SUPREME COURT OF QUEENSLAND

CITATION:	*Darveniza v Darveniza & Drakos as Executors of the Estate of Bojan Darveniza and Ors* [2014] QSC 37
PARTIES:	**NATASHA MORGAN (under Part 4, Sections 40-44, *Succession Act* 1981 (Qld)** (applicant) **v** **XIAO HONG DARVENIZA AND HARRY DRAKOS as Executors of the Estate of BOJAN DARVENIZA deceased** (respondents)
FILE NO:	SC 13827 of 2010
PARTIES:	**STEVEN BOJAN DARVENIZA** (plaintiff) **v** **XIAO HONG DARVENIZA AND HARRY DRAKOS as Executors of the Estate of BOJAN DARVENIZA deceased** (first defendant) **LEISURE KART CITY PTY LTD AS TRUSTEE FOR THE DARVENIZA FAMILY TRUST** (second defendant) **MIDAS INVESTMENTS PTY LTD** (third defendant) **UNIVERSAL ACCOMMODATION PTY LTD** (fourth defendant) **DARVENIZA PROPERTIES PTY LTD** (fifth defendant) **DARVENIZA PROPERTIES PTY LTD AS TRUSTEE FOR DARVENIZA GROUP SUPERANNUATION FUND** (sixth defendant)
FILE NO:	SC 1766 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2013, 1, 2, 3 and 4 October 2013
JUDGE:	Martin J

ORDER:

In SC 13827 of 2010

That further provision be made for the proper maintenance and support of Steven Darveniza out of the estate of Bojan Darveniza by payment of a lump sum of $3,000,000.

In SC 1766 of 2012

The claim is dismissed.

CATCHWORDS: SUCCESSION – FAMILY PROVISION – REQUIREMENT OF ADEQUATE AND PROPER MAINTENANCE – WHETHER APPLICANT LEFT WITH INSUFFICIENT PROVISION – CLAIMS BY CHILDREN – where the testator died leaving an estate worth approximately $27,000,000 – where no provision was made for a grown son of the testator's first marriage – where the son's net worth was approximately $2,500,000 at trial – where the son had worked for many years in the testator's business – where the testator's reasons for not providing for the son were misconceived – where family provision claims by other children of the testator had been settled for between $2,850,000 and $3,200,000 – whether the son was entitled to an order under the *Succession Act* that he be provided for, and if so, to what extent

ESTOPPEL – ESTOPPEL BY CONDUCT – ACT, OMISSION OR ASSUMPTION – REPRESENTATION GENERALLY – NATURE OF REPRESENTATION – where a son of the testator's first marriage had worked in the testator's business – where the testator had encouraged him to do so, and to leave school in order to work for him – where the testator had made statements about the future of the business – where the son had pursued an alternate career as an airline pilot – whether the testator's representations were sufficiently clear and unambiguous to give rise to an estoppel in the circumstances

TRADE AND COMMERCE – COMPETITION, FAIR TRADING, AND CONSUMER PROTECTION LEGISLATION – TERMINOLOGY – TRADE OR COMMERCE – GENERAL PRINCIPLES – where the testator's son had made certain representations to his son in respect of his businesses and interests in property – where the son worked, over a period of time, for the business – whether the representations were made "in trade or commerce"

Succession Act 1981, s 41
Trade Practices Act 1974, s 82

In re Allen (Deceased); Allen v Manchester [1922] NZLR 218
Anasson v Phillips NSWSC, Young J, 4 March 1988, unreported
Re Buckland [1966] VR 404
Chatard v Bowen [2008] NSWSC 533
Colebatch v Colebatch [2007] NSWSC 30
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594
Collins v McGain [2003] NSWCA 190
Delaforce v Simpson-Cook [2010] NSWCA 84; (2010) 78 NSWLR 483
Giumelli v Giumelli [1999] HCA 10; 196 CLR 101; 73 ALJR 547
Hammond v J P Morgan Trust Australia Ltd [2012] NSWCA 295
John Alexander's Clubs Pty Ltd v White City Tennis Club Limited (2010) 241 CLR 1
Litchfield v Smith [2010] VSC 466
Lloyd-Williams v Mayfield (2005) 63 NSWLR 1
Pontifical Society for the Propagation of the Faith v Scales (1961-2) 107 CLR 9
Singer v Berghouse (1994) 181 CLR 201
Van Dyke v Sidhu [2013] NSWCA 198
Varma v Varma [2010] NSWSC 786
Vigolo v Bostin (2005) 221 CLR 191
Walton's Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387
Welsh v Mulock [1924] NZLR 673

COUNSEL: P Dunning QC and R Whiteford for the plaintiff/applicant
P J Flannigan QC and P Hackett for the defendant/respondent

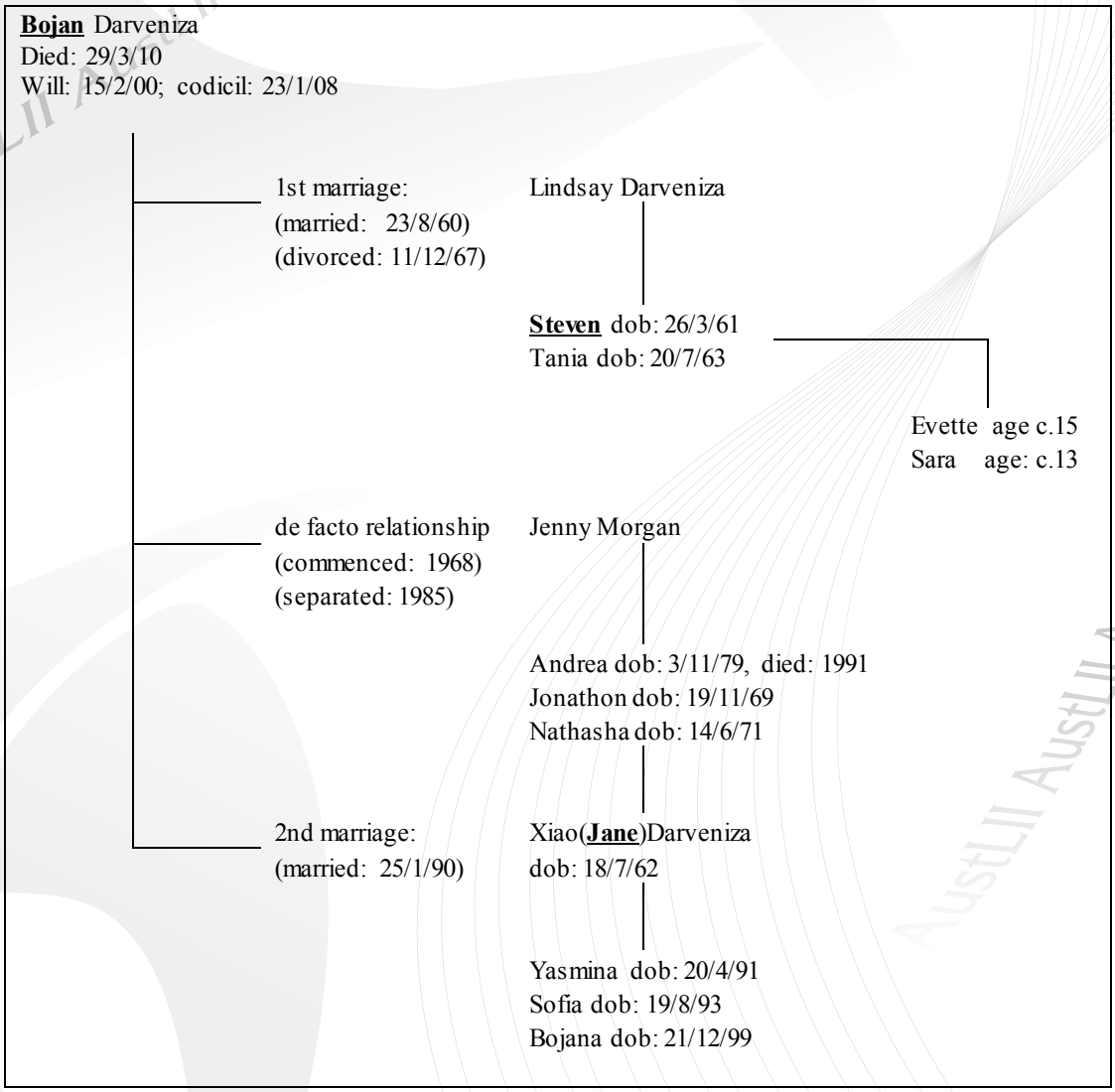
SOLICITORS: McCullough Robertson for the applicant/plaintiff
H Drakos and Company for the respondent/defendants

[1] Leo Tolstoy famously commenced his novel *Anna Karenina* with the declaration that "All happy families are alike; each unhappy family is unhappy in its own way." Apart from wealth, the matters which gave rise to the unhappiness of the families in that story have no echoes here. But, it does serve to emphasise the complexity which attaches to family relationships. The interaction among family members can often be difficult for an outsider to comprehend. Whether the Darveniza family was happy or not is irrelevant to the determination which must be made. It was, though, a household in which the bonds of family life were tested to extremes and in which some of the children were left hurt and resentful by the actions of their father, whose estate lies at the centre of the present dispute.

[2] This case involves an examination of the familial and financial relationships of the Darveniza family. Steven Darveniza has brought two matters before the Court. In the first he seeks an order for provision (pursuant to s 41 of the *Succession Act* 1981) from the estate of his deceased father, Bojan Darveniza ("the provision claim"). In the second, he seeks declarations about, and transfers of interests in, a number of family companies ("the trust claim"). He also seeks damages pursuant to s 82 of the *Trade Practices Act* 1974[1] and consequential orders ("the company claim").

The Family

[3] It will assist if I set out at this point the relevant part of the Darveniza family tree.



[4] During the trial, each of the applicant, his deceased father, his stepmother and other members of the family was referred to by his or her given name in order to avoid confusion. I do not intend disrespect by doing the same in these reasons.

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[1] The matters alleged in the Amended Statement of Claim all occurred before the commencement of the *Competition and Consumer Act* 2010 (Cth).

[5] Bojan was married twice and was in a de facto relationship between the two marriages. Steven is a child of the first marriage. He is married to Deborah. Bojan's widow, and a co-executor of his estate, is one of the respondents in each matter. She uses the name Jane and that was how she was referred to by the members of the Darveniza family.

The Companies

[6] In the company claim:

(a) The second defendant ("Leisure Kart") is the current corporate trustee of the Darveniza Family Trust.

(b) The third defendant ("Midas"), fourth defendant ("Universal") and the fifth defendant ("Darveniza Properties") are each companies used by Bojan at various times with respect to the businesses he conducted.

(c) The sixth defendant ("Darveniza Properties as Trustee") is the corporate trustee of the Darveniza Group Superannuation Fund.

[7] With respect to each of those companies:

(a) Bojan was, at the time of his death, a director.

(b) Jane was and remains a director.

The Will

[8] Bojan died on 29 March 2010 aged 78. A grant of probate issued in relation to his will of 15 February 2000 and a codicil of 23 January 2008.

[9] Pursuant to those testamentary instruments, Bojan:

(a) left to Jane:

(i) his home at 22 Chermside Street, Highgate Hill;

(ii) his furniture and personal effects;

(iii) his shares in Darveniza Properties Pty Ltd, Hire Furniture Co Pty Ltd, Universal Accommodation Pty Ltd, Midas Investments Pty Ltd and Leisure Kart City Pty Ltd;

(iv) the balance of his residuary estate.

(b) made no provision for the children of his marriage to Jane 'in the expectation that my wife will provide for them from the bequests which I have made to her and from the various trusts promoted or established by me in which those children are beneficiaries'.

(c) Left to Jonathon his property at 56 Coopers Camp Road, Bardon debt free;

(d) made no provision for Steven and set out four reasons for doing so:

(a) *'I have during my lifetime purchased income producing properties in his name; and*

(b) *I have recently at his request transferred the management of those properties to him in order that he may be independent of me following my death; and*

(c) *he is a potential beneficiary under various trusts established by me during my lifetime; and*

(d) *he has indirect interests in other properties owned by a company established by me in which he is a shareholder.'*

(e) made no provision for Natasha and set out two reasons for doing so:

(a) *'I have during my lifetime purchased an income producing property as trustee for her; and*

(b) *she is a potential beneficiary under various trusts established by me during my lifetime.'*

(f) made no provision for Tania and set out two reasons for doing so:

(a) *'I have already provided for her as set out in a deed executed by her and me entitled "Heads of Agreement" and dated 2 November 1992;*

(b) *My said daughter has conducted herself to my detriment details of which have been provided to my trustees.'*

(There was no memorandum setting out any matter relevant to the last paragraph.)

[10] There have been three other applications for provision by children of Bojan. Each of them was settled. This table shows the relevant net worth and settlement sum for those children:

Applicant	Net Worth	Further Provision
Jonathon	- $178,211	$3,200,000
Tania	$700,591	$2,700,000
Natasha	$1,858,000	$2,850,000

The provision claim

[11] This claim is brought under s 41 of the *Succession Act* 1981. So far as it is relevant, it provides:

> "(1) If any person (the deceased person) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.
>
> (1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased

person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.

(2) The court may—
(a) attach such conditions to the order as it thinks fit; or
(b) if it thinks fit—by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or
(c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable."

[12] An application under this section is to be considered in two stages:
(a) Was the provision made inadequate in all the circumstances?

If yes, then

(b) What provision ought to be made?

[13] The process was considered in *Singer v Berghouse*[2] where the majority said:

"The first question is, was the provision (if any) made for the applicant "inadequate for [his or her] proper maintenance, education and advancement in life"? The difference between "adequate" and "proper" and the interrelationship which exists between "adequate provision" and "proper maintenance" etc. were explained in *Bosch v Perpetual Trustee Co. Ltd.*. **The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.**

The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, **that assessment will largely determine the order which should be made in favour of the applicant**. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the

2 (1994) 181 CLR 201.

applicant is found to have been left without adequate provision for proper maintenance."[3] (emphasis added, citations omitted)

Stage 1 – was adequate provision made?

[14] This stage was considered by Gummow and Hayne JJ in *Vigolo v Bostin*[4] where their Honours considered the reasons of Kirby P and Sheller JA in *Permanent Trustee Co Ltd v Fraser*[5]:

> "[74] The correct approach to construction of the first or "jurisdictional" limb of provisions such as s 6(1) of the Act is that indicated in the joint judgment in *Singer*. Their Honours referred to the statement of Gibbs J in *Goodman*:
>
> > "[T]he words 'adequate' and 'proper' are always relative. **There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards**."
>
> Their Honours then added:
>
> > "It is clear from this passage that his Honour was conveying that the primary judge was in essence making a value judgment in much the same way as a primary judge makes a sound discretionary judgment in personal injury cases when he or she assesses the quantum of damages say for pain and suffering, and for loss of amenities of life."
>
> They earlier had observed:
>
> > "**The evaluative character of the decision stems from the fact that the court must determine whether the applicant has been left without *adequate* provision for his or her *proper* maintenance, education and advancement in life**."
>
> [75] With these passages is to be read the preceding statement of their Honours:
>
> > "**The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty**."

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3 Ibid at 209-210, per Mason CJ, Deane and McHugh JJ.
4 (2005) 221 CLR 191.
5 (1995) 36 NSWLR 24

> For the present appeal, the references in the above passage to the totality of the relationship between the applicant and the deceased is of particular importance." (emphasis added, citations omitted)

[15] One of the factors to be taken into account when considering whether "adequate" provision has been made is whether the applicant can show he or she has a "need" for maintenance. It was expressed in the following way in *Collins v McGain*[6] :

> [42] … there can be no question that, **at least as part of the first stage of the process, the question of whether the eligible person has a relevant need of maintenance etc is a proper enquiry. This is so as the proper level of maintenance etc appropriate for an eligible person in all the circumstances clearly calls for a consideration of his or her needs. However, the question of needs must not be too narrowly focussed. It must, in my view, take into account, depending upon the particular circumstances of the case, present and future needs including the need to guard against unforeseen contingencies.**
>
> …
>
> [47] As I have observed, **the issue of need** is not confined to whether or not an eligible person has, at the date of hearing, a then (sic) need for financial assistance with respect to his maintenance etc. It **is a broader concept**. This is so because the question of needs must be addressed in the context of the statutory requirement of what is 'proper maintenance etc' of the eligible person. It is because of that context that, in the present case, the 'proper maintenance etc' of the appellant required consideration of a need to guard against the contingency to which I have referred.
>
> [48] This Court warned against a narrow focus on an eligible person's 'needs' in *Akkerman v Ewins*, unreported. In that case the Master had said this:
>
> > "There is no suggestion that he is destitute or that he is in urgent need of any financial benefit for any specific purpose. I am not satisfied that he has in any relevant sense established need with the consequence that I am not satisfied that he has established that he has been left without adequate provision for his maintenance, education or advancement in life."
>
> [49] In paragraph 6 of his judgment Handley JA (with whom Beazley JA agreed) commented on this passage as follows:
>
> > "Mr Weinstein, counsel for the appellant, submitted that the statement by the Acting Master that the appellant was not destitute or in urgent need of any financial benefit for any specific purpose, while correct factually did not adequately reflect the legal test under s9(2) of the Family Provision

[6] [2003] NSWCA 190.

> Act. This is, if I may say so, correct. However, I am not persuaded that the error Mr Weinstein has identified in this ex tempore judgment invalidated the Acting Master's next finding that he had not been satisfied that the appellant had, in any relevant sense, established need or that he had been left without adequate provision for his "maintenance, education or advancement in life'".

[50] Fitzgerald JA, whilst agreeing with Handley JA, added the following warning:

> "**The difficulty with the Acting Master's reasons which the presiding Judge has mentioned arises from the convenient but potentially inaccurate equation of 'need' to the statutory test of 'inadequate provision' for the provision for the appellant's 'proper maintenance, education and advancement in life' in s9(2) of the *Family Provision Act* 1982.**
>
> **Although such shorthand is understandable the two concepts are not identical and care is necessary to ensure that where need is referred to, attention is not diverted from the legislative requirement**."

[51] It is in the respects referred to above that the Acting Master has erred in this case. He has focussed too much on the particular or specific needs of the appellant rather than upon his needs in the 'relevant sense'", namely, in the sense of what was necessary for the appellants' "proper maintenance, education and advancement in life"."[7] (emphasis added)

[16] From those, and other, decisions the following may be drawn:

(a) The court must determine whether the applicant has been left without *adequate* provision for his or her *proper* maintenance, education and advancement in life.

(b) When considering the proper level of maintenance, the following, at least, should be taken into account:
  (i) the applicant's financial position,
  (ii) the size and nature of the deceased's estate,
  (iii) the totality of the relationship between the applicant and the deceased,
  (iv) the relationship between the deceased and other persons who have legitimate claims upon his or her bounty,
  (v) present and future needs including the need to guard against unforeseen contingencies.

(c) The use of the word "proper" means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the "station in life" of the parties and the expectations to which that has given rise, in other words reciprocal

[7] Per Tobias JA, with whom Beazley and Hodgson JJA agreed.

claims and duties based upon how the parties lived and might reasonably have expected to live in the future.[8]

(d) "Maintenance" may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live.[9]

(e) "Support", similarly, may imply provision that exceeds a person's bare needs. The use of the two terms serves to amplify the powers conferred upon the court. And, furthermore, provision to secure or promote "advancement" would ordinarily be provision beyond that for the mere necessities of life. It is not difficult to conceive of a case in which it might appear that sufficient provision for support and maintenance had been made, but that in the circumstances, further provision would be proper to enable a potential beneficiary to improve his or her prospects in life, or to undertake further education. This might be the case where, for example, a promise had been made, or where a claimant reasonably held an expectation that such provision would be made.[10]

(f) The totality of the relevant relationship would include:

(i) any sacrifices made or services given by the claimant to or for the benefit of the deceased;

(ii) any contributions by the claimant to building up the deceased's estate; and

(iii) the conduct of the claimant towards the deceased and of the deceased towards the claimant.[11]

(g) Any such sacrifices, services or contributions (whether described as giving rise to a moral duty/moral claim or not) are a relevant consideration (as part of the totality of the relationship between the claimant and the deceased), but are neither a necessary nor a sufficient condition for the making of an order under the Act.[12]

(h) A claimant may fail to establish that the disposition of the deceased's estate was not such as to make adequate provision for his or her proper maintenance, etc, even though no provision was made for him or her in the will.[13]

(i) The determination of whether the disposition of the deceased's estate was not such as to make adequate provision for the proper maintenance, etc, of the claimant will always, as a practical matter, involve an evaluation of the provision, if any, made for the claimant on the one hand, and the claimant's 'needs' that cannot be met from his or her own resources on the other.[14]

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8 *Vigolo v Bostin* (2005) 221 CLR 191 at [114] per Callinan and Heydon JJ.
9 Ibid at [115].
10 Ibid.
11 *Goodman v Windeyer* (1980) 144 CLR 490.
12 *Permanent Trustee Co Ltd v Fraser* (1987) 8 NSWLR 573.
13 *Singer v Berghouse* (1994) 181 CLR 201.
14 *Hunter v Hunter* (1987) 8 NSWLR 573.

(j) The adequacy of the disposition is assessed as at the time of the testator's death. Any order that might be made is considered in the light of the applicant's circumstances at the time of the trial.[15]

[17] Care must be taken not to extend the idea of a "moral claim" beyond the language of the statute. Section 41 does not give a court carte blanche to remake a will in a way that may appear to be more just. It is a power that should be exercised with the restraint dictated by the terms of the section. The predicament in which a court finds itself has been commented upon many times. In *Pontifical Society for the Propagation of the Faith v Scales*[16] Dixon CJ observed that it was never intended by the legislation that "freedom of testamentary disposition should be so encroached upon that a testator's decision expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court".[17] Consideration of these applications must always proceed with the understanding that the capacity of a court to make an assessment is necessarily limited, as the deceased cannot explain his or her reasons for the disposition of the estate or respond to the claims of an applicant.[18]

[18] While the terms "moral duty" and "moral claim" have been used as shorthand expressions in the consideration of applications for provision they must be used with care. As Gleeson CJ observed in *Vigolo*:

> "The descriptions of references to moral duty or moral obligations as a gloss upon the text was not new. In 1956, in *Coates v National Trustees Executors and Agency Co Ltd*, Fullagar J said: 'The notion of "moral duty" is found not in the statute but in a gloss upon the statute. It may be a helpful gloss in many cases, but, when a critical question of meaning arises, the question must be answered by reference to the text and not by reference to the gloss.'"[19] (citation omitted)

[19] In the light of those principles set out above, I turn to consider the issues in this case.

Personal history

[20] When Steven was six years old his parents divorced and he lived with his mother for some time. He was a weekly boarder at a private school in the years 1970 – 1972. In 1973 he was a sent to a State high school, but was returned to the private school in 1974. In the second half of that year Steven left the boarding school and ran away from home. The reasons for that are disputed. It seems unlikely that Bojan (who was paying the school fees) would remove him from the school given that he later assisted him with his instructions to become a pilot by paying $30,000 towards the cost of tuition. He commenced work, undertaking menial tasks, at the Huttons factory at Oxley. Bojan asked him to return home but he declined. In 1977 he worked for a short time at a plumbing supplies firm, followed by another short period of employment at Bushel & Company. He left there in June 1979 at the age

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15 *White v Barron* (1980) 144 CLR 431 at 441 per Mason J.
16 (1961-2) 107 CLR 9.
17 Ibid at 19.
18 Ibid at 20; *Stott v Cook* (1960) 33 ALJR 447 at 453-4.
19 *Vigolo v Bostin* (2005) 221 CLR 191 at [21].

of 18 and worked full time for Bojan. His "remuneration" consisted of being allowed to: use Bojan's petrol account at a service station, and to sleep in a tool shed on one of Bojan's properties at Highgate Hill. That stopped in 1981 when he obtained employment at Castlemaine Perkins. He worked there until late 1982 or early 1983 when he again returned to work for his father.

[21] Between October 1979 and June 1985 he obtained a series of qualifications and licences which enabled him to commence work in 1984 as a commercial pilot, flying out of Cairns for Hinterland Aviation. In 1987 he started working for Flight West Airlines and remained there until December 1989 when he went to the United States of America, working there until June 1990. Upon his return to Brisbane he took up work as a pilot for Air Research Mapping and then returned to Flight West. At Flight West he was promoted to First Officer and then to Captain.

[22] Steven met Deborah in 1990 and they married in 1994. They have two teenaged daughters.

[23] Steven made a number of applications for employment with major airlines such as TAA/Australian Airlines, Ansett, Qantas and Cathay Pacific. None of these were successful. His lack of success was based on two things: first, his lack of formal education and, secondly, his insufficient experience with jets and lack of flying hours. He did attempt to obtain a Year 12 qualification but was unable to complete the subjects because, he said, of his work as a pilot and for his father. Steven completed some subjects by correspondence from the South Brisbane Secondary Education School when he was 17 or 18. At the age of 19 he attempted further studies at the Coorparoo Adult Education Centre. He did not, though, manage to obtain a pass in English, mathematics, physics or chemistry by the time he was 24 or thereafter. This was the result, not of any lack of intelligence, but of his determination to become a pilot and obtain the qualifications for that job. He asserts that he did not seek work as a pilot in Europe or the Middle East because of the statements made by his father (dealt with below). There was no evidence of the requirements that these airlines might have had.

[24] Steven last flew as a commercial airline pilot on about 20 September 2003. No reason appears to have been advanced for this. In any event, Steven was injured in a motor cycle accident on 12 January 2004. He received an insurance payout of $700,000 which, after legal costs, provided a net figure of $638,253. The injuries he suffered led to one expert opinion being that he could struggle in the future with work as a commercial pilot because of the prolonged sitting required to fly a plane. He was assessed as having a 30 per cent whole person impairment. Apart from this preventing him from working as a pilot it also meant that he was no longer able to perform the type of labouring/handyman work on his own properties and, thus, had to engage others to do that work.

Relationship with his father

[25] Bojan is described in the applicant's written submissions as "an extremely harsh disciplinarian". I do not disagree with that portrayal. Steven's recollections of the degrading treatment and beatings he received were corroborated by the unchallenged evidence of Natasha, Jonathon and Jennifer Morgan. The callous treatment included:

- hitting Steven (when he was 7) with a belt because he had cut his foot on debris;
- stabbing Steven in the side of the head with a pencil (he was in grade one or two) because he could not do some maths homework;
- when Steven was caught smoking in grade 8, cutting off his hair with a cut throat razor and cutting Steven's neck in the process;
- frequently striking him with objects such as an electric cord, a piece of timber, a tree branch and a broom handle.

[26] If Steven tried to evade these punishments he would be beaten again.

[27] When Steven grew up and was able to resist the physical attacks, Bojan continued with verbal and emotional abuse.[20]

[28] Despite the physical and mental abuse directed at Steven, the relationship with his father was not completely destroyed. He agrees that his relationship with his father was good up to his death and that there were other matters which indicated a rapport which might be thought unlikely given the treatment described above. But that is not something which demonstrates a complete implausibility in Steven's account. The relationship within families is an extremely complex area and one which is not susceptible to forensic analysis in a proceeding of this kind. The actions of a parent and the reactions of a child can be difficult to understand from the dispassionate view of an outsider who does not have a complete understanding of the interplay of emotions within a family.

Provision during Bojan's life

[29] Shortly before their marriage in May 1994, Steven and Deborah moved into a property at Scott Road, Herston. It was owned by Bojan. They resided rent and utility free until they purchased it from Bojan in November 1999 for $310,000. At about the same time Bojan bought three other properties – Hutchison Street, Albion, Landy Street, Northgate and Melton Road, Northgate – in Steven's name. Those properties were managed by Bojan until 1999 when Steven took over the management. At the same time, Steven assumed a debt in the sum of $315,814 which was owed to the Darveniza Family Trust in respect of the three properties. The acquisition of Scott Road, Herston and the management rights to the other properties were part of an arrangement or restructuring which included Steven's departure as a director of all companies in the Darveniza Group and other arrangements with respect to shareholdings in Darveniza companies.

[30] The effect of the arrangements in November 1999 was that:

(a) Steven and Deborah became the owners of Scott Road, Herston.

(b) Steven, who was already the registered proprietor of the other properties at Albion and Northgate, took over their management upon payment of $315,813.

(c) Steven ceased to be a director of any companies in the Darveniza Group (formal resignations took place in March 2005).

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[20] Described in the affidavits of Jennifer, Jonathon and Natasha Morgan.

(d) Jane had the capacity to control all companies in the Darveniza Group following the death of Bojan as she was the only director and had the right to exercise certain option agreements. In those companies in which Steven had a shareholding she was also the majority shareholder.

[31] That internal rearrangement within the Darveniza family and group was undertaken by Steven with independent advice from a firm of solicitors. He borrowed $650,000 from St George Bank so that he might fulfil the requirements of the restructure.

[32] After the motorcycle accident Steven developed his own business as a property investor. In August 2005 a property at Gosport Street, Hemmant was purchased for $3,350,000. The vehicle used to buy that property was Byzantine Corporation Pty Ltd as trustee for the S B Darveniza Family Trust ("Byzantine"). The whole purchase price was borrowed through an entity called Balmain Commercial. Byzantine was controlled by Steven.

[33] Steven continued to be involved in the property market. His understanding of that market was largely a result of learning from his father and observing what his father had done.

[34] The amount borrowed through Balmain Commercial was, at various times, rolled over or varied in amount according to the financial requirements of Steven's property business. As is common when seeking an increase in borrowings or some other type of facility, Steven was required to provide a statement of assets and liabilities to financiers. In August 2007, he adopted such a statement for use in obtaining a new facility. In that statement he represented that he had an excess of assets over liabilities of $5,795,000. That amount did not include other amounts such as his superannuation entitlement (then valued at about $600,000) or his expected accident compensation payment.

[35] In August 2010 – some five months after Bojan's death – a credit submission was made by Balmain Commercial with a view to refinancing a loan of about $2,500,000. It was represented that Steven (through his financial vehicles) had a net worth of about $6,772,000 and a total rental income of about $680,000. This application was successful and a facility for $2,940,000 was put in place.

[36] There are valuations for all of the relevant properties and they are the values relied upon by Steven. Steven submits that his (the combined value with his wife and the family trust) net worth at the time of Bojan's death was about $3,885,000. On his case, that had decreased to about $2,580,000 at the time of the trial.

[37] The case advanced for Steven in the final submissions proposed ten reasons for concluding that adequate and proper provision was not made for Steven. I will deal with each of them in turn.

(a) **The estate is large**

[38] Jane Darveniza estimates that Bojan's estate was, at the date of death, worth about $40,000,000. There are liabilities in the order $12,000,000 to $14,000,000. Thus, the net value of the estate is between $26,000,000 and $28,000,000. It is at least that amount, and may be much more, as the respondent has not provided a more detailed estimate.

[39] It was noted in *Vigolo v Bostin*[21] that "in the case of large estates, provision can be made for the well-to-do".[22] In *Lloyd-Williams v Mayfield*[23] Bryson JA had cause to consider circumstances where the testator's estate was large. He said:

> [29] In almost all applications under the *Family Provision Act* 1982 questions of needs are prominent because of the scale of the resources available. The present case is one of the few which are free of that limitation. The focus of attention on needs is not an underlying legal limit on provision which can be ordered, but a subject which usually arises for consideration when the Court addresses the circumstances of each case, as it is required to do. **Decisions in the past show that judges formerly took a very limited view of the provision appropriate to be made, for example, for able-bodied adult sons and a limited view of the appropriate provision for married daughters. These decisions belong to past times and do not express the values of the present age**. See *Hunter v. Hunter*.
>
> [30] The range of matters that the court may consider is very wide. The terms stated in s 9(3) of the *Family Provision Act* include:
>
> "9 Provisions affecting Court's powers under s 7 and s 8
>
> …
>
> (c) circumstances existing before and after the death of the deceased person, and
>
> (d) any other matter which it considers relevant in the circumstances."
>
> [31] **The facts in the present proceedings have features which are rarely encountered in contentious claims** under the *Family Provision Act* 1982; particularly rarely are they encountered together. One is that **the interests involved and the value of the shares designated as notional estate are very large**, in comparison with estates ordinarily dealt with. Another is that **the provision ordered** for the respondent by White J **cannot in reality have any significant adverse affect on the wellbeing of the appellant and cannot impose any hardship upon her**, as she is otherwise provided for out of the estate of Mrs Shirley Stewart in an extremely ample way; there was no attempt to show that she could incur any kind of hardship. Another is that **the respondent does not have any needs in terms of lack of present provision for necessities and amenities of life, on ordinary scales of needs as understood in the community generally. The concepts of needs and competition for their satisfaction out of the estate are usually prominent in litigation under the *Family Provision Act* 1982, but they have no place here**.
>
> [32] **It was open to White J and altogether appropriate to look well beyond needs when interpreting and applying community standards to decide what provision the Court ought to order. The concept of advancement in life can take consideration well beyond**

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21 (2005) 221 CLR 191.

22 At 221 per Gummow and Hayne JJ.

23 (2005) 63 NSWLR 1. In which a legacy of $850,000 was ordered to be paid out of a notional estate of about $8,000,000.

> **needs**. The purposes White J considered are not concrete projects, but are means of appraising the provision which ought to be made, and of giving dimensions to an exercise which cannot be made highly concrete. Nothing commits the respondent to using the provision in the ways which White J considered." (emphasis added, citations omitted)

(b) **Contribution to the estate**

[40] The applicant relies upon the work he did as a boy and as a young man for his father and the extent to which that work assisted in the amassing of the estate.

[41] Steven gave a great deal of evidence in his affidavits about the extent of the work he performed on the properties controlled by his father. There are no contemporaneous documents which either support or detract from Steven's case on this point. One would not expect them to exist given the family relationships and the type of work being done. I do not accept that the work conducted by Steven was at the unrelenting level he advanced in his evidence. The effect of his evidence was that, except for the times when he was employed by another party, he would work during the daylight hours for six days a week and have only a short period of time to himself on Sunday. I accept that Bojan was a demanding father who insisted that his children work in the family business for little compensation and for long periods of time. Steven said that, when he was employed by other people, he would still be required to work for his father before and after the work day for the other employer and, of course, on weekends. The level of work he asserted was, to some extent, supported by the evidence of some of his siblings, but the probability of it being of the extent asserted by Steven is low.

[42] There was little evidence about the work which was done on other properties. Bojan's property portfolio was large and the work done by Steven could not have constituted all that which had to be done or was done.

[43] He was, during much of the time he said he was working for such long periods, still able to obtain sufficient skills to become a commercial pilot and to meet and marry his wife.

[44] Against the evidence of Steven's siblings is the evidence of others who have worked with or for Bojan, such as David Bright, Jonathan Morgan, Bruce Smith, Jenny Morgan, Gerald Curtis and others.

[45] So far as it is possible, and in some cases it is not possible to reconcile the evidence of some of the witnesses, I find that Steven did perform a substantial amount of work over many years for his father's business. I do not accept that he worked the hours that he purported to have worked in his evidence, but it is not possible to arrive at any sensible idea of the number of hours involved. It is possible though, and I conclude, that Steven's work – especially when he older – made a substantial contribution to the accumulation of assets by Bojan.

(c) **Reasonable to rely on deceased's promises**

[46] This is an argument presented on the basis that I accept all that Steven has asserted concerning the amount of work he did. Steven says that Bojan made certain

promises to him about what would happen to the family business and that there was no reason for Steven not to believe that.

[47] I accept that so far as I find that Bojan did make promises, there was no reason for Steven not to accept that those promises were made and could be relied upon. Of course, one needs to examine carefully the nature and extent of those promises or representations and I will return to such questions later in these reasons.

(d) **The promises were not fulfilled**

[48] The promises concerning the inheritance of the business or at least a large part of the business did not come to pass so far as those promises can be accepted as having been made. Steven submits that because of the actions and promises of his father he was not able to pursue a more lucrative career as a pilot. That, though, appears only to have been because of his lack of formal education and an inability to obtain a sufficient number of flying hours. Steven gave evidence that he attempted to obtain a year 12 qualification but did not pursue it. While it might be the case that Bojan did talk Steven into leaving school early or, on Steven's case, required him to leave school early, he was not prevented from pursuing further academic qualifications later.

(e) **No compensation for mistreatment**

[49] An application of this nature does not allow for the court to provide compensation on the basis of any mistreatment by a parent. The mistreatment, which did occur though, is said by Steven to be something relevant to the extent of Bojan's moral responsibility to make provision for him. I respectfully agree with Hargrave J in *Litchfield v Smith*[24] where he says:

> "Where the conduct of the deceased has the effect of depriving an applicant for provision of opportunities in life, and there is some causal connection between the conduct and the applicant's need for further provision, the Court may take that into account in determining whether adequate provision has been made. Further, although not relevant in this case, as it is acknowledged, **such conduct may also be taken into account in determining whether the deceased had a moral responsibility to make adequate provision for the applicant.**"[25] (emphasis added)

(f) **Steven's injury**

[50] When Bojan died, Steven had already suffered his motor vehicle accident and, as is noted above, had a 30 per cent whole person impairment. Bojan would have been aware that the injury prevented Steven from working as a pilot and restricted him generally in physical work. At the date of Bojan's death, Steven had not then received compensation. Steven argued that this demonstrates that Bojan had ignored Steven's impaired earning capacity.

(g) **The claims by other children**

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24 *Litchfield v Smith* [2010] VSC 466

25 Ibid at [57].

[51] Three of Bojan's children have made claims and those claims have been settled. They are set out above. They afford one factor which can be taken into account in this exerciser.

[52] Jane is another possible claimant but, given that she has not provided any evidence concerning her financial circumstances and that she has substantial holdings in companies which in turn have substantial assets, then it is most unlikely that she would have any claim available to her.

(h) **The transfer of the Scott Street property was not beneficial**

[53] Steven argued that he was required to pay more than full market value at the time of the transfer. I do not accept that the transfer was not beneficial. The analysis of that is set out above.

(i) **Misconceived reasons in the will**

[54] Steven asserted that the reasons given by the deceased in his will for not making provision for him are misconceived. This is an argument which is a combination of earlier arguments made about the work that Steven had done, the size of the estate, and the absence of other extant claims on the estate.

[55] But, it also relates to the other reasons which state:

> "(c) he is a potential beneficiary under various trusts established by me during my lifetime,
>
> (d) he has indirect interests in other properties owned by a company established by me in which he is a shareholder".

[56] Steven is a discretionary subject of the Darveniza Family Trust, the Darveniza Family Trust No 2, and the Darveniza Management Trust. These three trusts have made a profit of about $15,000,000 since the death of Bojan. No distributions to Steven were made before Bojan's death and none have been made since. Jane points to clause 10 of the will which provides:

> "It is my wish that if any child of mine should make a claim that provision be made for him or her from my estate (whether successful or not) in excess of the gifts (if any) to that child in this my will my said wife should exercise her voting power as trustee of various family trusts promoted or established by me to exclude that child from participating in any distribution of the income or capital of those trusts."

[57] In cross-examination Jane said:

> "You understood that your husband's attitude to how he was dealing with his – with these two children was that – a way he would provide for them is that they were beneficiaries under trusts that were in place?---I think he want to say that he already provide for them. Therefore, he – they should be able to financially independent out from him after he died and he did give opportunity that they may benefit from the family trust. If you go to paragraph 10, you will note there is a condition.
>
> Yes. So what you're saying is you understood him to say that they should benefit from the family trust – was his attitude, provided the

> condition in clause 10 was met?---The paragraph 10 is saying if they don't have any claim and it's – pretty much, what he meant is they can have some benefit from the family trust."[26]

[58] While that demonstrates what Jane thought Bojan intended, she did not evidence any desire to accommodate that intention. She made no distributions to Steven in the period from Bojan's death on 29 March 2010 and the filing of the originating application by Steven in this matter on 7 July 2011 – a period of just over 15 months. I can find no reason to accept that Jane would have made any distribution to Steven even if this application had not been made.

[59] The other reason given for not making provision was that Steven had "indirect interests in other properties owned by a company established by [Bojan] in which he is a shareholder." It is not known to which company Bojan was referring. Steven was a minority shareholder in a number of property owning companies – Midas, Universal, Darveniza Properties and others. What is known is that in November 1999 Bojan entered into deeds whereby Jane was given the option of taking ten further shares in each of Midas and Universal for the sum of $20. Four months after Bojan's death, Jane exercised those options with the result that Steven's one-third shareholding at the date of Bojan's death was reduced to a one-twelfth shareholding. This was a matter which was easily foreseeable and which goes to consideration of whether adequate provision was made. The benefit which might accrue to Steven, as a minority shareholder, is dubious – even more so when the shareholding is diluted.

(j) The November 1990 events were not a settlement

[60] It was argued that the transaction in 1999 was intended to make Steven financially independent. There was, I perceive, a confusion about the proper description of this financial event. While it was a settlement, it was not intended to be an arrangement which would, for all time, bring to an end any connection between Steven and his father. It was intended to assist Steven on his way to becoming financially independent and I find that it did.

[61] It can be observed from the brief recitation of the 10 points argued on Steven's behalf that "need" is not one of them. Of course, as is referred to above, "need" is not always an essential element of an application of this nature.

Position of Steven at the time of Bojan's death

[62] At the time of Bojan's death, Steven had net assets in his own name or controlled by his trustee company in an amount of approximately $3,885,000. This is made up of assets of about $9,785,000 and liabilities of about $5,900,000. The executors argue that his assets were worth more. This was based on the representations made when seeking finance. It is not uncommon for a person seeking finance to paint the assets held in a very favourable light. Given the difference between the two sets of figures, I prefer to rely on the independent valuations made soon after Bojan's death.

[63] Steven was also able to realise gross rentals in the order of $700,000 from the commercial properties he owned or controlled. He was not in need as most people

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26 T 3-59.

would understand that term. But, there have been cases[27] where persons who might be regarded as "well off" have satisfied the jurisdictional test.

Has Steven satisfied the jurisdictional requirement?

[64] I find that Steven has satisfied the jurisdictional requirement. Proper provision was not, in terms of s 41(1), made for the applicant's proper maintenance and support. In reaching that conclusion, I have taken all the matters referred to above into account and, in particular, rely upon the following:

(a) The estate is very large.

(b) Steven worked long and hard for his father and contributed to the growth of Bojan's property interests.

(c) At the date of death Steven had substantial assets but also had substantial liabilities which were subject to the vagaries of the financial market.

(d) Two of the reasons for Bojan not providing for Steven in the will were either misconceived or based on a misunderstanding of their value.

(e) Steven's injury meant he could no longer be a pilot and he could not perform labouring work on his own properties.

(f) The provision made during Bojan's lifetime was subject to Steven entering into debt in order to obtain the benefit of the properties. In other words, what was received was not a gift but, in effect, a discounted sale.

Stage 2 – what provision should be made?

[65] This is not an easy task to undertake, given the paucity of Steven's evidence about his current financial position. He claims that his net asset position is about $2,583,000. This change (from the circumstances which pertained at Bojan's death) comes about, he claims, because of a reduction in value of the assets he controlled together with an increase in his debts. He gave evidence of personal debts of $3,385,000.

[66] In his affidavit of 9 September 2011, Steven deposes:

> "[37] … I am living off the equity in the industrial sheds listed in paragraph 50 of [his affidavit of 7 July 2011]. As a result, my equity has reduced by between $100,000.00 and $170,000.00 per year in each of the last two years. My present net asset worth is approximately $2.65 million. This is reducing each year because of the equity I am withdrawing in order to pay for my family's living expenses.
>
> [38] Apart from flying, managing rental properties is the only real skill that I have. Accordingly, I do not want to sell my industrial sheds. Due to the back injury I sustained in the motor bike accident, I can no longer carry out laboring (sic) work or much of the maintenance work that I formerly did in the family business."

[67] The reason for the diminution in net worth is not obvious. In his affidavit he said that he was "living off the equity in the industrial sheds …'. But rental income increased by over 30 per cent to $1,616,000. In cross-examination he sought to

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[27] E.g., *Colebatch v Colebatch* [2007] NSWSC 30; *Chatard v Bowen* [2008] NSWSC 533.

explain the increase in expenses by referring to the need "to conduct repairs and maintenance and satisfy my financiers and insurers." His evidence about the amount expended on repairs to the various properties was unconvincing. It was much greater than the amount claimed for repairs in, for example, the tax return for the 2012 year. It is most unlikely that a claim for a deductible expense like repairs will be understated in a tax return.

[68] In the witness box, Steven appeared to be attempting to portray himself as confused and of limited intellectual capacity. I do not accept that. While he did not have an extensive formal education, Steven has been able to qualify as a commercial pilot and conduct a property business in which, at least, no loan repayments were ever missed. He knew that the values of the various properties were an important part of his case but he was not open with the Court. For example, in cross-examination there was this exchange:

> "But for present purposes what is in your – to your knowledge the highest valuation you have received in relation in Gosport Street?---It will be about 3.5. I'd have to look at the latest valuation and I'm happy to share that.
>
> Yes. But, you see, in your affidavit material you're informing us that the valuation from M3 is 3.5?---Mmm.
>
> I'm asking you what are you aware of in terms of valuations by other valuers in relation to Gosport Street, and how high do they go?---Well, I know they're about 3.5, and when I see them – I don't know if I have any with me. They might still be with Balmain.
>
> $4.7 million?---I don't know. I'd have to look at it.
>
> $4.2 million?---Yeah, that could be right.
>
> Why didn't you state that in your affidavit, that there are in fact in existence valuations of $4.7 million for Gosport Street?---I didn't think it was necessary."[28]

[69] I have come to the view that he was exaggerating the amounts he said he spent on repairs to the various properties and that he was deliberately downplaying the value of the assets he controlled. It is of some interest to note that no evidence was sought to be led from an accountant as to Steven's worth but that a detailed report was obtained which seeks to estimate the income Steven is alleged to have lost by not being able to obtain employment with one of the large airlines.

[70] Steven now has substantial debts, greater than he had when his father died. The evidence does not allow me to estimate that difference. He will not receive any distribution from any of the family trusts because, as I find, Jane will comply with Bojan's wish expressed in clause 10 of the Will. Similarly, his interests in other "family" assets have been substantially diluted through Jane exercising the options available to her.

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[28] T 2-45 – 2-46

[71] There is no formula which can be used to determine an appropriate amount. The difficulty attaching to this exercise was recognised by Salmond J in his well-known exposition of principle in *In re Allen (Deceased); Allen v Manchester*[29] exposition when he said

> "Applications under the … Act … are divisible into two classes. The first … consists of those cases in which, owing to the smallness of the estate and to the nature of the testamentary dispositions, the applicant is competing with other persons who have also a moral claim upon the testator … The **second class of case is that in which, owing to the largeness of the estate** or the nature of the testamentary dispositions, **the applicant for relief is complaining** not of the unjust distribution of an inadequate fund among dependants all of whom had a moral claim upon the testator, but **of the failure of the testator to make out of the abundance of his resources a provision sufficient for the proper maintenance of the claimant**. In such a case … the function of this Court is not, as in the first class of case, that of distributing an insufficient fund, so far as it will go, among the various dependants in accordance with their relative needs and deserts. **It has the more difficult function of determining the absolute scope and limit of the moral duty of a wealthy husband or father to make testamentary provision for the maintenance of his widow and children**. In the first class of case the Court has to judge between the competing claims of different dependants; **in the second class of case it has to judge between the claims of a dependant to be maintained by the testator and the claim of the testator himself to do as he pleases with his own**."[30]

[72] I must also take into account the various warnings which have emerged in cases involving large estates. In *Anasson v Phillips* [31] Young J (as his Honour then was) said:

> "… with a very large estate … there is a great temptation on a court to be over-generous with other people's money. This is especially so when the court can see that plaintiff's have been very hardly done by at the hands of a domineering testatrix. However, the case should not be approached in this way as the application has to be determined in accordance with the legal principles.
>
> …
>
> If the estate is a large one, the court has a slightly different approach. The basic principles are the same, that is, the will can only be affected to the extent that it is necessary to discharge the moral duty by making adequate provision for the plaintiffs, but where there is a large estate, competition between claimant and claimant, and claimant and beneficiary under the will is much reduced or eliminated. Further, there may be a more liberal assessment of the moral duty owed, to be reflected in what is

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29 [1922] NZLR 218
30 Ibid at 221-222
31 NSWSC, Young J, 4 March 1988, unreported

> proper provision for the plaintiffs. In particular, the lifestyle that has been enjoyed by the plaintiffs, because they have been associated with a wealthy testatrix is a relevant factor. These principles all, I think flow from such cases as *Re Buckland*'.

[73] The decision in *Re Buckland*[32] is instructive. Adam J said:

> "Throughout the hearing the vastness of the estate has tended to overshadow all other elements in the case. I can appreciate readily enough the significance of the size of the estate when the question is whether the estate is sufficient to provide what in an ample estate would be adequate provision for proper maintenance of a claimant. Where there are competing moral claims for maintenance and the estate is insufficient to satisfy all, one can understand that less than what otherwise would be proper maintenance may be considered adequate provision in a will for proper maintenance. I can understand also that **where the estate is ample and competing moral claims may be disregarded, the purposes of the legislation are not served by the judge being niggardly**. As Williams and Fullagar, JJ, said in another context in *Worladge v Doddridge* …: 'It is clear that the claim of a widow, where the estate is of considerable value, and there are no competing claims of children, should not be disposed of in any niggardly manner', and, further, as Fullagar, J, said in *Re Sinnott* …: "... wisdom and justice can connote a degree of generosity without degenerating into fondness and foolishness".
>
> These propositions are helpful pointers no doubt when one is dealing with an ample estate in contrast to a small one, but should some different result be reached according to whether the estate is ample or whether it is vast? Is it, for instance, of relevance to the result that the estate is not of 500,000 pounds only but one running into several millions? Were it my function to make a new will for the testator founding myself on what many people might reasonably consider a fair distribution of his wealth, no doubt the precise extent of the fortune to be disposed of would be of great importance, but I am enjoined to remember that this is not my function; **my function is to ensure only that adequate provision is made for proper maintenance and support**." [33]

[74] At various places in the evidence reference was made to Bojan's simple, modest lifestyle. He preferred to accumulate wealth rather than dispose of it. But, that choice of his does not confine the consideration which may be given at this point of the analysis. The proper approach was described by Salmond J in *Welsh v Mulock*[34]:

> "It seems to me clear that the true measure of a testator's moral obligation is not necessarily to be found in the standard of maintenance and the way of life to which his family was

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32 [1966] VR 404
33 Ibid at 414
34 [1924] NZLR 673

> accustomed in his lifetime. Testamentary provision in conformity with such a standard is not necessarily either obligatory on the one hand or sufficient on the other. It may be either higher or lower than that required by natural justice and moral duty. **It is no answer to a claim by a wife or child for a further testamentary provision that the testator in his lifetime, though possessed of ample means, accustomed his family to a life of penury, and that the testamentary provision made by him is sufficient to maintain them in the same way of life which they followed in his lifetime He cannot, by failing in his duty to them while alive, reduce the standard of his testamentary obligations towards them on his death**. Conversely, a testator who in his lifetime keeps his family in luxury is not necessarily under a moral obligation to make such testamentary provision as will enable them to live on the same scale after his death even if he is financially capable of doing so **The most that can be said is that the way of living to which the claimant has been accustomed in the testator's lifetime is doubtless one of the elements which may be taken into consideration in determining the justice of a testamentary provision.** For a reduction to a lower scale of life may impose upon the claimant a needless and unjustifiable hardship."[35] (emphasis added)

[75] Given the circumstances I have considered above, including the income which is available from Steven's properties, the other assets he controls, and his overall indebtedness, an amount of $3,000,000 is proper. It does not eradicate his debt but it will bring it to a manageable level.

The trust claim

[76] In his statement of claim Steven pleads the following:

"3. In about January 1978:
- (a) the Plaintiff was employed as a storeman/forklift driver by Bushell & Co, Moorooka;
- (b) the deceased
  - (i) requested the Plaintiff to work for him in the business;
  - (ii) said to the Plaintiff words to the effect:
    - (i) "This is all you need to know because one day you will continue the business";
    - (ii) "This will be yours and the family's. You will have to continue running it";
    - (iii) "The business is for the family and the family is for the business";
    - (iv) "This will be for you to work in and continue when I am gone."

4. Relying on the representations pleaded in paragraph 3 hereof, the Plaintiff:

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35 Ibid at 686, concurred in by Reed and Hosking JJ

(a) between about January 1978 and about June 1979, worked for the deceased in the business during the week after he finished his shifts at Bushell & Co and on the weekends;

(b) after he turned 18 in 1979, resigned from Bushell & Co and worked for the deceased in the business full time until 26 July 1981;

(c) from 2 August 1981 until 30 August 1982, worked full time as a cellarman for Castlemaine Perkins but, during the week after his shifts and on the weekends, worked for the deceased in the business;

(d) to his detriment, performed this work for no or minimal remuneration.

5. In about August 1982

(a) the deceased requested the Plaintiff to resign from Castlemaine Perkins and work full time for him in the business;

(b) the deceased said to the Plaintiff words to the effect:

(i) "One day you will have to take over and run the business"; and

(ii) "It will be yours and the family's one day";

(c) relying on the representations pleaded in 5(b) hereof, the Plaintiff:

(i) in August 1982 resigned from Castlemaine Perkins and worked for the deceased in the business full time until 25 April 1983;

(ii) between 1987 and 1989:

(i) worked about 20 hours per week as a commercial pilot;

(ii) between shifts as a pilot, worked for the deceased in the business;

(iii) to his detriment, performed this work for no or minimal remuneration.

5A. Further:

(a) between 1997 and 2001, on at least 5 occasions, the deceased said to the Plaintiff, on occasions in the presence of his wife, words to the effect: "whatever we have before Xaio Hong stays with the old family and whatever we have after stays with her";

(b) in or about 1998 the deceased said to the Plaintiff and his wife, in the lounge room of 22 Chermside Street, Highgate Hill, words to the effect: "I do not want the ching chongs getting everything";
These words were spoken by the deceased whilst he was pointing towards the kitchen where the first named Defendant was standing talking to her mother;

(c) during the time of the Plaintiff's employment for airlines as a pilot, on numerous occasions the deceased said to the Plaintiff words to the effect: "do not waste money on Airline Superannuation as the properties were his fund and that is all that he needed"

(d) relying on the representations pleaded in paragraphs 3 and 5 above and sub-paragraphs (a)-(c) of this paragraph, collectively ("the representations") the Plaintiff acted as follows:

(i) continued to provide assistance to the deceased in the business, including management, supervision of tradesman, supplying materials to tradesman, property inspections and

opening and closing of rental properties for no remuneration, apart from a laborer's wage between December 1992 and April 1993;

(ii) remained a director of certain of the companies pleaded in sub-paragraphs 1 (a) and (aa) above until approximately 2005;

(iii) permitted properties to be bought and sold in his name without receiving any benefit from such acquisition or sale; permitted his assets and personal covenant to be provided as security in support of liabilities of the business, so that the business could borrow to increase its capital base;

6.

(a) The representations meant and conveyed that, and induced the Plaintiff to adopt the assumption or expectation that, if the Plaintiff complied with the deceased's requests, the deceased would:

(i) by his will leave; and

(ii) by the control he exercised over the owners thereof cause to be conveyed;

an equal share in the properties which were part of the business as at January 1990 to the deceased's children referred to in paragraphs 2(a) and 2(b) hereof;

(b) by reason of matters pleaded in paragraphs 4, 5 and 5A above the Plaintiff acted, and to some extent abstained from acting, in reliance on the representations;

(c) the assumptions and or expectations pleaded in subparagraph (a) above were ones which the deceased could either lawfully satisfy or cause lawfully to be satisfied."

[77] The claim which is made by Steven is sometimes called a claim for a proprietary estoppel by encouragement.

[78] The basic principle underlying this form of estoppel was described in *Walton's Stores (Interstate) Ltd v Maher*:

> "[a] person whose conduct creates or lends force to an assumption by another that he will obtain an interest in the first person's land and on the basis of that expectation the other person alters his position or acts to his detriment, may bring into existence an equity in favour of that other person, the nature and extent of the equity depending on the circumstances."[36]

[79] The nature of the estoppel was described by Handley AJA in *Delaforce v Simpson-Cook*[37] in the following terms:

> "21. The proprietary estoppel upheld by the Judge was an estoppel by encouragement. Such an estoppel comes into existence when an owner of property has encouraged another to alter his or her position in the expectation of obtaining a proprietary interest and that other, in reliance on the expectation created or encouraged by the property owner, has changed his or her position to their detriment. If

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36 (1988) 164 CLR 387 at 404; [1988] HCA 7.

37 (2010) 78 NSWLR 483; [2010] NSWCA 84.

these matters are established equity may compel the owner to give effect to that expectation in whole or in part."

[80] In *Delaforce* a husband and wife had negotiated a property settlement following the break up of their marriage. Most of the terms were incorporated in consent orders made by the Family Court. The husband had wished to retain a house property which the wife was concerned to acquire for personal reasons. They came to an agreement whereby he could retain the property but would leave it to his wife in his will. That agreement was not made the subject of an order but was merely noted in the consent orders. The husband's last will gave the property to another person. At trial it was found that the husband's promise had created a proprietary estoppel by encouragement and the husband's executor was ordered to transfer the property to the former wife. The application of this type of an estoppel was further considered in substantial detail by Handley AJA in *Delaforce*.[38]

[81] The following need to be established in order to succeed in an estoppel claim of this type:

"(a) the making of a clear and unequivocal promise (such that it was objectively reasonable for the appellant to interpret the promise in a particular way and to act in reliance on that interpretation);

(b) that the respondent's promise caused the appellant reasonably to assume that a particular legal relationship existed between her and the respondent;

(c) that the appellant acted reasonably in reliance on the promise;

(d) that the respondent knew or intended that the appellant would act in reliance on the promise;

(e) that the appellant's reliance on the promise was to [his or] her detriment; and

(f) that the respondent acted unconscionably in not honouring the promise."[39]

[82] The executors contend that there are insurmountable problems facing the acceptance of such an estoppel.

[83] First, the claim against the companies is founded on the allegation that Bojan was the "controlling mind of the companies". So much can be accepted so far it concerns companies within what might be called the "Darveniza group". Although Bojan was a minority shareholder in Midas and Universal it was clear from all the evidence that he was a man who would brook no interference in the conduct of those companies. He had a controlling personality and his word was law when it came to the operation of his property empire. So far as Darveniza Properties was concerned he had effective control of that through his shareholding in Stevania Properties Pty Ltd which held the majority of shares in Darveniza Properties.

[84] But, there is not the necessary simultaneity of representation and control for all of the entities at the relevant times:

(a) Bojan did not become a director of Leisure Kart until 1994 some 12 years after the second set of alleged representations.

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38 His Honour's very helpful analysis appears at [31] to [36] and [55] to [92] of his reasons.

39 *Van Dyke v Sidhu* [2013] NSWCA 198 at [40].

(b) The Darveniza Superannuation Fund was not created until 1987 some five years after the second set of alleged representations.

(c) The Darveniza Family Trust was not created until 1981, before the second set of representations but after the first set.

[85] The history of Bojan's property interests is a very complex one. Properties were bought, improved and then often sold. There was a substantial turnover of properties as he built up the property portfolio held by the companies in the Darveniza Group.

[86] It was argued by Mr Dunning QC that the fact that there are some representations that predated the existence of some of the defendant companies did not take away from the force of those representations after those companies came into existence. In other words, it was being argued that the representations made by Bojan would bind companies which did not exist at the time they were made and would cover property which was not then owned by companies in the Darveniza Group. It was submitted that the family business was expanding and that the representations made in 1978 and 1982 had a continuing effect on all companies and properties, either brought into existence or acquired after those times. I cannot accept that the representations pleaded can have the effect pleaded in paragraph 6(a) of the Amended Statement of Claim when the corporate bodies which controlled the properties did not exist at those times, notwithstanding that Bojan would come to have effective control of those companies some years later.

[87] In any event, there are other problems which confront the plaintiff on this claim.

[88] All the properties owned by the defendants are mortgaged and cross-collateralised. The relevant mortgagees have not been joined to this action. In *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited*,[40] the High Court considered the line of cases in which *Giumelli v Giumelli*[41] was considered. The Court said:

> "[129] … That line of cases does not permit a constructive trust to be declared in a manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant."

[89] The High Court said that, on that ground alone, it would have been appropriate to allow the appeal in that case.

[90] In the absence of the relevant mortgagees a constructive trust should not be declared in this case.

Were the representations made?

[91] It is well recognised that a court is confronted by substantial difficulties when determining whether a deceased made the representations alleged. The authorities on this point were collected by Ward J (as her Honour then was) in *Varma v Varma*[42]:

> "[418] The difficulties facing the court where a claim is based on an assurance made by a deceased have been noted in many cases.
> …

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40 (2010) 241 CLR 1.

41 (1999) 196 CLR 101.

42 [2010] NSWSC 786.

> [419] **Careful scrutiny is required** (*Plunkett v Bull*; *Clune v Collins Angus & Robertson Publishers Pty Ltd*). As explained in *Weeks v Hrubala*, **the court generally looks for corroboration of those claims** (see also *Re Hodgson*; *Vukic v Luca Grbin; Estate of Zvonko Grbin*).
>
> [420] In *Weeks v Hrubala*, Young CJ in Eq said:
>
> > 'In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see *Re Hodgson* even though, as a matter of law, corroboration is not absolutely necessary. **Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration.**'
>
> [421] In *Plunkett v Bull*, Isaacs J said:
>
> > 'Then we come to the question how far the onus of proof which lay upon the plaintiff was satisfied. She had the burden of establishing the original creation of the indebtedness of the deceased to her, and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as prima facie fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.'
>
> [422] In *Vukic* and in *Joseph Saliba v Thomas Tarmo*, respectively, each of Brereton and Nicholas JJ emphasised that the court must closely scrutinise claims against an estate in circumstances where the only person who can contest the issue is deceased.
>
> [423] Similarly, in *Lewis v Lewis*, Hodgson J (as his Honour then was) referred to the need for caution before finding an intention to create legal relations in a family situation." (emphasis added, citations omitted)

[92] I must also bear in mind that the representations which are pleaded were made a long time ago – the first set in 1978 (when Steven was not yet 18 years old) and the second set in 1983 (when Steven was about 21). When it is alleged that something was said some 40 to 45 years ago then recognition must be given to the fallibility of human memory. This was addressed by McClelland CJ (as his Honour then was) in *Watson v Foxman*[43]. What his Honour said is applicable both to the relief sought by way of declaration and the Trade Practices claim:

> "Where, in civil proceedings, a party alleges that the conduct of another was misleading or deceptive, or likely to mislead or deceive (which I will compendiously described as "misleading")

[43] (1995) 49 NSWLR 315. See also, for an examination of this topic, *The Seven Sins of Memory: How the Mind Forgets and Remembers* (New York, Houghton-Mifflin, 2001).

> within the meaning of s 52 of the *Trade Practices Act* 1974 (Cth) (or s 42 of the *Fair Trading Act*), it is ordinarily necessary for that party to prove to the reasonable satisfaction of the court: (1) what the alleged conduct was; and (2) circumstances which rendered the conduct misleading. **Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances.** In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, **human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.**
>
> Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that **the court "must feel an actual persuasion of its occurrence or existence".** Such satisfaction is "not … attained or established independently of the nature and consequence of the fact or facts to be proved" including the "seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding": *Helton v Allen* (1940) 63 CLR 691 at 712."[44] (emphasis added)

[93] Steven's recollection was more one of impression than of detail. That is not a criticism. The time and the circumstances in which the alleged statements were made and Steven's age at the time – particularly the first set of representations – would not conduce to an accurate recollection. His recollection can be better assessed by reference to his oral evidence, rather than the professionally prepared affidavits.

[94] Steven was cross-examined with respect to the second set of representations[45]:

> "Now, even assuming for present purposes, Mr Darveniza, that your father said words to that effect to you between the ages of 21 and 23, your understanding of what your father was saying to you is that he wanted you to work fulltime with him in the family business. Yes?---No.

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44 Ibid at 318.

45 T 2-53 – 2-55

No?---No.

It's actually your pleaded case that those representations are that your father wanted you to work fulltime in the business, if I understand it?---Only after I left Bushell and Company.

Yes. But this is after you'd left Bushell Company, isn't it?---Five years afterwards.

But it's after you've left Bushell Company. Those representations, one day you'll have to take over and run the business?---Yes.

It will be yours and the family's one day?---Yes.

You understood by those representations that your father wanted you to work fulltime with him in the family business. Yes?---It kept changing.

Now, these conversations you had with your father, that you outline in paragraph 25, are conversations you had prior to your father meeting Mrs Darveniza, Mrs Jane Darveniza?---What was said in 25 is what was said - - -

Prior – prior to your father meeting Mrs Jane Darveniza?---Yes. Yes.

It's certainly things that were said by your father prior to him marrying Mrs Darveniza in 1990?---Yes.

And certainly prior to him having three children with her?---Yes.

And it was certainly prior to Jane Darveniza working fulltime in the business with your father. Yes?---Yes.

Now, in the same paragraph at 25 you say there's – and this is really, it comes to perhaps the heart of your trade practices action case. You say, as a result of these representations I was led to believe that my siblings and I would inherit, equally, the properties comprising his business. Do you see that?---I do see that. But it was mentioned many times thereafter.

Thank you. I'm only dealing with this?---Yes.

I can only deal with one paragraph at a time, you can appreciate?---Yes.

Just so we can understand it, **are you saying that these representations made by your father were understood by you in this way. That if you, Steven Darveniza, worked fulltime in the business – not your other siblings, but you – then each of your siblings would inherit equally. Is that how you understood it?---No.**

Did you understand it to mean that your father was saying if the whole family works fulltime in the business with him, then they will inherit equally?---No.

How did you understand it then?---That if you continue to work with me as per the agreed and what was amicable, and continued to learn about the business, you will then know enough to be able to run it, and have your portion.

What you've sworn to in paragraph 25 are words spoken by your father to you, as a young man. Yes?---Yes.

None of your other siblings are present according to this paragraph - - -?---No.

- - - when he speaks those words to you. Yes?---None of us was spoken to in the presence of one another. It was always one-on-one.

All right. But you can only tell us what your father said to you. Yes?---At this point in time. Yes.

Yes. So your father is saying words to a 21 year old son, albeit the eldest son, but you say it's between – in or about January 1983. Yes?---Mmm.

And the words that are being spoken are being spoken by your father to you. Yes?---Yes.

But so that we can understand your case, when your father spoke those words to you, you understood that if you worked in the business fulltime your siblings would inherit the same portion of the estate as you, as the eldest son?---Fulltime was not mentioned.

All right. How else are we to understand words such as you will have to take over and run the business; it will be yours and the family's one day?---What was my understanding of that?

Yes?---He said if we continue to do what we're doing, learning, working, we would then have the knowledge and the skills to take over the business, all of it." (emphasis added)

[95] Steven's understanding of what he was told is important for two reasons. First, it is quite different to the pleaded representations. He refers to "we" which must be a reference to the family and that he understood that the family would "take over" the business. He rejects the meaning advanced in the Amended Statement of Claim that the business would be inherited equally among his siblings. Secondly, the terms in which he understood his father's statements did not inevitably involve the business being left or transferred to him and his siblings.

[96] The representations as he understood them were not of such a "clear and unequivocal" nature that they could lead to an order of the type sought by Steven. The need for clarity of a representation is subject to the circumstances in which it

was made. Meagher JA summarised the weight of authority in *Hammond v J P Morgan Trust Australia Ltd*[46] in this way:

> "[52] Although it has been said that a representation must be "clear" or "clear and unambiguous" before it can found a promissory estoppel (see *Foran v Wight* at 410-411 per Mason CJ citing *Legione v Hateley* at 435-437), **generally a representation will support an estoppel if it was reasonable for the representee to interpret the representation or promise in the way contended for and to act in reliance on that interpretation**: per Hodgson JA (McColl JA agreeing) in *Sullivan v Sullivan* at [85]. See also *The Western Australian Insurance Company Ltd v Dayton*; *Australian Crime Commission v Gray*; *Galaxidis v Galaxidis*; *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd*; cf *Westpac Banking Corporation v The Bell Group Ltd (In Liq) [No 3]*. It is not necessary in this case to consider Drummond AJA's observations concerning *Australian Crime Commission v Gray* because I have concluded that the conduct relied upon was not reasonably capable of giving rise to the representations said to have been acted upon by the appellant.
>
> [53]When addressing whether conduct is reasonably capable of giving rise to a particular representation or promise **it is necessary to have regard to the context in which it occurred and to consider what it would have conveyed to a person in the position of the recipient**: ... This requires attention to Mr Hammond's position as the person acting on behalf of the appellant and to whom any representations were made. The primary judge found that Mr Hammond was experienced in the mortgage industry. As such he should be taken to have had some knowledge of the operation of default notices and of proceedings to enforce rights under mortgages, including by proceedings for possession." (emphasis added, citations omitted)

[97] The trust which is sought to be imposed would result in the plaintiff holding a one-quarter interest in the various properties owned by the defendants. That prayer for relief was amended in the last version of the Statement of Claim by including an alternative that the property be held on behalf of Steven in "such interest as the Court determines". The representations pleaded, even if I had found that they were made, do not allow for a finding of any intention that an equal share of the properties be provided to the relevant children. Further, the pleaded representations were insufficiently clear to allow a conclusion to be drawn as to what interest if any might be drawn from them.

[98] I have considered: the pleaded representations, the circumstances in which they were said to have been made, Steven's age at the time he pleads they were made, his answers in cross-examination and his demeanour when answering those questions. He was uncertain about the words used and I formed a clear opinion that he was conveying nothing more than his impression of what was said. The evidence does

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46 [2012] NSWCA 295.

not lead to an "actual persuasion" that the representations were made in the form alleged.

[99] There are further matters which tend strongly against the making of a declaration:

(a) There is no evidence that any of the defendants owned any of the properties which would be the subject of such an order before 1990.

(b) The assets of the Darveniza Superannuation Fund are held under the requirements of the *Superannuation Industry (Supervision) Act* 1993 for the benefit of its members and could not be the subject of a declaration of the type sought by Steven.

(c) So far as the representations which are alleged to have been made between 1997 and 2001 are concerned (apart from their uncertainty), the particulars provided by Steven in the Amended Statement of Claim do not set out any work that was done after 1990. Thus, reliance has not been established so far as those representations are concerned.

[100] This part of the claim must fail.

The company claim - Trade Practices Act

[101] This part of the claim must also fail. It is pleaded in the Amended Statement of Claim that:

> "15A The deceased made the representations, inter alia, on behalf of, and in his capacity as, controller of the companies referred to in sub-paragraphs 1(a) and (aa) hereof.
>
> 15B The representations were:
>
> (a) were in trade or commerce within the meaning of s.4 Trade Practices Act 1974;
>
> (b) as to future matters within the meaning of s.51A Trade Practices Act and the Plaintiff relies on that provision;
>
> (c) misleading or deceptive or likely to mislead or deceive in contravention of s.52 Trade Practices Act by reason of the deceased not:
>
> (i) making any provision for the Plaintiff by his will; and;
>
> (ii) prior to his death, by the control he exercised over the owners thereof, cause to be conveyed;
>
> a one-quarter share of the properties which were part of the business as at January 1990."

[102] The allegation in paragraph 15A is unfounded for the reasons given above with respect to the claim for a constructive trust.

[103] The representations which were recalled by Steven were insufficiently certain to support this type of claim.

[104] More importantly, even if it is accepted that the representations were made as pleaded, they were not made "in trade or commerce". These were statements made by a father to a son, not, for example, by a corporation to a consumer. They were a part of the ordinary discussions which might occur between a parent and child about

prospects and possibilities for the child. They were not statements made on behalf of trading corporations.

[105] The purview of the s 52 of the *Trade Practices Act* was considered in *Concrete Constructions (NSW) Pty Ltd v Nelson*[47]:

> "**The real problem involved in the construction of s. 52 of the Act does not, however, spring from the use of the words "trade or commerce". It arises from the requirement that the conduct to which the section refers be "in" trade or commerce**. Plainly enough, what is encompassed in the plenary grant of legislative power "with respect to … Trade and commerce" in s. 51(i) of the *Constitution* is not of assistance on the question of the effect of the word "in" as part of the requirement that the conduct proscribed by s. 52(1) of the Act be "in trade or commerce".
>
> **The phrase "in trade or commerce" in s. 52 has a restrictive operation**. It qualifies the prohibition against engaging in conduct of the specified kind. As a matter of language, a prohibition against engaging in conduct "in trade or commerce" can be construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business. If the words "in trade or commerce" in s. 52 are construed in that sense, the provisions of the section would extend, for example, to a case where the misleading or deceptive conduct was a failure by a driver to give the correct handsignal when driving a truck in the course of a corporation's haulage business. It would also extend to a case, such as the present, where the alleged misleading or deceptive conduct consisted of the giving of inaccurate information by one employee to another in the course of carrying on the building activities of a commercial builder. Alternatively, the reference to conduct "in trade or commerce" in s. 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt words used by Dixon J. in a different context in *Bank of N.S.W. v. The Commonwealth*, the words "in trade or commerce" refer to "the central conception" of trade or commerce and not to the "immense field of activities" in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.
>
> As a matter of mere language, the arguments favouring and militating against these alternative constructions of s. 52 are fairly evenly balanced. The scope of the prohibition imposed by s. 52 is, however, governed not only by "the terms in which it is created" but by "the context in which it is found" (see *Yorke v. Lucas*; and, generally, *Bank of N.S.W. v. The Commonwealth*). … [W]hen the

[47] (1990) 169 CLR 594.

> section is read in the context provided by other features of the Act, which is "An Act relating to certain Trade Practices", the narrower (i.e. the second) of the alternative constructions of the requirement "in trade or commerce" is the preferable one. Indeed, in the context of Pt V of the Act with its heading "Consumer Protection", **it is plain that s. 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business**. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. **What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character**."[48] (emphasis added, citations omitted)

[106] The representations pleaded by Steven did not involve activities of a trading or commercial character. They were, on his case, in the nature of testamentary promises, that is, they concerned the manner in which Bojan might dispose of his business in his will. The fact that the real property involved was held in the name of companies was purely incidental.

[107] This claim fails at the beginning. The *Trade Practices Act* does not apply.

Orders

13827 of 2010

[108] It is ordered that further provision be made for the proper maintenance and support of Steven Darveniza out of the estate of Bojan Darveniza by payment of a lump sum of $3,000,000.

1766 of 2012

[109] The claim is dismissed.

[110] I will hear the parties on costs in each matter.

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48 Ibid at 602-604.