SUPREME COURT OF QUEENSLAND

CITATION:	*Affoo & Anor v Public Trustee of Queensland* [2011] QSC 309
PARTIES:	**WILLIAM FREDERICK AFFOO AND RHONDA ANN AFFOO** (applicants) v **PUBLIC TRUSTEE OF QUEENSLAND as the Legal Personal Representative of the Estate of Irene Joan Blair, deceased** (respondent)
FILE NO/S:	BS 11376 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	24 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2011
JUDGE:	Dalton J
ORDER:	**Application for Family Provision dismissed.**
CATCHWORDS:	Contracts – voidable for want of capacity – construction of condition precedent – contract immediately binding as to some obligations notwithstanding effect of s 59 *Public Trustee Act* 1978 – implied promise to make reasonable efforts to bring about fulfilment of condition precedent – implied term that condition precedent to be fulfilled within a reasonable time Family provision application – does not abate on death – need for Court Order to finalise proceeding – significance of agreement between parties as to orders – effect of death of applicant after agreement as to orders – distinction between Court making final orders in family provision application and sanction pursuant to s 59 *Public Trustee Act* 1978 Sanction pursuant to s 59 *Public Trustee Act* 1978 – test to be applied on application – material relied upon by applicants *Public Trustee Act* 1978 (Qld) s 59 *Succession Act* 1981 (Qld)

Bailey v Warren [2006] EWCA Civ 51
Bartlett v Coomber [2008] NSWCA 100
Bourke v Bourke (No. 2) (1994) 18 Fam LR 1
Brennan v ECO Composting Ltd and Anor [2006] EWHC 3153 (QB)
Dietz v Lennig Chemicals Ltd [1969] 1 AC 170
Drinkall v Whitwood [2003] EWCA Civ 1547
Fisher v Marin [2007] NSWSC 1411
Gibbons v Wright (1954) 91 CLR 423
Groser v Equity Trustees Ltd (2008) 19 VR 598
King v Condon [2009] 2 Qd R 143
Kirk v Kirk [2002] QSC 310
Lieberman v Morris (1944) 69 CLR 69
McKenzie v Lucas [2010] NSWSC 1083
Mitchell v Osborne, unreported decision Supreme Court of New South Wales Equity Division, Young J, 20 May 1997, BC 9702446
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537
Read v Nicholls [2004] VSC 66
Reid v Moreland Timber Co Pty Ltd (1946) 73 CLR 1
Re Hatte [1943] St. R. Qd. 1
Re Shannon (1935) 35 SR (NSW) 516
Re Wardle (1979) 22 SASR 139
Smallman v Smallman [1972] Fam. 25
Smith v Butler [1900] 1 QB 694
Smith v Smith (1986) 161 CLR 217
Sprott v Harper [2000] QCA 391
Total Gas Marketing Ltd v Arco British Ltd and Ors [1998] 2 Ll Rep 209
Underwood v Underwood [2009] QSC 107

COUNSEL: NJ Thompson for the applicants
RT Whiteford for the Public Trustee

SOLICITORS: Parker Family Law for the applicants
Official Solicitor to the Public Trustee for the Public Trustee

[1] **DALTON J:** Mr Edward Blair was born in 1915. He married in 1937 and had five children before divorcing in 1954. In 1971 he married again, his second wife was Irene Blair. They had no children. Irene Blair died in 2003. By her will she left $9,000 to her husband and other small bequests. The bulk of her estate was left to charity. The Public Trustee is executor of Irene Blair's will.

[2] In December 2003 Mr Blair commenced this proceeding for family provision pursuant to the *Succession Act* 1981 (Qld) against his wife's estate. The proceeding went to mediation on 17 November 2004 and an agreement was made in the following terms:

> "Subject to the Guardianship and Administration Tribunal declaring that the applicant has capacity and is able to understand the nature

and effect of this compromise and is able to instruct a solicitor with regard thereto, or alternatively the sanction of the Supreme Court of Queensland, the applicant's claim is settled on the following terms:-

1. That the Public Trustee of Queensland ('the Public Trustee') as the administrator of the estate of Irene Joanne Blair, holds the estate on trust for Edward Blair for life and to invest the same for his benefit with remainder to the residuary beneficiaries named in clause 9 of the Will of Irene Joanne Blair made on 12 April 2001.

2. That the Public Trustee as such administrator is authorised by the residuary beneficiaries to pay such amount as may be necessary for an accommodation bond to a nursing home, retirement village or equivalent residence for Edward Blair from estate funds.

3. Any monies refunded to the Public Trustee on the death of Edward Blair as a result of the said accommodation bond will form part of the residue of the estate.

4. If the declaration of capacity is not made then his present solicitors will refer the case to the Adult Guardian with a view to having a litigation guardian appointed to represent the said Edward Blair for the purpose of the sanction application and otherwise.

5. That the sum of $9,000.00 being the legacy contained in clause 7.01 of the Will of Irene Joanne Blair be paid to trust account of the applicant's solicitors to be held pending the fulfilment of these terms.

6. The costs of all parties including any costs incurred by or on behalf of the applicant in fulfilling any of these terms be assessed on an indemnity basis and paid out of the estate."

[3] On 29 November 2004 a geriatrician examined Edward Blair and reported:

"He was not able to remember going to the mediation meeting nor when it was, vaguely saying it was a few weeks ago. He could not remember who else was in attendance at the meeting and he could not remember what the terms of settlement were. He was not able to give me any specifics about what was agreed upon, nor how his wife's estate was going to support him until he died … He has … such poor understanding and memory of the events, that his capacity to adequately comprehend the terms of the settlement and discussions held at the time, would have to be doubted.

On examination, on this occasion, his MMSE was 26/30 which is no different from my previous assessment, again with a very severe short-term memory deficit. Medically, he fulfils the criteria of mild cognitive impairment, not dementia at this stage, but in all probability, would not have, at this level, sufficient executive functioning to understand the complex legal matters, which have transpired ...

> It is therefore my opinion that Mr Blair does not have sufficient capacity to fully understand the terms of the settlement …"

[4] Mr Blair died in November 2008. No application had been made to the Guardianship and Administration Tribunal and no sanction had been sought from the Supreme Court.

[5] Mr Blair's will appointed his friends and neighbours, Mr and Mrs Affoo, as his executors and left the bulk of his estate to them. Mr Blair's family provision claim did not abate on his death.[1] In February 2011 Mr and Mrs Affoo were substituted as applicants in this proceeding. In March 2011 the Public Trustee made application to determine whether or not the agreement reached at mediation had been frustrated by the death of Mr Blair and if not:

> "3. … a determination whether, in the events which have occurred, the applicants are entitled to enforce the said terms of settlement.
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> 4. If 'yes' in answer to paragraph 3, a determination whether:
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> (a) upon its proper construction, and in the events which have occurred, the terms of settlement are conditional upon the court's sanction;
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> (b) the court should sanction the terms of the settlement."

[6] In March 2011 declarations were made that the terms of settlement were not frustrated by the death of Mr Blair and that the applicants were entitled to enforce the terms of settlement. It was agreed between the parties on this application that the second declaration was to be read as meaning that the Affoos, as substituted applicants in the family provision application, were entitled to prosecute rights under the agreement reached at mediation. The remaining questions, those at paragraph 4 of the application, came before me on a separate hearing.

Construction of the Agreement reached at Mediation

Capacity to Contract

[7] The effect of the geriatrician's report is that Mr Blair did not have capacity to make the agreement reached at mediation. This was accepted by both parties before me. The result is that the agreement reached at mediation was voidable at Mr Blair's instance, upon his showing that the other parties to the agreement were aware of his disability.[2] Mr Blair never acted to avoid the agreement. Mr and Mrs Affoo ratified it by their stance in this application, if not before.

Condition Precedent

[8] The introductory words of the agreement are in my view a contingent condition precedent to the operation of the primary obligations contained in the agreement. Until there is either a declaration of capacity or a sanction by the Supreme Court, neither party is bound to render performance of the primary obligations contained in the agreement.[3]

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1 *King v Condon* [2009] 2 Qd R 143.

2 *Gibbons v Wright* (1954) 91 CLR 423.

3 See the discussion in Treitel, *Law of Contract* 10th ed, pp 58-59.

[9] Depending upon the construction of any given agreement, the existence of a condition precedent may mean there is no agreement at all, or may mean that there is an agreement, the operation of which is suspended until the occurrence of the relevant event. Here, my view is that there was an agreement made between the parties, the operation of which was suspended until doubts over Mr Blair's capacity were resolved one way or the other. The parties to the agreement were obviously concerned about the legal capacity of Mr Blair at the time of the mediation, and the introductory words of the agreement show that the parties had struck a bargain which was to be honoured whether or not he had capacity. The words provide for performance of the agreement, either upon the Tribunal declaring that Mr Blair had capacity, or if he did not, subject to the sanction of the Supreme Court. The case of *Smallman v Smallman*[4] is apposite:

> "If the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it … Pending the application to the court, it remains a binding agreement which neither party can disavow."

Dietz v Lennig Chemicals Ltd

[10] However, there is case law to the effect, that an agreement cannot be construed as I have construed this one, when legislation to protect the rights of incapacitated persons declares a settlement invalid unless sanctioned. In *Dietz v Lennig Chemicals Ltd*[5] proceedings concerned settlement of a claim made by a widow and infant arising from the death of a worker after an explosion at the defendant's plant. A settlement was reached, subject to the approval of the Court. Approval was sought, and given. However, before the order was perfected, the widow remarried. The defendant refused to honour the settlement and the House of Lords held it was entitled to refuse to do so. The rules of court[6] provided that where money was claimed on behalf of a person under a disability, no settlement was valid without the approval of the Court. The House of Lords held:

> "… 'not valid' means having no legal effect. The settlement … was only a proposed settlement until the court approved it. Either party could lawfully have repudiated it at any time before the court approved it."[7]

[11] *Dietz* has been followed in England in *Drinkall v Whitwood*;[8] *Brennan v ECO Composting Ltd and Anor*,[9] and *Bailey v Warren.*[10] *Dietz* does not appear to have been followed on this point in Australia. It was considered in *Fisher v Marin*[11] but distinguished on the basis of differently worded court rules.

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4 [1972] Fam. 25, 31; *Sprott v Harper* [2000] QCA 391; *Bourke v Bourke* (No. 2) (1994) 18 Fam LR 1. *Smallman* was followed in a family provision matter – *Mitchell v Osborne*, unreported decision Supreme Court of New South Wales Equity Division, Young J, 20 May 1997, BC 9702446 at 6.

5 [1969] 1 AC 170.

6 Which had the force of statute.

7 p 190 per Pearson LJ.

8 [2003] EWCA Civ 1547.

9 [2006] EWHC 3153 (QB).

10 [2006] EWCA Civ 51.

11 [2007] NSWSC 1411.

[12] In Queensland s 59(1) of the *Public Trustee Act* 1978 provides:

> "In any cause or matter in any court in which money or damages is or are claimed by or on behalf of a person under a legal disability … no settlement … shall, as regards the claim of such person under a legal disability, be valid without the sanction of a court or the public trustee …"

[13] Rule 98(1) of the *UCPR* provides:

> "A settlement or compromise of a proceeding in which a party is a person under a legal incapacity is ineffective unless it is approved by the court or the public trustee acting under the *Public Trustee Act 1978*, section 59."

[14] The rule in *Dietz* has unfortunate consequences. In *Drinkall* (above), having settled a motor accident claim involving a plaintiff who sustained brain damage in the accident, a defendant repudiated the settlement agreement with a view to contending for a higher degree of contributory negligence. The Court had not sanctioned the compromise. The primary judge in the matter said, "In effect, what the defendant is seeking to do is to use the protection given to minors to resile from an agreement which was reached between the claimant, through her litigation friend and the defendant." The primary judge held the settlement agreement was binding but was reversed on appeal. The Court of Appeal followed *Dietz* with express regret. Unusually, the Court added footnotes as to the difficulties and inconveniences caused by the *Dietz* decision. In the case of *Brennan v ECO Composting* (above), the conclusion was reached, following *Dietz*, that there could be no valid acceptance of a payment into Court until Court sanction. The result was that interest on monies paid into Court went to the defendant rather than the plaintiff.

[15] It is in the interests of certainty that parties who have agreed on terms, albeit subject to a condition precedent, have some measure of certainty when the contract, properly construed, contemplates that they are immediately bound. Mason J said this in *Perri v Coolangatta Investments Pty Ltd*:[12]

> "Generally speaking the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the conclusion that the stipulation is a condition precedent to the formation or existence of a contract. In most cases it is artificial to say, in the face of the details settled upon by the parties, that there is sno binding contract unless the event in question happens. Instead, it is appropriate in conformity with the mutual intention of the parties to say that there is a binding contract which makes the stipulated events a condition precedent to the duty of one party, or perhaps of both parties, to perform."

Dietz Not Followed

[16] For all the above reasons, I am not inclined to adopt the approach taken in *Dietz* if an alternative approach, consistent with principle, can be found. In my opinion it can. Treitle says of contracts containing conditions precedent, "A distinction must be drawn between two types of obligation: the principle obligation of each party

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12 (1982) 149 CLR 537, 552.

(e.g. to buy and sell) and a subsidiary obligation, i.e. one not to withdraw, not to prevent occurrence of the condition, or to make reasonable efforts to bring it about."[13] This distinction is evident in *Perri v Coolangatta Investments.* In that case the condition was, "This contract is entered into subject to Purchasers completing a sale of their property No 9 Korokan Road, Lilli Pilli." Gibbs CJ described the effect of the condition as making, "the completion of the sale of the property at Lilli Pilli a condition precedent to the performance of certain of the obligations of the parties under the contract, including the obligation of the respondent to complete the sale." Other conditions came into effect immediately upon signing the contract. There was an implied promise by the vendors to do all that was reasonable to find a buyer for the Lilli Pilli property.[14] That obligation came into force on the signing of the contract. The main obligations as to completion and conveyance did not come into force on the making of the contract, but upon the fulfilment of the condition precedent. Mason J said this of the distinction between preliminary and primary obligations under an agreement subject to a condition precedent:

> "There is an obvious difference between the condition which is precedent to the formation or existence of a contract and the condition which is precedent to the obligation of a party to perform his part of the contract … In the first category the transaction creates no rights enforceable by the parties unless and until the condition is fulfilled. In the second category there is a binding contract which creates rights capable of enforcement, although the obligations of a party, or perhaps of both parties, to perform depends on fulfilment of the condition and non-fulfilment entitles him to terminate.
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> Conditions precedent within the first category may produce different consequences. In most cases, but perhaps not in all, a party may be able to withdraw from the transaction before fulfilment of the condition. But in each class of case, the transaction creates no enforceable rights in respect of the subject matter of the transaction unless the condition is fulfilled because, until the occurrence of that event, there can be no binding contract."[15] (my underlining)

[17] The agreement reached in mediation in this matter can be construed as having a contractual effect, short of settlement of the claim, which bound the parties in respect of preliminary obligations, but created no valid or effective obligations to settle without the sanction of the Supreme Court, if that proved necessary. It must be remembered that at the time the agreement was made, it was not known whether or not Mr Blair had capacity. Had the matter been investigated, and had he proved capable, s 59 of the *Public Trustee Act* 1978 would not have applied. In my view, the agreement was valid and effective to compel Mr Blair to take the necessary steps to clarify whether or not he had legal capacity, and if not, to seek a sanction from the Court. If sanction proved necessary, the agreement obliged the other parties to co-operate in obtaining that sanction. The other parties to the agreement were obliged not to withdraw from the agreement before the occurrence of one of the two events precedent to performance. To the extent that it created those preliminary obligations, the agreement reached at mediation was not a settlement

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13 Above, p 59.

14 Gibbs CJ p 541; Mason J p 553; Wilson J p 559, and Brennan J p 566.

15 Above, pp 551-552.

declared to be invalid or ineffective by s 59 of the *Public Trustee Act* 1978 or r 98(1) of the UCPR.

Time for Occurrence of Events Precedent to Performance of Primary Obligations

[18] Often a contract will specify a time by which the event precedent to performance must occur. Alternatively, by the nature of the condition precedent, or from other terms of the contract, a date can be fixed after which the contract is discharged if the event has not occurred. The conveyancing contract in *Smith v Butler*[16] is an example. Land was purchased under a contract subject to a condition precedent. The sale contract fixed a date for completion. It was held that the purchaser was bound to wait until the date fixed for completion had passed before he was discharged from further performance in the event that the condition precedent was not fulfilled.

[19] In other cases the contract will not provide such a date. *Perri v Coolangatta Investments* concerned such a contract. There was neither a time fixed for the occurrence of the event precedent to performance, or for completion. The High Court implied a term that the sale of the property at Lilli Pilli was to take place within a reasonable time. Gibbs CJ referred to *Reid v Moreland Timber Co Pty Ltd*: "An implication of a reasonable time where none is expressly limited is, in general, to be made unless there are indications to the contrary."[17] What is a reasonable time in any particular case is a question of fact and will depend upon the circumstances against which the parties contracted.

[20] Under a contract which contains a condition precedent and which creates an obligation that neither party can withdraw until the event occurs, the parties are not bound to wait indefinitely to see whether the event occurs. A term will be implied as to a reasonable time. In *Total Gas Marketing Ltd v Arco British Ltd and Ors*[18] Lord Slynn said this:

> "I agree with Mr Pollock that it is important to keep promissory and contingent conditions separate but in my opinion there is a common factor. If the provision in an agreement is of fundamental importance then the result either of a failure to perform it (if it is promissory) or of the event not happening or the act not being done (if it is a contingent condition or a condition precedent or a condition subsequent) *may* be that the contract either never comes into being or terminates. That may be so, whether the parties expressly say so or not. *Wickman Machine Tool Sales Ltd v L Schuler AG* [1973] 2 Lloyd's Rep 53 at p 65, col 2; [1974] AC 235 at p 262G per Lord Wilberforce. To adapt the words of Mr Justice Maugham in *In re Sandwell Park Colliery Co* [1929] 1 Ch 277 at p 282 'the very existence of the mutual obligations is dependent on the performance of the condition.' For completeness I would substitute 'performance or fulfilment of the condition' for 'performance of the condition.'
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> I do not, therefore, accept Mr Pollock's argument that the effect of the failure of an event upon which further performance depends can

16 [1900] 1 QB 694.
17 (1946) 73 CLR 1, 13.
18 [1998] 2 Ll Rep 209, 215.

> only lead to the suspension of the party's obligation under the contract. In my opinion it depends on the proper construction of the contract as to whether on the non-happening of the event the parties' obligations are suspended or whether the contract ceases to bind."

[21] In that case, Lord Slynn found that the condition precedent was fundamental to the parties' bargain. It was the entry of Arco into an allocation agreement without which gas could not flow to the delivery terminal where Arco was obliged, under the principal terms of the contract, to supply gas to Total. The House of Lords determined that there was an implied condition that the condition precedent must be fulfilled before the first date fixed for delivery of gas pursuant to the primary obligations under the contract.

[22] In this matter the alternative conditions precedent were for the benefit of both parties. Without one or the other being satisfied, the respondent could not receive a good discharge for the consideration it provided under the agreement, nor could Mr Blair be certain that the respondent would not withdraw from the agreement before performing it. When the substantive provisions of the agreement are considered, it can be seen that the purpose of the agreement was to provide for Mr Blair adequately during his lifetime. He received a life interest in the estate. The executor was able to pay an accommodation bond to a nursing home for him should he need it. However, after his death any bond monies refunded would form part of the residue of his late wife's estate.

[23] There was no time limited by the agreement for the occurrence of either the declaration of capacity or the sanction. In my view there were implied terms that Mr Blair would prosecute either an application to the Tribunal or the Supreme Court within a reasonable time and that if either a declaration or a sanction was not obtained within a reasonable time, the agreement was at an end. Neither event occurred within the lifetime of Mr Blair. Whatever arguments might be mounted in favour of an earlier time, it seems to me that it must have been implied in the agreement that one or other of the events was to occur within Mr Blair's lifetime – the whole purpose of the agreement was to assist him financially during his lifetime. I find that, on the death of Mr Blair, the agreement made at mediation was discharged and neither party continued to be bound by it. Whether the Public Trustee had a right to sue for the breach of the implied promise by Mr Blair to use reasonable efforts to obtain either a declaration or a sanction is an academic question in this case.

Final Orders in a Family Provision Application

[24] The final disposition of a family provision application calls for the exercise of the Court's discretion, it cannot be achieved by agreement or deed.[19] The rule has its origins in the policy that a person cannot by contract exclude the jurisdiction of the Court to make a family provision order.[20] When parties to a family provision application make an agreement as to the final orders they believe ought to be made in the proceeding, a court will have regard to that agreement as a factor, usually a

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19 *Lieberman v Morris* (1944) 69 CLR 69; *Smith v Smith* (1986) 161 CLR 217, 235 and 249; *Bartlett v Coomber* [2008] NSWCA 100 [84]; *McKenzie v Lucas* [2010] NSWSC 1083. If paragraph 7.18 of *Family Provision in Australia*, de Groot and Nickel (3rd ed) is to the contrary it is wrong, cf paragraph 8.7 of the same edition.

20 *Re Hatte* [1943] St. R. Qd. 1, 13-14.

significant factor, in deciding what order to make in the exercise of its discretion.[21] Accordingly, whatever the terms of the agreement reached at mediation in this case, it could not dispose of the family provision application made by Mr Blair; an order of this Court was required to do that.

[25] There is a question of construction as to whether the introductory words to the mediation agreement, "subject to the … sanction of the Supreme Court of Queensland …" referred to the need for a sanction in the event that Mr Blair did not have capacity (i.e. a sanction pursuant to s 59 of the *Public Trustee Act* 1978), or referred to the need for a court order to put an end to the family provision application. In my view, the former construction is correct, as indeed both parties submitted. The word "sanction" is the word used in s 59 of the *Public Trustee Act* 1978. The text, *Family Provision in Australia*[22] says of an application for final orders in a family provision application where there has been an agreement of the parties as to terms, "in effect, the court is being asked to sanction the agreement reached by the parties." As discussed above, this is not strictly an accurate description of the Court's function on such an application and, in my view the use of the word "sanction" is apt to confuse in a jurisdiction where consideration of the interests of infants and incapacitated persons is not infrequent. The same criticism can be made of the use of the word in paragraph 4 of the application in this case, see above. The Public Trustee drew the application but it is apparent from its submissions in the matter that it wants determined the question of whether the Court should make final orders in accordance with the agreement reached at mediation, not a sanction pursuant to s 59 of the *Public Trustee Act* 1978.

[26] As discussed above, the parties in this case, having doubts as to Mr Blair's capacity, were determined to ensure that, so far as they were able, the agreement they had reached would be honoured, whether or not Mr Blair had capacity. That is, reading the introductory words to the agreement all together, they provide what is to happen if Mr Blair has capacity (declaration), and what is to happen if he has not (sanction). They are concerned with Mr Blair's capacity, not the exercise of discretion by this Court in disposing of the proceeding. The provision at numbered clause 4 of the agreement tends to support this construction.[23] I find that the agreement reached at mediation referred to a sanction pursuant to s 59 of the *Public Trustee Act* 1978 in its introductory words.

[27] Counsel for Mr and Mrs Affoo submitted that, as a result of this construction, the only question before me was the question which must be asked pursuant to s 59 of the *Public Trustee Act* 1978*:* whether the agreement reached at mediation was one which was in Mr Blair's best interests or whether it would be in the interests of Mr Blair to reject the offer and continue the family provision proceeding in the hope of receiving a larger benefit.[24]

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21 *Bartlett v Coomber,* above, [57]-[58], [72], [90]-[91]. This case helpfully discusses the type of inquiry which a court will make when a "consent order" is brought before it on a family provision application.

22 de Groot and Nickel (above), 8.7.

23 Numbered clause 4 of the agreement appears something which is inappropriately included in the document. It contains a promise by someone who is not a party to the agreement. In my view, it is properly to be regarded as a statement of intention forming the background to the agreement which has been included in the document erroneously, no doubt due to the fact that such agreements are often drafted quickly in an impromptu setting at the end of a successful mediation.

24 Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, [11.4.3]; *Bartlett v Coomber* (above) [25]; *Kirk v Kirk* [2002] QSC 310.

[28] The approach taken by the Public Trustee on this application is that, like the agreement reached in *Bartlett v Coomber*, the agreement reached at the mediation was subject to the sanction of the Court pursuant to s 59 because of Mr Blair's disability, but also that the Court needed to consider whether or not to make an order finally disposing of the family provision application in terms of the agreement reached at mediation. In view of my discussion of the law, above, that position is plainly correct.

Sanction Pursuant to s 59 *Public Trustee Act* 1978

[29] Because of my finding that the agreement reached at mediation is discharged, I refuse to sanction it as a settlement pursuant to s 59 of the *Public Trustee Act* 1978. Additionally, counsel for Mr and Mrs Affoo did not put before the Court the material required by r 98(2) of the UCPR, nor was an opinion of counsel provided on the application – cf Practice Direction 9 of 2007,[25] so that I would have refused a sanction in any event.

Disposition of the Family Provision Application

[30] Consideration of an application for final orders in a family provision application, where the applicant has died before an order is made, must begin with *Re Shannon*:[26]

> "… The claimant having died before any order could be made, it is obvious that no provision could be properly made for her future maintenance, education or advancement; nor do I think that in a case where the claimant has died after having in fact maintained himself or herself without running into debt, even though on a scale less generous than he or she was entitled to require or expect, the Court ought to make an order after the claimant's death which would merely have the effect of swelling the estate which would pass under the claimant's will, or to his or her next-of-kin if intestate, and of benefiting persons who are not within the scope of the Act. In the present case, however, the evidence establishes that the widow died indebted in respect of board and residence to the extent of £23.8s.9d; and … I think that an order should be made to that extent, notwithstanding that indirectly her legatee may be benefited to that extent."

[31] This decision was followed in *Re Wardle;*[27] *Read v Nicholls*,[28] and in *Groser v Equity Trustees Ltd*.[29] The principles were accepted by Jones J in *Underwood v Underwood*.[30] The most recent case to consider whether or not orders should be made in a family provision application in terms of an agreement to settle after one of the interested parties had died, is *McKenzie v Lucas*.[31] There Bryson AJ

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25 Although that practice direction deals with proceedings for personal injuries, it is a good guide for any sanction application.
26 (1935) 35 SR (NSW) 516.
27 (1979) 22 SASR 139.
28 [2004] VSC 66.
29 (2008) 19 VR 593.
30 [2009] QSC 107 [27].
31 [2010] NSWSC 1083.

described the death of the interested party as "a radical alteration in the relevant circumstances" and refused to make an order in terms of the agreement.

[32] The evidence here establishes that after his wife's death Mr Blair maintained himself without running into debt. He did sell some assets to enable this to happen. However, he also gave away substantial assets. There was no evidence of debts incurred because Mr Blair did not have access to the benefit he was to receive under the agreement made at mediation. The case falls squarely within the principle first enunciated in *Re Shannon*, and followed in the subsequent cases mentioned above. Accordingly, it is not appropriate for this Court to make orders disposing of this proceeding in terms of the agreement reached at mediation. I dismiss the proceeding.