SUPREME COURT OF QUEENSLAND

CITATION:	*Mann v Mann & Ors* [2024] QSC 50
PARTIES:	**GRAEME PETER MANN** (Applicant) **v** **NAN ELLEN MANN (as executor of the Will of GEOFFREY GORDON MANN deceased)** (First Respondent) **NAN ELLEN MANN** (Second Respondent) **STUART GORDON MANN** (Third Respondent) **NATALIE JEAN MANN** (Fourth Respondent)
FILE NO/S:	499 of 2023
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 March 2024
DELIVERED AT:	Cairns
HEARING DATES:	29 January 2024, further submissions received 9 & 16 February 2024
JUDGE:	Henry J
ORDERS:	**1. Application dismissed.** **2. Liberty to apply to be heard as to costs, on the giving of two business days' notice in writing by no later than 24 April 2024.** **3. If the liberty conferred by order 2 is not exercised in time, the estate will pay the parties' costs to be assessed if not agreed on the indemnity basis.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S INTENTION – GENERALLY – where the Queensland State Government resumed a portion of the Mann farm property and paid partial compensation to the deceased – where the deceased made a will which excluded the State resumed land and effectively included the anticipation of the consequential compensation as residue – where the deceased left the farm

property to his adult children equally – where the deceased left the residue of his estate to his wife and appointed her executor of the will – where the Cairns Regional Council resumed a further part of the property and paid compensation after the death of the deceased – where the State Government revoked their resumption and returned the resumed land after the death of the deceased – where the deceased did not anticipate the possibility of these future events in his will – where the applicant seeks a declaration the returned resumed land and the council compensation form part of the property left to the children – where the first respondent opposes that declaration and argues that the returned resumed land and the council compensation form part of residue of the estate – whether the will should be construed so that the returned resumed land and council compensation goes to the children or the wife.

Acquisitions of Land Act 1981 (Qld) s 17
Succession Act 1981 (Qld) ss 6, 21, 33, 33C, 33E, 33F

Brown v Butcher (1922) 22 SR (NSW) 176 discussed
Castle v Fox (1871) LR 11 Eq 542 discussed
Fell v Fell (1922) 31 CLR 268 cited
In re McBeane (1973) 7 SASR 579 discussed
In re Portal & Lamb (1885) 30 Ch D 50 discussed
In re Willis (1911) 2 Ch 563 discussed
Knight v Knight (1912) 14 CLR 86 cited
Nicol v Chant (1909) 7 CLR 569 cited
Orr v Slender; Estate of Godfrey Raymond Orr (2005) 64 NSWLR 671 cited
Roberts v Pollock [2019] QSC 184 cited
Webb v Byng (1885) 1 K&J 580; 69 ER 591 discussed

COUNSEL:	A R Philp KC for applicant B Bilic for first respondent
SOLICITORS:	The Will and All for applicant MacDonnells Law for first respondent

[1] The Mann family's cane farm at Mill Road, Edmonton was gradually surrounded by the southern creep of Cairns suburbia. It became a target of government acquisition. The Queensland Government resumed about 40 per cent of it but later gave the land back. It paid only partial compensation in the meantime. The Cairns Regional Council resumed another, smaller section, paying full compensation.

[2] The farm's half owner, Geoffrey Mann, made a will early in that series of events, when only the State Government resumption and payment of its partial compensation had occurred. His will left his share in the Mill Road farm and two

other family farms to his adult children, Graeme Peter, Stuart and Natalie. He left the residue of his estate to his wife, Nan, who was also appointed his executor.

[3] At the time of his will Geoffrey believed the Mill Road farm no longer included the 40 per cent of it resumed by the State Government but that substantial further compensation for that resumption would be received. He was not to know that, after his death, the State Government resumption would be revoked and the resumed land returned. Nor was he to know the local Council would proceed to resume a further part of the farm, paying compensation after his death. Unsurprisingly, the terms of his will did not expressly cater for the possibility of such future events.

[4] Nan and Graeme Peter disagree on how the will should be construed in connection with the outcome of those unanticipated events. Should the land returned by the State Government and the compensation paid by the Council go to the children or to Nan? Graeme Peter applies for a declaration that each form part of the property left to the children. Nan argues they each form part of the residue.[1]

[5] Before moving to the will's construction, it is helpful to have some understanding of the sequence of the Mill Road farm resumption and compensation events, relative to the date of the will and of death.

What was the sequence of Mill Road resumption and compensation events?

[6] The Mann family have owned a farm of varying scale at Mill Road since 1907. Geoffrey's brother, Allan John Mann, deposes:

> "Mann's Farm was the first land ever owned by the Mann family following generations of subsistence as tenants in feudal style Scotland and was prized to such a degree that the family declared that it should never be sold or put at risk through mortgage".

[7] Their father, Alexander, inherited the farm from his father in 1939. It was inherited by Allan and Geoffrey in equal shares on their father's death in 1966. They together purchased additional farms without mortgaging Mann's Farm in the 1970s.

[8] The Queensland State Government compulsory acquisition of part of the brothers' Mill Road farm, ostensibly for a future hospital, health precinct and roads, occurred in December 2010. That resumption was of 21.567 ha of land, constituted by lots 2, 3, 5 and 6 of the land described in what became Survey Plan (ie "SP")240391. The resumption did not include lots 1 and 4 of SP240391. It did include a resumption of a smaller homestead block, lot 9, but the detail of that is not alleged to be relevant to the parties' present dispute.

[9] The farm had originally been 54.155 hectares. The land resumed by the State Government thus represented roughly 40 per cent of the farm. This left lot 1's 19.848 ha and lot 4's 12.74 ha, about 32.59 ha, as the whole of the remaining Mill Road farm owned by Geoffrey and Allan.

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[1] The other two children did not appear in the application, although Nan filed and read an affidavit from Stuart.

[10] The consequence of the State Government resumption was that at the time of Geoffrey's will, executed on 13 October 2015, the Mill Road farm consisted of lots 1 and 4 on SP240391. As will be seen, they were the lot and plan numbers he hand-wrote into his will.

[11] The Queensland Government paid an "advance against compensation to be paid" for the resumption, in the amount of $4.364 million in December 2011. It had earlier paid an advance of $848,852 in respect of lot 9. The balance of the compensation owing remained in dispute and had not been determined or paid as at the time of Geoffrey's will or by his death, on 13 February 2016. The evidence shows an overall amount of $29.4M had been sought, which, allowing for the partial compensation paid, meant $24M was still being sought as the balance of the State Government compensation. That may have been optimistic, but the obvious development value of the land made it realistic to expect the eventual balance of the compensation to be paid by the State government would be a substantial, multi-million dollar amount.

[12] The Cairns Regional Council's intention to compulsorily resume part of the Mill Road farm was advised by the lodging of notices of intention to resume in July 2015, before the execution of Geoffrey's will in October 2015. The resumption was implemented after the will's execution, by gazetted notices in December 2015 and January 2016. The implementing of the resumption involved dividing the land in lot 1 of SP240391 into what then became lots 1, 2 and 3 of SP284229 and Council resuming lots 2 and 3 thereof. The 2.526 ha of land thus resumed by Council represented about 8 per cent of the Mill Road farm as it was after the State Government resumption. It left lot 1 with 17.3207 ha and lot 4 with 12.74 ha, a total of 30.06 ha, owned by Geoffrey and Allan. This position prevailed as at Geoffrey's death, on 13 February 2016.

[13] Subsequent to his death the Council resumption compensation claim was settled by his estate and a compensation amount of $750,000 was received on 30 October 2017.

[14] Also, after Geoffrey's death, the Queensland State Government revoked its resumption. This was unheralded from the perspective of the Mann's. The only time there had been any suggestion of it as a possibility was during the Liberal National Party's period of executive government from March 2012 to January 2015. However, the Labour party had re-affirmed its continued commitment to the southside hospital development on its return to executive government.

[15] The revocation process began on 16 June 2016, when Crown Law emailed the respondent's lawyers, indicating that the State was prepared to revoke the resumption on the Mill Road farm, on the basis that the Manns retain the advance against compensation, that being the $4.364 million paid to them. The revocation soon proceeded on that basis, being published in the Queensland Government Gazette on 19 July 2016. What legal consequence did that have?

[16] Section 17 *Acquisitions of Land Act 1981* (Qld) provides:

> **"17 Revocation before determination of compensation**
>
> (1) If, at any time after the publication of the gazette resumption notice and before the amount of compensation to be paid in respect of the taking thereof is determined by the Land Court or the payment of compensation in respect of the taking is sooner made, it is found that the land or any part thereof is not required for the purpose for which it was taken, the Governor in Council or a gazetting authority, by gazette notice (the revoking gazette notice), may revoke the gazette resumption notice, in whole or in part.
>
> …
>
> (2) Upon the revocation wholly or otherwise by a revoking gazette notice of any gazette resumption notice –
>
> (a) the gazette resumption notice shall to the extent to which so revoked be deemed to be absolutely void as from the making thereof as if it had not been made.
>
> …
>
> (4) Any person entitled to claim compensation under this Act in respect of the taking of any land may, upon the revesting of such land or part thereof pursuant to this section, claim from the constructing authority compensation for the loss or damage and (if any) costs or expenses incurred by the person in consequence of the taking of the land and prior to its revesting." (emphasis added)

[17] The effect of s 17 is that upon the publication of the revoking gazette notice on 19 July 2016, the resumption on December 2010 was deemed absolutely void from the time of its making, "as if it had not been made." This means the 40 percent of the Mann brothers' farm at Mann Road thought to have been resumed by the State Government in 2010 is deemed to have continued to be owned by Geoffrey and his brother, up to and beyond the time Geoffrey made his will. Of course, Geoffrey did not know that when making his will.

[18] The revesting restored the total property owned by the estate and Geoffrey's brother at Mill Road to about 51.6 ha, compared to the 32.59 ha Geoffrey thought it was at the time of will.[2]

[19] That brief history of the Mill Road farm resumption and compensation events relative to the time of the will and of death may be summarised thus:

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[2] The areas of the land purportedly resumed by the State Government revested with land that had not been resumed to became two lots, the new SP numbers of which were further altered after a dispute between the estate and Allan John Mann, prompting inclusion of a portion of lot 9, the house lot.

Date	QGovt Resumption	Local Govt Resumption
Dec 2010	Resumption of 21.567 ha occurred	
Dec 2011	$4.3M paid as advance on compensation	
July 2015		Notices of intention to resume lodged
13 Oct 2015	**Will Executed**	
Dec 2015/Jan 2016		Resumption of 2.526 ha occurred
13 Feb 2016	**Geoffrey died**	
19 July 2016	Resumption of 21.567 ha revoked (deemed void from its occurrence in Dec 2010)	
30 Oct 2017		$750,000 paid as full compensation

[20] This history of events assumes present relevance because of the wording of Geoffrey's will of 13 October 2015.

What did the will say?

[21] The only two dispositive clauses were clauses 4 and 5.

[22] Clause 4 dealt with the disposition of Geoffrey's interests in the three family farms.

[23] Clause 5 left the residuary of his estate, after meeting the estate's debts and expenses, to his wife Nan. Its meaning is not in issue. It described the residue as:

> "…all my real and personal estate, wherever it is and in whatever form it is, not otherwise disposed of by this will"

The only other property disposed of by the will was the property left by cl 4 to the children.

[24] The meaning of cl 4 is in issue. Clause 4 is headed "Specific gifts". The ensuing content, which consists solely of cl 4.1, contains typed writing and handwriting as follows:

4. SPECIFIC GIFTS

4.1 I give all my estate and interest in and to:

(a) Mill Road, Edmonton (real property description L500 SP171159 & L1,4 SP240391), also known as and incorporating any property described as

(b) Wiseman Road, Edmonton and 500L Hambledon Drive, Edmonton;

and

(c) Stewart Road, ~~Edmonton~~ Caravonica.

and in the proceeds of sale thereof (in the event a contract for its sale is completed after my death) and the income therefrom to my children Graeme Peter Mann, Stuart Gordon Mann and Natalie Jean Mann absolutely (if more than one then equally as tenants in common) subject to them assuming responsibility from the date of death of all such outgoings or proportion of outgoings for which I or my estate is liable in respect of the properties (such income and outgoings to be apportioned at the date of my death to achieve the result whereby my estate is entitled/responsible up to and including the date of death and the beneficiary is entitled/responsible thereafter).

What issues arise for determination about the meaning of the will?

[25] Two issues of construction arise from those words.

[26] The first construction issue relates to the meaning in cl 4.1 of what real property was described in consequence of the handwritten additions after cl 4.1(a)'s typed words "Mill Road, Edmonton". The handwritten references to "L500 SP171159" and "500L" fall away as materially relevant because they match the lot and plan numbers of other real property, namely that at "Wiseman Road, Edmonton", referred to by the typed words of cl 4.1(b). The only lots specifically described in the handwriting that were in fact lots of Mill Road farm are lots 1 and 4 of SP240391. They were the only lots remaining after the State Government resumption. The description prompts this question for determination:

1. Is the revested part of the Mill Road farm which had purportedly been resumed by the State Government part of the Mill Road property described in cl 4.1?

[27] The second construction issue relates to the meaning of what was meant by "proceeds of sale" and "income" as later used in clause 4.1. It assumes significance in that the compensation derived from Council's resumption of part of the land described in cl 4.1 (a) was received after Geoffrey's death. It prompts this question for determination:

2. Is the Council resumption compensation within the meaning of "proceeds of sale" or "income" as referred to in cl 4.1?

[28] Graeme Peter contends the answer to both questions is "yes". For the reasons which follow the answer to both questions is "no".

What is the nature of the interpretative exercise to be undertaken?

[29] The jurisdiction to give declaratory relief of the kind here sought is conferred by s 6 *Succession Act 1981* (Qld). It confers a broad jurisdiction, including to make "all such declarations … as may be necessary or convenient" in respect of all testamentary matters and matters relating to the estate and its administration. The proper construction of the will is such a matter.

[30] The court's self-evident task in construing a will is to give meaning to the words which the testator deployed to give effect to the testator's testamentary intention.[3] The focus of such an exercise is necessarily upon the meaning of the words used, considered on the context of their use within the will. However, the meaning of some words of a will may not be apparent from the will's content or may be ambiguous. Where that occurs s 33C of the Act applies.

[31] Section 33 is the Act's variant on what is known as "the armchair principle", by which the court has regard to evidence beyond the content of the will so as to understand the intended meaning of the testator's language.[4] It provides:

> "**33C Use of evidence to interpret a will**
>
> (1) In a proceeding to interpret a will, evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it—
>
> (a) meaningless; or
>
> (b) ambiguous on the face of the will; or
>
> (c) ambiguous in the light of surrounding circumstances.
>
> (2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).
>
> (3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will."

[32] Section 33C thus permits recourse to extrinsic evidence, including of the testator's intention, where the will's language is meaningless or ambiguous.

[33] Before turning to whether extrinsic evidence is admissible here, four further points of interpretative relevance should be noted:

(1) It is the whole of the will which must be considered in ascertaining the meaning of the words used.[5]

(2) The ordinary meaning of words in a will should be adopted, unless the other content of the will or the context of the words' use within the will indicates the words convey a different meaning.[6]

(3) Pursuant to s 33E of the Act, unless a contrary intention appears in the will, it takes effect in respect of property disposed of by it, "as if it had been executed immediately before the testator's death". However, while the will is thus said

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3 GE Dal Pont, *Interpretation of Testamentary Documents*, (LexisNexis Butterworths, 2019) 3 [1.1].
4 *Roberts v Pollock* [2019] QSC 184, [37].
5 *Fell v Fell* (1922) 31 CLR 268, 273-274.
6 *Knight v Knight* (1912) 14 CLR 86, 107-108.

to speak from the date of death, regard should be had in construing it to the circumstances present to the mind of the testator at the time of execution.[7]

(4) Pursuant to s 33F of the Act, where part of property disposed of by a will has been disposed of before death, the will operates to dispose of such remaining interest the testator continued to have in the property.

Is extrinsic evidence admissible?

[34] In the present case some of the language relevantly used by cl 4 of the will is either meaningless or ambiguous without the aid of extrinsic evidence.

[35] Firstly, as to shortcoming in meaning, it was not seriously suggested by either side that extrinsic evidence was not needed to ascertain the identity of the property on the ground referred to by cl 4(a), (b) and (c); a process known as "fitting the will to the ground".[8]

[36] The same does not apply to the language used to describe "income" and "proceeds of sale". They are words of ordinary meaning.

[37] Secondly, as to ambiguity, Nan's primary position was there is no ambiguity, albeit contending that if there was, the extrinsic evidence in any event favoured her urged interpretation. Graeme Peter contended there was ambiguity. In my conclusion there was ambiguity on the face of the will in respect of the property described in cl 4.1(a) and (b) but not in respect of its later reference to "income" and "proceeds of sale".

[38] Clause 4.1 was obviously typewritten with space left for potentially more to be inserted by hand on the lines against the existing parts of the typed descriptions at (a), (b) and (c). It may reasonably be inferred from those typed descriptions that Geoffrey was not literally intending to devise Mill Road, Wiseman Road and Stewart Road, they being publicly owned roads. The typed descriptions, in the absence of the handwriting added, would have suggested he was intending to devise the interest he believed he owned in some property near those three roads.

[39] After the will refers to "(a) Mill Road, Edmonton", there appears the handwritten entry "(real property description L500 SP171159 & L1, 4 SP240391)". Yet there then follows a semi-colon followed by the next line of writing, which is all handwriting, before the next line which commences with the typewritten entry "(b) Wiseman Road, Edmonton". The additional line in between reads "also known as and incorporating any property described as". To what does that line of writing refer? Is it intended to refer to the property to which line (a) was intended to refer? Is it intended to refer to the writing appearing thereunder at (b) only? Is it intended to refer to the writing thereunder at both (b) and (c)? Is the writing "L500" appearing in line (a) a reference to the same or a different property description contemplated by the "500L" referred to in the handwritten description in (b)? Are the words "also known as" intended to refer to property known as "Mill Road" or known as "Wiseman Road" or known as "Wiseman Road" as well as "Stewart Road"? Are the handwritten lot and title numbers inserted as handwriting intended to be the

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7 *Nicol v Chant* (1909) 7 CLR 569, 580.

8 *Roberts v Pollock* [2019] QSC 184, [33].

complete description of the properties or merely descriptions of some lot and title numbers incorporated into such properties? Some of those earlier questions overlap with fitting the will to the ground but the latter question squarely arises from ambiguity.

[40] The meaning of the Mill Road property description is, on the face of the will, ambiguous. I readily conclude that evidence, including evidence of Geoffrey's intention, is admissible to help in interpreting what is meant by the language which purported to describe the real property Geoffrey was apparently trying to devise pursuant to cl 4.1.

[41] The ambiguity associated with cl 4's description of real property does not raise, however, any ambiguity about what is meant later in that clause by "the proceeds of sale thereof" or "the income therefrom".

[42] On the face of the will, those terms are unambiguously referring, pursuant to their ordinary meaning, to the proceeds of any sale of those properties completed after death or the income derived from those properties received after death. Nothing in the other content of the will or the context of the words used within the will indicates the words convey a meaning different than their ordinary meaning.

[43] The clause's ensuing reference to the process of apportioning income and outgoings by reference to the date of death makes it apparent the income being referred to is, in context, income derived from continuing ownership, not loss of ownership, of the property.

[44] The qualifying reference in brackets to the "event a contract for its sale is completed after my death", makes it contextually clear the clause's reference to proceeds of sale is specifically to the proceeds of sale from a contract for sale completed after death. This description in the clause discloses an intention which avoids the ademption, that is the extinction, of the interest being passed,[9] in the sense proceeds of sale will still pass as the land would have, rather than reverting to the residue, where such a contract is completed after death. But it is the proceeds of such a sale, not compensation for a resumption, which is there described.

[45] In effect Graeme Peter's argument has to be that, the surrounding circumstance of some of the property being subject to compulsory acquisition, raises ambiguity as to whether such acquisition and resulting compensation come within the meaning of the will's terms referring to completion of a contract of sale and its proceeds or to income. There is no potential ambiguity in respect of those terms so that they potentially appear to refer to compensation received from government for the compulsory acquisition of land. Such an acquisition of land does not involve "a contract for its sale". Nor could such compensation sensibly be regarded as "income" derived from continuing ownership of the property. To the extent the words of cl 4.1 contemplated the receipt of money in consequence of loss of ownership of the property it was only the receipt of proceeds from a contract for the sale of the property.

[46] That conclusion is determinative of the dispute as to the proper construction of the will's use of the words "proceeds of sale" or "income" in cl 4.1. To cater for the

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99 See for example, *Orr v Slender; Estate of Godfrey Raymond Orr* (2005) 64 NSWLR 671, 675 [16].

possibility that conclusion is wrong, this construction issue will nonetheless be briefly considered later in these reasons by reference to the extrinsic evidence. At this point, though, it is the impact of extrinsic evidence upon the other construction issue to which these reasons now turn.

Is the revested part of the Mill Road farm which had purportedly been resumed by the State Government part of the Mill Road property described in cl 4.1?

[47] It will be recalled s 17 *Acquisitions of Land Act 1981* has the consequence the resumption of about 21 hectares of land by the State Government was deemed to be absolutely void as from the making of the resumption in 2010, as if it had not been made. That obviously has a very significant consequence to the form of the bounty which the worth of those 21 hectares translated to under the will. Rather than the bounty being compensation for the value of that land, it turned out to be the land itself. Was that land part of the property referred to in cl 4.1 or was it part of the residue referred to in cl 5?

[48] Ms Maiden, one of the solicitors who took instructions from Geoffrey and Nan in order to draft both their wills, deposed in respect of the outstanding compensation for the land resumed for a hospital:

> "There was an expectation that compensation was going to be received. Geoffrey told me that he wanted the resumption compensation to go to Nan."

[49] There is no reason not to accept Ms Maiden's evidence about this. The file notes of Geoffrey's instructions produced by the solicitor's firm show Geoffrey wanted the State Government resumption compensation to go to Nan.

[50] The file notes make clear he intended his children should receive in equal shares his share of the three farm properties. That is consistent with his past expressed intention to family members. It was submitted for Graeme Peter that this was consistent with a scheme for dealing with the estate reflected by the will,[10] namely that Geoffrey's interest in the three farming properties go to the children and everything else go to Nan. From this it was said to follow that the will should be construed to give effect to that scheme so that the full extent of the Mill Road farm, inclusive of the revested resumed portion, should pass to the children. But that is to ignore the point, now elaborated upon, that Geoffrey actually intended the language of his will to pass the value of that substantial portion of resumed land to Nan as part of the residue.

[51] The file notes evidence that intention. One file note includes the following:

> "→3 prop → nb. ademption
>
> → Owed $ from Qld Health
> for bal of payt.
> Prop tfrd.
> Chose in action
> → Nan in residue.
> Wanted $20-$25M [indecipherable] yrs ago they acquired

1010 Citing *Roberts v Pollock* [2019] QSC 184, [47].

> it. Pd $5M total. $15-$20M bal + int %
> ½ → Nan."

[52] The instructions reflected by that note shows Geoffrey intended the language of his will to mean the State government resumption compensation would go to Nan as part of the residue, which explains why the will did not specifically refer to the compensation.

[53] I prefer that evidence, as a reliable objective indicator of Geoffrey's intention regarding any compensation for resumptions of Mill Road, to Graeme Peter's evidence of a conversation with his father in October 2015, the month of the will's execution. Graeme Peter deposes his father told him:

> "I am leaving you kids the farms and any of the money that is due to come in from the Queensland Health resumption and the Council resumption, just in case I am not here to enjoy it. This should make you kids comfortable, and it's up to you where you take it from there! … Your mother will be very well taken care of with all the other things that I am leaving her."

This seems to be the only evidence Geoffrey was then aware there was to be a Council resumption occurring some months later. In any event the account is so at odds with what Geoffrey then instructed his solicitors that it is not a reliable indicator of Geoffrey's intention. That is not to suggest Graeme Peter's account is untrue. Perhaps something in the conversation was misunderstood. Perhaps Geoffrey firmed to a different view by the time of his will. Perhaps Geoffrey was merely softening or avoiding discussion of a difficult reality by telling a loved one what he thought they would prefer to hear.

[54] The above quoted instructions reveal the intended meaning of the will's language. They also show Geoffrey expected that as much as $15M to $20M, plus interest, would be received as the balance of compensation for the State Government resumption. To Geoffrey that represented the very substantial, yet to be compensated, balance of the worth of the 40 per cent of the Mill Road property he believed to have been resumed by the State government.

[55] Geoffrey had interests in an array of real and other property, including the marital home at Homestead Close, Edmonton (acquired because of the State Government resumption of lot 9); real property at Yungaburra; real property at Vasey Esplanade, Trinity Beach and various financial assets. The value which those other components would likely contribute to the residue is not apparent from the evidence. However, whatever their contribution to the residue's value, it is quite clear Geoffrey intended by his will that the residue's value should be further and very substantially enhanced by the multi-million-dollar worth of the 21 hectares of land resumed at Mill Road. On this aspect his intended transfer of wealth was quite clear: he intended the very substantial worth of that land to go to his wife, not to his children.

[56] That intention is not deemed altered by the fact of the resumption revocation after his death or the consequence that worth now manifests in the value of the land itself, rather than its anticipated monetary worth in compensation. That is a difficulty for the argument of Graeme Peter, which also encounters the difficulty that cl 4

specifically includes lot numbers and they are not the lot numbers of the land Geoffrey believed had been resumed.

[57] In devising his share in the Mill Road property as a specific gift, Geoffrey did so both by the typewriting, which refers to it as "Mill Road, Edmonton", as well as the handwriting, which contains some real property descriptions. The handwritten description "L1, 4 SP240391", was a reference to the lots 1 and 4 which he believed constituted the Mill Road farm subsequent to the Queensland Government resumption. The other lot description, "L500 SP171159", was a reference to the lot that constitutes the Wiseman Road property and was implicitly repeated in the later handwritten insert, "500L Hambledon Drive". That repetition evidently derived from the fact Hambledon Drive and Wiseman Road were each roads abutting lot 500 on SP171159.

[58] The extrinsic evidence explains that the insertion of the lot and title numbers by hand was done at the request of Geoffrey's solicitors, who had requested the property details. This is, for example, apparent from a file note of 12 October 2015 which includes the entry:

> "- need property details x 3"

[59] A further file note from this era notes:

> "- ideally need Lot & Plan for Geoff's properties.
>
> - Lot 500 Lot 1 & 4 are all farm Mill Road, Wiseman Road & Hambledon Drive all same property
>
> - JMM & EMO discussion re: wording
>
> - Handwrote insertion of Lot & Plan description into will"

An ensuing note records there was no number for Stewart Road. The file note is of course consistent with the handwriting added to the typed will.

[60] The handwriting reveals Geoffrey chose to describe the Mill Road property and the geographically nearby Wiseman Road property, collectively. Thus, the combination of typewriting and handwriting at (a) and (b) of cl 4.1 was intended to be read in combination as:

> "Mill Road, Edmonton (real property description L500 SP171159 & L1, 4 SP240391); also known as and incorporating any property described as Wiseman Road, Edmonton and 500L Hambledon Drive, Edmonton"

Note the reference to "also known as and incorporating" was not to additional property at Mill Road, it was to property at Hambledon Drive. It was not submitted the collective reference to both properties bore upon what was meant by the description as it related to the property at Mill Road.

[61] There are competing interpretations urged about what Geoffrey intended in his manner of description of the specific gift of the Mill Road property in his will. Nan's counsel submits he was specifically intending to describe the property he believed he and his brother owned at Mill Road. That seems obvious - lots 1 and 4 were the

only lots he believed they did own there and they were the only Mill Road lot numbers he wrote in.

[62] The interpretation urged by Graeme Peter is that Geoffrey's use of language was not intended to be specific but rather was intending to generally describe an identifiable class of property, commonly referred to by the Mann family as the "Mill Road property". It is in effect contended the description was of elastic effect in that the class of property so described was capable of variation in size.

[63] It turns out there was no such variation in size as a result of the State Government resumption, the law deeming it void as if never made. However, it is apparent from the cases, where there has been variation in the size of real property apparently described in wills, that the generality or specificity of description is not the only interpretative consideration. The following cases illustrate the point:

- *Webb v Byng:*[11] The relevant gift in the will was described as "all my Quendon Hall estates in Essex". There was after-acquired property which adjoined the estate. However, other documents of the testatrix did not show she dealt with the adjoining lands as being part of the Quendon Hall estates. It was held they were not within the meaning of the property described in the will.

- *In re Portal & Lamb*:[12] The wording of the will's devise deployed a description "my cottage and all my land at *Stour Wood*". At the time of the will that property consisted of a cottage and land covered in gorse and fir trees. By the time of death, the testator had also acquired adjoining property in the form of a house with garden and 10-acre grounds. It was held the words in the will did not include the subsequently acquired property.

- *Castle v Fox*:[13] The property devised was "all my mansion and estate called *Cleeve Court*". The testator had for some time been the owner of an estate called Cleeve Court consisting of a mansion house and many acres, however before the date of the will, to increase that estate, he purchased a "near or adjoining" property called Kingswood, some of which was conveyed before the day of the will and some after. He thereafter treated it and other after-acquired patches of property which lay "inconveniently intermixed' with the estate as coming within what he named and treated while living as his Cleeve Court estate. The additional and after-acquired property was therefore held to be included within the will's description of the devise.

- *In re Willis*:[14] The will described the relevant devise as "all that my freehold house and premises situate at Oakleigh Park, Whetstone, in the County of Middlesex, and known as 'Ankerwyke,' and at which I now reside". The testator subsequently acquired two plots of adjoining land which the Court concluded came within what became known as "Ankerwyke" at the date of the testator's death and was therefore included within the property described in the will.

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11 (1885) 1 K&J 580; 69 ER 591.
12 (1885) 30 Ch D 50.
13 (1871) LR 11 Eq 542.
14 (1911) 2 Ch 563.

- *Brown v Butcher*:[15] The will worded the relevant devise as "my house and premises known as Edgecumbe in Macquarie Street, Parramatta, with the site thereof". The testatrix subsequently acquired land immediately adjoining her property known as "Edgecumbe" and fenced it in for use as part of the grounds of Edgecumbe. Harvey J considered the additional land came within the description in the will.

- *In re McBeane*:[16] The will's relevant description was "all my freehold land tenements and hereditaments known as 'Glen Devon' situated in the County of Adelaide and being and comprising the sections [sections numbered] and being the whole of the land comprised in Certificates of Title [certificates of title described]". The will was drawn some years after the acquisition of the testator's adjoining land, which the testator used and referred to as part of the expanded holding he described as "Glen Devon". Sangster J concluded the testator's use of the expression "Glen Devon" in the will was meant to include both the land particularised by title reference in the will as well as the additional land which adjoined, and which the testator was known to regard as, part of the estate.

[64] The present case has an element of similarity with the last-mentioned case of *McBeane* in that there was interpretive tension between the inclusion of specific land title descriptions and a general property name description. But there was, in *McBeane*, a clear omission of the descriptions of title to property which the testator was well known to regard as included within the property he referred to as Glen Devon. The distinction here is that the included Mill Road property title descriptions correctly embraced the whole of the land which the testator believed formed the Mill Road property.

[65] Importantly, those cases each turned upon their individual facts and how those facts informed the meaning the testator intended to convey by the words used. To the extent courts took into account how property was treated after the will, it was only to the extent of how the testator's subsequent treatment of property informed what was meant by the description of property in the will. That consideration was justified on the premise, now encapsulated in s 33E *Succession Act*, that the meaning of the will fell to be construed as if executed immediately before death. But that consideration changes nothing here. For years before his will, at the time of his will and up to and including the time of his death, Geoffrey believed he and his brother only owned lots 1 and 4 of the Mill Road property. There is no evidence he continued to treat or refer to the other 40 per cent of the property, which he believed to have been resumed by the State Government, as the property of he and his brother at Mill Road.

[66] In respect of the will's handwritten descriptions of the lot numbers Geoffrey believed constituted the whole of the Mill Road property, Graeme Peter argues:

(1) Geoffrey's intention in including the lot numbers was to assist in identifying the properties being referred to; and

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15 (1922) 22 SR (NSW) 176.
16 (1973) 7 SASR 579.

(2) those handwritten descriptions were not intended to confine the extent of the land devised; and

(3) the intended effect of the description of the Mill Road property was to describe the whole expanse of land owned by the brothers near Mill Road, howsoever it may increase or diminish over time.

[67] Step (1) in that argument is uncontroversial. The handwritten descriptions of lot 1 and 4 at Mill Road and lot 500 at Hambledon Drive were evidently included, at the solicitor's request, to identify the properties. But steps (2) and (3) conjure up the imputation of absent and present intentions which are unsupported by evidence.

[68] The significance of step (2) in lending force to step (3) is illusory in that it relies upon an absence of evidence of a particular intention as somehow supporting the opposite; as if to give rise to Geoffrey's non-existent contemplation of the expanse of land he described by lot numbers increasing in the future.

[69] Graeme Peter's arguments about a scheme of passing the farm on to the children had an appealing quality of generational romanticism, hinting at an aspiration of pioneering forebears that real property might be passed on down the family bloodline, perhaps even increasing in scale over the years. On dispassionate analysis it transpires there is no relevant evidence such an aspiration featured in Geoffrey's testamentary intention, beyond the bare fact Geoffrey made a specific gift of real property to the children.

[70] As to the notion of retention in the family, Geoffrey's brother Allan deposed that shortly before the death of their father Alexander in 1966 he informed Allan of his wish "that Mann's Farm be kept in the family bloodline if at all possible". That is valueless; it says nothing of Geoffrey's intention half a century later.

[71] Allan also deposed:

> "From conversations with Geoffrey over many years I am in no doubt whatsoever that he wished that his portion of Mann's Farm would by tradition also pass to his children upon his death".

Such opinion evidence is of no probative value. It was unaccompanied by evidence of what it was that Geoffrey said, and when, which led Allan to that conclusion. It pales into neutrality when it is realised Geoffrey's own will implicitly contemplated, by cl 4.1's reference to "a contract for its sale", that the property may be sold rather than kept in the family.

[72] Further, the Mill Road property had been leased out for some years, with the 40 per cent of it purportedly resumed by the State Government in 2011 not permitted to be cultivated. On Nan's recollection, the Mann family had not undertaken its own farming on the Mill Road property since 2009.

[73] As to the notion of the Mill Road property increasing in size in the future there is no evidence to suggest Geoffrey believed that was remotely likely. It had become surrounded by suburbia. There was no prospect of its expansion. Moreover, so far as Geoffrey was aware the property had reduced 40 per cent in size by reason of the

State Government resumption and there is no evidence to suggest he believed that may be reversed.

[74] It follows, in deploying the words he used to describe the Mill Road property in the will, Geoffrey held no belief its size would increase in the future and did not intend by his words to describe a property which might become larger than the size of the two lots he described by his hand-writing. By his mix of type-written and hand-written words he intended to do no more than describe the property he believed he owned with his brother at Mill Road, with the intention of devising his share of that described property to his children.

[75] Those reasons compel the conclusion Geoffrey was not intending, by his language in the will, to gift the children some potentially greater expanse of real property at Mill Road than the lots he believed it consisted of, namely lots 1 and 4.

[76] A further difficulty with the construction urged by Graeme Peter is its narrow focus on cl 4.1 in isolation. The meaning of cl 4.1 must be considered in the context of the whole will. That includes cl 5 by which Geoffrey left the residue of his estate to his wife, Nan.

[77] As already explained, Geoffrey intended the value of that residue would include the multi-million-dollar worth of the 21 hectares of land he thought resumed at Mill Road. To now interpret his cl 4.1 description of real property as including that worth is to ignore the broader context that his decision-making about the division of assets in his will, as between his wife and children, was premised upon that worth going to his wife.

[78] Geoffrey's testamentary intention that the very substantial worth of the portion of land thought resumed by the State Government should form part of the residue left by cl 5 of his will to his wife fortifies the conclusion already reached.

[79] In my conclusion, the revested part of the Mill Road farm which had been resumed by the State Government does not come within the property described in cl 4.1 of the will.

Is the Council resumption compensation within the meaning of "proceeds of sale" or "income" as referred to in cl 4.1?

[80] These reasons earlier explained why cl 4.1's reference to "the proceeds of sale thereof" and "the income therefrom" involve no ambiguity. They clearly relate respectively to proceeds from a contract of sale of the property and income derived from continuing ownership of the property.

[81] Lest that conclusion be wrong, does the extrinsic evidence suggest the words were intended to convey a different testamentary intention? Specifically, do the words include compensation received for a compulsory acquisition of the land, as was received after death for the Council's resumption?

[82] The extrinsic evidence provides no support for such a conclusion. Indeed, it tells against it. There is admittedly little evidence of Geoffrey ever referring to the

council resumption,[17] but he long knew of the State Government resumption and was expecting very substantial compensation to be received. As already discussed, the extrinsic evidence shows he clearly intended that compensation would add to the quantum of the residue he was leaving per cl 5 to Nan. It may therefore be safely inferred he did not intend his references to "income" or "proceeds" in cl 4.1 to mean compensation for the resumption of land by government.

[83] Recourse to the extrinsic evidence thus leads to the same conclusion already reached, that the Council resumption compensation was not within the meaning of "proceeds of sale" or "income" as referred to in cl 4.1.

Is rectification a remedy of any relevance in the present case?

[84] Finally, something should briefly be said about the relevance of rectification as a potential response to the impact here of the deeming effect of s 17 *Acquisitions of Land Act*. It had not been submitted that it was relevant but I took the precautionary step of inviting further submissions about it prior to reserving my decision. Subsequent deliberation, aided by counsels' submissions, made it obvious it can have no relevance here.

[85] Section 17's retrospective consequence here reached back in time before the will but only in consequence of the event of revocation and that event occurred well after the will. Section 17's potential relevance to the occurrence of error in a will, in a case like the present, would logically only arise if, at the time of the will, the testator knew or believed that its operation was going to be triggered. There is no suggestion of any such knowledge or belief here.

[86] It is illustrative to compare the present construction task with the exercise of a Court revoking an old will and authorising a new will to be made on behalf of a person without testamentary capacity, per s 21 *Succession Act*. In the latter task the court may take into account events since the former will, which if the testator had capacity and understood, would give rise to the making of a differently worded will. In performing that task, the court may properly consider what the testator's intention would likely have been if equipped with knowledge of an event such as a revocation of land resumption and its retrospective revesting effect. But in the present construction task it is not to the point to ask what the testator would have intended if imputed with knowledge of the consequence of a future occurring event such as revocation of resumption.

[87] Nor would that be to the point in the task of considering rectification. Section 33(1) *Succession Act* permits a court to rectify a will if satisfied the will does not carry out the testator's intentions because a clerical error was made or the will does not give effect to the testator's instructions. The temporal focus of that exercise is upon what was known and what occurred at the time of the will, not the consequence of what was not known would later occur. The foregoing reasons demonstrate the will does carry out Geoffrey's intentions. In any event, the will is consistent with the instructions given and there is no suggestion of clerical error. It follows none of the conditions of s 33's operation are present in this case.

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[17] It was referred to in the above quoted evidence of Graeme Peter's October 2015 discussion with his father.

Conclusion

[88] These reasons have explained the declarations sought in the present application are at odds with the proper construction of Geoffrey's will. Therefore, they should not be made.

[89] It was not submitted it is necessary in quelling the controversy to additionally articulate the construction favoured by the executor, confirmed by these reasons, in the form of a declaration. The application should simply be dismissed.

[90] In respect of costs, this controversy derived from the uncertain impact on the will's meaning of the unanticipated consequences of State and local government interference in the testator's private property. My present view of the just course in such a situation is that the estate should bear the parties' costs on the indemnity basis.

[91] In the interests of expedition, I will make such an order but, as a matter of caution, also confer a brief period of liberty to apply to be heard as to costs.

Orders

[92] My orders are:

1. Application dismissed.

2. Liberty to apply to be heard as to costs, on the giving of two business days' notice in writing by no later than 24 April 2024.

3. If the liberty conferred by order 2 is not exercised in time, the estate will pay the parties' costs to be assessed if not agreed on the indemnity basis.