the balance of the loan and discharge the mortgage.[28] Unfortunately there was no direct evidence provided to the Court about the payout figures.

[27] The plaintiff was cross-examined about his assertions that he had paid off the majority of the debt, and about other parts of his evidence. He did have significant difficulties recollecting detail of this kind and was prone to avoid answering difficult questions at some points. I accept that he did make a significant contribution to the Anula property, both in the nature of payments of some principal of the loan monies, and in paying for some repairs and improvements.

[28] It is common ground that the value of the Anula property was approximately $350,000. The current value is unknown.

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26 P Bundle at p 15.11.

27 Transcript at p 21; D Bundle at pp 229 – 230.

28 D Bundle at p 226 at [12] and [14] and p 246.

Philjan

[29] In 1995 Phillip incorporated Philjan.[29] The two equal shareholders were Phillip and Janette, each holding one share.[30]

[30] With funds introduced by Phillip, Philjan purchased a property at Spencer Road, Darwin River, constructed a home on the property (**the Darwin River property**) and planted mango trees.[31] The evidence suggests, and I find, that Philjan purchased that property using funds loaned by the plaintiff.[32] The other improvements to the property were paid for partly by way of further loans from the plaintiff, or perhaps his company Groven, and partly by way of bank loans which were paid off by further loans by the plaintiff.[33] There is no evidence that the plaintiff made any capital injections of equity or ex gratia payments to Philjan. To the contrary, at all times the plaintiff has expected (and in recent years been in a position to effect)[34] the repayment by Philjan of the amounts loaned.

[31] Much of the physical labour was performed by Phillip personally, for which he was nominally paid a wage.[35] Janette attended to the

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29 P Bundle at p 15.12.

30 P Bundle at p 251.2.

31 P Bundle at p 15.13.

32 P Bundle at p 15 at [12] and p 17 at [23].

33 P Bundle at p 15 at [13].

34 The Plaintiff's evidence discloses that he caused Philjan to sell the Spencer Road property in 2015: P Bundle at p 16 – [29] 2nd Cutting Affidavit.

35 P Bundle at pp 16.19 – 17.22.

accounts, for which she also was nominally paid a wage.[36] However it would appear, and I accept, that some of those entitlements were not paid to them but accrued as debts owing to them by Philjan. Indeed this is the basis of the Philjan debt of $53,757 which was owed to the Estate.

[32] Phillip and Janette divided their time between living at the Anula property and the Darwin River property.[37]

[33] Counsel for the defendant submitted, and I accept that, given that the plaintiff has always maintained an entitlement to repayment from Philjan, his payments to and labour for Philjan ought not be characterised in the same way as, say, a husband contributing more than his wife to a marital asset. Notably, the plaintiff relied on Philjan's indebtedness to him in the course of the 2008 settlement negotiations to persuade the Executors that Philjan's shares were of no value.[38]

[34] Counsel also submitted that as a result of Janette's passing, the plaintiff became the sole director of Philjan, and as such remained entitled to continue to live at the Darwin River property and was effectively in control of any debt owed to him by Philjan. Evidence tendered by the plaintiff is to the effect that at around the time of

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36 P Bundle at p 7.6.

37 P Bundle at p 18.27.

38 P Bundle at p 98.

Janette's death, the plaintiff and his other company Groven Nominees Pty Ltd (**Groven**), was owed approximately $877,360.49 by Philjan.[39] The plaintiff was also receiving an income from Philjan, dividends from Groven, and dividends from his share portfolio which was to the value of "a few hundreds of thousands of dollars".[40]

[35] Unfortunately there is very little documentary evidence regarding the value of Phillip's assets including his shareholdings in Groven and listed companies and the true value of the Philjan shares at the time when Phillip and Janette made their Wills. Further, it is impossible to know what knowledge Janette had of the true value of Phillip's assets and Philjan when she made the Will.

The Will

[36] In late 2003, whilst in Mullumbimby visiting Janette's sister, Janette and Phillip made wills.[41] They were made separately and they did not discuss their contents. At the time, Phillip was due to undergo a by-pass operation. Because of that, as well as their comparative general state of health, he never expected that he may outlive Janette.[42] Similarly, Janette told her daughter Amanda that Janette did not expect Phillip to outlive her; nor, indeed, even to survive the heart surgery.[43]

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39 P Bundle at pp 91 – 92.

40 P Bundle at p 8 [12]; see also Transcript at p 33.

41 P Bundle at pp 15.15 – 16.16.

42 P Bundle at p 16.17.

43 P Bundle at p 2.8.

[37] However, in 2006, Janette had a kidney removed and was diagnosed with liver cancer. After a reasonably brief illness during which Phillip cared for her, she died on 16 July 2006 at their home at Anula.[44]

[38] Janette, made the Will on 2 December 2003, some two weeks or so after the plaintiff, Phillip, made his Will, on 18 November 2003. Both Wills seem to have been prepared by the same solicitors, at Mullumbimby, New South Wales. Both Wills used similar forms of drafting. Both appointed the same Executors, namely Janette's sons-in-law – Peter Ruzsicska (Amanda's husband) and Frederick Huysse (Nicole's husband). I would infer that the solicitors and Executors knew the full circumstances underlying the substantive differences between the two Wills.

[39] In his Will Phillip directed that:

(a) any of his and Philjan's debts be paid out of his Estate;

(b) any bank accounts in his name, items of jewellery or precious stones, and any contents and belongings owned by him at the house when he was living be left to his wife Janette;

(c) as to his shareholding in Groven Nominees Pty Ltd, so many of his shares as would enable his son Philip Cameron Cutting to hold 51 per cent of the total number of shares be given to him, 12 per

44 P Bundle at p 16.18.

cent to each of his daughters Kathleen Cutting and Leanne Cutting, and 25 per cent to his son Robert Cutting;

(d) as to his shareholding in Philjan , so much of it as would enable his wife Janette to hold 55 per cent of the total shareholding be given to her, and the other 45 per cent be split equally between his four children, Philip Cameron Cutting, Kathleen Cutting, Leanne Cutting, and Robert Cutting; and

(e) any residual estate to his wife Janette Cutting.

[40] In the Will Janette:

(a) devised and bequeathed the whole of her property to her Trustees upon trust "to sell, call in and convert the same to money and stand possessed of the proceeds … upon the trusts following …";

(b) directed that half of her share in Philjan be given to her children and the other half to her grandchildren (cl 5);

(c) directed that the Anula property be sold and the net proceeds be held in trust for her grandchildren to be received at the age of 25 (cl 6); and

(d) directed that the remainder of her Estate, which would include the Philjan debt, go to her children (cl 7).

[41] In short, in their Wills, Janette left nothing to Phillip and everything to her children and grandchildren, whereas Phillip left his Estate to Janette and his four children. At the time of the hearing five of Janette's six children were still alive and she had 13 grandchildren all of whom are direct descendants of Janette from her former marriage.

[42] It seems clear to me that the family, in particular Janette and Philip, were expecting Philip to die soon and predecease Janette. Under their respective Wills they were intending their respective children and grandchildren to end up with much of their respective Estates (after they both died), namely:

(a) Janette's family with the proceeds of the Anula property;

(b) Phillip's side with Groven Nominees Pty Ltd (the fishing business); and

(c) As to Philjan, after its debts were paid, 55 per cent to Janette's family and 45 per cent to Phillip's family.

[43] Counsel for the defendant resisted the assertions on behalf of the plaintiff that the reason for Janette not leaving anything to her husband Phillip in the Will was that she expected him to predecease her. Counsel contended that it is equally conceivable that she considered that Phillip did not require anything from her small Estate, leaving it instead to her own direct descendants. As I have said, it is possible

that Janette did not have full knowledge of Phillip's wealth or of the true value of Philjan when she made the Will. That may well explain why she dealt with her share in Philjan and with the Philjan debt in the way that she did. However it would not explain clause 6 which required the Anula property to be sold, thereby forcing Phillip to leave the home which they had enjoyed together for some 15 years and where she had chosen to die, having been cared for there by Phillip.

[44] I think it more probable than not that Janette's primary concern at the time of making the Will and her reason for excluding Phillip from any part of it, was her belief that he may not survive his forthcoming surgery and even if he did he would predecease her. Had Janette thought that Phillip was going to outlive her it is unlikely that she would have decided to force him out of the Anula property. At the least she would have left him a life estate so he could continue to live there. On the other hand, I see no particular reason why she would have left him her share in Philjan. She would have presumed that he could continue to use the Darwin River property including to visit and live on it. Nor am I aware of any particular reason why she would have given him the Philjan debt.

Relevant events following death

[45] The Executors engaged Maleys Solicitors to obtain probate. Phillip engaged Paul Maher Solicitors to represent his interests. On 11 April 2007 Mr Maher wrote to Maleys foreshadowing a claim under the

FPA.[45] No such claim was made then, presumably because negotiations were occurring between the solicitors on behalf of their respective clients.

[46] As I have said probate was granted to the Executors on 4 June 2008, apparently based upon the Affidavit of Assets and Liabilities that they had sworn on 8 April 2008 estimating the net Estate value at about $1,058,000. Janette's share in Philjan was estimated to be worth $750,000.[46]

[47] Meanwhile, on 29 February 2008, the plaintiff attended the local office of ASIC in Darwin and completed and signed a "Change to company details" form relating to Philjan. He completed various parts of the form stating that Janette was no longer a director or secretary of the company and that her share was cancelled and now belonged to him.[47] In his evidence he said that he went to the ASIC office to inform them that Janette had died and was no longer a director or shareholder. He was given the form and some help to fill it out. He did that before he consulted Mr Maher and without any professional advice. He thought he was doing the right thing at the time, but was later advised by Mr Maher that he should not have done that.[48]

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45 P Bundle at pp 74 – 75.

46 D Bundle at pp 138 – 144.

47 D Bundle at pp 9 – 20.

48 P Bundle p 20 at [35] – [36]. See too transcript at pp 39 – 42.

The Purported Agreement

[48] The Purported Agreement comprises a without prejudice proposal put by Paul Maher in his letter of 1 August 2008, which was accepted by the Executors by way of Maleys' letter of 16 September 2008.

[49] In his letter of 1 August 2008 Paul Maher referred to the accounts of Philjan as at 30 June 2007. They showed that Philjan owed Phillip $766,330 and Groven $107,445. They also showed an amount of $53,757 owed to the Estate. The letter then stated:

> Having regard to the assessed market value of the only asset of Philjan, namely the mango farm at $850,000, it is apparent that the shares in Philjan are worthless. I was therefore surprised to see that the executors in the affidavit of assets and liabilities, value one share at $750,000. I can only presume that arose from a complete misunderstanding of the accounts. It bears no connection with reality.
>
> Philjan would probably not be able to pay the debt to the estate in full upon a winding up, but for ease of calculation I would assume it could pay $50,000. The only other real asset of the estate is the house at 6 Ellison Court, Anula, which Mr Cutting estimates is worth $350,000. Therefore the estate is really worth about $400,000.

[50] Mr Maher referred to the fact that Phillip and Janette Cutting had been happily married for many years and Mr Cutting had nursed his wife during her final illness and was with her when she died at the Anula property. If Phillip Cutting was to make an application under the FPA the Court would make provision out of the Estate for him. Mr Maher then said:

> The most obvious aspect of that provision is that the Court would order that the estate's share in Philjan be transferred to Mr Cutting and that the estate's debt of $53,757 be assigned to him. That would have the effect of giving him the control of the mango farm without the prospect of interference from the numerous beneficiaries under the will, although the actual value of all that is only about $50,000.
>
> I put it to you that it is also likely that the Court would make some further provision for Mr Cutting and I suggest that would be in the sum of $100,000. Such a provision, in combination with the assignment of the debt owed by Philjan, is about 1/3 of the estate. I suggest that is the appropriate point of compromise between the estate and Mr Cutting.

[51] Mr Maher then referred to Mr Cutting's strong emotional attachment to the Anula property. He would like to purchase the property from the Estate for $250,000, namely its estimated value of $350,000, less the further provision of $100,000 that he would expect to be awarded out of the Estate. He then went on to explain that because of his limited access to cash Mr Cutting wished to pay the $250,000 by way of an initial payment of $100,000, and vendor finance for the balance to be paid within three years.

[52] He then proposed that "in full and final satisfaction of Mr Cutting's entitlements against the Estate pursuant to the Family Provision Act":

1. The estate's share in Philjan be forthwith transferred to Mr Cutting.
2. The estate forthwith assign the debt owed by Philjan to it in the sum of $53,757 to Mr Cutting.
3. The executors enter into a contract with Mr Cutting for the sale of 6 Ellison Court, Anula for $250,000, with $100,000 payable upon settlement (within 30 days of contract) and the balance to be provided by way of vendor finance, secured by

> first registered mortgage and repaid in full within three years of the date of contract.

[53] Mr Maher concluded by referring to the 12 months limitation period for making an application under the FPA, requesting a prompt response and stated that: "If agreement can be reached, I suggest that a deed incorporating the terms of this letter in a more formal fashion, should be entered into."

[54] Maleys replied on 16 September 2008:

> We have now had an opportunity to take instructions from the executors of the estate who have made the decision to accept the proposal to resolve any claim Mr Philip Cutting would have against the estate pursuant to the Family Provisions Act on the terms outlined under cover of your letter dated 1 August 2008.
>
> The executors of the estate are extremely mindful of Phillip Cutting's contribution and the unusual circumstances which led up to the creation of the Will by the late Janette Cutting which effectively overlooked the prospect of Phillip Cutting surviving her.
>
> We will now prepare a Deed to that effect and the necessary paperwork to transfer the property of 6 Ellison Court, Anula to Mr Cutting. Would you kindly make the necessary arrangements to prepare the required documentation to transfer the estate's share in Philjan to Mr Cutting and an assignment of debt of the money owed by Philjan in the sum of $53,757 to Mr Cutting.

Subsequent events

[55] On 19 September 2008,[49] Maleys sent to Paul Maher draft documents for the transfer of the Anula property and mortgage and, by separate letter, a draft Deed of Release. By email dated 24 September 2008,

49 P Bundle at p 108.

Paul Maher sent Maleys documents for the assignment of debt and share transfer.

[56] By letter dated 2 February 2009 from Paul Maher to Maleys,[50] Phillip returned all documents signed by him (except the Deed of Release, which was never signed). With their letter dated 26 February 2009 from Maleys to Paul Maher,[51] the Executors provided:

(a) A transfer of the Anula property and partial vendor finance mortgage (both signed by Phillip on 30 January 2009) countersigned by the Executors on 25 February 2009;

(b) An undated share transfer signed by the Executors; and

(c) An assignment of debt dated 25 February 2009 signed by the Executors.

By the same letter, Maleys further advised "Arrangements will now be made for the exchange."

[57] Meanwhile, the Executors had written the letter to Dale Griffen and Janette's other children and the Estate of her deceased son Stewart Griffin on 12 December 2008 referred to in [6] above.[52] The letter enclosed a copy of the Will, correspondence between Paul Maher and Maleys, and the "Agreement and Acknowledgement by Beneficiaries"

50 P Bundle at p 114.

51 P Bundle at p 126.

52 D Bundle at pp 131 – 2.

document to be signed by each of Janette's children. The letter outlined the proposal regarding the sale of the Anula property to the plaintiff and the likely share that each beneficiary would receive. It made no reference to Philjan, relevantly Janette's share in Philjan and the Philjan debt. The only other reference to assets of the Estate was a statement that "there is also a small amount of money in a bank account in the deceased's name." The letter went on to say that their legal advice was to the effect that Philip would have a very strong case if he contested the Will and made an application under the FPA, and that the legal costs to the Estate would be in the vicinity of $100,000 to $150,000 "if this matter did not reach settlement and proceeded to court." The letter also added the following:

> Any beneficiary who considers they have any other claim to any part of the estate should provide details of any claim along with **supporting documentation** to the executors as soon as possible.
>
> No beneficiary has to date made any specific written claim against the estate to either executor.
>
> …
>
> It should be noted that any **legal costs** associated with any claim **will be at the expense of the beneficiary making the claim** and **not** the estate.
>
> (Emphasis in bold and underlining in original letter)

[58] As I have noted above in [7], several recipients of that letter engaged solicitors Murphy Schmidt, who wrote back to the Executors on

4 February 2009 seeking more information and proposing that any settlement achieved be approved by the Court.[53]

[59] Maleys replied on 24 February 2009 and enclosed the Affidavit of Assets and Liabilities sworn by the Executors on 8 April 2008 for the purposes of their Application for the grant of probate. The Summary of Assets and Liabilities showed net assets of $1,058,247 made up primarily of the Anula property valued at $300,000, and the half share in Philjan valued at $750,000. Nothing was said about any debts owed by Philjan. The Summary attached a document identifying each of the six children and 13 grandchildren and setting out the estimated value of their share of the proceeds. Each child would receive about $62,500 being his or her "$^{1}/_{6}{}^{th}$ of ¼ share of the business" (Philjan) and $3754 being his or her $^{1}/_{6}{}^{th}$ share of the remainder of the Estate. Each grandchild would receive almost $22,000 upon reaching the age of 25 being his or her $^{1}/_{13}{}^{th}$ share of the proceeds of sale of the Anula property plus another $28,846 for his or her $^{1}/_{13}{}^{th}$ share of ¼ share of the business".

[60] Maleys wrote again to Murphy Schmidt on 25 February 2009 advising that they had "now had an opportunity to take instruction from the Executors" and that the Executors have resolved to settle the claim against the Estate by Phillip Cutting under the terms and conditions

53 D Bundle at p 135.

outlined in the previous correspondence to the respective beneficiaries."

[61] Murphy Schmidt replied to both letters on 11 March 2009.[54] Murphy Schmidt:

(a) stated that the Executors cannot settle the claim "without the agreement of all beneficiaries to the Will, and the approval of the Court";

(b) queried the valuation of Philjan particularly in light of Paul Maher's labelling of the valuation in his letter of 1 August 2008 as a "complete misunderstanding of the accounts", and requested a copy of any valuation and a copy of the company's Articles of Association;

(c) queried the valuation of the Anula property and requested a copy of the valuation or appraisal obtained for that property;

(d) noted that Maleys "have not addressed the issues of the lack of provision in the proposed settlement for the deceased's grandchildren and their need to be represented now, that any settlement will require the approval of the Court"; and

(e) requested a copy of "[Mr Cutting's] affidavit in support of his Claim".

54 D Bundle at p 148.

[62] On 27 March 2009 Maleys wrote to Murphy Schmidt[55] advising that:

(a) They "are instructed by the Executors that the proposed settlement with Phillip Cutting in relation to this claim under the Family Provisions Act will proceed";

(b) "Your clients can file the appropriate application in the Supreme Court of the Northern Territory if they are of the view that the administration of the grant of probate by the Executors is unfair or disadvantages them in some way"; and

(c) Settlement is scheduled to occur on 9 April 2009.

[63] Murphy Schmidt replied on 30 March 2009 in which they:

(a) state that Maleys' letter of 27 March ignores the issues raised in Murphy Schmidt's previous letters in particular the fact that "the interests of the infant beneficiaries are completely disregarded in the proposed settlement";

(b) point out that Rule 15.08 of the *Northern Territory Supreme Court Rules* require that a compromise involving an infant requires the approval of the Court;

(c) point out that "you wrote to our clients requesting consent. All have refused to consent to the proposed settlement.";

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55 D Bundle at p 151.

(d) repeat the need for up-to-date and accurate valuations; and

(e) request Maleys to confirm that they will not proceed with the settlement scheduled to occur on 9 April.

[64] Murphy Schmidt wrote again on 31 March repeating the concerns about the values of the Anula property and the Darwin River property, requesting copies of valuations or access to the properties so that valuations can be obtained, and repeating the desire of their clients to "resolve these issues sensibly and without reverting to the Courts."[56]

[65] By letter dated 8 April 2009,[57] Maleys advised the plaintiff's solicitors that due to complaints from some beneficiaries, while they did still intend to settle in accordance with the original terms and conditions, they proposed to seek formal ratification from the Court. Until that ratification is obtained, "the Executors will not be in a position to settle your client's claim."

[66] By letter dated 9 April 2009,[58] Paul Maher responded, stating "[Phillip] completely understands your client's [sic] position" and proposing settlement be delayed until 1 June 2009, with the possibility of further extensions if required. By further letter dated 24 April 2009,[59] Paul Maher proposed changes to the sale contract to require the Executors to

56 D Bundle at p 157.

57 P Bundle at p 144.

58 P Bundle at p147.

59 P Bundle at p 156.

apply to the Court forthwith; with settlement to occur 30 days after court declaration. On 5 May 2009 the Executors agreed to the changes to the sale contract.[60]

[67] On 28 August 2009, Phillip paid *ad valorem* stamp duty on the transfer of the Philjan share.[61] On September 2010, $100,000 on account of the purchase price was paid by Phillip to Maleys Trust Account.[62]

[68] By letter dated 8 February 2011,[63] Paul Maher advised that the delay was unacceptable and put the Executors on notice that Phillip may take steps to enforce the contract. On 24 March 2011, Maleys requested Phillip's permission to use some of the $100,000 held on trust by them to pay Merit Partners to value Philjan. On 7 April 2011, Phillip authorised Maleys to use up to $5,000 towards payment for the valuation.

[69] By letter dated 5 March 2012,[64] Paul Maher advised Maleys that Phillip proposed to pay the balance of $150,000 and register the transfer on or after 2 April 2012. On 11 April 2012 Phillip provided to Maleys the balance of the purchase price of the Anula property, being $150,000. On 30 April 2012 Paul Maher advised Maleys that the transfer cannot be registered, as the title remained in Janette's name (the transfer

60 P Bundle at p 160.

61 P Bundle at p 164.

62 P Bundle at p 182.

63 P Bundle at p 189.

64 P Bundle at p 205.

having been executed by the Executors). Following an email request from Maleys dated 5 July 2012, on 2 August 2012 Phillip swore an affidavit in support of a proposed application by the Executors for ratification of the agreement. No such application was ever made by the Executors. On 2 October 2012 Maleys informed Paul Maher that the title to the Anula property had now been transmitted into the names of the Executors.[65] On 7 December 2012, the transfer from the Executors to Phillip was registered.[66]

[70] Following what Maleys, in their letter of 12 December 2012, described as "continuing threats from the interstate beneficiaries to hold [the Executors] personally liable", the Executors elected to renounce their role and the Public Trustee was asked to take over.[67] This occurred on 29 August 2013 when the Public Trustee was appointed by the Court.

[71] Murphy Schmidt continued to maintain that the Purported Agreement would be subject to challenge. For example, by letter dated 5 April 2016 addressed to Paul Maher, Murphy Schmidt advised "until your client's alleged settlement of his application has been approved by the Court it is not legally effective." [68]

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65 P Bundle at p 258.

66 P Bundle at p 260.

67 P Bundle at p 262.

68 Smith Affidavit, p 264.

[72] Phillip commenced these proceedings shortly after that. It seems that his lawyers subsequently considered the proceedings were unnecessary and decided to discontinue them. Counsel for the plaintiff contended that discontinuance of the proceedings required the consent of the defendant, and that as consent was not given, the proceedings were amended to have the Court determine the validity of the Purported Agreement without court approval. Counsel did not indicate why the plaintiff could not have sought leave pursuant to Rule 25.03 of the *Supreme Court Rules* if he really did want to discontinue these proceedings.

Validity of the Purported Agreement

[73] As counsel for the plaintiff pointed out the Purported Agreement evidenced by the offer and acceptance dated 1 August 2008 and 19 September 2008 respectively was not expressed to be conditional. While it was anticipated that the agreement should be formalised in a Deed, there is no suggestion that it was not intended that there be a binding agreement until a Deed was executed. All of the terms had been agreed. It is in the first class of cases referred to in *Masters v Cameron*:

> The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms

restated in a form which will be fuller or more precise but not different in effect."[69]

[74] Counsel for the defendant contended that there was no binding agreement, primarily because it involved a compromise of a family provisions claim and also the compromise of the interests of infants. I will return to that contention shortly.

[75] Counsel asserted other reasons why there was no binding agreement. These included that:

(a) the proposal put forward by Mr Maher in his letter of 1 August 2008 was merely an opening offer;

(b) unbeknownst to them the Executors did not have effective control of the Philjan share and were not in a position to deal with it because the plaintiff had already asserted ownership of it;

(c) the sale of the Anula property was not a sale for proper value, nor was the assignment of the Philjan debt for $50,000;

(d) the Executors did not have information sufficient for them to value the Philjan share; and

(e) the Executors seem to have accepted the plaintiff's opening offer without any negotiation on behalf of the Estate.

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69 *Masters and Anor v Cameron* [1954] HCA 72; (1954) 91 CLR 353 at 360.

[76] With the possible exception of the point about the Philjan share I do not see any merit in those contentions. On its face Mr Maher's letter of 1 August 2008 contained a clear offer on behalf of the plaintiff to settle his potential claim under the FPA on the three conditions set out therein, and Mr Maleys response of 16 September 2008 was an unequivocal acceptance of that offer. As to the Philjan share, even though the plaintiff had claimed ownership of it when he completed the ASIC form on 29 February 2008, the share had not been validly transferred to him at that time and still belonged to the Estate.

[77] Even if the agreement was entered into in circumstances where the Executors were not fully aware of the value of the subject matter of the agreement, or even if the Executors were negligent or in breach of their duty in accepting the offer, that in itself would not vitiate the agreement.

[78] However, their capacity to enter into such an agreement was limited by the powers conferred upon them under the Will and also by statute such as the FPA and the *Trustee Act*. Counsel for the plaintiff pointed out that clause 3 of the Will gave the Executors the power to sell any of the Estate property. However that clause did not empower the Executors to dispose of the proceeds contrary to other provisions of the Will. In particular, clause 6 of the Will required the Executors to sell the Anula property and hold the net proceeds of that sale in trust for the grandchildren.

[79] Counsel for the plaintiff also pointed to provisions such as ss 14, 15 and 21 of the *Trustee Act* which confer certain powers on trustees. However those provisions only apply in so far as they are not contrary to the intentions expressed in the relevant trust instrument, here the Will.

[80] Although the correspondence constituting the Purported Agreement did not expressly contemplate any conditions, it is apparent from the Executors' letter of 12 December 2008 to Janette's children that they required each beneficiary to sign the Agreement and Acknowledgement by Beneficiaries form which they attached to their letter.

[81] In view of my conclusions below about the necessity for an agreement of this kind to obtain approval of the Court, it is not necessary for me to express a final view in this part of the plaintiff's contentions. However it is clear that the Executors did not have the capacity to enter into this agreement and to deal with the Estate in a manner contrary to the terms of the Will.

Requirement to obtain court approval

[82] It has long been held that family provision claims can only be disposed of by court order, and this requirement cannot be contracted out of. Per Dalton J in *Affoo v Public Trustee of Queensland*[70], at [24]:

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70 [2011] QSC 309; (2012) 1 Qd R 408; following *Lieberman v Morris* (1944) 69 CLR 69; *Smith v Smith* (1986) 161 CLR 217 at 235 and 249; *Bartlett v Coomber* [2008] NSWCA 100 (***Bartlett***) at [84].

> The final disposition of a family provision application calls for the exercise of the Court's discretion, it cannot be achieved by agreement or deed. The rule has its origins in the policy that a person cannot by contract exclude the jurisdiction of the Court to make a family provision order.

[83] Counsel for the plaintiff contended that "there is in fact no general rule requiring court approval in the absence of existing proceedings." This contention is unsupported by authority. The overriding rule, rendering out-of-court settlements to be unenforceable, emanates from the High Court's judgment in *Lieberman v Morris*;[71] a case in which the purported settlement agreement was reached before any proceedings were on foot. The plaintiff's submissions attempt to advance the entirely novel argument that the necessity of court approval only arises in some cases and not others. In this regard, the plaintiff's submissions fail to take account of the binding overriding principles expounded in *Lieberman v Morris*, which have been applied in countless cases throughout Australia, including in this Court.[72]

[84] This Court's power to make an order in favour of a claimant for whom adequate provision has not been made under a will is contained in s 8(1) of the FPA. The relevant part of that provision states that:

> the Court may, in its discretion and having regard to all the circumstances of the case, order that such provision as the Court thinks fit be made out of the estate of the deceased person.

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71 [1944] HCA 13; (1944) 69 CLR 69.

72 *Albany v Albany* [2010] NTSC 25; (2010) 27 NTLR 89.

[85] An order made under s 8 operates as if it were a codicil to the Will of the deceased person executed by the deceased person immediately before her death.[73] It is also relevant to note that the Court may regard an application for provision out of the Estate of a deceased person by one person, as an application made on behalf of all the persons entitled make application for provision out of the Estate.[74] In the present matter, all of the beneficiaries under the Will would have been so entitled by force of s 7(1)(c) or (e).

[86] In *Bartlett* the New South Wales Court of Appeal (Mason P, Hodgson JA and Bryson AJA) was dealing with an appeal against an order approving a compromise entered into on behalf of the Testator's 10 year old daughter, she not having been provided for in the Testator's Will. The power to make such an order was contained in s 7 of the *Family Provision Act 1982* (NSW) which provided that the Court:

> … may order that such provision be made out of the estate… of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

[87] Referring to the compromise, Bryson AJA said at [84] – [86]:

> [84] The agreement could only be given effect by an order made by the Court, and the Court could only act in exercise of the power in s 7 of the *Family Provision Act 1982*. If claimants and executors agree to settle a Family Provision claim their

73 S 16(1).

74 S 8(4).

agreement cannot have effect unless the Court exercises its power under s 7 and orders provision in accordance with the agreement. Whatever their agreement says, obtaining an order of the Court is impliedly a condition of its effectiveness.

[85] If the Court simply accepted the agreement of the parties and ordered the provision for which the agreement provides without considering exercise of its power under s 7 the Court would act in error; it would in substance fail to exercise its power.

[86] An order for provision always adversely affects property rights in estate assets which somebody would otherwise have. Alterations of property rights of this kind are authorised by law only if the Court makes under a decision under s 7; not otherwise.

[88] See too Mason P at [41] – [42] and Hodgson JA at [68] – [69].

[89] Bryson AJA observed that in addition to the power to decline to make orders under s 7 of the *Family Provision Act 1982* the Court also has the power to decline to make orders giving effect to a compromise where it is unjust to enforce a compromise or it is in the interests of justice that the matter proceed to trial.[75]

[90] See too Master Bredmeyer in *Daebritz v Gandy*[76]:

> The considerations of public policy just referred to are now regarded as the main reason why a person cannot contract out of his or her right to apply for family provision. This inability is accordingly not dependent upon statutory provisions to this effect. In the recent High Court case of *Smith v Smith* (1986) 161 CLR 217, all the members of the court acknowledged the principle that unless statute provides otherwise, any agreement to forgo a right

75 At [88].

76 [2001] WASC 45 at [10] quoting from Dr A Dickey: Family Provision After Death, at 188 – 189.

> to apply for family provision is void as being contrary to public policy.
>
> For the purposes of the rule against contracting out of a right to apply for family provision, it does not matter that the contract was made with the deceased or with beneficiaries of the deceased's estate, or that it was made before or after the deceased's death, or before or after the institution of proceedings for family provision.
>
> Although an agreement to forgo a right to apply for family provision is void, the terms of such an agreement may be taken into account by the court in the exercise of its discretion in an application for provision under the legislation.

[91] Counsel for the plaintiff also contended that:

> In these circumstances, none of the cases referred to undermines the powers of the Executors to enter into the agreement they did – without approval or sanction of the Court. No release of a family provision claim is in issue. No-one is seeking to argue that the agreement does, or does not, prevent a family provision claim now being brought by Phillip.[77]

[92] I reject this contention. It was the plaintiff's offer to release the Estate from a family provision claim by him that has been the fundamental basis of his initial offer and of everything that has happened since. If this contention was valid any individual could enter into a binding agreement with executors that would have the effect of completely nullifying the terms of a will and depriving the beneficiaries, including children, of the entitlements which the Testator had expressly bestowed upon them. That is not the law. Any such agreement requires the scrutiny and approval of a court.

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77 Plaintiff's Submissions at [85].

[93] Counsel for the plaintiff also contended that there are substantial factual similarities between the present matter and the circumstances considered by the Western Australian Court of Appeal in *Wheatley v Wheatley*[78] where the Court granted an extension of time for the bringing of the family provisions application under the *Inheritance Act* (WA). That matter involved an alleged agreement in 2012 between the Testator's son who had not been provided for in the Testator's Will, and his mother who had been left the whole of her husband's Estate following his death in 2008. In early 2016 the son commenced proceedings to enforce the alleged agreement. At about the same time the son commenced a family provisions application as a contingency against the enforcement proceedings being unsuccessful. The mother's opposition to the extension of time was successful at first instance but reversed by the Court of Appeal. Counsel for the plaintiff emphasised various passages in the reasons of the Court of Appeal which recognised that the family provisions application was only a contingency and assumed that the Purported Agreement did not require court approval.[79]

[94] That decision and the passages referred to are readily distinguishable from the present matter. The Purported Agreement between the mother and son did not purport to release the Estate from a family provision

78 [2018] WASCA 34.

79 Plaintiff's Submissions at [86] – [87].

claim by the son. It was reached after distribution of the Estate, to the mother under the Will, and was reached between the son and the mother. The Estate was not, and did not need to be, a party to the agreement, nor to the enforcement proceedings. The Court of Appeal's decision only related to the son's alternative family provision application brought to cover the contingency of him being unsuccessful in the enforcement proceedings which related to a private contract between him and his mother over land that she had inherited from her husband. Unsurprisingly, the Court in that case did not need to refer to principles such as those in *Lieberman v Morris*[80] and *Smith v Smith*[81].

[95] I agree with the defendant's contentions that this Court is bound by *Lieberman v Morris* and *Smith v Smith* to hold that any arrangement which purports to release an estate from a claimant's rights under the FPA is void and unenforceable[82] (or at the very least has its operation suspended pending the Court exercising its discretion, which does not change the result in this case)[83] unless and until the claimant applies for and obtains an order under s 8 of the FPA in the same terms as the settlement arrangement.

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80 [1944] HCA 13; (1944) 69 CLR 69.

81 [1986] HCA 36; (1986) 161 CLR 217 at 235 and 249.

82 See *Lieberman v Morris* [1944] HCA 13; (1944) 69 CLR 69; *Re Hatte* (1943) St R Qd 1; *Smith v Smith* (1986) 161 CLR 217, 235, 249; *Bartlett v Coomber* [2008] NSWCA 100; *Daebritz v Gandy* [2001] WASC 45.

83 *Albany v Albany* [2010] NTSC 25; (2010) 27 NTLR 89 at 51; *Affoo v Public Trustee of Queensland* [2011] WSC 309; (2012) 1 Qd R 408 [24].

[96] As counsel points out, the freedom of testamentary capacity is an important feature of our legal system and the Testatrix is entitled to expect her Will to be upheld.[84] Moreover, the importance of court approval to a compromise is highlighted where the affected beneficiaries are infants.[85]

[97] Accordingly, even if the Purported Agreement was otherwise a valid and enforceable agreement it is not so in the present circumstances where court approval has not been obtained.

Effect upon transactions carried out under the Purported Agreement

[98] Counsel for the defendant has made submissions and sought findings concerning the validity of various transactions that have occurred, in particular the conveyance of the Anula property and the transfer of the Philjan share. See [18] above. Counsel also makes allegations against the Executors, who are not parties in this proceeding. The answers to these questions may partly depend upon the answers to the remaining questions raised by the plaintiff in this proceeding and may require additional evidence and submissions. They may also require the bringing of fresh proceedings joining all relevant and necessary parties. I do not consider it appropriate to deal with those questions now.

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84 *Application of Scali* [2010] NSWSC 1254 at [11], *Pontifical Society for the Propagation of the Faith and St. Charles Seminary, Perth v Scales* [1962] HCA 19; (1962) 107 CLR 9 at 19.

85 *Hore v Perpetual Trustee Co Ltd* [2009] NSWSC (8 June 1995); *Cutting v Public Trustee of the Northern Territory* [2017] NTSC 6 [31]; See also *Morrison v Abbott* [2012] NSWSC 320 [70].

Proceedings under the FPA

[99] The first question is whether the plaintiff requires and should be granted an extension of time for the making of an application for an order under the FPA. Before turning to that question, it is convenient to briefly summarise the nature of the application before the Court.

[100] In considering whether to make an order under s 8, the Court must consider all relevant factors. The existence of a settlement agreement such as the Purported Agreement is but one of those factors.[86]

[101] When determining a family provisions application a court is normally required to adopt a two-stage process:[87]

(a) the first stage requires the Court to determine whether or not there has been adequate provision made under the terms of the Will for the proper maintenance, education and advancement in life of an applicant - this is often referred to as the **Jurisdictional Question**; and

(b) if the Court is satisfied that adequate provision has not been made the Court should then consider what provision ought to be made, if any - this is often referred to as the **Discretionary Question**.

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86 *Lieberman v Morris* (1944) 69 CLR 69, 88. See too *Bartlett* at [43] and [72] – [73].

87 *Simonetto v Dick* [2014] NTCA 4 [3], applying *Singer v Berghouse* [1994] HCA 40; (1994) 181 CLR 201 at 208 – 211. See also *KR & LAR v Public Trustee of the Northern Territory* [1996] NTSC (16 May 1996) at pp 5 – 7.

[102] The Jurisdictional Question requires the Court to assess the circumstances as at the date of the Testator's death. The Discretionary Question normally requires consideration of an applicant's circumstances and entitlements, and also the value of the Estate, as at the date of the hearing.[88] At all times the plaintiff has the onus of establishing his entitlement to a family provision order.[89]

[103] Counsel for the plaintiff contends that in the present matter the plaintiff is not seeking the usual kind of relief, namely the second stage noted above. Rather the plaintiff is seeking the Court's approval of the Purported Agreement of 16 September 2008.[90] I disagree with this contention in so far as it might imply that the Court is not required to have regard to s 8 and other relevant provisions of the FPA.

[104] Counsel for the defendant submitted that no order under s 8 of the FPA should now be made in the plaintiff's favour (either in terms of the Purported Agreement nor in any other terms), because:

(a) The plaintiff is time-barred by s 9 of the FPA from seeking to apply for any family provision orders. In the current circumstances, an extension of time would not be appropriate.

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88 *Coates v National Trustees Executors & Agency Co Ltd* [1956] HCA 23; (1956) 95 CLR 494; *White v Barron* [1980] HCA 14; (1980) 144 CLR 431 at 445 and 449.

89 *Edgar v Public Trustee of the Northern Territory & Anor* [2011] NTSC 05 at [46], [52] and [54].

90 Plaintiff's Submissions at [95] – [96] and [102] – [110] and Transcript at pp 60 – 63.

(b) There is insufficient evidence to establish that the plaintiff was in need of any provision from the Estate as at the date of the Testatrix's death in 2006, and a “moral claim” is not guaranteed in the circumstances.

(c) Even if the plaintiff was in need of provision from the Estate in 2006, having regard to the circumstances as at 2018, it is now impossible to determine whether the terms of the Purported Agreement represent the appropriate provision from the Estate to the plaintiff.

[105] Relevant to the Discretionary Question and also the plaintiff’s application for an extension of time for the making of this application is the date to which the Court should have regard where, as here, the Court is being asked to approve the Purported Agreement of September 2008 as distinct from determining afresh what provision if any should be made under s 8 of the FPA. As I have said the Discretionary Question is normally answered by reference to the applicant’s circumstances and entitlements at the date of the hearing. The defendant contends that that is also the appropriate date in a case such as this where the plaintiff is seeking the Court’s approval of a compromise. The Court cannot turn a blind eye to the happenings of the past decade.

[106] However, in his written submissions in reply counsel for the plaintiff asserts, without reference to any authority, that the relevant date is the date of the Purported Agreement. I disagree with that contention.

[107] As I have already observed, the compromise, and hence its approval or otherwise, is of the claimant's potential claim under s 8 of the FPA. Until and unless such approval is given, the claimant's only right to a share of the Estate would be his right, if any, to pursue and establish a claim under s 8. The determination and quantification of such a right is ascertained at the date of the hearing.

[108] A fundamental reason for entering into a compromise is to avoid the costs and uncertainty of a contested hearing. "[A] valid compromise gives effect to an agreement that effectively supersedes the antecedent rights of the parties."[91] At [39] of *Bartlett* Mason P quoted from an unreported decision of *McMahon v McMahon*[92] where Young J, referring to the Court's "duty of seeing that an order [approving a compromise] is only made in appropriate circumstances" said:

> Because of this it is necessary for me to look into the facts and circumstances of the plaintiffs and the defendant so far as they are relevant to a possible claim under the Family Provision Act.

[109] I agree with the defendant's contention that when considering the approval of the Purported Agreement it is appropriate to have regard to

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91 Mason P in *Bartlett* at [58]. See too Hodgson JA at [72].

92 [1985] NSWSC (2 August 1985).

the circumstances of the relevant parties at the time of the hearing, not at the time of the alleged agreement.

Extension of time - Originating Motion Order 1

[110] Order 1 on the Originating Motion seeks an order that time permitted for the making of the plaintiff's application under s 8 of the FPA be extended.

[111] In his written submissions counsel for the plaintiff said[93], simply:

> 111. It is Phillip's contention that as there is no substantive application being brought under section 8 of the Act, the limitation question simply does not arise.
>
> 112. To the extent that the court considers an extension of time needs to be determined, Phillip relies upon and adopts the approach taken by the court in *Wheatley*.

[112] In his written submissions in reply to the detailed submissions on behalf of the defendant on this issue counsel for the plaintiff said:

> The submissions of Public Trustee on the question of extension of time are misconceived. There is no application for a family provision. The question of whether the time to bring such a claim should be extended does not arise. The Executors having obtained probate on 4 June 2008, any potential claim by Phillip for family provision could be made within 12 months thereafter and accordingly was within time when the matter was compromised. There is no formal time limit within which to seek approval following a compromise.[94]

[113] It is difficult to reconcile these submissions with the order which the plaintiff seeks, namely an order extending time "for the making of the

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93 Plaintiff's Submissions at [111] – [112].

94 Plaintiff's Reply Submissions at [24] – [25].

plaintiff's application under s 8 of the Family Provision Act." In any event, I reject counsel's contentions, and in particular the distinction which counsel attempts to draw between a "substantive application" brought under s 8 and an application for court approval of an agreement that would have the same effect as other orders made under and following an application under s 8.[95] Accordingly I conclude that the Application is an application purportedly under s 8 of the FPA.

Principles

[114] Section 9 of the FPA requires that an application for an order under s 8 of the FPA be made within 12 months after the date of probate, unless the Court allows an extension of time under s 9(2) FPA.

[115] The general approach by this Court in relation to provisions for the extension of limitation periods within legislation (that is without reference to the *Limitation Act*) is that:

> where a provision confers a discretion to extend time, the discretion should only be exercised in favour of an applicant where, in all the circumstances, justice is best served by so doing. The onus of satisfying the court that the discretion should be exercised in favour of the applicant lies on the applicant.[96]

[116] Consistent with this approach, Australian courts have said in family provision applications that the plaintiff bears the onus of proof in

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95 See for example s 16.

96 *Brown v Northern Territory of Australia & Brown* [2005] NTSC 26 at [15] (referring to *Drover v Northern Territory of Australia & Ebatarinja* [2004] NTCA 11; (2004) 14 NTLR 140 at [30]-[33] and *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541.

establishing the appropriateness of an extension of time.[97] The time limit is "a substantive provision laid down in the Act itself, and is not a mere procedural time limit imposed by rules of court".[98]

Defendant's contentions

[117] In this case the limitation period expired on 4 June 2009. The plaintiff commenced these proceedings seven years and two days after that date. The defendant opposed the plaintiff's application for an extension of time on the following grounds:

(a) It is no longer possible to meaningfully determine the Discretionary Question in the manner required, because the Settlement Assets were transferred to the plaintiff many years ago.

(b) The delay in commencing proceedings has resulted in the loss of relevant evidence.

(c) The delay was for an extended period of time, was not the result of any ignorance of the plaintiff's right to seek provision, and instead was the result of his baseless refusal to accept that he was required to commence an application.

(d) The plaintiff has engaged in unconscionable conduct.

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97 *Re Guskett* [1947] VLR 212, *Re Nassim (dec'd)* [1984] VR 51 at 55, *Clayton v Aust* (1993) 9 WAR 364 at 366 (referring to *Re Salmon (deceased)* [1981] CH 170 at 174 – 175).

98 *Re Salmon, Deceased* [1981] Ch 167; cited by *Andre v Perpetual Trustees WA Ltd as Executor of the Will of Barbara Helen Owen Stewart* [2009] WASCA 14 and *Wheatley v Wheatley* [2018] WASCA 34 [54].

(e) The plaintiff has not established that he will suffer any manifest injustice, and it is likely that he will have redress against other persons if the extension is refused. Conversely, there is significant prejudice and injustice to the beneficiaries if the matter were allowed to proceed.

[118] Counsel for the defendant contended that the Discretionary Question is not able to be assessed. This is partly because of the events that have occurred subsequent to 2008 including the sale of the Darwin River property in 2015, the alleged improper receipts by the plaintiff of estate assets such as the Anula property, the Philjan share and the Philjan debt, and the benefit of rent-free occupation of the Anula property between the Testator's death in 2006 and the transfer of the property to him in 2012. The value of the Estate has also diminished partly due to the costs and expenses associated with this litigation.

[119] Counsel also contended that the paucity of evidence presented by the plaintiff, his evident lack of recall in giving oral evidence, and the difficulty the Public Trustee has experienced in seeking to investigate this matter, indicates that the delay in commencing proceedings has resulted in the loss or inability to access relevant evidence, particularly in relation to the plaintiff's finances as at the date of the Testatrix's death and the appropriateness of the Purported Agreement compared with the plaintiff's need. Examples of this difficulty include:

(a) The plaintiff claims to have made the majority of financial contributions toward the Darwin River property[99] and to the mortgage over the Anula property.[100] However, as was evidenced in his cross examination, the plaintiff is no longer able to remember how much was provided by him and any relevant financial documentation to support his assertions is now presumed lost.[101] Further, the plaintiff's evidence regarding contributions to the Anula property is confusing and contradictory.

(b) The plaintiff gave evidence regarding the existence and quantum of debts owed to him by Philjan. Difficulties may have arisen in this regard even if the Application had been brought in time, however the difficulties are compounded in considering the issues now. In particular, the plaintiff's solicitor has reported: "the former accountant for Phil (Murray Prentice) was most unhelpful and has since retired and disappeared from the scene. The handover to the new accountant Byrne Haig was most unsatisfactory for Phil. Murray really let him down and it caused Haig a lot of difficulties in trying to work out exactly what had

99 P Bundle at p 8 [12] – [13].

100 P Bundle at p 6 [2].

101 Transcript at pp 22 – 27.

gone on."[102] Had the matter been brought on more expeditiously this issue may have been ameliorated.

(c) The plaintiff gave evidence that Philjan owned shares in public companies (presumably he is referring to shares owned in or about 2006 or 2008), that they were "not many", that they were "sold long ago" and that he "cannot remember the details of them".[103] Despite the plaintiff's assessment of the shares being "not many", Philjan's financial statements as at 30 June 2006 record Philjan's shareholdings as having a value of $102,951.[104] Those financial statements attribute the exact same value to those shareholdings as at 30 June 2005, implying that $102,951 was not the market value of the shares as at 30 June 2006 - it might have been less, but it also might have been significantly more. In any event, it is not disclosed in the records and the plaintiff now cannot remember.

(d) Further, the plaintiff concedes that he cannot remember the actual value of his personal shareholdings in 2006.[105]

[120] Counsel also contended that when considering the Discretionary Question, the consequences flowing from the loss of financial documentation are compounded. Philjan's financial statements indicate

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102 P 312 Affidavit of Leonie Smith affirmed 8 September 2017 (**Smith Affidavit**); See also P Bundle at p 18 – [25].

103 P Bundle at p 7 [8].

104 P Bundle at pp 91 – 96

105 P Bundle at p 7 [11].

that its shareholding in public companies was valued at $87,548 as at the end of each financial year from 2007 to 2010.[106] As with the values at 2005 and 2006, it is evident that these figures do not reflect the contemporaneous market value at the time but are suggestive of shareholding of value (the quantum of which has now been forgotten by the plaintiff).

[121] Counsel also contended that by receiving the Settlement Assets, the plaintiff has engaged in conduct which was unconscionable (or at the very least, conduct which had no lawful basis), which is a ground on which the Court may refuse an extension of time.[107] In particular:

(a) Prior to the Purported Agreement being reached or even offered (but after an initial indication by the plaintiff's solicitor, Mr Maher, to the Executors that a family provision application may be pursued), on 29 February 2008, the plaintiff lodged the ASIC form to register the transfer of the Philjan share to himself. The Form 484 indicates that the plaintiff gave an unequivocal direction to ASIC to register a transfer of shareholding from the Testator to himself,[108] at a time when he was on notice that the Will had bequeathed that share to the Testatrix's descendants.[109]

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106 P Bundle pp 91 – 96 and pp 205 – 223.

107 *Richardson v Pedler* [2001] NSWSC 221.

108 D Bundle at pp 9 – 10.

109 By this time Paul Maher Lawyers and Maleys had exchanged significant correspondence in relation to the Plaintiff's claim: Refer P Bundle at pp 73 – 96.

(b) The plaintiff received the Settlement Assets (improperly and without any lawful basis) on 26 February 2009 and ceased any movement toward commencing appropriate family provision proceedings prior to the limitation date. This is notwithstanding that, prior to receipt of the Settlement Assets, the plaintiff's solicitors drew attention to the limitation date and foreshowed an application that needed to be resolved.[110] To the extent the plaintiff might look to the Executors as the cause of this delay (in light of their apparent agreement in 2009 for "formal ratification"), this cannot be accepted as a full explanation for the plaintiff's own failure to bring the Application in time.

(c) After receiving the Settlement Assets, and while on notice that the transfer of those assets was disputed by the Majority Beneficiaries, the plaintiff dealt with the assets over a number of years which has significantly impacted on the ability to assess the family provision claim and which is unlikely to be able to be fully wound back. For example, in 2015, the plaintiff caused Philjan to sell its major asset, the mango farm.

[122] Counsel also contended that the length of delay in commencing proceedings and the reasons for the delay are inexcusable on the following basis:

110 P Bundle at p 122.

(a) It has been held that: "The whole of the circumstances must be looked at and not least the reasons for the delay and also the promptitude with which the letter before action or otherwise was issued".[111]

(b) In this case, it has always been a requirement for the plaintiff to have commenced proceedings in order to realise any potential family provision benefits. At no point has the plaintiff been ignorant of his rights to family provision. This is a case in which the legal procedure governing his entitlements has simply been ignored, for no justifiable reason.

(c) In 2009, after the Majority Beneficiaries became aware of the Purported Agreement, on several occasions they put the Executors on notice of the requirement to seek an order under the FPA in order to properly dispose of the claim. Eventually, the Majority Beneficiaries' solicitors wrote directly to the plaintiff's solicitors in order to explain in unequivocal terms that such an order was essential.[112] As a legally represented family provision claimant, the plaintiff ought to have been aware of this from the outset in any event. Neither the correspondence from the plaintiff's solicitors, nor the plaintiff's written submissions, discloses any

111 *Beattie v Beattie* [2005] WASC 85 [3].

112 D Bundle at pp 108 – 114.

appreciable basis to delay the commencement of proceedings for over seven years.

[123] Counsel also contended that there is no evidence that the plaintiff will suffer any particular injustice if the Court refuses to grant an extension of time. Further, it is relevant to consider whether the plaintiff may have redress against any other persons if his extension is refused.[113] Counsel submitted that:

(a) The plaintiff is a man of means, and will remain so regardless of whether he is required to restore the Settlement Assets to the Estate. Over $1.3 million dollars was realised by Philjan upon the sale of the Darwin River property in 2015,[114] and on the plaintiff's own case, a large amount of that is or was owed to him by Philjan (some of which may by now have already been re-paid to the plaintiff by Philjan). If the plaintiff was required to pay an additional $100,000 to bring the sale of the Anula property to the full market value or if he were to re-assign the Philjan debt back to the Estate, it would be insignificant to the plaintiff in proportion to these amounts. Similarly, after the repayment of his debts, the Philjan Share is not likely to be a comparatively significant figure. Further, Philjan's contract of sale for the Darwin River property provides the plaintiff with free lodging for

113 *Beattie v Beattie* [2005] WASC 85 at [3].

114 Smith Affidavit at p 23.

the rest of his natural life and, unless he was required to transfer the Anula property back to the Estate, he also now has the Anula property (and, alternatively, if this property were to be transferred back he would be owed the return of his $250,000 purchase price – though likely with a reduction to account for the rent that should otherwise have been paid for its use before sale).

(b) To the extent that the denial of an extension of time renders the plaintiff liable to compensate the Estate for benefits received through the unlawful retention of the Settlement Assets over the past decade (such as lost rent), this does not visit any manifest injustice upon the plaintiff. To the contrary, the effect of such compensation would be to remediate an injustice: namely, the plaintiff's unlawful receipt of the Settlement Assets from the Estate.

(c) Further, if an extension of time is refused, then depending on the Court's reasons for refusing it, the plaintiff may well be able to seek redress from his solicitors' professional indemnity insurer, or look to the Former Executors and their legal advisors' insurer.

[124] Conversely, the beneficiaries, particularly the adult children of the Testatrix, will be significantly prejudiced if an extension is granted.[115] The Majority Beneficiaries have long agitated the need for the plaintiff

115 *Re Newton* (1950) 76 WN (NSW) 479.

to have the Purported Agreement brought to the Court at significant cost to them. If an extension of time is granted at this late stage they will likely suffer the injustice of losing the entirety of the Estate.

[125] Taking all of these factors together, the defendant submitted that the Court should not be persuaded to exercise its discretion to grant an extension of time for the plaintiff to now bring his family provision claim. In refusing to extend time, the remainder of the Application would no longer be required to be determined by the Court and the Application should be dismissed.

Consideration

[126] For the most part I accept and agree with the defendant's contentions. However I express no view and do not propose to speculate about whether or not the plaintiff might have other remedies if he is not granted the extension of time or about what the situation might be in the event that he has unlawfully obtained assets and benefits.

[127] The effluxion of time has rendered it very difficult for this Court to have reliable evidence in order to assess whether or not it is appropriate to approve the Purported Agreement. Moreover, the fact that the main assets, namely the Anula property and the Philjan share, have always been within the control of the plaintiff, and that the main Philjan asset, the Darwin River property, has been sold, has made it

virtually impossible for the defendant and the beneficiaries to ascertain the true value of the Estate.

[128] Had the application being made within time there would likely have been much more evidence available than there is now. For example, one would expect there to have been financial records and other records, including bank records, concerning Philjan and its assets and liabilities, and better evidence showing who contributed what towards the Anula property. One would also expect the Executors to be able to give evidence about the extent of their knowledge of the assets of the Estate at the time of the Purported Agreement, including the true value of the Philjan share which they had valued at $750,000 in their Affidavit of Assets and Liabilities.

[129] Further, I agree that the delay in bringing these proceedings is inexcusable. Contrary to some of the submissions advanced by counsel for the plaintiff, the onus has always been on the plaintiff and not the Executors or the beneficiaries, to validate his actions in obtaining estate assets contrary to the Will. He has been aware of the concerns expressed on behalf of the Majority Beneficiaries and of their requests for information, and the insistence of their lawyers that the Majority Beneficiaries be fully informed before agreeing to any compromise. He has also been on notice from the outset about the need to obtain court approval. I consider that he has consciously avoided bringing any action under the FPA or otherwise, content to remain in possession

of the Estate assets, until and unless someone else such as the Majority Beneficiaries or the Public Trustee forced the issue.

[130] I refuse the application for an extension of time.

Provision for the plaintiff on the terms of the Purported Agreement - Originating Motion Order 2

[131] Accordingly it is not necessary for me to deal with the plaintiff's application for approval of the Purported Agreement. However it might assist the parties if I express my views about that.

The Jurisdictional Question

[132] Such evidence as I do have leads me to think that the plaintiff was not in financial or other material need at the time of Janette's death. There is no suggestion, and it is unlikely, that anyone was going to force him out of the Anula property without affording him the opportunity to negotiate some form of tenure there. Moreover he could continue to live at the Darwin River property and work there on the mango farm.

[133] However I do consider that the plaintiff had a "moral claim" to provision out of the Estate, even if only a right to continue living in their home of 17 years or so. I accept that Phillip and Janette maintained a loving relationship during that time and that Phillip contributed towards the Anula property both financially and in kind. It is well accepted that a spouse is a natural object of testamentary recognition and there is a moral obligation to make provision where the

claimant has made significant contribution to the acquisition and improvement of the Estate assets.[116]

[134] Accordingly I find, particularly in these circumstances where there was no provision for Phillip in the Will, that he would have been eligible for provision under the FPA. The Jurisdictional Question would have been satisfied.

Approval of the settlement

[135] Once jurisdiction was established, the Court would need to consider whether approval should be given.

Bartlett v Coomber

[136] As references have been made by counsel to various passages in the decision of the New South Wales Court of Appeal in *Bartlett* I will outline here the relevant facts and circumstances and some of the comments made by their Honours.

[137] The Testator left his whole Estate worth more than $1 million to his mother Mrs Thomas and nothing to CC, his 10-old daughter. Despite paternity tests that showed otherwise, he had always disputed that CC was his daughter. Mrs Thomas died about 35 days after the Testator died. A potential family provisions claim on behalf of CC was settled by an agreement made on her behalf with the Executors of both Estates,

116 See for example *Spata v Tumino* [2018] NSWCA 17 at [95], [99] and [116]. See too *Goodman v Windeyer* [1980] HCA 31; (1980) 144 CLR 490 at 497 – 8 per Gibbs J.

pursuant to which she was to receive 50 per cent of the Testator's Estate plus costs. CC was the only eligible claimant to her father's Estate. However the Executor of the Estate of Mrs Thomas, Mr Bartlett, later sought to challenge the agreement. In short Mr Bartlett contended that CC should have received much less than 50 per cent of the Testator's Estate, and consequently he and the other beneficiaries of Mrs Thomas's Estate should receive more. The Supreme Court's approval of the agreement[117] was the subject of the appeal by Mr Bartlett to the New South Wales Court of Appeal.

[138] At [19] Mason P said:

> The settlement may have been reached between lawyers who were acting with the authority of their respective clients and it may have been certain in its terms. But since the agreement was, in effect, that the deceased's executor would submit to a particular order under the Act in favour of the plaintiff, the Court's role involved more than placing a rubber stamp on the transaction. It was common ground before Macready AsJ and in this Court that the Judge had to do more than satisfy himself that the order he was asked to make had the consent of the plaintiff and the deceased's executrix. How much more was the topic of the debate in this Court.

[139] His Honour proceeded to identify a number of factors relevant to the trial judge's examination of the strength of the plaintiff's claim:

(a) "… because there was a party before the Court additional to the parties to the agreement, the Court's powers to approve the

117 *Coomber v Stott* [2007] NSWSC 513.

settlement were at least constrained by the mandate of procedural fairness."[118]

(b) Because the claim involved an infant the judge "had to satisfy himself that the compromise was a good one so far as the plaintiff was concerned. Performance of this task required some consideration of the plaintiff's overall prospects not just to prospects of obtaining minimal of relief under the Act."[119]

(c) "The overriding principle is that the Court is concerned with the interests of justice and cannot allow its processes to become an instrument of injustice or abuse."[120]

[140] His Honour also noted that the trial judge considered the affidavit evidence filed on both sides in the pending proceedings for relief under the Act, briefly summarised the plaintiff's situation including her educational goals and prospects, her financial needs and the (limited) financial and health capacities of her mother, and then considered what he saw as the other side of the ledger namely the interests of the beneficiaries under Mrs Thomas' Will. The trial judge had found that the most favourable outcome for the plaintiff would have been an award in the region of $200,000 to$250,000, an amount less than half than she was to get under the agreement.

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118 [21].

119 [25].

120 [28].

[141] Mason P said:

> [56] I accept that the court's power to reject a compromise reached in proceedings under the Act is available both where the sum to be provided is too low or too high. Either extreme might indicate, for example, that the proceedings were being conducted through to completion for a purpose foreign to that of the Act and/or that some fundamental mistake vitiated the settlement process.
>
> [57] But it must be borne in mind that litigation under the Act takes place in an adversary context in which the active parties to the particular litigation are usually expected to be the best judges of what is in their own interests. The policy of Australian law encourages the settlement of disputes (see eg ***Baltic Shipping Co v Dillon*** (1991) 22 NSWLR 1 at 9 per Gleeson CJ and **Uniform Civil Procedure Rules 2005**, Part 20). Our legal system would collapse were it not for the fact that most disputes are resolved by agreement.
>
> [58] … the court may decline to give effect to a settlement if doing so failed to effectuate the specific policies of the Act, amounted to an abuse of process or otherwise offended public policy in a demonstrable way.
>
> …
>
> [60] When determining whether or not to translate a binding agreement into an order, a court proceeds in the full knowledge that it lacks full knowledge about the rights and wrongs of the yet to be litigated dispute. Allegations are necessarily undeveloped and untested.
>
> …
>
> [65] Naturally, there will be situations where a court can be sufficiently satisfied that the proffered compromise agreement lies outside the range of possible outcomes and to such a degree that the proposed order should be regarded as giving effect to some purpose extraneous to those within the Act. But much more is required than that one party to the compromise has repented of it, *a fortiori* a non-party like the present appellant

[142] Hodgson JA cited a number of authorities to the effect that the parties to proceedings for an order under the relevant statute are generally just

the applicant for the order and the legal personal representative of the deceased person. He then said:

> [71] According to these authorities, the duty of the legal personal representative is either to compromise the claim or to contest it and to seek to uphold the provisions of the will (or the distribution on intestacy); and to that end, to put before the court evidence made available by beneficiaries that is relevant to the issues. The beneficiaries may be joined as parties, but generally only if it appears that the legal personal representative is not fulfilling this duty to represent their interests, or there is some other reason justifying this unusual course.
>
> [72] As with other types of proceedings, agreements to compromise are possible, and indeed are to be encouraged. Such an agreement may be made by the parties to the proceedings, and the court will generally give effect to it. However, the court will need to be satisfied that the pre-condition in s 9(2) of the Act is fulfilled, and that the order agreed on is one which ought to be made in terms of s 7 of the Act. Because of the agreement, the court will generally be satisfied of these things without the need for any significant investigation of the evidence.
>
> [73] If an agreement to compromise is made, and then one party to that agreement seeks to withdraw from it prior to the making of any orders, it is in my opinion still generally appropriate for the court to give effect to the agreement and to make the agreed orders without the investigation into the facts which would have occurred if no agreement had been made. Otherwise, the agreement would be set at naught. On the other hand, depending on the reasons advanced by the party seeking to withdraw from the agreement, it may be reasonable for the court to consider the underlying facts to a greater extent than would have been the case if both parties had maintained their support for the agreement, in order to determine whether there would be any injustice in giving effect to the agreement.
>
> [74] In the present case, the primary parties to the litigation have maintained their support for the agreement. Mr Bartlett, the party opposing the agreement, is a person representing a deceased beneficiary. … It was appropriate that he be given the opportunity to persuade the court that the legal personal representative was not adequately representing the interests

of beneficiaries, and that to make an order in accordance with the agreement would involve injustice; but his participation was a concession for that purpose rather than a matter of entitlement, and the primary judge did correctly consider that he was bound by the agreement to compromise which he had initially supported.

[75] There could be no doubt in this case that the threshold in s 9 of the Act was satisfied, so the only issue could be whether the order to which the legal personal representative agreed was one which ought to be made within s 7. In view of the opposition of Mr Bartlett, it was appropriate to consider the facts to a greater extent than if there was no opposition; but the agreed order was appropriately still considered as one which prima facie ought to be made, and the facts were appropriately investigated only to the extent necessary to determine whether it would involve injustice.

[76] In my opinion, even on the basis of the primary judge's assessment, on the limited evidence before him, of the likely outcome of a contested case, there is no error in his conclusion that there was no injustice which would justify refusing to give effect to the settlement, or his conclusion that the agreed order was one which ought to be made.

[143] At [91] Bryson AJA said:

> The circumstances to which the Court may have regard are wide and an agreement to settle a claim is part of them. There may be exceptions, but in almost every case an agreement which an executor has made in exercise of the statutory power to make compromises, with an understanding of the assets in the estate and the interests of the persons otherwise entitled to them, and with legal advice, will ordinarily have an extremely strong claim for attention among the relevant circumstances. It is not simply *pacta sunt servanda*, because such agreements are made subject to the necessity of obtaining the Court's approval. Nonetheless the importance of such agreements is high. (Emphasis added by me)

Plaintiff's Contentions

[144] Citing [75] of *Bartlett*, counsel for the plaintiff contended that in light of the fact the agreement was reached with the Executors, then absent compelling evidence to the contrary, the order should be made. Where

orders approving a settlement are sought, as long as it was clear the orders sought were not for an improper purpose, they would invariably be given.[121]

[145] In this case, the Executors acted upon legal advice from independent solicitors, Maleys. By letter from Maleys to the Executors dated 16 September 2008, Maleys advised:

> We confirm that after carefully examining the claim made by Phil Cutting through his solicitor Paul Maher and the relevant provisions of the Family Provision Act we are firmly of the view that Phillip Cutting would have a substantial and significant claim over the estate of the late Janette Cutting.
>
> The Supreme Court would readily entertain any application by Mr Cutting given his contribution to the estate and the obvious oversight in the will of the late Janette Cutting. The estate could contest the application made by Phillip Cutting however in our view your professional fees and disbursements could be as much as $150,000 should the matter proceed to a fully contested trial in the Supreme Court of the Northern Territory. Ultimately, it will be the beneficiaries of the estate who will have to pay the costs associated with such litigation. Given the merits of Mr Cutting's claim there is a high likelihood that the estate would be required to pay his professional fees and disbursements should he make an application.
>
> In our view the proposal put forward under cover of letter dated 1 August 2008 from Paul Maher Solicitors is commercial and consideration should be given to accepting the proposal.

[146] In substance, the Estate comprised of the Anula property and Janette's one share in Philjan, together with a loan account with Philjan of $53,757.

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121 Citing [91], [56] – [58] then [72] of *Bartlett*.

[147] The parties proceeded on the basis that the Anula property was worth approximately $350,000. An appraisal by Ultimate Real Estate dated 15 April 2009[122] suggests a then selling price of $350,000 to $380,000, if the property was first given a garden tidy up. This follows a considerable increase in property values from July 2006, when its value would have been $280,000. Accordingly, the value at the time of the agreement is likely to have been no more than the $350,000 allowed, without regard to the selling fees required.

[148] The valuation of Philjan's shares was inextricably linked with the value of its one substantial asset, the Darwin River property.

(a) An appraisal of the Darwin River property by Ultimate Real Estate dated 28 April 2009[123] suggested it would then be difficult to find a buyer at almost any price, but suggested it would achieve a selling price of $850,000 to $880,000.

(b) This was after Phillip had planted an additional 1,000 mango trees since Janette's death.[124]

(c) Clearly the Darwin River property would have had a lesser value at the time of the Agreement.

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122 P Bundle at pp 149 – 154.

123 P Bundle at p 158.

124 P Bundle at p 7.

(d) Accordingly, after allowing for the loan accounts[125], the shares in Philjan had little if any value.

[149] In the circumstances, there is nothing to suggest the agreement reached was for an improper purpose, or otherwise an abuse of process. To the extent approval of the agreement is required, it should be given.

Defendant's contentions

[150] Counsel for the Public Trustee submitted that the Court must still consider the merits of an order in terms of the Purported Agreement. Counsel advanced a number of reasons why the Court need not (and ought not) merely accept the terms of settlement:

(a) An order under s 8 is a discretionary matter for the Court and depends on the individual circumstances of the case.

(b) The Purported Agreement is a decade old, and the changes in circumstances cannot be ignored for the purposes of the Discretionary Question.

(c) Infant beneficiaries are affected.

(d) A majority of beneficiaries object to the provision.

(e) The information relied upon by the Former Executors was not adequate.

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125 Recorded at $877,360.49 in 2006; $927,831.39 in 2007, see P Bundle at p 95.

[151] Counsel submitted that as a matter of public policy a court should be reluctant to endorse a decade-old dealing, retrospectively ratifying what may otherwise be a serious breach of executors' duties.

[152] In relation to the discretionary aspect of a s 8 FPA order, counsel rejected the plaintiff's submission that orders approving settlement agreements will "invariably" be given unless shown to have been for an improper purpose.[126] In all relevant cases, judges have caveated any such suggestion by confirming that each case must be considered on its own facts. Counsel cited the remarks of Bryson AJA at [85] – [86] in *Bartlett* quoted in [87] above and those of Hodgson JA at [73] quoted in [142] above.

[153] As for the Purported Agreement being a decade old, counsel pointed out that the financial positions of the plaintiff and the Estate have both changed very significantly since it was entered into (accepting the original financial positions are difficult to accurately articulate in the first place). Even if it were now established that the settlement was appropriate in 2008 (which the Public Trustee submits is not established), and even if this could have provided the basis for a court to grant such an order summarily in 2008 in reliance on the agreement, it should not follow that this Court in 2018 can proceed summarily on the same basis.

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126 Plaintiff's Submissions at [102].

[154] Counsel submitted that the Court cannot turn a blind eye to the happenings of the past decade.[127] For example, the Purported Agreement was predicated upon the assumption that the Darwin River property was worth approximately $850,000 and that Philjan owed $877,360.49 to the plaintiff and Groven around the time of the Testatrix's death.[128] As at the date of the hearing in 2018, these figures bear little meaning, if any. In 2015, the plaintiff caused Philjan to sell the Darwin River property for $1.3 million[129] while retaining a right for the plaintiff to live at the dwelling for the rest of his life.[130] The plaintiff (despite having the onus of proof in this case) has chosen not to adduce evidence of the amount he has personally been paid as a result of this sale. Further, whatever the plaintiff's life expectancy was in 2008, it is now about 10 years less.

[155] It is clear that the plaintiff's financial need as at the date of the hearing in 2018 is far less than it was in 2008. Similarly, it may readily be inferred that the Estate is in a far less favourable position than it was in 2008 (partly due to the transfer of the Settlement Assets and partly due to the toll of this litigation). In the Public Trustee's submission, this provides a compelling reason for the Court to refuse to now endorse the Purported Agreement.

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127 *White v Barron* [1980] HCA 14; (1980) 144 CLR 431 per Mason J at 445, Aickin J at 449.

128 P Bundle pp 91 – 96; see also *Cutting v Public Trustee for the Northern Territory* [2017] NTSC 6 at [11].

129 Smith Affidavit at pp 23 – 24.

130 P Bundle at p 16 [19].

[156] Further, courts may be more hesitant to make orders based on settlement agreements where infants are affected (as is the case here, given that a number of the grandchildren-beneficiaries are minors):

> In cases where the interests of infants or unascertained classes of persons may be affected by the orders, then the proposed orders are considered in more detail, not usually on the jurisdictional question, but more often on relevant terms of the orders themselves, and the extent of the benefit provided by them.[131]

[157] The Public Trustee submitted that the Majority Beneficiaries' consistent and continual objections to the Purported Agreement are a relevant factor, bearing in mind that Executors ought to take proper account of the positions and instructions of beneficiaries.[132]

[158] On the evidence before the Court, it is far from clear whether the Executors scrutinised the plaintiff's prospective family provision claim in the way which would ordinarily be expected prior to agreeing to a settlement. While they appear to have relied upon the plaintiff's lawyer’s assertions regarding the value of the Estate, they were not provided with any formulation whatsoever of the plaintiff's ongoing financial need for the purposes of his maintenance, education and advancement in life. An offer was made by the plaintiff and was accepted effectively without question or negotiation. While it was put that the Philjan share was valueless and the Philjan debt had a reduced value, it is apparent that even on the rough estimates provided the

131 *Hore v Perpetual Trustee Co Ltd* [2009] NSWSC (8 June 1995).

132 *Vasiljev v Public Trustee* [1974] 2 NSWLR 497.

share might have been at least worth something, but that was not adequately explored.

[159] Further, the Executors were not provided with any information regarding the plaintiff's savings, shareholdings or superannuation entitlements. They were not provided with sufficient evidence to establish the likely range of a family provision order which might have been made in 2008. In *Bartlett* it was observed that "the Court may decline to give effect to a settlement if doing so failed to effectuate the specific policies of the Act, amounted to an abuse of process or otherwise offended public policy in a demonstrable way."[133] In this respect the Public Trustee submitted that granting the plaintiff's application would not effectuate the specific policies of the FPA. To the contrary, it would retrospectively validate a dealing which subverted one of the important underpinnings of Australian succession law: namely, that Executors cannot part with estate assets in a way which rewrites a will, unless and until sanctioned by the Court in accordance with s 8 FPA. All authorities cited by the plaintiff and identified by the Public Trustee have dealt with circumstances in which applicants sought court orders embodying compromise agreements *before* carrying out the terms of the compromise. The current circumstances are obviously distinguishable.

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133 *Bartlett v Coomber* [2008] NSWCA 100 [58].

Consideration

[160] I accept the plaintiff's contentions regarding the value of the Anula property at the time of the Purported Agreement. However I have some difficulty accepting the estimated value of Philjan due to the obvious conflict between the value stated in the Affidavit of Assets and Liability and that asserted by the plaintiff by reference to loan accounts which cannot now be checked or verified.

[161] I accept and agree with the contentions made on behalf of the Public Trustee. I would add to that some additional concerns that I have regarding the conduct of the plaintiff.

[162] A major concern arises from his purported transfer of the Philjan share on 29 February 2008. Although his solicitor told him that he should not have done that, he never attempted to return the share to its rightful owner. Indeed it appears that he failed to disclose that he had transferred the share to himself to others who he knew would be acting on the assumption that the share was still held by Janette. In particular:

(a) The Executors must have been acting on that assumption when they swore the Affidavit of Assets and Liabilities on 8 April 2008 and obtained probate two months later;

(b) The plaintiff's solicitors must have been acting on that assumption when they made the settlement offer on 1 August 2008;

(c) The Executors and or their lawyers must have been acting on that assumption when they:

(i) considered the settlement offer;

(ii) purported to accept the settlement offer on 16 September 2008;

(iii) prepared the Deed and the "Agreement and Acknowledgement by Beneficiaries" and wrote to Dale Griffen and Janette's other children on 12 December 2008;

(iv) sent the Affidavit of Assets and Liabilities to Murphy Schmidt on 24 February 2009;

(v) continued to engage in discussions about valuing the Philjan share.

[163] Another concern that I have concerns the knowledge and understanding of the Executors, particularly about the ownership and value of the Philjan share, at the time when they accepted the settlement offer on 16 September 2008. Despite the fact that they had valued the share at $750,000 when obtaining probate and made no attempt to amend that valuation, they appeared to have accepted at face value the assertions made by the plaintiff's solicitors that it was worthless.

[164] I am also concerned about what appears to be a conscious decision on the part of the plaintiff to continue to deal with the Estate assets

despite having been frequently told that he could not do so without court approval. Related to this is his apparent reluctance to respond to reasonable requests made on behalf of the Majority Beneficiaries for information particularly about Philjan.

Possible value of a claim

[165] Counsel for the defendant then made submissions as to the plaintiff's likely entitlement if his claim was to be litigated. Counsel contended that the benefits provided to the plaintiff under the Purported Agreement are not within the likely range of orders which might be made if his family provision claim were now to be pursued ab initio.

[166] First, the plaintiff has not adduced sufficient evidence to this Court to ascertain the amount "needed" by the plaintiff (either as at 2018, nor as at 2008). By way of summary, the evidence that has been adduced regarding his current situation is that:

(a) Philjan sold the Darwin River property in 2015 for the amount of $1.3 million.[134] Those funds were (and possibly still are) within the effective control of the plaintiff (either by way of his alleged loan account,[135] or in his capacity as the alleged sole shareholder of Philjan, which has not traded since selling the farm).

134 Smith Affidavit at pp 23 – 24.

135 Smith Affidavit at p 452.

(b) The plaintiff has retained the right to live at the Darwin River property for the rest of his life.

(c) The plaintiff owns the Anula property on an unencumbered basis and uses it as a second residence.

(d) The plaintiff has substantial shareholdings in listed companies (possibly somewhere in the order of $700,000,[136] however the plaintiff has chosen not to disclose the actual value).

[167] The plaintiff has failed to adduce evidence of the following (and therefore has not discharged his evidentiary burden):

(a) The actual value of his shareholdings (which information would be readily ascertainable to him). In this regard, the plaintiff's evidence is evasive and contradictory: in his first Affidavit the plaintiff swore to the effect that his valuable assets comprised *only* his interests in Philjan and Groven;[137] conversely, in his second Affidavit the plaintiff referred to having owned a "few hundred thousand dollars" worth of shares around the time of the Testatrix's death.[138] Further, when questioned under cross-examination, the plaintiff conceded owning the abovementioned

136 Transcript at p 33.

137 P Bundle at p 17.

138 P Bundle at p 7 [11].

substantial shareholdings but claimed not to know the actual value.[139]

(b) The extent of any funds held in his bank account(s);

(c) The status of his loan account with Philjan in recent years (including the amount by which it increased and/or the extent of any repayments by Philjan to the plaintiff);

(d) The extent of any valuable personal assets held by him as at the date of the hearing (including, for example, any motor vehicle(s));

(e) Any information regarding his current income (including, for example, income from the abovementioned shareholdings in listed companies); and

(f) Information regarding the plaintiff's current expenses, and the extent to which they are met by his income.

[168] Counsel referred to the plaintiff's reliance upon the principle:

> …in cases such as this of widows, or widowers, that they should be secure in their home; that they should have an adequate income for their purposes; and that they should have a capital fund to protect them from unseen events and to spend for their own purposes as they see fit.[140]

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139 Transcript at p 33.

140 Plaintiff's Submissions at [100] citing *Hore v Perpetual Trustee Co Ltd* [2009] NSWSC (8 June 1995).

[169] Counsel contended that even on the scant evidence provided by the plaintiff, it seems that he probably has all of these things even without taking into account any provision from the Estate: with the Darwin River property, he is secured in his home. Further, as a 79 year old with (a) three quarter of a million dollars' worth of shares (b) a readily realisable debt from Philjan in the order of $1.3 million dollars (minus whatever he has paid himself since 2015), and (c) no rent expenses, he almost certainly has adequate funds at his disposal to fund a comfortable lifestyle for the rest of his life. On this basis, even in the alternative[141] that any meaningful conclusions can be reached based on the scant evidence provided, they weigh heavily against the plaintiff's case.

[170] To determine what orders are required the Court needs an evidentiary basis on which to form a view on the plaintiff's financial need. Even if the Court accepts that plaintiff's submission that the Court can summarily grant his application since it is based on the Purported Agreement, all relevant authorities point to the need for the Court to satisfy itself of its prima facie reasonableness. In order to make this assessment even on the most cursory basis, the Court needs to be candidly informed by the plaintiff of his financial position. The

141 The defendant's primary submission is that no meaningful conclusions can be reached based on the plaintiff's evidence.

plaintiff's evidence falls well short of this requirement, and the absence of this information is fatal to the plaintiff's claim.

[171] Second, when making provision for a widow or widower, rather than drawing from the Estate to make immediate lump sum payments to a claimant, courts should favour a "Crisp order":[142] that is, that the surviving spouse have a flexible movable *life estate*, so that the surviving spouse can secure more appropriate accommodation but the value ultimately returns to the intended beneficiaries when the surviving spouse dies.[143] In this case, at least with respect to the Anula property (and possibly even the Philjan Share), such an order would have been infinitely more appropriate. The Will bequeathed the Anula property to the Testator's 13 grandchildren (many of whom were infants) and the proceeds of sale of the Anula property were to be held on trust for them until their 25th birthdays.[144] A majority of the grandchild-beneficiaries are still less than 25 years old as at the beginning of 2018. If any order were to be made by a court in respect of an ab initio FPA application in the plaintiff's favour with respect to the Anula property, it would almost certainly be to confer upon him a life estate, so that the ultimate value of the property would flow to the Testatrix's 13 grandchildren (in much the same way as it would have

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142 Derived from *Crisp v Burns Philp Trustee Co Ltd* [1979] NSWSC (18 December 1979).

143 *O'Leary v O'Leary and Eccles* [2010] NSWSC 1347 at [80], *Milillo v Konnecke* [2009] NSWCA 109 at [47] – [48].

144 Clause 6 of the Will, see P Bundle at pp 23 – 26.

even if a Crisp order was not made), rather than to the plaintiff's descendants, who the plaintiff may name as the heirs to his Estate. This is particularly so when it is considered that the plaintiff also has a life interest in the residence at the Darwin River property.

[172] Third, the Purported Agreement was based upon the premise that the value of the provision to the plaintiff was approximately one third of the value of the Estate.[145] The parties failed to take account of the fact that the plaintiff remained in occupation of the Anula property without paying rent from 15 July 2006 until legal ownership was finally transferred to him on 7 December 2012. The plaintiff (who has the burden of proof of establishing the reasonableness of the settlement) has not adduced any evidence to quantify the value of this benefit. The defendant points out that at say $400 per week unpaid rent would have amounted to about $200,000.

[173] Finally, it is difficult to see how the plaintiff had any “requirement” for the Anula property. The plaintiff's arrangement of maintaining a dry-season residence and a wet season residence[146] is extravagant and needless.[147] It ought not to be accepted that the plaintiff needs to retain two residences so that he can "come to town and spend a few days at the Anula house in order to take the opportunity to go shopping and do

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145 P Bundle at pp 46 – 47.

146 P Bundle at p 18 [27].

147 See generally *White v Barron* [1980] HCA 14; (1980) 144 CLR 431 at pp 450 – 451.

the other things which can only be done in the city and not at Darwin River". The Darwin River property is less than an hour's drive from the Darwin CBD. Such distances are an ordinary incident of one's choice to lead a rural lifestyle and in any event, shops and services are increasingly abundant in the semi-rural areas around Darwin.

[174] With all of the above considerations taken into account, it would be wholly inappropriate to order provision in favour of the plaintiff in terms of the Purported Agreement.

Consideration and conclusions

[175] I accept these further submissions on behalf of the defendant. In particular the Court has not been provided with evidence sufficient for the Court to conclude that the plaintiff has any need at all for provision out of the Estate. If anything the evidence suggests the contrary. If he were to receive anything, it would probably be confined to a life interest in the Anula property.

[176] Nor is it possible to ascertain what the value of the Estate would be had its assets not been removed from the Estate and some of them, namely the Darwin River property, sold. Of the $250,000 paid to the Estate in September 2010 and April 2012 it is likely that much of this will have been spent, particularly on this litigation.[148] If the Purported Agreement was approved, the beneficiaries under the Will would each

148 As at 8 September 2017 the current value of the Estate was $167,547.62. At that time legal fees of almost $12,000 had been deducted. See D Bundle pp 547 – 550.

receive very little, much less than they would have expected having regard to the Affidavit of Assets and Liabilities, even if a family provisions claim duly made would have resulted in the plaintiff obtaining a life estate in the Anula property.

[177] These considerable disparities between what the plaintiff would receive if the Purported Agreement was approved and what he might receive following a successful claim under the FPA and what the intended beneficiaries might receive under either of those scenarios, my concerns about the conduct of the plaintiff expressed at [161] – [164] above, the circumstances and consequences of his delay in making this application, and my doubts about the understanding and knowledge of the Executors about the true value of Philjan when they accepted the offer, all cause me to conclude that it would be unjust to approve the Purported Agreement. In the circumstances the approval of the Purported Agreement would offend the public policy underlying the purpose of the FPA and the importance of acknowledging the Testatrix's wishes that her children and grandchildren receive a substantial share of her Estate.

Conclusions and orders

[178] I conclude that:

(a) The agreement said to have been reached between the plaintiff and the Executors of the Estate of the late Janette Cutting on or about

16 September 2008 (the Purported Agreement) would not be binding unless and until it was approved by the Court.

(b) The plaintiff has not made out his application for an extension of the limitation period in which to bring his Application. Cf Order 1 sought in the Application. Consequently the Application must be dismissed.

(c) Even if the Application was not dismissed, provision would not be made for the plaintiff on the terms contained in the Purported Agreement. Cf Order 2 sought in the Application.

(d) The Purported Agreement it is not valid and binding on the parties. Cf Order 3 sought in the Application.

[179] I make the following orders:

1. The Application for extension of time is refused.

2. The Application is dismissed.

3. Costs are reserved.

4. The parties have liberty to apply.

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