

Critical cases that every wills & estates lawyer should know: Part 1

GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

The time limit for IFP claims – six months from Probate to file and serve – will not be capable of extension where the estate has been distributed. Proceedings should be issued as early as possible.

A series of Full Court judgments dealing with practical problems arising out of claims under the *Inheritance (Family Provision) Act 1972 (SA)*, (*IFP Act*) have been handed down recently. The judgments are:

Miller v Miller [2018] SASCFC40 – 23 May 2018

Brooks v Young [2018] SASCFC81 – 16 August 2018

Green v Ellul [2018] SASCFC100 – 26 September 2018

They contain important lessons for all practitioners, especially those involved in IFP Act claims. Given the significance

of these issues, this article will deal with *Brooks v Young* and the December Riskwatch article will deal with *Miller v Miller* and *Green v Ellul*.

BROOKS V YOUNG: THE FACTS

Raymond Brooks, Trevor Brooks, Margaret Boyle and Rosemary Young were the children of Leslie Brooks. Leslie died on 27 September 2014. A will made by Leslie in 2011 left the residue of his estate to his surviving children in equal shares. A will made in 2012 (Leslie's last will) gave \$30,000 each to Raymond, Trevor and Margaret with the residue of the estate to Rosemary. Rosemary and her son Robert were appointed joint executors of the will. Probate was granted to Rosemary and Robert on 23 February 2015. The main asset of the estate was a house property at Berri and the estate was valued for probate purposes at \$434,542.02.

On 22 March 2015 Rosemary and Robert signed a Transmission Application (to Rosemary in her capacity as a beneficiary)

in respect of the Berri property. The Transmission Application was lodged at the Land Titles Office on 2 April 2015. On 8 April 2015 the Executors' solicitor wrote to Raymond and Trevor informing them of the grant of probate and advised that they were to receive the sum of \$30,000 (each) and that the estate was now in a position to be distributed. Raymond said he did not receive the 8 April 2015 letter until 13 April 2015. On 14 April 2015 \$81,677.89 was distributed to Rosemary and the following day \$30,000 was distributed to Margaret. The transfer of the Berri property to Rosemary was completed on 18 April 2015.

By 18 April 2015 therefore, the estate – apart from the \$30,000 legacies to Raymond and Trevor – had been distributed. Raymond, having discovered that the Berri property had been transferred to Rosemary instructed solicitors and on 22 April 2015 those solicitors wrote to the Executors requesting the withdrawal of the transfer and an undertaking that no further distribution be made until each beneficiary "shall have the opportunity to review their respective positions". The response from the Executors' solicitor was to give the undertaking not to further distribute without notice¹ but that the transfer to the Berri property would not be withdrawn.

BROOKS V YOUNG: THE PROBLEM

The solicitors for Raymond and Trevor were instructed to make an application for further provision from the estate pursuant to the IFP Act. Such applications must be filed **and served** on the executors within six months of the grant of probate (see s.8(1) IFP Act). In this case the final day for service was 23 August 2015. The application was issued on 17 August 2015 but not served on the executors until 31 August 2015 i.e. eight days out of time.



On 11 July 2016 Raymond and Trevor's solicitors filed an interlocutory application seeking an extension of time. A statement of claim claiming entitlements under the IFP Act, as well as making allegations of breaches of fiduciary duties against Rosemary and Robert, was filed on 28 November 2016. Shortly thereafter, on 12 December 2016, Rosemary filed an application seeking summary judgment or dismissal of the proceedings on the basis that the pleadings disclosed no reasonable cause of action.

In the ordinary case it might be thought that an eight day extension of time would not cause too many problems if the test was merely based on general discretionary considerations such as "*the interests of justice*". Claims under the IFP Act however are not ordinary cases and **the position as regards extensions of time are extremely strict.**

Whilst the Court has a discretion to extend the time for the bringing of an IFP claim (s.8(2)), the Court can only do so **if the application is brought before the final distribution of the estate** (s.8(4)). This is a critical factor.

Further, and perhaps even more critically, even if there is a successful application for an extension of time, any distribution of part of the estate made before the application for extension **shall not be disturbed by any order for provision** (s.8(5)).

BROOKS V YOUNG: THE JUDGMENTS

At first instance Stanley J held that the terms of s.8(5) meant that even if an extension was granted on a hearing of Raymond and Trevor's IFP claim, the Court would be precluded from making an order for provision out of the assets that had already been distributed by the time the application for extension was made. In this case all of the assets of the estate apart from the two \$30,000 legacies

to Raymond and Trevor had already been distributed. This meant that there was no point in allowing Raymond and Trevor's claim to continue.

Stanley J also held that whilst Rosemary and Robert, as executors, owed fiduciary duties to the beneficiaries named in the will, Australian law did not recognise any such duty to potential claimants under the IFP Act not to distribute the assets of the estate within six months of the grant of probate. Summary judgment was therefore entered against Raymond and Trevor's claims. An appeal was made to the Full Court pursuant to leave granted.

The principal judgment in the Full Court was that of Doyle J. Kelly J concurred with Doyle J and Bampton J, whilst also concurring with Doyle J, gave short additional reasons which contain some very interesting observations about the role of executors and a call for legislative reform to ameliorate the strictness of the position with respect extensions of time under the IFP Act.

The judgment of Doyle J, whilst comprehensive, is also a model of clarity and should be read carefully by all practitioners who do any wills and estate work whatsoever.

The judgment provides a useful summary of the relevant provision of the IFP Act (paras [56] – [62]) and of the operation of the IFP Act scheme (paras [63] – [77]) including the provisions regarding giving notice to executors of IFP claims contained in s.14 of the IFP Act. Proper use of this notice provision (not used in this case) will allow the Court to order provision out of portions of the estate that have been distributed. His Honour then finds (agreeing with Stanley J) that the application of the IFP Act scheme to the present case meant that the claims for provision would inevitably fail (paras [78] – [81]).

Much of the remainder of the judgment

is taken up with consideration of whether or not executors owe a fiduciary duty to prospective claimants. This consideration involves a comprehensive survey of all relevant Australian and New Zealand cases, some of which had suggested that – as submitted by Counsel for Raymond and Trevor – such a duty was owed and that Raymond and Trevor's pleaded case in this regard should be allowed to proceed to trial and not dealt with by way of summary judgment (paras [111] – [193]).

After this useful survey of the authorities, and a consideration of the principles governing the imposition of fiduciaries (paras [194] – [213]), Doyle J concludes that there was no fiduciary duty owed to the plaintiffs as potential claimants and that therefore it was appropriate for summary judgement to be entered against them.

BROOKS V YOUNG: THE LESSONS

Practitioners advising executors will find the discussion of executor's duties illuminating. Practitioners advising beneficiaries wishing to oppose IFP claims will likewise find the description of the manner in which IFP claims proceed instructive.

Overwhelmingly though, the major lesson is for practitioners acting for potential claimants in IFP matters - use the notice procedures set out in s.14 wherever possible but issue and serve proceedings well before the six month time limit – even if negotiations for settlement are in progress – because the consequences of missing the time limit are so severe that they outweigh the cost consequences of issuing proceedings.

Endnotes

- 1 Given that by this time the only amount which had not been distributed was the \$60,000 earmarked for Raymond and Trevor, it might be said that this was hardly much of a concession.