SUPREME COURT OF QUEENSLAND

CITATION:	*Hesse v Donovan & Ors* [2004] QSC 343
PARTIES:	**GRAHAM HESSE as executor of the estate of the late Clive Francis Chatwood** **(applicant)** **v** **HAZEL LARADE DONOVAN** **(first respondent)** **TIMOTHY MARK STANFIELD** **(second respondent)** **ELAINE WAUGH** **(third respondent)** **BENEFICIARIES ON INTESTACY [ROBYN FORSTER (NEE STANFIELD), WENDY PAYNE, PETER LINSAY STANFIELD, TIMOTHY STANFIELD, OLGA NICHOLS, CORAL KENT, GLENYS THOMPSON, LLEWELYN STANFIELD, VALMAI RANKIN, DESLEY DRAPER, GLENEVE STANFIELD, JOHN STANFIELD, JIM STEWART, JEFF STUART, BILL BINSTEAD, GARY BINSTEAD, GREG BINSTEAD, RON ZERNICKE, GRAHAM DEAR, PRUE DEAR, RODNEY GEDDES, MURRAY GEDDES, DESLEY LIND, CRAIG LIND, ESDENE KRUGER]** **(fourth respondents)**
FILE NO:	S7783 of 2003
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	7 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2004
JUDGE:	Mullins J
ORDER:	**1. It is declared that:** **(a) the expression "bank account" in clause 5 of the last will made on 9 November 1983 ("the will") of Clive Francis Chatwood ("the testator") refers to the one bank account in the name of the testator held with Bank of Queensland at the date of the testator's death and the bank accounts held by the testator with St George Bank Limited which had credit balances at the date of the testator's death, being two cash management accounts and the portfolio loan variable account;**

(b) the gift contained in clause 5 of the will is a specific bequest;
(c) each of the mortgages held by St George Bank Limited over the property at 1155 Logan Road, Holland Park and the unit at 6/9 Lambert Street, Kangaroo Point charged those respective properties with the total amount of the debt owed by the testator at the date of his death under the fixed rate loan accounts, being the total sum of $327,842.35;
(d) each of the property at 1155 Logan Road, Holland Park and the unit at 6/9 Lambert Street, Kangaroo Point is charged with the repayment to St George Bank Limited of the total debt of $327,842.35 in accordance with s 61(1) of the *Succession Act* 1981.
2. Liberty to any party to apply on 2 days' notice in writing to the other parties.
3. The costs of the applicant, the second respondent and the third respondent be assessed on an indemnity basis and paid from the estate of the testator.

CATCHWORDS: SUCCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS - where testator's real property was subject to an "all moneys" mortgage – whether will signified a contrary intention for purpose of s 61(1) of the *Succession Act 1981 (Q)* that real property not be primarily liable for all debts secured by the mortgage – no contrary intention found

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – LEGACIES AND DEVISES – whether a gift of the residue of the money in the testator's bank account, after payment of funeral and testamentary expenses, was a specific bequest

Succession Act 1981
Trusts Act 1973

Franguescos v Shaw [1977] 1 NSWLR 660
Re Harrison (1885) 30 Ch D 390
Lewis v Lohse [2003] QCA 199
McBride v Hudson (1962) 107 CLR 604
Perrin v Morgan [1943] AC 399
Re Rodgers [2002] 1 QdR 543

COUNSEL: DJ Morgan for the applicant
PG Bickford for the second respondent
M Wilson for the third respondent

SOLICITORS: Redmond van de Graaff for the applicant
MacDonnells for the second respondent
de Groot & Co for the third respondent

[1] **MULLINS J:** Mr Clive Francis Chatwood ("the testator") died in a motor vehicle accident on 23 November 2001 ("the date of death"). He had never married and had no children. He left a will made on 9 November 1983 ("the will") of which probate has been granted to Mr Graham Hesse ("the applicant") as the surviving executor named in the will.

[2] By originating application filed on 13 March 2004, the applicant has sought directions from the court pursuant to s 96 of the *Trusts Act* 1973 relating to the administration of the testator's estate. An order setting out directions for the conduct of the application and the hearing date of 4 June 2004 was obtained from Atkinson J on 28 April 2004. That order was served on each of the beneficiaries named in the will who are the first, second and third respondents to the application and those persons who would be beneficiaries on an intestacy who are identified as the fourth respondents to the application. It was only the second and third respondents who elected to be heard on the application in addition to the applicant.

The will

[3] The operative provisions of the will are found in clauses 3, 4 and 5:

> "3. I GIVE DEVISE AND BEQUEATH my property situated at Cairns Street, Kangaroo Point or any interest I may have therein at my death to HAZEL LARADE DONOVAN of 64 Annie Street, Torwood Brisbane for her sole use and benefit absolutely and I declare that should the said HAZEL LARADE DONOVAN predecease me then I GIVE DEVISE AND BEQUEATH this property at Kangaroo Point unto and to the use of my Trustees upon trust with Power to sell call in and convert into money or to postpone such sale calling in and conversion and to hold such proceeds in trust for my cousin TIMOTHY MARK STANFIELD and if he is a minor when I die my executors and Trustees may either use it for what they consider to be his benefit with liberty to pay the whole or any part of it to his parent or parents without being responsible to see to its application.
>
> 4. I GIVE DEVISE AND BEQUEATH my property situated at 1155 Logan Road, Holland Park or any property bought in substitution thereof as my residence unto and to the use of my Trustees upon trust for my cousin TIMOTHY MARK STANFIELD and I direct that if my cousin TIMOTHY MARK STANFIELD is a minor when I die my Executors may use his share for what they consider to be his benefit or pay the whole or any part of it to his parent or parents without being responsible to see its application.
>
> 5. I DIRECT that my funeral and testamentary expenses are to be paid from monies in my bank account and the residue of such money I GIVE AND BEQUEATH to my friend ELAINE WAUGH for her sole use and benefit absolutely."

Assets and liabilities at testator's death

[4] The testator was returning home after having settled the sale of his property at 8 Rusk Street, Annerley when he died. The net proceeds from the sale of that

property of $241,998.63 were deposited into a cash management account with St George Bank Limited ("St George Bank") in the testator's name on the date of death.

[5] The real properties owned by the testator as at the date of death were:

- property at 23-25 Cairns Street, Kangaroo Point
- property at 1155 Logan Road, Holland Park
- unit at 6/9 Lambert Street, Kangaroo Point

[6] The Cairns Street property was unencumbered. The applicant estimates that its value as at October 2003 is approximately $1.8m. That is the property devised to the first respondent under clause 3 of the will.

[7] As at the date of death the Logan Road property was encumbered by two registered mortgages shown on the title as being held by Advance Bank Australia Limited. Those mortgages are respectively registered numbers 602013121 and 701544344. Advance Bank had been taken over by St George Bank prior to the testator's death and St George Bank was providing virtually all the testator's banking services at the time of his death. The applicant estimates that the Logan Road property was valued at approximately $300,000 as at October 2003. The Logan Road property is the subject of the devise under clause 4 of the will in favour of the second respondent.

[8] There is no specific devise under the will of the Lambert Street unit. The applicant estimates that it was worth approximately $170,000 as at October 2003. It was mortgaged to St George Bank under mortgage registered number 703498216 as at the date of death.

[9] Apart from the cash management account which comprised the proceeds from the sale of the Rusk Street property, the deceased also had a Gold Cash Management Account with a credit balance of $9,878.04. In order to conduct his investment in properties, the testator had a line of credit with St George Bank for a total amount of $350,000 that was secured by the mortgages over the Logan Road property and Lambert Street unit and, after the sale of the Rusk Street property, by the maintenance of a minimum amount of $127,800 in the cash management account. As at the date of death, the testator had three St George Bank accounts that were described as fixed rate loan accounts with debit balances respectively of $139,256.96, $69,342.59 and $119,242.80. The debit balances were as a result of borrowings by the testator which he used for investment purposes. The one account that was in credit in this suite of accounts, to which I will refer as "the portfolio loan variable account", had a credit balance of $103,580.05.

[10] During the hearing of the application there was some concern expressed on behalf of the second and third respondents about the accuracy of the information provided by St George Bank as to the balance of the portfolio loan variable account at the date of death. The balances for the fixed rate loan accounts and the portfolio loan variable account set out in the preceding paragraph were taken from the letter from St George Bank to the applicant dated 11 January 2002. In a letter to the applicant's solicitors dated 10 September 2003 St George Bank advised that the portfolio loan variable account as at the date of death was in debit for $103,580.05. That appears to have been an error. A copy of the bank statement for the portfolio loan variable account for the month of November 2001 was obtained by the applicant's solicitors on 3 June 2004 which unequivocally shows that the amount in the account as at the

date of death was a credit balance of $103,580.05. It is therefore appropriate to decide this application on the basis that there was, in fact, a credit balance in the portfolio loan variable account in the sum of $103,580.05 as at the date of death.

[11] The applicant has ascertained that the testator had arranged for the net proceeds from the sale of the Rusk Street property to be deposited into the new cash management account, until the expiry of the fixed rate loan accounts, rather than paying off any of the fixed rate loan amounts. This was done to avoid penalties for early payout of the fixed rate loan accounts.

[12] The applicant obtained from St George Bank copies of some of the mortgage documents and a copy of the loan agreement which applied to the suite of accounts conducted by the testator. That loan agreement was entered into on 28 July 1999 and enabled the testator to borrow on 4 sub-accounts (including the portfolio loan variable account) for the credit limit set for each sub-account to a maximum combined amount at the date the agreement was entered into of $450,000. The credit limit of the portfolio loan variable account was $20,000. The other sub-account numbers mentioned in the loan agreement do not match the account numbers for the fixed rate loan accounts that were held as at the date of death. The portfolio loan agreement listed the securities that were already held at that time and provided for a first registered mortgage to be taken over the Lambert Street property. That is the mortgage that was still held by St George Bank at the date of death and was granted on 28 July 1999.

[13] It appears that each of the mortgages held by St George Bank were "all moneys" mortgages, so that each mortgage secured the total amount owed by the testator to St George Bank which at the date of death was the total of the debit balances in the 3 fixed rate loan accounts of $327,842.35. Although there is nothing in the documentation from St George Bank to support the applicant's statement, the applicant has indicated that the fixed rate loan account with the debit balance of $139,256.96 was the loan account used to purchase the Lambert Street unit. The applicant also appears to relate the fixed rate loan account with the debit balance of $119,242.80 to the Logan Road property, although there is nothing in the material to support that. The applicant concedes that there is no apportionment by St George Bank of the respective amounts owed as at the date of death in respect of the fixed rate loan accounts against any particular mortgage.

[14] The other assets held by the testator at the date of death were:

(a) bank account with the Bank of Queensland which had been essentially dormant containing approximately $5,000;
(b) 1927 Stutz Roadster which the applicant estimates was worth $50,000 as at October 2003;
(c) 1927 Delage unrestored chassis which the applicant estimates was worth approximately $20,000 as at October 2003;
(d) collection of vintage motoring spares, collectables, books etc which the applicant estimates was worth approximately $15,000 as at October 2003.

[15] Apart from the debit balances in the fixed rate loan accounts held with St George Bank, the applicant had total liabilities of $74,968.68 as at the date of death comprising:

(a) tax of $54,834.59;
(b) Visa card debt of $8,199.89;

(c) Telstra debt of $321.20;
(d) outstanding accounting fees of $5,757.50;
(e) outstanding fees to DRW Consulting for the Cairns Street property of $1,056; and
(f) outstanding fees to Phil Fletcher Town Planning for the Cairns Street property of $4,799.50.

Issues

[16] The questions which are raised by the application are:
(a) What amounts are secured by each of the mortgages to St George Bank?
(b) Does s 61 of the *Succession Act* 1981 ("the Act") apply to the payment of the debt secured by the mortgages?
(c) To which bank account or accounts does clause 5 of the will refer?
(d) Is the gift under clause 5 of the will a specific bequest or a gift of residue?

Relevant legislation

[17] It was common ground that in construing the will, s 28(a) of the Act applies:

> "Unless a contrary intention appears by the will-
> (a) the will is 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;"

[18] Sections 59 and 61 of the Act provide:

> "**59 Payment of debts in the case of solvent estates**
>
> **(1)** Where the estate of a deceased person is solvent the estate shall, subject to this Act, be applicable towards the discharge of the debts payable thereout in the following order, namely—
>
> **class 1**—property specifically appropriated devised or bequeathed (either by a specific or general description) for the payment of debts; and property charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;
>
> **class 2**—property comprising the residuary estate of the deceased including property in respect of which any residuary disposition operates as the execution of a general power of appointment;
>
> **class 3**—property specifically devised or bequeathed including property specifically appointed under a general power of appointment and any legacy charged on property so devised bequeathed or appointed;
>
> **class 4**—*donationes mortis causa*.
>
> **(2)** Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, the payment

> of pecuniary legacies rateably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied rateably.
>
> **(3)** The order in which the estate is applicable towards the discharge of debts and the incidence of rateability as between different properties within each class may be varied by a contrary or other intention signified by the will, but a contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts.
>
> **61 Payments of debts on property mortgaged or charged**
>
> **(1)** Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in property, which at the time of his or her death is charged with the payment of any debt, whether by way of mortgage, charge or otherwise, legal or equitable (including a lien for unpaid purchase money), and the deceased has not by will signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the debt; and every part of the said interest, according to its value, shall bear a proportionate part of the charge of the whole thereof.
>
> **(2)** A contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts."

[19] Sections 59 and 61 of the Act fall within Division 2 of Part 5 of the Act. For the purpose of Division 2, "residuary estate" is defined in s 55 of the Act to mean:

> "(a) property of the deceased that is not effectively disposed of by his or her will; and
>
> (b) property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary disposition."

General observations about the will

[20] The will is typewritten and in a format that suggests it was prepared in a solicitor's office. The witnesses showed their occupations as stenographer and law clerk respectively. The terms of the will do not suggest, however, that it was drafted by a lawyer of any experience.

[21] In view of the nature and extent of the testator's estate as at the date of death, the will is deficient in disposing of that estate.

[22] It is a fundamental approach to the construction of a will, that the court leans against an intestacy: *Re Harrison* (1885) 30 Ch D 390, 393. I therefore raised in argument the possibility of construing clause 5 of the will, so that it was a gift of the residue (of whatever nature) and not limited to "the residue of such money" in the testator's bank account. It is also a fundamental approach to the construction of a will to give the meaning to the words used by the testator which, having regard to the terms of the will, the testator intended: *Perrin v Morgan* [1943] AC 399, 406.

[23] I am satisfied however, that it is not possible to discern an intention on the testator's part to give the residue of his estate (both real and personal) under clause 5 of the will, despite the fact that this leads to a partial intestacy. This is because the express subject matter of clause 5 is the "monies" in the testator's "bank account". There is nothing in the terms of clause 5 or the balance of the will or otherwise in the structure of the will which would support construing those words in clause 5 to encompass the variety of assets (both real and personal) which were held by the testator as at the date of death and were not otherwise disposed of by clauses 3 or 4 of the will. There is also no basis to invoke s 29(a) of the Act.

[24] What that means is that there is no residuary gift of general application under the will, so that property which is undisposed of by the will such as the Lambert Street unit or the vintage vehicle or other collectables is residuary estate within the meaning of s 55(a) of the Act and passes on intestacy.

[25] Although discrete issues are raised by the directions sought in the application as to the source of funds for the payment of the mortgage debt and the construction of clause 5 of the will, the issues are related, as they require discernment of the testator's intentions by considering the whole of the will. In addition, the resolution of one issue may affect the resolution of the other.

Amounts secured under the mortgages

[26] As each mortgage granted by the testator to St George Bank was an "all moneys" mortgage, each mortgage secured the total debt of the testator to St George Bank at the date of death which was $327,842.35. Although submissions were made on the basis that the testator conducted a suite of accounts with St George Bank, there is nothing in the material put before the court on this application on the terms relating to the suite of accounts which would enable the debit balances in the fixed rate loan accounts to be set off against the credit balances in the cash management accounts and/or the portfolio loan variable account.

Application of s 61 of the Act to the payment of the mortgage debt

[27] The position under s 61(1) of the Act is that property that is charged with payment of any debt is primarily liable for the payment of the debt, unless there is a contrary or other intention under the relevant will. Section 61(2) of the Act specifically states that a contrary or other intention is not signified by a general direction, charge or trust for the payment of debts out of the estate or the residuary estate or by the gift of such estate after or subject to the payment of debts. An example of what can amount to a contrary intention is found in *Lewis v Lohse* [2003] QCA 199 at paragraph [13].

[28] It is argued on behalf of the second respondent that, upon the proper construction of clause 5 of the will, the expression "residue of such money" held in the testator's

"bank account" must mean the net balance of the bank accounts after the payment of all amounts due pursuant to the mortgages which should be treated as indicating a contrary intention for the purpose of s 61 of the Act.

[29] This argument cannot succeed. First, as I have already indicated there is no justification from the terms of the various accounts conducted by the testator with St George Bank for setting off debit balances against credit balances. The amounts in the accounts with credit balances form part of the testator's assets, whereas the debit balances represent debts. Second, clause 5 of the will does not even contain an express direction for payment of debts from the moneys in the testator's bank account. The direction that is contained in clause 5 is limited to funeral and testamentary expenses. Clause 5 of the will is less of a contrary intention for the purpose of s 61(1) of the Act than the type of direction that is given by way of example in s 61(2) of the Act, as not being sufficient to indicate a contrary intention for the purpose of s 61(1) of the Act. Even if the direction were treated as encompassing debts in addition to financial and testamentary expenses, that would still not be sufficient to indicate a contrary intention for the purpose of s 61(1) of the Act. The mere fact that the mortgage is an "all moneys" mortgage is not by itself sufficient to constitute a contrary intention for the purpose of s 61(1) of the Act.

[30] It follows that the Logan Road property and the Lambert Street unit are both charged with the repayment to St George Bank of the total debt of $327,842.35 secured against those two properties at the date of death.

The bank account/s to which clause 5 of the will refers

[31] As the testator conducted more than one bank account in credit at the date of death, there is no reason not to construe the expression "bank account" in clause 5 of the will as referring to all bank accounts with credit balances held by the testator at the date of death. Such construction gives effect to s 28(a) of the Act. There is nothing in the will to suggest that it should not be construed by reference to the existence of more than one bank account in the testator's name with a credit balance as at the date of death.

[32] Although the applicant has referred to the arrangement which the testator had with St George Bank in respect of the proceeds from the sale of the Rusk Street property held in one of the cash management accounts, that there was an agreement that a minimum amount of $127,800 would be maintained in that cash management account against the testator's indebtedness to St George Bank, there is nothing in the material obtained from St George Bank to indicate that the cash management account was charged to the extent of $127,800 with the payment of those debts. If such charge did exist, that would raise the application of s 61(1) of the Act to the gift of the moneys in that cash management account.

Nature of gift under clause 5 of the will

[33] This issue affects the payment of the debts of the estate. If clause 5 contains a residuary gift within the meaning of s 55(b) of the Act, then the moneys disposed of by clause 5 would be treated as a class 2 asset pursuant to s 59(1) of the Act. If the gift of moneys disposed of by clause 5 of the will is a specific bequest, then the moneys would be treated as a class 3 asset pursuant to s 59(1) of the Act.

[34] In view of my conclusion that the Logan Road property and Lambert Street unit are charged with the repayment of the total debts secured over those properties by the mortgages held by St George Bank, the consequences of characterising the nature of the gift under clause 5 of the will are not as great as they would have been if those real properties had not been charged with the repayment of the debts to St George Bank.

[35] All parties made submissions by reference to the decisions in *Franguescos v Shaw* [1977] 1 NSWLR 660 (*"Franguescos"*) and *Re Rodgers* [2002] 1 QdR 543 (*"Rodgers"*).

[36] There was no residuary clause in the deceased's will in *Franguescos*. Clause 3(c) of the relevant will provided for the payment of "the balance of all moneys including cash, money in Bank accounts or on fixed deposit held by me at my death" as to three-quarters to the deceased's daughter and as to one-quarter to the deceased's son. The deceased's widow submitted that either the use of the word "balance" in clause 3(c) of that will indicated that the deceased had established his own order of application of assets for the payment of debts or that the assets referred to in clause 3(c) of that will were not specifically disposed of, but included in a residuary gift. On the construction of that will, the conclusion was reached that the deceased did provide for his own order of application of assets and that the debts and expenses should be paid out of the assets the subject of clause 3(c). If that view were held to be wrong, an alternative finding was made that, having regard to the distinction drawn between specific and general legacies, clause 3(c) of that will must be regarded as a general gift of all moneys held by the deceased at his death and that each of the types of assets mentioned in that clause were merely examples of the form in which money may have been held by him.

[37] The decision in *Franguescos* was distinguished in *Rodgers*. The deceased in *Rodgers* in her handwritten will had left to one beneficiary "any money that is in Commonwealth Bank". Because that description identified the money by reference to the deceased's investment or holding of accounts with the Commonwealth Bank, the conclusion was reached that there was a specific bequest of that fund.

[38] The submission is made on behalf of the applicant that the facts in this matter fall somewhere between the respective decisions in *Franguescos* and *Rodgers*.

[39] The submission is made on behalf of the second respondent that, in view of the gift being made after provision was made for the payment out of the same moneys of funeral and testamentary expenses and in the absence of a residuary gift of general application in the will, the proper characterisation of the gift under clause 5 is that it is a gift of residue rather than a specific gift.

[40] The submission is made on behalf of the third respondent that the gift under clause 5 of the will is a specific gift, having regard to the description of what amounts to a specific bequest found in the judgment of Dixon CJ in *McBride v Hudson* (1962) 107 CLR 604, 617:

> "What marks a bequest as specific is that its subject-matter is designated as something that does at the time of the will, or shall at the time of the 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 the distinct subject of a testamentary disposition."

[41] Although the testator did not nominate the bank at which his account/s was held, he has referred to a specific fund belonging to him as the subject of the gift under clause 5 of the will. The word "residue" in clause 5 of the will has not been used to designate the residue of his estate, but to define the extent of the gift of the moneys in his bank account, after payment of the funeral and testamentary expenses. The residue of the moneys in the testator's bank accounts, after payment of the funeral and testamentary expenses, is an identifiable and separate part of the testator's property. The lack of an unequivocal gift of residue otherwise under the will is not a sufficient reason not to give effect to the testator's intention that is indicated by identifying the balance of money in his bank accounts as the subject of the gift under clause 5 of the will. The gift contained in clause 5 of the will is therefore a specific bequest.

Orders

[42] The orders which I make are:

1. It is declared that:

(a) the expression "bank account" in clause 5 of the last will made on 9 November 1983 ("the will") of Clive Francis Chatwood ("the testator") refers to the one bank account in the name of the testator held with Bank of Queensland at the date of the testator's death and the bank accounts held by the testator with St George Bank Limited which had credit balances at the date of the testator's death, being two cash management accounts and the portfolio loan variable account;

(b) the gift contained in clause 5 of the will is a specific bequest;

(c) each of the mortgages held by St George Bank Limited over the property at 1155 Logan Road, Holland Park and the unit at 6/9 Lambert Street, Kangaroo Point charged those respective properties with the total amount of the debt owed by the testator at the date of his death under the fixed rate loan accounts, being the total sum of $327,842.35;

(d) each of the property at 1155 Logan Road, Holland Park and the unit at 6/9 Lambert Street, Kangaroo Point is charged with the repayment to St George Bank Limited of the total debt of $327,842.35 in accordance with s 61(1) of the *Succession Act* 1981.

2. Liberty to any party to apply on 2 days' notice in writing to the other parties.

3. The costs of the applicant, the second respondent and the third respondent be assessed on an indemnity basis and paid from the estate of the testator.

[43] It was a proper case for the applicant to seek the assistance of the court in the construction of the will. The applicant drew attention to the issues that arose under the will, but did not adopt any firm position as to what the outcome of the application should be. It was appropriate for each of the second and third respondents to be represented on the hearing of the application to advance the competing constructions. The applicant is entitled to be indemnified for his costs out of the testator's estate on an indemnity basis, even without an order being made.

It is appropriate that the second and third respondents also recover their costs on an indemnity basis from the testator’s estate.