# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Davies v Davies & Anor (No 2)* [2019] QSC 294 |
| PARTIES: | **BEVAN ROY DAVIES as Executor of the Estate of ALAN DOUGLAS DAVIES**<br>(applicant)<br>**v**<br>**JEANNE LORRAINE DAVIES as Executor of the Estate of NEVILLE BRIAN DAVIES**<br>(first respondent)<br>**MICHAEL DOUGLAS DAVIES in his personal capacity and as Executor of the Estate of ALAN DOUGLAS DAVIES**<br>**ELAINE JAN LOUISE FISHER**<br>(second respondents) |
| FILE NO: | BS No 13463 of 2018 |
| DIVISION: | Trial |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 29 November 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 October 2019 |
| JUDGE: | Bradley J |
| ORDER: | **1. Upon the proper construction of the Will of Alan Douglas Davies, deceased, dated 29 January 2010 the following property passes to the first respondent:**<br>**a. Commercial fishing boat licence 120306;**<br>**b. Five dinghies, comprising one aluminium dinghy, two wooden dinghies and two flat bottom wooden dinghies; and**<br>**c. A jet boat, which was not registered at the deceased's death.**<br>**2. All parties' costs of this proceeding are to be paid from the estate of Alan Douglas Davies, deceased, on an indemnity basis, save for the costs dealt with by earlier orders in the proceeding.** |
| CATCHWORDS: | SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S |

INTENTION – ADMISSIBILITY AND USE OF EXTRINSIC EVIDENCE IN AID OF CONSTRUCTION – where the applicant and one of the second respondents are executors of the estate of their father (the deceased) – where a dispute has arisen between the executors as to the proper construction of clause 4.03 of the deceased's will, which makes special provision for the deceased's "fishing gear" to pass to one of his sons – where the applicant seeks declarations that the deceased's commercial fishing boat licence, jet boat and dinghies fall within the scope of the bequest in clause 4.03 – whether declarations to that effect ought to be made

*Succession Act* 1981 (Qld), s 33C

*Allgood v Blake* (1873) LR 8 Ex 160, cited
*Coorey v George*, unreported, Supreme Court of New South Wales, Powell J, 27 February 1986, cited
*Fairbairn v Varvaressos* (2010) 78 NSWLR 577, applied
*Farrelly v Phillips* (2017) 128 SASR 502, cited
*Marley v Rawlings* [2015] AC 129, cited
*Muir v Winn* [2009] NSWSC 857, applied
*Perrin v Morgan* [1943] AC 399, cited
*Re Fowler, deceased* [1963] VR 639, cited
*Ritchie v Magree* (1964) 114 CLR 173, cited
*The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26, cited

COUNSEL: R T Whiteford for the applicant
A C Barlow for the second respondents

SOLICITORS: Morton & Morton Solicitors for the applicant
Carswell & Company for the second respondents

[1] Alan Douglas Davies (**the deceased**) died on 3 September 2014. He was survived by four children: Bevan, Neville and Michael Davies and Elaine Fisher. In his will, he made provision that one of his sons, Neville Davies, should have "all of the fishing gear owned by me at my death including my 37 foot fishing trawler". After some other specific provisions, he left the rest and residue of his estate to those of his children who survived him.

[2] The court is to decide whether the specific provision for Neville Davies includes the commercial fishing boat licence held by the deceased at the time of his passing, or whether the licence is part of the residue of the estate.

**The parties**

[3] On 20 April 2015, probate was granted to Bevan and Michael Davies. The two were unable to agree on whether the licence passed to Neville. Bevan Davies is the applicant in this proceeding. Michael Davies and Elaine Fisher are the second respondents.

[4] On 6 July 2015, Neville Davies died. His wife, Jeanne Davies, is the executor and sole beneficiary under Neville's will. In that capacity, Jeanne is the first respondent.

[5] At the trial, the applicant and the second respondents were represented by counsel. The first respondent did not appear or take part in the hearing.

**The will provisions**

[6] The will was made on 29 January 2010. The operative provisions are as follows:

> "3. I GIVE the following directions to my Trustees concerning the property owned by me situated at 80 Eckert Road, Boonooroo described as Lot 1 on RP 195432, County March, Parish Poona in the State of Queensland (herein after referred to as "the property"):-
>
> 3.01 that if requested by my step grandson **GORDON WATKINSON** they do all such things and sign all such documents as may be necessary to allow the property to be subdivided into two (2) separate lots consisting of one (1) building block being the minimum width of a standard block which still has creek and road frontage and one (1) lot consisting of the house and remaining land.
>
> 3.02 that the application for subdivision and all associated costs be paid for solely by my step grandson **GORDON WATKINSON**.
>
> 3.03 that any Capital Gains Tax arising from the above subdivision be borne by the Estate.
>
> 3.04 that the application for subdivision be made and all works associated with such subdivision be completed within two (2) years of the date of my death.
>
> 4. I GIVE the whole of my estate to my Trustees upon trust:-
>
> 4.01 as to the building block referred to in clause 3.01 above if Title is available within two (2) years of my death for my step grandson **GORDON WATKINSON** provided he shall survive me. Should this gift fail then to give to my step grandson **GORDON WATKINSON** the sum of FIFTY THOUSAND DOLLARS ($50,000.00) provided he shall survive me for his sole use absolutely.
>
> 4.03 as to all of the fishing gear owned by me at my death including my 37 foot fishing trawler for my son **NEVILLE BRIAN DAVIES** provided he shall survive me for his sole use absolutely.
>
> 4.04 as to FIFTY THOUSAND DOLLARS ($50,000.00) each to my children **NEVILLE BRIAN DAVIES**, **BEVAN ROY DAVIES** and **ELAINE JAN LOUISE SCOTT** provided they shall survive me for their sole use absolutely.

4.05 as to the rest and residue of my estate of whatever kind and wherever situate for such of my children **MICHAEL DOUGLAS DAVIES, NEVILLE BRIAN DAVIES, BEVAN ROY DAVIES** and **ELAINE JAN LOUISE SCOTT** as shall survive me and if more than one than as tenants in common in equal shares.

5. In the event of any of my named beneficiaries predeceasing me I do not wish for their gift to pass to their issue and I declare that section 33N of the *Succession Act* shall not apply."

**The legal principles**

[7] A will should be construed so as to give effect to the intention of the testator.[1] The court is concerned only with what the "expressed intentions" of the testator mean, not with what the testator may have meant to do when the will was made.[2]

[8] The orthodox approach to interpreting a will is the same as that for a contract. As Lord Neuberger said in *Marley v Rawlings*:

> "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."[3]

[9] The most significant context of a clause in a will is the testamentary instrument as a whole. Like a contract, a will must be read as a whole, interpreting every clause as part of the entirety. One part may provide the clue to the meaning of another.[4]

[10] If it is possible to ascertain "the basic scheme which the deceased had conceived for dealing with his estate", then, the court should construe the will so as "to give effect to the scheme so revealed", if that is possible.[5] Where the will as a whole conveys a definite impression of the testator's intention, it may provide a more reliable guide to the intention of a particular provision than the "successive application of technical rules of construction to its parts".[6] The testator's scheme is very important where the language of the will is obscure or the effects of the literal reading and the reasoning impliedly underlying it are startlingly unlikely.[7]

[11] The approach of the court putting itself in the position of the testator is commonly referred to as the 'armchair principle'. The court puts itself in the position of the testator and considers "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". The court then declares:

---

1 *Perrin v Morgan* [1943] AC 399 at 420 (Lord Romer).

2 ibid at 406 (Viscount Simon LC).

3 [2015] AC 129 at 144 [20], with Lord Clarke of Stone-cum-Ebony, Lord Sumption and Lord Carnwath JJSC agreeing.

4 *Ritchie v Magree* (1964) 114 CLR 173 at 181 (Kitto J).

5 *Coorey v George* (NSWSC, Powell J, 27 February 1986, unreported) at 14, cited with approval by Campbell JA in *Fairbairn v Varvaressos* (2010) 78 NSWLR 577 at 581-581 [19], and by Stanley J in *Farrelly v Phillips* (2017) 128 SASR 502 at 508-509 [25].

6 *Re Fowler, deceased* [1963] VR 639 at 644 (Pape J).

7 *Muir v Winn* [2009] NSWSC 857 at [24] (Bryson AJ), cited with approval by Stanley J in *Farrelly v Phillips* at 509 [26].

> "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."[8]

[12] The armchair principle is subject to two qualifications:

> "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."[9]

[13] In Queensland, the use of extrinsic evidence in the interpretation of a will is governed by the *Succession Act* 1981 (the **Act**), in particular s 33C:

> **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.

[14] No party contended that clause 4.03 of the will was meaningless. The applicant contended it was not ambiguous. The second respondents equivocated about whether the clause was ambiguous, but finally contended it was "ambiguous in light of the surrounding circumstances", submitting those circumstances were that the deceased had a valuable asset, the licence, which was neither fishing gear[10] nor a trawler, and common-sense suggests a valuable asset would prompt particular consideration. Their

---

8 *Allgood v Blake* (1873) LR 8 Ex 160 at 162 (Blackburn J).

9 *Farrelly v Phillips* (2017) 128 SASR 502 at 509 [28] (Stanley J; Kourakis CJ and Nicholson J agreeing) (citations omitted).

10 The second respondent tendered the *Macquarie Dictionary* definition of "gear", and contended "gear" in clause 4.03 meant "the tools or equipment used to fish".

submission presumed the deceased intended to do something specific with the licence, rather than allow it to be dealt with as part of the residue of his estate.[11]

[15] As Atkinson J observed in *The Public Trustee of Queensland v Smith*,[12] subsection 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 the provision. Her Honour succinctly identified the three circumstances as the 'armchair principle', the 'equivocation' exception, and the equitable presumption rule. In the present dispute, the equivocation exception and the equitable presumption have no relevant operation.

**The extrinsic evidence**

***The licence***

[16] A copy of the commercial fishing boat licence 12036 was tendered. This was the licence held by the deceased at the time of his death. It was issued on 17 April 2012 by the delegate of the Chief Executive under section 49(1)(a) of the *Fisheries Act* 1994 (Qld) for a period that expired on 1 July 2016. It was the latest iteration of the licence the deceased had held for many years.

[17] The *Ajax* is the primary boat identified, by name, boat mark and length, in the licence. The licence allows only a commercial fisher to use the *Ajax*.[13]

[18] The licence authorised the use of the *Ajax* in various commercial fishing boat fisheries along most of the Queensland coast.[14] This authorisation operates under a statutory regime.[15] The licence allows the holder to use the *Ajax* to take fish for trade or commerce in any of the fisheries noted on the licence.[16] It allows the licence holder to use a tender boat – at the same time as the *Ajax* or independently of it – to take fish for trade or commerce in fisheries L1 and L3.[17] It allows the licence holder to sell fish taken using the licence and to process such fish,[18] and to buy, sell or possess commercial fishing apparatus.[19] It also allows the licence holder to authorise someone else to do any of these things.[20]

***Mr Williamson***

[19] Arthur Williamson, a friend of the deceased, gave evidence at the trial.

[20] For most of his working life, the deceased was a commercial fisherman. He and Mr Williamson had worked together as fishermen for 20 or 30 years. The deceased retired in about 2005. Afterwards, he and Mr Williamson were "cut lunch fishermen",

---

11 This seems contrary to the second respondents' ultimate submission that the will should be read so that the licence passes under clause 4.05.

12 [2009] 1 Qd R 26 at 32 [24].

13 *Fisheries Regulation* 2008 (Qld), s 247(2).

14 Fishery areas C1, L1(1), L3(1), M1, N1, N11 and T1 are noted on the licence. Use in those areas is permitted by s 247(3) of the *Fisheries Regulation*.

15 *Fisheries Act* 1994 (Qld) and *Fisheries Regulation.*

16 *Fisheries Regulation,* s 246(1)(a).

17 s 246(1)(b), (c), s 247(6).

18 s 246(1)(e), (f).

19 s 246(1)(g).

20 s 246(1)(h).

meaning they went out fishing only when the weather was good. They usually fished together two to three times a week. They did this for most of the 12 years or so preceding the deceased's death.

[21] Not long after retiring, the deceased let the commercial registration of the *Ajax* – his 37 foot fishing trawler – lapse. However, he maintained his commercial fishing boat licence and paid the licensing fees promptly. For a period between 2005 and 2014, the deceased leased the licence to another fisherman, Jimmy Thorburn.

[22] According to Mr Williamson:

> "[4] The deceased did not use "Ajax" for fishing after Neville moved to North Queensland. As the boat was not being used, on a number of occasions between 2005 and January 2010 I asked the deceased why he did not sell it. On each occasion he replied in words to the effect: "No, that's for Neville. He is going to come back and have the boat and the licence and work it." He also said to me that when Neville came back he wanted Neville to work with him."
>
> "[14] The deceased's son, Neville, and the deceased were both very interested in fishing. The deceased never had a great deal of money from fishing. During our many fishing trips over the years leading up to and after 2010, we would talk about repairs that needed doing to Alan's house. I frequently suggested that he should sell some of the fishing gear and use that for repairs for the house. The deceased's answer was always the same. He would always say "no", Neville is going to come back and get the trawler going again and would need that gear when he did.
>
> [15] We often had that conversation prior to 2010. It wasn't a conversation that we had weekly but every time it came up the deceased's response was always the same that Neville would need it when he came back to go fishing.
>
> [16] The deceased was adamant that he wouldn't sell the boat or any of the gear as Neville would need it to go fishing when he came back down this way.
>
> [17] The fishing trawler "Ajax" is not the sort of boat that could be sold without a Licence attached to it. If it didn't have a Licence then you may as well pull the plug on it and sink it at the end of the wharf. It might be possible that you could find a buyer who wanted to operate it around Moreton Bay but its not the sort of boat that could work off the far side of Fraser Island for example."

[23] Under cross-examination, Mr Williamson confirmed as "correct" his evidence that the deceased had said on a number of occasions that "Neville was going to get the boat and the licence", including in November or December of 2009.

***Bevan Davies***

[24] The applicant Bevan Davies also gave evidence. He worked with the deceased "on and off" over many years, from when he was at school. He did this between other work. The other work included an apprenticeship in Gladstone, work for another commercial fisherman in Hervey Bay, and work away from Boonooroo in Brisbane, Clermont and Townsville. He kept in regular weekly contact with the deceased by telephone.

[25] Bevan also gave evidence about Neville Davies.

[26] From about 1980, when Neville left school, until about 1982, Neville worked with the deceased as a commercial fisherman. Neville was an apprentice between about 1982 and 1986. In about 1989, Neville began working on a 50/50 basis with the deceased in a number of commercial fisheries. Bevan recalled that Neville worked as a commercial fisherman on the *Ajax* in Bowen for a while, before he and Bevan brought the vessel back to Boonooroo.

[27] Bevan exhibited a hand-written document made by Neville before he died. It recorded that from about 2005, when Neville relocated to Townsville, Neville allowed a "mate" of his to use the deceased's licence "to keep a good operational history on the licence, so as to not loose further access to fisheries on my return to the industry." During this period, the deceased continued commercial fishing with Mr Williamson, probably using Mr Williamson's licence to do so. When Mr Williamson sold his licence, Neville returned the deceased's licence to his father, so that the deceased and Mr Williamson could continue to fish.

[28] Bevan's affidavit evidence included the following:

> "[25] Over the years leading up to 2010, and afterwards there were a few occasions where I mentioned to the deceased about selling the "Ajax". The deceased's reply was always the same. He always said that Neville was going to have the boat when he came home to Boonooroo to resume fishing.
>
> [26] When the deceased sold the old Dory[21] he called Neville beforehand to check if Neville wanted it before the deceased sold it."

[29] In cross-examination, Bevan explained that when the deceased purchased the *Ajax* it came with the commercial fishing boat licence. Later, presumably through legislative or regulatory change, it became possible to separate the boat and the licence. He said that "fishing gear" to the deceased was "everything he had."

> "That was his whole life. Anything he done revolved around fishing, and the boat licence, dinghies, was all fishing gear to him.
>
> … Neville was always to get the fishing stuff – gear as far as we were led to believe by dad.
>
> … Because he'd always said that Neville was the only one of us that was interested in the fishing industry. He had his licences to work the boat, he had worked the boat, and was to continue on working the boat.
>
> …

---

[21] This was a shallow-draft boat of about 20 feet long, which the deceased owned before acquiring the *Ajax*.

> … It was always, "Neville will be coming back from Townsville and using the boat to go to work". He will be – Neville had bought a house at Boonooroo, just up the road between his place and Michael's place, which is not very far, walking distance, and he would be using the boat to go back fishing, trawling, and net fishing. That was always dad's opinion."

***Mr Suthers***

[30] In late 2009 or early 2010, the deceased saw a solicitor, Aaron Douglas Suthers, who worked at the firm Suthers Lawyers in Maryborough. Mr Suthers gave evidence in the form of an affidavit. He was not cross-examined.

[31] He recalled taking instructions for and preparing the will, which is dated 29 January 2010. While taking instructions, Mr Suthers made notes on a pre-printed document entitled "Instructions for Will". In accordance with his usual practice, Mr Suthers asked the deceased about the assets of value he had and made a note of them on the document. Mr Suthers' handwritten list is as follows:

> "80 Eckert Road, Boonaroo
>
> Only in our name
>
> No mortgage
>
> No company
>
> No trust
>
> No super
>
> Fishing gear our name"

[32] Mr Suthers recalled as an "out of the ordinary" aspect of the deceased's will that the deceased told him he wanted to leave "all my fishing gear" to his son Neville. In fact, this was the first of the two specific gifts noted by Mr Suthers in the Instructions for Will document.[22]

[33] Mr Suthers' hand-written note of this instruction reads "all of my fishing gear 37 foot trawler to Neville". He recalled asking the deceased to list all the items of fishing gear he wanted to leave to Neville. He said the deceased told him "it would be too difficult to categorise or list them and that many of the items were regularly renewed and changed." Mr Suthers had no recollection of the deceased mentioning a fishing licence.

[34] Mr Suthers drafted the will in accordance with the instructions he had recorded in the Instructions for Will document. The deceased reviewed the draft at a subsequent appointment on 29 January 2010. At the request of the deceased, Mr Suthers corrected the spelling of the surname of his grandson, Gordon. The deceased then executed the will in the presence of Mr Suthers and another witness.

***Michael Davies, Colleen Davies and Elaine Fisher***

---

[22] The other was the gift to the deceased's step-grandson Gordon of a part of the land at 80 Eckert Road, Boonooroo, which is expressed in the directions in clause 3 and the specific bequest in clause 4.01 of the will.

[35] Each of Michael Davies, his wife Colleen Dawn Davies, and Elaine Fisher gave evidence in the form of an affidavit. The applicant's objections to various parts of this evidence were resolved between the parties and a redacted version of each of the affidavits was tendered. Once the objections were resolved, none of these witnesses was required for cross-examination. The redacted affidavits depose to things the deceased said, which each deponent believed divulged the deceased's thoughts about what should happen to his licence.

[36] With one exception, none of these witnesses identified whether their evidence related to conversations with the deceased before or at about the time he made his will or subsequently. The only exception was Michael Davies, who indicated one conversation he had with the deceased was on or about 17 August 2014, that is, some four and a half years after the will was made, and a few weeks before he died. It follows that their evidence does not assist in understanding the material facts and circumstances known to the deceased in the period around 29 January 2010, when he made the will.

[37] The evidence of these three witnesses was to the effect that the deceased intended Neville to have his fishing boat and that he was concerned that Neville's partner, Jeanne, not "get her hands on it". Colleen Davies recalled the deceased telling her that Neville was going to get the trawler when he died because Neville had done maintenance work on it. The deceased told her he would have given the trawler to Neville earlier but he wanted to protect the boat from Neville's partner. This evidence, if it could be used, would not assist in construing clause 4.03. It goes only to an uncontentious matter: that Neville was to inherit the *Ajax*, if he survived the deceased.

[38] Michael and Colleen Davies gave evidence that the deceased told them that the basis of settlement with the deceased's former wife was that she allowed him to keep the fishing business, trawler, equipment and licence, on the condition that he keep it all for their children. The deceased did not seek to carry out that basis of settlement when he made his will. He plainly intended that the trawler and fishing equipment (at the least) should pass specifically to Neville, if he survived the deceased, and not to any of his other children.

[39] Elaine Fisher gave evidence that she was present on a number of occasions (on unknown dates) when the deceased said "his fishing licence was to be available for all of his four children as a fall-back position in case they need to earn a living." This evidence does not indicate anything specific about the deceased's testamentary intentions. It may simply reflect his attitude to his children having the use of the licence during his lifetime.

[40] Taken as a whole, the evidence of Michael and Colleen Davies and Elaine Fisher may indicate that at different times the deceased had different views about the ultimate disposition of his property. His views may have been about such dispositions during his lifetime or after his death. None of it assists in construing the intention of the deceased expressed by the words he used when he made his will on 29 January 2010.

**Consideration of the submissions and the evidence**

[41] Consideration of the will as a whole does not leave any ambiguity about the deceased's intention conveyed by the language he used in clause 4.03. By his will, read as a whole, the deceased's basic scheme is plain. He made specific provision of land or money for his grandson (land by clause 3 or money by clause 4.01) and for Neville (by

the disputed clause 4.03) and specific monetary provision for Neville, Bevan and Elaine (by clause 4.04). The rest and residue was to pass to his surviving children as tenants in common in equal shares.[23]

[42] The language the deceased used in clause 4.03 is not made ambiguous by the knowledge that the deceased held the licence at the time the will was made.[24] It follows that section 33C(1) of the Act is not engaged. The scope of extrinsic evidence is limited to that permitted for the purpose of applying the armchair principle.

[43] The primary focus is on the terms of the will itself. Admissible extrinsic evidence is limited to material facts and circumstances known to the deceased at the time he made the will that inform an understanding of his intention as expressed in the will.

[44] Three submissions were put by the second respondents.

[45] First, "the deceased's failure to mention the licence in clause 4.03 of his will strongly indicates that he didn't intend the licence to pass with the 37 foot trawler known as Ajax."

[46] In light of the uncontested evidence of Mr Suthers, which I accept, the first submission carries little weight. The bequest to Neville of "all of the fishing gear owned by me at my death including my 37 foot fishing trawler" was drafted on the basis of the deceased's instructions to Mr Suthers that "it would be too difficult to categorise or list" all of the things included in this specific bequest and "that many of the items were regularly renewed and changed". It is also relevant that the licence was something that was regularly renewed.[25]

[47] Second, the second respondents contended that "the deceased was intending to benefit all of his children more or less equally."

[48] I reject the submission. The scheme of the will, noted above, did not "benefit all of his children more or less equally" as the second respondents contended. The deceased treated the various beneficiaries of the specific bequests quite differently. The four children were treated equally only in respect of the residue of the estate.

[49] Third, it was put that the word "gear" in clause 4.03 of the will should be given one of the meanings found in the *Macquarie Dictionary*, namely: "the ropes, blocks, etc., belonging to a particular sail or spar" or "the tools and equipment used on a ship".

[50] I reject the third submission. In the instructions recorded by Mr Suthers the deceased described the relevant property as "all my fishing gear" and in the text of clause 4.03 of the will the deceased described it as "all of the fishing gear owned by me at my death". In each case, the deceased regarded the expression "fishing gear" as a broad enough descriptor to include a "37 foot fishing trawler". It follows that in his will the deceased did not use the expression "gear" in the narrower sense such as that found in the dictionary.

---

23 In each provision, each beneficiary had to survive the deceased in order to take. This was reinforced by clause 5.

24 See also: s 33C(2) of the Act.

25 It was renewed on 17 April 2012, after the will was made and before the deceased's death.

[51] I have considered the licence itself and the fact that the licence was necessary if Neville was to use the *Ajax* or any of its tender boats to take fish for commercial purposes in a relevant commercial fishery. Neville would have to hold the licence or be authorised by the person who held it.

[52] I accept the evidence of Mr Williamson, tested by cross-examination, that in the period between his retirement and the making of his will, the deceased expressed to him the intention that Neville was to "have the boat and the licence". I also accept the evidence of both Mr Williamson and Bevan Davies that, in the same period, the deceased anticipated that one day Neville would return to Boonooroo and work as a commercial fisherman using the *Ajax*.

[53] It is startlingly unlikely that, in January 2010, the deceased would have made the specific bequest to Neville of the *Ajax* and all its associated fishing equipment but have intended to leave him unable to use any of it for commercial fishing, or beholden to his three siblings to allow him to use the licence, as their joint property, or obliged to obtain an authority from another licence-holder. To give practical effect to his expressed intention that Neville was to have "all of the fishing gear … including" the *Ajax*, it would have been necessary for a licence to be available to Neville.

[54] It is also unlikely the deceased would have intended by the language in his will to leave the licence to be held in common by all his surviving children when only one of them was then a commercial fisherman and only he was to have the primary boat associated with the licence and all the deceased's fishing equipment.

[55] For these reasons, I conclude that the licence forms part of the specific bequest to Neville Davies of "all of the fishing gear owned by me at my death" and passes to him under clause 4.03 of the will.

**The jet boat and dinghies**

[56] Given the vacillation exhibited by the second respondents about the jet boat and the five dinghies, which the deceased used with the *Ajax*, it is appropriate to deal with their fate in the orders to be made.

[57] As noted above, the licence allows the tender boats for the *Ajax* – which is an apt description of the jet boat and the dinghies – to be used in a commercial fishery the subject of the licence.[26]

[58] Consistent with the analysis of the scheme of the will, set out above, the admissible extrinsic evidence of the deceased's intentions at the time he made the will, and the broad sense in which the deceased used the expression "all of the fishing gear" in his will, I am satisfied that the jet boat and the five dinghies form part of the specific bequest to Neville Davies in clause 4.03 of the will. A declaration to that effect should be made.

**Costs**

---

[26] *Fisheries Regulation*, s 247(6).

[59] In the originating application, the applicant sought an order that all parties' costs be paid from the estate of the deceased. No submissions on costs were made by the parties in writing or orally at the trial.

[60] Given the difference of opinion between the two executors and amongst the beneficiaries, it was appropriate to bring the proceeding. The evidence and the submissions were relatively succinct. The hearing was completed in half a day. The determination resolves the remaining matter in issue between the parties, the licence, and clarifies the position with respect to the dinghies and the jet boat.

[61] The separate application in the proceeding brought after the trial by the second respondents is the subject of separate decision and the costs of that application are dealt with in a separate order. Subject to that qualification, the costs order sought in the originating application is appropriate.