

SUPREME COURT OF QUEENSLAND

CITATION: *Re Estate of Badstuebner* [2020] QSC 144

PARTIES: **THOMAS PAUL BADSTUEBNER**
(applicant)
v
KARL PERRY BADSTUEBNER
(first respondent)
JENNIFER OLIVE BADSTUEBNER
(second respondent)

FILE NO/S: SC No 151 of 2020

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 29 May 2020

DELIVERED AT: Cairns

HEARING DATE: 24 April 2020

JUDGE: Henry J

ORDERS: **1. Application dismissed.**
2. I will hear the parties as to costs at 9.15 am 10 June 2020, if the Registrar has not in the meantime been notified in writing that costs are agreed.

CATCHWORDS: SUCCESSION - PERSONAL REPRESENTATIVES – COMMISSION - DISCRETION OF COURT - GROUNDS FOR REFUSAL OR REDUCING AMOUNT – where the applicant was appointed as the sole executor of the estate of his deceased father – where the will divided the estate in equal shares between the applicant and his three siblings – where the estate was not complex or large – where the applicant entered into negotiations with the other beneficiaries to obtain the deceased’s home – where the applicant purported to condition his performance of his executor’s duties on the payment of an “executor’s fee” or executor’s commission – whether the applicant is entitled to receive a commission

Succession Act 1981 (Qld), s 68, s 52(1)(a), s 52(1)(d)

Uniform Civil Procedure Rules 1999 (Qld), r 657C
Atkins v Godfrey [2006] WASC 83, applied
Dawson v Snedden [2019] NZHC 736, cited

Ex Parte Schneider; Re Estate of Blashild (2009) 3 ASTLR 61, cited

Ford v Princehorn; Estate of Ford [2012] NSWSC 1165, cited

Gonzales v Claridades (2003) 58 NSWLR 188, cited

Gonzales v Claridades (2003) 58 NSWLR 211, cited

Hawkins v Barkley-Brown [2010] NSWSC 48, applied

In the will of Henry Sherringham (1901) 1 SR (NSW) B&P 48, cited

In the Will of Wallace (1934) 51 WN (NSW) 84, cited

Kirkpatrick v Kavulak [2005] QSC 282, considered

Re Estate Gowing (2014) 11 ASTLR 128, cited

Re Estate of Celestino Ghidella [2005] QSC 106, considered

Re Lack [1983] 2 Qd R 613, considered

Re Phillips [2007] NSWSC 639, cited

G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis, 2nd ed, 2017)

De Groot's Publishing, *Wills, Executors and Probate Administration (Qld)*, vol I, (at May 2020)

COUNSEL: J Trevino for the applicant
A Crossland for the respondents

SOLICITORS: Miller Harris Lawyers for the applicant
Attwood Marshall Lawyers for the respondents

- [1] The deceased, Paul Herman Badstuebner, died on 6 May 2018. His will left his residual estate to his four children in equal shares and appointed one of his children, Thomas,¹ as executor.
- [2] The will did not provide for Thomas to receive a fee to perform the role of executor. Thomas presided over a slow administration in which he repeatedly pursued his own interests. Despite this shortcoming he now makes application for the court to allow him an executor's commission per s 68 *Succession Act 1981* (Qld).
- [3] The application is resisted by Thomas' siblings Karl and Jennifer. The other sibling, Brett, did not participate in the proceeding.

Background

- [4] The estate was uncomplicated. It comprised:
- (a) the deceased's home, a residential property at Kirby Close, Atherton, valued in the estate inventory at \$358,077.56 "after expenses";
 - (b) \$993,198.03 cash in various accounts;

¹ I will for convenience, and intending no disrespect, herein refer to the deceased's children by their first names.

- (c) two motor vehicles valued in the estate inventory at \$9000 and \$8000 respectively; and,
 - (d) sundry household chattels.
- [5] Thomas was granted probate on 25 June 2018. From then until at least November of 2018, Thomas pursued a distribution of the estate which, via a deed he propounded, would have seen him receive ownership of the deceased's Kirby Close property, the motor vehicles and the household chattels.² Thomas' prolonged attempt to negotiate that outcome failed. In the meantime, Thomas rented out rather than sold the Kirby Close property. While he secured his siblings agreement to such a course it was a clearly a course pursued by Thomas to accommodate his desire to receive that property as part of the distribution he spent much of 2018 in pursuit of. A substantial part of the commission he now seeks relates to the hours he expended in direct and indirect consequence of that essentially self-interested pursuit.
- [6] The Kirby Close house was rented out from August 2018 to February 2019. Thomas eventually engaged a real estate agent to sell the house in February 2019. It sold in September 2019.
- [7] Thomas made no partial distribution of the estate's significant cash holdings during 2018, despite their quantum far exceeding the estate's likely debts. Interim distributions totalling \$229,250 each (a total of \$917,000) were eventually made to all beneficiaries on 7 January 2019 and 5 June 2019, yet none were made after the house sale settled on 5 September 2019.
- [8] As at the hearing of this application in late April 2020, over seven months after the Kirby Close property was sold, the amount of \$447,500 still remained in the estate's accounts. That amount far exceeds the commission here sought of \$41,858.89 and any lingering financial obligations of the estate. No explanation was given by Thomas for why such a large amount has remained undistributed for so long.
- [9] The respondent submits the delay was to induce Thomas' siblings to agree that he be paid a commission. This is said to be part of a pattern of conduct throughout Thomas' executorship, by which he has abused his control of the timing of the administration of the estate to try and induce his siblings to agree to his wishes.

Material supporting the application

- [10] Rule 657C *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") relevantly provides:

"657C Application for commission

- (1) A trustee of an estate may apply to the court for commission.
- (2) The application must be supported by an affidavit of the trustee setting out—
 - (a) the basis of the application; and
 - (b) the commission sought; and
 - (c) the trustee's justification for the commission; and
 - (d) an inventory of the estate; and

² Affidavit of Thomas Paul Badstuebner, dated 20 March 2020, Court doc 2, Ex TPB9 p 46.

(e) material to identify the appropriate respondents to the application. ...”

- [11] The amount of commission sought by Thomas in his application is \$41,858.89, being a combination of three per cent of the estate’s capital of \$1,327,848.35 and five per cent of the estate’s income of \$40,468.84.
- [12] It should be acknowledged that Thomas performed some substantial work as executor, at times in an atmosphere of some family disharmony. However, it does not follow on that account that the court should authorise the whole or part of the commission sought.
- [13] Thomas’ affidavit in support of his application justifies the commission sought on the basis of the allegedly significant burden placed upon him in having to administer the estate, a burden compounded by him living in a remote rural area which is a two hour return drive to Atherton and a five hour return drive to Cairns. He explains the time spent on administration distracted him from time with his family and reduced the time available to him to work his cattle property. While he asserts the latter consequence adversely affected his income, no information is given as to the quantum of any reduction in his income.
- [14] He did however purport to quantify the hours he spent on the administration of the estate. His summary of work done³ totals 447 hours. The summary does not itemise travel time separately from associated tasks. Nor does it explain why some tasks, which on the face of it could have been tended to by email or telephone, required travel. However, even if a material proportion of work required travel it is still surprising that the total hours is as high as 447. To illustrate, expressed in comparison to a 40-day working week, that total is the equivalent of more than 11 week’s work. Such a comparison ought not be taken too far, in that the executor’s tasks inevitably fall to be performed in disrupted spurts rather than as the continuous work of a conventional working day. Nonetheless, it well illustrates the enormity of the total hours asserted.
- [15] This was not a complex or unusually large estate to administer. Indeed, the most valuable component of it was simple cash holdings in various accounts. Even allowing for Thomas’ remote location it is surprising that the estate’s administration, if approached with reasonable efficiency, would have consumed so many hours of the executor’s time.
- [16] The summary of work throws up some striking sub-totals of time spent. A total of 52 hours was allegedly consumed in various tasks attributed to “sale and disposal of household chattels”.⁴ According to the inventory there was one garage sale and nine individual sales of chattels, raising \$3,031. Even allowing for travel time and time spent sorting and disposing of unsold chattels, sales of \$3,031 seems to be a disproportionately low return for an investment of 52 hours of the executor’s time. It suggests inefficiency and or over-estimation. So too do some of the entries in support of the sub-total. For instance, they include entries, on 15 separate dates, each identically worded as: “Attended to disposal of unwanted and damaged

³ Affidavit of Thomas Paul Badstuebner, dated 20 March 2020, Court doc 2, Ex TPB4 pp 25-32.

⁴ Affidavit of Thomas Paul Badstuebner, dated 20 March 2020, Court doc 2, Ex TPB4 p 28.

chattels of no monetary value including trips to/from charity shops and council waste facility at Atherton”.

- [17] The management of the Kirby Close property, in connection with its rental, attracted entries totalling 121 hours. This included 57 hours in respect of eight entries for July and August 2018 attributed to “preparing Kirby Close property for rent/sale”.⁵ That Thomas chose in 2018 to rent rather than sell the property inevitably resulted in a significant addition to his time expended in connection with the property. The aforementioned 121 hours includes 36 hours for ten entries for June to December 2018⁶ attributed to “arranging and managing rental of Kirby Close property (personally)” and 28 hours in respect of six entries for February to May 2019 attributed to “arranging and liaising with rental property managers (after transfer of rental management)”. There are other related entries, such as dealing with insurers and tradespersons in respect of maintenance and needed repairs, which I have not included in the aforementioned 121 hour total. That an executor, having expended 57 hours readying a property for rent, would in turn expend 36 hours on tasks a local real estate rental manager could perform and then spend a further 28 hours in connection with tasks being performed by such an agent, does not suggest an efficient approach to property rental. Significantly, such time consuming work would not have been necessary but for Thomas’ choice to rent rather than sell the property while he pursued an agreement by which he could keep it as a beneficiary.
- [18] A final example is a sub-total of 65 hours for “entering into an agreement for appropriation of estate assets”. This is supported by the following descriptions of work done:
- “23.05.2018 to 07.01.2019: Attended to numerous emails and phone calls to beneficiaries to discuss appropriation of assets of the estate.
- 26.06.2018: Contacted solicitor to arrange a deed to document the appropriation of estate assets (“deed of residuary beneficiaries”).
- Numerous emails and ongoing contact with solicitor about the deed of residuary beneficiaries.”⁷
- [19] This sub-total relates to Thomas’ failed attempt to negotiate a distribution of the estate which, via the deed he propounded, would have seen him receive ownership of the deceased’s real property and chattels. It is surprising that it took 65 hours, or the equivalent of just over eight working days, for this unsuccessful negotiation process to occur. It suggests an inefficient use of Thomas’ time as executor. Bearing in mind the manner in which Thomas was to personally benefit from the attempted negotiation – he wanted to keep the deceased’s real property and chattels – it is difficult to avoid the impression that a material expenditure of this time was driven by his self-interest as a beneficiary rather than his role as an executor. An executor acting reasonably would not have thrown away so much time on the estate’s behalf in pursuit of an agreement designed to meet one beneficiary’s desire to retain the non-cash assets of the estate. Again, this exposes that a substantial component of the work summarised in support of Thomas’ application was driven not by his duty as executor but by his self-interest as a beneficiary.

⁵ There was no sale in that era – the property was rented.

⁶ The exhibit contains some entries for late 2019, by which time the property was sold, so I infer they should refer to 2018.

⁷ Affidavit of Thomas Paul Badstuebner, dated 20 March 2020, Court doc 2, Ex TPB4 p 27.

- [20] I will soon deal with whether Thomas' conduct should preclude the awarding of a commission. It is sufficient to observe for present purposes that, if Thomas has not over-estimated the time required of him in performing his duties as executor, he performed those duties inefficiently. His evidence of the time he spent on tasks would not be a reliable source in gauging the appropriate quantum of an appropriate commission, if I were to exercise the discretion to authorise one.

The discretionary power to award an executor's commission

- [21] The court's power to award a commission derives from s 68 *Succession Act 1981* (Qld) ("the Act"), which provides:

"68 Commission

The court may authorise the payment of such remuneration or commission to the personal representative for his or her services as personal representative as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit."

- [22] Where a commission is to be authorised the approach of the court's has been to make a summary determination of the amount.
- [23] This sometimes results in the court quantifying the amount of commission as a percentage of the estate's capital and income. According to de Groot's *Wills, Executors and Probate Administration (Qld)*, that "practice has been to award commission on corpus within the ranges of 1.50%-3% and on income in the range of 3%-5%".⁸ It is by no means a fixed range however and courts may eschew adopting percentages that result in an award disproportionate to the true extent of the demands upon the executor. For instance, in *Re Estate of Celestino Ghidella*,⁹ because much of the work was left to the estate's lawyers, Jones J only awarded 1.5 per cent on income and two per cent on corpus. In a similar vein, where an estate is simple to administer but very valuable, lower percentages may be adopted because higher percentages would result in an excessively high award relative to the modest demands of the executorship.¹⁰
- [24] Sometimes the court instead opts to fix a monetary amount reflective of the work actually involved.¹¹ For example, in *Re Lack*¹² McPherson J chose not to quantify the commission by reference to a percentage and instead awarded an amount resulting in what he regarded as "a not unduly generous reward for the work involved". Such an assessment is a summary determination of an amount the court considers appropriate in the circumstances. It does not involve calculations of hours worked and application of rates per hour as if an executorship were a commercial

⁸ De Groot's Publishing, *Wills, Executors and Probate Administration (Qld)*, vol I, (at May 2020) [603].

⁹ [2005] QSC 106.

¹⁰ See for example the observations of Windeyer J in *Re Phillips* [2007] NSWSC 639, [11].

¹¹ Sometimes both approaches are drawn upon in summarily determining a commission appropriate to the case. For example, in *Kirkpatrick v Kavulak* [2005] QSC 282, McMurdo J, as he then was, after reasoning why a modest remuneration was appropriate, concluded an amount of \$20,000 was a reasonable remuneration in the circumstances, observing it represented "slightly less than two per cent on capital of \$1 million and one per cent of the income".

¹² [1983] 2 Qd R 613, 617.

exercise.¹³ That would, as Slattery J observed in *Hawkins v Barkley-Brown*,¹⁴ reduce the exercise of a subtle discretion to mere economics. It would also ignore relevant though less readily quantifiable considerations of the kind to which r 657E(1) *UCPR* refers, for instance the composition of the estate, the nature of the work, the efficiency of the administration and the conduct of persons including the executor.

- [25] The executor’s conduct in the present case went beyond inefficiency and, for reasons explained below, breached his duty.

The relevance of a breach of duty

- [26] Considerations guiding the court’s decision on an application for commission are set out at r 657E *UCPR* as follows:

“657E Decision on application for commission

- (1) In deciding an application for commission by a trustee of an estate, the court may take into account—
 - (a) the value and composition of the estate; and
 - (b) the provisions of the will or trust instrument for the estate; and
 - (c) the conduct of all persons (including the parties) connected with the administration of the estate; and
 - (d) the nature, extent and value of work done by persons other than the trustee, including non-professional work delegated to a lawyer; and
 - (e) the result of any assessment of the estate account, including the scope and merit of any objections raised in a notice of objection before the estate account has passed; and
 - (f) the efficiency of the administration of the estate; and
 - (g) any other matter the court considers relevant.
- (2) The court may make any order for commission the court considers appropriate.”

- [27] Of the considerations specifically listed in r 657E(1) the value and composition of the estate, the conduct of the players and the efficiency of the administration are the most obviously relevant in the present case. In the circumstances of this case the occurrence and consequence of any breach of the executor’s duties appears to be a relevant consideration both as “conduct”, caught by r 657E(1)(c), and as a “relevant” matter, caught by r 657E(1)(g).

- [28] It is well settled that an executor’s breach of duty may result in the court refusing to authorise payment of a commission. For example, in an oft-cited observation, Walker J relevantly observed in *In the will of Henry Sherringham*:¹⁵

“[B]efore remuneration is allowed them, trustees must show that their conduct of the affairs of the trust is free from any suspicion and

¹³ *Re Estate Gowing* (2014) 11 ASTLR 128, 143.

¹⁴ [2010] NSWSC 48, [65].

¹⁵ (1901) 1 SR (NSW) B&P 48, 49.

that there has been no neglect on their part which has in any way prejudiced the estate.”

[29] The effect of the breach upon the estate will be relevant. Observations by Street J in *In the Will of Wallace*¹⁶ suggest that rather than concerning itself with the degree of blame for the neglect of duty the court should look to the effect of that neglect upon the estate.

[30] Nonetheless, the degree of seriousness of a breach of duty also remains a relevant consideration. In *Atkins v Godfrey*¹⁷ Le Miere J concluded on a review of authority and articles:

“It seems to be established and accepted that where executors have been guilty of positive fraud or dishonesty in their office the courts will refuse them commission. As to acts or neglects falling short of fraud or dishonesty, whether the executor’s commission should be refused or reduced will depend upon the severity of the breach, assessed according to its consequences and the culpability of the executor.”

His Honour concluded the executor in that matter had failed to exercise proper scrutiny over legal fees and failed to ensure the estate was administered with due expedition. He materially reduced the commission he would otherwise have allowed.

[31] In the present case the breaches of duty to which I will shortly come are undoubtedly such as to at least warrant a reduction in the commission. The real issue in the case is whether their consequences and Thomas’ culpability for them are such that it is appropriate no commission should be authorised.

The executor’s duties

[32] The specific duties of an executor are enumerated in s 52 of the Act:

“52 The duties of personal representatives

(1) The personal representative of a deceased person shall be under a duty to—

- (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
- (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
- (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
- (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be; and
- (e) pay interest upon any general legacy ...”

¹⁶ (1934) 51 WN (NSW) 84, 86.

¹⁷ [2006] WASC 83, [29].

- [33] Of those duties it is the duty to distribute the estate “as soon as may be” which is most relevant here, particularly as the administration was unnecessarily slow and interim distributions were not made in a timely way.
- [34] The duty imposed by s 52(1)(d) to distribute as soon as may be is “subject to the administration” of the estate. It does not follow though that the duty only arises once the administration is otherwise complete. If, in the administration of an estate, an interim distribution would carry no risk to the administration then s 52(1)(d) obliges the executor to make it as soon as may be.
- [35] Where an interim distribution is contemplated, caution of course requires that its quantum is not such as to jeopardise another of the executor’s duties, namely the duty under s 52(1)(a) to administer the estate according to law. Thus, the executor must retain sufficient assets to ensure the liabilities of the estate can be met in full and that beneficiaries sharing in the residue of the estate under the will shall, in the end result, receive the net share to which they are entitled. If an interim distribution can be made in an amount which would not present any realistic possibility of jeopardising the on-going administration of the estate according to law, then a failure to make it would breach the duty to distribute “as soon as may be”. Such a conclusion arises from the duties imposed by s 52(1) and is also consistent with the approach in other jurisdictions.¹⁸
- [36] Where no distribution can be made safely until the estate is otherwise administered, a substantial delay in the administration of the estate may of itself result in a breach of the duty in s 52(1)(d). If such a delay is unnecessarily long then the eventual distribution will have been delayed unnecessarily and could not be said to have occurred “as soon as may be”. It follows in such a case the duty in s 52(1)(d) will have been breached.
- [37] Further to s 52’s statutory duties, the trusted nature of the executor’s role, in getting in, administering and distributing the estate according to law, carries the fiduciary obligation not to abuse that trust. This manifests itself in a variety of fiduciary duties owed by the executor to the estate and those bequeathed a beneficial interest in it. This includes the ‘no conflict’ rule, which “requires a personal representative to avoid placing his or her own interests in conflict with the duty as a personal representative”.¹⁹ So, for example, in *Ford v Princehorn; Estate of Ford*,²⁰ an executor who withheld payment of an interim distribution in order to induce the beneficiaries’ consent to his claim for commission was found to have “in substance acted for his own benefit rather than for the benefit of the estate”.
- [38] An executor may be in breach of more than one duty if the executor threatens to slow the administration to induce beneficiaries to agree to the payment of an executor’s commission or some other disposition of estate property to the executor as a beneficiary. If, for such a purpose, the executor needlessly delays the administration, including the making of an interim distribution which can be safely

¹⁸ See for example *Gonzales v Claridades* (2003) 58 NSWLR 188, 200–1 (the reasons of Campbell J later meeting with approval on appeal at (2003) 58 NSWLR 211, 215); *Ex Parte Schneider; Re Estate of Blashild* (2009) 3 ASTLR 61, 72–4; *Ford v Princehorn; Estate of Ford* [2012] NSWSC 1165 [27]–[28]; *Dawson v Snedden* [2019] NZHC 736, [45]–[59].

¹⁹ G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis, 2nd ed, 2017) [12.21].

²⁰ [2012] NSWSC 1165, [42].

made, then the executor will be in breach of both the duty to avoid conflict of interest and the duty to distribute as soon as may be. The executor's conduct in the present case repeatedly put him in breach of both duties.

The executor's conduct

- [39] As will become apparent from the ensuing analysis, there are three features of the dealings between Thomas and his siblings about which Thomas exhibited little insight. The first is that Thomas' apparently tense and untrusting relationship with some of his siblings – which extended to one of them suspecting he had taken estate property – made it unlikely they would all execute the deed in the terms he sought. The second is that while his siblings had no objection in principle to Thomas receiving the house and some of the deceased's possessions as part of the distribution of the estate, or to the house being rented in the meantime, they did not ever agree that they should be disadvantaged by such an approach. The third is that while Thomas' siblings at times indicated a preparedness to enter into a deed agreeing to the above arrangement, the deed he pressed upon them would not constitute an agreement unless and until it was executed. Thomas evidently became frustrated that he could never quite finalise the agreement in the terms he sought with his siblings, seemingly perceiving they had misled him with their favourable intimations, without grasping they had every right not to execute the particular deed he was advancing. His apparent perception that he had somehow been wronged by his siblings' lack of co-operation in delivering the disposition he wanted appears to have blinded him to the folly of his ongoing self-interested conduct as executor.
- [40] The lack of trust was evident from the outset. On 18 June 2018, only a month and a half after the death of Mr Badstuebner and a week before probate had even been granted, Karl's solicitor wrote to Thomas requesting that "all correspondence to Karl in relation to the estate, including all proposals and negotiations regarding the transfer of estate assets, be directed to Karl's solicitor".²¹ The letter noted without elaboration, "there has been an issue pertaining to the expenses involved in maintaining the estate prior to distribution" and proceeded to note Thomas' obligation to avoid a conflict of interest and to record all expenses of the administration. The letter further noted there was nothing to prevent Thomas making a partial distribution, provided sufficient funds were retained to meet the estate's debts and expenses.
- [41] The letter referred at some length to "correspondence/negotiations" that had already occurred regarding the possible transfer of estate assets to Thomas in lieu of a cash component and explained the need for a valuation of the house in order to ensure a proper calculation of the equal apportionment of the estate.
- [42] It appears the aforementioned deed was drafted in around July 2018. On 14 August 2018 Karl's solicitor wrote to Thomas' solicitor, making various representations about the deed's content and the information still required about the administration. It also indicated Karl was unwilling to accept the deed's indemnity clause as worded.²² That clause indemnified Thomas against all claims and demands arising in connection with the estate or his administration of it as trustee.

²¹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 5-9.

²² Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 30-32.

- [43] On 20 September 2018 Karl’s solicitor wrote to Thomas’ solicitor, noting of the attempted finalising of the proposed agreement “that negotiations had not been fruitful”. The letter indicated Karl was prepared to settle the distribution of the estate in accordance with the draft deed, subject to clarifying some terminology and was happy to attend a meeting between the executor and beneficiaries to “discuss any outstanding issues and sign off on the deed”.²³
- [44] After being informed of the aforementioned correspondence, Thomas emailed his siblings on 22 September 2018 expressing dismay about the involvement of solicitors and disagreeing with the accuracy of the assertions of Karl’s solicitor. The email went on to explain Thomas was offering the beneficiaries “one last opportunity to salvage the deed”. It continued:
- “Failing that the will has precedent thereby:
Assets will be sold in due course.
NO distribution until **all** assets are sold and liabilities are accounted for.”²⁴
- [45] Such language made it plain that failing agreement on his proposed deed Thomas would not distribute any of the estate until the administration was otherwise completed. It was by this point apparent that the estate’s debts and liabilities were not large and any potential future costs of the administration would be far less than the estate’s cash holdings of nearly one million dollars. It would have been obvious that a substantial component of that money could be distributed without remotely jeopardising the on-going administration of the estate. By indicating he would not, failing the “salvage” of the deed, make any distribution until the completion of the administration Thomas’ above email breached his duties as executor. It was a clear attempt by him to induce his siblings to execute the deed by effectively threatening to breach his duty to distribute the estate as soon as may be. That attempt was an obvious breach of the no conflict rule, abusing his position of trust as executor in order to advance own interests.
- [46] In an email of 12 November 2018 Thomas noted to his siblings that further consideration of the deed had apparently not occurred. He wrote:
- “The only real option now is the sale of the house.
Given there still has not been any cooperation or assistance forthcoming, and in fact the opposite has continually occurred, with complaints, accusations and sniping, especially in relation to any involvement I have had with the house, I intend to let the three of you handle the marketing and sale of the house.”²⁵
- [47] Such language conveys the unfortunate impression that, not having secured his way regarding the deed, Thomas would not fulfil his role as executor vis-à-vis the inevitable need to sell the house.
- [48] On 24 November 2018 Jennifer emailed Thomas, acknowledging it had been “frustrating for everyone this path to settling the estate”. She asked for another week to have her lawyer review the deed, identifying various aspects of it of

²³ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 50-51.

²⁴ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 635-636.

²⁵ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 55.

concern to her.²⁶ Her email also alluded to the arrangements she was making with her accountant to review statements, invoices and receipts.

- [49] Thomas responded by email, complaining Jennifer was aware there were invoices yet to be supplied, some of which would be determined by whether a deed was entered into or not. His email then moved to seeking his siblings' agreement to an executor's commission, or "recompense for executor's costs" as he put it. He wrote:

"On **numerous** occasions I have asked for a determination on executor's costs before any more duties are carried out.

It has now been just over 4 weeks since I requested a specific plan on this issue.

There is **still** no such determination.

...

In order to have a clear understanding worked out between ourselves on this matter I am prepared to accept the following as recompense for executors costs,

1. The chattels.
2. The \$2000 fee previously proposed.

Both have been mentioned recently and thereby would have been considered.

This matter has been waiting for a determination for **far too long**.

This matter needs to be resolved very quickly in order to progress other estate matters."²⁷

- [50] The email's reference to the need for quick agreement on an executor's commission "in order to progress other estate matters" carried the inducement that Thomas' timely progression of the administration was dependent upon his siblings agreeing to the payment of an executor's commission. It is another, albeit subtle, example of Thomas abusing his control as executor to try and pressure his siblings into complying with his personal wishes.

- [51] Later that same day Jennifer emailed Thomas with copies to her other two brothers, indicating she and her other two brothers had discussed and agreed on:

"\$2000 executor "fee"
Plus value of the chattels
To you as executor for your 'executor services'"²⁸

- [52] The email noted in respect of the execution of the deed that Thomas taking possession of the Kirby Close property would be "contingent on all beneficiaries being satisfied with the full settlement of the estate – including submission of records, receipts, invoices and statements – that clearly show the estate has been managed entirely to the benefit of the estate in all regards".

- [53] Thomas' response, by email directed to his siblings, was:

²⁶ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 372, 373.

²⁷ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 371.

²⁸ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 371.

“In regard to Jennifer’s email below on agreement for executor’s costs, I look forward to individual acknowledgment from Brett and Karl as indicated.

At such time I will be in a position to resume services to the estate.”²⁹

[54] Thomas was evidently making performance, indeed the resumption, of his executor’s duties conditional upon his siblings agreeing to payment of an executor’s fee. If Thomas wanted an executor’s commission, and his siblings were unwilling to agree to it, the proper recourse was to take his chances with an application in due course to the court. If he was reluctant to continue as executor without being guaranteed of a commission, it was open to him to renounce. However, in trying to induce his siblings’ agreement to him being paid a commission by threatening to not administer the estate in a timely way he was placing his personal interests in conflict with his duties as executor.

[55] Jennifer sent a number of follow-up emails on 11 and 12 December 2018 including one in which she requested that a partial distribution of the “cash at bank” occur if, in light of the deed not proceeding, the Kirby Close property was to be placed on the market.³⁰ By an email to his siblings later the same day, Thomas noted:

“As there now will be no deed there are a number of issues that require attention ASAP and before any further progression. Karl has indicated that he will not make an allowance for executor’s costs. As there will now be extensive further and ongoing executive duties ... there are several options;

- Genuine consideration be given to the time, effort and expense that I have previously put into the administration of the estate and which could potentially continue into the foreseeable future.
- The three of you take up my previous offer to handle the sale and management arrangements for the house with the authority of the executor.
- The bulk of any ongoing administration of the estate be outsourced to a solicitor’s firm such as Montgomery’s who are mentioned in the will.
- I will instruct Miller Harris to apply for a determination on the executor’s fee. ...

The latter two options have the potential to cost the estate many thousands of dollars and thereby affect all of our bottom lines.”³¹

[56] Such language was obviously calculated at inducing his siblings to look upon their agreement to payment of an executor’s fee to him as the least inconvenient option available to them in seeing to it that the estate would be distributed.

²⁹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 371.

³⁰ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 59, 60.

³¹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 59.

[57] On 13 December 2018 Karl emailed Thomas, noting Thomas appeared focussed on his direct needs rather than what was of benefit to all the beneficiaries. He observed the duties remaining for Thomas as executor were not of an onerous nature and that the beneficiaries were all agreed on outsourcing the property to a real estate agent. The email went on to observe that the only way an executor's fee could be granted was either the agreement of all beneficiaries or an application to the Supreme Court. Karl noted he would welcome such an application and would contribute his view to the court on Thomas' performance as an executor.³² The email reminded Thomas there were outstanding unanswered queries from the beneficiaries, including the provision of an explanation to the beneficiaries as to why a partial distribution could not occur.

[58] On 31 December 2018 Thomas emailed his siblings, stating, inter alia:

“Given that selling the house may take some time I am prepared to look at a partial distribution of the cash assets, if acceptable to all beneficiaries.

That amount would be \$800,000 or there about.

As we're at the point of selling the house, we need to determine the process. These are the options as I see it.

1. I can handle the arrangements with a number and variety of agents.
2. The three of you could handle those arrangements.
3. We engage Montgomery's or a similar law firm to do the same.

As I previously pointed out, if I'm required to carry out further tasks on top of what I've already done, then a determination on an executor's fee needs to be made asap ...

If some determination is not made then I will initially make enquiries under option 3 for a law firm to handle further duties of the estate, including marketing the house, any partial distribution deliberations and so on.

As we are all aware there is also the option of applying to the courts for a determination on an executor's fee,

We should also be well aware that both these scenarios will be expensive and time consuming for the estate. I would prefer not to follow either case, but it should be obvious that there has been considerable time, effort, resources and energy already put in to this estate on my part, and now with the prospect of more to come I ... urge each of you to reasonably consider what position you wish to take for the best outcome.”³³

[59] Such language implicitly threatened the pursuit of the most expensive options for the estate if Thomas' siblings' did not agree to payment of an executor's commission.

³² Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 58.

³³ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 65.

- [60] On 1 January 2019, in an email by Karl to his siblings, he queried why the above intimated partial distribution would have the effect of leaving a balance of over \$180,000 in the estate accounts which, he asked, “seems to be a sizable sum of money for what contingency?” He went on to indicate that the option of the other beneficiaries taking over the house sale was unrealistic because the real estate agent could only be engaged by the duly appointed executor and that the option of having a law firm engaged to sell the property would only add additional expense because in any event the firm would outsource the property to a real estate agent. He indicated the option of the executor selling the house with the assistance of real estate agents was preferred. He further noted he would not sign off on “the full and final executor’s fee of \$2,000 cash and chattels as requested by the executor” unless option one was agreed to and payment was made promptly in early January.³⁴
- [61] Later on the same day Thomas responded, noting that everyone appeared to agree upon the so-called option one of him arranging for real estate agents to sell the property, but made it plain there would be no payment of a distribution until the payment of an executor’s fee, saying:
- “Upon receipt of a clear acceptance of the executor’s fee, I will contact NAB to determine the best payment option.”³⁵
- [62] This was yet another instance of him wrongly conditioning the performance of his duty as executor upon receipt of an executor’s fee.
- [63] It had the desired effect. On 2 January 2019 Jennifer, Karl and Brett each emailed Thomas stating that they accepted and agreed to the payment of “an executor’s fee of \$2,000 and the estate chattels, for executor’s services past, present and future to Thomas Badstuebner, to be paid upon partial distribution of the cash assets of the amount of \$800,000.”³⁶
- [64] On 7 January 2019 an interim distribution was made, with Karl receiving \$204,250, Jennifer receiving \$204,250, Brett receiving \$195,250 plus the deceased’s Nissan Navarra valued at \$9,000 and Tom receiving \$196,250 plus the deceased’s Nissan Maxima valued at \$8,000.³⁷
- [65] Having effectively extorted his siblings’ agreement to him receiving a commission as a condition of him making any interim distribution Thomas may have thought he had prevailed. He had not. On 5 February 2019 solicitors acting for Karl wrote to Thomas, alleging he had in various ways preferred his own interests to those of the beneficiaries, including “blackmailing and threatening the beneficiaries” by stating that he would charge an executor’s fee if they did not agree to his requests.³⁸ That complaint was well founded. The letter also requested a variety of information relating to the administration of the estate and foreshadowed that if a satisfactory response was not received an application would be filed.
- [66] In a responding letter by Thomas’ solicitors on 8 March 2019 it was admitted Thomas had received money from the estate for his management fees. The letter

³⁴ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 68, 69.

³⁵ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 71.

³⁶ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 74-76.

³⁷ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 14.

³⁸ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 77-80.

asserted Thomas had mistakenly believed a clause of the will entitled him to charge reasonable fees with respect to management and maintenance of the Kirby Close property.³⁹ The amount Thomas charged on that basis was apparently \$2,107.50.⁴⁰ The letter also mentioned Thomas had received \$3,031 in cash for the sale of various of the deceased's chattels and was holding the cash on behalf of the estate. No explanation was given as to why that money would not have been banked into an account of the estate. Further, the letter revealed Thomas had arranged for payment of the rent of the Kirby Close property to be paid into his personal account weekly "so that he could closely monitor receipt of same". He asserted the rental proceeds were transferred into the estate bank account once a month.⁴¹

- [67] On 3 April 2019, Karl's solicitors wrote to Thomas' solicitors demanding the immediate return to the estate account of purported management fees they had calculated at being \$3,686.07, along with other monies of the estate which he had intermingled with his personal finances.⁴² The letter also noted there was no necessity for the estate to be holding "such a significant sum of cash in the bank" and proposed that a further interim distribution should be attended to immediately.⁴³
- [68] In a capitulating letter of response of 17 April 2019, Thomas' solicitors disclosed their client had paid back the sums of \$2,000 he mistakenly thought he could take as an executor's fee, \$3,687.07 apparently charged as a real estate management fee, and deposited cash received apparently from chattel sales of \$3,031 into the estate bank account. The letter went on to assure that Thomas would not intermingle his personal assets with estate assets in the future and would no longer receive estate income into his personal bank account.⁴⁴ The letter also asserted Thomas was "mindful to attend to a further distribution of estate assets" once he was aware of all the potential liabilities and testamentary expenses of the estate, such as tax and property maintenance expenses.
- [69] Counsel for Karl and Jennifer in the present application developed an argument that the various above financial irregularities involved conduct which ought to disentitle Thomas from a commission, wholly or in part. Given the more troubling other aspects of Thomas' conduct will be determinative it is sufficient to note of the above irregularities that, on the known evidence, they do not appear to fall into the category of positive fraud or dishonesty alluded to by Le Miere J in *Atkins v Godfrey*.
- [70] Interim distributions of \$25,000 to each sibling were made on 5 June 2019. By 19 August 2019 a contract for the sale of the Kirby close property at \$370,000 had been entered into and become unconditional.⁴⁵ That sale would in due course settle on 5 September 2019.
- [71] It might be thought the entirely proper capitulation on Thomas' behalf by his solicitor in the April correspondence would have been sufficiently chastening for

³⁹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 82.

⁴⁰ Affidavit of Thomas Paul Badstuebner, dated 20 March 2020, Court doc 2, [94].

⁴¹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 83.

⁴² Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 278-279.

⁴³ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 280.

⁴⁴ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 289.

⁴⁵ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 389.

him that he would not resume abusing his position of control as executor to advance his own interests. It was not.

- [72] On 24 August 2019, in an email to his siblings Thomas mentioned, in apparent response to an enquiry by Brett, that the “actual cost of the executor’s fee to the estate in monetary terms will be \$5,031 plus proceeds from any future sale items”. It went on to explain that amount consisted of the value of the chattels sold at \$3,031 and the \$2,000 “previously agreed upon”.⁴⁶ On the same date Karl emailed Thomas, indicating he did not agree to the executor being paid any fee at all and referred to the fact Karl’s lawyers had previously indicated Thomas was not entitled to a fee but could request consideration of one at the end of the process for finalising the estate.⁴⁷ Thomas responded by email of 25 August 2019, asserting Karl’s position was unreasonable because of the emailed agreement of 2 January 2019 that he ought be paid an executor’s fee. He claimed this “has formed part of the basis for me to continue as executor of this estate”. That claim conveniently ignored that he had extracted that agreement by, as Karl’s lawyers had complained back in February, “blackmailing and threatening the beneficiaries”.
- [73] In an email of 27 August 2019 Jennifer reminded Thomas of his duties as executor and noted any fee ought be considered upon conclusion of the settlement of the entire estate, “not halfway through”. It advised him against prolonging matters because he felt he was losing control or advantage, noting, prophetically, that any delay or action to secure advantage “will just make matters worse”.⁴⁸ On 28 August 2019 a letter from Karl’s solicitors to Thomas’ solicitors referred to Thomas’ persistence in insisting upon being remunerated by way of an executor’s fee during the course of the estate administration as being unreasonable and unlawful.⁴⁹
- [74] The settlement of the Kirby Close property having occurred on 5 September 2019. On 16 September 2019, Thomas emailed his siblings, asserting:
- “Going forward I would be aiming for a swift conclusion to the Estate with a complete and final distribution at that point.
- There remain several matters to deal with including Estate tax returns for 18/19 & 19/20, sale of several chattels, ongoing insurance claim, payment of final electricity account, and a determination on an executor’s commission.”⁵⁰
- [75] None of the dealings involving estate tax returns,⁵¹ sale of chattels, the insurance claim, which related to damage done by tenants, or the payment of a final electricity account loomed as involving significant expenditure for the estate. In short, they were not material stumbling blocks to a further substantial interim distribution. Moreover, it is likely some such tasks would have been tended to long ago and the others would not have arisen at all, but for Thomas’ long, self-interested pursuit of an arrangement by which he could own the Kirby Close property and the chattels.

⁴⁶ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 392.

⁴⁷ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 395.

⁴⁸ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 397.

⁴⁹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 398.

⁵⁰ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 403.

⁵¹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 48 shows the estate had no tax payable for the year ended 30 June 2018.

- [76] Developing the email's reference to a "determination on an executor's commission", the email continued:⁵²

"As to the determination for an executor's commission, I simply ask for a reasonable response given the cost to me as executor, not only financially, but also in time, effort and distress involved over a long period of time. Consideration should be given to the income generated during the course of the Estate i.e. \$31,223.67 for the 18/19 year alone and that a sale price for the house was achieved at a figure \$40,000 above the valuation. There will need to be a discussion at the earliest convenience for a mutually agreed response, so as to determine what course will be required in order to further facilitate the conclusion of the estate." (emphasis added)

- [77] By email of 17 September 2019 to Thomas and his siblings, Karl observed because the major estate asset had been liquefied there was no reason to hold large reserves of cash in the estate accounts and that another interim distribution should occur. He went on to assert he had been financially disadvantaged by Thomas' action "or inaction" and forecast Thomas' misconduct as executor would cause a court to refuse any award of an executor's commission.⁵³

- [78] Undaunted, Thomas responded by email on 18 September 2019 warning of the potential cost to the estate of having to bring an application for commission and again asking to be compensated for the cost to him of having to administer the estate.⁵⁴ No explanation was given as to why a further interim distribution could not occur. The circumstances compel the inference that Thomas was again hoping his siblings' interest in receiving another interim distribution would cause them to buckle to his resumed quest for their agreement that he be paid a commission.

- [79] Karl reiterated by return email that he did not agree to the executor getting any commission and that Thomas' persistence in asking for consent to it was "getting to be bullying".

- [80] Still undeterred, on 20 September 2019 Thomas emailed his siblings, noting he was yet to receive a reply from Brett or Jennifer as to their position regarding an executor's commission.⁵⁵ It is difficult to understand the point of such an email in circumstances where Thomas well appreciated Karl's lack of consent would preclude Thomas receiving a commission by agreement. Karl intimated as much in a return email later that same date in which he also said:

"What should not be happening is any insinuation stated or otherwise that the settlement of the estate is contingent on a fee or any agreement to a fee or payment of any type."⁵⁶

- [81] Emails from Brett and Jennifer to Thomas of 20 September 2019 in any event made it plain their agreement to the payment of an executor's commission would not be forthcoming.⁵⁷

⁵² Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 404.

⁵³ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 411.

⁵⁴ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 412-413.

⁵⁵ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 415.

⁵⁶ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 416.

⁵⁷ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 417, 418.

[82] On 22 September 2019 Thomas had email exchanges with both Brett and Jennifer, obviously calculated at persuading them to change their position. On 23 September 2019 Jennifer enquired of Thomas by email:

“Are you delaying the settlement of the estate (distribution and submission of estate accounts) until you can secure agreement from the beneficiaries that they will agree to pay you an executor fee?”⁵⁸

[83] In a remarkable response by email on 23 September 2019, Thomas professed surprise at Jennifer’s suggestion. His lengthy response included assertions that, because Karl was refusing an executor’s fee, Thomas had “little option but ... to now outsource any further administrative duties to a suitably qualified legal or accounting firm” and that the estate could have been wound up “almost 12 months ago except for the ridiculous antics of Karl and yourself by disputing indemnity clauses provided by a reputable law firm in the Deed of Arrangement”. The letter went on to try and enlist Jennifer to change Karl’s mind and noted:

“If such commonsense were to prevail, I would also hopefully be able to avoid the arduous task of outsourcing the ongoing administrative duties, and the associated added cost to the estate.”

[84] Despite his professed denial of the suggestion that Thomas was delaying the settlement of the estate in order to secure agreement from the beneficiaries to an executor’s fee, the substance of the letter had the presumably unintended effect of confirming the accuracy of Jennifer’s allegation.

[85] On 3 October 2019 Karl emailed Thomas, outlining how, despite recent correspondence from Karl’s lawyers to Thomas’, Thomas had set about contacting him by a telephone call on 2 October, in which Thomas stated:

“[T]hat the estate was right on the cusp of being finalised and could be done so promptly if

- a) if the beneficiaries agreed to the \$6,000 you want as an executor’s fee and
- b) accepted the accounts as presented by you, without going through a third party to put it together.”⁵⁹

The email also referred to an SMS by Thomas in which he had messaged, “For your own sake and that of the entire estate why not at least try to discuss a resolution?”. By email of 6 October 2019 Thomas described the assertions in Karl’s email as fantasies.

[86] In emails of 21 and 22 October 2019 Karl proposed to Thomas, with Jennifer’s and Brett’s agreement, that another partial distribution should occur, there being “no reason why such a large amount of cash needs to be held by the estate when only a small amount needs to be held back until the estate is finalised”.⁶⁰ In Thomas’ email response of 24 October 2019 he disagreed that most of the estate costs were known, asserted there were a number of considerable potential costs that may need to be determined and asserted it would be more sensible “to minimise expense to the

⁵⁸ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 431.

⁵⁹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 438.

⁶⁰ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 pp 489-491.

estate” by making a single final distribution at the conclusion of the estate.⁶¹ He did not explain what “expense to the estate” would be caused by another interim distribution, given it would merely involve transferring funds held in a bank account.

- [87] An explanation was predictably requested and in an email of 29 October 2019 Thomas purported to give it:

“In order to make a distribution, **as I have on two previous occasions**, I would have to attend a NAB branch in business hours.

Depending on which branch, that involves one to two hours travel, plus the time for the transactions.

That is a personal cost to me, not only in lost time to my own business, but also for vehicle expense and the requirements for the transaction.

I have put forward a number of questions to the beneficiaries over the course of this estate without response, including the following:

Why I am expected to incur substantial personal costs for this estate with no recompense, while only being one of four equal beneficiaries??”⁶²

- [88] Yet again Thomas’ language linked the fulfilment of his executor’s duties with the issue of him being compensated for carrying them out. It is noteworthy Thomas’ explanation did not assert the administration would be jeopardised by another interim distribution. That is hardly surprising given the sale of the Kirby Close property had settled almost two months earlier. The estate’s remaining debts and liabilities would have been small in comparison to the hundreds of thousands of dollars immediately available to distribute. A further substantial distribution could readily have been made without risk to the administration. Thomas was stalling, again putting his self interest in inducing an agreement about his commission in conflict with his duty as executor to distribute as soon as may be.
- [89] By late November 2019 correspondence was being exchanged between Thomas’ and Karl’s solicitors in respect of a potential arrangement by which Thomas would forego a claim to an executor’s remuneration, legal costs of the estate were to be paid from the residuary estate and remaining administration tasks were to be attended to in a timely manner.⁶³ However, in an optimistic letter of 2 December 2019, Thomas’ lawyer advised that there would need to be a deed of release and indemnity prepared and signed by all parties for the purpose of such an agreement. Karl’s solicitor promptly and unsurprisingly rejected the request for a release and indemnity.⁶⁴
- [90] Still no further interim distribution was forthcoming.

⁶¹ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 492.

⁶² Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 495–6.

⁶³ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 585.

⁶⁴ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 590.

- [91] Further unproductive exchanges ensued between Thomas and his siblings. Thomas' emails pursued familiar themes. For instance, in an email to Jennifer of 13 December he wrote:

“There needs to be an attitude change in order to try and put this estate behind us. I have put forward a proposal that could see this estate finalised in the near future. If that proposal is not reconsidered or a viable alternative agreed on, then we are looking at continuing for another 12 months or more. ... Surely it is possible for us to come to some arrangement between ourselves, without squandering more and more of any assets, either estate or personal?”⁶⁵

- [92] There was no need for an “attitude change”. There was no need to come to any “arrangement” in order for Thomas to do his duty as executor. He should have made a further interim distribution, retaining sufficient funds to cover the estate's lingering liabilities, including his prospective claim to the court for commission, and otherwise continued to administer the estate according to law.
- [93] Remarkably, by the time of the hearing of the present application on 24 April 2020, over seven months after the settlement of the Kirby close sale, there still had been no further partial distribution forthcoming. No evidence was proffered in explanation of why it had not been made. Such evidence as there is of any of the estate's lingering financial obligations after the time of the sale makes it clear that a substantial distribution could easily have been made soon after the property was sold without remotely jeopardising the administration of the estate according to law. Thomas should have made such a substantial distribution soon after the sale settled. By not doing so, not even by the time he pursued this application, he was in on-going breach of his duty to distribute as soon as may be.

Conclusion

- [94] The above analysis demonstrates the administration was materially delayed in the second half of 2018 by Thomas' self-interested pursuit of ownership of the deceased's house and chattels. His siblings reasonably afforded him an opportunity to pursue that outcome and to that end did not resist him renting the house. Their consent to that extent fell well short of the agreement Thomas sought via his ill-fated deed but it means the associated delay in the second half of 2018, while contextually relevant, is not of itself concerning. However, it was in that era, commencing with his email of 22 September 2018, that Thomas commenced breaching his two duties as executor to avoid conflict of interest and to distribute the estate as soon as may be.
- [95] It is a significant consideration in my determination of the application that his threat to not make an interim distribution if the deed was not executed was not an isolated slip in an otherwise proper discharge of his role. If it had been then it might be dismissed as a regrettable fit of pique involving minor culpability and consequence. However, it was just the beginning of a sustained pattern of such breaches.
- [96] By 24 November he had also begun abusing his control over the progress of the administration in order to induce his siblings' agreement to a commission for him.

⁶⁵ Affidavit of Karl Perry Badstuebner, dated 17 April 2020, Court doc 6, Ex KPB-1 p 604.

He repeated such a conflict in the exercise of his duty on 1 January 2019. Indeed, it was only after he had thereby extorted their agreement that he finally made an interim distribution on 7 January 2019. No explanation has been advanced as to why, given the estate's large cash reserves, an interim distribution had not been made much earlier. By not distributing earlier Thomas was in breach of his duty to distribute as soon as may be. He breached that duty, to advance his own interests, in conflict with his role as executor.

- [97] It is no answer to say that during the prolonged delay in administration the rental of the house and interest on the bank accounts in the meantime earned the estate income. Thomas' siblings made plain that they wanted access to their monies as soon as may be, as was their right. Thomas' breach of duty had the detrimental consequence that his siblings' right to have and use significant amounts of their inheritance for their purposes was needlessly delayed.
- [98] By September 2020, the era when the house sale settled and an interim distribution of significant cash holdings could readily be made, Thomas was yet again abusing his trusted position as executor. He was a little subtler this time around but a collective consideration of his emails of September through December 2019 make his extortionate intent clear. He was threatening to stall the administration and make no further interim distribution to again induce his siblings' agreement to an executor's commission for him. He was at once breaching both the no conflict rule and his duty to distribute as soon as may be.
- [99] By the measures of culpability and consequence alluded to by Le Miere J in *Atkins v Godfrey*, Thomas' sustained breaches of duty were very serious, involving a repeated and deliberate abuse of the position of control entrusted to him as executor to pursue his own interests. Their consequence was also very serious. For prolonged periods his siblings were wrongly denied their use of significant amounts of money which should have been distributed to them earlier. Indeed, by the time of the hearing of this application Thomas remained in on-going breach of his duty to distribute as soon as may be.
- [100] The culpability and consequences of his conduct are so serious that in my conclusion it is not appropriate to authorise any payment of commission for his services as executor. The application should be dismissed.

Orders

- [101] My tentative view is that costs should follow the event and that they should not have to be borne by the estate. However, there may be matters I am unaware of and the parties should have an opportunity to be heard as to costs if they cannot be agreed. My orders will cater for that.
- [102] My orders are:
1. Application dismissed.
 2. I will hear the parties as to costs at 9.15 am 10 June 2020, if the Registrar has not in the meantime been notified in writing that costs are agreed.