SUPREME COURT OF QUEENSLAND

CITATION:	*Micallef & Anor v Micallef & Anor; Arrowsmith v Micallef & Ors* [2012] QSC 239
PARTIES:	**ADRIANO ALFREDO MICALLEF and SILVANO FRANK MICALLEF** (first applicant) and **LAURETTA CANDIDA DUMESNY** (second applicant) **v** **ROBERT JAMES MICALLEF and CHEVONNE ELIZABETH ARROWSMITH (as executors of the will of ALLAN JAMES DUMESNY deceased)** (respondents) **CHEVONNE ELIZABETH ARROWSMITH (as executor of the estate of ALLAN JAMES DUMESNY deceased)** (applicant) **v** **ROBERT JAMES MICALLEF (as executor of the estate of ALLAN JAMES DUMESNY deceased)** (first respondent) and **LAURETTA CANDIDA DUMESNY** (second respondent) and **MATTHEW DUMESNY** (third respondent)
FILE NOS:	5922 of 2012 6302 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	3 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2012
JUDGE:	Applegarth J
ORDER:	In proceeding 6302 of 2012: **The application is dismissed.** In proceeding 5922 of 2012:

That the respondent executors of the estate of the late Allan James Dumesny be directed pursuant to Section 8 *Trusts Act 1973* that, in the premises of:-

(a) the "renunciation" of a 1/5th share of residue in the estate by each of Adriano Alfredo Micallef, Silvano Frank Micallef and Robert James Micallef, in favour of Lauretta Candida Dumesny; and,

(b) the orders made by the Honourable Justice Daubney on 6 February 2012 giving effect to the terms of settlement;

the estate should be distributed on the basis that Lauretta Candida Dumesny receives the further provision as ordered as well as 3/5ths of residue; and Chevonne Elizabeth Arrowsmith and Matthew James Dumesny each receives 1/5th of residue.

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – Administration generally – Queensland – where beneficiaries under a will purported to "renounce" their residual interests in the estate in favour of another identified beneficiary – where application for directions concerning the effect of those "renunciations" – whether the renunciations operated as "disclaimers" such that the beneficiaries' interests return to the estate's residue

Property Law Act 1974 (Qld), s 199
Succession Act 1981 (Qld), s 6
Trusts Act 1973 (Qld), ss 8, 96

Commissioner of Stamp Duties v Livingstone (1964) 112 CLR 12, cited
Comptroller of Stamps (Vic) v Howard-Smith (1936) 54 CLR 614, cited
Karam v Australia and New Zealand Banking Group Ltd [2001] NSWSC 709, applied
Kennon v Spry (2008) 238 CLR 366, cited
Norman v Federal Commissioner of Taxation (1963) 109 CLR 9, cited
Official Receiver in Bankruptcy v Schultz (1990) 170 CLR 306, cited
Probert v Commissioner of State Taxation (SA) (1998) 72 SASR 48, cited
Re Faulkner [1999] 2 Qd R 49, cited
Re Paradise Motor Co Ltd [1968] 2 All ER 625 at 632, cited
Re Scott (deceased) [1975] 2 All ER 1033 at 1045, cited

COUNSEL: D J Morgan for the first applicants in 5922 of 2012
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M J Liddy for the respondent Robert James Micallef as executor of the estate of Allan James Dumesny in both 5922 of 2012 and 6302 of 2012
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[1] The issue of substance in this matter is whether three brothers effectively "renounced" each of their one-fifth interests in the residue of their father's estate in favour of their mother (as they clearly intended to do), or whether, as their step-sister claims, their "renunciation" in favour of their mother amounted to a "disclaimer" of their interests. If their step-sister is correct, then their three-fifth interests were disclaimed, and fell back into the residue of the estate, to be shared equally by their step-sister and step-brother.

Background

[2] Allan James Dumesny ("the testator") died on 19 September 2010. He was survived by:

(a) Lauretta Candida Dumesny, his widow from his second marriage;

(b) two children from his first marriage:

(i) Chevonne Elizabeth Dumesny; and

(ii) Matthew Dumesny;

(c) three step-sons from his second marriage (Lauretta's sons):

(i) Robert James Micallef;

(ii) Silvano Frank Micallef; and

(iii) Adriano Alfredo Micallef.

It is convenient to refer to these parties by their first names.

[3] The testator's will appointed Chevonne and Robert as executors. Probate was granted on 20 January 2011. In simple terms, the will left a life interest to the testator's widow, Lauretta, and upon her death "the rest residue and remainder" of his estate was to be divided equally between his children and step-children,

Chevonne, Matthew, Robert, Silvano and Adriano. In other words, each had a one-fifth interest as residuary beneficiaries.

[4] On 16 June 2011 Lauretta filed a family provision application in the Supreme Court. Chevonne and Robert, in their capacity as executors, engaged Murdoch Lawyers to act on their behalf. Robert made his intentions and the instructions he had received from his brothers, Silvano and Adriano, clear. They considered that their shares of the estate should go to their mother. Robert says that he received advice from Murdoch Lawyers that the best way to achieve the outcome whereby his mother received the three-fifths share that he and his brothers were to receive was to renounce their shares, as it would save the lengthy process of receiving their entitlements then passing them on to their mother.

[5] On 15 December 2011 Murdoch Lawyers wrote letters on behalf of the estate to Adriano and Silvano. Each letter noted Robert's instructions that they intended to renounce their interests and observed, "It may be the case that you intend to renounce this interest in favour of your mother, Lauretta Dumesny." The letter noted that the addressee was entitled to seek independent legal advice with respect to the matter, but stated:

> "If you do not intend to seek legal advice and do wish to renounce your interest as a beneficiary we ask that you please sign, date and return the duplicate of this letter enclosed. Furthermore, we will also require details of any person/s who may benefit from any renunciation."

Adriano completed the letter in the form provided by identifying that he wished to renounce his interest in favour of his mother. Silvano did the same thing. In the case of Adriano, the relevant form of words was as follows:

> "I, Adriano Alfrdo (sic) Micallef of 80 Gum Street, Warner, hereby renounce my interest as a residuary beneficiary under the Will of Allan James Dumesny dated 23 July 2002 in favour of Lauretta Dumesny."

Silvano signed a document in the same terms, save for his name.

[6] The clear intent of these documents was to favour their mother.

[7] Robert did not execute a similar document. In an affidavit which was filed in the family provision proceedings on 12 December 2011 he referred to the fact that he and his brothers Silvano and Adriano wished to renounce their interests as residuary beneficiaries of the estate. As he explained in a recent affidavit, the 12 December 2011 affidavit was signed by him after a lengthy meeting at Murdoch Lawyers that day when he was in a hurry to get back to work as he had to attend to his employees. The meeting had been a long one, occupied by questions posed by Chevonne. He did not read the affidavit carefully and thought that it reflected his past discussions with Murdoch Lawyers. He did not realise at the time that the word "renounce" in paragraph 5 of that affidavit could be interpreted as meaning that he and his brothers wished to completely relinquish their share of the estate with the effect that the other residuary beneficiaries, Chevonne and Matthew, would receive their shares. In any event, he specifically informed Murdoch Lawyers and Chevonne at a meeting on 12 December 2011 that he had not given up his share of the estate to increase Chevonne's share. This statement was made in response to

Chevonne saying that she wanted the three-fifths of the estate left to Robert and his brothers as they "didn't seem interested in receiving [their] entitlement". I am satisfied that Robert, like his brothers Adriano and Silvano, made clear to Murdoch Lawyers and Chevonne that he wished to renounce his interest as a residuary beneficiary of the estate in favour of his mother. So much was made clear to Chevonne. As she acknowledged under cross-examination on 24 July 2012, she was in no doubt that her step-brothers were intending to benefit their mother. She also understood that this renunciation or assignment took place before the mediation that occurred on 22 December 2011.

[8] The mediation on 22 December 2011, at which Lauretta and the executors were legally represented, resolved the family provision application. Terms of Settlement were executed. The Terms of Settlement commenced:

> "1. Further and better provision be made for the Applicant, Lauretta Candida Dumesny, in lieu of the provision made for her in the Last Will of the Deceased at 23 July 2002, on the following terms: …".

Clause 1 went on to provide for certain interests in the estate to be transferred to Lauretta and also for Lauretta to transfer a share in a company which owned certain real estate. The terms went on to deal with other matters concerning a secured creditor, Suncorp, household contents and items of personalty. Clauses 6 and 7 of the Terms of Settlement provided:

> "6. On the performance of these Terms of Settlement each of the Applicant and the Respondents release the other from all claims, actions or demands howsoever arising in respect of the Estate of the Deceased.
>
> 7. Each of the parties will do all things necessary and sign all documents necessary to give effect to these Terms of Settlement, including the making of final orders in the Supreme Court of Queensland at Brisbane."

[9] An application for final orders to give effect to the Terms of Settlement was filed on 27 January 2012. The application was heard on 6 February 2012, and Daubney J made orders that further provision be made for Lauretta's proper maintenance and support from the estate in accordance with the Terms of Settlement signed by the parties on 22 December 2011. No party sought to agitate before Daubney J any issue in relation to the effect of the renunciations, or to argue that the Terms of Settlement were entered into by mistake or should not be given effect to for some other reason. The Terms of Settlement did not refer to the "renunciations".

[10] Understandably, Adriano and Silvano assumed that their renunciations in favour of their mother would be given effect to in accordance with their terms. Their solicitors corresponded with Murdoch Lawyers about that topic. Murdoch Lawyers asserted that the renunciations "disposed of their interests". Adriano and Silvano's solicitors contested this proposition and sought an explanation. On 30 January 2012 Murdoch Lawyers advised Adriano and Silvano's solicitors that upon the sanction of the Terms of Settlement, the balance estate would be distributed to Chevonne and Matthew.

[11] On 31 January 2012 Adriano and Silvano's solicitors sought clarification that the residuary estate would be distributed three-fifths to Lauretta, one-fifth to Chevonne and one-fifth to Matthew. There was no response. On 1 February 2012 Adriano and Silvano's solicitors again wrote to Murdoch Lawyers noting the lack of response, and recording their understanding that the co-executor, Robert, wished the residue of the estate, after the Terms of Settlement had been complied with, to be distributed three-fifths to Lauretta, one-fifth to Chevonne and one-fifth to Matthew. There was no response.

[12] The matter remained unresolved. The executors did not bring an application for directions. Murdoch Lawyers, apparently acting on the instructions of Chevonne, wrote to Robert on 10 February 2012, foreshadowing an application to remove him as executor if he was not prepared to renounce his executorship voluntarily. No such application was brought.

[13] The executors having not brought an application for directions or other orders in relation to the administration of the estate and, in particular, the effect of the "renunciations", it fell to Adriano and Silvano to do so. By an application filed 5 July 2012 they sought the following orders:

> "1. That the respondent executors of the estate of the late Allan James Dumesny be directed pursuant to Section 8 *Trusts Act 1973* that, in the premises of:-
>
> (a) the 'renunciation' of a 1/5th share of residue of (sic) in the estate by each of Adriano Alfredo Micallef, Silvano Frank Micallef and Robert James Micallef, in favour of Lauretta Candida Dumesny; and,
>
> (b) the orders made by Hon. Justice Daubney on 6 February 2012 giving effect to the terms of settlement;
>
> the estate should be distributed on the basis that Lauretta Candida Dumesny receives the further provision as ordered as well as the 3/5ths of residue assigned by the applicants and Robert James Micallef; and Chevonne Elizabeth Arrowsmith and Matthew James Dumesny each receive 1/5th of residue.
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> 2. An order that Chevonne Elizabeth Arrowsmith pay the applicants' costs of and incidental to the application personally, and not have recourse to the estate to indemnify herself."

Chevonne's response to the application

[14] Chevonne engaged new solicitors, de Groots, to act for her in her capacity as one of the executors of the will. On 16 July 2012 her solicitors wrote to Adriano and Silvano's solicitors and asserted that Adriano and Silvano:

> "... do not have standing to bring the application they have made and that it is misconceived. They renounced their interests as beneficiaries in the residue in writing in December 2011. Prior to then, as the residuary beneficiaries, they had no more than a right to require the due administration of the estate. When they 'renounced'

> their interest as residuary beneficiaries, they ceased to have even that."

The letter went on to assert that the "renunciations" in the letters of 15 December 2011 "have the effect of disclaimers of their interests in the residue" and prevented any share of the residue vesting in them at all. The letter recorded Chevonne's view that the renunciations "are effective disclaimers of your clients' interests in the residue of the estate" and that they had the effect of casting the same in residue.

[15] This position was pressed in written submissions upon the hearing of Adriano and Silvano's application on 24 July 2012. In summary, Chevonne submitted that:

(a) Adriano and Silvano had no standing to bring the application because they had no interest in the estate;

(b) each "renunciation" was in fact a disclaimer by which the interest that Adriano and Silvano had in the estate as residuary beneficiaries fell into the residue "when they disclaimed that interest";

(c) the renunciations, which were characterised by Chevonne as a "disclaimer", did not operate as an assignment as this would impermissibly re-write the will of the deceased.

She also submitted that even if the renunciations operated so that Lauretta should have the benefit of her son's shares in the residue, Lauretta negotiated away that right in the family provision application mediation and entered into Terms of Settlement by which she granted a discharge and release regarding any other claims she may have on the estate.

The joinder of Lauretta

[16] Lauretta applied to be added as a party to the proceeding brought by Adriano and Silvano (5922 of 2012), and on 24 July 2012 I ordered that Lauretta be joined as a further applicant in that proceeding.

The standing issue

[17] A residuary beneficiary in an unadministered estate has a right to due administration of the estate.[1]

[18] Chevonne's contention that Adriano and Silvano did not have standing to bring their application rests on the proposition that they do not have any interest in the estate. That submission depends primarily upon my acceptance of Chevonne's substantive submission that their renunciation amounted to a disclaimer and that, where an interest is disclaimed, it is as if it had never been acquired by the disclaiming party.[2] Adriano and Silvano were said to rely on the "disclaimer" in bringing the application, and Chevonne submitted that the "disclaimer precludes them from seeking relief" as they have no interest in the estate. I am unable to accept this argument. It depends upon the success of Chevonne's substantive argument that the

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1 *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 314; *Commissioner of Stamp Duties v Livingstone* (1964) 112 CLR 12 at 17; *Kennon v Spry* (2008) 238 CLR 366 at [75].

2 *Probert v Commissioner of State Taxation (SA)* (1998) 72 SASR 48.

renunciation amounted to a disclaimer and, for reasons to be given, I do not accept this. On the standing issue, Adriano and Silvano have an interest in arguing that their renunciation did not amount to a disclaimer.

[19] Adriano and Silvano argued that their "renunciation" never amounted to an unconditional disclaimer, but expressly stated that the "renunciation" was in favour of Lauretta. They adopted the submissions of Lauretta that the "renunciation" was in fact an assignment. For reasons to be given, I favour this view.

[20] Chevonne argued that as assignors Adriano and Silvano had no interest which gave them standing, and that the proper party to enforce the assignment was the assignee, Lauretta. Obviously, Lauretta has an interest, and was properly joined as a party. However, I consider that the applicant brothers who purported to assign their share in the estate to their mother also have an interest in seeing that the executors give effect to the assignment and properly administer the estate. In circumstances in which Chevonne has refused to recognise and give effect to their renunciations, which were clearly intended to favour the applicants' mother, and in her submissions argued that Adriano and Silvano's interests fell into the residue by way of a "disclaimer" (thereby benefitting her and her brother), Adriano and Silvano had a sufficient interest in the matter to seek relief. Insofar as the application is brought pursuant to s 8 of the *Trusts Act* 1973 (Qld) I find that they had the requisite interest to apply pursuant to that section. The section is to be widely construed.[3] If I had reached the conclusion that the applicants did not have standing to bring an application under s 8 then I would have entertained an application by them for appropriate declaratory relief given their interest in the matter.

The point of substance – the effect of the "renunciations"

[21] Chevonne submits that the "renunciations" have the effect of disclaimers of the interests of Adriano, Silvano and Robert as residuary beneficiaries of the estate. She submits that "renunciation" is a word which sits uneasily in this context, and that "disclaimer" would be the more usual term. However, the effect is said to be the same. A disclaimer is a refusal to accept that an interest has been bequeathed to the disclaiming party. Where an interest is disclaimed, it is as if it had never been acquired by the disclaiming party.[4] As Danckwerts LJ stated in *Re Paradise Motor Co Ltd*:

> "… a disclaimer operates by way of avoidance, and not by way of disposition".[5]

To like effect is a statement in *Re Scott (deceased)*:

> "The effect of a disclaimer is not to throw the property on to the scrap heap, but to refuse to accept it in the first place, leaving the ownership with the people or the interest, or the estate, or whatever, from which it was derived in the first place".[6]

[22] If Chevonne's characterisation of each "renunciation" as a disclaimer is correct, then the interests of Adriano, Silvano and Robert fell into the residue, to be shared equally by Chevonne and Matthew.

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3 *Re Faulkner* [1999] 2 Qd R 49 at 53, following *Re Whitehouse* [1982] Qd R 196.
4 *Probert v Commissioner of State Taxation* (supra) at 52-55.
5 [1968] 2 All ER 625 at 632.
6 [1975] 2 All ER 1033 at 1045.

[23] I am unable to accept that each "renunciation" should be properly characterised as a disclaimer. As Adriano and Silvano submit, renunciation is a term of art which in modern practice generally refers to the renunciation of an entitlement to seek a grant of representation, either probate or administration. That is the sense in which the term is used in rules 603(4) and 610(5) of the *Uniform Civil Procedure Rules* 1999 and in other contexts in succession law.

[24] When the word "renounce" was used in the letters signed by Adriano and Silvano dated 15 December 2011, and when it was used by Robert in his discussions with Murdoch Lawyers, it was not being used in its technical sense. The letter drafted by Murdoch Lawyers dated 15 December 2011 contemplated that the relevant interest as a beneficiary might be renounced in favour of another named party. It contemplated that the beneficiaries might "intend to renounce [their] interest in favour of [their] mother, Lauretta Dumesny". The section of the letter that was completed by Adriano and Silvano was drafted in a form which provided for a direction for each of them to "renounce [their] interest as a residuary beneficiary under the will of Allan James Dumesny dated 23 July 2002, in favour of ... (name/s to be inserted)." The insertion of the name Lauretta Dumesny and the signing of this document made it obvious that the beneficiary wished his mother to have that interest. There was no indication that he intended to relinquish unconditionally an interest under the will.

[25] Although Robert did not sign a similar document, his intention to "renounce" his interest in favour of his mother could not be interpreted as wishing to completely relinquish his share in the estate. On the contrary, the evidence is that he and his brothers wanted their shares in the estate to go to their mother. This wish was communicated orally to Murdoch Lawyers, and prompted Murdoch Lawyers to write the letter dated 15 December 2011 to Adriano and Silvano. I accept Robert's evidence concerning the circumstances under which he signed the affidavit that was sworn on 12 December 2011, that at all material times he intended his mother to receive the one-fifth interest and that he communicated this intention to Murdoch Lawyers and to his fellow executor, Chevonne.

[26] Counsel for Adriano and Silvano advanced submissions, which I accept, that a residuary beneficiary may assign his or her interest in an unadministered estate. The right to due administration that a residuary beneficiary holds is an equitable chose in action.[7] Such a right is capable of being assigned or transferred.[8]

[27] The fact that the letters of 15 December 2011 used the word "renounce" rather than "assign" is not to the point. The characterisation of these dealings is a matter of substance, not form.[9] Each of the brothers intended to assign his interest to his mother. Each of the letters signed by Adriano or Silvano constituted written notice to the executors and complied with the requirements for the assignment of an equitable chose in action under s 199 of the *Property Law Act* 1974 (Qld). Robert did not sign a similar letter. However, it is clear that he also intended to assign his interest and his interest was assigned in equity.[10]

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7 *Kennon v Spry* (supra) at 393-394 [75] per French CJ.

8 *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614; Ford & Lee *The Law of Trusts* [1.8510]; Parry & Kerridge *The Law of Succession* (2009, 12th ed) at [24-33].

9 Dal Pont *Equity and Trusts in Australia* 2011 5th ed at [3.45].

10 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 28; *Comptroller of Stamps (Vic) v Howard-Smith* (supra) at 619-620.

[28] I conclude that Adriano, Silvano and Robert each assigned his interest to his mother, and that each assignment was effective prior to the mediation. The executors were on notice of the assignment. Chevonne acknowledged this under cross-examination.

[29] Chevonne submitted that the so-called "disclaimer" does not operate as an "assignment" as this would "impermissibly re-write the will of the deceased". I do not agree. The will was not re-written. It was unchanged. Instead, three beneficiaries assigned their interest.

[30] Each of them had a direct or indirect interest in the property and a right to due administration of the trust upon which the executors held the property. They had standing to challenge the conduct of Chevonne in failing to administer the estate in accordance with the directions given by them that their three-fifths share of the residue had been renounced in favour of their mother.

[31] In her oral evidence on 24 July 2012 Chevonne accepted that her step-brothers intended to benefit their mother and that the renunciation or assignment took place before the mediation. She acknowledged under cross-examination, and confirmed in later evidence, that by the time of the mediation their three-fifths share had already gone to their mother. Despite this Chevonne, through her solicitors prior to the hearing of the application in proceeding 5922 of 2012 and in her Counsel's written submissions contended that her step-brothers had disclaimed their interests, so that their three-fifth shares fell into the residue to be shared equally by Chevonne and Matthew. I reject that characterisation of the "renunciations".

Chevonne's release argument

[32] Chevonne's final substantial argument is that even if the renunciations operate as her step-brothers contend, so that Lauretta should have the benefit of their shares of the residue, Lauretta "negotiated away that right in the family provision application mediation". Lauretta is said to have negotiated away that right and to have entered into terms of settlement whereby she would receive certain property in compromise of that litigation. She is also said to have granted a discharge and release regarding any other claims she may have on the estate.

[33] The first matter to observe is that Adriano and Silvano were not parties to the Terms of Settlement, and Robert signed them in his capacity as an executor, not as a residuary beneficiary.

[34] As to the point of substance, the release contained in cl 6 of the Terms of Settlement falls to be construed in accordance with the principles stated by Santow J (as his Honour then was) in *Karam v Australia and New Zealand Banking Group Ltd*.[11] Santow J stated the following propositions:

> "The principles applicable to construing released or purported releases can conveniently be set out in a series of propositions:
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> (1) In construing a release, here embodied in a letter of variation to the terms of lending, the Court should ascribe to the release the meaning that the release would convey to a reasonable person having all the background knowledge which would reasonably

[11] [2001] NSWSC 709 at [46] followed in *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114.

have been available to the parties at the time that they signed the document containing the release: ICS v West Bromwich BS [1998] 1 All ER 98 per Lord Hoffman at 114.

(2) In order for the Court to give effect to what in an objective sense the contracting parties intended, it is clear that a party may agree to release claims or rights of which it is unaware and of which it could not be aware, *provided* clear language is used to make plain that that is its intention : see Salkeld v Vernon (1758) 1 Eden 64, 28 ER 608 per Lord Keeper Henley.

(3) Consistent with this emphasis on intention, general words in a release are limited to what was specifically in the contemplation of the parties at the time when the release was given: Grant v John Grant and Sons (1954) 91 CLR 112 per Dixon CJ, Fullagar, Kitto and Taylor JJ; Iletrait Pty Ltd v McInnes (NSWCA, 17 April 1997, unreported) per Priestley JA with whom Grove AJA and Handley JA agreed).

(4) Although there are no special rules of construction, such as a contra proferentem requirement, in the absence of clear language courts have been slow to infer that a party intended to surrender rights and claims of which it was unaware and could not have been aware: BCCL v Ali [2001] 1 All ER 961 at 966 per Lord Bingham, (contrast Lord Nicholls in BCCL v Ali (supra) at 971-972 who was of the view that for the purposes of construction a general release is simply a term in the contract).

(5) Although each release should be considered against its own matrix of facts, an example of this line of 'cautionary principle' (Lord Bingham's phrase) is the frequently cited judgment of the High Court of Australia in Grant v John Grant & Sons Pty Ltd (supra), where Dixon CJ, Fullagar, Kitto and Taylor JJ (at 125) referred with approval to the proposition put by Sir Frederick Pollock in his 'Principles of Contract' (Stevens: London 1950) 13th ed at 412, that 'in equity a release shall not be construed as applying to something of which the party executing it was ignorant.'

(6) Despite the fact that, strictly speaking, releases are subject to no special rules of construction, a transaction in which one party agrees in general terms to release another form any claims upon it does have special features: BCCL v Ali at 984 per Lord Hoffman.

(7) In such circumstances it may well be appropriate to imply an obligation upon the beneficiary of such a release to disclose the existence of claims of which it actually knows and which it also realises might not be known to the other party: BCCL v Ali at 984 per Lord Hoffman, for such an obligation is consistent with a concern to protect parties from sharp practice, by preventing

advantage being taken of the known ignorance of the conceding party; BCCL v Ali per Lord Nicholls at 973. (The Bank made no such disclosure here.)

(8) Most recently in this Court in Amaca Pty Ltd formerly known as James Hardie & Coy Pty Ltd v CSR Ltd [2001] NSWSC 324, Bergin J adopted the principles of construction broadly as outlined above, including the 'cautionary principle' and taking into account the purpose of the contract and the circumstances in which made."

[35] Applying these principles, the release related to the resolution of the family provision claim. It should not be construed as releasing the executors from a claim that might subsequently arise in relation to the due administration of the estate, such as a breach of trust or maladministration. The evidence before me indicates that the parties to the settlement understood prior to the mediation occurring that Adriano, Silvano and Robert had renounced their interests in favour of their mother and that an assignment of their interests in favour of their mother had taken place before the mediation. I granted leave at the start of the hearing on 24 July 2012 for Chevonne to file by leave an affidavit sworn by her on 23 July 2012 which confirmed the contents of a statement of facts filed in proceeding 6302 of 2012. Subparagraph 18(a) of this statement of facts contended that Chevonne, as executor, agreed to the terms of settlement "on the basis that Robert, Silvano and Adriano had disclaimed their interest as residuary beneficiaries". The oral evidence given by Chevonne on 24 July 2012 does not support this if "disclaimed" is used in its technical sense of a disclaimer, the effect of which was to leave the ownership of Adriano's, Silvano's and Robert's three-fifths share in the residue to be shared equally by Chevonne and Matthew, rather than assigned to their mother.

[36] The parties to the mediation embarked upon it on the basis that the three brothers had assigned their interest to their mother and the mediation was concerned with resolution of Lauretta's family provision claim, not the issue which I have been required to determine and which only developed into a dispute after the mediation. In the circumstances, I do not construe cl 6 of the Terms of Settlement as precluding Lauretta from joining in the application brought by Adriano and Silvano. As noted, the release does not preclude them from seeking such relief.

[37] Incidentally, if cl 6 of the Terms of Settlement was to be construed as widely as Chevonne contends then it would preclude her in her capacity as executor from making the contentions that she has and from commencing proceeding 6302 of 2012.

[38] I decline to construe cl 6 as releasing Chevonne or Robert in their capacities as executors of the estate from claims, actions or demands that seek to determine the effect of the "renunciations" and give directions for the administration of the estate in accordance with those findings.

[39] Significantly, the Terms of Settlement do not purport to address the effect of the renunciations. The operative clause of the Terms of Settlement made further and better provision for Lauretta in lieu of the provision made "for her" in the will. Specific items of property were to be transferred to Lauretta. This had consequences in respect of the property that constituted the residue. However, it did

not purport to address entitlements to the residue. The entitlements of the parties to the residue had been resolved prior to the mediation, with the three brothers renouncing their three-fifth shares in favour of their mother, and Chevonne and Matthew each retaining a one-fifth share.

[40] Finally, I note that cl 6 only operates as a release on the performance of the Terms of Settlement. There is no evidence that the Terms of Settlement have been performed, and the position taken by Chevonne suggests that they have not been. It is unnecessary to address this aspect, since I do not accept Chevonne's argument concerning the effect of cl 6.

[41] In summary, cl 6 of the Terms of Settlement does not bind individuals who are not parties to the Terms of Settlement. It did not preclude Adriano and Silvano from bringing the application which they did in proceeding 5922 of 2012. It did not preclude Lauretta from joining that proceeding and contending that the renunciations had the effect which her sons clearly intended, namely to favour their mother.

Conclusion – proceeding 5922 of 2012

[42] The applicants have persuaded me that I should make directions essentially in the terms sought in paragraph 1 of the originating application filed in proceeding 5922 of 2012.

Costs in that application

[43] Adriano and Silvano sought an order that Chevonne pay their costs of and incidental to the application personally, and not have recourse to the estate to indemnify herself. Upon the hearing, counsel for Adriano and Silvano sought their costs on an indemnity basis, and noted that the argument was whether those costs should be paid by anyone other than the estate. Given that they contended that they had validly assigned their interest to their mother, they could not contend that as a result of action by another party their share of residue has been diminished by such an order.

[44] In proceeding 5922 of 2012 Chevonne sought an order permitting to have her costs from the estate on an indemnity basis and that the applicants (Adriano and Silvano) pay the estate's costs so incurred. This submission was made on the basis that the application was unsustainable and misconceived and that the applicants did not discontinue their application in the face of correspondence from Chevonne's solicitors dated 16 and 20 July 2012.

[45] The application was not unsustainable or misconceived. It was properly brought, supported by Lauretta who was joined as an applicant to it and supported by Robert in his capacity as a beneficiary.

[46] Despite her lack of success in resisting the application in proceeding 5922 of 2012, the starting point for a consideration of costs is Rule 700 of the *Uniform Civil Procedure Rules* 1999. A party who sues or is sued as trustee is entitled to have costs of the proceedings, that are not paid by someone else, paid out of the fund held by the trust unless the Court orders otherwise. Rule 704 provides that if a party who sues or is sued as a trustee is entitled to be paid costs out of a fund held by the

trustee, a costs assessor must assess the costs on the indemnity basis, unless the Court orders otherwise.

[47] Chevonne submits that she has acted as executor of the estate and has not engaged in conduct which would suggest that she ought not to have her costs paid from the funds of the estate. There was a genuine dispute as to the distribution of the residue.

[48] Lauretta argues that the entitlement of an executor to indemnity only arises where expenses are reasonably incurred and that Chevonne's opposition to the application in proceeding 5922 of 2012 and her own application in proceeding 6302 of 2012 in relation to the same dispute lacked merit so that she should be refused any costs. Proceeding 6302 of 2012 was said to be an application brought by Chevonne for her own pecuniary benefit, not merely in the discharge of her duties as executor. In failing to secure the pecuniary benefit that she sought, she should pay the costs of the failed attempt.

[49] There is much to support this submission. However, the matter comes with its complexities, including the circumstances in which Chevonne and Robert were unable or unwilling to agree on the instructions to be given to Murdoch Lawyers. It would have been appropriate for the executors to agree to bring an application for directions rather than have that task fall to Adriano and Silvano. Subsequently, Chevonne brought her own application for directions which addressed the same matters of substance. She has been unsuccessful in opposing Adriano and Silvano's application and the resolution of that application makes it unnecessary to further prosecute proceeding 6302 of 2012.

[50] It may be said that Chevonne's contention that her step-brothers had disclaimed their interests, such that their interests fell into the residue to be divided equally between Chevonne and Matthew, was without merit. Still, it may have been necessary for the executors to bring an application for directions, if only to achieve a determination of the matter to facilitate the due administration of the estate.

[51] The untenable nature of the argument that the renunciations operated as a disclaimer, given their terms and the concession made by Chevonne under cross-examination, disinclines me to make an order that Chevonne's costs should be paid out of the estate, let alone paid on an indemnity basis. However, I will hear the parties on the issue of costs once they have had an opportunity to consider my reasons.

Proceeding 6302 of 2012

[52] In her originating application Chevonne sought directions concerning the administration of the estate pursuant to s 96 of the *Trusts Act* 1973 and directions pursuant to s 96 of the *Trusts Act* 1973 and/or s 6 of the *Succession Act* 1981 that:

> "(a) the estate of Allan James Dumesny be administered by the distribution of the residue of the estate to the extent of one half to the Applicant and one half to the Third Respondent;
>
> (b) the Applicant has recourse to estate funds to pay her costs of and incidental to this Application; and

(c) the Applicant have recourse to estate funds to pay her costs of and incidental to the Originating Application filed on 5 July 2012 bearing proceeding number 5922 of 2012."

The respondents to the application were Robert as first respondent, Lauretta as second respondent and Matthew as third respondent. The application sought orders that the costs of the application incurred by the estate be paid by Robert and Lauretta. It also sought an order that Robert not be entitled to payment of his costs of and incidental to the application from the estate.

[53] The application was made returnable on the same day as the application in proceeding 5922 of 2012. Chevonne argued that her application should be the subject of directions and then a hearing in the Civil List, and that it should be permitted the opportunity for resolution at mediation. Draft orders proposed by Chevonne included provision for the filing of material, disclosure and an order for mediation. The other parties (save for Matthew who by his solicitor's letter indicated that he supported the orders sought by Chevonne in both applications) opposed the making of such orders.

[54] My decision in proceeding 5922 of 2012 makes proceeding 6302 of 2012 redundant since both proceedings address the same issue of substance. I was not persuaded that the issues justified directions of the kind sought by Chevonne in proceeding 6302 of 2012. The matter was an appropriate one for determination in proceeding 5922 of 2012, turning as it did upon the proper construction of the renunciations and legal argument concerning the effect of cl 6 of the Terms of Settlement. Had proceeding 5922 of 2012 not been brought I would have been disinclined to make all of the directions sought by Chevonne. The appropriate course is to dismiss proceeding 6302 of 2012. I will hear the parties in relation to the question of costs.

[55] Finally, I should observe that no party brought an application to set aside the Terms of Settlement or to set aside the order made by Daubney J giving effect to them. Some evidence was given about the understanding which Lauretta, Chevonne and Robert had concerning the effect of the Terms of Settlement. Chevonne gave evidence in support of an application for an adjournment. That application for an adjournment came late in the day and after lengthy argument. I declined to grant the adjournment. If Chevonne or any other party wished to contend that the Terms of Settlement were vitiated by mistake or liable to be set aside on some other ground then an application should have been brought before the hearing and determination of proceeding 5922 of 2012. My determination of that application was not assisted by evidence concerning the subjective understandings of the parties about the effect of the settlement. s

[56] One thing is clear. Adriano, Silvano and Robert "renounced" their interests in favour of their mother prior to the mediation. This was clear from the terms in which they expressed their intention. Chevonne's oral evidence established that she understood that the renunciation or assignment of their interests took place before the mediation such that their three-fifths share had been transferred to their mother before the mediation. The respective intentions of the three brothers were clear and known to the executors prior to the mediation. The contention that the "renunciations" had the effect of disclaimers was without merit, given the terms of the renunciations and the communication of the brothers' intentions to the executors and the then-solicitors for the executors. The estate should be distributed on the

basis that Lauretta receives the further provision, as ordered by Daubney J on 6 February 2012 giving effect to the Terms of Settlement, as well as three-fifths of the residue, and that Chevonne and Matthew each receives one-fifth of the residue.