

CANADA / JUDGMENT

Chan v. Lee

2002 BCSC 678

COURT

Supreme Court of British Columbia

DECIDED

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Citation: CHAN et al v. LEE et al

Date: 20021030
2002 BCSC 678Docket: A991410
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: MARGARET CHAN and MAUREEN FONG
PLAINTIFFSAND: GORDON YUEN LEE, WILLIAM YEN LEE AND GILBERT TONG LEE, EXECUTORS OF
THE ESTATE OF PETER WAH LEE, GORDON YUEN LEE, WILLIAM YEN LEEN,
GILBERT TONG LEE, YEN KAM LEE, RAYMOND LEE, MICHAEL LEE, GREGORY LEE,
AND NAM WAH TONG HOLDINGS LTD.
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HOOD

Counsel for the Plaintiffs:

C.A. Millar

Counsel for the Defendants, Gordon Yuen Lee, William Yen Lee, Gilbert Tong Lee, and Nam Wah Tong Holdings Ltd.

J.B. Rotstein

Counsel for the Defendant,

Yen Kam Lee

C.N.L. Chui

No One Appearing On Behalf Of The

Defendants, Raymond Lee, Michael

Lee and Gregory Lee, Beneficiaries

Date and Place of Hearing/Trial:

September 10-11, 13 and 14, and

October 15-18, and 25, 2001

Vancouver, B.C.

INTRODUCTION

- [1] The plaintiff sisters bring action against their brothers, Gordon Yuen Lee, William Yen Lee, and Gilbert Tong Lee, as the Executors of the Estate of their late father, Peter Wah Lee, seeking an order that their father's Last Will and Testament be varied in their favour, pursuant to provisions of the Wills Variation Act, R.S.B.C. 1996 c.490, and related relief. They also advance a claim for unjust enrichment.
- [2] They sue their stepmother, Yen Kam Lee, and their nephews, Raymond Lee, Michael Lee and Gregory Lee, but advance no claims against them. They also sue Nam Wah Tong Holdings Ltd., seeking a declaration that the company holds an interest in property owned by it in trust for them, and an order that such interest be transferred to them.
- [3] The plaintiffs' primary claim is that their late father's Will did not provide for them adequate, just and equitable maintenance and support. I agree. The question is whether this wrong can be redressed by the Court.
- [4] Other issues are whether the plaintiffs' claims are statute barred, the value and ownership of the shares in Nam Wah Tong Holdings Ltd., and if the plaintiffs succeed, how should the Will be varied?
- [5] Credibility is also in issue. In this regard, I prefer the evidence of the plaintiffs over that of the two brothers who gave evidence, Gilbert Tong Lee and William Yen Lee, and whose evidence at times caused me some concern.
- [6] The defendant stepmother is aligned with the defendant brothers. In the event that the plaintiffs recover against them under the Wills Variation Act, she also advances a claim under the Act by way of a counterclaim.

- [7] I should note here that throughout this matter in fact, and I find, whenever one of the plaintiffs spoke to one of the three defendant Executors she represented the other plaintiff. Similar, when one of the defendant Executors, for example, Gilbert Tong Lee, spoke to one of the plaintiffs, he represented the other two defendants as well as himself. Gordon Yuen Lee did not give evidence at the trial, for reasons I accept, and nothing turns on this. Finally, I will refer to the parties by their first names from time to time, as was done at trial.

A BRIEF HISTORY

- [8] The deceased Peter Wah Lee died on August 21, 1996 at Vancouver at age 89. He may have been 92. He and his first wife, Mabel Edith, who died on August 17, 1969, had five children, Gordon Yuen Lee, born August 15, 1938, William Yen Lee, born January 19, 1940, Margaret Chan, born May 28, 1941, Gilbert Tong Lee, born May 7, 1943, and Maureen Fong, born July 8, 1945.
- [9] Mr. Lee and his first wife started out operating a grocery store in Vancouver at 800 West Pender Street. For many years they operated a grocery store on Pender Street at various locations. Later on they also operated a restaurant. The Lees were frugal and used their savings to continually acquire revenue producing properties in the City of Vancouver.
- [10] On January 17, 1963, the Lees incorporated Nam Wah Tong Holdings Ltd., a B.C. company, and then transferred to it six parcels of land, which they owned in the Lower Mainland, for a promissory note executed by the company. The amount was described as "the total amount of the present depreciated value of the lands and premises." The balance sheet for the company as at December 31, 1963, listed assets valued at \$385,416.19. The major liabilities consisted of a mortgage in the amount of \$74,355.65, and shareholders' loans due to the Lees totalling \$294,658.49.
- [11] On its incorporation, Mr. and Mrs. Lee each acquired a 50 per cent interest in the company. Each held 15 Class A voting shares, 1650 Class B non-voting shares, 1650 Class C non-voting shares and 1650 Class D non-voting shares. The Class B, C and D shares had no voting rights.
- [12] From a very young age, all of the children were involved in the operation of the grocery stores, and later the restaurant. They started out bagging potatoes and putting away bottles. As they grew older, they started serving customers, bagging groceries and eventually worked as cashiers. The children also helped out in the home.
- [13] The children worked part-time while they attended regular school and Chinese school, after school hours, on the weekends and holidays and so on. They also helped out at home. They were not given allowances or a wage for the work they did. However, if they required money for a reasonable purpose it was given.
- [14] The daughters worked mostly in the restaurant when they were older, performing the usual duties of waitresses and kitchen help. It is common ground that the plaintiff daughters worked more, and longer hours, than the three defendant sons, in part due to the fact that

William and Gilbert attended UBC. The daughters worked in the family business until they found outside work, and thereafter continued to help out when they could. The parents paid for the education of all of the children. William and Gilbert graduated as Pharmacists and they continue to practice in that profession. The eldest son, Gordon, did not graduate from high school. He continued to work in the grocery store and eventually was given the business by the father for the nominal sum of \$1,000. He operated the grocery store business out of the 500-block West Pender Street location until his retirement in 1986.

- [15] After graduating from high school, the plaintiff daughters both attended the Duffus Business School and received secretarial training, developing skills in typing and bookkeeping. After graduating from the School, Margaret worked for an independent engineering firm for a brief period of time and then started working for the Bank of Montreal until December of 1965 when she married. She left the workforce for a while until she had her three children. In 1971, she started working for the post office and continued to do so until her retirement in September of 2000.
- [16] After graduating from the Duffus Business School in 1965, Maureen began working for a roofing manufacturer. In February of 1967, she married and then went into business with her husband. They were able to do this in 1967 with the help of the mother who bought the property, and some of the equipment, for an auto body business for \$32,500. The mother then leased the property to Maureen and her husband who then carried on the body shop business, and subsequently a number of car rental businesses. The property was sold by Nam Wah Tong Holdings Ltd. for \$750,000 in 1988.
- [17] The sons also received assistance from the father, much more than the daughters in fact. On graduating from the school of pharmacy, William and Gilbert worked for Cunningham Drugs until 1967. They then incorporated a company, Clairling Holdings Ltd., and operated their business, the Drug Centre, through that company. They carried on business in premises which their company leased from Nam Wah Tong Holdings Ltd., but never paid rent for the use of the premises.
- [18] It is also probable that Gordon did not pay rent for the use of the Pender Street premises while operating the grocery business over the years. And there is other evidence of the father providing financial assistance to the sons, and which I need not detail. An example is Gilbert receiving \$100,000 through the company when he went through his divorce. I also observe that in helping the children financially, Mr. Lee, and apparently his first wife as well, favoured the sons substantially; and it appears that any help that a daughter received had to be paid for, either by services or monthly payments.
- [19] The five children are all independent adult children. The three brothers are well off. They are much better off than the two daughters, particularly Margaret.
- [20] When Mr. Lee's first wife, Mabel, died in 1969, she left \$10,000 to each daughter. Her husband received the balance of her estate, including her shares in the company. Mr. Lee then married a second wife, the defendant Yen Kam Lee, in 1972. And in 1973 he transferred

one Class A voting share to her. This left him with 29 voting Class A shares at the time of his death. He had earlier given the other shares, the Class B, C and D shares, to the three sons. I will deal with this latter point in a moment, as it gives rise to an issue of the ownership of the Class B, C and D shares, and perhaps a further issue as to who gifted the shares.

- [21] Mr. Lee's Will was dated December 1, 1992. By it he left \$50,000 to each of the plaintiffs, and \$10,000 to each of his three grandsons. He then divided all of his shares in Nam Wah Tong Holdings Ltd., the 29 Class A shares, equally among the three sons, Gordon, William and Gilbert. All articles of personal, domestic and household use or ornaments belonging to him were left to his wife. Finally, the residue of his estate was divided equally among his wife and three sons.
- [22] The value of the estate of Mr. Lee, exclusive of his shareholdings in the company, is said to be \$542,197.78. The value of his 29 Class A shares is hotly disputed.
- [23] Probate was granted to the three Executor sons on September 30, 1997. The plaintiffs denied being aware, prior to March of 1999, that a Grant of Probate had been issued to their brothers. They also denied ever receiving a Notice of Intention to Apply for Probate of their father's Will. Each of the brothers confirmed that they did not advise their sisters of the intention to file for probate.
- [24] On August 21, 1997, the three Executors swore an affidavit pursuant to s.112 of the Estate Administration Act 1996 R.S. Chap. 122. Annexed to the affidavit was a Notice of Application for Probate required by s.112 of the Act, which provides that a court must not grant probate unless the applicant or the applicant's solicitor certifies that he or she has mailed or delivered the Notice to certain persons listed, including any person who is a beneficiary under the Will, and any person who is entitled to apply under the Wills Variation Act with respect to the Will.
- [25] In their affidavit, the Executors deposed:

2 We have mailed a notice in the form prescribed by s.112 of the Estate Administration Act (the "Notice"), along with a copy of the Will to each of the following who, other than the applicants, are to the best of our knowledge the only beneficiaries. A true copy of the Notice is Exhibit A to this affidavit.

And the persons listed include the plaintiffs.

3 To the best of our knowledge, the only people who would be entitled to share in the estate on an intestacy or a partial intestacy are the applicants, Yen Kam Lee, Margaret Lee, also known as Margaret Chan, and Maureen Lee, also known as Maureen Fong.

4 To the best of our knowledge, the only people entitled to apply under the Wills Variation Act with respect to the Will are the applicants, Yen Kam Lee, Margaret Lee, also known as Margaret Chan, and Maureen Lee, also known as Maureen Fong.

- [26] The affidavit was false, because in fact the Executor brothers had not mailed the Notice, along with a copy of the Will, to the plaintiffs. They never did so. Their explanation is that they simply left matters to their solicitor.
- [27] I pause here to note the reference in the affidavit to the Wills Variation Act and to the entitlement of the plaintiffs to make application under it. It seems to me to be more likely than not that the Executors' lawyer, who took the affidavit, would have explained the Wills Variation Act to the Executors, its application and the plaintiffs' rights under it; that as of the date of the affidavit the Executors would have known the significance of this information, and in particular, that the plaintiffs could challenge the Will under the Wills Variation Act at any time up to six months after the probate was granted. In this regard, William testified that he knew about the Wills Variation Act and the limitation period, but he couldn't recall what it was. Gordon was told about the Wills Variation Act by William and I am satisfied that Gilbert would have known about these matters as well.
- [28] The plaintiff, Maureen Fong, was not aware of the contents of her father's Will until a copy of it was faxed to her on October 29, 1996, apparently by Mr. Rotstein's firm. She then advised her sister of its contents.
- [29] It should be noted also that the Executors were prohibited from distributing the legacies to the respective legatees, and to otherwise effect distribution of the estate, under the will, until March 31, 1998, by virtue of s.12 of the Wills Variation Act. However, the Executors paid the plaintiff, Margaret Chan, her \$50,000 legacy within two months of the Grant of Probate, and the plaintiff, Maureen Fong, received hers a few days later. As counsel for the plaintiffs notes, the Executors were, in fact, in breach of the provisions of the Act upon which they now rely to defeat the plaintiffs' claims.
- [30] Section 12(1) of the Wills Variation Act provides that the Executor must not distribute any portion of the estate to beneficiaries under the Will, until six months have passed from the issue of probate of the Will, except (a) with the consent of all persons who would be entitled to apply. (My emphasis) or (b) if authorized by order of the court.
- [31] It is obvious that the six month period relates back to the six month limitation period which is provided for in s.3. The words, "who would be entitled to apply" refer to a party "claiming the benefit of this act". In the case at bar, neither condition (a) nor (b) was met; no informed consent, or order of the court, was obtained.
- [32] It is of some interest to consider what was the alternative faced by the executor brothers when they made the premature payments to the plaintiffs. It seems to me that it was to do what is normally done by Executors, that is, to tell the plaintiffs that they would not be entitled to recover their legacies for a period of six months after probate was taken out, because any beneficiary who wished to apply to vary the Will under the Act must bring his or her action within the six month period. I have little doubt that had this been done, the plaintiffs would have been alerted to the limitation period and to their rights, and probably would have consulted counsel at that time. I observe also that the failure of the defendant

executors to abide by the provisions of the Act, in light of their other conduct and behaviour, is of some significance, and has caused me some concern.

[33] I turn now to the issues. I will deal with further evidence when considering the individual issues. The first issue is whether the action is statute barred, or whether the defendants are estopped from asserting that it is.

IS THE ACTION BARRED UNDER SECTION 3 OF THE
WILLS VARIATION ACT; ARE THE DEFENDANTS ESTOPPED?

[34] Section 3(1)(a) of the Wills Variation Act provides as follows:

3(1) An action must not be heard by the court at the instance of a party claiming the benefit of this act unless

(a) the action is commenced within six months from the date of the issue of probate of the Will in British Columbia or the resealing in British Columbia of the probate of the Will

Since the probate was issued on September 30, 1997, the six month period expired on March 31, 1998. However, the action was not commenced until over a year later, on May 20, 1999.

THE ESTOPPEL EVIDENCE

[35] I am satisfied that in January of 1964, Mr. and Mrs. Lee effectively gave his company to the three sons by transferring the Class B shares to Gordon, the Class C shares to William and the Class D shares to Gilbert; retaining only their Class A shares. And over the years it was known and accepted by the members of the family that the Lees had in fact given the company to their sons to the exclusion of the daughters, the plaintiffs. And over the years, William and Gilbert took over and ran the company, although with some participation by their father in the earlier years. While I will return to the issue in a moment, I will say here that I am satisfied that Mr. and Mrs. Lee effectively gave the company to their sons.

[36] It is common knowledge that over the years the plaintiff daughters were very unhappy with what they considered to be this unfair distribution of the father's primary asset. In this regard, for my purposes, I look upon the transfer of the shares in the company to the three sons as simply an early disposition by Mr. Lee, and Mrs. Lee, of the primary part of their estates.

[37] I will observe here that as I recall none of the witnesses referred to the first wife, Mabel Edith, when dealing with what was referred to as the ownership of the company. They and counsel simply referred to the question of whether or not Mr. Lee had given the company to the sons. I take it that while the first wife held half the shares in the company earlier described, in the family the company was considered to belong to Mr. Lee. I do not think it matters whether it is found that Mr. and Mrs. Lee gave the company to the sons, or whether it was Mr. Lee who did so, he being the true owner of the company. Even if the former is the case, the value of his half-interest in the Class B, C and D shares which was conveyed to the

three sons was substantial. Henceforth, I will refer to Mr. Lee giving the company to the sons as the witnesses did, particularly the plaintiffs.

THE EVIDENCE OF MAUREEN FONG

- [38] Maureen Fong testified that at one point in time she realized that her father had given the company to her brothers, and that she and her sister would have "no part of it". She thought it was unfair, and she went to see her father about it, in 1992 she believes. She said her father's response to her plea was, "Oh, I give you some." She said also that later on she had a similar conversation with her father about the unfairness of what he had done.
- [39] There is no point in speculating what her father meant when he said, "I give you some." He could have been putting her off, or expressing his intention at the time to give the daughters something else, or he could have been referring to the \$50,000 he gave to each of them by his Will. In any event, I have concluded that the father's intentions were clear when he gave the company to his sons and when he gave his daughters the monies. Rightly or wrongly, that is what he intended. And whether or not in doing so, he was following a Chinese tradition is irrelevant. It is not the way of this country, and s.2 of the Wills Variation Act makes that clear.
- [40] I believe it is important to observe here that I found the plaintiffs to be somewhat naïve, unsophisticated and having some difficulties expressing their views and approach to their father's unfairness in the disposition of his assets. They obviously tie together his "distribution" of the shares in his company and his distribution of the rest of his estate by his Will. It is just as obvious that once the contents of their father's Will became known to them, they saw the situation as their last chance for them to persuade their brothers to redress the unfairness of what their father had done in the distribution of his assets or estate, by giving the brothers the company and giving them \$50,000 each. They were looking at the big picture. It did not matter how their problem was resolved. They preferred a payment of monies to them, monies generated by the company, as opposed to shares or involvement otherwise in the company.
- [41] Thus, whether they speak of the unfairness of the brothers being given the company, or the unfairness of the Will itself, they are talking about the unfairness of the father's distribution of his assets or estate. That was the subject matter of their approach to their brothers, to which I now turn.
- [42] Maureen Fong testified that she raised the matter with her brothers, William and Gilbert, in 1992 or 1993. She said that she explained how she and her sister felt, that it wasn't fair "that they got the entire company and we didn't get any, considering we had also worked for them." She said she could remember complaining about how unfair it was that their father had given them the shares in the company "and they agreed". She could not say exactly what was said. Gilbert agreed that the distribution of the company was not fair. She could not remember what William actually said.

- [43] With regard to her working in the family business, it is clear, as I have already indicated, that the plaintiffs worked in the family business much more than the sons did, particularly Gilbert and William. She recalled an occasion when her father was making up the payroll at the restaurant when she put out her hand and said, "Oh, it's pay time", and he just patted her hand. On another occasion when she was upset because she had to work so late, she said to her father, "Why do you always make us work so much?" and he said to her, in Chinese, "Don't make so much noise", and "Some day it will be your guys", or "Some day it will belong to you people."
- [44] Maureen said that when she received a copy of her father's Will, by fax, in October of 1996, she phoned Margaret to let her know what the Will contained. She was angry because in her view what the Will left them was not fair. She suggested that Margaret should talk to the brothers, particularly Gilbert, "regarding how unfair the Will was, because they have led us to believe that they would do something for us." Margaret often went to the drug store where Gilbert worked to fill her prescriptions. Hence, it was more convenient for her to speak to Gilbert on those occasions.
- [45] Maureen also remembered having a conversation with Gilbert at some point in time just before she received her \$50,000, which was in late November or early December of 1997. She said that she asked him what was actually happening, and he told her that they were still trying to settle the father's estate, and "hadn't figured out how to handle the problem of ... to help us with the unfairness." She did not press for a meeting at that time because in effect Gilbert told her that they would have to wait until their father's affairs had been settled. At this time the following exchange occurred:
- THE COURT: Well, you wanted them to change the Will and he told you they couldn't do anything until the Will was finalized. Do I have that correct?
- THE WITNESS: I didn't ask him to change the Will. I asked him if they had figured out a solution how to make it more fair, but he told me that they couldn't do anything until the Will was finalized so there was no sense having a meeting.
- [46] Maureen also recalled dropping in at the drug store and talking to Gilbert about the "unfairness in the Will" some time in 1998, she believes. At that time, she asked him if they had figured out a solution for the problem of the unfairness. He told her they didn't know how to handle the problem. They still hadn't figured out an answer. Prior to the end of December of 1998, none of her brothers ever told her that they weren't going to do anything about the problem.
- [47] She also recalled phoning Gilbert to try and arrange a meeting in November of 1998. He suggested that they wait until the new year. She phoned him again on January 8, 1999 to try and arrange a meeting, and asked him if they had figured out how to resolve the unfairness "between the boys and the girls." He thought a meeting between the four of them would be a good idea. He suggested that she phone William and arrange the meeting.

[48] She says that she then phoned William and asked him if he had figured out a solution for the unfairness. He told her that he was a trustee of their father's estate, and that their father and their stepmother had told him to keep the company in tact. She assured him that she didn't want company assets sold or liquidated; that there were other ways of handling the matter, for example, that they could be given something. She said:

He also said that he was not about to give me a third of his shares. He said he had his own idea of how to handle it. He said currently the company had no money because they were building the Kingsway project, but at some later date when the company had money, that they --- well, he was thinking that they could set up I guess it's a trust fund for the grandkids, all the grandkids. And he said that he'd had already told Gil --- he already told Gil that he would convince my stepmother and Gordy of his idea. I said a future idea is no better than a past promise. He said that's more than my dad had given me. He said whether we meet or don't meet, it's not going to change his mind, he was adamant about the way he felt. And I said, well, what happens if something should happen to you tomorrow, then my kids would still get nothing and your kids would inherit your shares. At the end of the conversation I was very upset.

She was very upset about his ideas and how adamant he was that that was the only way it was going to be resolved, and only when the company had money in its account.

[49] Maureen testified that she then phoned Gilbert again and told him what William had said and that she thought it was unfair and that it upset her. She also told him her idea of a possible solution. She suggested that "they could start paying us \$25,000 a year for to myself and my sister over a period of time so that we weren't draining the company's cash."

[50] On the following day, January 9, Gilbert phoned her saying that he had talked to William and it was agreed that they should have a meeting at her house on the following day. They had dinner at her place the following day. Gilbert had briefed William about his conversation with her the previous day. She says that at her home William told her that he would be mad too if he were in her shoes and:

To the best of my recollection, Bill said \$25,000 a year over a period of time sounds reasonable and he would consider it. He said I would talk to stepmother and Gordy and check the company finances. He said I'll talk to stepmom and Gordy and get back to you by the end of the week. He then went on to say that we, meaning Margaret and myself, had worked more than they did.

He also told me that he had talked to Dad previously regarding the amount that Dad had left us in the Will. He had suggested to Dad that maybe he should increase the amount so there would not be a fight at a later date, but Dad could not accept the larger amount because he did not know where he was going to get the cash from. So Bill suggested that he could take the money from the company because it was no big deal because we were his kids too. Gilbert had asked me when I consulted a lawyer.

She told Gilbert that she hadn't really consulted a lawyer and that she didn't want a lawsuit. She also said that when Gil told her that they might have a problem with their stepmother and Gordy, he said also that since the stepmother was only a minor shareholder, it would be possible to side-step her "if the two boys could agree."

- [51] Maureen said also that at the meeting at her home William reiterated what he had said to her on the phone, about his idea to look after the future for the grandchildren. She felt the meeting ended on a very high note and that everybody felt that it was very successful. "It definitely was a turn around from the last phone call I had with Bill."
- [52] Maureen said that she waited for a couple of weeks for William to phone her. When he didn't, she finally phoned Gilbert on January 28 and asked him what was happening. He said he would phone William and get back to her. He did so on the following day. What he told her was that there would be no money forthcoming because of the state of the Kingsway project which they were getting ready to complete. They would not be able to look at their cash flow until the stores and the development were leased.
- [53] She also referred to what she called the final meeting which occurred on February 14, 1999. It was at a Chinese New Years' dinner, which was attended by the entire family. She understood that William had said some things at the dinner, and she heard Margaret and William yelling at each other. She heard William say, "It all belongs to us, what right do you have to dictate?" And, "No, I won't give you anything in writing. Why do I have to give you anything in writing, my customers trust me, why don't you?" She also recalled William saying, "If you sue, you'll get nothing and stepmom will get her part."
- [54] On cross-examination, Maureen acknowledged that she never had any discussions with the defendants about starting an action. None of them said to her, "Hold off from starting an action because we'll try to settle things up." And none of them said, "Don't worry about any limitation period." She was never aware of the limitation period until she consulted her lawyer around February 14, 1999. She said that she was never interested in seeking a legal action at any time "until the boys closed the door on us and told us they would not do anything for us."
- [55] It was put to her that no one ever promised anything, referring to the defendants. Her answer was, "They never gave us an actual promise but always led us to believe that they would do something for us."
- [56] When asked in which conversations her brothers William and Gilbert led her to believe that they would do something regarding the estate or the Will, she said, in effect, that they never mentioned anything regarding changing the estate or the Will. She said, "They did not use those words." I am not satisfied that the witness understood the questions put to her in this area. The gist of her evidence was that they never said they would change or alter the estate or the Will. But clearly, her evidence was that they led them to believe that they would do something for them. The "something" was never specified, but I think it is clear that it involved the payment of monies to them by the company. And, in any event, I did not

conclude from the cross-examination that she was resiling in any way from her position that she and her sister had been led to believe that something would be done to redress the unfairness. And I am satisfied that this is the case, from what the brothers said to the plaintiffs, and from the brother's conduct.

- [57] Maureen was also cross-examined by Mr. Chui who represents the defendant Yen Kam Lee, the stepmother, who is aligned with defendant son Executors. Much of the cross-examination pertained to assertions by counsel that there was good reason for Mr. Lee for disinheriting his daughters. I was not impressed with this tactic or the evidence before me on that subject matter. I accept Maureen's evidence that she had a good relationship with her father and that the assertions were not true. In any event, none of the facts asserted would, in my opinion, give rise to a conclusion that Mr. Lee was not required to meet his legal and moral obligations to his daughters.
- [58] The witness was in effect asked what she understood she was being told by her brothers when they said that they had to settle the father's estate before they could do anything. She defined the words, "settle the estate", or "settle the Will" as meaning, "organized, figure out my Dad's assets and his liabilities."
- [59] She was also cross-examined on the conversation she had with her father when she told him that it was unfair for him to have given the shares in the company to her brothers, and when he said, "I will give you some." It was put to her that the conversation took place in her father's living room; that her stepmother was sitting on the sofa at the time. She said that the stepmother was not there the whole time.
- [60] It was put to her also that during the conversation he used the Chinese word "mocho", which means in Chinese, "Don't make a noise" and has the colloquial translation, "Shut up" or "Be quiet", and she agreed.
- [61] It was put to her that he was not laughing when he was talking to her, and that he did not say "I give you some." She did not agree.
- [62] It was also put to her that, in fact, her father had said, "How could it be done now, how could it be changed?" Her answer was, "He may have said that during the conversation, but I don't say that was his final answer." When pressed to say that he said those words in Chinese, she seemed to agree. Finally, it was put to her that he said, also in Chinese, "It was more than 30 years ago, how can it be done now?" She said that she didn't remember that part, but that it was possible. I will observe here I found the witness' candour to be refreshing, and that she was a truthful witness.

THE EVIDENCE OF MARGARET CHAN

- [63] I turn now to the evidence of the plaintiff, Margaret Chan, mainly on the issue of estoppel. She gave evidence similar to that of her sister with regard to the nature and extent of the work which they did in the family businesses. She said, in effect, that when they were not in

school, for example, when they were on holidays, or on the weekends, they would work in the restaurant six to eight hours a day. In addition, since she was the older daughter, she was expected to do housework and ironing. She also gave some evidence about the fact that her parents were unhappy about her relationship with her husband, Ken, before and after they married, and how her parents loaned her \$3,000, to pay off his gambling debt, which she repaid by looking after some suites owned by her parents. She receives a pension from the post office of \$1,400 a month, and \$542 a month under the Canada Pension Plan. Her husband receives \$906 a month under that plan, and a further \$255 a month under a IWA disability pension.

- [64] She testified that when at the hospital in August of 1996, when the father was dying, she had a conversation with Gilbert about the distribution of the estate. She asked him if he remembered having an earlier meeting with Maureen and William in 1992 to discuss the unfairness of the distribution of the shares; and Gilbert said that he remembered the meeting and that he had agreed that it was unfair. She was asked what Gilbert said to the best of her ability and she said:

As far as I can remember, I remember Gil saying, "Yes, I think it is unfair", and he was willing to do something for us. And he said that Bill at that time had also agreed with him. So that was in 1992. And then he said he still felt that way when I was speaking to him in '96.

Both brothers agreed that the distribution of the shares in the company was unfair; meaning that the brothers had the shares in the company while the sisters did not have any shares. Gilbert also said that they should all get together and sit down and discuss it.

- [65] The next conversation with Gilbert was in November of 1996, after she had received a copy of the Will. She went to his drug store on a regular basis to fill her prescriptions and saw him quite often. She said that he said again that they should get together, sit down and discuss the matter of the unfairness, but that they should wait until after the Will was settled. When asked about what she understood was meant by the words, "The Will was settled", she said, "That they had to fine out what my Dad owned, all his assets."

- [66] She had a similar conversation with Gilbert in November of 1997 after she received her \$50,000. She continued to see him at work throughout 1998. She says:

Well, every time I ask him about a meeting he said, "Well, he'd have to set it up with Bill." So each time I'd ask him getting towards the latter part of 1998, Gil said that he ... "I've seen Bill, I've talked to Bill on several occasions but then the timing was not right for either one of us." So Maureen and I were getting a bit frustrated because it was taking them so long to set up a meeting. Then Maureen said she would try and set --- arrange a meeting.

- [67] Her next conversation with Gilbert was during the January 10, 1999 meeting. With regard to what was said at the meeting, she said:

Well, to the best of my recollection, we had gotten around talking about the unfairness of the distribution of the shares going to the boys and Bill said, "If I were in your shoes, I'd be mad too."

She said that Bill said that he had tried to talk their Dad into giving them more than \$50,000. He had told his father that he could give them hundreds of thousands of dollars, that he didn't care because "We have money in the account, in the company account." According to her, William also mentioned at the meeting that if any of their children wanted to have a further education or to be set up in business, he could help them through the company. She told him that her children were doing find, why shouldn't she get the money rather than her children and so on. She mentioned that she could use some money for a holiday and William said that he would arrange for her to have the money.

- [68] Margaret said that at the meeting Maureen made a proposal to the two brothers that each of them receive \$25,000 a year for as many years as it would take for them to receive \$500,000 each. William said that it sounded reasonable, but that he would have to go back and check the company finances. She said that at that point she said that they would like to have something in writing, and he said something to the effect, "I'll see you get that." He would speak to their stepmother and Gordy and he would get back to Maureen in a week.
- [69] He did not call Maureen. She phoned him on numerous occasions and he did not return her calls. The witness said that she next saw Gilbert at his drug store on January 30 and he told her, "That we wouldn't be getting anything in writing." She told him that it would be better if they settled matters among themselves, otherwise they would all have to retain a lawyer, there would be legal fees and so on. At that time Gilbert told her, "Do what you have to do, do what you feel you have to do." On February 6, he then phoned her and told her, "Bill might give you something in writing."
- [70] They then met on February 14 at the Golden Swan where the family was celebrating a New Years dinner. She approached him at the dinner and asked him if he was going to give them anything in writing, pointing out that if he died they wouldn't receive anything. His response was, "Don't you trust me", "all my customers do", "What right do you have to dictate to me a time and an amount when all of it belongs to us." And, "If you're going to sue, you'll get nothing and stepmom will seek her share." She then ran out of the room crying. His answers suggest that perhaps he had obtained some legal advice, and was changing his mind.
- [71] She was then cross-examined in some detail by Mr. Rotstein with regard to her father's relationship with her and with her husband Ken. She was also asked about her seeing Gilbert in November 1997. She said that she had been seeing him all along, that:

We were always asking for meetings though. Ever since I saw the Will right up till when I got the cheque, I was always talking to Gil and we were always having discussions and I was asking him how come it was taking so long for the Will and he was telling me that Bill was having problems with father's accounts and this was like from '96 on to '97, I kept talking to Gil and asking him what was happening, when we'd get the money, and he'd say, "Well, Bill is having problems with Dad's, with locating all of Dad's assets and getting all his accounts together, sorting all the things

out before we could receive the cheque or money."

The statement is perhaps a bit confusing. She seems to mix or combine asking for a meeting to resolve the disparity in their father's disposition of his assets, which at the request of the brothers would be held once the Will was "settled", and the receipt of money from the company at that time, as well as their \$50,000 cheques.

- [72] The rest of her cross-examination related to her relationship with her father, the period of time when she worked in the grocery store and in the restaurant, her marriage and her relationship with her stepmother. She says that her stepmother phoned her after her father died; that while the stepmother did not know much about matters she told her, the witness, that she should accept whatever her father gave her in the Will, and that she should not fight it.
- [73] The witness also acknowledged that her real complaint with her father's Will was that he did not leave them any shares in the company. When it was put to her that she knew for years that the majority of the shares in the company belonged to her brothers she said, "My father owned the 29 voting shares, and he could have changed things at that time if he wanted to." She went on to say in effect that her father could have created shares in the company and given them to her and her sister or he could have given them "some of the voting shares."
- [74] She was then cross-examined by Mr. Chui, mainly with regards to negative assertions about her relationship with her father. I say again that these assertions, even if they are accepted, would not in my opinion affect the father's legal and moral obligations to the plaintiffs in the making of his will.
- [75] I turn now to the evidence of the three defendant Executors, again pertaining mainly to the issue of estoppel.

THE EVIDENCE OF GORDON YUEN LEE

- [76] Gordon did not testify at the trial, but his discovery evidence was read in. He was examined on the contents of the defence filed on behalf of the Executors, and obviously he could not give evidence pertaining to the defences or assertions therein made. He said that he didn't observe any difference between his relationship with his father and his father's relationship with his brothers and his sisters. He first became aware of the fact that his sisters were unhappy with the provisions made for them in their father's Will shortly after his father died. He heard this from William.

- [77] I will set out here some of his discovery evidence:

Q Did you brothers ever discuss with you the possibility of paying, and this is after your father's death, after your father's death, did either of your brothers ever discuss with you paying some monies to your sisters out of your father's estate?

A Yes.

Q All right. When did that take place?

A At mother's place, I think.

Q Not where, when?

A I don't remember when.

Q Okay. But there was a discussion. Was it with both brothers or just one brother?

A It was ... it was two, I think.

Q All right. So Bill and Gil had a discussion with you about paying some monies to your sisters because they were unhappy about the way that the estate had been distributed?

A Yes.

Q All right. Well, how long after your father's death was it?

A Father died in 1996.

Q Yes. So was it 1996? Would it have been in 1997?

A Probably '97, I think.

[78] Counsel also read in at his friend's request:

Q All right. So your recollection is that some time in 1997 your brothers were talking to you about the possibility of paying some to your sisters? Correct?

A I don't

Q I can't hear you.

A I don't remember, but I think ... I'm not sure.

Q All right.

A I can't recall.

Q But you gave that answer before.

Mr. Rotstein:

Yes, but if he says he's not sure, he's not sure.

Mr. Millar:

All right. I just ...

A Yeah, I can't recall.

[79] Gordon was also asked the following questions and gave the following answers:

Q Were you ever aware of the possibility that your sisters could bring an action under the Wills Variation Act?

A I heard about it.

Q All right. When did you hear about it?

A After my father's death.

Q All right. After ... but how long after your father's death?

A Probably in '97 or '98.

Q All right, 1997 or 1998. And who told you about that?

A My brother.

Q Your brother?

A (Witness nods.)

Q Which brother?

A I think Bill.

Q And did you understand what the nature of that action was, what could happen if such an action was brought?

A No, I didn't.

Q All right, was it mentioned in the terms of it was a way of your sisters getting something from the estate?

A Possibly, yes.

Q Possible, yes? All right. Do you recall it being mentioned having any other affect?

A No.

Q No?

A No.

Q Was there ever any mention to you about the time limit that your sisters had to bring that action?

A No, not to me.

THE EVIDENCE OF THE DEFENDANT, GILBERT TONG LEE

[80] Counsel for the plaintiff read in certain evidence given at discovery by the witness. At that time he agreed that after the father died there were a number of meetings and discussions between him, William and the plaintiffs, "centering around their dissatisfaction and what

could be done to cure their dissatisfaction." He said that after his father died he was in contact with Margaret on a regular basis, and that her concern then was when she was going to get her inheritance. He said that once she received her \$50,000 "the conversation changed to what we were going to do". She and her sister were unhappy about the way things were. This was in November of 1997.

- [81] The witness said that Maureen phoned him after she had had a conversation with William. The conversation upset her because William told her that he was not prepared to do anything for the girls. Arrangements were then made for a meeting at Maureen's house which all four attended. He said that Maureen said that she and her sister should each receive \$500,000 a piece, and that he responded that that was not going to happen. Maureen then clarified what she was saying, that each would receive \$25,000 per year. He said that he and William still did not agree with this, but they left the meeting stating that they would in effect discuss it and talk to the stepmother.
- [82] I will pause here to note that at times Gilbert and William seemingly held out the stepmother and brother Gordon as being adamant that the plaintiffs should not receive any further monies out of the estate or the company, thus preventing the plaintiffs from receiving any monies. In this regard, I am satisfied that William and Gilbert ran the company and the family as well, and that the stepmother and Gordon would go along with whatever they recommended. I do not accept their suggestion that the stepmother and Gordon could or did prevent the payment of monies to the plaintiffs by the company. Rather, I am satisfied that this was just another excuse or put off on the part of Gilbert and William, particularly, the latter.
- [83] Gilbert did not remember William acknowledging that Maureen's suggestion of annual payments of \$25,000 was not unreasonable. I am satisfied that William did so. He did recall William saying that he would look into the current finances of the company. This, of course, would not have been necessary if William was not intending, or at least considering, that the company should make the payments. He also recalled William saying that it was his job to look after anyone in the family with financial needs; and indicating that if Maureen or Margaret's children wanted further education or to open a business he would be able to help them.
- [84] Gilbert acknowledged that he saw Margaret on a regular basis during which time she kept asking for a meeting between the plaintiffs and him and William. He said that he was in touch with William on numerous occasions about the meeting, but the timing was never good. He said:

I indicated to Margaret that I didn't know what we could do, but that we should talk. I said that there were other people involved that would not necessarily be thrilled with this idea.

The other people referred to, of course, were the stepmother and brother Gordon. I have already expressed my opinion of this rather cautious answer.

- [85] At trial, Gilbert described how he and William began helping his father run the company in about 1969. In 1986, the father sought their help to rebuild the property at 500 West Pender after a fire. They looked into it and the property was then redeveloped into a parkade with commercial stores on the ground floor. Other properties were sold to raise the capital, a \$3.5 million dollar mortgage was obtained and so on. Clearly, by this time, Gilbert and William were running the company. They continued to do so after the father's death, when they developed a second project at the corner of Kingsway and Cecil Streets in Vancouver, starting in 1998.
- [86] Gilbert recalled a meeting which he thought occurred in 1992 between the four of them, at a local restaurant. The plaintiffs, "the girls", were unhappy with the way the shares in the company had been distributed, and wanted to know what "the boys" would do to change this. He said he told the plaintiffs at that time that their Dad probably had his reasons, and wouldn't want to change the share structure. He also pointed out that the father was unhappy with their husbands. The meeting concluded with William and Gilbert leaving with the idea that they would think about what Maureen had said. I observe that Gilbert's recollection of what occurred at the 1992 meeting is somewhat different from that of the plaintiffs, whose version or evidence I accept.
- [87] Gilbert said that he next spoke to Maureen about the girls' dissatisfaction in December of 1998 or early January of 1999. She phoned him and was quite upset at the time because she had just talked to William and he had told her that he wasn't going to do anything for them; but that he might help out the grandchildren if they wanted further education or wanted to start a business. He telephoned William and a meeting was arranged at Maureen's house. He believes this occurred within a week of Maureen's telephone call to him. He said that Maureen started the meeting by saying that she and Margaret were unhappy about the unfair distribution of the shares. William said that they were not going to do anything about restructuring the shares. Maureen said they didn't want the shares, that they had "worked more than you guys did." He agreed with her statement.
- [88] This was the meeting where the witness said that Maureen first suggested that each girl would be paid \$500,000, to be paid at \$25,000 a year. He said he told the girls that that was not going to happen either. His evidence was:

Bill said, "There's more than just Gil and I to consider here, there's Gordy and there's Mom", and there was no way that we could make a decision.

But they agreed that they would talk to the stepmother. Again, I observe that Gilbert's recollection of what was said at the meeting differs from that of the plaintiffs. I observe also that while his evidence as to what was said at the meetings generally was in conflict with that of the plaintiffs, for example, that during the 1999 meeting he told them that they would not pay them \$25,000 a year, he said in effect that at the end of each meeting, he and his brother would tell the sisters that they would look into the matter, consider the matter, or that they would speak to the stepmother and brother Gordy about it. They never told their sisters that they would not pay

them some monies which they considered would address the imbalance complained of.

- [89] Gilbert does not recall talking to the plaintiffs about these matters again until a dinner the family attended in February of 1999 to celebrate Chinese New Year. He said that there was quite an argument at that time between Maureen and William. However, he did not witness this because he had left the table. He said that nothing else happened between him and his sisters after that.
- [90] He was then questioned about the period 1996 onward. He agreed that on many occasions Margaret would speak to him in his pharmacy and would be "interested in knowing when she was going to get her \$50,000 from Dad's Will." He said that she did not ask any other questions regarding the Will that he could recall, and she did not ask him about the share distribution of the company. He said that after she received her \$50,000 in 1997, "She did mention again on several occasions about the unfairness of the share distribution of the company." And he agreed that throughout 1998, Margaret was attempting to arrange for a meeting between the four of them through him. He said she wanted to know if they could meet and talk about the unfairness of the share distribution of the company. I have concerns with this evidence, in that it suggests that Margaret only spoke to him about receiving her \$50,000 legacy. I prefer other evidence, including Margaret's evidence, to the contrary.
- [91] Gilbert said that every time he talked to Margaret on these matters he would tell her he would have to get in touch with William, because he, the witness, was "the youngest member in our company and I wouldn't have had any power to make a decision of the nature that Margaret and Maureen would have wanted." This went on throughout 1998 and he said that once every two or three months she would indicate to him that she would have to see a lawyer. Again, I have some concerns with this evidence.
- [92] Gilbert said basically that whenever Margaret approached him about a meeting he would communicate with William. When asked what the result was, he said:

Bill didn't know what we could do. It was a dilemma in the sense that he knew he had to talk to Mom and Gordy and he knew that it would be quite a difficult task to try to have either of them accept any giving up of any sort of monies to the daughters.

Gilbert acknowledged that he never told his sisters that William was having this perceived difficult time approaching the stepmother or Gordon. I observe again that I have concluded from the whole of the evidence that William and Gilbert were simply putting the girls off, stalling them if you like; although at the same time they never told them that they would not do anything about their dissatisfaction with the distribution of their father's estate, both in the company and by the Will.

- [93] Gilbert was also asked in direct examination about the fact that he swore the affidavit indicating that he had sent the notice to the sisters regarding the application for probate, when that was not in fact true. He said he swore the affidavit with the full understanding that the lawyer who took the affidavit "would look after whatever matters needed to be

done." I pause here to observe the significance of the fact that the statutory notice was not given and that the plaintiffs were paid their legacies well before the six month limitation period had expired, in the circumstances of this case. Had the brothers as Executors proceeded in accordance with the provisions of the Act, whether or not they were explained to the plaintiffs, the plaintiffs may well have gone to a lawyer and brought their action in time. On the other hand, it could be said that their conduct at the least is consistent with other conduct on their part which seemingly involved delaying and putting their sisters off while they pressed for a fairer share of their father's estate.

[94] On cross-examination, Gilbert said that he did not remember telling the girls at the 1992 meeting at the restaurant that he agreed that the distribution of the shares was unfair. He did remember leaving the meeting agreeing that they would think about what the girls had said, and that nothing was done about it. He recalled that Margaret brought up the 1992 meeting in 1996 at the hospital when the father was about to have an operation. At that time she asked him if they had thought about what had been discussed at the 1992 meeting. He said that he told her that they had thought about it, but that there were other people that were involved, his stepmother and the brother Gordy, and that they couldn't give them a definite answer at that time about doing something for them.

[95] Gilbert agreed that after Margaret received her \$50,000 she started asking him and William what they were going to do about the way things were. He was asked these questions and he gave these answers:

Q I'm going to get to that. When she talked about the way things were, isn't it true that she was talking about the fact that your father had a large estate and she and her sister were only getting \$50,000 each out of it?

A What's your definition of a large estate?

Q Well, perhaps \$500,000.

A Yes, that's correct.

And:

Q Now, the effect of your father's Will and I guess the -- correct me if I'm wrong, the source of Margaret's displeasure was that you and your brother ended up with the company Nam Wah Tong Holdings? Is that your understanding from her complaints to you?

A Her complaints to me were because of the shareholdings that we had that things were unfair. That was always her complaint to me.

Q Now, correct me if I'm wrong but you knew as a director of the company that the value of the properties owned by the company Nam Wah Tong Holdings was approximately \$5.5 million dollars, correct?

A That's correct.

The witness also agreed that if something was going to be done for the sisters, it most likely was going to be done through the company. Also, that the discussions with the girls were about the payment of money, not the restructuring of the shares in the company.

[96] Gilbert then corrected his evidence given on direct examination that he hadn't told Margaret about the other people being involved, and not being thrilled about it, that is, the stepmother and brother Gordon. When his discovery evidence was put to him, he agreed that he had told her.

[97] The witness seemed to be reluctant to agree that what his sisters were complaining about was the fact that he and his brother had received a company that owned \$5.5 million dollars worth of property, while they only received \$50,000 each. He could not remember any conversation with either of his sisters to that effect. Nor could he recall any discussion with either of them about the Will. He suggested that the sisters were only unhappy about the original share distribution in 1964, emphasizing that the Class A shares that he and his brothers received by the Will only had a value of \$8,000 odd dollars; an appraisal done by the company's accountant, Mr. Bock Yip. I again note my concerns about this evidence.

[98] The following questions were then put and answers given:

Q So you will agree with me that there was this imbalance with what, over the course of time perhaps, you and your brothers received from your parents, directly or indirectly, and what your sisters received?

A There is an imbalance, I agree.

Q And it was that imbalance that your sisters wanted to have a meeting about?

A That's correct.

Q You and your brother Bill, at least were willing to have that meeting?

A That's correct.

And:

Q And it took from November of 1996 until January of 1999 to have that meeting, to arrange that meeting?

A It took that long.

THE COURT: Your answer is "Yes?"

THE WITNESS: Yes.

MR. MILLAR:

Q And Margaret had been asking for it regularly from November of 1996 through to the fall of 1998?

A Yes, she had.

And:

Q Is it fair to say that in the fall of 1998 Maureen was getting so frustrated with the delays in getting the meeting that she took it upon herself to get the meeting going?

A Yes.

[99] Gilbert was cross-examined by Mr. Chui, on behalf of his stepmother. Contrary to his earlier evidence, he said that on a number of occasions, he told Margaret that there were other people involved, referring to his stepmother and to his brother Gordon. However, he never spoke to his stepmother, or to his brother Gordon, about Maureen and Margaret's complaints and unhappiness. It will be seen that while he did not speak to them it is William's evidence that he had no intention of speaking to them.

THE EVIDENCE OF THE DEFENDANT, WILLIAM YEN LEE

[100] At discovery, William said that most of the discussions about the sisters' unhappiness were with his brother Gilbert. When asked what Gilbert told him about this he said:

My understanding is, well, he agreed with them that if he were in their shoes he would be unhappy too, that maybe we could have a meeting and discuss with them what can be done or will be done, but it wasn't just my brother and myself, because it involved the company, of which my brother Gordy and my stepmom are also shareholders and directors of the company. So the decision, if any could be made, would have to involve everybody.

[101] He said that the first actual contact he had with his sisters regarding the Will, and their unhappiness, was when he attended the meeting at Maureen's house which took place in early 1999. He did not know how long the sisters had been trying to set up the meeting, whether they were ever given a copy of the Grant of Probate, whether they were ever advised that probate had been granted, or when they received their \$50,000. When asked what his understanding of the purpose of the meeting was he said:

The purpose of the meeting was we'll see if we could provide them with either some funds or give them some type of compensation for ... to make up the inequity in the ... from their point of view.

[102] He was then referred to Maureen's telephone call to him, apparently setting up the January 10, 1999 meeting. He had said that he had not had any discussions about what could be done or what the solutions were, prior to the meeting. He did agree that during the telephone conversation with Maureen, he said that maybe something could be done in the future for their children. He also said that if anyone was in dire need of money he would help them.

[103] With regard to the meeting, he said:

And then after dinner, I guess, the sisters were talking about being short-changed on the Will. Then they offered what they thought were a couple of possibilities to make it more fair in their point of view. We listened and nothing was finalized but we agreed that what they said was possibly do-able or realistic, but we can't make up a decision one way or the other because other people are involved with the company who have to be informed before a final decision could be made.

He believes that specific sums were mentioned by the girls. He cannot remember the amounts. In this regard, he says:

I think they did mention specific sums, but specific sums at that time, from what I gather, was unrealistic, and I just shrugged my shoulders at them.

He also acknowledged that at that meeting he agreed with the plaintiffs that they had been unfairly treated.

[104] The witness was asked whether at the time of the meeting he was aware of the Wills Variation Act and steps that family members can take under it. He said that he was aware that there was a limitation period; that his father was also aware of it. However, he did not know how long it was or when it started to run, and at the time of the meeting he was not aware that the time limitation had expired. When asked how the meeting ended, he said:

To my understanding we were going to talk to my brother Gordy and my mom, discuss it with them and see how we are to follow up on the discussions that had happened at the meeting.

[105] The witness said that he talked to his stepmother, that she had no intention of accommodating the plaintiffs. Because of this, he did not bother to talk to his brother Gordy about making any accommodations for the plaintiffs, "And we left it at that." He was asked, what he said to Gilbert and he said:

Well, I says, well, I guess we are not going to do anything. So as a result we never got back to them.

[106] It was suggested that Gilbert did get back to the plaintiffs, and he said that it was possible. It was also put to him that Gilbert had said to Maureen that no money would be forthcoming until the Kingsway project had been finished. His reply was, "Okay, that's possible. He could have said that."

[107] He then went on (still at discovery) to give inconsistent evidence as to what the plaintiffs were told. He said:

Yeah. At the meeting we said that we may accommodate them. At the meeting. But only when the cash flow from the company was positive. But at that time the cash flow was negative and we couldn't do anything. And we weren't willing to do anything.

[108] He said it was possible that after the meeting with the sisters there was a discussion about putting something in writing for the plaintiffs. He agreed that a conversation in this regard took place during the Chinese New Year's dinner. He said, referring to his sister Margaret:

After the dinner she came up to me and said, "What is going to transpire from the discussions we had at the meeting at Maureen's house?" And I says, "Nothing". And she says, "Well, I want what you're going to do, what you propose to do in writing, and I want these payments to be retroactive." Now, nothing was talked concrete about payments, nothing was said about when it's going to start, this is Nam Wah Tong company, in which we are the major shareholders and we are going to have some outsider give us --- dictate policy? So after we got into heated argument, my sister said, "Well, if it isn't forthcoming, we are going to see a lawyer and it's going to cost you more." And I says, "Hey, do what you have to do." And that was it.

[109] I turn now to William's evidence at trial. He acknowledged that he heard his brother Gilbert testify about meetings with his sister Margaret. However, the witness said that he never met with Margaret or Maureen prior to the January 10, 1999 meeting. He does not remember a 1992 meeting with them. He said that the only commitment he made to his sisters at the January 10, 1999 meeting was that they would listen to their proposal and then relate their proposal to their stepmother and to their brother Gordon. I have already noted that I am unimpressed with the evidence of Gilbert and William to the effect that the stepmother and brother Gordon prevented them from doing the right thing with their sisters.

[110] William testified that after the January 10, 1999 meeting he spoke to his stepmother and later to his brother Gordon. The stepmother said, according to him, that there was no way that they would make any changes in the company (something which I note the sisters did not seek) to accommodate the plaintiffs. I observe also that this firm position did not seem to be consistent with a person who has only one share in the company, and who according to her testimony, knew very little, if anything, about it. While he spoke to his brother Gordon, William did not talk to him about the meeting or the unhappiness and proposal of the plaintiffs.

[111] When asked why he didn't involve Gordon, he said it was because he knew that Gordon's wife "was dead-set against giving them, my sisters, money or shares of the company."

[112] When asked whether he spoke to Gordon's wife about the matter, he said that he had not done so. When asked what made him believe that her position was that she was dead-set against giving anything to the plaintiffs, he said:

My sister - in law - works very hard for her income and I know from her habits and living with her in when she just got married that she was very tight with her money and that all the money that she earned in her lifetime was just like the way my mom, my mom Mabel, earned her income, and she was very tight-fisted about the money they earned.

He said that as a result he did not speak to her or to his brother Gordon. I pause to note again that I had some concerns about this witness' evidence, and his evidence in this area is a good

example.

[113] William acknowledged that he knew, prior to the January 1999 meeting, that Gilbert had met with Margaret from time to time, and that she was asking for a meeting. Gilbert relayed this information to him. When asked what he did as a result of Gilbert relaying this information to him, he said:

"I didn't do anything." When asked why, he said:

Yes, I knew my mother's ... stepmother's stand in the position of the share structure of the company and I knew my sister-in-law's stand on this issue as well, and as a result no changes were going to occur and I didn't feel that there was any reason to bring it up.

[114] The witness also volunteered evidence as to a conversation he had with his father when he came out of the hospital in 1993 after his surgery. He said that at that time he was concerned with his father's Will, so he asked him how much he had left to his sisters. When the father told him that he had left them \$50,000 each, he told his father that the sisters were not going to be happy and:

I said to him, "I think you should give them more, the company has a lot of money or a lot of assets and we could afford to give them more." And he replied, "They don't deserve it."

[115] The witness then went on to relate a conversation which he said he had with his father about their stepmother. He said:

My father told me that he wasn't going to leave her very much in his Will either, that it was my responsibility to look after her because she has no other family members or close friends here in Vancouver and that her English is not very good.

And:

THE WITNESS:

I promised my Dad that I would look after her like my real mom because she looked after him and cared for him very deeply over the years.

The evidence is that the defendant stepmother receives the sum of \$1,000 a month from the company, and any other assistance which she requires. I am satisfied that Gilbert and William are looking after her to her satisfaction, as they were directed to do so by their father.

[116] Mr. Chui cross-examined William with regard to the stepmother's loving relationship with his father, and how she looked after him until he died. I am satisfied that they had a good relationship and that she indeed looked after his father as he said. He also confirmed that the mortgage-free home that the stepmother owns has an assessed value of \$334,500 according to the 2001 assessment.

- [117] When cross-examined by Mr. Millar, the witness confirmed that there was no formal agreement pertaining to looking after his stepmother. The present arrangement is that the company pays all her living expenses pertaining to her home, and the company also pays her the net sum of \$1,000 a month, and pays her taxes.
- [118] William said that he was not aware that his sisters were unhappy with respect to the fact that he and his brothers were given the shares in the company, until about 1993. He denied that he agreed with them that it was not fair. He said that he simply acknowledged to them that if he were in their shoes he would feel the same way they did; which perhaps is the same thing. And his evidence with regard to his conversation with his father, if accepted, suggests that he was of the view that in the circumstances the father's Will did not make adequate provision for the plaintiffs.
- [119] While recalling Gilbert's evidence at trial that Margaret came to him looking for a meeting after she received her \$50,000 in November of 1997, he could not remember Gilbert contacting him about Margaret coming to him and wanting to set up a meeting. He said that he was first aware that Margaret wanted the meeting in late 1998. He was then referred to his evidence at discovery which seemed to conflict with his trial recollections. He then agreed that he was aware that his sisters were having discussions with Gilbert around the time they got the Will, which was in 1996, and that Gilbert was telling him about those discussions. He said it was possible that in 1997, he was aware that Gilbert wanted to have a meeting, that Margaret wanted to have a meeting, and that they could not set up the meeting because it was not convenient to him.
- [120] The witness also agreed that he knew at the time that his sisters' unhappiness was with respect to the fact that he and his brothers had ended up with the company which had a value of approximately \$5.5 million dollars. He eventually agreed that it boiled down to the fact that they were unhappy with what they received from their father's estate at the end of the day, and they were trying to set up a meeting to address that issue.
- [121] And his answers to the following questions are of some interest:
- Q And Gilbert wasn't telling you that your sisters were looking for shares in the company? That was never said?
- A No, it wasn't.
- Q All right. Then, as I understand your evidence, you had formed the opinion, without talking to either one of them, either your stepmother or Gordy, that they weren't going to agree to any change or any benefit or any compensation being paid to your sisters? That was your opinion as to what their response would be if you had gone to them and asked them about it, correct?
- A Yes, that's right, Your Honour.
- Q But you didn't tell Gilbert that, did you?

A No I didn't.

Q Nor did you tell Gilbert to tell Margaret that you had no intentions of doing anything?

A That's right, Your Honour.

Q And Gilbert continued to approach you about getting these meetings set up and your answer was, "Well, it's not convenient, I can't do it right now", or words to that effect?

A It's possible.

Q And it continued from 1997 on until 1998?

A It's possible. (My emphasis).

[122] William also acknowledged that he knew there was a time limit in the Wills Variation Act. However, he did not know what the limitation was and he was not curious as to what it was, according to his testimony.

SUBMISSIONS

[123] Mr. Millar, for the plaintiff, referred to the decision of Harvey J. in *MacDonald v. MacDonald Estate* (1996), 21 B.C.L.R. (3d) 379 (S.C.) as authority for the proposition that the court is free to grant relief under s.2 of the Wills Variation Act, even though the action was not commenced within the time limit by the Act. There, His Lordship found that the general equitable principles of promissory estoppel were directly applicable to the facts before him. He followed *Nailen v. Powell River Municipality* [1978] 2 W.W.R. 350 (B.C. Co.Ct.) a decision of McClellan C.C.J. who cited the decision of the Saskatchewan Court of Appeal in *Clark v. Thomas J. Gaytee Studios Inc.* [1930] 4 W.W.R. 489 for the proposition that a court will not allow the period of limitations to be used as the shield to protect a defendant where the officers of that defendant have mislead a plaintiff. Mr. Justice Harvey also referred to texts on the law of limitations wherein it is stated that estoppel may be inferred from or implied by the conduct of a party making a representation over a period of time, and that the doctrine is essentially one of fairness and equity.

[124] Counsel said that the plaintiffs relied on a broader ground of estoppel than promissory estoppel, estoppel by conduct. He relies on the Court of Appeal's decision in *Litwin Construction (1973) Ltd. v. Pan, Nicholson and Nicholson* (1988), 29 B.C.L.R. (2d) 88 in which that court dealt at some length with a "more flexible approach" to estoppel. In that case, the Court of Appeal reviewed leading authorities on the doctrine of estoppel, including the following passage from Lord Justice Oliver's decision in *Habib Bank Ltd. v. Habib AG Zurich* (1981) 1 W.L.R. 1265, [1985] 2 All E.R. 650 (C.A.) at page 668:

Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.

(My emphasis).

[125] Reference was also made to Lord Justice Oliver's earlier statements, speaking as a trial judge in *Taylor Fashions Ltd. v. Liverpool Victoria Friendly Society* [1981] Q.B. 133 at pp. 151-152 where he said:

Furthermore the more recent cases indicate, in my judgement, that the application of the *Ramsden v. Dyson* L.R. 1 H.L. 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

So regarded, knowledge of the true position by the party alleged to be estopped, becomes merely one of the relevant factors - it may even be a determining factor in certain cases - in the overall enquiry.

And at p.155:

The enquiry which I have to make therefore, as it seems to me, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared, and, in approaching that, I must consider the cases of the two plaintiffs separately because it may be that quite different considerations apply to each. (My emphasis).

The enquiry stated of course was that applicable to the facts of the case before His Lordship.

[126] In *Litwin*, supra, the Court of Appeal stated its preference of the words, "unfair" or "unjust" to "unconscionable", defining the former phrase as "producing a result contrary to a sound sense of the equities, rights and conduct of the parties". The court then states the broad principle at p.99 as follows:

Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of

judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.

(My emphasis).

[127] And at p.101, after dealing with the question of detriment in the case before them, the Court of Appeal noted that the purpose of the doctrine of estoppel is to prevent detriment; citing the decision of Mr. Justice Dixon, in *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1938), 59 C.L.R. 641 (Aus. H.C.) at p.674 where that learned judge stated:

In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.

(My emphasis).

The Court of Appeal then stated its conclusion that the trial judge was right in his finding that the investors affirmed their contracts "by words or conduct in circumstances which make it unfair or unjust for them to resile from their contracts."

[128] In *Charles v. Insurance Corporation of British Columbia* (1989), 34 B.C.L.R. (2d) 331 (C.A.) Lambert J.A., speaking for himself, Chief Justice McEachern and Carrothers J.A. even more precisely defines the principle contained in *Litwin* in the following passage at p.336, after quoting from the decision of Lord Justice Oliver in *Habib*, as I have done, as follows:

That statement was adopted by this court in *Litwin* It does not usurp the customary approach to estoppel by conduct, but states instead a unifying principle which makes such matters as detriment and reliance into indicators of inequity rather than universally essential characteristics of estoppel by conduct, in themselves. (My emphasis).

[129] I return to the submissions of counsel for the plaintiffs. He submitted that the conduct of the defendant Executors, Gilbert Tong Lee and William Yen Lee, particularly the latter, was such that it would be wholly inequitable that they should be entitled to succeed in these proceedings by relying upon s.3(1)(a) of the Wills Variation Act.

[130] Mr. Miller concluded his written submission on the point as follows:

63. Further it would be unjust or unfair to allow the claims of the plaintiffs to be defeated when the claimants were relying on the defendants to meet with them once a convenient time could be arranged. The defendant executors did not deliver a notice of intention to apply for probate to the plaintiffs as required by s.112(1) of the Estate Administration Act, R.S.B.C. 1996 c.122. William Lee admitted that he was aware that there was a time limit for the

plaintiffs to bring an application under the Wills Variation Act. It was William Lee who kept stalling the plaintiffs with respect to arranging the meeting as he had decided, without discussing it with his brothers or step mother, that no accommodation would be granted to his sisters. If the payments due to the sisters under the will had been delayed or William had advised his sisters that he had no intention of accommodating them, it is fair to assume that his sisters would have obtained legal advice earlier and would have commenced their action within the time limit. They sought legal advice in 1999 as soon as they were told that there would be no accommodation and the action was commenced shortly thereafter.

64. The other circumstances of the conduct and behaviour of the brothers which support a finding that it would be wholly inequitable that they be able to resist the plaintiffs' claims by reason of the fact that they did not commence their action within the time are that the brothers all knew their sisters were unhappy with the distribution of their father's estate, they never made their sisters aware that they were applying for probate, they never made their sisters aware that probate had been granted, and they made repeated assurances that they would meet to discuss doing something about their unfairness.
65. Such conduct is not to be rewarded by allowing the brothers to succeed in their defence.
- [131] Mr. Chui commenced his argument by dealing with perhaps older law pertaining to the principle of promissory estoppel, and its elements which must be satisfied, and then dealt similarly with the broader ground of estoppel, estoppel by conduct, advanced by the plaintiffs. He distinguished *Litwin* as a case involving contract law in which the actions of the defendant were unequivocal, the defendants were in partial performance of their contractual obligations, and their assurances induced the plaintiff to complete his contractual obligation. In this case, he said, there is no agreement between the parties, no unequivocal actions and no assurances given that induced the plaintiffs to give up their rights. His primary point is that there are no words or conduct of any of the defendants that make it unfair or unjust for the defendants to rely on the limitation period and the fact that the plaintiffs' action to vary the testator's will is statute-barred. I am unable to agree with the submission.
- [132] In his submission Mr. Chui emphasized on numerous occasions the lack of evidence of conduct or behaviour on the part of the three defendant brothers on which the court can conclude that it would be wholly inequitable that they should be entitled to successfully rely on the limitation period defence. He seemed to be more concerned with the conduct of the plaintiffs which, while important, seems to me to be secondary to that of the defendant brothers who are alleged to be estopped.
- [133] For example, counsel says that neither of the plaintiffs had any dealings with William, about either the Will or the company, from the date of death of the testator until January of 1999, well after the expiry of the limitation period; that only Gilbert had any relevant dealings with the plaintiffs during the running of the limitation period, and the only representation that he made was that he had to talk to William. I am unable to agree. I

point out again that in my view when one brother was speaking to one of the sisters he represented the other two brothers. Specifically, I am satisfied that when Gilbert was dealing with his sisters William well knew what was going on, and was represented by him.

[134] Finally, Mr. Chui's view of the evidence is obviously quite different from mine. I am satisfied that at least from the time that Mr. Lee died until February of 1999 the defendant brothers led the plaintiffs to believe that in time they would address the obvious unfairness or imbalance in the distribution of Mr. Lee's estate, by the gifting of the company to them, and the gifting of \$50,000 to each of the plaintiffs in his Will, by a payment of monies from the company; while at the same time they stalled and put off the uninformed plaintiffs whenever they could, and even later on when at least William had no intentions of doing anything.

[135] Mr. Rotstein submitted that there was no evidence that the defendant brothers or any of them would see something is done to rectify the perceived imbalance resulting from the shared distribution of the company. He said, "Indeed, both Maureen Fong and Margaret Chan testified to the contrary and said that no one had said that they would do anything to rectify the perceived imbalance of the share distribution." I pause to note that this simply not the case. What they said in effect was that it was never suggested that there should be a redistribution of the shares, that a payment of money by the company was always considered to be the solution to the unfairness.

[136] Mr. Rotstein continued:

6. To the extent that there were any discussions of a serious nature between the executors and the plaintiffs, those discussions occurred in late 1998 and early 1999, significantly after the running of any limitation period. The plaintiffs' submissions lack clarity as to when any discussions occurred which might lend themselves to support this plea.
7. It is also clear from the plaintiffs' evidence that the matter under discussion was the shared distribution of Nam Wah Tong Holdings Ltd. and not the will. Indeed, Margaret was unaware of the contents of the will until she saw a copy of it in October or November 1997. The only conclusion possible is that the will was not under discussion.

[137] I am unable to agree with this interpretation of the evidence. I am satisfied that even before Mr. Lee died the plaintiffs made it clear to the defendant brothers that they were unsatisfied with the unfairness of the gifting of the company to them, and that they believed that the defendant brothers should address that unfairness by placing them in funds through the company. The defendant brothers agreed that the gifting of the company was unfair to the plaintiffs, and that they would get together with them when it was convenient (although they always had excuses, i.e., the timing wasn't right, the estate had to be settled, the company's latest projects had to be completed and so on) to address it; or, at a minimum, that was the reasonable impression left with the unsophisticated plaintiffs.

- [138] The brothers never told their sisters, expressly or by implication, that they would not deal with the situation in a positive manner. And the defendant brothers' conduct and behaviour was consistent before Mr. Lee died, during the running of the limitation period, and thereafter, until the final meeting in the restaurant in February of 1999 when for the first time, William apparently somewhat angrily declared in effect that they would not be paid any monies. And I observe that this was the brother who, according to his testimony, asked to see his father's Will, and then pointed out to his father the unfairness of the disposition to the plaintiffs, and urged him to increase the amounts substantially.
- [139] After Mr. Lee died, and the contents of his Will were finally known by the plaintiffs (and this was in October or November of 1996, not 1997), they then consolidated their complaints as it were by adding the fact that the distribution of \$50,000 to each of them under Mr. Lee's Will was equally unfair. However, from that point on their complaint was that the distribution of their father's estate, by giving the sons his company having a value of approximately five and a half million dollars, while giving them only \$50,000 each by his Will, was most unfair, and that the brothers should correct this imbalance. The defendant brothers would have known that that was the situation.
- [140] Mr. Rotstein distinguished Litwin on its facts, as did Mr. Chui. The importance of that case of course rests with the principle enunciated therein, the adoption of Lord Justice Oliver's broad approach to the application of the principle of estoppel by conduct in *Taylor Fashions and Habib Bank*, and which was succinctly stated by Lambert J.A. in *Charles*.
- [141] Mr. Rotstein submitted that the words used by Gilbert and William in considering the unfairness complained of were mere words of sympathy. There was no inducement in the case at bar as there was in *Litwin*. Like Mr. Chui, he argued that there was no evidence of any agreement by the defendant brothers to change the share structure or to change the Will. Even if this was the case, it is clear in my opinion that the brothers did agree, or at the least held out, that they would address the unfairness or imbalance by making a payment of funds to the plaintiffs through the company. And I am satisfied on the plaintiffs' evidence, and to some extent on the defendant brothers' evidence as well, that at one point they agreed that a payment of \$25,000 a year by the company to each plaintiff, over a period of time, was reasonable. Although later this was met by what I consider to be nothing more than a trumped up excuse, that they were having difficulty convincing the step mother and brother Gordon to go along with any payment, and which was simply not true.
- [142] Mr. Rotstein submitted that the most important aspect of estoppel is reliance, referring to the Court of Appeal's recent decision in *Sami's Restaurant v. W. Hanley & Co. Ltd.* 2002 BCCA 218 (Vancouver Registry No. CA027669, 4 April 2002). In that case Madam Justice Huddart stated for the Court:

There is no injustice in permitting the appellants to enforce their legal rights in these circumstances. The appellants have not established that the conduct and behaviour of the respondents, and Mr. Hanley in particular, is such as to make it "wholly inequitable that [they]

should be entitled to succeed in the proceeding." This is the fundamental test for the application of estoppel by conduct approved by this court in *Litwin Construction (1973) Ltd. v. Pan* (1988), 29 B.C.L.R. (2d) 88 (C.A.) at 99. The prevention of injustice caused by reliance is the purpose of estoppel by conduct or acquiescence.

In my view this case does not support the position of the defendant brothers. Rather, it emphasizes or clarifies exactly what the fundamental test of the application of estoppel by conduct is; and which the plaintiffs have clearly met. Additionally, while not an essential characteristic in itself of the estoppel in this case, reliance on their sophisticated and well-educated brothers, Gilbert and William, to address the unfairness or imbalance of the distribution of their father's assets or estate, by having the company pay them an appropriate sum, a situation which their brothers knowingly allowed or encouraged, has been established.

[143] Counsel also submitted that the fact that the plaintiffs were not given the statutory notice of the application for probate was of no moment because the plaintiffs knew that the Will was being "settled", and that they would only receive their legacies on settlement of the estate. The submission perhaps ignores the plaintiffs' definition of the word settled to simply mean straightening out the liabilities and assets of the estate. One of the specific purposes of the s.112 notice under the Administration Act is to make sure that any person who is entitled to apply to vary the provisions of the will under the Wills Variation Act is given formal notice of the application for probate. Finally, I am not prepared to conjecture that had the defendant brothers executors abided by the Act and given the plaintiffs formal notice, that they would not have consulted a lawyer and, with knowledge, proceeded differently. Certainly, a search of the file would have disclosed the contents of the s.112 affidavit sworn to by the brothers, if the plaintiffs' solicitor for some reason did not advise them of their rights under the Wills Variation Act. And I have already expressed my view of the fact that in addition to failing to deliver the formal notice, the defendants paid the plaintiffs their legacy prematurely, in the circumstances of this case. The problem, in my view, is that the plaintiffs continued to rely on their brothers to address their father's inadequate provision for their proper maintenance and support.

DISPOSITION OF ISSUE NO. 1

[144] The question I must decide is whether the plaintiffs have established that the circumstances of the conduct and behaviour of the defendant brothers, the executors, are such that it would be wholly inequitable that they should be entitled to succeed on their defence that the plaintiffs' action is statute-barred. The answer, without any doubt, is in the affirmative, for in my opinion a grave injustice would be done to the plaintiffs if the defendants were found to be entitled to succeed.

[145] And this is so in the first instance without having to consider or analyze the evidence in detail, particularly that of the defendants, with regard to such matters as knowledge, reliance, detriment, acquiescence or encouragement and so on. Without more the evidence clearly supports a finding that the circumstances of the conduct and behaviour of the three

brothers are such that it would be wholly inequitable that they should succeed. Finally, if inducement, reliance and detriment or harm need to be established, either as indicators of inequities, or as essential ingredients of the estoppel, they are overwhelmingly proven by the evidence.

ISSUE NO. 2 - THE OWNERSHIP OF THE CLASS B, C AND D SHARES

- [146] Mr. Millar says, "The shareholdings of Peter Wah Lee in the company, and the value of those shareholdings was the central issue at trial"; that Mr. Lee still owned the Class B, C and D shares at the time of his death. I will deal with the issue of value in a moment, as it relates to the shares held by Mr. Lee at the time of his death.
- [147] I do not propose to deal with the ownership of the Class B, C and D shares at great length. I have already indicated that in my opinion those shares were given to the three sons long ago, as early as 1964. It was common knowledge in the family that the shares had been given to them, and the family members conducted themselves as if a formal transfer had taken place.
- [148] Mr. Millar bases his submission on the fact that most of the transfer documents, pertaining to the three classes of shares, contained in the company's books, are unsigned. An example is a Director's Minute dated January 31, 1964 contained in the Minute Book of the company, which records the receipt of an application by each of the three sons for the transfer of 1650 shares to them for the sum of \$4,000. The evidence is that the \$4,000 was never paid, and no signed Minute has been produced. Other documents, such as share transfer documents, were not signed.
- [149] It seems to me that all of the unsigned company documents indicate an intention on the part of Mr. Lee and his first wife, at one point in time, to transfer their Class B, C and D shares to the three sons. And there are other signed documents or company records which suggest that in fact the shares were transferred to the three sons.
- [150] There is a handwritten register of transfers of company shares covering the period January 18, 1963 to January 18, 1973. The record indicates that on January 31, 1964, Mr. and Mrs. Lee transferred their Class B, C and D shares to their three sons. On August 17, 1969, Mrs. Lee's Class A shares were transferred to Mr. Lee. On December 18, 1973, Mr. Lee transferred one Class A share to his second wife, the defendant Yen Kam Lee.
- [151] There is a document entitled "Register of Directors" which states that as of January 31, 1964, the three sons become Directors. On December 18, 1973, the stepmother became the secretary of the company, and on August 21, 1996, William Lee became the President.
- [152] The typed and handwritten Register of Members also indicate that as of January 31, 1964, Gordon Lee owned 3,300 Class B non-voting shares, William Lee owned 3,300 Class C non-voting shares and Gilbert Lee owned 3,300 Class D non-voting shares. And in this regard, it is noted that the various Company Acts in force over the years each provides that the

Register of Members is proof in the absence of any evidence to the contrary of any matters directed or authorized by the Act to be inserted in it. There is also in evidence a three-page annual report for January of 1973 recording the shareholdings of the company and signed by Mr. Lee, showing Gordon, William and Gilbert to be the holders of the Class B, C and D shares respectively. I do not have this exhibit before me at the present time, but I rely on counsel's submission. I refer also to the evidence of the plaintiff, Maureen Fong, about her conversation with her father when she confronted him about the fact that the shares had been transferred to the sons; and in which he in effect said to her, "How could the transfer be changed or reversed after 30 years?"

[153] I have concluded based on the evidence that in fact the three sons became the owners of the Class B, C and D shares probably in 1964. However, having said that, it is my opinion that in deciding the issues before me, I can take it into consideration the fact that the three sons were given the shares in the company which owned properties having a value of at least \$5,500,000. If it is found that all of those shares were under the control of Mr. Lee and were in fact his shares, then the three sons each received approximately one-third of \$5,500,000. If it is assumed that half of the shares belonged to Mr. Lee's first wife, then the sons still received one-third of approximately \$2,750,000, a substantial sum which would have formed a part of Mr. Lee's estate had he retained the shares.

THE VALUE OF THE 29 CLASS A SHARES HELD BY MR. LEE

IN THE COMPANY AT THE TIME OF HIS DEATH____

[154] These shares were valued at \$8,565.15 in the Disclosure Statement filed in support of the Probate application. The value was provided by the company's accountant, Mr. Bock Yip, and is said to be based on the fair market value of the company divided pro rata among all of the issued shares.

[155] The plaintiffs filed expert reports of Gary Mynett, C.A., C.B.V. of the firm of MacKay Mynett, Chartered Accountants and Certified Business Valuators. The reports are in evidence. Mr. Mynett was not called to testify.

[156] According to his report dated July 12, 2001, Mr. Mynett was retained to estimate the en bloc fair market value of the issued and outstanding shares of the company as at August 21, 1996, the valuation date. In addition, he was asked to provide an estimate of the fair market value of 29 Class "A" shares of the company owned by the deceased at the valuation date.

[157] His estimate of the en bloc fair market value (the fair market value of the ownership interest of the business viewed as a whole) and his estimate of the value of the 29 Class "A" shares (the highest price available in an open and unrestricted market between informed and prudent parties acting at arm's length and under no compulsion to transact, expressed in terms of money or monies worth) are as follows:

En bloc fair market value

Low Mid-point High

\$3,200,000

\$4,050,000 \$4,900,000

29 Class A shares

Low Mid-point High

\$3,090,000

\$3,915,000 \$4,740,000

It is seen that Mr. Mynett allots all of the value of the company to the Class A shares.

[158] The defendants filed a report dated September 5, 2001 of another Chartered Accountant/ Business Valuator, W.A. McMann, of Price WaterhouseCoopers LLP. Mr. McMann also testified at trial.

[159] In his report, Mr. McMann accepts the en bloc value of the company at August 21, 1996 as \$4,050,000. He also accepts Mr. Mynett's definition of fair market value. However, he strongly disagreed with Mr. Mynett's allocation of all of the value of the company to the Class A shares.

[160] Mr. McMann's specific disagreement with Mr. Mynett's valuation is contained in the following passage contained at p.5 of his report:

Implicit in Mr. Mynett's valuation of \$3,915,000 for the 29 Class A voting shares owned by the late Mr. Peter Wah Lee at August 21, 1996, is that there exists a fully informed and prudent purchaser willing to acquire the said shares for that price.

I disagree.

All the issued classes of share rank pari passu with each other.

- If a dividend were declared, the holder of the 29 Class A voting shares would expect to receive 29/9,930 of any dividend so declared (0.2992%)

- If the company were to be wound up, then the holder of the 29 Class A voting shares could expect to receive 29/9,930 of the liquidated proceeds (0.2992%) (My emphasis).

[161] Mr. McMann then goes on to deal with the specific reasons given by Mr. Mynett in his report for the allocation of 100 per cent of the en bloc value of \$4,050,000 to the Class A shares. Those reasons are contained in the following two extracts from Mr. Mynett's report:

At the valuation date, all issued and outstanding shares of the company were owned by Peter Wah Lee and his family members. We do not believe there would be any arm's length purchasers for the Class "B", "C" or "D" shares because they do not have voting rights and therefore there would be no assurance that any return or investment, whether by means of dividends, employment by the company or by shareholder benefits would be received.

And

In contrast, we believe all the en bloc fair market value should be allocated to the Class A "voting shares" because of the ability of their holders to direct and influence the operations of the company.

[162] Mr. McMann then goes on to give persuasive reasons as to why he disagrees with Mr. Mynett. He says:

Since there are other shareholders, other than Class A shareholders, any remuneration or benefits to the Class A shareholder for his employment services can be expected to be a fair market value for the services provided. The Class A shareholder could not expect to award himself salary or benefits in excess of a reasonable amount for the service provided to the detriment of other shareholder interest.

The Class A shareholder may indeed work to direct and influence the operations of the company, but not for his own benefit but for the benefit of the company and all its shareholders.

I cannot then believe that an arm's length third party, fully informed and prudent would be willing to acquire 29 Class A voting shares of the company at the valuation date for \$3,915,000 for the apparent reasons suggested by Mr. Mynett.

I also note that in his Appendix A Scope of Review Section, Mr. Mynett, amongst other, placed some reliance upon a text "The Valuation and Pricing of Privately-Held Business Interests" authored by Ian R. Campbell. This is a widely read treatise on valuation in Canada. Mr. Mynett acknowledges this text as the source of the definition of value used at page 2 and 3 of his report.

Mr. McMann then goes on to quote from the text, a passage which clearly supports the position that he, that is Mr. McMann, propounds.

[163] In his conclusions, Mr. McMann states:

I do not believe that a willing, fully informed and prudent purchaser would pay \$3,915,000 for the 29 Class A voting shares owned by the late Peter Wah Lee because:

- (a) All classes of share rank *pari passu*.
- (b) Any salary or benefits where the purchaser may envisage would be expected to be commensurate with the service provided and not in excess of reasonable market rates.

- (c) Even if the company were to prosper under the guidance of the purchaser, his equity return is limited to 29/9,930 of any equity growth.
- (d) A prudent purchaser would also consider alternative returns available to him on a potential \$3,915,000 investment and choose accordingly. For example, at a low risk yield at 6 per cent, the return on \$3,915,000 is \$234,900 annually. Given the share structure of the company, I believe it impossible to envisage such a return to the Class A shareholders.

[164] Mr. McMann then provided his estimates as follows:

En bloc value \$4,050,000

Rateable value per share \$407.85

Value of 29 Class A shares \$11,828

He concludes his report by noting that it does not follow that all residual value would be allocated to the Class B, C and D shares; that it is frequently the situation in valuation, given certain share structures, that the sum of the parts need not equal the whole.

[165] At trial on direct, the witness explained his latter statement saying he did not want to leave the impression with the court that the difference in value between the \$4,050,000 value of the company less the \$11,828 value of the 29 Class A shares would be the market value of the Class B, C and D shares. He pointed out again that he wasn't asked to value the Class B, C and D shares and he didn't want to leave that impression in terms of value, "because it is very common in valuation where you have different classes of shares that when you value them, and I stress the word value, the sum of the parts frequently will not equal the whole."

[166] While Mr. McMann was cross-examined in some detail on the point, little headway was made. His evidence remained the same as that contained in his report which I have reviewed. While acknowledging that the value of the Class B, C and D shares was not simply a matter of deducting the \$11,828 from the \$4,050,000, and that one of the reasons was that the holder of the Class B, C and D shares would not have any vote, he still would not ascribe any premium to the voting rights of the Class A shares for the reason he had already given. For example, on a sale of the company, the holder of the Class A shares would still only receive a 29/9,930 proportionate interest in the proceeds. Any salaries received by the holder of the Class A shares by virtue of his control would have to be commensurate with the value of the services provided, and so on.

[167] Finally, Mr. McMann agreed that it was his evidence that if the court decides that the 29 Class A shares in the estate should be handed over to the plaintiffs, the court should ascribe a value to those shares of \$11,828.

[168] While the purpose of expert evidence is to assist the court in determining the issues before it, and the determination of the value of the 29 Class A shares is mine alone, I find Mr. McMann's evidence to be most persuasive, and I prefer it over that of the equally qualified

expert for the plaintiffs, Mr. Mynett. While in a given case, a particular purchaser of the 29 Class A shares might be prepared to pay some form of premium for those shares over and above Mr. McMann's estimated value of \$11,828, there is simply no evidence before me on which I could fix such a premium, or even on which I could safely assume that such a purchaser exists. And I have no way of estimating with any certainty the value of those shares to the three brothers. In these circumstances then, I fix the value of the 29 Class A shares at \$11,828. And I add the caution emphasized by Mr. McMann that it must not follow that the value of the Class B, Class C and Class D shares is simply the difference between \$4,050,000 and \$11,828.

THE WILLS VARIATION CLAIMS

(a) The Claim of the Widow, Yen Kam Lee

- [169] Mr. Millar read in much of the stepmother's evidence given at discovery on August 28, 2001. Other than the fact that she married Mr. Lee on April 15, 1973, she really knew very little with regard to the matters at issue. She doesn't speak or read English. When asked whether she was a defendant in the action, she said she didn't know. When asked about various assertions made in the Statement of Claim, for example, those made in paragraphs 19, 21, 22 and 23, she said she didn't know. When asked if she knew what the word "plaintiffs" meant in paragraph 19, she said she didn't know. She did say that she didn't "know about the business of their father".
- [170] She was also asked about assertions made in her defence and her answers were the same. When asked about the facts asserted in paragraphs 5 and 6, she said, "What facts? When I don't know about something, I don't know."
- [171] She acknowledged that the sons had agreed with her husband to look after her on his death, and that they have done so. She owns the mortgage-free house she lives in which has an assessed value of \$334,500 in 2001. It was the family home. She said she did not have any income, but acknowledged that she received the Canada Pension. She receives slightly over \$1,000 a month from two pensions.
- [172] She said also that her sons give her money for food. At the time of discovery, she had \$200,000 in the bank and \$60,000 in bonds. She also has one Class A share in the company.
- [173] I turn now to the evidence given by Yen Kam Lee at trial. She was born in China on September 4, 1927. She is 75 years old. She was married to Mr. Lee for 23 years. They met in HongKong and at that time discussed marriage. He sponsored her to come to Canada because he wanted someone to look after him, and she did so. She washed his clothes and made his meals and they loved each other.
- [174] Her sons have paid her expenses since Mr. Lee's death. She is paid the sum of \$1,000 a month by the company, and the company pays her taxes.

[175] She was also questioned with regard to the plaintiffs' relationship with their father, suggesting that they never came to see him. I have already expressed my opinion as to the weight to be given to such evidence, and that in any event, the assertions made on her behalf about the plaintiffs would not entitle Mr. Lee to disown them. Nor would they, in my opinion, reduce the legal and moral obligations which he owed to them.

[176] The witness also gave somewhat vague evidence of two conversations between Maureen and the father, when she says she was present. The evidence was basically led by her counsel. I will refer to two passages from her evidence which contains the gist of it:

Yes. Yes, he said that the daughter had asked him for a quarter of the company. Dad said it's been so long ago, how do I give you? Then the daughter said, "If you don't give me now, sooner or later I'll get."

And

She asked Dad to give. The Dad said no. And he said, "How could I?" The daughter said, "You", she said, "You don't give it to me now, I will sooner or later get it." Dad said, "How can you get it?" And people were upset.

Her evidence was that the daughter, Maureen, wanted shares in the company.

[177] She confirmed that her bonds then had a value of \$80,000 and that she had \$220,000 in savings in the bank. Before her husband died, he paid for everything, so she did not have to spend any money. She saved it. After he died, she has been able to save, "a little bit over \$100 a month" out of the \$2,000 per month she received, being \$1,000 from the company and \$1,000 in pension payments. She also received \$60,000 from the estate. If it is "included" she has "a little bit over \$300,000" in the bank.

[178] The witness said that she takes medication for high blood pressure. She is fairly active. She does "swimming and some relaxings, martial arts." She also walks in the park. She feels that she is "in good shape".

[179] On cross-examination, the witness confirmed that Mr. Lee often went to Maureen's house to play Mahjong, and she took him to the race track. She confirmed also that Margaret would come to their home on family occasions.

[180] She was questioned about the sons' agreement to look after her. I will refer to some of her evidence in this regard:

Q You have an agreement with the three sons of Mr. Lee that they will look after you financially?

A If he have talked to the sons I was not aware.

Q No, I'm talking about you having the agreement with them?

A Well, I do not ask the sons. The sons just told me that they would take care of me.

Q And the amount of money you're receiving now is sufficient for your current expenses?

A Well, it is not sufficient. I am so old now, I'm concerned. As I'm getting old, I would have more illness and medical conditions.

Q And if you need more money, it's your understanding your sons will see that it's paid to you or for you, correct?

A Well, it's hard to say. Sons are taking care of me now but in the future, who knows. They may not have enough money to take care of me.

She was then questioned as to whether there was any other reason, than the lack of money, that the sons might not take care of her. And her evidence continued:

A Well, I did not give birth to these children and I have no guarantee if they would take care of me for the rest of my life.

Q Anything else?

A What do you mean by anything else?

Q Any other reason that you are aware of?

A Any reason of what?

Q That the sons won't pay the money necessary to pay your expenses in the future?

A Well, what reason did they want to ... do not want to take care of me. I did not give birth to them so this is the reason.

[181] The witness was then questioned about a document produced by the defendant brother which apparently evidences a loan made by her to the company with a balance owing of \$122,295.14 as of December 31, 1996. She did not recognize the document and did not know anything about a loan. In particular, she said that she had no knowledge of any loan by her to the company. She also could not recall the company paying her \$3,500 on August 24, 1996 and \$1,400 on September 26, 1996 because it was "too long ago".

[182] Mr. Millar then called William Lee to the stand to give evidence as to the company records and whether or not the monies were owed by the company to the stepmother. On direct examination, he didn't know if any monies had been paid to Ms. Lee to reduce the balance owing as of December 31, 1996. On cross-examination by his counsel, Mr. Rotstein, he said he had no idea whether the document reflected accurately the records of the company. He didn't know who prepared the document. He did not believe that the stepmother had lent any monies to the company.

[183] I turn now to the law. The leading case on the Wills Variation Act, of course, is the decision of Chief Justice McLachlin, speaking for the court, in *Tataryn v. Tataryn* (1994), 93 B.C.L.R. (2d) 145 (S.C.C.). In that case, the bad son, as perceived by the testator and for which reasons were given in the will, was disowned. Mr. Tataryn left his entire estate to the good

son, leaving his wife a life estate in the matrimonial home, and the beneficiary of a discretionary trust composed of the estate's residue. The good son was a trustee and residuary beneficiary.

- [184] In commencing her analysis of the language of the Wills Variation Act and the law, the Chief Justice noted that by s.2 the Court was required to determine whether the testator had made "adequate provision" for his spouse and children, and that if the answer is in the negative, the Court, "may in its discretion order that the provision that it thinks adequate, just and equitable, in the circumstances, be made out of the testator's estate for the spouse or children. The search is for contemporary justice. The ultimate question is, what is "adequate, just and equitable" in the circumstances judged by contemporary standards.
- [185] Her Ladyship went on to dispose of arguments that the test of what was adequate, just and equitable was a needs-based test. She cited with approval the oft-quoted passage of Duff J., as he then was, in *Walker v. McDermott*, [1931] S.C.R. 94 at p.96, which is worthy of repeating:

What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving affect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view) consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and other circumstances, reference ought to be had. (My emphasis).

- [186] Her Ladyship then noted that what was adequate, just and equitable had to be viewed in light of current social norms, and that two sorts of norms were available and had to be addressed; the first being the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise, i.e., legal obligations; the second being society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standard, i.e., moral obligations. The two norms provide a guide to what is adequate, just and equitable in the circumstances of each case. Madam Justice McLachlin then went on to consider what the testator's legal responsibilities were during his lifetime, noting that those obligations reflect social expectation. And reference was made to a testator's legal obligation under the Divorce Act, R.S.C. 1985, c.3, family law Legislation and the Law of Constructive Trust and the leading cases are cited.
- [187] Madam Justice McLachlin also noted that the legal obligation of a testator may also extend to independent children, which is the case here. She says at p.156:

And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.

[188] I will pause here to note that in the case at bar in my view, the principles of unjust enrichment indicate a legal duty by the testator, during his lifetime, to the plaintiffs for their substantial contribution to his estate. I will return to this point in a moment.

[189] Her Ladyship next turned to the moral duties owed by a testator to his spouse and children; pointing out some of the difficulties involved in formulating and then rewarding the recipient of the moral duty. She points out that most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow; that some provisions should be made for independent adult children as well, but depending upon the size of the estate and whether circumstances negate the existence of such a moral obligation.

[190] Madam Justice McLachlin then went on to delineate how the Court should balance conflicting claims against each other. Where the estate permits, all should be met. Claims which would have been recognized during the testator's life should generally take precedence over moral claims. As between moral claims, some may be stronger than others and the Court must weigh them.

[191] Her Ladyship ends her analysis of the law by stating the following at p.157 with regard to the wide range of options, any of which may be considered appropriate in the circumstances of a particular case:

In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and it is to be interfered with not lightly but only insofar as the statute requires.

The question in most cases is whether the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms. If so, the court must make an order which achieves the justice the testator failed to achieve.

[192] Chief Justice McLachlin then went on to apply the test in the case before her. She dealt first with the testator's legal responsibilities during his life towards his then spouse. His first obligation was to maintain her. The marriage was a long one and she had worked hard and contributed much to the assets she and her husband had acquired. Her Ladyship found that at a minimum, the widow was entitled to recover that which she would have been entitled to (maintenance and a share in the family assets) had they separated.

[193] The Chief Justice then turned to the moral claims on the testator. She observed that the widow had a high moral claim to be provided for in the "extra years" after her husband's death. Her Ladyship said at p.158:

Mr. and Mrs. Tataryn regarded their estate as being there to provide for their old age. It cannot be just and equitable to deprive Mrs. Tataryn of that benefit simply because her husband died first. To confine her to such sums as her son may see fit to give her, as the testator proposed, fails to recognize her deserved and desired independence and constitutes inadequate recognition of her moral claim.

She also found that the remaining moral claims of the two grown and independent sons could not be put "very high", noting that "there is no evidence that either contributed much to the estate." Her Ladyship concluded at p.158:

The "legal claims" of Mrs. Tataryn entitled her to at least half of the estate and arguably to additional maintenance. Additionally, her "moral claim" to the funds set aside for old age is strong. These claims indicate that an "adequate, just and equitable" provision for her requires giving her the bulk of the estate. The moral claim of the sons is adequately met by the immediate gift of \$10,000 awarded by the trial judge to each of them, and a residuary interest in a portion of the property upon the death of Mrs. Tataryn. It may be noted that neither son contested the trial judge's order giving John a portion of the estate.

[194] I return to the claim of Yen Kam Lee, and in this regard I make the following observation. She is 75 years of age. It was a second marriage for both of them, and it lasted 23 years. Her present standard of living seems to be the same as that which she enjoyed while she was married to Mr. Lee. And she was content with the arrangements made for her in his Will, and outside his Will with the sons, by Mr. Lee, until the plaintiffs brought their action. Finally, the widow did not contribute to the assets acquired by Mr. Lee, including the company, all of which was attained well before their marriage, and through the effort of the first wife and of the children as earlier described. Mr. Lee would have been about 70 years old when the couple were married. However, I am satisfied that Yen Kam Lee did look after him during their marriage in the manner described.

[195] It is clear that Mrs. Lee continues to live somewhat frugally, as she and Mr. Lee did before his death. She continues to save money. At the present time, she receives slightly in excess of \$1,000 per month in pensions and a further sum of \$1,000 from the company. She lives in a mortgage-free house having a value in excess of \$330,000. She has approximately \$220,000 in her bank account, and bonds having a value of \$80,000. And I am satisfied that she has received other sums from the company in the past.

[196] The question is whether, in these circumstances, Mr. Lee made adequate provision for her in his Will. What would the judicious father do in discharging both his marital and his parental duties, given the legal and moral duties owed to his widow, and those owed to his children?

- [197] Another factor which I believe should be considered is the fact that the brothers promised their father that they would look after their stepmother. And they have done so, through the company, since his death, and she has been adequately maintained, according to her testimony, when all of her incomes, including the payment from the company, are taken into consider. And I have no doubt that the three sons will continue to meet this family obligation to their stepmother, which was assumed at the request of their father.
- [198] Now, I am well aware of the fact that in *Tataryn*, Madam Justice McLachlin said that the widow, at a minimum, was entitled to be given that which she would have been entitled to, for maintenance and a share in the family assets, had the parties separated. She also said that to confine the widow to such sums as her son may see fit to give her, as the testator required, "fails to recognize her deserved and desirable independence and constitutes inadequate recognition of her moral claim." And the agreement of the three sons to look after her is said to be discretionary. This may depend in part on whether it is enforceable, but more I would suggest on the integrity of the three sons and it is a factor. It is in my view a source of income having some reliability. Finally, Mrs. *Tataryn* was given half the estate on the basis of the legal and moral obligations owed to her, and because her moral claim "to the funds set aside for old age is strong" an adequate, just and equitable provision for her required giving her the bulk of the estate.
- [199] I do not read *Tataryn* as saying that in every case the deceased spouse will recover at least one-half of the estate by virtue of the legal obligations owed by the testator under the Family Relations Act and so on, although that may be the starting point for consideration. When considering the testator's pre-death legal obligations to his spouse it is useful to consider s.65(1) of that Act and the circumstances surrounding the hypothetical separation of the parties. In this regard, it is noted that in *Tataryn*, Chief Justice McLachlin observed that both Mr. and Mrs. *Tataryn* were industrious and frugal, and that they both had amassed the estate which was held in his name. When dealing with the testator's legal obligations she observed the importance of the length of the relationship and the contribution of the claimant spouse, as well as the desirability of independence, when considering the share of each spouse in the estate. She also observed that in that case there was no evidence that either of the competing sons contributed much to the estate. These are not the facts of the present case.
- [200] In this case, it was Mr. Lee's first wife who contributed substantially to the amassing of the estate, not his present widow. Both plaintiffs also contributed substantially to that estate. And it would seem that the desirability of independence here is not as important a factor. Further, the principles of unjust enrichment reflect a legal duty by the testator to the plaintiffs, although independent children, by reason of their substantial contribution to the estate. And the determination of what is adequate, just and equitable as regards Yen Kam Lee cannot be made in a vacuum. The fact that the plaintiffs have competing claims, legal as well as moral, must be considered as well. In my opinion, having considered the legal and moral obligations pertaining to the various claimants, as well as the gifting of the Class

B, Class C and Class D shares to the three sons, I have concluded that adequate, just and equitable provisions for each claimant is met by dividing the residue of the estate equally among Yen Kam Lee, Margaret Chan and Maureen Fong; which brings me to the claim of the plaintiffs.

(b) The Claims of the Plaintiffs

[201] I have already expressed my opinion that Mr. Lee had legal and moral obligations to the plaintiff daughters and to the defendant sons as well. And it will be seen that in my view his duties owed to the sons were well met long ago when they were given the Class B, Class C and Class D shares in the company. While those shares in the company did not form a part of Mr. Lee's estate at the time of his death, I am of the opinion that in determining what is adequate, just and equitable for the claimants in this case, I can take into consideration the fact that during Mr. Lee's lifetime, he gave those shares to his three sons in a company then having a value of approximately \$5,500,000, and to the exclusion of the plaintiff daughters.

[202] There is some authority for this proposition contained in the decision of the Court of Appeal in *Morris v. Morris* (1982), 41 B.C.L.R. 239, wherein MacFarlane J.A. gave the judgment of the court. In that case, the testator left his entire estate to his second wife. Each of his two younger children, who did not receive anything under the will, had previously received from the father shares in a private company valued at \$79,000. The testator's two oldest children, who also did not receive anything under the will, applied pursuant to the Wills Variation Act for provision out of their father's estate and they succeeded. At p.253, MacFarlane J.A. stated:

Very different circumstances prevailed at the time of his death. To give effect to this statute one must proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty in the circumstances existing at the date of his death. The trial judge held that the testator had discharged his parental duty by having provided for the maintenance, education and support of the children until they were established in life, and that one of the motives of the testator, in not making any further provision for his children in the will was that "too much money was no good for children". Presumably, he felt that his duty was to give them a good education and a good, even expensive, upbringing, but not to spoil them by excessive gifts of capital. But he had bestowed valuable gifts upon Derrick and Dennis when he transferred his shares in Morris Agencies Ltd. The trial judge failed to take that into account, and to consider whether his failure to treat his four children equally, in respect to distribution of capital, was in the circumstances a breach of parental duty. Indeed, it appears that the testator overlooked that question.

In exercising its discretion under the Act the court ought to take the greatest care to appreciate the motives of the testator and should not merely make a new will for him. His motives, derived from the alternate provisions of his will and from his conversation with Dr. Rogers, was to treat his children equally, in the sense that each of them ought to be given an equal opportunity to do well in life. His intention went beyond mere support and education, but to capital advancement.

Otherwise, he would not have given Derrick and Dennis his shares in Morris Agencies Ltd. His failure was to revise his will to recognize legitimate expectation of his other two children to share his capital assets to some degree. (My emphasis).

And further down the page,

The estate and Mrs. Morris have sufficient assets to provide adequately for her, and for the children. Derrick and Dennis have been provided for outside the will. I have concluded there has not been adequate provision made for the proper maintenance and support of Diana and David, within the broad meaning given to that language in the authorities. (My emphasis).

[203] While Morris was concerned in part with the testator's motives, in my view it emphasizes the importance of a testator's distribution of capital whether in or outside of the will. If statutory and common law fairness is the test, the distribution of capital assets outside the will, whether or not to a beneficiary, should be taken into consideration when determining what is adequate, just and equitable.

[204] It is my opinion that a judicious spouse and father of a family seeking to discharge both his marital and parental duties in the circumstances existing at the date of Mr. Lee's death would have considered the situation, something along the following lines:

"The boys were given the shares in the company or the company long ago. The company continues to do well, as have the boys. That gift will constitute their inheritance.

As for the girls, I will give to them my 29 Class A shares. And after giving the grandsons \$10,000 each, the girls will share the residue of my estate with my wife."

[205] In my view, in the circumstances, one half of the Class A shares and one third of the residue of the estate would be adequate, just and equitable provision for each of the plaintiffs. I am similarly of the view that a disposition of one-third of the residue to Mr. Lee's second wife, Yen Kam Lee, together with the articles of personal, domestic and household use and so on left to her in the Will, would be adequate, just and equitable provision for her as well.

[206] In summary then, I would vary the Will as follows:

- (1) The legacies to the plaintiffs in sub-paragraphs (I) and (II) are deleted. The legacies to the three grandsons of \$10,000 each remain.
- (2) Clause 3(d) is amended to provide as follows: To divide all my Class A shares in Nam Wah Tong Holdings Ltd. equally among my daughters, Margaret Chan and Maureen Fong.
- (3) Clause (e) will remain in favour of the wife, Yen Kam Lee.
- (4) Clause (f) is amended to provide for the division of the residue of the estate equally among the wife, Yen Kam Lee, and the daughters, Margaret Chan and Maureen Fong.

[207] Costs may be spoken to if counsel do not agree that they should follow the event.

"S.W. Hood, J."

The Honourable Mr. Justice S.W. Hood

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