Few lived to see the end of an exhausting court battle, writes Kim Arlington.

It was *Bleak House* played out in the NSW Supreme Court, with an inheritance dispute that dragged on for so long, many potential beneficiaries never lived to see it resolved.

Grant MacDonald is one of the few still standing.

After fighting a three-year court case while also battling cancer, the pensioner finally secured a share of his great aunt's estate - 42 years after she died.

Like the Dickens novel, which unfolds against the backdrop of the notoriously drawn-out inheritance case of Jarndyce and Jarndyce, the Supreme Court matter of **MacDonald v the NSW Public Trustee** had its share of mystery.

Doubts were cast over the marriage of a good Catholic couple in 19th century Ireland. Money from a widow's estate disappeared in ''sinister'' circumstances. Her relatives were stonewalled for decades by what a judge described as ''blind bureaucratic management''.

It was all exposed by Mr MacDonald, who argued his own case without legal assistance. Despite failing health, he was determined to find out what happened to his Aunt Tessie's estate. "It was a story that had to be told," he said. "And nobody else could tell it."

It began in 1968, with Theresa Stapleton's death. The widow left behind no children - and no will. When citizens die intestate, the government-appointed office of the Public Trustee has a duty to distribute their estates to those with a rightful claim.

Theresa's estate was modest; her house in Lidcombe fetched $6000 when sold by the trustee in 1970. Her brother and sister claimed an interest. But without their parents' wedding certificate, proving they were Theresa's legitimate siblings, a functionary in the trustee's Parramatta office refused to acknowledge them as beneficiaries.

Theresa, 80, was the youngest of 11 children born to Thomas Carter and Margaret Kelly. A respected Catholic couple, they were thought to have wed in the Irish county of Rosscommon in 1863, before compulsory registration of marriages. An Irish genealogist enlisted by the trustee to find a record of the union died before any was found.

With no documentary evidence of the Carters' marriage, the trustee held the assets of Theresa's estate in abeyance.

It claimed that by 1990 it had transferred more than $11,000 - the estate, plus interest - to the NSW Treasury. After Theresa's siblings died, other relatives kept agitating the matter. Mr MacDonald began inquiring about the fate of the estate in 2000. Having waited seven years for answers, he took legal action to trace the money.

The judge who heard the case, Associate Justice John McLaughlin, said a disturbing picture emerged of the estate's administration - or lack of it. And with no evidence that the money was ever transferred, or that the Treasury received it, that picture "assumed a more sinister character", he said.

"The only inferences which the court can draw from this deplorable state of affairs are, at best, that there has been total incompetence and gross negligence on the part of the (trustee) or, at worst, that there has been deliberate dishonesty and misappropriation.'' Associate Justice McLaughlin directed the state ombudsman and corruption watchdog be alerted to the case.

In a scathing judgment handed down on Friday, he said the trustee failed to carry out its statutory duty for more than 40 years, despite inquiries from Theresa's family, and was negligent in handling the estate's assets.

Its conduct reflected an "**abandonment to blind bureaucratic management in substitution for its legal responsibility'**', he said.

''The renowned fictional case of *Jarndyce and Jarndyce* … is immediately called to mind by the circumstances of the instant case, which reflects so badly upon the Public Trustee and its staff over the past 42 years,'' he said.

A spokeswoman for the former Public Trustee, now known as the NSW Trustee and Guardian, said genealogy research had significantly improved since the 1960s. Its dedicated genealogy unit investigates more than 200 cases each year before transferring any money to Treasury. After the trustee conceded that Mr MacDonald was entitled to a one-eighth share in Theresa's estate, the judge ordered it pay him $43,034, plus exemplary damages of $50,000 for having "contemptuously disregarded" its duties.

In *Jarndyce and Jarndyce*, which became a byword for endless legal proceedings, costs eventually devoured the entire estate. In this case, the judge ordered that no money from Theresa's estate be used to pay Mr MacDonald's costs, damages or interest.

The victory came as a relief for Mr MacDonald. Suffering from secondary liver cancer, he feared he might die before he saw the case through.

''This court case was the last thing I really wanted to be able to finish,'' he said yesterday. **''Public officials must be accountable; they must be constantly and easily scrutinised. This should never have gone on for so long.''**

The NSW Public Trustee did everything in their power to **prevent** this case from being published however, Jas it was in the public's best interest for it to be published, McLaughlin denied the Trustee's request.

State Crest
New South Wales
Supreme Court

CITATION: MacDonald v Public Trustee [2010] NSWSC 684
This decision has been amended. Please see the end of the judgment for a list of the amendments.

HEARING DATE(S): 3 May 2010
JUDGMENT DATE: 25 June 2010

JUDGMENT OF: McLaughlin AsJ

DECISION:

1. I declare that the Plaintiff is entitled to a one eighth interest in the estate of the late Theresa Stapleton ("the Deceased").

2. I order that the Defendant pay to the Plaintiff the sum of $43,034, such sum representing a one eighth interest in the estate of the Deceased, together with interest thereon, calculated upon a compound basis, up to and including 30 June 2008.

3. I order that the Defendant pay to the Plaintiff the sum of $50,000, by way of exemplary damages.

4. I order that the Defendant pay the costs of the Plaintiff, such costs to be on the indemnity basis.

5. I order that, apart from the Plaintiff's one eighth interest in the estate of the Deceased, the Defendant personally pay the foregoing sums of money and the foregoing costs and not be entitled to have recourse to the estate of the Deceased for such sums of money or such costs.

6. I order that the moneys payable by the Defendant to the Plaintiff pursuant to orders 2 and 3 hereof be paid within 14 days of the date hereof, and if not so paid to bear interest at Supreme Court judgment rates until payment.

7. I reserve to the parties liberty to apply in respect to any arithmetical calculations or corrections.

8. I direct that the exhibits be retained in the Court file.

9. I direct the Registrar to furnish a copy of this judgment to each of the following:

(a) The Attorney General of New South Wales
(b) The Ombudsman of New South Wales
(c) The Independent Commission Against Corruption
(d) The Auditor-General of New South Wales
(e) The Treasurer of New South Wales.

CATCHWORDS : SUCCESSION - intestacy - administration of estate by Public Trustee - duty of Public Trustee to ascertain identity of persons entitled upon intestacy - failure of Public Trustee for more than forty years to fulfil that duty - conduct of Public Trustee in administration of intestate estate - assets of estate are no longer held by and cannot be located by Public Trustee - breach of statutory duty and breach of duty of care - entitlement of Plaintiff, a beneficiary upon intestacy, to compound interest - entitlement of Plaintiff to exemplary damages.

LEGISLATION CITED: Civil Liability Act 2002
Limitation Act 1969
Public Trustee Act 1913
Wills, Probate and Administration Act 1898

CATEGORY: Principal judgment

CASES CITED: Wilkes v Wood (1763) Lofft 1 at 19; 98 ER 489
Nocton v Lord Ashburton [1914] AC 932
Lamb v Cotogno (1987) 164 CLR 1
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10; (2003) 56 NSWLR 298

PARTIES: Grant MacDonald (Plaintiff)
The Public Trustee (Defendant)

FILE NUMBER(S): SC 2007/ 254231

SOLICITORS: Grant MacDonald, Plaintiff, in person
Gordon A. Salier (Defendant)

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

ASSOCIATE JUSTICE McLAUGHLIN

Friday, 25 June 2010

2007/ 254231 GRANT MacDONALD –v- PUBLIC TRUSTEE OF NEW SOUTH WALES

JUDGMENT

1 HIS HONOUR: These proceedings were instituted by summons filed by Grant MacDonald on 30 March 2007. An amended summons was filed on 22 October 2007 (pursuant to leave in that regard granted by me, after a contested hearing, on 17 October 2007).

2 By that amended summons the Plaintiff claims such relief as to which he may be entitled, including equitable compensation and interest.

3 It should here be recorded that the proceedings were instituted by the Plaintiff in person, without the benefit of any legal representation, and that he has conducted the proceedings, including the present hearing, in person and without any legal representation.

4 Pursuant to an order in that regard made on 12 March 2010 by Justice Slattery, as Duty Judge in the Equity Division, the proceedings in their entirety were committed to me for determination.

5 It is appropriate that, in commencing these reasons for judgment, I should refer, at least in summary, to the factual background of the proceedings.

6 Part of that factual background was set forth in my reasons for judgment of 17 October 2007, in respect to the contested application by the Plaintiff for leave to amend the summons (Grant MacDonald -v- Public Trustee of New South Wales [2007] NSWSC 1237).

7 That factual background has emerged from a considerable quantity of evidence presented by the Plaintiff, consisting essentially of affidavits of himself and documentary material annexed to such affidavits or tendered by the Plaintiff.

8 The factual background also emerges from a number of affidavits filed on behalf of the Defendant, including affidavits of Margaret Pringle, who was a solicitor employed by the Public Trustee and who formerly had the carriage of these proceedings.

9 The source of information presented to the Court by Ms Pringle consisted of books and records of the Public Trustee.

10 The present proceedings relate to the estate of the late Theresa Stapleton, née Carter (to whom I shall refer as “the Deceased”). She died intestate on 23 June 1968. Letters of Administration of her intestate estate were granted to the Public Trustee on 5 November 1968.

11 The Deceased was not survived by any spouse or by any children, but she was survived by two siblings. The Plaintiff is the grandson of one of those two siblings of the Deceased; that is, the Deceased was the Plaintiff’s great-aunt.

12 In my judgment of 17 October 2007, I stated that the picture which emerges in respect to the administration of the estate of the Deceased throughout what was then a period of almost 40 years since the death of the Deceased was a disturbing one. The picture which emerged at the final hearing, more than 41 years after the death of the Deceased, was even more disturbing, and assumed a more sinister character.

13 The estate had only one significant asset, being a house property situate at 106 Joseph Street, Lidcombe. For probate purposes, that house property was valued at $6,750. It was subsequently sold by the Defendant to the Department of Main Roads, for $6,000, that sale being completed on 17 November 1970, that is, two and a half years after the death of the Deceased, and more than two years after letters of administration were granted to the Defendant. Any other assets of the estate were got in, and funeral and testamentary expenses were paid, including death duties of $336.

14 Various relatives and kinsfolk of the Deceased (including the present Plaintiff and other members of his family) have been for more than forty years in communication with the Public Trustee, asserting their entitlement to share in the intestate estate of the Deceased.

15 The Plaintiff and his kinsfolk have been communicating with the Ombudsman of New South Wales, the Treasury of New South Wales, the Office of State Revenue, the Auditor-General of New South Wales, the Independent Commission Against Corruption, the Attorney General of New South Wales, the Shadow Attorney General of New South Wales, all in an attempt to obtain some form of redress regarding an estate which had been lying in abeyance for the best part of forty years.

16 The Plaintiff has a most legitimate complaint regarding the conduct of the Public Trustee in this matter. There are two separate, but closely connected, aspects of this matter which are of grave concern to the Court.

17 The first is the failure of the Public Trustee for a period of more than forty years to carry out its statutory obligation to administer the estate of the Deceased and to distribute the assets of the estate for the benefit of those persons entitled thereto.

18 The second is the failure of the Public Trustee to maintain and to safeguard the assets of the estate. The Defendant no longer holds those assets. There is no evidence that the Defendant, as it now alleges, ever transferred those assets to the Treasury of New South Wales, or that the Treasury ever received those assets. The situation which is revealed by the incompetence and possible misappropriation and dishonesty in the office of the Public Trustee is a very serious matter, which cannot be overlooked by the Court, or by those public authorities which have the responsibility for overseeing the Public Trustee and the administration of its office.

19 For ten years the administration (or the non-administration) of this estate by the Public Trustee drifted on in a casual and languid fashion. Obviously the Parramatta Office (which at that time had the control of the estate) did not consider that such a delay was out of the ordinary (perhaps for that office it was not), or that the interests of the beneficiaries were of any particular concern to it.

20 In October 1978 a decision was made by a functionary in the Parramatta Office of the Public Trustee that those various relatives and kinsfolk of the Deceased would not be entitled to any benefit out of the estate, unless those persons were able to establish to the satisfaction of the Public Trustee that their respective parents and grandparents were siblings of the Deceased. That decision meant that, in effect, until such evidence was proffered by those relatives the Public Trustee would not proceed to carry out its statutory duty to administer the estate of the Deceased, but would hold the assets of the estate in abeyance.

21 It has been asserted that the Public Trustee in 1988 and in 1990 transferred to the Treasury of New South Wales those assets, then totaling in excess of $11,000 (as a result of income earned on the proceeds of sale of the house property). As I have already observed, there is no evidence to support the assertion that any such transfer was effected.

22 The Public Trustee had at that time, and still has, a statutory duty to distribute the intestate estate of the Deceased to those persons entitled upon intestacy. (The existence of that statutory duty was conceded by the solicitor for the Public Trustee at the hearing of the present proceedings.) If, from the material which it held, the Public Trustee was not satisfied as to the identity of the persons entitled

upon intestacy, then it could have availed itself (as it frequently does in this Court in other estates) of the right to approach the Court by way of a next of kin inquiry. It chose not to do so.

23 It would appear that the concern of the functionary in the Parramatta Office of the Public Trustee, a person named David Lewis (who in 1978, some ten years after the death of the Deceased chose to place the administration of the estate in abeyance), was that the kinsfolk of the Deceased were not able to produce to the Public Trustee a certificate of the marriage of the parents of the Deceased, which would thus have established that the two surviving siblings of the Deceased were, in fact, her siblings. Such a marriage would have occurred in Ireland, probably in the 1860s, before compulsory registration of marriages in that country.

24 It should be emphasized that it was not the obligation of those kinsfolk to produce such a certificate to the Public Trustee. In any event, whether or not there was documentary evidence that the marriage took place, it was the obligation of the Public Trustee to administer the intestate estate by distributing it to the persons entitled upon intestacy. If the Public Trustee did not know the identity of those persons, then it should have approached the Court. To have merely placed the administration in abeyance was a failure on the part of the Public Trustee to carry out its statutory duty.

25 If, as has been asserted by it and on its behalf in the present proceedings, the Public Trustee in fact transferred the assets of the estate from out of its control (be it to the Treasury of New South Wales, or to any other entity), that action was totally unnecessary. No adequate explanation was offered for the alleged conduct of the Public Trustee in that regard.

26 That conduct can only be described as alleged conduct, because there is, in fact, no evidence whatsoever, first, that the Public Trustee did transfer the assets of the estate to the Treasury of New South Wales, or, second, that the Treasury ever received those assets.

27 It has now been asserted by the Public Trustee, that that entity has attempted to recreate what might be described as an account in respect to the intestate estate of the Deceased, with the asserted consequence that, for practical purposes, the funds representing the estate of the Deceased will ultimately be available for distribution to the persons entitled to those funds.

28 Despite its intransigent attitude to the contrary for a period of thirty-four years, the Public Trustee ultimately, by letter dated 15 May 2002, indicated that it is now prepared, without the sighting of a marriage certificate dating from the mid-nineteenth century, to be satisfied that the two persons who asserted themselves to be siblings of the Deceased were, in fact, the legitimate siblings of the Deceased.

29 Why the Public Trustee delayed more than thirty-four years before making that acknowledgement is not explained. It should also be noted that no next of kin inquiry was ever conducted before that decision was made.

30 In failing to distribute the estate, and in not availing itself of its right of recourse to the Court (by way of a next of kin inquiry or an application for judicial advice), the Public Trustee breached its statutory duty to administer the estate of the Deceased.

31 In my earlier judgment herein, of 17 October 2007, I stated that the Public Trustee at that time acknowledged that the Plaintiff was entitled as a beneficiary in the estate of the Deceased, and that the solicitor for the Public Trustee during the course of that earlier hearing informed the Court that the Plaintiff was entitled to a one tenth interest in the estate of the Deceased.

32 However, subsequently, during the course of the present proceedings, and before the final hearing, the solicitor for the Defendant sent to the Plaintiff a letter dated 5 June 2009, which was admitted into evidence as Exhibit 1 at the final hearing before me. That letter (omitting formal parts) states: I am instructed that, for the purposes of these proceedings, the Public Trustee acknowledges: -

(i) he had a duty as the administrator of the estate of the late Theresa Stapleton to administer the intestate estate of the deceased by distributing it to those entitled upon intestacy; and(ii) if he was not satisfied by the material which he held to identify the persons entitled upon intestacy he could have availed himself of the right to approach the Court by way of next of kin inquiry; and(iii) to transfer the assets of the estate from out of his control to the Treasury of New South Wales at the time was unnecessary and cannot be satisfactorily explained; and (iv) to have placed the administration of the estate in abeyance was a failure on his part to carry out his statutory duty to administer the estate of the deceased In the light of these acknowledgements the Public Trustee has recreated an account in respect of the estate of the deceased from his own resources. As a result of pursuing all necessary searches and enquiries the Public Trustee is now in a position to administer the intestate estate of the deceased by distributing the same to those entitled upon intestacy.

33 I have already recorded that at the hearing the Plaintiff appeared for himself, without the benefit of any legal representation. The Defendant was represented at the hearing (and throughout the proceedings) by a very experienced legal practitioner, who is a specialist in this area of the law. He did not attempt to defend or justify the conduct of the Defendant. He recognised that it was not possible to do so.

34 During the course of the present hearing oral evidence was given by various persons who were in attendance in response to subpoenas issued at the instance of the Plaintiff. Accordingly, the Plaintiff was entitled to call those witnesses and elicit from them evidence only in the nature of evidence in chief, but he was not entitled to cross-examine those persons.

35 Those persons were Ms Jennifer Campton, who had been employed by the Public Trustee in its Parramatta Office, from 1973 to 1976, and who had been what was described as the “case officer” for the estate of the Deceased; William James Darwen, who had been the Public Trustee for a period of 20 years, until 2001; and Peter John Whitehead, who had succeeded Mr Darwen as Public Trustee, and had held that office until mid-2009. Before holding that office Mr Whitehead was General Counsel for Mr Darwen in 2000 and 2001.

36 None of those three persons was cross-examined on behalf of the Public Trustee.

37 At the outset of its purported administration of the estate the Public Trustee retained the services of a genealogist in Ireland, in an attempt to establish the marriage of the Deceased’s parents, in the 1860s, and, in consequence, the relationship of the Deceased’s siblings (from whom the Plaintiff and his other kinsfolk trace their descent). However, that genealogist was said to have died while in the

process of conducting his inquiries and searches. At that point it seems that the Public Trustee was content to cast upon the potential beneficiaries the Public Trustee's own obligation of ascertaining who should receive the benefit of the intestate estate of the Deceased. The Public Trustee then required those persons to provide appropriate evidence of their claim. It appears that a decision in that regard was made by the functionary, Mr Lewis, who was the Manager of the Parramatta Office of the Public Trustee.

38 It was not for those potential beneficiaries to assume the obligation of providing the evidence. It was for the Public Trustee to discharge its duty to ascertain who should receive the intestate estate of the Deceased. If the evidence before the Public Trustee was not sufficient, he should have availed himself of his legal entitlement to approach the Court by way of a next of kin enquiry. No explanation has ever been offered for the failure of the Public Trustee to do so.

39 On 12 May 1971, one of the kinsfolk of the Deceased, Brian J. Ingoldsby (resident in the United States of America) had written to Mr Lewis and requested that the Public Trustee accept "the assumption a legal marriage had been performed and this matter thereby closed permitting distribution of the estate". The evidence does not reveal whether the Public Trustee replied to that letter.

40 In October 1978 (apparently on 26 October 1978) a decision was made by Mr Lewis that until those kinsfolk of the Deceased could proffer documentary evidence of a marriage that took place in Ireland in the middle of the nineteenth century, then the Public Trustee would not proceed to carry out its statutory duty to administer the estate of the Deceased, but would hold the assets of the estate in abeyance.

41 That decision by Mr Lewis was ultimately made in 1978, more than ten years after the death of the Deceased and after the Public Trustee had assumed a legal and statutory obligation to administer the estate of the Deceased. No adequate explanation has been offered for that delay of ten years. The decision by Mr Lewis that the estate should be placed in abeyance was totally without justification.

42 Mr Lewis had no legal qualifications. His role was an administrative one. Yet he did not at any stage refer the matter for appropriate advice to any of the legal officers in the employ of the Public Trustee. He allowed the administration of this estate to coast along for a period of ten years, and then formally placed that administration in abeyance. He had the file stamped "NFA". (The evidence at the hearing disclosed that those initials stood for "No Further Action".)

43 None of Mr Lewis's superior officers appeared to be in the least concerned by this conduct on the part of the administrative head of the Public Trustee's Parramatta Office. No one on behalf of the Public Trustee, either throughout the subsequent thirty-two years during which the Plaintiff and his kinsfolk have been agitating the matter, or during the course of the present hearing, appeared to regard the conduct of Mr Lewis as being one attracting criticism. Mr Darwen in his oral evidence at the hearing disagreed with the description of the situation as "disturbing". Mr Whitehead was of the view that Mr Lewis "was not necessarily in error".

44 The attitude adopted by Mr Darwen in the witness box was that he had no personal knowledge of the estate, that he had no recollection of the estate, and that he never saw any papers in relation to the estate. In summary, he disclaimed all responsibility, and just washed his hands of the matter.

Concerning a letter of 19 April 2001 addressed to the Auditor-General of New South Wales, which bore Mr Darwen's signature and which stated "despite extensive searches this office could not prove entitlement", Mr Darwen said that he had no recollection of the document.

45 In that letter Mr Darwen revealed that he did not know what had happened to the Deceased's money, but nevertheless be asserted that "this office has dealt with the matter appropriately". In a further example of the Public Trustee's abandonment to **blind bureaucratic management in substitution for its legal responsibility to administer the estate of the Deceased**, the letter went on to state, Any further queries relating to the matter will incur a fee, which will be assessed and payable prior to any action.

46 Mr Darwen in his evidence said, "We would do our best to find the beneficiaries". Despite my express advertence to that phrase "our best" and my stated hope addressed to the solicitor for the Defendant that the Court would be informed what constituted "the best" of the Public Trustee, there was no cross-examination of Mr Darwen either concerning that assertion or concerning any other matter.

47 During the course of his evidence at the hearing, Mr Darwen stated that he did not consider that the beneficiaries had been disadvantaged by the conduct of the Public Trustee in the administration of the estate (T27). Even the Public Trustee's own present solicitor in the proceedings did not attempt to support such an extraordinary and outrageous attitude.

48 In this regard I set forth the following passage from Mr Darwen's evidence (T27). PLAINTIFF

Q. Do you or did you consider then that people, the beneficiaries in this estate may have been disadvantaged by all of this – OBJECTION. QUESTION ALLOWED.

A. Could I have the question again?

QUESTION READ

A. No, my consideration here was that the office, for any loss caused my [scil., by] its misconduct would have been met by the office and I don't see that in relation to that particular estate if this estate was one that was disadvantaged by the money not being accounted for then the office would have picked that up.

Q. How?

A. We pay for it from our own money. It's an obligation on our office to pay it.

49 Down the years various enquiries were made by the Plaintiff and other members of his family entitled upon intestacy.

50 The constant and unyielding reaction of the Defendant to those inquiries was one whose obduracy was exceeded only by its arrogance. For example, in its letter of 19 April 2001, as I have already recorded, the Defendant, to add insult to injury, stated that any further inquiries regarding the matter would incur a fee which would have to be paid before the Defendant responded.

51 I have already referred to the asserted transfer of the assets of the estate of the Deceased by the Public Trustee to the Treasury of New South Wales in 1988 and 1990.

52 If that transfer to the Treasury had taken place, the fact of that transfer alone would probably constitute negligence on the part of the Defendant, in light of the fact that there were certainly living at that time persons who were entitled upon intestacy. Moreover, if that that transfer had taken place without the Public Trustee maintaining any record of or receipt for such transfer, that omission demonstrates that the Public Trustee had not exercised the due care and diligence that can and should be expected from any trustee of an estate, let alone one with a statutory duty in this regard, and especially one which occupies a statutory office. That conduct constitutes a breach by the Public Trustees of its statutory duty. Yet the grim picture of the administration of this estate does not end there.

53 It should be emphasized that that transfer of the assets was no more than an assertion and an allegation, and that the solicitor for the Defendant acknowledged at the hearing that there was no evidence whatsoever that the assets had been so transferred. Further, the State Treasury held no record of the assets having been received.

54 The only inferences which the Court can draw from this deplorable state of affairs are, at best, that there has been total incompetence and gross negligence on the part of the Defendant, or, at worst, that there has been deliberate dishonesty and misappropriation on the part of the Defendant.

55 Perhaps even more disturbing than the incompetence, and possible dishonesty, displayed by the documents and correspondence, is the intransigent and arrogant attitude manifested by the Public Trustee and its staff. The estate moneys were held on trust for those entitled to them. Those moneys did not belong to the Public Trustee. Yet the Public Trustee acted as if any enquiries by persons who might potentially be entitled to those moneys were nothing more than a nuisance and an irritant to the Public Trustee. I have already referred to the arrogant and insulting statement that any further enquiries by those persons would incur a fee.

56 The evidence (both documentary and by affidavit, as well as the oral evidence at the hearing) discloses that every superior officer in the office of Public Trustee for the past thirty-two years has attempted (and, until the matter finally came before the Court in the present proceedings, has largely succeeded) with obduracy and determination, as well as with total arrogance, to support and maintain and defend the totally improper and indefensible decision made by Mr Lewis in 1978.

57 Some attempt was made on behalf of the Plaintiff to have this decision reviewed.

58 The evidence in relation to the manner in which that application for review was dealt with by Mr Whitehead was somewhat alarming. First, Mr Whitehead claimed that he was not familiar with the idea of standing in the shoes of the original decision maker (presumably, for what would have been a review of the original decision on its merits). His oral evidence then continued (T35),

Q. You have to take responsibility for what was done as CEO in 2000, 2001 and onwards?
A. The office of the Public Trustee was a corporate sole position; to use that continuity at the time would have been for the running of the office.

Q. When it comes to ask questions, you would have had to stand in his shoes –

A. I wouldn't have had to stand in his shoes in my position as CEO.

Q. If you are asked to review what was done?

A. I wasn't standing in his shoes. Given my position as CEO reviewing the file, I can't stand in someone else's shoes, I can only review the decision made by people and I would be making my call on that decision.

Q. Don't you understand this is an order for review, isn't that standing in the person's shoes, the person who made that decision, you never heard that?

A. No.

Q. Never heard that?

A. I don't see where that point is being made. I am saying my position would be to review the file and make a call on what he has done and be accountable as the current CEO in that role, fulfilling that role, and to make a decision.

Q. If the Deputy Public Trustee signed that in 1988, '68, if he said to swear to well and truly administer the estate, then it becomes your responsibility, doesn't it?

A. As I said, it's a conceptual role for the Public Trustee to fulfil, to administer the estate according to law. Whoever is in that position at the time has that accountability to the office to do that.

59 Yet later in his evidence Mr Whitehead employed what one assumes was only a figurative use of the phrase "standing in the shoes" of the Mr Lewis, the original decision maker. In conducting his examination the Plaintiff obviously noted the reference, but Mr Whitehead did not offer any explanation as to the sense in which he was then using the phrase "standing in the shoes", and the following evidence continued (T39),

Q. I have said there, the top paragraph, "Thus, what Brian Ingoldsby was putting to the trustee was true, factual evidence was just not available. There are indeed gaps in the evidence, the trustee was obliged to accept and respond to this". Do you agree that if Mr Lewis did receive that letter he was obliged to respond to it and give that presumption [of marriage], would you say?

A. Putting myself in the shoes of Mr Lewis, I would say in some ways a couple of practical things I would think about, how big were the gaps, what I had done to date to try and fill those gaps, had my professional genealogists search been enough to fill those gaps? I am talking about--

Q. You said you were putting yourself in his shoes?

A. A branch manager would look at the practical side in administering the estate.

Q. You said you were putting yourself in his shoes?

A. That's right, a practical person managing the estate; he would look at what those gaps were and see if anything further reasonably could be done noting there had been professional searching for the certificate of proof.

Q. Do you agree, again in relation to relatives, asking them to continue a failed search?

A. When a trustee feels they have taken their searches to a reasonable level it can be asked of the family "we have taken it to a reasonable level do you have any further information or if you come across further information please bring it forward" because once you make a decision to take no further action based on the reasonable searches you have decided are reasonable you can still open the case or if something comes forward many years later you can still write to State Revenue asking for the funds back if something comes forward.

Q. But the circumstances of the case were that the estate had already been in administration 10 years, that is one thing he had to take into consideration, wasn't it, that is a big consideration?

A. Yes.

60 Nevertheless, the Public Trustee eventually agreed to review the original decision of Mr Lewis, and ultimately concluded that the latter had given insufficient weight to the presumption of marriage. In reviewing that decision the Public Trustee then on 19 December 2003 wrote to the Plaintiff, expressing his apology “for the lack of weight given to the law on presumption of marriage in 1978”.

61 In his letter Mr Whitehead referred to the decision made by Mr Lewis in 1978 “to take no further action in the estate, based on the lack of certificate proof of marriage of Margaret Kelly and Thomas Carter”. The letter continued, This decision was made within the authority level of Mr Lewis who was a Branch Manager. It is acknowledged, however, that it appears that the issue of presumption of marriage may not have been given full consideration by legal staff. Certainly no records remain of this, or of any communication to possible beneficiaries about the decision. Marriage Presumption

The secondary evidence of a marriage is outlined in my letter of 15/5/02. This evidence would have been available in 1978, and could have been given more emphasis by Mr Lewis when he decided to take no further action. Clearly, Mr Lewis in 1978 took a cautious approach to proving entitlement concentrating on certificate evidence rather than fully exploring the presumption of marriage.

62 The letter of 15 May 2002 from Mr Whitehead, as Acting Public Trustee stated, On the basis of information provided by you, and noting the value of the estate, the Public Trustee as administrator of the estate has made the decision that Thomas Carter was married to Margaret Kelly. Although Church records of the deceased’s parents’ marriage do not exist, other secondary evidence refers to a marriage having taken place:[That secondary evidence is then identified]There is also other consistent information within the papers provided.

63 As I have already recorded, as long ago as 12 May 1971, one of the kinsfolk of the Deceased, Brian J. Ingoldsby (resident in the United States of America), had written to Mr Lewis and requested that the Public Trustee accept that the presumption of marriage be applied. It took from 12 May 1971 until 15

May 2002 – precisely 31 years – for the Public Trustee to accept such a presumption of marriage.

64 Even after it had decided to accept the presumption of marriage and resume its administration of the estate of the Deceased, the attitude of the Public Trustee towards that administration appears hardly to have changed in character.

65 On 17 January 2003, a functionary at the Chatswood Office of the Public Trustee (who by that time had assumed the carriage of the estate) in a letter to the Plaintiff, said, with almost mind-numbing understatement, "As this extended delay is now causing some concern", and proceeded to request the Plaintiff to provide certain genealogical information, most of which had already been held by the Public Trustee since the mid-1970s in the form of various genealogical tables compiled apparently with the assistance of potential beneficiaries of the estate of the Deceased.

66 The Public Trustee did not attempt to offer any explanation for the conduct of any of the persons responsible for the administration (or, rather, non-administration) of this estate. The evidence by the case officer, Ms Campton, and by two former Public Trustees, Mr Darwen and Mr Whitehead, was made available only as a result of those persons being called under subpoena by the Plaintiff. The Public Trustee did not choose to proffer any evidence at the hearing by anyone who had any direct involvement in the administration of the estate, as distinct from legal officers who have participated in the conduct of the present proceedings. Neither were any of the foregoing three persons cross-examined on behalf of the Public Trustee. The Public Trustee did not attempt to offer to call Mr Lewis, or to offer any explanation for his absence. Appropriate inferences can be drawn from the absence of any evidence from that person.

67 Mr Whitehead said that when the matter came before him in 2000 and 2001 he "was not disturbed", but was "a little bit disappointed" that Mr Lewis had not referred the matter for a legal determination before making his final decision. Mr Whitehead again stated, "I am saying not disturbed, I am saying disappointed…" Mr Whitehead said that his disappointment was "Disappointment to the people we had an obligation to administer the estate for".

68 In her affidavit of 4 June 2009, Ruth Pollard, a solicitor in the employ of the Public Trustee, stated (in paragraph 11), The Public Trustee will consent to an order that he pay the Plaintiff the sum of $21,500 in full settlement of the claim of the Plaintiff for equitable compensation and interest as the sole beneficiary of the estates of the late Honora O'Brien and Edeline MacDonald as to their respective interests as to the intestate estate of the deceased.

69 Subsequently, in her affidavit of 5 November 2009, Michelle Maynard, a solicitor in the employ of the NSW Trustee and Guardian (formerly the Public Trustee), stated (in paragraph 17), The NSW Trustee and Guardian will consent to an order that it pay the plaintiff the sum of $42,500 in full settlement of the claim of the plaintiff for equitable compensation and interest as the sole beneficiary of the late Honora O'Brien, Edeline MacDonald and John Matthew O'Brien as to their respective interests as to the intestate estate of the Deceased.

70 However, paragraph 14 of that affidavit sets forth the result of a calculation of the Plaintiff's entitlement (assuming that the Plaintiff does not press a claim for interest between 1 July 2008, and 31 March 2009), calculating the Plaintiff's gross entitlement as at 6 November 2009, to be $43,034.61. That affidavit does not explain any connection between that calculation and the statement contained in

paragraph 17 of Ms Maynard's affidavit, that the NSW Trustee and Guardian will consent to an order that it will pay the Plaintiff only the sum of $42,500. Upon the Defendant's own calculation the Plaintiff's entitlement is some $534 greater than that amount of $42,500.

71 At the hearing the Defendant, through its solicitor, expressly acknowledged the entitlement of the Plaintiff to one eighth of the estate of the Deceased. Indeed, at the hearing, the submissions of the Defendant were essentially addressed to the nature of the relief to which the Plaintiff was entitled. The Defendant did not dispute that the Plaintiff was entitled to some relief.

72 The Defendant did not dispute the entitlement of the Plaintiff to interest calculated on the basis of compound interest. Upon the calculations provided by the Defendant, the solicitor for the Defendant acknowledged that, if the Plaintiff is entitled to compound interest from 1 July 1972 to 30 June 2008, then the figure of $13,532.90 (referred to in the foregoing affidavit of Michelle Maynard sworn 5 November 2009, Annexure B) should be multiplied by three, resulting in a figure of $40,598. (The evidence did not disclose the basis of that calculation of compound interest, whether (for example) it was calculated upon daily, weekly, monthly, or even annual, rests.) Neither does Ms Maynard's affidavit explain the difference between that latter figure of $40,598 and the figure of $43,034 referred to in paragraph 14 of her affidavit.

73 I would here interpolate that the calculation of compound interest only up to 30 June 2008 was stated to be because, when the matter was before Justice Brereton on 11 September 2009, the Plaintiff said "I will not claim any interest since the time I got sick last July and could not progress my case."

74 At the hearing before me the Plaintiff said that at the time when he made that statement to Justice Brereton he was not well, and had no advice. As I understood it, the Plaintiff now wishes to withdraw the concession he made in September 2009. It is relevant in this regard that, although the matter was later fixed to be heard on 22 and 23 June 2009 that hearing date was, upon the Plaintiff's own application, vacated by Justice Rein on 5 June 2009.

75 I have every sympathy for the situation in which the Plaintiff has found himself in this matter (a situation for which he has in no way been responsible), and I have every sympathy for the physical and mental condition of the Plaintiff (in relation to which there has been placed before the Court a medical report of Dr Jennifer Wines of 3 August 2009, stating that the Plaintiff at that time was quite unwell, was having further chemotherapy, which was causing him to be exhausted and nauseated). Nevertheless, on account of the foregoing occurrences relating to the Plaintiff's health, which interrupted the orderly progress of the proceedings in July 2008 and in June 2009, I consider that the compound interest for which the Defendant should be liable should not extend beyond 30 June 2008.

76 In the absence of any other calculation of compound interest, I am (at least for the present) prepared to accept the Defendant's foregoing calculation of compound interest upon the Plaintiff's entitlement, in the sum of $43,034. That amount is slightly greater than the amount of $42,500 to which the Defendant has conceded the Plaintiff is presently entitled. I shall, in due course, make any order which reflects the Defendant's calculation of the higher amount.

77 In addition, the Plaintiff claims damages of $100,000 (being a claim for $25,000 under each of the heads of breach of statutory duty, breach of fiduciary duty, breach of duty of care, negligence).

78 As I understand it, the Plaintiff in claiming the foregoing sum of $100,000 submits that, in addition to the amount of about $43,000 which is admitted by the Defendant, he is entitled to receive a further sum in the nature of damages.

79 The Defendant, through its solicitor, did not dispute that if the Defendant be found to have breached its statutory duty, then such a breach would attract damages, or equitable compensation.

80 By his affidavit of 22 April 2010 the Plaintiff, in annexure A provided what is described as "Statement on Damages and Quantum – 22 April 2010", and in annexure B provided what is described as "Quantum of Damages Sought".

81 The Defendant's solicitor prepared a document entitled "Statement of Issues", dated 3 April 2009. Consequent upon the order of Justice Slattery in that regard of 2 March 2010, that document was replaced by an amended statement of 23 April 2010. I have also received a written outline of submissions from the Defendant, also dated 23 April 2010. The foregoing documents provided on behalf of the Defendant will be retained in the Court file.

82 It now falls to be considered the nature of any cause of action of the Plaintiff arising out of the facts of this case, and the appropriate remedy to which that cause of action entitles the Plaintiff.

83 In circumstances such as these, where the trustee of an estate has been errant in the administration of the estate, the cause of action of a person in the situation of the present Plaintiff would most commonly be to pursue the trustee for breach of its fiduciary duty, and to request the Court in its equitable jurisdiction to order an account of profits, or award equitable compensation, or perhaps award a proprietary remedy.

84 In the circumstances of the instant case, however, the trustee of the estate of the Deceased also owed to the beneficiaries a statutory duty to administer the estate. (I have already recorded that the solicitor for the Defendant acknowledged the existence of that statutory duty.) That is, the equitable fiduciary duties and the common law duties of the Defendant overlap. It was observed by Lord Dunedin in Nocton v Lord Ashburton [1914] AC 932 at 964, that, "whenever we come to the idea of breach of duty we see how nearly the domains of law and equity approach, or perhaps, more strictly speaking, overlap".

85 Where, as here, the Defendant owed to the Plaintiff a statutory duty, and the Plaintiff is alleging that the Defendant has breached its statutory duty, or has been negligent, the Court will first consider any breach of that common law duty, and thereafter will consider whether there is any need for or utility in resort to equitable rights or remedies.

86 The duties of the Public Trustee in force at the time of the death of the Deceased (and until 2009 when the NSW Trustee and Guardian Act 2009 commenced) were set forth in section 12 of the Public Trustee Act 1913, as follows: General powers and duties

(1) The Public Trustee shall, subject to the provisions of this Act and rules made thereunder, be capable of being appointed and of acting under that name: (i) as a trustee,
(ii) as an executor or administrator, including administrator pendente lite,
(iii) as collector of estates under an order to collect,
(iv) as an agent or attorney,
(v) as manager of the estate of a protected person,
(vi) as guardian or receiver of the estate of a minor,
(vii) as a receiver of any other property.
The Public Trustee may be appointed and may act jointly with any other person in any such capacity as is mentioned in this subsection.
…

(2) The Public Trustee shall have all the same powers, duties, and liabilities, and be entitled to the same rights and immunities, and be subject to the control and orders of any court as a private person acting in the same capacity.

87 By section 61B of the Wills, Probate and Administration Act 1898 (the relevant statutory provision in force at the time when the Defendant obtained the grant of administration, and at the time when the Defendant ceased to hold the assets of the estate), the Defendant was under a statutory duty to hold the real and personal estate of the Deceased for the persons entitled thereto. Subsection (1) of that section provides: (1) Where a person dies wholly intestate, the real and personal estate of that person shall, subject to the payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate, be distributed or held in trust in the manner specified in this section, and the real estate of that person shall be held as if it had been devised to the persons for whom it is held in trust under this section.88 It should not be overlooked that the role of the Public Trustee in administering estates is not a philanthropic one. The Public Trustee expects not only to be reimbursed for its activities, but also to receive by way of profit a commission, to which it has a statutory entitlement and for which it (unlike a private administrator or executor) does not require to make application to the Court. 89 Further, the Public Trustee does not merely have the duties and responsibilities which are required of every administrator and trustee. The Public Trustee is a statutory entity, of which the highest standards of integrity and efficiency are expected. In the instant case those expectations were not fulfilled. 90 Section 48 of the Public Trustee Act provides that any remedy which can be pursued against a private person can be pursued against the Public Trustee. 91 In the instant case the Defendant obtained a grant of letters of administration of the estate of the Deceased. The Defendant then got in the assets of the estate and held those assets on trust for the persons entitled thereto. The Defendant not only was in breach of its duty to those persons by not distributing the estate, but acted in such a way that it no longer held the assets of the estate, and thus deprived itself of the ability to carry out that duty. 92 Negligence has been defined by section 5 of the Civil Liability Act 2002 as “a failure to exercise reasonable care and skill”. Section 43 of that statute concerns proceedings against public or other authorities based on a breach of a statutory duty. In the instant case the circumstances in which the Public Trustee ceased to control the monetary assets of the estate disclose gross negligence on the part of the Defendant. The circumstances in which the Defendant conducted itself in refusing to administer the estate over the past forty-two years, and the attitude manifested by it towards those persons who attempted to claim some entitlement to the estate certainly constitute a failure to exercise reasonable care and skill. It also constituted conduct which could in no way be considered to be a reasonable discharge of its duty by a statutory authority in the position of the

Defendant. Moreover, those circumstances and that attitude demonstrate a contumelious disregard for the Defendant's own statutory obligations, as well as for the corresponding rights of the beneficiaries. 93 I am satisfied that, since the Defendant ceased to hold the assets of the estate, the Defendant was in breach of its statutory duty. (I have already recorded that the solicitor for the Defendant conceded that the Defendant had been in breach of its statutory duty.) 94 The evidence in this matter clearly establishes, to my complete satisfaction, that the Defendant has been errant in its duties as trustee, as asserted by the Plaintiff in his amended summons of 22 October 2007; has breached its duty of care; has failed in its statutory duty to administer the estate of the Deceased; and has been negligent in ceasing to retain control of the assets of the estate. 95 At the hearing the solicitor for the Defendant hardly disputed any of the foregoing matters, and did not raise any matters which would constitute opposition to the foregoing findings and conclusions expressed by me herein. The admissions made by the Defendant in the letter of 5 June 2009 from its solicitor (Exhibit 1) would of themselves establish the claim of the Plaintiff. 96 The Defendant did not assert that it had any defence under the Limitation Act 1969, or that that statute had any application to the circumstances of the instant case. 97 It was necessary for the Plaintiff to institute the present proceedings in order to retain redress to which he was entitled. If the Defendant had carried out its statutory and fiduciary duty, and had retained the assets of the estate under its control, and if it had approached the Court for a next of kin inquiry, or even if it had allowed the light of common sense to penetrate the caliginous fog of its bureaucratic mindset, these proceedings would never have become necessary. 98 The renowned fictional case of Jarndyce and Jarndyce in the Court of Chancery, described by Dickens in Bleak House, is immediately called to mind by the circumstances of the instant case, which reflects so badly upon the Public Trustee and its staff over the past forty-two years. 99 Until eight years ago, the Defendant was disputing the entitlement of the Plaintiff to receive any part of the estate of the Deceased. Subsequently, and after many attempts to persuade the Defendant to such effect, the Defendant most grudgingly admitted that the Plaintiff was entitled to a one eighth interest. 100 In this regard it should, however, be recorded that in his letter of 27 January 2005 the Ombudsman told the Plaintiff that the Ombudsman had been informed by the Public Trustee's Manager of Branch Services that: the simple reason the Public Trustee will not write to you confirming that you are a beneficiary of Theresa Stapleton's estate is because you are not a beneficiary.

Apparently that information was communicated to the Ombudsman as recently as late 2004 (that is, well after Mr Whitehead's letters to the Plaintiff of 15 May 2002 and 19 December 2003, which had the effect of acknowledging the Plaintiff's status as a beneficiary). It would appear that the Public Trustee had misled the Ombudsman.

101 At the end of 2009, the Defendant conceded that the Plaintiff was entitled to $21,000. Shortly before the final hearing in 2010 the Defendant conceded that the Plaintiff was entitled to $42,500. 102 I have now concluded that the entitlement of the Plaintiff is to the amount of $43,034, calculated by Ms Maynard in paragraph 14 of her affidavit of 5 November 2009 as the Plaintiff's entitlement, being his eighth share of the estate, together with compound interest thereon to 30 June 2008. 103 In addition, the circumstances of this case are such as to call most strongly for an award of damages, in the nature of exemplary damages, which should be in the sum of $50,000. That sum is to compensate the Plaintiff for the necessity of bringing the proceedings, for his continued need to withstand the opposition which has been manifest by the Defendant, and to act as a deterrent to the Public Trustee which has so contemptuously disregarded not only the fiduciary duties of an administrator and trustee, but also the principal statutory duty for which that entity exists. 104 Because the foregoing entitlement (by way of compound interest and exemplary damages) will adequately compensate the Plaintiff for the loss suffered at the hands of the Public Trustee, it will not be necessary for me to consider the application of any purely equitable remedies. If however, contrary to my foregoing conclusions, the Public Trustee could not be held accountable for breach of its statutory duty or for breach of its common law duty of

care, then the Court would be precluded from awarding any sum in the nature of exemplary damages by way of purely equitable relief. (See Harris v Digital Pulse Pty Ltd [2003] NSWCA 10; (2003) 56 NSWLR 298, especially the judgment of Heydon JA (as he then was), at 341f). 105 However, fortunately for the Plaintiff, and for the protection of others who might find themselves in a similar situation, his entitlement is not grounded exclusively upon rights in Equity. The Public Trustee ought to be held accountable for the breach of its statutory duty and of its common law duty of care; and exemplary damages in the foregoing sum are both a fitting deterrent and an appropriate example where such breaches were in contumelious disregard of the Plaintiff's rights over a period of more than forty years. 106 In the celebrated case of Wilkes v Wood (1763) Lofft 1 at 19; 98 ER 489 at 498-499, Pratt LCJ said of exemplary damages that they are more than satisfaction for the injury received, and are awarded "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." (That passage was quoted with approval by the High Court of Australia in a joint judgment in Lamb v Cotogno (1987) 164 CLR 1 at 8.) The foregoing description may be regarded as having application to the conduct of the Public Trustee in the instant case. 107 In regard to the award of exemplary damages, I should again emphasise that the solicitor for the Defendant did not dispute that the Court in these proceedings had the power to award exemplary damages. 108 I am satisfied that the Defendant should pay the Plaintiff's costs and that those costs should be on the indemnity basis. Further, the Defendant is not entitled to have recourse to the estate of the Deceased for the payment of those costs, or for the payment of interest upon the Plaintiff's one eighth share, or for payment of the foregoing sum by way of exemplary damages. 109 Accordingly, I make the following orders: 1. I declare that the Plaintiff is entitled to a one eighth interest in the estate of the late Theresa Stapleton ("the Deceased"). 2. I order that the Defendant pay to the Plaintiff the sum of $43,034, such sum representing a one eighth interest in the estate of the Deceased, together with interest thereon, calculated upon a compound basis, up to and including 30 June 2008. 3. I order that the Defendant pay to the Plaintiff the sum of $50,000, by way of exemplary damages. 4. I order that the Defendant pay the costs of the Plaintiff, such costs to be on the indemnity basis. 5. I order that, apart from the Plaintiff's one eighth interest in the estate of the Deceased, the Defendant personally pay the foregoing sums of money and the foregoing costs and not be entitled to have recourse to the estate of the Deceased for such sums of money or such costs. 6. I order that the moneys payable by the Defendant to the Plaintiff pursuant to orders 2 and 3 hereof be paid within 14 days of the date hereof, and if not so paid to bear interest at Supreme Court judgment rates until payment. 7. I reserve to the parties liberty to apply in respect to any arithmetical calculations or corrections. 8. I direct that the exhibits be retained in the Court file.9. I direct the Registrar to furnish a copy of this judgment to each of the following:
(a) the Attorney General of New South Wales(b) the Ombudsman of New South Wales(c) the Independent Commission Against Corruption(d) the Auditor-General of New South Wales(e) the Treasurer of New South Wales.
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Amendments

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01/07/2010 - Typographical error. - Paragraph(s) [101]

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