SUPREME COURT OF QUEENSLAND

CITATION:	*Woodgate v Tanks & Ors* [2013] QSC 204
PARTIES:	**NEIL TREVOR WOODGATE (as executor of the estate of WILLIAM BURNETT BOISEN, deceased)** **(applicant)** **v** **ANNETTE TANKS** **(first respondent)** **JANE SCHY** **(second respondent)** **PAUL JAMES BOISEN** **(third respondent)** **FRANCESCA GERTRUDA MARIA HUTTON AND NEIL JAMES HUTTON** **(fourth respondents)**
FILE NO/S:	BS3601/13
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2013
JUDGE:	Margaret Wilson J
ORDER:	**1. Declare that, on its proper construction, clause 2(a) of the will of William Burnett Boisen (deceased) ("the testator") made on 30 July 2010 is to be read and construed as a gift of one sum of one hundred thousand dollars ($100,000) to be shared by the first, second and third respondents as tenants in common in equal shares.** **2. Declare that, on its proper construction, clause 5(a) of the said will is to be read and construed as a gift of one sum of fifty thousand dollars ($50,000) to be shared by the fourth respondents as tenants in common in equal shares.** **3. Direct that:** **(a) the applicant would be justified in distributing the testator's estate on the basis that the gift in clause 2(j) of the said will is a gift to The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane for the general purposes of**

the Parish of Murgon;

(b) the applicant would be justified in distributing the testator's residuary estate pursuant to clause 6 of the said will equally among each of the following:

i. **The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane;**
ii. **The Roman Catholic Trust Corporation for the Diocese of Cairns;**
iii. **The Roman Catholic Trust Corporation for the Diocese of Rockhampton;**
iv. **The Corporation of the Trustees of the Roman Catholic Archdiocese of Toowoomba; and**
v. **The Roman Catholic Trust Corporation for the Diocese of Townsville.**

(together, "the Queensland Catholic Dioceses")

(c) the receipt of the financial officer or the Archbishop or the Bishop of each of the Queensland Catholic Dioceses be sufficient to discharge the applicant;

(d) the applicant would be justified in entering into any agreement as to the payment of the executor's commission in the estate with the Queensland Catholic Dioceses; and

(e) the applicant would be justified in joining the Queensland Catholic Dioceses as respondents to any application to the Court for the payment of the executor's commission.

4. Order that the applicant's costs of and incidental to the application be paid out of the testator's residuary estate on the indemnity basis.

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – GENERALLY – where testator bequeathed legacies "to each of" the first, second and third respondents "in equal shares as tenants in common" – where

testator bequeathed legacies "to each of" the fourth respondents "in equal shares as tenants in common" – where executor sought direction as to proper construction of the will – whether the clauses conferred separate gifts of the entire nominated sum "to each of" the legatees, or a single gift of the nominated sum to be shared equally amongst "each of" the legatees

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – WHERE MISTAKE OR MISDESCRIPTION – AS TO PERSON OR OBJECT – where testator bequeathed gifts to "The Catholic Church Murgon Parish" and "The Catholic Church Queensland Brisbane" – where no entities by those names existed – whether the entities the testator intended to describe could be ascertained

Property Law Act 1974 (Qld) s 33
Succession Act 1981 (Qld) ss 5AA, 33C

Askin v Ghidella, Reghenzani (112 of 2000) [2001] QSC 135, cited
Fell v Fell (1922) 31 CLR 268, cited
King v Perpetual Trustee (Ltd) (1955) 94 CLR 70, cited
Lascelles v M'Swaine (1894) 6 QLJ 44, considered
Perrin v Morgan [1943] AC 399, cited
Re Gifford [1944] Ch 186; cited
Re Hewitt [1945] SASR 102, cited
Re McBean (1973) 7 SASR 579, cited
Re Minton; Public Curator (Qld) v Toohey [1939] St R Qd 159, cited
The Public Trustee of Queensland v Smith [2009] 1 Qd R 26, considered
The Trust Company Limited & Anor v Zdilar & Ors [2011] QSC 5, cited

COUNSEL: AB Fraser for the applicant

No appearance for the first, second, third or fourth respondents

M Liddy for The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane, The Roman Catholic Trust Corporation for the Diocese of Cairns, The Roman Catholic Trust Corporation for the Diocese of Rockhampton, The Corporation of the Trustees of the Roman Catholic Archdiocese of Toowoomba, The Roman Catholic Trust Corporation for the Diocese of Townsville and The Corporation of the Roman Catholic Bishops of Queensland

SOLICITORS: de Groots for the applicant

No appearance for the first, second, third or fourth respondents

Thynne & Macartney for The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane, The Roman Catholic Trust Corporation for the Diocese of Cairns, The Roman Catholic Trust Corporation for the Diocese of Rockhampton, The Corporation of the Trustees of the Roman Catholic Archdiocese of Toowoomba, The Roman Catholic Trust Corporation for the Diocese of Townsville and The Corporation of the Roman Catholic Bishops of Queensland

[1] **MARGARET WILSON J:** William Burnett Boisen ('the testator') died on 23 August 2010. By his last will, which he made on 30 July 2010 ("the 2010 will"), he appointed the applicant as executor.

[2] The applicant has applied for determinations as to the proper construction of the will and directions in relation to the performance of his role.

Background

[3] The testator died at the age of 89. He had never married. He died without issue and without a "spouse" as defined in s 5AA of the *Succession Act* 1981 (Qld). His only sibling, his sister Beryl, predeceased him without issue.

[4] The applicant is the son of the testator's first cousin Sybil. The first, second and third respondents are children of Bevan Boisen, who was Sybil's brother.[1] The fourth respondents were close friends of the testator, but not related to him. [2]

[5] The first, second and third respondents were not legally represented in this application, but the first and second respondents provided written submissions to the Court on 2 May 2013. The fourth respondents were not legally represented and did not provide any material in the application.

[6] The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane, The Roman Catholic Trust Corporation for the Diocese of Cairns, The Roman Catholic Trust Corporation for the Diocese of Rockhampton, The Corporation of the Trustees of the Roman Catholic Archdiocese of Toowoomba, The Roman Catholic Trust Corporation for the Diocese of Townsville and The Corporation of the Roman Catholic Bishops of Queensland ("The Catholic Church respondents") appeared by counsel.

The testator's wills

[7] On 26 July 2010, the testator was admitted to the Royal Brisbane and Women's Hospital. On 30 July 2010, whilst still in hospital, he made the 2010 will with the assistance of Mr Benjamin Trost, a solicitor employed by Stephens and Tozer. Mr

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1 Affidavit of Neil Trevor Woodgate sworn 19 April 2013, paragraph [3]; submissions on behalf of the first, second and third respondents at page 1.

2 Affidavit of Francesca Gertruda Maria Hutton sworn 16 December 2011, filed in proceeding 13689/10.

Trost took verbal instructions from him, recording his instructions on a copy of an earlier will ("the 2008 will") provided by his former solicitor. Mr Trost then handwrote the will, and read the handwritten document to the testator *verbatim*. The testator executed the will, signing it in the presence of Mr Trost and the paralegal assisting him, Ms Carolene Jacinto.

[8] The testator had made a will on 6 July 2002, which was revoked by the 2008 will.

[9] Probate of the 2010 will was granted by this Court on 13 August 2012.

This application

[10] The applicant has sought:

"1. A determination as to whether, upon a proper construction of clause 2(a) of the Will, it is
   (a) a gift of the sum of one hundred thousand dollars ($100,000) to each of ANNETTE TANKS, JANE SCHY and PAUL JAMES BOISEN; or
   (b) in the alternative, a gift of the sum of one hundred thousand dollars ($100,000) to be shared amongst ANNETTE TANKS, JANE SCHY and PAUL JAMES BOISEN in equal shares as tenants in common.

2. A determination as to whether, upon a proper construction of clause 5(a) of the Will, it is
   (a) a gift of the sum of fifty thousand dollars ($50,000) to each of FRAN and NEIL HUTTON; or
   (b) in the alternative, a gift of the sum of fifty thousand dollars ($50,000) to be shared by FRAN and NEIL HUTTON in equal shares as tenants in common.

3. That, pursuant to s. 96 of the *Trusts Act 1973* (Qld), the Court direct that:
   (a) the applicant would be justified in distributing the estate of William Burnett Boisen (**Deceased**) on the basis that the gift in clause 2(j) of the Will is a gift to The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane for the general purposes of the Parish of Murgon;
   (d) the applicant would be justified in distributing the residuary estate pursuant to clause 6 of the will equally to each of the following:

      i. The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane;
      ii. The Roman Catholic Trust Corporation for the Diocese of Cairns;
      iii The Roman Catholic Trust Corporation for the Diocese of Rockhampton;
      iv. The Corporation of the Trustees of the Roman Catholic Archdiocese of Toowoomba; and

v. The Roman Catholic Trust Corporation for the Diocese of Townsville.
(together, the **Queensland Catholic Dioceses**)

(e) the receipt of the financial officer or the Archbishop or the Bishop of each of the Queensland Catholic Dioceses be sufficient to discharge the applicant;
(f) the applicant would be justified in entering into any agreement as to the payment of the executor's commission in the estate with the Queensland Catholic Dioceses; and
(g) the applicant would be justified in joining the Queensland Catholic Dioceses as respondents to any application to the Court for the payment of the executor's commission.

4. That the applicant's costs of and incidental to the application be paid out of the residuary estate of the Deceased on an indemnity basis.

5. Such further or other direction or order as the Court may think fit."

[11] Counsel for the applicant told the Court that his client did not "adopt any firm position as to the outcome of the application", but, as executor, was under an obligation to place all arguable constructions of the testator's will before the court. That was the proper course in the circumstances.

The 2010 will

[12] In the application, the clauses in the 2010 will in issue were identified as numbers 2(a), 5(a) 5(j) and 6. In fact the clauses on the first page were not numbered. The application proceeded on the basis that the clauses in issue were those set out below, the first of them being treated as if preceded by the number "2".

[13] The 2010 will provides, relevantly:

"I give and bequeath the following legacies:

(a) As to the sum of one hundred thousand dollars ($100,000) to each of Annette Tanks, Jane Schy and Paul James Boisen in equal shares as tenants in common. I direct that Annette Tanks and Jane Schy shall direct how my trustee is to distribute the one-third share to Paul James Boisen.

…

5. I give and bequeath the following further legacies:

(a) As to the sum of fifty-thousand dollars ($50,000) to each of Fran and Neil Hutton in equal shares as tenants in common.

…

(j) As to the sum of twenty thousand dollars ($20,000) to the Catholic Church Murgon Parish absolutely for general purposes.

…

6. I give, devise and bequeath all the rest and residue of my property both real and personal… to the Catholic Church of Queensland Brisbane absolutely for whatever religious or

> charitable purposes such organisation may think fit. The receipt of the Secretary for the time being of such religious organisation shall be a sufficient discharge to my trustee."

Construction principles

[14] The Court's role in construing a will is to give effect to the intention of the testator, "such intention being gathered from the language of the will read in the light of the circumstances in which the will was made."[3] In determining the testator's intention, the Court must consider the will as a whole, and not simply those clauses whose meaning is contested.[4]

[15] Under the common law, in construing a will a Court is generally required to confine its inquiry to the language expressly used.[5] However, in limited circumstances, it may admit further extrinsic evidence to assist in its interpretation. There are exceptions to the general rule, including the armchair rule and the equivocation exception.

[16] The armchair rule allows the Court to receive extrinsic evidence of the knowledge and circumstances of testator at the time the will was made, allowing the Court to "sit in the testator's armchair" and thereby explain what he or she wrote and meant by the words used.[6]

[17] The equivocation exception allows evidence of the testator's actual intention to be admitted where the description in the will remains equally capable of bearing two or more meanings after surrounding circumstances have been considered.[7]

[18] Extrinsic evidence may also be admitted under s 33C of the *Succession Act* 1981 (Qld), which provides:

> "**33C Use of evidence to interpret a will**
>
> (1) In a proceeding to interpret a will, evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it—
>
> (a) meaningless; or
>
> (b) ambiguous on the face of the will; or
>
> (c) ambiguous in the light of surrounding circumstances.
>
> (2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).
>
> (3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will."

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3 *Perrin v Morgan* [1943] AC 399 at 420.

4 *King v Perpetual Trustee (Ltd)* (1955) 94 CLR 70 at 77.

5 *Jenkins v Stewart* (1906) 3 CLR 799.

6 *Re Minton; Public Curator (Qld) v Toohey* [1939] St R Qd 159. See also DM Haines QC, *Construction of Wills in Australia* (1st ed, 2007) at [5.6] and *O'Brien v Smith* [2013] 1 Qd R 223 at [13] - [17].

7 *Re Robertson; Equity Trustees Executors & Agency Co Ltd v Ramage* [1946] VLR 162. See DM Haines QC, *Construction of Wills in Australia* (1st ed, 2007) at [2.16].

[19] In *The Public Trustee of Queensland v Smith*,[8] Atkinson J summarised the contemporary approach to construction in this way –

> "**[26]** It follows from the foregoing discussion that the court of construction should start with the words of the will. If their usual meaning is clear, the will will be given that construction. If not, the court may have regard to such extrinsic evidence as allowed by the rules of construction traditionally applied by the courts with the addition of the aids to construction found in s 33C of the Act." (footnotes omitted)

Clauses 2(a) and 5(a)

[20] Clauses 2(a) and 5(a) are similar in that both are expressed in terms of a gift

> *as to the sum of [$x] to each of [more than one person] <u>in equal shares as tenants in common</u>*.

Clause 2(a) contains extra words which do not appear in clause 5(a) –

> I direct that [two of the three named beneficiaries] shall direct how my trustee is <u>to distribute the one-third share to [the third named beneficiary]</u>. (Emphasis added)

[21] The first step in determining the meaning of the will is to give the testator's words their "plain" or "ordinary" meaning.[9]

[22] According to the *Oxford English Dictionary*, the word "each" can mean:[10]

> "1. Every (individual of a number) regarded or treated separately"; or
> "… 4. Distributing a plural subject or object."

[23] Thus, the words "to each of" are, in their ordinary meaning, capable of more than one implication. In clause 2(a) they may signify a gift of $100,000 split three ways (as counsel for the applicant and the Catholic Church respondents contended), or alternatively a gift of $100,000 each, that is, a total of $300,000 (as the first and second respondents contended). Similarly, in clause 5(a) they may signify a gift of $50,000 split two ways, or alternatively a gift of $50,000 each, that is, a total of $100,000.

[24] The remaining words of the clauses in issue must also be given meaning, as far as possible.[11] Clauses 2(a) and 5(a) continued -

> "in equal shares as tenants in common".

[25] The law recognises two forms of co-ownership of property – joint tenancy and tenancy in common.[12] Under a tenancy in common each co-owner has a definite share in the property, and upon the death of a co-owner his or her share passes to his or her personal representative for distribution in accordance with the will or the

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8 [2009] 1 Qd R 26.

9 *Abbott v Middleton* (1858) 7 HLC 68; *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at [20]-[21].

10 *The Oxford English Dictionary*, 'Each' < http://0-www.oed.com.catalogue.sclqld.org.au/view/Entry/58924?redirectedFrom=each#eid >.

11 *Re Hewitt* [1945] SASR 102 at 107.

12 *Property Law Act* 1974 (Qld) s 33.

intestacy rules. Under a joint tenancy, upon the death of a co-owner his or her share passes to the surviving co-owner.

[26] Where technical words are used in a will, the Court will ordinarily presume that the testator intended to give them their technical meaning,[13] unless the will evinces a clear intention that they be applied in a different sense.[14] The phrase "tenants in common" is a legal term, signifying the nature of the ownership that a person or persons have in property. For this reason counsel for the applicant, with whom counsel for the Catholic Church respondents agreed, submitted that the use of the phrase "tenants in common" was consistent with a gift of one sum of money split three ways. They submitted that the words "in equal shares" also suggested division, and so supported the interpretation for which they contended. I accept those submissions.

[27] In clause 2(a) there is also the subsequent reference to "the one-third share" to be distributed by the testator's trustee to the third respondent. That is consistent with a gift of one sum of $100,000 split three ways.

[28] It is useful to compare and contrast the wording of clauses 2(a) and 5(a) with that of other provisions of the 2010 will. As counsel for the applicant observed, there is little consistency in the drafting of the will. It contains bequests using six different sets of wording. Each begins by specifying the "sum" which will be the subject of the gift. The gift is then given:

(a) *"to each of [the legatees] in equal shares as tenants in common"* (as in clauses 2(a) and 5(a));
(b) *"to [the legatees] in equal shares as tenants in common"* (as in clauses 2(b) and 5(b));
(c) *"to [the legatee] absolutely"* (as in clauses 2(c), (d) and (g));
(d) *"to [the legatee] absolutely for general purposes"* (as in clause 2(h), (i), and (j));
(e) *"to each of [the legatees] absolutely"* (as in clause 2(e));
(f) *"to [the legatees]"* (as in clause 5(c)) .

There is also a gift of "all of my livestock, plant, machinery, vehicles and tools… *to each of William James Hobbs, Dorothy Jean Hobbs as to a two-thirds share and to TE Hobbs as to a one-third share*" (clause 4).

[29] The testator distinguished between legacies given "in equal shares as tenants in common", and legacies given "absolutely". All of the legacies except that in clause 5(c) are described in one of those two ways. The word "absolutely" ordinarily means "completely" or "independently".[15] This implies a whole undivided right, in contrast to the co-ownership contemplated by the words "equal shares" or "tenants in common".

[30] His use of the words "to each of" is less uniform. While each use of that phrase relates to a gift to more than one person, not every gift to more than one person is described in that way. See, for example, clauses 2(b) and 5(b).

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13 A Preece, *Lee's Manual of Queensland Succession Law* (7th ed, 2013) at 357.
14 *Re McIlrath deceased* [1959] VR 720.
15. *The Oxford English Dictionary*, 'Absolutely' <http://0-www.oed.com.catalogue.sclqld.org.au/view/Entry/680?redirectedFrom=absolutely#eid>.

[31] Counsel for the Catholic Church respondents submitted that clause 4 provided an example of the testator's use of the phrase "to each of" which could not be interpreted as a gift wholly "to each of" the named beneficiaries because of the nature of the property. The testator could not have intended two separate gifts of all of his livestock, plant, etc, because if he gave all of that property to William James Hobbs and Dorothy Jean Hobbs, there would be none left over for TE Hobbs. In my view it is clear that in clause 4 the words "to each of" signify the presence of a plurality of recipients of the identified property.

[32] I do not accept counsel for the applicant's submission that there is inconsistency between the words "to each of" and the words "as tenants in common in equal shares". Nor do I accept that if there were such inconsistency, the words "to each of" should be treated as mere surplusage.

[33] In my view there is no inconsistency if the words "to each of" are interpreted as signifying a plurality of recipients of one sum of money, and the subsequent words are interpreted as signifying the nature of their co-ownership and their respective shares. Such interpretations would accord with one of the ordinary meanings of "each" and the presumption that the testator intended the expression "tenants in common" to have its technical legal meaning.

[34] I have concluded that by clause 2(a) the testator made a bequest of one sum of $100,000 to be split three ways among Annette Tanks, Jane Schy and Paul James Boisen in equal shares as tenants in common. Similarly, by clause 5(a) he made a bequest of one sum of $50,000 to be split two ways between Fran and Neil Hutton in equal shares as tenants in common.

[35] In my review there is no ambiguity, and thus it is not permissible to admit any extrinsic evidence of the facts and circumstances surrounding the creation of the will to aid in its interpretation. However, the extrinsic facts sought to be relied upon, namely those set out in Mr Trost's affidavit at paragraphs [21]-[26], are consistent with the conclusion that I have drawn.

Clause 5(j): the gift to the Catholic Church Murgon Parish

[36] By clause 5(j) the testator gave $20,000 "to the Catholic Church Murgon Parish absolutely for general purposes." There is not, and nor was there at the time of the testator's death, any entity called "the Catholic Church Murgon Parish". However, the trading name "Catholic Parish – Murgon" is listed under ABN 25 328 758 007, which is registered to "The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane".

[37] Misdescription is not uncommon in testamentary dispositions. The Court is reluctant to allow misdescription to vitiate a gift,[16] and leans against a finding of intestacy.[17] In such cases, the court of construction will apply the principle of *falsa demonstratio*, meaning that a false description does not vitiate, provided that the thing or person described can be sufficiently identified.[18]

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16 *Re McBean* (1973) 7 SASR 579; *Re Newman deceased* [1967] VR 201.

17 *Lightfoot v Mayberry* [1914] AC 782, applied in *Fell v Fell* (1922) 31 CLR 268.

18 *Re Gifford* [1944] Ch 186; applied in *Askin v Ghidella, Reghenzani (112 of 2000)* [2001] QSC 135.

[38] Pursuant to the armchair rule, evidence of the factual matrix in which the testator made the 2010 will, including his beliefs and habits, is admissible to allow the Court to place itself in the position of the testator, and identify the entity that he intended to benefit.[19] Those facts and circumstances indicate that the testator intended to make a gift to the Catholic Church, to be applied to the Murgon Parish.

[39] The applicant deposed that the testator was "a devout member of the Catholic Church in Queensland and that he attended the local Catholic Church, St John the Baptist located at 16 Bramston Street, Wondai, Queensland (which is part of the Murgon Parish) every Sunday, with few exceptions".[20] The testator appears to have made his intended gift known to the priest of St John the Baptist Church.

[40] It is possible to give effect to the testator's intention to make a gift of $20,000 to the Parish of Murgon by distributing that sum to The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane for the general purposes of the Parish of Murgon. Counsel for the applicant drew a number of cases to my attention in this regard. In *Lascelles v M'Swaine* (1894) 6 QLJ 44, Harding J (with whom Cooper and Real JJ agreed) said —[21]

> "…where a bequest or devise is made to any integral part – that is to say, any congregation, as it would be in this case – of the whole corporation, that is a bequest or devise to the corporation… That is to say, they hold the legal estate or the property in trusts for the purposes pointed out by the testator for the benefit of the church."

[41] I am satisfied that distributing the gift to The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane, to be held by that corporation on trust for the general purposes of the Parish of Murgon, would give effect to the testator's intention. I therefore make the declaration sought at paragraph 3(a) of the originating application, that the applicant would be justified in distributing the gift in that way.

Clause 6: the residuary gift

[42] By clause 6 of the will, the testator left "all the rest and residue of my property both real and personal… to the Catholic Church of Queensland Brisbane". This clause suffers a similar error of misdescription as the gift to the Murgon Parish in clause 5(j), as there is no entity called "the Catholic Church of Queensland Brisbane".

[43] The Catholic Church in Queensland operates under five dioceses, represented by five corporate entities and trustees:

1. The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane;
2. The Roman Catholic Trust Corporation for the Diocese of Cairns;
3. The Roman Catholic Trust Corporation for the Diocese of Rockhampton;
4. The Corporation of the Trustees of the Roman Catholic Archdiocese of Toowoomba; and
5. The Roman Catholic Trust Corporation for the Diocese of Townsville

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19 *Charter v Charter* (1874) LR 7 HL 364 at 377; *Re Minton; Public Curator (Qld) v Toohey* [1939] St R Qd 159.

20 Affidavit of Neil Trevor Woodgate sworn 19 April 2013, paragraph [21].

21 *Lascelles v M'Swaine* (1894) 6 QLJ 44 at 49.

The applicant seeks a declaration that the residue of the estate be distributed equally amongst the five dioceses. This is not opposed by the Catholic Church respondents, nor by the entity called 'The Corporation of the Roman Catholic Bishops of Queensland', which may have had an interest in the bequest.

[44] The clause may be interpreted as leaving the residue of the estate to "the Catholic Church of Queensland [in] Brisbane", limiting the gift to that particular diocese. Alternatively, as proposed by the applicant, emphasis could be placed on the use of the word "Queensland", implicating the whole state, and the limiting word "Brisbane" could be read down or excluded. Thus, there is an ambiguity on the face of the will, as it is not possible to determine which of the two constructions the testator intended. Extrinsic evidence is therefore admissible under s 33C(1)(a) of the *Succession Act* 1981 (Qld), and under the common law rule of latent ambiguity, to allow the Court to determine which entity or entities the testator intended to describe.

[45] Two pieces of extrinsic evidence are particularly important in the interpretation of the residuary clause. The first relates to the circumstances in which the phrase "Catholic Church of Queensland Brisbane" came to be used in the will. As I outlined at paragraph [8], the 2010 will currently was written by Mr Trost using a copy of the testator's earlier 2008 will as a template. The 2008 will was in turn based on an earlier will made in 2002. Mr Greenslade, who prepared the 2002 will, did not recall the specific discussion he had with the testator about the residuary clause. However, according to his contemporaneous notes, the residuary gift was to be "left in hands of organization Catholic Church of Queensland for whatever religious or charitable purpose they think fit", without any mention of limiting the gift to the Brisbane diocese. Mr Greenslade told the applicant that "'Brisbane' was included in the residuary clause merely as the place where the office of the Queensland section of the Catholic Church would expected [sic] to be situated."[22]

[46] The second important piece of extrinsic evidence relates to the testator's known attitude to the centralisation of power in Queensland, particularly within the church. The applicant deposed that the testator was firmly opposed to the amalgamation of shire councils, and attributed the shortage of local church funds (at least in part) to "money leaving the parish and little returning".[23]

[47] The extrinsic evidence indicates that the testator intended the residue of his estate to be given to the Catholic Church operating throughout the state of Queensland. I am satisfied that the best way to give effect to this intention is to divide the estate equally among the five dioceses that make up the Catholic Church in Queensland.

[48] I make the declaration sought in paragraph 3(b) of the originating application, that the applicant would be justified in distributing the residuary estate pursuant to clause 6 of the will equally amongst the five dioceses.

Costs

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22 Affidavit of Neil Trevor Woodgate sworn 19 April 2013, exhibit NTW-4.

23 Ibid at paragraph [31].

[49] In cases such as this, costs are ordinarily assessed on the indemnity basis, and paid out of the residue of the estate of the deceased.[24] I see no reason to depart from the usual practice in the present case.

Orders

[50] I make the following orders –

1. Declare that, on its proper construction clause, 2(a) of the will of William Burnett Boisen (deceased) ("the testator") made on 30 July 2010 is to be read and construed as a gift of one sum of one hundred thousand dollars ($100,000) to be shared by the first, second and third respondents as tenants in common in equal shares.
2. Declare that, on its proper construction, clause 5(a) of the said will is to be read and construed as a gift of one sum of fifty thousand dollars ($50,000) to be shared by the fourth respondents as tenants in common in equal shares.
3. Direct that:
   (a) the applicant would be justified in distributing the testator's estate on the basis that the gift in clause 2(j) of the said will is a gift to The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane for the general purposes of the Parish of Murgon;
   (b) the applicant would be justified in distributing the testator's residuary estate pursuant to clause 6 of the said will equally to each of the following:
      i. The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane;
      ii. The Roman Catholic Trust Corporation for the Diocese of Cairns;
      iii. The Roman Catholic Trust Corporation for the Diocese of Rockhampton;
      iv. The Corporation of the Trustees of the Roman Catholic Archdiocese of Toowoomba; and
      v. The Roman Catholic Trust Corporation for the Diocese of Townsville.

      (together, "the Queensland Catholic Dioceses")
   (c) the receipt of the financial officer or the Archbishop or the Bishop of each of the Queensland Catholic Dioceses be sufficient to discharge the applicant;
   (d) the applicant would be justified in entering into any agreement as to the payment of the executor's commission in the estate with the Queensland Catholic Dioceses; and
   (e) the applicant would be justified in joining the Queensland Catholic Dioceses as respondents to any application to the Court for the payment of the executor's commission.
4. Order that the applicant's costs of and incidental to the application be paid out of the testator's residuary estate on the indemnity basis.

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[24] *Re Buckton; Buckton v Buckton* [1907] 2 Ch 406; *The Trust Company Limited & Anor v Zdilar & Ors* [2011] QSC 5.