HOW SHOULD QUEENSLAND COURTS RESPOND WHEN A SPECIFIC GIFT HAS BEEN ADEEMED BY ATTORNEYS LAWFULLY EXERCISING THEIR POWERS?

ANTHONY W. COLLINS*

Thomas J in Re Viertel (1997) 1 Qd R 110 ('Re Viertel') was confronted with a difficult situation; meritorious beneficiaries under a valid will were to be denied a specific gift due to their own actions as attorneys. In finding that the gift was not adeemed, Thomas J set a course which was adopted and followed by other judges and recognised as the 'Re Viertel exception'. The New South Wales Court of Appeal in RL v NSW Trustee and Guardian [2012] NSWCA 39 distinguished Re Viertel. Subsequently, the Supreme Court of Queensland declined to follow Re Viertel. The purpose of this paper is to show that a legislative response is required to fill the void left by the apparent demise of the Re Viertel exception.[1]

Thomas J (as he then was) in *Re Viertel* contrived a brave judicial response to a threat of obvious injustice, where a specific gift under a will is sold by an attorney prior to a testator's death in circumstances where the testator lacks capacity to make further provision for the beneficiary but the product of the sale forms part of the residuary estate. In doing so Thomas J expressed doubt about the correctness of the course. Those reservations were evidenced by the fact that he said it was desirable for a court of higher authority to determine the issue before him. What became known as the '*Re Viertel* exception' was almost immediately utilised by judges in other jurisdictions.

One such judge was Hargrave J of the Victorian Supreme Court who in *Simpson v Cunning*[2] examined a number of those cases and recognised that a difficulty in analysing the authorities was the lack of vigorous argument in opposition. Hargrave J recognised that the core issue was that when an attorney acting lawfully disposes of a specific gift under a valid will, they will often act contrary to the testator's wishes in circumstances where the testator lacks testamentary capacity to create a new will. He stated:

> Moreover, as rightly acknowledged by counsel for the defendant, there are many circumstances where the strict application

* Barrister at Law

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2 *Simpson v Cunning* [2011] VSC 466.

> of the ademption principle will lead to an unjust result which is obviously against the testator's wishes. For example, a husband and wife have three children, a daughter and two sons. They jointly own three properties of approximately equal value – the family home and two investment properties. They make mutual wills providing that the surviving spouse leaves the family home to the daughter and one investment property to each son; with the residuary estate being left to a favourite niece. In circumstances such as the present, an attorney sells the family home to pay an accommodation bond. The daughter survives the parents. If the ademption principle is strictly applied, the niece receives the balance of the sale proceeds as part of the residuary estate; leaving the daughter to make a claim for further provision out of the estate under testator's family maintenance provisions of applicable legislation if there are grounds to do so. Such a result is clearly unjust, and not in accordance with the parents' obvious intent.[3]

The decisions in *Re Viertel* and *Simpson v Cunning* are well reasoned and elegant, delivered in states where there was no legislative equivalent of s 22 of the *Power of Attorney Act 2003* (NSW), which provides:

> **22 Effect of ademptions of testamentary gifts by attorney under enduring power of attorney (cf 1983 No 179, s 48)**
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> (1) Any person who is named as a beneficiary (a "named beneficiary") under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made.
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> (2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, charged, disposed of or dealt with.
>
> (3) Except as provided by subsection (4), money received for equality of partition and exchange, and all fines, premiums and

[3] Ibid [40].

> sums of money received on the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of a deceased principal are to be considered as real estate.
>
> (4) Fines, premiums and sums of money received on the grant or renewal of leases of property of which the deceased principal was tenant for life are to be considered as the personal estate of the deceased principal.
>
> (5) This section has effect subject to any order of the Supreme Court made under section 23.
>
> (6) A person is named as a beneficiary under a will for the purposes of this section if:
>
> > (a) the person is referred to by name in the will as being a beneficiary; or
> >
> > (b) the person answers a description of a beneficiary, or belongs to a class of persons specified as beneficiaries, under the will.
>
> (7) This section does not apply to any person to whom section 83 of the *NSW Trustee and Guardian Act 2009* applies.

In the absence of a legislative provision equivalent to s 22 of the *Power of Attorney Act 2003* (NSW), there is a risk that the type of injustice described by Hargrave J will occur in Queensland. That risk may be greater where the residuary beneficiary has the capacity to litigate.

I The Rule of Ademption

A specific gift under a will is said to have been adeemed when it no longer exists at the time of the death of the testator. The High Court defined ademption in the following terms in *Brown v Heffer*:

> Ademption of a specific gift by will, occurs where the property the subject of the gift is at the testator's death no longer his to dispose of: (see Stanley v. Potter). An obvious case of ademption is that in which the testator has completely divested himself of the property in his lifetime so that at his death there is in his estate nothing which even substantially (see McBride v. Hudson) answers the words of gift. But ademption occurs also where the

> property has been so dealt with that by the rules of equity it must be considered at the death as having been converted into other property, such as money, which the words of gift are not apt to comprehend: (see Watts v. Watts ; McArthur's Executors v. Guild ; In re Edwards dec›d; Macadam v. Wright). Thus, in the case of a simple devise of land, if it is found at the testator's death that after making the will he became bound by a contract to convey or transfer the land to another, and the contract is still subsisting, so that when he died he was … a trustee of the land for the purchaser and entitled only to money in its place, there is no property in respect of which the words of devise are capable of taking effect.[4] (*footnotes omitted*)

A testator with capacity who disposes of a specific gift does so with full knowledge of the consequences. A testator with capacity may make other provisions for a devisee as to where a specific gift is to be disposed. However, where a testator no longer has capacity and their affairs are the subject of an enduring power of attorney, one power that an attorney does not have is the power to make a new will.

Where an executor is unable to locate property that matches the description of the specific gift an executor has limited powers. Once a specific gift is adeemed the donee has no right to that gift or to the value of the gift. Generally, a donee will not receive property if it has been converted unless it is substantially the same thing, such as a boat with a changed name.[5]

In *Re Blake (deceased)*[6] Forrest J set out the process that a court must go through to ascertain whether a specific gift has been adeemed:

> To determine whether the principle of ademption has application to the gift, two questions must be answered by the court. First, what is it that has been bequeathed by the specific gift and, secondly, having identified the nature of the gift, does the subject matter of the bequest exist as at the death of the testator.[7]

Upon the death of a testator all property (save that which the testator held as a trustee)[8] immediately vests with the administrators named in the deceased

4 *Brown v Heffer* (1969) 116 CLR 344 at 348.
5 See *In Re Slater* [1907] 1 Ch 665.
6 (2009) 25 VR 27.
7 Ibid [45].
8 *Succession Act 1981* (Qld) s 45(4).

person's last will.

Devolution of the property is effected whether or not the administrator has or seeks a grant of probate.[9] The property that devolves is the property that the deceased held at the time of death. Section 33E of the *Succession Act 1981* (Qld) provides that, '[a] will takes effect, in relation to the property disposed of by will as if it had been executed immediately before the testator's death'. Some property is incapable of devolution, for example an interest in an estate for the deceased's life or real estate held as a joint tenant.

Where a testamentary gift has ceased to exist or had been disposed of prior to death, so that it cannot devolve to the administrator, it is possible that the product of the sale of such a gift may devolve or the specific gift may have substantially changed. Whether such change results in the gift being adeemed is a question of fact. A change in name or form is less likely to result in ademption of the gift.

In *Turner (Gordon's executor) v Turner,*[10] Lord Tyre of the Scottish Outer House Court of Session described the history and development of the doctrine:

> The doctrine of ademption has its origins in Roman law, but in one important respect Scots law has followed English law in departing from Roman law principles. In contrast to the doctrine of conversion, the intention of the testator is not regarded as relevant to ademption.[11]

II Exceptions to the Rule of Ademption

In *Power v Power,*[12] Gzell J identified exceptions to the rule of ademption including the following examples. Where the gift has been removed by fraud or practice, on purpose to disappoint the legacy or by a tortious act, unknown to the testator as recognised in *Earl of Shaftsbury v Countess of Shaftsbury*[13]. Where an agent disposed of the gift the subject of the bequest outside of the terms of his authority and without the knowledge of the testator as in *Basan v Brandon*[14]. Where the gift is still in the estate in substance although changed in name and form as in *Oakes v Oakes* ('*Oakes*')[15]. An exception was also

9 *Succession Act 1981* (Qld) s 45(1)-(2).
10 [2012] CSOH 41.
11 Ibid [20].
12 [2011] NSWSC 288.
13 Ibid at [23] and [24] [1716] 23 ER 1089
14 Ibid at [25] [1836] 59 ER 68;
15 Ibid at [26] [1852] 68 ER 680

recognised in *Jenkins v Jones* 'where a testator has given a specific thing, and without his knowledge, perhaps against his wishes, or tortiously, another person has sold it or done enough to wholly alter its character'.[16]

Gzell J's analysis included a discussion of the observation of Cozen-Hardy MR in *In re Slater:*[17] 'where a change occurred in the nature of the property, ademption would follow unless the case could be brought within the principle of *Oakes*'.[18]

Gzell J also referred to *Re Viertel* and to *Johnston v Maclarn* (see below).

III The *Re Viertel* Exception

Re Viertel involved an artful solution to an increasing problem, where an attorney acting lawfully and bona fide disposes of a specific gift in circumstances where the testator lacks testamentary capacity and 'when the intention … to benefit the devisee never altered'.[19]

The *Re Viertel* exception was regarded as good law in Queensland up until 29 June 2012 when Mullins J[20] applied the judgment of the New South Wales Court of Appeal in *RL v NSW Trustee and Guardian* [2012] NSWCA 39 and declined to follow *Re Viertel*.[21]

The New South Wales Court of Appeal rejected the *Re Viertel* exception and held that a specific gift disposed of by an attorney acting lawfully was adeemed. Campbell JA undertook a detailed and thorough analysis of the law relating to the ademption of specific gifts. His Honour relied upon the development of the law of ademption by contrasting it with the development of the law relating to lunatic's estates.

Campbell JA found that the *Re Viertel* exception was based upon 'an incorrect view of the law'[22] and misapprehension of *Jenkins v Jones* (1866) LR 2 Eq 323.[23]

Mullins J applied Campbell JA's analysis in *Trust Company Limited v Gibson*

16 Ibid [27] (1866) LR 2 Eq 323
17 (1907) 1 Ch 665 at 671.
18 Power v Power [2011] NSWSC 288 [26]
19 Re Viertel (1997) 1 Qd R 110 at 111(Thomas J)
20 *Trust Company Limited v Gibson & Anor* [2012] QSC 183.
21 Ibid [27].
22 Paragraph [151] Campbell JA opined that Thomas J had accepted the sort of argument rejected in Re Freer (1882) 22 Ch D 622.
23 Ibid [152-157].

at paragraph [27]:

> [27] The analysis undertaken by Campbell JA in *RL* of the relevant authorities on which *Viertel* was based concluded that the exception to ademption in *Jenkins v Jones* should be confined to a case where the subject matter is extinguished by fraud or tortious acts unknown to the testator. I therefore consider that I should apply the *dicta* in RL and not follow *Viertel* and the cases that have followed *Viertel*. It will be a matter for the Parliament in Queensland to address whether there should be any statutory response to the circumstances that resulted in the decision in *Viertel*.

Her Honour recognised that Hargrave J of the Supreme Court of Victoria in *Simpson v Cunning* had followed *Re Viertel* but did not recognise, as Hargrave J did, that the *Re Viertel* exception had developed into 'a further exception to the ademption principle'.

Hargrave J's judgment had previously been considered in Queensland when Ann Lyons J followed *Simpson v Cunning* in *Public Trustee of Qld as Administrator of the Estate of Ellen Olwyn Richardson, deceased v Lee & Ors.*[24]

In New South Wales in *Johnson v Maclarn*[25] Young CJ in Eq observed that '[t]here is conflict in the authorities but the trend seems to be to recognise the further exception articulated by Thomas J in *Viertel*.'

The authorities relied upon by Campbell JA in *RL v NSW Trustee and Guardian* are predicated upon the notion that testamentary intent is irrelevant, because the attorney stands in the shoes of the principal. By contrast, Thomas J recognised the importance of testamentary intent in determining whether the product of the sale of a specific gift should be traced:

> It seems to me that when a testator's asset is altered by a third party, the question whether the testator had notice or knowledge of the facts is a relevant factor on the question of ademption. This was the view of Neuberger QC in *Re Dorman Deceased* [1994] 1 W.L.R 282 288 the reason mentioned by the learned Deputy judge being "presumably because in the absence of such knowledge the testator would not have had an opportunity of

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24 *Public Trustee of Qld as Administrator of the Estate of Ellen Olwyn Richardson, deceased v Lee & Ors* [2011] QSC 409 (Judgment delivered on 19 December 2011).

25 [2011] NSWSC 288.

> altering his will".[26]

In *Mulhill v Kelly*[27], Kaye J recognised that 'the rejection of inquiry into intention' had moderated and that '[i]n recent times courts of first instance have recognised a wider exception to the rule than that expressed by Cozens-Hardy MR (in *Re Slater*)'. Those views were supported by Hargrave J in *Simpson v Cutting* at paragraph [39]:

> It was contended for the defendant that an exception which depends on the Court's assessment of a testator's mental capacity and likely intent would involve the Court and the parties in wide-ranging factual enquiries on incomplete evidence. It was submitted that an identity based approach based on a strict application of the ademption principle was preferable, as it would lead to a certain result which would reduce costs to the estate and avoid the use of Court resources. I do not accept these submissions. As stated above, the exceptions for fraudulent, tortious or unauthorised dispositions of the relevant property already require the Court to consider the likely wishes of the testator at relevant times. Further, the Court is routinely called upon to examine testamentary capacity in determining disputes about wills.

IV The Factual Background to *Re Viertel*

Mr and Mrs McCallum were very good friends to Mrs Viertel. It seems from the judgment that testatrix had no other relatives and was elderly. It was accepted by the court that Mr and Mrs McCallum had cared for the testatrix from 1978 up until she was admitted to a 'home'. In her last will dated 2 November 1982 the testatrix nominated the Public Trustee as her executor and trustee. In 1987 Mrs Viertel was admitted to a care facility. On 19 April 1991 Mrs Viertel appointed the McCallums her attorneys 'pursuant to an enduring power of attorney'. In June 1993 the testatrix suffered a stroke and lost testamentary capacity.

Her principal asset was a home and contents in Vulture Street, Brisbane. As attorneys Mr and Mrs McCallum decided that Mrs Viertel's home should be sold to fund her care. Prior to selling the house the McCallums made certain enquires of the Public Trustee as Thomas J noted:

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26 Re Viertel (1997) 1 Qd R 110 at 112.

27 [2006] VSC 407.

> Prior to selling the property Mrs McCallum wrote to the Public Trustee seeking advice as to what should be done with the property. She was told that the Public Trustee was not at liberty to disclose the contents of the will and that the McCallums would have to decide for themselves whether or not they sold the residence.[28]

Acting pursuant to the enduring power of attorney the McCallums sold the house to a person called Ferrier for $141,500.00 and a transfer was registered on 25 July 1994. They invested that money in Mrs Viertel's name in debenture stock with Suncorp Finance.

It was only when Mrs Viertel died that the McCallums became aware that they were the beneficiaries of specific gift under the will. That gift was the same Vulture Street house and contents which had been sold.

One intriguing feature of *Re Viertel* is that it is not mentioned in the judgment as to whether there was a residuary beneficiary. There was no appearance for a residuary beneficiary.

The Public Trustee brought a summons under s 134 of the *Public Trustee Act 1978* (Qld) seeking answers to questions concerning the administration of Mrs Viertel's estate. The question centred on whether Mrs Viertel's gift of her house to the McCallums had been adeemed.

The facts did not readily lend themselves to any of the recognised exceptions to the rule of ademption. Thomas J found that the sale was made for the benefit of the deceased and His Honour observed that '[i]t was certainly not a deposition of an asset by a testatrix or even a deposition of which she was aware, and it was probably one which she would have disapproved'.

V The Issue in *Re Viertel*

Thomas J identified the issue in the following terms: 'Whether or not an ademption is effected when a sale is lawfully made by an attorney who is ignorant of the terms of the will when the testatrix is likewise ignorant of the action of the attorney, and when the intention of the testatrix to benefit the devisee never alters'.

Thomas J relied upon what he regarded as a further and different exception to the rule of ademption recognised in *Jenkins v Jones*.[29]

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28 At line 11-15 page 111.

29 (1866) LR 2 Eq 323.

The testator in that case was a farmer who held a yearly tenancy. In his last will he appointed his wife and son as executors and left to his son 'the whole of my farming stock animate and inanimate including the whole of my implements of husbandry, which shall be in my possession at my decease'. Two years prior to his death the testator lost capacity. Consequently, his wife and son gave up possession of the farm and sold all his farming stock and implements. They deposited the proceeds into a bank account. The residual beneficiaries brought a motion for an account of those funds. Stuart VC, held that 'it was no act of the testator that the chattels were converted, for he never intended any conversion, but intended that the specific legatee should have his farming stock, I ought to refuse the motion to vary the certificate'.[30]

Jenkins v Jones does not sit comfortably with the established exceptions to the rule of ademption[31], which is reflected in the note of caution, which Thomas J expressed in *Re Viertel*:[32]

> It would be preferable that a point of this importance be determined by a court of greater authority. That seems unlikely in the present case, as no adverse party is opposing the relief which Mr and Mrs McCallum seek. With some hesitation I express the view that the rule recognised by Stuart VC in *Jenkins v. Jones* above is an historical exception to the consequence of ademption and that the present circumstances fall within that exception.

Young CJ in Eq discussed the difficulty with this interpretation of *Jenkins v Jones* in *Johnston v Maclaren*[33] at [18-19] where he said:

> [18] In Jenkins v Jones (1866) LR 2 Eq 323, 328, Stuart VC considered that there was an exception to the ademption rule where the annihilation had taken place without the testator's knowledge, even if it had occurred with implied authority. He based himself on *Shaftsbury v Shaftsbury* (1716) 2 Vern 747; 23 ER 1089.
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> [19] Although, it is a tad difficult to reconcile these cases with principle, see in *Re Slater* [1907] 1 Ch 665, 671, they remain

30 *Jenkins v Jones* (1866) LR 2 Eq 323 at 329.

31 As is set out below Campbell JA took the view that the gift was not adeemed because the executors were not authorised to dispose of the assets.

32 *Re Viertel* (1997) 1Qd.R.110, 116 (Thomas J).

33 [2001] NSWSC 932.

> good law. This was the conclusion reached by Thomas J in *Re Viertel* [1997] 1 Qd R 110 after reviewing all the authorities including American and Canadian cases and texts.

Young CJ in Eq's acceptance that *Jenkins v Jones* 'remains good law'[34], was recognised by Kaye J in *Mulhall v Kelly* who followed and applied *Re Viertel*.

Mulhall v Kelly involved the sale of real estate, for the purpose maintaining the testatrix after she had lost testamentary capacity. The plaintiff acting as attorney had sold the testatrix's home unit (which had been specifically gifted to her under the will) in order to pay a bond of $327,000.00 to a nursing home. The balance of the sale proceeds were exhausted in the care of the testatrix and the plaintiff had 'commenced to meet the deceased's living costs out of her own resources'.[35] When the testatrix died the nursing home bond was repaid to the executors. Kaye J expressed similar reservations as Thomas J, but applied the Re Viertel exception.[36]

Re Viertel was not followed by Judge Rich QC in Banks v National Westminster Bank,[37] but the point was not the subject of vigorous argument before the judge.[38]

VI The Extension of the *Re Viertel* Exception

In September 2010 in *Moylan v Rickard,*[39] Peter Lyons J applied and extended the *Re Viertel* exception in circumstances where there was no specific gift and the exceptions to the rules of ademption did not apply. Mrs Sybil Moylan had by her will made a disposition to her husband (the applicant in the case) of a sum of money calculated at 15% of the value of the house at death to be subtracted from the net proceeds of the sale of the house. The respondents were the deceased's children from her earlier marriage. The applicant and the deceased commenced a relationship in 1973 and they married in 1979 and at the date of her death they had been married for 29 years.

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34 Prior *to Johnson v Maclaren, Re Viertel* was adopted by the Western Australia Supreme Court in In the Matter of the affairs of *Hartigan; Ex Parte The Public Trustee* (unreported Western Australia Supreme Court CIV 2283 of 1997).

35 In the matter of the *Estate of Joan Patricia Waterton deceased Mulhall v Kelly* [2006] VSC 407 [2].

36 It should be noted that there was no serious opposition to the orders proposed and any further legal action would see the estate diminished.

37 [2005] EWHC 3479 (Ch).

38 See *Simpson v Cunning* at paragraph [32] (Hargrave J).

39 [2010] QSC 327.

The deceased made her last will in 1996 and on the same day executed an enduring power of attorney ('EPA'). The respondents held the EPA. By 2000 the deceased was diagnosed with Alzheimer's disease. In 2008 the deceased suffered a serious heart attack and was hospitalised for a significant period of time. Ms Rickard (one of the respondents) attempted to care for her mother at her own place of residence but due to the deterioration in her mother's condition and her own family commitments it became apparent that it was impossible for Mrs Moylan to stay at Ms Rickard's home. There were other attempts to provide care for the testatrix.

The attorneys decided that there were not enough funds to care for Mrs Moylan and maintain her home. The house was sold and on settlement $845,116.94 was received by the solicitors acting for the respondents. The respondents invested $600,000.00 for the care of Mrs Moylan. The sum of $115,000.00 was gifted by the respondents to themselves.

Mrs Moylan died on 5 April 2008. After probate was granted the respondents distributed the estate amongst themselves. Of the $600,000.00 invested $442,681.03 remained.

His Honour considered that an analogy 'may be made with the approach taken in *Re Viertel* to avoid the failure of the gift intended by the deceased in favour of her husband.'[40] Peter Lyons J held that 'The principle that an act taken during the testator's incapacity does not affect a disposition of property is not, it would seem, limited to cases to which the doctrine of ademption applies'.[41]

In *Public Trustee of Qld as Administrator of the Estate of Ellen Olwen Richardson, deceased v Lee & Ors,*[42] Ann Lyons J identified the prerequisites to the *Re Viertel* exception[43]. However, in that case the attorney knew of contents of the will and therefore the previously accepted prerequisites could not be satisfied. Her Honour held:

> I can see no valid reason why ignorance of the contents of the will should be an essential component before the exception to the rule can be invoked particularly when one of the duties of an attorney would always be to make decisions in the best interest of the principal. Furthermore the cases relied on by Thomas J

40 Ibid [58].
41 Ibid [55].
42 [2011] QSC 409.
43 *Public Trustee of Qld as Administrator of the Estate of Ellen Olwyn Richardson, deceased v Lee & Ors* [2011] QSC 409, [22].

> in *Re Viertel* are not cases which made ignorance by the person disposing of the property an essential element[44].

In *Simpson v Cunning* Hargrave J was dealing with a case where the testatrix 'gave her house to her son, Mark Cunning, or, if he predeceased her or died within 30 days of her death, to his children in equal shares. She made other specific bequests to her children. She gave her residuary estate to her grandchildren in equal shares.'[45]

The testatrix developed dementia and deteriorated to the point where she lacked capacity. Acting on advice from the Public Advocate, her solicitor, who was executor of the will and held an enduring power of attorney, exercised that power and sold the house to pay for a nursing home bond. It was said that:

> The net proceeds of sale amounted to $522,928.88. After payment of the accommodation bond, these settlement proceeds were quarantined in a separate account. Following the deceased's death, there was a partial refund of the accommodation bond. That refund was paid into the quarantined account. The amount standing to the credit of the quarantined account, together with accrued interest, is approximately $450,000.[46]

The solicitor brought an application in the Supreme Court seeking directions on how he should distribute the estate. The solicitor (the plaintiff in the case) contended that there had been no ademption and that Mark Cunning should receive the remaining sale proceeds. Hargrave J analysed the law in the following passage:

> [21] Subject to exceptions, a gift in a will is adeemed, and therefore fails, if the subject matter of the gift is disposed of by the testator prior to death. In *Brown v Heffer*,[47] the High Court expressed the general principle:
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> Ademption of a specific gift by will occurs where the property the subject of the gift is at the testator's death no longer his to dispose of. An obvious case of ademption is that in which the testator has completely divested himself of the property in his lifetime so that at his death there is in his estate nothing which even substantially answers the words of gift. But ademption oc-

44 Ibid paragraph [31].
45 Ibid [2].
46 Paragraph [15].
47 (1967) 116 CLR 344.

curs also where the property has been so dealt with that by the rules of equity it must be considered at the death as having been converted into other property, such as money, which the words of gift are not apt to comprehend. Thus, in the case of a simple devise of land, if it is found at the testator's death that after making the will he became bound by a contract to convey or transfer the land to another, and the contract is still subsisting, so that when he died he was … a trustee of the land for the purchaser and entitled only to money in its place, there is no property in respect of which the words of devise are capable of taking effect.[48]

[22] As stated, the general principle of ademption is the subject of some exceptions. The exceptions were recently catalogued by Gzell J in *Power v Power*.[49] The exceptions include circumstances where the testator ceases to own the property which is the subject of the gift at death because of fraud or tortious act unknown to the testator,[50] because of the unauthorised act of an agent,[51] or because of a disposition of the property without the testator's knowledge and against his apparent wishes, even where it may be thought the disposition was with the testator's implied authority.[52]

[23] These exceptions appear to be based upon the fact that the relevant property has ceased to be owned by the testator against his or her wishes or intention. In these circumstances, where tracing is possible, the donee is entitled to receive the money or other assets held by the testator at death in place of the relevant property.

[24] These exceptions appear to contradict the often quoted statement of the law of ademption by Cozens-Hardy MR in *Slater v Slater*,[53] that:

There was a time when the courts held that ademption was dependent on the testator's intention, on a presumed intention on his part; and it was therefore held in the old days that when a

48 Ibid, 348-9 (citations omitted).

49 [2011] NSWSC 288, [23]-[27].

50 *Earl of Shaftesbury v Countess of Shaftesbury* [1716] 2 Vern 747; 23 ER 1089.

51 *Basan v Brandon* (1836) 3 Sim 171; 59 ER 68.

52 *Jenkins v Jones* (1866) LR 2 Eq 323; *Johnston v Maclarn* [2002] NSWC 97, [18].

53 [1907] 1 Ch 665.

> change was effected by public authority, or without the will of the testator, ademption did not follow. But for many years that has ceased to be the law, and I think it is now the law that where a change has occurred in the nature of the property, even though effected by virtue of an Act of Parliament, ademption will follow unless that case can be brought within what I may call the principle in *Oakes v Oakes* …[54]
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> [25] Later, Cozens-Hardy MR stated the applicable law in this way:
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> I feel bound myself to adopt the view taken not in one case only, but in many, that you have to ask yourself, Where is the thing which is given? If you cannot find it at the testator's death, it is no use trying to trace it unless you can trace it in this sense, that you find something which has been changed in name and form only, but which is substantially the same thing.[55]
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> [26] A further exception based on lack of the testator's intention to divest the relevant property was identified by Thomas J in *Re Viertel*.[56] The result in this case depends upon whether this Court should endorse and apply that further exception.

Hargrave J then undertook a thorough analysis of *Re Viertel* and Thomas J's reasoning and concluded at paragraph [45]:

> [45] In my opinion, the statements in Jenkins v Jones were not intended to create a new exception to the ademption principle. Rather, as held in *Banks v National Westminister Bank*,[57] *Jenkins v Jones* was an application of the existing exception for unauthorised dispositions of the relevant asset without the knowledge or consent of the testator. However, I am nevertheless of the view that a further exception to the ademption principle, to the effect expressed in *Re Viertel,* constitutes a justified extension of the common law to reflect current circumstances. People are living longer than in the past and their physical health is outlasting their mental capacity. It is commonplace for properties owned by incapacitated persons to be sold under the authority

54 Ibid, 671.
55 Ibid, 672; citing *Oakes v Oakes* (1852) 9 Hare 666; 68 ER 680.
56 [1997] 1 Qd R 110.
57 [2005] EWHC 3479 (Ch), [28].

> of enduring powers of attorney, to fund accommodation bonds and other necessities and comforts for an aging population. Further, as noted, there is no good reason why the position should be different if, in the absence of an applicable enduring power of attorney, it is necessary to appoint an administrator under the *Guardianship and Administration Act* to sell property of an incapacitated person for such purposes

VII *RL v NSW Trustee and Guardian* [2012] NSWCA 39

There are some interesting aspects to the New South Wales Court of Appeal's decision in *RL v NSW Trustee and Guardian.* The decision did not involve ademption as the testator, Ms PBL, was still alive at the time of the litigation. The appeal involved the management of her estate. Ms PBL was 95 years of age and had been admitted to a nursing home suffering from advanced Alzheimer's disease. The question before the Court was whether a manager was 'obliged to segregate the proceeds of sale of the asset that had been the subject of the specific legacy'. The specific gift in question was a life estate in a shed on Ms PBL's property.

Campbell JA recognised that *Re Viertel* had no application in New South Wales because s 22 of the *Power of Attorney Act 2003* (NSW)[58] 'covers the type of situation with which *Re Viertel* was concerned'. Yet, Campbell JA undertook a comprehensive and thorough examination of the cases and opined that '*Re Viertel* has come to an incorrect view of the Law'.[59] Campbell JA held that Thomas J erred in failing to recognise that *Jenkins v Jones* was a case involving an unauthorised dealing in the estate prior to the testator's death[60].

> ***[152] Jenkins v Jones,*** on which the decision in ***Re Viertal (sic)*** purported to be based, was a case where a farmer had made a will that appointed his wife and son as executors. The will gave a specific bequest to his son of certain of his farming stock. The farmer became incapable, following which his wife and son sold the farming stock. However, they did not have any authority to deal with his estate at that time. That lack of authority would have amply justified the court's conclusion that the legacy had not been adeemed. By contrast, in ***Re Viertel*** the attorneys had full legal authority to sell the house.

58 *RL v NSW Trustee and Guardian* [2012] NSWCA 39, [149].
59 Ibid [151].
60 Ibid [152].

In *Re Viertel* Thomas J accepted that the sale by the attorneys was lawful and that the executors were bound by the attorneys' action. What concerned him was not whether the principal was bound by an attorney's act but rather whether the principal's clear intentions should be considered where the testator lacked capacity to make provision for the beneficiary of the specific gift.

Campbell JA 's views are set out at paragraph [183]:

> Absent matters such as dishonest dealings, a principal is bound by the acts of his attorney within the scope of the authority conferred, even if the principal has no intention to carry out the specific act that the attorney has carried out. This is no different to the way in which an incapable person is bound by acts, performed with proper legal authority, of whoever is administering his or her affairs, whether that administration is occurring under a court or Guardianship Tribunal management order or an enduring power of attorney.

A defect in Campbell JA's reasoning was his failure to properly recognise the development of the *Re Virtel* exception was no longer an extension of *Jones v Jenkins* but rather as a discrete exception to ademption. While Campbell JA addressed *Simpson v Cunning*, at paragraph [187] His Honour did not address Hargrave J's analysis of the authorities including the following:

> In my opinion, the statements in *Jenkins v Jones* were not intended to create a new exception to the ademption principle. Rather, as held in *Banks v National Westminister Bank*,[61] *Jenkins v Jones* was an application of the existing exception for unauthorised dispositions of the relevant asset without the knowledge or consent of the testator.

Nor did Campbell JA address Hargrave J's recognition, that *Re Viertel* represented a discrete exception to the rules of ademption or Hargrave J's dicta on testamentary intent:

> In support of the third submission, that the further exception was inconsistent with the testator's testamentary intent, counsel contended that the exception would require the Court to compare the testator's asset position at the date of the will, the date of the disposition and the date of death; and to consider the testator's likely wishes if competent to decide what course to follow

61 [2005] EWHC 3479 (Ch), [28].

> at these times. I do not accept those submissions. The further exception requires the Court to give effect to the testator's presumed wishes in circumstances where he or she no longer has the capacity to decide what should be done. That does not involve supplanting the testator's wishes with those of the attorney or the Court. Rather, it involves the Court in an assessment of the testator's likely wishes if given the choice, when mentally competent, to alter his or her will in circumstances where the relevant property must be sold to further his or her interests[62]

These are important matters not resolved by the judgment of the New South Wales Court of Appeal in *RL v NSW Trustee and Guardian*. However, on 13 November 2012 Ann Lyons J delivered her judgment in *Public Trustee of Queensland (as litigation guardian of Ethel May Brigg also known as Lucy Brigg) v Stibbe as executor of the Will of the late Winifred Deidre & Anor*[63] where Her Honour declined to follow *Re Viertel*:

> I am also satisfied that I should not follow the decision of *Re Viertel,* which was for over a decade accepted as authority for the proposition that a specific gift was not adeemed if the property was disposed of by a third party without the knowledge of the deceased. In the recent decision of *RL v New South Wales Trustee and Guardian,* the New South Wales Court of Appeal held that *Re Viertel* was wrongly decided. The Court held that the sale during the deceased's lifetime of a 'lock up garage', which was specifically gifted under a will, resulted in an ademption of a specific gift of that asset even though it was sold in accordance with a court order after the testatrix lost capacity. The Court held that the real question is —whether the testator possessed the property in the specific gift at the time of his death. If he did not, the legacy is adeemed by annihilation of the subject.

The vice which *Re Viertel* addressed was the situation where a specific gift was disposed by a third party acting lawfully for the benefit of the testator prior to the testator's death in circumstances where the testator lacked the testamentary capacity to make a fresh arrangement for the beneficiary.

Until the Queensland Court of Appeal decides the issue there is uncertainty as to whether the *Re Viertel* exception continues to exist. However, to date there

62 *Simpson v Cunning* [2011] VSC 466, [37].
63 [2012] QSC 357.

has been no judicial attempt to revive the *Re Viertel* exception.

The law of Queensland does not permit an executor to attempt to satisfy a testator's intention by tracing the residue of a specific gift lawfully disposed of by an attorney during the life of an incapable testator. However a disappointed beneficiary can bring an application to the court pursuant to s 107 Powers of Attorneys Act 1998.

VIII Section 107 *Powers of Attorney Act 1998* (Qld)

The *Powers of Attorney Act 1998* (Qld) was enacted after Thomas J delivered his judgement in *Re Viertel* and s 107 of that Act pertinently provided:

> **107 Power to apply to court for compensation for loss of benefit in estate**
>
> (1) This section applies if a person's benefit in a principal's estate under the principal's will, on intestacy, or by another disposition taking effect on the principal's death, is lost because of a sale or other dealing with the principal's property by an attorney of the principal.
>
> (1A) This section applies even if the person whose benefit is lost is the attorney by whose dealing the benefit is lost.
>
> (2) The person, or the person's personal representative, may apply to the Supreme Court for compensation out of the principal's estate.
>
> (3) The court may order that the person, or the person's estate, be compensated out of the principal's estate as the court considers appropriate but the compensation must not exceed the value of the lost benefit.

A more rigorous assessment of *Re Viertel* was undertaken by McMurdo J[64] in *Ensor v Frisby*[65] which involved a similar factual situation to that in *Re Viertel*. The testatrix died in May 2007, having made her last will in May 1999. After making that will she developed dementia and lost testamentary capacity. She left to her children from her first marriage the specific gift of her residence. One of those children acting as her attorney sold the house. The defendant was the beneficiary of the residuary estate. McMurdo J outlined that:

> [3] In factual circumstances indistinguishable from the present,

64 Judgment delivered 07 September 2009.

65 [2010] 1 Qd R. 146.

> Thomas J (as he then was) held in *Re Viertel* that there was no ademption. That judgment has been followed in the Supreme Court of Western Australia in *Re Hartigan; Ex Parte The Public Trustee* and the Supreme Court of Victoria in *Mulhall v Kelly*. In the Supreme Court of New South Wales, there is a contrary decision of Nicholas J in *Orr v Slender; Estate of Godfrey Raymond Orr,* in which *Re Viertel* and *Re Hartigan* were cited in argument but not in the judgment. However, for the view of Thomas J in *Re Viertel* there is some support in the judgment of Young CJ in Eq in *Johnston v Maclarn*.
>
> [4] The applicants and the executors say that I should follow *Re Viertel.* The respondent Ms O'Loughlin argues that I should not, because the general law is said to be now affected by s 107 of the *Powers of Attorney Act* 1998,

In *Ensor v Frisby* the respondent did not pursue the argument that *Re Viertel* was decided wrongly but rather that it was supplanted by the enactment of s 107. McMurdo J followed *Re Viertel* after an analysis of the authorities.

> [19] The main difficulty in all of this is in seeing any justification for ignoring the words used in the will. If they are incapable of meaning anything other than a gift of specific property and not also of its proceeds of sale, then as Young CJ in Eq has said, it is "a tad difficult" to reconcile any exception with the principle. But once an exception is recognised for an unauthorised act of which the testatrix was unaware, it is a relatively smaller step to recognise, as Thomas J did, an exception where the act was done under the authority of an enduring power of attorney. Ultimately I am persuaded to follow *Re Viertel*, followed as it has been in two other Australian jurisdictions.

McMurdo J held that s 107 could apply consistently with the *Re Viertel* exception, where the testator had capacity at the time of the disposition or where the proceeds were fully expended or could not be traced.

Section 107 is unique to Queensland. It is compensatory in nature and applies to the consequences of the lawful acts of an attorney rather than a tool for tracing the lost benefit. An application must be brought by a disappointed beneficiary to a court. The court examines the whole of the estate and is empowered to make compensatory orders that may affect other beneficiaries. A judge may make orders that may have the effect of providing proportionate amounts.

Because of the operation of the rule of ademption there was little point in seeking to trace a gift unless the situation recognised by Cozens-Hardy MR in *Re Slater*[66] at 672 was raised:

> You have to ask yourself, 'Where is the thing that is given?' If you cannot find it at the testator's death, it is no use trying to trace it unless you can trace it in the sense, that you find something which has been changed in name and form only, but which is essentially the same thing

Where a specific gift such as a house is sold for the purpose of providing a nursing home bond, and the bond is refundable on the testator's death a tracing exercise is straightforward. The traditional exceptions to ademption did not contemplate the conversion of an asset into a refundable sum. Nor did they contemplate the possibility of a Court making 'an assessment of a testator's likely wishes if given the choice, when mentally competent, to alter his or her will in circumstances where the relevant property must be sold to further his or her interests.'[67]

Section 107 was applied by Martin J in *Neuendorf & anor v the Public Trustee of Qld as executor of the estate of J R Dickfos (deceased)*,[68] in circumstances reminiscent of *Re Viertel*. Jean Rose Dickfos and Elaine Ada Shaw purchased a property in Bald Hills as joint tenants in 1998. At about the same time they both appointed Janet Christine Neuendorf as their 'respective Attorney for personal, health and financial matters'.

Ms Neundorf provided assistance to both Miss Dickfos and Miss Shaw for a number of years. In November 2009 Miss Dickfos fell and fractured her hip. She deteriorated in hospital and could not return to the Bald Hills home. She was placed in a nursing home as a 'high care' resident. Miss Shaw decided to move into the nursing home and was placed in an adjoining room. Because she was a low care patient a bond had to be paid.

The Bald Hills house was sold and the proceeds divided between Miss Dickfos and Miss Shaw. In their original wills each left all of her property to the other. In the substitutional provision in Miss Dickfos's will she made a specific gift of her Bald Hills property to Ms Neuendorf and Ms. Brandon. The residue was left to the Christian Blind Mission International.

After the sale of the Bald Hills Property Miss Shaw made a new will leaving

66 [1907] 1 Ch.665.

67 *Simpson v Cunning* [2011] VSC 466, [37].

68 [2013] QSC 156.

50% of her estate to Ms Neuendorf and 40% to the second applicant. At this time Miss Dickfos lacked testamentary capacity and she did not make a new will. On 15 June 2011 Miss Shaw died. Her estate was distributed in accordance with the terms of her will.

On 24 August 2012 Miss Dickfos died. Ms Neuendorf was unaware that she was a beneficiary of a specific gift under Miss Dickfos's will. In January 2013, Public Trustee informed Ms Neuendorf and Ms Brandon that their gifts had been adeemed. The Public Trustee advised Ms Neuendorf and Ms Brandon to bring an application under s 107.

Martin J found:[69]

> The action of Ms Neuendorf was consistent with her duty as an attorney and was for the benefit of the donor of the power. It resulted in the failure of the gift in the will of Miss Dickfos to her and Ms Brandon. This is a case where actions properly taken have resulted in a loss to the attorney and in which s 107 should respond in the attorney's favour with an award of appropriate compensation

His Honour took the view that the Christian Blind Mission International was 'as innocent of any wrong doing as the applicants'. Section 107(3) provides a discretionary power to compensate. Martin J ordered that the applicants receive 84.5% of the estate and that the Christian Blind Mission International receive 15.5%.

IX Is it Preferable to Trace the Product of a Lost Specific Gift?

Under the *Re Viertel* exception and s 22 of the *Power Of Attorney Act 2003* (NSW), the product of a specific gift could have been traced without the need to affect the whole of the estate. If the law enabled an administrator to trace the proceeds of an adeemed gift, the costs of litigation could be averted. Were the situation that the disappointed beneficiary thought their gift diminished by the act of an attorney then plainly an action could still be brought under s 107.

As Hargrave J pointed out, it is not uncommon in an aging population for a will to contain not only a principal place of residence but also a portfolio of investments. Neither is it difficult to see in a situation where a beneficiary may hold an enduring power of attorney and be executor. One of the virtues of the

69 *Neuendorf & anor v the Public Trustee of Qld as executor of the estate of J R Dickfos (deceased)* [2013] QSC 156, [32].

post *Ensor v Risby* version of the *Re Viertel* exception was that it allowed for a simple tracing exercise which did not prejudice the rights of other beneficiaries yet preserved the right of a disappointed benificiary to pursue compensation where necessary.

X Conclusion

Lord Tyre in *Turner (Gordon's executor) v Turner*[70] analysed the approach of Judge Rich QC in *Banks v National Westminster Bank PLC* and the Australian authorities decided prior to *RL v NSW Trustee and Guardian* and commented:

> [31] In *Re Viertel* has been followed by judges in a number of other Australian states; the various decisions are summarised in the judgment of Gzell J in *Power v Power* [2011] NSWSC 288. For present purposes I wish only to refer to an observation by Hargrave J in the Supreme Court of Victoria in the case of *Simpson v Cunning* [2011] VSC 466 at paragraph 45 that *Re Viertel* "...constitutes a justified extension of the common law to reflect current circumstances". My impression of the Australian case law is that at least some of the judges who have addressed the issue have been inclined to regard ademption as an unjust result, and have accordingly focused upon awareness of the testator, rather than authorisation, as the basis of the *Jenkins v Jones* exception to ademption. *Power v Power* also provides an interesting illustration of a sale by an attorney that was held not to be ademptive because it did not fall within the scope of the attorney's authority.
>
> [32] In the end, however, a choice between the English and Australian approaches is not before me, as Scots law has adopted neither authority nor awareness as the criterion for determining whether the act of a representative such as an attorney has ademptive effect. It is, though, of some reassurance that the approach which I consider that I am bound to adopt on the basis of the Scottish jurisprudence produces a result which has generally been regarded in the Australian cases as a reasonable one and not the result which was regarded as unfortunate in *Banks v National Westminster Bank plc*

Young JA conceded in his judgment in *RL v NSW Trustee and Guardian* 'the

70 *Turner (Gordon's executor) v Turner* [2012] CSOH 41.

line of cases of Queensland' were 'well reasoned decisions.'[71]

Section 22 of the *Power of Attorney Act 2003* (NSW) is the legislative equivalent of the *Re Viertel* exception. Hargrave J and Mullins J in their judgments both suggested that legislative intervention was required to 'resolve doubt' about the application of the *Re Viertel* exception. The alternative to legislative reform is an argument in the High Court, which would seem unlikely as few estates could bear the costs of such litigation.

The *Re Viertel* exception was an attractive judicial solution which led to 'reasonable results'. The New South Wales legislation recognises its virtue. To not legislate may result in what Lord Tyre identified as 'unfortunate' outcomes for the victims of an unintended ademption. The Parliament of Queensland should amend the legislation to include a vision akin to s 22 of the *Power of Attorney Act 2003* (NSW).

71 *RL v NSW Trustee and Guardian* [2012] NSWCA 39, [190].