SUPREME COURT OF QUEENSLAND

CITATION:	*Mortimer v Lusink & Ors* [2017] QCA 1
PARTIES:	**ANITA NARELLE MORTIMER (under Part 4 of the *Succession Act* 1981)** (appellant) **v** **CHRISTOPHER THEODORE GORDON LUSINK (as executor of the will of Loma Narelle Green deceased)** (first respondent) **CHRISTOPHER THEODORE GORDON LUSINK (in his personal capacity)** (second respondent) **VANESSA LUSINK** (third respondent) **GORDON THEODORE LUSINK** (fourth respondent)
FILE NO/S:	Appeal No 6284 of 2016 SC No 3842 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 119
DELIVERED ON:	31 January 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2016
JUDGES:	Gotterson and Morrison JJA and Jackson J Separate reasons for judgment of each member of the Court, Gotterson and Morrison JJA concurring as to the orders made, Jackson J dissenting in part
ORDERS:	**1. The appeal be allowed.** **2. The orders of the Supreme Court made on 2 June 2016 be set aside and in lieu thereof it be ordered that:** **a. It is directed that the Applicant's application for provision out of the estate of Loma Narelle Green deceased shall be heard notwithstanding that such application was not instituted within nine months after the death of the deceased.** **b. By consent, all amounts received by the Second, Third and Fourth Respondents from the First Respondent, less any amounts paid by them for reasonable legal fees and expenses incurred in responding to this proceeding, shall be repaid to the**

First Respondent forthwith and be held by him as executor of the estate of Loma Narelle Green deceased pending the determination of the Applicant's application for provision out of the estate of Loma Narelle Green deceased.

c. By consent, the proceedings are discontinued as against the Second, Third and Fourth Respondents upon such payment.

d. Pursuant to the *Civil Proceedings Act* 2011 it is ordered that the proceeding be transferred to the District Court held at Brisbane.

e. Directions be made in compliance with Practice Direction No 8 of 2001.

3. The First Respondent pay the appellant's costs of the appeal, including the application to adduce further evidence, and her costs of the application below.

4. The First Respondent be granted a certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld), including for his own costs of the appeal.

CATCHWORDS: SUCCESSION – FAMILY PROVISION – PROCEDURE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – PARTICULAR CASES – where the appellant, the testator's daughter, was refused an application for an extension of time within which to apply for provision from the estate – where it is alleged on appeal that the primary judge reached his conclusions by the application of principles or considerations applicable to the grant of final relief, rather than those applicable to the exercise of the discretion under s 41(8) of the *Succession Act* 1981 (Qld) – where it is further alleged that the primary judge made factual errors arising from misapprehensions of the evidence – where the primary judge relied on a principle that it was necessary for an applicant to establish an entitlement to final relief, instead of whether or not an applicant has established an arguable case for final relief – whether the discretion under s 41(8) ought to have been exercised

Succession Act 1981 (Qld), s 41

Bird v Bird [2002] QSC 202, cited
Burke v Burke [2015] NSWCA 195, cited
Higgins v Higgins [2005] 2 Qd R 502; [2005] QSC 110, cited
Hills v Chalk [2009] 1 Qd R 409; [2008] QCA 159, cited
Mortimer v Lusink & Ors [2016] QSC 119, overruled
Singer v Berghouse (1994) 181 CLR 201; [1994] HCA 40, cited

COUNSEL: D B Fraser QC, with K J Young, for the appellant
R M Treston QC for the respondent

SOLICITORS: Dormer Stanhope for the appellant
de Groots Wills & Estate Lawyers for the respondent

[1] **GOTTERSON JA**: This appeal is against an order made by a judge of the Trial Division on 2 June 2016 to dismiss an application made by Anita Narelle Mortimer. Her application was made by an originating application filed on 14 April 2016.[1] By it, Ms Mortimer sought leave pursuant to s 41(8) of the *Succession Act* 1981 (Qld) ("the Act") to bring an application under s 41 of the Act for adequate provision to be made for her proper maintenance and support out of the estate of Loma Narelle Green ("the deceased"). The application also sought an order for adequate provision in her favour, subject to exoneration from the incidence of any such order of a specific testamentary gift of $50,000 made to a friend of the deceased, Ms Julie Schornig.

The familial circumstances

[2] Ms Mortimer is the daughter of the deceased and her former husband, Theodore Lusink. They divorced in about 1975. The deceased then married Peter Arthur Stanley Green. That marriage ended in divorce in 1990.

[3] The deceased died on 2 July 2015 at 89 years of age. Her last will dated 18 December 2012[2] was admitted to probate in the Supreme Court of Victoria on 8 September 2015. Under the will, the deceased's son, Dr Christopher Theodore Gordon Lusink, was appointed executor of the will and trustee of the deceased's estate. He was named as first respondent to the application in his capacity as executor of the deceased's will and as second respondent in his personal capacity.

[4] Ms Mortimer has two children from her first marriage to Anthony Fredrick Dormer. They are a son, Aaron Dormer, and a daughter, Justeen Dormer, who are 44 years old and 42 years old respectively. She and Mr Dormer separated in September 1979. She married Ronald William Mortimer on 27 March 1982. She is now 70 years of age and he is 75 years old. They reside at Yerrinbool south-west of Sydney.

[5] Dr Christopher Lusink is 63 years of age. He and his wife, Selga Lusink, have two children, Gordon aged 31 years, and Vanessa who is about 28 years of age. The children were named as fourth and third respondents to the application in their respective capacities as residuary beneficiaries of the deceased's estate.

[6] Theodore Lusink remarried. He and his wife, Rose Margaret Lusink, resided in Victoria.

The deceased's will and estate

[7] Two specific gifts were made by the deceased in her will. One was the gift to Ms Schornig, to which I have referred, made by clause 4.

[8] By clause 5 of the will, the deceased gave the appellant the sum of $20,000 absolutely. The request was accompanied by an express declaration in the clause that the deceased was making "only limited provision" for the appellant as "I consider that she has adequate financial means and as it is my belief that she will be adequately provided for by her father and my former husband, Theodore Lusink".[3]

---

1 AB196-199.
2 AB87-89.
3 AB87.

[9] The deceased gave the remainder of her estate to her son, Dr Christopher Lusink, and her grandchildren, Vanessa and Gordon, as tenants in common in equal shares.[4] No provision was made for either former husband.[5]

[10] The inventory of assets and liabilities[6] filed in support of the probate application disclosed that the gross value of the estate assets was $1,231,031.63, consisting principally of a house at Frankston valued at $450,000, bank deposits of $491,452.55 and an accommodation bond at an aged care facility at Morayfield of $288,961.08. The estate's liabilities at death were $2,469.95.

[11] After estate expenses were met, the residuary estate was worth $1,128,041.82, including chattels valued at $20,020.00. It was distributed to the residuary beneficiaries before the appellant filed her application.[7] As the learned primary judge noted, the respondents undertook not to dispose of their respective distributions until further order.[8]

The application for leave to adduce further evidence

[12] It is convenient to mention at this point that on 12 October 2016, the appellant filed an application for leave to adduce further evidence of certain facts that occurred after 2 June 2016 and an affidavit of Justeen Dormer in support of the application. This application was heard with the appeal.

[13] At the hearing, senior counsel for the respondents indicated that her client consented to the receipt of evidence that Mr Theordore Lusink died on 22 July 2016; that by his last will dated 17 August 2010, he appointed his widow, Rose Margaret Lusink, to be executor of the will and trustee of his estate; that by clause 4 of the will, Mr Lusink gave all his real estate and the balance of his personal estate (after bequests of $5,000 each to his grandchildren, Gordon Lusink, and Vanessa Lusink) to his widow provided that she survived him by 30 days with default gifts over to the appellant and his three step-sons in equal shares; and that the widow did survive Mr Lusink for more than 30 days. Counsel also indicated that her clients maintained an objection to an exhibit to Ms Dorner's affidavit, JKD 1, which contained details of Mr Lusink's estate. In the face of that objection, senior counsel for the appellant stated that his client would not press for the receipt of those details.[9]

[14] In these circumstances, it is unnecessary to make formal orders disposing of the application for leave to adduce further evidence other than to order that the costs of the application will be costs in the appeal.

The application and the affidavit evidence

[15] Section 41(8) of the Act provides:

> "Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within

---

4 Will clause 8: AB88.
5 Will clauses 13, 14: AB88.
6 AB83-85.
7 Affidavit C Lusink paragraph 12: AB170.
8 Reasons [12]; AB232. Dr Lusink, by his solicitors, had undertaken not to distribute the estate until the appellant made an application for further provision, provided that it was made within time. Because of a mistake on the part of the appellant's solicitor, Ms Justeen Dormer, the application was not filed within time: Reasons [22]; AB234.
9 Appeal Transcript 1-2 l29 – 1-3 l28.

> 9 months after the death of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made."

Here, the nine month period after the deceased's death expired on 2 April 2016. Because the appellant had not applied for further provision by that date, it was necessary for her to seek the exercise of the discretion conferred by s 41(8) in order for her application for further provision to be heard and determined. The appellant sought the exercise of the discretion by filing the originating application. It was filed some 12 days after the nine month expiration of the period.

[16] The appellant filed in support of her application an affidavit of Justeen Dormer sworn on 13 April 2016[10] and her own affidavits sworn on 12 May 2016[11] and 17 May 2016[12] respectively. The respondents' affidavit material consisted of an affidavit sworn by Dr Christopher Lusink on 17 May 2016[13] and several short affidavits made by solicitors in the employ of his legal advisors.

[17] The respective affidavits of the parties were read at the hearing. No deponent was required for cross-examination.

[18] Ms Dormer is a solicitor. She has acted for her mother in these proceedings. Her affidavit principally related to communications between family members after the deceased's death concerning the estate and the amount of the provision made for the appellant in the deceased's will. By mid-October 2015, Ms Dormer had notified Dr Lusink and the other residuary beneficiaries that she held instructions to commence legal proceedings over the adequacy of the provision for her mother.[14]

[19] The appellant's principal affidavit is the one she swore on 12 May 2016. In it, she canvassed, in some detail, the circumstances of the failure to commence her application within the nine month period; her relationship with the deceased; her financial resources; her earning capacity and employment history; her health and wellbeing; and her present and likely future needs.

[20] Dr Lusink's affidavit exhibited two previous wills that the deceased had made. It dealt briefly with his relationship and contacts with the deceased and took issue with several statements made by the appellant in her principal affidavit concerning a conversation between them about the deceased's funeral, information given by him to her about the deceased's will, and the timing of a Christmas visit by the appellant to the deceased and Mr Green in Melbourne.

The decision at first instance

[21] **Applicable principles**: In his reasons, the learned primary judge turned first to relevant principles.[15] He cited from the judgment of White J (as her Honour then was) in *Bird v Bird*,[16] an application under s 41(8). In that case, her Honour endorsed[17] as applicable to such an application, the observation of Megarry VC in *Re Salmon*,

---

10 AB30-43.
11 AB44-141.
12 AB142-148.
13 AB168-185.
14 Affidavit paragraph 30; AB36.
15 Reasons [4]-[9]; AB229-232.
16 [2002] QSC 202.
17 At [22].

deceased[18] that an applicant who has failed to make a timely application for further provision must make out a substantial case for it being just and proper for the court to exercise its statutory jurisdiction to extend the time. White J also referred[19] to the four factors which Hodgson J of the Supreme Court of New South Wales identified in *Warren v McKnight*[20] as relevant to such an application, namely:

1. the sufficiency of the explanation of delay in making the claim;
2. whether there would be any prejudice to the beneficiary/ies;
3. whether there had been any unconscionable conduct by the applicant; and
4. the strength of the applicant's case.

[22] **The fourth factor**: As to the fourth factor, his Honour referred to the further consideration given to it by this Court in *Hills v Chalk*.[21] He cited observations made in the separate reasons given by Keane JA[22] and Muir JA[23] concerning how the court should assess probability of success of the substantive application for the purpose of exercising the discretion.

[23] The learned primary judge then gave consideration to each of the four factors. His Honour noted that the respondents accepted that there was no evidence that they would suffer any particular prejudice if the application was granted beyond the possible return of some part of their distributions (which were subject to the undertaking) and loss of the right to rely on the limitation period. In his view, such prejudice was not out of the ordinary and would not weigh against exercise of the discretion.[24]

[24] His Honour next noted that the respondents did not suggest that there had been any unconscionable conduct on the part of the appellant.[25]

[25] The learned primary judge rejected the respondents' submission that the delay in making the claim had not been sufficiently explained. In so doing, his Honour noted that the cause of the delay was not the appellant's fault. She herself did not prevaricate and the delay was very short. His Honour was satisfied by the explanation given.[26]

[26] The fourth factor, the strength of the applicant's case, was critical in the reasoning of the learned primary judge. His Honour expressly identified four criteria which he drew from the decision of the High Court of Australia in *Singer v Berghouse*[27] as points of reference in determining whether a substantial case has been made out. Those criteria are:

1. the applicant's financial position;
2. the size of the deceased's estate;
3. the relationship between the applicant and the deceased; and

---

18 [1981] Ch 170 at 175.
19 At [23].
20 (1996) 40 NSWLR 390 at 394; See also *Enoch v Public Trustee of Queensland* [2006] 1 Qd R 144.
21 [2008] QCA 159; [2009] 1 Qd R 409.
22 At [31], [32], [37].
23 At [76]-[79].
24 Reasons [10]-[12]; AB232.
25 Reasons [13]; AB232.
26 Reasons [22]; AB234. The respondents have not filed a notice of contention which seeks to have the judgment below affirmed on the ground that this factor was not made out and that the finding to the contrary was made in error.
27 (1994) 181 CLR 201.

4. the relationship between the deceased and other persons with legitimate claims.[28]

[27] His Honour also referred[29] to *Singer* as establishing that the court is required to carry out a two stage process for determining a substantive application. He cited from the judgment of the plurality (Mason CJ, Deane and McHugh JJ) the explanation that the first stage, which addresses a jurisdiction question, requires an objective determination of whether the applicant had been left without adequate provision for proper maintenance, education and advancement in life; whereas, the second stage, which arises only if the first is determined in favour of the applicant, requires the determination of what provision ought to be made out of the deceased's estate for the applicant.[30]

[28] His Honour also cited[31] the plurality's elaboration[32] that the first stage "calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things," to the four criteria which his Honour had identified. He noted their Honours' further observation that the second stage, should it arise, involves similar considerations to the first.[33]

[29] The learned primary judge also expressed the view that, as well, it is appropriate to consider whether any further provision that might be ordered would be so small as to be disproportionate to the costs which an application would generate. That consideration, his Honour said, reflects a concern that it be "just and proper" to allow the application to proceed.[34]

[30] **The appellant's financial position**: Turning to matters of fact, his Honour addressed the appellant's financial position. He did so by summarising evidence and submissions relating to it in the following way:

> "[28] The applicant and her husband:
>
> (a) Own an unencumbered house worth between $500,000 and $525,000;
>
> (b) Have no debts;
>
> (c) Have a combined income of a little under $40,000 a year;
>
> (d) Have a combined superannuation fund worth about $29,000; and
>
> (e) Own a car worth about $30,000 together with household contents and personal effects.
>
> [29] It was submitted that the applicant's position is uncertain as:
>
> (a) Her husband is in poor health;
>
> (b) The annual income is a Commonwealth old age pension;

---

28 Reasons [24]; AB235.
29 Reasons [25]; AB235.
30 At 208.
31 Reasons [25]; AB235.
32 At 209-210.
33 *Ibid*.
34 Reasons [26]; AB235.

(c) She has no earning capacity;

(d) The superannuation fund is small; and

(e) The house in which she lives is in need of substantial expenditure for repairs and replacements.

[30] On the other hand, the respondent identified these matters as relevant:

(a) The applicant retired at 50 and has not worked since then;

(b) Her health is relatively good for her age;

(c) She wants to buy a house elsewhere in Victoria at a cost of about $600,000;

(d) Alternatively, she wants to engage in substantial work on the house in which she lives;

(e) Her combined fortnightly income with her husband exceeds their fortnightly expenses by about $250; and

(f) Her claim that she needs to spend $7,000 on dental work is not supported by evidence.

[31] The applicant has exhibited a quotation from a builder for repairs and improvements to her home. She also sets out a number of matters which she says require almost immediate attention. Together, all those matters add up to about $170,000 in capital amounts with some sort of allowance for recurrent expenses of about $20,000 a year. I have not included the separate 'claim' for house painting as that was in the builder's quotation. While those amounts are large for a couple on an aged pension the need for all of them was not substantiated. The 'house renovations' appeared to be more in the nature of a 'wish list' than anything else. Similarly, and by way of example, apart from the applicant's assertions, there was nothing to support either the need for, or the cost of, a mattress and pillows ($6,000) or furniture ($3,000 to $7,000)."[35]

[31] **Provision made for the appellant**: The learned primary judge noted the pecuniary legacy of $20,000 given to the appellant and the explanation for it in clause 5 of the will.[36] He also noted the other dispositive provisions in the will and the sworn value of the estate.[37]

[32] His Honour referred to a submission for the appellant that the deceased had mistakenly made two assumptions when she gave the explanation in the will. One assumption concerned the adequacy of the appellant's financial means and the other was that the deceased's former husband, Mr Theodore Lusink, would adequately provide for the appellant in his will.

[33] The submission did not influence his Honour to discount the explanation. He thought that it was difficult to assess its merit so far as the first assumption was concerned.

---

35 AB236.

36 Reasons [32]; AB237.

37 Reasons [33], [34]; AB237.

As to the second, he observed that it was based upon an equivocal conversation between the appellant and Mr Lusink's then wife. His Honour was not willing to conclude, on the evidence before him, that the deceased was not provided for in her father's will.[38]

[34] **The relationship between the appellant and the deceased**: The learned primary judge dealt with this criterion under the heading "Estrangement?" This heading would appear to have been intended by his Honour to reflect the evidence of a limited contact between the appellant and the deceased over the 50 years since her parents separated and the appellant's denial of an estrangement between them. He contrasted Dr Lusink's close and loving relationship with the deceased against the lack of evidence that the appellant provided any contribution to the deceased's estate or provided her with any care or assistance.[39]

[35] His Honour referred to the decision of the New South Wales Court of Appeal in *Burke v Burke*[40] for the proposition that an estrangement does not disqualify an applicant for further provision. He thought that whilst estrangement was not asserted against the appellant, conclusions expressed by Ward JA in that case would be of assistance. Those conclusions included the proposition that estrangement is a matter to be taken into account, but it is not necessarily determinative; that estrangement does not usually prevent an adult child from satisfying the jurisdictional requirement; and that there is no prima facie entitlement to provision in circumstances where there is financial need on the part of an estranged adult child.[41]

[36] **Conclusions**: The learned primary judge stated his conclusions for dismissing the application in the following two paragraphs:

> "[40] In an application of this kind, the applicant is assumed to have 'put her best foot forward'.[42] Her best case, then, is one in which the applicant:
>
> (a) Has not established that the deceased was mistaken in her assumptions about the applicant's position;
>
> (b) Has been shown to have been emotionally removed from the deceased and to have had little contact with her for over half a century;
>
> (c) Has no entitlement to provision as of right; and
>
> (d) Is living in modest, but not straitened, financial circumstances.
>
> [41] The applicant must do more than show that she might succeed. She has to demonstrate 'a substantial case for it being just and proper for the court to exercise its statutory discretion to extend the time'. This she has not done. The factors in her favour are too weak to justify the order sought. Further, even if the application were allowed to proceed and the applicant were to succeed, I am satisfied that any order that might be made in the applicant's favour would be so limited that it would be disproportionate to the costs involved."[43]

---

38 Reasons [37]; AB237.
39 Reasons [38]; AB237.
40 [2015] NSWCA 195.
41 Reasons [39]; AB237-238.
42 *Higgins v Higgins* [2005] QSC 110; [2005] 2 Qd R 502 at [46] per White J.
43 AB238.

On 2 June 2016, his Honour ordered that the application be dismissed and that the appellant pay the respondents' costs of the application, including reserved costs, on the standard basis.[44]

The grounds of appeal

[37] The appellant's notice of appeal filed on 24 June 2016[45] lists some 14 grounds of appeal. The grounds may be categorised into two broad classes. There are those that allege error of principle and those that allege factual errors arising from misapprehensions of the evidence. The relief sought includes an order setting aside the orders made on 2 June 2016, an order under s 41(8) of the Act directing that the appellant's application for further provision be heard, and an order transferring the proceeding to the District Court at Brisbane.

[38] It is appropriate to consider the two classes of error separately. For convenience, I shall refer first to the grounds alleging error of principle.

Alleged errors of principle

[39] The appellant submits that despite the extensive references made by the learned primary judge to the decision of this Court in *Hills* in his discussion of relevant principles, his Honour failed to follow it in reaching the conclusions expressed at paragraphs 40 and 41 of his reasons. In short, the submission is that he reached those conclusions by the application of principles or considerations applicable to the grant of final relief, rather than those applicable to the exercise of the discretion under s 41(8).

[40] In developing the argument, senior counsel for the appellant cited his Honour's reliance upon the decision of White J in *Higgins*. He noted that her Honour's statement that the applicant must be assumed "to have put his best foot forward evidentially" was made about an applicant for final relief who was facing an application for summary dismissal of his application and who had not indicated that there was further material which he wished to have the opportunity of adducing.

[41] An applicant for an order under s 41(8) is not in a comparable evidential position. An applicant for such an order is not presumed to have put forward his or her best case for substantive relief. So much was recognised by Muir JA in *Hills* where his Honour said:

> "…In any such process there is a need to recognise the limitations of the material before the Court on the application for leave, which will generally be untested by cross-examination, in comparison with the more extensive material likely to be in evidence on the substantive hearing."[46]

[42] Senior counsel also referred to the statement by the learned primary judge at paragraph 41 of his reasons that he was satisfied that any order that might be made in the appellant's favour would be disproportionate to costs. This statement implied that his Honour had made some assessment of the best-case outcome for the appellant. It was submitted that the errors in making the assessment were twofold. First, it was one that was undertaken without regard for the evidential limitations to which Muir JA referred in *Hills*.

---

44 AB239.
45 AB242-253.
46 At [77].

[43] Secondly, and importantly, that it was undertaken implied a reliance by his Honour upon a principle that, in an application of this type, it is necessary for an applicant to establish an entitlement to final relief. To the contrary, it was submitted that, by contrast, the relevant enquiry is as to whether or not an applicant has established an **arguable case** for final relief.

[44] This submission finds support in the following observations of Keane JA in *Hills* with respect to the proper approach to be taken in a s 41(8) application. His Honour said:

> "[31] The appellants' submission was that the probability that an application for provision out of the estate will ultimately succeed is a necessary, though not sufficient, condition of the grant of an extension of time. There is support for that view. In *Re Terlier, deceased*,[47] Townley J said: 'If it is improbable that the substantive application will succeed it seems idle to grant the extension.' This statement was approved by Lush J in *Re Walker, deceased*[48] where his Honour went on to add that the improbability of success 'may stem either from the condition of the estate … or from the facts relevant to the [claimant's] claim, or from both …'.
>
> [32] Other decisions, such as *Ashhurst v Moss*[49] and *Warren v McKnight*,[50] do not suggest that these statements are erroneous in point of principle; but they follow a somewhat more flexible approach. That more flexible approach is appropriate where facts material to the ultimate merits of the substantive application are unclear or disputed. In such cases, it will often not be possible to come to a clear view that ultimate success is improbable. In such cases, a balancing of the competing considerations may be necessary.
>
> [33] In this case, even on the best view of the evidence for Mr Hills, it was distinctly improbable that his substantive application would ultimately succeed. The learned primary judge did not specifically address the question whether it was probable that Mr Hills would ultimately succeed in obtaining an order for further provision. Her Honour did express the view that Mr Hills 'has reasonable prospects of success'; but that is not quite the same as rejecting the proposition that, ultimately, success is improbable. And, in reaching her conclusion, her Honour gave no weight to the pre-nuptial agreement or to the circumstance that Mr Hills has adult children in relation to whom there was no suggestion that they are not ready, willing and able to provide for his needs. In these respects, I consider that her Honour erred in point of principle.
>
> [34] In *Bird v Bird*,[51] White J said:
>
> 'Time limits in statutes are for good reason. Malcolm CJ in *Clayton v Aust* (1993) 9 WAR 364 quoted with approval the

---

47 [1959] QWN 5.
48 [1967] VR 890 at 892.
49 (2006) 14 VR 291 at 316-317 [109]-[111].
50 (1996) 40 NSWLR 390 at 395-396.
51 [2002] QSC 202 at [22].

approach of Megarry VC in *Re Salmon (deceased)* [1981] Ch 167 at 175:

> '… the time limit is a substantive provision laid down in the Act itself, and it is not a mere procedural time limit imposed by rules of court which will be treated with the indulgence appropriate to procedural rules. The burden on the applicant is thus, I think, no triviality: the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to extent [sic] the time'.'

> [35] It is difficult to see that there is any good reason why a claim for provision out of an estate which is clearly unlikely to succeed should attract the grant of an extension of time where the delay has been, as it is here, very long indeed. Most litigation is economically wasteful and involves personal stress. Litigation over the estate of a deceased loved one is usually especially stressful, and the economic waste is a matter of special concern. There will usually be little mercy, and there will often be considerable harm, in granting an extension to enable the making of a claim which should have been made, if at all, years before. When that claim will probably fail, there is no 'substantial case for' granting an extension of time. To grant an extension of time in such a case is likely to serve only to waste resources and to cause, or increase, personal bitterness on all sides of the litigation."

[45] As these observations, particularly those in paragraph 35, indicate, it was relevant for the learned primary judge to have enquired into whether the appellant's claim was one that was clearly unlikely to succeed or was one that would probably fail. It was noteworthy that in other jurisdictions, intermediate courts of appeal have held that under the comparable statutory provision, the relevant enquiry is as to whether or not an arguable case has been made out by the applicant for relief.[52]

[46] His Honour did not, however, undertake such an enquiry. He did not address the issue whether the appellant's case was clearly unlikely to succeed. Nor did he enquire into whether it would probably fail. He expressed no view as to whether there was an arguable case. In undertaking the assessment that he did make, his Honour appears to have conflated the concept of a substantial case for relief under s 41(8) with the concept of a prima facie case for a substantial award by way of final relief.

[47] For these reasons, I am persuaded that the learned primary judge did err in principle and that the error affected the decision he reached to dismiss the application.

[48] I mention that the appellant also submitted that the learned primary judge erred in principle in certain other respects. One was in deriving assistance from the conclusions expressed in *Burke* when estrangement was not asserted against the appellant.[53] Another was in attributing significant relevance to the explanation for the bequest to

---

52 See *Ansett v Moss* [2007] VSCA 161 at [11]-[12] per Buchanan JA (Redlich JA and Cavanough AJA agreeing); *Andre v Perpetual Trustees WA Ltd* [2009] WASCA 14 at [41] per Steytler P (Pullin and Buss JJA agreeing).

53 It was noted, as well, that the explanation for the bequest in the will did not refer to any distancing between the deceased and the appellant.

the appellant in the deceased's will and whether the appellant had demonstrated mistaken assumptions in the explanation when, at most, those matters were of marginal relevance.

[49] It is unnecessary to express views about those alleged errors given the critical error of principle that has been established. Because of that error, the decision based upon it must be set aside. That outcome is independent of the alleged errors of fact. I do, however, propose to refer to some of them because the factual matters that they concern do have a bearing upon the orders that this Court ought to make.

Alleged errors of fact

[50] These errors principally concern the appellant's financial position. His Honour's consideration of facts relevant to it are in paragraphs 28 to 31 of the reasons. I shall identify the errors by reference to the respective paragraphs where they are said to be found.

[51] **Paragraph 30(e)**: His Honour attributed to the respondents a submission that on the appellant's own evidence, the combined fortnightly income of her and her husband exceeds their fortnightly expenses by about $250. In fact, the submission was that the combined monthly income ($3,261) exceeded their monthly expenses ($2,955) by about $300.[54]

[52] Even so, the submission did not accurately reflect the evidence. In paragraph 49 of her principal affidavit, the appellant set out a table of "monthly household expenditure".[55] The items in it totalled $2,955. This was not a table of their total monthly expenditure. There was no provision in it, for example, for expenditure on medical or hospital costs not covered by the public system, replacement of household items, heating in winter or recreational activities. At paragraph 52 of her affidavit,[56] the appellant swore that she and her husband spend all of their monthly income on their expenses and are not able to retain any as savings. This evidence was unchallenged.

[53] It is true that the learned primary judge did not make specific findings of fact with respect to the matters listed in paragraph 30 of the reasons. However, a fair reading of the paragraph is that he acted upon the assumption that they were factually correct. For the reasons I have stated, the matter set out in paragraph 30(e) was not supported by the evidence before his Honour.

[54] **Paragraph 31**: In paragraph 31 of the reasons, the learned primary judge referred to a schedule in paragraph 78 of the appellant's principal affidavit.[57] The schedule set out a list of items that the appellant said urgently required replacing and the costs of replacement. Those costs included the costs of renovations to the "A-frame" tin-roofed house that she and her husband occupy at Yerrinbool and the costs of replacement clothes, bedding and furniture as well as the costs of dental work for the appellant and recurrent annual costs for items such as house cleaning and private health insurance.

[55] The appellant's complaint is focused upon the renovation costs. They are for a total amount of $139,150 which the appellant verified by a quotation given by a registered builder for the work and exhibited to her affidavit.[58] The quotation is for "aged care

---

54 Respondents' submissions dated 18 May 2016, paragraph 23.
55 AB57-58.
56 AB59.
57 AB65-67.
58 Exhibit ANM-16; AB127-129.

and building works" for the house property. Major items in it are removing a spa bath in the main bathroom and replacing it with an aged-person accessible shower ($26,000), removing and replacing the rear deck with a single level area with aged-person access ($13,000), removing the internal stairs to the second storey and replacing them with a council approved item including a handrail ($13,000), replacing the skillion roof over the main bedroom with colorbond iron ($6,500), replacing the pitched roof with colorbond iron ($8,000) and replacing the leaking garage roof with colorbond iron ($4,500).

[56] In the schedule, the appellant described the renovations as ones that were required to make the house more suitable for her and her husband now, and as they age and their health deteriorates. This evidence was unchallenged. I do not read his Honour's characterisation of them as "in the nature of a wish list" as meaning no more than that these are renovations the applicant and her husband wish to have done. I understand him to have meant that they were not in the nature of needs to be taken into account in assessing the appellant's financial position. To view them that way disregards the appellant's evidence to which I have referred and overlooks that, at the hearing of a substantive application, more extensive evidential material is likely to be presented.

[57] **Paragraph 40(d)**: In this paragraph, the learned primary judge stated his conclusion that the appellant is living in modest, but not straitened, financial circumstances. The appellant challenges that conclusion and submits that it is one that is not open in light of the uncontested evidence that the appellant and her husband:

1. spent all of their monthly income on their expenses and were unable to retain any savings;[59]
2. went without many basic necessities of life because they could not afford them;[60]
3. had $134.61 in savings;[61]
4. live from pension payment to pension payment;[62]
5. were in receipt of an allocated pension of $1,359.96 per year paid to her husband;[63] and
6. had drawn down the amount of $5,000 on the appellant's superannuation fund reducing its value to $9,830.68 to pay for part of the acquisition of a replacement car needed because of her and her husband's mobility restrictions.[64]

[58] Reference was made also to the evidence that the appellant and her husband could not afford to:

1. turn on the heater in their house in winter;[65]
2. take holidays since 2004;[66]
3. engage in any recreational activities or go to the movies;[67]

---

59 Appellant's affidavit sworn 12 May 2016, paragraph 52; AB59.
60 *Ibid*, paragraph 51; AB59.
61 *Ibid*, paragraph 48; AB57.
62 *Ibid*, paragraph 80; AB68.
63 *Ibid*, paragraph 44; AB55-AB56.
64 *Ibid*, paragraphs 45, 46; AB56.
65 *Ibid*, paragraph 77(i); AB64.
66 *Ibid*, paragraph 77(ii); AB64.
67 *Ibid*, paragraph 77(iv); AB64.

4. eat out regularly, even at McDonalds;[68]

5. buy clothes, except second-hand at charity shops;[69]

6. visit their children or grandchildren in Sydney because they could not afford the price of fuel or tolls to do so;[70] or

7. take out private health insurance.

[59] I would accept that the conclusion expressed by his Honour is questionable in light of this evidence. To my mind, it does not reflect adequately the considerable constraints imposed on the applicant and her husband's lifestyle by their limited financial means. Moreover, it gives no recognition to the appellant's financial vulnerability in the event that her husband predeceases her and his pension ceases.

Re-exercise of the discretion

[60] It is open to this Court to re-exercise the discretion under s 41(8). It will do so on the evidence now before the Court and in circumstances where the delay is minimal, not attributable to the appellant herself, and has not caused sufficient prejudice.

[61] The evidential factors to which I have referred in the preceding discussion leads irresistibly to a conclusion that the financial resources available to the appellant are insufficient to meet her needs now and into the future. The bequest to her under the deceased's will falls well short of that insufficiency. As is now known, her plight has not been ameliorated by an inheritance under the will of her late father.

[62] Whilst an award for further provision for the appellant would not be expected to equate to the totality of the insufficiency in her resources, there is a capacity in the estate for significant further provision to be made for her. The relationship between the appellant and the deceased was not a close one.[71] However, the geographical distances between their places of residence precluded regular physical interaction between them. There is no suggestion in the evidence of any antipathy between them, let alone an antipathy based on conduct on the part of the appellant, as might temper her claim.

[63] In my view, the appellant has advanced an arguable claim for further provision out of the deceased's estate. It is not a claim that is clearly unlikely to succeed. It cannot be said that it will probably fail. I am therefore satisfied that, in all these circumstances, the discretion under s 41(8) ought to be exercised in the appellant's favour.

Disposition

[64] At the hearing of the appeal, the parties were in agreement as to the form of orders that ought to be made by this Court in the event that the appeal is allowed. I would propose making orders accordingly.

[65] Two of those orders concern costs. The first is that the First Respondent, Dr Christopher Lusink, pay the appellant's costs of the appeal. The second is that he be granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld) in respect of those costs and of his own costs of the appeal.

---

68 *Ibid*, paragraph 77(vi); AB64.
69 *Ibid*, paragraph 77(vii); AB64.
70 *Ibid*, paragraph 77(v); AB64.
71 *Ibid*, paragraph 42; AB53.

[66] A certificate may be granted under s 15(1) in an appeal to this Court which succeeds on a question of law. Here, the appeal has succeeded on a question of law. The error of law on which the appellant has succeeded was one of failure on the part of the learned primary judge to observe the applicable principles of law. The course taken by his Honour in that regard was not one that was urged upon him by either party. Neither side submitted that he should assess the appellant's case as for a determination of substantive relief. In light of this, I am also satisfied that an indemnity certificate should be granted in respect of the costs of the appeal.

Orders

[67] I would propose the following orders:

1. The appeal be allowed.

2. The orders of the Supreme Court made on 2 June 2016 be set aside and in lieu thereof it be ordered that:

    a) It is directed that the Applicant's application for provision out of the estate of Loma Narelle Green deceased shall be heard notwithstanding that such application was not instituted within nine months after the death of the deceased.

    b) By consent, all amounts received by the Second, Third and Fourth Respondents from the First Respondent, less any amounts paid by them for reasonable legal fees and expenses incurred in responding to this proceeding, shall be repaid to the First Respondent forthwith and be held by him as executor of the estate of Loma Narelle Green deceased pending the determination of the Applicant's application for provision out of the estate of Loma Narelle Green deceased.

    c) By consent, the proceedings are discontinued as against the Second, Third and Fourth Respondents upon such payment.

    d) Pursuant to the *Civil Proceedings Act* 2011 it is ordered that the proceeding be transferred to the District Court held at Brisbane.

    e) Directions be made in compliance with Practice Direction No 8 of 2001.

3. The First Respondent pay the appellant's costs of the appeal, including the application to adduce further evidence, and her costs of the application below.

4. The First Respondent be granted a certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld), including for his own costs of the appeal.

[68] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes.

[69] **JACKSON J:** I agree with Gotterson JA except in relation to the proposed order for the grant of a certificate under the *Appeal Costs Fund Act* 1973 (Qld). As we are overturning the decision of the judge of the trial division, out of respect I would add something in my own words on the primary questions as well as upon the question whether an indemnity certificate should be granted.

[70] Leaving the detail aside, the appellant was unsuccessful in obtaining an extension of 11 days to file an application for family provision from the estate of her deceased

mother. The appellant is a 70 year old age pensioner with no income other than the pension, no substantial savings, a sick aged pensioner husband to care for, and a modest house in need of repairs.

[71] She has only one sibling, her brother, who is the respondent in this proceeding. He is a surgeon and the executor of the estate under the will of the deceased. There is no other spouse, child or dependant who applied for family provision. Her mother's estate of approximately $1.2 million was left to the respondent and his children except for two pecuniary legacies. One was for $50,000 to a friend. The other was to the appellant for $20,000.

[72] On the face of it, the appellant was someone for whom at least arguably adequate provision had not been made for her proper maintenance and support and the estate is one from which a larger gift to the appellant could have been accommodated. The questions on the final hearing of an application for provision would be whether the mother did not make adequate provision for and the court should make better provision for the appellant.

[73] What were the reasons for the conclusion that the appellant not be permitted to make an application for provision by granting the 11 day extension sought? It was not that she did not have an explanation for the delay. The explanation was a lawyer's mistake as to when the time expired. It was not that there was any prejudice to the others interested in the estate by reason of the delay. It may be inferred that both the appellant's brother and his adult professionally qualified children were aware of the appellant's intention to make a claim when the time expired, in light of the known limited provision for the appellant.

[74] Simplifying, the reasons for refusing the application were a combination of the primary judge's views that the appellant had not sufficiently proved that she was in need, or that the testator had a mistaken view as to her prospects of bounty from her father's estate and that, also having regard to the lack of a close relationship between the testator and the appellant, any provision that might be ordered in the appellant's favour would not be enough to warrant the costs that would be incurred in the proceeding.

[75] In my view, the primary judge acted upon a wrong principle, mistook some of the facts and did not take into account a material consideration in relation to the exercise of the discretion to extend time in reaching that conclusion, within the meaning of *House v The King*.[72]

[76] First, in my view, the primary judge erred in the view that, on an application of this kind, an applicant is to be assumed to have "put [their] best foot forward",[73] suggesting that all the evidence that might be expected to be adduced at a final hearing was before the court. I will describe that as the "best foot forward assumption". In my view, that assumption is not apt generally on an application to extend time to bring a family provision application, because the circumstances of different cases will vary. For example, as Muir JA said in *Hills v Chalk*:[74]

> "In any such process there is a need to recognise the limitations of the material before the Court on the application for leave, which will be generally untested by cross-examination, in comparison with the more extensive material likely to be in evidence on the substantive hearing."[75]

---

72 (1936) 55 CLR 499.
73 *Mortimer v Lusink & Ors* [2016] QSC 119, [40].
74 [2009] 1 Qd R 409.
75 [2009] 1 Qd R 409, 434 [77].

[77] The primary judge found, looking through the prism of the best foot forward assumption, that the appellant was living in "modest, but not straitened, financial circumstances."[76] The primary judge recorded that the respondents submitted to him that the appellant's combined fortnightly income with her husband exceeded their fortnightly expenses by about $250.[77] That statement of fact and submission were erroneous, and it may have informed the primary judge's conclusion as to the appellant's financial circumstances. Another possible error made by the primary judge is that he referred to a car owned by the appellant and her husband worth about $30,000 and a gift made to the appellant of $20,000 in the will.[78] However, the car was purchased with the gift and by trading in a 2006 model Toyota Corolla.

[78] More importantly, in my view, the primary judge did not refer to or otherwise appear to take into account other evidence that showed that the appellant's circumstances were really very modest. Among them, the appellant deposed that she and her husband could not afford to fix holes in the roof of their house or to replace worn out household items, such as to buy a new mattress, could not afford electricity for heating in winter and could not afford to go on a holiday. In my view, it is no exaggeration to describe those circumstances as straitened, according to the ordinary dictionary meaning.

[79] The primary judge's view of the facts that the appellant was in modest but not straitened circumstances is a matter of opinion, but at the least the opinion appears to have been informed to some degree by an error as to those facts.

[80] Second, the primary judge concluded that the appellant had not established that the mother as testator was mistaken in her assumption that the appellant would be adequately provided for by her father. The evidence was that the appellant's father had dementia and was living in a nursing home. Unsurprisingly, therefore, the appellant deposed to a conversation in August 2015 with her father's wife about her father's will. That conversation was consistent with her father's estate going to his wife and grandchildren and, as far as the appellant expected, not devolving upon the appellant. Her father's wife had said that she felt guilty that the appellant was "left out".[79] Accordingly, the appellant swore in her affidavit that her mother's assumption that her father would provide for her in his will was incorrect. The primary judge was not prepared to act on that evidence because that conversation was equivocal and not such that he would be willing to conclude that the appellant is not provided for in her father's will.[80]

[81] In my view, the combination of the best foot forward assumption and the primary judge's unwillingness to act on the evidence that the appellant was not provided for in her father's will erected a threshold that in law the appellant was not required to cross in order to establish to the requisite degree that adequate provision might not have been made from the estate so as to justify a grant of a relatively small extension of time.

[82] Third, in considering whether the appellant had adequate financial means in the sense described in the will, the primary judge found that it was difficult to assess the merit of that question, but that it should be assessed by reference only to the circumstances of the appellant and the testator.[81] I am not sure that approach was correct. Under the will, the testator gave her bounty worth about $1.2 million to her son, who is

---

76 *Mortimer v Lusink & Ors* [2016] QSC 119, [40].
77 *Mortimer v Lusink & Ors* [2016] QSC 119, [30].
78 *Mortimer v Lusink & Ors* [2016] QSC 119, [28] and [32].
79 AB1-49.
80 *Mortimer v Lusink & Ors* [2016] QSC 119, [37].
81 *Mortimer v Lusink & Ors* [2016] QSC 119, [36].

a surgeon and the appellant's only sibling, and her son's children, apart from the $20,000 bequest to the appellant and a $50,000 bequest to her friend. In my view, it is arguable that whether the appellant had "adequate financial means", as her mother apparently considered, should be viewed in the light of those circumstances as well. But it is unnecessary to decide this question.

[83] Last, although the primary judge was of the view that any order that might be made in the appellant's favour at a hearing would be so limited that it would be disproportionate to the costs involved,[82] it is not clear to me what amount or amounts his Honour may have had in mind. There was some evidence as to the likely costs, but the primary judge commented during argument that it lacked weight.[83] The extent to which there would be any factual issue at a final hearing was not canvassed before the primary judge. Equally, there is no indication as to what may have been the primary judge's view as to the amount of any order that might be made in the appellant's favour. No specific submission supporting this part of the primary judge's reasoning was made by the respondent on the hearing of the appeal.

[84] In my view, in exercising the discretion afresh, having regard to the relatively short period of extension that was sought, the reasons for the failure to make the application within time and the existence of a reasonably arguable case for further provision from the estate, it is appropriate to set aside the order made by the primary judge and to make an order extending time for the application for provision from the testator's estate.

Indemnity certificate

[85] Although there was an error of law in the primary judge's reasoning, it was an error into which he was led by the respondent's opposition to the application for leave made under s 41(8) of the *Succession Act* 1981 (Qld) and the grounds of that opposition. Specifically, the respondent urged on the primary Judge "about the applicant's evidence on an application such as this …" that an applicant "… must [be] assumed to have put his best foot forward evidentially … on an application for leave."[84] As Gotterson JA shows in his reasons, the passage relied on by the respondent for that submission was taken out of context.

[86] Since *Lauchlan v Hartley*[85] it has been accepted that even where this court is of the view that there is no legal basis on which the judgment or order under appeal could properly have been made, provided the legal warrant for the decision below "was arguably available or the settled principle was arguably distinguishable", a respondent may succeed in obtaining a certificate.[86]

[87] In my view, however, there was no arguable subtlety in the application of the relevant legal tests to the facts in the present case which justified the respondent's grounds of opposition below or in this court. The respondent simply took a hard line in opposition to an application made under s 41(8) when, prima facie, the application had reasonable prospects of success.

[88] In my view, the circumstances should not attract the grant of an indemnity certificate.

---

82 *Mortimer v Lusink & Ors* [2016] QSC 119, [41].
83 AB1-7.
84 AB1-24.
85 [1980] Qd R 149.
86 *Lauchlan v Hartley* [1980] Qd R 149, 151-152. See *Keeley v Horton* [2016] QCA 253, [28]-[29]; *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)* [2008] QCA 398, [21].