

# SUPREME COURT OF QUEENSLAND

CITATION: *Borthistle v Kanaef & Ors* [2016] QSC 182

PARTIES: **CHRISTINE BORTHISTLE**  
(applicant)  
v  
**JANET HELEN KANAEF**  
(first respondent)  
**JANET HELEN KANAEF and CAROL RUTH VIDAL**  
as executors of the will of **JOHN HAMPDEN**  
**BORTHISTLE deceased**  
(second respondents)

FILE NO: BS11379 of 2014

DIVISION: Trial Division

PROCEEDING: Interlocutory applications

DELIVERED ON: 16 August 2016

DELIVERED AT: Brisbane

HEARING DATE: 7 June 2016

JUDGE: Mullins J

ORDERS:

- 1. The application filed on 15 April 2016 is dismissed.**
- 2. The application pursuant to s 106(5) of the *Powers of Attorney Act 1998* to extend the time for making the application for compensation for loss caused by breaches of the *Powers of Attorney Act 1998* is dismissed.**
- 3. The application pursuant to s 49(2) of the *Succession Act 1981* to give the consent of the court *nunc pro tunc* for the applicant to bring this proceeding for the benefit of the estate of the deceased is adjourned to a date to be fixed.**
- 4. The application to join Mr Glenn Desmond as third respondent to this proceeding is adjourned to a date to be fixed.**
- 5. The application for an injunction against the first respondent is dismissed.**

CATCHWORDS: SUCCESSION – PERSONAL REPRESENTATIVES – RIGHTS, POWERS AND DUTIES – GETTING IN AND REALISING ESTATE – where applicant and respondents were executors, trustees and beneficiaries of deceased father’s estate – where applicant renounced role of executor – where grant of probate made to respondents – where applicant beneficiary seeks leave to bring claim on behalf of estate not

brought by executors – whether it is appropriate to grant leave where the applicant shares the estate equally with each of the respondents, the estate is modest, the quantum in dispute is unclear and the claim has not been adequately pleaded

*Powers of Attorney Act 1998 (Qld)*, s 66, s 73, s 86, s 87, s 88, s 106

*Succession Act 1981 (Qld)*, s 49, s 66

*Bridgewater v Leahy* [1997] QCA 36, considered

*Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66, considered

*Ede v Ede* [2007] 2 Qd R 323; [2006] QSC 378, considered

*Smith v Glegg* [2005] 1 Qd R 561; [2004] QSC 443, considered

COUNSEL: C A Brewer for the applicant  
A P J Collins for the first and second respondents and the proposed third respondent

SOLICITORS: Mehera Saunders for the applicant  
Bell Legal Group for the first and second respondents and the proposed third respondent

- [1] Mr John Borthistle died on 29 October 2013 at the age of 89 years. He was survived by his three daughters who are all parties to this proceeding: Ms Borthistle, Ms Kanaef and Ms Vidal. Although all three daughters were named as executors and trustees in the deceased's will made on 27 February 2013, the applicant renounced the role as executor and the grant of probate of the deceased's last will was made to Ms Kanaef and Ms Vidal on 25 February 2014 and in that capacity they are the second respondents in this proceeding. As at the date of his death, the deceased's assets comprised his unit at Ashmore (which was in a retirement village) and approximately \$174,000 in his bank account. The deceased's estate subsequently received a net payment of \$263,145.97 for the sale of his unit which settled on 23 December 2015. Apart from any amount that could be clawed back to the estate, if the applicant's claims were allowed to proceed and were substantially successful, the deceased's estate is characterised appropriately as modest. It became apparent during the course of hearing the applications that there is a high level of acrimony and frustration between the parties.
- [2] Under the deceased's will, after a couple of specific bequests and small legacies, the residue is given to the deceased's three daughters in equal shares.
- [3] By the amended application that was filed on the hearing of the applications, the applicant pursuant to s 49(2) of the *Succession Act 1981 (Qld)* (SA) seeks leave nunc pro tunc to bring this proceeding for the benefit of the deceased's estate, an extension of time pursuant to s 106(5) of the *Powers of Attorney Act 1998 (Qld)* (the Act) to apply for compensation for loss caused by breaches of the Act, for leave to join Mr Glenn Desmond as third respondent to this proceeding, and for an injunction requiring Ms Kanaef to reimburse the deceased's estate for legal fees paid in defending this proceeding on her behalf and restraining her from using funds of the estate to defend this proceeding on her

behalf. For the purpose of obtaining the relief sought in the amended application, the applicant produced a proposed amended statement of claim (“the proposed statement of claim”) that included the claims against Mr Desmond and the amended and additional claims the applicant now wishes to pursue against the first respondent. The application is opposed by the respondents and the proposed third respondent. The respondents have incurred legal costs in respect of the proceeding in an amount of approximately \$45,000 up to 6 June 2016.

- [4] It is common ground that, if the proceeding is to continue, it should be transferred to the District Court.

**This proceeding**

- [5] It is relevant in determining the leave that is now sought by the applicant to consider the course which this proceeding has taken to date.
- [6] The proceeding commenced on 26 November 2014 when the applicant filed an originating application seeking an order pursuant to s 122 of the Act and/or pursuant to s 6 and s 52 of the SA that Ms Kanaef file and serve detailed accounts for all financial dealings and transactions which occurred in relation to the affairs of the deceased on or after the signing of the enduring power of attorney (EPA) dated 27 February 2013 for the period between 27 February and 29 October 2013. Relief was also sought under the SA that the second respondents provide the applicant a full inventory of the estate assets and liabilities as at the date of death, copies of the estate bank account statements from the date the deceased’s death to the “present” (which presumably referred to the date on which the application was due to be heard) including an explanation for all amounts paid from the estate bank account with copies of invoices and receipts, and copies of the deceased’s bank statements from the date of death of the deceased’s second wife (11 August 2007) until 27 February 2013.
- [7] In the affidavit which the applicant filed in support of the application, she explained that she had been informed by Ms Kanaef in August 2013 of the deceased’s approximate bank account balance and, at the date of the deceased’s death, the balance of the bank account was “significantly less” than what the applicant reasonably would have expected it to be. (The implication from this assertion is that the applicant accepted what she was told about the balance in August 2013, but was concerned at the diminution in the ensuing two months or so until the deceased’s death.)
- [8] The applicant was aware that the EPA had been executed by the deceased, was for both financial and personal health matters, and appointed Ms Kanaef and her severally as attorneys. The applicant deposed to her belief that from the date of the EPA, Ms Kanaef gradually took over the deceased’s affairs. On 26 March and 9 April 2014 the applicant caused her solicitor to make a request of Ms Kanaef (among many other requests) for copies of bank account statements for all the deceased’s bank accounts for the period between the date of the death of the deceased’s second wife and the deceased’s death. The second respondents did not comply with the request for copies of those bank statements (because of the cost in obtaining them from the bank) and that resulted in the commencement of the proceeding.
- [9] The applicant obtained leave from the court to issue a notice of non-party disclosure to the Commonwealth Bank of Australia in respect of copies of bank statements for accounts

held by the deceased from 27 February 2013 until 21 January 2015. An order was made by the court on 16 April 2015 that the proceeding continue, as if it commenced by claim.

[10] The bank provided copies of the deceased's bank statements to the applicant. The applicant's statement of claim was filed on 2 June 2015. The applicant alleges in paragraph 11 of the statement of claim that after Ms Kanaef moved in with the deceased, the deceased authorised her to use internet banking on his bank accounts and to make other withdrawals from those accounts. It was alleged in paragraph 17 that from 27 February 2013 all transactions between Ms Kanaef and the deceased or between a relation, business associate or close friend of Ms Kanaef and the deceased are presumed to be as a result of the undue influence of Ms Kanaef. There were allegations made in paragraphs 18 and 19 that from 2009 many of the transactions on the deceased's bank accounts "were not and could not have been undertaken by the deceased" and the transactions in annexures A and B to the statement of claim were undertaken by Ms Kanaef. It was alleged in paragraphs 20 and 21 that in so doing Ms Kanaef acted in breach of her fiduciary duties or each transaction was presumed to be procured by the undue influence of Ms Kanaef over the deceased pursuant to s 87 of the Act. The transactions appear to include some that took place after the deceased's death.

[11] Section 87 of the Act provides:

"The fact that a transaction is between a principal and 1 or more of the following—

- (a) an attorney under an enduring power of attorney or advance health directive;
- (b) a relation, business associate or close friend of the attorney;

gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence."

[12] It was held by McMurdo J (as his Honour then was) in *Smith v Glegg* [2005] 1 Qd R 561 that s 87 applies even where the transaction was not effected under an enduring power of attorney, provided the transaction was effected by the attorney. McMurdo J explained at [40]:

"On its face, s 87 is engaged simply from the fact that the transaction is one which is between a principal and an attorney or a related person as described in para (b). There is no expressed limitation in s 87 that the transaction must involve an exercise of the attorney's power. Indeed, by presuming that the principal was induced to enter the transaction by the attorney's influence, the section operates in a context where the principal does not enter the transaction simply by the attorney's doing so on his behalf. And it cannot be said that the apparent policy behind the section is one which requires such a limitation to be implied. In my view, s 87 is engaged where the transaction is between the principal and the attorney or another person within (b), whether or not the transaction was effected by the exercise of the powers under the enduring power of attorney."

[13] The respondents in their defence filed on 23 June 2015 asserted it was the deceased who instigated internet banking on his accounts and that all transactions were made with the deceased's authority and specific direction. The respondents responded to paragraph 11 of the statement of claim by asserting that "all transactions on the internet were made by

the first respondent together with the deceased who gave direction for each transaction and supervised the transactions”. Similarly, the respondents denied the allegation in paragraph 13 of the statement of claim that the deceased never used internet banking himself, on the basis that all transactions on the internet were made by Ms Kanaef “together with the deceased who gave direction for each transaction and supervised the transactions”. The respondents alleged that the EPA was never activated by the deceased and was retained in safe custody by his lawyers and the deceased continued to manage his own financial affairs.

- [14] The parties are at issue over the capacity of the deceased to give instructions to Ms Kanaef on financial matters in the months (or years) leading to his death. Ms Kanaef asserts that her father had full capacity and managed his own financial affairs to the date of his death, although he asked her to complete internet transactions on his behalf. The applicant in her affidavit filed on 26 May 2016 sets out all of the matters that she considers affected her father’s functioning from the time that Ms Kanaef moved in with him and “doubts” that he maintained a full state of capacity towards the end. No medical or other independent evidence has been filed by any party to support the different positions taken as to the deceased’s capacity. If this proceeding continues, that will be a matter on which both parties will need to gather evidence.
- [15] It was after the statement of claim had been filed that the applicant informed her solicitor that there were two enduring powers of attorney made by the deceased prior to the EPA. The applicant was aware at all times of the two earlier enduring powers of attorney, as the applicant was named as an attorney under each of them.
- [16] The respondents filed an application on 15 April 2016 seeking to have paragraphs 18 to 21 of the statement of claim struck out. In view of the fact that the claims in that statement of claim were premised on the mere basis that the transactions by internet banking and ATM withdrawals could not have been undertaken by the deceased himself and the lack of particulars of the transactions alleged to have been undertaken by the first respondent in breach of fiduciary duty or procured by undue influence, the respondents would have been successful with that strike out application, but for the fact that the applicant is no longer proceeding on and has sought to amend that statement of claim. I will therefore formally dismiss that application.
- [17] The applicant filed an application on 3 May 2016 seeking the joinder of Mr Desmond as the third respondent, the transfer of the proceeding to the District Court, and an injunction requiring the first respondent to reimburse the deceased’s estate for legal fees paid in defending the proceeding on her behalf and restraining the first respondent from using estate funds to defend this proceeding on her behalf. Both applications came on for hearing before Douglas J on 26 May 2016 when the applications were adjourned to 7 June 2016 at the applicant’s request and the applicant was ordered to pay the costs thrown away of all respondents in respect of both applications. The respondents’ solicitor estimates the respondents’ costs covered by that order (inclusive of counsel’s fees) are between \$5,000 and \$6,000.
- [18] The parties addressed their submissions by reference to the proposed statement of claim which not only pleads the EPA, but now refers to the two earlier enduring powers of attorney. On 7 November 2007 the deceased had appointed the applicant, Ms Vidal and Ms Kanaef as the deceased’s attorneys for both financial and personal and health matters when he became incapacitated, and authorised them to act successively (the 2007 EPA).

On 13 April 2011 the deceased had appointed the applicant, Ms Vidal and Mr Desmond as the deceased's attorneys for both financial and personal and health matters upon his incapacitation and authorised them to act by majority (the 2011 EPA). Mr Desmond is Ms Kanaef's partner who commenced to reside with Ms Kanaef in the deceased's home in 2010. Ms Kanaef had commenced living with the deceased in his home, so she could care for him, in about September 2009. It was the applicant who had helped the deceased with his finances after his second wife died in August 2007 until Ms Kanaef moved in with him. The applicant organised the 2007 EPA and the 2011 EPA and it was at the applicant's suggestion that Mr Desmond was named as an attorney in lieu of Ms Kanaef in the 2011 EPA, because of Ms Kanaef's role as the deceased's carer.

- [19] There is no allegation in the proposed statement of claim that any of the impugned transactions were undertaken by either Ms Kanaef or Mr Desmond in exercise of any power under any enduring power of attorney. That is consistent with the fact that the applicant's challenge in this proceeding is to transactions on the deceased's accounts from the time Ms Kanaef moved into the deceased's home and internet banking and ATM withdrawals undertaken by Ms Kanaef in respect of the deceased's accounts. Ms Kanaef did not need to use the EPA or the 2007 EPA for any of these transactions. (Although paragraph 19 of the proposed statement of claim alleges that the impugned withdrawals were undertaken by Ms Kanaef and/or Mr Desmond, the applicant's written submissions acknowledge that it is not in contention that all transactions on the deceased's accounts were undertaken by Ms Kanaef.)
- [20] In paragraph 13A of the proposed statement of claim, the plaintiff pleads the matters on which she relies to allege that from about mid-June 2009 until the date of his death, the deceased was vulnerable to exploitation by persons with access to his financial affairs. These include during that period the deceased declined in his ability to give instructions freely and voluntarily concerning his financial affairs and became increasingly frail and feeble and was impaired in his ability to monitor or inform himself independently about his financial affairs. It is then alleged that the deceased was at a special disability vis-à-vis Ms Kanaef and Mr Desmond, because they both had access to his financial affairs and lived with him, and each of them knew of the special disability. It is also alleged that each of them was a fiduciary of the deceased.
- [21] Reliance is placed on s 87 of the Act in paragraph 17 to plead against Ms Kanaef that from 7 November 2007 to 13 April 2011 and from 27 February 2013 to 29 October 2013 all transactions between her and the deceased or a relation, business associate or close friend of Ms Kanaef and the deceased are presumed to be as a result of the undue influence of Ms Kanaef. A similar allegation is made in paragraph 17A against the third respondent in respect of all transactions between the third respondent and the deceased or a relation, business associate or close friend of the third respondent and the deceased from 13 April 2011 to 27 February 2013 (when the 2011 EPA was current). The applicant is seeking to impugn any transactions between the deceased and Ms Kanaef while the 2011 EPA was operative in reliance on s 87 of the Act, on the basis that Ms Kanaef was a relation (as defined in the Act) of Mr Desmond who was an attorney under the 2011 EPA.
- [22] All of the withdrawals from the deceased's bank accounts (other than those that have been struck out on the lists in annexures A and B to the proposed amended statement of claim) are alleged to have been undertaken by either Ms Kanaef or Mr Desmond and are alleged to have not been free or voluntary transactions by the deceased or could not have been

undertaken freely or voluntarily by the deceased. (There are still transactions included in annexure A that appear to have taken place after the deceased's death.)

- [23] The transactions in annexures A and B concern those which remain after the applicant's solicitor excluded those shown in the bank statements as made directly to a third party merchant such as Aldi, Bunnings, Woolworths, Origin or Foxtel which could be explained as usual living expenses, those less than \$50 each and those annotated as relating to charities, church, the deceased's ex-wife or presumed to be gifts. Prima facie, the applicant has taken an arbitrary approach to the remaining transactions in treating them as suspicious, because they do not fit within the criteria applied by the applicant.
- [24] An additional basis for characterising some of the transactions as suspicious is pleaded in paragraphs 19A to 19E of the proposed statement of claim. It is alleged that at various times between July 2013 until 29 October 2013 the deceased was in residential care when withdrawals were made from his bank accounts totalling approximately \$200,000 when it is alleged that he could not have authorised them, because he did not have the capacity to do so, or was under a decision making ability at the time and was unable to give instructions freely and voluntarily for his financial affairs. It should be noted that the sum of \$200,000 includes \$30,000 that was deposited to the applicant's account and \$75,000 deposited to each of the accounts of Ms Kanaef and Ms Vidal at the end of August 2013 which Ms Kanaef claims were gifts to each of them at the deceased's direction. The capacity of the deceased to authorise these gifts will be in issue in the proceeding, but it puts the allegations in perspective when it is appreciated that the majority of the impugned amount of approximately \$200,000 (referred to as withdrawals during residential care) was paid to the three daughters. It also gives perspective to the consequence of impugning these payments to the three daughters that the practical outcome of success by the applicant in respect of the payments to the three daughters totalling \$180,000 is that the excess of \$90,000 paid to Ms Kanaef and Ms Vidal would be refunded to the estate, but the three daughters would potentially share equally in that refund (after allowing for the impact of costs borne by the estate in respect of recovering the amount). In other words, ignoring costs implications, the challenge to the payment of \$180,000 has a maximum potential benefit to the applicant of \$30,000 plus interest.
- [25] A payment of rates to Ballina Shire Council is particularised in paragraph 19B(d). This proposed statement of claim was prepared after a mediation was held on 16 March 2016 when that transaction was identified, and Ms Kanaef acknowledged that it had been paid by her on 27 October 2013 from the deceased's account by mistake (instead of her own account) and it is sworn to by Ms Vidal in her affidavit filed by leave on 7 June 2016 that Ms Kanaef repaid the amount to the estate account on 18 March 2016 with interest. Ms Vidal did not exhibit any documentary evidence of the receipt of the payment into an estate account. When I queried Ms Brewer of counsel for the applicant, as to why that transaction was still being pursued, the response was to the effect that while it may end up being the case that the amount had been repaid with interest, the applicant (and her lawyers) were not able to ascertain that at the present time. It seems a heavy handed approach to put all parties (including the applicant) to the cost of making this a specific claim in the proposed statement of claim, when there has been an admission in the applicant's favour and the repayment will be able to be verified ultimately in due course in the estate accounts, if not earlier.
- [26] Apart from being characterised as "suspicious transactions" on the basis that they could not have been undertaken "freely or voluntarily" by the deceased, the applicant makes

alternative claims against the respondents in the proposed statement of claim in respect of the same transactions for breach of fiduciary duty, undue influence, breach of the Act and unconscionable conduct.

### **Nature of claims pursued by the applicant**

- [27] To the extent that the applicant seeks to pursue claims against the first respondent and Mr Desmond which would have otherwise accrued to the deceased, the applicant wishes to pursue those claims for the benefit of the deceased's estate, in reliance on s 66(1) of the SA. The applicant can do so only if the consent of the court is given pursuant to s 49(2) of the SA.
- [28] The respondents have pointed to the many deficiencies in the proposed statement of claim, characterising it in the nature of a fishing expedition that will not get very far, unless the applicant specifies with particularity each of the transactions which she wishes to pursue under each cause of action.
- [29] Without in any way attempting to identify the breach of the Act that is alleged in respect of each transaction, the applicant pleads in paragraph 22 of the proposed statement of claim that each transaction which the first and/or third respondent carried out while appointed as an attorney of the deceased was in breach of each of s 73, s 66(1), s 86(1) and s 88(1) of the Act. Section 73 of the Act covers only conflict transactions, as defined in s 73(2), where the attorney has made use of the relevant power of attorney. Section 66(1) of the Act also applies only to the exercise by the attorney of a power conferred under the power of attorney. Section 86(1) of the Act could conceivably apply, whether or not the attorney was exercising power under the relevant power of attorney, but there is no indication in the material of any failure by either the first or third respondents to comply with s 86(1) of the Act. Section 88(1) of the Act applies where the attorney gives away the principal's property in the circumstances that are specified which arguably applies only where the attorney is exercising power under the power of attorney, but would not cover any gifts that were made with the express approval of the principal, if the principal had the capacity to give the approval. Different considerations apply to each of these provisions of the Act, but no attempt has been made by the applicant to identify transactions that are alleged to be caught by the respective provisions of the Act. As there is no allegation that Ms Kanaef or Mr Desmond ever acted under a power of attorney in respect of the impugned transactions, there is arguably no breach of s 66, s 73 or s 88 of the Act. The pleading in respect of alleged breaches of the Act must be amended to identify transactions which are alleged to have been undertaken in breach of a provision of the Act that could apply to the particular transactions.
- [30] The respondents submit that the applicant's reliance on s 87 of the Act is misconceived, as it is an evidentiary presumption that will operate only if there was a transaction between the deceased and Ms Kanaef (or a relation, business associate or close friend of Ms Kanaef, when she was an attorney, or if there is a transaction between the deceased and Mr Desmond or Ms Kanaef, when Mr Desmond was the attorney). It is therefore submitted that the statement of claim must identify which transactions fall within that category before the applicant can rely on the operation of s 87 of the Act.
- [31] The applicant's counsel submits that if an attorney physically withdraws cash money of the principal, why should that not be characterised as "a transaction between an attorney (or relation)", irrespective of what the cash is used for? Similarly, the applicant's counsel

poses the question “if an attorney lives with principal and the attorney uses the principal’s bank account to pay for living expenses for the household, why is that not a “a transaction between an attorney (or relation)”?”

- [32] The questions posed by the applicant’s counsel are answered by the fact that it is a condition precedent to the operation of the presumption of undue influence under s 87 of the Act that there is a transaction between the principal and an attorney (or a relation, business associate or close friend of the attorney). Withdrawing cash that is then given by the attorney to the principal or used by the attorney to pay a debt owed by the principal to a third party at the principal’s request could not be characterised as a transaction between the principal and the attorney.
- [33] The proposed statement of claim has taken a broad brush and arbitrary approach to the transactions on the deceased’s bank accounts from mid-June 2009 until the deceased’s death. Serious allegations are made against Ms Kanaef (and Mr Desmond) as to their conduct vis-à-vis the deceased. Ms Kanaef (and Mr Desmond) are entitled to a properly particularised statement of claim that identifies the basis on which each of the transactions is impugned. Ms Vidal deposes in her affidavit filed by leave on 7 June 2016 to explanations given to the applicant and her lawyers and an analysis that has been undertaken of the transactions in one of the deceased’s account between 27 February and 29 October 2013. It may be that the parties will need to develop a proposal for further exchanges of information to assist the applicant in avoiding prosecuting a claim for transactions which is unlikely to succeed and identifying the legal basis on which each transaction is impugned. The proceeding cannot advance on the basis of the proposed statement of claim.

### **Application for extension under s 106(5) of the Act**

- [34] Section 106(1) of the Act provides:

“An attorney may be ordered by a court to compensate the principal (or, if the principal has died, the principal’s estate) for a loss caused by the attorney’s failure to comply with this Act in the exercise of a power.”

- [35] Section 106(1) therefore creates a statutory action for compensation that accrues to the principal (or the principal’s estate on death) for a loss caused by the attorney’s breach of the Act in the exercise of a power under the power of attorney. As no allegation is made against Ms Kanaef (or Mr Desmond for that matter) in respect of any transaction on behalf of the deceased that was conducted using any relevant power of attorney, the applicant will not succeed on a claim for compensation under s 106(1) of the Act. The application for extension of time brought under s 106(5) of the Act serves no purpose in this proceeding. The application for that relief must be dismissed.

### **Whether leave should be granted to the applicant to pursue claims on behalf of the estate**

- [36] In the normal course personal representatives bring any action that is necessary to recover what was due to or recoverable by the deceased. Section 49(2) of the SA empowers the court to consent to another person bringing an action that should be brought by the personal representative, where the personal representative refuses to do so or it is not appropriate for the personal representative to do so. The nature of the discretion conferred

on the court was considered by the Court of Appeal in *Bridgewater v Leahy* [1997] QCA 36. Fitzgerald P (who would have allowed the appeal) noted at p 6 that the purpose of such provision as s 49(2) of the SA is “to facilitate the orderly and efficient administration of deceased and trust estates” and suggested at p 7 that if the parties seeking to prosecute the claim in lieu of the executor had a good claim, that would be relevant to the discretion to grant leave. Davies JA (with whose reasons Macrossan CJ generally agreed) at p 33 suggested that leave should be given under s 49(2) “where the executor has declined to commence an action for the benefit of the estate which it was proper for him to bring”. The members of the Court of Appeal were agreed on that case being an appropriate one for leave under s 49(2), even though the majority dismissed the appeal. Although the decision of the Court of Appeal was overturned by the High Court in *Bridgewater v Leahy* (1998) 194 CLR 457 and the question of leave was not an issue before the High Court, there was no contrary view expressed at [27] or [80] about the approach of the Court of Appeal to the exercise of the discretion to grant leave under s 49(2).

- [37] It is not irrelevant that the applicant elected not to take on the role of executor of the deceased’s will, despite being named as such under the will, did not oppose the grant of probate of the will being made to her sisters, and does not seek to have them removed as executors.
- [38] Another factor that is relevant to the applicant’s claim for leave is that she shares the residuary estate equally with the second respondents, so that any claim pursued by her on behalf of the estate has the potential (subject to the impact of any costs borne by the estate) to benefit each of the respondents equally with her. Their attitude to the application must therefore be relevant. They strongly oppose the leave on the basis of the significant costs that have been incurred to date in the context of the size of the estate in response to the proceeding, the numerous changes made by the applicant in how she seeks to formulate her claim and the convoluted nature of the claim.
- [39] In the light of how the three daughters share the residuary estate, the ultimate quantum that is being pursued by the applicant on behalf of the estate may be a very relevant consideration in this matter to the propriety of the claim and the exercise of the discretion to grant leave. As the proposed statement of claim is not an adequate pleading to enable the proceeding to advance, the determination of whether there is a good claim that justifies allowing the applicant to pursue the claim on behalf of the deceased’s estate awaits the re-formulation by the applicant’s lawyers of the statement of claim. I am mindful of the approach in *Ede v Ede* [2007] 2 Qd R 323 at [50] that a court should not readily exercise its discretion to enable a fiduciary who is in breach of fiduciary duty to avoid accounting for the breach, but in all the circumstances, it is prudent to defer making the decision on the leave under s 49(2) of the SA until after the next version of the statement of claim has been prepared. For the same reason, I would not dispose finally of the application to join Mr Desmond as the third respondent until that next version of the statement of claim is available.

#### **Use of estate funds to pay the respondent’s legal costs**

- [40] The applicant cannot complain about the respondents using estate funds to pay their legal costs, when the initial relief was sought against them as executors in respect of accounting for transactions since the date of the deceased’s death. In addition, to the extent that the proceeding sought relief against Ms Kanaef, as a result of her role prior to the deceased’s death, a question has been in issue, as to whether it was in the estate’s interest to oppose

the applicant's proceeding, because of the potential diminution of estate assets by costs incurred, as a result of the changing nature of the proceeding.

- [41] To the extent that any legal costs have been paid by the estate which can be properly characterised as costs incurred in relation to the claim against Ms Kanaef alone, Ms Kanaef will be obliged to reimburse the estate for those costs. That is a matter that can be pursued when the accounts for the estate are considered. It is not a matter that must be dealt with by injunctive relief when there are adequate procedures available to a beneficiary for challenging expenses incurred by the executors in the administration of the estate.
- [42] After the publication of these reasons, it will be apparent to Ms Kanaef that she cannot expect the estate to bear any personal costs of hers in defending the proceeding. I am not persuaded that an injunction is the appropriate relief at this stage.

### Orders

- [43] It follows the orders which should be made at this stage are:
1. The application filed on 15 April 2016 is dismissed.
  2. The application pursuant to s 106(5) of the *Powers of Attorney Act* 1998 to extend the time for making the application for compensation for loss caused by breaches of the *Powers of Attorney Act* 1998 is dismissed.
  3. The application pursuant to s 49(2) of the *Succession Act* 1981 to give the consent of the court *nunc pro tunc* for the applicant to bring this proceeding for the benefit of the estate of the deceased is adjourned to a date to be fixed.
  4. The application to join Mr Glenn Desmond as third respondent to this proceeding is adjourned to a date to be fixed.
  5. The application for an injunction against the first respondent is dismissed.
- [44] It will be necessary to make directions setting a timetable for delivery by the applicant to the respondents and Mr Desmond of another proposed statement of claim and for the date by which any objections to that statement of claim should be communicated to the applicant.
- [45] In view of my conclusion that the questions of whether the applicant should be authorised to pursue the proceeding for the benefit of the deceased's estate and the joinder of Mr Desmond as the third respondent should be deferred until the applicant makes another attempt at formulating a statement of claim that is not vulnerable to being struck out, it is appropriate to defer transferring the proceeding to the District Court until those issues are resolved.
- [46] Subject to submissions, I am inclined to order that the applicant pay the respondents' costs of the application filed on 15 April 2016. I will hear submissions from the parties on whether any costs orders should be made now in respect of the application filed on 3 May 2016 and the amended application filed by leave on 7 June 2016 or whether that should wait until the relief sought in the amended application is finally disposed of.