SUPREME COURT
OF QUEENSLAND

STEP Queensland Branch – Annual Conference 2013
Peppers Salt Resort & Spa, Kingscliff
Thursday 5 September 2013, 9:05am
Plenary address

The Hon Paul de Jersey AC
Chief Justice

When I became Chief Justice in 1998, I decided to break with a by then reasonably well-established tradition and sit at first instance, as well as on appeal. I will not today elaborate the reasons for that – they are I suppose fairly self-evident anyway, but following this course exposed the Chief Justice's judgments to appeal, and suffice it to say the rule of law has undoubtedly and healthily prevailed.

I have over the years spoken and written about some of my more interesting cases, and not, I hasten to say, confining myself to those judgments upheld on appeal.

I have written about what was probably my most graphic reversal, *Bridgewater v Leahy*, though I plead that on the High Court Justices Gleeson CJ and Callinan J agreed with me; and then there is my most substantial success, *R v Keenan*, where the High Court unanimously rejected the intermediate views of the Court of Appeal.

At this conference, I have tended to mention estate cases in which I have recently been engaged, and today's, *Johnson v Herrod* (2012) QSC 98, is a case where the reasoning of my judgment was substantially, though not fully, vindicated on appeal ((2012) QCA 360).

I talk about this case today because, obviously, I feel it may interest you. It was certainly the most demanding and challenging and interesting civil case I determined in the year 2012.

Like many if not most of the cases you daily deal with, this one exemplified the dramatic destruction of family relationships among siblings following the death of a parent whose forceful personality had hitherto assured the integrity and security of the broad family unit.

The judgments, at trial and on appeal, canvas a plethora of difficulty issues: breach of fiduciary duty by administrators who engaged in self-dealing and conflicted transactions; misleading the plaintiff beneficiaries by failing properly to account for their administration; and unlawfully profiting personally through misuse of the estate and trust property.

I found most of those alleged abuses did occur, and I allowed equitable compensation, I declined to order indemnity costs, which was itself a difficult decision, though agreed in by the Count of Appeal. That issue may itself be worthy of some study, though the issue of equitable compensation predominated.

The Court of Appeal disagreed with me on the quantum of damages. In computing the compensation, I had allowed compound interest on the amounts unlawfully denied the plaintiffs, at eight percent. Notwithstanding that rate was not actively disputed before me – here the trial judge 'goes again'!, the Court of Appeal, for what I accept was of course good reason, pegged that rate back to five percent, which substantially reduced the amount of the judgment in favour of each of the daughter plaintiffs, from approximately $433,000, to approximately $273,000.

By his will, this testator gave each of his daughters, the plaintiffs, a one-ninth share in his residual estate. He appointed one of his two sons, and the other daughter, as his executors. The major estate asset was the testator's share in a pastoral partnership. There was an issue about the consequence of its dissolution. That aside, after the death, the male co-partners, the sons and brothers, by various means, extracted from their sisters, effectively a surrender of their interest in the estate by a misrepresentation that it was worth, in each case, no more than $50,000. The sons went on to arrogate the partnership estate to themselves, and develop and ultimately sell it for large reward.

The litigation was factually and legally complicated. It was emotionally charged in the usual way in such situations, but additionally here, because the parties followed the tenets

of the Jehovah's Witness faith, and there was a strong submission that the dominant brothers had exploited their sisters by exerting their religious sway.
It was not necessary for me to determine the case by reference to that, for their breach of duty, as executors and fiduciaries, was otherwise patent.

The case is probably most notable as a precedent for the consideration of relief.

Was compensation in equity justified? Yes, because of the defendants' defaults – receiving and dealing with trust property for their own financial benefit and to the financial detriment of the daughters, and failing properly to account to the daughters, whether as executors or trustees.

What use would the daughters have made of the funds due to them, but unpaid? I found, for these by nature frugal people, the best profitable use.

This was therefore a rare, but prime, candidate for a reward of compound interest. The Court of Appeal judgment contains a lot of useful analysis of that.

As to costs, it is tempting to see a case of grievous dereliction, as this one was, as ipso facto a candidate for indemnity costs.

But how the court resolves the issue of costs relates primarily to the unsuccessful party's conduct of the litigation. These defendants' pre-action conduct was, I thought, in many respects reprehensible, but their conduct of the proceedings not so specially "left-field" as to warrant indemnity costs.

I commend the Court of Appeal's analysis of this case, per my colleague Justice Muir, as worthy of attention.

Many of the cases which engage you throw up the panoply of colourful issues which attend these domestic melt-downs. This particular, very recent case, reminds us of those issues, and provides access to the considered, comprehensive, refined analysis of Justice Muir, with the agreement of his colleagues.

As I have said, that has been my most interesting and challenging civil case of the last year or so. Probably a Judge should not "grade" cases. But anyone reading the judgments would, I suspect, readily agree.

This case was out of the ordinary. And while of course not factually enduring, the legal principle established on appeal will usefully inform, as years go on: first, other judgments; and second, the advice given in solicitors' offices and barristers' chambers.

In opening the Conference, I applaud both the intellectual commitment of STEP practitioners, a refined and pivotally important legal realm; and, their collegiality! Thank you …