SUPREME COURT OF QUEENSLAND

CITATION:	*Sylvester v Sylvester & Anor* [2010] QSC 331
PARTIES:	**ROBERT JOHN SYLVESTER (under Part IV, Sections 40-44, *Succession Act* 1981)** **v** **WILLIAM EWART SYLVESTER and GORDON MARTIN (as executors of the will of EWART GLADSTONE SYLVESTER deceased)**
FILE NO:	BS1668 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application for summary judgment
DELIVERED ON:	8 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2010
JUDGE:	Mullins J
ORDER:	**The application filed on 18 May 2010 is dismissed**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION AND MAINTENANCE – PRACTICE – PROCEDURE, ORDERS AND OTHER MATTERS – IN RELATION TO APPLICATION – claim for family provision by adult son in respect of father's estate – where application made by executors to dismiss claim summarily – where deceased expressly made no provision under his will for the applicant – where applicant worked for family business which operated several properties – where applicant ceased working for family business after relationship with his father deteriorated and he was required to vacate the family property – where applicant claims his exclusion from his father's will fails to recognise his contribution to building up family business – where applicant was able to acquire one of the family properties from his mother on favourable terms and settled a dispute with his father over a water licence for payment to the applicant of $550,000 and that the applicant sell his property – where applicant after his father's death was able to purchase a smaller property than the one he had acquired from his mother that was not sufficient to run all his stock – where the farming partnership of the applicant and his wife was making losses – whether applicant's affidavits establish a *prima facie* case – whether application should be dismissed summarily *Succession Act* 1981, s 41

Atthow v McElhone [2010] QSC 177, considered
Banks v Seemann [2008] QSC 202, considered
Bosch v Perpetual Trustee Co Ltd [1938] AC 463, considered
Higgins v Higgins [2005] 2 Qd R 502, followed
Hughes v National Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134, considered
O'Donnell v Gillespie [2010] QSC 22, considered
Singer v Berghouse (1994) 181 CLR 201, followed
Vigolo v Bostin (2005) 221 CLR 191, considered

COUNSEL: R M Treston for the applicant
D G Mullins SC for the respondents

SOLICITORS: Thynne & Macartney for the applicant
McCullough Robertson for the respondents

[1] The applicant is one of the children of the late Ewart Gladstone Sylvester (the deceased) who died in May 2009. Probate of the deceased's last will made on 8 July 2008 and codicil made on 13 February 2009 was granted to the respondents as the executors of the will. The applicant commenced this proceeding in order to obtain further provision from the deceased's estate in reliance on s 41 of the *Succession Act* 1981 (the Act). The respondents apply for summary dismissal of the application on the basis that it does not disclose a *prima facie* case or that the applicant fails to demonstrate that he has any reasonable prospects of success.

The family

[2] The deceased was married to Mrs Margaret Sylvester who died in March 2008. The deceased was survived by his five children: the respondent Mr William Ewart Sylvester (known as Ewart Junior), who was born in 1954, the applicant who was born in 1956, Elizabeth Brennan (Elizabeth) who was born in 1959, Ian Sylvester (Ian) who was born in 1962, and Alan Sylvester (Alan) who was born in 1963.

[3] The applicant is married and he and his wife have two sons who are aged 19 years and 17 years. The younger son is at boarding school. The elder son is in employment.

The will

[4] The applicant has agreed to the bequests in clauses 3.1 to 3.5 of the will and the pecuniary legacy of about $20,000 in the codicil being exonerated from the burden of any order made in his favour in this proceeding. The estate has been distributed to the extent of these bequests and the legacy.

[5] Under clause 3.6 of the will the deceased gave the 90 shares that he owned in the trustee of "The Sylvester Farming Trust" to Ian (26 shares), Ewart Junior (31 shares) and Alan (31 shares) with the remaining two shares to be held by Ian, Ewart Junior and Alan as tenants in common in equal proportions. As the company owns no assets, but acts as trustee, the shares have no value as such. The deceased then gave the balance of his residuary estate to Ewart Junior, Elizabeth, Ian and Alan in equal shares as tenants in common.

[6] Under clause 4.3 of the will, the deceased expressly acknowledged that he had made no provision under the will for the applicant, stating "Having given the matter a lot of thought, I have deliberately made no provision for Robert – ".

The estate

[7] The respondents have exhibited to their affidavit filed on 18 May 2010 the statement of assets and liabilities of the estate for distribution purposes as at 18 January 2010. The total estimated value of assets as at that date was $5,715,592.88. The total liabilities ascertained or provided for as at that date was $241,444.90. The total gifts that have been exonerated from this application were valued at the same date as $900,050. That leaves net assets in the estate of $4,574,097.98 which would, but for this application, allow for a distribution to each of the applicant's siblings of $1,143,524.

Payments by the deceased prior to his death

[8] The applicant exhibits three cheque butts that show payments by the deceased to Ewart Junior of $1m on 17 April 2008, $400,000 on 30 June 2008 and $250,000 on 1 February 2009.

[9] The applicant also exhibits cheque butts that show that the deceased made payments to Ian of $1m on 17 April 2008 and $250,000 on 1 February 2009.

[10] The applicant exhibits cheque butts that show payments by the deceased to Alan of $545,000 in around April 2008 and $250,000 on 1 February 2009. At the same time the payment of $545,000 was made, the deceased gave a cheque to Alan for $445,000 for "shares" which the applicant deduces was for the shares that Alan had held in Undabri Pty Ltd.

[11] On 1 February 2009 the deceased made a gift of $250,000 to Elizabeth.

The applicant's relationship with the deceased

[12] The following summary is taken primarily from the affidavits sworn by the applicant. The respondents filed the joint affidavit on 18 May 2010 and were prepared to argue the application largely on the basis of the material relied on by the applicant.

[13] The applicant and his siblings grew up on the family property "Undabri". It started as a cattle property and the family business diversified into sheep and cropping. From a young age the applicant and his brothers worked on the property when they were not at school. After school the applicant attended Longreach Pastoral College for two years and then worked on the family property, mainly with the sheep. In 1976 the property was registered as a merino stud. The applicant was involved in showing rams on the show and field day circuit.

[14] The property "Appletree" was purchased as part of the family business in 1980.

[15] The applicant worked in employment away from the family property for most of 1982, but returned to work in the family business.

[16] In 1988 the property "Kulali" was purchased for the family business and Ian managed that property.

[17] The applicant and his wife were married in 1989 and moved into the house on "Teelabar" which was one of the properties operated by the family business and adjoined "Undabri". The applicant took over running the irrigated cropping for the family business.

[18] The structures used to operate the family business and the applicant's interest in them are not entirely clear. The applicant has prepared a schedule of the income he received from the family business between 1973 and 2006. He was first paid as an employee of Undabri Pty Ltd and then Undabri Pastoral Company. There was a restructure of the family business in 1989, and the applicant's wages were reduced, but he received drawings in addition to wages. Although the applicant states that the drawings were loans from the company, that does not reconcile with what is shown as his taxable income.

[19] Ewart Junior stopped working in the family business in 1992.

[20] Alan worked on Undabri until he left the family business in 1993 and apart from a couple of years in the mid 1980s. Ian took on "Appletree" after Ewart Junior left. "Kulali" was sold in 1996.

[21] In 1996 the Sylvester Farming Trust with Sylvestabri Pty Ltd as trustee was formed and took over the assets of the family business. The loans for the family business were refinanced and the applicant had to provide a personal guarantee of the debts of Sylvestabri Pty Ltd to the bank.

[22] The applicant's mother had a breakdown in 1996 and the deceased looked after her. The applicant was given the role of manager of the family business and his wife took over the office work for which she was paid. In 1996 the applicant's wife had mitral valve repair surgery which precludes her from undertaking physically demanding work and for which she requires ongoing monitoring.

[23] Around 1996 the applicant sold his shares in Undabri Pty Ltd to his father for the sum of $180,000. The applicant did not receive the sum of $180,000, but understood that he would inherit his father's shares in Undabri Pty Ltd, provided he forgave his father the sum of $180,000. The material does not show how the applicant came to have the shares in Undabri Pty Ltd that he transferred to his father.

[24] In 1998 the applicant's mother gave a one-fifth interest in the property known as "Oakey" (comprising 2,635 hectares) which was operated as part of the family business to the applicant. The applicant then purchased from his mother the remaining four-fifths interest in that property for the sum of $728,800. The applicant's mother advanced the applicant the sum of $20,000 on account of the purchase price by way of deposit and the applicant was liable to pay the balance purchase price by annual instalments of $20,000 per annum. The applicant renamed the property "Brentwood" and it was leased back to the family business for the sum of $20,000 per annum plus GST from 2000. The first payment of rent was used by the applicant to repay his mother for the loan she had advanced to him to enable him to pay the deposit for the property and the subsequent rent payments were used to pay the annual instalments of purchase price. The applicant was therefore set up to purchase "Brentwood" at the 1998 value of the four-fifths interest in that property without paying any interest on the loan from his mother.

[25] In 1999 the applicant and his family moved from "Teelabar" to "Undabri". Because of the applicant's mother's declining health, the applicant's parents had moved from the property into Goondiwindi. The applicant's parents built a residence in Goondiwindi, but eventually the applicant's mother moved into a home for the aged. The deceased had a stroke in about 2001. In 2004 he moved into a home for the aged.

[26] "Appletree" was sold in 2003 to avoid a mortgagee sale. The applicant asserts that Ian was forced out of the family business by their father. From the year ended 30 June 2003, the applicant did not receive drawings from the family business and his wages were increased to $30,000 in 2003, $60,000 in 2004 and $72,000 in 2005.

[27] From 2004 Ewart Junior started visiting "Undabri" and his parents regularly.

[28] In April 2005 the deceased wanted the applicant to buy the deceased's interest in the family business for $4m and take over the existing debt of $3.25m. The deceased wanted to receive $4m, so that he could keep $1m for himself and give $1m to each of the applicant's brothers. The Commonwealth Bank which was the financier for the business refused to refinance to allow that proposal to proceed. The deceased made a different proposal in May 2005. He proposed to give "Undabri" to his sons in equal shares on condition that by 31 October 2005 they raised the funds required to take over the existing loans. A deed of gift was prepared to implement that proposal which all parties signed. The applicant felt that his relationship with his father deteriorated from the time the deed of gift was signed.

[29] In July 2005 the applicant found out from the bank manager that his father had told the bank that he was withdrawing his personal guarantee for the debt of the family business. At that time the applicant was the only other guarantor of the debt. That was the last straw for the applicant and he telephoned his father to tell him that due to health and personal reasons he was taking leave indefinitely. The applicant had a medical certificate saying that he was unfit for normal work between 28 June and 30 November 2005. The applicant went away for about 10 days.

[30] The applicant had a number of meetings with his brothers during August 2005 to work out a course of action, as they anticipated that the deed of gift would not come into effect.

[31] The existing loans for the family business were not refinanced at the end of October 2005 and the bank gave the business until 31 March 2006 to sort out what was to be done.

[32] The applicant agreed with his brothers in late 2005 that he was no longer to be involved in the family business, but he was to get the merino stud, a dozer and his work utility. The deceased did not agree with that arrangement. It was changed so that the applicant would get 800 ewes and 750 lambs which were to be delivered after shearing, but not the merino stud. The applicant received the sheep in accordance with this arrangement, after shearing in January 2006, but did not receive the Nissan Patrol utility and the dozer.

[33] A sore point for the applicant was that he had not received the Nissan Patrol utility that he thought he should receive in accordance with the arrangements made with his brothers. The deceased's position was that the applicant had got a Nissan Navarra utility, but the applicant claimed that had been purchased by his wife and

him and hired out to Sylvestabri Pty Ltd. In about June 2006 the applicant and his father were arguing about this, when the applicant grabbed his father's shirt with the intention of taking him inside to show him the paperwork for the purchase of the Nissan Navarra utility, but his father overbalanced onto him. As a result, the farm manager who was present punched the applicant in the face so hard, he fell down and his father fell too. The applicant needed medical attention. The applicant had a broken eye socket, cheekbone and nose. The applicant did not need surgery, but the side of his face was numb for about 18 months afterwards.

[34] The applicant and his wife were in Brisbane for the applicant to see doctors about his face injury, when they received notification that they were required to vacate "Undabri" by 16 June 2006. Because of his medical problems, an extension was obtained to 20 July 2006. They found temporary accommodation until they were able to organise a donger for "Brentwood" and moved there in late 2006. The applicant bought an additional 1,500 ewes in 2006. The applicant and his wife conducted business as the partnership of RJ & LJ Sylvester in sheep and beef cattle farming and crop production.

[35] The property "Undabri" was put up for auction in October 2007, but there was a dispute between the applicant and his father over a water licence or water allocation which the applicant claimed was his, but which his father was purporting to sell with "Undabri". The applicant does not deal with how he acquired this water licence. I note that the applicant's mother purported to leave the relevant water licence to the applicant under the codicil to her will made on 13 May 1999 and that in his solicitors' letters setting out the terms of the settlement his claim is referred to as an equitable interest in the licence. The dispute resulted in the applicant taking a proceeding to obtain an injunction to restrain the sale. The dispute was settled on terms that resulted in the applicant also selling "Brentwood" and his father authorising the applicant to receive the sum of $550,000 at the settlement of the sale of "Undabri" in full and final settlement of the applicant's claim in respect of the water licence. The applicant purchased 1,000 ewes from the sale of stock on "Undabri" in 2007.

[36] Settlement of the sale of "Brentwood" took place in February 2008. The sale price was $3.35m. The applicant used the sale proceeds to pay out debts, including the amount of $508,800 that was owed to his mother under the mortgage that he had given to her for the finance that she provided for his purchase of the property. The applicant does not detail the total amount of debts that he repaid at this time. Although the loan to his mother was repaid prior to his mother's death, the applicant agreed to the gift in clause 6 of his mother's will taking effect, as if he had not repaid the debt until after her death. Under clause 6 of her will, the applicant's mother had left the applicant's siblings the balance of the debt owed by the applicant under the mortgage. Each of the applicant's siblings therefore received $127,200 on account of clause 6 of their mother's will. Each of the applicant and his siblings shared in the residuary estate and received $79,252 on that account.

[37] Although the applicant and his family were invited to and attended his father's 90th birthday party on 12 September 2008, the applicant and his father had effectively been estranged from at least the time when the applicant was required to vacate "Undabri".

The applicant's circumstances

[38] The applicant does not specify his assets and liabilities at the date his father died. Instead the applicant gives details of his joint and partnership assets as at the date he swore his affidavit on 18 February 2010. The applicant and his wife own their own home at Goondiwindi which they purchased in November 2008 for $580,000 which they paid from their own funds. The applicant and his wife used the name "Brentwood Merino Stud" from 2007 for wool sales and the sale of merino rams. They completed the purchase of a grazing property known as "Largo" near Yelarbon in 2010 for a sum of $966,666 using their own funds. "Largo" is a considerably smaller property than "Brentwood", but at the time of purchase the applicant did not consider that he could afford a larger property. They have livetock (2,700 sheep) and rams valued in total at about $150,000. They agist the rams on "Largo" but have to incur agistment fees to run the ewes on other properties that are some distance from Goondiwindi. The adjusted value of plant, equipment and farm vehicles, as at June 2008, is $450,594. The applicant estimates the value of his joint and partnership assets at about $2.5m net.

[39] The applicant has included in his material copies of the partnership returns for RJ & LJ Sylvester for the years ended 30 June 2007, 2008 and 2009, as well as the individual tax returns for each of the applicant and his wife for those years. The 2007 partnership return shows a loss of $420,456. It is reasonable to infer from the partnership accounts that the size of the loss was, in part, due to starting up the business. The partnership loss for 2008 was $232,216. The partnership loss for 2009 was $132,148. I infer that these losses have been able to be met from the funds that the applicant had at his disposal after the sale of "Brentwood" and the receipt of the settlement sum of $550,000 from his father. In his affidavit filed on 1 June 2010, the applicant predicted that the partnership would suffer a loss for the year ending 30 June 2010 in the order of $50,000 to $70,000. The partnership has carry forward losses as at 30 June 2009 which may benefit each of the applicant and his wife to the extent of around $380,000 if they are able to take advantage of the losses in the future. When the applicant swore his affidavit filed on 1 June 2010, the stock was then agisted at Mitchell and Boomi and the current cost for agistment was $65,000 per annum. The applicant wishes to purchase a substantial grazing property closer to where he and his wife live and on which they could run their stock, in order to avoid the costs of agistment and reduce the travel required to check on the stock.

[40] In October 2003 the applicant had a lens implant to repair a traumatic cataract that he had since an injury to his eye in about 1964.

[41] The applicant believes his health was affected by the family tensions. He suffered from hypertension and severe depression in 2005 and was under the care of a psychiatrist from late 2005, and during 2006. Because of the need to travel in 2007 to check on agistment stock, the applicant found it too difficult to attend on the psychiatrist for counselling. He relies on monitoring by his general medical practitioner.

[42] The only medical reports that are exhibited to the applicant's affidavits are from 2005 and 2006. The respondents submit they are stale and should be given little weight. The applicant deposes, however, to his continuing health difficulties with hypertension and depression, and was not required for cross-examination. The application should proceed on the basis that the applicant does have the health issues to which he deposes which at least give rise to possible future health

problems. The applicant is also concerned that the physical work that is required of him to run the stud will be too much for him within the next 10 years.

[43] With respect to future needs, the applicant also foresees assisting the ongoing education of his sons. Although his elder son was in employment at the time of the hearing of the application, he is still young and wishes to attend a college in Victoria to study for a degree in agribusiness for which the applicant and his wife not unreasonably wish to support him. The applicant's younger son is still at school and is likely to require some support when he finishes school.

[44] The applicant also expresses a wish "to build up a source of income" for the retirement of his wife and him and "to leave something from all our work in the Sylvester farming business for our sons." In view of the applicant's age, it is appropriate in a family provision application to take into account the applicant's desire to secure his retirement, but the applicant's desire to ensure a pastoral inheritance for his sons is not a relevant matter.

The law

[45] Provisions such as s 41 of the Act require the court to undertake the two stage process that was explained in the joint judgment of Mason CJ, Deane and McHugh JJ in *Singer v Berghouse* (1994) 181 CLR 201, 208-209 (*Singer*):

> "It is clear that, under these provisions, the court is required to carry out a two-stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the 'jurisdictional question'."

[46] The two stage process was confirmed by the High Court in *Vigolo v Bostin* (2005) 221 CLR 191 at [5], [37], [74], [82]-[83].

[47] What the first stage of the process or the jurisdictional question involves was described in *Singer* at 209-210:

> "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."

[48] The jurisdictional question is one of fact determined usually at the date of the hearing of the family provision application, even though it involves the making of value judgments on whether at the date of the deceased's death an applicant has been left without adequate provision for the applicant's proper maintenance, education and advancement in life: *Singer* at 210, 211.

[49] Where there is a large estate, courts may recognise that there is a greater opportunity for a deceased to make provision for contingencies which could not be provided for in smaller estates: *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 478.

[50] The respondents concede that on the basis of the stage at which this application has reached, their application for summary judgment depends on their showing that the jurisdictional question cannot be determined in favour of the applicant.

[51] An application for family provision may be dismissed summarily, where an applicant fails to disclose a *prima facie* case on the basis of the material filed by that applicant in support of the application: *Higgins v Higgins* [2005] 2 Qd R 502 at [15] (*Higgins*). The applicant for family provision therefore has the evidentiary burden on the application for summary dismissal of the proceeding.

[52] In *Higgins*, the case presented by the applicant (Malcolm) was scrutinised to ascertain "whether it is one which can be said to be futile so that it ought to be dismissed summarily" (at [17]). Malcolm and his brother (Douglas) were the two adult sons of the testatrix. The testatrix gave her residence valued at $480,000 to Douglas and his wife. The residue of her estate was valued at $1.357m. She gave 50 per cent of the residue to Douglas and his wife, 25 per cent to their children and the remaining 25 per cent to the children of Malcolm and his wife. The testatrix and her husband had worked two farming properties with Douglas and Malcolm. Douglas took over running one of the properties and Malcolm the other. After the death of the testatrix' husband, Malcolm, Douglas and the testatrix became the owners of these farming properties as tenants in common in equal shares. Malcolm deposed to net assets of $2.1m, some of which were jointly owned, but he did not identify his co-owner, although it could be inferred it was most likely his wife. He did not indicate his present sources of income. He did not depose to any present difficulty in meeting his liabilities or any possible future contingencies. His application for family provision was based on a claim that the testatrix did not give recognition to the work that he and his wife had done on the farm properties which contributed to the building up of the testatrix' estate.

[53] White J (as her Honour then was) concluded in *Higgins* that Malcolm's application was bound to fail and dismissed the application, observing at [46]:

> "No doubt Malcolm had and continues to have a sense of grievance that the testatrix did not provide for him in the same way as she provided for Douglas in her will. That is not the purpose of what is, after all, intrusive legislation into the freedom of a deceased person to dispose of his or her estate as he or she desires whether by will or by intestacy."

[54] The approach taken in *Higgins* to a summary judgment application was applied in *Banks v Seemann* [2008] QSC 202 (*Banks*), but the applicant in that matter, who was the son of the testatrix, successfully resisted summary judgment sought by his sister who was the executrix of their mother's estate. Although the applicant and his wife had substantial assets and a steady income from their superannuation fund, the applicant had been suffering ill-health since 1993 that was a matter known by the testatrix. His sister was in a good financial position. The applicant had worked in his parent's business to which his mother had succeeded on his father's death and the applicant had received no benefit from his father's estate. The relationship between the applicant and his mother was also described as "unusual". It was

concluded that the combination of the relevant factors in that case meant that the applicant had shown a *prima facie* case for further and better provision from his mother's estate.

[55] In another application for summary dismissal of a family provision application, the applicant's claim for provision was described as being "practically hopeless", but, in exercising the extreme caution that was described as appropriate for applications in summary judgment in this sort of matter, the court declined to exercise the discretion to summarily terminate the proceeding: *Atthow v McElhone* [2010] QSC 177 at [29].

Is the applicant's claim bound to fail?

[56] Many statements made by the applicant in his affidavits show he is aggrieved by the treatment of his father towards him and that his father did not give appropriate financial recognition to the contribution that the applicant made in building up "Undabri" and the family business. An example of these statements is paragraph 7 of the applicant's affidavit filed on 1 June 2010:

> "Over the course of the 33 years I have worked in the family business I have always believed that I would, on my parents' death, ultimately inherit a substantial farming property, but believing when I received it I might well have to make some payment to my brothers and sister. If at any time I had realised that I was not going to inherit a substantial farming property, I would have attempted to obtain fair value for my work by working elsewhere where I would have been properly remunerated."

[57] As *Higgins* illustrates, an application for family provision is not for the purpose of redressing family grievances or disappointed expectations. The classic statement was made by Gibbs J in *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, 146 (*Hughes*) that "the court is not entitled to re-write the will of a testator in accordance with its own ideas of fairness or justice."

[58] The respondents place great significance on the fact that the future needs identified by the applicant are largely due to the voluntary purchase by the applicant of "Largo" after his father's death which is too small for the type and size of farming business that the applicant wishes to conduct and that he and his wife were otherwise financially secure at the date of the deceased's death. The respondents also rely on the trend of decreasing losses made by the partnership of the applicant and his wife which they assert shows that the partnership is "improving significantly". The submission is made that, even if the deceased's estate is characterised as "large", that does not assist the applicant in showing a *prima facie* case, absent demonstrable financial need.

[59] The difficulty with the respondents' criticism of the applicant's decision to purchase "Largo" is that the applicant is pursuing the type of business that was the legacy of his upbringing and following his parents' way of life. He had pursued farming most of his working life in conjunction with his father for the benefit of the family business and that is what he is qualified to do. It was that family business that generated the assets that enabled the deceased to make generous gifts to the applicant's siblings in 2008 and under his will. The applicant's farming partnership with his wife had commenced prior to his father's death. It had to be in

contemplation of the deceased that the applicant would continue in the only business that he knew and which, until 2005, he had been encouraged to pursue by the deceased. The partnership business may be improving, but it is making losses and was making a loss when the deceased died.

[60] It is a relevant factor in considering whether the applicant has been left without proper provision that his affidavits support his claim that he assisted in the building up of his father's estate: *Hughes* at 147; *O'Donnell v Gillespie* [2010] QSC 22 at [59] and [69]. The applicant's material shows that he is hindered in conducting his farming business by the need to travel to distant properties to agist sheep. He has shown a financial need arising from the establishment of his own farming business and possible future health problems. One issue that his application for family provision will focus on that is not appropriate in the circumstances for summary determination is whether the benefits that the applicant obtained from his parents prior to his father's death (including the benefit of the accretion in value of "Brentwood" over 10 years until its sale, his receipt from the family business of 800 ewes and 750 lambs in January 2006, and the settlement sum of $550,000) preclude his being successful on his application. At this stage of the proceeding, it is not irrelevant that the deceased's estate can be characterised as large, and that the respondents do not rely on any superior competing claim from the applicant's siblings who were otherwise legitimate recipients of the deceased's bounty both in the year before the deceased died and under his will..

[61] The omissions in the applicant's material that I have identified in the course of summarising that material are better characterised as omissions relating to detail, rather than matters of fundamental significance. This can be contrasted with the failure of Malcolm in *Higgins* to provide details of the sources of his income or to identify future liabilities or needs.

[62] There is enough in the applicant's material to show a *prima facie* case that he has been left without proper maintenance and support, even though the strength of it may be debatable. It would be premature to conclude at this stage that the applicant's claim was bound to fail. The applicant's claim at the summary judgment stage is more akin to that in *Banks*, than that in *Higgins*.

Orders

[63] It follows that the respondents' application filed on 18 May 2010 must be dismissed. In relation to the costs of that application, the respondents will be entitled to an indemnity for their costs out of the deceased's estate without the need for an order. The applicant has successfully resisted that application and, subject to hearing submissions from the parties, my view is that the applicant should receive a costs order in his favour in connection with the summary judgment application, as otherwise he is disadvantaged by the unsuccessful and costly step taken by the respondents. Even if the applicant were ultimately unsuccessful with his family provision application, he has unnecessarily been put to the costs of resisting the summary judgment application at this stage. Before making the order for costs, however, I will give the parties an opportunity to make submissions on what is the appropriate order.