SUPREME COURT OF QUEENSLAND

CITATION:	*West & Ors v Blackgrove & Anor* [2012] QCA 321
PARTIES:	**ROBERT JOHN WEST** (first appellant) **JOY LORRAINE WEST** (second appellant) **THE ESTATE OF THE LATE DORIS JEAN WEST** (third appellant) **v** **BETTY JUNE BLACKGROVE** (first respondent) **KEITH WARREN WEST** (second respondent)
FILE NO/S:	Appeal No 5629 of 2012 SC No 8861 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2012
JUDGES:	Holmes and Muir JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The judgment of the primary judge be varied so that paragraph 7 thereof provides: "7. There be no order as to the costs of the originating application.".**
CATCHWORDS:	SUCCESSION – ADMINISTRATION OF ESTATE – DISTRIBUTION – MATTERS RELATING TO BENEFICIARIES – where first appellant and respondents surviving children of testatrix – where probate of will granted to first appellant – where second appellant wife of first appellant – where residential Thornlands property of testatrix registered in the name of second appellant at time of her death – where respondents filed an originating application in the Supreme Court claiming various matters against the first appellant with respect to the testatrix's will, his power of attorney, and the Thornlands property – where application adjourned to civil list – where various legal correspondence was exchanged between appellants and respondents who

made various allegations against each other – where interlocutory application came before Supreme Court – where orders made with respect to providing monetary figures and documentation – where appellants filed application claiming, inter alia, that respondents' applications be struck out – where Supreme Court judge ordered matter be mediated – where no such mediation took place – where respondents applied for further orders in relation to revoking the grant of probate, removing the first appellant as trustee under the will, and disclosure – where matter set down for two day trial – where many issues where abandoned or simplified at trial – where appellants submitted respondents delayed sale of Thornlands property by, inter alia, threatening and lodging caveats – where appellants submitted this delay caused loss – where primary judge held that property could have been sold at any time as it was registered in second appellant's name – where primary judge dismissed the respondents' originating application with no order as to costs – whether the primary judge erred in dismissing first appellant's claim for damages arising from the diminution in value of the property as a result of respondents preventing its earlier sale – whether the primary judge erred in hearing an application filed by the respondents rather than dismissing it peremptorily and ordering costs for the appellants

Uniform Civil Procedure Rules 1999 (Qld), r 681(1)

Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd (1986) 10 FCR 177; (1986) 71 ALR 287; [1986] FCA 85, cited
Cachia v Hanes (1994) 179 CLR 403; [1994] HCA 14, cited
Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10; (1986) 69 ALR 660; [1986] FCA 357 , cited
Interchase Corporation Ltd (in liq) v Grosvenor Hill Queensland Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, cited
Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, considered
Thiess v TCN Channel Nine Pty Limited (No 5) [1994] 1 Qd R 156, cited

COUNSEL: S W Sheaffe for the appellants
R Cameron for the respondents

SOLICITORS: No appearance for the appellants
McCarthy Durie Lawyers for the respondents

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA**: **Introduction** In this appeal counsel for the appellant, who came into the matter late, sensibly abandoned all unarguable or pointless grounds of appeal.

Two issues remained for determination: whether the primary judge erred in dismissing the first appellant's claim for damages arising from the diminution in value of a residential property as a result of the respondents preventing its earlier sale; and whether the primary judge erred in hearing the respondents application filed on 21 December 2011 rather than dismissing it peremptorily and ordering the respondents to pay the appellants' costs.

[3] Before considering the grounds of appeal, it will be helpful to explain how this sorry piece of litigation originated and its subsequent history.

The will and the acquisition of the Thornlands property

[4] The first and second respondents and the first appellant are the surviving children of the late Doris West, who died on 1 May 2009, leaving a will dated 30 December 2008. On 16 February 2011, probate of the will was granted to the first appellant, the executor named in the will. The second appellant is his wife.

[5] Each of the deceased's children was left $100,000 under the will and the first appellant was the sole residuary beneficiary. The second respondent's bequest was to be held in trust to be applied for the benefit of the second respondent during his lifetime with any sum remaining on his death becoming part of the residuary estate. At the date of the testatrix's death, a residential property at Thornlands was registered in the second appellant's name. It had been purchased in 2007 for $568,000, $300,000 of which had been provided by the testatrix. She also paid $12,000 on account of stamp duty and other costs of the acquisition.

[6] The will assumed that the testatrix had an interest in the Thornlands property. Clause 6 of the will explained:

> "The reason for giving my son, **ROBERT JOHN WEST**, the remainder of my estate and any profits from the sale of the Thornlands property are to try and repay him for the sacrifices, help, love, care, and attention he has shown me in the last years of my life. This property was purchased jointly only to help me in my final years because I needed constant supervision, and he is the one who has taken a risk investing his finances in this property to provide some comfort, help and support for me."

The history of these proceedings

[7] On 14 August 2009, the respondents filed an originating application in the Supreme Court claiming:

1. against the first appellant:–

   (a) compensation pursuant to s 106 of the *Powers of Attorney Act* 1998 for misuse of an enduring power of attorney granted by the testatrix;

   (b) an order pursuant to s 122 of the *Powers of Attorney Act* that the first appellant file and serve an affidavit containing a summary of receipts and expenditure under the power of attorney commencing with the sale of the testatrix's property at Rochedale until the death of the testatrix;

2. a declaration that the second appellant holds the Thornlands property on trust for the third appellant in such portions as shall be determined;

3. an order that the Thornlands property be sold and the proceeds be "distributed to the parties in accordance with the portions declared by the Court…";

4. costs against the first appellant.

[8] On 9 September 2009, an order was made adjourning the application to the civil list and directing the filing and serving of affidavits. The order provided that upon compliance with the requirements of the order and the filing of a request for trial date signed by or on behalf of the applicants and the respondents, the matter be placed on the call over list.

[9] The appellants' solicitors informed the solicitors for the first and second respondents in letters dated 8 October 2009 and 4 November 2009 respectively that: their clients agreed to the sale of the Thornlands property; their clients agreed that the proceeds of sale be distributed in portions to be determined; and that, in effect, $300,000 of the testatrix's funds had been used in the purchase of the property. At the request of the respondents' solicitors, the appellants' solicitors, under cover of a letter of 4 November 2009, provided the respondents' solicitors with a copy of the testatrix's bank passbook, copies of bank statements in respect of the testatrix's bank account and an "Accounting of all [estate] assets held at March 2007" and of income and expenditure. The respondents were not satisfied with what had been provided. They complained in a letter dated 16 November 2009 that some of the copies provided were difficult to read and that the accounting provided was not in affidavit form. The letter contained ten numbered queries and demanded an opportunity to inspect original documents.

[10] The appellants' solicitors provided a detailed response to the letter of 16 November 2009 in a letter of 17 December 2009.

[11] The first and second respondents' solicitors had queried the source of the funds used to pay stamp duty and to meet other costs of the purchase. The appellants' solicitors addressed that in their letter of 17 December 2009. They advised that the appellants accepted that the testatrix's contribution to the purchase price should include stamp duty and associated lodgement fees, making the testatrix's contribution to the purchase $312,225.40. They sought the other solicitors' agreement to that figure. There was no challenge to the calculation.

[12] The primary judge held:

> "The position had been reached then, by the end of 2009, that the issues, or apparent issues, which had given rise to the originating application were no longer issues. There was an acknowledgement of the beneficial ownership of the land and a stated preparedness to give effect to it."

[13] The primary judge also found, and it was not disputed on appeal, that "… in truth there was no dispute as to the entitlement of the [testatrix] to a share in the Thornlands property or in turn the entitlement of the estate to that share".

[14] In a letter dated 16 February 2010, the appellants' former solicitors advised the respondents' solicitors that their retainer had been terminated.

[15] The solicitors for the respondents wrote to the appellants on 24 February 2010 alleging non-compliance with the 9 September 2009 order and threatening proceedings for contempt if the alleged non-compliance was not remedied within seven days. It was alleged that the appellants' non-compliance was delaying the determination of the proceedings.

[16] By this time, as the primary judge pointed out, there was no material dispute about how the Thornlands property or the proceeds of sale of the property was or should be held. The claims relating to the enduring power of attorney were academic. The respondents had no interest in the estate other than that relating to their pecuniary legacies and there was no suggestion that these were at risk.

[17] Despite there being no live issues in the proceeding, the first and second respondents not only maintained, but expanded their claims. The appellants were also not averse to escalating the scope of the conflict.

[18] An exchange of correspondence then took place. I will refer only to its more significant parts. On 26 March 2010, the respondents' solicitors informed the appellants in an email that the respondents were claiming that: the testatrix lacked capacity to make the will; the first appellant breached his duty as the testatrix's attorney by using the proceeds of sale of the testatrix's property to purchase the Thornlands property and that the first respondent had exerted undue influence over the testatrix in the making of the will.

[19] The first appellant responded to the 26 March email with an email of 9 April 2010 alleging fraud and illegality on the part of the first respondent. These allegations were fortified and expanded in an email of 16 April. There was then an unfruitful exchange of correspondence.

[20] Even though no statement of claim had been filed and served, the appellants filed a document they described as a defence and counterclaim on 18 October 2010. The counterclaim sought against the first and second respondents:

- dismissal of both "applications";
- costs;
- compensation for lost income, interest of $15,756, council rates of $3,132 and maintenance costs of $600;
- repayment to the third respondent of the $5,000 loan given to the first respondent and repayment of $4,000 discount received by the second respondent;
- compensation for stress and hardship;
- probate of the will.

[21] An interlocutory application filed by the respondents on 29 September 2010 came before Boddice J on 20 October 2010. His Honour made orders which, inter alia, required the appellants:

1. to update an income and expenditure statement in respect of the estate;

2. to provide details of various monies including the deposit and withdrawal of monies from a Bank of Queensland account and of the cash held by the testatrix and of the use made of such money.

[22] The orders also required the respondents to make various documents relating to the testatrix's estate available for inspection by the solicitors for the respondent. The respondents were ordered to tender a signed request for trial date to the appellants within seven days of the filing of any additional material relied on by the respondents. As explained earlier, the utility of any such orders relating to the administration of the estate had long ceased to exist if indeed there was ever any point in them.

[23] The appellants filed an application in the proceedings on 26 October 2010 claiming relief which included: an order that the originating application and subsequent applications be dismissed; an order that the respondents' affidavits be "stricken from the record for lies and inconsistencies…"; compensation pursuant to s 106 of the *Powers of Attorney Act* 1998; an order that the first respondent file and serve an affidavit relating to her dealings with the testatrix's Commonwealth Bank pension account; and an order that the first respondent repay a loan allegedly made to her by the testatrix.

[24] A grant of probate of the will was made to the first appellant as executor under the will on 16 February 2011.

[25] On 28 February 2011, the solicitors for the respondents sent to the solicitors for the appellants a request for trial date, asking that it be signed and returned for filing.

[26] Fryberg J made an order on 29 November 2010 on the hearing of the 26 October 2010 application. The order dismissed paragraphs (1)(a), 1(b) and 3 of the application, ordered that the first and second respondents provide certain material requested in the application and "… information by way of an explanation pursuant [to] paragraph 1(f) of The application…". Fryberg J also ordered that the dispute between the parties be mediated. No mediation took place.

[27] Notwithstanding that a request for trial date had been signed by the parties and filed, the first and second respondents applied on 21 December 2011 for orders including orders that: the first appellant be removed as executor; the grant of probate in favour of the first appellant be revoked; the first appellant be removed as trustee under the will; and that certain disclosure provisions of the *Uniform Civil Procedure Rules* apply to the proceedings.

The trial

[28] The 21 December 2011 application was set down on 3 February 2012 by a judge in the applications list for a two day hearing. It came before the primary judge on 28 May 2012.

[29] That was fortunate for the parties. The primary judge carefully considered the history and content of the litigation. With admirable patience and the exercise of no little skill, he ascertained what were, in fact, the real issues that the parties wanted litigated. With the cooperation of the parties resulting from his encouragement, he

set about finally resolving the litigation in two days. The decision under appeal was delivered on the second day of the hearing. This proactive approach to the disposition of litigation, which hopefully will become more common, saved the parties from further wasteful and expensive interlocutory proceedings and the costs of what was likely to have been, under less skilled management, a trial of substantial length.

[30] Counsel for the respondents informed the primary judge at the commencement of the first day of the hearing that the real issues, so far as his clients were concerned, were the removal of the first appellants as executor "because the relationship between [him] and his siblings has… become so poisoned and acrimonious … because of conduct in the due administration of the estate by him…".

[31] The flow of counsel's submissions was then interrupted by discussion of some matters of an historical nature. He later referred the primary judge to the 21 December 2011 application by his clients and confirmed, in effect, that his clients were seeking the relief sought in it and that there was a challenge to the validity of the will. He said, in effect, that the challenge to the validity of the will would involve disputed questions of fact. Without, it would seem, a trace of irony, counsel for the respondents confirmed that a ground for removal of the first appellant as executor relied on by the respondents was that he had "taken too long to administer the estate".

[32] At approximately 4.00 pm on the first day of the trial, counsel for the respondents informed the Court that his clients were content to have all outstanding issues resolved at the hearing. These were identified as the appellants' claims for loss occasioned by the respondents allegedly delaying the sale of the Thornlands property; the removal of the first appellant as executor; and the appellants' claims against the respondents for payment of money due to the testatrix.

[33] Not long after the commencement of proceedings on the second day of the trial, the first appellant provided evidence that $200,000 was held in a trust account or trust accounts in order to accommodate the respondents' claims. In the course of his submissions, the first appellant said that he was happy for a solicitor to be appointed to manage the funds held on trust for the second respondent during his lifetime. The claims in relation to the *Powers of Attorney Act* were also abandoned.

The first appellant's damages claim

[34] The primary judge discussed the first appellant's claim for loss flowing from interference with the sale of the Thornlands property as follows:

> "[36] I turn then to the substantial issue between the parties, which is the complaint that the [respondents] held up the sale of the Thornlands property occasioning losses to both the estate and to the second [appellant]. The Thornlands property has been sold only very recently, the settlement occurring about two weeks ago. It sold for a sum of just under $600,000. This is more than was paid for the property in 2007, but the [appellants] maintain it was less than would have been obtained for the property had it been sold in 2009.

[37] The first [appellant] has duly caused $200,000 from the proceeds of sale to be paid to accounts which he has opened in the name of the estate to make provision for the gifts to the [respondents]. The whereabouts of the remaining proceeds, insofar as they belong to the estate, are unknown; but now that there is no issue as to the validity of the 2008 will, that matter need not be explored because the balance of the funds belonging to the estate are to go to the first [appellant].

[38] The first of the complaints, as I have mentioned, is that the sale in 2012, rather than in 2009, of the Thornlands property has resulted in a loss of the order of $70,000. The evidence put forward to support that figure of $670,000 was in the form of correspondence from real estate agents. The evidence was not in the form of opinion evidence given by an appropriately qualified valuer. The [respondents'] objection to it must be upheld. The evidence was not given by an appropriately qualified witness, and cannot be admitted to prove the value of this property at any particular time.

[39] The next component of the [appellants'] claim for damages was for the loss of interest which could have been earned on the proceeds of sale in the period from 2009 until 2012. The first [appellant], as executor of the estate, claimed $52,327 in that respect and the second [appellant] claimed $46,770. The quantification of those sums was not the subject of any serious challenge. I would be prepared to accept that interest of that order could have been derived on the proceeds of sale, had the property been sold, say, within three months of the death of Mrs West. However, as I will explain, those claims together with these other claims for compensation, have difficulties at the threshold of the [appellants'] argument.

[40] Other components of the claim by the estate for a delay of sale of Thornlands were in the nature of holding costs, that is to say for rates of $8,559, insurance of $1,684, maintenance of $1,111, garden care of $1,420 and a telephone of $1,065. Again, none of these sums is seriously challenged. I would accept that they are sufficiently accurate estimates of the costs of holding the house within that period of, say, three months from the death of the testatrix. But, of course, that is not to say that the [respondents] are obliged to pay them.

[41] It was further claimed that the [respondents] should compensate the estate for what were described as 'legal costs,' which were quantified by the first [appellant] as totalling $69,624. There are two parts to that component.

[42] The first consists of the amounts charged by Murphy Schmidt, who acted for the [appellants] until early 2010. None of their fees seem to be attributable to some delay in the sale of the Thornlands property; rather they are costs and expenses of responding to the originating application.

[43] The other part of this component for so-called 'legals' consists of amounts claimed by the first [appellant] for his own time and effort in attending to the affairs of his late mother and doing things in the administration of the estate. He suggests that the will entitles him to such amounts by a provision in these terms: 'I declare that my trustee being engaged in any profession or business may be so employed to act and while acting as an executor and trustee shall be entitled to charge and be paid for all work done and time expended by him or his firm in relation to his executorship, including acts which an executor and trustee not being in a profession or business could have done personally, and that such charges shall be free from all succession, estate, or other death duty.' The short answer to this part of the [appellants'] claim is that first [appellant] is not a person engaged in a profession or business which would make this clause relevant.

[44] I have mentioned the second [appellant's] claim for a loss of income on the proceeds of sale, had they been derived earlier. There was also a claim that she and the first [appellant] have had to borrow a hundred thousand dollars from her family to meet living expenses because they were unable to sell the Thornlands property and obtain the second [appellant's] share of the proceeds. On that account they claim an amount of $6,000 in interest. Again, there was no substantial dispute as to the quantification of that sum. But it far from appears that they have had to pay it or are liable for it.

[45] There was a further component of this compensation claim, which was for an amount of $3,976, being the estimated costs of the [appellants] of having to travel between the Thornlands property and their own house, having to, in effect, maintain two houses. The accuracy of that estimate, again, was not debated, although it was not admitted. The accuracy of the amount need not be determined, given my decision as to the recoverability of any of these sums.

…

[47] In late 2009, through their solicitors, the [respondents] sought an undertaking that the [appellants] would not sell the Thornlands property, or in particular that the second [appellant] would not sell the Thornlands property until either the [respondents] had consented or until the originating application had been heard and determined. No such undertaking was given.

[48] In that same correspondence, seeking the undertaking, the [respondents'] solicitors wrote that in the event that the undertaking was not received by 9 October 2009, they would seek the [respondents'] instructions about bringing what was described as a 'preservation order protecting our clients' interests.' No application for such an order was ever made.

[49] The [respondents], on two occasions, sought to prevent a sale by lodging a caveat. The first caveat was lodged on about 14 August 2009. It was rejected by the Registrar and at least by October 2009 it was of no effect. Another caveat was lodged on about 31 May 2011. Again, it was rejected by the Registrar, this time on about 18 July 2011. It could not be said that either of these caveats substantially affected the timing of the sale of the property. Indeed it is not clear that the [appellants] were aware of the first of those caveats. The second caveat may have delayed, to some extent, the listing of the house for sale; but if so that would have involved a delay of only a few weeks, and given the time which was taken in making a sale after the property was listed, the caveat could not be said to have had any significant effect.

[50] As to the [respondents'] threat to apply for an interlocutory injunction, I would accept that in the minds' of the [appellants], this threat was of some influence. But it was merely a threat and it did not, of itself, prevent the second [appellant], the property being in her name, from selling the property.

[51] The [appellants] maintain that a further problem which they apprehended about selling the property was the [respondents'] challenge to the validity of the 2008 will. But because the property was legally owned by the second [appellant] it was unnecessary to obtain any grant of probate to facilitate its sale.

[52] Regardless of whether the 2008 will was valid, this was a property which was owned legally by the second [appellant] and held by her, as to a part, in trust for the estate of her late mother-in-law. The doubts as to the will and the controversy in that respect provided no legal impediment to the sale of the Thornlands house. Similarly, any issue as to the precise accounting which was required of the first [appellant] in relation to the affairs of the late Mrs West did not prevent a sale of the property.

[53] It was strongly argued by the first [appellant] that there was no sensible reason for the [appellants] to delay selling this house, particularly given their financial circumstances, where they were having to maintain two households, this one and their own house, and substantial funds representing the likely proceeds of the sale were being frozen rather than made available to the [appellants] through the second [appellant's] beneficial share.

[54] I accept that the [appellants] came to believe that they were unable to sell the Thornlands property or at least that they should not attempt to do so until a grant of probate of the 2008 will had been made. But as I have discussed, that was a mistaken view on their part and the [respondents] should not be made to compensate them for that mistake.

> [55] Ultimately then I am not persuaded that there was any act by either of the [respondents] which prevented the earlier sale of the Thornlands property. These claims for compensation from a delay in that sale therefore fail at the threshold."

[35] I will now discuss the remaining grounds of appeal.

The primary judge erred in finding in para [55] of the judgment that there was no act by the respondents that prevented the sale of the Thornlands property and consequently erred in not finding for the first appellant

[36] In addition to the evidence referred to in the primary judge's reasons, counsel for the appellants referred to the following. In a letter dated 8 October 2009 from the appellants' solicitors it was said that both appellants agreed that the property be sold and distributed in accordance with portions to be determined. In a letter dated 4 November 2009 the solicitors for the appellants again wrote to the respondents' solicitors advising that the appellants were anxious to sell. The respondents' solicitors replied on 16 November 2009 refusing to consent to the sale and stating that the respondents saw little point in a sale until such time as the "portions in which the property is held in trust can be agreed or determined by the Court".

[37] In an email to the respondents of 13 May 2011 the appellants informed the respondents, probate having been granted, that the property was to be sold. On 31 May 2011 the respondents lodged a caveat which was rejected six weeks later on 18 July 2011. The appellants were prevented from selling the property over that six week period.

[38] The first appellant emailed the solicitors for the respondents on 24 June 2011 stating that the caveat was preventing the sale of the property and "the disbursement of all moneys as directed in [the will]". An application to the court for the setting of a trial date and the removal of the caveat was threatened. In an email to the first appellant of 27 June 2011 the solicitors for the respondents said that they believed that their instructions would be to not remove the caveat. The email explained that as the only asset of the estate was in the name of the first appellant's wife, there was "effectively no assets in the Estate from which to pay" the second respondent's $100,000. The solicitors put forward a proposal that the monies from the sale of the property be held in their trust account until the finalisation of the proceeding.

[39] Counsel for the appellants submitted that the foregoing facts and the matters referred to by the primary judge revealed the continuing determination on the part of the respondents, known to the appellants, to prevent the sale of the property.

[40] It is plain that the respondents were opposed to the sale of the Thornlands property throughout and gave the appellants reason to believe that any attempt to sell may have been thwarted by their taking legal action. It is also true, as the primary judge held, that there was no legal impediment to the sale of the property at any relevant time except, possibly, while the real property caveats were on the title.

[41] Counsel for the appellants accepted that in order to succeed his clients had to show that they were unlawfully prevented by the respondents from selling the property. He did not point to any fact or principle of law which demonstrated error in the

primary judge's finding that the property, being registered in the second appellant's name, could have been sold by her at any time. Having regard to these matters and the evidentiary problem I am about to mention, there is nothing to be gained by any further examination of the merits of this point.

[42] Counsel for the appellants sought leave to read and file an affidavit of the first appellant. It exhibited a valuation report made by a certified practising valuer which gave the opinion that the market value of the property as at September/November 2009 was in the range of approximately $675,000 to $685,000. The evidence was that the property was sold in 2012 for just under $600,000. The primary judge had ruled inadmissible evidence in the form of correspondence from real estate agents on the basis that such evidence was not shown to be expert opinion evidence as the witnesses had not been shown to be appropriately qualified valuers. The primary judge did not err in so concluding. The evidence would have been inadmissible, in any event, as unsworn out of court statements by persons not called to give evidence.

[43] It was submitted on behalf of the appellants that the new valuation report should be received in evidence as the primary judge had accepted affidavits and exhibits from the respondents at the commencement of the trial over the objection of the appellants and because the appellants were unaware that a valuation from a registered valuer was required. The receipt by this Court of the valuation report would not have assisted the appellants even if the maker of the report had been present in court so that the report could have been tendered through him and he could have been cross-examined. Although the report may have established the property's value as at September/November 2009, the evidence of market value at the time of sale was not established. The property was sold for $599,999. That is some evidence of market value at the time of the sale, but one sale does not establish a market. There is no other evidence of comparable sales at around the time of the sale of the property. Nor is there evidence of how the property was marketed or the terms or conditions on which it was sold. The appellants thus failed to prove loss. This ground of appeal was not made out.

The costs ground

[44] The primary judge ordered that:

1. $100,000 be paid to a named solicitor to be held by him in trust for the second respondent;

2. $100,000 to be paid to the first respondent according to the terms of the will;

3. the application filed on 21 December 2011 be dismissed;

4. the originating application be dismissed;

5. paragraphs 1(c)(d)(e) and (f) of the application filed on 26 October 2010 be dismissed and that no orders be made in respect of paragraph 2 of that application;

6. there be no order as to the costs of the originating application save for the costs of the application filed on 21 December 2011 which must be paid by the appellants.

[45] The primary judge's reasons for the cost orders made by him were as follows:

> "[64] The remaining questions are ones of costs. The [respondents] have had substantial success, ultimately via their application filed on 21 December last. In order to obtain the moneys left to them under this will they have had to meet the [appellants'] case that the [appellants] are entitled to substantial offsets for compensation for wrongfully impeding the sale of the Thornlands property. That became the principal issue in this trial, a[s] discussed in my reasons. The [respondents] succeeded on that issue.
>
> [65] The [respondents] also raised, by that same application, a challenge to the validity of the 2008 will. That is a challenge which they ultimately withdrew. That circumstance suggests that they should not have the whole of their costs of the interlocutory application, that is that filed on 21 December (sic).
>
> [66] However, in practical terms, no significants (sic) costs would have been occasioned by that challenge. That is because I was told, at the outset of the hearing yesterday, that the [respondents] would not be arguing, and had not prepared to argue within this hearing, the question of the validity of the 2008 will. In the same way I was told by [the first appellant] at the beginning of the hearing that the [appellants] had come to Court not expecting that that question would be debated within this hearing. In other words, each side seems to have thought, for one reason or another, that it would not be litigated this week and therefore it is unlikely to have made a substantial difference to the costs.
>
> [67] The [respondents], having had to make this interlocutory application, and having had success upon it, the costs of that interlocutory application should follow effectively the event. However, different considerations apply to the costs of the wider proceedings commenced by the originating application. The originating application has been dismissed. That of itself would suggest that the [appellants] should have their costs of it.
>
> [68] The [appellants] were legally represented at an early stage of the proceedings and did incur some costs, it would appear of the order of 12 or $13,000. However, before the interlocutory application was filed on 21 December last, the [appellants] had raised their complaints about the [respondents] delaying the sale of the Thornlands property, firstly within the document described as a 'defence' which was filed on 18 October 2010 and also within affidavit material. In other words, the costs occasioned by the [appellants] claiming compensation for a delayed sale of Thornlands could not be said to be contained entirely within the costs of the interlocutory application.

> [69] The [appellants] had not, at any stage, endeavoured to disguise a beneficial interest in the Thornlands property, held by the late Mrs West and in turn by the estate; but it must also be observed that it was not until about December 2009 that the precise entitlement of the estate, in that respect, was formally acknowledged.
>
> [70] Further, the property at Thornlands ought not to have been acquired solely in the name of the second [appellant] without there being in place, at the same time, some document which duly recorded the terms of the trust under which that property was held."

[46] Counsel for the respondent emphasised the difficulties facing a litigant in having set aside a costs order made against him or her. The applicable principles are not in dispute.

[47] The general rule is that costs of a proceedings are in the discretion of the Court but follow in the event unless otherwise ordered.[1]

[48] McHugh J identified the principles underlying provisions such as r 681(1) of the *Uniform Civil Procedure Rules* as follows:[2]

> "The expression the 'usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party[3]. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation."

[49] As is implicit in r 681(1), the Court has a discretion to make another order if that is required in the interests of justice where, for example, "… the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; …or obtains relief which the unsuccessful party had already offered in settlement of the dispute".[4]

[50] Another obvious circumstance justifying departure from the general rule is where a party has succeeded on its claims only to a limited extent.[5]

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1 *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1).

2 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97.

3 *Latoudis v Casey* (1990) 170 CLR 534 at 543, per Mason CJ; at 562-563, per Toohey J; at 566-567, per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

4 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [69].

5 See e.g. *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60–61; and *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10.

[51] A judge has a discretion as to costs which has sometimes been referred to as "unfettered".[6] The discretion, however, must be exercised judicially, without caprice and having regard only to relevant considerations. An exercise of such a discretion, having regard to its unfettered nature, is not to be readily or lightly disturbed.[7]

[52] Notwithstanding the above principles, I have concluded that the appellants have established appellable error on the part of the primary judge, who, in my respectful opinion, erred in failing to have regard to material facts and considerations in deciding as he did. The primary judge decided costs in respect of the 21 December 2011 application as if it was a discrete matter rather than an integral part of the litigation commenced by the respondents on the filing of the originating summons. He also attributed to the respondents a greater degree of success than they actually had. Although the respondents had a measure of success on their interlocutory application, in comparison with the relief sought their success was minor. The respondents abandoned much of the relief sought only at the end of the first day of the hearing. Their prospects of obtaining the abandoned relief were minimal at best. There was no point in seeking orders that the grant of probate be revoked and that the first appellant be removed as executor unless the validity of the will was successfully challenged. An order that a solicitor be granted letters of administration and be appointed trustee was in the same category.

[53] The sole interests of the respondents in the administration of the estate concern their respective legacies. The second respondent could be adequately protected by an order that she be paid $100,000. It was appropriate that some other order be made in respect of the second respondent's provision under the will, but the respondents did not seek a reasonable order. No proposal at all, let alone a reasonable one, was put to the appellants.

[54] Counsel for the respondents submitted that the appellants' conduct had not been impeccable. The submission was accurate. I do not suggest that the respondents were entirely to blame for the litigation. The appellants and, in particular, the first appellant behaved intemperately at times, made scurrilous allegations and threats and ignored or acted in contravention of the rules of court causing the appellants and the respondents unnecessary delay and expense.

[55] The history of the litigation is relevant. The 21 December 2011 application was, after all, the opening by the respondents of a third front in the campaign commenced by the first and second respondents' originating application. The second front was opened by the appellants with their 26 October 2011 application and "the defence and counter-claim" which was filed around the same time.

[56] The originating application made serious allegations against the first appellant and sought declaratory relief, an order for sale of the property and an account. There was no justification for these claims unless the validity of the will was challenged. Such a challenge, although raised in correspondence, never eventuated except perhaps by inference in the 21 December 2011 application. The declaration as to the testatrix's interest in the Thornlands property was never necessary. Before commencing proceedings, the respondents did not request any information or

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6 *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 121.

7 *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 at 207.

assurance from the appellants as to how the property was held or otherwise seek to have their real or imagined concerns resolved. Had that been done, as it should have been, this unfortunate litigation may have been avoided.

[57] The primary judge implicitly criticised the appellants for acquiring the Thornlands property in the second appellant's name without there being a formal record of the way in which the property was held. I do not accept the validity of that criticism. The testatrix and the appellants were free to do as they wished in relation to the Thornlands property. The respondents had no interest in it.

[58] It is relevant, when considering the appropriate costs order, to have regard to the fact that although there may have been no actual legal impediment to the sale of the Thornlands property at relevant times, the appellants' conduct in not pressing ahead with the sale was influenced by the threats made by the respondents. The primary judge held that "in the minds' of the" appellants, this threat was of some influence. Even if the appellants' claims for damages arising from the delayed sale were legally unsustainable, they cannot be said to be unreasonable.

[59] I regret not being able to agree with the primary judge on the question of costs. It is appropriate in the circumstances to record that the primary judge did not have the benefit of counsel on both sides of the record or the opportunity to reflect, with a comparative degree of leisure, on the relevant facts.

[60] For the above reasons, I would order that:

1. The appeal be allowed.

2. The judgment of the primary judge be varied so that paragraph 7 thereof provides:

   "7. There be no order as to the costs of the originating application."

[61] I would also not make any order as to the costs of the appeal as the appellants failed to succeed on any ground other than that relating to costs.

[62] **DAUBNEY J:** I respectfully agree with Muir JA.