

SUPREME COURT OF QUEENSLAND

CITATION: *Scattini & Anor v Matters* [2004] QSC 459

PARTIES: **DAMIAN JOHN SCATTINI**
and
MICHAEL MORRISON QUINN
(plaintiffs)
v
DAVID PAUL MATTERS
(defendant)

FILE NO: S1126 of 2002

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 6, 7, 8, 9 December 2004

JUDGE: Muir J

ORDER: **1. That probate in solemn form be granted to the plaintiffs subject to the formal requirements of the registry.**
2. That the defence and counterclaim be dismissed.
3. That the plaintiffs' costs on an indemnity basis and the defendant's costs to be assessed on the standard basis be paid out of the estate.

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where executors under 2001 will sought grant of probate in solemn form – whether the testator had testamentary capacity at the time of giving instructions or executing the will – whether the testator suffered from dementia or delusions – whether the testator knew of the contents of his will

Bailey v Bailey (1924) 34 CLR 558
Banks v Goodfellow (1870) LR 5 QB 549
Battan Singh v Amirchand [1948] AC 161
Boughton & Marston v Knight (1873) LR 3 P & D 64
Bull v Fulton (1942) 66 CLR 295

Easter v Griffith (17 June 1994, Santow J, unreported)
Parker v Felgate (1883) 8 PD 173
Re Crooks Estate (14 December 1994, Young J, unreported)
Re Crichton (22 July 1994, Bryson J, unreported).
Re Estate of Hodges Deceased; Shorter v Hodges (1988) 14
 NSWLR 698
Timbury v Coffee (1942) 66 CLR 277

COUNSEL: D Mullins SC & G Forde for the plaintiffs
 C Hampson QC & K F Boulton for the defendant

SOLICITORS: Quinn & Scattini for the plaintiffs
 Turner Freeman for the defendant

Introduction

- [1] Allan Phillips died on 7 October 2001 at the age of 96 leaving a Will dated 28 June 2001 (“the Will”) appointing the plaintiffs, members of Quinn & Scattini solicitors, his executors and trustees and giving the whole of his estate to the trustees of the Allan Phillips World Peace Trust. That Trust was constituted by a deed dated 28 June 2001 entered into between Duncan Keith Murdoch as settlor and the testator and Andrew Alexander Malins as trustees. Mr Murdoch, a solicitor employed by Quinn & Scattini, drew both the Will and the Trust Deed. Mr Malins is a member of the accounting firm Kitchen Malins & Ward. He commenced doing accounting work for the testator in 1999.
- [2] On 13 July 1999 the testator, who had been a member of the Communist Party of Australia for many years, had made a will, prepared for him by another employer of Quinn & Scattini. In it he appointed, Peter Symon and David Matters, office holders of the Communist Party of Australia, executors and trustees. Pecuniary legacies of \$20,000, \$10,000, \$20,000 and \$20,000, respectively were made to the Diana, Princess of Wales Memorial Fund, Animal Liberation (Qld) Limited, Green Peace Australia Ltd and The Greens New South Wales. The residue of the estate went to the Communist Party of Australia.
- [3] At the time of execution of the 13 July 1999 Will, the testator also executed a trust deed between himself as settlor and three members of the Communist Party, including Mr Symon as trustees. The beneficiaries of the trust constituted by the deed were the members for the time being of the Communist Party of Australia. The deed recited, as was the fact, that the testator had transferred a house and land situated at 4 Haysmouth Parade, Clontarf (the testator’s residence) and another property to the trustees to be held on the terms of the trust.

The issues for determination

- [4] In these proceedings, the plaintiffs seek a grant of probate of the Will in solemn form. The defendant alleges that at the time of execution of the Will the testator lacked testamentary capacity. This allegation is particularised by asserting of the testator at the time of execution of the Will that –
- “(a) he was aged about 96 years;
 - (b) he had very limited eyesight;
 - (c) he was deaf in one ear;

- (d) he was suffering from mental frailty, poor memory, erratic behaviour, delusions and/or dementia.”

- [5] Alternatively, it is alleged that the testator did not know and approve of the contents of the Will. Particulars of this allegation include allegations that the instructions for preparation of the Will given on 13 June 2001 to Quinn & Scattini came from Mr Malins rather than the testator, as did the instructions for the formation of the Allan Phillips World Peace Trust. It is further alleged that the testator did not personally confirm the instructions given by Malins and that the terms of the Will were not adequately explained to the testator. An allegation that the Will was executed by the testator under the influence of Mr Malins was abandoned prior to the commencement of the trial. By his counterclaim, the defendant seeks a grant of probate in solemn form of the 13 July 1999 Will.

The events leading up to the execution of the Will and Trust Deed

- [6] On 8 March 2001, on his request, the testator was taken to Quinn & Scattini’s offices by Mrs Sullivan, a partner in a firm of real estate agents with whom the testator had had extensive contact. At the meeting, which was also attended by Mrs Sullivan, the testator explained that he did not want the Communist Party of Australia to be a beneficiary under his Will, that he had some ideas as to what he wanted to include in his Will and wished to explore the matter with Mr Murdoch. He explained that the Communist Party was not the Communist Party of old. He had previously made this assertion to Mrs Sullivan and had informed her of his desire to exclude the Party from any testamentary benefit.
- [7] The testator brought to the meeting a six page document. The first page, in the testator’s handwriting, was addressed “Mr Chairman”. It stated, inter alia –

“The reason why I am here today is because the Communist Party of Australia who I have been an an (sic) active member of since 1938 is being threatened by the traitorous (sic) actions of the Australian Communist Party now.

Explanation sequences indicated by easily verified numbers herewith on separate sheets from one to six.

Allan Phillips

Make photocopies of all these sheets ...”

- [8] Sheet five was a printed page containing a poem by the testator entitled “A Mother’s Day Remembrance”. Another one of the six sheets was a page from the 26 May 1997 issue of the *Guardian* in which was published another of the testator’s poems. The content of the other pages was not revealed by the evidence.
- [9] Mr Murdoch took the testator through the 1999 Will. In the course of that exercise, the testator said he did not want the Communist Party to be a beneficiary, but that he was happy with the pecuniary legacies. The testator explored the possibility of forming his own party under the name “the select credit party”. Mr Murdoch pointed out the many practical difficulties in the way of such a course. In discussion about the extent of the testator’s estate, the testator estimated its value at between

\$1.5 million and \$2 million, depending on the values of the residential properties. Upon being reminded by Mr Murdoch that he had transferred the residential properties, the testator said words to the effect that he had overlooked that fact.

- [10] When it appeared to Mr Murdoch that, apart from the testator's consistent desire to exclude the Communist Party as a beneficiary, no finality was being reached, he suggested that a temporary will be made to effect the exclusion. That suggestion was rejected by the testator. Another proposal of Mr Murdoch's was that he could consider excluding the Communist Party, leaving his estate to the four existing pecuniary legatees and perhaps adding as beneficiaries other charitable bodies such as the Salvation Army. The testator stated that he did not want the pecuniary legatees to have "that sort of money", and firmly rejected the suggestion that the Salvation Army might benefit.
- [11] Mr Murdoch was aware of his professional obligation, having regard to the testator's age, to satisfy himself of the testator's testamentary capacity. Before the meeting he had written an aide memoir setting out the tests of testamentary capacity propounded in *Banks v Goodfellow*¹ so that he could remind himself of them in the course of the meeting. He said in examination in chief:

"I was actually impressed by his state of mind for a 90 year old. All the questions he answered correctly. He had an understanding of what his current will said and provided and he had a clear understanding of what he wanted to achieve."

These opinions were unchallenged in cross examination.

- [12] Mr Murdoch's next connection with the affairs of the testator occurred in March 2001 when he spoke to Mr Symon over the telephone and was informed that the testator was anxious to have the property at 4 Haysmouth Parade re-transferred to him. Mr Symon sought some stamp duty and income tax advice in that regard. Prior to that conversation, the testator had telephoned Mr Symon and told him that he wanted to buy his house back for \$50,000 as he felt insecure without having it in his name. Mr Symon suggested that \$100,000 would be a more appropriate sale price as the lower consideration might lead authorities to think that there was some scheme being carried out. The testator voiced no opposition to this suggestion and Mr Symon said he would raise the matter with his executive. He did so and, some days later, called the testator back and told him that the re-transfer had been approved. It does not appear that, in the course of this conversation, there was mention of the other property transferred to trustees for the Communist Party of Australia.
- [13] In a letter dated 20 March 2001 to Mr Murdoch, Mr Symon advised that the registered proprietors of the 4 Haysmouth Parade property agreed to re-transfer it to the testator for a consideration of \$100,000. The letter stated that the testator had asked that the property be transferred back to him "to ensure his security in his remaining days". As Quinn & Scattini were unable to act in the matter, as a result of a conflict of interest, the testator retained a Wynnum solicitor, Mr Gleeson, to act on his behalf. The testator's dealings with Mr Gleeson will be discussed later.

¹ (1870) LR 5 QB 549.

Instructions for preparation of the Will

[14] In early June 2001 the testator told Mr Malins in the course of a telephone call or telephone calls that he wished to set up a trust to further his political views and to benefit some specific entities or causes. In that conversation the testator spoke about problems which he perceived he had had with the Communist Party and with Mrs Gayle Sullivan. He did not elaborate on his difficulties with Mrs Sullivan but his complaint concerning the Communist Party was that, in his view, it was no longer the party he had believed in for many years. He also thought that he had been pressured by the party over some undisclosed issue and was upset that, in his understanding, he had to fight to get his house back. He said that the Party's conduct in relation to the latter dealings was unfair.

[15] At the testator's request, Mr Malins met with the testator in his home on 7 June 2001. He then gave Mr Malins a sheet of paper on which the following appeared, in his handwriting –

“Andrew Maling (sic)
3379-4756

Nominate Mr Bob Brown, a leading Australian Politition (sic) for the
criteria of His Very Deep Scientific analysees (sic).

Also a 5 year Period of World Peace support By Allan Phillips
Of 4 Haysmouth Parade
Clontarf QLD 4019

And then a Period of support afor (sic) world peace of fifteen years

Peter Elliott House Shopping. Every Tuesday morning
Peace Poster see Goebels Entertainmen (sic)
Gayle Sullivan Finished permanently”

[16] Mr Malins's account of what happened at the meeting is as follows. The testator nominated Mr Bob Brown and his party as proposed beneficiaries. The support of world peace was to be another of the trust's purposes. He said that he wanted the trust to continue for 15 years and that he would be involved for 5 years. He asked Mr Malins to be his co-trustee. After 5 years Mr Malins was to take over the operation of the trust. The testator's household bills were to be paid out of the trust and the responsibility for those matters was to pass immediately to Mr Malins. The testator was to be provided with an allowance for his general living expenses out of the trust fund and his assets were to be transferred to it.

[17] At the meeting, Mr Malins prepared a note of his instructions. It recorded “Animals Liberation” as a potential beneficiary and noted that Gayle Sullivan was to be completely removed from any funeral bequests or activities in relation to the testator. It further provided:

“Set up trust for purpose of furthering the political beliefs of Mr
Allan Phillips and publishing his writing.”

[18] These instructions, or at least the substance of them, came from the testator. There was no suggestion in Mr Malin's evidence that he was merely responding to proposals advanced by Mr Malins. I gained the impression that Mr Malin's role was essentially that of recording and transmitting the testator's instructions. Mr Malins advised that a solicitor should be retained to prepare the documentation necessary to

give effect to his instructions. The testator agreed and Mr Malins retained Mr Murdoch to act on the testator's behalf.

- [19] In the course of a telephone conversation on 11 June 2001 Mr Malins and the testator again discussed the setting up of the Trust. The testator instructed that all of his assets were to be transferred into a trust to be formed. The trustees and purposes of the Trust were further discussed as was its role in meeting the testator's living expenses.
- [20] In accordance with the testator's instructions Mr Malins telephoned Mr Murdoch on 13 June and asked him whether a trust could be set up for the testator having as its purposes: the support of world peace; further promoting and publishing the testator's works and the support of the political party of Dr Bob Brown, the Tasmanian Green Party. Mr Malins instructed Mr Murdoch that the trust was to operate for 15 years after which the property was to be distributed between charitable organisations. The trustees were to be the testator and Mr Malins for the first five years of the operation of the trust or until the testator's earlier death, whichever should first occur. In his diary note of the conversation, Mr Murdoch also recorded:

“Wants to pay in all moneys, provision for living and death expenses, will. House not going into trust. Sundry bank accounts and personal effects, beneficiary would be trust Q & S executors.”

- [21] Mr Murdoch sent a draft of the proposed Trust Deed and Will to Mr Malins on 25 June 2001 accompanied by a copy of his letter to Mr Phillips of that date. The letter gave a brief explanation of the content of the draft documents. Mr Malins, in a fax to Mr Murdoch on the same day, advised –

“I have discussed the documents with Mr Phillips and he has indicated the following amendments to the earlier instructions:
The trust is to be named the Allan Phillips World Peace Trust.
An additional aim of the trust will be ‘to protect the environment’.”

- [22] The discussion referred to in the fax took place in the course of one of a number of phone calls made by the testator to Mr Malins in which he enquired about the progress of the proposed will and trust documents.
- [23] Mr Malins confirmed in his oral evidence that upon receipt of the draft documents he had telephoned Mr Phillips and read some selected parts of the documents to him. In particular, he informed the testator of the content of cl 1.5 which set out the aims of the Trust. In the course of that discussion, the testator, who by that stage had not received his copies of the drafts, gave him the instructions contained in the fax.
- [24] On 27 June 2001, Mr Malins, in a fax to Mr Murdoch, said –

“You are back in favour, I am meeting with Mr Phillips between 11-11.30 tomorrow. If you are able to meet me there it would be appreciated. Allan will want to talk for a couple of hours so it may be best to travel separately. ...”.

The execution of the Will and Trust Deed

- [25] Mr Murdoch attended at the testator's house at Clontarf on 28 June 2001. Mr Malins had arrived first and was greeted at the door by the testator who asked him to come in. He thanked Mr Malins for arranging matters, saying that it was important to him that his views "be carried on". In response to a query about the will and trust documents, Mr Murdoch said they should wait until Mr Murdoch arrived as he was going to explain them to the testator. The testator then spoke of some poetry that he wanted to work on saying words to the effect that the poems constitute his beliefs and that he wanted them published as an exposition of his views. At some time in the course of the meeting, possibly in Mr Murdoch's absence, the testator gave Mr Malins an A4 piece of paper on which he had written –

"Date Thursday – 28 June 2001
11 o'clock (sic) meeting – those present
Andrew Malins, Duncan/Scatinni (sic)
Allan Phillips.
Poems by Allan Phillips ..."

There then appeared the names of six of the testator's poems.

- [26] There is some divergence in detail between the accounts of the meeting given by Mr Murdoch and Mr Malins. But the differences in their recollections are not of much significance for present purposes. I regard Mr Murdoch's account of events as likely to be the more accurate of the two. He impressed me as a careful and methodical person with reasonable recall of the events in question.
- [27] In the course of the meeting, the testator once again explained his dissatisfaction with the Communist Party of Australia. That was in response to Mr Murdoch's raising its exclusion as a beneficiary. Mr Murdoch then took the testator through the terms of the trust deed offering an explanation of those provisions which he considered required mention or explanation. The same process was gone through with the Will. The testator had a copy of the documents in front of him at the time and appeared to be reading the relevant provisions and following Mr Murdoch's explanations. He indicated his assent to the content of each provision referred to or discussed.
- [28] At the conclusion of his explanations, which I conclude were delivered carefully and clearly, Mr Murdoch asked the testator if he had any questions to ask and was told by the testator that he understood the documents and their effect. Before asking the testator to sign the documentation, Mr Murdoch asked him his name, the day of the week and the name of the Australian Prime Minister. The testator answered these questions correctly. The documents were then executed.
- [29] After Mr Murdoch left, the testator again thanked Mr Malins for arranging the matter, observed that he felt "a lot safer now" and said that they could start work in earnest on the poems he wanted to have published. The testator then informed Mr Malins of the work he intended to do in relation to his poetry and discussed a number of his poems.

The evidence of solicitors other than Mr Murdoch

- [30] Two other solicitors gave evidence which bore on testamentary capacity. Mr Quinn, an experienced solicitor who had had a significant opportunity to observe the testator prior to the preparation of the 1999 Will, had also been engaged in discussion with the testator for half an hour or so on his visit to Quinn & Scattini on 8 March 2001. His observations of the testator lead him to conclude that there were no concerns about lack of testamentary capacity.
- [31] Mr Gleeson, who acted for him in the re-conveyance in 2001, spoke to him on the telephone and also in his office. He entertained no doubts about the capacity of the testator to understand his affairs. One example of the testator's ability to manage his financial affairs is provided by his responding appropriately to a request in April 2001 by Mr Gleeson for a bank cheque. In the course of the subject transaction Mr Gleeson communicated with him on the telephone in order to obtain instructions, give advice and arrange a meeting.

Mr Malins' evidence of his other dealings with the testator

- [32] Mr Malins and a number of acquaintances gave evidence of their dealings with the testator.
- [33] Mr Malins had extensive contact with the testator in June, July, August and September 2001 the extent of which is able to be assessed from accounts rendered to "Allan Phillips World Peace Trust" by Judicent Pty Ltd, a company controlled by Mr Malins. An account dated 15 July 2001 in the sum of \$11,000 describes the work done as;

"attendance of A Malins to establishment of trust, transcription of poetry, lengthy discussion with Mr A Phillips regarding his poetry and his editing thereof. For the period of 1 June 2001 to 15 July 2001, time cost at \$200 per hour for in excess of 55h".

- [34] Judicent's account dated 15 August 2001 in the sum of \$1,650 was for;

"attendance of A Malins to numerous discussions with Mr A Phillips regarding the further editing of poetry, production of draft booklets of poems, trust administration, etc for the period. At lower of \$200 per hour or \$1500 as agreed".

- [35] An account dated 15 September 2001 in the same sum was rendered for;

"attendance of A Malins to assistance of Mr A Phillips with the administration of the trust, Mr Phillips' personal expense payments, discussions regarding further changes desired to the poetry, etc during the period ended 15 September 2001.
Time costs @ \$200 per hour well exceeding, fee as agreed."

- [36] The bulk of the time recorded in the accounts, according to Mr Malins, was time spent by him with the testator in which the testator dictated alterations to his poems which were written down by Mr Malins and read back to and altered by the testator. Mr Malins would then, from time to time, produce a typed copy of the altered poem for the testator's consideration. Mr Malins conceded that he had no particular skills or expertise either in publishing or literature and that at no time did he seek

assistance in the testator's project from anybody with appropriate expertise. In response to my query whether he had ever suggested to the testator that it might be more useful for him to consult a person who had knowledge of literature and publishing, he said that on a couple of occasions he suggested to the testator that he not use up his time in relation to things that were better done by somebody else. On other occasions, he said, that when the testator asked his opinion on words or phrases, he informed the testator that he had to make those decisions as it was not for him (Mr Malins) to decide. Perhaps not surprisingly, the extensive use of Mr Malins's time in relation to the testator's publishing project appeared to achieve little, if anything, in furtherance of the testator's aims.

- [37] In the course of his extensive dealings with the testator, excluding the period of his hospitalisation, Mr Malins noted no shortcomings in the testator's memory. He supplied Mr Malins with the documents required to enable his accounts to be paid by the Trust, telephoned him when he wanted him to visit and carried on lengthy and lucid conversations. It may be inferred from Mr Malin's evidence that he noticed nothing untoward in either the testator's conversation or conduct and, in particular, that he detected no marked memory loss or the existence of any delusions.

The evidence of other witnesses called by the plaintiffs

- [38] Mrs McKnight-Grant had fairly extensive dealings with the testator in the two years prior to his death. She first met him in 1999 and started taking him shopping. At times this occurred roughly on a weekly basis. The shopping trips ended in the winter of 2001. In the latter half of the period, on a number of occasions, she took him from his home to hers where she assisted him by typing his revisions of his poems on her computer. During these visits she would discuss with him topics including current affairs and Australian Rules football. Asked to describe the testator, she said "...he was just a really bright man to me". She observed no change in the way in which he conversed.
- [39] Whilst noticing that the testator's house was in a "very messy" condition, Mrs McKnight-Grant observed that the benches on which the testator prepared his meals were always cleaned off. The testator stopped asking her to take him shopping, explaining to her that it was too onerous for her to continue to do so, having regard to her work.
- [40] Mr Grant, Mrs McKnight-Grant's father, saw the testator socially from time to time over a period of many years concluding a few months before the testator's death. He didn't notice any deterioration in the testator's mental condition or any signs of erratic behaviour, delusions or dementia.
- [41] Mr Peter Elliot, a taxi driver who took the testator shopping from time to time, most probably during a period of a few months ending in about August 2001, detected in him no signs of delusions, memory loss, dementia or erratic behaviour. He recalled that the testator did his shopping unaided and that, if he owed Mr Elliot money after one excursion, he remembered it and paid Mr Elliot the next week.
- [42] Mrs Sullivan had reasonably extensive contact with the testator from about mid-1999. She took him to do his food shopping on a fairly regular basis and he telephoned her from time to time. On other occasions she called in to see him. That contact continued until just before he went into hospital on 4 September 2001. The

testator complained to her from time to time about changes in the ideals of the Communist Party.

- [43] Mrs Sullivan, whom I consider to be an astute observer, detected no deterioration in the testator's conversational ability or mental condition.

Evidence relied on by the defendant to demonstrate lack of testamentary capacity

- [44] On 27 August 2001, Mr Murdoch visited the testator at his home at the testator's request. He informed Mr Murdoch that Suncorp-Metway wanted a premium of between \$2,000 and \$3,000 for insurance on his property. Mr Murdoch inspected the insurance renewal notice which showed the premium to be \$370. After some discussion, the testator agreed to continue his insurance through Suncorp-Metway and accepted that he had mistaken the amount of the premium.
- [45] It was in this meeting that the testator said that he thought there was something sinister about his neighbour Mr Wilson. He complained that he had been sick recently and unable to walk. Although he cried out for assistance, no one would help him. Mr Murdoch explained that with the house closed up, Mr Wilson may not have been able to hear him and he appeared to accept that explanation. He said that during his recent sickness Mr Wilson had given him some sort of powder which had taken away the functioning of his legs and also that Mr Wilson was trying to lock him into his house. Mr Murdoch demonstrated the working of the lock to the testator who then appeared satisfied.
- [46] The testator told Mr Murdoch that ants were coming into the kitchen through a down pipe outside the kitchen wall. He said that he had asked Mr Wilson to clean out the drain, that Mr Wilson had done some work on it, but that the problem had not been cured. Mr Murdoch gained the impression that the testator held Mr Wilson responsible for the presence of the ants. He explained that ants were a natural phenomenon and could be eradicated by being sprayed with Mortein. He pointed out that he could see no ants in any event and that he did not think that Mr Wilson was responsible for them. The testator said words to the effect that that could be the answer and the topic was closed.
- [47] At the meeting in the offices of Quinn & Scattini on 8 March 2001, the testator had emphatically rejected the tentative suggestion by Mr Murdoch that the Salvation Army could derive a benefit under his Will. His pronounced reaction to the suggestion was something noted by both Mr Murdoch and Mr Quinn. At a later time, when Mr Malins told the testator that Mr Murdoch was being requested to prepare a draft Will and Trust Deed, the testator said words to the effect "I don't like that Duncan Murdoch fellow because he supports the Salvation Army". Despite this attitude, the testator was prepared to have Mr Murdoch continue to act for him. Nor did the testator raise any objection to Mr Murdoch's attending at his house on 28 June in order to explain the proposed Will and Trust Deed.
- [48] In his July 1999 Will, the testator had made pecuniary legacies to the Diana, Princess of Wales Memorial Fund, Animal Liberation (Qld) Limited, Greenpeace Australia Limited and the Greens New South Wales. The same pecuniary legacies were provided for in the testator's 9 May 1999 Will. His 7 April 1999 Will contained a pecuniary legacy of \$100,000 to the Diana, Princess of Wales Memorial

Fund, \$50,000 to Animal Liberation (Qld) Limited, and \$100,000 to Greenpeace Australia Limited. The legacies in his March 1999 Will were –

- House and land at 2 Short Street, Woody Point to his friends Jock and Cathleen Burr
- \$100,000 to the Diana, Princess of Wales Memorial Fund
- \$50,000 to Animal Liberation (Qld) Limited
- \$100,000 to Greenpeace Australia Limited

- [49] There were no pecuniary legacies in the 30 December 1998 Will which contained a bequest to the Burrs. The 13 October 1997 Will was materially similar to the 30 December 1998 Will as were the 9 October 1997, 6 October 1997, 13 June 1997 and 8 May 1997 Wills.
- [50] The Will did not benefit Greenpeace, Animal Liberation (Qld) Limited or the Diana, Princess of Wales Memorial Fund. This, it was contended, provided evidence of lack of testamentary capacity.
- [51] Mrs Marion Roper had considerable contact with the testator between 1978 and the time of his death. At unspecified intervals she had made social visits to his house, taken him shopping and to medical appointments or to see a real estate agent. She discussed with him topics such as health, politics and her son's football. She noticed some physical deterioration in the testator in the 12 months or so before he was hospitalised in September 2001. She also observed that his clothing wasn't as clean as it used to be, that his yard was not being kept as fastidiously as in the past and that his housekeeping had deteriorated. She observed that he was becoming less friendly and that "he would, sort of, jump down your throat".
- [52] In 2001 she "did happen to read as [she] was going by" a will in the testator's handwriting in which the beneficiary was the editor of the local paper.
- [53] She gave evidence of an occasion, which she placed in mid July 2001, on which she arrived early to take the testator shopping. She called out to him from the foot of the stairs. The testator said that he wasn't ready to go, that he had been in Sydney, and had been very busy. He added "I have written a wonderful shopping note ... It's an excellent note" and invited her up to see it. When she opened the front door she saw that he was standing in his underclothes. Mrs Roper did not detect anything special about the shopping list. She spoke also of occasions on which, after she had selected vegetables for him when assisting with his shopping, "he would just throw them down as if they failed to meet with his approval".
- [54] Mrs Roper, however, did not appear to have noticed any significant diminution in the testator's memory or thought processes before his hospitalisation.
- [55] Mr Turnbull, who first met the testator when asked to witness a Will of his in May 1999, gave somewhat different evidence. He said that within a month or so of that occasion he commenced a regular contact with the testator which was initially fortnightly and then weekly. He said that, normally at the telephoned request of the testator, he would call in and take him shopping. On other occasions he would discuss the testator's poems with him, take home an altered manuscript, type it and print it out on his computer. He would then take the testator a disk containing the

material and a hard copy of its content. He said that at times he was engaging in such activity two to three days a week. His last contact with the testator was towards the end of January 2001 when he reports the testator, having alighted from his car after being taken shopping, as saying, without prior warning, "I've got no further use for your services".

- [56] Mr Turnbull gave the opinion that the testator commenced writing out shopping lists because of his deteriorating memory. He said "On some occasions though ... later on he would query why we were here, and I would show him the note and show him the item on that note that the reason why we're here is that you wanted that". He said that the testator, on these occasions, usually would "make an attempt to appear that he hadn't forgotten at all". Mr Turnbull remarked on a habit the testator developed of throwing vegetables in the supermarket to him, sometimes from around his side or over his shoulder. Mr Turnbull was expected to catch them and put them in a bag. When asked to refrain from this practice the testator would do so for a while before resuming it. Mr Turnbull does not suggest that he noticed anything untoward with the testator's conversation or thought processes during his quite extensive dealings with him. I gained the impression that Mr Turnbull overstated the extent of his contact with the plaintiff and that he may also have exaggerated a little when discussing the state of the testator's memory. His evidence, however, was untested by cross-examination.
- [57] The testator complained of the Communist Party ringing him up and asking for money and exhibited a determination to change his will so as to exclude the party as a beneficiary. So strong was his desire in this regard that after the meeting at Quinn & Scattini's offices on 8 March 2001, he made another will excluding the Communist Party as a beneficiary lest he die leaving the July 1999 will. This task was effected in discussion with Mrs Sullivan by altering a copy of his will dated 9 May 1999.
- [58] Mrs Sullivan gave evidence that the May 1999 will was changed by: deleting the executors and substituting Mrs Sullivan; deleting the Communist Party of Australia as residuary beneficiary and by adding another five charitable bodies suggested by Mrs Sullivan as pecuniary legatees. As there was some doubt about the proper description of the new beneficiaries Mrs Sullivan made some enquiries and obtained the missing information the next day. She re-typed the altered will and took it to the testator. He later telephoned her and said in relation to the added legatees "They're fine. [its] only a will. I make wills all the time".
- [59] The testator gave her no reason to believe that she had said or done anything to cause the testator offence or to cause him to bring their relationship to an end. Yet on 7 June 2001 the testator had given Mr Malins the sheet of paper quoted earlier on which were written the words "Gayle Sullivan finished permanently". This evidence of capriciousness on the testator's behalf and his conduct in relation to the altered will were matters on which the defendant placed considerable reliance.
- [60] Mr Peter Symon, the General Secretary of the Communist Party of Australia, first met the testator in 1997. He subsequently met him at his home on four or five more occasions, the last of which was in mid 2000. He also corresponded and had quite lengthy telephone conversations with him. Mr Symon had a record of three such telephone conversations with the testator in early 2001 but thought that there may have been more.

- [61] Mr Symon's recollection was that in the 2001 conversations the testator was slurring his words and that his memory was not as good as it used to be. Mr Symon, however, does not suggest that he sensed any lack of mental capacity in the testator during their discussions about the retransfer of the testator's house property. Nor does he suggest that in these and other discussions the testator used inappropriate language or revealed any cognitive deficiencies.
- [62] Mr David Matters had known the testator since about 1995. He estimated that he had visited the testator on at least 20 occasions. He had also had numerous telephone conversations with him. Mr Matters recalled an occasion in 2001 when, quite uncharacteristically, the testator came to the door dressed only in his underpants. He noticed on another occasion that the testator's clothing was not as clean as it had been in the past and that the house was more untidy and dirtier.
- [63] Mr Matters spoke of unspecified occasions where the testator expressed distrust of Mrs Sullivan. He didn't understand the testator's reasons for this attitude but refrained from enquiring into it. He also recalled an occasion, at an unspecified time, on which, after doing a favour for the testator, the latter said, "Oh look, I can write you into my will."
- [64] Mr Matters gave no evidence, except as narrated above, which was suggestive of a deteriorating mental condition on the part of the testator.
- [65] The abandonment of the Communist Party as a beneficiary is not a matter which assists the defendant's case and it was not relied on in argument. In a will made in October 1987, the testator gave Mr Symon and another \$30,000 to be used for the purposes of the Socialist Party of Australia. Broadly speaking, a number of subsequent wills left the testator's residuary estate to the Communist Party of Australia or to a trustee or trustees for the Communist Party of Australia for as long as it adhered "to the Marxist concept of surplus value in the economic field and ... enlightenment of objective reality in the philosophical field".
- [66] The 30 December 1998 and subsequent wills did not contain this requirement. That seemed to concern the testator and lead him to believe that the principal beneficiary of his estate should be a trust. By the time Dr Berry saw the testator in February 1999 he was asserting that he had "lost faith with the Communist Party and its integrity". The reasons for this change in attitude to the party do not emerge clearly from the evidence but there is no basis for finding that the change resulted from delusional or irrational thought processes. There is evidence that the testator resented being approached for money in relation to a printing press or photocopier. Also, it would be unremarkable if he resented being asked to pay \$100,000, rather than the \$50,000 offered by him, to secure the re-transfer of his house. He did in fact express dissatisfaction with the Communist Party's conduct in relation to the retransfer.
- [67] The exclusion from the Will of those pecuniary beneficiaries for whom provision was made in the 1999 wills was a matter relied on by the defendant. I accept that it is a matter for concern, particularly having regard to the testator's intimation to Mr Murdoch on 8 March 2001, that he was happy with them. There is no evidence that either Mr Murdoch or Mr Malins during and after the giving of instructions by the testator in June 2001 drew to his attention the omission of these pecuniary legacies from the proposed new will.

- [68] Concern about this omission, however, is considerably allayed by the fact that, although the testator's interest in the Diana, Princess of Wales Memorial Fund and animal liberation appear to have been substantial, it was not of a particularly long standing duration. So much may be gleaned from earlier wills. The testator's new approach of having a trust as the sole beneficiary of his Will was inconsistent with the provisions for pecuniary legacies in previous wills. By the time the testator gave his instructions to Mr Malins on 7 June, he seemed to have shifted the focus of his thinking away from a will which made provision for charitable bodies by way of pecuniary legacy. There was to be no residuary estate. The sole beneficiary was to be the Trust with nominated purposes or beneficiaries to be benefited during the Trust's life. The concept of distributing the corpus after 15 years to charitable bodies may well have been thought an appropriate way of making provision for gifts to the charities favoured by the testator.
- [69] There seemed to be an element of capriciousness in some aspects of the testator's conduct as witnessed by his treatment of Mr Turnbull and his stated attitude to Mrs Sullivan. But in this and other respects it is appropriate to bear in mind that the testator's views, motivations and reasons are unknown except insofar as they can be gleaned, in some instances, from witnesses' imperfect recollections of observations by him. In any event, a testator's caprice, eccentricity or folly does not, of itself, establish lack of testamentary capacity.²
- [70] It is possible to envisage circumstances in which a pattern of capricious conduct in relation to matters of consequence may provide evidence of lack of mental capacity or mental decline. But the capriciousness exhibited by the testator was plainly not of that order and, in my view, is worthy of little weight in the general scheme of things. In so concluding, I have taken into account the draft will in favour of the newspaper editor which Mrs Roper thought she sighted, albeit fleetingly. Assuming Mrs Roper was not mistaken, it is impossible to know what lay behind the testator's actions. The document may have been a whimsical exercise, designed to help pass the time. It may have contained other testamentary dispositions which Mrs Roper did not notice. She may even have been mistaken as to its effect. Whatever its explanation, the testator does not appear to have had it formally prepared or executed. It may be inferred that no copy of it was found with the testator's papers.

The expert evidence

- [71] The only expert medical evidence presented in the case was that of Dr Berry, a geriatrician, retained by solicitors in 1999 to assess the testator's testamentary capacity prior to his making a will. In that regard Dr Berry produced a report dated 25 February 1999 in which she concluded that he had testamentary capacity. The report noted -

“His Mental Status Questionnaire was 10/10 and his Mini-Mental Status Examination was 28/30... He has good abstract thinking and verbal fluency was intact...Simple calculation was intact, although there were some minor degree of poor attention and concentration indicated by only being able to subtract Serial 7s to 86. He was able to interpret a proverb appropriately...

² *Boughton v Knight* (1873) LR 3 P & D 64, 65 and *Bull v Fulton* (*supra*) at 340.

He thus has only very mild memory impairment, which is within normal limits for his age... and definitely shows superior verbal and literacy skills.”

- [72] In a report dated 2 December 2004 prepared for the defendant’s solicitors Dr Berry concluded -

“This medical sequence of events is consistent with a progressive dementing illness from approximately late 2000 with progressive functional decline and evidence of behavioural symptoms of dementia, culminating in an acute admission where significant cognitive dysfunction was documented. He subsequently deteriorated with acute confusion due to multiple medical factors superimposed on his dementia....

Given the complexity of the trust deed and the will (2), and their departure from the content of the previous trust deed and will (1), it is highly unlikely given the level of dementia suggested by the previous assessment, that the testator would have had capacity to sign the documents.”

- [73] The “events” to which reference is made are incidents, acts and omissions of and in respect of the testator described in statements provided to Dr Berry; documents in the testator’s handwriting and hospital records.
- [74] Those materials provided to Dr Berry and listed in her report, necessarily, were limited in scope and gave something of an incomplete, and even inaccurate, picture of the testator’s physical and mental condition.

Consideration of the matters relied on by Dr Berry to form her opinion

- [75] Two written statements of Mrs Roper setting out her observations of the testator’s physical condition and general conduct constitute a significant part of the material presented to Dr Berry. But, in a number of significant respects, Mrs Roper’s evidence did not match the contents of the statements. The former is less suggestive of factors indicative of significant mental or physical decline than the latter.
- [76] The incident in which the testator greeted Mrs Roper clad only in his underwear is capable of being regarded as a product of inadvertence resulting from or assisted by Mrs Roper’s early arrival. However it may be regarded, it was an isolated incident. Only one other witness remarked on a somewhat similar event. Mrs Roper’s statements speak of the testator being “aggressive, explosive and unpredictable in his moods”. Her oral evidence in that regard struck me as somewhat more muted. It is significant that others who had more extensive dealings with the testator at around the same time did not witness any such conduct.
- [77] If a pattern of aggressive conduct and sudden mood changes was emerging, one would have expected it to manifest itself to others at a time when the testator was under considerable pressures whilst negotiating and implementing the re-transfer of his dwelling house. Whilst I accept that Mrs Roper was a truthful witness, I consider it probable that Mrs Roper somewhat magnified in her own mind this aspect of the testator’s behaviour. It is possible also that there was some cause of friction in their dealings which did not exist in the case of the other witnesses or that the testator’s aggressive conduct was connected with a bout or bouts of ill health.

- [78] Dr Berry was concerned about the testator's capacity to understand what she regarded as the quite complex concepts involved in the Will and Trust Deed. She pointed out that unless the testator had been asked to put in his own words what was meant and what was to be accomplished by the documentation it would be difficult, if not impossible, to gauge his level of understanding of it. As a result of her instructions, Dr Berry was of the impression that the testator's role had been a largely reactive one of indicating his assent to proposals put forward by others. The reality, however, was otherwise as I will explain a little later.
- [79] Dr Berry, in forming her opinion, understandably gave weight to what she described as "evidence of paranoid ideation directed against the neighbour". This was a reference to the testator's views revealed in discussion between him and Mr Murdoch on 27 August 2001. The testator then complained about being given a powder by Mr Wilson which had taken away the functioning of his legs and gave Mr Murdoch the impression that he regarded Mr Wilson in some way responsible for the ants. He also seemed to think that Mr Wilson was locking him in.
- [80] The ant incident is capable of a number of explanations which do not bear on the testator's testamentary capacity. What was said to give rise to Mr Murdoch's understanding was unexplored and the possible delusion must therefore be treated with caution. I am of the view also that the other odd views put forward by the testator that day, whilst giving rise to concern, fail to provide strong evidence of lack of testamentary capacity. Although the views under consideration appear to have been irrational, the testator seems to have accepted Mr Murdoch's explanations. There is no evidence that any such views adversely affected the testator's relationship with Mr Wilson. There is evidence to the contrary and there is no evidence that those or any other such views were held about Mr Wilson or anyone else at or about the time the Will was executed. The states of mind do not appear to have been either entrenched or strongly held and there is evidence that, at the time, the testator was emerging from a bout of ill health.
- [81] As the above narrative shows, a number of people had extensive dealings with the testator on and around the date on which the Will was signed. The only other witness who reports any conduct which might be considered delusionary is Mrs Roper who recalled the testator saying he had been to Sydney. Nothing is known of the circumstances which gave rise to this observation or about the testator's health at the time. On no other occasion prior to his hospitalisation is the testator reported as being disorientated as to place, or for that matter, time.
- [82] The testator showed no inclination in the last few wills executed by him to benefit friends or relatives and it does not appear to me that any delusions the testator may have had about Mr Wilson bear upon the bequests in his Will.
- [83] It was submitted on behalf of the defendant that the absence from the testator's handwritten document of 28 June of reference to the Will, the trust or testamentary disposition should excite suspicion about the testator's mental capacity. Dr Berry regarded the document as evidencing a cognitive error ("calling Duncan Murdoch, Duncan Scattini") and "a deterioration from his superior [literacy] skills". I doubt that the testator did mistake Mr Murdoch's name. He placed a nearly vertical stroke between "Duncan" and "Scattini", suggesting to me that he couldn't recall Mr Murdoch's surname and wrote down the firm name or what he could remember of it. Even if the testator did make a mistake about Mr Murdoch's name, the error

would provide but faint evidence of a failing memory. After all, the testator had met Mr Murdoch on only one prior occasion.

[84] Relying on the document as a guide to mental capacity presents a number of difficulties. The significance, if any, of failure to mention the Will and Trust Deed depends on when the note was made. If it was written after the Will and Trust Deed were executed and before or during the discussion between Mr Malins and the testator about the latter's poetic works, the omission would not be surprising. Also, in order to evaluate the omission properly, it would be necessary to know the testator's purpose in bringing the note into existence. An obvious enough explanation is that it is an aide memoir in respect of the testator's poems which, in his mind, recorded aspects of his general philosophy. In that regard, it may be noted that the six listed poems do not include his more light-hearted works such as "I went to the Doc with my Tum tum" and "The Daylight Saving Blues". The facts suggest that the document was prepared to be given to Mr Malins. It was hardly necessary to tell him anything about the Will and the Trust Deed at this stage.

[85] The last of the matters to which Dr Berry referred in her report were the records of the Redcliffe Hospital to which the testator was admitted on 4 September 2001. Dr Berry observed –

“On admission, he had evidence of dehydration, malnutrition with anaemia due to B12 and folate and iron deficiency, and bilateral pleural effusions ... the next day the occupational therapist documented an MMSE³ of 20/30.”

[86] That test, as Dr Berry pointed out, does not assess executive functioning. The testator's health, after improving briefly as a result of hydration and proper nutrition, declined rapidly and he contracted terminal pneumonia. The hospital records reveal, and Dr Berry's report notes, that in the weeks prior to his admission to hospital the testator had multiple falls. And it is reasonable to conclude that the testator's physical condition on and about 4 September was far worse than it was on the date the Will was signed.

[87] Dr Berry also observed during her evidence-in-chief that

“... people who are extremely elderly, whether they have dementia or not, have decreased cerebral reserve and, therefore, are more at risk of acute confusing factors which could be due to any sort of medical illness, either inside the brain or out of it”.

[88] Matters such as this, including stress and extreme tiredness, are capable of providing an explanation for at least some of the incidents upon which the defendant relies.

Relevant principles of law

[89] The following passage in his judgment in *Timbury v Coffee*⁴ Dixon J (as he then was) reformulated Cockburn CJ's classic statement of the matters necessary to establish testamentary capacity in *Banks v Goodfellow*⁵–

³ Mini mental status examination.

⁴ (1942) 66 CLR 277 at 283.

⁵ (1870) LR 5 QB 549 at 565.

“Before a will can be upheld it must be shown that at the time of making it the testator had sufficient mental capacity to comprehend the nature of what he was doing, and its effects; that he was able to realise the extent and character of the property he was dealing with, and to weigh the claims which naturally ought to press upon him. In order that a man should rightly understand these various matters it is essential that his mind should be free to act in a natural, regular, and ordinary manner’ (per Hood J, *In the Will of Wilson*) ‘If a will rational on the face of it is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it’ (per Cresswell J, *Symes v Green*) – Cf. per Holroyd J, *In the will of Key* ‘In the end the tribunal - the court or jury - must be able, affirmatively, on a review of the whole of the evidence, to declare itself satisfied of the testator’s competence at the time of the execution of the will ...’.”

- [90] In *Banks v Goodfellow*, Cockburn CJ said⁶ in a passage referred to by Latham CJ in *Bull v Fulton*⁷ that where an insane delusion “has had ... or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to its validity”.

Latham CJ continued⁸–

“The onus in such a case is on those supporting the will to show that the delusion did not influence the will . . . This does not mean that a propounder must absolutely demonstrate this negative proposition. He must establish it according to the standard of proof required in civil cases. It will be sufficient for him to satisfy the Court that it is a reasonable inference from the facts that a delusion proved to exist did not affect the disposition in question.”

- [91] The ultimate question for the court is not the appropriate medical classification or description of any illness or incapacity suffered by a testator but whether the testator suffered from a “delusion” or other incapacity which affected the making of the will.⁹ The enquiry identified by Williams J in *Timbury v Coffee*¹⁰ is whether “the delusion overmastered the judgment at the time of executing the will to such an extent as to render him incapable of making a reasonable and proper disposition of his property or of taking a rational view of the matters to be considered in making a will”.

⁶ at 561.

⁷ (1942) 66 CLR 295 at 299.

⁸ at 299.

⁹ Cf. *Re Crooks Estate* (14 December 1994, Young J, unreported); *Re Crichton* (22 July 1994, Bryson J, unreported); and *Re Estate of Hodges Deceased; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-707.

¹⁰ (1941) 66 CLR 277 at 280.

[92] Counsel for the plaintiffs, in reliance on the reasons of Powell J in *Re Estate of Hodges Deceased; Shorter v Hodges*, advanced the proposition that the concept of “insane” delusion today means “incorrigibility of a belief whose falseness is not amenable to appeals of reason”. Powell J’s formulation is, in fact, slightly different. At page 706 of his reasons, he appeared to adopt what he described as “the latter-day psychiatrist’s test of what is a ‘delusion’”, namely one “not capable of rational explanation or amenable to reason, and (which) is not explicable by reference to the subject person’s educational culture”. A similar formulation, attributed to psychiatrists, is to be found in *Executors, Administrators and Probate* by Williams, Mortimer and Sunnucks, 18th ed, para 13-17.

[93] Santow J, in *Easter v Griffith*,¹¹ after a review of authority and relevant literature, concluded that “the concept of ‘insane’ delusion” today means -

“...incorrigibility of a belief whose falseness is not amenable to appeals of reasons ... the delusion must be tested by objective evidence as to it being fixed, false and incorrigible such that the testator could not be reasoned out of it. Such delusions or disorders of the mind thus go beyond mere eccentricity, or vindictiveness or irrationality, though these may be evidence pointing with other material, to lack of testamentary capacity.”

[94] As the above passage suggests, the existence of delusions does not become immaterial merely because the testator, in the past, has been reasoned out of them or other delusions. What must be assessed is the extent, if any, to which a delusion existing at the time of making the will affected the testator’s ability to satisfy the traditional tests of testamentary capacity stated, for example, by Dixon J in *Timbury v Coffee*.¹²

[95] Where the delusion is in respect of a matter irrelevant to the disposition of the testator’s estate it may nevertheless provide evidence of mental capacity which must be evaluated as part of the general body of evidence. Similarly, the fact that a testator was known to have delusions at a time reasonably proximate to the date of the Will may create a concern as to whether those or other delusions existed at that date.

[96] Great age is a factor which will normally suggest the exercise of particular vigilance when considering testamentary incapacity.¹³ It does not follow, however, that even a marked decline in a testator’s intellectual capacity through advancing age establishes lack of testamentary capacity.

[97] In *Banks v Goodfellow*¹⁴ Cockburn CJ, speaking of infirmity of mind arising from “the decay of advancing age” said –

“In these cases it is admitted on all hands that although the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is

¹¹ (unreported 17 June 1994).

¹² See also the above quoted passage from the reasons of Williams J in *Timbury v Coffee*.

¹³ *Bailey v Bailey* (1924) 34 CLR 558.

¹⁴ (1870) LR 5 QB 549 at 566.

enough if, to use the words of Sir Edward Williams in his book on executors, ‘the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done’.”

- [98] A party propounding a will must establish that the testator knew and approved of its contents at the time of execution. Such proof is normally effected by evidence that the testator read it or that it was read to the testator before signing. Where a will is prepared in accordance with the testator’s instructions given when he had testamentary capacity, it will suffice if the testator is capable only of understanding that he is executing the will for which he has given instructions.¹⁵
- [99] In *Battan Singh v Amirchand*¹⁶ it was observed in the judgment the Privy Council delivered by Lord Normand that where, as is the case here, the instructions are delivered to the solicitor through an intermediary, great caution needs to be exercised in applying such a principle. In particular, “the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor”.

Observations as to the testator’s physical and mental condition

- [100] In June 2001, the testator was physically frail but able to walk about his house unsupported and ascend and descend its stairs, using the rails for support. Mr Murdoch described him as walking “in a shuffling manner”. His hearing appears to have been poor in one ear but adequate. Although his eyesight was also poor, he was able to compensate for this by the use of glasses with magnifying lenses. His health at the time of the Will appears to have been reasonable. He lived alone, doing his own cooking, cleaning and washing.
- [101] Although the testator was untidy, had piles of papers throughout the living area and failed to clean the kitchen floor and living room carpet as well as he ought, his living conditions could not be described as squalid. In June and July 2001 he was keeping the kitchen table, fridge and food preparation area clean. There had been some falling off in the cleanliness of his clothes in the months preceding his death but that was not particularly marked. Some of his acquaintances failed to observe it. There appears to have been no significant decline in his personal hygiene.
- [102] The testator continued to do his own shopping until falling ill in August 2001. When he lacked the assistance of a friend or acquaintance, he arranged by telephone for a taxi driver to take him. The only physical support provided by taxi drivers consisted of bringing a shopping trolley to the car and, after return to the testator’s house, taking the shopping to the kitchen. Although he was helped with his shopping by some of those who took him to the shops, the assistance was not prompted by need or the perception of it. The evidence does not suggest that the testator had any difficulty in handling money when paying taxi drivers or paying for his groceries.
- [103] Although the defendant appears to have had difficulty in managing his financial affairs through his general untidiness and lack of system, the evidence, both oral and documentary, does not reveal any lack of understanding of those affairs. The testator came to realise the desirability of having someone more expert and orderly

¹⁵ *Parker v Felgate* (1883) 8 PD 171 and *Battan Singh v Amirchand* [1948] AC 161.

¹⁶ (*supra*) at 169.

manage his finances and he entrusted Mr Malins with this role. None of Mr Malins and the solicitors and others who had dealings with the testator in 1999, 2000 or 2001 apprehended any lack of capacity on his part to comprehend the transactions in which he was engaged. Nor does the documentary evidence suggest any lack of such comprehension.

- [104] The evidence of the solicitors is important. Mr Murdoch and Mr Quinn, in particular, were experienced in preparing wills for the elderly and infirm. They were alert to the need for Mr Murdoch to satisfy himself as to testamentary capacity.
- [105] The testator went to Quinn & Scattini on 8 March 2001 with two principal objectives in mind, the exclusion of the Communist Party as a residuary beneficiary and the substitution for it of a new political party to be founded by him. The new party was one which he expected would promulgate his political philosophies. After he was persuaded of the impracticality of that course, he decided that the beneficiary of his will should be a trust, the purposes of which were to: benefit world peace, Senator Bob Brown and the Greens; promote and publish the testator's works. He put forward the proposal that all of his assets should be transferred to the trust which would meet his living expenses. It was also his idea that he and Mr Malins would be trustees and that the trust would conclude after 15 years when its corpus would be distributed to charitable organisations.
- [106] There was only a period of three weeks between 7 June and the execution of the Will and Trust Deed on 28 June. During this period the testator gave further instructions to Mr Malins. Thus, when Mr Murdoch and Mr Malins attended on the testator on 28 June, although it is regrettable that nothing more was done to test his understanding of the documentation, the procedure adopted by Mr Murdoch and concurred in by Mr Malins was understandable. Mr Murdoch was doing no more than document instructions which, in themselves, were strongly suggestive of testamentary capacity. They were lucid, sensible enough and a natural substitution for the abandonment of the scheme to form a new political party put forward by the testator in the course of the lengthy meeting on 8 March 2001.
- [107] The Will and Trust Deed were signed against the background of that lengthy meeting. In the course of it Mr Murdoch had become impressed with the testator's mental capacity. Furthermore, he took his instructions through Mr Malins who, having no doubts as to the testator's mental capacity, raised none with Mr Murdoch. Mr Murdoch was undoubtedly of the belief that Mr Malins, who had had lengthy discussions with the testator, discerned in him no want of understanding.
- [108] A number of witnesses had extensive contact with the testator in connection with the revision by him of his poetry. None of them appears to have detected any noteworthy failings of the testator's memory or in his cognitive processes in relation to these endeavours. Whilst the testator's conduct in this regard appears from the evidence to be somewhat eccentric, none of the witnesses who assisted him with his poetry appeared to find anything untoward in his literary endeavours and related conduct.
- [109] The evidence shows the testator to have been an interesting conversationalist and his acquaintances appeared to have enjoyed his company. He was mentally alert and not unduly concerned with events in the distant past. The evidence does not suggest that he imposed upon those willing to assist him or that, with rare exceptions, his behaviour was socially inappropriate. There is some modest evidence of increasing

forgetfulness on his part, but, overall, the evidence strongly suggests that, at the date of the Will, his memory was reasonably sound.

Conclusion

- [110] I consider it probable that the testator understood what was said to him on 28 June 2001 about the contents of the Will and Trust Deed. Mr Murdoch and Mr Malins thought he did. And what he was being told by Mr Murdoch as he read out and explained the documents would have been familiar to him, the documents having been prepared in accordance with his instructions. I consider it probable also that the testator read and understood the contents of the will before signing it.
- [111] The above considerations lead me to conclude that the testator, when making his Will and executing the Trust Deed, had sufficient mental capacity to comprehend the nature of what he was doing and its effects. He knew the extent of his property. He had no claims on his bounty which he ought reasonably to have acknowledged and was thus free to select beneficiaries which suited his fancy or caprice. He was not, however, capricious in his choice as the foregoing discussion demonstrates.
- [112] I find that the testator had testamentary capacity.
- [113] I do not consider it appropriate that the defendant pay the plaintiffs' costs. There were a number of matters to which he was able to point which were capable of giving rise to legitimate concern about testamentary capacity. But I do not consider that costs should be awarded on an indemnity basis. The defendant was acquainted with the strength of the plaintiffs' case, probably by the commencement of the trial and certainly by the end of the first day. Nevertheless, the defendant elected to proceed, taking no steps to confine the scope of the case.
- [114] I pronounce for the force and validity of the Will dated 28 June 2001 of Allan Phillips, being Exhibit 20 in these proceedings, and order that probate in solemn form be granted to the plaintiffs the executors named in the Will subject to the formal requirements of the registry.
- [115] I order that the defence and counterclaim be dismissed.
- [116] I order that the plaintiffs' costs on an indemnity basis and the defendant's costs to be assessed on the standard basis be paid out of the estate.