SUPREME COURT OF QUEENSLAND

CITATION:	*Curran & Ors v McGrath & Anor* [2010] QCA 308
PARTIES:	**JANET ROBERTA CURRAN** **&** **KATHRYN ANN CHAMBEYRON** **&** **MARIA CYNTHIA BROWN** **&** **EVELYN MARY PINNINGTON** (applicants/appellants) **v** **JOHN CHARLES MCGRATH** **&** **ROBERT CLIVE MCGRATH** **AS EXECUTORS OF THE ESTATE OF THE LATE CECIL ROBERT MCGRATH** (respondents/respondents)
FILE NO/S:	Appeal No 5767 of 2010 SC No 149 of 2008 SC No 150 of 2008 SC No 151 of 2008 SC No 153 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	5 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2010
JUDGES:	McMurdo P and Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – primary judge refused appellants' applications for extension of time under s 41(8) *Succession Act* 1981 (Qld) – appellants submitted there was an adequate and reasonable explanation for the delay – appellants submitted it was not reasonable to pursue applications whilst other disputes regarding the estate were

being resolved – appellants submitted primary judge erred in concluding that the estate assets had been distributed – appellants submitted their claims were meritorious and the beneficiaries suffered no prejudice – whether primary judge erred in the exercise of his discretion under s 41(8)

SUCCESSION – FAMILY PROVISION AND MAINTENANCE – APPEALS – appellants submitted respondent executors' conduct estopped respondents from enforcing time limit under s 41(8) – appellants submitted respondents had a fiduciary obligation to advise the appellants prior to distributing estate assets – respondents submitted estoppel and breach of trust arguments could not be relied upon as they were not raised at first instance – whether court should consider estoppel and breach of trust arguments

Succession Act 1981 (Qld), s 41(1), s 41(8)

Baker v Williams & Brunner (as executors of the estate of Baker) [2007] QSC 226, cited
Bird v Bird [2002] QSC 202, cited
Blunden v Blunden [2008] SASC 286, cited
Hills v Chalk [2009] 1 Qd R 409; [2008] QCA 159, cited
Holdway v Arcuri Lawyers [2008] QCA 218; [2009] 2 Qd R 18, cited
Re Donkin Deceased; Riechelmann v Donkin [1966] Qd R 96, cited
Re Faulkner [1999] 2 Qd R 49; [1996] QSC 261, considered
Re McPherson [1987] 2 Qd R 394, cited

COUNSEL: K M Wilson SC, with G Coveney, for the appellants
G F Crow for the respondents

SOLICITORS: Beckey, Knight & Elliott for the appellants
Macrossan & Amiet Solicitors for the respondents

[1] **McMURDO P:** This appeal should be dismissed with costs for the reasons given by Muir JA.

[2] **MUIR JA: Introduction**
The appellants each appeal against an order of the primary judge made on 7 May 2010 refusing an application for a direction that her application for adequate provision for maintenance and support out of the Estate of her late father, Cecil Robert McGrath, be heard and determined notwithstanding that the appellant failed to bring the application for such provision within nine months after the death of the deceased. Section 41(8) of the *Succession Act* 1981 (Qld) provides that, unless the Court otherwise directs, no application for provision of maintenance and support under Part 4 of the Act may be made unless "the proceedings for such application be instituted within 9 months after the death of the accused".

[3] Before turning to the grounds of appeal, it is desirable to outline briefly the underlying facts.

The underlying facts

[4] The appellants are all daughters of the deceased and his wife, Mary McGrath. The respondents are their two surviving sons. At the time of the deceased's death some 11 parcels of real property were registered in the names of the deceased and Mrs McGrath as joint tenants. The matrimonial home of the deceased and Mrs McGrath was on one parcel. The partnership businesses of cane farming and grazing were conducted on the properties. The partners were the deceased, Mrs McGrath and the respondents and their respective wives. What I have stated is a slight oversimplification: one or more of the properties was or were held by another partnership but such details are unimportant for present purposes.

[5] On or about 28 August 2006, the deceased retained Macrossan & Amiet, who are also the respondents' solicitors in these proceedings, to prepare new wills for himself and Mrs McGrath and to sever the joint tenancies in respect of the properties.

[6] A transfer of the deceased's and Mrs McGrath's interests in the properties to themselves as tenants in common in equal shares was executed in the offices of the respondents' solicitors on 29 September 2006. The deceased and Mrs McGrath also executed new wills that day.

[7] The deceased, by his will, save for provisions dealing with the excision of a 20 acre parcel of land on which the family homestead was situated, gave his interest in the properties and the partnerships to the respondents. The will executed by Mrs McGrath mirrored that executed by the deceased. The deceased died unexpectedly in a motor vehicle accident on 28 November 2006, leaving a substantial estate. Its extent depended, to a degree, on whether the properties, or some of them, were owned by the deceased and Mrs McGrath or were held in trust by them for one or more of the partnerships. In consequence of the deceased's death, apart from her interests in the properties and partnerships, Mrs McGrath had, as the surviving joint tenant or joint interest holder, approximately $1,038,116 in bank accounts and shares with a market value exceeding $50,000. She also obtained insurance moneys and superannuation fund entitlements of $33,406 and $232,000 respectively. The residuary estate was relatively modest and the primary judge's finding that its value was "too insignificant to justify any application" was not contested.

[8] The transfer of the properties executed by the deceased and Mrs McGrath was lodged for registration on 6 December 2006. Mrs McGrath subsequently alleged that her execution of the transfer was procured by undue influence or unconscionable conduct on the deceased's part and that, in consequence, the transfer was either void or voidable and that the joint tenancies had not been severed.

[9] By letters dated 26 March 2007, the respondents' solicitors gave notice to an appellant, Mrs Pinnington, who was appointed an executor under the deceased's will, that the respondents had instructed them to apply for a grant of probate of the deceased's will. The letter enquired if Mrs Pinnington wished to join with the respondents in making the application and advised that the respondents' instructions were that they desired to obtain the grant and proceed with administration of the Estate without further delay.

[10] On 24 April 2007, the appellants' solicitors, Beckey, Knight & Elliott, wrote to the respondents' solicitors advising that they acted for the appellants and Mrs McGrath and that it was their clients' intentions to make application for proper maintenance and support pursuant to s 41 of the Act. Macrossan & Amiet replied to this letter on 27 April 2007, giving a general description of the assets of the Estate and enquiring whether proceedings had been instituted. They asked to be advised, if the proceedings had not been instituted, when it was anticipated that proceedings would be commenced. No reply to that request was received.

[11] The nine month limitation period under s 41(8) of the Act expired on 28 August 2007.

[12] On 26 October 2007, after a hearing on 15 June 2007, a judge of the Supreme Court dismissed an application by Mrs McGrath for the production of materials in the possession of the respondents' solicitors relating to the preparation of her will and the severing of the joint tenancies.

[13] Mrs McGrath commenced proceedings on 13 November 2007 against the respondents, seeking declarations that the joint tenancies had not been severed and an order that the transfer of the properties and other interests be set aside.

[14] On 10 June 2008, a mediation of Mrs McGrath's claim against the respondents took place. In the following month, the respondents entered into a contract for the sale of "Rugby Run", by far the most valuable of the properties, for a sale price of $15,750,000. That contract settled on 31 July 2008. A further mediation of Mrs McGrath's claims against the respondents took place on 5 September 2008. The mediation was successful and resulted in an agreement, signed on 5 September, under which, in consideration of the payment to her of $7,500,000, Mrs McGrath agreed to:

(a) assign to the respondents all of her right, title and interest in and to "Rugby Run", the partnerships and the other properties; and

(b) file a notice of discontinuance in the proceedings.

[15] The settlement was expressed to be in full and final satisfaction of any claims in the proceedings and of any claim which any party might have against any other party. The $7,500,000 was paid to Mrs McGrath on 21 November 2008. On that day each appellant filed her application under s 41 of the Act. The appellants' solicitors advised the respondents' solicitors by letter dated 25 November 2008 that the appellants had commenced proceedings under s 41 of the Act and the respondents were served with the applications shortly thereafter.

[16] On 19 October 2009, an order was made that the appellants' applications pursuant to s 41(8) be set down for hearing for one day in the sittings of the Supreme Court in Mackay commencing on 8 February 2010. Directions were made for the filing of affidavits. The hearing at first instance took place on 22 April 2010.

[17] The primary judge observed in his reasons that prior to the payment of $7,500,000, after 5 September 2008, and in the absence of any further notice of any intention to proceed with claims under the Act, the respondents, "… set about their executorial duties. Transmission applications were signed and lodged to transfer the deceased's interest in the [property] to the respondents as devisees. These were registered by 21 November 2008".

[18] The primary judge's reasons describe further matters attended to by the respondents after 5 September 2008:

> "[18] The respondents had resolved between them that they would not continue in partnership and that one brother would receive certain lands known as 'Tennis Court Road Farm' and one lands known as 'The Home Farm' with a cash adjustment to reflect the agreed different value of the two aggregations. To that end the transfers that were submitted to the widow on settlement of her proceedings provided for some lands to be transferred to one son and some to the other son. These transfers were lodged for registration on 18 February 2009 and subsequently registered. The respondents then co-owned the lands in certain shares. Subsequently the respondents have undertaken the necessary transfers to bring about their agreed arrangement and severing the co-ownership that had existed. James McGrath and his wife have paid the cash adjustment agreed to Robert McGrath – a sum of $1,040,000."

[19] The primary judge noted that "Rugby Run" was "the significant asset" of what he described as the "six way partnership" and that the proceeds of sale of that property were the source of the $7,500,000 payment to Mrs McGrath. He found that the balance of such moneys was the source of distributions of $480,000 made on 28 November 2008 by CR & MA McGrath & Sons to the respondents.

The relevant findings of the primary judge

[20] The primary judge held that by the time of the hearing at first instance, the assets remaining in the Estate of the deceased were "too insignificant to justify any application" under the Act.

[21] The primary judge also concluded that it would be "substantially unjust" to permit the appellants' applications to proceed. The reasons for this conclusion may be summarised as follows. There was no adequate explanation for the appellants' substantial delay. The applications under s 41(1) were filed some 15 months after the expiration of the nine month time limit and not served for several months after that. Each of the appellants was legally represented within the limitation period and none had sworn to being unaware of the existence of the time limit. It is to be inferred that each appellant was aware of the time limit, let it pass, and permitted the respondent executors to operate under the assumption that "no applications were to be brought".

[22] The appellants' explanation for delay, that they were advised that until the proceedings brought by Mrs McGrath were finalised the *Succession Act* applications could not "proceed" because the size of the deceased's estate depended on the outcome of those proceedings, lacked merit. The limitation period expired two months prior to the commencement of Mrs McGrath's proceedings and mere uncertainty about the assets in the Estate did not justify delay.

[23] The reason for the statutory time limit is to assist in "prompt administration of the estate and the 'preservation of the certainty and integrity of an executorial administration regularly completed'".[1]

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[1] Citing *Baker v Williams & Brunner (as executors of the estate of Baker)* [2007] QSC 226 at [30].

[24] The appellants were each aware that the respondents were actively discharging their executorial duties and were dealing with the litigation instituted by Mrs McGrath. It would have been evident to any reasonable person that the absence of claims against the Estate would bear upon the respondents' approach to the resolution of Mrs McGrath's claims. That was relevant to the adequacy of the appellants' explanation for the delay.

[25] The respondents were "significantly prejudiced" by the appellants' delay. The respondents swore that they would not have settled with Mrs McGrath on the terms that they did had they been aware that the appellants intended to pursue their applications for further provision. There is no reason to doubt the respondents' evidence in this regard or that the respondents ordered their affairs on the same assumption by, for example, dividing the properties amongst themselves, paying moneys, incurring liabilities such as stamp duty, and working on the divided properties.

[26] Finally, the Estate had been administered to the extent that there were insufficient remaining assets available to the appellants, if successful, to warrant the determination of any application for further provision.

The appellants' case on appeal

[27] At first instance the respondents swore to the effect that they negotiated and settled with Mrs McGrath on the understanding that the appellants would make no further claim on the Estate if the dispute between Mrs McGrath and the respondents was resolved and that this understanding influenced the terms of the settlement which was reached. The effect of the respondents' evidence was that their understanding was induced, in part at least, by representations made to them by or on behalf of the appellants.

[28] The respondents' evidence was also to the effect that after settlement on 5 September 2008, the respondents, on the understanding just mentioned, instructed solicitors to proceed with the administration of the Estate and that they set about arranging their respective affairs and interests in the properties in accordance with agreements between them in that regard.

[29] The appellants swore that they did not make any express representations to the respondents to the effect that they would not pursue applications for further and better provision if the dispute between Mrs McGrath and the respondents was settled. The primary judge concluded that he was not in a position on the evidence before him to resolve whether the representations alleged by the respondents had been made by the appellants.

The estoppel and breach of trust arguments

[30] Counsel for the appellants submit that the primary judge erred in not attributing appropriate weight to the dispute about the alleged representations by the appellants in the determination of the leave application and by making findings (contrary to his determination that he could not resolve the dispute) favourable to the version of the dispute contended for by the respondents. The dispute was of significance because, if resolved against the respondents, it was likely to have given rise to an estoppel against the respondents. The estoppel, it would seem, was one which operated to prevent the respondents from denying:

> "… that the statutory time limitation and attendant consequences (as to executorial protection and rights of distribution upon assent) under the statute had, either, been assumed suspended or, were not, in truth (consistent with fiduciary duty) capable of being ignored in the act of the estate administration leading to final distribution without the consequence of intervention by equity."

[31] The argument expanded to include allegations of breach of trust and unconscionability:

> "The intervention in those circumstances would be warranted so as to remedy a breach of trust by the executors and/or their unconscionable or unconscientious conduct designed to put assets, which the respondents must have known were always liable to attachment to any rights [under the Act] beyond the reach of the exercise of any court order to grant leave to proceed".

[32] The estoppel argument included the contention that an analysis of the correspondence between the respective firms of solicitors and the chronology of relevant events "admits of an arguable foundation for assertion by the appellants that they were induced by the silence and inaction of the executors to assume, wrongly on the executors' case, that the delivery of a good notice of intention to bring an [application under the Act] … survived the expiry of the relevant … limitation period". The respondents by their conduct, it was submitted, are estopped from asserting both an entitlement to the protection of s 44(3) and the limitation period in s 41(8).

[33] Counsel for the appellants submitted, in writing, that the respondents were fiduciaries with a fiduciary obligation to advise the appellants prior to distributing the Estate assets.

[34] Another submission was that, as counsel for the appellants at first instance had raised with the primary judge the undesirability of proceeding further with any determination until questions such as whether the respondents were estopped from asserting that the properties had been lawfully distributed and whether the respondents in distributing the properties had been in breach of trust, those matters had been raised sufficiently to enable the appellants to advance them on appeal. It was further submitted that in the course of making such submissions on these matters counsel for the appellants at first instance had contended that, because of the limited evidence about the Estate assets, the issues in that regard should be determined after a trial of preliminary issues.

The contention that the Estate assets had not been distributed

[35] The appellants advanced the following arguments. The primary judge erred in concluding that the intention of the respondents was that the transfer of realty and personalty following the settlement with Mrs McGrath effected a transfer of the beneficial ownership in those assets to the respondents in their own right. None of the transfers executed in furtherance of the settlement agreement is relevant to the question of distribution of Estate assets. There was no evidence in respect of the majority of the properties as to the capacity in which the purported transfers had been effected.

[36] In *Holdway v Arcuri Lawyers*,[2] Keane JA noted:[3]

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2 [2008] QCA 218.

3 At [75].

> "… it must be presumed, in the absence of proof to the contrary, that a trustee or personal representative intends to deal with assets held in a representative capacity in accordance with his or her obligations as such before asserting his own beneficial interest in respect of those assets."

[37] The primary judge was thus not entitled to conclude that the assets of the Estate had been distributed. There was a presumption that any transfer effected by the respondents was effected to maintain the status quo of the Estate pending resolution of the appellants' applications.

The contention that the exercise of the primary judge's discretion miscarried

[38] It was contended that the exercise of the primary judge's discretion in relation to the granting of leave miscarried as:

(a) there was adequate and reasonable explanation for the appellants' delay. The complications arising from the purported severing of the joint tenancies so close to the deceased's death were bound up with the identification of the assets of the deceased's Estate and with the question of whether each child had been dealt with fairly under the will;

(b) it was not reasonable or practical for the appellants to pursue their applications in circumstances in which the issue of the severance of the joint tenancies would determine whether there was an estate against which to claim at all. Although the proceedings to set aside the severance were not commenced until after the expiration of the limitation period, the fact that the respondents had not made distributions to themselves prior to the resolution of that dispute indicated the respondents' awareness "that the estate was far [from] settled";

(c) the delay in waiting for the joint tenancy matter to be resolved was an adequate explanation for the delay in bringing the proceedings for leave;

(d) the beneficiaries suffered no prejudice. The conclusion that the respondents had acted on the assumption that the appellants would make no further claims on the Estate after the settlement with Mrs McGrath was not warranted;

(e) the primary judge was wrong in relying on the respondents' evidence in this regard in the absence of cross-examination on credit. Any prejudice which the respondents allege must be measured against their conduct in proceeding with the administration in the face of clear notice of the appellants' impending applications;

(f) there has been no unconscionable conduct by any of the appellants; and

(g) the applications were meritorious in that the appellants all made contributions to the family farming business over a long period of time.

Consideration

The estoppel, trust and trial of separate issues arguments

[39] Counsel for the respondents submits that the estoppel and trust arguments were not relied on before the primary judge and therefore cannot be relied on on appeal. It is the case that counsel for the appellants at first instance submitted to the primary judge that the facts in relation to the Estate assets, including the extent of their distribution, were insufficiently known to enable a proper determination of the matter before the primary judge. However, at no point did counsel make an application for an adjournment or make any formal application that the matter not

proceed further until further discovery had been given, further documents produced or further information provided. Nor was there an application that there be a separate trial of the questions of when and in what circumstances interests in the properties had been distributed. No doubt counsel had in mind that the matter had been set down for hearing some months earlier and that the substantive affidavits of the respondents had been served in January 2010.

[40] Ultimately, counsel for the appellants intimated that he was content to proceed with the applications under s 41(8). Counsel on both sides informed the primary judge that there would be no cross-examination.

[41] Counsel for the appellants at first instance did make submissions in the course of his address which raised the possibility that the respondents may have committed a breach of trust, depending on when the Estate assets were distributed. However, he conceded that the subject facts were dissimilar to those under consideration in *Re Faulkner*[4] and it did not appear that he was relying on an argument that the respondents had acted in breach of trust in distributing Estate assets. In his submissions in reply he made it plain that he was not pursuing any such argument and his written submissions did not raise any arguments in relation to estoppel or breach of trust. Consequently, counsel for the respondents was not called on to meet the estoppel or trust arguments. The estoppel argument was not adverted to in the grounds of appeal.

[42] An issue before the primary judge was whether the appellants had, by statements or representations, caused the respondents to believe that once the dispute between the respondents and Mrs McGrath was resolved, the appellants would not claim on the Estate. The issue was not whether the respondents by their conduct were estopped in the manner now asserted by the appellants. The appellants did not give evidence to the effect that they were induced to act or not to act in any way in relation to their respective applications by the respondents' conduct and, consequently, the estoppel argument would seem to lack a factual foundation. Counsel for the appellants gamely submitted that, despite this obvious evidentiary deficiency and the failure to raise the argument at first instance, the primary judge should have adverted to the argument now advanced and inferred reliance from the documents before him, particularly the evidence that the solicitors for the appellants had written a number of letters to the solicitors for the respondents concerning the Estate.

[43] This argument, with respect, was rather fanciful. Some of the correspondence upon which the argument was based was referred to in affidavits sworn by each appellant without being put in evidence. The content of the letters, apart from the fact that one or more of them asked questions about the Estate assets, including real property assets, could not be determined from the affidavit material. Also, nothing was pointed to which could be relied on to support the conclusion that the respondents had said or done or omitted to do anything which could have led the appellants to believe that the respondents would not rely on whatever rights and defences may have been available to them.

[44] As it could not be said of the estoppel argument that the respondents could not have adduced further evidence which "by any possibility could have prevented the point from succeeding", it is not appropriate that this Court now entertain it.[5] The same may be said for the allegations of distributions of Estate assets in breach of trust.

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4 [1999] 2 Qd R 49.

5 *Coulton v Holcombe* [1986] 162 CLR 1 at 7-8 and see also *Corliss v Gibbings-Johns* [2010] QCA 233 at [20]; *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

[45] The trust argument, in any event, would have been fraught with difficulties. It has been long established that property which has ceased to be an asset of a testator's estate cannot be affected by an order under the Act.[6] Counsel for the appellant argued that the respondents had acted in breach of trust and that the "purported distributions" could be ordered to be reconveyed.

[46] The appellants relied on *Re Faulkner*.[7] In that case the respondent executors distributed the estate assets after the applicant had made application for relief under s 41(1) of the Act within time and after the Court had made directions for the conduct of the proceeding. The applicant applied, by originating summons, pursuant to s 8(1) of the *Trusts Act* 1973 (Qld) for an order that the transfers of the relevant properties be set aside. The judge, Moynihan J, held that it was impossible to avoid the conclusion that the respondents had made the distribution for the purpose of defeating the applicants' claim. He found that the applicant had, at least, a contingent interest in the trust property and a right of due administration in respect of the trust property sufficient to give her standing to make the application. The core of his Honour's reasons is to be found in the following passage:[8]

> "The applicant also has a right of due administration in respect of the trust constituted by the will. A trustee who has received notice that a fund in his possession is or may be claimed is liable to the claimant for dealing with the property in disregard of the notice should the claim prove well founded. *Guardian Trust and Executors Company of New Zealand v. Public Trustee of New Zealand.*[9] The obligation is to preserve the estate until the claim is resolved; *Re Simson*;[10] *Re Crowley*.[11] Distribution with notice of claim under similar legislation was held to be a failure by the executors to provide for contingent liabilities so as to constitute a breach of trust in *Re Winwood (deceased).*[12]"

[47] None of *Re Simson*, *Re Crowley* and *Re Winwood* was a case in which a distribution was made by an executor after the time limit for an application for further provision out of the estate had expired. The expiration of the nine month period allowed by s 41(8) changed each appellant's rights or interests under the Act. Within the nine month period each had a right to have any application made by her heard and determined by the Court. After the expiration of that period such a right only arose if the Court "otherwise direct[ed]".

[48] The authorities do not establish that there is absolute prohibition on distributions by executors while a claim on the Estate is pending or threatened[13] but an executor who distributes estate property in such circumstances runs the risk of being held personally liable to make up for any shortfall in the assets available to meet the claim.[14] In this case there is evidence, which the primary judge accepted, that the

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6 *Re Donkin; Riechelmann v Donkin* [1966] Qd R 96; *Re McPherson* [1987] 2 Qd R 394.

7 [1999] 2 Qd R 49.

8 *Re Faulkner* [1999] 2 Qd R 49 at 52-53.

9 [1942] AC 115 at 127.

10 [1950] Ch 38 at 42.

11 [1949] St R Qd 189 at 192.

12 [1959] NZLR 246.

13 *Blunden v Blunden* [2008] SASC 286 at para [24] and *In re Simson Deceased; Simson v National Provincial Bank Ltd* [1950] Ch 38.

14 *Blunden v Blunden* [2008] SASC 286 at para [24]; *In re Simson Deceased; Simson v National Provincial Bank Ltd* [1950] Ch 38 and *In re Winwood (Deceased), Winwood v Winwood* [1959] NZLR 246 at 250.

respondents understood for a substantial period prior to 25 November 2008 that no appellant would pursue a claim under s 41(1). I think it correct to infer from the reasons that the primary judge regarded such beliefs as reasonable. In view of the conclusions reached earlier, however, about the approach taken at first instance, it is not necessary to pursue this matter further.

The distribution of Estate assets issue

[49] The appellants point out that in the passage from his reasons in *Holdway* quoted above, Keane JA spoke of a presumed intention of a personal representative of a trustee "in the absence of proof to the contrary". Here, there was evidence of the respondents' respective intentions in dealing with the properties. The evidence is not particularly clear but counsel for the respondents submits that the inference may be drawn from the affidavits of the respondents that transfers of the properties were being effected with a view to giving effect to the settlement, and the fulfilment of an agreement, between the remaining partners. The fact that some transfers were to only one of the respondents rather than both provides strong support for the respondents' position. However, in view of the conclusions I have reached in relation to the discretionary considerations next discussed, it is unnecessary to determine this issue.

Discretionary considerations

[50] The dispute and proceedings concerning the joint tenancies and the lack of certainty concerning the assets of the Estate offer faint excuse, at best, for the appellants' failure to commence proceedings within time. As the primary judge pointed out, the time limit provided by s 41(8) had expired for two months before the applications were made.

[51] It is not correct that it could not be known whether there were sufficient assets in the Estate to justify the bringing of the applications until after Mrs McGrath's claims were settled. The deceased's will disposed of the deceased's interests in the partnerships and disclosed that a number of the properties, including "Rugby Run", were partnership assets. The resolution of the dispute between Mrs McGrath and the respondents in Mrs McGrath's favour could not have produced the result that properties ceased to be partnership assets and became Mrs McGrath's property absolutely.

[52] Each appellant swore in an affidavit filed in support of her application under s 41 to a belief that the Estate's assets were worth several million dollars. She also acknowledged being aware that "Rugby Run" was a partnership asset. It is also reasonable to infer from this and the matters about to be mentioned that the appellants were generally aware of the nature and value of the assets of the Estate. They, or some of them, supported their mother in her dispute with the respondents and they all had the same solicitors. Counsel for the appellants at first instance conceded that the appellants "were aware of what was going on [in relation to Mrs McGrath's dispute] and kept an eye on things".

[53] Having regard to the size of the Estate, postponing the making of an application did not make much sense, unless the postponement was for the reason discussed below. An application (and there could and should have been only one) would have cost relatively little and it could have proceeded in conjunction with Mrs McGrath's proceeding.

[54] As the primary judge pointed out, the appellants were legally represented within the nine month time limit and no appellant swore to being unaware of the existence of the time limit. It is difficult to resist the conclusion that the appellants made a deliberate choice not to bring their applications, not merely before the resolution of their mother's dispute with the respondents but until after payment of the settlement moneys of $7,500,000, lest the applications prejudice their mother's interests in her dispute with the respondents. It tends to follow from that conclusion that the argument that the delay did not cause prejudice to the respondents cannot be accepted.

[55] The respondents swore, in effect, that they settled with Mrs McGrath for substantially more than they would have if they had believed that the appellants would bring their applications. Additionally, the respondents swore to being aware of the expiration of the limitation period. Mr John McGrath said:

> "I was aware that my mother and sisters had had a QC and a barrister as well as a solicitor acting for them and they had money to pay for good legal advice and they knew that the 9 month period of limitation had passed. I felt an enormous sense of relief as I thought that all of our legal disputes would be over. Sadly I was wrong."

Mr John McGrath, swore that he agreed to pay the sum of $7,500,000 to his mother, which he regarded as "well above the level which [he] considered [he] should pay" because he wanted to "keep some peace within the family" and because he knew that his sisters "would obtain their fair share from [his] mother". Mr Robert McGrath gave evidence to like effect.

[56] That evidence was accepted by the primary judge. He was entitled to accept it. It was not challenged in cross-examination and, importantly, the evidence accords with objective likelihood. The conduct of the appellants indicates a belief on their part that the bringing of the applications would have had a bearing on the outcome of negotiations adverse to their mother. The filing of their applications on the day the $7,500,000 was paid was hardly coincidental. It seems obvious enough, having regard to their mother's age, which was 80 at the time of the trial, that the appellants' own financial interests were advanced by a favourable outcome for their mother in the dispute. I do not mean to suggest that the appellants, in supporting their mother, were motivated by self interest but it must have occurred to each of them that the enhancement of Mrs McGrath's assets was likely to benefit her on Mrs McGrath's death if not before.

[57] The challenge to the primary judge's finding that the respondents acted on the assumption that the appellants would not bring claims against the Estate must be rejected.

[58] In *Bird v Bird*[15], White J said:

> "Time limits in statutes are for good reason. Malcolm CJ in *Clayton v Aust* (1993) 9 WAR 364 quoted with approval the approach of Megarry VC in *Re Salmon (deceased)* [1981] Ch 170 at 175:
>
> > '… the time limit is a substantive provision laid down in the Act itself, and it is not a mere procedural time

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15 [2002] QSC 202 at [22].

> limit imposed by rules of court which will be treated with the indulgence appropriate to procedural rules. The burden on the applicant is thus, I think, no triviality: the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to exten[d] the time.'"

[59] In *Hills v Chalk & Ors (as executors of the estate of Chalk (deceased))*[16], I explained:

> "The time limit imposed by s 41(8) of the Act has the obvious purpose of ensuring that an application for further provision from an estate does not unduly interfere with the estate's prompt administration. There is also the consideration that persons named as beneficiaries in wills, to adopt the language of McHugh J in relation to limitation periods in *Brisbane South Regional Health Authority v Taylor* '… should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against [the estate]'."

[60] I am prepared, like the primary judge, to proceed on the basis that the appellants had meritorious claims. Nevertheless, for the reasons given above and having regard to the statements of principle just quoted, I am unable to conclude that the primary judge erred in the exercise of his discretion under s 41(8) of the Act. The appellants failed to identify any material error in his Honour's reasons relating to discretionary considerations. The appellants have not established that it would have been just and proper for the primary judge to extend time.

Conclusion

[61] For the above reasons I would order that the appeal be dismissed with costs.

[62] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with him that the appellants have demonstrated no error by the learned primary judge in refusing to extend the time within which to bring their claims for provision out of their late father's estate under Part 4 of the *Succession Act* 1981.

[63] I agree with the order proposed by his Honour.

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16 [2008] QCA 159 at [78].