SUPREME COURT OF QUEENSLAND

CITATION:	*Romano & Anor v Ladewig & Anor* [2003] QCA 530
PARTIES:	**CATERINA ROMANO AND ROCKY NIMJIS HOARAN (AS BENEFICIARIES UNDER THE WILL OF MARJORIE OAKEY POCOCK)** (applicants/appellants) **v** **CLEM LADEWIG AND IAN LADEWIG (THE NEXT OF KIN OF THE DECEASED ENTITLED TO SHARE IN THE ESTATE ON AN INTESTACY)** (respondents/respondents)
FILE NO/S:	Appeal No 6179 of 2003 SC No 5011 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2003
JUDGES:	de Jersey CJ, McPherson JA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – WHAT WORDS WILL PASS PARTICULAR PROPERTY – REAL ESTATE – where testatrix bequeathed net sale price of "vacant allotment of land on the lefthand side of my house property" – where testatrix originally owned five contiguous lots, including lots on both sides of house – where testatrix sold lot to left of house (from perspective of observer on street) prior to making will – where lots to right of house (from perspective of observer on street) contained garden and driveway associated with house – whether testatrix speaking from perspective of observer on street or from perspective of observer in house *Succession Act* 1981 (Qld), s 28 *Hicks v McLure* (1922) 64 SCR 361, considered

McBride v Hudson (1962) 107 CLR 604, applied
Pohlner v Pfeiffer (1964) 112 CLR 52, considered
Thomas v Bergin [1986] 2 Qd R 478, applied

COUNSEL: J Griffin QC, with T Somers, for the appellants
A Morris QC, with P Howard, for the respondents

SOLICITORS: Deacon & Milani for the appellants
Martinez Lawyers for the respondents

[1] **de JERSEY CJ**: The deceased died on 9 March 2003 leaving a will dated 20 November 1987. At the time of her death, she owned a house property situated at Palmer Street, Windsor. The house property covered four contiguous lots, numbered six, seven, eight and nine. The house structure was located substantially on lots six and seven, save for concrete entrance steps which encroached .7 metre onto lot eight. The front of the house ran parallel and was very close to the common boundary of lots seven and eight. The house was serviced by a gravelled entrance driveway passing over lots eight and nine, with the gateway to Palmer Street, and letter box, on lot nine. The house was complemented by a garden well-established over the rest of the lots.

[2] By her will, the testatrix bequeathed what she termed "my house property" to her sister and half brother, and directed her executors to sell the residue of her estate, which was also to go to her sister and half brother, save for "the nett sale price of my vacant allotment of land on the lefthand side of my house property situate in Palmer Street", which was to go to two of her friends.

[3] The learned Judge held in effect that the deceased did not, as at the date of her death, own any vacant lot on the left-hand side of her Palmer Street house property.

[4] The relevant provisions of the will are these:

> "3. I GIVE DEVISE AND BEQUEATH my house property and the contents of same between such one or more of my sister the said LILLIAN ETHEL STANTON BALLINGER and my half-brother JAMES SHEEHAN of 89 Buranda Street Buranda Brisbane aforesaid as shall survive me and if both so survive me then equally between them as tenants in common for their sole use and benefit absolutely.
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> 4. I GIVE DEVISE AND BEQUEATH all the rest and residue of my real and personal property of whatsoever nature and kind and wheresoever in the world the same may be situate UNTO AND TO my said Executors and Trustees UPON TRUST to sell call in and convert into money such part or parts thereof as shall not already consist of money at such time or times and in such manner as they shall think fit with power to postpone the sale calling in and conversion of any part or parts of such real and personal property for such period or periods as they shall judge expedient without being responsible for any consequential loss and during the suspense of the sale calling in and conversion to manage and

> order all the affairs thereof in all matters as though they were beneficially entitled to the same and to stand possessed of the proceeds of such sale calling in and conversion and also of such parts of my estate as shall already consist of money UPON TRUST for the following purposes -
>
> (a) To pay transfer and hand over the nett sale price of my vacant allotment of land on the lefthand side of my house property situate at Palmer Street Windsor Brisbane aforesaid between such one or more of my friends, CATRINA ROMANO of 14 Hawdon Street Wilston Brisbane aforesaid and ROCKEYE HORAN of 35 Chatsworth Road Greenslopes Brisbane aforesaid as shall survive me and if both so survive me then equally between them as tenants in common for their sole use and benefit absolutely.
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> (b) To pay transfer and hand over the rest and residue of my nett estate then remaining between such one or more of my sister the said LILLIAN ETHEL STANTON BALLINGER and my half-brother the said JAMES SHEEHAN as shall survive me and if both so survive me then equally between them as tenants in common for their sole use and benefit absolutely."

[5] The deceased had owned lot five, contiguous with lot six, and it had been vacant save for a hen coop, but the deceased sold that lot approximately 17 months prior to her execution of the will, with the transfer registered four months later. Whether the appellants may be entitled under the will to any proceeds of that sale was not a matter in issue before the learned Judge, although it was and is common ground that the appellants are entitled to an amount equal to the net proceeds of the sale of that lot. But the appellants claim a larger entitlement.

[6] The appellants contended before the Judge that in referring to "my vacant allotment of land on the left-hand side of my house property", the testatrix must be taken to have been referring to lots eight and nine. That was the only issue which fell for determination. His Honour took the view that she was speaking from the point of view of an observer standing in Palmer Street looking towards the house: from that perspective, lots eight and nine were situated on the right-hand side of the house. Further, lots eight and nine could not in his Honour's view be characterized as "vacant", in that, with the established garden and access way, they formed "an integral part of the dwelling house, its curtilage and general surrounds".

[7] The appellants challenged the question of perspective, suggesting that one might more appropriately determine the issue from the position of an observer within the house looking out: especially, a testatrix sitting within the house executing her will. There is no evidence, I should say, that the deceased executed her will at the house.

[8] But there is no need to address that issue further. That is because the appellants' contention must in any event fail for the reason that lots eight and nine were not vacant land. The appellants contended that "lots eight and nine … were on one title, and together they constituted an allotment of some 32 perches. They were immediately capable of sale separately from the allotments on which the house was

built …" All of that is true. But what cannot be accepted is the appellants' following submission, which was that those lots "were the only land which the testatrix owned, either at the date of the will or her death, which could answer the description "my vacant allotment of land"." That contention cannot be sustained for the simple reason that lots eight and nine were not, properly considered, "vacant" as at the date of death. The learned Judge's characterization of those lots as "an integral part of the dwelling house, its curtilage and general surrounds", acknowledging the significance of the established garden and driveway, the intrusion of the concrete steps to the house, etc, was plainly correct. The appellants' contention that the land would only cease to be vacant if the house were erected on it, cannot be accepted.

[9] I would dismiss the appeal, with costs to be assessed. Mr Griffin QC urged that the costs be ordered to be paid out of the estate. But in my view that would be inappropriate at this appellate stage, where the appeal has failed.

[10] **McPHERSON JA:** This appeal concerns the interpretation of the will of the late Mrs Marjorie Pocock of Brisbane, who died at the Amarina Aged Care centre at 26 Palmer Street, Windsor on 9 March 2003 at the age of 86 or 87 years. She left a will dated 20 November 1987. The two executors and trustees appointed under it, who were her sister Lillian Ballinger and her solicitor, having both predeceased her, letters of administration with the will annexed were granted to the nephews of the residuary beneficiaries Mrs Ballinger and Mr Sheehan, a half-brother, who also predeceased Mrs Pocock.

[11] By cl 3 of the will the testator, who gave her address as 85 Palmer Street, Windsor, Brisbane, gave "my house property and the contents of same between" such of her sister and half-brother as survived her. By cl 4 she left the rest and residue of her property to her executors on trust to sell and convert and to stand possessed of the proceeds upon trust:

> "(a) To pay transfer and hand over the nett sale price of my vacant allotment of land on the left hand side of my house property situate in Palmer Street Windsor Brisbane aforesaid between such one or more of my friends CATRINA ROMANO of 14 Hawdon Street Wilston Brisbane aforesaid and ROCKEYE HORAN of 35 Chatsworth Road Greenslopes Brisbane aforesaid as shall survive me …
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> (b) To pay transfer and hand over the rest and residue of my nett estate then remaining between such one or more of my sister … and my half-brother …"

Clause 5 contains a substitutionary provision, which in the event operated in favour of the two nephews who became the administrators.

[12] Something must be said about the house and land at 85 Palmer Street referred to in the will. Judging by the title searches and certificates exhibited, the land had been in the Pocock family since at least 1912, the testator having acquired it in 1983 by transmission on the death of her late husband Edwin Pocock. At that time there were five 16 perch allotments registered in her name designated as lots 5, 6, 7, 8 and 9 on registered plan 19287. For what it matters, lots 8 and 9 were on a separate

certificate of title from lots 6 and 7, which at one time also included lot 5. Each of those adjacent lots is a narrow rectangle in shape fronting on Palmer Street, along the boundary of which there was a continuous white picket fence. A plan of the house property recently prepared by Quinn & Trent, surveyors, locates the house on lots 6 and 7 with the outer limit of the verandah on the boundary between lot 7 and lot 8 and with a set of concrete steps on lot 8 that lead down from the verandah to the garden on lot 8.

[13] The house is described by his Honour in his reasons as a substantial "old Queenslander". It is placed "side on" to the direction of Palmer Street, vehicular access to it being gained from that street through a gate on lot 9 leading to a circular gravel driveway on lot 8 and the concrete steps at what is obviously the front of the house. There is a well established garden on lots 8 and 9 incorporating shrubs and large palm trees, a blackbean tree and some tall bunya pines, together with concrete or stone garden edging, and a fish pond. The late Mr Edwin Pocock had kept birds or poultry in sheds or coops on lot 5. After his death in 1983, the lot on which that activity had previously been conducted was sold by the testator to a Mr and Mrs Goldberg, to whom it was transferred by memorandum of transfer dated 30 June 1986, which was entered on the titles register on 24 October 1986. The transfer shows that a consideration of $42,000 was paid by the purchasers, the stamp duty on that amount having been discharged on the preceding contract of sale.

[14] The question for determination on the originating application issued by the applicants Catrina Romano and Rockeye (or Rocky) Horan is the identity of the subject matter described in cl 4(a) of the will of the testator as "my vacant allotment of land on the left hand side of my house property situate in Palmer Street, Windsor, Brisbane . . ." They submit that it refers to lots 8 and 9 (the garden and driveway of the house) on the registered plan, whereas the administrators and residuary beneficiaries claim it refers to lot 5 (the adjoining land on which Mr Pocock used to keep birds).

[15] Muir J, before whom this application came, decided that it referred to the latter and not the former, and accordingly dismissed the application for the determination or declaration sought. His Honour found that at the time of the sale of lot 5 it was accurate enough to describe it as a "vacant allotment" having regard to the fact that the only structure on it was a poultry or bird coop or cages. To the contrary, he considered that the physical features of lots 8 and 9 made them "an integral part of the dwelling house, its curtilage and general surrounds", rendering it inaccurate to describe them as a "vacant allotment of land". In addition, his Honour thought it would be remarkable if, in referring to her "house property" in the disposition in cl 3 of the will, the testator had not intended to include the front stairs, the front gate, the driveway and much of the established garden of the property. That conclusion tends to be supported by photographic evidence of the area in question.

[16] In his Honour's view, when describing the location of an adjoining lot in relation to the house "the obvious point of orientation" was the Palmer Street frontage looking towards the house. He thought the next most likely point was looking from the front of the house. Neither of these points of orientation led to the conclusion that lots 8 and 9 were the "allotment of land on the left hand side of my house property". Adopting the first, lots 8 and 9 were on the right; using the second, they were in front of the viewer. The appellants submitted that this left out of account the possibility that Mrs Pocock might have been giving instructions to her solicitor from

inside the house, with lots 8 and 9 on her left; but there is no evidence where in fact she was, or was facing, when she gave instructions for her will in November 1987. She may have done so at the solicitor's city office or by telephone.

[17] Perhaps the appellants' strongest point, or so they were inclined to submit on appeal, was that in cl 4(a) the testator had described the land as "*my* vacant allotment of land . . ." That, it was said, could not refer to lot 5, which she had already sold some 16 or 17 months before. It was more likely to have been intended to describe land which, like lots 8 and 9, would have to be sold in future under the direction in cl 4 of the will to the executors to sell all the rest of her property apart from the house, of which for that purpose the vacant allotment in cl 4(a) formed part. In that context, it was said to be more natural to speak of the consideration for land that was to be sold as the "price" than to use that term to describe the proceeds of a past sale that had taken place so long before.

[18] The first step is to identify the subject matter of the gift or bequest in cl 4(a) of the will. Whether or not something answering the description used by the testator exists as part of the testator's estate is said to be a pure question of fact. See *McBride v Hudson* (1962) 107 CLR 604, 617. Whether or not it is intended to pass under the provisions of the will is a question of construction; which is a matter of law, or of mixed law and fact: ibid. If the gift in cl 4(a) were of the land itself or alternatively the proceeds of its sale, it would be a specific bequest of that land or those proceeds. What marks a bequest as specific, said Dixon CJ in *McBride v Hudson*, at 617:

> "is that its subject matter is designated as something that does, at the time of the will, or shall at the time of death of the testator, form an identifiable part of his property and is, so to speak, distinguished by the intention of the testator as ascertained from his will to separate it in his disposition from the rest of his property for the purpose of bequeathing it as a distinct subject of a testamentary disposition".

Here there can be no doubt that cl 4(a) does not contemplate a specific gift of lot 5. Neither at the date of Mrs Pocock's will, nor at her death, did it form an identifiable part of her property on which the bequest in cl 4(a) could operate.

[19] Nor can it, in my opinion, be regarded as a specific bequest of the proceeds of sale of that land. The appellants are correct in saying that there is no evidence to suggest that the proceeds of sale of lot 5 to the Goldbergs in 1986 have remained as a "pool of money" or in any other identifiable form, or that Mrs Pocock would have expected them to do so for the rest of her life. If she had that result in mind, she would surely have invested or earmarked the money in some way to identify it as being destined for the appellants. A will falls to be construed with reference to the property comprised in it to speak and take effect as if it had been executed immediately before the death of the testator. See *Succession Act 1981*, s 28(a), which is a replica of s 24 of the Wills Act 1837. It has been the source of many difficulties, of which some are debated in *McBride v Hudson*.

[20] Considered at the death of Mrs Pocock in 2003, lot 5 could not have passed under the bequest in cl 4(a) of her will. It was at her death no longer "my" land, having by that date been sold and transferred by her in 1986. But s 28(a) and its predecessors have always, as they are now in the opening words of s 28, been subject to a contrary intention in the will. The presence of such a contrary intention has

sometimes been used to save a specific bequest from ademption which would otherwise follow if the subject matter of a specific gift is disposed of by the testator between the date of the will and the date of death. An example is the Canadian case of *Hicks v McLure* (1922) 64 SCR 361, which bears a superficial resemblance to this. There the testator made a will disposing of his farm or its proceeds to his two sons; but he sold the farm before his death and took a mortgage to secure the balance of the purchase price. The Supreme Court held that the mortgage passed to the sons under the terms of the will. What saved it from ademption was, according to Anglin J that it was not a devise of the farm in specie but of the proceeds of its sale, which demonstrated a "contrary intention" that the funds representing the property should pass to the beneficiaries at death (64 SCR 361, 364-365). See also *Re Culbertson* (1966) 59 DLR (2d) 381.

[21] The present case is, however, not one where a contrary intention under s 28 of the Act can or needs to be discovered in the will. Lot 5 was sold not only before the date from which the will spoke at Mrs Pocock's death in 2003 but even before she made her will in 1987. What is more important is that cl 4(a) does not purport to be a bequest of the proceeds of sale of the vacant lot, but of "the nett sale price" of the land. The question is what she meant by this description. In my opinion, it can only be read as referring to the *amount*, or its equivalent, of the net sale price of the vacant land, which, if it was indeed lot 5, was the sum of $42,000 for which she sold it in 1986, less estate agent's commission, solicitor's fees and the like. What the testator had in mind in cl 4(a) was to make a pecuniary bequest of such an amount to the appellants, and not a specific bequest of the land itself or the proceeds of its sale. She was not, in the words of Rigby LJ in *Re Nottage (No 2)* [1985] 2 Ch 657, 664, "trying to describe something that she has". She knew she had not had it since its sale and transfer in 1986. Instead, she was describing an amount which by cl 4 her executors were directed to pay out of the trust of the residue and hand over to the appellants or the survivor of them.

[22] To construe the bequest in cl 4(a) in this way makes sense of it, and accords with the provisions of cl 4 which created the primary trust of the rest and residue of Mrs Pocock's real and personal property out of which that bequest in cl 4(a) is the first to be met. As a pecuniary and therefore general legacy, the bequest is one having no reference to the actual state of the testator's property at her death, but is a gift of money, measured in this case by the net sale price of lot 5 in 1986, which being a general legacy must be raised and paid by the administrator out of the testator's general residuary estate. See *McBride v Hudson* (1962) 107 CLR 604, 617, 630. *Theobald on Wills* (17th ed) §19.01, at 259. Williams and Mortimer, *Executors Administrators and Probate*, at 796-797. Courts traditionally lean towards the construction of legacies as general rather than specific: *McBride v Hudson*, at 630. They do so to such an extent that, as Hawkins says, legacies are prima facie construed as being general: *Hawkins on the Construction of Wills* (2nd ed) §6.03, at 108.

[23] What has been said so far aids in determining the question for the court, which is whether it is lots 8 and 9, or lot 5, that are "my vacant allotments of land on the left hand side of my house property" referred to in cl 4(a) of the will. It is unnecessary to repeat all of what was said by his Honour, which has already been set out in these reasons. The gift of the "house" property in cl 3 is specific and would, as his Honour observed, ordinarily include the messuage, or what in Australia is called the yard, surrounding it. See *Thomas v Bergin* [1986] 2 QdR 478, 480. As such, it

would include the garden, the driveway and other features described at the front and the side of the house, which are situate on lots 7 and 8 of the house. It would be surprising if Mrs Pocock had intended to dispose of them separately from the house, so depriving it of the existing means of access and inferentially greatly reducing the market value of the house itself. It is true that those two lots are on one certificate of title; but, even if she knew of that, Mrs Pocock did not describe the land she was disposing of by lot or title number. If she had done so, the present problem would not have arisen.

[24] As between lot 5 and lots 7 and 8, "vacant" allotment is not the way in which people ordinarily refer to the garden and driveway or yard of their home. As a description, it is much more apt to describe the land contained in lot 5 at least after the birds ceased to be kept there, which on the evidence was some years before her husband died. It is true that in cl 4(a) she speaks of it as "*my* vacant allotment"; but that was a means of identifying something that she had no doubt known by that description during her married life and which had passed to her on her husband's death in 1983. It was not unnatural for her to continue to speak of it in that way when describing it at a later date. That she was aware that she had sold it some time before she made her will is shown by the fact that she did not purport to dispose to the applicants of the land itself or the proceeds of its sale, but of the net "sale price" of $42,000 or whatever its net amount might have been. It may be that she had always intended to give that particular allotment of land to the appellants for their kindnesses to her, and sold it to reduce the rates she was paying to the Council, or for some other reason; but that, in doing so, she took the view that the net amount for which it was sold should stand for the land itself. It would have been interesting to know if there had been an earlier will that devised the land to them in specie; but it is, of course, pure speculation to suppose that there might have been.

[25] In the result, I consider that his Honour was correct in the way he construed the will by treating the description "house property" in cl 3 and 4(a) as referring to lots 6,7, 8 and 9 together. It would necessarily follow that the "vacant allotment" mentioned in cl 4(a) is lot 5. His Honour was not asked to make an affirmative declaration to that effect. In the end he simply dismissed the originating application seeking a determination that lots 8 and 9 were the land so described, so we should, I consider, content ourselves with dismissing the appeal from that decision. His Honour made no order as to the costs of the application. That might perhaps be thought contrary to the general practice described in *Pohlner v Pfeiffer* (1964) 112 CLR 52, 71, which Menzies J referred to as the "ordinary rule" that prevails where the trustee applies, which is that the costs ought to be borne by residue, see also *Re Buckton* [1907] 2 Ch 406,416; but his Honour may well have been influenced by the statement from counsel for the administrators at the hearing that they had never contemplated *not* paying the net sale price of lot 5 to the appellants, to which administrators have always considered cl 4(a) of the will referred. However that may be, this is now an appeal from a decision to that effect, which we are proposing to affirm, to which the ordinary rule is not applicable.

[26] The appeal should be dismissed with costs.

[27] **McMURDO J:** I agree with the reasons and the orders proposed by the Chief Justice and McPherson JA.