

SUPREME COURT OF QUEENSLAND

CITATION: *Acton v Hartnell* [2026] QSC 212

PARTIES: **KIM ELLEN ACTON AND TIMOTHY DANIEL CONNOLLY**
(applicants)
v
WALTER JOHN HARTNELL
(first respondent)
ROBIN DANIEL CONNOLLY
(second respondent)

FILE NO/S: BS 5619/25

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 12 March 2026 (delivered *ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 12 March 2026

JUDGE: Treston J

ORDER: **1. The Applicants are advised that they are justified in:**

- (a) defending proceedings BS 3274 of 2023;**
- (b) selling the following properties:**
 - (i) Lot 147 on Crown Plan DL51 and Lot 251 on Crown Plan DL224, title reference 16419048;**
 - (ii) Lot 152 on Crown Plan DL36, on title reference 16419059;**
 - (iii) Lot 151 on Crown Plan DL68, title reference 16234197;**
 - (iv) Lot 260 on Crown Plan DL68, title reference 16419058;**
 - (v) Lot 1 on Registered Plan 42704, title reference 16419056; and**
 - (vi) Lot 1 on Registered Plan 45950, title reference 16419055.**

2. The Applicants are directed to pay from the proceeds of sale of the properties referred to in paragraph 1(b) of this Order the agent's commission, selling costs and

other usual adjustments on sale with the balance proceeds to be distributed in accordance with the below (net proceeds of sale):-

- (a) deposit one half of the net proceeds of sale into a separate account until the earlier of:**
 - (i) the finalisation of proceedings BS 3274 of 2023;**
 - (ii) an order of the Court directing how the money in that account should be paid; and**
 - (iii) written agreement of the parties as to how that money should be paid;**
 - (b) as to the other half, unless otherwise ordered by the Court or with the written agreement of the parties, to retain the other half of the net proceeds and not pay or disburse the same except in payment of any debts, liabilities (including costs orders) and expenses of Janice Mary Connolly, deceased or of the Applicants (as executors) including:**
 - (i) any assessed tax, insurance, rates, land tax and other statutory charges payable in relation to, and for the maintenance and repair of, any assets of the deceased's estate; and**
 - (ii) the Applicants' costs of proceedings BS 3274 of 2023 on the indemnity basis provided that they are properly incurred.**
- 3. The following documents be placed in a envelope marked "not to be opened without an order of the Supreme Court of Queensland or the consent of the parties":**
- (a) the Affidavit of Katie Worsnop filed 6 March 2026, court document no. 5;**
 - (b) Counsels' opinion provided to the Court on the hearing of this Application.**
- 4. All parties' costs of this Application be paid from the estate of Janice Mary Connolly, deceased, on the indemnity basis.**

CATCHWORDS: SUCCESSION – PERSONAL REPRESENTATIVES – PROCEEDINGS BY PERSONAL REPRESENTATIVES – INSTITUTION OR CONTINUATION OF PROCEEDINGS ON BEHALF OF DECEASED – where applicant executors apply for judicial advice as to whether they are justified in defending proceedings brought by the first respondent – where

advice also sought as to whether the applicant executors are justified in selling an asset of the estate – where no written statement of facts provided with the application for advice – where application supported by confidential advice and affidavit material – where appropriate, in this case, to proceed with application – where application supported by the first respondent and not actively opposed by the second respondent – whether applicant executors' actions justified

Trust Act 1973 (Qld), s 34, s 94

COUNSEL: R Whiteford with A Bratti for the applicant
I Klevansky for the first respondent
A G Rae for the second respondent

SOLICITORS: McInnes Wilson for the applicant
Geoff Lyons Solicitors for the first respondent
de Groot for the second respondent

- [1] HER HONOUR: The matters before me today arise out of the estate of the deceased Janice Mary Connolly who died on 18 June 2022. The deceased was survived by three children, Kim Acton, and Timothy Connolly, who are the named executors, and the second respondent, Robin Connolly. It is alleged that the deceased was also survived by a de facto spouse, the named first respondent to these proceedings.
- [2] From about 1982 until the time she died the deceased was the sole registered proprietor of over 3,000 acres of cattle property near Mitchell in the State of Queensland, a property called Homebush. The evidence suggests that Homebush is worth something in the vicinity of \$4 million.
- [3] The first respondent is a 75-year-old man who, it is alleged, commenced living in a de facto relationship with the deceased in the late 1970s. But for a short period of separation early in their relationship, he says that their relationship persisted effectively between then and the time of the deceased's death in 2022.
- [4] The first respondent also alleges that some time many years ago, probably in the late 1970s or early 1980s, after that brief period of separation, the deceased represented to the first respondent that if he resumed his relationship with her and operated the cattle partnership on Homebush in partnership with her, she would transfer one-half of her interests in the Homebush property to him. By proceedings commenced in this court, he alleges that relying upon that representation he returned to Homebush the next day and thereafter operated Homebush in partnership with the deceased over the next four decades leading up to her death, improving and maintaining it and living in a house built upon it.
- [5] The deceased's children deny that the first respondent and the deceased lived in a de facto relationship after about 2000 and further deny that the deceased made the alleged representations to the first respondent.
- [6] The deceased's last will is dated 24 October 2021, and it appoints the applicants and the first respondent as the executors and gives the first respondent an interest in

another property known as Brooklyn, as well as plant and equipment and a bank account of her partnership with him. Then, after making minor gifts of chattels to her daughter Kim, the will gives the residuary estate, which expressly included her interest in Homebush, to her three children in equal shares.

- [7] Probate was granted to the applicants in May 2023 with leave reserved to the first respondent to seek a grant. By originating application filed in March 2023, the first respondent commenced the substantive proceedings as they are described in the matter before me, which includes an application for a declaration that the applicants hold a half interest or such other share as the court considers appropriate in all of the lots comprising Homebush on trust for him and, additionally, or in the alternative, further provision from the estate. The proceedings were mediated in April 2024 and did not resolve.
- [8] An order of this court was made in June 2025 that the first respondent deliver pleadings in relation to the substantive proceeding, being the declaration of trust over the Homebush property. A defence and reply have been filed.
- [9] Before me is an application for an order that the executors are justified in defending the proceeding brought against the estate by the first respondent in what is referred to as substantive proceedings being that general description of the proprietary estoppel claim brought by the first respondent as well as defending his family provision application.¹
- [10] In addition, in the circumstances that currently pertain, it is not in issue that there are simply insufficient funds in the residuary estate to pay the estate expenses, including, in particular, the expenses associated with defending the proceedings. To date the applicants have been paying estate liabilities personally, and the evidence demonstrates the applicants have borne costs approaching \$200,000 in relation to estate liabilities. Unsurprisingly, the applicants are not prepared to continue to fund estate liabilities, including the conduct of the litigation, out of their own personal funds. There is, therefore, another order sought, and that is in relation to the sale of an asset of the deceased's estate in order to place the estate in funds to defend the first respondent's application.
- [11] All the parties represented before me today agree that the executors are justified in defending the proceedings brought by the first respondent, both the family provision proceedings and the substantive proceedings.
- [12] I have been provided with and carefully read the confidential opinion of Mr Whiteford and Ms Bratti of counsel, which I will shortly place in a sealed envelope and mark not to be opened without an order of the court. It is unnecessary for me to say much in relation to the order that the estate is justified in defending the proceeding, but both the strengths and weaknesses of the case have been sensibly and thoroughly considered by counsel, and for the reasons set out in that advice, it is, I conclude, in the interests of the deceased's estate for the applicants to defend all the proceedings, and no party contends to the contrary.

¹ The application was brought pursuant to s 96 of the *Trusts Act 1973* as the *Trusts Act 2025* commenced on 28 April 2026, that is after the application was heard and determined. In any event, s 284 of the *Trusts Act 2025* provides that for a proceeding commenced under Part 7, Division 4 (other than s 101), the proceeding remains subject to the *Trusts Act 1973*.

- [13] The most significant matter in issue before me today, however, having regard to the financial position of the estate and the estate's position that it does not have sufficient liquid assets to defend the proceedings on foot, is how to fund those expenses going forwards. All the parties accept it is entirely appropriate for the applicants to realise some estate assets in order to fund proceedings, and no one suggests that the applicants ought to fund those expenses out of their own pockets as they have done to date.
- [14] The issue that arises here is what property ought to be sold. It can be accepted that the residuary estate is the first asset which can be utilised for the purpose of meeting estate expenses. Homebush appears to be the only asset in the residuary estate which can be sold. When the originating application was first filed, the executors had sought the court's advice as to whether they were justified in selling the entirety of the Homebush property. On the application before me today, and only shortly prior to the hearing of it in the last few days, did it become the executor's position that, rather than selling the whole of Homebush, the executors needed only to sell half of it.
- [15] The evidence before me demonstrates that Homebush, although divided into a large number of lots, is, in fact, operated effectively as a northern part and a southern part of the property. The southern part of the property is the part where the main residence is and where the first respondent contends he has lived with the deceased for over four decades.
- [16] A number of valuations have been obtained in relation to Homebush, and there is, I accept, evidence both ways as to whether the maximum value might be obtained for the property by the sale of either the whole of it or only part of it. It is unnecessary for me to summarise all of the evidence of each of the valuers to reach any particular conclusion as to how the best price might be achieved. The resolution of that question, if it ever becomes relevant, will ultimately be a matter for a trial.
- [17] But the issue which I must consider today in respect of the giving of judicial advice arises primarily because originally, as I say, the executors had proposed to seek advice that they were justified in selling the entirety of the property, whereas, after receiving some further valuation evidence on behalf of the first respondent, they now seek advice that they are justified in selling only the northern section. The executors' approach to selling only the northern part of Homebush is supported by the first respondent.
- [18] The second respondent had originally proposed to support the proposal to sell the whole of Homebush. The second respondent contends that, given the executors change in approach to sell only the northern part, they have not, in the time available, been able to satisfy themselves whether they ought to support the more limited basis for the application. That is not to say that they suggest that no asset should be sold. They accept that the estate has no liquid funds and that some asset needs to be sold; however, they contend that there is generally insufficient evidence for the court as to how the sale of only one-half rather than the whole would affect the partnership which is conducted on the property.
- [19] They have raised concerns that the proposal to sell only half might lead, in fact, to further disputation. They identify that there is, in their view, a lack of information as to whether, for example, there is sufficient water on the southern side of the property; whether the property on the southern side is viable as a cattle property; whether there

is clear evidence regarding things such as the state of the fencing, or whether cattle are situated on both of the properties, and, generally, whether the southern part of the property can properly be run as a cattle operation if the northern part of the property is sold.

- [20] Whilst ultimately the second respondent submits that he will abide the order of the court, the second respondent, nevertheless, contends that there is some risk to the executors in the way in which the matter has been conducted, because, in the absence of evidence regarding how the partnership might continue to operate, in fact, after the sale of the northern part, that is a matter I ought to take into account.
- [21] The court has power to grant a *Beddoe* order, as it is commonly known, under what was s 96 of the *Trusts Act 1973* (Qld) (now s 184 of the *Trusts Act 2025* (Qld)) and also under s 6 of the *Succession Act 1981*. The principles in relation to a *Beddoe* application are well known and include:
- (a) that it is an important purpose of directions to provide protection to the interests of the trust;
 - (b) the procedure is a summary one;
 - (c) the function of the advice is to give personal protection to the trustee;
 - (d) the advisory function operates as an exception to the court's ordinary function of deciding disputes between litigants,
 - (e) the giving of judicial advice to resolve doubts about the propriety of a trustee's actions, when the trustee acts in accordance with advice given by the court.
- [22] The underlying principle for a *Beddoe* application ultimately is that the trustee, or here executor, ought not to lightly engage in litigation that will incur costs or otherwise engage in action that will diminish trust property.
- [23] From a practical perspective it is often recognised that the ability of the court to provide well-measured advice might be affected to the extent that it is or is not given the benefit of a full appreciation of what the competing interests might say. As a matter of practice, the court is ordinarily provided with a statement of facts upon which the court is entitled to act, even if those facts are contested or controversial. Indeed, the provision of s 96 of the *Trusts Act 1973* (Qld) provides:
- “Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust ...”
- [24] There is no equivalent provision regarding a statement of facts under s 184.
- [25] Here the court was not provided with a document expressly entitled Statement of Facts as often occurs in litigation of this sort. The court was, however, provided with a detailed advice from highly experienced counsel setting out all the relevant factual matters known to the executors at the time of making the application. That advice was supported by considerable affidavits on behalf of the applicant. I am content to proceed in this matter on the basis that the factual matters are accurately set out by the applicants' submissions and, in the confidential advice of experienced counsel, properly supported by affidavits relied upon in this application.

- [26] No one has suggested that I ought to adjourn the application for the production of a statement of facts and, in my view, the costs of adjourning an application like this is simply not justified when the breadth of the material before me is substantial and the matter has been argued fully on all sides by capable counsel. So I proceed on the basis, therefore, that the affidavit material and the submissions all constitute effectively the statement of facts for the purposes of this application. In doing so I take particular account of the fact that the giving of judicial advice is a process which is, as I have said, intended to be a summary one and not to be treated as a trial of the issue.
- [27] The question for the court in giving this advice as to whether the executors are justified in acting in the manner in which they propose requires satisfaction of the court that the executors have given real and genuine consideration to the relevant matters. It seems to me that I can be satisfied that there has been such real and genuine consideration of at least the following matters.
- [28] First, the respondent has lived on the southern side of the property for many decades. I accept it is a matter that the executors ought to take into account that it would be a hardship for him to have to vacate the property at this stage when there is still an argument that he has an entitlement to a share of it.
- [29] Second, the first respondent is earning an income from the cattle business which is being conducted on Homebush, and the sale of only half the property permits him to continue to do so. He himself has deposed to being able to continue to run the business with only half of the property of Homebush and, on an application of this sort, there is no reason for the court to second guess that evidence.
- [30] Third, the proposed sale of only the northern section of the property allows the estate to fund the defence of the proceedings, which it ought to be allowed to do, without imposing upon the personal finances of the applicant, but does not require the whole sale of the estate property at this stage. That seems to me to be an appropriate balance.
- [31] Fourth, whilst there might be conflicting evidence as to whether a higher price will be obtained for Homebush if the whole of it is sold rather than a part, that is simply not a matter that can properly be decided on an application such as this. Equally, there is evidence before me that separate sales might, in fact, maximise the return for the estate. As I say, it is not a matter I can decide today.
- [32] Fifth, in addition to the first respondent's own evidence, there is evidence available from the various valuers regarding the state of water on the properties, the existence of fencing, and the location at which cattle are situated which would tend to support, at least at the level of an application of this sort, that the first respondent can continue to conduct the cattle business on the property if only part of the property is sold.
- [33] Sixth, the executors have a wide discretion as to how they go about exercising the power of sale, and when the evidence demonstrates that the executors have gone about their task rationally and honestly, the court would not lightly withhold its approval about the way in which the executors propose to approach their tasks.
- [34] Seventh, I take into account that the only party genuinely at risk in an application of this sort is, in fact, the applicant executors who are entirely prepared for the matter to proceed on the basis of the material which is before me.

- [35] In the circumstances, despite the terms of s 96 of the *Trusts Act 1973* that a document styled “written statement of facts” ought to usually be filed in such an application, and nothing which I say here ought to suggest that this practice should not be adopted in other cases in the future, in the circumstances of this particular case I am prepared to proceed in the absence of such a document.
- [36] For the reasons that I have set out, it seems to me that the applicants are justified in both defending the proceedings numbered 3247 of 2023 and selling the identified properties that are listed in the draft order. No party having made otherwise any objections or alterations or suggestions to the draft order, I am satisfied there ought to be an order in accordance with the draft handed up by Mr Whiteford, initialled by me and placed with the file.