



Précis Paper

Adult Family Provision Claims

A discussion about the recent decision in *Page v Hull-Moody* (2020) NSWSC 411.

Discussion Includes

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Adult Family Provision Claims

In this edition of BenchTV, Paul Glissan (Barrister, 4th Floor Selbourn Chambers, Sydney) and Roderick Storie (Principal, Roderick Storie Solicitors, Sydney) discuss the recent decision of *Page v Hull-Moody (2020) NSWSC 411*.

Basis for claim

1. The plaintiff was the older daughter of the deceased and she was left a quarter of the estate. The plaintiff claimed that she needed financial provision in addition to the provision made for her in her mother's will.
2. The plaintiff claimed that her need for provision included enough money to pay the mortgage over her home, the amount owing under the mortgage then was approximately \$111,000.00, enough money to repay debts in the order of \$30,000.00. She also claimed that needed money to attend to her teeth, the amount required at that stage was unknown as well as a capital sum to pay for private medical insurance for the remainder of her life which was capitalised by the original solicitors for the plaintiff, Armstrong Legal at around \$96,000.00.

Estate Assets

3. The estate comprised two properties, one was a unit in a nursing home that was vacant but unsold and the other was a half interest as a tenant in common in the former matrimonial home of the plaintiff's parents. This was subject to a right of the plaintiff's father to reside in it for as long as he wished which meant that it was an asset that could not immediately be realised into money.
4. As a result, the estate was effectively worth around \$500,000.00 and the need for provision claimed by the plaintiff was more than a quarter of that amount.

Unforeseen events in the course of proceedings

5. The first unforeseen event occurred on 1 January, 2020 when the plaintiff's father became too ill to remain in the property and had to go into full time hospital and nursing care. That meant that under the terms of the Family Law Agreement between him and the deceased.
6. There was a Family Law Agreement between the plaintiff's father and the deceased that had been made the subject of orders which provided for him to have the right to reside in

the former matrimonial home for as long as he wished. If he ceased to remain in it for more than seven days, then the property had to be sold.

7. The effect of him moving out on the first of January 2020 was that the property became realized into money and the estate doubled in value.
8. The other unforeseen event was that during the actual hearing, the defendant's tended a copy of the father's will which they had obtained by subpoena. The Will showed that the father, after leaving two small legacies left the residue of his estate to his two daughters equally. The plaintiff's interest under her father's will was over \$400,000.00 and it became a future resource to her that loomed large in His Honour's thinking about her claim.

Amendments to the needs-based claim

9. During the course of the hearing, the plaintiff abandoned the claim for the lump sum for the future private health insurance cost for the remainder of her life as a result of the availability of the large sum of money that would come to her upon her father's death.
10. After abandoning that, her claim amount came down to \$50,000.
11. The plaintiff was not the ordinary plaintiff. She had lifelong health problems including a personality disorder, ADHD and bipolar disorder which was all substantiated in the medical evidence. These findings were also substantiated by the Queensland Civil and Administrative Tribunal when it appointed the Public Trustee of QLD to manage her financial matters in 2010.
12. Whilst His Honour made an inference that the case was driven by some ulterior motive, however the case was arguably driven for financial need.
13. There was evidence put on from a builder which spoke to the cost of doing up the plaintiff's house and there was evidence from dental experts as to the cost of dental implants which totalled \$54,000.
14. Further, the up to date amount owing on her mortgage was provided to the court, as well as the up to date amount of all of her debts.

Initial calculation of plaintiff's needs

15. The barrister involved in the proceedings; Paul Glissan initially assessed the additional provision of the plaintiff to be around \$200,000.
16. At that stage, it was unknown that the father had moved out of the property permanently and it was still included in the assessment lump sum for medical health insurance.
17. By the time of the hearing, this had reduced to \$50,000. This is due to the fact that by the time of the hearing, it was known that the estate was now approximately double and sitting at just over \$1million. Therefore, the plaintiff was aware that her share was just over \$250,000.

18. The mortgage, debts owed, the money to do up the house and the money for her teeth came out to be around \$50,000 and it was claimed that the deceased owed the plaintiff a strong testamentary duty which was not discharged by only leaving her one quarter of the estate. This is because the plaintiff was a person with special needs which she had had all her life.
19. In assessing whether adequate provision has been made for a person's proper maintenance, education and advancement in life, there is a list of factors that the court must look at under section 60 of the *Succession Act* 2006 (NSW).
20. His Honour's judgement sets out all of the leading authorities, what they have said about how the act is to be interpreted and operate and in particular in relation to claims by adult children.

Disproportionality

21. In his judgement, his Honour focused on the topic of disproportionality between a claim and the costs of making that claim.
22. In doing so, he referred to the case of *Squire v Squire* [2019] NSWCA 90 in which Justice Meagher delivered a judgment in which he drew attention to the need for proportionality between costs and the subject matter of a claim, referring to the requirements of the *Civil Procedure Act* 2005 (NSW) in doing so.
23. The case of *Squire v Squire*, on its facts is not analogous to the *Page v Hull-Moody*. In *Squire v Squire*, the Executrix widow had jointly owned a unit with her late husband as joint tenants and his half share passed to her by survivorship. After this, the remaining estate was insolvent.
24. Justice Kuntz at first instance was not prepared to order any provision for the two adult children of the deceased as his view was that the widow needed to keep the half of the unit that he owned in order to rehouse herself. However, when the children appealed, the Court of Appeal reversed that.
25. The only real analogous situation is that costs were expended in both cases which were possibly disproportionate to the result in the end.

Decision

26. Ultimately, in *Page v Hull-Moody*, the plaintiff's claim failed and in looking at the reasons behind His Honour's judgement seems to be the fact that His Honour respected the deceased's wishes in the will. At paragraphs 251-255 and 258-260 of His judgement, His Honour took the view that it was a wise and fair will.
27. Having regard to the fact that the plaintiff already owned a home in QLD, His Honour took the view that she was making adequate provision after directing that the mortgage be

repaid from the plaintiff's share, she took the view that the remainder would be sufficient for the plaintiff's needs.

28. His Honour further went on to say at paragraph 261 of His judgement that if he was wrong about that on a jurisdictional level, then on a discretionary basis he was still not prepared to alter the will due to all of the provision the plaintiff had had from both her parents during their lifetimes and under her father's will.

Costs

29. When the Paul Glissan first came into the matter on 10 December, 2019 there was an Affidavit of Cost that the original solicitors had filed which estimated costs on the ordinary basis to be, up to and including mediation to be \$30,000. He then estimated his fees, up to the conclusion of a two-day hearing to be \$15,000.
30. By the time it got to the hearing the estimated cost was around \$60,000 as by then the original solicitors were seeking more than \$30,000.
31. The Executor's costs were around \$90,000.
32. At paragraphs 77 and 78 of his Judgement, His Honour said that 'even if (the plaintiff) received \$50,000 by way of additional provision, she would only be \$12,500 better off than she would have been if no proceedings were commenced.' This analysis was on the basis that the whole estate would bear the burden of a legacy of \$50,000 in favour of the plaintiff, however legal counsel for the plaintiff submitted that the burden of such a legacy should be borne by the First Defendant's one-quarter share and that the costs of the proceedings should be borne by the First Defendant's share or her and the other beneficiaries' shares, in which event he plaintiff would have been \$50,000 better off.

BIOGRAPHY

Paul Glissan

Barrister, 4th Floor Selborne Chambers, Sydney

Paul is an experienced barrister who practices in numerous areas of law; administrative law, commercial, criminal law, equity, estate/family provision, personal injury/intentional torts, real property, wills and probate. He was a former arbitrator for the Local Court of New South Wales and the District Court of New South Wales. He is currently a member of the General Criminal Law Panel for Legal Aid NSW and the Domestic Violence Panel for Legal Aid NSW.

Roderick Storie

Principal, Roderick Storie Solicitors, Sydney

Roderick was admitted to the Bar in 1983 and prior to opening Roderick Storie Solicitors in Windsor in 1994, spent time as a lecturer at the College of Law, working in a range of diverse legal placements and gaining experience in a comprehensive range of legal specialties. He is the current President of the Nepean-Hawkesbury Law Society.

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Page v Hull-Moody (2020) NSWSC 411

Squire v Squire [2019] NSWCA 90

Legislation

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