SUPREME COURT OF QUEENSLAND

CITATION:	*Kerr v Kerr & Anor* [2017] QSC 323
PARTIES:	**MICHELLE MARGARET KERR** (Plaintiff/Applicant) AND **BRUCE ARTHUR KERR** (First Defendant/Respondent) And **VANESA BRONWYN JOY PAVIOUR** (Second Defendant/Respondent)
FILE NO/S:	S723/2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	20 December 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	8 December 2017
JUDGE:	McMeekin J

ORDER:

1. **Subject to the formal requirements of the Registrar, an Order to Administer the Estate of June Margaret Kerr (deceased) according to her Will dated 31 October 1997 (a copy of which is exhibit MMK-03 to the affidavit of Michelle Margaret Kerr dated 19 October 2017) be granted to the Public Trustee of Queensland;**

2. **That the First Defendant pay the costs of the Plaintiff including the costs of this application on the indemnity basis;**

3. **That the Plaintiff's costs of and incidental to the proceedings including the costs of this application be paid out of the estate to the extent that they are not met by the First Defendant;**

4. **That the First Defendant pay the costs of the Second Defendant on the standard basis;**

5. That the parties have liberty to apply.

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GENERALLY – where the deceased died on 15 April 2017 – where on 15 April 2017 the first defendant procured the deceased's signature on a document which purported to be her last Will –where the effect of the 2017 document is to make a very significant gift to the first defendant's girlfriend, the second defendant – where the deceased also left a Will dated 31 October 1997 – where the plaintiff's reason for bringing the litigation was to propound for the 1997 Will and against the 15 April 2017 document – where the relief sought is not now opposed

SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – COSTS – WHERE LITIGATION NOT CAUSED BY TESTATOR – REASONABLENESS — where the plaintiff had good reason to doubt the force and validity of the 15 April document – where the existence of the 15 April document was not revealed until 4 months after the deceased died – where the first defendant has not acted openly and honestly with the plaintiff – where the first plaintiff has acted entirely properly towards first defendant – where it is argued that the second defendant should never have been joined to the proceedings – where the second defendant had a considerable interest in the proceedings – whether it was sufficient to justify the plaintiff including the second defendant in the suit - whether the plaintiff should be protected as to costs by both the first and second defendants

Powers of Attorney Act 1998 (Qld), s 19, s 73
Succession Act 1981 (Qld), s 45
Uniform Civil Procedure Rules 1999 (Qld), r 62, r 603, r 681

In the Goods of the Earl of Levin (1889) LR 15 PD 22, cited
Mitchell v Gard (1863) 3 Sw & Tr 275, considered
Nelson v Nelson (1995) 184 CLR 538, cited
Re Cowin (Dec'd) [1968] QWN 3, cited
Re Estate Late Hazel Ruby Grounds; Page v Sedawie [2005] NSWSC 1311, followed

COUNSEL: S J Deaves for the applicant

M Conrick for the first and second respondents

SOLICITORS: Grant and Simpson Lawyers for the applicant

Spranklin McCartney Lawyers for the first and second respondents

[1] **McMeekin J:** These proceedings concern the estate of June Margaret Kerr, deceased. The plaintiff and the first defendant are her only children. The deceased left a Will dated 31 October 1997 naming as reserve executors her children, should her nominated executor, her husband, predecease her, as in fact occurred. The plaintiff brought these proceedings to obtain a grant of probate in solemn form in respect of that Will. That relief is not now opposed.

[2] By her solicitor's letter of 4 October the plaintiff indicated that she proposed that the first defendant be passed over as executor and trustee. She had twice before suggested that the Public Trustee might be best appointed. On 1 November she brought an application that either she or the Public Trustee be appointed administrator *pendent lite* with ancillary orders.

[3] It is now agreed that the Public Trustee be appointed as administrator with the Will annexed. The need for an administrator *pendent lite* has been overtaken by events – namely that the plaintiff has succeeded in obtaining the primary orders that she sought. All that is in issue is the costs of the proceedings.

[4] The plaintiff seeks that the defendants pay her costs on the standard basis and that the estate pay the difference between those costs and costs on the indemnity basis.

[5] The defendants initially sought that the plaintiff pay their costs. That, with respect, was a very bold submission. After oral argument the position urged was that the plaintiff should pay the second defendant's costs personally i.e. without recourse to the assets of the estate, and that the costs of the plaintiff and first defendant be reserved until after the estate had been finalised.

[6] The answer to the dispute I think lies in the comment of Sir J. P Wilde (as Lord Penzance then was) in *Mitchell v Gard*:[1]

> "The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties, and the question, who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred?"

[7] The answer to that question here is that it is the first defendant's fault that there has been litigation. It is only just that he bear the consequences of his actions. It is necessary to go into the facts.

[8] The deceased died on 15 April 2017. Some time that day the first defendant procured her signature on a document which purported to be her last Will. The effect of that document was to make a very significant gift, probably in excess of half of the testatrix's estate, to the first defendant's girlfriend, the second defendant here. The only witness to the "Will" was the first defendant. Four months after his mother died the first defendant, by his solicitors, produced the "Will" and told the plaintiff that he proposed to propound that document as the last Will of the deceased. Hence the litigation.

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[1] (1863) 3 Sw & Tr 275.

[9] The plaintiff's conduct in seeking by litigation to propound the Will now accepted as the last Will is criticised. I cannot understand why. Her reason for bringing the litigation was to propound for the 1997 Will and against the 15 April 2017 document. From her perspective, and to put the point mildly, suspicion could reasonably attach to the making of the document of 15 April. There is the peculiar and very generous gift to the second defendant, which was to the plaintiff's disadvantage. The "Will" was not witnessed as it should have been. It was obtained by the first defendant who it seems was in a strong position of influence over his mother. There was no independent witness present. There is no suggestion of any independent advice being sought. And the testatrix died the day she signed the document. She did not die from an accident. She died at an unknown time after signing the disputed document. The state of the deceased's health would suggest a level of frailty indicating that she needed independent advice. The deceased's death certificate suggests that by the time of her death she was a seriously ill woman. She was aged 86 years. The causes of death are listed as:

> "Cause of death –
>
> 1. (a) Heart failure (b) Rapid atrial fibrillation (c) Pneumonia and sepsis (d) Carcinoid tumour (e) Liver mass February 2017 not biopsied but thought to be malignant
>
> 2. Congestive cardiac failure, triscuspid / aortic / mitral regurgitation
>
> Duration of last illness
>
> 1. (a) years (b) 1 day (c) 2-3 days (d) 1980 2. Years, years"

[10] For all those reasons the plaintiff had good reason to doubt the force and validity of the 15 April document. To add to her concerns the first defendant has still not sworn to the facts surrounding the making of the 2017 "Will". There appears a brief explanation in his solicitor's letter of 15 August as follows:

> "Our client has now produced to us a document, being a Will of his Mother, dated 15th April 2017. Our client instructs us that this document came into existence as follows: -
>
> 1. Our client and his girlfriend Vanessa Paviour attended upon Mrs Kerr at her residence on Friday, 14th April 2017 where they had lunch with her and helped her to clean the house;
> 2. Mrs Kerr appeared to be in good health at that stage;
> 3. On Saturday morning, our client received a telephone call from his Mother who indicated that she had not slept that night and was worried about tying up her financial affairs;
> 4. Our client then travelled to Yeppoon where he met with his Mother. She confirmed with him that she had not slept that night and wished to make provision in the Estate in a better way than what she had in her Will many years previous;

5. After discussions with his Mother, Mr Kerr prepared the original document, copy of which is enclosed;
6. Mrs Kerr read the document, indicated that she was exceedingly happy with it and signed it in front of her Son.

[11] That is the only explanation that the plaintiff has ever received of what transpired. So she is told that the day before her mother's death the first and second defendants had spent some time with the deceased, that she had spent the night following worrying about her financial affairs and the Will made 20 years before and decided she had to do something, apparently as a matter of urgency and without seeking further advice. The death certificate shows that on the day she was suffering from rapid atrial fibrillation, pneumonia and sepsis, the latter having come on a day or two before. There is no explanation proffered as to why the deceased thought that these 2017 provisions were in some way superior to the 1997 will, assuming that the deceased was indeed cognisant of those arrangements from 20 years before on 15 April 2017. No evidence has been advanced to explain the very generous gift to the second defendant. The defendants might say that as they now no longer wish to propound the 2017 "Will" they are not called on to explain it. But the issue they do raise is the reasonableness of the conduct of the plaintiff. And the reasonableness of her conduct must be judged on what she knew, and what it was obvious to her was being hidden from her.

[12] And then for reasons still not explained the first defendant hid the fact that the 15 April document existed until four months after his mother's death. In the meantime the plaintiff and the first defendant attended on solicitors in June, then each engaged their own solicitors, and as late as 8 August 2017 the first defendant's solicitors were proposing to deal with the estate in accordance with the 1997 Will.

[13] On 9 August the plaintiff's solicitors proposed that an independent firm of solicitors act to administer the estate or alternatively the Public Trustee. They asked that the first defendant provide details of the mother's estate pointing out that he had held power of attorney for both his parents for many years. From what is now known it seems likely that the first defendant was indeed well placed to provide the information requested.

[14] Then, on 15 August, the first defendant's solicitors announced by letter to the plaintiff's solicitors that the first defendant had "produced" the 15 April document and that "this document will be pursued by him as the last will of the deceased". He advised further that he proposed to make an application for further and better provision out of the estate.

[15] On 16 August, i.e. the day after the disclosure of the supposed "Will" of the deceased, the plaintiff's solicitors called on the first defendant to renounce his executorship. Given the announced intention to sue for better provision the first defendant had no option but to do so. In this letter the solicitors advise that they had become aware that $90,000 had been taken from the deceased's bank account. They asked for the monies to be re-instated, assuming, accurately as it turns out, that the first defendant had taken those monies.

[16] What is now known is that three days after her mother died the first defendant took $81,000 from his mother's bank account, the balance relating to funeral expenses. He put the monies into an account that he controlled. The first defendant defends his conduct saying that he had placed the monies into the deceased's account in the first place. That may be so – there has been no proper accounting of what has gone on – but the first defendant had no business taking those monies. What power he had to deal with the deceased's property is not explained but he held the deceased's power of attorney. He was therefore required to avoid conflict transactions: s 73 *Powers of Attorney Act* 1998 (Qld). In any case that power of attorney came to an end on the deceased's death: s 19 *Powers of Attorney Act* 1998 (Qld). Any consent that the deceased had given to behave in this way towards her monies, which the first defendant says is the case, died with her. It is said there was a resulting trust in respect of those monies in his favour. Perhaps. There has been no juridical determination of any such thing. No authority is cited to justify self-help to the money of a deceased estate in these circumstances. But the reason for these dubious transactions is far from clear.

[17] The response of the first defendant after the letter of 15 August, and despite each side having solicitors acting, was to email the plaintiff directly to inform her that she would not get "one cent" from the estate and words to that effect. The solicitors twice protested at these direct communications and sought a response to their letters. None came.

[18] On 8 September the defendants' current solicitors advised they had received instructions to act and would be in touch.

[19] On 4 October the plaintiff's solicitors advised they had instructions to commence proceedings. They had received no communication from the defendants' solicitors.

[20] That is where matters stood when the Claim was issued on 5 October. I would have thought that at this point in time, and had the litigation then been resolved as it now has, the plaintiff would have been entitled to an order for costs on the indemnity basis against the first defendant personally. She had behaved perfectly properly as the named executor in her mother's will. The first defendant had obtained her mother's signature on a document in circumstances that were highly suspicious and purported to espouse that document as her mother's last will and to the plaintiff's disadvantage, had taken (and from the plaintiff's perspective perhaps stolen is not too strong a word) $90,000 from the estate bank account, essentially all the cash available, and failed to divulge information about her mother's affairs that he very likely possessed. If that was not enough he had indicated an intention to sue the estate and threatened her that she would get nothing from the estate if she did not do as he said. One wonders what else the plaintiff was supposed to do.

[21] On 13 October the first defendant finally responded, by his new solicitors, to the communications from two months before. Those solicitors advised that their client was not pursuing the 15 April "Will" and accepted the 1997 Will. They suggested that there was nothing untoward about their client taking

substantial monies from the estate bank account and that there was no need for the first defendant to stand aside as executor. Their explanation was this:

> "Whilst our client has been counselled on the appropriateness of carrying out the subject transfer of funds, given they were required immediately to attend to the debts of the company [I interpose here: presumably a reference to a company Kerr Solutions Pty Ltd], it was essential that no delays were experienced in having the monies dealt with.
>
> Your client cannot reasonably content (sic) the subject funds belonged to the deceased is (sic) a review of the relevant account indicates that the balance on 2 April 2017 (some 16 days before the date of death) was less than $2000. This is in line with what would be expected for an account held by a pensioner."

[22] Whether that explanation is true or not is still not evident to me. With respect to those solicitors the deceased wasn't merely a pensioner. She was the owner of the only two shares in the company referred to. That being so, in the normal course, she was entitled to the profits of the company. And as the legal owner the shares devolved on her death to her executors: s 45(1) *Succession Act* 1981 (Qld). So any dealing with company monies should have involved the plaintiff.

[23] Quite apart from that the explanation raises the question - if monies were needed urgently to pay the debts of the company why is it that they were transferred into the deceased's personal account only two weeks before? Were the payments made because the monies were in truth the income from a business owned by the deceased and so rightly hers? Or were monies being hidden away from the companies' creditors? In their letter of 13 October the solicitors reveal that the Deputy Commissioner of Taxation had issued a Statutory Demand against the company claiming an amount owing in excess of $740,000, an amount that the first defendant advised he was concerned that the company could not meet. If monies were being hidden then the issue is: would equity assist the first defendant re-claim those monies as rightfully his? Counsel for the plaintiff says that the doctrine of clean hands would come into play.

[24] The solicitors make several further claims in that letter. One is that the first defendant had loaned "substantial amounts" to his parents "over the years". The claim was that the monies had gone in discharge of a mortgage over the mother's property. He was concerned these monies may be traceable back to the company and a Liquidator may have an interest in doing that tracing. Why, if he had made the claimed loans personally, there would be any tracing back to the company is puzzling.

[25] A second claim is that "some of the debt" had accrued while the parents were the directors and that issues of insolvent trading "may be raised". That raises the question of just who had been involved in any insolvent trading – the elderly frail mother, or the son exercising day to day control? In other words, whose interests was the first defendant protecting?

[26] A third claim is that various vehicles and boats registered in the deceased's name are in fact his property. There is a demand for the immediate signing over of these assets to the first defendant. There are eight motor vehicles, four boats and a jet ski mentioned in the letter. That is an interesting claim as when drafting the 2017 "Will" only several months before the first defendant had arranged for the deceased to dispose of these assets as her property. She left them to the second defendant. She left all monies in her bank accounts to the second defendant as well.

[27] The first defendant says the business, Kerr Solutions Pty Ltd, is really his. That is a fourth claim made. His parents became the shareholders of the company only because he was an undischarged bankrupt at the time of its formation. It was submitted that there was a resulting trust in his favour. It is said that the plaintiff knew all this (and it seems she did know of his status as a bankrupt) and should have realised there was a just claim for a resulting trust in the first defendant's favour. So it is said that she should not have persisted in claiming that the $90,000 or more removed from the accounts were properly the property of the estate. Indeed the plaintiff was told that if she did not comply with the first defendant's demands – of which, as I follow things, she was entirely ignorant because the first defendant had not provided her with information that she had every right to, given that she was an executor of the estate – then she would be sued and the first defendant "will vigorously pursue costs … for failing to act in the best interests of the estate."

[28] These various explanations were supposed to ease the mind of the plaintiff and make it clear to her that the first defendant should continue as executor and that she should work amicably with him. The first defendant says that the Court need not be concerned about any of this – and nor should the plaintiff.

[29] By this stage the issue is not which document is the last Will but who is to have management and control over the estate, work out what the assets are, and get the assets in. Were the plaintiff's concerns and approach reasonable?

[30] It is not the time for any finding of fact or law but the first defendant's view of what is in the best interests of the estate is an interesting one. For my part I have very considerable doubts about the claimed resulting trust where the first defendant is pretending to his creditors that the monies the company earns are his parents' money and to his parents that the monies are his. That assumes that the source of these monies is Kerr Solutions Pty Ltd, as they seem to be. At the very least the proposition is contestable.[2]

[31] And as to whether there should be any change to the legal ownership of the assets will depend upon a close examination of what appear to be numerous transactions involving dealings with the company, its accounts, its credit card, and the parents' money, with the first defendant exercising perhaps properly, perhaps not, a power of attorney. But the determination of all of these various contentions is for another day. The issue is what was the plaintiff to do in the face of all this? I would have thought precisely what she did do – insist that there needed to be a proper examination of what has gone on, insist that the

[2] Cf. *Nelson v Nelson* (1995) 184 CLR 538 at 558-9 per Deane and Gummow JJ, at 609 per McHugh J.

first defendant be removed as executor, and if she was not acceptable to her brother, insist that an independent person take charge of the estate.

[32] In my view the first defendant's position is indefensible. He has created a great deal of mischief. He has not acted openly and honestly with the plaintiff. She has acted entirely properly towards him. She should be protected as to costs.

The second defendant

[33] It is said that the second defendant is in a different position. Her counsel argues that she should never have been joined in the proceedings at all. The second defendant has at no time said that she wished to propound the 2017 Will. The plaintiff it is said has unfairly dragged her into a fight between the brother and the sister.

[34] The plaintiff says that she had to be joined. Rule 62(1) *Uniform Civil Procedure Rules* 1999 (Qld), it is said, requires the joinder. It provides:

> **62 Necessary Parties**
>
> (1) Each person whose presence is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in a proceeding must be included as a party to the proceeding.

[35] The second defendant had a considerable interest in the proceedings. She is the largest beneficiary under the 2017 Will. By that "Will" she had been left substantial assets, an interest in a house worth hundreds of thousands of dollars, all monies in the deceased's bank accounts – over $90,000 – and a legacy out of the sale of the house property of $45,000. But it is said she had no interest in this dispute because she was a mere beneficiary and not entitled as an executor under that disputed Will. The problem with that claim is that it is not at all clear who is the executor under that document.

[36] There is no express statement that any person is the executor. Counsel for the defendants argues that the final paragraph of the document appoints the plaintiff and the first defendant as executors according to the tenor. It reads:

> "Accepting the above apportionments to be my primary concerns I then appoint both my son and daughter to have equal power of attorney regarding the rest of my affairs, goods and chattels."

Lee's Manual of Queensland Succession Law (7th edn) by Preece at [8.60] is cited.

[37] There are some difficulties with that submission. The first is that "power of attorney" is a very different thing to executorship under a will. We know now that the deceased was fated to die later that day. But presumably the deceased did not know that when she had the first defendant draft the document. That she may have wanted her children to look after her affairs while she was alive is certainly a possibility. Given that the first defendant was present and drafted the document and presumably knew perfectly well what a power of attorney

was (as he himself was the donee of, and exercised, that power for the deceased) adds considerable weight to the view.

[38] A second problem is that the authorities suggest that the Court should be wary of appointing according to the tenor. *In the Goods of the Earl of Levin* (1889) LR 15 PD 22 Butt J said at p 23:

> "I have great objection to granting probate to people who are not expressly designated executors of the will, and who merely claim to be executors according to tenor; … It is a serious thing and it ought not to be done except in cases where it is quite clear that it was the intention of the testator to cast on the person the duties of an executor."

The passage was cited with evident approval by Hart J in *Re Cowin (Dec'd)* [1968] QWN 3.

[39] A third problem is that if the plaintiff and the first defendant are not the executors according to the tenor then the second defendant has an arguable case that she ranks in priority to them. Rule 603 *Uniform Civil Procedure Rules* 1999 (Qld) provides, inter alia:

> **603 Priority for letters of administration with the will**
>
> (1) The descending order of priority of persons to whom the court may grant letters of administration with the will is as follows—
> (a) a trustee of the residuary estate;
> (b) a life tenant of any part of the residuary estate;
> (c) a remainderman of any part of the residuary estate;
> (d) another residuary beneficiary;
> (e) a person otherwise entitled to all or part of the residuary estate, by full or partial intestacy;
> (f) a specific or pecuniary legatee;
> (g) a creditor or person who has acquired the entire beneficial interest under the will;
> (h) any one else the court may appoint.
>
> (2) The court may grant letters of administration with the will to any person, in priority to any person mentioned in subrule (1).
>
> (3) If 2 or more persons have the same priority, the order of priority must be decided according to which of them has the greater interest in the estate."

[40] The second defendant is in the class mentioned at paragraph (f). The defendants argue that the plaintiff and the first defendant are the residuary beneficiaries and so rank ahead of the second defendant but that is by no means clear. The argument again turns on the meaning to be attributed to that last paragraph. If the argument was wrong then the second defendant was an essential defendant, as she, prima facie, had the duty to uphold the 2017 Will, as she had the greatest interest in the estate. It should be recalled too that the

first defendant had indicated his intention to sue the estate and so could not properly act as executor or administrator. The plaintiff was propounding a different document as the last will. Who was left as a contradictor?

[41] In my view these considerations are sufficient to justify the plaintiff including the second defendant in the suit.

[42] The second defendant's complaint, made initially through her solicitors, is that she should not have been included in the suit. Despite that she chose to defend. Her defence says little more than that she is not in a position to admit or deny anything and asserts that she should not have been joined. In that case why defend? By the time she filed that defence the first defendant had indicated that he was not propounding the 2017 Will. Given that position and assuming she agreed, the second defendant would have been better advised to not enter any appearance and simply abide the order of the Court. The only reason that she has incurred any costs is her decision to defend a suit that she says she had no interest in defending. It is hardly the plaintiff's fault she incurred those costs. Even after filing she continued her involvement and chose to negotiate an outcome of the present application, presumably incurring more costs in a matter she says does not concern her. Counsel for the plaintiff argues that by defending, and given her failure to explain her non admissions and denials, she is deemed to have admitted the case against her (see r 166 UCPR) and so can hardly complain about a costs order against her. Technically that may be right but I do not decide that point as I do not think I need to.

[43] Despite her defending and despite her involving herself in the dispute even marginally, nonetheless it is true that she has been dragged into a fight between the brother and the sister. The fault for that however lies not with the plaintiff. From her perspective she had no choice. The fault lies with the first defendant.

Conclusion

[44] In my view the person who has caused all this trouble is plainly the first defendant and it is he who ought to pay the costs.

[45] Costs are of course discretionary. The general rule is reflected in r 681(1) *Uniform Civil Procedure Rules* 1999 (Qld) which provides that costs are at the discretion of the court but follow the event unless the court considers another order to be more appropriate. The plaintiff here has been successful in her suit. That is not conclusive but is supportive of my approach.

[46] In *Re Estate Late Hazel Ruby Grounds; Page v Sedawie*[3] Campbell J discussed the principles applicable to probate actions and said inter alia:

> "Without needing to expound in detail the way in which this has happened in the caselaw concerning probate litigation, it can safely be said that a consistent theme in the cases is that the principles concerning costs which are applied to a person who seeks probate (whether successfully or not) are not the same as the principles which apply to the costs of a person who

[3] [2005] NSWSC 1311.

> opposes probate (whether successfully or not). **In probate litigation, it is not only who succeeds in the litigation which matters – which is the only factor operating in the "costs follow the event" rule. As well, the role which a particular party has played in litigation, whether as plaintiff or defendant, is relevant. Further, facts about the knowledge available to parties, and the reasonableness of their conduct in conducting the litigation, can be taken into account.**"[4]

[47] I agree with those views.

[48] In my judgment the plaintiff has acted perfectly appropriately throughout. There is no reason at all why she should be deprived of her costs. Nor do I see why the estate should bear the costs. That is not to say that the plaintiff should not be indemnified by the estate if necessary. But the first defendant's conduct has created this litigation. He is the one who involved the second defendant in his machinations. The plaintiff had no choice but to join her in the suit. In my view he should bear the costs of all the parties.

[49] The orders will be:

1. Subject to the formal requirements of the Registrar, an Order to Administer the Estate of June Margaret Kerr (deceased) according to her Will dated 31 October 1997 (a copy of which is exhibit MMK-03 to the affidavit of Michelle Margaret Kerr dated 19 October 2017) be granted to the Public Trustee of Queensland. ;
2. That the first defendant pay the costs of the plaintiff including the costs of this application on the indemnity basis;
3. That the plaintiff's costs of and incidental to the proceedings including the costs of this application be paid out of the estate to the extent that they are not met by the first defendant;
4. That the first defendant pay the costs of the second defendant on the standard basis;
5. That the parties have liberty to apply.

[4] At [32]. My emphasis.