DISTRICT COURT OF QUEENSLAND

CITATION:	*Sweaney & Another v Bailie* [2017] QDC 295
PARTIES:	**JON EDGAR SWEANEY & JAN ELIZABETH SWEANEY** (applicants) **v** **MICHAEL TRAVIS BAILIE (as Executor of the Will of the deceased)** (respondent)
FILE NO.:	4900 of 2016
DIVISION:	Civil
PROCEEDING:	Application
DELIVERED ON:	8 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2017
JUDGE:	Rosengren DCJ

ORDER:

1. **Pursuant to s 41 of the *Succession Act* 1981 (Qld), further and better provision for the proper maintenance and support of the applicant, Jon Edgar Sweeney, be made out of the estate of Ronald Ross Sweaney, deceased (the "deceased") by the deceased's Will dated 4 January 2016 (the "Will") being read and construed as follows:**

   > **"3. I give the whole of my estate to my Trustee upon trust to pay my just debts. I give the whole of the residue of my estate to my son, Jon Edgar Sweaney."**

2. **The respondent's costs of and incidental to the proceeding be paid out of the estate on an indemnity basis and be capped at $45,000.**

3. **The applicants' costs of and incidental to the proceeding be paid out of the estate on an indemnity basis and be capped at $45,000.**

4. The parties have liberty to apply.

CATCHWORDS:

SUCCESSION – FAMILY PROVISION – REQUIREMENT FOR ADEQUATE AND PROPER MAINTENANCE – CLAIMS BY ADULT CHILDREN - where the applicant applied pursuant to s 41 *Succession Act* 1981 (Qld) for proper maintenance and support out of the deceased's estate – where the parties came to an agreement as to the applicant's claim for further and better provision of the deceased's estate – where an order of the court is required to finalise the proceedings - significance of agreement between the parties as to orders

SUCCESSION – FAMILY PROVISION ORDER - COSTS – HOW BURDEN OF COSTS OF THE PROCEEDINGS TO BE BORNE – where the estate is modest - whether costs should follow the event or some other order should be made - whether costs for both parties should be capped or fixed

Legislation
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 687, r 700A, r 703(3)
Succession Act 1981 (Qld), s 41

Cases
Singer v Berghouse (1994) 181 CLR, cited
Abrahams v Abrahams [2015] QCA 286, cited
Affoo v Public Trustee of Queensland [2011] QSC 309, cited
Watts v Public Trustee of Queensland [2010] QSC 410, cited
Manly v the Public Trustee of Queensland [2008] QCA 198, cited
Collett & Anor v Knox & Anor [2010] QSC 210, cited
Underwood & Anor v Sheppard [2010] QCA 76, cited
Jackson v Riley (Unreported, Supreme Court of New South Wales, Cohen J, 24 February 1989), cited
Gill v Smith [2007] NSWSC 832, cited
Underwood v Underwood [2009] QSC 107, cited
Jones v Jones [2012] QSC 342, cited
DW v RW (No 2) [2013] QDC 189, cited
Cerneaz v Cerneaz & Anor (No 2) [2015] QDC 73, cited

COUNSEL:

D Kelly for the applicants
W Brown for the respondent
H Blattman for the Attorney General

SOLICITORS:

Ehrich Monahan & Tisdall for the applicants
Hooper & Hooper for the respondent
Crown Law for the Attorney General

[1] By an originating application filed 14 December 2016, Jon Edgar Sweaney and Jan Elizabeth Sweaney applied for further and better provision out of the estate of Ronald Ross Sweaney (deceased), pursuant to s 41 of the *Succession Act* 1981 (Qld) ("the Act").

[2] Mr Sweaney is the son of the deceased and is 55 years of age. Ms Sweaney is the daughter of the deceased and is 57 years of age.

[3] The respondent is the executor of the estate of the deceased pursuant to the terms of the deceased's last will dated 4 January 2016. He had been a former neighbour and very good friend of the deceased.

[4] The deceased left his estate to be '*divided among any worthy charities*'. No provision was made for the applicants. In the six or so months between the making of this will and the deceased's passing, the deceased gave approximately $150,000 to various charities.

[5] The applicants and the respondent attended a mediation on 24 April 2017, and a compromise was reached. Terms of settlement were entered into to carry the compromise into effect. In essence, the agreement was that the applicants' receive the entire residue of the deceased's estate. Despite the Attorney General being the proper representative of the beneficial interests under the will, the mediation proceeded without the knowledge of or input of the Attorney General.

[6] Mr Sweaney's application and supporting affidavit material were served on the Attorney General. Written submissions were provided on behalf of the Attorney General. The principal submission was that while the Attorney General does not oppose the making of an order for family provision in favour of Mr Sweaney, that part of the estate ought still go to charity, in accordance with the deceased's intention. However, this position was not pressed at the hearing. Counsel for the Attorney General informed the Court that the Attorney General would not oppose an order that Mr Sweaney receive the whole of the residue of the estate.

[7] On 21 November 2017, the respondent executor filed a cross application seeking an order that the terms of settlement reached between the parties on 24 April 2017 be set aside, and that the matter be remitted to a mediation. Counsel for the respondent abandoned this application at the hearing and did not make any oral submission in relation to it. Counsel for the applicants conceded that only negligible costs had been incurred by the applicants in preparing to oppose this application.

[8] The applicants seeks a further order that the respondent's costs to be paid from the estate on an indemnity basis, be in a fixed amount.

[9] By email dated 24 November 2017, the parties were invited to provide written submissions by 6 December 2017, addressing whether the applicants' costs should also be fixed. Both parties have provided written submissions and I have considered these.

Relevant issues

[10] The relevant issues for determination are:
(i) whether adequate provision should be made for the proper maintenance and support of Mr Sweaney out of the estate of the deceased; and
(ii) whether the parties costs to be recovered from the estate should be fixed.

Adequate provision

[11] The deceased died on 24 July 2016. He is also survived by his ex-wife Marion Elsie Sweaney. They separated in 1989. Mrs Sweaney has sworn an affidavit dated 9 November 2017. She is aware that the application is for her son, Jon, to receive the whole of the residue of the estate, in accordance with the terms of settlement. She deposes that she has no desire to be heard on the application.

[12] Even though the deceased's daughter, Ms Sweaney applied for provision out of her late father's estate, she did not proceed with this. In an affidavit filed 10 November 2017, Ms Sweaney said that she has significant assets and is in a good position financially when compared to the financial position of her brother, and had decided not to pursue her application.

[13] The evidence reveals the estate to be a modest one. In an affidavit filed on 10 November 2017, the respondent sets out the assets and liabilities of the estate. These included a little over $12,500 in a bank account, the balance of which is now $1,000 on account of expenses and the respondent's legal costs and outlays; approximately $212,000 from the proceeds of sale of the deceased's property at Laidley; a Toyota Camry with an estimated value of $1,500 and a tractor.

[14] The terms of settlement provide for the respondent to receive the tractor, Toyota Camry and $10,000 in lieu of any other claim that he could make on the estate, including for executor's commission. As explained above, the terms also provide that the applicants' receive the residue of the estate.

[15] Mr Sweaney left school at the age of 15. He has worked as a plasterer for all of his adult life. He was first married for some 16 years between 1990 and 2006. Upon separation, his ex-wife kept the house they had purchased and retained custody of their daughter. He has been in a de facto relationship since about 2008. His partner works as an aide in the aged care industry and is paid between $600 and $800 per week. They live in rented premises and apparently have no prospect of purchasing a property. They do not have any children. Mr Sweaney is generally in good health.

[16] The evidence is that Mr Sweaney has very little in superannuation. His only other assets are furniture and other belongings estimated at $25,000, and a vehicle with an estimated value of $5,000. Apart from his weekly living expenses, his other liabilities include a credit card debt in the order of $13,500, loans for $5,300 and a tax liability estimated to be $8,500. He deposes that the only money the deceased gave him in his adult life was $20,000 in the early 1990s.

[17] Mr Sweaney only had intermittent contact with the deceased between 1989 and 2014. He resumed contact with the deceased after his sister informed him that the deceased had required major surgery and had failing health. Mr Sweaney had more, but still

relatively infrequent contact with the deceased subsequent to this time and up until his passing.

[18] Turning now to the applicable law. The entitlement of Mr Sweaney to claim further provision from his father's estate is governed by s 41(1) of the Act. This provides:

> **"**If any person (the deceased person) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant."

[19] As Mr Sweaney is the son of the deceased, he is eligible to make the application.

[20] In *Singer v Berghouse*[1], the High Court held that when considering an application such as this, the Court is required to undergo a two stage process. The majority held:

> "The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance… The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant.
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> …
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> The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty."

[21] The first stage is often referred to as the jurisdictional question. It calls for an assessment to be made as to whether any provision ought to have been made for Mr Sweaney's proper maintenance and support, having regard to matters such as his financial position, the size of the deceased's estate and the relationship between he and his father. There is no need for Mr Sweaney to show some special need or claim. The evidence establishes that Mr Sweaney has accumulated little superannuation or other reserves. He has a very limited ability to protect himself against the ordinary vicissitudes of life and has a relatively modest income.

[22] In my view, balancing the various considerations leads me to the conclusion that the deceased did not make adequate provision for Mr Sweaney's proper maintenance and

[1] (1994) 181 CLR at 201-210.

support. He has discharged his onus in respect to the justification for the claim and he has a proper basis for making it.

[23] Turning to the second stage referred to in *Singer*, it is of relevance that the parties agreed to the terms of settlement, in circumstances where none of them is under a legal disability. However, the application calls for an exercise of the court's discretion.[2]

[24] In *Watts v Public Trustee of Queensland*,[3] Jones J said:

> "Once the court is of the view that the jurisdictional question has been satisfied then the issue arises as to the effect of the parties' agreement. Obviously considerable weight must be given to the agreement of the parties. The inquiry thereafter is limited. The circumstances would be unusual indeed for the court to override the agreement of the parties who are of full age and where there is no evidence of undue influence at work in the reaching of the agreement."

[25] I consider it appropriate in this case to give considerable weight to the terms of settlement. It seems to me to provide for a proper level of maintenance and adequate provision for Mr Sweaney. In arriving at this determination, I am conscious of the relatively modest size of the estate and the likely costs from the estate were the matter to proceed to trial.

Costs

[26] The outstanding liabilities which must be brought into account in order to assess the net assets of the estate are the applicants' and the respondent's costs. The applicants' costs are $66,759. The respondent's costs are estimated to be in the order of $70,000.[4] This is a total of some $136,759. The net value of the estate is approximately $213,000. Therefore, the parties' costs are 64% of the estate. The respondent has had his costs assessed at $56,000 and claims this amount. This together with the applicant's costs, totals some $122,759 and equates to some 58% of the estate.

[27] The concerning aspect of this is that it was a relatively straightforward matter in relation to a modest estate. There was no doubt about the eligibility of either of the applicants to the claim. The principal question was limited to a consideration of the adequate and appropriate provision for the applicants.

[28] For the reasons set out below, I consider the costs should be capped at $45,000 for each party. This means that the estate is only diminished by $90,000, which is 42% of the estate.

Relevant rules and principles

[29] It is uncontroversial that the court has a broad discretion when determining costs on such an application. Rule 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ('the UCPR') provides:

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[2] *Abrahams v Abrahams* [2015] QCA 286; *Affoo v Public Trustee of Queensland* [2011] QSC 309.
[3] [2010] QSC 410 at [15].
[4] Respondent's further submissions as to the fixing of the applicant's costs, para 3.

"Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise."

[30] Rule 687 provides:

"(1) If, under these rules or an order of the court, a party is entitled to costs, the costs are to be assessed costs.

(2) However, instead of assessed costs, the court may order a party to pay another party –

(a) a specified part or percentage of the assessed costs; or

(b) assess costs to or from a specified stage of the proceedings; or

(c) an amount for costs fixed by the court; or

(d) an amount for costs to be decided in the way the court directs."

[31] Rule 700A provides:

"(1) This rule applies to—

(a) a proceeding under the Succession Act 1981 , part 4; or

(b) another proceeding relating to an interest in property under a will or trust.

(2) Without limiting the court's discretion under these rules to make an order about costs in relation to all or part of the proceeding, the court may, in determining an order for costs, take into account the following matters—

(a) the value of the property the subject of the proceeding and, in particular, the value of the property about which there is a disputed entitlement;

(b) whether costs have been increased because of any one or more of the following—

(i) noncompliance with these rules;

(ii) noncompliance with a practice direction;

(iii) the litigation of unmeritorious issues;

(iv) failure to make, promptly or at all, appropriate concessions or admissions;

(v) giving unwarranted attention to minor or peripheral issues;

(c) an offer of settlement made by a party to the proceeding."

[32] Whilst ordinarily costs follow the event, the overriding principle in family provision applications is the overall justice of the case.[5] The size of the estate is a relevant consideration.[6]

[33] The respondent's counsel submitted that the respondent was, as a matter of right, entitled to have his costs paid on an indemnity basis from the estate. I do not accept this submission as it is premised on the assumption that the court has no power to limit the parties, including the executor, in the expenditure of estate funds on

[5] *Singer* (supra).
[6] *Manly v the Public Trustee of Queensland* [2008] QCA 198.

applications of this type. This is clearly contrary to r 700A of the UCPR. It also ignores the fundamental principle that the executor's costs to be recoverable from the estate ought to be properly and reasonably incurred.[7]

[34] In *Underwood & Anor v Sheppard*[8], Holmes JA relevantly observed:

> "The learned judge's observation that the obligation to consider the impact of costs on the estate applied with greater force to the executors than to the beneficiaries is unimpeachable. Executors bear a fiduciary duty to which they must have regard in conducting litigation affecting the estate; beneficiaries do not."

[35] In *Collett*[9], McMeekin J endorsed the following observations by Cohen J in *Jackson v Riley*[10]:

> "In my opinion the legal profession in both branches has an obligation to reduce the costs of litigation as much as possible when the amounts in dispute are so small. If the parties cannot reach a compromise then it seems to me that by consultation their legal advisers, both solicitors and counsel, should seek to find all means of defining the real issues and confining the evidence in relation to them. Where cross-examination will be unlikely to alter the substance of a witnesses' evidence it should be dispensed with. The heavy expense of bringing those witnesses from distant places should be actively avoided... it requires everyone in all cases to look somewhat further than [fighting for one's client's interests] and to look at what the final issue will be. Because everybody has stood by their respective clients so well there is practically nothing to be argued about. The plaintiff and the principal beneficiary will have to bear the heavy expense of the litigation with little left for them at the end. It is most regrettable and I think it shows up the need for early consultation and early advice to clients as to what at the end they will be facing."

[36] The costs ultimately remain in the discretion of the court subject to the discretion being exercised judicially. This may include the capping or fixing of costs.[11]

Respondent's costs

[37] The respondent relies on a three page assessment dated 30 July 2017 from Ryan Cost Consulting Pty Ltd ('the Ryan's assessment'). The report assessed the respondent's professional costs on an indemnity basis between 11 July 2016 and 16 June 2017 in the sum of $42,181.08. This was pursuant to a client agreement dated 19 April 2017, which is curiously some nine months after the solicitors started the work and only five days before the mediation. The client agreement is not in evidence. The amount assessed includes a sum of $7,030.18 for '*care, complexity, difficulty, novelty, importance to client, specialised knowledge, responsibility, time spent by solicitor,*

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[7] *Collett & Anor v. Knox & Anor* [2010] QSC 132 (08/0043) Mackay McMeekin J 23/04/2010 at [174].
[8] [2010] QCA 76 at [16].
[9] [2010] QSC 132 (08/0043) Mackay McMeekin J 23/04/2010 at [171].
[10] (Unreported, Supreme Court of New South Wales, Cohen J, 24 February 1989) 2.
[11] See for example, *Gill v Smith* [2007] NSWSC 832; *Underwood v Underwood* [2009] QSC 107; *Jones v Jones* [2012] QSC 342; *DW v RW* (No 2) [2013] QDC 189; *Cerneaz v Cerneaz* & Anor (No 2) [2015] QDC 73.

including research of the law'. In addition, a further $2,912.11 is allowed for '*Sundries and Outlays*', equating to a total for indemnity costs in the sum of $45,093.19 inclusive of the solicitor's professional fees, sundries, outlays and GST. A further $10,871.54 is claimed for counsel's fees. This gives a total of some $56,000.

[38] In oral submissions, counsel for the respondent submitted that the costs claimed by the respondent were reasonable because they were in accordance with the Ryan's assessment.

[39] I am not persuaded by this submission for a number of reasons. First, r 703(3) of the UCPR provides that a cost assessor must have regard to the scale of fees prescribed for the Court, the costs agreement and charges ordinarily paid by a client to a solicitor. The Ryan's assessment makes no reference to these factors. Second, it appears that hourly rates allowed for attendance by a legal practitioner, paralegal, drafting a document and producing a document and other rates for perusing a document, photocopying and drafting letters are in some cases significantly in excess of the District Court Scale of Costs. For example, the rate allowed for photocopying is more than six times the prescribed scale allowance. The rate allowed for a paralegal is nearly four times the prescribed scale allowance for a clerk. Third, the assessment is not sufficiently comprehensive to allow an understanding of the work which the assessment purports to represent. Fourth, the charging of professional fees on an hourly basis for 47.75 hours applying the six minute unit allows for time to be rounded up rather than rounded down. This component of the assessment is some $20,000. Fifth, the 'uplift' allowance of $7,030.18 is unexplained in the circumstances of this matter and without more detail, appears excessive. Sixth, the respondent's position is that he did not have legal representation when he made an offer to the applicants' solicitors in October 2016. Yet the assessment purports to assess costs in the three months prior to this time. Seventh, when assessing costs, I am not bound by the Ryan's assessment, particularly given that I am not satisfied that it is a reflection of the costs which have been properly and reasonably incurred.

[40] The applicants' solicitors had Glenn Walter, a cost assessor, provide an estimate of the respondent's costs under the District Court Scale of Costs. His assessment was on the basis of the expenses which would have been incurred by a competent solicitor who attended on the executor, took instructions, instructed counsel and obtained advice that the proposal communicated to the executor in October 2016 was reasonable but subject to the sanction of the court. Mr Walter's estimate included representing the respondent up to and including the hearing of the sanction application. The figure arrived at is $12,571.65.

[41] This assessment assumes that the claim could have effectively been resolved between the parties in October 2016, subject to the exercise of the court's discretion. I do not consider this to be a reasonable assumption, particularly in circumstances where the respondent did not even engage lawyers until the following month. The application and supporting affidavit material were not filed until 14 December 2016. Further, it would have been entirely inappropriate to have attempted to resolve the claim at this early stage, without notification to and the involvement of the Attorney General. Further, while a letter from the applicants' solicitor to the respondent solicitor set out the financial positon of Mr Sweaney, the well-established law is that this is not the only relevant consideration when determining a claim for proper maintenance and

support. Finally, it was not until 8 December 2016 that the applicants' solicitors notified the respondent's solicitors that they were now also acting for the deceased's daughter, Jan Sweaney. All correspondence prior to this time had been on behalf of Mr Sweaney only.

[42] Having said this, I do have other concerns regarding the costs being claimed by the respondent. For example, by letter dated 20 January 2017, the respondent's solicitors made an offer to settle, which included that the sum of $20,000 be paid to each the deceased's brother and his brother's wife. This is somewhat curious in that no provision was made for this in the will and there is no evidence that either of them had an entitlement to make a claim pursuant to s 41 of the Act.

[43] Further, by correspondence dated 5 January 2017, Mrs Sweaney, the ex-wife of the deceased, informed the respondent's solicitors that she did not intend to make an application for further provision from the estate. Despite having made her position clear, the respondent's solicitors forwarded further correspondence to her dated 6 February 2017, addressing the same issue.

[44] I note that in a letter from the respondent's solicitors to the applicants' solicitors dated 7 July 2017, it states that at the time of the mediation, their costs were estimated to be $35,000. This seems high to get the matter to this point. They offered to cap their fees at $50,000 to finalise the matter. The additional work required on the part of the respondent's solicitors since the mediation has not been extensive and it is difficult to understand how it could have entailed some $21,000 in fees and expenses. At least some of it seems to have been in relation to correspondence arising out of the Ryan's assessment, which I consider to be unhelpful for the reasons set out above.

Applicants' costs

[45] It is submitted in the written submissions by counsel for the applicants, that there is no reason for the courts to intervene and fix the costs, in circumstances where the applicants have a right to challenge the costs pursuant to the UCPR. I do not agree. Like the lawyers for the respondent, the lawyers for the applicants also have an obligation to reduce the costs of litigation as much as possible, particularly when the estate is as modest as this one is.

[46] After the mediation, the applicants' solicitors informed the applicants that their professional costs and disbursements, including the mediation totalled $33,129.54. Once again this seems high. I also do not accept that the additional work required on the part of the applicants' solicitors since this time could equate to some $33,500 in fees and other expenses.

[47] I also do not accept the submission by counsel for the applicants that the applicants' lawyers 'were given no choice but to conduct the matter in the manner in which it has been conducted.

[48] Significant costs were incurred in arranging and convening the mediation. However, as stated at the outset, for reasons which are not clear, it was conducted by the parties without the knowledge of or the involvement of the Attorney General, who was clearly the proper representative of the beneficial interests under the will. It is arguable that there was no useful purpose to be served in having the mediation without

the Attorney General. Subsequent to the mediation, the applicants' solicitors incurred costs communicating with Crown Law between July and November 2017 regarding the Attorney General's position as to the appropriate amount of provision which ought to be made for Mr Sweaney out of the estate. Much of this would have been unnecessary if the Attorney General had been notified of and invited to participate in the mediation.

[49] Further, the applicants' solicitors have gone to the expense of having the respondent's costs assessed by Mr Walter. For the reasons detailed above, I consider the assumption on which the applicants' solicitors asked Mr Walter to rely, was overly ambitious and unrealistic.

[50] The written submissions on behalf of the applicants refer to the costs that have been incurred by the applicants in relation to the abandoned cross-application by the respondent and the application by the Attorney General, which was also withdrawn. However, at the hearing, counsel for the applicants conceded that only negligible costs had been incurred by the applicants in preparing to oppose the respondent's application. Further, as explained above, the involvement of the Attorney General in the lead up to and at the hearing, was consequential upon the failure of the parties to notify the Attorney General of the mediation.

Conclusion

[51] In all of the circumstances, including the size of the estate, I consider this is a case where the costs to be paid out of the estate should be capped at $45,000 for each party. In my view, this is still a generous sum to reflect the work and difficulty associated with this matter. The total costs would then be $90,000, leaving an estate of approximately $120,000. I consider this reflects the justice of the case.

Orders

[52] I order that:

(i) Pursuant to s 41 of the *Succession Act* 1981 (Qld), further and better provision for the proper maintenance and support of the applicant, Jon Edgar Sweeney, be made out of the estate of Ronald Ross Sweaney, deceased (the "deceased") by the deceased's Will dated 4 January 2016 (the "Will") being read and construed as follows:

> "3. I give the whole of my estate to my Trustee upon trust to pay my just debts. I give the whole of the residue of my estate to my son, Jon Edgar Sweaney."

(ii) The respondent's costs of and incidental to the proceeding be paid out of the estate on an indemnity basis and be capped at $45,000.

(iii) The applicants' costs of and incidental to the proceeding be paid out of the estate on an indemnity basis and be capped at $45,000.

(iv) I will allow liberty to apply on the form of the orders and/or as to any errors in my calculation.