SUPREME COURT OF QUEENSLAND

CITATION:	*Roberts v Pollock & Anor* [2019] QSC 184
PARTIES:	**COLIN BENJAMIN ROBERTS (as the executor of the estate of ALISTAIR GOW HENDERSON, deceased)** (Applicant) **v** **DAVID ANDREW POLLOCK** (First Respondent) AND **WATCHTOWER BIBLE AND TRACT SOCIETY OF AUSTRALIA** (Second Respondent)
FILE NO/S:	BS No 6858 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	31 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	2, 8 August 2018, 13 November 2018
JUDGE:	Davis J
ORDER:	**It is declared that:** **1. (a) By clause 4 of the last will of Alistair Gow Henderson (deceased) the benefit of Suncorp Bank Account No 042592860 passes to David Andrew Pollock; and** **(b) By clause 5 of the last will of Alistair Gow Henderson (deceased) the benefit of Suncorp Bank Account No 601899465 and the benefit of Suncorp Term Deposits 506342531 and 506337074 pass to the Watchtower Bible and Tract Society of Australia.** **2. The parties will be heard on the question of costs.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S INTENTION – GENERALLY – where the testator left "all monies standing to my credit with the Stanthorpe Branch of any bank or banks at the time of my death" to his brother-in-law under his last will – where the testator left "the rest and residue

of my real and personal estate including any property over which I may have any power of testamentary disposition" to the Watchtower Bible and Tract Society of Australia in his last will – where the testator had, amongst his assets at the time of his death, two term deposits made through the Stanthorpe Branch of Suncorp and an account opened at the Hornsby Branch of Suncorp – whether the money in the Hornsby account falls to residue and passes to the second respondent – whether the term deposits are regarded as money standing to the holder's credit at the Stanthorpe Branch of Suncorp

Administration of Justice Act 1982 (UK), s 21
Evidence Act 1977, s 92
Succession Act 1981, s 33C

Ashton v Ashton [2010] QSC 326, cited
Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd [2019] QSC 163, cited
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; [1993] HCA 15, followed
Byrnes v Kendle (2011) 243 CLR 253; [2011] HCA 26, cited
Coorey v George, unreported Supreme Court of New South Wales 27 February 1986, followed
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, followed
Farrelly v Phillips (2017) 128 SASR 502, followed
Fell v Fell (1922) 31 CLR 268; [1922] HCA 55, followed
Hatzantonis v Lawrence [2003] NSWSC 914, followed
Lindsay v McGrath [2016] 2 Qd R 160; [2015] QCA 206, cited
Marley v Rawlings [2015] AC 129, followed
Perpetual Trustee Co Ltd v Wright (1989) 9 NSWLR 18, followed
Perrin v Morgan [1943] AC 399, followed
Public Trustee v Leitch (1928) 28 SR (NSW) 313, cited
Padbury Home of Peace for the Dying and Incurable v Solicitor-General (1908) 7 CLR 680; [1908] HCA 72, cited
Re Stokell (1913) 9 Tas LR 7, cited
Suthers v Suthers [2015] QSC 285, followed
The Public Trustee of Queensland v Smith [2009] 1 Qd R 26; [2008] QSC 339, followed
The Trust Company Limited & Anor v Zdilar & Ors [2011] QSC 5, cited

COUNSEL: G R Dickson for the Applicant
R D Williams for the First Respondent
M Horvath for the Second Respondent

SOLICITORS: Thynne & Macartney for the Applicant
GHS Legal for the First Respondent

Michael Cooper Lawyer for the Second Respondent

[1] Alistair Gow Henderson (Mr Henderson) died on 11 May 2013 leaving a will dated 24 June 2008 (the 2008 will) and a significant estate.

[2] By the 2008 will Mr Henderson appointed the applicant and Stephen Sullivan as trustees and executors. Mr Sullivan renounced his right to probate. Probate of the 2008 will was granted to the applicant on 19 February 2014.

[3] A dispute has arisen as to whether certain money to Mr Henderson's credit at the Suncorp Bank (Suncorp) passes by specific bequest to the first respondent or falls to the second respondent as part of the residue.

Distillation of the issues

[4] Mr Henderson lived in Cottonvale which is a township near Stanthorpe, although by the time of his death he was residing in an aged care facility in the town of Stanthorpe itself.

[5] At the time of his death Mr Henderson owned land at Cottonvale and the following assets:

(i)	Suncorp Bank Account No 601899465,[1] Hornsby Branch, NSW	$298,835.12
(ii)	Suncorp Bank Account No 042592860,[2] Stanthorpe Branch	$16,031.49
(iii)	Share portfolio (valued as at 15 May 2014)	$606,265.00
(iv)	Refund of accommodation bond from the aged care facility where Mr Henderson was residing at the time of his death	$295,000.00
(v)	Suncorp Term Deposit No 506342531, Stanthorpe Branch	$145,000.00
(vi)	Suncorp Term Deposit No 506337074, Stanthorpe Branch	$95,000.00
	Total	$1,456,131.61

[6] The land at Cottonvale, together with improvements and various chattels associated with the land, was the subject of a specific bequest to the first respondent. There is no dispute about the fate of the Cottonvale land or the improvements and chattels.

[7] Clauses 4 and 5 of the 2008 will provide:

> "4. I GIVE all monies standing to my credit with the Stanthorpe Branch of any bank or banks at the time of my death UNTO my brother-in-law DAVID ANDREW POLLOCK absolutely.
>
> 5. I GIVE the rest and residue of my real and personal estate including any property over which I may have any power of testamentary disposition

[1] To which I will refer as "465".

[2] To which I will refer as "860".

> UNTO the "WATCHTOWER BIBLE AND TRACT SOCIETY OF AUSTRALIA" of 2-4 Zouch Road, Denham Court, New South Wales for its general world-wide work. I DECLARE that the receipt of the proper officer of the "Watchtower Bible and Tract Society of Australia" for the benefits described in this clause shall be a good and sufficient discharge to my trustees and shall absolve my trustees from monitoring the application of those benefits."

[8] The $295,000 representing the refund of the accommodation bond, and the share portfolio, valued at $606,265 at the time of Mr Henderson's death clearly fall to residue and therefore pass to the second respondent. Suncorp account 860 which at the date of Mr Henderson's death stood at a credit of $16,031.49 is, the parties all accept, an account "with the Stanthorpe Branch of [a] bank". It falls to the first respondent by clause 4.

[9] The dispute concerns account 465 and the two term deposits, 506342531 and 506337074.

[10] Account 465 is an account opened at the Hornsby Branch of Suncorp not the Stanthorpe Branch so *prima facie* does not fall to the first respondent under clause 4 of the will and would pass to the second respondent as part of the residue. A term deposit might not be regarded as money standing to the holder's credit at the branch of a particular bank[3] and would therefore also fall to residue under clause 5.

[11] The applicant submits that the money to Mr Henderson's credit in account 465, and the two term deposits pass to the second respondent by clause 5 of the will. That is also the position of the second respondent.

[12] The first respondent submits that, properly construed, clause 4 catches account 465 and the two term deposits, the benefit of which then falls to him. He seeks to rely on evidence beyond the 2008 will which, he submits for various reasons, supports his position.

[13] The second respondent submits that most of the evidence is inadmissible as being irrelevant to the task of construction.

[14] The matter came before me initially on 2 August 2018 when it became evident that it was necessary for counsel to consider the admissibility, through a witness Gregory Hilliard Smith (the solicitor for the first respondent) of a statutory declaration sworn by Allen John Webb (Mr Webb). Mr Webb's statement is inadmissible if introduced through Mr Smith unless there is compliance with s 92(2) of the *Evidence Act* 1977. The hearing was adjourned to 8 August 2018. By then Mr Webb had sworn affidavits and the matter was adjourned again to 13 November 2018 when I heard evidence from him. The significance of Mr Webb's evidence becomes apparent below.

[15] It is appropriate to analyse the evidence before determining its admissibility and significance (if admissible).

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[3] *Re Stokell* (1913) 9 Tas LR 7 at 9, Haines QC, Construction of Wills in Australia, Lexis-Nexis Butterworths, 2007 paragraph 11.10, although ultimately that is a matter of construction of the will; *Public Trustee v Leitch* (1928) 28 SR (NSW) 313 at 318.

The Evidence

[16] Mr Henderson married Ailsa Martin in 1961. Ailsa died in October 1967. In the 1970s the first respondent married Mr Henderson's sister Susanne Pollock. Susanne died in October 2000.

[17] Mr Webb is an accountant who became professionally involved with Ailsa's family (the Martin family) and then Mr Henderson. Mr Webb managed Ailsa's assets. Upon Ailsa's death, Mr Henderson inherited her estate which was substantial. The Martin family assets, of which Mr Henderson had an interest, consisted of property settled on trustees (including Mr Webb) through the deceased estate of Ailsa's grandmother[4] (the settlement) and the assets held by two companies, F&M Investments Pty Ltd (F&M) and Neptune Investments Pty Ltd (Neptune). Ailsa had two siblings, John and Rosemary. They, with Mr Henderson were the effective beneficial owners of the settlement and any worth which attached to F&M and Neptune.

[18] Mr Henderson apparently did not possess skills in the management of things financial. Mr Webb undoubtedly did. Upon Ailsa's death, Mr Henderson appointed Mr Webb and two others, Mr Frank Smith and Mr Keith Watson to be his attorneys. Mr Smith and Mr Watson were accountants who were practicing in partnership with each other and with Mr Webb. They have both since died, leaving Mr Webb as the sole surviving attorney.

[19] In the years which followed, Mr Webb made all significant decisions concerning the management and investment of Mr Henderson's assets acquired through the Martin family. In Mr Webb's evidence before me, the arrangement was described in these terms:

> "MR HORVATH: Thank you?---Because he[5] said when he learned of his wife's death, he said 'I don't want to' - 'I don't consider it my money. You just keep on investing it the way you did for my wife'.
>
> I'm going to come to that. Can I check with you, as far as I can tell, there was never a written plan prepared by you about where the money was going to go?---No. He left it entirely to me.
>
> Yes. For years and years, from 1967 onwards?---Yes. I handled all the family's - most of the family's money before this time - getting interest in those shares and I just continued on with my other director in all the investments.
>
> Yes. And you didn't find it necessary to discuss with him what the long-term plan was for any of those assets in those family companies?---He had - we had an annual general meeting in Sydney to which he came every year.
>
> And at the annual general meeting - - -?---That's right.
>
> - - - you would simply report to him what you were doing which you thought was in his best interests?---Yes.
>
> With those family companies?---Yes.

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[4] Transcript 13 November 2018; 1-19/15-20.

[5] A reference to Mr Henderson.

And he let you do that from year to year?---Yes."[6]

[20] In the 1970s account 860 was opened. Into that account went income earnt from investments made by Mr Webb. Mr Webb had no access to account 860 although he did receive information about it when necessary to prepare Mr Henderson's tax returns. Mr Henderson operated account 860 without advice or input from Mr Webb. That account did not fund any of the investments made by Mr Webb on Mr Henderson's behalf.

[21] On 10 June 2004 Mr Henderson made a will (the 2004 will). Like the 2008 will, the 2004 will left the Cottonvale land to the first respondent. It left a separate parcel of land at Cottonvale to Kerry Connole and Leigh Connole (the Connoles) and then provided;

> "5. I GIVE AND BEQUEATH any monies standing to my credit with any bank or banks at the time of my death as follows:
>
> (a) as to the sum of $50,000.00 UNTO my brother-in-law the said DAVID ANDREW POLLOCK for his own sole use and benefit absolutely.
>
> (b) as to the balance then remaining UNTO such of my friends the said KERRY CONNOLE and LEIGH CONNOLE as shall survive me and if both in equal shares for their own use and benefit absolutely.
>
> 6. I GIVE DEVISE AND BEQUEATH the rest and residue of my estate both real and personal of whatsoever nature and wheresoever situate of or to which I shall be seized possessed or entitled at the time of my death or over which I shall then have a power of appointment or disposition by Will UNTO such of them my niece CAROL JOAN SMITH of 30 Ravensdowne, Berwick upon Tweed, Northumberland, England and my nephew COLIN HUNTER McLEAN of 16 Cobden Crescent, Edinburgh, Scotland, as shall survive me and if both in equal shares PROVIDED HOWEVER should either of them my niece the said CAROL JOAN SMITH or my nephew the said COLIN HUNTER McLEAN predecease me leaving a child or children who shall survive me then and in either such case such child or children as have attained or as shall live to attain the age of twenty-one (21) years shall take and if more than one in equal shares the benefits of every description which his or her or their parent would have taken under the provisions of this my Will had such parent survived me."

[22] Some time prior to May 2008, Mr Henderson and Ailsa's siblings, John and Rosemary decided to wind up the settlement and also wind up both F&M and Neptune. Held in the settlement were assets including shares and it was agreed that an *in specie* distribution would be made to Mr Henderson of a parcel of shares.

[23] On 9 May 2008 a parcel of shares was transferred to Mr Henderson. Some of the shares were subsequently sold to pay a tax liability which arose consequent upon the distribution, and some shares were thought by Mr Webb (acting on stockbrokers' advice) to be underperforming and were sold. The proceeds of that sale ($78,111.70) were deposited into

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[6] Transcript 13 November 2018; 1-17/43 to 1-18/15.

account 860. Apart from those transactions, the shares that were distributed to Mr Henderson were those held by him at the time of his death.

[24] Before the shares were distributed to Mr Henderson, he and Mr Webb had a conversation about management of the assets which would pass to him from the winding up of the settlement and the two companies. Mr Webb gave Mr Henderson an estimate of the value of what would come to him. Mr Henderson told Mr Webb "I won't know what to do with all that money and the shares. I will do what you recommend. Just look after it for me".

[25] Mr Henderson's last will, the 2008 will, was made about a month after the transfer of shares to him.

[26] The file of the solicitors who drew the will was in evidence before me, subject to objection. That file included notes taken by the solicitor who drew the will. The notes show that the solicitor clearly used the 2004 will as a reference point from which to take instructions. Next to a note "clause 5", which by the 2004 will dealt with the disposal of money held in banks, the solicitor noted "all Bank funds in Stanthorpe branch of any bank to David Andrew Pollock". Those instructions no doubt led to clause 4 in the 2008 will.

[27] As a matter of undisputed fact, clause 5 of the 2004 will refers to "any monies standing to [Mr Henderson's] credit", and clause 4 of the 2008 will refers to "all monies standing to [Mr Henderson's] credit". That is submitted by the first respondent to be of some significance.

[28] On 15 May 2009, Mr Henderson, John and Rosemary, formally resolved to wind up F&M and Neptune and liquidators were appointed for that purpose.

[29] On 26 July 2010, Mr Henderson appointed Mr Webb and the first respondent as his attorneys. Shortly thereafter the liquidators distributed two sums of money, $477,267.66 and $359,543.76 to Mr Henderson. These sums were received by Mr Webb who opened account 465 at the Hornsby branch of Suncorp. The decision to open the account at Hornsby not Stanthorpe was made by Mr Webb not by Mr Henderson. In order to maximise the return from the money received from the liquidators, money was invested on term deposit from time to time with Suncorp. These deposits were initially arranged through the Hornsby branch and later through the Stanthorpe branch.

[30] In December 2010, term deposits were maturing and Mr Webb opened account number 452607131 (account 131) at the Hornsby branch and deposited $675,000.00 into that account.

[31] By August 2011 it was obvious to Mr Webb that Mr Henderson could no longer live at home and arrangements were made for him to be accommodated at the Carramar Home for Senior Citizens. A bond of $300,000 was paid to Carramar. Account 131 was closed and the balance in that account was paid to account 465.

[32] Some of the term deposits and some of the other transactions were arranged by Mr Pollock through the Stanthorpe branch of Suncorp. This was easily facilitated because Suncorp do not have account numbers specific to particular branches. Term deposits 506342531 and 506337074 were made through the Stanthorpe branch of Suncorp. This change in the management of Mr Henderson's affairs happened as a result of a discussion between Mr Webb and the first respondent and a decision by them that the first respondent would

become more active in managing the funds as he was living close to Mr Henderson and was in daily contact with him. Control of all accounts was transferred internally to the Stanthorpe Branch. That occurred after the 2008 will was made.

The relevant principles of construction

[33] The task of construction of the terms of a will is to ascertain the intention of the testator.[7] That intention is determined from the language of the will.[8] Resort can be had to evidence beyond the will itself for, relevantly here, three purposes:

(i) To identify the assets which fall within the terms of the will. This is often described as "fitting the will to the ground".[9]

(ii) To understand the language used in the will in the light of the circumstances in which the will was made. This is often described as "the armchair principle".[10]

(iii) To identify the testator's intention by evidence beyond the language of the will. Extrinsic evidence of the testator's actual subjective intention serves a different purpose to the admission of evidence under either the armchair principle or the principle of fitting the will to the ground. Evidence led under either of those two principles is not evidence probative of the subjective intention of the testator. It is evidence considered in the construction of the language of the will and it is the language of the will from which the intention of the testator is objectively ascertained.

[34] Extrinsic evidence of the intention of the testator may be admitted under s 33C of the *Succession Act* 1981 which is in these terms:

> "**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).

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7 *Perrin v Morgan* [1943] AC 399, *Fell v Fell* (1922) 31 CLR 268 at 273-274.

8 *Perrin v Morgan* [1943] AC 399 at 406.

9 In *Padbury Home of Peace for the Dying and Incurable v Solicitor-General* (1908) 7 CLR 680, Griffith CJ described the admission of evidence "for the purpose of identifying the object of a gift in a will"; see page 686, and see AA Preece, *Lee's Manual of Queensland Succession Law*, 8th Edition, Lawbook Co 2019 at [14.250].

10 *The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at [24].

(3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will."

[35] That section was considered by Atkinson J in *The Public Trustee of Queensland v Smith*[11] where her Honour explained:

"[22] The circumstances in which extrinsic evidence may be used and the purpose for which it may be used are now governed by s 33C of the Succession Act 1981 (Qld) ('the Act') which was extensively amended with effect from 1 April 2006. Section 33C sets out what extrinsic evidence is admissible in interpreting a will:

[Her Honour set out s 33C which appears in paragraph [34] above]

[23] This provision gave effect to a recommendation found in Chapter 6 Part 5 of the Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills produced by the National Committee for Uniform Succession Laws published by the Queensland Law Reform Commission as Miscellaneous Paper 29 in December 1997.

[24] As a result, in addition to the circumstances set out in s 33C(1), s 33C(3) continues to allow the admission of extrinsic evidence in the construction of wills in the three circumstances which obtained prior to the introduction of s 33C in its present form on 1 April 2006. The three rules of construction which have been retained are:

(1) The 'armchair principle' which permits the court to sit in the testator's armchair to take account of his or her 'habits of speech and of his or her family, property, friends and acquaintances' in order to determine what the testator meant by the words of a will. The 'armchair principle' does not, however, allow direct evidence to be given of the testator's intention by, for example, allowing evidence of the instructions to the solicitor.

(2) The 'equivocation' exception. This rule of construction provides that 'evidence of the testator's actual intention, while not ordinarily admissible to assist in the construction of a will, is admissible where there is what is described as 'equivocation' in the will, that is, where a description, usually of a person, is equally capable of referring to more than one person.' This rule is sometimes referred to as the 'latent ambiguity rule' where there are, for example, two legatees of the same name.

(3) The equitable presumption rule. Evidence of a testator's intention may be given when a presumption arises in equity that a legacy in a will is in satisfaction of payment due under another instrument such as a deed.

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[11] [2009] 1 Qd R 26.

> [25] In addition to these three circumstances in which extrinsic evidence may be led are the three circumstances set out in s 33C of the Act:
>
> (1) when the language used in the will makes the will or part of it meaningless;
>
> (2) when the language used in the will makes the will or part of it ambiguous on the face of the will;
>
> In both of these circumstances extrinsic evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will.
>
> (3) when the language used in the will makes the will or part of it ambiguous in the light of the surrounding circumstances, then extrinsic evidence, but not evidence of the testator's intention in order to establish any of those circumstances, is admissible to help in the interpretation of the language used in the will."[12]

[36] Her Honour does not mention the principle of fitting the will to the ground. That is, with respect, understandable as that principle concerns not so much the construction of the terms of the will but with its application to the assets in the estate. Her Honour refers to the "equivocation" exception and the "equitable presumption rule", neither of which are of relevance here.

[37] While s 33C does not expressly mention the armchair principle, that principle is recognised in both s 33C(1)(c) and s 33C(3). By s 33C(3) common law rules of construction permitting the admission of evidence extrinsic to the will (as the armchair principle is) are preserved as explained by Atkinson J. The armchair principle, as I have explained, permits evidence of "surrounding circumstances" to the making of the will. If evidence admitted under the armchair principle gives rise to an ambiguity then, by s 33C(1)(c) extrinsic evidence of the testator's intention becomes admissible under s 33C(1).

[38] In *Marley v Rawlings*[13] Lord Neuberger sitting as President of the Supreme Court of the United Kingdom considered s 21 of the *Administration of Justice Act* 1982. That was in these terms:

> "(1) This section applies to a will – (a) in so far as any part of it is meaningless; (b) in so far as the language used in any part of it is ambiguous on the face of it; (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

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[12] At [22]-[25]; citations omitted.

[13] [2015] AC 129.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation."[14]

[39] His Lordship said of that section:

"[25] In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above.[15] In particular, section 21(1)(c) shows that 'evidence' is admissible when construing a will, and that that includes the 'surrounding circumstances'. However, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question.

[26] Accordingly, as I see it, save where section 21(1) applies, a will is to be interpreted in the same way as any other document, but, in addition, in relation to a will, or a provision in a will, to which section 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator's actual intention (eg by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared)."[16]

[40] The section considered in *Marley v Rawlings* is broadly equivalent to s 33C of the Queensland legislation. Lord Neuberger held that s 21(1)(c)[17] recognised that evidence of "surrounding circumstances" was generally admissible in order to construe the terms of a will[18] but that s 21(1) allows direct evidence of the testator's intention in certain circumstances.

[41] Earlier in the judgment Lord Neuberger considered the general approach to construction of a will including the admission of evidence pursuant to the armchair principle. His Lordship considered that the principles of construction of wills are, subject to statutory modification, similar to those applied to the construction of other legal documents such as contracts. His Lordship said:

"[19] When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other

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[14] At paragraph [24].

[15] Which I set out below.

[16] The other Judges on the appeal agreed with Lord Neuberger, with Lord Hodge adding some observations concerning Scots Law.

[17] Like s 33C(1).

[18] At paragraph [23].

provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. In this connection, see *Prenn*,[19] at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H E Hansen-Tangen)* [1976] 1 WLR 989, per Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill, and the survey of more recent authorities in *Rainy Sky*,[20] per Lord Clarke of Stone-cum-Ebony JSC, at paras 21-30.

[20] When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, 1400 that "courts will never construe words in a vacuum".

[21] Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. Thus, the court takes the same approach to interpretation of unilateral notices as it takes to interpretation of contracts: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, per Lord Steyn at pp 770C-771D, and Lord Hoffmann at pp 779H-780F.

[22] Another example of a unilateral document which is interpreted in the same way as a contract is a patent—see the approach adopted by Lord Diplock in *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183, 243, cited with approval, expanded, and applied in *Kirin-Amgen* at paras 27-32 by Lord Hoffmann. A notice and a patent are both documents intended by its originator to convey information, and so, too, is a will.

[23] In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see eg *Theobald on Wills*, 17th ed (2010), chapter l5 and the recent supplement supports such an approach as

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[19] A reference to *Prenn v Simmonds* [1971] 1 WLR 1381.

[20] A reference to *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

> indicated in *Royal Society for the Prevention of Cruelty to Animals v Sharp* [2011] l WLR 980, paras 22, 31). Indeed, the well known suggestion of James LJ in *Boyes v Cook* (1880) 14 ChD 53, 56, that, when interpreting a will, the court should 'place [itself] in [the testator's] arm-chair', is consistent with the approach of interpretation by reference to the factual context."

[42] *Marley v Rawlings* was considered by the Full Court of the Supreme Court of South Australia in *Farrelly v Phillips.*[21] One of the questions before the Full Court was whether, when construing the testator's last and operative will, regard could be had to earlier drafts of the will. Of the armchair principle, Stanley J[22] said:

> "[27] The appellant seeks to rely upon the so-called 'armchair principle'. This was described in *Allgood v Blake* by Blackburn J as follows:
>
> > The general rule is that, in construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words . .. the meaning of words varies according to the circumstances of and concerning which they are used.
>
> [28] There are two qualifications to the armchair principle. First, when the court considers the circumstances known to the testator, it is only the circumstances existing at the time the testator made his will that may be considered. Second, extrinsic evidence cannot be used to make words in a will bear a meaning which on the face of the will they are incapable of conveying. This is sometimes described as the 'incapable meaning rule' or the 'plain meaning rule'. In relation to the armchair principle, Lord Romer observed in *Perrin v Morgan*, that when seated in the armchair the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he plainly said."[23]

[43] His Honour then referred to the passage in *Marley v Rawlings* which I have set out at [41], and concluded that the approach was consistent with that adopted by Heydon and Crennan JJ in *Byrnes v Kendle.*[24] *Byrnes v Kendle* concerned the construction of a declaration of trust where their Honours identified and explained principles relevant to the construction of statues and

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[21] (2017) 128 SASR 502.

[22] With whom Kourakis CJ agreed and Nicholson J generally agreed in principle while dissenting on the result.

[23] Citations omitted.

[24] (2011) 243 CLR 253 at [95] – [116].

contracts and opined that the approach to construction of various species of legal documents ought to be consistent.

[44] Stanley J in *Farrelly v Phillips* then continued:

> "[32] While the task of the Court in construing the will is to ascertain the intention of the testatrix, the Court must take care to avoid interpreting the will on the basis of some a priori assumption about the testatrix's intentions. The surest guide to the testatrix's intention is the language of her will. Her expressed intentions are embodied in its text read in light of the surrounding circumstances in accordance with the armchair principle. The search is for her expressed intentions, not what she meant to say, but what she actually said.
>
> [33] In that context, a question arises as to whether, in construing the will, the Court can have regard to earlier drafts of the will. In my view it is open to the Court to consider evidence of earlier drafts of the will in order to assist in ascertaining the testator's expressed intention. I consider that such evidence is admissible as part of the surrounding circumstances. While it was once the case at common law that evidence of draft contracts was not admissible for constructional purposes, that no longer appears to be the position. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council* the High Court had regard to various drafts of a deed that passed between the parties in order to construe the concluded deed. The drafts were admitted as evidence of surrounding circumstances.
>
> [34] In accordance with the approach in *Marley v Rawlings* the Court should apply those principles applicable to the construction of contracts to the construction of a will for the purposes of ascertaining the expressed intention of the testator. In *Marley v Rawlings* Lord Neuberger said it was open to the court to consider evidence of drafts of a will which the testator may have approved or caused to be prepared for the purposes of interpreting the will or a provision of the will. However, his Lordship reached that conclusion on the basis of an express statutory provision in the *Administration of Justice Act* 1982 (UK) which permitted the court to receive extrinsic evidence of the testator's intention to assist in interpretation. No equivalent provision is to be found in the *Wills Act* 1936 (SA). Nonetheless, notwithstanding the absence of an equivalent statutory provision I am satisfied that it is permissible to receive draft wills as evidence of surrounding circumstances for the purposes of ascertaining the testator's expressed intention. In *Byrnes v Kendle* Heydon and Crennan JJ held that evidence of pre-contractual negotiations is admissible for the purpose of drawing inferences about what the contract meant where it demonstrates knowledge of surrounding circumstances. In relation to the constitution of wills, that would require, however, evidence that the draft will was approved by the testator or that the testator caused the draft to be prepared in particular terms so as to throw some light on his intention. So the evidence of draft wills, like pre-

> contractual negotiations, is only admissible where it demonstrates knowledge of surrounding circumstances."

[45] As observed by Stanley J in *Farrelly v Phillips*, *Marley v Rawlings* has been applied in a number of single judge decisions in Australia.[25] None of these are Queensland decisions although Jackson J followed *Farrelly v Phillips* in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd*,[26] a case concerning the construction of a contract.

[46] Mr Williams for the applicant relies on *Marley v Rawlings* and *Farrelly v Phillips* as explaining the current application of the established principles of construction of wills. Neither *Marley v Rawlings* nor *Farrelly v Phillips* have been considered by a Queensland Court other than by Jackson J and his Honour's consideration of *Farrelly v Phillips* was in a commercial context.[27] The approach to construction taken in those two cases is consistent though with the approach taken in various Queensland decisions.[28] I should follow the judgment of the South Australian Full Court which has adopted *Marley v Rawlings*.[29]

[47] Importantly, when the words of a will are viewed in the light of the surrounding circumstances in which it is made, a scheme for dealing with the estate may emerge as the deceased's intention. The will should then be construed, if possible, to give effect to that scheme.[30]

Application of the principles to this will

[48] The evidence outlined in each of paragraphs [16] to [31], but excluding [26] and [27] is admissible in proof of the circumstances against which the 2008 will was made.

[49] As already observed,[31] control of the term deposits passed to the Stanthorpe branch of Suncorp after the 2008 will was made. That undisputed fact can form no part of the circumstances against which the will was made. The evidence though is potentially admissible to "tie the will to the ground". Mr Williams submits that as the term deposits were controlled through the Stanthorpe branch of Suncorp, the term deposits constitute "money standing to [Mr Henderson's] credit with the Stanthorpe branch of any bank or banks at the time of my death".

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[25] See *Farrelly v Phillips* at footnote 17.

[26] [2019] QSC 163.

[27] *Marley v Rawlings* was cited in argument on a point irrelevant to the current controversy and not considered in the judgment in *Lindsay v McGrath* [2016] 2 Qd R 160.

[28] *Ashton v Ashton* [2010] QSC 326 at [13] – [15] and *Suthers v Suthers* [2015] QSC 285 and *The Trust Company Limited & Anor v Zdilar & Ors* [2011] QSC 5 at [21].

[29] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

[30] *Coorey v George*, unreported Supreme Court of New South Wales 27 February 1986, *Perpetual Trustee Co Ltd v Wright* (1989) 9 NSWLR 18 and *Hatzantonis v Lawrence* [2003] NSWSC 914 at [7] – [10].

[31] Paragraph [32].

[50] Evidence of the instructions given for the making of the 2008 will as examined at paragraph [26] could only be admissible as extrinsic evidence under s 33C of the *Succession Act*.[32] The file note relied upon by Mr Williams takes the matter nowhere, even if it is admissible. It casts no light upon whether clause 4 of the 2008 will was intended to catch the term deposits and the money to Mr Henderson's credit in account 465. Further, when the 2008 will is construed against the surrounding circumstances upon which it was made there is no ambiguity which would enliven s 33C. For the reasons which follow, the intention of Mr Henderson is clearly ascertained from the terms of the 2008 will.

[51] Mr Henderson at all relevant times knew that he held account 860 and knew that was an account held and operated at Stanthorpe. He knew he owned the land at Cottonvale and also knew that he had other assets being unparticularised property under the control of his trusted attorney Mr Webb.

[52] By the 2004 will the Cottonvale land was left to the first respondent together with a specific sum of $50,000. What evidence there is before me suggests that account 860 was unlikely to hold such a sum so that bequest would have been met, at least in part, from the investments controlled by Mr Webb. Apart from that, the benefit of the investments controlled by Mr Webb would fall to the residuary beneficiaries who were then his niece and nephew.

[53] By the time the 2008 will was made, changes were anticipated in Mr Henderson's financial holdings. The Martin family companies were to be wound up but there is nothing in the evidence to suggest that at the time of the making of the 2008 will Mr Henderson planned a change in the management of his assets. From the evidence mentioned at paragraph [24], I draw the inference that Mr Henderson intended that he would continue to control the Cottonvale land and account 860 and Mr Webb would continue to control all other investments. There is nothing to suggest that as at the time of making the 2008 will, Mr Henderson contemplated holding any money in a bank in Stanthorpe beyond account 860. The fate of any assets which might pass to him from the liquidation of the Martin family companies (and the settlement) and the form those investments might take were decisions for Mr Webb.

[54] By the 2008 will, the specific bequest of cash of $50,000 to the first respondent in the 2004 will was replaced by a gift of those moneys to Mr Henderson's credit at banks in Stanthorpe. In the context of how Mr Henderson arranged his affairs through Mr Webb and, in particular, Mr Henderson's apparent lack of interest in how Mr Webb chose to invest his assets, there was no contemplation at the time of the 2008 will that the proceeds of the winding up of the Martin family companies necessarily would result in cash, let alone cash held at the Stanthorpe branch of any bank. In the context of the circumstances, the reference in clause 4 of the will to accounts held at the Stanthorpe branch of any bank is a reference to accounts contemplated by Mr Henderson to be controlled by him; account 860 or any replacement.

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[32] *The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at [24](1) and *Marley v Rawlings* [2015] AC 129 at [26].

[55] Mr Williams' submission that the reference to "all monies" in clause 4 of the 2008 will suggests a broader and more encompassing gift than the term "any monies" in clause 5 of the 2004 will must be rejected. The gift in the 2008 will is limited to money held in Stanthorpe.

[56] Account 465 was an account opened and controlled by Mr Webb in Hornsby. The money in that account is not moneys "standing to [Mr Henderson's] credit with the Stanthorpe branch of [Suncorp]" and therefore does not pass to the first respondent under clause 4 of the will but falls to residue and passes to the second respondent by clause 5.

[57] As already observed, there are a number of cases where term deposits have not been regarded as money held to the testator's credit in a bank account.[33] Mr Williams, for the first respondent, submitted that the modern approach to construction would in this case lead to an inquiry as to the surrounding circumstances of the will to understand the words used in the will rather than reliance upon how particular terms have been construed in cases involving other wills. In support of that submission, Mr Williams relied upon the principles explained in *Marley v Rawlings* adopted in *Farrelly v Phillips*, cases to which I have already referred.

[58] Mr Williams' submission ought to be accepted. The exercise is to construe the terms of the 2008 will in the context of the surrounding circumstances as I have identified them rather than to attribute meaning to particular terms by reference to earlier judgments which have considered those or like terms.

[59] This was the approach that Burns J took in *Suthers v Suthers*[34] even though his Honour did not refer to *Marley v Rawlings*. In *Suthers v Suthers* his Honour said:

> "The court is bound to construe the will "as trained legal minds would do". That, however, is not to say that the will must be construed in a strictly technical or legalistic sense; its construction should be "sensitive to the factual context of ordinary life and circumstances"."[35]

[60] For the reasons I have already given, the scheme of the 2008 will was to pass the Cottonvale land to the first respondent together with the money that Mr Henderson was controlling himself, that is money held at the Suncorp Bank in Stanthorpe. The remainder of the estate, which included the investments not being managed by Mr Henderson, were then to fall to the second respondent. Term deposits, whether physically controlled through Stanthorpe or otherwise, are not within the gift under clause 4. The benefit of the term deposits fall to residue and then to the second respondent. Money held by Mr Webb through an account opened in Hornsby (465) falls to residue for the same reasons.

Conclusion and order

[61] The application seeks relief in these terms:

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[33] See paragraph [10].

[34] [2015] QSC 285.

[35] At [6], footnotes omitted.

"TAKE NOTICE that the applicant is applying to the Court for the following orders:

1. The following declarations, in respect of the Will dated 24 June 2008 ['the Will'] of Alistair Gow Henderson, deceased, whether, on its proper construction, clause 4 confers on David Andrew Pollock:

   (a) Suncorp Bank Account No 042592860, Stanthorpe Branch; or in the alternative

   (b) Suncorp Bank Account No 042592860, Stanthorpe Branch·, Suncorp Term Deposit No 506342531 and Stanthorpe Branch, Suncorp Term Deposit No 506337074, Stanthorpe Branch; or in the alternative

   (c) Suncorp Bank Account No 042592860, Stanthorpe Branch, Suncorp Term Deposit No 506342531, Stanthorpe Branch, Suncorp Term Deposit No 506337074, Stanthorpe Branch and Suncorp Bank Account No 601899465, Hornsby Branch, NSW.

2. That the costs of the applicant be paid out of the estate on the indemnity basis.

3. Such further orders as the Court may deem appropriate."

[62] The application therefore seeks declarations as to which of the disputed money falls to the first respondent.

[63] I intend to make a declaration, the broad effect of which is consistent with paragraph 1(a) of the application. However, rather than simply making a declaration concerning account 860, it is appropriate to declare the fate of the three items of property which are in dispute as well as clarifying the position of account 860.

[64] I make the following declarations:

(i) By clause 4 of the last will of Alistair Gow Henderson (deceased) the benefit of Suncorp Bank Account No 042592860 passes to David Andrew Pollock; and

(ii) By clause 5 of the last will of Alistair Gow Henderson (deceased) the benefit of Suncorp Bank Account No 601899465 and the benefit of Suncorp Term Deposits 506342531 and 506337074 pass to the Watchtower Bible and Tract Society of Australia.

[65] I will hear the parties on the question of costs.