SUPREME COURT OF QUEENSLAND

CITATION:	*Flower v Allen* [2014] QSC 300
PARTIES:	**ELIZEBETH JUNE FLOWER AS EXECUTOR OF THE ESTATE OF JEAN ELIZABETH ALLEN, DECEASED (applicant)** **v** **JOHN HARDING ALLEN (**the beneficiary under clause 7 of the will of the deceased) and **ELIZEBETH JUNE FLOWER, JULENE ELISE HAACK, MARICE ELIZABETH KRAAL and ANDREW MARK HAACK (**as trustees for the Elizebeth June Flower Testamentary Trust) (the residuary beneficiaries of the will of the deceased) **(respondents)**
FILE NO:	BS10489 of 2014
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	11 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2014
JUDGE:	Mullins J
ORDER:	**1. It is declared that, upon the proper construction of the will of the late Jean Elizabeth Allen (the deceased) dated 10 May 2007, the condition to which the devise in clause 7 of the will is subject that John Harding Allen within three calendar months of the date of the deceased's death transfer Lot 22 of RP 862810 in the County of March, Parish of Gympie (Lot 22) to the Elizebeth June Flower Testamentary Trust applied only if Lot 22 had not been transferred by the said John Harding Allen to the deceased prior to her death.** **2. It is declared that, upon the proper construction of the deceased's will, as the said John Harding Allen transferred Lot 22 to the deceased prior to her death, he is entitled to the devise in his favour under clause 7 of the will.** **3. The costs of the applicant and the respondents be paid out of the estate of the deceased on the indemnity basis as a testamentary expense.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE –

QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – where applicant sought to have an application for declarations as to the proper construction of the will decided without an oral hearing – where there was no opposition to the making of the order – whether application was the type of application that should be determined without an oral hearing

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTUCTION GENERALLY – where the will of the deceased provided for a devise of real property to her son on condition that he transfer specified property to a testamentary trust within three calendar months of the date of the deceased's death – where the son transferred the property to the deceased prior to the deceased's death at the deceased's request – where the deceased expressed an intention that if her son did not transfer the property to her while she was alive, she would make her will on terms that would ensure that he did so after her death – whether the condition applied where the property had been transferred by the son to he deceased before her death

Succession Act 1981, s 33C
Uniform Civil Procedure Rules 1999, r 489, r 490, r 491

Perrin v Morgan [1943] AC 399, considered
The Public Trustee of Queensland v Smith [2009] 1 Qd R 26, considered

COUNSEL: S K McLeod for the applicant
J M Lavercombe (*sol*) for the respondent John Harding Allen

SOLICITORS: Thynne & Macartney for the applicant
Stephens & Tozer as town agents for Power & Cartwright for the respondent John Harding Allen

[1] The applicant is the executor of the estate of the late Jean Elizabeth Allen (the deceased) who died on 7 January 2013 aged 98 years. Probate of the deceased's last will dated 10 May 2007 was granted to the applicant on 8 August 2013. The applicant is one of the deceased's daughters.

[2] Clause 7 of the deceased's will provides:

> "7 Subject to paragraph 13 hereof and PROVIDED THAT the said **JOHN HARDING ALLEN**, at his cost, shall have within three (3) calendar months of the date of my death transferred to the **ELIZEBETH JUNE FLOWER TESTAMENTARY TRUST**, in respect of which the primary beneficiary shall be named in the schedule to this Will and the Trustees shall be the said **ELIZEBETH JUNE FLOWER, JULENE ELISE HAACK, MARICE ELIZABETH KRAAL and ANDREW MARK HAACK**.

> The terms of the Trust shall be those set out in the schedule attached to this Will the land and fixed improvements thereon described as Lot 22 on RP 862810 in the County of March, Parish of Gympie I GIVE DEVISE AND BEQUEATH the land and fixed improvements described as Lot 50 on SP 115913, Lot 6 on MPH 23661, Lot 1 on MPH 5820 to the said **JOHN HARDING ALLEN**. IN THE EVENT that the said **JOHN HARDING ALLEN** does not transfer the said land to the said the **ELIZEBETH JUNE FLOWER TESTAMENTARY TRUST** as required by this paragraph then this bequest shall lapse and the land referred to herein shall form part of the residue of my estate."

[3] There appears to have been a typographical error made in relation to the sentence fragment "The terms of the Trust shall be those set out in the schedule attached to this Will". It obviously applies to the Elizebeth June Flower Testamentary Trust (the Testamentary Trust). There should not have been a full stop after the name "Haack" and the sentence fragment should have been in brackets. The only way to read clause 7 grammatically is to overlook these typographical errors, because otherwise the structure of the clause is clear.

[4] Clause 9 of the deceased's will provides:

> "9 Subject to paragraph 13 hereof, I GIVE DEVISE THE BEQUEATH the land and fixed improvements described as Lot 2 on CP 858594, Lot 3 on CP 858594, Lot 22 on RP 862810, Lot 616 on SP 115913, Lot 11 on RP 862810, Lot 99 on SP 153520, Lot 43 on SP 115913, Lot 49 on SP 115913 and Lot 1 on MPH 5740 to the said **ELIZEBETH JUNE FLOWER TESTAMENTARY TRUST** absolutely."

[5] Under clause 12 of the will, the Testamentary Trust is the beneficiary of the residue of the deceased's estate.

[6] Clause 13 of the will makes special provision for how the beneficiaries under the will are to share in the amount of any capital gains tax liability of the deceased's estate or the estate of her late husband.

[7] When the deceased executed her will, her son Mr John Allen (John) was the registered owner of Lot 22 on RP 862810, but on 30 November 2007 John transferred Lot 22 to the deceased and she remained the registered owner of Lot 22 at the date of her death. Since the deceased's death Lot 22 was transmitted to the applicant as personal representative and was subsequently transferred on 2 December 2013 to the trustees of the Testamentary Trust pursuant to clause 9 of the deceased's will.

[8] The applicant considered that because John had transferred Lot 22 to the deceased prior to the date of the deceased's death, in conjunction with the operation of clause 9 of the will, he had in substance complied with the condition contained in clause 7 of the will that he transfer Lot 22 to the Testamentary Trust within three calendar months of the date of the deceased's death.

[9] In order to clarify the applicant's view and John's view as to what should occur in relation to the Lots, the applicant and John entered into a deed dated 4 October 2013. That deed recited that they agreed to vary the terms of the deceased's will in accordance with the provisions of the deed. Clause 3 of the deed purported to vary clause 7 of the will, so it would provide:

> "Subject to paragraph 13 hereof I GIVE DEVISE AND BEQUEATH the land the fixed improvements described as Lot 50 on SP115913, Lot 6 on MPH 23661 and Lot 1 on MPH 5820 to the said **JOHN HARDING ALLEN**."

[10] That deed could never effect a variation of the deceased's will, as the parties to the deed have no power to do so.

[11] The applicant and John signed the documents to transmit Lots 50, 6 and 1 (referred to in clause 7 of the deceased's will) to John, but that transmission was requisitioned by the Registrar of Titles. In the original requisition, the registrar pointed out the discrepancy between clauses 7 and 9 of the will. In the second requisition, after the deed dated 4 October 2013 had been provided, the registrar not surprisingly queried the power of the applicant and John to vary the terms of the deceased's will.

[12] In order to respond to the requisition, the applicant commenced this proceeding seeking declarations that, upon the proper construction of clause 7 of the deceased's will, the word "within" means at any time before a date which ends three calendar months from the date of death of the deceased, and further that, in the events which have occurred, the condition imposed on John has been satisfied as Lot 22 was transferred to the Testamentary Trust before the date which is three calendar months of the date of death of the deceased. The applicant also seeks a declaration that John is beneficially entitled to Lots 50, 6 and 1 devised to him by clause 7 of the will.

Application on the papers

[13] The applicant initially sought to have the application for declarations as to the proper construction of clause 7 of the will determined as an application on the papers pursuant to r 489 of the *Uniform Civil Procedure Rules* 1999. Even though John did not oppose the course proposed by the applicant and his written advice confirming he had no objection to the orders sought in the application was exhibited to the applicant's affidavit, it must have been apparent that the question of the construction of clause 7 of the will in the circumstances where the strict terms of the condition were unable to be fulfilled after the deceased's death was not straightforward. The fact that there may be no opposition to the making of an order does not qualify an application as one that is appropriate for a decision on the papers without an oral hearing.

[14] The availability of obtaining a decision from a judge without an oral hearing can be a costs saving for parties in appropriate cases. It dispenses with the need for the party's lawyer (where the party is represented) to attend court for the hearing of the application. Written submissions are required under r 490(1)(b) of the *UCPR*, but written submissions would also be required, if the application were heard in the normal course: *Supreme Court Practice Direction* No 6 of 2004. The procedure is particularly suited for commonplace applications, such as an application for

substituted service or an application by solicitors seeking leave to withdraw as the solicitors on the record for a party. They are the types of application where the requirements for obtaining the particular order are well settled and the order is usually made on generally standard terms and the party's solicitor can check that the supporting material and proposed draft order meets the settled requirements.

[15] In this application, however, where the discrepancies between clauses of the will are distinguished by the circumstances of the case and the construction of the will may involve some care in the consideration of the relevant legislation and case law, it should have been anticipated that the judge embarking on the application would be assisted in exploring the relevant issues with the applicant in the course of a hearing. I therefore decided pursuant to r 491(1) of the *UCPR* that this application was inappropriate to determine on the papers and set it down for hearing.

[16] If any vindication was required for that decision, it was found in the filing of a further affidavit of the applicant dealing with the circumstances surrounding the making of the will and the transfer of Lot 22 to the deceased, including the critical fact that Lot 22 was transferred by John to the deceased at her request after the will was executed.

The approach to the construction of the will

[17] The starting point for the construction of the will is that the court must give effect to the intention of the testator which is gathered from reading the will as a whole and giving the words the meaning which, having regard to the terms of the will, the testator intended: *Perrin v Morgan* [1943] AC 399, 406, 420.

[18] Section 33C of the Act provides:

> "(1) In a proceeding to interpret a will, evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it—
>
> (a) meaningless; or
>
> (b) ambiguous on the face of the will; or
>
> (c) ambiguous in the light of surrounding circumstances.
>
> (2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).
>
> (3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will.

[19] Section 33C(3) preserves the circumstances in which admission of extrinsic evidence was permitted in limited circumstances prior to the enactment of this provision. See the discussion by Atkinson J of the law regulating the construction of a will in *The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at [20]-[26].

[20] On a literal construction of the will, Lot 22 passed to the Testamentary Trust under clause 9 of the will and John was unable to fulfil the condition contained in clause 7, because he had transferred Lot 22 to the deceased before her death. There is some inconsistency between the clauses in the will, with clause 7 proceeding on the basis that Lot 22 would be owned by John at the deceased's death, with the devise of the land under clause 7 in favour of John being made conditional on Lot 22 being transferred by John to the Testamentary Trust within three months after the

deceased's death, and clause 9 proceeding on the basis that Lot 22 would be owned by the deceased at her death.

[21] The condition in clause 7 of the will appears on its face to be for the purpose of obtaining the transfer by John to the Testamentary Trust of Lot 22 to enable the devise under clause 7 in John's favour to take effect. The fact that the deceased wished to benefit the Testamentary Trust with Lot 22 is also confirmed by clause 9 of the will. The condition in clause 7, however, provides for the condition to be fulfilled within the three months after the deceased's death. One of the reasons for structuring the condition that way was no doubt that the Testamentary Trust would not commence until the death of the deceased. That raises the question whether the substance of the condition is that the Testamentary Trust receives the benefit of Lot 22 or whether it is the Trust receives the benefit of Lot 22 within the time period specified in the condition. If the condition is applied literally, the devise under clause 7 would not take effect, even though the Testamentary Trust received Lot 22 by virtue of the deceased's ownership of it at her death. These issues mean that clause 7 is ambiguous on the face of the will which allows recourse under s 33C(1) of the Act to evidence of the deceased's intention.

[22] The applicant in her affidavit filed on 25 November 2014 set out the history, as she understood it from the deceased's communications to her about Lot 22. The solicitor who acted for the applicant in the 20 years prior to her death and had taken instructions for the will also swore an affidavit for the purpose of this proceeding. It had been the intention of the deceased and her husband to purchase Lot 22 from John in 1994 and they believed they had done so and acted as if they were the owners. The title had not been conveyed to them and that became apparent to the deceased shortly after her husband's death on 1 November 2005. The deceased then pursued John to seek the transfer of Lot 22 into her name. Her expressed intention to her solicitor and to the applicant was that, if John did not transfer Lot 22 to her while she was alive, she would make her will on terms that would ensure that he did transfer Lot 22 after her death. The solicitor explained that clause 7 was put into the will to ensure that John transferred Lot 22, as the deceased wanted Lot 22 ultimately to pass to the Testamentary Trust. It was the deceased's intention that John would take his benefit under clause 7, if he had transferred Lot 22, to facilitate the carrying out of the deceased's wishes in respect of Lot 22.

[23] In the circumstances in which prior to her death the deceased was procuring John to transfer Lot 22 to her, it is apparent that the substance of the condition to which clause 7 of the will was subject was intended to apply only if Lot 22 had not been transferred by John to the deceased prior to her death. That is supported by clause 9 of the will which anticipated that Lot 22 would be owned by the deceased at her death and that there was no express alternative gift in the will of Lots 50, 6 and 1.

[24] There was therefore no work for the condition in clause 7 of the will to do, if Lot 22 was transferred by John to the deceased prior to her death. Consistent with the deceased's intention, the condition for clause 7 must be construed as applying only if John had not transferred Lot 22 to the deceased prior to her death.

[25] It is therefore appropriate to make declarations in the following terms:

1. It is declared that, upon the proper construction of the will of the late Jean Elizabeth Allen (the deceased) dated 10 May 2007, the condition to which the devise in clause 7 of the will is subject that John Harding Allen within

three calendar months of the date of the deceased's death transfer Lot 22 of RP 862810 in the County of March, Parish of Gympie (Lot 22) to the Elizebeth June Flower testamentary trust applied only if lot 22 had not been transferred by the said John Harding Allen to the deceased prior to her death.

2. It is declared that, upon the proper construction of the deceased's will, as the said John Harding Allen transferred Lot 22 to the deceased prior to her death, he is entitled to the devise in his favour under clause 7 of the will.

[26] The originating application sought a direction to the Registrar of Titles to record the transmission that is presently the subject of requisition. The registrar is not a party to the application. In any case, it is not appropriate to consider such a direction until the registrar has been given an opportunity to register the transmission after the sealed order containing the declarations made in this proceeding are provided to the registrar.

[27] The applicant also filed an application on 25 November 2014 seeking leave to amend the originating application, in order to seek rectification of the will by way of alternative relief. As the applicant has succeeded in her contention on the issue of the construction of the will, it is unnecessary to make any orders in respect of the application filed on 25 November 2014.

Costs

[28] The order for costs sought by the applicant in the originating application of which notice was given to all respondents (including John) was that the costs of the applicant and the respondents be paid out of the deceased's estate on the indemnity basis as a testamentary expense.

[29] Prior to the hearing on 26 November 2014, the applicant's solicitors gave notice to John's solicitors that the applicant proposed seeking an order for costs out of the realty the subject of the disposition that caused the difficulty in the construction of the will. John was therefore represented at the hearing on 26 November 2014 to argue that any costs should be ordered to be paid out of the estate on an indemnity basis, including John's costs.

[30] The issue of construction that arose in this application was due to a combination of circumstances, including that the deceased herself had procured the transfer of Lot 22 from John to her, after she had made the will.

[31] In the circumstances, I consider that there is no reason to depart from the order for costs that was flagged by the applicant to the respondents at the commencement of this proceeding.