SUPREME COURT OF QUEENSLAND

CITATION:	*Arrowsmith v Micallef & Ors* [2013] QCA 143
PARTIES:	**CHEVONNE ELIZABETH ARROWSMITH** (appellant) **v** **ROBERT JAMES MICALLEF** (first respondent) **ADRIANO ALFREDO MICALLEF** (second respondent) **SILVANO FRANK MICALLEF** (third respondent) **MATTHEW JAMES DUMESNY** (fourth respondent) **LAURETTA CANDIDA DUMESNY** (fifth respondent)
FILE NO/S:	Appeal No 9069 of 2012 SC No 5922 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2013
JUDGES:	White and Gotterson JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for the admission of further evidence on the appeal is refused.** **2. Appeal allowed.** **3. Matter remitted to the trial division for further hearing.** **4. The parties file and exchange written submissions on costs within 7 days of the date hereof unless they have reached agreement within that time as to the appropriate costs order and have informed the Registry of it.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – INJUSTICE – PARTICULAR CASES – REFUSAL OF ADJOURNMENT

– where terms of settlement were agreed between the parties at a mediation – where a dispute emerged about the effect of the terms of settlement – where the terms of settlement contained a release clause – where at first instance the appellant sought an adjournment to obtain evidence that might be relevant in construing the release clause – where the application for an adjournment was refused – whether there was a denial of justice to the appellant as a result of the refusal of her application for an adjournment

PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – OTHER MATTERS – where terms of settlement were agreed between the parties at a mediation – where a dispute emerged about the effect of the terms of settlement – where an order was made giving effect to the terms of settlement – whether the terms of settlement as incorporated into the order are to be construed in the same manner as a written agreement

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where terms of settlement were agreed between the parties at a mediation – where a dispute emerged about the effect of the terms of settlement – where the appellant contended evidence from the mediator would be relevant to construing the terms of settlement – whether extrinsic evidence would be admissible to construe the terms of settlement – whether the terms of settlement were ambiguous

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – HEARING OF APPEAL – PROOF AND EVIDENCE – where the appellant sought leave to rely on further affidavit evidence – where it was expressly stated that this was not "fresh evidence" – whether leave should be granted

Supreme Court of Queensland Act 1991 (Qld), s 114
Uniform Civil Procedure Rules 1999 (Qld), r 766

Bloch v Bloch (1981) 180 CLR 390; (1991) 55 ALJR 701; [1981] HCA 56, cited
Chaina v Alvaro Homes Pty Ltd [2008] NSWCA 353, considered
City Supermarkets Pty Ltd v Lightbrake Pty Ltd [2011] QCA 205, cited
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, considered
Fraser v The Irish Restaurant & Bar Company Pty Ltd [2008] QCA 270, cited

Karam v Australia & New Zealand Banking Group Ltd [2001] NSWSC 709, considered
Langdale v Danby [1982] 1 WLR 1123, cited
Maxwell v Keun [1928] 1 KB 645, considered
MBF Investments Pty Ltd v Nolan [2011] VSCA 114, cited
Powell v Camm [2003] QCA 353, considered
Prenn v Simmonds [1971] 1 WLR 1381, considered
Qantas Airways Ltd v Gubbins (1992) 28 NSWLR 26, considered
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45; [2002] HCA 5, cited
Sali v SPC Ltd (1993) 67 ALJR 841; [1993] HCA 47, considered
Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40, cited
Vigolo v Bostin (2005) 221 CLR 191; [2005] HCA 11, cited
Watson v Watson [1968] 2 NSWR 647, cited
Western Export Services Inc v Jireh International Pty Ltd (2011) 86 ALJR 1; [2011] HCA 45, cited

COUNSEL: K Wilson SC for the appellant
D J Morgan for the second and third respondents
No appearance for the fourth respondent
A J H Morris QC, with B McGlade, for the fifth respondent

SOLICITORS: Van de Graaff Lawyers for the appellant
Gleeson Lawyers for the second and third respondents
No appearance for the fourth respondent
Quadrio Lee Lawyers for the fifth respondent

[1] **WHITE JA:** I have read the reasons for judgment of Peter Lyons J. I agree with his Honour that this is a case where, notwithstanding that it is an appeal from an exercise of discretion made in a matter of practice and procedure, the appeal should be allowed. I agree with the orders proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Peter Lyons J and with the reasons given by his Honour.

[3] **PETER LYONS J:** Orders were made in the trial division for the distribution of the estate of Allan James Dumesny (*the deceased*). The appellant appeals against those orders, primarily on the ground that the proceedings should have been adjourned, to enable her to adduce further evidence.

Background

[4] The appellant (*Chevonne*) is the daughter of the deceased. The fourth respondent (*Matthew*) is the son of the deceased. They are children of the deceased's first marriage.

[5] The fifth respondent (*Lauretta*) is the deceased's second wife, and his widow. The first, second and third respondents (respectively *Robert*, *Adriano*, and *Silvano*) are Lauretta's children, and accordingly the deceased's step-children.

[6] The deceased died on 19 September 2010. He left a will dated 23 July 2002. The major provisions of his will left a life interest in his real estate to Lauretta, and on her death, the residue of the estate equally between his children and step-children. Robert and Chevonne were appointed the executors of the will.

[7] On 16 June 2011, Lauretta filed an application for further provision from the estate, pursuant to s 41 of the *Succession Act* 1981 (Qld).

[8] On 15 December 2011 Adriano and Silvano each executed a document stating that he "renounce(d) my interest as a residuary beneficiary under the Will of Allan James Dumesny dated 23 July 2002 in favour of Lauretta". Robert took a similar position in an affidavit sworn on 12 December 2011. At first instance it was held that Robert, Adriano and Silvano had each assigned his interest in the deceased's estate to Lauretta, and that the executors were on notice of the assignment. These findings are not challenged in the appeal.

[9] A mediation of Lauretta's *Succession Act* claim was held on 22 December 2011. Of the parties, only Chevonne, Robert and Lauretta were present. It resulted in Terms of Settlement, signed by Lauretta, and by Robert and Chevonne as executors of the estate.

[10] Clause 1 of the Terms of Settlement provided that further and better provision be made for Lauretta by the provision of certain property (including some farm equipment, and other plant and equipment) to her, and that she transfer her share in a company which owned some other property, to the estate. Under cl 5, Lauretta agreed to make available certain items of personalty to Chevonne. With the exception of cl 6, the other clauses of this document are not of present relevance. Clause 6 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."

[11] Subsequently, a dispute emerged about the effect of the Terms of Settlement. Murdoch Lawyers at this stage purported to represent Chevonne and Robert, the executors; and Gleeson Lawyers represented Adriano and Silvano, and purported also to represent Robert. The dispute most clearly emerges in correspondence in late January 2012. Thus a letter from Murdoch Lawyers to Gleeson Lawyers of 30 January 2012 asserted that Robert, Adriano, and Silvano had renounced their interests in the estate; that Lauretta's claim was resolved at the mediation; and that accordingly, upon sanction of the Terms of Settlement, after provision in accordance with it, the balance of the estate would be distributed equally between Chevonne and Matthew. Yet on 31 January 2012, Gleeson Lawyers wrote to Murdoch Lawyers seeking confirmation that after distribution to Lauretta in accordance with the Terms of Settlement, she would in addition receive 3/5^{ths} of the residue; and Chevonne and Matthew would receive 1/5th each.

[12] In the meantime, arrangements had been made to have the matter listed so that an order could be made in Lauretta's *Succession Act* application, to give effect to the Terms of Settlement. Notwithstanding that further correspondence did not resolve the dispute just mentioned, orders were made by Daubney J on 6 February 2012. One of the orders was as follows:

> "Further provision be made for the Applicant's proper maintenance and support from the estate of Allan James Dumesny, deceased, in accordance with the terms of settlement signed by the parties on 22 December 2011."

[13] Subsequently, Murdoch Lawyers ceased to represent the executors. On 5 July 2012 an originating application was filed on behalf of Adriano and Silvano. It sought an order that the estate be distributed on the basis that Lauretta receive further provision from the estate in accordance with the order of 6 February 2012; and in addition that she receive 3/5^{ths} of the residue, with Chevonne and Matthew to receive 1/5th each. Their standing to bring this application was disputed by a letter from de Groots Lawyers, by now acting on behalf of Chevonne, dated 16 July 2012. The letter asserted that on 15 December 2011, Adriano and Silvano had renounced their interest in the estate, which passed into residue; or alternatively that Lauretta had, by the Terms of Settlement, given up any right assigned to her by Adriano and Silvano.

[14] In the meantime, on 13 July 2012, de Groots wrote to Robert about the dispute. The letter enclosed a document for Robert's signature, authorising the lawyers who had formerly represented the executors "to obtain documents" and to discuss all things relating to the mediation and the Terms of Settlement with de Groots Lawyers. It would appear that Robert did not respond.

[15] On 17 July 2012, an originating application was filed on behalf of Chevonne. The respondents were Robert, as one of the executors of the will of the deceased; Lauretta; and Matthew. It sought a direction that the residue of the deceased's estate be distributed equally to Chevonne and to Matthew. Both this application, and the application filed on behalf of Adriano and Silvano, were returnable on 24 July 2012.

[16] By this time, Lauretta was represented by Quadrio Lawyers. On 19 July 2012 they wrote to de Groots suggesting that on the return date for the applications, directions be made for the future conduct of the matters; and indicating that Lauretta was considering making an application to the same effect as that made by Adriano and Silvano. The letter sought agreement to the proposal to treat the hearing as a directions hearing, by 4 pm that day. The material does not include the response from de Groots.

[17] The submissions on behalf of the appellant make it necessary to refer in some detail to the hearing.

Hearing at first instance

[18] The hearing was, to some extent, complicated by the differing orders sought in the applications. In addition, Lauretta submitted that she should be added as a party to the application made by Adriano and Silvano, an unfiled application to that effect apparently being provided to the learned primary Judge. Some of the matters raised were plainly capable of immediate determination.

[19] When the matter first came on for hearing, brief oral submissions were made by Counsel for each of the parties in support of the position taken by their clients in respect of the final determination of the applications. In the course of that, Chevonne's Counsel indicated that at the mediation, Chevonne understood that Robert, Adriano and Silvano had assigned their interests in residue to Lauretta; but

Lauretta had given that up in the settlement. She relied on the release found in clause 6. Chevonne's Counsel also indicated that Chevonne wished to assert that Robert was estopped from arguing to the contrary, and she wished to provide an affidavit responding to Robert's affidavit, delivered late the previous afternoon. She indicated that Chevonne's case was that she entered into the agreement at the mediation on the basis that Lauretta was giving up the interests assigned to her by her sons; and that the evidence might show that Lauretta and Robert negotiated on the same basis. She submitted that there was an issue as to the meaning of the Terms of Settlement; or alternatively as to whether there had been a meeting of minds. She also indicated that the application for directions about the ultimate distribution of the estate should be adjourned, with directions. She indicated that it might be necessary to obtain affidavits from the barrister representing the executors at the mediation, and from the mediator, with a view to establishing that Lauretta, Robert and Chevonne were all negotiating on the same basis.

[20] After an adjournment to read material, the learned primary Judge indicated that he would deal with the issue of the standing of Adriano and Silvano to bring their applications; and with Lauretta's application to be joined in that proceeding. After argument, he ordered that Lauretta be joined in that proceeding as an applicant.

[21] The learned primary Judge then stated that he would deal with the application made on behalf of Adriano and Silvano. He heard submissions on their behalf, which dealt with their standing to bring the application; and with the question whether they had assigned their interest in the estate to Lauretta.

[22] The learned primary Judge then heard oral submissions made on behalf of Lauretta. They dealt with the remaining substantive issues. The submissions opposed the making of directions for the future conduct of the matter on the ground it could be dealt with by the learned primary Judge, and any other course could be expensive.

[23] In the course of the oral submissions for Chevonne, the learned primary Judge queried whether the Terms of Settlement, as signed at the mediation, dealt only with Lauretta's claim for provision out of the estate; and did not affect the interests which passed to Lauretta by assignment. At that point, Counsel for Chevonne stated that if his Honour were against her, she needed to seek an adjournment of that application. In part her position was that matters had not been dealt with in her affidavit material, because of the "without prejudice" nature of the mediation; and because Chevonne, as one of two executors, could not waive legal professional privilege as to the discussions involving the lawyers acting for the executors at the mediation. The legal professional privilege was waived by conduct (by the affidavit of Robert, served the previous afternoon); but the solicitors who had formerly acted for the executors had not released the file to Chevonne's current solicitors. The "without prejudice" privilege had only been waived by the affidavit of Robert, received the previous afternoon, and the affidavit of Lauretta, received after 10 am that morning. Chevonne's Counsel indicated that she wished to obtain evidence from the barrister representing Robert and herself at the mediation, and from the mediator, as to "what was said and what was done, and what the understanding was." She submitted that one aspect of the matter was what was decided at the mediation, and whether the interests assigned to Lauretta fell within it or were outside it. She submitted that the evidence might establish an estoppel, on the basis that either Lauretta or Robert had conducted themselves in the mediation in a way that gave rise to a belief in Chevonne about the effect of the Terms of Settlement,

different from their proper construction. The submissions appeared to be directed to the proposition that Chevonne would receive one half of the residue, after the transfers of property identified in the Terms of Settlement.

[24] Counsel for Chevonne then sought and was granted leave to adduce evidence to support the adjournment application. Chevonne's evidence was to the effect that she was informed by one of her lawyers, and the mediator, that, under the Terms of Settlement, the residuary estate would be divided evenly between herself and Matthew, a position accepted by Robert. While she did not negotiate directly with Lauretta, as they progressed, Lauretta's position was communicated to her. Chevonne also gave evidence that she believed that Robert, Adriano and Silvano had assigned their interest in the residue to their mother. She appeared to equate that with the provision to be made for Lauretta under the *Succession Act*. The remainder of the estate was to go to her brother and herself.

[25] The learned primary Judge then heard submissions for some time from Counsel for Chevonne about the effect of her evidence. His Honour pointed out that Chevonne did not give evidence of any relevant communication from Lauretta about the effect of the then proposed Terms of Settlement; in response to which Chevonne's Counsel referred to her evidence of the responses communicated to her through the mediator, in Robert's presence. His Honour drew attention to the fact that no application had been made to set aside the Terms of Settlement. Although she referred to the possibility of making such an application, Chevonne's Counsel submitted that it was unnecessary if she was correct on the interpretation of the Terms of Settlement. His Honour also indicated that there would be no utility in obtaining evidence of the subjective views of the parties.

[26] The adjournment was ultimately refused. No reasons were given at that point, though the basis for the refusal might be identified from the matters raised by the learned primary Judge in the course of submissions. In his reasons for granting the relief sought by Adriano and Silvano, his Honour referred to his refusal of the adjournment, stating that the application came late in the day, and after lengthy argument. He noted that, if it were to be contended that the Terms of Settlement were vitiated by mistake, or should be set aside, an application should have been made earlier. He also stated that his determination of the substantive application was not assisted by evidence of subjective understandings of the parties about the effect of the Terms of Settlement.

Determination at first instance

[27] The learned primary Judge concluded that Adriano and Silvano had standing to bring their application. He indicated that had he thought otherwise, he would have permitted an application by them for declaratory relief, in similar terms to the relief sought in their application. He then dealt with the submissions made on behalf of Chevonne that Robert, Adriano and Silvano had disclaimed their interest in the estate so that those interests fell into residue. He found that each of them had assigned his interest to Lauretta, effective prior to the mediation. He then dealt with the question whether the Terms of Settlement disposed of the rights assigned to Lauretta, so that her only rights were to the property which was to come to her pursuant to the Terms of Settlement. He rejected Chevonne's submissions, holding that the Terms of Settlement (in particular cl 6) dealt only with Lauretta's claim under the *Succession Act* for better provision of the estate. In doing so, he referred

to propositions relevant to the construction of a release, formulated by Santow J in *Karam v Australia and New Zealand Banking Group Ltd*[1] The effect of his Honour's order was that, in addition to further provision under the Terms of Settlement, Lauretta was to receive 3/5^{ths} of the residue of the estate.

Submissions on appeal

[28] The submissions for Chevonne drew attention to the indications in the transcript that, at the hearing at first instance, Chevonne had sought an adjournment. It was submitted that extrinsic evidence was relevant to the construction of the Terms of Settlement, including as embodied in the order of 6 February 2012. It was submitted that extrinsic evidence might show that there was an agreed basis on which the parties entered into the Terms of Settlement, which would be relevant to the construction of clause 6. It was submitted that the Terms of Settlement, and in particular clause 6, were sufficiently ambiguous to permit recourse to extrinsic evidence.

[29] The written submissions for Chevonne contended that the learned primary Judge, in his reasons for judgment, had incorrectly characterised the principal issues to be determined. His Honour had stated it to be whether Robert, Adriano and Silvano had effectively assigned their interest in the residue of the estate to Lauretta; when in truth it was whether Lauretta had given up the benefit of those assignments pursuant to the Terms of Settlement. It was submitted that his Honour erred in deciding, in a summary way, that the parties at the mediation were only dealing with the family provision claim; and that the scope of the mediation could not be determined without further evidence. It was submitted that *Karam* showed the importance of permitting Chevonne to adduce evidence of the circumstances of the agreement reached at the mediation.

[30] On the appeal, oral submissions were made on behalf of Adriano and Silvano. It was submitted that at the mediation, their interests were represented by the executors. It was submitted that Chevonne had been invited to seek a waiver of the privilege which attached to the mediation, by a letter from Gleeson Lawyers, the solicitors acting for Adriano and Silvano, on 25 January 2012. On the question of an adjournment, it was submitted that, since the case related to a deceased estate, expensive and lengthy disputes should be avoided. It was submitted that, at first instance, Chevonne had failed to demonstrate any reason why access to the file of the solicitors acting for the executors at the mediation would be of assistance. It was submitted that Chevonne's evidence on the adjournment application demonstrated that she understood that 3/5^{ths} of the residue would go to Lauretta; and that further evidence would be of no assistance. It was also submitted that the Terms of Settlement were not ambiguous.

[31] For Lauretta, it was submitted that the Terms of Settlement, being embodied in a Court order, are to be construed without reference to the parties' prior negotiations, or their subjective intentions; though, in a case of ambiguity, reference might be had to the matrix of facts. It was submitted that the Terms of Settlement were not ambiguous. It was also submitted that the evidence which Chevonne sought to adduce was of subjective intention, and not of admissible background facts, and accordingly was inadmissible. In so far as the appeal was an appeal against the refusal of an adjournment, it was out of time, and time should not be extended.

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1 [2001] NSWSC 709 at [46]. His Honour also referred to *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114.

[32] In the written submissions provided on behalf of Lauretta, it was submitted that a decision on an adjournment application will not readily be disturbed on appeal. It was submitted that the authorities[2] demonstrated that the exercise of the discretionary power to refuse an adjournment will only be interfered with on an appeal, if it appears that the primary Judge erred in law, or the result of the refusal of the adjournment was to do an injustice to one of the parties.

[33] The written submissions for Lauretta identified a number of matters said to be the reasons for the refusal of the adjournment application. They included the fact that the relevant issue was an issue of construction, which had to be ascertained objectively, and for which extrinsic evidence could not assist; and that Chevonne's oral evidence went only to her subjective understanding of the agreement reached at the mediation. It was also submitted that the language of the Terms of Settlement was quite clear; relevant to the question whether extrinsic evidence was admissible. It was submitted that evidence of prior negotiations was not admissible, as extrinsic evidence for the construction of a written agreement. It was also submitted that Chevonne's contention that the application should have been adjourned was not supported, on the appeal, by evidence of the kind which the adjournment was supposedly intended to give her an opportunity to adduce.

Nature of Chevonne's appeal

[34] Chevonne has appealed against the grant by the primary Judge of the relief sought by Adriano and Silvano. Her ground of appeal is, in substance, that the learned primary Judge should not have determined their application; and that he erred in refusing her application for an adjournment.

[35] It is by no means uncommon for a party to appeal against a judgment, on the ground of an antecedent refusal to grant an adjournment. There are examples of cases where such appeals have been brought, unsuccessfully; but it has not been suggested that the appellant erred in appealing against the judgment[3]. It was not suggested in these cases that the proper course was to appeal against the order refusing the adjournment[4].

[36] It is not difficult to see why the course taken by Chevonne is competent. The wrongful refusal of an adjournment will often mean that a party has not had a fair hearing, nor a trial according to law. In *Chaina v Alvaro Homes Pty Ltd*[5], the failure to grant an adjournment was considered by reference to the question whether there had been a denial of procedural fairness, in turn associated with a substantial miscarriage of justice[6].

[37] If that view be wrong, I would have been prepared to grant leave to the appellant to make appropriate amendments to the notice of appeal; and to extend the time to bring the appeal. It was common ground that the considerations which would be raised in those circumstances would not be materially different; and there has been no suggestion that the extension of time would result in material prejudice to any other party.

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2 *Powell v Camm* [2003] QCA 353 at [23]; *Maxwell v Keun* [1928] 1 KB 645; and *Sali v SPC Ltd* (1993) 67 ALJR 841, 845.

3 See *Powell v Camm* [2003] QCA 353; *Bloch v Bloch* (1991) 55 ALJR 701; *Sali v SPC Ltd* (1993) 67 ALJR 841.

4 Though that appears to have been the course taken in *Walker v Walker* [1967] 1 WLR 327.

5 [2008] NSWCA 353.

6 See [20], [28] and [29].

Admissibility of extrinsic evidence for construing the Terms of Settlement

[38] As has been noted, the Terms of Settlement were incorporated in the order of Daubney J. It is that order, rather than the original written agreement, which determines the rights of the parties in respect of the deceased's estate.

[39] The submissions made by the parties on this appeal accepted that the Terms of Settlement, as incorporated into the order, were to be construed in the same manner as a written agreement; and that the admissibility of extrinsic evidence is to be determined by reference to what was said by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[7]. There is a body of authority supporting the proposition that a consent order is to be construed in this fashion[8]. While the order of Daubney J is not recorded as a consent order, it reflects a common position adopted on behalf of the parties interested in the distribution of the deceased's estate, and those having potential claims for further and better provision out of it under the *Succession Act*. It therefore seems to me that the same principles of construction should apply to it.

[40] In my view, cl 6 of the Terms of Settlement is ambiguous. It is not plain, from a reading of it, whether its effect was that Lauretta was giving up only her claim for further and better provision out of the deceased's estate, under the *Succession Act*; or, also, any other claim she may have had in respect of the estate. A residuary legatee has the right to have the estate properly administered, and, upon completion of the administration, the appropriate proportion of the residue transferred to him or her[9]. As has been mentioned, it was held at first instance that Robert, Adriano and Silvano had each assigned his interest in the deceased's estate to Lauretta, and that Robert and Chevonne were on notice of the assignment. That, no doubt, is to be understood by reference to the rights of a residuary legatee, as I have attempted to describe them.

[41] The language used in clause 6 is very broad. On its face, it would appear broad enough to cover any claim Lauretta may make against the estate as a result of the assignments. It might well be said to have been intended to have some broader operation than clause 1, which would on its face substitute the specific provision there made for Lauretta, for the provision made for her in the will; though there is clearly an available argument to the contrary.

[42] The learned primary Judge considered that cl 6 was to be construed by reference to principles relevant to the construction of a release. His Honour cited a number of principles relevant to such construction from *Karam*. Three, in particular, draw attention to the potential importance of extrinsic evidence:

> "(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 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.

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7 (1982) 149 CLR 337, 352-353.

8 See *Kirkpatrick v Kotis* (2004) 62 NSWLR 567 at [39]-[45] where a number of authorities are collected; and *Beck v Weinstock; Beck v LW Furniture (Consolidated) Pty Ltd* [2012] NSWCA 289 at [76] where further authorities are stated.

9 See *Dr Barnardo's Homes v Special Income Tax Commissioners* [1921] 2 AC 1, 8, 10; cited with approval in *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12, 21.

> …
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> (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 Limited v McInnes* (NSWCA, 17 Apri1 l997, unreported) per Priestley JA with whom Grove AJA and Handley JA agreed).
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> …
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> (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 Limited* (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.'"

[43] Reference might also be made to the following statement by Gleeson CJ and Handley JA in *Qantas Airways Ltd v Gubbins*[10]:

> "The rule is that the general words of a release will, in an appropriate case, be read down to conform to the contemplation of the parties at the time the release was executed."

[44] In my view, relevant extrinsic evidence was admissible on the construction of cl 6, because it was ambiguous, and possibly because this is specifically required for the construction of a release.

Appeals based on refusal of adjournment

[45] Obviously, this is an appeal against an exercise of discretion, in a matter of practice and procedure. Some guiding principles have been formulated for the determination of appeals where there has been a refusal of an application for an adjournment.

[46] A frequently cited authority is *Maxwell v Keun*[11]. In that case, after referring to the circumstances, Atkin LJ said[12]:

> "The result of this seems to me to be that in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion."

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10 (1992) 28 NSWLR 26, 29; see also 43B, 44D, per Kirby P; see also *Fraser v Irish Restaurant & Bar Company Pty Ltd* [2008] QCA 270 at [62]-[67], [1], [48], where the court did not consider it necessary to determine whether a special rule applied to the construction of a release.

11 [1928] 1 KB 645; see *Sali v SPC Ltd* (1993) 67 ALJR 841, 843, where reference was made to *Walker v Walker* [1967] 1 WLR 327, 330; *Bloch v Bloch* (1981) 55 ALJR 701, 703; see also *Powell v Camm* [2003] QCA 353; *Watson v Watson* [1968] 2 NSWR 647; *Walker* was referred to in *Carryer v Kelly* (1969) 90 WN (Pt 1 NSW) 566, 569, [1969] 2 NSWR 769, 771.

12 At 657.

[47] In *Sali v SPC Ltd*[13], the judgment of three members of the Court stated the principle, by reference to *Maxwell*, to be that:

> "…although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party."

[48] *Sali* recognised some modification of the principle by reference to the competing claims by litigants in other cases awaiting a hearing in a busy court[14]. There has been no suggestion that this consideration is relevant in the present case.

[49] In *Powell v Camm*, the following statement was made by McMurdo P, with whom the other members of the Court agreed, referring to *Maxwell* and *Sali*[15]:

> "The discretionary exercise to refuse an adjournment will only be interfered with on appeal if it appears that the judge erred in law or the result of the refusal of the adjournment was to do an injustice to one or other of the parties…"

Was the adjournment erroneously refused?

[50] There are, in my view, some matters which provide strong support for the appellant. Section 114 of the *Supreme Court of Queensland Act* 1991 (Qld), as it stood in December 2011, made inadmissible evidence of anything done or said at the mediation, unless all parties to the dispute otherwise agreed. The affidavits of Robert and Chevonne dealt with events at the mediation, and at the latest by the time that they were admitted into evidence, it seems to me that there was an agreement by conduct that evidence of things done and said at the mediation was admissible at the hearing. This consequence of the use of those affidavits at the hearing was specifically relied upon by Counsel for Chevonne before the learned primary Judge. It seems to me that there is much to be said for the proposition that Chevonne should have been given the opportunity, through her legal advisers, to investigate whether there was available evidence, now admissible, relevant to the construction of cl 6.

[51] That consideration would not affect the outcome of the appeal, if it were clear that there was no real prospect that such an investigation might discover admissible evidence relevant to the construction of the clause, and supportive of Chevonne's case. However, there are, in the present case, two reasons for thinking that Chevonne should have been given this opportunity.

[52] Cases such as *Karam* and *Qantas Airways Ltd v Gubbins*[16] suggest that, exceptionally, what was in the actual contemplation of the parties is relevant. It appears to be an open question as to whether this represents the law in Queensland[17]. The effect of Chevonne's evidence was that, when agreement was reached, she believed that she and Matthew would share the residue of the estate evenly. On that basis, cl 6 must have been intended as a release by Lauretta of her claim to a share of the residue. Chevonne's belief arose from communications to her by the mediator and her barrister, in Robert's presence. That suggested a real

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13 At 843.
14 *Sali* at p 844.
15 At [23].
16 (1992) 28 NSWLR 26.
17 *Fraser v Irish Resturant & Bar Co Pty Ltd* [2008] QCA 270.

prospect of obtaining evidence that the communications originated from Lauretta; and that Chevonne's contemplation was also shared by her. The fact that Lauretta and Robert had sworn otherwise was not itself a reason why Chevonne should not have had an opportunity to obtain the evidence; rather the contrary is the case.

[53] Even if there is no exception, for the construction of a release, to the general limitations on extrinsic evidence formulated in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[18], nevertheless, Mason J there[19] recognised that prior negotiations "will tend to establish objective background facts which were known to both parties and the subject matter of the contract".

[54] The judgment of Mason J drew on statements of Lord Wilberforce in *Prenn v Simmonds*[20]. His Lordship there said[21]:

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners v Adamson*[22] provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view."

[55] The learned primary Judge found the subject matter of cl 6 of the Terms of Settlement to be the resolution of Lauretta's claim for further provision out of the estate[23]. In my view, extrinsic evidence is admissible on that question. The communications between the parties would be relevant, in so far as they would assist in the objective identification (that is, from the point of view of an hypothetical independent observer) of the subject matter of the agreement recorded in the Terms of Settlement, and in particular in cl 6. Such evidence would equally be admissible if one were to seek to identify the "genesis" or the "aim" of the agreement[24].

[56] Chevonne's evidence on the adjournment application shows that there is a live issue as to the subject matter or aim of the agreement reached at the mediation. It is whether the parties are to be taken objectively to have intended to reach, and to have reached, an agreement about all that Lauretta was to receive from the estate; or only about what she was to receive in addition to the interests in residue assigned to her by her sons. It is not unlikely that communications between the parties at the mediation would shed light on that question. In much the same way as has been discussed with reference to the special approach to the construction of the release, Chevonne's evidence indicates the real prospect of obtaining evidence of communications originating from Lauretta, and known to Robert, relevant to that issue.

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18 (1982) 149 CLR 337, 352; see also *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at [39]; and the remarks in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 [3]-[5].

19 At 352.

20 [1971] 1 WLR 1381, 1383–1385; see in particular *Codelfa* at 348-351.

21 At 1383-1384.

22 (1877) 2 App Cas 743, 763.

23 [2012] QSC 239 (*Reasons for Judgment)*, [35].

24 See *Codelfa* at p 348.

[57] Moreover, it is somewhat unlikely that the negotiations occurred without reference to the assigned interests in the residue. The question whether an order is to be made for better provision out of the estate is to be determined by a two-stage process. The first stage considers whether a person applying for an order has been left without adequate provision for proper maintenance and support, determined by reference to the will in the circumstances as they prevailed at the date of the deceased's death. The second stage (assuming a positive answer for the first stage) determines what provision ought to be made out of the deceased's estate for the applicant[25]. The second stage involves a consideration of the applicant's financial position at the time when further provision is to be made[26]. At the second stage, the fact that interests had been assigned to Lauretta was plainly relevant; and there was therefore some likelihood that they were considered by the parties at the mediation. Chevonne's evidence on the adjournment application supports that likelihood. If accepted, it provides a ground for thinking that the broad terms of cl 6 were intended to dispose of Lauretta's interest in the residue of the estate.

[58] The learned primary Judge focussed his attention on the evidence of Chevonne's state of mind. As indicated, even on that basis, further evidence demonstrating her state of mind may well have been admissible, as well as evidence demonstrating the state of mind of Robert and Lauretta. However, in my view the evidence went further, demonstrating the prospect of obtaining evidence which would objectively establish the subject matter, or the genesis and aim, of the Terms of Settlement, including cl 6.

[59] The refusal of the adjournment deprived Chevonne of the opportunity to investigate the availability of evidence in support of her position about the proper construction of cl 6 of the Terms of Settlement. Her evidence demonstrated a real prospect that evidence might be obtained to support her position, from sources likely to be regarded as credible. It seems to me that as a result there was a denial of justice to Chevonne.

[60] While the adjournment may have resulted in some delay, it seems to me that there would have been no denial of justice to the other parties, and in particular Lauretta, had it been granted. The earlier of the two applications before the court had been filed as recently as 19 days before the hearing. Lauretta had not herself taken any proceeding to establish her claim to an interest in the residue of the estate until the day of the hearing. In that context, there is no reason to think that an adjournment permitting Chevonne a relatively brief period of time in which to obtain further evidence would have worked any injustice to any other party.

[61] It was said that the evidence could have been obtained earlier. Plainly that is true, but it is difficult to give much weight to this consideration when such evidence became admissible only at about the time of the hearing.

[62] It was submitted that the issue of the construction had been raised much earlier, as had the question of having privilege waived in respect of the events which occurred at the mediation. Again the facts are correct. However, the proposal for a waiver came from the solicitors for Adriano and Silvano. This occurred well before any proceedings were commenced. Lauretta's attitude was then unknown; but her

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25 See *Singer v Berghouse* (1994) 181 CLR 201, 208-209; *Vigolo v Bostin* (2005) 221 CLR 191, 197, 212, 227.

26 See de Groot & Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed 2012) at para 2.27 esp at n 167.

interests were diametrically opposed to those of Chevonne. While it might be said that once proceedings were commenced, Chevonne could have sought to obtain the consent of Lauretta to the waiving of privilege in respect of the mediation, any delay from that point was relatively brief; and in any event, Robert, whose consent was needed both in respect of the mediation, and in respect of communications with their jointly appointed solicitors, did not respond to the request made on 13 July 2012. Delay in asking Lauretta to waive privilege in respect of the mediation does not seem to me to be significant enough to outweigh the seriousness of the loss to Chevonne of the right fully to investigate the availability of evidence and lead evidence in support of her position.

[63] At the hearing, Chevonne's Counsel permitted argument to take place on the effect of the Terms of Settlement, without immediately applying for an adjournment. However, at the outset of the hearing, she had indicated the need to obtain further evidence, and that she would be applying for directions. It seems to me the failure to make a prompt application for an adjournment is not of such significance as to outweigh the importance of permitting Chevonne to obtain and lead further evidence.

[64] The appeal has been conducted on behalf of Chevonne on the basis that she should have been granted an adjournment to obtain evidence relevant to the construction of the Terms of Settlement. This was referred to at first instance, though the argument there focussed on establishing an estoppel. No point was taken about any difference of approach on the appeal.

[65] Accordingly, it seems to me that this is a case where the refusal of the adjournment is such as to warrant intervention on appeal.

Further evidence

[66] On the appeal, Chevonne's Counsel sought to rely on affidavit evidence from the solicitor and barrister who had represented Chevonne and Robert at the mediation, and subsequently on the application before Daubney J. It was expressly stated that this was not "fresh evidence". This evidence shows that negotiations at the mediation sought to determine the distribution of the entire estate. In particular, the ultimate offer made on behalf of Robert and Chevonne (with Matthew's support) provided for the transfer of specified property to Lauretta, with some specified personal property to go to Chevonne and Matthew, and the remainder of the estate also to go to Chevonne and Matthew. This was accepted, save that Lauretta also wished her costs to be paid out of the estate. The question of costs was resolved by an agreement that in addition to the other specified property, Lauretta would receive some additional farm equipment in lieu of costs. The Terms of Settlement were then prepared and signed. It seems to me that this evidence, if accepted, would support the view that the subject matter of the Terms of Settlement was the distribution of the entire estate; or, alternatively, that its aim was the disposition of the entire estate. These matters would be relevant to the construction of cl 6.

[67] This evidence also shows that, on the hearing before Daubney J, the submissions presented on behalf of Robert and Chevonne stated that under the Terms of Settlement, Lauretta was to receive from the estate specified property (identified as the property to be transferred to her under the Terms of Settlement), which, after allowing for the transfer by Lauretta of her share in Dumesny Property Pty Ltd, had a value of approximately $780,000; representing approximately 40 per cent of the

estate. It was submitted that this represented proper provision out of the estate for Lauretta, bearing in mind the competing entitlements of Chevonne and Matthew. Although Lauretta was represented by Counsel, no submission was made to suggest that the provision to be made for Lauretta out of the estate extended beyond the property specified in the Terms of Settlement, so as to include a share of the residue. This evidence would be relevant if the document to be construed is the order of Daubney J; and in any event may be regarded as corroborative of evidence of events at the mediation.

[68] The affidavits appear to be responsive to the submissions made on behalf of Lauretta previously mentioned, that Chevonne's position as to the proper construction of the will was "even now, unsupported by any evidence of the kind which the adjournment was supposedly intended to give Chevonne an opportunity to adduce".

[69] In *Chaina*, as previously stated, a ground of appeal was that the appellant had been denied procedural fairness, by reason of the refusal of an adjournment at first instance to allow the appellant to obtain further expert evidence[27]. In the course of rejecting that ground of appeal, Basten JA, with whom the other members of the Court agreed, said[28]:

> "There is a further consideration. By the time the application was made to this Court, by summons filed on 10 April 2008, the appellants had had four months in which to determine whether there was indeed a basis for demonstrating that the evidence before her Honour proceeded upon some misapprehension or was incomplete in a material respect, having a significant financial impact, adverse to the appellants. No such evidence was produced to this Court."

[70] The basis on which such evidence might have been admissible was not explained. Under r 766 of the *Uniform Civil Procedure Rules* 1999 (Qld), this Court may, on special grounds, receive further evidence as to questions of fact; and such evidence may be given without special leave, unless the appeal is from a final judgment. Tests stated in *Langdale v Danby*[29] and *Clarke v Japan Machines (Aust) Pty Ltd*[30] have been applied to determine whether evidence should be admitted under this rule[31]. Those tests require it to be shown that the evidence could not have been obtained with the use of reasonable diligence for the hearing at first instance; that the evidence, if allowed, would probably have an important influence on the result of the case; and that the evidence is credible. These tests do not draw on the language of the rule, and there may be a question about their universal application, for example, when a challenge to produce evidence is made by a respondent to an appeal, or on the basis that the consideration referred to in the passage just quoted from *Chaina* is relevant to the determination of the appeal. However, in my view it is unnecessary to determine that question.

[71] For reasons set out previously, it seems to me that this appeal can be determined in favour of Chevonne, without recourse to the further evidence. Accordingly I would not be prepared to receive it. If that conclusion were wrong, it seems to me that the evidence would reinforce the view which I had earlier reached.

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27 See at [20].

28 At [85]; see [1] and [118].

29 [1982] 1 WLR 1123.

30 [1984] 1 Qd R 404.

31 See, for example, *Cairns City Supermarkets Pty Ltd v Lightbrake Pty Ltd* [2011] QCA 205 at [16].

Conclusion

[72] The application for the admission of further evidence on the appeal should be refused. The appeal should be allowed. The matter should be remitted to the trial division for further hearing.

[73] Subject to further submissions, I would propose to order that Chevonne pay the costs of the day of the hearing at first instance; that otherwise the costs of the applications heard at first instance be reserved; and that Lauretta, Adriano and Silvano pay Chevonne's costs of the appeal.