SUPREME COURT OF QUEENSLAND

CITATION:	*Whitla v Launchbury & Anor* [2014] QSC 70
PARTIES:	**SCOTT GRAHAM WHITLA (as Administrator of the Estate of ALLAN JAMES LAUNCHBURY)** (applicant) **v** **BARBARA JANE LAUNCHBURY** (first respondent) **JONATHAN DAVID LAUNCHBURY** (second respondent)
FILE NO/S:	SC No 2963 of 2014
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2014
JUDGE:	Chief Justice
ORDER:	**The Court directs that the applicant should distribute the sum of $355,700.57 referred to in the affidavit of Scott Graham Whitla sworn 8 April 2014 pursuant to cl 3.5 of the will of Allan James Launchbury dated 9 April 2008 (as part of the residuary estate).**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – WORDS TO HAVE ORDINARY AND GRAMMATICAL MEANING – by the deceased's last will dated 9 April 2008 cl 3.1 he gave his daughter any real estate he owned at the date of his death and by cl 3.5 he gave the residue of the his estate to his son and daughter in equal shares – subsequently the deceased sold his freehold land and entered into a rent free sub-lease of a unit within a retirement village – associated with the sub-lease was an interest free loan provided by the deceased to the retirement village – prior to his death the deceased gave notice to terminate the sub-lease but he remained the legal registered proprietor of the sub-lease on the date of his death – upon the unit being re-let following the deceased's death, the deceased was entitled to a refund an amount of the interest free loan –

whether the refund of the loan is the proceeds of 'real estate owned by the deceased at the date of his death'

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – PARTICULAR TESTAMENTARY DISPOSITIONS – DESCRIPTION OF SUBJECT MATTER – REAL ESTATE – GENERAL DISPOSITION OF REAL ESTATE: WHAT PROPERTY INCLUDED – by the deceased's last will dated 9 April 2008 cl 3.1 he gave his daughter any real estate he owned at the date of his death and by cl 3.5 he gave the residue of the his estate to his son and daughter in equal shares – subsequently the deceased sold his freehold land and entered into a rent free sub-lease of a unit within a retirement village – associated with the sub-lease was an interest free loan provided by the deceased to the retirement village – prior to his death the deceased gave notice to terminate the sub-lease but he remained the legal registered proprietor of the sub-lease on the date of his death – upon the unit being re-let following the deceased's death, the deceased was entitled to a refund an amount of the interest free loan – whether the refund of the loan is the proceeds of 'real estate owned by the deceased at the date of his death' – whether the loan and sub-lease ought to be amalgamated

Succession Act 1981 s 33I

Holt v Holt [1921] 2 Ch 17, applied
Re: Stanley [1965] SASR 159, distinguished
The Trust Company Limited & Anor v Zdilar & Ors [2011] QSC 5, applied

COUNSEL: R T Whiteford for the applicant
L J Nevison for the first respondent
S C Fisher for the second respondent

SOLICITORS: McCullough Robertson for the applicant
John Crossan & Co for the first respondent
Romans & Romans for the second respondent

[1] **CHIEF JUSTICE**: The administrator of the estate of Mr Allan Launchbury seeks a declaration or direction as to the proper construction of the deceased's will. The administrator is Mr Whitla, a solicitor of this court.

[2] The deceased died on 27 July 2012. By his last will, which is dated 9 April 2008, he appointed his daughter Barbara (the first respondent) and his son Jonathan (the second respondent) as his executors; by cl 3.1 he gave Barbara "any real estate that I own at the date of my death"; by cl 3.2 he gave his superannuation fund to Jonathan

and Jonathan's wife; by cl 3.3 he gave his tools to Jonathan; by cl 3.4 he gave his shares to his grandchildren; and by 3.5 he gave the residue of his estate to Barbara and Jonathan in equal shares.

[3] When he executed that will, the deceased lived at Lammermoor. On 5 June 2009, he sold that property and moved into a unit at Renaissance Retirement Village, Victoria Point. He entered into a (rent free) sub-lease of his unit from Renaissance VP Pty Ltd. He was entitled to terminate the sub-lease on one month's notice (cl 3.1). He gave notice terminating the sub-lease on 27 March 2012, effective from 27 April 2012. It was then that he vacated the unit and moved into a nursing home. When he died, he was still registered as proprietor of the sub-lease of the unit. He owned no other freehold or leasehold property.

[4] Associated with the rent free sub-lease was a loan agreement, under which the deceased lent $425,000, interest free, to Renaissance VP Pty Ltd, as his "resident's ingoing contribution". On the termination of the sub-lease, the parties were obliged to cooperate to re-let the unit. It was re-let on 17 May 2013. Under the loan agreement, upon the re-letting, Renaissance VP Pty Ltd became obliged to refund to the deceased an amount of $355,700.57 (adjusted against the amount of $425,000 paid at the outset).

[5] The question for my determination is whether that amount is to be dealt with under cl 3.1 of the will, as being the proceeds of real estate owned by the deceased at the date of death – going to Barbara; or under cl 3.5, as residue – shared equally by Barbara and Jonathan. The applicant administrator favours its being dealt with under cl 3.5, as residue, as unsurprisingly does Jonathan, whereas Barbara argues that cl 3.1 should apply.

[6] The refund monies were paid to the estate, not under the sub-lease, but under a loan agreement collateral to the sub-lease. Although obviously related, the sub-lease and the loan agreement were in law separate transactions, which renders it difficult to regard the refund monies as the proceeds of a transfer or surrender of the sub-lease. I do not consider Mr Nevison's "contrivance" submission justifies effectively amalgamating the sub-lease and the loan agreement such that refunds under the latter should be characterized as the proceeds of sale or surrender of the former.

[7] Also, prior to his death, although the deceased remained registered proprietor as sub-lessee of the unit, he had in fact terminated that sub-lease, so that he had foregone any beneficial ownership of the unit, again rendering it difficult to regard the refund as the proceeds of transfer or surrender of the sub-leased property.

[8] Mr Nevison relied on *Re: Stanley* [1965] SASR 159. That case is distinguishable because of the comprehensive terms of the disposition in that will.

[9] Although the circumstances are not identical, the facts confronting Margaret Wilson J in *The Trust Company Limited & Anor v Zdilar & Ors* [2011] QSC 5 have relevance to this case. Her Honour considered the refund monies were not proceeds of "my house property…situated at 18 Emma Street, Rochedale or any substitute house property I shall own at the date of my death". Her Honour said that even if the unit in that case fell within the words "substitute house property", it was not "a property owned by her when she died". Similarly here, the deceased had terminated the sub-lease prior to his death, notwithstanding he remained as registered proprietor of the bare legal estate.

[10] I acknowledge that at common law a gift of "real estate" passes a leasehold interest if the deceased dies without any freehold property (*Holt v Holt* [1921] 2 Ch 17, 23-4); and see s 33I *Succession Act* 1981. But I have difficulty characterizing these refund monies as the proceeds of real estate owned by the deceased when he died. The monies were payable under a loan contract collateral to a sub-lease which he had previously terminated, and properly reflect the discharge of a chose in action, amounting to personalty.

[11] There will therefore be a direction that the applicant should distribute the sum of $355,700.57 referred to in the affidavit of Scott Graham Whitla sworn 8 April 2014 pursuant to cl 3.5 of the will of Allan James Launchbury dated 9 April 2008, that is, as part of the residuary estate in which the respondents share equally.

[12] As agreed at the conclusion of the oral hearing, costs are reserved. I will determine them as necessary, if convenient on the basis of written submissions.