SUPREME COURT OF QUEENSLAND

CITATION:	*Holdway v Arcuri [No 2]* [2007] QSC 378
PARTIES:	**MARGARET ELIZABETH HOLDWAY** (plaintiff) **v** **ARCURI LAWYERS** (defendant) **MICHAEL EASTWOOD** (third party)
FILE NO:	SC No 3255 of 2004
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	18 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	21-23, 27 November 2007
JUDGE:	Fryberg J
ORDER:	**Judgment for the plaintiff in the sum of $233,000.00**
CATCHWORDS:	Professions and trades – Lawyers – Solicitor and client – Duties and liabilities – Generally – Acceptable that solicitor will rely upon competent barrister's advice – Solicitor maintains duty to exercise reasonable care and independent judgment – Duty to be familiar with law of jurisdiction relevant to solicitor's practice Professions and trades – Lawyers – Solicitor and client – Duties and liabilities to client – Obligations of solicitors – Allegation of negligence – Failure to serve or give notice of application for family provision Succession – Executors and administrators – Administration – Distribution – What constitutes Succession – Family provision and maintenance – Valuation of lost chose in action – Assessment of prospects of success – Factors considered *Succession Act 1981* (Qld) s41, s44, s45, s52 *Baker v Williams* [2007] QSC 226 cited *Boland v Yates Property Corp Pty Ltd* (1999) 74 ALJR 209

cited
Commissioner of Stamp Duties (Queensland) v Livingston (1964) 112 CLR 12 cited
Easterbrook v Young (1977) 136 CLR 308 distinguished
Holmes v Webb [1992] QCA 172 cited
Holt v Deputy Federal Commissioner of Land Tax, New South Wales (1914) 17 CLR 720 cited
Re Anderson [1957] NZLR 401 cited
Re Burgess [1984] 2 Qd R 379 considered
Re Donkin [1966] Qd R 96 referred to
Re Faulkner [1999] Qd R 49 cited
Re Hardgraves [1955] St R Qd 601 cited
Re Hill (Unreported, Supreme Court of Queensland, Carter J, 17 June 1988) cited
Re Lago [1984] VR 706 distinguished
Re Lowe [1964] QWN 37 cited
Re McPherson [1987] 2 Qd R 394 cited
Re Terlier [1958] QWN 5 referred to
Re Whitter [1984] 2 Qd R 356 cited
Sweeney v Attwood Marshall [2003] QCA 348 followed
Wolfson v Registrar-General (NSW) (1934) 51 CLR 300 cited

COUNSEL: Plaintiff: M Cooke QC and D Morgan
Defendant: R Derrington SC

SOLICITORS: Plaintiff: Phillip Roberts Lawyers
Defendant: Sparke Helmore

[1] **FRYBERG J:** Mrs Margaret Holdway has sued Arcuri Lawyers for professional negligence.

The story

[2] On 18 June 2002 Mrs Holdway, consulted solicitors. Her friend (to use a neutral term for the moment) Mr Frank Virgona, with whom she had been living, had died a fortnight earlier. By his will he left everything to his son Frank Jr., who was appointed executor. She wanted some of the estate. The firm she consulted was the defendant, which had acted for the late Mr Virgona. It held itself out as providing professional services in the area of wills and estate administration and it held out its employee, Mr Scott Pearson, as someone with experience in those fields. There are different recollections as to whom she first saw. She thought it was Mr Pearson, but it is more likely that she saw the principal, Mr Arcuri. She told him that she had been in a de facto relationship with Mr Virgona for 10 years and they discussed the possibility of making a claim for family provision against the estate.

[3] The solicitors for the executor were Bow & Company. They wrote to the defendant on 31 July sending a copy of Mr Virgona's will. The letter explained that before his death Mr Virgona had asked the executor to make certain provision for Mrs Holdway. This included $100,000 in cash and the business conducted by Robina Property World Pty Ltd (a jointly owned company financed by Mr Virgona which

conducted a real estate business) free of rent until it should become more viable. By the letter the executor offered to provide what Mr Virgona had asked and also some other benefits, in satisfaction of any claim which she felt she might have against the estate.

[4] On the following day Mrs Holdway instructed the defendant to proceed with the claim. Mr Pearson wrote to Bow & Company seeking a full list of the assets and liabilities of the estate, but it seems that this was not provided. However Mr Pearson knew from Mrs Holdway that the major assets of the estate were the home, still occupied by Mrs Holdway with the executor's consent, and a small office building containing three tenancies (one of which was that of Robina Property World Pty Ltd). In the course of a number of telephone and personal attendances on Mrs Holdway during August, Mr Pearson obtained a certain amount of additional information about her and the estate. In particular, he ascertained that she had been receiving social security since 1996; and that she was concerned to place a caveat over the property.

[5] Mr Pearson renewed his request to Bow & Company on 28 August, at the same time enquiring whether the executor was willing to attend a without prejudice conference. On the same day he formally notified the executor through the solicitor of Mrs Holdway's intention to make a claim under the *Succession Act 1981* ("the Act"). He requested confirmation that the executor would take no steps to distribute the assets without first notifying the defendant, adding (I assume truthfully) that the defendant held instructions to institute proceedings in the absence of such confirmation. No such confirmation was provided. Mr Pearson apparently accepted that none would be provided: he had a number of subsequent telephone conversations with representatives of that firm and there is no evidence that he again raised the question. Nor did he then institute proceedings.

[6] One such conversation was with an employee of Bow & Company named Kerrie. It must have taken place on or about 17 September. Kerrie proposed 2.00 pm on 4 October for a settlement conference. As something of an opening salvo for negotiations, she told Mr Pearson that Mrs Holdway had been receiving payments from the Department of Social Security when she should not have been doing so. "Therefore," said Kerrie (according to Mr Pearson's diary note), "any money she gets will have to be paid back to DSS."

[7] Either that day or the following day Mr Pearson contacted Mrs Holdway and ascertained that the date of the proposed conference was suitable. He confirmed the date with Bow & Company and then wrote to Mrs Holdway. In that letter he confirmed the conference date, informed her that he had advised Bow & Company that he would make an offer of settlement prior to the conference, "note[d]" that Mrs Holdway would forward all documentation in her possession and confirmed that once in receipt of such documentation, the defendant would be in a position to advise her in respect of her rights.

[8] Mr Pearson testified that the information from Kerrie regarding the social security payments was a matter of major concern to him. He said that the reason for his concern was that he knew that at some stage Mrs Holdway had been working as a real estate agent and that he was always concerned when a client was working and also receiving social security payments because it affected their credibility in court.

He was concerned that she may have failed to advise the department of her income and been receiving benefits inappropriately.

[9] That evidence was somewhat different from what he wrote in his letter to Mrs Holdway. There he wrote that Bow & Company had suggested that she was receiving social security benefits while she was living with Mr Virgona and would be required to repay those benefits if she were to receive any money from the estate. He advised that *the defendant did not believe this to be the case*, but asked her the reason she was receiving benefits and whether she had notified the Department of Social Security that she was living with Mr Virgona. He wrote nothing about any concern regarding her income and sought no information about it. Rather the focus of the letter was upon whether she had advised the department about cohabitation. That was no doubt relevant, not only to credibility but also to the issue of whether she was a de facto spouse. However it appears from the words italicised above that it was not a matter of major concern. On that point I do not accept Mr Pearson's evidence.

[10] Moreover, had the question of credibility then been one of major concern to Mr Pearson, one would expect that he would have pointed this out to his client. He did not do so. She had already given instructions to institute proceedings in the absence of confirmation within 21 days that the executor would take no steps to distribute the assets of the estate without notification. That period expired on the day the letter was written. Mrs Holdway was entitled to be told of any matter of major concern affecting her prospects which had arisen since she gave the instructions. Mr Pearson sought to explain the omission on the basis that "I didn't want to alarm her", but that hardly seems adequate. He did not explain why he did not commence proceedings as instructed.

[11] Later in his evidence and with the benefit of hindsight, Mr Pearson suggested that Mrs Holdway was in danger of a criminal prosecution if the judge referred the matter to the Department, but he did not suggest that this was a concern during the period while he was acting.

[12] By 25 September Mr Pearson had drafted what was headed a statement but was in the form of an affidavit for Mrs Holdway. It contained a number of blanks. Mr Pearson obtained the information in it from talking to Mrs Holdway and from a file note taken by Mr Arcuri. By this time Mr Pearson was evidently satisfied that Mrs Holdway had forwarded any documentation in accordance with his letter of 18 September, for he wrote, "We confirm that once your statement has been finalised we will be in a position to obtain an advice from our Barrister as to your entitlements in respect of the estate." He had a meeting with Mrs Holdway on 3 October when he obtained the information he needed. He edited the statement and sent it, together with a copy of the will and the offer from Bow & Company, to Mr M Eastwood of counsel, to provide an opinion as to quantum.

[13] The settlement conference was held on 4 October 2002. There is no evidence that Mr Eastwood had provided any advice in the period of less than 24 hours available to him. No settlement was achieved. It may be that Bow & Company had insufficient information about Mrs Holdway, for on 17 October Mr Pearson wrote to them setting out details of the basis of her claim. The letter confirmed a without prejudice offer to settle the claim and also the fact that the defendant held instructions to make an application if the matter were not resolved by negotiation.

It again requested the schedule of assets and liabilities of the estate, this time with details of payments of liabilities already made.

[14] There was no response to the letter so Mr Pearson wrote a follow-up letter on 6 November. He discussed the position with Mrs Holdway the following day when she instructed him to wait a short time to see what the other side's response was. When she telephoned again on 22 November the position was unchanged. She instructed him to institute proceedings; but he did not immediately do so.

[15] Bow & Company provided valuations of both blocks of land by 27 November and Mr Pearson forwarded them to Mrs Holdway. The shops were valued at $310,000 and the home at $490,000. They provided no other response. Consequently on 2 December Mr Pearson sent a brief to Mr Eastwood to settle an originating application, a supporting affidavit and a draft directions order, and to advise on quantum. The draft affidavit was four pages long and was based on information already provided by Mrs Holdway.

[16] Predictably, nothing further happened before the Christmas break. In the New Year Mr Eastwood requested a conference with Mrs Holdway. On 28 January, apparently after first telephoning her, Mr Pearson wrote to Mrs Holdway informing her that Mr Eastwood had been briefed (but not mentioning that this had occurred nearly two months earlier), that he had requested a conference and that the conference had been arranged for the following day. Later that day Mr Eastwood telephoned Mr Pearson seeking further information on a number of points and Mr Pearson sent a further letter to Mrs Holdway by facsimile with a copy of the draft affidavit and a list of the questions.

[17] The conference took place over two days, on 29 and 30 January 2003. Mr Pearson said that throughout the conference Mrs Holdway was evasive about specifics. Mr Eastwood asked Mrs Holdway a large number of questions and dictated a list of further information which was needed. In cross-examination it was put to Mrs Holdway that she told Mr Eastwood that she had made no contribution to Mr Virgona's estate and she agreed that this was correct. By that answer I understood her to mean not only that she said it but that what she said was true.[1] I accept that evidence. Mr Pearson testified that this was a clear change to the instructions which she had originally given him.

[18] Next day Mr Eastwood sent Mr Pearson an e-mail:

> "I attach herewith a list of those matters which need to be attended to prior to the giving of my advice.
>
> The limitation period contained in the Succession Act is 9 months from the date of the death of the Deceased. This should be borne in mind when obtaining the necessary information. Should it not be obtained before the expiry of the limitation period then proceedings should be instituted regardless."

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[1] She subsequently made a vague suggestion that she did contribute towards some of the furniture in the house, but since the executor gave her most of the furniture, any such contribution can be ignored.

A list of 29 questions was attached. Mr Pearson faxed a copy of the list to Mrs Holdway the same day. He also had a telephone conversation with her about some of those matters, as well as about a matter with which I shall deal later in these reasons.[2]

[19] He sent another copy of it with his letter to her dated 3 February. By the same letter he sent a copy of what he described as "the draft Affidavit which Mr Eastwood has prepared", asking her to contact the defendant if any changes were necessary. Presumably that referred to the settled or partly-settled version (it was not tendered). Echoing Mr Eastwood's words, he wrote, "We confirm that once we are in possession of all that information we will then be in a position to have Mr Eastwood provide us with an advice in respect of your claim." He did not suggest that the absence of any of the instructions would impede the commencement or prosecution of the proceedings and Mrs Holdway did not suggest that any amendments were necessary. Needless to say, the affidavit did not contain the information sought in Mr Eastwood's list of matters to be attended to prior to the giving of his advice.

[20] Meanwhile Bow & Company were also obtaining counsel's advice. They wrote to the defendant on 10 February and Mr Pearson forwarded the letter to Mrs Holdway the following day. The letter stated that their advice was that before counsel could provide a complete advice he required further instructions and information in relation to any contributions made by Mrs Holdway toward the acquisition of Mr Virgona's assets. In particular they sought details of the exact contributions made by her and copies of all her financial records evidencing the contributions, including bank statements and details of property owned by her. In his covering letter to Mrs Holdway, Mr Pearson emphasised that it was extremely important to obtain all of the necessary information "to protect your interests in this matter".

[21] Mr Pearson testified that by this expression he meant, "So that we could institute proceedings within the time limit." That was not so. Mr Eastwood had prepared a draft of the affidavit needed to institute proceedings. His 29 questions were required to enable him to advise on quantum. He said so in his e-mail to Mr Pearson and Mr Pearson said the same in his letter to Mrs Holdway dated 3 February. Indeed Mr Eastwood had explicitly said that proceedings should be commenced regardless of whether the additional information was obtained. However I do not think Mr Pearson's answer was untruthful. Rather, by 11 February he had become confused. Not unreasonably, he was intent upon serving Mrs Holdway's interest by negotiating a settlement with Bow & Company. They wanted much the same information as did Mr Eastwood, and for the same reason: to advise on quantum. Mr Pearson believed the matter could be settled without instituting proceedings in a way which would be less costly to Mrs Holdway. As he testified, "I was using [Bow & Company's letter of 10 February] as a way of getting her to talk to me." While Mr Eastwood did want to include the additional information in the affidavit if that were possible, that was simply to avoid having to file a supplementary affidavit.

[22] Mrs Holdway telephoned Mr Pearson the day after his letter, presumably after she received it. She explained that her sugar levels were extremely high (as Mr Pearson knew, she was a diabetic) and that she was unable to complete the questions until

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[2] Her gambling; see para [98].

she felt well again. It is unlikely that Mr Pearson believed her. Her continued failure to produce bank statements coupled with her unwillingness to pay for copies to be obtained from the bank had led him to distrust her. He testified, "I found it difficult to trust her. There was something about her. She was fairly evasive when she spoke to me is probably the best way I could put it."

[23] Mr Pearson had understood Mrs Holdway's initial instructions to be that she had contributed to Mr Virgona's estate, at least indirectly and possibly directly. Mrs Holdway did not clearly deny that she gave such instructions and having regard to the correspondence in 2002 and early 2003, I am satisfied that she probably did so. However she clarified the position during the conference with Mr Eastwood. Despite this it seems that Mr Pearson and perhaps Mr Eastwood did not accept her statement at the time. Perhaps they hoped that evidence of some contribution might be found if her documents were produced – even as late as mid-May Mr Eastwood's advice referred to contributions by her to the estate. Such a hope would in part explain Mr Pearson's focus on obtaining further documentation. Perhaps Mr Pearson simply did not want to acknowledge those instructions while negotiations were still alive, as they would certainly harm Mrs Holdway's negotiating position.

[24] However Mr Pearson also knew that time was passing. Mr Virgona had died on 4 June 2002 and Mr Pearson knew that the limitation period for commencing family provision proceedings was nine months. He telephoned Mr Eastwood on 27 February. What passed between them was critical to one aspect of the defence. It was the subject of quite extensive evidence, not all of it consistent, and which requires careful analysis.

[25] Mr Pearson testified that he was, "asking for [the documents]". Relying on a diary note, he said that Mr Eastwood told him "He has drafted documents and is e-mailing them to me." They agreed that the time limit would expire on 4 March. His evidence was:

> "Did you have any discussion about the time limit, or what could be done?-- I wanted - I wanted to definitely try and file something before then, but I was concerned that any material we filed would be defective.
>
> HIS HONOUR: Any material what?-- Any material which we did file might be defective.
>
> Yes?-- Might not have enough information in it.
>
> MR DERRINGTON: I see. Did you discuss that with Mr Eastwood?-- I did.
>
> Did he give you advice about that?-- He subsequently gave me advice that we should file it and see what happened.
>
> Okay.
>
> HIS HONOUR: When did he give you that advice?-- I think that was subsequent. I'm not sure if that was on this particular day or not.
>
> How long subsequent?-- Probably in the next day or so after this. Everything started to happen very quickly about now."

In cross-examination Mr Pearson agreed that it may well have been he who suggested that the application be filed but not served.

[26] Mr Derrington SC (for the defendant) then took Mr Pearson to a letter dated 27 February 2003 which Mr Eastwood wrote to him. I set out the material portions of it:

> "While there is a requirement that application be made within 9 months of the date of death, there is nothing within the *Succession Act* which requires that the application and supporting material be served within that time period. Neither is there a requirement that the Practice Direction be filed.
>
> Bearing in mind the lack of instructions from Querist I have drafted the Affidavit in support as best I can. Needless to say it is completely deficient as to particulars of various allegations and totally unsupported by Querist's documents. This is so since Querist is suffering from diabetes. She is not in the best of health to allow those instructions to be given to my instructing Solicitors.
>
> As a consequence it may be best, should the Registry allow it, to simply file the application and not the Affidavit which I have drafted. In that way the material can be properly prepared and filed once rather than addendum Affidavits being filed later. It is always difficult to anticipate the attitude of Registry staff regardless of what the Rules provide, however.
>
> In any event the Affidavit should be sworn by Querist so that should the Registry require the Affidavit to be filed, it can be.
>
> Bearing in mind my instructing Solicitors' intention to withhold service of the Application and supporting documents until Querist is in a position to give proper instructions I have left the dates in the Directions Order blank. In this way they can be filled in after discussion between my instructing Solicitors and I when the time is appropriate."

[27] After Mr Pearson read the letter in the witness box, the following exchange took place:

> "Did that relate in any way to the discussion that you had that day?-- Yes, it did.
>
> In what way?-- It set out the concerns that Mr Eastwood and I discussed that we had to institute proceedings and I specifically asked Mr Eastwood if we had to - if we had to file the material - if we had to serve the material or could we simply file it and hold onto it and when we got the appropriate instructions, then we could bring an application - then we could serve it with the appropriate affidavit with all the necessary instructions.
>
> So you asked Mr Eastwood that?-- I did.
>
> What was his response to you?-- Mr Eastwood told me that, yes, we could file it and not serve it and I asked him to put it in writing and he did so.
>
> Okay.

> HIS HONOUR: So what he told you is what is set out in the letter here?-- Yes."

There is of course a difference between saying that the solicitors could file and not serve the material and saying (as Mr Eastwood did in the letter) that nothing in the Act required that the application and supporting material be served within nine months of the death. Whether the difference is significant I defer for later consideration.[3] What is plain is that Mr Pearson saw no difference between the two propositions:

> "HIS HONOUR: Just before you might get away from that letter, can you look at the second page of it?-- Yes.
>
> Tell me if my understanding is right. That seems to suggest that you had told him that you intended to withhold service of the application; is that correct?-- Yes, that's quite right, after he told me that I didn't have to actually serve it.
>
> Well, what he told you is in the fourth paragraph of the first page, that is that there is nothing in the Succession Act which required the application and supporting material to be served within that time period?-- Yes, yes, that's what he told me.
>
> Right.
>
> MR DERRINGTON: … Well, your conversation with Mr Eastwood on the 27th-----?-- Yes.
>
> -----it is obvious that it is about what you should do?-- Yes.
>
> You were answering a question from his Honour about the statement that it was your intention to withhold service?-- Yes.
>
> How did - did you express that to Mr Eastwood?-- I asked him if it was okay if I did.
>
> Okay?-- He said to me, "Yes.", and that's why I specifically asked him to put that in writing.
>
> I see.
>
> HIS HONOUR: Well, what you told me before was that what he told you was what he said in the letter?-- I'm sorry, your Honour, I didn't realise if I made any difference to that. I hadn't intended to mislead your Honour."

Mr Pearson later agreed that what was in the letter was responsive to what he had asked. No doubt that explains why that part of the defence which relies upon Mr Eastwood's advice is pleaded only in the terms of the letter. I am satisfied that if any oral advice was given, it was to the same effect as what was set out in the letter, and was responsive to the question asked.

[28] Another possible point of confusion relates to the documents e-mailed by Mr Eastwood to Mr Pearson. From the foregoing evidence one could be forgiven for thinking that the affidavit under discussion was a final version of the one originally drafted by Mr Pearson and amplified by Mr Eastwood as a result of the conference. However that affidavit had been received by Mr Pearson and sent to Mrs Holdway

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[3] Paragraph [49].

under cover of his letter of 3 February.[4] It became clear in cross-examination that the affidavit in question was the one filed in proceedings 1895 of 2003 on 3 March – exhibit 2 in the present proceedings. It was barely two pages long and was sworn on 28 February. It formally complied with the requirements of Practice Direction 8 of 2001 save that it did not contain "such other material as may be necessary to support the application".[5] That omission was explained by reference to Mrs Holdway's diabetes, which was said to have prevented her from carrying out the necessary investigations at that time.[6] Mr Pearson agreed that it was a holding affidavit.

[29] Mr Pearson did not explain how Mr Eastwood came to draw and settle this further affidavit. I infer that it must have been done in response to instructions from Mr Pearson. Those instructions must have preceded the telephone conversation recorded in the diary note of 27 February.

[30] Mr Pearson informed Mrs Holdway of developments by letter dated 5 March:

> "We confirm that it is extremely important that you forward all the information requested by Mr Eastwood at his conference to our offices as soon as possible so that we can prepare the necessary documentation and provide you with an advice in respect of your claim.
>
> We confirm that we have now instituted proceedings in the Supreme Court to protect your interest although we will delay service of the application and supporting affidavit until you have provided us with all the necessary information."

There was no suggestion that any other additional information was required.

[31] Mr Pearson thought that he did get one or two pieces of information, but not very much, in response to that letter. He wrote again on 20 March:

> "We note that some time ago we provided you with a list of questions prepared by Mr Eastwood of Counsel. We confirm that until you are able to provide us with as much of that documentation as possible then we can take no further steps in respect of the prosecution of your claim.
>
> We confirm that the Solicitors acting for Frank Virgona Junior have also requested that we provide them with this information and it is unlikely that they will enter into any negotiations with us in an effort to resolve this matter until we receive this information.
>
> We note that you have had a number of telephone conversations with Scott Pearson of our office wherein you indicated that you would obtain some documentation and had been unable to obtain other documentation. In the circumstances, we request you provide us with all documentation which you have obtained together with a list of any of the documentation which you are unable to obtain and why,

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4 See para [19].

5 Paragraph 7(k) of the Direction.

6 See para [22].

> so that we may take steps to prepare the necessary Affidavit material which will be required to be filed in the Court in support of your claim."

[32] At some time between 20 March and 2 April, Mrs Holdway returned the list of 29 questions with a number of answers written in. Further answers were written in, I infer, during a conference between Mrs Holdway and someone from the defendant other than Mr Pearson. Mr Pearson forwarded those answers to Mr Eastwood, together with some other documents which he had obtained, when redelivering counsel's brief on 2 April. On the same day he wrote to Mrs Holdway. It is evident from that letter that Mr Pearson knew that Mrs Holdway did not have copies of bank and credit card statements and could not afford to obtain them. Question 12 on the list therefore could not be answered. Question 11 sought a list of the accounts and account numbers, and although Mrs Holdway had not provided that information, Mr Pearson did not press for it in his letter. The letter noted that Mrs Holdway had agreed to provide a list of employers and to obtain copies of her tax returns for the period 1992 to 2002 from the Australian Tax Office. That dealt with question 14. By question 18 Mr Eastwood had sought details of the dates on which Mrs Holdway and Mr Virgona went on the three ocean cruises referred to in the draft affidavit. Mrs Holdway answered that by providing a copy of her passport showing the dates, but Mr Pearson now sought receipts from the travel agents in respect of the cruises and if available receipts indicating that Mrs Holdway had purchased various items of furniture and other items in the relationship. That related particularly to a legacy of $40,000 received by Mrs Holdway from her mother's estate. The letter noted that Mrs Holdway was obtaining a copy of the contract for the sale of a property at Heathmont in Melbourne, the solicitor's settlement statement for that sale and a letter from the bank saying what the pay out of the mortgage was at the time of the sale.

[33] The remaining information which Mrs Holdway was to obtain had not been received when Mr Eastwood completed his advice on 15 May. On liability, Mr Eastwood wrote:

> "To prove dependency Querist must show what was spent on her by the Deceased and what she contributed to her own expenses or, alternatively, that of the Deceased. Dependency is a question of determining what was spent on Querist and whether it was spent from Querist's own income or that of the Deceased. (*Re Cobb* [1989] 1 QdR 522).
>
> Of course, Querist has no records of that which was spent by the Deceased. Those records form part of the Estate. They are held by the Son. No doubt, as the matter progresses, disclosure will be held of those documents and the contribution made by the Deceased to Querist's living expenses can be ascertained.
>
> However, there is no evidence of that which Querist spent, or, upon which it was spent. Unless that can be proved, Querist cannot prove she was a dependant. Further such evidence is required to assist in deciding the moral claim on the grounds of contribution to the wealth of the Deceased. Should she not be able to prove the financial position allowing her to claim her case must fail. Merely proving

> that the Deceased contributed is insufficient. (*Re Cobb* [1989] 1 QdR 522).[7]
>
> It is therefore extremely important that Querist provide the instructions that are sought from her, failing which I hold the view that her prospects of success are negligible.
>
> It should be pointed out to Querist that, as the matter progresses, she will be required to provide copies of the documents sought by me to the Solicitors for the Estate. Further, she will be required to depose to her income and how it was spent. Providing this now is doing nothing more than Querist needs do in the future to prosecute her claim."

As to quantum it was Mr Eastwood's opinion that querist was likely to receive no more than one quarter of the value of the assets of the estate at best. That would require discounting should she not be able to prove her financial status during the course of the relationship. Mr Pearson sent a copy of that advice to Mrs Holdway, with a request that she discuss it with him.

[34] She telephoned him to do so on 26 May. She was plainly unhappy with Mr Eastwood's advice. Mr Pearson told her she could give instructions to obtain advice from another barrister; she could attempt to enter into negotiations with the other side; or the defendant could draft the necessary affidavit and try to bring on the proceedings. She said she would think about the matter. Mr Pearson asked her to do so and to give him some instructions.

[35] She saw Mr Arcuri on 10 June and three days later she again spoke to Mr Pearson. They discussed the position at some length. The outcome was that Mrs Holdway instructed Mr Pearson to proceed with the claim - the third option discussed on 26 May. He noted that the defendant would have to draft an affidavit for her and get the matter ready to proceed. He did not seek any further information from her. She rang him again on 18 June and instructed that she wanted to finalise the matter as soon as possible. She said her business might be going to fold or she might sell it. Mr Pearson told her that the defendant would try to finalise "all of this" as soon as possible and would talk to her next week. Despite his evidence that he asked her for more information in almost every conversation he had with her, I am not satisfied that he did so on this occasion.

[36] There is no evidence that Mr Pearson did anything to comply with his instructions of 13 June. Indeed he seems to have done nothing more on behalf of Mrs Holdway apart from forwarding a request to Bow & Company for the estate to pay the renewal of registration of one of the motor vehicles. I am satisfied that his inaction was the result of his belief that if the matter proceeded it was doomed to fail; he "doubted her on most things that she told me unless there was specifics placed in front of me".

[37] By August Mrs Holdway had become dissatisfied with the defendant. She went to another firm, Phillip Roberts, who sought her file from the defendant by letter dated 18 August 2003. The defendant claimed a lien on the file to cover its outlays and

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[7] It is not necessary for me to consider whether the case supports the proposition for which it was cited.

demanded an undertaking from Mrs Holdway to pay its professional costs from the proceeds of any settlement.

[38] Meanwhile Mr Bow had not been idle. On 25 July, after taking counsel's advice, he filed transmission applications on behalf of the executor for registration as devisee (as opposed to registration as personal representative) in respect of both blocks of land.[8] Those instruments were registered on that day. Until they were registered the land had remained in the name of Mr Virgona. At the time those instruments were registered, the estate had not been fully administered. It remained indebted to Mrs Holdway for a loan of $15,000 which she had made to Mr Virgona and to the Bank of Queensland under a guarantee for approximately $115,000. Some assets (shares) had not been got in. There were insufficient assets in the estate to pay the debts without recourse to one or other of the blocks of land.

[39] Some time in the second half of August Mr Roberts spoke to Mr Bow and informed him that he was now acting for Mrs Holdway. According to a letter he wrote to the defendant dated 1 September, Mr Bow advised that Mrs Holdway's claim was out of time. "Apparently," wrote Mr Roberts, "the estate has now been largely distributed." Mr Roberts suggested that the defendant hand a copy of the letter to its insurers. The reason for that suggestion was s 44(3) of the Act:

> "(3) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative—
>
> (a) not earlier than 6 months after the deceased's death and without notice of any application or intended application under section 41(1) or 42 in relation to the estate; or
>
> (b) if notice under section 41(1) or 42 has been received—not earlier than 9 months after the deceased's death, unless the personal representative receives written notice that the application has been commenced in the court or is served with a copy of the application."

[40] The evidence of what happened thereafter is sketchy. The originating application and a resworn affidavit were served on 8 October. Thereafter there were negotiations between the parties and on 21 November they entered into a Deed of Compromise. Materially it provided:

> "**WHEREAS**
>
> A. The late Frank Virgona died on the 4th June, 2002 ("the Deceased").
>
> B. The Executor is the Executor of the Will of the late Frank Virgona dated the 30th January, 1992.
>
> C. Probate of the said Will was obtained in favour of the Executor on the 30th September, 2002.
>
> D. The Claimant commenced proceedings on the 3rd March, 2003 but proceedings were not served. The Claimant should

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[8] See *Land Title Act 1994*, ss 111, 112.

have commenced proceedings for family provision pursuant to Part 4 *Succession Act* 1981 and served the Executor by no later than the 3rd March, 2003.

E. The Executor was not served nor notified of proceedings on behalf of the Claimant within the period of nine months from the death of Frank Virgona, notwithstanding that proceedings dated the 3rd March, 2003 were instituted within nine months of the date of death of the Deceased.

NOW THIS DEED WITNESSES AS FOLLOWS:

1. That the Claimant acknowledges that the estate of the Deceased has been lawfully distributed by the Executor and that the Claimant no longer has any basis to make any claim against the Executor or the assets of the estate.

2. The Executor (without any obligation to do so) and the Claimant agree as follows:

   (i) The Executor shall transfer all of the Deceased's shares in the company Robina Property World Pty Ltd to the Claimant and shall resign from the office of Director of that company;

   (ii) The Executor shall transfer the ownership of the Toyota Camry motor vehicle registered number to the Claimant and the Claimant shall be responsible for all costs and expenses relating to the motor vehicle, including registration and any costs required to make the vehicle roadworthy;

   (iii) The Executor will grant the Claimant a lease of the business premises situated at Shop 16C Robina Quay Shopping Centre for twelve months or if no Lease is sought by the Purchaser of that property then the Executor will pay a sum of $10,000.00 to the Claimant to subsidise the Claimant's rent in alternate premises.

   (iv) The Executor will not claim any rent for the Claimant's occupation of the commercial premises or the residence of the deceased from the date of the death of the Deceased until the date of this Deed.

   (v) That the Claimant shall vacate the residential property at 17 Long Island Court, Robina within fourteen (14) days of the date of this Deed, and the Claimant undertakes to ensure that the property is in a good state of repair, condition and cleanliness and is of attractive presentation upon vacating it so as to facilitate a quick sale of the property at the best possible market price.

   (vi) The Executor will transfer ownership of all furniture and chattels in both the house property and the business premises to the Claimant with the exception

of the smoking chair and stained hall vase stand which are to be returned to the Executor.

(vii) The Executor will proceed to sell the property situated at 17 Long Island Court, Robina forthwith and shall pay to the Claimant from the proceeds of sale the sum of $100,000 less any further expenses incurred by the estate in relation to such other assets which are being used or enjoyed by the Claimant until her surrender of those assets of their disposition.

3. The Claimant will discontinue her proceedings against the Executor.

4. Both parties agree that this Deed represents a full and final settlement of the Claimant's Claim against the Executor and that no further proceedings shall issue with respect to this matter against the Executor."

By that deed the executor gave Mrs Holdway essentially the same things as he had offered on 31 July 2002.[9]

The issues

[41] In the present action Mrs Holdway alleges that the defendant was negligent in failing to serve the originating application or notice of it "within the time limits prescribed in Part 4 the Act". She alleges that the executor distributed the estate and as a result of the defendant's negligence she lost all prospects of obtaining provision from the estate. She alleges she would have received an award of up to $540,000 and claims damages for breach of contract and negligence in that sum.

[42] The defendant in its pleading admits that it was under a duty to exercise reasonable care in acting for the plaintiff in respect of her claim. It raises a number of matters of defence. First, it alleges that it reasonably relied upon Mr Eastwood's advice and withheld service of the application. Second, it alleges that the plaintiff failed to give it proper instructions about her claim when asked for them at any time prior to the (time of) distribution of the land; that in the absence of further instructions any claim brought prior to that time was bound to fail; and that consequently its conduct was not causative of any loss. In the alternative it relies on Mrs Holdway's failures as contributory negligence and breach of an implied term by her. Third it alleges that even if the application had been successfully prosecuted the amount which Mrs Holdway would have been awarded would have been nothing like $540,000. Fourth, it asserts that Mrs Holdway must give credit for the amount received under the compromise. Mr Cooke QC for Mrs Holdway in part conceded the last point during his opening. Finally, Mr Derrington submitted that the land had not been distributed prior to service of the application on 8 October 2003, so that any loss was caused solely by Mrs Holdway's failure to prosecute her claim. Mrs Holdway joined issue on all points apart from the one conceded, and further submitted that it

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[9] See para [3].

was not open to the defendant to rely upon the last point because it had not been raised by the defence – indeed distribution of the land had therein been admitted.

[43] The defendant did not submit that if it failed on these issues the plaintiff had nonetheless failed to prove breach of duty. In my judgment it cannot be doubted that, subject to these matters, the defendant did commit such a breach.[10]

[44] It is convenient to defer consideration of the likely amount of any award and to consider the other issues on the assumption that Mrs Holdway had a claim for family provision which was likely to yield substantially more than she received in the compromise.

Reliance upon counsel's advice

[45] The parties were agreed that the relevant principles were stated by Kirby J:

> "The proper analysis of the duty of care owed by a solicitor, other than in respect of in-court advocacy, is to be found not in any immunity secured by analogy, inference or suggested necessity from the immunity enjoyed by a barrister-advocate retained by the solicitor. It rests instead upon general principles governing the liability of a solicitor, operating in a divided legal profession, where he or she has retained a barrister to provide advice and, if it proves necessary, for the barrister to conduct any proceedings in court that may ensue. In such a case the solicitor will, in general, be entitled to act in accordance with instructions given by the client on the basis of the barrister's advice, so long as the solicitor has taken care to retain a barrister of competence with the skill necessary to advise and represent the client in the field of legal practice in question and has properly and competently instructed the barrister to the best of the solicitor's care, skill and ability.
>
> Ordinarily in a divided legal profession it is responsible conduct for a solicitor (particularly if he or she has no disclosed specialist experience in a field of legal practice) to rely upon a competent barrister's advice. Doing so makes proper use of the specialised Bar. However, the solicitor must not accept the barrister's advice blindly. He or she retains a legal duty to the client, separate, independent and personal, both by reason of the general law of negligence and the contract of retainer. The solicitor must exercise independent judgment to the extent that it is reasonable to demand this having regard to the solicitor's reputed knowledge and experience, the complexity of the case and the skill and experience of the barrister who has been retained. If the solicitor reasonably considers that the barrister's advice is obviously wrong, it is the solicitor's duty to reject that advice and to advise the client independently, including as to the wisdom of retaining a fresh barrister. In a divided profession, the immunity enjoyed by an advocate does not automatically extend to a non-advocate solicitor. The answer which such a solicitor, who has

[10] See paras [50] - [53].

> retained a barrister may give to a client's later allegation of negligence is not that the solicitor is immune from suit. It is that, although liable to suit, the solicitor is not negligent because reliance on the advice of the barrister was proper and reasonable in the circumstances and no occasion arose for that advice to be rejected."[11]

[46] Mr Pearson was admitted to practise as a solicitor in 1991. The defendant held itself out as providing professional services in the area of wills and estate administration and it held Mr Pearson out as someone with experience in those fields. It submitted that it did not hold him out as, nor was he, a specialist in those areas. That may be so; but it does not negate the implication that his knowledge exceeded that of a practitioner without that experience. The defendant submitted that it was relevant that much of his work prior to these events had taken place in New South Wales, where the equivalent act entitled the court to make provision out of the estate even after it had been distributed. I reject that submission. Members of the public are entitled to expect the same standard of care from all practitioners, regardless of where they gained their experience. It is incumbent upon a practitioner who moves to a new jurisdiction to make himself or herself generally familiar with the law of that jurisdiction relevant to his or her areas of practice.

[47] A practitioner should certainly be aware of his or her own limitations, and be able to recognize situations where assistance is advisable. However obtaining advice from counsel does not reduce the standard of care which a solicitor must bring to a given task, at least in the absence of an explicit explanation to the client, in advance, of any such limitations.

[48] Mr Pearson decided not to serve the application and any supporting affidavit and, it seems, not to give the executor notice that the application had been made. The essence of the negligence alleged against him is that the implementation of that decision gave the executor time to distribute the land, which left insufficient assets in the estate to cover Mrs Holdway's claim. There is no doubt that if the land is excluded from the estate and it is assumed that the value of the claim was substantial, the assets were insufficient. Conversely there seems little doubt that had service been effected or notice given, the executor would not have distributed the land; and even if he had done so, he would have been liable either for devastavit or under the Act.[12] The questions which arise are, first, did Mr Eastwood advise Mr Pearson that it was sufficient to protect Mrs Holdway's interests to commence an application, and that it was not necessary to serve it or to do so promptly or to give notice of it; and second, if he did, should Mr Pearson, by the exercise of independent judgment to the extent that it was reasonable to require this, have reached a different conclusion.

[49] Mr Eastwood advised Mr Pearson that there was nothing within the Act which required that the application and supporting material be served within nine months of the date of death. In my judgment that is a significantly different proposition from the one implemented by Mr Pearson. It is different in several respects. It dealt

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11 *Boland v Yates Property Corp Pty Ltd* (1999) 74 ALJR 209 at pp 239-240; [1999] HCA 64 at [141] - [142].

12 *Re Hill* (Unreported, Supreme Court of Queensland, Carter J, 17 June 1988); *Re Faulkner* [1999] Qd R 49.

with whether the Act contained a *requirement* for service, not with whether, for other reasons, prompt service or service within nine months was desirable; it did not address the possibility of giving notice; it did not advise Mr Pearson not to serve, but only referred to his decision, already made, not to do so; and it did not address the wider question of how to protect Mrs Holdway's interests generally. It is, moreover, in terms correct. Mr Pearson extrapolated from that narrowly expressed advice and in doing so went beyond what Mr Eastwood had said. He deferred service of the application indefinitely and gave no notice of it. Mr Eastwood did not advise him to do this.

[50] Even if Mr Eastwood's advice should be understood in the sense for which the defendant contends, the defendant is not exculpated. Mr Pearson was obliged to exercise his own professional judgment on the question of whether service or notice of the application should be withheld. He did not do so. Delay in serving the application or giving notice of it exposed Mrs Holdway to the risk that the estate, or its major assets, would be distributed, thus leaving nothing or next to nothing as potential subject matter for an order for family provision. The executor's year[13] was allowed to pass without service being effected. Of course, even if the application had been served or notice been given promptly the executor might still have distributed the land; but it is unlikely that this he would have taken such a course and even had he done so he would have acted at his peril.[14]

[51] Family provision is covered in a mere six sections of the Act Mr Pearson did not say whether he read the Act in relation to Mrs Holdway's application, but he did say that he was unaware of and had not read s 44(3). Nor, it seems, did he consult the leading textbook:

> "**[4.3]** In Queensland, it is essential that written notice of the intention to make an application be given to the personal representative within six months of the date of death and thereafter the application made and written notice of this (or the application) served on the personal representative within nine months of the date of death of the deceased.[5] (5. Qld Act s 44(3), (4)).":[15]

That arguably overstates the position, but reference to it would have alerted Mr Pearson to the relevant law.

[52] This was not a case of a solicitor deferring to counsel's opinion on competing, arguable interpretations. This was a case where the solicitor did not apply his mind to the problem. Mr Pearson had acted for the executor or administrator in 100 or so matters and was "aware that there [were] limits on the time period after which the deceased dies that an executor may distribute the estate without any repercussions". The possibility of the claim being defeated by distribution of assets does not appear to have occurred to him in early 2003. This is remarkable, since in late August 2002 he had sought an assurance from Bow & Company that the executor would not distribute the assets without notice. (No such assurance was forthcoming, but this does not seem to have occasioned him any alarm or induced additional caution.)

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13 The existence of the executor's year is acknowledged by the Act: s 52(1A).

14 *Re McPherson* [1987] 2 Qd R 394 at p 399; *Succession Act 1981* ss 52(2) and 44(3); Preece A A, *Lee's Manual of Queensland Succession Law* 6th ed (2007) at para [9.340].

15 De Groot, J K and Nickel, B W: *Family Provision in Australia* 2nd ed (2001), p 157.

[53] Even as late as the first half of June 2003 the loss which Mrs Holdway suffered could have been avoided had Mr Pearson obeyed her instructions to proceed with the claim. He accepted those instructions, but without further reference to Mr Eastwood, did nothing to implement them.

[54] In my judgment Mr Eastwood's advice provided no defence.

Distribution and causation

[55] The power of the court to make an order for family provision under s 41 of the Act was limited to making an order "that such provision as the court thinks fit shall be made *out of the estate* of the deceased person".[16] If there is no estate no order can be made. There is no estate if the estate has been fully administered and all the assets distributed.[17] That was not the position in the present case at any material time. Mr Bow gave evidence that his file as solicitor for the estate was still not closed as at the date of trial; his trust account then contained $6,120.66 for the estate. It seems in late 2003 or the first part of 2004 there remained shares in a company called CITIC Australia Trading which had still not been got in; and the liability to the Bank of Queensland under the guarantee certainly remained unpaid until early 2004. There was at the time of the compromise a credit balance for the estate in Bow & Company's trust account of $13,577.24. Although by cl 1 of the Deed of Compromise Mrs Holdway acknowledged that the estate had been distributed and that she no longer had any basis to make a claim against the executor or the assets of the estate, the remainder of the deed is inconsistent with the accuracy of that acknowledgement. It is true that Mrs Holdway pleaded that the estate was distributed, but that was not the basis upon which she conducted her case. It was put on the basis that by the time the application was served the land had been distributed to the beneficiary; and what was left was insufficient for a claim to be likely to have succeeded.

[56] If in fact the land was distributed, that argument is probably correct. Without the land the liabilities of the estate exceeded the assets. Even if there were a small surplus of assets over liabilities, it would be improbable that an application would succeed.[18] But had the land been distributed?

Distribution

[57] Until the Act commenced on 1 January 1982, land in Queensland devised by will vested in the devisee immediately upon the death of the testator. That was changed by s 45 of the Act, which provided that it should devolve to and vest in the executor. The title which the executor acquired was acquired not by transfer but by operation of law, sometimes described as acquisition by transmission.[19] The title so acquired was the full title, not merely an equitable title.[20] That was true even in respect of

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16 Emphasis added.

17 *Re Lowe* [1964] QWN 37.

18 Compare *Re Terlier* [1958] QWN 5.

19 The distinction was described by Starke J in *Wolfson v Registrar-General (NSW)* (1934) 51 CLR 300 at p 311; [1934] HCA 29.

20 *Commissioner of Stamp Duties (Queensland) v Livingston* (1964) 112 CLR 12 at p 17; [1964] HCA 54 at [14].

land under the Torrens system; it did not matter that the deceased remained registered as proprietor.[21]

[58] In the present case that was the title which devolved upon the executor when Mr Virgona died. That was the title which the executor retained until he sold the land in early 2004, well after service of Mrs Holdway's claim and the execution of the Deed of Compromise. However Mrs Holdway submitted that from the time of registration of the executor's application to the registrar for registration as devisee (25 July 2003), the executor held the land as beneficiary, not as executor; and therefore the land had been distributed and was no longer available to provide for any order for family provision. The defendant made the contrary submission.

[59] What constitutes distribution of an asset, particularly of land under the Torrens system in Queensland? The answer is to be found in the decision of the Full Court in *Re Donkin*.[22] In that case the relevant part of the estate (including some land) was given to executors, who were also trustees, upon trust for some of the testator's infant children. It was argued that by the time the application was made, the executors had ceased to act as such and held the property as trustees; that consequently that property had been distributed; and (there being no other remaining property) there was no estate out of which provision could be made by the applicant. Gibbs J wrote:

> "The *Acts* do not define the words 'the estate of the testator'. Those words in their natural sense refer to all the property that belonged to the testator and has not yet passed to any other person absolutely and in his own right. Once the title of a beneficiary has become complete, so that he holds in his own right the property given to him by the will, that property ceases in any ordinary sense to be part of the estate of the testator, and becomes part of the estate of the beneficiary. …
>
> …
>
> The question that then arises is whether an asset similarly ceases to be part of the testator's estate when it is vested in trustees for a beneficiary, even if the trustees are the executors under the will, provided that they hold the property in the character of trustees rather than that of executors.
>
> …
>
> If a will requires the executors to hand over the residuary estate to other persons to hold it as trustees, once the estate has been so handed over it ceases to be the estate of the testator and is beyond the power of the court to effect by an order under *The Testator's Family Maintenance Acts*. If however the executors are themselves the trustees, once the estate has assumed the character of a trust estate it equally ceases to be part of the testator's estate; *in equity it belongs to*

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21 *Holt v Deputy Federal Commissioner of Land Tax, New South Wales* (1914) 17 CLR 720; [1914] HCA 26.

22 [1966] Qd R 96.

> *the beneficiaries and the Court is not empowered to divest what has been vested in them.*"[23]

In other words, the estate had been distributed; and the essence of the distribution was the acquisition of title by the beneficiaries, who had no proprietary interest in the estate until that occurred.[24] The trustees no longer had full ownership of the property in the estate, but only the legal title. The property no longer constituted or was part of the estate.

[60] On the facts of the case his Honour held that before the application was made, "the estate had ceased to be the estate of the testator and had become in equity the estate of the [beneficiaries] … ."[25]

[61] That decision was followed in *Re Burgess*.[26] That too was a case where executors were also trustees. During the 23 years which elapsed between the testator's death and the application for what is now called family provision, not only had the equitable estate vested in the beneficiaries, but also there had been two changes of trustees. Carter J relied on all changes in title in deciding that the estate, or at least the relevant part of it, had been distributed at the time of the application.

[62] It is, however important to bear in mind that whether property has ceased to form part of an estate (for that is what is meant by distribution in this context) is a question of fact to be decided on all of the evidence in the case – on that point I accept the submission of the executor.[27] One must be careful not to lose sight of the description of the words "the estate of the testator" advanced by Gibbs J in *Re Donkin*: "all property that belonged to the testator and has not yet passed to any other person absolutely *and in his own right*". The emphasised words are important. At the time *Donkin* was decided personalty passed to the executor and it did so, as shown above,[28] absolutely. It is true that realty then passed directly to the devisee, but it was still regarded as available for satisfying a family provision order.[29] In neither case could the property be said to be held by the executor "in his own right". That phrase reflects the fact that in some cases it may not be sufficient merely to demonstrate that an equitable title has become vested in a beneficiary if that title is defeasible. That is not the present case and it is unnecessary to say anything further about it. In the present case there has been no change in proprietary rights in respect of the land said to have been distributed during the relevant period. It was owned absolutely by the executor at all material times.[30] The question is whether at the time the application was compromised he owned it as executor, so that it was liable to be sold to pay estate debts for example, or whether he owned it in his own right.

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23 [1966] Qd R 96 at pp 113-7 (emphasis added). Hanger J reached the same decision for similar reasons.

24 *Commissioner of Stamp Duties (Queensland) v Livingston* (1964) 112 CLR 12; [1964] HCA 54.

25 [1966] Qd R 96 at p 123.

26 [1984] 2 Qd R 379.

27 *Re Anderson* [1957] NZLR 401.

28 Paragraph [57].

29 *Re Hardgraves* [1955] St R Qd 601.

30 The defendant did not submit that this fact by itself necessarily meant that there had been no distribution, and I need not consider such an argument.

[63] Mr Virgona's will was simple enough. It consisted of only four clauses. The first revoked all prior testamentary dispositions. The second appointed his son to be the executor and trustee of the will. Notwithstanding the appointment as trustee, the third clause devised and bequeathed all Mr Virgona's property to his son absolutely, subject only to a 30 day survival condition. The fourth provided a gift over in the event that his son did not survive him for the requisite 30 days. (No executor or trustee was appointed to deal with this contingency.)

[64] In some respects the situation resembles that in *Re McPherson.*[31] There the whole estate was left to the testator's widow who was appointed executrix. The estate consisted of a parcel of land and a small amount of money, insufficient to pay even the funeral expenses. The testator's daughter gave timely notice of intention to apply for provision and commenced proceedings in time. After receiving the notice but before the application was brought, the widow applied for and obtained registration as proprietor of the land on the basis of transmission by death. Connelly J wrote, "The realty having been transferred beneficially to the devisee, there would seem, prima facie, to be considerable force in this submission [that there was no estate upon which any order for family provision could operate]".[32] Technically the realty had not been transferred but had been transmitted to the widow as executrix upon her husband's death, and what was transmitted was not simply a beneficial interest; but it seems to have been assumed without examination by those involved in the case that registration conferred a beneficial interest on her. His Honour recited but did not analyse the facts, nor did he consider the question as one of fact. The whole focus of his reasoning was on questions of law. He considered at some length whether *Re Donkin* was impliedly overruled by the decision of the High Court in *Easterbrook v Young*,[33] as had recently been held by Shepherdson J at first instance.[34] He also considered (without deciding) whether the daughter might have some other type of claim against the executrix.

[65] In the present case neither side suggested that I should apply *Easterbrook v Young*. In that the parties were correct. The facts of the present case are quite different from those in that case; and in any event, it is now well settled in Queensland that "the position in other jurisdictions, such as NSW, and the decision in *Easterbrook v Young* are to be distinguished on the basis of differences in the relevant legislation".[35]

[66] Relying on *Re Lago*,[36] Mrs Holdway submitted that the executor commenced to hold the land in his own right upon the lodgement of the transmission application. I do not find decisions in other cases of assistance in resolving questions of fact, *a fortiori* when they are decisions based on materially different legislation. In that

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31 [1987] 2 Qd R 394.

32 [1987] 2 Qd R 394 at p 396.

33 (1977) 136 CLR 308; [1977] HCA 16.

34 *Re Whitta* [1984] 2 Qd R 356.

35 *Holmes v Webb* [1992] QCA 172; see also *Baker v Williams and Brunner* [2007] QSC 226. I note however that the draft of the Act prepared by the Law Reform Commission contained a provision expressly intended to negative the High Court decision: *The Law Relating to Succession*, Queensland Law Reform Commission Report no 22, February 1978, p 22; and that this provision was dropped from the legislation as enacted.

36 [1984] VR 706.

case there was no doubt that the estate was treated as having been fully administered unless that was precluded by the fact that the transmission application in respect of Torrens system land had at the material time not been registered (although lodged). It was common ground that had registration occurred the estate was to be regarded as having been fully distributed. It was held that the fact of non-registration made no difference. The citation does not advance Mrs Holdway's case.

[67] In the present case, at the time the transmission applications were lodged, the other assets of the estate were insufficient to meet its liabilities. At that time, the executor was planning to sell the house in order to pay off a major part of the estate debts, as well as the $100,000 which he had promised his father to pay to Mrs Holdway, and had told his solicitor of that plan. Even without taking the latter amount into consideration, the assets were still insufficient. That being so it is curious that, shortly after the expiry of his year, the executor applied for registration of the house property under s 112 of the *Land Title Act 1994* (registration as devisee) rather than under s 111 (registration as personal representative). Unusually, the application was, as Mr Bow testified, made after taking counsel's advice:

> "[W]hat led you to lodge that transfer? I presume you had instructions to do so from your client?-- Yes, your Honour. Your Honour, look, in the normal course we - we effect - we attend to those things as quickly as possible. The normal procedure is the deceased died, the death certificate's forwarded to us, we advertise the property, we've got the documents signed to obtain probate, we lodge the documents for probate. That was all done promptly. And normally following that we pay the debts and we collect in the assets and we distribute them as soon as possible. In this case we'd received notice from Arcuri Lawyers that there was going to be a claim and the administration of this estate was delayed for - oh, 15 months or more ending seeing what happened there. So in this case that - dealing with the assets was delayed by - by a longer time than normal. But-----
>
> And what led to the cessation of the delay and the - and the processing of these documents?-- Certain advice I received from my counsel and certain instructions I received from my client and then that - that led to us then progressing the administration of the estate.
>
> Notwithstanding knowledge of the fact that there was - there were letters asserting a claim?-- There'd been a letter about a year previously stating that there would be a claim and maybe, you know, for a few weeks after that. Yes, after receiving certain advice from our counsel, perusing the relevant sections of the Succession Act and obtaining instructions from my client we then proceeded with - with starting to distribute and administer the estate."

[68] I infer that the application was made as part of a deliberate attempt to create the appearance or perhaps even the reality of a distribution; but without the intention to do immediately all those things which necessarily fell to be done if the property were truly to cease to be part of the estate and be held by the executor in his own right. In saying that I imply nothing improper about those who were involved. They were entitled to act as they saw fit to avoid the administration of the estate dragging on. I am satisfied that at all material times the executor intended to and did hold the house property in his capacity as such, and not in his own right. As late

as February 2004 the cost of rates, swimming pool treatment and lawn mowing for the house property were paid by the estate. The transmission application did not affect proprietary rights, and when the land was sold, the proceeds were used to pay the debt to the Bank of Queensland and to pay the amounts which the estate had become liable to pay under the Deed of Compromise.

[69] Mrs Holdway sought to discount the evidence of the debt owing to the Bank of Queensland by reference to s 61 of the Act. That section is concerned with the position as between multiple beneficiaries. It has no relevance to the issue presently under discussion.

[70] I am satisfied that at all material times the house property remained part of the estate and would have been available for the purposes of satisfying any order made under the Act. It is unnecessary to determine the position in relation to the land on which the shops were erected. Mrs Holdway did not need to compromise her claim for the reason she thought. She was the author of her own loss.

The admission by the defendant

[71] In the alternative, Mrs Holdway submitted that it was not open to the defendant to rely upon this point because it had not been raised by the defence, in which distribution of the land had been admitted. The course of the pleadings was that by her statement of claim, Mrs Holdway pleaded, "12. The executor, as he was entitled to do, distributed the estate." The defendant pleaded in response:

> "The defendant does not admit the allegation in paragraph 12 of the statement of claim, and cannot admit same unless and until the plaintiff provides proper particulars of the matters alleged therein, save to the extent that the defendant says that the two principal assets of the estate of the deceased, being the real property described as Lot 1 on Survey Plan 124775 County of Ward Parish of Gilston and the unit described as Lot 1 on BUP 104934 County of Ward Parish of Gilston, were not distributed by the personal representative of the said estate until 25 July 2003 when transfers of each of the said properties from the name of the deceased into the name of Francis John Virgona were registered in the Office of the Registrar of Titles."

[72] In my judgment the last two clauses of that paragraph constitute a clear, although implied, admission that the land was distributed.

[73] No application to withdraw that admission has been made and I very much doubt whether any such application could at this late stage succeed. In my judgment I should decide the case on the basis of the admission. I do not think that any failure by Mrs Holdway to object to evidence relating to the question of distribution can be construed as a tacit acceptance of a withdrawal of the pleading in the defence. I therefore hold that as between the parties, the land was distributed.

Failure to give instructions

[74] The defendant alleged that Mrs Holdway failed to give it proper instructions about her claim when asked for them prior to the (time of) distribution of the land; that in

the absence of further instructions any claim brought prior to that time was bound to fail; and that consequently its conduct was not causative of any loss. In the alternative it relied on Mrs Holdway's failures as contributory negligence and breach of an implied term by her. Essentially, this part of the defence sought to establish that based on what was made available to Mr Pearson, she had little hope of success. It is difficult to see how this pleading could afford a defence. It was not incumbent on Mrs Holdway to put all of the evidence which might be led at trial into her first affidavit. The task at the initial stage was to demonstrate a *prima facie* case.[37] Provided that was done, directions would be given for the further prosecution of the application. There is no reason why she would not have been able to provide as much material at the trial of the application as she provided before me.

[75] The defendant placed considerable emphasis upon Mrs Holdway's alleged failure to provide further information and documents. I have already described the history of these requests.[38] It was desirable, as Mr Whitney testified, for Mrs Holdway to "put her best foot forward" in her first affidavit; but it was not essential. I am satisfied that by early April 2003 at the latest, the defendant was in a position to file an affidavit of sufficient substance to avert the risk of the application being struck out. Mr Eastwood had already drafted such an affidavit, subject to the provision of some further information, and Mrs Holdway had provided a substantial part of that information by early April. That is not to say that there were no deficiencies in her material – far from it. Mr Eastwood had expressed the view that without evidence of her expenditure she would be unable to prove she was a dependant, and her case would ultimately fail. That was not sufficient to justify conduct by the defendant productive of immediate failure. Of course it would have been prudent for Mr Pearson to warn her of the risks of proceeding with the case and to obtain her explicit instructions to do so notwithstanding the state of the evidence. He might even have refrained from serving the application or notice of it if he had explained to her the risks which that course entailed and obtained her informed instructions to take those risks. In the end, however, any deficiencies in the state of the evidence did not cause, contribute to or justify the omission to serve the application or give notice of it.

Mrs Holdway's loss

[76] The foregoing findings demonstrate that as a result of the defendant's negligence Mrs Holdway was deprived of the full value of a chose in action. (It was not suggested that (assuming the land had been distributed) her conduct in compromising her claim was unreasonable.) Specifically, in the present case, she was deprived of the opportunity to realise that value by litigation. Perhaps surprisingly she did not contend that she was deprived of the opportunity to realise that value by negotiation or mediation and no evidence relating to either of these processes was led. Her loss is constituted by the full value of the chose in action as realisable in litigation less the value of what was obtained under the compromise.

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37 Practice Direction 8/2001.

38 Paragraphs [17] - [32].

[77] It is therefore necessary to assess her prospects of success had her application proceeded to trial and an amount or a range of amounts which she might have recovered out of that hypothetical trial. The general approach which should be taken is described in the judgment of the Court of Appeal in *Sweeney v Attwood Marshall.*[39]

[78] In the circumstances of the case, a number of factors would affect her prospects at that hypothetical trial: her credit, her chance of establishing her standing to bring the application and her chance of obtaining a favourable exercise of judicial discretion in relation to the making of an award. In theory her chance of establishing that inadequate provision had been made for her would also affect her prospects, but the defendant conceded that she would have satisfied that element at the hypothetical trial.

Credit

[79] There is no reason to suppose that a judge at trial of the application would have reached any different view as to Mrs Holdway's credit than did I at this hearing. I found her a difficult witness. On numerous occasions she was completely unable to remember matters which one would have expected her to remember. Her answers often seemed like those of a person addressing the issues cold, without having taken any step to prepare herself to give evidence. She seemed to want to avoid making a definite statement, as for example when she initially was unable to recognize Mr Eastwood's list of questions. There is no reason to think that she would not have refreshed her memory; one would expect that she would have wished to be able to assist the court in any way possible. She does still suffer from diabetes and on at least one occasion became distressed in the witness box, necessitating a short adjournment. There was however no medical evidence that her condition was currently such that it could be expected to impede her capacity to give evidence. She demonstrated a capacity to think ahead and often answered questions on the basis of what she thought the question was heading toward rather than what had actually been asked. Her answers were often evasive, occasionally cleverly so. Overall I regarded her as less than completely frank. Given the lack of documentation to support a number of her allegations – documentation which in some cases could have been provided, albeit at some expense – that lack of frankness represented a considerable impediment to her case.

[80] The defendant submitted that Mrs Holdway changed her version of events as she perceived that it suited her to do so. In particular it relied on changes which had been communicated to the defendant during that time it acted for her in relation to the loan of $15,000 referred to above and in relation to whether she had contributed to Mr Virgona's estate. I think there is some force in that submission. Before me there was no attempt to explain those changes.

[81] I also take into account her claim for privilege on the ground of possible self-incrimination in relation to questions concerning her social security benefit. While that suggests a certain level of possible dishonesty, it does not necessarily equate with untruthfulness. It is not a factor of major importance.

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39 [2003] QCA 348.

[82] The significant risk of adverse credit findings at the hypothetical trial adversely affects her prospects at that trial.

Standing – de facto spouse

[83] I am easily satisfied that on the hearing of any application Mrs Holdway would have proved that she was the de facto spouse of Mr Virgona at the time of his death.[40] Mrs Holdway's evidence was corroborated by that of her daughter and son-in-law. In my judgment the defendant's concession that she would probably have succeeded on this point at the trial of the application was correctly made. The risk of an adverse finding is so small that it may be disregarded.

Standing – dependency

[84] It would have been incumbent on Mrs Holdway to demonstrate at the hypothetical trial that she was a dependant of Mr Virgona. That would have required her to demonstrate that she was "being wholly or substantially maintained or supported" by him at the time of his death. The evidence clearly established that Mr Virgona provided the home in which he and Mrs Holdway lived. He also guaranteed a bank loan to the company which she used to operate her real estate business, a business from which she derived some income. They helped each other in the ways in which people who cohabit necessarily do; she instanced his assistance to her in helping to balance her sugar levels and control her diabetes. I also accept her submission that Mr Virgona's request on his deathbed that the executor make provision for her demonstrated an awareness of her dependency, as well as of a moral obligation.

[85] Mrs Holdway claimed that she used the proceeds of the sale of her house to help with the joint expenses incurred by her and Mr Virgona. There is a worrying lack of corroboration of that evidence. I do not think that she would have succeeded at the hypothetical trial in proving that she made such payments.

[86] Nonetheless there is in my judgment little doubt that she would have established a relationship of dependency at the hypothetical trial. Again the risk of an adverse finding may be disregarded.

The putative award

[87] When Mr Virgona died, Mrs Holdway was aged about 57. She first met him in 1990 and they began living together in 1992, albeit with some subsequent periods of separation. There were of course no children of their relationship. She suffered from diabetes and had suffered from depression from time to time. During the period of their cohabitation she sold her home in Melbourne and by the time of his death the proceeds of sale were substantially dissipated, as were the proceeds of an inheritance which she had received from her mother. (Some of that money may have been spent toward daily living expenses and/or during the three ocean cruises which she and Mr Virgona undertook at his expense.) Mr Virgona provided her accommodation and probably maintained her. She had no substantial assets but earned some money from carrying on a real estate business and it is necessary to elaborate a little on that.

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[40] This was necessary under the legislation as it stood at the date of Mr Virgona's death.

[88] In January 2002, Mrs Holdway and Mr Virgona had established a real estate business. It was operated through the company Robina Property World Pty Ltd, in which they each held the same number of shares. Mrs Holdway was licensed to sell real estate (Mr Virgona paid for her licence); Mr Virgona was not. Mr Virgona arranged for an advance to the company of some $95,000. He guaranteed that loan and it has been accepted on both sides the liability under the guarantee was an estate debt. The business was the company's only substantial asset. Mrs Holdway estimated the business was worth $30,000, presumably on an ongoing basis, and that evidence was not challenged. The company's balance sheet was not put into evidence, but it can be inferred that its liabilities substantially exceeded its assets. The indebtedness to the bank had, with interest, climbed above $100,000 and was about $115,000 at the time of its discharge. On a liquidation basis, without Mrs Holdway, the business would have been worth very little to the company. No doubt that was why the estate accepted the liability under the guarantee.

[89] There was no evidence of what the company (ie the business) earned. Mrs Holdway was drawing $450 per week, but whether this was against profit is unclear; she may have been eating into working capital. From time to time she was also earning commission on sales (presumably she was employed by the company), but the evidence about this is scanty.

[90] Following Mr Virgona's death, the executor gave his shares in the company to Mrs Holdway, by the time of the compromise if not earlier. Given that this company indebtedness was paid out by the estate, it must be concluded that the shares were worth approximately $15,000 to Mrs Holdway (half the value of the company's only asset, the business). She (ie the company) sold the business in mid-2004 for $20,000 because, she deposed, of her “age, failing health and missing Frank”. It should in my judgment have been foreseeable to Mr Virgona that her future working life as at the date of his death was short.

[91] The house where Mr Virgona and Mrs Holdway had lived was at 17 Long Island Court, Robina. It was a modern two-storey detached dwelling on 626m² of land and was built in about 2000. It had four bedrooms, two bathrooms, a study, a powder room and the usual other rooms which one would expect, an inground swimming pool and a watering system. It was valued as at 30 October 2002 by Herron Todd White at $490,000. The executor sold it in early 2004 for $665,000.

[92] I am satisfied that at a trial of Mrs Holdway’s application the foregoing facts would have been proved.

[93] The evidence of the value of the estate is surprisingly unsatisfactory. The best evidence seems to be an estimate made by Mr Bow on 30 July 2004. I summarise that evidence:

ASSETS	
Bank of Queensland's savings account	$ 4,638.53
Australian National Credit Union account	$ 26,556.73
17 Long Island Court, Robina	$ 490,000.00
361 Robina Parkway, Robina (shops)	$ 310,000.00
Interest in Robina Property World Pty Ltd	nil
Interest in father's estate	$ 64,014.08
Ford LTD	$ 12,500.00
Toyota Camry	$ 2,000.00
Other	$ 1,400.39
TOTAL	**$ 911,109.73**

LIABILITIES	
ANZ Bank Visa card	$ 8,208.34
Bank of Queensland trading account	$ 95,867.93
Funeral expenses	$ 12,367.45
Primus account – motor vehicle	$ 14,648.28
NAB credit card	$ 13,689.19
Westpac Visa card	$ 5,388.77
American Express	$ 3,375.67
Gold Coast City Council – rates	$ 4,638.91
Margaret Holdway (see attached statement of loan)	$ 8,656.70
Wayne Andrews (Gardening)	$ 1,051.50
Bank of Queensland trading account repayments etc	$ 10,721.34
Bow & Company – re estate	$ 15,986.11
Herron Todd White valuation fees	$ 2,420.00
Dr Tan	$ 1,204.68
Other	$ 3,380.40
TOTAL	**$201,605.27**

In some cases these amounts appear to reflect values as at the date of death (eg the land); while others appear to reflect subsequently accrued liabilities which would have been paid by 30 July 2004. The LTD car was apparently held under some sort of financing arrangement and represented a net liability. The loan owing to Mrs Holdway was $15,000 but the amount actually paid to her on 17 September 2003 was reduced by offsetting charges in respect of the car.

[94] It is necessary to identify an approximate time at which a trial of the application would probably have taken place had it been served or notice of it been given in March or April 2003. It is I think likely to have been a difficult matter to get ready for trial, having regard to the paucity of documentation. One could anticipate that there would have been interlocutory applications regarding disclosure of documents. In my judgment the best that could be expected would have been a trial date in about March 2004.

[95] On the above figures the net value of the estate was approximately $709,500. However it is known that the house property was sold in early 2004 for $665,000, $175,000 more than in those figures. Whatever may have been the position with regard to the other land, it is in my judgment appropriate to bring that land into account at the trial date at that figure. That produces at the hypothetical trial date a net value of approximately $885,000.

[96] Mr Virgona owed a moral duty to Mrs Holdway, but identifying how much he ought to have left to her to fulfil that duty is not easy. I have not been assisted by the fact that neither side placed before me copies of Mrs Holdway's bank statements during the period of cohabitation; and the evidence of her personal wealth during that period is vague. Copies of the statements could have been subpoenaed. I infer that they would not have assisted either side. Mr Virgona's estate was not large and in my judgment he also owed a moral duty to his son and his grandchildren, although they were not of course dependants. Before he died he said that he wanted the rent from the block of shops to be used toward the latter's education, a reasonable attitude. Mrs Holdway had lived with him as his wife for most of his last 10 years. He was aware of her health problems and, no doubt, of the fact that he was supporting her. But she had not contributed to his estate and he was aware of and was concerned about her gambling.

[97] Mrs Holdway admitted that she gambled at a number of venues, particularly on poker machines, and that Mr Virgona did not like the way she gambled. I infer from that evidence and from the amounts of cash withdrawals for gambling that were put to her in cross-examination that she lost substantial amounts on poker machines, both before and after Mr Virgona's death. She denied that she was a heavy gambler, but when asked had she ever been a heavy gambler responded, "Depends on what you mean by heavy, I suppose." Asked what she meant by heavy she said, "Well, I think that if you're a person that was gambling and you lost everything, that would be being a heavy gambler." She claimed that she did not gamble excessively and denied that she had a gambling problem. Asked whether, in the light of what he said to her, she thought that he felt she had a gambling problem, she answered, "Looking back, a person that doesn't gamble at all I think would feel that I had a problem". That was an evasive answer, for she had earlier asserted that Mr Virgona also gambled.

[98] On 31 January 2003 Mrs Holdway had a conversation with Mr Pearson by telephone. It related in part to the loan of $15,000 which she had made to Mr Virgona. She told Mr Pearson that the $15,000 was in safe keeping for her. She said that at times when she was with Mr Virgona she had a gambling problem and that he had put the money away to save it for her. In her evidence at the trial she claimed she could not remember telling Mr Pearson this, but I do not believe her. I accept his evidence, corroborated as it is by his contemporary file note.

[99] Even if Mrs Holdway did have a gambling problem, Mr Virgona was not in my judgment relieved from his obligation to make provision for her. He must have known that it would be necessary to sell some of his land to pay all of the estate debts. From his perspective, if his wish that the income from the shops should be used for the education of his grandchildren were to be fulfilled, it was the house which would have to be sold. It was in any event too large for Mrs Holdway's needs. If it were sold, even at the amount of the Herron Todd White valuation, there would be adequate money available to purchase a home unit for her. Units and townhouses were available in the area, and on the evidence before me $240,000 would have been enough to buy one suitable for her.

[100] Assessing the amount which might have been awarded at the hypothetical trial is neither a simple nor a mechanical exercise. That is particularly so when the claim is one where the amount to be awarded is discretionary. In *Sweeney v Attwood Marshall*, I wrote in reasons with which McPherson JA and White J agreed:

> "In some cases (for example, where the chose in action lies in contract or in debt) the amount which would have been recovered may not be in doubt. In cases where the hypothetical action is for damages for personal injuries, the amount which the plaintiff would have recovered will usually be attended by some uncertainty. However the amount will not be at large. Often it will be possible to identify an amount which on any sensible view is the minimum at which the plaintiff's damages could have been assessed, and another which on any sensible view is the maximum. It can then be stated as a certainty that the assessment would have fallen within the identified range. In theory, the plaintiff would have a set of chances for the various amounts (or perhaps steps) within the range; the sum of the elements of the set would necessarily be 1 (certainty).
>
> [31] In practice it would be ridiculous to expect a judge to conduct a detailed probability analysis in respect of the various amounts at which damages might be assessed. Usually it would also be pointless since in the end those probabilities would have to be weighed and accumulated. Sometimes it may be helpful to identify the maximum and minimum amounts which the plaintiff could have recovered in the hypothetical action, or particular amounts (and their probabilities) dependent upon alternative findings. Often the practical course (particularly in cases where there is no difference between the evidence which would have been available in the hypothetical trial and that available in the professional negligence trial) will simply be to make an assessment. That necessarily involves weighing and balancing all of the contingencies. Given the uncertainties of the data the more mathematical approach would seldom produce a greater level of accuracy or precision. How the judge approaches the task in practice will vary depending upon the facts of the case. No single approach will be correct in every situation. In the end, it will be necessary for a figure to be identified which reflects all of the contingencies, favourable and unfavourable, which would have affected the proof of quantum. Provided the reasoning is transparent, the process will be no more open to challenge on appeal than an assessment of damages in any other case."

In the present case there is no reason to think that the evidence available before me is significantly different from that which would have been available on the hypothetical hearing of the claim. I propose to deal with the question of quantum by making an assessment myself of the amount which would have been assessed in the hypothetical trial.

[101] Mrs Holdway submitted that she would have had a strong claim for having the house transferred to her. The defendant submitted that the limit of any moral claim was a trust to acquire a unit or villa in which Mrs Holdway could live and which might then be used to provide for her in a nursing home if and when that should become necessary, with the property vesting in the residuary beneficiary on her death. It submitted that on the hypothetical application the value of such a trust was the most she would have been awarded. I reject both submissions. In my judgment adequate provision for Mrs Holdway's proper maintenance and support would have been provided first by an amount sufficient to purchase a comfortable town house or

unit in the locale with which she was familiar: $240,000. Next, to provide for maintenance of the unit and for a contribution to her other living expenses, a capital sum would have been provided. It would not have been appropriate to assess that sum on the basis that it be tied by some constraints such as a trust, nor ought it have been subject to a gift over. In all the circumstances $120,000 would have been a reasonable sum. Adding those two amounts I assess the amount of the hypothetical claim at $360,000.

Discounting and deductions

[102] The next step is to discount that figure to reflect Mrs Holdway's prospects of success on issues relating to standing and credit. I have already found that the risk of an adverse finding as to her standing was so small as to make it appropriate to disregard it. I have considered whether some discount should be applied to reflect the risk of an adverse credit finding. However I have made credit findings and applied them in making my assessment (including in finding the facts upon which it is based) and it seems to me that to apply any further discount would involve double counting. I therefore do not propose to discount the amount assessed. The value of the chose in action of which Mrs Holdway was deprived was $360,000.

[103] That however is not the measure of her damages in the present action. Mrs Holdway compromised her claim and received various benefits as a result. The defendant propounded an extensive list of benefits which it submitted should be deducted from the value of the chose in action.

[104] Under the compromise the executor paid or applied to Mrs Holdway’s benefit the sum of $100,000. That amount plainly should be deducted.

[105] The defendant submitted that there should also be a deduction of $30,000, being the value of the business. I reject that submission. What Mrs Holdway received was Mr Virgona's shares in Robina Property World Pty Ltd. That company's liabilities exceeded its assets. The shares would have been worthless but for the fact that pursuant to Mr Virgona's guarantee the estate paid the debt of the company to the Bank of Queensland – about $115,000. Accepting Mrs Holdway's valuation of the business, and assuming that it was the company's sole asset, the shares transferred was worth $15,000 (half the net assets valued on an ongoing basis) and that amount should be deducted. She did not receive $115,000 and no deduction should be made in respect of that amount.

[106] The executor provided the company with rent-free accommodation in the shopping centre for the period from the death of Mr Virgona until the business was sold in 2004. Market value of that accommodation was $40,977. However that benefit was not provided to Mrs Holdway and it is not appropriate to deduct that amount. I reject the defendant's submission to the contrary. If the evidence disclosed what she earned from the company during that period, those earnings or of least some of them might be deductible, but there are too many contingencies and uncertainties in the evidence for such an exercise to be attempted as things stand.

[107] Mrs Holdway was paid $10,000 pursuant to cl 2(iii) of the Deed of Compromise and that amount should be deducted.

[108] The defendant submitted that the value of Mrs Holdway's accommodation at the house from the date of Mr Virgona's death until she vacated the property pursuant to the Deed of Compromise should also be deducted. I have already found that Mrs Holdway had a moral claim to accommodation. In the absence of any other provision it was reasonable for her to continue to live in the house and no doubt there were some benefits to the estate in her so doing. No deduction should be made for that accommodation.

[109] Finally the defendant submitted that a deduction should be made for the LTD car. Mrs Holdway did not receive a clear title to that car. Rather, she had the use of it for a period and was unable to keep up the payments. The value of $12,500 in the accounts is more than offset by the corresponding liability of $14,648. The value of her use is not able to be determined from the evidence and is unlikely to have been a large amount in any event. I do not propose to make any deduction in respect of it. On the other hand she did receive a clear title to the Toyota Camry which was worth $2,000. That amount should be deducted.

[110] The defendant did not submit that any deduction should be made for the value of furniture received by Mrs Holdway from the estate.

[111] The total amount to be deducted is therefore $127,000.

Conclusion

[112] As a result of the defendant's negligence and breach of contract Mrs Holdway was deprived of a chose in action worth $360,000. By way of compromise she received $127,000. Her loss was therefore $233,000.

Order

[113] There should be judgment for the plaintiff in the sum of $233,000. I will hear the parties on interest and costs.