SUPREME COURT OF QUEENSLAND

CITATION:	*Douglas v Train & Ors* [2003] QSC 437
PARTIES:	**HEDLEY DENNIS DOUGLAS** (applicant) **v** **STEPHEN PHILLIP TRAIN and JOHN ELLIS DOUGLAS** (first respondents) **JANETTA ANN DOUGLAS** (second respondent)
FILE NO/S:	S7292 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	9 December 2003
JUDGE:	Mackenzie J
ORDER:	**1. The application insofar as it relates to citing the first respondents for contempt of court is dismissed** **2. Subject to 4, 5 and 6, the application insofar as it relates to removal or restraint of the first respondents as executors is dismissed** **3. The first respondents file and serve on or before 2 February 2004 an affidavit including a list of estate assets and liabilities and estimates of value specifying the date of the estimate or valuation** **4. If:** **(a) The usual undertaking as to damages is given in writing by the applicant through his legal guardian and filed forthwith but not later than noon on Wednesday 24 December 2003; and** **(b) An undertaking is given in writing and filed by the first respondents no later than 4.00pm on Wednesday 24 December 2003 that, until further order, they will not encumber or dispose of, (except for the payment of bona fide debts and necessary outgoings of the estate and legal fees in connection with these proceedings) the assets of the Testator's estate without the applicant's written consent;**

the application to restrain them will stand dismissed

5. **If, within the time prescribed in 4(a) the undertaking in 4(a) is given but the undertaking in 4(b) is not given within the time stated in 4(b), the first respondents are restrained, until further order, from encumbering or disposing of, (except for the payment of bona fide debts and necessary outgoings of the estate and legal expenses in connection with these proceedings) the assets of the Testator's estate without the applicant's written consent, such restraint to operate from 4.00pm on 24 December 2003**
6. **If the undertaking in 4(a) is not given and filed by noon on Wednesday 24 December 2003 the application to restrain the first respondents will stand dismissed**
7. **If:**
   - **(a) The usual undertaking as to damages is given in writing by the applicant through his legal guardian and filed forthwith but not later than noon on Wednesday 24 December 2003, and**
   - **(b) An undertaking is given by the second respondent in writing and filed no later than 4.00pm on Wednesday 24 December 2003 that, until further order, she will not encumber or dispose of (except for payment of reasonable living expenses, bona fide debts, necessary outgoings or legal expenses in connection with these proceedings), the assets of the Testator's estate without the applicant's written consent;**

   the application to restrain her will stand dismissed
8. **If within the time prescribed in s 7(a) the undertaking in 7(a) is given but the undertaking in 7(b) is not given within the time prescribed in 7(b), the second respondent is restrained, until further order, from encumbering or disposing of, (except for the payment of bona fide debts, reasonable living expenses, necessary outgoings and legal expenses in connection with these proceedings), the assets of the Testator's estate without the written consent of the applicant, such restraint to operate from 4.00pm on 24 December 2003**
9. **If the undertaking in 7(a) is not given and filed by noon on Wednesday 24 December 2003, the application to restrain the second respondent will stand dismissed**
10. **The second respondent file and serve, on or before 2 February 2004 an affidavit setting out any assets, liabilities or sources of income not disclosed in her affidavit sworn on 8 December 2003 and filed by leave on 9 December 2003**
11. **The second respondent file and serve or cause a**

director or principal executive officer of Derryvale Pty Ltd as trustee of the Douglas Family Trust to file and serve, on or before 2 February 2004, an affidavit as to any assets of the Douglas Family Trust consisting of or derived from property distributed from the estate of the Testator and as to any facts and circumstances with respect to Derryvale Pty Ltd as trustee for the Trust or the Trust itself that will or may affect the value of the Testator's estate in any way

12. **Otherwise the application is dismissed**
13. **Liberty to apply**
14. **The costs of the respondents and of and incidental to the application be paid out of the estate**
15. **Three quarters of the costs of the applicant of and incidental to the application be paid out of the estate**

CATCHWORDS: SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – PROCEDURE, ORDERS AND OTHER MATTERS – OTHER PROCEDURAL MATTERS – where applicant son of testator – where testator's widow entitled to whole of real and personal estate under testator's will – where applicant claimed no adequate provision made for him under the will – where estate consisted of numerous parcels of property and companies – where numerous orders made since August 2002 – where procedure put in place by Court order for the selection by applicant of one of three valuers nominated by first respondents to value real estate by a specified time – where valuations not provided in specified time – where valuations of all but one property provided by time present application heard – whether series of orders should be made to facilitate valuation of estate by litigation support accountant – whether accountant of applicant make a valuation of the estate

SUCCESSION – EXECUTORS AND ADMINISTRATORS – TITLE AND ESTATE OF – REMOVAL AND DISCHARGE – whether executors should be removed and replaced

PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT - WHAT CONSTITUTES – DISOBEDIENCE OF ORDERS OF COURT – OTHER CASES – whether first respondents should be cited for contempt of court

SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT –

PROCEDURE, ORDERS AND OTHER MATTERS – ORDERS – where first respondents required to file an affidavit deposing to estates assets and liabilities – where information regarding assets and liabilities of estate provided from various sources – where beneficiary provided statement of her assets and liabilities – whether first respondents should file an affidavit listing the estates assets and liabilities, and estimates of value, and any information they have about the assets and liabilities and sources of income of beneficiaries with competing claims – whether second respondent should file an affidavit listing her assets, liabilities and sources of income – whether director or principal executor officer of trustee of family trust should file an affidavit setting out assets, liabilities and sources of income of family trust

SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – PROCEDURE, ORDERS AND OTHER MATTERS – ORDERS – where certain properties sold by executors and one property transferred to second respondent prior to applicant's claim being made – where affidavit material revealed no intention to further dispose of any properties – where undertaking by respondents put as alternative order – whether first respondents should be restrained from further distributing the assets of the estate – whether order should be made restraining second respondent from disposing of, encumbering or otherwise dealing with estate assets which have been distributed to her – whether undertaking by respondents sufficient

SUCCESSION – FAMILY PROVISION AND MAINTENANCE – FAILURE BY TESTATOR TO MAKE SUFFICIENT PROVISION FOR APPLICANT – PROCEDURE, ORDERS AND OTHER MATTERS – ORDERS – where first respondents required to submit to applicant a panel of three accountants to value companies in Papua New Guinea – where applicant to nominate accountant and first respondents to appoint accountant to carry out valuations – where first respondents to provide copies of valuations within 5 days of receipt – where accountant appointed – where valuations not yet completed – whether time for compliance with order should be extended

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – FAILURE IN PART OF CASE – where application originally also alleged respondents in contempt of court – where issue not pursued – where only some of relief sought in application obtained – whether applicant entitled to costs of and incidental to the application from the estate

COUNSEL:	F Redmond for the applicant RIM Lilley for the first and second respondents
SOLICITORS:	Klar & Klar for the applicant Hemming & Hart for the first and second respondents

[2] **MACKENZIE J**: The application before me commenced as an application filed on 26 November 2003, alleging that the first respondents were in contempt of court and seeking their removal as executors of the estate of Dennis Brian Douglas. On 3 December 2003 an amended application seeking, in addition, other forms of relief against them and against the second respondent was filed. At the hearing, notwithstanding the terms of the application, only the relief in a draft order presented to me was sought. The application relating to contempt was not pursued. By the time the application proceeded, all valuations but the valuation of a company based in Papua New Guinea ("PNG") had been already provided, rendering an order with respect to those provided unnecessary.

[3] The applicant is the son of the Testator and his first wife whose marriage was dissolved on or about 2 January 1967. The first respondents are executors of the estate of the Testator who died on 24 November 2000. Probate was granted on 24 January 2001. The second respondent is the widow of the Testator. She survived him for the required period under the Will with the result that she was entitled to the whole of his real and personal estate. There were assets in Queensland and PNG.

[4] The applicant is on a disability services pension having been diagnosed as a sufferer of schizophrenia. He claims that no adequate provision has been made for him under the Will. The family provision application was filed out of time on 9 August 2002, although there is evidence that as early as February 2001 a dependency claim by him had been foreshadowed by a solicitor in the ACT. One of the complaints against the first respondent is that, despite there being reference in a letter from the former solicitors for the respondents to instructions that the executors would not make any distribution of assets of the estate without reasonable notice to the solicitor, substantial distributions did occur without notice.

[5] Since there is reference to it in the relief sought, the following is the effect of Practice Direction 8 of 2001. The Practice Direction is concerned with the form of a direction order, a pro-forma version of which forms a schedule to the Practice Direction. Paragraph 6 of the Practice Direction requires that at the time of service of the originating application the applicant is to serve a draft directions order signed by the applicant and completed as to dates for compliance with various steps. Paragraph 9 gives a right to the respondent to sign and return the order, or to put an alternative proposal in respect of matters with which he disagrees. The parties are required to try to resolve their differences. It is only if those differences cannot be resolved that an application is to be made to the court. It appears from the affidavit of Mr Murphy that on or about 8 August 2002 the draft Practice Direction order was served on the estate's then solicitor. There was no formal response from the solicitor then acting for the applicant. However, it is apparent that correspondence was exchanged between the parties which included information about estate assets and that there was discussion about mediation. There is nothing to indicate that a Practice Direction order was ever filed in the registry as would be required by para

9(b) of the draft order. It appears that Fryberg J, by orders of 13 May 2003 and 23 July 2003, put in place alternative arrangements for ascertaining the information about the estate to that sought in the application.

[6] As previously mentioned, the originating application was filed on 9 August 2002. On 15 August 2002 in accordance with the Practice Direction the application and a draft directions order was served on the solicitors then acting for the respondents. The second respondent on or about 16 October 2002 provided an affidavit deposing to her perception of the relationship between the Testator and the applicant. An inventory of assets as at 1 September 2002 and a letter relating to transferring an account from the name of the first respondents as trustees for the estate to a company as trustee for the Douglas Family Trust was also provided to the applicant. On 7 November 2002 a letter raising a number of specific questions about the assets of the estate was sent to the respondents' solicitor, apparently for the purpose of facilitating informed discussion by counsel for the parties. On 18 November 2002 a letter containing a preliminary response to the enquiries was sent and 27 November 2002 suggested as a date for mediation. The solicitor for the applicant indicated on 21 November 2002 that he was not ready to mediate, partly because he had insufficient understanding of the estate at that point.

[7] On 3 December 2002 title documents, a contract relating to a Cairns property and other documents relating to the estate were sent to the applicant. An explanation of the difficult PNG position and a contact at a firm of accountants with whom it might be discussed were given.

[8] On 14 December 2002 a further letter requesting information about the estate property and referring to the absence of valuation evidence was sent to the respondents. On 18 December 2002 the respondents replied that sufficient information had been given. A proposal for a basis for settlement was made. A request that the applicant's accountant be funded from the estate was refused. On 21 March 2003, a r 444 letter requesting that information concerning the estate's assets and liability situation be provided was sent.

[9] In late April 2003, after a change of solicitors, there was apparently discussion about reaching a consent order with respect to disclosure. When that failed and an application to be heard on 13 May 2003 was filed, the first respondent gave the plaintiff a draft order proposing that an affidavit with accompanying documents be prepared by the first respondent in compliance with para 11 of Practice Direction 8 of 2001 deposing to the assets and liabilities, together with a dispute resolution plan, including mediation if necessary.

[10] Fryberg J made an order that an affidavit deposing to the assets and liabilities be filed by 20 May 2003 and a procedure be followed for the applicant to select one of three valuers nominated by the first respondents to value real estate included in the estate, with the valuations to be completed by 23 June 2003. The order appears to have been an agreed draft between the parties. A request in the application for information to be released to the applicant's accountant to prepare a report relating to the net worth of the estate, at the estate's expense, was not included. I note that the respondents' outline of argument on that occasion submitted that it was premature, unnecessary and an excessive cost to the estate to do so.

[11] An affidavit of the estimated value of the estate at the date of death was filed on 26 May 2003, deposed to by the first first respondent who deposed he was authorised by the other executor to swear the affidavit on his behalf as well. On 6 June 2003 another r 444 letter alleging non-compliance with Fryberg J's order was sent to the respondents. Apparently for the reason that only one of the two executors had sworn the affidavit, it was alleged that the order had not been complied with. Another complaint was that the panel of valuers had not been provided for "…each of the real estate properties included in the estate or at all". A letter of 22 May 2003 from the respondents had advised of difficulties in identifying valuers in PNG who were able to value the property there. On 12 June 2003 the respondents disputed that an affidavit sworn by one executor with the authority of the other amounted to non-compliance with the order, but to avoid argument said that the solicitors would get the second executor to swear an affidavit. (This never happened). It was also said that because of difficulties caused by the absence of the first of the first respondents from Australia they would respond as soon as possible about valuers. If necessary they would seek to vary the order.

[12] On 19 June 2003 a further response to the r 444 letter raised issues of whether the intent of the order was that each executor should separately depose to the estimated value of the assets. Doubt was expressed whether, since the second of the first respondents had relied on information given by the other first respondent, he could swear an affidavit in any event. Panels of valuers for the Maleny and Balgowlah properties were provided. It was also said that information received was that, given the volatility of the PNG currency and the commercial property market in Port Moresby, a valuation would be "somewhat useless" and excessively expensive. The name of one valuer equipped to do a valuation was, however, suggested. The value of the PNG company as at 31 December 2000, based on a taxation return with the qualification as to the possibility of significant alteration in the net worth of the assets since the last valuation, was provided. On 22 July 2003 a balance sheet as at 31 December 2002, which had just been received, was provided.

[13] On 14 August 2003 another r 444 letter complaining of non-compliance with the Practice Direction in several respects was sent. It was, in effect, complained that none of the requirements of para 11 of the Practice Direction had been complied with. The relief requested was for the respondent to estimate the costs of administration and give information required by para 11(c) to 11(e). This restriction presumably recognised that a good deal of information about the assets had by this time been disclosed.

[14] Although there is no application on the file, the matter came back before Fryberg J on 23 July 2003. The time for complying with the order facilitating appointment of valuers to properties at Wooloowin, New Farm, Cairns and Balgowlah was extended. An order was made incorporating the same process for appointment of an accountant to value the PNG company as at 24 November 2000 and currently. On 30 July 2003 panels of possible valuers for Wooloowin, New Farm, Cairns and Balgowlah were provided. On 6 August 2003 another r 444 letter complained about the panels provided. The criticisms were promptly rejected but a revised list was provided. In short, the period following Fryberg J's order of 23 July 2003 was punctuated by arguments about the suitability of people nominated to the various panels. On 29 August 2003 a nomination in respect of the PNG valuation was made. Nominations were also progressively made in respect of the other properties throughout August 2003.

[15] On 20 August 2003 the first of the first respondents, on the basis that he was authorised by the other executor to swear the affidavit on his behalf as well, addressed the alleged deficient compliance with the Practice Direction raised in the letter of 14 August 2003. He referred, on information and belief, as to the wishes expressed by the Testator shortly before his death as to certain uses to which parts of the estate would be put, particularly in the context of exoneration. He said that his opinion was that costs would increase from $10,000 to $50,000 by reason of the proceedings. There was no exoneration of any bequests. With respect to the requirement to provide "any information the respondent has about the assets and sources of income of a beneficiary with competing claims on the Testator's bounty" he said the following:

> "11. I have little information in relation to the assets and liabilities and sources of income of beneficiaries who are natural persons. I am aware, however, that the deceased's widow, Janetta Douglas, was the registered proprietor of a residential property at Leopard Street, Kangaroo Point in Brisbane and that she claimed an equity interest in a property that was held by the deceased being land improved with a small boat shed only at Moray Street, New Farm. I am also aware that there is a trust called the Douglas Family Trust established by the deceased in 1996 which has assets including a building in Bundaberg leased to the Commonwealth Bank. I am aware that the Trust also has substantial liabilities. The executors were trustees of the trust. However, Derryvale Pty Ltd has now been appointed as trustee and has full control of the trust and its assets.
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> 12. So far as the executors of the estate are aware, the financial interaction between the estate and the Douglas Family Trust is that:
>
> (a) estate assets are the subject of a mortgage to Australia and New Zealand Banking Group Limited to secure borrowings by the Trust for the purchase of the Bundaberg Building;
> (b) the Trust has advanced income that it has received for the administration of the estate."

[16] With regard to para 11(e) of the Practice Direction he said there was nothing in the application or the supporting affidavit with which he took issue, although he could not say whether some matters were true or untrue because he did not know the facts.

[17] Another r 444 letter was sent on 22 October 2003 complaining about the length of time it was taking for the valuations to be completed. A letter informing of the expected timetable for receipt of the valuations was sent on 29 October 2003. It was foreshadowed that the PNG valuation might take time to complete because of issues previously referred to. The next significant event was the filing of the application on 26 November 2003 to cite the first respondents for contempt of Fryberg J's orders and to have them removed as executors.

[18] The affidavit of Mr Murphy dated 26 November 2003 recites that it is common ground that properties at Wooloowin, New Farm, Cairns, Balgowlah, Maleny and Mapleton are or have been assets of the estate. According to the affidavit of the first of the first respondents dated 23 May 2003, the properties at Wooloowin, Cairns and Mapleton had been sold by the executor and the New Farm property transferred to the second respondent. The fact that a 50% equitable interest in the New Farm property was claimed was recorded.

[19] At the hearing before me, affidavits were read by leave from the first of the first respondents (with authority of the second executor), the second respondent and the solicitor for the applicant. The affidavit of the second respondent addressed the nature of some of the PNG assets. She explained what were alleged by the applicant to be inconsistencies in the values attributed by her to properties in the estate. She attributed the discrepancies to the estimates being given informally at that early stage in an attempt to settle the matter. Specific issues with respect to particular properties were addressed.

[20] She said that she had always wished that the matter would be settled as expeditiously as possible. To the extent that there was a complaint about her contacting the applicant's mother, his litigation guardian, personally, an explanation was given that she was trying to arrange to give him a motor vehicle. She also asserted that she did not intend to contact the applicant further until the claim was settled. She also explained the circumstances in which the Mapleton property was sold and the proceeds held in a term deposit in her name. She said that she had no intention of selling the Maleny and Balgowlah properties. She gave an explanation as why the New Farm property was transferred to her name and said that she did not intend to sell it. There was also information given about a property in Bundaberg purchased by the Dennis Douglas Family Trust, the trustee of which is Derryvale Pty Ltd, of which she is a director. Her personal assets (apart from her entitlement to the Testator's estate) are listed.

[21] The first of the first respondents addresses, on behalf of both executors, the application for removal in some detail. He points to his intimacy with the estate because of long connection with the business affairs of the Testator as a significant reason for not doing so, along with the expense of employing accountants as substitute executors. He gave reasons why the New Farm property had been transferred and the Mapleton and Wooloowin properties sold. He also said that the executors had no intention to sell or transfer the Maleny or Balgowlah properties. He said that the Family Trust was not part of the estate although the Maleny estate is part of the security for its borrowings.

[22] He addressed the issue of partial distribution of the estate, pointing to the course of correspondence with the solicitor then acting. In particular, he relied on a letter of 21 August 2001 where the solicitor pressed for an outline of the provision being sought on behalf of the applicant. He had referred in that letter to previous requests that had not been responded to. The letter of 21 August 2001 was itself not responded to in a timely way. Soon after that, the period for making a claim passed and the view was taken that administration of the estate could not be delayed indefinitely in case a claim might be made. Because of the instructions conveyed by the original solicitor for the respondents to the applicant's former solicitor that notice would be given of distributions, it is understandable that there was concern on the part of the applicant that the opposite happened. However, the apparent

failure to advance the claim despite requests to do so is some mitigation. But nevertheless, it would have been easy to put the applicant on notice of the intention to begin distribution. In the circumstances it is not necessary to enter the controversy developed in counsel's submissions over whether distribution should have begun or not where there was a possibility of a claim but no steps taken to institute it. By the time the claim was made, almost 12 months later, some assets had been transferred or sold. Mediation had been proposed but did not happen because the new solicitors did not believe they had enough information about the estate.

[23] The first first respondent addressed the inconsistencies and discrepancies in early responses concerning the value of properties in much the same way as the second respondent had. With regard to the complaint about the administration of the estate, his position is encapsulated in para 5.1 which is as follows:

> "The executors have not ignored the claims of the applicant. At all times since first hearing of the applicant's intention to make a claim the executors have attempted to determine an appropriate amount to make provision for the applicant. In that regard;
>
> (a) as early as April 2001 I sought details of the claim and have continued to do so. They have not been provided
> (b) I instructed my solicitors to obtain details of any claim for special needs. Those details have not been provided
> (c) the executors have briefed Senior Counsel for an opinion as to the appropriate provision for the applicant if his claim were to be successful
> (d) without disclosing that advice which is privileged, in dealing with any assets of the estate I have borne in mind counsel's advice and believe that the executors have acted prudently."

He believed that the executors had complied with their duties under the *Succession Act* 1980 (Qld).

[24] The affidavit of the solicitor for the applicant added little except to assert that it had never been clear that the executors had at no stage been involved in the management or administration of the Douglas Properties Group.

[25] Setting out the history of the matter demonstrates that it is imperative that steps be taken promptly to bring the matter to a conclusion as soon as possible. The latest application has at least started to bring together the various strands of information that will be necessary for the matter to proceed to a hearing, if that be necessary. With regard to removal and replacement of the executors, at this point, I am not satisfied to the required standard that conduct justifying that drastic step has been demonstrated on the material that is available. The fact that the evidence is only on affidavit compounds the difficulty of deciding matters that may be in dispute although much of the fabric of the case can be determined from the documents.

[26] With regard to other aspects of the draft order, para 1 which sought an order for supplying valuations of the "Maleny and Mapleton" properties has become academic since they have now been provided. The second order seeks an extension of the time within which the first respondents are to comply with para 5 of the order

of 23 July 2003. The only remaining obligation under para 5 is to provide copies of the PNG valuation within 5 days of its receipt. The order sought is therefore misconceived. Less it be thought that that is an unduly technical view of the matter, because of the difficulties associated with the valuation I am not inclined to fix a date by which the valuation is to be provided. If however there is any inordinate delay, the matter can obviously be revisited.

[27] The third order sought is that the first respondents file an affidavit including a list of estate assets and liabilities and estimates of value specifying the date of estimation or valuation and any information the first respondents have about the assets and liabilities and sources of income of beneficiaries who are natural persons having a competing claim on the bounty of the Testator. In my view it is appropriate to consolidate the information that has been already provided in a piecemeal fashion into one affidavit so far as the assets are concerned. It is not entirely clear from the material that the issue of liabilities has been fully dealt with on the material so far exchanged. I will therefore order that the first respondents file an affidavit including a list of estate assets and liabilities on or before 2 February 2004.

[28] With respect to the second part of what was asked for in that proposed order, under the Practice Direction the only obligation on the executors is to provide "any information the respondent has about the assets and liabilities and sources of income of beneficiaries …". The beneficiary has in her recent affidavit given a statement of her assets and liabilities. I will not make an order in that regard. There was in any event no evidence that the information provided by the executors as to their state of knowledge about those matters was not comprehensively stated in the affidavit dealing with the issue.

[29] The next group of paragraphs in the draft order seek an order that the accountant proposed by the applicant make a valuation of the estate at the expense of the estate and for ancillary orders for that to be achieved. The estate, with the possible exception of the PNG assets, should not be complicated to value. I am not persuaded that, now that there are independent valuations of the properties in Queensland and one is in the course of preparation with regard to the PNG property, there is any demonstrated utility in having a separate and distinct valuation by a person acting on behalf of the applicant. This is particularly so having regard to the obligation imposed by the order that will be made in the terms above requiring the issue of liabilities as well as assets of the estate to be set out in an affidavit. Should there be any residual concerns after that process has been undertaken, it is a matter for the parties to resolve them by whatever means they see fit.

[30] There is an application for an order that the first respondents be restrained from further distributing the assets of the estate. At the time the affidavit referred to earlier was sworn there was no intention on the part of the respondents to dispose of the Maleny or Balgowlah properties. It was submitted by the respondents that if it was thought desirable to have a restraint on the properties, rather than make an order in that regard the executors should be given the opportunity to give an undertaking. There is also an application for an order that the second respondent be restrained from disposing, encumbering or otherwise dealing with the estate assets which have been distributed to her. She has sworn that, at the time of swearing the affidavit, she had no intention of disposing of the New Farm property. Reference has already been made to the proposal by the applicant prior to the hearing that an undertaking would be acceptable.

[31] In my view, it is desirable in the circumstances to ensure that the status quo is maintained. In my view undertakings from the first respondents and the second respondent would suffice if they are prepared to give them. If not orders would follow to like effect. Having said that, in my view the restraint sought upon the second respondent is too stringent. It would be unfortunate if an argument developed as to whether monies spent by her for legitimate purposes of ordinary living were part of the estate assets and therefore under restraint. Any undertaking or order should exclude such expenses.

[32] An order is sought that the second respondent file an affidavit setting out a statement of her assets and liabilities and sources of income. Her assets and liabilities have been set out in her recent affidavit. With regard to sources of income, in my view it is appropriate that any which had not been previously disclosed be disclosed and I will make an order in that respect. With regard to supplying information she has regarding the assets and liabilities and sources of income of beneficiaries having competing claims on the bounty of the Testator, assuming that extends to her children (who are not beneficiaries), there is, firstly, an indication that they do not intend to claim and, secondly, it is difficult to see a basis to require her to do so. Her only involvement in the proceedings is as the sole beneficiary, not an executor.

[33] There is also an application that the second respondent cause the director or principal executive officer of Derryvale Pty Ltd as trustee of the Douglas Family Trust to file an affidavit setting out a statement of the assets and liabilities and sources of income of the Douglas Family Trust. One aspect of the interface between the Family Trust and the estate is to be found with regard to the mortgage over the Maleny property as security for the borrowings of the Trust. If there are any other circumstances where the Trust and the estate have an interface or their affairs are intermingled, that should be disclosed. However, as presently advised I would not be prepared to make an order in terms as wide as that sought.

[34] It seems appropriate in the circumstances to grant liberty to apply. As to costs, there is a request that the costs of the parties of and incidental to the application be paid out of the estate. Ordinarily, that would be the case. In the present application, however, while the applicant has obtained some of the relief sought, the application for contempt, which is a serious step was, rather precipitately, not pursued. The circumstances relied on to remove the executors fall somewhat short of what was necessary. Withholding a proportion of the costs that would ordinarily be paid from the estate is therefore appropriate.

[35] Since the disposal of the matter contemplates the giving of undertakings, the restraints will be formulated as applying only from a date in the future in the event that undertakings are not forthcoming. There will also need to be an undertaking as to damages on the part of the applicant. A complaint was made that any undertaking would be of little worth. Ordinarily that would be of significance in determining whether or not to restrain a respondent. The present case is unusual. The respondents say they do not intent to dispose of real property held by them. Money which is the proceeds of one property that has been sold is on term deposit of undisclosed duration. In the circumstances, preserving the status quo is unlikely to cause significant damage. Principally for that reason, I would be prepared to give the doubt about the monetary value of the undertaking less weight than it may otherwise have.

[36] The orders are as follows:

1. The application insofar as it relates to citing the first respondents for contempt of court is dismissed.
2. Subject to 4, 5 and 6, the application insofar as it relates to removal or restraint of the first respondents as executors is dismissed.
3. The first respondents file and serve on or before 2 February 2004 an affidavit including a list of estate assets and liabilities and estimates of value specifying the date of the estimate or valuation.
4. If:
   (a) The usual undertaking as to damages is given in writing by the applicant through his legal guardian and filed forthwith but not later than noon on Wednesday 24 December 2003; and
   (b) An undertaking is given in writing and filed by the first respondents no later than 4.00pm on Wednesday 24 December 2003 that, until further order, they will not encumber or dispose of, (except for the payment of bona fide debts and necessary outgoings of the estate and legal fees in connection with these proceedings) the assets of the Testator's estate without the applicant's written consent;

   the application to restrain them will stand dismissed.
5. If, within the time prescribed in 4(a) the undertaking in 4(a) is given but the undertaking in 4(b) is not given within the time stated in 4(b), the first respondents are restrained, until further order, from encumbering or disposing of, (except for the payment of bona fide debts and necessary outgoings of the estate and legal expenses in connection with these proceedings) the assets of the Testator's estate without the applicant's written consent, such restraint to operate from 4.00pm on 24 December 2003.
6. If the undertaking in 4(a) is not given and filed by noon on Wednesday 24 December 2003 the application to restrain the first respondents will stand dismissed.
7. If:
   (a) The usual undertaking as to damages is given in writing by the applicant through his legal guardian and filed forthwith but not later than noon on Wednesday 24 December 2003, and
   (b) An undertaking is given by the second respondent in writing and filed no later than 4.00pm on Wednesday 24 December 2003 that she, until further order, will not encumber or dispose of (except for payment of reasonable living expenses, bona fide debts, necessary outgoings or legal expenses in connection with these proceedings), the assets of the Testator's estate without the applicant's written consent;

   the application to restrain her will stand dismissed.
8. If within the time prescribed in s 7(a) the undertaking in 7(a) is given but the undertaking in 7(b) is not given within the time prescribed in 7(b), the second respondent is restrained, until further order, from encumbering or disposing of, (except for the payment of bona fide debts, reasonable living expenses, necessary outgoings and legal expenses in connection with these proceedings), the assets of the Testator's estate without the written consent of the applicant, such restraint to operate from 4.00pm on 24 December 2003.

9. If the undertaking in 7(a) is not given and filed by noon on Wednesday 24 December 2003, the application to restrain the second respondent will stand dismissed.
10. The second respondent file and serve, on or before 2 February 2004 an affidavit setting out any assets, liabilities or sources of income not disclosed in her affidavit sworn on 8 December 2003 and filed by leave on 9 December 2003.
11. The second respondent file and serve or cause a director or principal executive officer of Derryvale Pty Ltd as trustee of the Douglas Family Trust to file and serve, on or before 2 February 2004, an affidavit as to any assets of the Douglas Family Trust consisting of or derived from property distributed from the estate of the Testator and as to any facts and circumstances with respect to Derryvale Pty Ltd as trustee for the Trust or the Trust itself that will or may affect the value of the Testator's estate in any way.
12. Otherwise the application is dismissed.
13. Liberty to apply.
14. The costs of the respondents and of and incidental to the application be paid out of the estate.
15. Three quarters of the costs of the applicant of and incidental to the application be paid out of the estate.