SUPREME COURT OF QUEENSLAND

CITATION:	*Helg v Sergiacomi & another* [2011] QSC 322
PARTIES:	**ROSINA MARIA HELG** Applicant **And** **ROBERT SALVATORE SERGIACOMI** First Respondent **PETER GERARD SERGIACOMI** Second Respondent
FILE NO/S:	S491/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	2 November 2011
DELIVERED AT:	Rockhampton
HEARING DATE:	24 October 2011
JUDGE:	McMeekin J

ORDERS:

1. Direct that the respondents file and serve such further affidavit as they might be advised concerning:
   (a) the withdrawals between 11 August 2006 and 18 August 2006 from the account numbered 3876-27157 held at the ANZ bank in the deceased's name;
   (b) the matters raised in paragraphs 59 and 61 of the applicant's affidavit filed 11 October 2011.
2. Direct that such further affidavit be filed and served on or before 4pm on the 7th of November 2011.
3. The further hearing of this application stands adjourned to 21 November 2011.
4. Costs Reserved

CATCHWORDS SUCCESSION – EXECUTORS AND ADMINISTRATORS – Proceedings against executors and administrators – where

applicant seeks filing and passing of accounts – where complaints made pertaining to the administration of the estate and the performance of duties as executors – whether evidence sufficient to merit intervention

COUNSEL: Applicant in person

A. Arnold for the respondents

SOLICITORS: Applicant in person

Finemore Walters & Story for the respondents

[2] **MCMEEKIN J:** The Applicant, Rosina Maria Helg, is a beneficiary under the terms of the Will of her late father, Ernesto Sergiacomi (the deceased). The respondents, Robert Salvatore Sergiacomi and Peter Gerard Sergiacomi, are her brothers and were appointed by their father as the Executors of his Will.

[3] The deceased died on 11 August 2006. Administration of his estate was completed in 2010 and on 19 November 2010 the respondents instructed their solicitors to forward to the Applicant their final statement of accounts for the administration of the estate, which they did.

[4] By his Will the deceased left a one-quarter share of his estate to each of his four children, with one of those quarters being placed into a testamentary trust for the sibling not involved in the application, Anthony. The respondents' final statement of accounts shows that the significant assets of the estate consisted of a shareholding in a private company Multifield Pty Ltd, a house property in Bundaberg and a one-half interest in a shopping centre at Torquay Heights. There were various cash assets and other personalty.

[5] The applicant is concerned that the respondents have not administered the estate according to law and in the interest of the beneficiaries. By her application she seeks various orders. The applicant is self represented. It was no easy task to understand her complaints. According to her Originating Application she seeks the following:

a) An order requiring the examination and passing of the Executors accounts of the estate pursuant to Rule 644, *Uniform Civil Procedure Rules* 1999 ("UCPR");

b) An order calling on the Executors to show cause why they should not comply with a request to apply for and take all necessary steps to register the transmission of any real or leasehold estate or to pay or hand over any legacy or residuary request to the person entitled to it, pursuant to Rule 643 UCPR;

c) To review the acts and decisions of the executors pursuant to Section 8, *Trust Act* 1973, with reference to the testamentary trust established under the Will.

[6] The respondents contend:

a) That an order pursuant to r 644 UCPR is not for the asking, that the Applicant has failed to demonstrate that there are any discrepancies in their handling of the estate nor any irregularity to raise the concerns of the Court;

b) The executors have not neglected or refused to register the transmission of any real or leasehold property or to pay or hand over any legacy or residuary bequest to the Applicant or, for that matter, any other person, to justify an order being made pursuant to r 643 UCPR;

c) The application under Section 8 of the *Trust Act*, according to the terms of the application, relates to the testamentary trust created under the Will which concerns only one beneficiary, a brother Anthony, hence the applicant has no interest in the matter and arguably no standing to seek any order – Anthony being under no legal disability. Further, no act or decision of the Respondents is identified as one requiring review.

[7] I turn to the orders sought and Ms Helg's concerns.

Filing and Passing of Accounts – r 644

[8] The right to require a formal examination and passing of accounts by executors is not absolute. It arises only when a Court requires it. Section 52 of the *Succession Act* 1981 provides:

> "52 The duties of personal representatives
>
> (1) The personal representative of a deceased person shall be under a duty to—
>
> (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
>
> (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court…"

[9] Rule 644 UCPR provides:

> **"Filing and passing account on application of beneficiary**
> (1) A beneficiary may apply to the court for an order requiring the examination and passing of the executor's or administrator's accounts of the estate.
> (2) The applicant must file an affidavit stating the reasons for the application.
> (3) The court may make the orders it considers appropriate.
> (4) In this rule—
> ***beneficiary***, in an estate, includes—
> (a) a person with a beneficial interest in the estate; and
> (b) a person with a right to compel the executor or administrator of the estate to complete the administration."

[10] Both the legislative provision and the rule make it plain that the respondents' submission that an order for the examination and passing of executor's accounts is not for the asking is correct: see *Re Schilling* [1995] 1 Qd R 696. The terms of the rule indicate that a reason must be stated and that reason when identified must, at

least, lead the Court to the view that the making of an order is "appropriate". Evidence suggesting grounds for concern about the conduct of the executors and indicative that the applicant's rights may have been adversely affected, albeit not conclusively shown, would be sufficient. As will be seen, subject to two matters, I cannot see any ground for concern.

[11] Further, as will be seen, the beneficiaries entered into an agreement in February 2007 affecting their interests under the Will. It is clear that any order for accounts would not be able to relate to any property which had been resettled (*In the will of Lockett* (1920) SR (NSW) 213; (1920) 37 WN (NSW)).

[12] In her application the Applicant asserts:

> "I allege that the administrators have withheld my rightful entitlements and have not administered the estate according to the law.
>
> I have uncovered a number of undisputed facts in regards to assets owned by my late father that were never disclosed to me and I asked the court for full accounting on my late fathers estate while they [i.e. the Respondents] have been in control of his estate. I also believe there are discrepancies in monies in all accounts belonging to my late father."

[13] In the course of her oral submissions I attempted to have the applicant identify the discrepancies on which she relied to justify an order under r 644. Many allegations were made but I could not see that they were always relevant and, if relevant, supported by any evidence.

The Terms of the Will

[14] The applicant asserted that the first matter that attracted the jurisdiction of the court could be found in the terms of the Will itself. She submitted that clause 8(p)(iv) revealed the initial discrepancy. Clause 8 of the Will is a definition provision. It sets out the meanings that are to apply to the terms used in respect of a testamentary trust established by the Will and a schedule to the Will. Clause 8(p) defines the terms "Trust Fund". Subparagraph (iv) includes in the meaning of "Trust Fund" "the money, investments and property of every description from time to time representing the property referred to in clauses 8(n)(i) to 8(n)(iii)". The applicant's point is that if one then goes to clause 8(n) there is no subparagraph (i) or (ii) or (iii). In fact clause 8(n) provides the definition of the word "Trust" and would appear to have nothing to do with the concept of property or the word "Property" which is defined in clause 8(i).

[15] It seems evident that there has been a mistake in the drafting of the Will. No explanation of that error has been proffered but then it is unlikely that the respondents are in a position to offer any explanation and the matter was only raised in the course of oral submissions. However, none of this is relevant. The point that the applicant apparently wanted to make was that she considered it unlikely, if not highly improbable, that her late father would have executed a Will which contained such an error. Effectively she wishes to argue that the document that has been admitted to probate was not the true last Will and Testament of her father. This has nothing to do with the application that she has brought. It is certainly not a

discrepancy that in any sense reflects upon the conduct of the executors in carrying out their duties of administering this estate.

[16] There is the same difficulty with the first point that Ms Helg makes in her affidavit. I should observe that the affidavit filed is as much a submission as a recounting of relevant facts. Appropriately, given Ms Helg's lack of legal training or knowledge, no objection was taken.

[17] The first point made in the affidavit is a complaint more about the terms of the Will rather than with the conduct of the executors, who, of course, are obliged to carry out the testator's instructions and directions set out in the Will. Thus in paragraph 1 of her affidavit Ms Helg asserts: "I consider this Will requires a review in relation to the trust how at Page 20 number 29: purpose of testamentary trust" and then at paragraph 3 "I pose the question as to why no schedule is identified for the beneficiaries in my late father Will dated 6th February 2006. It states at number 6(b) the Terms of Existing Trust are substantially identical to the terms of the testamentary Trust (in the opinion of the Trustee)".

[18] The Court is not concerned with why it is that the testator has made the dispositions that he has chosen to in his Will. What I think Ms Helg is attempting to assert is that the terms of the Will suggest that her father believed that there were two trusts in existence – "the existing trust" and "the testamentary trust" – yet no schedule is attached to the Will applicable to "the existing trust". Even if the applicant's contentions were right this application is not the vehicle by which errors on the face of the Will are to be corrected.

[19] However, if I have understood the applicant's point accurately, it is misconceived. Clause 6 of the Will when considered in its entirety does not presuppose that there are two trusts necessarily in existence. Rather it allows for the possibility that there may be an "existing trust" in existence at the time of death and if there is then the trustees [i.e. the respondents] are given the power and discretion to "pay, transfer or otherwise apply to the existing trust any gift that would otherwise pass under this Will to the testamentary trust". The applicant does not assert that there was in fact in existence at the date of the deceased death an "existing trust" as defined in clause 6 of the Will, nor has she endeavoured to demonstrate that the executors were under any obligation to "pay, transfer or otherwise apply" any gift that would otherwise pass to the testamentary trust to that existing trust.

[20] So far as is presently relevant the implication of her submissions seem to be that she believed that respondents, during the course of the deceased's lifetime, exercised power and influence over him and over his financial decisions and affairs. The implication of the submissions made, and of various paragraphs of her affidavit, seems to be that the applicant believes that her brothers have used their influence in such a way that the property held by the deceased at his death was minimised and the terms of the Will influenced by the respondents.

[21] Again, if I have understood the applicant's point accurately, this application is not the vehicle by which such matters can or ought to be investigated.

[22] I should say that I could not detect any evidence at all to support those allegations. The only "evidence" that the applicant pointed to was that her brothers had not informed her, during their fathers' lifetime or indeed after he died and until

relatively recent times, that, 15 months before his death, the deceased had executed an enduring power of attorney appointing the respondents as his attorneys. The respondents were under no obligation to tell Ms Helg of their appointment. In any case the respondents have sworn that their father remained competent until about a week before his death and they at no time exercised any power of attorney on his behalf. There is no evidence that they did.

Multifield Pty Ltd

[23] One area of significant concern to Ms Helg is the state of the shareholding in a company, Multifield Pty Ltd. According to the respondents, and all the records disclosed, there were only ever four shares issued in the company and at the time of his death the deceased held only 1/3rd of one share in his own name.

[24] At paragraph 7 of her affidavit the applicant explains that she appreciated that it was necessary "to understand the true breakdown of my late father's estate as it was complex and I did not fully comprehend all components of his estate, in particular how the company of Multifield Pty Ltd and my father were linked as it was my belief that my father would have held in his own right controlling interest".

[25] In order to better understand the arrangements she consulted with Mr Hurwood, senior partner of Finemore Walters & Story. Mr Hurwood, she explains, was the attorney of her late father's estate at the time that he died. Mr Hurwood responded by letter to her request on 24 October 2006. He had carried out a search of the records of the Australian Securities and Investments Commission (ASIC), attached a copy of that search, and explained to Ms Helg, in clear and direct terms, what the search meant. Mr Hurwood went further and examined the company records that had been provided to him by the company accountant. These records explained that a share in the company Multifield Pty Ltd that had been originally held by the deceased had been transferred by him into a family trust on 18 October 1992. Mr Hurwood enclosed copies of the relevant documents, which included a standard transfer form, a transfer journal and a register of members. He explained that the transfer meant that that share did not form part of the deceased's estate but continued to be owned by the family trust.

[26] The ASIC search also indicated that one of the four shares in the company was held jointly by Denblade Pty Ltd, the deceased and one of the respondents, Peter Gerard Sergiacomi. Mr Hurwood explained that he had examined the company records in relation to that share and, as well, records held by Finemore Walters & Story. He indicated that there was a question as to whether, upon the deceased's death, his interest in the share passed to the other joint shareholder by survivorship, or whether it formed part of the assets of the estate. He advised the applicant that after considering various matters including legislative provisions and common law principles, he considered that the deceased's interest in that share formed part of the assets of the estate. That decision of course favoured the applicant by increasing the estate.

[27] There were various other matters discussed in the letter (which is Ex C to Ms Helg's' affidavit) which suggest a careful consideration of all relevant matters.

[28] At paragraph 9 of her affidavit, the applicant asserts that she "felt Mr Hurwood's explanation did not seem plausible". At paragraph 10 she asserts that she "believes

something had been withheld from me, in particular my father's true breakdown of assets he owned and the content of his estate, which I believe was far greater than Mr Hurwood's explanation". No evidence at all is proffered as to why the applicant should think the explanation not plausible, nor any evidence offered as to what other assets the deceased may have had and that ought to have formed part of his estate.

[29] Ms Helg's repeated statements that she does not believe matters to be true does not advance her case at all in the absence of evidence to support her beliefs.

[30] Thus, the evidence indicates that the respondents have consulted solicitors and accountants familiar with the company records and taken advice as to the shareholdings in Multifield Pty Ltd. That advice has been given by persons who not only apparently had a longstanding connection with the deceased and the company but whom the respondents had no reason to doubt were persons of integrity and competent in their respective professions. No evidence is advanced to show that the respondents' confidence in their advisors was misplaced. The respondents have complied with that advice in making appropriate distributions under the Will and as they are instructed to do by the Will.

[31] Further, the respondents advise that although their legal advice was that the share that had been transferred by the deceased into his family trust (known as the Ernie Sergiacomi Family Trust) did not form part of the estate, they considered that they were under a moral obligation to their siblings i.e. the applicant and their brother Anthony, to provide them with a benefit from that share.

[32] At a family meeting held in Bundaberg in February 2007, at which the four siblings attended, the respondents put forward certain proposals as to how the estate's interest in Multifield Pty Ltd should be distributed. One such proposal, the one that was formally agreed to by all parties, involved a payment by the respondents to the applicant and to their brother Anthony (to the AG Sergiacomi Testamentary Trust which was established under the will) an amount of $250,000 each. By the terms of the agreement the applicant acknowledged that she would make "no further claim in any form whatsoever against [the respondents] for any further rights to any shareholding" in Multifield Pty Ltd.

[33] The respondents assert, and it is certainly not shown to the contrary, that the figure was arrived at by including, as an asset of the estate, the share that the deceased had transferred away to his family trust.

[34] The end result is that despite the records of the company showing that the deceased held only a one twelfth interest in the company the respondents have treated his holdings as if they were a one-third interest. No evidence is advanced by the applicant that any record was wrong, that any advice was wrong or that she was not aware of the claimed shareholding when she entered into the family arrangement in February 2007. Indeed it is expressly recorded in the agreement.

[35] In any case the resettlement of property rights under that agreement cannot now be the subject of a taking of accounts. It is fundamental that a right to such an accounting depends on "the assumption that the party calling for it is entitled to the sum found due": *Doss v Doss* (1843) 3 Moo Ind App175 at 196-197; 18 ER 464 at 472 per Dr Lushington. The estate's interests in Multifield Pty Ltd has now ceased

as has Ms Helg's rights as a beneficiary to her share of that portion of the assets of the estate.

Email Exchanges with BTA Tax and Accounting

[36] The applicant asks that inferences be drawn from certain email correspondence that passed between her brother, Robert, in his capacity as executor and an accountant, Marie Gallagher of BTA Tax and Accounting[1], the deceased's personal accountant. In one such email Robert Sergiacomi enquires: "we are still trying to sort out what entity dad had his share in Multifield in. It appears at this stage that it was in his family trust's names. Can you check your files to see if you have old share transfer records showing what names/entity the shares are in?"

[37] The applicant contends that "this evidence discrepancies as Robert claims out of four shares, the one jointly held share, being a third, was thought to be the only component that constituted his estate interest along with one share held in his Ernie Sergiacomi Family Trust. I find this extremely hard to believe as my father started Multifield and owned the land long before Robert and Peter Sergiacomi became involved."

[38] Ms Helg says that she is suspicious because she asserts "why would he [i.e. Robert] be asking the question when he would have known full well what entity my father held his shares in?"

[39] It can be seen that, in Ms Helg's mind, an innocent and, I might say, most proper inquiry by her brother of the person whom one would expect would have good knowledge of the shareholdings of the company, confirming his then belief, which it turns out was accurate, becomes a matter of suspicion.

[40] Ms Helg also draws attention to the response of Ms Gallagher to her brother's inquiries. Ms Gallagher said at one point: "in regards to the Multifield shares, we need a bit more clarity as to how they are bequested as per the will in order to give further advice". Ms Helg asserts in her affidavit (paragraph 17): "I too believe my father would have bequested his shares in his will."

[41] If I am following Ms Helg accurately, and I am not sure that I am, I think that she converts the accountants' inquiry as to the terms of the will into a statement that supports her belief that her father owned a greater number of shares in the Multifield company than the records disclose. Of course the comment that I have quoted has no such effect.

[42] In the same email the accountant advised that: "once the estate is settled a P'Ship ABN TFN will then need to be set up in the name of the testimony [sic] trust and Mrs Sergiacomi". The applicant queries why that would be necessary. The accountant was offering what I imagine to be standard advice in relation to the continuing conduct of a partnership business that had been previously conducted by the deceased and his wife Mrs Sergiacomi in relation to the Torquay Heights shopping centre. Why Ms Helg sees that this is any way suspicious or would merit any further enquiry is not clear.

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1 This entity is variously referred to as BTA or BTA Tax and Accounting or Bundaberg Tax and Accounting

[43] Ms Helg seeks to make a further point from the email exchange. On 28 April 2011 in response to a Notice of Non Party Disclosure served on Bundaberg Tax and Accounting, the deceased's personal accountant, Mr Andrew Vautin, who the applicant asserts was both the principal of that firm and the accountant having conduct of her father's affairs, stated in an email that his firm was not the accountants or tax agents for Multifield Pty Ltd, nor the Ernie Sergiacomi Family Trust and asserted that his firm only held records of the family partnership between the deceased and his wife and, after their respective deaths, their estates.

[44] At paragraph 20 of her affidavit Ms Helg concludes:

> "This evidences discrepancies in regards to Marie Gallagher's discussion with Robert Sergiacomi regarding setting up a partnership ABN and TFN between Mrs Sergiacomi and the testamentary trust. This evidences that the EPO's [presumably a reference to Enduring Power of Attorney] misappropriated that trust from my mother while she was alive."

[45] As I have mentioned, Ms Gallagher was an accountant with Bundaberg Tax and Accounting. To put her discussion with Robert Sergiacomi in context it needs to be appreciated that she was concerned with the continued carrying on of the business of the Torquay Heights shopping centre that had been conducted in a partnership between the deceased and his wife. It is plain that Ms Gallagher's understanding of the terms of the Will was such that initially the partnership would be continued to be conducted between the deceased's widow and the deceased's estate. That was to be an interim measure to apply until the estate was, as she put it, "settled". She then believed (inaccurately, but that is not presently relevant) that the testamentary trust established under the terms of the deceased's Will would hold the one half share previously held by the deceased and hence a new partnership would form and a new business number and tax file number would need to be obtained. She at no time claimed to hold records relating to the Multifield Pty Ltd nor did she claim to hold records relating to the Ernie Sergiacomi Family Trust. There is no discrepancy between one email and the other. This in no way "evidences that the EPO's misappropriated the trust" from Mrs Sergiacomi whilst she was alive. In fact, quite to the contrary.

[46] The next point made by Ms Helg in her affidavit is that through the non party disclosure process she was informed by Mr Bradley Walker, the accountant for Multifield Pty Ltd, that he held no records for the Ernie Sergiacomi Family Trust. Ms Helg goes on:

> "These were the only two CPA accountants my father dealt with and yet both these accountants claim that they knew nothing about his family testamentary trust".

[47] Quite where this leads completely escapes me. The testamentary trust was established under the will. There was no reason for that trust to have an accountant prior to the deceased's death. That testamentary trust is of course separate and distinct to the Ernie Sergiacomi Family Trust. I was informed by Mr Arnold of counsel, who appeared for the respondents, that his instructions were that Multifield Pty Ltd had never declared a dividend and hence there had never been a reason for the Ernie Sergiacomi Family Trust, which held one share of that company, to file a

tax return, hence there may never have been a reason for the deceased to retain an accountant to prepare any records for the trust.

[48] There is the further point that the fact that the accountants held no records in relation to the Ernie Sergiacomi Family Trust does not necessarily mean that they were not aware of its existence, if that is what Ms Helg intends to assert.

[49] It may be that Ms Helg wishes to say that no such family trust existed at any time. Three things might be said about that. First, it is plain that the deceased believed that such a trust existed as he transferred a share to it nearly 18 years before his death. Secondly, whilst the Deed establishing the Ernie Sergiacomi Family Trust is not before me, the Deed is expressly referred to in correspondence from Finemore Walters & Story to McCowans Estate Lawyers, who were then acting on behalf of the applicant, and a copy of the Deed was said to be enclosed with the correspondence according to the exhibit that the applicant has provided (see Ex O(iv)). Mr Dalziel of McCowans Estate Lawyers then gave the applicant advice on the assumption that the Deed existed. All this strongly suggests that the Deed exists.

[50] Finally, the only significance of that trust would appear to be that it did own one share in Multifield Pty Ltd and, as I've explained, the respondents assert that they have treated that share as in fact an asset of the deceased's estate. This was to the advantage, not disadvantage, of the applicant.

[51] It is far from clear, if it be the case, that the deceased's apparent failure to have any accountant prepare records for the Ernie Sergiacomi Family Trust in any way impacts upon any relevant issue. I note that the respondents appear to have conducted themselves appropriately in carrying out their duties as executors in their treatment of the Family Trust. Mr Walker's email to which Ms Helg refers discloses that he has lodged a return for that family trust in 2008 when the respondents had taken over the role of trustees (see Ex F(ii) to Ms Helg's affidavit).

The February Agreement

[52] Ms Helg's next complaint (see paragraphs 22 to 33) concern the dealings that took place between the family members that resulted in the execution, by all members, of a formal agreement dated 25 February 2007. Ms Helg makes, I think, four points. Firstly, tax returns provided to her prior to her signing the agreement were inaccurate. Secondly, at the time she signed the agreement she did so ignorant of the true situation, and at a time when she was under duress by reason of being "bullied". Thirdly, she was misled by the accountant, Mr Bradley Walker, whom she trusted. And fourthly, she was provided with two valuations "that were performed 8 August 2006 by John Logan, 3 days prior to my late fathers passing… all containing discrepancies". Ms Helg asserts at paragraph 32: "it is my belief this plan was orchestrated well before my father was deceased and involves many people to deceive me out of my rightful inheritance".

[53] The propriety of the respondents' actions surrounding the negotiations and entry into of the formal agreement by the beneficiaries of the estate seem to me to be a matter entirely divorced from the respondents' execution of their duties as executors. The principal response that can be made to Ms Helg's complaint is that if she wishes to have that agreement set aside then she will need to do so by way of separate proceedings.

[54] However, lest Ms Helg be under the impression that I am in any sense encouraging her to take that course, I make these points.

[55] First, Ms Helg completely misunderstands the effect of the valuations prepared by Mr Logan. I endeavoured to explain this to her in the course of her submissions. I suspect that I was not successful.

[56] In the executive summary to the valuation of Lot 102 on survey plan 164546, County of Cook, Parish of Kalkie, being land at Telegraph Road, Kalkie Mr Logan explains that they had been prepared for the "Estate of Sergiacomi", that the purpose of the assessment was "for estate management purposes, taxation and asset distribution", that the date of his inspections was "November 2006" and the date of valuation "8 August 2006". The Executive summary is identical for the second valuation relating to land located at Enterprise Street, Bundaberg, save that that valuation is said to have been prepared for Multifield Pty Ltd "being part of the Sergiacomi estate" and the purpose of the assessment there being "to determine market value for estate management purposes". The dates of valuations and inspection are the same. I note that in her email of 4 October 2006 Ms Gallagher had advised that a valuation would be needed "as at date of death" if the shopping centre had been acquired post 20 September 1985 (Ex E(i) at p2).

[57] Ms Helg seems to have assumed that because the date of the valuation was 8 August 2006 that meant that Mr Logan inspected the properties and had his instructions prior to the date of her fathers' death. This completely misconstrues the effect of the valuation. Plainly Mr Logan's intent was to identify the value of the lands as at the date of death. The executive summary assumes the date of death to be 8 August not 11 August. I doubt that Mr Logan was under any misunderstanding as I note in perusing the valuations that in fact Mr Logan has the "pertinent date" as being the 11th of August 2006 (for example see p15 of Ex J(i)). Thus it would seem that the executive summaries in each case contain a typographical error. Plainly enough Mr Logan received his instructions some time after the death of the deceased, carried out his inspection in November and produced his valuations and, in the usual way, related the valuation back to the pertinent date, here the date of death. From the error in the executive summary Ms Helg is seemingly determined on her belief that there was an orchestrated plan in place to deceive her. This belief is unsupported by the material on which she relies.

[58] Secondly, as to the tax returns. The complaint that Ms Helg makes about the tax returns is accurate in the sense that the interim return that was available at the time of the meeting was different to the final return that was eventually prepared by Mr Walker. Ms Helg complains that she was not told that the return provided to her prior to the meeting was an interim one. I certainly cannot see anything on the document (presuming it to be Ex H(i) to her affidavit as I was informed) that would have alerted her to its provisional nature. However the relevant point is whether she was misled to her disadvantage by the interim return. It is plain that she was not. The interim financial documents overstate not understate the assets of the company. This was to her advantage in the sense that all parties assumed that the deceased's interest in the estate represented by the shareholdings was greater in value than the accountants eventually determined.

[59] Mr Walker in his covering letter of 24 May 2011 (which forms part of Ex H(ii)) explains that the stock on hand figures that he had previously assumed for the

purposes of the interim return were incorrect and overstated by some $213,000 and hence the net income after tax was overstated by about $150,000. These matters were corrected in the final financial records that he prepared.

[60] Ms Helg made the further complaint that when one studied the statement of financial position of the company, the information conveyed in the final financials suggests greater activity as evidenced by references to the various stages of development of the land owned by the company. She referred me to the current assets of the company and the heading "Inventories" where reference is made to stages 1 to 10 of a development and Lots numbering 1 to 51, 52 to 54 and 95 to 113 together with various other separately identified lots (see Page 16 of Ex H(ii)). Effectively she claims that the extent of the activity of the company was concealed from her because this information was not contained in the statement of financial position with which she was provided. While it is true that the detail of the various stages was not broken down in the document with which she was first provided (see p13 of Ex H(i)) she could have hardly have been in any doubt that the company was involved actively in land development and, if anything, the activity overstated. I say that because in the interim financial document under "construction work" an asset of $323,546.81 was identified, whereas in the final document that figure under the same heading is reduced to $197,472.51.

[61] If it was relevant to Ms Helg to know the extent of the development work then I assume that she would have made some further enquiry because the financial papers give no great idea of it. That Ms Helg knew the land was intended for development is clear given her statement that she was aware that her father had purchased the land originally to develop.

[62] If it be relevant, and I think it is not, there is nothing in the material to suggest that either of the respondents acted otherwise than in good faith and on the assumption that the tax returns and financials that they provided, and which had been prepared by an apparently respected accountant with whom the family had had a long association, were anything but accurate.

[63] Ms Helg's complaint about any communication that she might have had with Mr Walker cannot reflect on the respondents. There is no suggestion that they have instructed him to act in any particular way and indeed there is no evidence that anything that Mr Walker has said misled the applicant to her disadvantage.

[64] Ms Helg complains about the terms of the agreement. She asserts:

> "The offer and agreement signed by all four parties is ambiguous and cannot be substantiated. At the time of this agreement I was under duress and virtually told that if I did not sign I would be drip fed as they made me believe that I had no rights as I was not an executor of the company, however the executors neglected to tell me that dates estate included a larger portion than what was disclosed to me."

[65] As I have said, this application for the filing and passing of accounts is an inappropriate vehicle for Ms Helg to complain about an agreement that she has entered in to.

[66] The complaint that "the executors neglected to tell me that dad's estate included a larger portion that what was disclosed to me" is unsupported by any evidence.

[67] The respondents reject the applicants' assertions that they pressured her into signing the agreement or threatened that she would be "drip fed", as she claims, if she did not sign the agreement. They deny the applicant's claims that they have in any way deceived her or that they have transferred properties belonging to the deceased to themselves. They deny that they have misappropriated any assets of the deceased or of his estate. Apart from the applicant's bald assertion there is no evidence of any such conduct. Indeed the applicant advances no evidence whatsoever that her late father was anything but competent and in charge of his own affairs until the last week of his life, as the respondents assert. Even if there was such evidence it would not be relevant to the question of whether the executors have properly discharged their duties.

[68] To summarise, so far as the evidence shows, the executors have obtained all relevant records, instructed an independent valuer (and in this regard Ms Helg was doubtful of Mr Logan's independence but the respondents point out that their brother Anthony, who appears to have been treated in the same way as Ms Helg in terms of the payment under the agreement, is himself a registered valuer with considerable experience in valuing residential, commercial and development properties (see paragraph 23 of the respondents' affidavit) and he makes no complaint) have obtained from an experienced accountant with long familiarity with the affairs of the company the financial documents upon which they and the other parties to the agreement relied, and have followed the advice received. They appear to have acted properly in every way. As it transpires, those financial documents overstated the assets of the company. That was not to Ms Helg's disadvantage.

Certificates of Title

[69] Ms Helg's affidavit then asserts that following the execution of the agreement between herself and her brothers, she has "collated documents and examined how my brothers have deceived me". She then explains that she has performed title searches on Multifield Pty Ltd and states that she has "observed several transfers of titles in what I believe to have belonged to my late father and constituted a large part of his estate" (paragraph 35). She then exhibits to her affidavit a number of searches. The searches themselves, and I have looked through them, do not suggest any wrong doing by the respondents, and nor do they indicate that assets not included in the estate ought to have been included.

[70] Ms Helg's belief that the property the subject of the titles ought to have formed part of the deceased's estate is apparently derived from her beliefs about a code that appears on the searches. Ms Helg asserts at paragraph 36 of her affidavit:

> "I consider my brothers simply transferred properties belonging to my late father which contain his code over to themselves and simply misappropriated that their positions as EPO's and administrators of his estate. The administrators provided me with a small percentage of what my true entitlements were out of my fathers' estate."

[71] There is in fact no evidence before me that there was a "code" applicable to the deceased. In the course of her submissions Ms Helg asserted that the letters and

numbers "ENE250" were her late father's code, but that statement from the Bar table was not evidence. Nor does it take the matter very far. Many of the dealings evidenced by the searches took place whilst the deceased was alive. Ms Helg's complaint that the respondents misused the enduring powers of attorney granted to them to transfer the property of the deceased away from his ownership in the course of his lifetime is a matter that is not appropriate to explore on this application. This application concerns the respondents' performance of their duty as executors of the estate. Again, in case the applicant interprets my remarks as offering any encouragement to her, I hasten to point out that there is nothing to suggest that the respondents were connected with the transfers that occurred in the deceased's lifetime. If the executors have transferred properties after death then that evidences no necessary wrongdoing - they are obliged to reduce the estate into possession.

Allegations of Misconduct by Professionals

[72] At paragraph 38 of her affidavit Ms Helg asserts "my brother, Mr Story and previous solicitors including Mr Kent Dalziel have continued to rehash the same old story pertaining to Multifield and a breakdown of Multifield when in fact they have avoided the very facts and have only provided to me a portion of what my father owned in his own right."

[73] Mr Story is the solicitor at Finemore Walters and Story having conduct of the matter on behalf of the estate. Mr Kent Dalziel is a solicitor with McCowans Estate Lawyers and who acted on behalf of the applicant at one time.

[74] Ms Helg's complaint is not only that the respondents have misled her but that the solicitors who have acted both for the respondents and for her have deliberately engaged in this conduct. Ms Helg advances no evidence whatsoever to support her very serious allegations. Nor does she identify the facts which she says they all have "avoided" unless the matter I am about to turn to is such a "fact".

[75] Ms Helg asserts that she obtained certain documents from the deceased's home which she claims "clearly shows the company structure as being two thirds Multifield Pty Ltd – one third Ernesto Sergiacomi". The documents relate, the applicant says, to "property development winding up in Ipswich round 2002 in which Multifield Pty Ltd and the deceased were involved". She says too that the documents show that the distribution to Multifield Pty Ltd of two thirds of the funds available was in the form of a trust distribution. This she says is contrary to the assertion made by the respondents that the deceased's estate consisted of only one third of one jointly held share in Multifield Pty Ltd.

[76] To the extent that the documents can be understood, they seem to me to not bear at all upon the share structure of Multifield Pty Ltd or the assets that made up the deceased's estate. The documents relate to the sale of certain real estate, identified as Lot 101, Flinders View, Ipswich, years before the deceased's death, which property was held in some form of common ownership by Multifield Pty Ltd and the deceased. The property was sold for the sum of $30,000. Multifield Pty Ltd had a two thirds interest and the deceased a one third interest in the property. Two thirds of the net proceeds of sale were distributed to Multifield Pty Ltd. It appears that at the time there was a unit trust in place which Mr Walker says was the Flinders View Unit Trust and the distribution to Multifield Pty Ltd of its share of the settlement proceeds was treated by the accountants "as income in the form of a trust

distribution" (see p5 of Ex L). Mr Walker advises in his letter to Bundaberg Tax and Accounting of 23 July 2002 that Flinders View Unit Trust was in the business of property development and it was wound up during the year ending 30 June 2000. Why the existence of a unit trust wound up 6 years before the deceased's death should have any impact at all upon the issues before the Court completely escapes me. After pointing out that the deceased was a one third owner of this particular item of property and Multifield Pty Ltd a two thirds owner, Ms Helg asserts:

> "This is a huge difference in what constitutes his estate that has been hidden from me and taken from me as my rightful inheritance. I believe my father owned one whole third in his own right and was also a whole third shareholder of Multifield Pty Ltd." (See paragraph 43 of Ms Helg's affidavit).

[77] The dealings evidenced by the documents exhibited to Ms Helg's affidavit bear in no way upon the deceased's shareholding in Multifield Pty Ltd. Nor do they bear in any way upon the proprietary interest that he may have held in any property other than the one mentioned in the documents. As those documents show, the amount involved in the transaction was modest. The sale price is shown as $30,000 and the net distribution to the deceased at $6,154.58. There is nothing to suggest that this transaction in any way demonstrates "a huge difference in what constitutes his estate". Ms Helg's assumptions are illogical and ill-conceived.

A Failure to Provide Files

[78] Ms Helg's next point relates to a memorandum of cost assessments carried out on certain files at the request of Finemore Walters & Story. Ms Helg complains that she had not been provided with these files despite her request for "these transfer documents for a number of years" (paragraph 47). She claims that she should have been entitled to view the files being a beneficiary of her fathers' estate, as "these files would clearly have given the breakdown in my late fathers' estate". She asserts: "these costs assessments of files are not what I was told were part of my late fathers' estate and I believe as I have all along, that this evidences discrepancies and warrants an accounting of my fathers' estate" (paragraph 46).

[79] Amongst the documents that Ms Helg refers to is a memorandum from Law Costs Pty Ltd to Mrs Finemore Walters & Story (see p3 of Ex M). Law Costs Pty Ltd had been retained to prepare a solicitor and a client assessment. They performed that assessment and apportioned the fees and costs between five different files. They identified the files and their apportionment. This exercise was performed in September 2007, or thereabouts. The five files identified are "Estate Ernesto Sergiacomi deceased", "The AG Sergiacomi Family testamentary trust reappointment of new trustee AGS Holdings (no.1) Pty Ltd", "The Ernie Sergiacomi Family Trust reappointment of new trustee – Robert Salvatore Sergiacomi and Peter Gerard Sergiacomi", "Multifield Pty Ltd re estate Ernesto Sergiacomi deceased – transfer of shares" and "Estate Ernesto Sergiacomi deceased re Multifield Pty Ltd". It needs to be borne in mind that the assessment of costs is taking place well after the execution of the February agreement of the siblings and no doubt the work on the files reflects the adjustments necessary following that agreement. Hence the interest that the deceased's estate had in Multifield Pty Ltd needed to be adjusted to reflect that agreement. In relation to the last three files that I have identified, the total fees and costs charged were respectively $371.25,

$211.30 and $677.64. It is plain that whatever work was performed was of a very modest nature, as indeed one might expect.

[80] Ms Helg was not the client of Finemore Walters & Story and she had no right to examine their files. It is apparent from the fees charged that the work performed on the files was very modest. Ms Helg was aware of the appointment of the new trustee to the Ernest Sergiacomi Family Trust because that was revealed to her former solicitors by Finemore Walters & Story in their letter of 2 September 2009 (see pp3-4 of Ex O(iv)). The appointment of a trustee to the testamentary trust established under the will cannot be considered, in any sense, a revelation to Ms Helg.

[81] Ms Helg's real interest was in the estate file and the dealings concerning Multifield Pty Ltd.

[82] The documents that Ms Helg has included in Ex M show that she has received advice from Finemore Walters & Story as to the work that they had performed on the file "Estate Ernest Sergiacomi". Further, following a letter from Ms Helg to Finemore Walters & Story of 22 September 2011, in which she seeks the files "containing all the documents which clearly show the breakdown of what constituted his estate" (see p1 of Ex N) Ms Helg was provided with a response from Finemore Walters & Story of 30 September 2011 (Ex P) in which the solicitors explain the work the work that they had performed. Significantly, the solicitors informed Ms Helg that the file "Estate Ernesto Sergiacomi deceased re Multifield Pty Ltd" contains correspondence relating to the advice given to the respondents concerning the structure of Multifield Pty Ltd and that letter of advice had been provided to Ms Helg previously and had been exhibited by her to an affidavit that she had filed in the Supreme Court on the 22nd of March 2011.

[83] In short, Ms Helg has been informed of the work that was performed by the solicitors, she has the letter of advice that they wrote to the respondents concerning the company shareholding, which seems to be at the heart of her complaints and the modest amounts charged to the files seems completely consistent with the work that would be expected.

[84] These documents do not evidence any discrepancy as Ms Helg alleges, nor do they justify any requirement to have an accounting of her fathers' estate.

A Failure to Provide Documents

[85] In paragraph 52 of her affidavit Ms Helg asserts, accurately, that Mr Story of Finemore Walters & Story claims that the deceased's estate has been administered and that he asserts "that all documents had been provided to me and my previous solicitor Kent Dalzeil of McCowans Estate Lawyers". She alleges that these assertions and claims are "totally untrue" and refers me to Ex O.

[86] Ex O(ii) consists of four letters written by Mr Dalzeil of McCowans Estate Lawyers. Three are to Ms Helg and one to Finemore Walters & Story. In the letters Mr Dalzeil asserts on 4 September 2009 that he had "received the documents from Finemore Walters & Story". In his letter of 15 September 2009, he records that he had met Ms Helg the previous day, records that "a significant bundle of documents" had been provided by Finemore Walters and Story and says "I am endeavouring to read all of the documents provided by Finemore Walters & Story so that I can give

you a detailed letter of advice by the end of the week". In a letter of the same date to Mr Story, Mr Dalzeil says "we are currently reviewing all of the material that you provided to us". In the final letter of 4 November 2009 to Ms Helg, Mr Dalzeil says that he encloses in that letter "as requested" three documents which had been provided by Finemore Walters & Story, namely a valuation of a property at 9 Willis Street, Bundaberg obtained from Heron Todd White, the Ernie Sergiacomi Family trustee dated 9 November 1992 and various lease documents for the Torquay Heights shopping centre.

[87] Ex O(v) is a letter of advice from McCowans Estate Lawyers to Ms Helg, dated 18 September 2009. In the introductory section of the letter the solicitors say "I have read through the documents from Finemore Walters & Story so far as they relate to the Ernie Sergiacomi Family Trust and Multifield Pty Ltd." There then follows a detailed discussion of both the Ernie Sergiacomi Family Trust, its history, the terms of the trust and Ms Helg's rights as beneficiary under the trust and, in relation to Multifield Pty Ltd, an explanation of the shareholdings both before and after the family agreement was reached on 25 February 2007, an explanation of what had occurred in relation to the shares in Multifield Pty Ltd in which the deceased had an interest, followed by an explanation of what the respondents had done and what Ms Helg could do if she wished to take issue with their actions.

[88] The effect of the oral submission made by Ms Helg was that the letter of 4 November 2009 (which is at p4 of Ex O(ii)) and which enclosed the three documents which I have mentioned demonstrates that Mr Dalzeil did not have extensive documentation from Mr Finemore Walters & Story. The inference that Ms Helg draws from the letter is that documents enclosed in that letter were the only documents ever provided by Finemore Walters & Story to Mr Dalzeil. Mr Dalzeil's letter doesn't say that, that inference is totally at odds with the other statements made by Mr Dalzeil in the correspondence that Ms Helg has revealed (by way of example the reference in the letter of 15 September to Ms Helg of his receipt of a "significant bundle of documents") and, as well, is inconsistent with the scope and extent of the advice that he proffered in his letter of advice of 18 September 2009. He could not have given that advice if the only documents that he had held were the three documents mentioned in the letter of 4 November 2009.

[89] The impression that I had from Ms Helg's submissions is that she greatly distrusted Mr Dalzeil (and I should say further that Ms Helg has appeared before me on a number of occasions now in which she has expressly made her feelings known about Mr Dalzeil and her distrust of him) and that she appears to entertain a suspicion that Mr Dalzeil was in some way in a conspiracy with Mr Story to mislead her. Again, there is not the slightest evidence to support such an allegation. There is nothing to suggest that Mr Dazeil has not, in accordance with his duty to Ms Helg, examined the "significant bundle of documents" that was provided to him and given Ms Helg an accurate analysis of those documents and his honestly held opinion as to her rights and her options. Far from supporting her claim that Mr Story's assertions were untrue, to the extent that they touch on it, the documents in Ex O are consistent with his claim that he has provided relevant documentation to Ms Helg's former solicitors as requested.

Torquay Heights Shopping Centre

[90] The next relevant matter raised by Ms Helg in her affidavit concern the respondent's dealings in the Torquay Heights shopping centre. She makes various allegations and asserts a number of matters but for present purposes importantly concludes that the facts that she has deposed to evidence misappropriation (see paragraph 61).

[91] At paragraph 58 of her affidavit Ms Helg poses the question "as to where the income from the shopping centre from 12 August 2006" went. The paragraph continues: "I asked a question as to why an account was opened in December 2006, three months after my fathers passing, until 2009 in the names of Santina Sergiacomi [i.e. the applicants' mother] and Ernesto Sergiacomi [i.e. the deceased]." Ms Helg refers me to Ex Q.

[92] Ex Q consists of four pages. The first three pages appear to be bank statements issued by the ANZ bank in relation to account number 5606-31062 held in the names of the trustees of the estate of E Sergiacomi and Mrs Santina Sergiacomi. The account was on 11 December 2006. The pages given appear not to be consecutive in that there is a gap between the entry of 21 February and 17 April 2007. And there appears to be withdrawals that occurred on 11 June 2007 that are not detailed in the documents revealed. The fourth page of Ex Q again appears to be a document issued by the ANZ bank but this time in relation to a cash management account kept in the name of Mrs Santina Sergiacomi. It relates to a period in January, February 2007.

[93] To return to the question that Ms Helg poses in paragraph 58 as to why the account was opened in December 2006, three months after the death of her father in the names of Santina and Ernesto Sergiacomi. The short answer is that it was not. The account is in the name of the trustees of the estate of her late father and jointly with her mother.

[94] Further, the respondents offer an explanation as to what occurred. They explain that the account was opened only after they obtained probate of their father's will. Probate was granted on 29 November 2006 and the account opened 12 days later on 11 December 2006. In the time between the deceased's death and the opening of the bank account they left open the former partnership account conducted by their mother and father and into that account the income received from the Torquay Heights shopping centre was deposited. They refer to the account that existed at the time of their fathers' death as the "old partnership account" and the account that they opened following the grant of probate as the "new partnership account". Upon the opening of the new partnership account they calculated the net income that would properly have been payable to the new partnership and which had been deposited into the old partnership account and transferred monies from the old account to the new account to reflect what was owing. They say that that amount was $31,201 and it was transferred on the 5th of February 2007. The bank statement records such a transaction.

[95] Thus the questions posed by Ms Helg in paragraph 58 have been answered and, it seems to me, the answer that the respondents provide is a full explanation and a satisfactory one.

[96] Ms Helg asserts at paragraph 59 of her affidavit that her mother, who owned a one half share in this shopping centre, did not receive ongoing income to which she was entitled. She draws my attention to the debit entry on the fourth page of Ex Q in an

amount of $46,201 withdrawn from her mother's cash management account on the 5th of February. The page provided to me does not show any deposit between 12 January and 13 February save for the crediting of interest. But that hardly demonstrates that a proper accounting was not made of her mother's entitlements to a one half share of the income from the shopping centre.

[97] At paragraph 61 of her affidavit Ms Helg asserts "a partnership account should have been opened around November or December 2006 and this did not occur until November 2007…". As I have explained, the documents in Ex Q demonstrate Ms Helg's misunderstanding of the situation. The respondents have provided a full explanation in their affidavit of what has occurred.

[98] Ms Helg further asserts at paragraph 61 that "full income was not going into this account [i.e. the partnership account] until September/October 2008". She refers me to Ex S. Ex S consists of a bundle of bank statements relating to account number 4867-28818 held with the ANZ bank in the names of Santina Sergiacomi, the respondents, the applicant and AGS Holding (no.1) Pty Ltd as trustee for the AG Sergiacomi testamentary trust. As Ms Helg asserts, that account was opened on the 28th of November 2007. The first significant deposit occurs on the 12th of May 2008. Whilst significant deposits were made in May and June in the sums of $10,000 and $40,000 respectively the first deposits which appear to reflect payment of rent, as one would expect from a shopping centre, seem to first occur in September 2008 and following.

[99] On their face, the matters that Ms Helg raises do arouse concern. A failure to account for income received from the shopping centre over a period of two years would indeed raise suspicions as to whether the executors had properly discharged their function. The matter is not assisted by the failure of the respondents to deal expressly with this aspect of Ms Helg's complaints. The explanation proffered explains the opening of the account in the joint names of Mrs Santini Sergiacomi and the trustees of the estate of the deceased but the respondents do not then deal, expressly at least, with the period from 11 June 2007, being the last entry in the accounts mentioned in Ex Q and 1 September 2008 where the first deposits applicable to rent from the shopping centre appear in the bank statements that form Ex S.

[100] But for two matters, that would be sufficient to cause me to require an examination and passing of the executor's accounts. Those two matters are first, the applicant does not claim that the banks statements that she has exhibited in Ex Q are all the bank statements applicable to the account 5606-31062 and indeed on their face they are not. According to the face of the documents the applicant has revealed only statements numbered 1 and 11. The respondents assert that they have provided to the applicant copies of "all of the relevant bank statements" (paragraph 39 of their affidavit).

[101] Secondly, there is an apparent explanation. The respondents assert that from the time that the "new partnership account" was opened [i.e. the one referred to in Ex Q] the estate's share of net income from the shopping centre was then deposited from time to time into that bank account.

[102] At paragraph 42 of their affidavit the respondents depose that all of the estate's net income from the partnership comprising their mother and the estate of the deceased

in the operation of the shopping centre was deposited to the estate bank account at the ANZ bank and subsequently distributed to the beneficiaries of the estate. Presumably the reference to the estate bank account at the ANZ bank is a reference to the new partnership account as previously described in their affidavit.

[103] Presumably that remained their practice up and until the time they commenced to deposit the income from the shopping centre into the bank account established in the names of each of the beneficiaries, who were in fact entitled to the one half share of that income. That practice would be consistent with Ms Helg's assertion in paragraph 55 of her affidavit that "all partners of the shopping centre agreed to let the two executors run the centre for one year from October 2007 until October 2008 until things were sorted with regards to issues of my fathers' estate". It would be consistent with such an arrangement that the respondents may have continued to bank monies into the "new partnership account" that they mention in their affidavit up until the time that the partners in the shopping centre had agreed they ceased to control it i.e. October 2008.

[104] However given Ms Helg's express complaint I would have expected the matter to be expressly dealt with rather than by my drawing an inference from what I am told. In the face of a direct allegation that they have misappropriated monies the respondents have not explained why it is that the account in the names of the beneficiaries and Mrs Sergiacomi was not opened until November 2007 and why it is that monies were not deposited in that account reflecting the earnings of the shopping centre until 10 months later.

[105] The inference seems reasonably strong that the respondents have in fact conducted themselves in accordance with their agreement with their fellow beneficiaries but it seems to me regrettable that they have not addressed this matter directly given the serious nature of the allegation made against them.

[106] In the circumstances I propose to direct that the respondents file such further affidavit as they might be advised, addressing the matters raised in paragraphs 59 and 61 of Ms Helg's affidavit. I am reluctant to put either the estate or any one of the beneficiaries (and I include in that Ms Helg) to the expense of an examination and passing of accounts if the concerns raised by Ms Helg can be simply addressed by a more complete affidavit from the respondents explaining the arrangements that they made, the distributions that were made and annexing the bank statements applicable to the accounts that have been opened and into which the income from the shopping centre has been placed and distributed following the death of the deceased.

The Registration of Interests

[107] In paragraph 60 of her affidavit Ms Helg queries the timing of the registration of the interests of the beneficiaries under the will on the registered title of Lot 1 on registered plan 132915 County of March Parish of Urangan. The Torquay Heights shopping centre is erected on that land. The beneficiaries' interest was registered on 1 August 2007. Ms Helg contrasts this with the registration of her mother's interests in a neighbouring block of land Lot 2 on registered plan 221931 County of March Parish of Urangan. That land had been previously held by the deceased and his wife, Mrs Santina Sergiacomi as joint tenants. Her interest was registered on 2 November 2006 some three weeks prior to the grant of probate.

[108] The answer to Ms Helg's query lies in the differing nature of the respective entitlements. As Mrs Santina Sergiacomi held her interest as joint tenant with the deceased the deceased's interest in the land passed to her by way of survivorship. There was no need for a grant of probate to first issue before her title could be registered. However, in relation to the beneficiaries under the will it was necessary for the respondents to first obtain a grant of probate and then attend to payment of any debts of the estate[2] before then registering the interest of the beneficiaries. While the respondents might have attended to the registration more quickly than they did nothing seems to flow from that. Ms Helg did not allege that she has suffered any detriment as a consequence of any delay. Nor does she allege that the respondents acted inappropriately in registering the title that they did. These facts give no rise for any concern about the proper discharge of the respondents' functions.

The Declaring of the Deceased's Income

[109] By paragraph 62 of her affidavit Ms Helg asserts that "the income received for the partnership of the late Ernesto Sergiacomi has never been disclosed nor declared on the final accounts of my late father's administration of his estate". She then refers to two tax returns lodged on behalf of the E & S Sergiacomi partnership. One relates to 2005-2006 financial period and the other to the 2006-2007 financial period.

[110] The first return, whilst lodged after the deceased's death by the respondents, refers to the period whilst the deceased was alive. That return shows gross business income of $127,197, the business being identified as the "Hervey Bay shopping centre". The second return relates to the period from 1 July 2006 to the date of the deceased's death on 11 August 2006. That return shows gross business income of a non primary production nature of $14,300.00. The business identified again is the Hervey Bay shopping centre. I note that each return was prepared by Mr Andrew Vautin of Bundaberg Tax and Accounting Pty Ltd. In the main business schedule which forms part of the return (p13 of Ex T(ii)) the income of $14,300 is shown as "rental received" and the business activity carried on is described as "Retail Traders' Association Operation" at the Hervey Bay shopping centre.

[111] Given these various facts, I do not understand Ms Helg's claim that the income received for the partnership has not been disclosed or declared. Plainly income has been declared. No evidence at all is advanced to demonstrate that any greater income was received than the amount that was disclosed in the tax return.

[112] Ms Helg drew my attention to the substantial losses recorded in the second tax return and she made a submission to the effect that her father did not conduct his business at a loss let alone a significant loss. Ms Helg misunderstands the effect of the return. The loss from business that is recorded and which is indeed substantial at $75,479 has come about not through the partnership's activities in relation to the shopping centre but rather through its primary production activities in relation to a Neem tree plantation that the deceased and his wife conducted. That primary production activity brought in no income but, according to the tax return incurred substantial expenses in the amount of $86,360, the vast bulk of which is described as "deferred prior losses" in the sum of $62,666 (see p14 of Ex T(ii)). It would appear that the deceased was taking advantage of the ability to legitimately defer

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[2] S 56 *Succession Act* 1981

primary production losses and was applying losses incurred in previous years to reduce the taxable income of the partnership.

[113] Again, Ms Helg's suspicions are unfounded. The tax returns do not evidence discrepancies as she asserts. No inference adverse to the respondents can be rationally drawn from any of this.

Misappropriation of the Deceased's Monies

[114] In paragraph 63 of her affidavit Ms Helg asserts that she believes that the respondents have misappropriated a large amount of funds from her father's personal bank account which she asserts was entrusted to the respondents acting under the enduring powers of attorney granted to them. She says: "if they can answer to sums of money such as $380,000.00 vanishing from his account within 6 months I will be very interested to have a full accounting performed on this account as to know what the funds were used for". She exhibits to her affidavit bank statements issued by the ANZ bank in relation to account number 3876-27157 held in the name of the deceased.

[115] That substantial sums were withdrawn from the account in the six months prior to the deceased's death is plainly right. The bank statements show that in January 2006 the account had a modest balance of $368.33 and that this grew to $375,716 following two substantial deposits in February 2006. Further deposits were made at various times over the ensuing months totalling over $90,000. The final major deposit made into the account was on the 8th of August in the sum $55,422.67. By 18 August 2006, when the last of the cheques were presented, at least as shown by the bank statements, the balance was $64,791.20. Hence approximately $400,000.00 was withdrawn from the account in the period between 3 February 2006 and 18 August 2006.

[116] But the fact that monies have been withdrawn from the account during the deceased's lifetime is not to the point. Again I note that this application concerns the respondents' performance of their duties as executors of the estate. It does not concern their activities prior to the death of the deceased.

[117] So even if Ms Helg's allegations could be substantiated this is not the vehicle in which to agitate her concerns.

[118] Again I hasten to add that there is no evidence of any wrongdoing by the respondents. Again I note that the respondents' answer to the applicant's complaint is that they at no time acted as attorneys for the deceased albeit he had granted an enduring power of attorney in their favour. They assert that the deceased had capacity to make his own decisions up until the week prior to his death. There is no evidence that the respondents did exercise their power of attorney for their father at any stage. Ms Helg has not advanced any evidence that they did so. Nor did she advance any evidence that her father lacked capacity in the period from February 2006 until his death. However, this is all largely irrelevant to this application.

[119] In respect to the deceased's bank account the respondents assert that they are not aware of the details of his transactions in the six months prior to his death but say that "we are aware that in the first half of 2006 he purchased a residential block of land and constructed a residence at Santina Drive, Bundaberg East". A residence at

that address is listed in the assets of the estate in the respondents' final Statement of Accounts as having been sold in June 2007 for $341,606.35 (see Ex V at p2).

[120] However, while it may not have been Ms Helg's primary point, the bank statements do raise a matter that I feel the respondents ought to address. Seven entries appear in the bank statement dated 11 August 2006 (ie the date of death) or later and which involve withdrawals from the account. Only two of those seven entries are, to my mind, substantial, each occurring on the 17th of August and one being in the amount of $4,300 and the other in the amount of $16,676. Each of the withdrawals appears to be related to a particular cheque number. I have no evidence as to the payees of the cheques or of the dates upon which the cheques were written. The probable explanation is that the cheques were written out prior to the deceased's death and presented after it.

[121] It may be that the statement in the respondents' affidavit that "we are not aware of particular details of his bank transactions" is intended to inform the Court that they do not have access to cheque books or cheque butts, or that there are no details on the cheque butts that they can readily access. Nonetheless it seems likely that if that is their situation the respondents could obtain details from the ANZ bank of these transactions to explain where the deceased's monies have gone.

[122] Again, I would be reluctant to require a full examination of all accounts based on what may be an easily explained oversight in relation to a relatively modest sum of money. Again it seems to me that given the serious nature of the allegations made I should not operate on inference where there is, or may be, direct evidence available.

The Final Statement of Accounts

[123] Ex V to Ms Helg's affidavit includes a final statement of accounts for the administration of the deceased's estate provided by Messrs Finemore Walters & Story to her in November 2010. Ms Helg does not point to any entry in that statement which she can show to be wrong or misleading.

Conclusion re r 644 Application

[124] Having listened to Ms Helg's submission for some hours it is apparent that she trusts no one connected with this estate. She does not trust her brothers. She does not trust the solicitors who have received instructions from her brothers. She made serious allegations against a solicitor who acted on her behalf. She doubts the integrity of the accountants who appear to have acted for her father over many years. She doubted the independence of a valuer retained to advise her brothers. I do not think it unfair to observe that the degree of suspicion that Ms Helg entertains has impacted substantially on her ability to impartially weigh up the evidence and assess her position.

[125] Plainly what I have said is in the context of a provisional examination of fairly limited materials presented by an unskilled lay person and on many matters which seem to me irrelevant to the issues that are properly before me here. I have gone in to these matters in the detail that I have in the hope of demonstrating to Ms Helg that significant bases for her beliefs are untenable and thereby dissuading Ms Helg from pursuing what may turn out to be fruitless litigation.

[126] Subject to the two matters that I have mentioned, and in respect of which there might well be an innocent explanation, there is no cause to require that there be an examination of accounts.

Rule 643 Application

[127] The application appears misconceived. Ms Helg does not identify any failure on the part of the respondents to register a transmission of any real or leasehold estate. Nor does she identify any failure by them to pay or handover any legacy or residuary bequest to her.

[128] Ms Helg's application indicates that the application was predicated on the assumption that the respondents have failed to disclose all the assets of the deceased and hence her entitlement as a beneficiary under the will has not yet been met. There is no evidence to support the assumption that Ms Helg makes.

Section 8 of the *Trusts Act* 1973

[129] In her application Ms Helg seeks an order that her "fathers family testamentary trust be reviewed as I believe the administrators… have not disclosed the true facts relating to how my father bequested his shares in his trust".

[130] Further her application asserts: "I also believe there are few directions in his will regarding the schedule of beneficiaries for his trust and it seems to only reference Anthony Guido Sergiacomi testamentary trust. I also find the content of the discussion held between Marie Gallagher and Robert Sergiacomi, one of the executors, regarding my mother and the family trust in regards to setting up a partnership ABN and TFN in the name of Santina Sergiacomi and the trust."

[131] It is far from clear what Ms Helg means to convey by these various statements. The manner in which the deceased "bequested his shares in his trust" is set out in his Will which has been admitted to probate. It is not clear what it is that Ms Helg wishes to have disclosed to her. The purpose behind the application was not made any clearer in oral submission. The final two sentences that I have quoted do not seem, in any sense, to be relevant.

[132] As the respondents submit there is no act or decision of theirs that is identified that requires any review. Nor is it apparent how Ms Helg could claim to be a person aggrieved in aspect of the testamentary trust established by the will in favour of her brother Anthony.

Conclusion

[133] I direct that the respondents file and serve such further affidavit as they might be advised concerning:

(a) the withdrawals from the account number 3876-27157 held at the ANZ bank in the deceased's name between 11 August 2006 and 18 August 2006; and

(b) the matters raised in paragraphs 59 and 61 of the applicant's affidavit filed 11 October 2011.

[134] I direct that such further affidavit be filed and served on or before 4pm on the 7th of November 2011.

[135] The further hearing of this application stands adjourned to 21 November 2011.

[136] I note that on 26 October last I directed the Registrar to inform the parties of these directions.