SUPREME COURT OF QUEENSLAND

CITATION:	*Chapman v Wilson & Ors* [2013] QCA 235
PARTIES:	**MARGARET CHAPMAN by her litigation guardian CHRISTOPHER JOHN RAWSON-HARRIS** (appellant) **v** **WILLIAM RODERICK SELWYN WILSON & WAYNE RODERICK LYONS** (first respondents) **MICHAEL WILLIAM FRASER & SIMON MARTIN FRASER & ALEXANDER DUNCAN FRASER & DOUGLAS ROSS FRASER** (second respondents)
FILE NO/S:	Appeal No 12367 of 2012 SC No 2789 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2013
JUDGES:	Holmes and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Leave granted to the parties to make written submissions with respect to costs of the appeal within seven days of the publication of these reasons.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS CREATED BY WILL – OTHER MATTERS – where the deceased created a trust under a will – where the appellant was life tenant and was entitled to 'income and profits' under the trust – where the balance of the trust was to be transferred to the remaindermen on the death of the life tenant – whether the phrase 'income and profits' includes realised and unrealised capital gains *Clark v Inglis* [2010] NSWCA 144, distinguished *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (In liq)* (2005) 225 CLR 488, [2005] HCA 70, cited

Evans v Deputy Federal Commissioner of Taxation (SA) (1936) 55 CLR 80, [1936] HCA 2, cited
Federal Commissioner of Taxation v Slater Holdings Ltd (1984) 156 CLR 447, [1984] HCA 78, cited
Read v The Commonwealth (1988) 167 CLR 57, [1988] HCA 26, cited
Re Spanish Prospecting Co Ltd [1911] 1 Ch 92, cited
Wood v Inglis [2009] NSWSC 601, distinguished

COUNSEL: G A Thompson with A Fraser for the appellant
D B Fraser with R Whiteford for the first respondents
G R Dickson for the second respondents

SOLICITORS: de Groots Wills and Estate Lawyers for the appellant
Wilson Lawyers for the first respondents
McCullough Robertson for the second respondents

[1] **HOLMES JA:** I agree with the reasons of Gotterson JA and the orders he proposes.

[2] **GOTTERSON JA:** By a notice of appeal filed on 21 December 2012, the appellant, Margaret Chapman, who has also been known as Margaret Harris, by her litigation guardian, Christopher John Rawson-Harris, has appealed against orders made by the Supreme Court of Queensland on 10 December 2012. Those orders concerned the construction of a provision in the will of Marion Dorothea Jane Fraser ("the testatrix") made on 7 January 1959. The orders were made in proceedings commenced by an originating application filed on 26 March 2012.

The Will and the parties

[3] The testatrix died on 9 July 1963. Probate of her will was granted on 29 October 1965 to the executors named therein. The testatrix and her husband, Douglas Martin Fraser, had three children:

(a) William Martin Fraser;
(b) Anne Dorothea Clarke; and
(c) Margaret Chapman.

[4] By clause 2 of her will, the testatrix appointed her son, William Martin Fraser, and her son-in-law, Alexander Howard Burnett Clarke, to be the executors and trustees of her will. She made bequests of shares in family proprietary companies, furniture, household effects and jewellery by clauses 3, 4 and 5 thereof.

[5] Clause 6 of the will disposed of the residuary estate by way of gift to the trustees to divide the same into three equal parts for the following purposes:

"(a) PROVIDED my son the said WILLIAM MARTIN FRASER shall survive me for the space of three calendar months then but not otherwise to pay transfer and hand over to him one such equal part or portion for his sole use and benefit absolutely

(b) PROVIDED my daughter ANNE DOROTHEA CLARKE shall survive me for the space of three calendar months then but not otherwise to pay transfer and hand over to her one such equal part or portion for her sole use and benefit absolutely

> (c) TO HOLD the remaining equal part or portion either in its present form or in any form of investment that they in their absolute discretion may think fit (including in the investment in shares in any mining company) UPON TRUST for my daughter MARGARET HARRIS and to PAY TRANSFER AND HAND OVER the income and profits derived therefrom to her until she shall become a bankrupt or shall do or suffer any act or thing whereby the said income and profits or her interest therein or any part thereof would or might but for this provision become charged encumbered or become vested in any other person or persons or a corporation and I direct that my Trustees shall during the residue of the life of the said MARGARET HARRIS pay transfer and hand over the income and profits derived therefrom to my son WILLIAM MARTIN FRASER but so that my trustees shall not be responsible for paying the said income and profits derived therefrom to the said MARGARET HARRIS after the happening of any such act or thing as aforesaid unless and until they have received express notice thereof and as from her death as well as in the case of her having predeceased me TO PAY TRANSFER AND HAND OVER such equal part or portion UNTO and TO my son the said WILLIAM MARTIN FRASER for his sole use and benefit absolutely PROVIDED HOWEVER that should he have pre-deceased my said daughter then TO PAY TRANSFER AND HAND OVER the same UNTO and TO such one or more of his children as shall survive him and if more than one in equal shares as tenants in common for their sole use and benefit absolutely."

[6] Thus, of the three parts into which the residue was divided, one went to William Martin Fraser absolutely, another to Dorothea Clarke absolutely, and the third constituted the trust property of the trust constituted by clause 6(c) of the will ("the trust") in which the appellant has a life interest. This litigation has concerned the meaning of certain words used in clause 6(c).

[7] The originating application was made by William Roderick Selwyn Wilson and Wayne Roderick Lyons. Since 19 February 2009, when they were so appointed, they have been the sole trustees of the trust. They are also the first respondents to the appeal. Clause 6(c) provides for a gift over on the death of the appellant to the son, William Martin Fraser, or in the event that he should have predeceased her, to his children. William Martin Fraser predeceased the appellant, having died on 1 December 1997.

[8] The appellant was the first respondent to the originating application. The second respondents to it were Michael William Fraser, Simon Martin Fraser, Alexander Duncan Fraser and Douglas Ross Fraser. They are the sons of the first marriage of William Martin Fraser. They are also the second respondents to the appeal.

[9] There was a third respondent to the originating application. He is Robert Martin Fraser who is a son of William Martin Fraser. His mother became William Martin Fraser's second wife some six and a half years after his birth. It is sufficient to note

that the originating application put in issue whether he was a child of William Martin Fraser for the purposes of the gift over in clause 6(c) of the will. The learned primary judge determined this issue in the affirmative. There is no challenge to that determination. Robert Martin Fraser is not named separately as a respondent to the appeal. On the hearing of the appeal, the court was informed that he was aware of the hearing but did not wish to be heard at it.

The background to the disputed issue on appeal

[10] The other matter put in issue by the originating application concerned the proper construction of the words "income and profits" in clause 6(c). The correct meaning of these words is of singular importance to the administration of the trust because they describe and define that which the trustees are to "pay transfer and hand over" to the appellant.

[11] The originating application sought by paragraph 1 thereof, a declaration as to whether those words mean:

> "(a) the net income of the trust established thereby; alternatively
> (b) the net income of and the net realised capital gain made by that trust; alternatively
> (c) some other and what amounts."

[12] Mr William Wilson, who is a solicitor, swore an affidavit on behalf of both trustees in support of the application. This affidavit explains the circumstances in which the need for judicial determination of the issue arose.

[13] He states that the current trustees have been unable to ascertain the assets which comprised the third part of the residue and which became the trust property of the trust when it was first established.[1] The available records indicate that from 1981 at least, the trust property consisted of cash investments, shares and debentures. As shares were sold or debentures matured (or were sold), the proceeds were reinvested by the trustees from time to time in shares. As a consequence, the only payments made to the appellant from that time appear to have been dividends and interest.[2]

[14] Mr Wilson also states[3] that on 28 January 2003 instructions were given to the then trustees of the trust with respect to investment management of, and payments from, the trust. The instructions were given by a letter which was signed by Alexander Duncan Fraser who signed on behalf of all sons of the first marriage. The letter also purports to have been signed by the appellant. At the hearing of the appeal the court was informed that the status of the letter is controversial so far as the appellant is concerned. I refer to its contents solely for the purpose of recording how the litigation arose and not for the purpose of construing the will.

[15] The instructions, the first paragraph of which reveal why they were given, were in the following terms:

> "Following a review of the tax returns of the Estate for the financial years ended 30 June 1995 to 2001, it is our view (which is supported by legal opinion) that the accounting and taxation treatment of certain items, particularly capital gains, is inconsistent with the Will of MDJ Fraser ("Will").

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1 AB18 ff Affidavit W R S Wilson sworn 23 March 2012 paragraph 7.
2 *Ibid* paragraph 8.
3 *Ibid* paragraph 9.

Accordingly, for the 30 June 2002 and succeeding financial years, you are hereby instructed as follows:

(a) The Estate is not to become an active share trader such that it can be successfully argued either for the purposes of the Will or so far as is possible the Australian Taxation Office, that capital gains are treated as income or profits; "

(b) *Income and profits*, attributable to Mrs Margaret Chapmans' life tenancy, means:

(i) dividends including franking credits from the share portfolio;
(ii) interest from cash investments;
(iii) any dividends reinvested including any shares, dividends or taxation arising out of that reinvestment;
(iv) rights issues and resultant capital gains or dividends less tax thereon where income is used to acquire those rights issues; and
(v) less the trustees' expenses of administering the fund, including engaging accountants to prepare Estate tax returns;"

(c) *Income and profits* does not include:

- Capital gains less the tax thereon except those gains arising out of dividend reinvestment; and
- Rights/issues and other investments acquired from capital sources.

(Would you please note-that the above "definitions" deal with the common items of income and expense. Accordingly, they may not be exhaustive)

In addition:

- the various beneficial interests in the Estate hereby confirm that any former treatment of income, capital gains or expenses for the 30 June 2001 and prior financial years which is inconsistent with the aforementioned principles is accepted on the basis previously presented; and
- would you please confirm your acceptance of these instructions in the space below and return a copy to both Mrs Margaret Chapman and Mr Alex Fraser in due course."[4]

[16] According to Mr Wilson, the trust records indicate that from the fiscal year ended 30 June 2003 and thereafter, the trust has been administered in conformity with these instructions.[5]

[17] In February 2011, the appellant disputed a significant aspect of the administration of the trust concerning payments made to her. Solicitors acting for her wrote to the trustees stating *inter alia*:

> "We are instructed that, from the date of death and throughout the administration of the trust fund, our client has received income only from the trust fund.

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4 *Ibid* Exhibit WW-7 (AB45).
5 *Ibid* paragraph 10.

> Our client requires you, in your capacity as trustees, to properly account to her for her entitlements under the will, which entitlements also include profits derived from the trust fund. Our client considers the simplest and most cost effective way for you to do this is to credit her loan account with an amount equal to the current value of the trust fund less the value of the 1/3 share of the residue of the estate as at the date of death ("the original corpus of the trust fund").
>
> On our client's death, the original corpus of the trust fund will pass to the remainder beneficiaries, being the children of the late William Martin Fraser."[6]

[18] The complaint made on behalf of the appellant was amplified in a subsequent letter as follows:

> "Our client considers that all the capital and income of the trust, over and above the initial capital sum, represents the income and profits derived from that initial capital sum and is due and payable to her. Please account to our client accordingly."[7]

[19] The trustees did not accept that the appellant's entitlement is as her solicitors had claimed. A disputed issue thereby arose as to what constitutes the income and profits to which the appellant has an entitlement to be paid under her life interest.

The determination of the disputed issue at first instance

[20] The objective of the trustees in filing the original application was, by paragraph 1 thereof, to have the court determine this disputed issue. The submissions before the primary judge centred upon whether or not the appellant is to receive unrealised capital gains which have generated within the trust. In this context, the expression "unrealised capital gain" means an increase in the value of a component of property of the trust above its acquisition cost which has not been realised as a gain because there has not been any disposal of that property component by the trust.

[21] His Honour expressed the following conclusions with respect to the disputed issue:[8]

> "[48] The inclusion of the words 'and profit' after the word 'income' shows an intention on the part of the testatrix for the first respondent to receive more than just income. I am satisfied that the testatrix intended that the first respondent receive realised capital gain made by the trust. The income and realised capital gains payable to the first respondent should be net of the costs associated with accounting for the income and realisation of the gains respectively.
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> [49] The phrase 'income and profits' does not extend to unrealised capital gains. As Byrne SJA observed in *Graham v Trust Company Australia*[9], to extend the meaning of 'profits' to include unrealised captain gain 'would involve consequences so inconvenient that a construction of the will producing them should not be adopted unless compelled by

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6 *Ibid* Exhibit WW-8 (AB46-47).
7 *Ibid* Exhibit WW-9 (AB48).
8 Reasons [48]-[50].
9 Unreported, Supreme Court of Queensland No 13356 of 2008, 5 March 2009.

> clear words.' There are no such clear words here. Any unrealised capital gain, provided it remains in this form, should be preserved for the residuary beneficiaries.
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> [50] It is therefore appropriate to declare that upon the proper construction of clause 6(c) of the will of Marion Dorothea Jane Fraser, deceased, dated 7 January 1959 the words 'income and profits' mean the net income of, and the net realised capital gain made by, the assets of the trust established thereby."

The orders of the court made on 10 December 2012 contained, in paragraph 1 thereof, a declaration in terms of that foreshadowed in paragraph 50 of the reasons.

The appeal and the ground of appeal

[22] The appellant challenges the construction for which this declaration was made. The sole ground of appeal is that the primary judge erred in holding that the words "income and profits" do not extend to unrealised capital gains. She seeks orders that the declaration be set aside and that there be substituted in lieu a declaration that these words mean "net income of, the net realised capital gain made by, and the unrealised capital gains of (the trust)".[10]

[23] In written submissions, the appellant accepted as uncontroversial that absent any provision in the trust instrument to the contrary, where there are successive classes of beneficiaries, such as a life tenant and remaindermen:

(a) a trustee is under a duty to act impartially as between those classes in the execution of the trust; and

(b) there is a general presumption that where the trust corpus is augmented, the augmentation accrues for the benefit of all beneficiaries and thus is to be treated as capital and not as income.[11]

[24] It is as uncontroversial, as the appellant also acknowledged, that a settlor may, by the terms of the trust instrument, displace the general presumption as to intention with respect to augmentation.[12] Whether the presumption has been displaced is, of course, a matter of construction of the trust instrument. The appellant's submissions, both written and oral, focused upon clause 6 of the will which, the appellant argued, demonstrates by its use of the words "income and profits derived therefrom" in paragraph (c) thereof and by the scheme of dispositions within it, that the testatrix intended that the appellant take all capital augmentations in the trust to the exclusion of the remaindermen. It is appropriate to consider each of these two aspects of the clause separately.

"**Income and profits derived therefrom**"

[25] The interpretation favoured by the primary judge gave a role to each of the expressions "income derived therefrom" and "profits derived therefrom"; the former to include income derived by way of dividends and interest, and the latter, realised capital profits. A realised capital profit was derived by the trustees when there was

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10 AB107.

11 Appellant's written submissions paragraph 8.

12 *Ibid* paragraph 9; Hayton et al, *Underhill and Hayton: Law relating to trusts and trustees*, 17th edit at paragraph 48.1.

a disposal of an item of trust property. The realised capital profit was the difference between the consideration received by the trustees upon disposal and the aggregate of the costs of acquisition of the property and the costs of disposal of it.[13]

[26] The appellant relies upon the expression "profit derived therefrom", for her contention that she is entitled to unrealised capital gains. In the course of oral submissions on her behalf the expressions "unrealised capital gains" and "unrealised capital profits" were used interchangeably.[14]

[27] In support of this contention, the appellant referred to a number of decisions beginning with the well known observations of Fletcher Moulton LJ in *In re The Spanish Prospecting Company, Limited*[15] where his Lordship observed:

> "The word "profits" has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. "Profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."[16]

[28] In *Federal Commissioner of Taxation v Slater Holdings Ltd*,[17] Gibbs CJ observed that the meaning given to profits by Fletcher Moulton LJ is a guide rather than a rule of universal application. His Honour's observation was cited with apparent approval by the High Court in *Commissioner of Taxation v Sun Alliance Investments Pty Ltd (In liq)*.[18]

[29] Turning to the notion of derivation, the appellant next referred to the decision in *Evans v Deputy Federal Commissioner of Taxation (SA)*.[19] Speaking of the extent of reach of s 16(b)(i)(1) of the *Income Tax Assessment Act* 1922 (Cth), Rich, Dixon and Evatt JJ said:

> "… (The section) brings into charge all dividends and distributions out of profit, whatever be the nature of the profit. The word 'derived' does not connote that the profit must be a realized profit. It is enough at least if it is an ascertained profit, ascertained by a proper account."[20]

[30] Combining these two themes, the appellant submitted that the concept of derived profit was apt to include all net gains revealed by a comparison of value of assets at the beginning and the end of a given interval of time, including gains that were not realised. In support for the submission, reference was also made to the decision of the High Court in *Sun Alliance*.

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13 Typically, brokerage including GST.
14 Tr1-3 LL35-41.
15 [1911] 1 Ch 92.
16 At 98.
17 (1984) 156 CLR 447 at 460.
18 [2005] HCA 70; (2005) 225 CLR 488 at [43].
19 (1936) 55 CLR 80.
20 At 101.

[31] That case concerned the meaning of s 160ZK(5) in Part IIIA of the *Income Tax Assessment Act* 1936 (Cth) which taxes capital gains. This section speaks of an amount paid by a distribution which "could reasonably be taken to be attributable to profits derived by" a company. In interpreting these words, the court held[21] that they required two tasks to be fulfilled: first, the ascertainment by a process of computation and comparison, of a gain made by the company; and, secondly, the making of a determination as to whether a distribution by that company may be attributed to the ascertained gain. The process required by the first task would allow for the inclusion of an unrealised capital gain without regard for its permanence.

[32] At this point, it is instructive to note that meanings that have been attributed to the concepts of profit and derivation of profit have varied with context. In *Sun Alliance*, the court[22] observed that "there is no universal legal meaning of the term 'profits' applicable in every circumstance for every purpose".

[33] That this is so may be illustrated by a comparison of the cases to which the appellant has referred with other circumstances. The appellant's cases all concern the concept of profit made by a business, usually one carried on by a company. However, the frame of reference in which a comparison of asset values at intervals is made may not be as readily appropriate for the circumstance where an individual engages in a single or several profit making transactions only, short of carrying on a business. For such an individual, the appropriate frame of reference would more likely be transaction-focused and involve ascertaining the profit derived on each transaction.

[34] Moreover, different legislative objectives and contexts have seen the attribution of different meanings to these concepts of profit and derivation of profit. In *Sun Alliance*, s 160ZK(5) had been enacted by amendment to prevent a mischief which the court identified[23] as "a situation in which the controlling shareholder in a company could claim a capital loss on disposing of its shares in that company, despite not having incurred an equivalent economic loss". Continuing, their Honours said[24] that "*prima facie* the concept of an economic loss does not respect the distinction between realised and unrealised gains and losses."

[35] By contrast, in *Read v The Commonwealth*,[25] the court was concerned with a definition of "income" of a person in s 18 of the *Social Security Act* 1947 (Cth) which included "profits earned, derived or received by that person". Mason CJ, Deane and Gaudron JJ observed[26] that the expression "capital gain" generally connotes "a realised capital gain". Their honours added:

> "In our opinion a mere increase in the value of an asset does not amount to a capital profit. A profit connotes an actual gain and not mere potential to achieve a gain. Until a gain is realized it is not "earned, derived or received". A capital gain is realized when an item of capital which has increased in value is ventured, either in whole or in part, in a transaction which returns that increase in value."

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21 Per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ at [67].
22 At [71].
23 At [54].
24 *Ibid*.
25 (1988) 167 CLR 57.
26 At 66-67.

[36] Together, these authorities which I have mentioned, demonstrate clearly that the meaning to be attributed to the concepts of profit and derivation of profit are highly influenced by the context in which they are used, albeit in a statutory or other legal instrument. Accepting that as the guiding principle, I now turn to the contextual setting in which the words in question are placed.

[37] The instructions to the trustees in clause 6(c) is to pay, transfer and hand over to the appellant the income and profits derived from the trust property. Significantly, that which is to be paid, transferred and handed over must be that which is capable of being paid, transferred and handed over. Thus, only derived income and profits which are capable of being paid, transferred and handed over to the appellant are the subject of the direction. Dividends and interest which have been received by the trustees are clearly capable of being paid, transferred and handed over by them to the appellant. Likewise, for realised capital gains. However, unrealised capital gains or profits stand in stark contrast. With them, there is no gain or profit in the hands of the trustees which they may pay, transfer or handover to the appellant. In my view, the very words of the direction to the trustees exclude unrealised capital gains or profits from its purview.

[38] Other considerations also support this construction. First, neither the express terms of the will itself nor the law with respect to the duties of trustees require the trustees here to undertake periodic valuations of trust property whether for the purpose of ascertaining gains or otherwise. It will be recalled that the concept of profit in a business context, as articulated by Fletcher Moulton LJ, is dependent upon such valuations and comparisons. The absence from the will of any provision requiring such valuations tells against the inclusion of unrealised capital gains or profits as "profit".

[39] Secondly, it is unlikely that the settlor intended that a monetary equivalent of unrealised capital gain or profit be paid, transferred or handed over to the appellant periodically from trust property. It may be expected that in order to carry out such a task, the trustees would have to dispose of some trust property, for example, shares. In all likelihood, that process itself would generate realised capital gains which themselves would fall to be paid, transferred and handed over to the appellant as such and separately. Such an exercise would have the potential for an exponentially expanding incursion into trust property.

[40] Faced with these difficulties, counsel for the appellant submitted during oral argument that the trustees' duty to pay, transfer and hand over unrealised capital gains or profits was not one to be discharged periodically during the life of the appellant, but upon her death. That submission has its own difficulties to which I shall refer later in these reasons.

[41] Finally, on this topic, I propose to refer briefly to two additional decisions on which the appellant relied. Each concerned an *inter vivos* discretionary trust established by a Dr Inglis.[27] During Dr Inglis' lifetime, the trustees had, on accountant's advice, valued the trust property periodically and credited ascertained gains including unrealised capital gains (or portions of them) to a beneficiary's loan account in his name. The litigation, which arose after his death, concerned the validity of that part of the indebtedness to him on the loan account as was attributable to unrealised

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[27] *Wood v Inglis* [2009] NSWSC 61 per Brereton J; on appeal, *sub nom Clark v Inglis* [2010] NSWCA 144.

capital gains. The question was whether they were income of the trust which was eligible to be credited to the loan account. The discretionary trust there is distinguishable from the trust here in crucial respects. Firstly, the trustees of the discretionary trust were given a binding discretion to determine whether any property or moneys held by them constituted capital or income. This discretion permitted them to determine that unrealised capital gains were income. Secondly, there was no direction which required income and its profits to be paid, transferred and handed over to any beneficiary. Thus, it was open to the trustees to apply income for the benefit of a beneficiary merely by crediting a beneficiary's loan account: actual payment, transfer and handing over of it to the beneficiary was not required. There are other significant differences in the words of the trusts and their respective administrations which it is unnecessary to detail. Those identified sufficiently illustrate why the decisions concerning that trust are of no assistance here.

Scheme of the will

[42] The appellant contends that the pattern of gifts under clause 6 of the will indicates that she is to receive unrealised capital gains, if not periodically during her lifetime, then at her death. The argument in support of the contention is that clause 6 both creates three equal parts or portions and indicates that the three children of the testatrix are to benefit equally from their respective parts or portions. The gift over to the remaindermen under the trust, it is said, is of no more than that which initially constituted the part or portion to which clause 6(c) refers. It follows, so it is argued, that all trust property other than the initial trust property is to go to the appellant or, more accurately to her estate. By this process of deductive reasoning, the appellant proposes that unrealised capital gains or profits at her death are to be paid to her or to her estate.

[43] It must be said at once that this argument was attended with some imprecision on the appellant's part. It was not clarified whether, in speaking of the part or portion at the time when the trust was created, the appellant meant to refer to the very property which initially constituted the trust property on its creation or to the then monetary value of the property. To propose either as the applicable point of reference would provoke justifiable sceptism. It will be recalled that under clause 6(c), the trustees are to hold the part or portion "either in its present form or in any form of investment that they in their absolute discretion may think fit". In other words, the will specifically contemplates that the property which initially constituted the trust property might not remain property of the trust. So far as equivalent monetary value is concerned, the absence of any provision for adjustment to accommodate for depreciation in the value of money over time tells against it as being the intended reference point.

[44] At the heart of the applicant's argument here is the proposition that the testatrix intended that her three children benefit equally. That clearly is not the case. Two of them, William and Anne, were to receive their one-third parts or portions absolutely upon surviving the testatrix by three months. The appellant was to receive a life interest only in the third part or portion, defeasible in the event of her bankruptcy or other nominated circumstances.

[45] Moreover, it is not legitimate to define the appellant's entitlement under clause 6(c) by the process of deductive reasoning she has proposed. What she is to receive is

defined by the words of the clause. They specify what it is that is to be paid transferred and handed over to her during her lifetime. They do not provide for some additional amount to be paid, transferred or handed over to her or to her estate upon her death.

Disposition

[46] For these reasons, I do not accept the appellant's arguments. I agree with the conclusions of the primary judge to which I have referred. I would dismiss the appeal.

[47] It need be said at this point, that evidently the trust has not been administered in accordance with the declaration made by the primary judge in so far as it relates to realised capital gains. Apparently they have not been paid, transferred and handed over to the appellant as they had been derived. No relief has been sought in respect of that conduct in these proceedings. During the course of argument, it was hinted on behalf of the appellant that the interpretation with respect to unrealised capital gains or profits for which she has contended, ought to be adopted by way of what might be called a "proxy method" for making up for gains that have not been paid, transferred and handed over to her in the past. Obviously, it would not be legitimate for a court to interpret the trust provisions in question here with a view to pursuing that objective.

[48] So far as costs are concerned, no appeal is brought against the costs order made by the primary judge. It is appropriate that the parties have leave to make written submissions with respect to the costs of the appeal within seven days of the publication of these reasons.

Orders

[49] I would propose the following orders;

1. Appeal dismissed.
2. Leave granted to the parties to make written submissions with respect to costs of the appeal within seven days of the publication of these reasons.

[50] **APPLEGARTH J:** I agree with the reasons of Gotterson JA for dismissing the appeal and with the orders proposed.