SUPREME COURT OF QUEENSLAND

CITATION:	*Catelan v Herceg* [2012] QSC 320
PARTIES:	**LINDA MARIA CATELAN** (applicant) **v** **DANNY HERCEG** (as one of the executors of the will of RAYMOND DANIEL CATELAN (deceased)) (respondent)
FILE NO:	BS 3752 of 2012
DIVISION:	Trial
DELIVERED ON:	25 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2012
JUDGE:	de Jersey CJ
ORDER:	**1. The application for summary judgment is dismissed;** **2. The indemnity costs of both parties be paid from the estate.**
CATCHWORDS:	PROCEDURE — SUPREME COURT PROCEDURE — QUEENSLAND — PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS — SUMMARY JUDGMENT — where the wife filed an application for an order under s 41 of the *Succession Act* 1981 for further provision from estate of deceased, her husband – where estate of substantial value – where wife may have to draw on capital to maintain standard of living – where binding financial agreements entered by wife and the deceased regulating what wife was to receive upon the death of the deceased – where deceased's will provided only for the wife to receive furniture, artworks and the contents of a house and the sum of money agreed in first financial agreement – where first agreement provided wife was to receive a "settlement sum" upon separation from deceased or death of deceased – where over the course of the relationship the wife received from the deceased substantially more than the settlement sum in the first financial agreement – where wife waived entitlement to "settlement sum" in the second agreement – where second agreement envisaged the possibility of the deceased leaving further gifts to the wife under a new will – where a new will was drafted but never finalised – where the executor applied for summary dismissal of the application for further provision from the estate –

whether summary judgment should be granted

Succession Act 1981, s 41
Uniform Civil Procedure Rules 1999, r 658

Bosch v Perpetual Trustee Co [1938] AC 463, cited
Frey v Frey [2009] QSC 43, cited
Hills v Chalk [2009] 1 Qd R 409; [2008] QCA 159, cited
Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40, applied
Vigolo v Bostin (2005) 221 CLR 191; [2005] HCA 11, cited
White v Barron (1980) 144 CLR 431; [1980] HCA 14, cited

COUNSEL: G A Thompson SC, with A Fraser, for the applicant Catelan
P Dunning SC, with J Otto, for the respondent Herceg

SOLICITORS: de Groots for the applicant Catelan
Mullins Lawyers for the respondent Herceg

[1] The applicant is a 57 year old woman who was married to the deceased on 24 June 2007. They had commenced a relationship a year earlier. In May 2008 the deceased was diagnosed with a serious illness from which he died on 24 July 2011, aged 61 years. The applicant and the deceased enjoyed a close relationship. She cared for him, in the sense of nursing him, up to his death. On the evidence before me, they lived comfortably while not extravagantly.

[2] The deceased was a successful businessman. The net value of his estate, on the available evidence, is at least $27 million, but probably much more than that, allowing for the value of some shares. Page 69 of the exhibits to the affidavit of N Stratton-Funk suggests a value, as at 31 August 2010, of as much as $58.6 million.

[3] The deceased was survived by the applicant his wife, his stepdaughter – the applicant's natural daughter Victoria (now 24 years old), and his two natural daughters Michelle aged 41 and Leanne aged 38.

[4] Under the deceased's last will dated 28 April 2010, he gave the applicant the furniture, artworks and the contents of his house at Hamilton, and a particular sum of money, to which I will come. Apart from an apparently small gift to his stepdaughter, the rest of the estate went to his daughters or is subject to discretionary trusts of which they and his granddaughters are beneficiaries.

[5] The sum of money to which the applicant was entitled, in addition to the furniture etc, was money he agreed to leave her under his will pursuant to a prenuptial agreement dated 15 June 2007. That provided that upon the death of the deceased, the applicant was to receive the greater of $2 million or the "settlement sum" which would have been payable to her had she and the deceased separated (cl 1.1(b)).

[6] Accordingly, the deceased's intent, when executing his last will, was that the applicant should receive at least $2 million.

[7] That prenuptial agreement was however revoked, by a later financial agreement executed on 18 April 2011, which was three months before the death of the deceased.

[8] By then the applicant and the deceased had been married for a period approaching four years, the deceased's health had substantially deteriorated, the applicant had been rendering substantial care, and there is evidence that he wished to leave her his interest in companies which ran a water bottling business (utilizing the applicant's separately owned real property) and a sand and gravel business – they would generate ongoing income for her.

[9] There is evidence that during the negotiations prior to the execution of this later financial agreement, the deceased's solicitor referred to the deceased's intention to deal with further provision for the applicant in a further will, rather than through the financial agreement, and one may infer that this at least contributed to the applicant's preparedness to forego the $2 million to which she would otherwise have been entitled under the thereby revoked pre-nuptial agreement.

[10] Under the agreement of 18 April 2011, in the event of the deceased's death prior to any separation, in view of the applicant's having received the "settlement sum" – which under Sch 3 was approximately $5 million paid to her by the deceased from 31 May 2006 – then she agreed to release the deceased's executor from any further claim on the estate (in exchange for a further amount of $100,000), "other than as provided for Linda in Ray's will" (a handwritten addition to the typed draft).

[11] The deceased gave instructions to his solicitor for the preparation of a new will. The solicitor sent a draft of that will to the deceased in late June 2011. The deceased died a month later, without having executed the further will. That draft will provided for the applicant to receive the deceased's shares in the two companies and a sum of money which, on the evidence, the deceased had instructed his solicitor to leave blank, inferentially for completion by the deceased himself presumably in handwriting.

[12] As things stand, therefore, while having received substantial benefits, approximating as much as $5 million, during the deceased's lifetime, the applicant was upon the death entitled to no more than the personalty bequeathed under the operative will.

[13] On 24 April 2012 the applicant filed an application for an order under s 41 of the *Succession Act* 1981 for further provision from the estate. On 31 August 2012, the respondent, who is the executor of the deceased's estate, filed an application for summary dismissal of the applicant's application for further provision, under r 658 of the *Uniform Civil Procedure Rules* 1999, on the basis that the applicant's application disclosed no reasonable cause of action.

[14] The respondent executor contends that the application for further provision should be dismissed summarily, because the applicant has not established a prima facie case for further provision; she has not established a prima facie case that she "has been left without adequate provision for…her proper maintenance…and (support)" (*Singer v Berghouse* (1994) 181 CLR 201, 208).

[15] The jurisdiction to dismiss summarily is to be exercised with considerable care.

[16] The executor relies substantially on the generous provision made by the deceased for the applicant during the five years of their comparatively short relationship, and the financial agreements between them. While not decisive against the application for further provision, those agreements are plainly of considerable significance (cf *Hills v Chalk* [2009] 1 Qd R 409, 428).

[17] The essence of the executor's approach may be summarized in this passage from Counsel's written submissions of 8 October 2012:

> "The deceased made secure and comfortable provision for the applicant during his lifetime. Their mutual intentions and expectations were stated in the first (prenuptial agreement) entered into shortly before their marriage, and adjusted in the second (financial agreement), entered into shortly before his death. The applicant accepted the second (financial agreement) as fair, notwithstanding she had a hope or expectation that the deceased would make additional provision for her in a new will. That he did not do so does not mean that the provision he *did* make for her was inadequate for her proper maintenance and support. It was not." (emphasis in original)

[18] In his concise oral submissions, Mr Dunning SC, who appeared for the executor, emphasized that 'adequate provision…for…proper maintenance and support" (s 41) is that which a "wise and just" testator, rather than a "fond and foolish" testator, would provide (*Bosch v Perpetual Trustee Co* [1938] AC 463, 479). He suggested that it was the deceased's "fondness" for the applicant which apparently fed his desire to give her the companies and more money. But where the deceased had been so bountiful to her, to the point where she now enjoys assets worth $4.5 million (applicant's second affidavit filed 28 September 2012, para 1), he must, it was submitted, be regarded as having made "adequate" provision for her.

[19] It goes without saying that except where inadequacy is established, courts must be astute not, by inference in these situations, effectively to diminish freedom of testamentary disposition: *Grey v Harrison* [1997] 2 VR 359, 366.

[20] But her capital assets aside, according to the applicant's affidavit, against a monthly income of $2,000, her liabilities per month are approximately $13,500. She has outstanding liabilities of $40,000 for tax and $30,000 the unpaid cost of a security system. She has no superannuation. She is unemployed, and at the age of 57 probably unemployable. She suffered a heart attack in the year 2010.

[21] It was contended the applicant should be liquidating some of her substantial capital assets so that she can meet her ongoing expenses. But it is arguable that with an estate of this magnitude, a "wise and just" testator would not have expected her to do so, and that is consistent with the deceased's intent that she have the companies in order to generate an income stream presently lacking. See the observations of Wilson J in *White v Barron* (1980) 144 CLR 431, 457.

[22] Mr Dunning submitted her shortfall is the result of her choosing to hold her assets in a particular way. That disposition of assets arose during the lifetime of the deceased. For the reasons just expressed, I do not consider those aspects condemn her application for further provision.

[23] Because of the nature of the application brought by the executor, it is not necessary that I traverse in these reasons all of the other points made. I will however briefly mention some of them.

[24] The comparative shortness of the relationship should be seen in perspective: the marriage was cut short by the death of the deceased from an illness diagnosed after the marriage, and it is the fact that the applicant cared for the deceased until his death.

[25] As to the deceased's generosity to the applicant during his lifetime, which was marked, it is significant nevertheless that a very large estate survived his death, and if the evidence before me is ultimately accepted, he intended to make substantial further provision for the applicant via a second will. That consideration is relevant to an assessment of "adequacy": cf *Vigolo v Bostin* (2005) 221 CLR 191, 231.

[26] As to the question of "need", while the applicant is set up well financially, there is obvious scope, with an estate of this magnitude, to provide for a further buffer against contingencies for which accommodation could not reasonably be expected in a smaller estate (see *Re Buckland* [1996] VR 404 and *Frey v Frey* [2009] QSC 43, paras 134-136), and there is the issue of her inability presently to meet outgoings.

[27] As to the financial agreements, the significance of the later agreement is to be assessed in the context of the evidence, should it be accepted, that the deceased intended to make substantial additional provision for the applicant through a new will.

[28] For these reasons, I am not plainly satisfied that the applicant has not established a prima facie case for further provision.

[29] The executor's application for summary judgment is therefore dismissed.