

SUPREME COURT OF QUEENSLAND

CITATION: *Holman v McClelland & Holman (as executors of the estate of Holman, dec'd)* [2003] QCA 509

PARTIES: **TAMAR HOLMAN**
(applicant/appellant)
v
**ANN LOVEDAY TREVENEN MCCLELLAND AND
NICHOLAS JOHN HOLMAN (AS EXECUTORS OF
THE ESTATE OF NICHOLAS PAUL TREVENEN
HOLMAN, DECEASED)**
(respondents/respondents)

FILE NO/S: Appeal No 4971 of 2003
SC No 10900 of 2002

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED EX
TEMPORE ON: 13 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 13 November 2003

JUDGES: de Jersey CJ, Davies JA and McMurdo J
Separate reasons for judgment for each member of the Court,
each concurring as to the order made

ORDER: **Appeal dismissed with costs to be assessed**

CATCHWORDS: LIMITATION OF ACTIONS – POSTPONEMENT OF THE
BAR – EXTENSION OF PERIOD – POWER OF COURT
TO EXTEND TIME – where appellant filed application for
further provision out of deceased estate approximately two
months late – where substantive case not without merit –
where appellant aware that limitation period existed - where
no correspondence occurred during period immediately prior
to expiry of limitation period – whether learned trial judge
erred in refusing to extend limitation period

Succession Act 1981 (Qld), s 41
House v R (1936) 55 CLR 499, approved

COUNSEL: D R M Murphy for the appellant
R D Petersen for the respondents

SOLICITORS: Anderssen & Co for the appellant
Mallesons Stephen Jaques for the respondents

THE CHIEF JUSTICE: Section 41 subsection 8 of the Succession Act 1981 provides that unless the Court otherwise directs, an application for further provision out of a deceased estate must be instituted within nine months from the date of death of the deceased.

The deceased died on the 24th December 2001. Any application should therefore have been filed by the 24th September 2002. The relevant application was filed on the 28th November 2002 approximately two months late.

In the exercise of his discretion, the learned primary Judge declined to direct that the application proceed notwithstanding its late institution and accordingly dismissed it with costs to be assessed. The appeal is brought against his declining to determine the application notwithstanding its lateness.

The learned Judge was ultimately influenced by the combined effect of difficulties attending the applicant's case on the merits and inadequacy in the information put before him concerning events in what he termed "the critical period in the days immediately prior to the limitation period expiry."

As to the former, his Honour observed that "her case appears to be not without difficulty but while this is so, it cannot be said definitely that it is a case without any merit."

The appellant was the deceased's second wife. Their marriage spanned the 20 years leading up to his death. They lived together substantially for only the first half of that period, although they remained close thereafter. She was his primary carer over a substantial period as his death approached. She received one-tenth of the residue of his estate, that share being worth about \$120,000, with the rest going to the deceased's children and charity.

Apart from their having lived separate lives for much of their marriage, the difficulties to which the learned Judge referred include the deceased's having made gifts of substantial amounts of money to the appellant in his lifetime, in 1994 the benefit of an insurance policy to the value of about 39 thousand pounds sterling and other amounts totalling about \$125,000, and their having executed a deed in August 1991 by which they disentangled their mutual business and domestic financial affairs and covenanted that neither would make any further claim on the other.

His Honour's provisional characterisation of the prospects of the application for further provision was in my view reasonable. As to the appellant's lateness in bringing the application, his Honour acknowledged that the two month delay was not long. From March 2002 at the latest, the appellant was represented by solicitors. They corresponded with the solicitors for the executors in order to ascertain the extent of the estate and on the 21st June 2002 gave notice of the appellant's intention to make a claim.

As I have noted, the limitation period expired on the 24th September 2002. On 16th September 2002, the appellant's solicitors wrote to their counterparts requesting information and saying that unless it was provided by return, the appellant would have little alternative but to commence proceedings. As the learned Judge observed, from then until 28th November 2002, "the documentary record in evidence is blank."

On the 28th November, new solicitors for the appellant advised the solicitors for the executors that they had been retained.

The appellant deposed to her awareness that there was a time limit for the bringing of the proceeding, but said that she did not recall being told what it was. She said this in an affidavit:

"While I note that the date 25th September 2002 was referred to in a letter from my former solicitors to the solicitors for the executors dated 16 September 2002, I do not believe that I was aware that the date referred to was the date on which a limitation period expired within which to bring any application. It was following my seeking alternative advice from my present solicitors that I was made aware that the time for bringing an application had passed. One of the reasons for my seeking alternative advice was that I was aware that many months had passed during which information sought from the executors had not been forthcoming and I was concerned that something more could be done to address that situation before making a decision as to whether or not to make an application for further provision."

The learned Judge expressed concern about the appellant's indecision revealed by that last part of the passage and the absence of evidence of possible contact between the appellant

and her solicitors in the period preceding 24th September and he referred to the possibility of professional negligence. He summarised his view of the inadequacy of the explanation for the delay as follows:

"The absence of evidence as to whether the applicant received a copy of the letter of 16 September 2002 from the solicitors prior to the expiration of the relevant period, whether there had been any conversations between her and the solicitors in the period prior to 28 November 2002 which is a subject peculiarly within the knowledge of the applicant leaves one with the concern that there is a gap of some importance in the evidence as to why the application was not brought within time."

The well known constraints expressed in *House v. The King* (1936) 55 Commonwealth Law Reports 499 at 505 govern the disposition of this appeal against what was a discretionary judgment.

As to the merits, Mr Murphy, who appeared for the appellant, submitted it was not improbable the substantive application would succeed. That may be accepted and is not inconsistent with his Honour's observation. Mr Murphy principally submitted that the learned Judge placed too much emphasis on the question of the appellant's explanation for the delay bearing in mind other relevant factors, especially the absence of any likely prejudice to the respondents were the application to proceed.

Putting the matter that way immediately lends the appeal an unpromising complexion, because the weighing of the various relevant circumstances was very much a matter for the evaluative judgment of the primary Judge.

Mr Murphy submitted the Judge should have inferred that the appellant was not aware of her solicitors' letter of 16 September and that there was no interaction between her and her former solicitors from then until when she engaged new solicitors in October.

The difficulty about drawing those inferences favourable to the appellant is the point made by the Judge, that there is simply no evidence upon which the inferences could be based, in that the appellant is silent as to what if anything occurred over that critical period, a silence which may take on additional significance bearing in mind her solicitors were asked by the respondent's solicitors on the 18th February 2003 to specify the reasons for the delay in the bringing of the application.

Mr Murphy submitted his Honour's approach was rather severe bearing in mind the result was the conclusive determination of the claim against her, but again the criticism focuses on matters of weight and shading and is essentially irrelevant at this stage of appeal.

In my view no error in his Honour's approach has been demonstrated such as would warrant this Court's taking a different approach.

I would dismiss the appeal with costs to be assessed.

DAVIES JA: I agree.

McMURDO J: I agree.

THE CHIEF JUSTICE: Those are the orders.
