FEDERAL COURT OF AUSTRALIA

Waterton v Lafferty, in the matter of Lafferty [2019] FCA 1267

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| File number: |  |
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| Judge: | **BANKS-SMITH J** |
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| Date of judgment: | 14 August 2019 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** - creditor's petition - where debt relied upon is unpaid costs order - where costs order made after trial of issues in which debtor was unsuccessful plaintiff - where debtor seeks to go behind costs order and seeks to go behind underlying judgment dismissing claim - where debtor claims creditor acted fraudulently with respect to execution of father's will and will invalid - where validity of father's will not relevant to issues before trial judge - whether substantial reasons shown for questioning costs order - whether petition abuse of process |
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| Legislation: | *Bankruptcy Act 1966* (Cth) s 52  *Evidence Act 1995* (Cth) s 75  *Federal Court (Bankruptcy) Rules 2016* (Cth) r 4.06  *Wills Act 1997* (Vic) ss 7, 9  *Rules of the Supreme Court 1971* (WA) O 66 r 57 |
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| Cases cited: | *Calandra v Murden* [2015] NSWCA 231  *Compton v Ramsay Health Care Australia Pty Ltd* [2016] FCAFC 106; (2016) 246 FCR 508  *Corney v Brien* (1951) 84 CLR 343  *Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC 8  *Katter v Melhem (No 2)* [2014] FCA 1176  *Kitay, in the matter of Frigger (No 2)* [2018] FCA 1032  *Lafferty v Waterton [No 2]* [2017] WASC 84  *Lafferty v Waterton [No 4]* [2017] WASC 302  *Lowbeer v De Varda* [2018] FCAFC 115  *Psevdos v Commonwealth Bank of Australia (No 2)* [2017] FCA 19  *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28; (2017) 261 CLR 132  *Simon v O'Gorman Pty Ltd* (1979) 27 ALR 619  *Walsh v Sloan as executor of estate of Keddie* [2019] WASCA 107  *Wren v Mahoney* (1972) 126 CLR 212 |
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| Date of hearing: | 16 May 2019 |
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| Counsel for the Respondent: | Mr PG Clifford |
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| Solicitor for the Respondent: | Armeli & Molony Lawyers |

ORDERS

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|  | | WAD 420 of 2018 |
| IN THE MATTER OF SUSAN JUANITA LAFFERTY | | |
| BETWEEN: | WILLIAM FRANK WATERTON  Applicant | |
| AND: | SUSAN JUANITA LAFFERTY  Respondent | |

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| JUDGE: | BANKS-SMITH J |
| DATE OF ORDER: | 14 AUGUST 2019 |

THE COURT ORDERS THAT:

1. There be a sequestration order under the *Bankruptcy Act 1966* (Cth) against the estate of Susan Juanita Lafferty.
2. The costs of the applicant be assessed by a Registrar of the Court and be paid from the bankrupt estate of Susan Juanita Lafferty in accordance with the *Bankruptcy Act*.

The Court notes that the date of bankruptcy is 21 August 2018.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BANKS-SMITH J:

1. This is an application for a sequestration order. It is opposed on the basis that the judgment upon which it is based is said to be tainted by fraud and on the basis that the creditor's petition is an abuse of process.

## Background

1. The applicant creditor, William Waterton, is one of three children of the late William and Peggy Waterton. The respondent, Susan Lafferty, is his sister. There has been a history of litigation between the members of the family in the Supreme Court of Western Australia, culminating in the decision of Allanson J following trial in ***Lafferty v Waterton [No 4]***[2017] WASC 302.
2. In Allanson J's reasons, the parents were referred to as Mr Waterton and Mrs Waterton respectively. Their three children were referred to as William, Susan and Madelaine. I will continue that convention, and mean no disrespect by doing so.
3. Mr Waterton died on 3 December 2003. Probate of his will dated 29 November 2003 (**Will**) was granted by the Supreme Court of Victoria on 22 July 2004. Mr Waterton left the whole of his estate to Mrs Waterton, who was then aged 80 and had been wholly dependent on her husband.
4. Mrs Waterton died on 8 August 2015.
5. In 2013, so before Mrs Waterton died, Susan commenced proceedings against Mrs Waterton, William and Madelaine. As summarised by Allanson J, Susan claimed that she was entitled to one‑third of her mother's estate and that property that her mother had given to William and Madelaine was impressed with a trust as to that one‑third interest. The claim was based on a letter written by Mrs Waterton in about 2004. Susan contended that her mother, and later her mother's estate, was estopped from acting other than in accordance with the representations made in that letter: *Lafferty v Waterton [No 4]* at [1]. For the purpose of these reasons, it is important to keep in mind that the proceedings issued by Susan related to her mother's estate.
6. After Mrs Waterton died, the executors of her estate (William and Madelaine) were joined in that capacity.
7. The trial proceeded before Allanson J over the course of three days in September 2017 and judgment was delivered in October 2017. Susan was represented by senior counsel during the trial and in interlocutory disputes: see, for example, the application for further and better discovery determined by Allanson J in March 2017 in ***Lafferty v Waterton [No 2]*** [2017] WASC 84 in which senior counsel appeared.
8. Susan was unsuccessful at trial. The decision was not appealed by Susan. The action was dismissed after a contested hearing where the parties were given an opportunity to provide evidence and to make submissions.
9. Following judgment, William obtained the benefit of a costs order against Susan. It is not in issue that costs followed the event.
10. In his creditor's petition presented on 19 September 2018, William relies on non-compliance with a bankruptcy notice served 30 July 2018 that claimed an alleged debt in the sum of $193,451.05 as assessed on a taxation of a bill of costs by a Registrar of the Supreme Court of Western Australia. Under O 66 r 57 of the *Rules of the Supreme Court 1971* (WA), the costs allowed by a taxation officer on a certificate of taxation shall be deemed to be a judgment of the Court. Such a provision has the effect of creating a judgment without any further action being required: *Calandra v Murden* [2015] NSWCA 231 at [5]; and ***Kitay****, in the matter of Frigger (No 2)* [2018] FCA 1032 at [2].
11. Susan opposes a sequestration order on the basis that the judgment for costs was obtained by fraud in that it is connected to the underlying judgment which was obtained by fraud, and that this Court should look behind that underlying judgment in accordance with the principles discussed in *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28; (2017) 261 CLR 132. In the alternative, the sequestration order is opposed on the basis of abuse of process that in turn relies upon the same alleged fraud.
12. The alleged fraud relates to the probate of Mr Waterton's will. Susan alleges that it was not properly witnessed and that William swore a false affidavit that was filed in the Supreme Court of Victoria in support of his application for probate of the Will.

## Susan's case in the Supreme Court proceedings

1. A summary of Susan's case taken from the reasons in *Lafferty v Waterton [No 4]* is as follows:

[85] Susan pleads that, as a natural child of Mr Waterton, she was entitled to apply for a family provision order under pt IV of the *Administration and Probate Act 1958* (Vic). She alleges that:

(1) her father had a moral duty to provide for her maintenance and support: par 7; and

(2) she is not and was not at the time of her father's death capable by reasonable means of providing for her maintenance and support: par 8.

[86] In par 9, she pleads the property in her father's estate, and estimates its worth. She also pleads factors relevant to a family provision application, including the age and financial position of each of the children.

[87] In pars 10 to 15, Susan sets out the events from 2004 relating to the subdivision and sale of land owned by his father in Victoria. In par 16, she pleads the circumstances in which her mother acquired Unit 3; and in par 17, the circumstances in which William acquired title to Unit 9.

[88] The crux of Susan's claim is in pars 19 and 20. Susan pleads that in the letter of March 2004, Mrs Waterton represented to her:

The estate which she had inherited from [Mr Waterton] and any assets of her own subject to what may be expended for her proper maintenance and support during her lifetime would upon her death be divided in equal third shares between her three children.

[89] Susan pleads that the representation induced in her an assumption and expectation to that effect. Acting in reliance on the representation and induced by it, she refrained from applying for provision from her father's estate: par 20.

[90] Susan pleads that Mrs Waterton subsequently evinced an intention not to be bound by the representation, and acted in such a manner so as to ensure she would be unable to fulfil it, by giving gifts of money and personal property to both William and Madelaine, and by the creation of the trust over Unit 3: pars 21‑25.

[91] Susan pleads that she has suffered loss and damage in that any entitlement she may have had in respect of the estate of her father is no longer available to her: par 27.

[92] Susan further pleads that William and Madelaine knew of the terms of the representation and knew or ought to have known of Mrs Waterton's intention not to be bound by it when they received transfers of assets from their mother: pars 28 to 30.

…

[95] In pars (d) - (f) of the prayer for relief, she also seeks:

A declaration that [William and Madelaine] are liable to account for the one third share of the estate to which [Susan] was entitled and which they knowingly received in breach of the Representation.

In the alternative equitable compensation in a sum equivalent to the value of a one third share of the estate which [Mrs Waterton] inherited from [Mr Waterton] and any assets of her own subject to what she may have expended for her proper maintenance and support during her lifetime.

Further in the alternative equitable compensation in a sum equivalent to the sum [Susan] would have received from the estate of [Mr Waterton] had she made a claim for provision from the deceased's estate under the *Administration and Probate Act 1958* (Vic).

1. The defences were summarised by Allanson J as follows:

[96] William and Madelaine filed broadly similar defences - in many respects identical. Each denies that, at the date of their father's death, Susan was not capable, by reasonable means, of providing adequately for her maintenance and support. The defendants deny that the property in their father's estate included Unit 3 and Unit 9, saying that Mrs Waterton was the legal and beneficial owner of Unit 3, and William the owner of Unit 9. They plead that the antiques and other household items passed to Mrs Waterton by survivorship.

[97] Each of them responds to Susan's claim that she would have been entitled to an order out of Mr Waterton's estate.

[98] William and Madelaine deny Susan's allegations in pars 19 and 20 regarding the letter of 2004, and her reliance on the representations in it. Further, each pleads that, even if Susan acted in reliance on representations in the letter as she alleges, she suffered no detriment because Mr Waterton had no responsibility to make provision for her, and the distribution of the estate made adequate provision for her proper maintenance and support.

[99] Each denies knowledge of the letter and the representations in it.

[100] Each admits the gifts made to them (as set out above).

1. The following facts referred to by Allanson J are also relevant:

[47] Before she received the letter, Susan's husband told her she may be entitled to make a family provision claim and suggested that, if she was unhappy, she should obtain advice from a Melbourne solicitor. She had not made enquiries or sought advice before the letter arrived. After receiving her mother's letter, Susan said she thought it would be wrong to question the will, 'when I believed my mother had clearly promised to leave me an equal one third share of her Estate'. Susan did nothing more about a claim against her father's estate. She did not, until 2012, tell her mother or her siblings that she had contemplated challenging her father's will or seeking an order for provision out of his estate.

1. His Honour referred in his reasons to the difficulties with Susan's claim.
2. His Honour referred (relevantly) to the following matters:
   1. the 2004 letter from Mrs Waterton to Susan which was said to comprise the representation founding the estoppel said, amongst other things:

However you must remember that Bills main concern was to leave me provided for as is every husbands duty and wish, so if there is anything left after I die please be assured you will get your fair 1/3.

* 1. after the letter and until 2011 Mrs Waterton made various gifts, including payments of $200,000 to each of Susan, Madelaine and William in January 2010; additional payments to William and Madelaine; payment of her only grandson's school fees (the grandson being Madelaine's son) and a transfer of a unit to William and Madelaine to be held on trust such that income is paid to Madelaine until the property is transferred to her son once he attains the age of 30;
  2. in October 2012 Susan's lawyers wrote to Mrs Waterton advising that they were instructed to challenge the validity of Mr Waterton's will and to commence proceedings against Mrs Waterton regarding the transfers of property to William and Madelaine;
  3. in December 2012 Mrs Waterton then made a long statutory declaration in which she explained that she and her husband had made mutual wills leaving everything to each other; that she had always regarded her money as her money and that she was entitled to do what she wanted with it; that she wanted to make sure that her only grandson was properly looked after in the future; that she gave money to Madelaine as it would be used to look after her grandson; that she had inherited the unit from her mother and had always wanted it to go to her grandson; and that she was worried that Susan would not be happy about the transfer of the unit and would contest her will;
  4. on 23 December 2013 Mrs Waterton made a new will relevantly leaving the residue of her estate to William and Madelaine; and
  5. on the same day she assigned to William and Madelaine all her interest in all her personal property.

1. His Honour found that it was clear that Mrs Waterton intended to divest herself of all her interest in any property and had ensured that she had no substantial assets to dispose of by will.
2. His Honour found that there was no evidence that William or Madelaine knew about the 2004 letter.
3. His Honour found there were fundamental defects in Susan's case. For example:

[108] In her statement of claim, Susan pleads the first alternative [as to the meaning of the alleged representation]: Mrs Waterton promised that the estate which she had inherited and any assets of her own, subject to what may be expended for her proper maintenance and support during her lifetime, would upon her death be divided in equal third shares. As counsel for William correctly submitted, this representation has three components: Mrs Waterton would give Susan one third of her estate on her death; she would preserve her assets (subject to her proper maintenance and support); and she would not revoke or depart from that intention before death.

[109] The claim as pleaded is unrealistic. The letter cannot be reasonably understood as promising one third of the assets Mrs Waterton then held, including the estate of Mr Waterton, subject only to expenditure for 'proper maintenance and support'. Mrs Waterton asserted her right to 'go through the lot', writing that there may not be anything left on her death. She did not promise to act frugally or even reasonably in using or expending her property in her lifetime only for 'proper maintenance and support'. If there is a promise, it is confined to one third of what may remain, with no representation about how Mrs Waterton would use her property during her life.

[110] At best, for Susan's case, Mrs Waterton said that it was not her nature or her desire to 'go through the lot'. That statement is not promissory. Quite simply, there is no promise to preserve assets, and Susan did not understand that such a promise had been made. In cross‑ examination, Susan accepted that, on her understanding of the letter, her mother had not promised that she would not dispose of assets, or make gifts, or pay for her grandchild's education, or perhaps make substantial donations to charity. She accepted that she understood that her mother might use up her property during her lifetime, and not just on basic necessities. Her evidence is not consistent with her having any assumption or expectation, as a result of the letter, that Mrs Waterton's expenditure during her life would be confined to proper maintenance and support.

1. His Honour concluded that there was no claim against William or Madelaine:

[114] While Mrs Waterton did give an assurance that she would distribute what was left on her death equally, that is not sufficient for Susan to establish any claim against William and Madelaine. To succeed against them, she must establish the representation she has pleaded so that she may 'undo' the gifts made by Mrs Waterton during her life. If she cannot undo the effect of those gifts, Susan is left with the claim which (somewhat surprisingly) her counsel maintained in his final address, for one third of the $261 that remained in Mrs Waterton's estate at the date of her death.

1. His Honour also found that Susan failed to establish detriment by changing her position in reliance on the 2004 letter, as there was no evidence she was going to make a family provision claim or even seek advice about a claim that if successful would have made some provision for maintenance and support. There was no unconscionability on the part of Mrs Waterton in that she could not have known that Susan would treat her letter as an assurance inducing her to refrain from legal action. There was no evidence that Mrs Waterton knew Susan was contemplating a claim. Further, Susan failed to establish detriment because on the 'exiguous evidence' as to Susan's financial means, his Honour was not satisfied that at the time of Susan's father's death her proper maintenance and support required any provision from Mr Waterton's estate.
2. In summary, the claim by Susan against her mother's estate failed at the first hurdle, as the representation alleged to have been made by her mother as pleaded was not established.

## Susan's allegations as to fraud by William

1. Susan alleges there is uncertainty about when Mr Waterton's Will was executed, although it is dated 29 November 2003. She alleges that the Will is invalid because it was not signed in front of two witnesses, contrary to s 7(1) of the *Wills Act 1997* (Vic). She alleges that although the Will is indorsed with the signature of two witnesses, being Richard Balston and Elizabeth Balston (now Elizabeth Prater), they were not present at the time Mr Waterton signed his Will. Susan relies on comments written on a letter received by Ms Prater and then returned to Susan's solicitors in 2013 (the same year the proceedings were commenced) and a written statement of Ms Prater apparently signed in 2016.
2. Susan then refers to an 'affidavit of executor' dated 14 July 2004 filed in support of the application for probate, in which William states that the Will was executed in front of Mr Balston and Ms Prater in Swanbourne, Western Australia, and asserts that the affidavit was false.
3. In these proceedings Susan submits that this Court should go behind the judgment debt relied upon by William and take into account the conduct of William in what she alleges is a fraud by him in providing the false affidavit for the purpose of obtaining probate of the Will.

## Susan's knowledge and choices

1. There was considerable material before me relevant to the state of Susan's knowledge prior to and during the Supreme Court proceedings.
2. On 29 January 2013 Susan's lawyers wrote to Ms Prater asking a number of questions about the circumstances of the execution and witnessing of the Will. Shortly after, Ms Prater returned a copy of the letter with her comments indorsed. She stated that she was not present when the Will was signed by Mr Waterton, and that it was brought to her and her then husband for signing by William.
3. Susan then wrote to the Registrar of Probate on 21 February 2013 alleging that the Will was invalid, stating that Mr Waterton was not present when the witnesses signed the Will, and stating that William as executor was aware that the Will was invalid as he took it to the subscribing witnesses and asked them to sign it.
4. By 14 November 2016 Susan had further documentary evidence from Ms Prater to that effect.
5. Susan deposes as follows:

6. I was informed by my husband, Philip Lafferty (**Philip**) an experienced litigation lawyer and I verily believed that if my father was not present when the Will dated 29 November 2003 (**Will**) was witnessed by Elizabeth and my cousin Richard Balston (**Richard**) then the Applicant made a false statement in paragraph 9 of his affidavit sworn 14 July 2004 and filed in support of his application to the Supreme Court of Victoria (**Court**) for a grant of probate (**Probate**) of the Will.

7. I was also informed by Philip and I verily believed that if my father had not been present when the will was witnessed by Elizabeth and Richard then arguably the Will was invalid.

8. I was also informed by Philip and I verily believed that if it could be proved by direct evidence that the Applicant had practised an actual fraud on the Court by obtaining probate of the Will by making a false statement concerning the manner in which the will was witnessed then an application could be made to the Court to revoke the grant of probate.

…

18. I was informed by Philip and I verily believed that in order to prove either actual fraud and/or perjury in respect of the Will and/or in respect of the application for the grant of probate of the Will I would need to adduce direct evidence ideally from both Richard and Elizabeth or from at least one of them.

…

25. On 14 November 2016 as stated in my previous affidavit Mr Milligan obtained a hand-written statement from Elizabeth (see Annexure **SJL7** to my previous affidavit).

1. The reference to Mr Milligan in Susan's affidavit is a reference to a private investigator who took the statement from Ms Prater and who travelled to New South Wales with Susan and Philip Lafferty to see Ms Prater.
2. Susan states that on 15 November 2016 she made a complaint to the fraud and extortion squad in Melbourne.
3. Susan, presumably on the basis of legal advice, chose not to issue a subpoena to Ms Prater or Mr Balston. Susan knew from at least February 2014 that it was open to her to request that a subpoena issue to Ms Prater and Mr Balston: so much is clear from a letter dated 14 February 2014 from her solicitors to Mr Balston in which they inform him that they would issue a subpoena if necessary, 'as this matter is now proceeding to Trial'.
4. Further, during the course of the Supreme Court proceedings Susan pleaded that the witnesses of Mr Waterton's Will, Mr Balston and Ms Prater, did not witness Mr Waterton's signature in his presence and that the witnesses had signed the Will some considerable time before 29 November 2003 (amended statement of claim filed 8 September 2014 signed by senior counsel, amending statement of claim indorsed on writ dated 29 May 2013).
5. In a witness statement prepared for the purposes of the Supreme Court proceedings (dated 7 March 2017), Susan stated in effect that:
   1. she caused investigations to be carried out in 2012 regarding Mr Waterton's estate;
   2. she had assumed that the Will had been witnessed by Mr Balston and Ms Prater in Mr Waterton's presence in Melbourne;
   3. her then solicitors, Optima Legal, wrote to Ms Prater on 29 January 2013 requesting information regarding the circumstances in which she witnessed the Will;
   4. Ms Prater made handwritten annotations on the letter in response to those queries; and
   5. Ms Prater and Mr Balston were living at the same address in Perth at that time.
6. Susan attached to her witness statement various documents, including, relevantly, the letter to Ms Prater from Optima Legal with handwritten response from Ms Prater and the letter to the Registrar of Probate at the Supreme Court of Victoria dated 21 February 2013, in which Susan's solicitors asserted that the Will was invalid by reason of information obtained from Ms Prater, and that William was aware that the Will was invalid at all material times.
7. Therefore, it is clear that Susan caused investigations to be conducted into the circumstances of execution of the Will before issuing the Supreme Court proceedings, and that she knew of Ms Prater's statement about the circumstances of the execution of the Will and had supporting documentation when the Supreme Court proceedings were instituted and certainly prior to commencement of the trial. Susan had complained to the Supreme Court of Victoria alleging neither witness was present when the Will was signed. She had lodged a complaint with the police. The allegations were included at some point in a Supreme Court pleading signed by senior counsel.
8. However, Susan did not run a case as to the invalidity of the Will. Instead, she elected to run a different case against her mother, William and Madelaine and in fact conceded that issues as to the circumstances of the execution of the Will were not relevant in those proceedings.
9. So much is clear from the reasons of Allanson J in his determination of Susan's discovery application prior to trial. In *Lafferty v Waterton [No 2]* (delivered 20 March 2017) Allanson J refused to order discovery of certain documents from Iron Group Lawyers, McCracken and McCracken, Cabrini Health and Gisborne Medical Centre, stating, relevantly, as follows:

[35] The plaintiff has reason to believe that Iron Group Lawyers has an electronic file relating to the probate of Mr Waterton's will. In the affidavit in support of the application, the plaintiff sought to establish relevance of these documents by referring to uncertainty about when the will of Mr Waterton was signed, and the circumstances in which he came to sign it.

[36] **As counsel conceded at the hearing, none of those matters is in issue in this action. If the plaintiff is to challenge the will, it should be in Victoria where the grant of probate was made. But it is not part of this action. The plaintiff's claim is based upon an estoppel arising out of her refraining from making an application for family provision.**

[37] **The concession had, in fact, been made on the last occasion this matter was before the court.** The application for discovery had then already been filed, but not served, and it was open for the plaintiff to discontinue it. There was no reasonable basis to take it to this hearing.

…

[39] The plaintiff says that the firm of McCracken and McCracken, Solicitors, are the successor to the firm that acted for Mr Waterton in respect of his personal and business dealings. The plaintiff has been told that the firm has two files - one relating to Mr Waterton and one to the second defendant.

[40] The plaintiff's solicitor believes that one file contains a will, a guarantee relating to a business and at least one power of attorney. The plaintiff's solicitor also has been informed that McCracken and McCracken received a written request to forward documents to another firm of solicitors acting for the second defendant in his capacity as executor of his father's estate.

[41] The plaintiff seeks discovery on the basis that the documents are relevant 'given the unusual circumstances surrounding the preparation signing and execution of the Deceased's last will and testament' and that 'the request by the second defendant … to uplift the Deceased's private papers requires further investigation': affidavit of Mr Molony, par 32.

[42] **The circumstances of the preparation signing and execution of the will of Mr Waterton are not in issue in this action.** The plaintiff has not shown why a request by the second defendant, as executor, for the papers of his father requires investigation in this action.

…

[49] The plaintiff asserts relevance by reference to where the deceased was on the date of execution of his will, and his state of mind and testamentary capacity at the date of execution. Again, these applications should not have been pursued. **None of those matters is in issue in the action, and the plaintiff conceded that in February**.

(emphasis added)

## Susan's information obtained from police

1. As noted, on 15 November 2016 Susan made a complaint to the 'fraud and extortion squad' in Melbourne. It is apparent that there were further communications between Mr Lafferty and the police (Melbourne Crime Investigation Unit) from January 2019. The circumstances that led to the further communications in 2019 were not clearly disclosed to this Court. Mr Lafferty swore several affidavits in support of his wife's opposition to the sequestration order. A subpoena to produce documents was also issued to the police, and documents were produced on return of the subpoena. Inspection of some of the produced documents was opposed by the police on public interest immunity grounds, a claim upheld on a determination by a Registrar of this Court.
2. Relevantly, Susan sought to rely on two documents that were provided by the subpoena process and available for inspection, as annexed to an affidavit of her solicitor, Damian Molony. The first was a transcript of a record of interview conducted by an officer from the Melbourne Crime Investigation Unit with Mr Balston on 29 January 2019. The second was a statement signed by Ms Prater dated 6 March 2019. The interview and statement respectively provide to the effect that Mr Waterton was not present when Mr Balston or Ms Prater signed the Will and that William brought the Will to them to sign with a signature (purportedly that of Mr Waterton) already on it.
3. I interpose at this point to note that I am not aware of the state of the police investigations. William is entitled to the presumption of innocence insofar as any criminal matters are concerned. There was no evidence before me that charges were to be or had been laid, that addressed the nature of any defences that might be relevant or that addressed the potential for a will to be deemed valid albeit that there has been a failure to comply with statutory requirements as to execution (see, for example, s 9(1) of the *Wills Act*).

## William's submissions

1. William contended that there were two significant issues with the grounds of opposition to the petition relied upon by Susan.
2. *First*, relying on *Kitay*, he contended that Susan's submissions do not distinguish between the costs judgment and the judgment after trial, and that it is only the costs judgment that led to any liability.
3. *Second*, William contended that the costs orders relates to the fact that he successfully defended the claim that Susan elected to pursue, being a claim relating to her mother's estate, and that the validity of the Will was not relevant to that case and therefore it could not be said that there was any fraud or collusion with respect to the proceedings pursued before Allanson J.
4. I should add that because of these contentions, William also argued that much of the evidence upon which Susan wished to rely as to the circumstances of the execution of the Will was irrelevant. I will return generally to the issue of objections below.

## Principles

### General

1. The existence of a judgment of a superior court may be regarded as satisfactory proof of a debt for the purposes of s 52(1)(c) of the *Bankruptcy Act 1966* (Cth): *Corney v Brien* (1951) 84 CLR 343 at 355. However, the court has a discretion whether to accept a judgment as the required proof: *Wren v Mahoney* (1972) 126 CLR 212 at 224 (Barwick CJ, with whom Windeyer and Owen JJ agreed) where it was said:

The judgment is never conclusive in bankruptcy. It does not always represent itself as the relevant debt of the petitioning creditor, even though under the general law, the prior existing debt has merged in a judgment. But the Bankruptcy Court may accept the judgment as satisfactory proof of the petitioning creditor's debt. In that sense that court has a discretion. It may or may not so accept the judgment. But it has been made quite clear by the decisions of the past that where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof. It must then exercise its power, or if you will, its discretion to look at what is behind the judgment: to what is its consideration.

1. The principles were addressed more recently by the High Court in *Ramsay Health Care*. The plurality (Kiefel CJ, Keane and Nettle JJ) at [48] referred to the summary of the position in *Simon v O'Gorman Pty Ltd* (1979) 27 ALR 619 at 633 (Lockhart J, Fisher J agreeing):

The circumstances in which the court will inquire into the validity of a judgment debt are not closed; but it is clear that the court will not inquire as a matter of course into that question.

Circumstances tending to show fraud, collusion or miscarriage of justice or that a compromise was not a fair and reasonable one are the most frequent examples of the exercise by the court of this jurisdiction.

The courts are reluctant to exercise this jurisdiction where the judgment was entered after a full investigation of the issues at a trial where both parties appeared and had ample opportunity to put their case to the court.

1. The plurality in *Ramsay Health Care* continued:

[68] For the purposes of s 52 of the Act, a judgment may usually be taken to be sufficient evidence of a debt in that a judgment against a debtor in favour of a creditor obtained after a trial is, generally speaking, a reliable indication of the true state of indebtedness as between creditor and debtor. Indeed, such a judgment can usually be expected to provide the most reliable statement of the debt humanly attainable because the ordinary processes of the adversarial system provide a practical guarantee of reliability. The testing of the relative merits of a claim and counterclaim under the rigours of adversarial litigation will usually establish the true state of accounts as between the parties to the proceedings. Accordingly, a Bankruptcy Court will usually have no occasion to investigate whether the judgment debt is a true reflection of the real debt. But where the merits of a claim and counterclaim have not been tested in adversarial litigation, a judgment debt will not have this practical guarantee of reliability.

[69] In *Petrie v Redmond* [[1943] St R Qd 71 at 75‑76], Latham CJ, with whom Rich and McTiernan JJ agreed, said that the Bankruptcy Court:

is entitled to go behind the judgment and inquire into the validity of the debt where there has been fraud, collusion or miscarriage of justice … Also the court looks with suspicion on consent judgments and default judgments … The Bankruptcy Court does not examine every judgment debt. Special circumstances must be established before it will do so. It is impossible to lay down any general rule.

1. As the plurality noted, consent judgments and default judgments are the sorts of cases where third party creditors are at risk of being disadvantaged in that a sequestration order may be made without the rigorous process of adversarial litigation.
2. However, the High Court confirmed that even where there has been a trial, it may be that the circumstances are such that the court will go behind the judgment and inquire as to the validity of the debt. The circumstances where the court may so inquire are not limited to those of fraud, collusion or miscarriage of justice. It is not the case that a suspicion of inadequate representation is of itself sufficient to give rise to a question worthy of investigation: rather, the question is whether the judgment was not the outcome of the rigorous processes of adversarial litigation, such as if there is probative evidence to which counsel did not refer: *Ramsay Health Care* at [70]‑[71].
3. In *Ramsay Health Care*, it was held that the unexplained failure to present and rely upon particular evidence was consistent with the possibility that the judgment was obtained in circumstances where there was a failure by the judgment debtor to present his case on the merits. There was evidence before the Court which, while it remained uncontradicted, was apt to suggest that the debt was not truly owing: *Ramsay Health Care* at [71].
4. I also note Wigney J's detailed and useful collection of the guiding principles in *Katter v Melhem (No 2)* [2014] FCA 1176 at [69]‑[78].

### Particular cases dealing with costs

1. It is important at this juncture to take into account the nature of the debt relied upon by William.
2. It is not in issue that William was awarded costs of the Supreme Court trial on the basis that Susan was unsuccessful in her claims and the costs followed the event. There is no issue as to quantum or the method of assessment of costs. There is no issue that William incurred an underlying obligation to his solicitors to pay costs and the costs order obliged Susan to accordingly compensate him. William did not otherwise claim any debt due from Susan or bring any claim against her. The debt upon which he relies arose solely as a result of his successful defence of Susan's claim and the exercise of the Court's discretion to order costs in his favour.
3. In *Kitay*, a liquidator had brought an application under s 477(2B) of the *Corporations Act 2001* (Cth) for directions as to entry into three agreements where the term of the agreements or their discharge by performance may have been more than three months from the date the agreements were to be entered into. One of those agreements was a proposed litigation funding agreement relating to the defence of proceedings instituted by Mr and Mrs Frigger against the liquidator and potential counterclaims. The liquidator filed an affidavit disclosing legal advice to the Court as to potential claims against Mr and Mrs Frigger. That affidavit was subject to confidentiality orders that restricted access to any person without a further order of the Court. Leave was granted under s 477B to enter into the agreements.
4. Without obtaining any further order permitting access, Mrs Frigger obtained a copy of the confidential affidavit and annexed it to an affidavit in separate proceedings. The liquidator brought an application for delivery up of copies of the affidavit. Mrs Frigger sought orders permitting use of the confidential affidavit and a range of other relief, which is detailed in the reasons. Having taken into account various affidavits filed by Mrs Frigger, Master Sanderson concluded (as set out at [75] of Colvin J's reasons):

This matter has gone on long enough. As soon as it was pointed out to Mrs Frigger she had obtained a copy of the confidential affidavit she was not entitled to possess, she should have returned it to the liquidator's solicitors. That is the beginning and the end of the matter. There can be no possible justification for her retaining possession of any copies of the confidential affidavit and the orders I will make are designed to so far as is possible put the situation to rights. Mrs Frigger should pay the costs of this application including all reserved costs. I will hear the parties as to whether those costs ought be payable on an indemnity basis.

1. Subsequently, costs on an indemnity basis were ordered and founded the creditor's petition.
2. Colvin J noted the distinction between the type of debt the subject of the authorities considered in *Ramsay Health Care*, where the debt claimed to be owing is one that has been adjudicated by a court to be due and which has merged in the judgment, and those where there is a failure to pay the assessed amount of costs in a proceedings where the assessment takes effect as a judgment. In the latter case, the costs order may follow from the establishment of an underlying debt, but not always.
3. The nature of the costs orders should be considered carefully. His Honour explained:

[32] An award of costs is discretionary, but must be exercised judicially, that is according to relevant considerations and taking account of the contextual features and facts of the litigation: *Kazar (Liquidator) v Kargarian; In the matter of Frontier Architects Pty Ltd (In Liq)* [2011] FCAFC 136; (2011) 197 FCR 113 at [4]. Settled principle guides the exercise of the discretion: *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at [38]. Generally, the discretion is exercised in favour of the successful party: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 at [25]. So, a cost order usually follows the event, but need not do so.

[33] If the event is success on a monetary claim then proof of a debt arising from the costs order may be said to require proof of the underlying debt because costs follow the event on that claim. It is not necessary to consider whether this is so in this instance because the claim before Master Sanderson did not involve the adjudication of any claim in debt, or indeed any claim to a monetary award of any kind. Rather, the costs order relied upon by the petitioning creditors forms part of a judgment in proceedings in which orders were made concerning a confidential affidavit. The costs order is not any part of a determination in respect of an underlying debt.

[34] The result is that the debt relied upon by the petitioning creditors has no antecedent aspect in the sense that arose in the cases to which I have referred. Rather, the claimed liability was brought into existence solely by the costs order. Then the quantum of the debt was established by the assessment made by the Registrar in taxing the bill presented to the court. Upon that assessment a judgment in the assessed amount was brought into existence by operation of O 66 r 57 of the *Rules of the Supreme Court*.

[35] So, the petitioning creditors in this case do not rely upon the judgment of Master Sanderson to prove an underlying debt. They rely upon the making of the order and the assessment of the bill of costs presented pursuant to that order as the debt. Accordingly, care must be taken in simply assuming the existence of a broad jurisdiction to 'go behind' the decision of the court in which the costs order was made on the basis of the line of authorities considered in *Ramsay Health Care*. The question is whether a debt has been proved, not whether there should be some review of the exercise of the discretion to make the indemnity costs order or a reconsideration of the assessment undertaken on taxation of the bill of costs presented pursuant to that order.

1. In *Psevdos v Commonwealth Bank of Australia (No 2)* [2017] FCA 19, an indemnity costs order was made against the appellant in the course of proceedings in the Supreme Court of South Australia because he had wasted the Court's time by abandoning part of his defence. A bankruptcy notice and creditor's petition were issued relying on the costs order. A Judge of the Federal Circuit Court made a sequestration order pursuant to the creditor's petition. On appeal, the appellant asserted that the primary judge erred in not going behind the Supreme Court judgment, on the basis of the arguments abandoned before the Supreme Court. Charlesworth J held:

[38] In the present case, the judgment debt sustaining the bankruptcy notice was the Allocatur. Although issued pursuant to the order of Master Dart, the Allocatur, in its legal context, is the progeny of the indemnity costs order made by Parker J in the Supreme Court Proceedings …

[39] … The point is that the principles in *Wren v Mahoney* (1972) 126 CLR 212 as summarised in *Katter* do not apply in the same way as they might in a case where, for example, a pre-existing debt merges in a judgment and then becomes the subject of a bankruptcy notice. CBA did not sue on a debt. It sued for declaratory relief in respect of an equitable priority dispute. The debt sustaining the bankruptcy notice arose by the exercise of the power of the Supreme Court of South Australia to make orders as to costs and, more particularly, to compensate a party for costs thrown away by reason of the abandonment of a claim or defence.

[40] Mr Psevdos' submission on the appeal largely ignored that important background.

1. In *Lowbeer v De Varda* [2018] FCAFC 115, the Full Court affirmed a decision to go behind a costs order on the basis that the costs which were the subject of the order were not actually payable, because the respondent's costs had been met by a third party pursuant to an indemnity agreement. The Court held:

[66] … [The primary judge] proceeded on the usual basis in making such costs orders, which is to assume the existence of a retainer unless an issue is raised. Therefore, there was no forensic inquiry or determination of the issue as to who was liable for those costs. In those circumstances, the 2014 costs orders did not reflect a determination after a considered hearing of a kind that provides a practical guarantee of reliability.

1. The Court held at [86]‑[88] that although in costs proceedings there is a presumption that a solicitor can look to a party for costs where the solicitor is on the record for that party, such a presumption is not imported to bankruptcy proceedings. Instead, the onus of proof in relation to the underlying issue falls on the party claiming to be a creditor.

## Nature of the hearing before me

1. After some discourse during the hearing, the parties accepted that the basis upon which the hearing proceeded before me was that it was a preliminary investigation as to whether the Court should 'go behind' the judgment, and that if the question were answered in the affirmative, there would be a second hearing. If it were answered in the negative, and subject to satisfaction of the requisite formalities, then it was open to me to make a sequestration order: *Corney v Brien* at 358; *Compton v Ramsay Health Care Australia Pty Ltd* [2016] FCAFC 106; (2016) 246 FCR 508 at [13].

## Consideration

1. William submits that he does not rely upon the judgment of Allanson J in the Supreme Court action to prove the underlying debt. He relies upon the making of the costs order and the assessment of his bill of costs pursuant to that order. William contends that, relying on *Kitay*, costs orders are distinct from a determination in respect of an underlying debt and that there is no antecedent liability to be impugned. On that basis, he contends that none of the evidence as to the circumstances of the execution of the Will are relevant. The Court should only be concerned with any question as to the manner in which the costs order itself was determined, and in this case there is no challenge to the assessment process or whether the indemnity principle was met (and so no argument analogous to that made in *Lowbeer*).
2. In my view, the submission assumes a distinction between a scenario where a costs judgment follows a finding in favour of a creditor who has established an antecedent monetary claim and any costs judgment which does not follow such a finding. That distinction alone may not, in my view, resolve the question.
3. Care must be taken not to attribute to a debt by way of costs order any special protection from investigation merely because it gives rise to a separate monetary liability. If there were such special protection, then a creditor who succeeds at trial and obtains a monetary judgment that might be impugned by fraud, but who also succeeds in obtaining a separate costs order on the basis that costs follow the event, could pursue a sequestration order based solely on the unpaid costs order and avoid any question of the bankruptcy court going behind the monetary judgment.
4. *Kitay* is an example of where the conduct of the debtor was such that a costs order was made in favour of the petitioning creditor regardless of any determination of the underlying issue before the Court. The conduct reflected in the costs order concerned the manner in which the debtor dealt with the confidential affidavit contrary to orders of the Court. The truth or otherwise of the confidential affidavit was not to the point and no determination was required on that issue by the Court for the purpose of the application seeking delivery up.
5. So too in *Psevdos*, the Court was concerned with the conduct of the debtor (his abandonment of a claim). That conduct in the proceedings led to a costs order in favour of the creditor, an order made regardless of the determination of the underlying proceedings between the creditor and the debtor.
6. In those examples, one can see the lack of connection between the costs order, based as it is on particular conduct of the debtor, and the merits of the underlying claim. The creditor is entitled to costs regardless of the merits of the underlying claim. There is no basis in such circumstances to consider the merits of the underlying claim.
7. In the case of litigation which is dismissed, leaving a successful defendant with an entitlement to costs on the basis that costs follow the event, it may well be artificial to ignore the connection between a costs order that follows the event and the event itself. The costs order would not have been made against the unsuccessful plaintiff but for the fact that the underlying litigation has been determined in a particular manner. If that underlying judgment itself is open to question as to whether there has been fraud, collusion or a miscarriage of justice then there may be a sufficient connection between the costs and the judgment to justify going behind the costs judgment and the underlying judgment, albeit that the costs liability alone comprises the debt. I do not read *Ramsay Health Care* or *Kitay* as denying the potential for such an argument.
8. As noted by Colvin J at [26]‑[30], the authorities considered in *Ramsay Health Care* deal with cases where the debt that is claimed to be owing by the respondent to the creditor's petition is a separate liability that has been adjudicated by a court to be due and which has merged in the judgment: *Wren v Mahoney* - liability of the respondent for income tax; *Corney v Brien* - liability of the respondent under a hire purchase agreement; and in *Ramsay Health Care* itself - liability of the respondent under a guarantee. The Court in those cases was not concerned with the position of a party who has unsuccessfully pursued a claim and so incurred a costs liability. Therefore statements such as that in *Corney v Brien* at 358 (that the matter to be decided is the existence or non‑existence of a debt antecedent to the judgment) are to be read in that light.
9. In *Kitay*, Colvin J said as follows:

[43] The question is whether there is a debt and whether the judgment arising from the certificate of the taxing officer should be accepted as proof of the debt in these bankruptcy proceedings. Beyond that, this Court does not go back and revisit the history of the litigation between the parties. In particular, in the absence of fraud, collusion or miscarriage of justice this Court does not go behind the judgment as to aspects that do not concern whether there was an antecedent debt. It does not undertake a review of the assessment of costs on taxation or the exercise of discretion as to the making of the costs order.

1. His Honour's reasons might be seen as a definitive statement that the court may only consider going behind a judgment that concerns an antecedent debt. However, the conclusion is qualified by his Honour's reference to such being the course in 'the absence of fraud, collusion or miscarriage of justice'. That reasoning seems to me to preserve the potential in the face of an allegation of fraud, collusion or miscarriage of justice for the court to go behind a costs liability where there is not an antecedent debt but where, in contrast to the factual scenarios the subject of *Kitay* and *Pvsedos*, there is a link between the underlying determination of issues and costs by way of the exercise of discretion to order that costs follow the event after trial.
2. Regardless, in this case I do not consider Susan has established special circumstances for going behind the costs judgment by going behind the underlying judgment. So, even assuming it is open to the court to go behind the costs judgment despite the absence of an antecedent liability, the outcome in this matter would be no different. In my view, Susan has not established on this preliminary investigation that there are substantial reasons for questioning the decision of Allanson J in *Lafferty v Waterton [No 4]* or the subsequent costs order on the grounds of fraud.
3. The litigation pursued against Mrs Waterton, William and Madelaine was pursued on a particular basis. The causes of action did not include a claim based upon the invalidity of the Will. So much was made expressly clear both in the reasons in the interlocutory decision in *Lafferty v Waterton [No 2]* and the trial judge's summary of the claims and relief. Susan chose to pursue a claim based on a representation allegedly made by her mother as to the distribution of her estate. In the context of satisfying the element of reliance and detriment for an estoppel argument, she chose to rely on a claimed lost opportunity to pursue a family provision claim.
4. William was obliged to address the claim actually brought against him and bear the costs of his lawyers in doing so. The costs order in his favour reflects that outcome.
5. This was all done in the context of knowledge on Susan's part as to the alleged invalidity of the Will: receipt of documentary supporting evidence from Ms Prater in 2013 and 2016; advice received from her barrister husband including as to the validity of the Will; representation by senior counsel; disclosure to the Court of the alleged invalidity of the Will; concessions made as to the nature of the claim being brought against her mother's estate and her siblings and the irrelevance of the invalidity of the Will in that context; and an interlocutory judgment which stated that there was no relevant connection and was not the subject of any appeal. Such matters indicate no mere forensic error on the part of those representing her but a considered and informed decision over the course of several years as to the causes of action that Susan chose to pursue in the Supreme Court proceedings. I also note that in *Ramsay Health Care*, the particular evidence that was not considered by the trial judge was directly relevant to quantum and so to the existence of the debt claimed under the guarantee. In this case, as Allanson J determined and Susan conceded, the alleged invalidity of the Will was not relevant to the causes of action that were pursued. Allanson J properly focussed on the pleaded representation by Mrs Waterton: Susan's case failed because the pleaded representation could not be established, and that finding was not premised on any claim about the validity of the Will, as conceded by Susan in the proceedings.
6. In coming to this view I have not proceeded on the basis that Susan is simply bound by the conduct of her case before the trial judge. That notion alone is not a sufficient reason not to look behind a judgment: *Ramsay Health Care* at [67]. I have taken into account the manner in which she conducted her case because it is relevant to the question of fraud raised by Susan and the exercise of the Court's discretion. It informs the question of the matters that were quite deliberately in issue and relevant to the hearing before the trial judge, and so the basis upon which the debt to William was incurred.
7. Nor is there new material evidence such as would persuade me otherwise. Susan contended that the police materials (the interview with Mr Balston and the statement of Ms Prater) comprise fresh evidence that should be taken into account in assessing the question of fraud. I have taken it into account for the purpose of the exercise undertaken on this preliminary inquiry, but it does not alter my view, the reason being that it confirms a position already understood and asserted by Susan. Susan had written confirmation of Ms Prater's position since 2013. Susan was told by Mr Lafferty that she needed a written statement from either Ms Prater or Mr Balston or both. Susan arranged to obtain a written, signed statement from Ms Prater. There was nothing to suggest Susan could not rely upon that statement. As is obvious from her letter to the Registrar of Probate of 21 February 2013, Susan understood from Ms Prater's evidence from 2013 that neither she nor Mr Balston were present when Mr Waterton signed the Will and understood there may be an issue as to the date of the execution of the Will. Counsel referred to a 'new' suggestion in Mr Balston's interview that Mr Balston was not sure that the signature on the Will is that of Mr Waterton, but that evidence does not rise beyond uncertainty on his behalf, many years after the event. That William may have been interviewed by the police and declined to answer questions, assuming that evidence to be correct, does not advance matters. One cannot properly draw any inference from such conduct at an interview.
8. Therefore, Susan has not satisfied me for the purpose of this preliminary inquiry that there are substantial reasons for questioning whether Allanson J's decision was infected by fraud, collusion or miscarriage of justice such that there was not in truth a debt due to William. His Honour addressed the case pursued before him, a case that did not require the question of the validity of the Will to be addressed. This was not a case where, for example, evidence of the alleged invalidity was fraudulently concealed from the Court's processes. Susan chose to proceed in the manner in which she did. The costs order reflects the costs consequence of that choice.
9. Accordingly, I accept the judgment for costs as satisfactory proof of William's debt relied upon in the petition.

## Abuse of process

1. Susan alleges the presentation of the petition is an abuse of process because William is utilising the Federal Court as an instrument to further his fraudulent conduct, and so has sought to invoke this Court's procedures for an illegitimate purpose and that the use of the Court's procedures would therefore bring the administration of justice into disrepute.
2. The relevant principles were collected by the Full Court in *Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC 8:

[66] Abuse of process occurs when a party seeks to use court processes in a way which is likely to cause manifest unfairness to another party or otherwise to bring the administration of justice into disrepute. Abuse of process may involve the commencement and prosecution of proceedings for an improper purpose. In *Dowling v Colonial Mutual Life Assurance Society Ltd* [1915] HCA 56; 20 CLR 509 at 521-522, Isaacs J said:

In English law there has long been recognized a form of wrong by malicious use of process - such as by malicious arrest. But in order to maintain an action for malicious *use* of the process there must have been a termination of the suit in plaintiff's favour. If, however, there has been an *abuse* of the process, as distinguished from the *use* of it, it is unnecessary to show any such termination of the suit. If the object sought to be effected by the process is within the lawful scope of the process, it is a *use* of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the process is outside the lawful scope of the process, and is fraudulent, then - both circumstances concurring - it is a case of *abuse* of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse. ... The purpose is foreign to the nature of the process. ...

Where it can be shown in a case of insolvency that the creditor is making his application not intending to pursue it to a recognized lawful end - whatever his motive may be for attaining that lawful end - but for the real purpose of attaining some other and improper end, such as extorting money as in *Davies' Case*, where the petition was hung up while in existence and used as a means of extortion, there is an abuse of process.

(Footnotes omitted.)

[67] In *Williams v Spautz* [1992] HCA 34; 174 CLR 509 at 526, Mason CJ, Dawson, Toohey and McHugh JJ said, concerning that passage:

The observations ... of Isaacs J. in *Dowling*, to which we referred earlier, represent an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.

(Footnotes omitted.)

Their Honours continued, at 526-527:

It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers. So, in *Dowling*, Isaacs J. pointed out that 'if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process'. However, because the Society wished to use the process for the very purpose for which it was designed, there was no abuse of process.

[68] In *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; 256 CLR 507 at [25], the majority of the High Court said:

Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.

(Footnotes omitted.)

1. Taking into account the findings I have made above, I do not consider that William's conduct in seeking a sequestration order comprises an abuse of process.
2. William is entitled to the costs of the litigation that Susan pursued regarding her mother's alleged representation, as reflected in the costs order. The use of bankruptcy proceedings upon non-payment is a process that was legitimately open to William. It is not an attempt to obtain some advantage for which bankruptcy proceedings are not designed or to seek any collateral advantage beyond what the laws offers. No case of abuse of process is made out.

## Evidence issues

1. It remains to say something about the affidavits relied upon and the objections to affidavits. The objections to Susan's affidavits were many. Indeed, for one affidavit of 46 paragraphs there were some 58 separate objections listed in a schedule of short‑form or one word comments of the nature recently discouraged by the Western Australian Court of Appeal and described as unhelpful: *Walsh v Sloan as executor of estate of Keddie* [2019] WASCA 107 at [65]‑[76].
2. Although some general submissions were made about the objections at the initial hearing (which was adjourned), counsel did not pursue the objections at the final hearing. Accordingly I will deal with them only briefly.
3. Susan swore two affidavits, one of 16 October 2018 and one of 30 November 2018. The content of the affidavits was objected to almost entirely, including on the basis of relevance. The relevance objections were founded in William's argument that the costs order should be considered without any regard to the question of fraud on the underlying judgment of the primary judge. To the extent I have referred in these reasons to paragraphs the subject of such objection, the evidence in both affidavits is relevant for the purpose that is apparent from my particular reference to it. Put generally, it is relevant to the purpose of considering the arguments relied upon by Susan as to the issue of fraud, taking into account my reasons at [67]‑[76].
4. As to the balance paragraphs to which a relevance objection was taken and to which I have not referred, then the evidence is either irrelevant or did not play any significant part in my reasons.
5. However, I note in particular that paragraphs 33 to 39 of Susan's affidavit of 30 November 2018 address an alleged omission by William of certain land in the application for probate, an omission that Susan says was later rectified by William, but which Susan asserts she has also brought to the attention of the police for investigation. Susan has not satisfied me that the allegation is materially relevant to the argument as to invalidity of the will or fraud with respect to the matters before the primary judge. I allow William's relevance objections to those paragraphs.
6. There were also various hearsay objections. Taking into account the nature of the preliminary inquiry, I am prepared to assume it is formally interlocutory although an adverse determination would determine a substantive right: *Ramsay Health Care* [2016] FCAFC 106 at [49]. Accordingly those objections are overruled on the basis that hearsay evidence on such an application is permissible:  *Evidence Act 1995* (Cth) s 75. However, it is still open to the court to give such hearsay evidence the weight it considers appropriate taking into account the nature of the evidence and its context and other grounds of objection. Relevantly, William objected on various grounds to paragraphs 6, 7, 8, 12, 18 and 26 of Susan's affidavit of 30 November 2018 (all of which refer to advice of a legal nature given to her by Mr Lafferty). Whilst the hearsay objections to those paragraphs are overruled, the evidence is not admissible as proof of the legal conclusions stated but is relevant on the limited basis that it discloses Susan's knowledge of issues at the time. I have referred to some of that evidence in my reasons on that basis.
7. As to the affidavit of 16 October 2018, there were also various 'opinion' or 'conclusion' objections that properly can be considered objections on the basis that the content comprises no more than Susan's summary of her case before Allanson J. In particular paragraphs 18 to 20 are received only as submission. Further, paragraph 17 states that 'Acting in reliance upon the promises contained in the letter I did not make a [family provision] claim within six months of the date of the grant of probate or at all'. This statement conflicts with the primary judge's finding that the letter did not make the pleaded representations, and his Honour's finding has not been impugned by the evidence on this application. Paragraphs 41 to 46 are also in the nature of submission only.
8. Susan also relied on three short affidavits sworn by her husband, Mr Lafferty. He appears to have been the person in contact with the police in recent times. The first and second affidavits contained objectionable material including purported hearsay evidence without proper particularity. The issues were addressed by a supplementary third affidavit. Much of Mr Lafferty's evidence was overtaken by the production of the transcript of interview and the copy statement from Ms Prater annexed to the affidavit of Susan's lawyer, Mr Molony. William did not object to the tender of those materials other than on the basis of relevance. Those materials were relevant for the purpose identified in [91] above.
9. Susan also relied on an affidavit of James Milligan, the private investigator, who deposed to the circumstances of obtaining a statement from Ms Prater. It was objected to as a whole on the basis of relevance. That objection is overruled for the reasons referred to at [91] above.
10. Leaving aside the numerous affidavits as to formal matters (none of which were in issue), William relied on an affidavit of Mr Dinelli sworn 16 November 2018 which was read without objection.
11. Counsel for Susan also submitted that a *Jones v Dunkel* inference should be drawn from the failure on the part of William to evince evidence in opposition to the allegations made by Susan. For the purpose of the preliminary investigation, I have taken into account the matters upon which Susan seeks to rely in asserting that there was fraud with respect to the decision of the trial judge. Susan has failed to satisfy me that there are substantial reasons for questioning the underlying judgment and costs order on the basis of fraud as alleged. *Jones v Dunkel* reasoning would not change that position.

## Formal matters

1. In the course of the hearing I noted that William had not complied with the requirements of r 4.06 of the *Federal Court (Bankruptcy) Rules 2016* (Cth). It is regrettably not uncommon that such requirements are overlooked by petitioning creditors on adjourned hearings or referrals from the Registrar. I gave leave to William to file those affidavits within seven business days and that was complied with.
2. I am satisfied as to the matters required by s 52 of the *Bankruptcy Act* and I am not satisfied that there is any other reason why a sequestration order should not be made.

## Orders

1. The petition for a sequestration order against Susan should be granted. As Susan failed to comply with a bankruptcy notice served 30 July 2018 by 21 August 2018, the relevant act of bankruptcy occurred on 21 August 2018.

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| I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Banks-Smith. |

Associate:

Dated: 14 August 2019