HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

HOMAYOUN NOBARANI APPELLANT

AND

TERESA ANNE MARICONTE RESPONDENT

Nobarani v Mariconte
[2018] HCA 36
15 August 2018
S270/2017

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 5 June 2017 and, in their place, order that:*

   (a) *the appeal to the Court of Appeal of the Supreme Court of New South Wales be allowed;*

   (b) *the orders of the Supreme Court of New South Wales made on 22 May 2015 (Slattery J) and 28 May 2015 (Senior Deputy Registrar Studdert) be set aside and, in their place, order that the plaintiff pay the second defendant's costs of the trial;*

   (c) *the proceedings be remitted to the Equity Division of the Supreme Court of New South Wales for a new trial; and*

   (d) *the respondent pay the appellant's costs.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

4. The respondent have liberty to apply within 14 days for an order that the costs referred to in orders 2(b), 2(d) and 3 be paid out of the estate of the deceased and on a trustee basis.

On appeal from the Supreme Court of New South Wales

Representation

M J Windsor SC with J E F Brown and M E Hall for the appellant (instructed by Remedy Legal)

G O'L Reynolds SC with A E Maroya and D F Elliott for the respondent (instructed by Vizzone Ruggero Twigg Lawyers)

CATCHWORDS

Nobarani v Mariconte

Practice and procedure – Appeals – Denial of procedural fairness – Where appellant unrepresented – Where nature of hearing altered at short notice – Where appellant's applications for adjournments refused – Whether appellant denied procedural fairness at trial – Whether denial of procedural fairness amounted to "substantial wrong or miscarriage" – Whether appellant denied possibility of successful outcome – Whether new trial should be ordered.

Succession law – Wills, probate, and administration – Grant of probate – Where appellant claimed interest in challenging will – Where respondent granted probate of will in solemn form – Whether appellant had interest in challenging will.

Words and phrases – "adjournment", "caveat", "denial of procedural fairness", "possibility of a successful outcome", "probate", "procedural fairness", "substantial wrong or miscarriage".

Supreme Court Act 1970 (NSW), ss 75A, 101(1)(a).
Supreme Court Rules 1970 (NSW), Pt 78 rr 42, 43, 44(4), 66, 69, 71.
Uniform Civil Procedure Rules 2005 (NSW), r 51.53(1).

KIEFEL CJ, GAGELER, NETTLE, GORDON AND EDELMAN JJ.

Introduction

1 This appeal concerns whether a new trial should be granted to the appellant on the basis that he was denied procedural fairness in the conduct of a trial, heard on 20 and 21 May 2015, involving the respondent's claim for probate of a will in solemn form.

2 The appellant was unrepresented. He claimed an interest in challenging a handwritten will made by the late Ms Iris McLaren in 2013 ("the 2013 Will"). He filed two caveats against a grant of probate without notice to him. The respondent brought proceedings for orders that the caveats cease to be in force. Until 14 May 2015, the appellant's preparation was essentially limited to those proceedings. The appellant had not been joined as a party to the respondent's summons for probate of the 2013 Will and was not named in her later statement of claim. No directions had been made requiring the appellant to file any evidence in the proceedings. He had, correctly, proceeded on the basis that he had not been directed to take any steps towards a trial of the claim for probate. On 23 April 2015, the appellant was told by the judge at a directions hearing that the trial on 20 and 21 May 2015 would be confined to the respondent's motion that the appellant's caveats cease to be in force ("the caveat motion").

3 On 14 May 2015, with three clear business days before the trial, the first directions hearing was held by the trial judge, Slattery J. For the first time, the respondent submitted that the appellant's caveats had lapsed by effluxion of time. The trial judge, with the urging of senior counsel who had appeared at the previous directions hearings, told the appellant that the trial on 20 and 21 May 2015 would be of the claim for probate. He directed that the appellant file and serve a defence to the statement of claim by 18 May 2015, that is, within one clear business day. He also directed that, within the same clear business day, the appellant should serve any supplementary evidence upon which he wished to rely in addition to the affidavits he filed in his caveat proceeding and identified during the directions hearing. The trial judge was not informed prior to making those directions that the appellant was not a party to the probate proceedings, or that the appellant's affidavits had been filed only in connection with the caveat motion.

4 On 20 May 2015, the first day of the trial, the appellant was joined as a party to the claim. His defence was in disarray. His applications for adjournments were refused. The trial judge delivered judgment orally on 22 May

2015, granting probate of the 2013 Will in solemn form. The appellant was ordered to pay the costs of the proceedings.

5 A majority of the Court of Appeal of the Supreme Court of New South Wales dismissed the appellant's appeal, but for different reasons. Ward JA dismissed the appeal because she concluded that, although the appellant had been denied procedural fairness, there was no possibility that the outcome would have been any different. Emmett AJA dismissed the appeal because he concluded that the appellant did not have an interest in challenging the 2013 Will.

6 This appeal should be allowed. For the reasons below, the appellant had an interest in the 2013 Will and he was denied procedural fairness at the hearing. The denial of procedural fairness was material in the sense of a "substantial wrong or miscarriage", as required by r 51.53(1) of the Uniform Civil Procedure Rules 2005 (NSW), because he was denied the possibility of a successful outcome.

The facts and course of proceedings

7 Ms McLaren died of cancer on 12 December 2013, aged 83 years. One week earlier, on 5 December 2013, she had made the 2013 Will, naming the respondent as executrix and leaving the whole of her estate to the respondent. The 2013 Will purports to be witnessed by two people, Ms Rachel Parseghian and Mr Chen Yuanun.

8 In an earlier will of the deceased, dated 12 August 2004 ("the 2004 Will"), she had made bequests to the Animal Welfare League NSW, including money and land, reflecting what the trial judge described as her strong, lifelong interest in the welfare of animals. In the same will, she had bequeathed to the appellant shares of her jewellery and personal possessions.

The caveat proceedings

9 On 23 January and 5 February 2014, two caveats were filed against the grant of probate in the estate of the deceased without notice to the caveator[1]. The first of those caveats was filed by the appellant, claiming an interest based upon his rights under one or more prior wills. The second was filed by the Animal Welfare League, claiming an interest as a beneficiary under the 2004 Will.

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1 Supreme Court Rules 1970 (NSW), Pt 78 r 66.

10 On 14 February 2014, the respondent filed the caveat motion[2]. The appellant and the Animal Welfare League were both joined as respondents to that motion.

11 The appellant and the respondent filed affidavits relating to the caveat motion. In one affidavit, the appellant said that he had visited the deceased on 5 December 2013, which is the date of the 2013 Will. He said that she was not alert but sleepy, and that she barely spoke. In other affidavits, the appellant doubted the veracity of the deceased's signature and stated that the address of one of the witnesses, Mr Yuanun, appeared to be a vacant building site. The appellant also annexed an affidavit of Mr Daniel Lemesle, who described himself as a close friend of the deceased who had known her for approximately 60 years. The 2013 Will has the words "Daniel Le" and the suburb in which Mr Lemesle lived below the space for a witness's signature, but those words are crossed out.

12 In Mr Lemesle's annexed affidavit, he deposed to conversations with the deceased where she had told him of her love for animals and her intention to leave the bulk of her estate to the Animal Welfare League. He described visiting her frequently in hospital after she was admitted in October 2013 and every day after she was readmitted in November. He described the deterioration of her condition during November, including her distress, pain, inability to eat or drink, and, at times, lack of comprehension and inability to maintain a conversation. He said that he received a Christmas card in December dated 30 November 2013, purporting to be from the deceased, when, to his knowledge, she was unable to sign her name. Mr Lemesle also described the events of the day that the 2013 Will was signed, although he said that the date was Monday, 9 December 2013. He said that when he arrived at the hospital room, a man who introduced himself as the deceased's solicitor asked him to leave the room. He left for about an hour. When he returned, and was told by the respondent that he had been sought as a witness to the will of the deceased, he expressed doubt that the deceased could sign a will in her present state, given that her condition had worsened from two weeks prior, when she could not sign the Christmas card.

13 The respondent filed an affidavit sworn by the solicitor who had prepared the 2013 Will on 5 December 2013 and read it to the deceased. The solicitor said that he knew the deceased well by the time of her death. He said that she rang him in early December 2013 and asked him to attend upon her in hospital. He said that, when he arrived, she appeared alert and interested, and she said that the

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2 Supreme Court Rules 1970 (NSW), Pt 78 r 71.

respondent was the only person who cared about her. He said that she understood that she had left everything to the respondent, and the 2013 Will was signed by the deceased in the presence of two witnesses.

14 On 15 September 2014, after the appellant's first caveat had lapsed by the effluxion of its six month duration[3], the appellant filed a new caveat against the grant of probate without notice to him.

The claim for probate

15 On 11 February 2014, shortly before filing the caveat motion, the respondent had filed a summons for probate of the 2013 Will. In contrast with the caveat motion, neither the appellant, nor the Animal Welfare League, was joined to the summons. The respondent's summons was to obtain a grant of probate, in chambers, in the absence of the parties.

16 As submissions at the trial revealed, the respondent's motivation for filing the caveat motion three days later was based upon her assumption that the appellant had no interest in challenging the 2013 Will. The respondent apparently assumed that success on the motion would be an efficient way to dispose of any dispute by the appellant because she apparently thought that the appellant would be shown to have no interest in challenging the grant of probate of the 2013 Will.

17 The respondent apparently took a different view of the interest of the Animal Welfare League. On 15 May 2014, the respondent filed a statement of claim seeking an order that she be granted probate of the 2013 Will. The Animal Welfare League was joined as a defendant. It filed a defence and a cross-claim. The respondent filed an affidavit from Ms Parseghian, a witness to the 2013 Will, who deposed that her mother had been in the same hospital ward as the deceased, and that she had spoken to the deceased, heard her speak, and did not consider the deceased to be mentally incapacitated.

18 The appellant was not joined to the statement of claim. Although the appellant was served with the statement of claim and filed an appearance on 27 June 2014, he was not directed to take any steps in the proceedings.

19 On 24 November 2014, Deputy Registrars made programming orders in the matter. The Animal Welfare League was given until 6 March 2015 to file

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3 Supreme Court Rules 1970 (NSW), Pt 78 r 69.

and serve further affidavit evidence. The respondent was given until 1 April 2015 to file and serve any evidence in reply. The trial was listed for 20 and 21 May 2015.

20 The respondent and the Animal Welfare League reached a compromise. On 10 February 2015, consent orders were filed dismissing the Animal Welfare League's defence and cross-claim and ordering that the respondent pay the costs of the Animal Welfare League, fixed at $35,000. The appellant, who was not a party, was not named in the consent orders, nor was his signature sought on the minute.

21 Although the respondent did not join the appellant to the proceedings, on 14 January 2015 the appellant was served with notice of the proceedings and a copy of the statement of claim, purportedly under Pt 78 r 42 of the Supreme Court Rules 1970 (NSW). It is difficult to see how that rule applied. The rule is concerned with persons whose interest may be affected by the Court's decision concerning an "informal testamentary document". Notice under the rule allowed the appellant to file an appearance[4] but, by Pt 78 r 44(4), it only permitted him to take part in the proceedings as a defendant in relation to the "informal testamentary document" and any other part of the proceedings as the Court directed. No informal testamentary document was in issue and no direction was made. Nevertheless, the appellant filed another appearance in response to the notice on 28 January 2015.

22 On 30 March 2015, the probate claim came before Hallen J for directions. The appellant was still not a named defendant. Hallen J told the appellant that the statement of claim had been served upon him and that the appellant had had 28 days to file a defence. If, as they purported to be, the notice and statement of claim were served on the appellant under Pt 78 r 42, the appellant's defence would have been limited to that based upon any interest he had under an informal testamentary document. In any event, no directions were made for the appellant to file any evidence or take any other steps.

23 On 20 April 2015, the statement of claim came before Hallen J again for directions. Since the directions hearing on 30 March 2015, the appellant had obtained legal representation and sought to inspect the deceased's premises for one or more undisclosed, buried wills. Due to various disputes about the inspection, it never occurred, and the appellant's legal representative withdrew

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4 Supreme Court Rules 1970 (NSW), Pt 78 r 43.

after obtaining leave to do so at a further directions hearing on 23 April 2015. At these directions hearings, the appellant had still not been joined as a party to the statement of claim. Hallen J considered an application by the respondent for summary judgment against the appellant, but said that the application was a waste of time because the appellant had not been named as a defendant in the statement of claim. Hallen J raised two alternatives with the parties: (i) leave the issue of whether the caveats should cease to be in force for the trial on 20 and 21 May 2015; or (ii) dismiss the caveat motion and have the trial proceed on the claim for probate. The second alternative would require granting leave to the respondent to amend the statement of claim to add the appellant as a party, and making orders for a defence and evidence from the appellant.

24 Presented with these options, senior counsel for the respondent urged Hallen J not to adopt the second alternative. He submitted that the most expeditious course would be to amend the caveat motion to address both of the appellant's caveats and to have the trial on 20 and 21 May 2015 proceed "on that issue". The likely assumption by senior counsel was that this course would be most efficient because, if the appellant were found to have an insufficient interest to support the caveats, the caveat motion would be allowed and a hearing on the statement of claim could occur without the appellant being joined as a party. Senior counsel for the respondent confirmed that all of the evidence upon which he intended to rely for the caveat motion had been filed. He accepted that if the caveats remained in force, or if there were a basis for the matter to proceed by way of pleadings, then the respondent would have to file an amended statement of claim. Hallen J accepted the submission by senior counsel for the respondent. He ordered that the caveat motion be amended by 24 April 2015 and that the trial on 20 and 21 May 2015 be limited to determination of whether the caveats should remain in force. He carefully explained to the appellant that the hearing would be limited to that issue.

25 On 14 May 2015, less than a week before the 20 May 2015 trial date, a directions hearing was held by the trial judge, Slattery J, who had not presided over the previous directions hearings. At that directions hearing, for the first time, senior counsel for the respondent pointed out that the two caveats that had been filed by the appellant had expired by effluxion of time. The second caveat had expired on 15 March 2015. Slattery J said to senior counsel for the respondent:

> "The only thing I just want to understand is what the nature of the hearing is going to be ... I think we do need to work out now what both sides are going to be expecting to happen and whether there has been any

misunderstanding about that. I have to say I am inclined to, in effect, let it all happen as though it were a kind of final hearing."

26 Senior counsel for the respondent twice urged the judge in favour of the course of having the trial as a final probate hearing. Senior counsel did not mention that, on 23 April 2015, he had strongly urged Hallen J against that course. He did not mention that the appellant had only filed evidence in opposition to the caveat motion and had not been directed to take any other steps to trial other than to file a defence based only upon any interest in an informal testamentary document. He submitted, but the appellant denied, that Monday, 18 May 2015, one clear business day away, would be "plenty of time" for the appellant to file a defence.

27 The trial judge accepted those submissions and also ordered the appellant to file any further evidence by the same date, 18 May 2015. At the very conclusion of the hearing, senior counsel for the respondent identified as a "housekeeping" matter that the appellant had not been joined as a defendant. The respondent was then directed to amend the statement of claim to join the appellant as a defendant.

The trial and the trial judge's decision

28 The respondent continued to be represented at trial by senior and junior counsel. The appellant continued to be unrepresented. At the commencement of the trial, the respondent amended her statement of claim, for the first time adding the appellant as a defendant and seeking costs against the appellant.

29 The appellant's conduct of the proceedings was not orderly. The trial judge described the appellant's hastily prepared defence as "almost incomprehensible". During the trial, the appellant asked for adjournments to call witnesses, to read documents, and to call expert evidence. No adjournments were granted. The evidence in the appellant's case was given by him and his wife. The evidence in the respondent's case was given by the respondent, Ms Parseghian, and the solicitor for the deceased who had prepared the 2013 Will.

30 The trial judge proceeded on the basis that the appellant had put in issue by credible evidence, placing the onus upon the respondent[5]: (i) questions of execution; (ii) questions of capacity; and (iii) questions of testamentary intention,

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5 *Timbury v Coffee* (1941) 66 CLR 277 at 283; [1941] HCA 22.

knowledge, and approval. The trial judge concluded that each of those was satisfied. Orders were made granting the respondent probate in solemn form of the 2013 Will and ordering the appellant to pay the respondent's costs.

31 As to the caveat motion, this was mentioned only in the closing submissions by senior counsel for the respondent. After observing that the caveats had expired, senior counsel said that his only submission about the motion was that the appellant had no interest that could support the caveats because the 2004 Will had not been proved. However, as the trial judge pointed out during oral argument, the respondent had admitted the 2004 Will. The trial judge held that the appellant had an interest under the 2004 Will, which gave him standing to challenge the 2013 Will.

The Court of Appeal decision

32 The appellant's primary ground of appeal alleged that he had been denied procedural fairness. He had numerous sub-grounds in support of this. The sub-grounds included the following: the appellant's inability to call Mr Lemesle as a witness or to rely on Mr Lemesle's affidavit; the trial judge's failure to allow him an opportunity to cross-examine Ms Parseghian; the trial judge's failure to allow him the opportunity to call expert evidence, including his failure to allow the appellant time to issue subpoenas, with respect to the deceased's eyesight; and the trial judge's failure to give him an opportunity to be heard in relation to objections to his affidavit evidence. As Simpson JA correctly said in the Court of Appeal, apart from the last mentioned sub-ground, all of the specific complaints arose out of the last minute change to the issue to be decided at the trial on 20 and 21 May 2015.

33 By majority (Ward JA and Emmett AJA), the Court of Appeal dismissed the appeal. Ward JA held that procedural fairness had been denied but, notwithstanding her disquiet (shared with Emmett AJA) about the way that the proceedings had been conducted, she concluded that the denial of procedural fairness did not deprive the appellant of the possibility of a successful outcome[6]. Emmett AJA held that the appellant appeared to have no interest in the validity of the 2013 Will[7]. In dissent, Simpson JA would have allowed the appeal,

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6 *Nobarani v Mariconte (No 2)* [2017] NSWCA 124 at [2]-[4].

7 *Nobarani v Mariconte (No 2)* [2017] NSWCA 124 at [124].

concluding that the appellant had been denied procedural fairness and that the denial was a substantial miscarriage of justice[8].

The appeal to this Court

34 In this Court, the appellant alleged that the Court of Appeal erred in not ordering a retrial. He submitted that Ward JA erred in determining that the denial of procedural fairness could not have made a difference to the result, and that Emmett AJA erred in determining that the appellant had no interest in the estate sufficient to challenge the validity of the 2013 Will.

35 By notice of contention, the respondent argued that the Court of Appeal erred in concluding that there was a denial of procedural fairness in any respect and, if there was a denial of procedural fairness, the Court of Appeal's decision should nonetheless be affirmed on the basis that there was no substantial miscarriage of justice by reason of any such denial. It is convenient for the purposes of these reasons to deal concurrently with the issues raised by the appeal and the notice of contention.

When a new trial should be ordered

36 Section 101(1)(a) of the *Supreme Court Act* 1970 (NSW) provides the circumstances in which an appeal can be brought, including, as in this case, an appeal by way of rehearing[9] from a judgment of the Equity Division. Section 75A(10) provides that the powers of the Court on appeal include that the "Court may make ... any order ... which the nature of the case requires". That discretion includes an order for a new trial.

37 Section 101(1)(a) is subject to the Uniform Civil Procedure Rules. Rule 51.53(1) provides that:

> "The Court must not order a new trial on any of the following grounds:
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> (a) misdirection, non-direction or other error of law,
>
> (b) improper admission or rejection of evidence,

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8 *Nobarani v Mariconte (No 2)* [2017] NSWCA 124 at [55].

9 *Supreme Court Act* 1970 (NSW), s 75A(5).

(c) that the verdict of the jury below was not taken on a question that the trial judge was not asked to leave to the jury,

(d) on any other ground,

unless it appears to the Court that some substantial wrong or miscarriage has been thereby occasioned."

38 The catch-all, "on any other ground", includes circumstances of a denial of procedural fairness. Those circumstances were not encompassed by the equivalent South Australian rule[10] that was in force at the time of this Court's decision in *Stead v State Government Insurance Commission*[11]. Nevertheless, the common law applied in that case, and the earlier case of *Balenzuela v De Gail*[12], contains an equivalent requirement to a "substantial wrong or miscarriage" before the power to order a new trial would arise. That requirement, reflected also in the usual requirement before an error will be considered to be jurisdictional and certiorari will lie[13], is that the error must usually be material in the sense that it must deprive the party of the possibility of a successful outcome. As this Court said in *Stead*[14]:

> "All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result."

39 In summary, a power under s 75A(10) to order a new trial arises where a denial of procedural fairness causes some substantial wrong or miscarriage. The denial of procedural fairness will cause a substantial wrong if it deprived the affected person of the possibility of a successful outcome. Unless the other party

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10 Supreme Court Rules 1947 (SA), O 58 r 26.

11 (1986) 161 CLR 141; [1986] HCA 54.

12 (1959) 101 CLR 226; [1959] HCA 1.

13 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 at [29]-[31], [42], [66]-[72].

14 (1986) 161 CLR 141 at 147.

can show some reason for the exercise of discretion not to order a new trial, the power will be exercised to order a new trial. One reason that might sometimes be sufficient, and upon which the respondent relied, is where no useful result could ensue because a properly conducted trial will not make a difference.

The appellant was entitled to a new trial

40 In oral submissions in this Court, senior counsel for the appellant accepted that the denial of procedural fairness was effectively encapsulated in the consequences of the failure to adjourn the proceedings. Contrary to the submissions of senior counsel for the respondent, this does not mean that the ground of appeal was concerned with a discretionary decision of the trial judge to refuse an adjournment[15]. Rather, the denial of procedural fairness arose from the consequences, and effect on the appellant, of altering the hearing, at short notice, from a hearing of the caveat motion to a trial of the statement of claim. The appellant's adjournment applications were attempts to ameliorate those consequences.

41 The trial judge gave two reasons for refusing the appellant's adjournment applications. First, he said that the matter had been set down for hearing for some time and that the appellant had been warned on 14 May 2015 that he needed to have all his evidence ready for the trial on 20 and 21 May 2015. The trial judge reiterated that the appellant had "plenty of opportunity" to prepare when explaining why he had refused an adjournment to allow the appellant to call expert evidence. Secondly, the trial judge said that the vagueness with which the appellant presented many of the procedural issues, and the disorder of the appellant's case, gave the Court no confidence that an adjournment would lead to his case becoming any more precise.

42 The trial judge was correct that the appellant had been told the previous week, on 14 May 2015, to have all his evidence ready for the trial, and that the proceedings needed to be managed in a just, quick, and cheap manner. Speed and frugality are often closely associated. But they must be consistent with justice. The trial judge erred in his statement that the appellant had had sufficient time to prepare because the matter had, for some time, been set down for trial. The trial judge did not appreciate, and was not informed, that the dates that had been set down were only to be used for the hearing of the caveat motion and that no directions had been made for the taking of any steps, or filing or service of

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15 See *Sali v SPC Ltd* (1993) 67 ALJR 841; 116 ALR 625; [1993] HCA 47.

any documents by the appellant, save for the misconceived indication on 30 March 2015 for a defence, which, under Pt 78 r 42, would have related to an informal testamentary document.

43 As Simpson JA correctly observed in the Court of Appeal, it is apparent that the appellant had little appreciation of the appropriate court procedure or rules of evidence and his command of English was not strong. In these circumstances, it is unsurprising that the appellant's case was vague and disordered when he had only three clear business days to: (i) consider the statement of claim in a proceeding to which he had not been joined; (ii) prepare and serve a defence; (iii) issue any subpoenas, with an abbreviated return date before trial; (iv) locate any supplementary witnesses and obtain supplementary evidence from those upon whom he wished to rely; and (v) secure those witnesses for trial.

44 The substantially abbreviated timetable to trial had consequential effects during the trial. First, Ms Parseghian was not called to give oral evidence because, in the short time between 14 May 2015 and the trial, the appellant did not give notice to the respondent that Ms Parseghian was required for cross-examination. This meant that the appellant could not cross-examine a significant witness as to the deceased's mental and physical condition. That inability to cross-examine was compounded by the inability to locate the other witness to the 2013 Will, Mr Yuanun, whose address appeared to be a vacant building site. Secondly, the trial judge refused to take account of Mr Lemesle's affidavit because, although that affidavit was annexed to the appellant's defence filed in opposition to the caveat motion, the affidavit was not read and the witness was not subpoenaed or brought before the Court. Thirdly, when, over objection from senior counsel for the respondent, the appellant was given access to the solicitor's diary from 5 and 10 December 2013, the trial judge gave the appellant only "about one minute to decide what you are going to do next", and an application to have the diary considered by an expert was refused. Each of these matters, by itself, may not have constituted a material denial of procedural fairness amounting to a substantial wrong or miscarriage. But all of the matters, in combination and together with the considerably abbreviated time for preparation, were manifestations of the material denial of procedural fairness to the appellant.

45 The respondent submitted that the appellant had known for a long time that a hearing on the caveat motion would be held and, although unbeknownst to him the caveats had lapsed, he had had months to prepare for this caveat hearing. The difficulty with this submission is that far less preparation is required for a caveat hearing than is required for the ultimate trial. If, as all the parties had assumed until the 14 May 2015 directions hearing, the appellant's second caveat

had not expired, then all the appellant needed to show was, in broad terms, that he had an interest to support the caveat and that he had a prima facie case of a ground of invalidity upon which he relied[16]. It was reasonable for the appellant to proceed towards the caveat hearing without completing all of the preparation that would be required for trial, on an assumption of success in the caveat motion. Indeed, at the trial itself, the respondent's submission that the caveat motion should be upheld was confined to the claim that the appellant had no interest in the 2013 Will sufficient to support the caveat.

46 The case presented by the respondent, with the evidence of the deceased's solicitor at its heart, was strong. But a grant of probate in solemn form was not inevitable. The denial of procedural fairness to the appellant amounted to a "substantial wrong or miscarriage" in the sense that the appellant was denied the possibility of a successful outcome.

47 This conclusion is not based upon reasoning that a litigant in person is entitled to be relieved from rules that would apply to a party who is represented. In this case, no legal representative would reasonably have been refused an adjournment if presented with only three clear business days to prepare for a trial of proceedings to which their client had not yet been joined and in which their client had not been the subject of pre-trial orders for preparing and filing a defence, preparing and filing evidence, issuing subpoenas, and locating and confirming availability of witnesses. As Samuels JA said[17] in a passage that has been relied upon on many occasions[18]:

> "the absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement ... An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a

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16 *Azzopardi v Smart* (1992) 27 NSWLR 232 at 238.

17 *Rajski v Scitec Corporation Pty Ltd* unreported, New South Wales Court of Appeal, 16 June 1986 at 27.

18 See, eg, *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438 at 446 [28]; *Platcher v Joseph* [2004] FCAFC 68 at [104]; *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [104].

litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent."

48 Senior counsel for the respondent made detailed oral submissions in this Court, almost relitigating the entire case, partly in support of a submission that the Court should exercise the discretion in s 75A(10) of the *Supreme Court Act* not to order a new trial despite a material denial of procedural fairness. He submitted that this was because a properly conducted trial could not make a difference to the result. It will be rare that such a submission succeeds. In this case, the submission cannot be accepted because it suffers from an erroneous basic assumption. That assumption is that this Court should attempt such an assessment by, in effect, conducting a hypothetical trial including the following: (i) making suppositions about the extent to which the evidence of Mr Lemesle might be made admissible; (ii) assessing the likely evidence of Mr Lemesle in light of the evidence of the solicitor for the deceased; (iii) drawing inferences, based upon limited evidence, about other witnesses, including expert witnesses, that the appellant had indicated he might call; and (iv) speculating about the lines of cross-examination that the appellant might pursue, based upon his grounds of challenge to the 2013 Will.

49 Finally, the respondent submitted that the appeal should be dismissed on the basis that, as Emmett AJA concluded in the Court of Appeal, the appellant had no interest in challenging the validity of the 2013 Will. That submission should not be accepted. A person will have a sufficient interest if he or she has a right "which will be affected by the grant"[19]. The trial judge held, correctly, that the appellant had an interest in challenging the 2013 Will as a legatee under the 2004 Will. No submission was made at trial or on appeal, and no point taken on the notice of contention filed in this Court, to suggest that the 2004 Will or the appellant's interest in it were invalid. The respondent's submission that a bequest to the appellant of a share of personal property and jewellery was too insubstantial to amount to an interest must also be rejected. That submission was based upon the factually erroneous assertion – founded only upon the lack of reference to jewellery in the deceased's inventory of property – that the bequest had no value. It is also legally erroneous to conclude that rights of low monetary value cannot amount to a legal interest.

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19 *In re Devoy; FitzGerald and Pender v FitzGerald* [1943] St R Qd 137 at 145.

Conclusion

50 The appeal should be allowed. Orders should be made as follows:

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 5 June 2017 and, in their place, order that:

   (a) the appeal to the Court of Appeal of the Supreme Court of New South Wales be allowed;

   (b) the orders of the Supreme Court of New South Wales made on 22 May 2015 (Slattery J) and 28 May 2015 (Senior Deputy Registrar Studdert) be set aside and, in their place, order that the plaintiff pay the second defendant's costs of the trial;

   (c) the proceedings be remitted to the Equity Division of the Supreme Court of New South Wales for a new trial; and

   (d) the respondent pay the appellant's costs.

3. The respondent pay the appellant's costs of the appeal to this Court.

4. The respondent have liberty to apply within 14 days for an order that the costs referred to in orders 2(b), 2(d) and 3 be paid out of the estate of the deceased and on a trustee basis.