



Supreme Court
New South Wales

Case Name: Horn v GA & RG Horn Pty Ltd

Medium Neutral Citation: [2022] NSWSC 1519

Hearing Date(s): 12 – 16, 19 – 23 September 2022; 4 – 6 October 2022;
submissions 18 and 26 October 2022

Decision Date: 10 November 2022

Jurisdiction: Equity

Before: Meek J

Decision: Estoppel claim made out. Parties to bring in short minutes.

Catchwords: ESTOPPEL — Estoppel by encouragement — estoppel by acquiescence — Farming properties held through a company — Company incorporated and initial management shares held by plaintiff’s father and paternal grandfather – Plaintiff claims his father gave encouragement for plaintiff and his wife to move onto one of the properties and subsequently also farm the other property and made promises to leave the shares in the company (or the properties) to the plaintiff upon his father’s death — Father makes various Wills leaving shares to plaintiff but 5 days prior to his death makes a Will leaving his estate to his wife (plaintiff’s mother) — Plaintiff claims father estopped from doing so and shares held on trust for plaintiff — Mother claims plaintiff did not abide by terms of promises by failing to make payments to father and failing to continue farms as “working farms” — Estoppel case made out

ESTOPPEL — Consideration of alleged conditionality of promises — Whether promises of testamentary inheritance of shares conditional upon plaintiff(s) making payments for benefit of the deceased albeit

payments made to corporate entity — Whether promises conditional upon plaintiff(s) continuing to work farms for the remainder of deceased's life — Effect of deceased's post promise intervention suggesting alternative use of property for members of plaintiffs' family

ESTOPPEL — Estoppel by encouragement — estoppel by acquiescence — Requirements — deceased aware of intended reliance — Life-changing decisions with practically irreversible consequences of a profoundly personal nature beyond the measure of money — Application of principle in *Donis v Donis* (2017) 19 VR 577; [2007] VSCA 89 — Substantial detrimental reliance established

TRUSTS — Time from which a constructive trust arises — Time of the conduct which gives rise to the trust occurred is generally when a plaintiff acts in reliance on the promise or expectation such that it later becomes unconscionable for the promisor to resile

EQUITY — Equitable remedies — Defences to specific performance — Unclean hands — consideration of onus of proof — Consideration of operation of maxim used as a defence against a party seeking equitable relief based on estoppel

PAYMENT — Consideration of payment obligation being waived or not pressed

LOANS — Onus of proof — Absence of evidence bearing directly on gifting of monies — Whether loan can be inferred from book entries without movement of money — Requirement for underlying agreement — Consideration of *Manzi v Smith* (1975) 132 CLR 671; [1975] HCA 35 — Whether inference of agreement open — Whether within the scope of authority of accountant to characterise payment as a loan and prepare company financial statements and tax returns accordingly

GIFTS — Absence of evidence bearing directly on

gifting of monies — Assessment of evidence — Gift established — In any event arguably a presumption of advancement arises

PRACTICE — Pleadings — Pleading of estoppel claims — Test of pleading is not greatest fidelity to facts but materiality of facts — Pleading events or contingencies need not be stated if they are not alleged to affect a plaintiff's right or title or claim to relief

CIVIL PROCEDURE — Subpoenas — Privacy and access issues — If parties have concerns regarding privacy but do not have technical capacity to address that they should actively seek the assistance of their legal representatives or other appropriate professionals who can assist them to resolve production issues in a way that fairly enables production of relevant material but otherwise preserves the integrity of matters that are properly the subject of privacy concerns

EVIDENCE — Photographic evidence — Admissibility — No requirement to prove who took the photograph — Photograph admissible where a witness is able to state the photograph accurately depicts what is shown of the relevant scene, item or facts — Nonetheless distortion of appearance may be ground to make a photograph inadmissible or use unfair

EVIDENCE — Self-incrimination — Informing witnesses of rights — Obligation under s 132 Evidence Act 1995 (NSW) regarding objections pursuant to s 132 Evidence Act to answering questions

DECLARATORY RELIEF — Conditioning relief on plaintiffs not being permitted to enforce claim against the estate in respect of a "director's loan" recorded in company accounts — Further nunc pro tunc declaration sought — Declined on the facts

TAXES AND DUTIES — NSW company shares — whether dutiable property — Marketable securities not dutiable property — Court otherwise will not pre-empt what duty or tax liability may flow from findings

regarding loan and gift transactions

ANCILLARY RELIEF — Order sought empowering Registrar to execute transfer documents — Court may condition orders with an “alternative execution” provision if circumstances demonstrate probable futility of signing request — Probable futility not demonstrated

ORDERS — Application for referral of matters to Regulator — Basis on which referral is made discussed — Whether appropriate in the circumstances — Papers not referred

Legislation Cited:

Civil Procedure Act 2005 (NSW)
Crimes Act 1900 (NSW)
Corporations Act 2001 (Cth)
Duties Act 1997 (NSW)
Evidence Act 1995 (NSW)
Income Tax Assessment Act 1936 (Cth)
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Succession Act 2006 (NSW)
Supreme Court Act 1970 (NSW)
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Associated Food v Baxter [1999] NSWSC 236
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HCA 77
Commonwealth Bank of Australia v Gaszewski [2006]
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Keskin v Keskin [2019] FamCA 384
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Manzi v Smith (1975) 132 CLR 671; [1975] HCA 35
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Grippaudo) [2012] NSWSC 587; (2012) 16 BPR 31,011
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(2021) 106 NSWLR 227; [2021] NSWCA 242
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Vukic v Grbin [2006] NSWSC 41
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Watson v Foxman (1995) 49 NSWLR 315
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Category:

Principal judgment

Parties:

Michael George Horn (First Plaintiff)
Adele Ruth Horn (Second Plaintiff)

GA & RG Horn Pty Ltd (First Defendant)
Barbara Constance Horn (Second Defendant)

Representation:

Counsel:

C Mantziaris / I S Young (6 October 2022) / A K
Flecknoe-Brown (12 September 2022) (Plaintiffs)
N Simpson / D Yazdani / M Bennett (26 October 2022)
(Defendants)

Solicitors:

Arnold Lawyers (Plaintiffs)
Tranter Lawyers (Defendants)

File Number(s):

2021/75707

JUDGMENT

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HIS HONOUR:

Introduction

The claims

- 1 These proceedings are brought by the first plaintiff Michael Horn (**Michael**) and the second plaintiff, Adele Horn (**Adele**) and involve disputed claims over farming properties in the Vacy district (north of Maitland) and in the Dungog Shire: CB 2.1/232, CB 3/80.5.
- 2 In the alternative there is a family provision claim by Michael in relation to the estate of his late father Ross George Horn (**deceased**) pursuant to the provisions of s 59 *Succession Act 2006* (NSW) (**Succession Act**).
- 3 The first defendant is a company G.A. & R.G. Horn Pty Ltd (**company**). The second defendant is the deceased's widow Barbara Constance Horn (nee Pryde) (**Barbara**).
- 4 The parties provided written submissions both prior to the hearing and on the final day of hearing as well as their counsel addressing orally on the final day of the hearing. Pursuant to an order on a discrete issue supplementary submissions were also provided.
- 5 I will make reference to the oral submissions by transcript page reference. For convenience, I will refer to the various written submission documents as follows:
 - (1) the plaintiffs' opening written submissions (**POS**), the plaintiffs' opening reply (**POR**), the plaintiffs' concluding written submissions (**PCS**) and the plaintiffs' supplementary submissions on remedy (**PSSR**); and
 - (2) the defendants' opening written submissions (**DOS**), the defendants' concluding written submissions (**DCS**), and the defendants' supplementary submissions on remedy (**DSSR**).
- 6 The essential claim of the plaintiffs is that the deceased made representations to Michael (or them) regarding shares in the company holding two properties

and as a result of the representations they farmed and improved the properties to their detriment. The deceased made various Wills leaving the shares (and thus indirectly the properties to Michael). But 5 days prior to his death the deceased changed his then Will and left the shares to Barbara. The plaintiffs claim the shares under estoppel principles.

- 7 The defendants submit that the proceedings should be dismissed and say the papers should be referred to the Australian Taxation Office (**ATO**) for reasons explained below. The defendants also submit in the event the proceedings are not dismissed, only a 'modest' family provision order should be made in favour of Michael, having regard to lifelong contributions to the deceased's estate by Barbara: DCS [3].

Some nomenclature

- 8 There are various properties referred to in the proceedings. However, for introductory purposes it suffices to note that the properties include "**Rossdale**", "**Gostwyck Flats**", "**Lennoxton**" and "**Failford**".
- 9 In these reasons I will refer to:
- (1) a part of Gostwyck Flats that has been sold as "**Gostwyck Sold**" or "**Lot 6**" and a part that has been retained as "**Gostwyck Remnant**" or "**Lot 5**" (as explained below);
 - (2) the net proceeds of sale of Gostwyck Sold as "**Gostwyck Fund**";
 - (3) Rossdale and Gostwyck Flats as the "**properties**";
 - (4) pleaded arrangements between the plaintiffs and the deceased regarding Rossdale (**Rossdale Arrangement**) and (**Gostwyck Flats Arrangement**) as the **Arrangements**;
 - (5) Water Access Licences (WAL14722 and WAL14723) held by the company in respect of Rossdale as the "**WALs**";
 - (6) Rossdale, Gostwyck Remnant and the WALs as the "**claimed property**";
 - (7) the deceased's shares in the company as the "**claimed shares**";
 - (8) the partnership known as 'M & A Horn' through which Michael and Adele conducted farming activities on the properties and I will refer to this simply as the "**partnership**"; and
 - (9) pleaded representations by the numbers assigned in the pleadings "**representations 1-6**" including variants of representation 1 as "**variant 1A-1C**";

- (10) a sum of \$817,417 sourced from Gostwyck Fund alleged to have been lent to the deceased and allegedly gifted to by the deceased to Michael or the plaintiffs which sum was used to facilitate the purchase of Failford as the “**\$817,417 amount**”; and
- (11) the Danmah Family Trust (see below) as the “**DFT**”.

Summary of outcome

10 I have identified 15 issues below for particular determination in the proceedings. For the reasons that I have outlined below, I determine regarding those 15 issues as follows.

- (1) Representations were made by the deceased to Michael and or the plaintiffs (issue 1):
 - (a) in 1991, 1993 and 2000 that should Michael come onto Rossdale and later onto Gostwyck Flats (variant 1A) and farm at his own expense (variant 1B) the deceased would by his last Will leave the claimed shares to Michael when the deceased died (giving by that means Michael indirect access and use to the properties) (representation 1);
 - (b) that if Michael did come onto the properties he could do what he wished with the properties including relevantly in the sense of not being confined as to their use in the way raised in issue 5 (representation 5); and
 - (c) in 2002 that the deceased approved Michael building a house on Rossdale (representation 3).
- (2) The deceased’s promises being representations 1 (including variants), 3 and 5 (**promises**) were sufficiently clear and unequivocal to permit Equity’s intervention and also declaratory relief (issue 2).
- (3) Contrary to the defendants’ contention, the promises forming the estoppel case were not generally conditional upon aspects of the Arrangements between the plaintiffs and the deceased (issue 3).
- (4) The promises were not conditional upon payment of remuneration by the plaintiffs to the deceased under the Arrangements, and relevantly:
 - (a) at least from 1993 there was a condition of payment regarding the Rossdale Arrangement and from 2000 a request for payment regarding the Gostwyck Arrangement;
 - (b) such payment, though a term of the Arrangements was not an essential term of the promises;
 - (c) Michael and Adele did not completely and meticulously pay to the company or to the deceased sums of \$500 for each of the properties from 1993 and 2000 respectively under the Arrangements; and

- (d) the deceased from at least 2000 did not insist on strict payment under the Arrangements and by 2010 did not require payment of the \$500 amounts for each property.
- (5) As to any requirement for continued operation of the farms (issue 5) the deceased did not impose as an essential part of the promises that in order for Michael to receive the shareholding in a company the properties had to be worked as "ongoing farms".
- (6) A relationship was assumed between Michael and the deceased (issue 6) of sufficient seriousness that it was susceptible to being enforced in Equity. The promises on the deceased part, were initially oral and found a more formal legal expression in his 2006 Will in gifting his shares in the company to Michael.
- (7) Michael and Adele acted reasonably in reliance on the promises (issue 7).
- (8) The deceased both knew and intended that Michael and or Adele would act in reliance on the promises (issue 8).
- (9) Michael's and Adele's reliance on the promise was to their detriment (issue 9).
- (10) By 2017 it would have been unconscionable for the deceased to renege on his promises with Michael and Adele and, subject to the remaining issues, it is unconscionable for Barbara in her capacity as executor and sole beneficiary of his estate to hold the deceased shares other than on trust for Michael (issue 10).
- (11) The events post 2017 regarding the subdivision of Gostwyck Flats and the proposed sale of Rossdale did not disable the plaintiffs from the relief that they seek in relation to the claimed shares, and indirectly the claimed property (issue 11).
- (12) Michael and Adele are not guilty of unclean hands so as to preclude Equitable relief to Michael or them (issue 12).
- (13) The \$817,417 amount was a loan from the company to the deceased, a gift from the deceased to Michael and a loan from Michael to the DFT (issue 13).
- (14) The estoppel case succeeds and regarding precise relief the parties should bring in short minutes of order to give effect to the findings I have made, to the general intent that:
 - (a) a declaration ought to be made that Barbara in her capacity as administrator of the deceased's estate holds the claimed shares on trust for Michael;
 - (b) the declaration should be subject to noting Michael's and Adele's undertaking that they by themselves or by the company will not be permitted to also enforce a claim by the company (or them) against the estate in respect of the \$817,417 amount.

- (15) Strictly speaking it is unnecessary to deal with the alternative claim for family provision relief and having regard to that and also the fact that no submissions were made by the plaintiffs in respect of the family provision claim, I expressly do not venture any view regarding possible relief regarding the family provision claim (issue 15).
- 11 I note for clarity's sake I do not accept there was an additional representation (representation 6) that should Michael predecease the deceased Adele would receive what Michael was to receive under the first representation. However, Michael did not predecease the deceased and so the alleged representation bears no practical significance to the outcome.
- 12 Prior to dealing with the 15 particular issues in the proceedings it is appropriate to outline some details regarding the family, Rossdale and Gostwyck Flats, the company and certain other properties. Much of that material is not seriously disputed. The facts that I set out in relation to those matters should be regarded as findings of the Court unless qualified or otherwise indicated.
- 13 I will later make particular findings regarding the facts on the 15 particular issues.

Family details

The deceased

- 14 The deceased was born in July 1930 and died on 20 March 2020 aged 89. He was the only child of George Amos Horn (**Amos**) and Gladys Horn (**Gladys**): CB 3/240, 331.
- 15 Within the family the deceased was referred to as "Ross", "Dad" and sometimes as "Papa": CB 2.1/154.
- 16 The deceased grew up at Vacy attending the local public school and then attending Boys' Grammar School at Morpeth: CB 3/241, 332.
- 17 After he left school he worked in his parent's store at Vacy.
- 18 The deceased worked in the Vacy store until about 1952. The deceased and his parents left Vacy and moved to Maitland where the deceased purchased the hardware store and ran it with Amos's help: CB 2.1/232.
- 19 Barbara was born in June 1936 and is currently 86 years old. Barbara was educated at Maitland Girls High. She spent a short time studying accounting at

Sydney Technical College in 1950 whilst working at the National Bank and undertook other studies in accountancy at Maitland Technical College from 1953 until 1955: CB 2.1/398.

- 20 At least during part of her studies Barbara worked for her father in his wholesale business, manufacturing confectionery: CB 2.1/398 – 399.
- 21 The deceased and Barbara met in 1955, were engaged in 1957 and married in 1958: CB 2.1/399.
- 22 In 1958 following his marriage to Barbara the deceased and Barbara built their first home at Tocal Road Bolwarra Heights: CB 3/242, 333.
- 23 On 20 May 1959, the company was incorporated.
- 24 In about June 1959 (CB 2.1/232, 3/241, 334) or 1960 (CB 3/242) the deceased sold the hardware store and commenced working on the family properties.
- 25 The deceased had a prominent stutter, from which he suffered for most of his life. In his later years he became deaf. In the last few years of his life he suffered from certain medical issues and had some eyesight issues: CB 2.1/227 [17].
- 26 Barbara asserts that the deceased was a private person, would not disclose his private affairs with friends and that indeed he rarely disclosed private matters to his family except the discussions they had when he would change his Will from time to time: CB 2.1/402.

The family

- 27 The deceased and Barbara have two children namely Michael and Philippa Furner (**Philippa**). Michael was born in July 1966 and is currently aged 56. Philippa was born in January 1961 and is currently aged 61.
- 28 Clearly within the family Barbara seemed, at least in later years if not earlier, to align herself with Philippa, rather than with Michael.
- 29 Barbara claims that Michael and the deceased had a difficult relationship citing occasions when the deceased was apparently disgusted that he had called in at Rossdale at mid- morning times and Michael failed to even offer him a cup of tea: CB 2.1/404.

- 30 I did not gain the impression and do not find that the deceased's relationship with Michael was particularly vexed or difficult. However, clearly the events of later years especially from September 2017 until the deceased's death were troubling for the deceased and Michael and caused strain within the family relationships.
- 31 Michael is married to Adele (nee White: CB 2.1/175) who was born in August 1966 and is currently aged 56.
- 32 Adele had lived in another de facto relationship/marriage from 1987 to 1991: CB 2.1/162.
- 33 Michael and Adele started living together in about May 1992. They married in September 1993. They have two children Nicholas born in August 1994 (now 28) and Danika born in August 1997 (now 25).
- 34 Nicholas has a de facto partner Kate Kelly (**Kate**) with whom he has two biological children. Kate has one child from a previous relationship: CB 2.1/226.
- 35 Danika is in a de facto relationship with Anthony Lawrence: CB 2.1/226.
- 36 Philippa is married to Stephen (**Steve**) Furner and they have three children being Tristian born in October 1982 (now aged 40), Hamish born in July 1984 (now aged 38), and Prudence born in May 1986 (now aged 36): T 1030; CB 2.1/226; 5/54.
- 37 In September 1978 Gladys passed away and within a few years Amos also passed away in 1980, aged 81: CB 3/243.
- 38 In March 1988 the deceased and Barbara moved to live in King Street Lorn: CB 2.1/352; 3/244.
- 39 Hamish works as an accountant with RHK Equities as an accountant (T 876) (having at a prior stage worked for Branxton Engineering Pty Ltd) and Philippa works as a School Support Officer with the NSW Department of Education.

Others including various professionals

- 40 Apart from the family members, the evidence referred to a number of other parties including the following persons:

- (1) Barry White and Elaine White - sharefarmers who lived in the Greenhouse on Rossdale (**Greenhouse**) from at least 1992 to 2000 (when Barry died): CB 2.1/163;
- (2) Andrew Saide – a friend of the deceased and from 2021 a director of the company: CB 2.1/337;
- (3) Alasdair Smart (Pearson Smart at Maitland) - accountant for the deceased and Barbara and the company from 1994 to May 2021: CB 2.1/130, 146;
- (4) James Carr (Anova Chartered Accountants) – accountant for the company from May 2021: CB 2.1/146;
- (5) Daryl Peter Lawrence (Waller Fry & Faulkner) – solicitors for the deceased and Barbara and the company at least from 2006 to 2016: CB 3/18.1, 18.5, 19; T 687, 743
- (6) Jim Meredith – (Meredith & Co at Maitland) – solicitor for the deceased (from October 2016) and for Barbara and the company from October 2016 until about early January 2020: CB 3/23.1; CB 2.1/324;
- (7) Randeep Singh – (Tranter Lawyers at Maitland) – solicitor for Barbara from about early January 2020: CB 2.1/324;
- (8) Janelle Banks (Thompson Madden at Orange) – solicitor for Philippa and Hamish from approximately 2019: CB 3/144.
- (9) Bruce Killingly (Get Planning) – financial adviser to the deceased and Barbara from about March 2018: CB 3/26.4;
- (10) Greg Lidbury (Bowe & Lidbury at Rutherford) – a stock and station/real estate agent: T 732;
- (11) Dr Donna Booth (Sempill Street Surgery at Maitland) – a medical practitioner for the deceased and Barbara; and
- (12) Beryl Mudd – a long-time friend of the deceased and Barbara and witness to the last Will of the deceased (15 March 2020).

Rossdale and Gostwyck Flats

- 41 Descendants of the Horn family immigrated to Australia from Baden Germany the mid 1800s: CB 2.1/232; 3/324. In 1873 Johannes Horn was naturalised and in May 1877 purchased a 525 acre property “Cory Vale” at Vacy located across the Paterson River opposite the Farmers Hotel in the Vacy Village: CB 3/325; T 651.
- 42 It is not necessary to recite in a detailed way of all the various landholdings referred to in the evidence. However, it is appropriate at this point to provide a degree of detail regarding two properties which feature prominently in the

evidence, being part of the claimed property, namely Rossdale and Gostwyck Remnant.

- 43 The two properties, which I will describe below, lie north of Maitland and Morpeth. Gostwyck Remnant is by direct line about 4 km north-east from Rossdale but about 7 km away by road (depending on the route taken): CB 2.1/242. There is about a seven to ten minute drive between the two properties: MFI 2; T 53.

Rossdale

- 44 Rossdale is a property at 598 Gresford Road, Vacy NSW (folio identifier 123/1063557) (**Rossdale**), on which Michael and Adele reside: CB 2.1/154.
- 45 Rossdale comprises land along both sides of Gresford Road, Vacy and at various times has included parcels individually known as Tillimby or Lennoxton: CB 2.1/155. In some parts of the evidence it is referred to as the “Vacy property”: e.g. T 812.
- 46 The two sides of Gresford Road are a ‘river side’ and a ‘hill side’: CB 2.1/162.
- 47 The ‘river side’ has a frontage to the Paterson River (CB 2.1/182). It is where the improvements to Rossdale including sheds and the house of Michael and Adele are located. The residential address (598 Gresford Road) is on this ‘river side’: CB 2.1/240.
- 48 The ‘hill side’ of Rossdale is basically grazing paddocks and timber: CB 2.1/240.
- 49 The plaintiffs contend that Amos purchased a farm “Rossdale” at Vacy comprising 226 acres on or about 22 December 1936: CB 1/61; CB 2.1/236, 238. There is some dispute on the pleadings regarding the correct title history of Rossdale. However, the current title of Rossdale and Gostwyck Remnant is clear and it is not necessary to make findings regarding the correct original title to the properties.
- 50 In about 1949 the deceased either purchased or received from his father Amos and two uncles a transfer of the property known as Tillimby (volume 5996 folio 84) which adjoined Rossdale: CB 2.1/236.

- 51 On or about 16 October 1959 Amos transferred Rossdale to the company: CB 1/61. The defendants dispute that the current title reference only came into existence in 2004: CB 1/138. It is not necessary to resolve that dispute.
- 52 In 1987 or 1988 Rossdale was subdivided to create three new title lots 11-13 in DP 773693 being (CB 2.1/161, 236, 238; T 656, 659):
- (1) lot 11 an area of about 7.5 acres (**Lennoxton**) on the south-western 'hill side' of Gresford Road and given to Michael by his parents as a 21st birthday present;
 - (2) lot 12 an area of about 94 acres adjacent to Lennoxton also on the south-western 'hill side' of Gresford Road; and
 - (3) lot 13 an area of about 130 acres situated on the 'river side' of Gresford Road.
- 53 The company retained lots 12 and 13: CB 2.1/238.
- 54 On or about 6 August 1992 a subdivision of Tillimby (folio 84) was registered: CB 1/61, 139. Folio 84 was subdivided into two parcels being one parcel of approximately 150 acres (lot 122) another parcel of approximately 76 acres (lot 2A): CB 2.1/239.
- 55 Lot 122 was sold by the deceased to a third party. Lot 2A was sold by the deceased to the company: CB 2.1/236.
- 56 Lot 2A was consolidated with lot 12 to create lot 121/918869 a parcel of about 170 acres (lot 121): CB 2.1/239.
- 57 On or about 2 February 2004, to get development approval to build a house on Rossdale (see below), the plaintiffs and the deceased caused the company to apply to consolidate the titles to "Rossdale" (lot 13 being 130 acres and lot 121 being 170 acres) to bring it up to one title of about 300 acres to satisfy planning requirements for having two houses on Rossdale being the Greenhouse and the house the plaintiffs proposed to build: CB 2.1/175, 237, 239. The consolidated title is the area currently known as Rossdale being folio identifier 123/1063557: CB 1/61, 139 – 140; 2.1/239.
- 58 Michael and Adele paid for the expenses associated with title consolidation even though the titles belonged to the company: CB 2.1/176.

59 Rosedale is currently described as comprised of river flats to soft undulating country. It is pasture improved, has numerous sheds, an office, cattle yards, 180 mega litre irrigation system with 25 acres under irrigation. It is zoned RU1 and R5 and has scope for subdivision: CB 2.2/78.

60 It has an appraised value of \$5.5M-\$6M: CB 2.2/79.

Gostwyck Flats

61 Gostwyck Flats is a property at 471 Dungog Road, Vacy NSW (folio identifier A/162949) (**Gostwyck Flats**). In some of the evidence the property is referred to as being located at Hilldale: e.g. CB 2.1/155; 3/163.

62 The history of Gostwyck Flats was explained by Michael in the evidence. It is not necessary for the purposes of the proceedings to recite the history other than to note as follows.

63 Gostwyck Flats was subdivided on or about 26 November 2018: CB 2.1/155, 188, 243. The evidence in the proceedings describes the subdivided property as follows:

- (1) Gostwyck Remnant/Lot 5 (folio identifier 5/1248814) - an area of 89.2 ha “proposed” for the plaintiffs’ son Nicholas; and
- (2) Gostwyck Sold/Lot 6 (folio identifier 6/1248814) - an area of 64 ha that in family discussions had been designated for the plaintiffs’ daughter Danika, which was sold on or about 10 December 2018 for \$840,000 with the net proceeds ultimately being paid to the company. The use of the net proceeds and in particular the \$817,417 amount to fund the purchase of Failford via the DFT is the subject of dispute (see issue 13 and below): CB 2.1/154, 243; 3/323.

64 A historical title search for Lot 5 showed it was created on 26 November 2018: CB 5/124. As at 6 September 2022 the property was subject to a mortgage to the National Australia Bank Ltd (**NAB**) and a caveat lodged by Michael: exhibit D7 (being a title search dated 6 September 2022): T 311. The caveat was lodged on 21 August 2020: CB 5/124.

65 Gostwyck Remnant is gently undulating grazing country. It is divided into numerous paddocks and has dams and a permanent creek. It has stockyards and shedding. It has an appraised value of \$1.3M to \$1.4M: CB 2.2/33 – 34.

- 66 Michael indicates that up until about the 1970s Gostwyck Flats was run by the company as a dairy farm under share farming arrangement with a neighbouring property to Gostwyck Flats called "Mirari", which he said was owned by Amos and sold in 1970: CB 2.1/242.
- 67 Barbara indicated Gostwyck Flats had been part of a larger lot of land known as Mirari (T 656) which was 1,000 acres and left to Amos' brothers John and Wesley: CB 2.1/416. Barbara later clarified that Amos bought out John's share and then later bought out Wesley's share in about 1970: T 644.
- 68 Seemingly Amos sold Mirari (T 656) and retained Gostwyck Flats.

The company

- 69 The company was incorporated on 20 May 1959.
- 70 There are various materials in the proceedings bearing upon the details of the company. These include pleadings, a company search (CB 5/52-68), the formal company register (exhibit D11) and some affidavit evidence.
- 71 The earliest documents in the company register date back to approximately 1984. The earliest records on the company search appear to be reference to an annual return received by ASIC on 1 January 1991: CB 5/60. The search also makes reference to two pre-ASIC documents received in 1990.
- 72 Most of the details regarding the shareholding of the company were admitted on the pleadings.

Memorandum of association and articles

- 73 The Memorandum of Association and Articles of Association are in evidence: CB 5/1-51.

Shareholding

- 74 On the incorporation of the company the Memorandum of Association reveals Amos and the deceased as having subscribed for one management share each: subscription table: CB 5/9; 1/58, 2.1/232.
- 75 The Memorandum of Association provided for the share capital of 50,000 shares of £1 each: clause 5 (CB 5/8).

- 76 The Articles of Association subdivided the company share capital into the following categories:
- (1) 200 management shares, which conferred upon the holder a right to vote at a meeting of members until such time as that share was transferred from its original allottee to another person;
 - (2) 29,800 ordinary shares which conferred no right to vote at a meeting of members until the death of all original allottees of management shares; and
 - (3) 20,000 ordinary "A" class shares which conferred no right to vote at a meeting of members: Articles clauses 4 and 76 (CB 5/13).
- 77 On the death of the original allottee of management shares, those shares converted to ordinary shares: clause 4(b) (CB 5/13).
- 78 At some point between 1 July 1965 and 17 December 1980 the company reorganised its share capital so that the issued share capital of the company consisted of:
- (1) 1 management share issued to Amos;
 - (2) 6 management shares issued to Barbara;
 - (3) 124 management shares issued to the deceased; and
 - (4) 1,700 ordinary shares with no right to vote issued to the deceased: CB 1/58 – 59.
- 79 On or about 11 June 2004 Michael was allotted one 'A' class ordinary share: Exhibit D11; CB 1/59. The minutes of meeting of directors establish that it was resolved that the one 'A' class share was issued on the basis that the share would only have rights to dividends and no other rights: Exhibit P11.
- 80 Up until 21 March 2019 the shareholding of the company was as follows:
- (1) the deceased - 124 management shares (presumably from December 1980 to 21 March 2019) and 17,000 ordinary shares (presumably from December 1980 to 21 March 2019): CB 5/57;
 - (2) Michael – 1 'A' class ordinary share issued on or about 11 June 2004: Exhibit P11; CB 2.1/233, 5/57; and
 - (3) Barbara – 6 management shares held presumably from December 1980 to 21 March 2019: CB 5/57-58.
- 81 On 21 March 2019 (about a year before the deceased's death) Barbara transferred her 6 management shares to the deceased: Exhibit D11 (also CB 1/59, 2.1/233[45], 5/57-58).

- 82 Immediately prior to the deceased's death the company had a share capital consisting of 130 management shares and 17,000 ordinary shares held by the deceased and one A class share held by Michael: CB 1/59.
- 83 On the death of the deceased the 130 management shares held by him were converted to ordinary shares: CB 1/59, clause 4(b) CB 5/13.
- 84 On 1 March 2021 all of the shares in the company held by the deceased were transferred to Barbara in her capacity as administrator of the deceased's estate and from that time the company has held share capital consisting of 17,130 ordinary shares with a right to vote held by Barbara and one A class share with no right to vote held by Michael: CB 1/59.

Directorship

- 85 The directors of the company have been and now are as follows:
- (1) initially presumably Amos and the deceased (although the evidence is not clear as to this);
 - (2) the deceased and Barbara for 36 years (1 July 1965 - 19 February 2002);
 - (3) the deceased and Michael for the next 18 years (19 February 2002 – 20 March 2020);
 - (4) Michael (20 March 2020 – 18 April 2020);
 - (5) Michael and Adele (18 April 2020 – 19 April 2021); and
 - (6) Barbara, Hamish and Andrew Saide (from 19 April 2021).
- 86 Barbara was the company secretary from 1 July 1965 to 19 February 2002. Adele was the company secretary from 19 February 2002 to 19 April 2021. Hamish has been the company secretary from 19 April 2021.

Banking arrangements

- 87 Barbara had experience as a bookkeeper by working in her father's business: T 666. When the company was initially set up Barbara did the wages and the deceased paid the accounts: T 667. As best she could recall Barbara thought that the company had one (bank) account and the deceased and Amos had separate accounts: T 667.
- 88 Evidence regarding the company's bank accounts included the following:

- (1) the deceased initially controlled the company accounts: T 530 (Mr Smart);
 - (2) there was four or possibly five company bank accounts in the early 2000s: T 554 (Mr Smart);
 - (3) at some point of time there ceased to be company bank accounts perhaps in 2012 (T 554) or possibly in 2010: PCS page 38/59.
- 89 The evidence does not disclose why there might have been four or five company accounts in the early 2000's.
- 90 A table which is set out in an appendix to these reasons discloses that in 2012 and following there were at least some monies paid to the company recorded as rent being \$2,994 in 2012; \$1,362 in 2013; \$1,459 in 2014; \$2,272 in 2015 and \$963 in 2016.
- 91 Mr Smart indicated that the company was not registered for GST and essentially the entries for rent or agistment on the one hand from the partnership as an expense and as income for the company were simply book entries: T 556.
- 92 Subsequently, on or about 8 May 2018 the company opened an account with the NAB, which was controlled by Michael and Adele: exhibit P2. The catalyst for opening the account appears principally to have been for the purpose of facilitating the sale of Lot 6 and receiving and then paying out the net proceeds of sale of Gostwyck Sold: T 556 (Mr Smart).
- 93 From this point (8 May 2018) onwards until about 19 April 2021 when Michael and Adele ceased to be directors and Barbara, Hamish and Mr Saide became directors (21 April 2021) the company bank accounts were controlled by Michael and Adele: PCS page 37/59.

Assets – the properties and the water access licences

- 94 The WALs (1472 and 1473) are registered in the name of the company and the relevant access licence details are set out in title searches at CB 5/126-129.

Other properties

Residential properties

- 95 I have noted that the deceased and Barbara having initially lived at Bolwarra Heights from about 1958 moved in March 1988 to live in King Street Lorn: CB 3/242, 244.
- 96 From at least 1991 Michael and Adele lived at Lennoxton Road Vacy (i.e. Lennoxton): CB 3/0.1.
- 97 From at least 1991 Philippa lived at Vine Street Branxton: CB 3/0.1.

Failford property

- 98 One of the issues in the proceedings relates to discussions within the family in respect of the deceased's desire expressed in 2017 to benefit Nicholas through providing to him some part of Gostwyck Flats.
- 99 Discussions between the deceased and Michael led to Michael and Adele seeking some advice and an eventual subdivision of Gostwyck Flats with part (Lot 6) being sold with the intent to benefit Danika and part (Lot 5) retained with the intent of being for the benefit of Nicholas.
- 100 Because of what is described as the issue regarding the \$817,417 amount, there is necessity in the proceedings to clarify precisely what happened with the sale proceeds of Lot 6.
- 101 Danika did not wish to live on or receive Lot 6 in specie. Michael and Adele received some advice regarding this and there were discussions regarding ways to assist Danika, but also protect her against the prospect of the funds being accessed by her partner in the event of a relationship breakdown.
- 102 It was decided (by the deceased, Barbara, Michael and Adele) that Lot 6 would be sold to an external buyer, who happened to be a neighbour: T 752.
- 103 Michael indicates he set up the DFT to hold the funds that came out of the sale of Lot 6 so that he and Adele could provide for Danika's future: CB 2.1/26.
- 104 Michael states he decided to put the sale funds into the DFT and have the trustee purchase an investment property rather than give the funds (or land)

directly to Danika, so that Danika would have some protection in the event of a family law dispute with her current or any future partner: CB 2.1/27.

- 105 Barbara deposes to the deceased's sceptical approach to trusts being dismissive of them and referring to them as "untrustworthy": CB 2.1/406.
- 106 On 10 April 2018 (CB 3/60) Mr Smart settled the DFT: CB 3/27-62. Damah Pty Ltd (**Damah**) is the trustee for the DFT which is a discretionary trust. "Damah" stands for Danika, Michael and Adele Horn: CB 2.1/26.
- 107 The terms of the DFT named Michael and Adele as the beneficiaries and Michael is the "principal" of the DFT: CB 3/60.
- 108 Barbara states that Philippa had taken the deceased to a meeting with Mr Smart in which he had told the deceased that Danika was not named as a beneficiary: CB 2.1/406. Technically it is correct that Danika is not a named beneficiary. However, at least by definition a class including the children of Michael and Adele are beneficiaries, so Danika is in fact one of the beneficiary objects of the DFT: see clause 1.1, definition of "Beneficiaries", para (b): CB 3/34.
- 109 Mr Smart in response to an email from Mr Meredith noted that Danika's name was intentionally left out as a beneficiary so that there would be "no clear named attachment" of Danika to the DFT "for family law purpose(s)": email 21 March 2019 CB 3/86.19, 86.20.2.
- 110 On 26 April 2018 Damah as trustee for the DFT opened an account with the NAB: exhibit P1 pages 18.
- 111 On or about 1 May 2018 Michael and Adele provided funds of \$44,000 being 5% deposit for the purchase of Failford, to Manning Valley Property & Livestock which amount was receipted on 7 May 2018: exhibit P1 pages 6,13 (NAB bank statement).
- 112 On about 3 May 2018 Damah as trustee for the DFT entered a contract for sale to purchase a rural property with residence of approximately 100 acres at 168 Greys Road Failford being folio 12/806418 (**Failford**) for \$880,000 with a mortgage of \$175,000. Failford is also known as 'Ruben Park': exhibit P1 pages 6,13 (NAB bank statement); CB 3/71.

- 113 On 16 May 2018 Mr Meredith met with Michael and the deceased and carried out a verification of identity for both of them: CB 3/66.1-66.8.
- 114 On 17 May 2018 the company entered into a contract for sale (prepared by Mr Meredith) of the then proposed Lot 6 in an unregistered plan (Gostwyck Sold) which contract for sale was signed by both the deceased and Michael on behalf the company as vendor. The sale was to David and Summah Lagettie (of Hilldale): CB 3/66.10, 66.12.
- 115 On or about 5 July 2018 Michael and Adele provided further funds of \$35,110 as payment for or in contribution towards duty for the purchase of Failford by Damah: exhibit P1 pages 7, 14 (NAB bank statement).
- 116 On 11 December 2018 the company received into its NAB account the sum of \$796,767.23 being part of the proceeds of sale of Gostwyck Sold and paid out of its account \$796,417.23 to Damah: exhibit P2.
- 117 On 12 December 2018 Damah completed the purchase of Failford: CB 2.1/244. I will say more about this below in issue 13 addressing the alleged loan/gift of the \$817,417 amount.

Activities on the properties

- 118 In pursuit of their farming activities Michael and Adele operate through the partnership, which initially (or at least from 1997) traded as "Hunter Earthworms": CB 4/12, 15.
- 119 In 1997 the main business activity of the partnership was described as being "Earthworms Farmers": CB 4/14.
- 120 In 1998, the description of the main business activity of the company was "beef cattle breeding & grazing": CB 4/20.
- 121 In 1999 the main business activity of the partnership was described as being "beef cattle breeding & grazing": CB 4/39.
- 122 The company holds the WALs which are used to irrigate Rossdale. The WALs allocate about 180 megalitres per year from the Paterson River which are used to irrigate Rossdale and grow pastures and Lucerne: CB 2.1/177, 241.

- 123 Since about 2008 Michael has also run a mechanical repair business from Rossdale trading as "Valley Machinery Service". He is a qualified trades mechanic. His work with Valley Machinery Service is mainly on the repair and maintenance of agricultural plant and machinery.
- 124 Currently Michael and Adele run cattle and grow lucerne hay on Rossdale: CB 2.1/213. They cut and bail hay into round bales silage, part of which is fed to the steers. They run about 80 steers through winter and about 123 through summer.
- 125 Michael and Adele sell the cattle and surplus silage: CB 2.1/213. The cattle and silage sales numbers vary depending on weather conditions: CB 2.1/241. They sell about 100 bales of silage a year: CB 2.1/241.

Pleadings and claims for relief

Procedural background

- 126 The proceedings were commenced by the summons filed on 17 March 2021. The only claim for relief was for a family provision order.
- 127 On 5 May 2021 the plaintiff filed a statement of claim. There is some suggestion that the document may have been rejected on that day after the filing attempt had been imprinted on the document, and that the document was re-lodged for filing and was in fact filed on 6 May 2021: T 11-12. Nothing turns on the actual filing date.
- 128 Barbara filed a defence to statement of claim on 25 May 2021 and the company filed defence on 27 May 2021.
- 129 Each of Barbara and the company filed amended defences on 10 December 2021.
- 130 The plaintiffs filed a reply on 29 June 2021.

Claims for relief

- 131 The primary relief sought in the statement of claim is:
- (1) declaratory relief that the company holds the claimed property on trust for Michael and or Adele (order 1: CB 1/52) and that Barbara holds the claimed shares on trust for Michael and or Adele: order 4 (CB 1/52); and

- (2) orders that the company and Barbara convey the claimed property to Michael and Adele (order 2: CB 1/52) and alternatively a charging order: order 3 CB 1/52.

132 The POS cast the plaintiffs' case as an "estoppel claim" in varying ways including that the plaintiffs seek to enforce the obligation of the deceased:

- (1) to "transfer the two farms upon his death": POS[1];
- (2) that Michael would succeed to "the company's land (and the company)" on the death of the deceased: POS[6]; and
- (3) that Michael would succeed to the properties "either through a transfer of the land or a transfer of the shares in the company": POS[7].

133 The estoppel was framed as one of "proprietary estoppel" by "representation and encouragement" (POS[7],[14],[21],[25], [44(a),(b)]) and by "acquiescence (convention)": POS[8],[14], [21(d)], [44(c)].

134 I refer to the particular representations below.

135 Dr Mantziaris submitted that:

- (1) all the conduct relied upon by the plaintiffs is captured under the estoppel by encouragement rubric, but should that case "fall short" in some respect, then estoppel by acquiescence is relied upon: POS[45]; and
- (2) Equity should not only recognise the promise of the farms, but also the fact that Michael and Adele relied on that promise in the "Inheritance Assumption" (see as the structure for their lives since about 1995 (sic). Their labour on the land, the improvements, the construction of Rossdale House, has improved the value of the land: POS [47].

136 Estoppel by acquiescence is conceptually different from estoppel by convention. As the references to estoppel by convention were not really explored in the case as presented I propose to say nothing further about them.

137 The PCS did not elaborate nor deviate from the casting of the case in the above way.

138 Dr Mantziaris submitted that if successful the plaintiffs would elect the remedies where election is required: POS[50], PCS[116]

139 There is a family provision claim which has been relegated below the principal relief in the statement of claim: CB 1/53. Dr Mantziaris in the POS expressly stated that the family provision claim was cast in the alternative and need only be determined if the plaintiffs failed on the estoppel claim: POS[15].

140 The POS indicate that the estoppel claim is anterior to the determination of any potential action to revoke the letters of administration in relation to the last Will: POS[16]. However, there is no claim in these proceedings to revoke the letters of administration.

141 I say nothing more about that other than to observe that these proceedings have been completed, progressed and heard on the basis that the last Will is a valid testamentary instrument.

The statement of claim

142 The statement of claim is a lengthy document.

Introductory matters

143 The introductory matters pleaded include matters relating to:

- (a) the parties and relevant family members;
- (b) the deceased's testaments;
- (c) the capital structure of the company;
- (d) the governance of the company;
- (e) the real property of the company;
- (f) the enterprises conducted on Rossdale and Gostwyck Flats.

Rossdale Arrangement and the 2000 Gostwyck Arrangement

144 Part G of the pleading describes two forms of arrangement between Michael and Adele and the deceased, namely the 1995 Rossdale Arrangement and the 2000 Gostwyck Arrangement. The pleading of those arrangements (CB 1/67-68[71],[75]) is as follows:

“The 1995 Rossdale Arrangement

71. In about 1995, the deceased proposed to Michael and Adele orally, and Michael and Adele accepted the proposal, that they should -

- (a) take over farming the land on Rossdale;
- (b) farm it, making improvements to it, as they wish;
- (c) do so at their expense;
- (d) retain whatever profits made;
- (e) pay the Company's outgoings and legal and accounting expenses for Rossdale;
- (f) pay the deceased's Directors' remuneration of \$500 per month;

(g) but allow the deceased to receive the rent from the Sharefarmers Cottage and to otherwise conduct the deceased's enterprise on Gostwyck Flats.

(the **1995 Rossdale Arrangement**)

Particulars

(i) Particulars of the Rossdale Arrangement are provided as particulars of Representation 1 at paragraph [86] below.

(ii) The conduct of Michael and Adele pleaded at paragraphs [61], [65] and [66] above.

...

The 2000 Gostwyck Arrangement

75. On 9 July 2000, the deceased offered to Michael and Adele, orally and in writing, and Michael and Adele accepted the proposal, that Michael and Adele should, in addition to the farming the land on Rossdale under the 1995 Arrangement –

- (a) take over farming the land on Gostwyck Flats;
- (b) farm it, making improvements to it, as they wish;
- (c) do so at their expense;
- (d) retain whatever profits made;
- (e) pay the Company's outgoings and legal and accounting expenses for Rossdale;
- (f) pay the deceased's Directors' remuneration of \$500 per month;
- (g) but allow the deceased the occasional use of certain parts of Gostwyck Flats and Rossdale and the selection of firewood from the land, as particularised below

(the **2000 Gostwyck Arrangement**).

Particulars

(i) Particulars of the Gostwyck Arrangement are provided as particulars of Representation 1 at paragraph [86].

(ii) Handwritten letter of the deceased to Michael (9 July 2000).

(iii) The conduct of Michael and Adele pleaded at paragraphs [62], [65] to [66](c)-(e) above.”

145 It became clear during the course of the evidence that the facts giving rise to the 1995 Rossdale Arrangement in fact occurred in 1993.

146 It is convenient at least for that reason to simply describe the arrangements pleaded as the "Rossdale Arrangement" and the "Gostwyck Arrangement".

147 The pleading regarding the Arrangements in essence indicated that from:

- (1) about July 1995 to date the plaintiffs farmed Rossdale at their own expense operating it as a farming enterprise in beef cattle and animal feed production by contributing their labour and capital to the farming enterprise in developing and improving Rossdale as farming land: CB 1/65[61];
- (2) 1995 to date the plaintiffs performed what was required of them under a number of aspects of the Rossdale agreement: CB 1/68[72];
- (3) 1995 to 2010 the plaintiffs paid the deceased a sum of \$500 per month: CB 1/68[73];
- (4) 1995 to 2000 the plaintiffs allowed the deceased to receive the rent from the share farmer's cottage and to otherwise conduct the deceased's enterprise on Gostwyck Flats: CB 1/68[74].

148 The plaintiffs similarly pleaded in relation to the Gostwyck Arrangement that they performed at least part of what was required from them between July 2000 and 2018. It is pleaded that from 2000 to 2010 they paid the deceased a sum of \$500 dollars per month and between July 2000 and 2018 they allowed the deceased the occasional use of certain parts of Gostwyck Flats and Rossdale and the selection of firewood from the land: CB 1/68-69[76]-[78].

149 It is alleged that the deceased acquiesced in Michael's actions under the Rossdale Arrangement and Gostwyck Arrangement including inter alia permitting the plaintiffs to farm the land, build a house on Rossdale, subdivide Gostwyck Flats and work without certain remuneration: CB 1/69[79].

Proposed 2009 intergenerational transfer

150 The pleading sets out details of a proposed 2009 intergenerational transfer of the title in Rossdale and Gostwyck Flats to Michael however recites that the proposal was not proceeded with: CB 1/68-69[80]-[81].

22 October 2019 Agreement

151 The pleading alleges that on or about 22 October 2019 the deceased, Barbara and the plaintiffs executed a written agreement which in part involved the sale of Rossdale (**October 2019 Agreement**).

152 The relevant part of the pleading (CB 1/70-71[82]) is as follows:

"The October 2019 Agreement

82. On or about 22 October 2019, the deceased, Barbara, Michael and Adele executed a written agreement intending to be bound in relation to the following terms:

- (a) That the deceased cause the Company to sell Rossdale.
- (b) That Michael will be responsible for managing the sale of Rossdale but will keep the deceased and Barbara informed of the sale process.
- (c) That the Company transfer the proceeds of the sale to Michael.
- (d) That, in accordance with tax advice to be procured, Michael use some of the proceeds of the sale to establish an investment portfolio for the benefit of the deceased and Barbara.
- (e) That the Gostwyck Remnant not be sold by the Company.
- (f) That Michael remain responsible for the outgoings of the Company.
- (g) That on the passing of the deceased, and in accordance with the August 2019 Will –
 - (i) The deceased's shares in the Company pass to Michael; and
 - (ii) That the residue of the investment portfolio for the benefit of the deceased be divided equally between Tristan, Hamish and Prudence.

(the **October 2019 Agreement**)”

153 It is asserted that over a period between October 2019 and January 2020 Philippa exercising a power of attorney in relation to the affairs of the deceased caused the performance of the October 2019 Agreement to be delayed and that thereafter until his death, the deceased and Barbara failed to perform the agreement: CB 1/71[83]-[84].

154 It is alleged that through the proposed 2009 intergenerational transfer and the October 2019 Agreement the deceased purported to alter “representation 1” (see below) CB 1/74[87].

Estoppel by encouragement - five representations

155 The next part of the pleading consists of five representations under the general heading “Proprietary Estoppel by Encouragement Offered to Michael”.

156 The five representations are relevantly as follows: CB 1/72 [86]-[90]:

- (1) Rossdale and Gostwyck Flats will be yours when I die (**representation 1**);
- (2) you will receive Rossdale and Gostwyck Flats (or some or all of their monetary value) in advance of my death if an accommodation is made for my old age care needs (**representation 2**);

- (3) Michael will receive Rossdale and Gostwyck Flats when I die, so build your house on Rossdale (**representation 3**);
- (4) you will receive half the proceeds of the sale of any company land you do not wish to farm (**representation 4**);
- (5) do what you wish with the company land as it is yours anyway (**representation 5**).

157 Within representation 1 there are three variants of the representation also pleaded: CB 1/72 [86].

158 The three variants are essentially that when the deceased died he would give to Michael the properties and/or the claim shareholding. The variants pleaded are distinguished by reference to timing. Namely that the deceased repeated representation 1 at various times: *before* (variant 1A); *during* (variant 1B); and *after* Michael (variant 1C) Michael came onto or had been on the farm and in the case of variants 1B and 1C, farmed at his own expense: CB 1/72[86].

159 Another aspect of the pleading alleged a proprietary estoppel by encouragement offered to Adele. This part of the pleading asserts that any instance of the representations to Michael were implied representations to both Michael and Adele: CB 1/78 [98]. It was further pleaded that there was an additional representation (**representation 6**) that should Michael predecease the deceased Adele would receive what Michael was to receive under the first representation: CB 1/78-79 [99].

160 The POS indicate that representations 1 and 5 are the dominant representations and items of encouragement: POS[24(b)]. (The reference was actually to representations 1 and 2. But in context of the submissions at POS[24] the main representations appear to be 1 and 5).

161 Barbara's amended defence (CB 1/172-174 [86]-[90], [98][99]):

- (1) denies representation 1 and further says that any such representation required the plaintiff to remunerate the deceased and says that they failed to do that;
- (2) does not admit representation 2 to the extent that it concerned the 2009 intergenerational transfer proposal and denied it to the extent that it concerns the October 2019 Agreement; and
- (3) does not admit the balance of the representations.

162 The company's amended defence (CB 1/146-148 [86]-[90], [98][99]):

- (1) denies representation 1 and further says that any such representation required the plaintiff to remunerate the deceased and says that they failed to do that;
- (2) denies representations 2-5 and denies that the representations were made to Adele; and
- (3) does not admit representation 6.

Reliance

163 The pleading asserts that Michael altered his position by undertaking a number of actions in reliance upon the representations: CB 1/75-78 [91]-[95].

164 The elements of alleged reliance are detailed. However essentially they include assertions that Michael pursued a life of farming on the properties foregoing opportunities to use his mechanical expertise within other industries (such as coal mining and civil construction), that he performed gratuitous work on the properties for the deceased and/or the company, that he made improvements on the properties, paid certain amounts for rent and outgoings and built a house on Rossdale. It is claimed that the plaintiffs would suffer detriment if the defendants were permitted to resile from the representations by allowing the claimed shares to be transferred to Barbara under the last Will: CB 1/78 [96].

165 Acts of Adele's reliance upon the representations were also pleaded. In part this included similar acts of reliance to Michael but additionally acts of reliance arising out of Adele's own contribution of money and property and efforts in relation to farming Rossdale and Gostwyck Flats and improving the lands: CB 1/79[100]. Likewise it was pleaded that Adele would suffer detriment if the defendants were permitted to resile from the representations: CB 1/80[101].

Estoppel by acquiescence or convention

166 The final aspect of the proprietary estoppel claim was a claim based in what was said to be estoppel by acquiescence or convention.

167 This was framed in terms of the plaintiffs and the deceased proceeding on an underlying assumption that the plaintiffs' farming of the land would result in the transfer by the deceased to Michael of the land or the deceased's shareholding in the company (described as the inheritance assumption) with consequential acts of reliance and claimed detriment and unconscionability if the defendants were permitted to resile from the assumption: CB 1/80-81[103]-[108].

Family provision claim

168 An alternative case for family provision relief is pleaded by Michael: CB 1/81-82[109]-[111].

The defences

169 Both amended defences admit that the Rossdale Arrangement and Gostwyck Arrangement were made essentially in the terms pleaded although relevantly denies the performance alleged by the plaintiffs.

170 The October 2019 Agreement is not admitted, representations 1-5 are denied and the representation 6 is not admitted. Reliance by the plaintiffs and consequent detriment are denied. The claims of estoppel by encouragement, acquiescence or convention are disputed.

171 Michael's family provision claim is disputed.

Disentitling Conduct and Unclean Hands

172 There is particular defence raised under the heading of "Disentitling Conduct and Unclean Hands".

173 The relevant aspects of the disentitling conduct and unclean hands are said to be as follows:

- (a) the breach of the plaintiffs' obligation to pay directors remuneration to the deceased as agreed or at all as a condition of any transfer of Rossdale and/or Gostwyck Flats to the plaintiffs;
- (b) the active concealment and failure of the plaintiffs to disclose the proposed sale of Rossdale to the deceased;
- (c) a failure (of the plaintiffs) to disclose the creation of the DFT used to hold assets of the company including the sale proceeds of Gostwyck Sold transferred without the authority and knowledge of the deceased and the company;
- (d) the failure to disclose to the deceased the purchase of Failford being a purchase funded through the assets of the company;
- (e) the taking out of a mortgage over Gostwyck Flats without the deceased's and/or the company's knowledge and approval; and
- (f) the undertaking of legal and financial decision-making by the plaintiffs in relation to Rossdale, Gostwyck Flats and the company without disclosure to, or consultation with, or with the authority of the deceased: CB 1/150.

The plaintiffs' final case

174 It was confirmed during final submissions that:

- (1) the plaintiffs' essential case was estoppel based on representations and encouragement: T 1047;
- (2) the pleading in the statement of claim regarding the Rossdale Arrangement, the Gostwyck Arrangement and the October 2019 Agreement are not connected to the estoppel claim (T 1047, 1048) and were apparently only pleaded to obtain admissions of fact of the parties' understanding as to the relationship at a particular point of time: T 1048, 1049;
- (3) mention in the statement of claim to payments were referable to management arrangements (or agreements), which reflected an understanding as to how the land was to be used but they stood independently of the "succession arrangement" (i.e. the estoppel claim): T 1049;
- (4) nonetheless, the payments made were legitimate because Michael and Adele trading as the partnership used the company's land to assist, and that in any event the payments were not insisted upon by the deceased who waived any such payment obligation at certain times: T 1049; and
- (5) the estoppel claim does not depend upon the plaintiffs making any payment to the deceased: T 1047, 1048 and accordingly the fact (if established) the payments were not made does not preclude or answer the estoppel claim: T 1049.

Pleading comment

175 During the hearing there was in the context of cross examination dispute about accuracy and interrelation of a number of matters in the statement of claim. For that reason it is appropriate that I make some brief comment regarding the pleading.

176 The elements of pleading estoppel were commented upon by Rees J in *Notesco Pty Ltd v Australian Financial Complaints Authority Ltd* [2022] NSWSC 285. Her Honour noted at [124]-[125]:

"124. As to estoppel, at the most general level of abstraction it may be observed that there are several types of estoppel, each of which offer "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted": *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419 (per Brennan J). There are common elements of inducement, reliance and detriment: *Walton Stores* at 428-429 (per Brennan J); *Verwayen* at 413 (per Mason CJ). But each type of estoppel has distinctive features and requirements.

125. Pleadings should articulate which type of estoppel is alleged and the facts relied upon to establish each element of estoppel. As Pepper J noted in *Greater Taree City Council v Murowski Investments Pty Ltd* [2010] NSWLEC 258, “the requirement for specific pleadings in respect of the allegations of fact relied upon to establish estoppel is nothing new”: at [34], citing *Commissioner for Railways v Bielewicz* [1963] NSW 482 at 486. Similarly, In *Magrath v Parkside Hotels Ltd* [2011] EWHC 143 (Ch), Judge Mackie QC observed, at [32]: “That pleading should state with precision and clarity all the matters relied upon, including detriment, to make good [the] case”: at [32].”

- 177 Clearly it is necessary to identify and plead the representations (e.g. *ING Bank Australia Ltd v Bucknell* [2016] NSWSC 1049 per Davies J at [3]-[6]) and any detrimental reliance: e.g. *Associated Food v Baxter* [1999] NSWSC 236 per Austin J at [16] – [18].
- 178 Beyond the above, caselaw tends not to be very prescriptive in terms of how estoppel is pleaded.
- 179 Obviously, pleadings in each case will depend upon the particular facts of the case and the general principles are intended for guidance rather than to be slavishly adhered to.
- 180 However, the approach to pleadings in New South Wales has been impacted by the reforms brought about by the *Civil Procedure Act 2005* (NSW) (**CPA**) and the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**).
- 181 The overriding purpose of the CPA and rules of court in civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s 56(1) CPA.
- 182 The Arrangements, promises and post 2017 events referred to in the statement of claim were the subject of extensive cross-examination.
- 183 During the cross-examination of the plaintiffs a number of errors and inconsistencies in the pleading were exposed.
- 184 A number of matters should be noted.
- 185 First, the initial 11 pages of the pleading addressed various matters including the parties and relevant family members, the deceased's testaments, the capital structure of the company, the governance of the company, the history of

real property of the company and the enterprises conducted on Rossdale and Gostwyck Flats.

186 Much of the material regarding the parties and relevant family members, the deceased's testaments, the capital structure of the company and the governance of the company was admitted or not seriously in dispute.

187 A degree of the pleaded the history of real property of the company was disputed. I have addressed this earlier.

188 Secondly, there were matters pleaded subsequent to the facts said to give rise to the initial promises underpinning the estoppel case which were essentially qualifications on the various representations or pre-emptive answers to potential defences.

189 One example of this is the October 2019 Agreement. The POS made some comment on aspects of the pleading including this.

190 The comment has been helpful to some degree to explain, or attempt to explain, the rationale for the pleading. The plaintiffs say:

- (1) that to ensure the greatest fidelity to the facts they have pleaded five different types of representation by the deceased regarding Michael's succession to Rossdale: POS[24];
- (2) the facts of the October 2019 Agreement were pleaded in order to obtain admissions of fact relevant to representation 2 (by which the plaintiff say that the deceased sought to qualify representation 1 by suggesting some provision in the event that aged care were needed).

191 However, the plaintiffs also say that representation 2 is now inoperative due to the death of the deceased and the plaintiffs do not seek to enforce the October 2019 Agreement as a contract: POS[29]. No relief was sought in respect of the October 2019 Agreement.

192 Dr Mantziaris made the observation that there are different theories and different approaches to pleadings and that sometimes pleadings are drafted in order to obtain admissions of fact: T 1047.

193 Dr Mantziaris accepted with the benefit of hindsight, a leaner pleading may have been more effective, noting it was created a long time ago in a situation where instructions were not as distilled as they are now: T 1049.

- 194 It was indicated that the purpose of pleadings regarding the Rossdale Arrangement, the Gostwyck Arrangement and the October 2019 Agreement were to record the understanding of the parties as to their relationship on various matters over time in particular points of time: T 1048, 1049.
- 195 The test of inclusion of facts in a pleading is not whether it ensures the greatest fidelity to the factual history of the relationships between the parties. Rather the test is whether the facts are material to the cause of action or relief claimed. Thus conventionally, it is not necessary to plead events or contingencies if they are not alleged to underpin or affect a plaintiff's right or title or claim to relief: e.g. D B Casson and I H Dennis, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice* (22nd ed, 1981, Stevens & Sons) (**Odgers'**) at 168.
- 196 Further, generally speaking, it is not necessary for a plaintiff to allege the performance of all conditions precedent as such an allegation is implied in the pleading: r 14.11 UCPR.
- 197 I consider that the pleading of the estoppel case with numerous representations including different variations some of which were accepted by the plaintiffs as not being operative, would have benefited from an approach which left out of the pleadings the historical events that had been either superseded by other arrangements on the one hand or not ultimately persisted with by the parties on the other hand, leaving the material elements of estoppel (e.g. promises with any associated detrimental reliance promises) said to ground the relief claimed as being the matters to be alleged.
- 198 Obviously it is easier to reflect on these matters with the benefit of hindsight. What I have said above is not intended to be critical of forensic choices.

Issues

- 199 The parties did not present any agreed statement of issues. However, having regard to the pleadings, the various submissions and the way the hearing was conducted the following issues emerged:
- (1) What promises were made by the deceased (**issue 1**)?
 - (2) Were the promises clear and unequivocal promises regarding the claimed shares and or claimed property (**issue 2**)?

- (3) Were the promises conditional upon aspects of the Arrangements **(issue 3)**?
- (4) Were the promises conditional upon the plaintiffs paying the deceased a remuneration for the remainder of his life?
 - (a) If so, were such payments made?
 - (b) Were payment requirements insisted upon or waived by the deceased and what was the effect of incomplete payment?**(issue 4)**
- (5) Were the promises conditional upon the plaintiffs continuing to work the farms for the remainder of the deceased's life **(issue 5)**?
- (6) Did the deceased's promises cause or lead Michael and or Adele reasonably to assume that a particular legal relationship existed between them and the respondent **(issue 6)**?
- (7) Did Michael and Adele act reasonably in reliance on the promise **(issue 7)**?
- (8) Did the deceased know or intend that Michael and or Adele would act in reliance on the promise **(issue 8)**?
- (9) Was Michael's and Adele's reliance on the promise to their detriment **(issue 9)**?
- (10) Did the deceased, and/or Barbara (in her capacity as executor and sole beneficiary of his estate) act unconscionably in not honouring the promises **(issue 10)**?
- (11) What if any effect did the post 2017 events have on the estoppel case **(issue 11)**?
- (12) Are the plaintiffs guilty of unclean hands so as to preclude equitable relief **(issue 12)**?
- (13) Was a loan of \$817,417 made to the deceased and then gifted to Michael or the plaintiffs **(\$817,417 amount) (issue 13)**?
- (14) If the estoppel case succeeds what remedy is appropriate and in particular what order ought be made regarding the \$817,417 amount **(issue 14)**?
- (15) If the estoppel case fails, what, if any, family provision relief should be given **(issue 15)**?

Evidence

Affidavit evidence

200 The plaintiffs relied on affidavits of:

- (1) Michael sworn 10 May 2021 (chief [PN 6(a)]); 27 July 2021 (chief); 9 August 2021 (correcting parts of the 27 July 2021 affidavit); 21 January 2022 (reply); 29 August 2022 (updating [PN 17]);

- (2) Adele sworn 2 August 2021 (chief); 21 January 2022 (reply);
- (3) Adam Slattery sworn on 17 March 2021; 19 April 2021; 26 June 2021 (costs [PN 6(c)]; 29 August 2022 (notice as to authenticity of documents); 29 August 2022 (costs [PN17.1]);
- (4) Alasdair Smart affirmed 30 July 2021 (chief); 21 January 2022 (reply) and 10 September 2022 (bank records of the company); and
- (5) Beryl Mudd sworn 13 August 2022.

201 The defendants relied upon affidavits of:

- (1) Barbara sworn 19 April 2021 (administrator [PN 9.1]); sworn 18 June 2021 (competing claim [PN 9.4]); 15 September 2021 (chief and reply); 30 August 2022 (updating [PN 17]);
- (2) Philippa sworn 7 September 2021 (chief);
- (3) Hamish Furner sworn 8 September 2021 (chief); and
- (4) Sarah Young sworn 19 April 2021 (service of notice of claim [PN 9.2]); 19 April 2021 (costs [PN 9.5]); 30 August 2022 (costs [PN17.2]); 23 September 2022 (in support of claim for privilege over documents); 5 October 2022 (identification of the particular costs incurred by the company).

Documentary evidence

202 There was a very large amount of documentary material tendered on the hearing. Volumes 3 to 6 inclusive of the Court Book became exhibit JP1 subject to any fair objection by either counsel: T 50. Exhibit JP1 became supplemented by an additional volume 8 which was essentially additional documentary materials marked chronologically which could be fitted into volume 3: T 205.

203 A three-page document being an index to exhibit MH-1 (listing 116 items) to the affidavit of Michael George Horn sworn 27 July 2021 became exhibit D4: T 160.

204 Dr Mantziaris tendered a bundle of bank statements for the company with the NAB for an account covering the period from approximately 8 May 2018 through to 30 June 2020, which became exhibit P2: T 206.

205 There was dispute about the extent of production of documents by the company. A number of documents were tendered relating to the company. These included:

- (1) a bundle of documents essentially being emails as between Mr Smart on behalf of Pearson Smart and behalf of Anova Chartered Accountants dated 26 April 2021 and 9 June 2021 and the company financial statements and tax return for the financial year ended 30 June 2020 - exhibit D10: T 546; and
 - (2) the binder of original company documents - exhibit D11: T546.
- 206 On Day 11 of the hearing Mr Simpson objected to an email from Valley Machinery Service to Mr Slattery dated 3 September 2022 (CB 3/320.30), and the attached three pages being screenshots of text messages as between Michael and Mr Lidbury: T 949.
- 207 There was lengthy debate about the admissibility of the documents. The essential debate related to the precise timing at which Rossdale had been listed. I rejected the tender of the document at CB 3/320.30 being a covering email from Michael to Mr Slattery: T 958. I provisionally admitted the following three pages (CB 3/320.31 – 320.33) on the basis that the parties could later make submissions about whether the texts were business records and Michael’s authority: T 959.
- 208 Dr Mantziaris informed the Court that he was instructed that there was no company mobile phone. The screenshots were from Michael’s personal phone being the phone that the person who had day-to-day carriage of the company’s affairs used to communicate with the sales agent: T 955. Mr Simpson confirmed there was no genuine dispute that the screenshots came from Michael’s personal phone: T 958.
- 209 The relevant part of the material is essentially the assertion of Mr Lidbury in the text messaging between himself and Michael that Rossdale (described as “Vacy”) was listed (by Bowe & Lidbury) on two websites being “realestate.[c]om” and “domain” on 5 July 2019: see screenshot of a conversation between Michael and Mr Lidbury dated 25 October 2019: CB 320.33.
- 210 The particular debate over this was linked to a further tender on the final day of the hearing. Dr Mantziaris sought to tender an email from Lisa Norrie of Bowe & Lidbury attaching what was described as a “web capture of the listing on Gresford Road, Paterson” and an attached page of listings relating to Rossdale

(specifically 598 Gresford Road) for 5 July 2019 and 28 November 2019 both marked “withdrawn”: T 1036.

- 211 The tender was fiercely contested. Mr Simpson submitted that the email in reference to “web capture” did not identify that it came from the database of Bowe & Lidbury nor where it came from: T 1039.
- 212 It was said that the date of listing was relevant to a series of credit points with respect to the recollections of three witnesses: T 1040.
- 213 It was difficult to understand why there was such intense contest over the tender. There was no real dispute that the property had been listed with Mr Lidbury and that Michael as distinct from the deceased had been the one who had listed it (at least prior to November 2019) with Mr Lidbury: T 1040.
- 214 Mr Simpson submitted that the contest went to Michael’s authority to list Rossdale, asserting that the “Succession Plan” dated 18 June 2019 (CB 3/105) was a “mea culpa document” and that Michael had no authority for listing: T 1040-1041.
- 215 On credit Mr Simpson indicated that it was relevant to the meeting between Michael and his parents on 1 July 2019 in which the defendants dispute Michael’s assertion that the deceased agreed that some cash from Rossdale would be good and Michael suggested the property be listed with Mr Lidbury: T 1041-1042.
- 216 Dr Mantziaris indicated that the tender had no real relevance to his case but was critical to his response to the defendant’s case: T 1042.
- 217 Ultimately I rejected the tender as having been too late to allow testing in the face of asserted contest over the issue. I had the tender document marked for identification: MFI 6: T 1042
- 218 Ultimately, I accept that the disputed text messages are admissible as business records. However, the contested debate about the admissibility of the screenshots of the text messages as between Michael and Mr Lidbury (CB 3/320.31 – 320.33) is in my view not critical in the outcome of the case having regard to my findings regarding the 15 issues.

Subpoenas and notices to produce

- 219 From the time of the pre-trial directions hearing there were simmering issues regarding production and subpoenas.
- 220 To their credit the representatives for the parties were able to resolve a number of these issues.
- 221 However, a number of production issues persisted into the hearing. It is not necessary to mention all of them. However, a number of matters ought to be recorded.
- 222 One of the subpoena disputes related to subpoenas served on Hamish (1 October 2021) and Tranter Lawyers (26 August 2022).
- 223 From the day prior to the hearing issues regarding those subpoenas generated a series of correspondence. A number of communications were tendered addressing those particular subpoena issues.
- 224 Dr Mantziaris tendered a letter dated 11 September 2022 from Tranter Lawyers to Arnold Lawyers responding to the subpoenas issued to Hamish and Tranter Lawyers; a letter dated 12 September 2022 from Arnold Lawyers to Tranter Lawyers; and emails dated 14 and 22 September 2022 from Mr Slattery to Ms Young - exhibit P8; T 850. The correspondence does not bear really on the issues. Though it might be said to bear on costs.

Notice to produce to Michael

- 225 Another issue involved the failure of Michael to produce materials pursuant to a notice to produce.
- 226 The failure by Michael to comply with the notice to produce was far from ideal., I did not get the impression that Michael was deliberately withholding materials from the Court or seeking to actively mislead the Court. Rather Michael did not take any steps to comply and resisted in providing the password because:
- (1) it gave access to Michael's personal emails: T 66, 74,75, 88;
 - (2) “that's what Adele's job is [deal with paper work]”, “she's the one that does all the paperwork, bookwork”: T 93;
 - (3) he or they required technological assistance: T 95.

227 Ultimately their solicitor Mr Slattery ended up changing the password (T 95) I understood because Michael did not have the ability to do that.

228 It is not necessary to go into the matter deeply.

229 Clearly part of the issue regarding the failure to produce or “provide” a password that had been requested as one of the items to be produced were concerns over privacy.

230 Ideally, providing access to company materials without compromising access to Michael's personal emails is something that ought to have been sorted out earlier so that relevant material could be provided.

Obligation of parties and practitioners regarding production of documents

231 The fact that a solution was able to be reached for production of material relatively quickly during the hearing, tends to suggest that inadequate attention was given to finding a solution in the months beforehand.

232 The intense gaze of participants on an issue during a Court hearing should not be required to galvanise parties into finding appropriate ways to produce material rather than resist production because they consider there are privacy issues, or some other person associated with the recipient handles paperwork and/or the recipient requires technological assistance to address production.

233 Production of documents on subpoena and pursuant to notice to produce imposes a serious obligation on parties to comply with the Court's order for production.

234 Not only is the obligation of production a serious one, which is the word subpoena suggests, carries with it an "under penalty" consequence or at least a penalty risk for non-compliance, there is pursuant to section 56(3) CPA a positive obligation on parties to assist the Court in its overriding purpose.

235 Agreement on access to material is a practical matter which ought to be able to be resolved by parties and legal practitioners working cooperatively to assist the Court in facilitating the just, quick and cheap resolution of the real issues in the proceedings.

236 If parties do not have the technical capacity to effectively produce material which is stored in computer hard drives or otherwise electronically stored, they should actively seek the assistance of their legal representatives or other appropriate professionals who can assist them to resolve production issues in a way that fairly enables production of relevant material but otherwise preserves the integrity of matters that are properly the subject of privacy concerns.

Subpoena to Tranter Lawyers

237 On the ninth day of the hearing the simmering issue regarding the provision claim in respect of the subpoena to Tranter Lawyers led to Mr Simpson providing an affidavit of Ms Young addressing a claim for privilege over certain documents: T 790.

238 Dr Mantziaris made submissions directed to pointing to what he asserted was the inadequacy of the information provided in the affidavit to enable the claim for privilege to be made out: T 791-795.

239 Rather than make directions for the parties to provide further affidavits, following discussion both counsel were content for me to view the privileged material and make a determination in respect of claim for privilege.

240 I adjourned briefly to enable that to occur: T 845-846. However, it became obvious on an examination of the documents that some parts of the material might not be privileged and other parts privileged, such that the convenient way of dealing with the matter was to make a copy of the materials and redact the privileged material: T 846.

241 I undertook that task and arranged for my tipstaff on a non-hearing day, being Monday, 26 September 2022 to email to the parties' representatives the bundle of materials which I considered to be nonprivileged with suitable redactions within that bundle of privileged material.

242 On the next sitting day of the hearing (4 October 2022) I considered it appropriate for the process to be formalised so that the materials that have been produced and redacted could be properly identified. That led to the

redacted version of the materials that I had formalised on 26 September 2022 being marked as an exhibit JP2: T 874.

Calls for documents

- 243 Further, during the hearing there were calls for various documents. The calls produced in some cases various documents which were then tendered including a bundle of documents being emails between Mr Smart and Michael and Adele - exhibit D6: T 212.
- 244 In answer to calls for all notes produced by the deceased for meetings with Mr Smart, Mr Meredith, Mr Killingly, Mr Lidbury and Michael and handwritten drafts of the deceased in relation to documents that were subsequently typed out for him from July 2019 to 20 February 2020 the written response of the defendants was that there were no documents other than those already appearing evidence and the Court Book: exhibit P9: T 850.
- 245 During the course of the hearing a number of documents were marked for identification. A number of documents were so marked in essence to facilitate ease of cross examination of a number of witnesses, for other forensic purposes and as an aide memoir for submission purposes. The documents so marked included:
- (1) typed versions of four handwritten letters by the deceased dated 9 May 2000, 25 July 2010, 30 November 2019 (being the typed version of the handwritten document which was agreed had been prepared by the deceased on 30 October 2019) and 14 February 2020 (though the typed version records the month mistakenly as January) - MFI 1: T 49;
 - (2) a map indicating the location of the company properties – MFI 2: T 53;
 - (3) the plaintiffs' chronology – MFI 3: T 53; and
 - (4) a table setting out details in relation to partnership and the company for the financial years from 1999 through to 2020 – MFI 4: T 548.
- 246 On Day 8 Mr Simpson sought to tender (or perhaps read) two affidavits being affidavits of Barbara and Philippa each sworn on 30 October 2020 being two affidavits that were provided to the Court on the administration application: T 700-701. Dr Mantziaris sought to reserve his position on the matter until he had considered the materials. The affidavits were accordingly marked MFI 5; T 701.

247 Dr Mantziaris revisited the matter and objected to their tender on Day 9 asserting that they raised an alternative version of events surrounding the execution of the deceased's handwritten last Will and indicated that if they were admitted the proceedings would not conclude on time: T 792-794. Ultimately the affidavits were not read or admitted.

The deceased's writings

248 There was significant amount of evidence in the proceedings in the form of affidavit evidence and documentary evidence.

249 In particular there were letters written by the deceased which in some material respects bear upon the claims in the case.

250 The extent of the written material from the deceased reflected the fact that he suffered from a stutter and would often reduce to writing matters he wished to convey: T 54.

251 The deceased could not type. He wrote. Barbara did not type up letters for Ross. Typed letters for the deceased were likely produced by Philippa: T 800-801.

252 There is no suggestion that the correspondence or notes written by the deceased in his own hand are other than authentic.

253 Potentially, assessment of some of the post September 2017 material produced by the deceased might need to be tempered by the fact that he was a man who seemingly sought to avoid particular confrontation. According to Barbara the deceased would act to be civil even after an argument or someone said something nasty to him: T 691.

254 Mr Simpson submitted that the deceased did not seem to be a person who wanted to lay blame on anyone and his 30 (October) 2019 letter was an attempt to achieve a reconciliation within the family the best he can: T 1091.

255 Nonetheless, on the whole, I considered that that letter and the other correspondence and notes from the deceased reflected his views about a number of matters, rather than being written principally to "keep the peace".

Witnesses

- 256 Each of the deponents, other than Mrs Mudd and the respective solicitors Mr Slattery and Ms Young, were cross-examined.
- 257 Mr Simpson tendered a letter from Mr Slattery to Ms Young dated 29 August 2022 with accompanying four-page document headed "A note for Mrs Beryl Mudd" in relation to queries regarding the affidavit of Mrs Mudd: exhibit D1. The purpose of the tender was provide the context to the forensic decision of Mr Simpson not cross-examine Ms Mudd: T 50-51.
- 258 It became clear that ultimately Mr Slattery had no communication with Mrs Mudd in relation to the preparation of the affidavit and that Mrs Mudd's grandson Jacob Smit, a lawyer, requested that all communication with Mrs Mudd be put through him and advised that he would be preparing the affidavit, which in fact occurred: exhibit D1.

Admissibility of photographic evidence

- 259 Photographic material was adduced during the hearing, which I detail below.
- 260 Where objects cannot be brought into court because of their size or for other reasons they may be the subject of photographs or other illustrations which are able to be brought into court: *Halsbury's Laws of Australia*, 195 - Evidence (**Halsbury's**) at [195-5005] (online) ('Material objects').
- 261 Photographs may be admitted as real evidence assisting the testimonial evidence given by witnesses of their perceptions. In that regard, they constitute illustrated testimony or pictorial testimony. They may also be silent witnesses which speak for themselves or which are probative evidence in their own right: *Halsbury's* at [195-5035] ('Photographs, films and videos').
- 262 For a photograph to be admissible, there is no necessary requirement to prove who took the photograph or made the visual record, provided a witness is able to declare that it shows the real appearance of the subject (whether that be a person, scene, object or some other item) at a relevant time and accurately depicts what is shown of the relevant subject: *Halsbury's* at [195-5035] citing *Taylor v Chief Constable of Cheshire* [1986] 1 WLR 1479 at 1486-7 per Ralph Gibson LJ.

263 Distortion of the appearance of things in photographs by the use of colour and enlargement, or other digital enhancement, may on occasion make them inadmissible or make their use unfair: Halsbury's [195-5035].

264 Sometimes the forensic issue facing the Court is not one of admissibility of the photograph but rather the weight to be attached to what is depicted: *Taylor v Chief Constable of Cheshire* at 1487.

265 Under the *Evidence Act 1995* (NSW) the definition of "document" includes photographs: s 31, Dictionary Pt 1. Thus, photographs may also be admissible in the same way as documents are admissible.

Photographic material regarding Rossdale and Gostwyck Flats

266 A significant turning point in the case arrived with cross-examination by Dr Mantziaris of Barbara regarding a series of photographs regarding the properties. The photographs were marked as exhibit P6; T 788. There are 82 photographs (exhibit started with 87 photographs although 5 photographs being pages 82 – 86 were removed prior to the tender).

267 The photographs reveal the following:

- (1) Michael and Adele's house built in 2004 on Rossdale: photos 1-4. Barbara accepted that none of the installations built around the house including the power poles and the water tanks or the structures were there before 1993 and they were put in at Michael's and Adele's own expense: T 770;
- (2) a driveway: photo 5. Barbara indicated that the driveway had been put in at or after the house was built. The photo also disclosed a line of trees which Barbara accepted were planted by Michael and Adele: T 771;
- (3) part of the driveway going out to the share farmer's cottage: photo 6. Barbara accepted that that was a new driveway that had been created by Michael: T 771;
- (4) an area adjacent to the Paterson River as at 1997 with no trees planted: photos 7-10: T 772;
- (5) an area adjacent to the Paterson River earlier than 1997 (photos 11-12) which Barbara agreed showed the effects of erosion: T772
- (6) a view from behind the house looking down to the Paterson River (photo 13) which Barbara accepted showed a number of mature trees that have been planted by Michael and Adele: T773;

- (7) pastureland with Mount Johnson in the background disclosing an irrigation main in the paddock (photos 14-17) which Barbara agreed was not there prior to 2004, which Michael and Adele had put in: T 774;
- (8) irrigated and non-irrigated land (photo 18) which Barbara agreed showed the beneficial effects of irrigation: T774;
- (9) a tractor (photo 19) being part of the partnership property and mown pastures on Rossdale (photo 20) down towards "Donnie Vicker's shed" which Barbara agreed showed fodder production of hay and lucerne which was not possible on Rossdale prior to the installation of the irrigation system: T 774-775;
- (10) a scene (photo 21) showing improved pasture due to irrigation with the lucerne truck ready for hay making: T 775;
- (11) sorghum crop on Rossdale (photo 22) which Barbara agreed showed the effects of improved land pasture : T 775-776;
- (12) an article taken from 'The Land' Newspaper on 9 June 2016 showing Michael and Adele having cleared a 1.8 km section of the Paterson River and planted 1,000 native trees and shrubs since the prior year's damaging Hunter floods (photo 23): T776;
- (13) flooding of the Paterson River in 2007 taken from the corner of Michael and Adele's house (photo 24): T 776-777;
- (14) an area with higher flooding of the Paterson River in 2015 (photo 25): T 777;
- (15) the riverbank on Rossdale being photos 26-34, said to have been taken on 2 May 2016 showing tree planting which Barbara agreed was to counter the effects of flood erosion: T777;
- (16) a line of mature trees on Rossdale planted by Michael and Adele along the road that goes to the sheds and further up to their house (photos 35 and 36): T 778;
- (17) old fencing (photo 37): T 779;
- (18) the entrance to Rossdale pre-1993 showing with an old hay shed to the left and further down the road, the old dairy (photos 38 and 39): T 779;
- (19) the new extension to the hay shed to the left which Barbara agreed Michael built and in the foreground to the left of the road the new machinery shed which Michael built and a new workshop (photo 40): T 779-780;
- (20) the old dairy which had been renovated by Michael and Adele into offices and a whole new machinery shed which Barbara agreed was built by Michael and Adele (photo 41): T 780;
- (21) the shed that had blown down in September 2002 (photo 42): T 780;
- (22) the new workshop built on the location of the blown down shed (photo 43): T 781;

- (23) inside the workshop which Barbara agreed Michael had built, showing Nicholas at about age 20 working behind Michael (photos 44 and 45): T 781;
- (24) the outside part of the workshop with roof covering farming equipment (photo 46): T 782;
- (25) outside of the workshop (further photos 47 and 48): T 782;
- (26) the old hay shed but with a new steel round yard in front of it and a new gate which has been used as a horse installation for the purposes of housing Nicholas' horses, which Barbara agreed had been built by Nicholas and Michael together (photos 49-51): T 782;
- (27) the cattle yard which Barbara agreed was constructed by Michael on Rossdale (photo 52): T 782;
- (28) the cattle race which Barbara agreed had not been installed prior to 2004 (photos 53 and 54): T 783;
- (29) cattle infrastructure, including loading race which Barbara agreed that Michael and Adele had built (photo 55): T 783;
- (30) a horse arena that Barbara agreed Michael and Nicholas had built for Nicholas' horses (photo 56): T 783;
- (31) a cattle crush which Barbara agreed Michael had installed on Rossdale (photo 57): T 783;
- (32) Adele doing fencing work and Michael working or planting (photo 58): T 783;
- (33) Adele drilling holes for fencing and digging for fencing (photos 59-61): T 783-784;
- (34) the driveway into Gostwyck Flats which Barbara agreed that Michael and Adele had arranged for resurfacing (photo 62): T 784;
- (35) cattle yards at Gostwyck Flats which yards Barbara agreed that Michael had enlarged (photos 63 and 64): T 784;
- (36) cattle yards which Barbara agreed Michael rebuilt (photos 65-69): T 784;
- (37) a road on Gostwyck Flats (photo 70) which Barbara agreed Michael had opened up, and grading of the road (photos 71 and 72): T 784-785;
- (38) a fallen fence at "Rocky Ridge" as a result of flooding which Barbara agreed was work that Michael and Adele would have to clean up on Gostwyck Flats after every flood since they moved in (photo 73): T 785;
- (39) new fencing installed by Michael and Adele in December 2016 after a flood (photos 74-77): T 785;
- (40) Michael's 'movable' house at Lennoxton Road Vacy as at 1990 which land the deceased had given him being 7-8 acres (photo 78): T 786-787;

- (41) the brick house being built at Lennoxton, which Barbara agreed that Michael and Adele had put a fair bit of work into (photos 79,81): T 786;
- (42) the shed at Lennoxton (photo 80): T 786;
- (43) the Lennoxton property circa 1987 before Michael and Adele built a home (photo 87): T 787-788.

Estate

Assets and liabilities

268 The estate as at (or more particularly within several months of) the date of death was according to the inventory of property (CB 3/229, 321) comprised as follows:

Asset	Value
Funds at Maitland Mutual Limited	\$4,187.24
Shares in the Company, namely 130 management class shares and 17,000 ordinary class shares	E\$2,500,000
Total	\$2,504,187.24

269 The inventory of property disclosed that the deceased and Barbara held the following joint assets:

Asset	Value
Leasehold interest Unit 202, 365 Morpeth Road, Morpeth	E\$455,000
Monies in three accounts with Maitland Mutual Limited	\$3,593.23
Personal chattels, household goods and furniture	E\$5,000.00
Total	\$463,593.23

270 The application for letters of administration was paid from the estate in the sum of \$3,515: CB 3/322.

271 On 27 July 2022, the Court directed the parties to provide an agreed schedule as to assets and liabilities and costs. The parties in compliance with the direction prepared a joint schedule.

272 As at the date of the deceased's death the joint schedule reflected what I have stated above as per the inventory of property and disclosed no liabilities.

273 The joint schedule in relation to notional estate in summary indicated the following:

Asset	Value
Leasehold interest Unit 202, 365 Morpeth Road, Morpeth	\$227,500
Monies in three accounts with Maitland Mutual Limited	\$3,593.23
Netwealth Investments Ltd funds	\$253,642.60
FirstChoice Wholesale Investments	\$7,110.25
Personal chattels, household goods and furniture	E\$5,000.00
Total	\$496,846.08

274 The particulars of joint ownership or entitlement indicated that in all cases Barbara was 50% joint owner other than in relation to the Netwealth Investments funds in which case she is listed as having a reversionary beneficiary interest and in relation to the personal chattels, goods and furniture of which she was simply designated as being the owner.

275 Details of the estate and the joint assets as noted in the DOS varied somewhat from above. The DOS noted (DOS[22],[27]):

- (1) the estate has no unpaid liabilities (not including costs of these proceedings); and
- (2) the deceased and Barbara held the following joint assets:

Asset	Value
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Unit 202, 365 Morpeth Road, Morpeth	\$330,000
Monies in three accounts with Maitland Mutual Limited	\$3,392.60
Personal chattels, household goods and furniture	E\$5,000.00
Total	\$338,354.44

276 No separate schedule was provided in relation to the assets of the company. However, is evident that the parties, having regard to the joint schedule agreed that Rossdale was valued at \$5.75M and Gostwyck Remnant at \$1.35M.

277 Although it is not expressly stated in any submission, it is clear that the above-mentioned figures accord with the appraised values by Ray White as at 10 June 2022 for Rossdale of \$5.5M-\$6M (CB 2.2/79) and for Gostwyck Remnant of \$1.3 to \$1.4M: CB 2.2/33-34.

Costs

278 The breakdown of the family relationships leading to this litigation has generated close to \$1M in costs. This is very sad.

279 In summary the joint costs schedule (see also CB 2.1/492, 496) indicated as follows:

Description	Estimated value	Costs paid to date
Ordinary basis		
Plaintiffs' costs	\$430,141.88	
Defendants' costs	\$257,465.53	
Total	\$687,607.41	

Indemnity basis		
Plaintiffs' costs	\$614,488.40	\$249,972.56
Defendants' costs	\$367,807.90	\$169,301.56
Total	\$982,296.30	\$419,274.02

280 The schedule confirmed that no costs of any party have been paid out of the estate of the deceased.

281 In relation to costs and expenses of any property that is or may be required to be sold the joint schedule indicated as follows:

Description	Estimated value
Rossdale	
Real Estate Commission 2% including marketing expenses based on estimated sale of \$5,750,000	\$115,000
Conveyancing fees	\$5,000
Subtotal Rossdale	\$120,000
Gostwyck Remnant	
Real Estate Commission 2% including marketing expenses based on estimated sale of \$,350,000	\$27,000
Conveyancing fees	\$3,000
Subtotal Gostwyck Remnant	\$30,000
Total	\$150,000

- 282 Dr Mantziaris raised in the POS an issue regarding the defendants incurring of costs on the part of the company. During the hearing, Dr Mantziaris sought to cross-examine Philippa regarding the decision of the company to take an active part in this dispute and not just stand by and abide by the order of the Court: Day 10; T 940.
- 283 There was objection to the cross examination and I asked regarding the relevance of the cross-examination. Dr Mantziaris indicated that the questioning went to the issue of costs. That led to some discussion in which I sought to understand the extent of costs incurred on behalf of the company.
- 284 At that point in the proceedings I was informed that there was no breakdown in the evidence regarding costs allocation between Barbara and the company: T 941. In those circumstances I indicated that there ought to be an affidavit provided which made that distinction: T 942.
- 285 That led the following day (Day 11) to Mr Simpson seeking leave to file an affidavit of Ms Young sworn 5 October 2022. Leave was granted to do that. The affidavit was read without objection: T 949.
- 286 The affidavit indicated that the legal costs incurred by the defendants on a solicitor client basis that were solely referable to the company was the sum of \$4,719.
- 287 The following (and final) day of the hearing Dr Mantziaris sought to tender a letter from Arnold Lawyers to Tranter Lawyers dated 5 October 2022 seeking what in substance were particulars regarding the extent of the costs and in particular the possibility of there being joint costs: T 1043.
- 288 There was a degree of debate about this: T 1043-1045.
- 289 Having regard to my perception of what was asserted in the affidavit and responses of Mr Simpson I noted for clarity's sake that I would determine the matter on the basis that the only costs that have been charged or are going to be charged to the company is the figure of \$4,719: T 1044.

Legal representatives

- 290 At least from 2006 the deceased and Barbara consulted the firm Waller Fry Faulkner for legal advice (CB 3/18.1, 18.5, 19; T 687, 743), later known as Macmillans Waller Fry for the legal affairs.
- 291 In or about 2010 Michael sought advice regarding the intergenerational transfer from Macmillans Waller Fry: CB 3/23.
- 292 At some stage no later than November 2016 the firm Mason Lawyers amalgamated with Macmillans Waller Fry.
- 293 From about 19 October 2016 the deceased and Barbara gave instructions to Mason Lawyers to transfer their legal files to Mr Meredith: T 688; CB 3/23.1.
- 294 Undercover of a letter dated 4 November 2016 Mason Lawyers provided Mr Meredith with the deceased's and Barbara's legal documents held with that firm: CB 3/23.1.
- 295 In December 2019 – January 2020 Mr Meredith informed the deceased and Barbara that they needed to change solicitors as he had a conflict of interest in continuing to act for them as he was also the plaintiffs' solicitor and the company's solicitor: CB 2.1/414; T 691 (Barbara).
- 296 In or about early January 2020 Barbara engaged Randeep Singh of Tranter Lawyers to act for her (CB 2.1/35), asserting in cross-examination “because we were absolutely disgusted with [Mr] Meredith. He was going doing things with Michael and not telling us”: T 689, see also 721.
- 297 In some of the questioning of witnesses and submissions in the proceedings it was suggested that whilst Barbara wished to change legal representation, the deceased was not unhappy with Mr Meredith and continued to correspond with Mr Meredith: e.g. handwritten letter dated 27 January 2020: CB 3/205. There is no need to form any concluded view about whether the deceased formally cut ties with Mr Meredith.

Wills

- 298 The deceased made a number of Wills. I mention the main Wills below.

2006 Will

- 299 The deceased made a Will on 6 February 2006 (**2006 Will**): CB 3/18.1-18.5
- 300 The deceased appointed Michael and Philippa as executors and trustees. He gave to Barbara his interest in the home at King Street Lorn and his shares in the company to Michael and any investments other than the shares to Philippa: CB 3/18.2-18.3.
- 301 Barbara also made a Will on 6 February 2006 leaving her interest in the home at King Street Lorn to the deceased, any shares she held in the company to Nicholas and the residue of her estate to Philippa: CB 3/18.7-18.8.

April 2019 Will

- 302 The deceased made a Will on 5 April 2019 (**April 2019 Will**): CB 3/93-97.
- 303 The deceased by the April 2019 Will appointed Michael and Philippa as executors and gave his shares in the company to Michael and the rest and residue of his estate to Barbara.
- 304 In the event that Barbara predeceased the deceased the residue of the deceased estate was given to Philippa.
- 305 There is a question of construction regarding the gift over in the event of Michael predeceasing the deceased. The parties have assumed that in that instance the deceased's shares were given to Adele, Danika and Nicholas in equal shares. It is not necessary to determine whether that is correct or not.

August 2019 Will

- 306 The deceased made a Will on 21 August 2019 (**August 2019 Will**): CB 3/112-116.
- 307 The terms of the August 2019 Will are relevantly the same as the April 2019 Will. The only material difference (subject to a question of construction) is that in the event of Michael predeceasing the deceased the deceased's shares in the company were given to the five grandchildren in equal shares.

Last Will

- 308 The deceased's last Will was made on 15 March 2020 (**last Will**): CB 2.2/2, 3/226.

- 309 The deceased by his last Will left his whole estate to Barbara.
- 310 The deceased did not appoint an executor under his last Will.
- 311 Unlike the previous Wills, the last Will is in handwriting and the body simply is as follows:

I Ross George Horn revoke all wills
and codicils made by me before
15th March 2020

I leave everything to my wife
Barbara Horn

- 312 On 17 December 2020, Barbara was granted letters of administration CTA of the deceased's last Will: CB 2.1/1, 3/227.

Barbara

Financial details

- 313 As at 29 August 2022 Barbara's financial position was described as follows (CB 2.1/500):

Asset	Value
Leasehold interest Unit 202, 365 Morpeth Road, Morpeth (after payment of owner retention sees to the village owner)	\$330,000
Bank accounts	\$17,754.20
Two accounts with FirstChoice Wholesale Investments	\$33,358.60
Net Wealth Super Accelerator account 1	\$271,706.69

Net Wealth Super Accelerator account 2	\$489,590.59
Motor vehicle	E\$10,000
Personal chattels, household goods and furniture	E\$5,000.00
Total	\$1,157,410.08

- 314 Barbara currently draws a pension from her investments in the sum of \$3,316.26 per month. She does not qualify for a Centrelink pension but does receive supplemental payment from Centrelink from time to time to assist with the cost of medications: CB 2.1/501. Her only other income is interest income that she receives on her bank accounts. She has regular expenses which total \$2,933.45 per month. She states that she is very careful to make sure that she lives within her means each month: CB 2.1/501.
- 315 In addition to her usual expenses, just prior to the hearing she had a vet bill for approximately \$1,800 and had recently purchased a new bed and linen with the remaining balance of approximately \$2,000 to be paid: CB 2.1/502.
- 316 Barbara lives at a unit in Closebourne Village Morpeth (as noted below), and states that she would like to remain living there for as long as she can although she anticipates in the future she is likely to need to move into a care facility that offers supported living arrangements. The cost of that is presently unknown because different facilities offer different levels of support and it will depend upon Barbara's needs when the time comes. Nonetheless she has a concern to ensure she is in a position financially to afford the facility of her choice so that she is comfortable and can receive a high standard of care that is commensurate with her then conditions: CB 2.1/502 – 503.
- 317 Barbara has borrowed money from Philippa to pay the legal costs of the proceedings as she does not have sufficient cash available to cover those costs. She has promised Philippa that she will repay the monies borrowed but needs to consult with her financial adviser and accountant to ensure the best way of doing this to avoid significant tax liabilities: CB 2.1/503.

Health

- 318 On 30 August 2022 Barbara in providing an updated affidavit annexed a patient summary from Tenambit Medical Centre. The affidavit explains that she was now seeing Dr Adam Jackel at the medical centre it being a lot closer than her former practitioner Dr Booth who was located at Lorn where she used to live prior to moving to Closebourne Village: CB 2.1/502.
- 319 Of note is that the patient summary indicates one of Barbara's "Current Problems" is cognitive impairment with "onset 28/10/2019": CB 3/320.24. That reference is in all likelihood sourced from a comment in a letter by Dr Booth on that date (see below).
- 320 Apart from the reference to cognitive impairment the patient summary indicates that Barbara suffers from thyroid disease, arthritis of the cervical spine and hypertension: CB 3/320.24.
- 321 Barbara otherwise indicates that she is generally in good health and suffers "the usual ailments" associated with ageing.
- 322 In June 2021 Barbara was undergoing testing to diagnose a spinal condition: CB 2.1/34.
- 323 Barbara has subsequently been diagnosed with arthritis of the cervical spine. However, that will not require surgery at this time though she has been advised to remain vigilant for further deterioration and complications: CB 2.1/502.

Needs

- 324 Barbara lives independently and receives regular physical assistance from Philippa, Tristan, Hamish and their families. They also provide her with assistance with maintenance and upkeep of her home, managing appointments, taking her to and from appointments and other visits, managing her correspondence and sorting out arrangements for insurances or dealing with service providers: CB 2.1/34.
- 325 Barbara was cross-examined regarding her financial resources and her attention was drawn to discussions which were noted under a heading "Cash flow" (CB 172.23) indicating that there was approximately \$2,000 per month surplus in their cash flow which Barbara was saving towards improvements at

their home. The improvements were then identified as being purchasing a single king-size bed, new sheets, new blankets, new bedspreads and some work done to get a paved path for the backyard. She accepted that \$2,000 comfortably covered those costs: T 684-685.

326 Ultimately the deceased had no need for funds for aged care: T 686 and Barbara acknowledged that (to this point) neither did she: T 686.

Michael & Adele

Financial details

327 Michael states that since his marriage to Adele they have pooled their assets together and invested the assets in the enterprise conducted on Rossdale and Gostwyck Remnant: CB 2.1/27.

328 Michael and Adele provided details of their financial position as at 10 May 2021 and 29 August 2022.

329 As at 29 August 2022 their financial details were as follows. Michael's position was:

Assets

2012 Nissan	\$10,000
Superannuation	\$33,000
Total	\$43,000

Liabilities

NAB credit card	\$1,460
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330 Their joint assets and liabilities were as follows:

Assets

Property West Street Forster	\$350,000
Farm plant and equipment	\$100,000
Cattle 92 steers	\$140,000
Forklift	\$12,000

Tools	\$10,000
Total	\$612,000

Liabilities

Mortgage – farm loan	\$548,500
Mortgage – Forster unit	\$176,000
NAB farm trading overdraft account	\$17,900
Mazda BT-50 lease	\$24,000
Forklift loan	\$11,000
Total	\$759,000

331 Adele's details are as follows:

Assets

Superannuation	\$20,874
Money in bank account	\$345
2019 BT-50	\$35,000
2010 boat and trailer	\$8000
1995 caravan	\$12,000
Total	\$76,219

332 The defendants contended that there had been inadequate production by Michael and Adele in the proceedings.

333 Following complaint by the defendants of lack of production by the plaintiffs of materials bearing upon their financial position, there was production of materials during the hearing. There was tender of some of the materials produced, which documents were marked as exhibits including:

- (1) a bundle of bank statements contained in a blue manila folder (exhibit D2: T 98) and a paginated version of exhibit D2 - being marked exhibit D2A: T 209;
- (2) a bundle of bank statements for Adele relating to a Newcastle Permanent account - exhibit D3: T 99;

- (3) a bundle of Greater Bank account statements for Michael and Adele - exhibit D5: T 207; and
 - (4) a bundle of tax returns for each of Michael and Adele for the financial years 2019 to 2021 and a partnership return for the M & A Partnership for the financial year ended 30 June 2021 – P 3: T 486.
- 334 There was evidence that the unit in Forster had first earned rental income in March 2015 and was income producing at least in 2020: exhibit D9.
- 335 On 29 October 2021 the NAB confirmed to Michael and Adele an offer of a Market Rate Facility (**MRF**) of \$570,000 with Farmers Choice Farm Management Account Overdraft of \$20,000 (**Overdraft facility**). The offer was accepted by Michael and Adele on 8 November 2021: exhibit D9
- 336 The purpose of the MRF was for the purchase of stock for business and the Overdraft facility provided working capital. The MRF was secured by mortgages over the Forster unit and supported by a guarantee and indemnity provided by Damah in its capacity as trustee of the DFT for \$590,000: exhibit D9.
- 337 The Greater Bank materials (exhibit D5) dated back to an account as early as 30 June 2012 (the institution then known as the Greater Building Society). The statements of account contain entries demonstrating payment of some of their legal fees for the proceedings (e.g. in April 2021). The materials were otherwise unremarkable. Relevantly as at 30 June 2022 Michael and Adele had a closing balance of \$1,558.67.
- 338 As at 10 May 2021 Michael's net monthly income was \$972: CB 2.1/26. That figure remained the same as at the time of the hearing: CB 2.1/478. Michael explained that his income was greater when he had the use of Gostwyck Flats to run cattle: CB 2.1/478.
- 339 Michael's tax returns for the financial years ended 2020 and 2021 were tendered and became exhibit D9: T 413. Michael's taxable income for the 2020 financial year was -\$9,635. His taxable income for the 2021 financial year was \$26,769.
- 340 During cross-examination there was some criticism of Michael and Adele regarding a failure to disclose Adele's income. At least indirectly there was

disclosure of Adele's income by the provision, albeit late, of documentary material. That showed that for the 2019-2021 financial years Adele had taxable income of respectively \$23,814, (-\$6,878) and \$38,229: exhibit P3. The figure of \$38,229 was in fact an amount of \$45,107 net of the loss of \$6,828 of the prior year: exhibit P3 page 16.

341 As at 10 May 2021 the plaintiffs' combined total monthly expenditure was \$6,815: CB 2.2/9. As at 29 August 2022 their combined monthly expenditure had increased to \$9,137: CB 2.2/19.

342 The main components for the increase in expenditure were rates which had increased by \$150, mortgage payments on the "farm loan" (I assume the MRF) which had increased by \$1,672, electricity expenses which had increased by \$120, and insurances which had increased by \$60.

Health

343 Michael indicates that he is in reasonable health for his age but acknowledges that his life of labour as a farmer and mechanic has had a (detrimental) impact on his body: CB 2.1/28.

344 He is largely deaf in his left ear, he suspects probably from working with machinery all his life. In the course of the proceedings he wore a hearing loop for the purposes of giving evidence.

345 Michael has a hernia, history of backache, otitis media, and shoulder injury: CB 2.2/26. His shoulder has torn tendons and rotated cuff muscles from an injury in about 2013 whilst mustering cattle. He has dental issues requiring work (CB 2.1/28) and also suffers from high blood pressure: CB 2.2/29.

Needs

346 Michael's future needs are said to be dependent on the outcome of the claims in the proceedings. As it currently stands he is in need of a house to live in, funds to retire on and buy the premises and land to continue his self-employed occupation as a farmer and mechanic or, if that is not forthcoming, a capital sum through which he can acquire land and premises to continue his employment: CB 2.1/27.

Damah Pty Ltd

347 The financial position of Damah as trustee for the DFT as at 29 August 2022 is said to be as follows (CB 2.2/21):

Assets

Property at Greys Road Failford	\$950,000
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Liabilities

Mortgage on Failford property	\$225,000
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Net assets	\$725,000
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Events

348 The following facts, drawn from the affidavit, documentary and testimonial evidence are, except as I otherwise indicate, either uncontested or not seriously in dispute.

1950s-1970s

349 In 1957, the deceased and Barbara bought land in Tocal Road Bolwarra Heights and lived there as their first home as a married couple from 1958.

350 In 1966 the deceased and Barbara moved to live in Moore Road Bolwarra Heights: CB 2.1/352.

351 From the company's inception, the deceased and Amos worked on the landholdings owned by the company, which subsequently came to be known as Rossdale and Gostwyck Flats: CB 2.1/399 [10].

352 From the 1950s to the mid 1970s, Barbara worked alongside the deceased undertaking a variety of jobs that included cattle work, property maintenance and improvements to the land: CB 2.1/400[23].

353 By the 1970s, Barbara returned to work at her family's business, which was involved in the wholesale of confectionery: CB 2.1/400[26].

1990s the Rossdale Arrangement

354 In the early 1990s there were changes in the milk quota system of the Hunter Valley Cooperative Dairy Co Pty Ltd and it was becoming unviable for dairy

farmers to continue dairying. This was seemingly a precursor to the deregulation of the dairy industry in New South Wales: CB 2.1/401.

355 In about late 1990 Michael had a discussion with the deceased in which his father raised the issue of starting up an earthmoving business: CB 2.1/252. At that stage he left work at Fairhall and worked for the company trading as 'GA and RG Horn Pty Ltd Earthmoving': CB 2.1/253.

356 On 7 March 1991 the deceased and Barbara gave powers of attorney to Michael and Philippa: CB 3/0.1 – 0.8.

357 In about the middle of 1991 the deceased had a conversation with Michael in Lennoxton regarding Rossdale: CB 2.1/253-254.

358 Michael says the deceased visited him at Lennoxton and had a conversation to the following effect:

"Dad: Barry [the sharefarmer] is getting to the age where he is going to retire soon and we are going to have to spend a lot of money on the dairy to get the ice bank in for the vat. Would you be interested in taking it on?

Me: I'd take it on but not as a dairy.

Dad: Alright. Well, I won't spend any money on the ice bank then. I won't have to run the dairy heifers at Gostwyck Flats anymore either. We'll wait until Barry retires and you can take it on then.

Me: Ok

Dad: That way you'll have Rossdale and I'll keep running Gostwyck Flats. When I'm finished there, you'll have both of them. It'll all go to you when I die anyway." (CB 2.1/254[140])

359 Michael's evidence outlined at least in a general way the work he did from about 1991 prior to taking over Rossdale. He says that the work he did included:

- (1) purchasing and raising calves;
- (2) purchasing and maintaining tractors, slashes and other agricultural equipment to use on Rossdale;
- (3) improving the infrastructure on Gostwyck Flats including building ramps for transportation of machinery, cleaning out dams, establishing gravel roads, carting and spreading fill and re-gravelling an access road; and
- (4) improving the infrastructure on Rossdale by creating access tracks with a bulldozer, clearing lantana, removing fencing, creating tracks for new fencing, undertaking major repairs to the hay shed, constructing three dams on the hillside, clearing paddocks including stump removal,

constructing a gravel access road from the dairy to the river and replacing piers and roofing on the Greenhouse: CB 2.1/256-257.

- 360 In the latter part of 1991 the deceased suggested to Michael that he run the earthmoving business himself, that a separate bank account would be opened and indicated he could use that: CB 2.1/253.
- 361 In the autumn of 1992 the deceased visited Michael at Lennoxton and had a discussion regarding giving Barry White (the share farmer) notice in the context of Michael taking over Rosssdale. Subsequently Barry was given notice: CB 2.1/254.
- 362 Michael says that based on the conversations about taking over Rosssdale and the earthmoving business he changed the focus of the earthmoving business to rural contracting, and that he purchased tractors and other farm machinery for the earthmoving moving business at his expense: CB 2.1/254.
- 363 Michael says that he used machinery from the earthmoving business to do work on the farms for no charge (presumably to either the deceased or the company) namely slashing at Gostwyck Flats and carting the deceased's cattle to and from market, carting gravel to the farms and spreading it over the roads and carting chicken litter to the farms and spreading it out over the paddocks. He states that he constructed a gravel pad on Gostwyck Flats: CB 2.1/255.
- 364 In about May 1992 Adele moved in to live with Michael at Lennoxton which was basically a vacant block with an ATCO site shed (used as the residence) and a shed for a workshop and storage: CB 2.1/161.
- 365 When Adele started living with Michael she was working as a radiographer. She had a property settlement with her prior spouse/partner and from that received a property at Verona Close Rutherford (**Verona**): CB 2.1/167.
- 366 Adele states that not long after she started living with Michael (in 1992) they had a conversation to the following effect:

“Michael: Dad dropped in this morning and asked me if I want to take over the running of Rosssdale when Barry retires. I said yes to it but not as a Dairy.

Me: Ok. When is this going to happen?

Michael: Dad is going to talk to him soon.

Michael: When my father dies, I will get all the shares in the company which owns both the farms and Phillipa will get all of Mums investments when she dies.

Me: What do you mean?

Michael: Get in the ute and I'll show you." (CB 2.1/162[59])

367 Adele then says that Michael took her to Gostwyck Flats and they drove around it: CB 2.1/162.

368 In or about June 1992 Adele indicates that the deceased visited herself and Michael at Lennoxton and she heard a conversation between Michael and the deceased in words to the following effect:

"Ross: I saw Barry and he is going to finish up at the end of June next year. It was one of the hardest things I've ever had to do. I'm pleased you're going to take it on. It's all going to be yours one day.

Michael: Thanks dad. That's really good. I'll start getting some things organised for then.

Ross: Goodo." (CB 2.1/163[63])

369 By 1993 Michael and Adele started building a four bedroom brick house on Lennoxton as owner builders: CB 2.1/161.

370 In about March 1993 Michael says that the deceased visited himself and Adele at Lennoxton and had a conversation to the following effect:

"Dad: Are you still going to take it [Rossdale] on or do you want to sell it.

Me: No way, I want to take it on, you promised me I could take it on.

Dad: If you don't, we can sell it and give you half the proceeds.

Me: No. I still want to take it on.

Adele: We have already been raising heifer calves to start our herd.

Dad: Alright then. I told Barry to finish up in about June, so I will arrange for a clearing sale and you can start then. Barry and Elaine are to stay on in the house for as long as they wish." (CB 2.1/255[146])

371 Adele's version of the conversation is to the following effect:

"Ross: Are you still wanting to take on the Rossdale property or do you want to sell it?

Michael: Yes, I still want to take it on, you promised me I could.

Ross: If you don't, we can sell it and give you half the proceeds I thought you could use it to build your house.

Michael: No dad I still want to take it on. I've been making plans for it.

Me: We have already been raising heifer calves to start our herd.

Ross: Alright then. Well Barry finishes at the end of June so you can start after that. Barry and Elaine will stay on in the house for a while. I'll do a clearance sale when they finish up." (CB 2.1/163-164[66])

372 In the period between March and June 1993 Adele indicates that she and Michael started doing a number of things in readiness for the eventual start of farming including purchasing calves, tractors, slashes and another agricultural equipment and doing improvements to the property: CB 2.1/164.

373 In about June 1993 Michael says that the deceased visited himself and Adele again at Lennoxton and had a further conversation as follows:

"Dad: When you take over Rossdale it's for you to make whatever improvements you like so long as you pay for them. You can keep all the profits but unfortunately, you're still going to have to pay me some money so I can survive. It's going to be \$500 per month. You'll also have to pay half of the accounting fees for the Company as well as the rates and everything like that.

Me: No worries Dad. We can do that.

Dad: It will all come to you when I pass away anyway. My father would be happy to know that you're going to take it on.

Me: I know. Thanks." (CB 2.1/256[147])

374 Adele's version of the conversation is to following effect:

"Ross: When you take Rossdale over you can make whatever improvements you like so long as you pay for them. You keep all the profits that you make off the farm. But you're going to have to pay me some money so I can survive. I would appreciate it if you could pay me \$500 per month. You'll also have to pay half of the accounting fees for the Company as well as half the rates as both farms are together on the one rates notice.

Michael: No Worries Dad. We can do that.

Me: I'm sure we can do that.

Ross: My father would be happy to know that you're going to take it on and the company will all come over to you when I die.

Michael: I know. Thanks Dad.

Ross: I will put it down in a letter and give it to you so we all know what is expected." (CB 2.1/164-165[68])

375 From about 30 June 1993 Adele rented the Verona property. She indicates that the rental income from that and all her wages went into meeting Michael's and her expenses: CB 2.1/167.

376 In about July 1993 Michael started a farm at Rossdale and at that stage the deceased was 63: CB 2.1/258

- 377 In about July 1993 Adele indicates that Barry and Elaine had finished dairying and Michael and Adele started to pay the deceased \$500 per month by cheque which she says she gave him during his regular visits: CB 2.1/165.
- 378 In about 1993 Michael and Adele re-piered the Greenhouse: CB 2.1/168.
- 379 Adele learnt to do more farm work and also to manage accounts on computer with MYOB and had a bookkeeping and accounts role: CB 2.1/165.
- 380 They started raising calves for their breeding herd and ultimately had about 40 heifers to start with: CB 2.1/165 – 166.
- 381 After starting up on Rossdale Michael says he carried out further work including constructing cattle yards and a race, purchase and installation of a cattle crush, purchase of cows and bull, replanting paddocks and fencing work, establishing lucerne pastures, constructing new dams in the new paddocks on the river side of Rossdale, constructing new roads and gravelling existing roads, constructing a machinery shed, liming of paddocks, restoration and conversion of an old dairy for general use, replacement of wooden gates with steel gates and the establishment of a bike shift irrigation system run by a diesel pump: CB 2.1/258.
- 382 Adele similarly set out work done in the early period of farming Rossdale: CB 2.1/166.
- 383 From about late 1993 to 1996 Michael says that he worked without having a day off: CB 2.1/259, 260.
- 384 In about July 1994 Michael and Adele moved into the (completed) Lennoxton house: CB 2.1/162.
- 385 Across 1996 to 1997 Michael worked at Tocal Agriculture College to get in some extra income: CB 2.1/260.
- 386 From about 1996 to 1999 Rossdale experienced drought and floods and consequent on reform to the regulation of beef production there was minimal income coming from beef production activity on Rossdale: CB 2.1/261.
- 387 In or about July 1997 Adele sold the Verona property for \$82,000 and received net proceeds of about \$40,000: CB 2.1/168. Adele used proceeds of sale to

pay for finishing off the house at Lennoxton including work on the main bathroom, outdoor barbecue area and carport: CB 2.1/260.

- 388 In 1998 Adele worked as a radiographer until resigning in 2002 to take up working full-time with Michael on Rossdale: CB 2.1/261.
- 389 From approximately 1998 until the present Michael identified lack of trees on the properties as making it more vulnerable to the impacts of floods and droughts and he and Adele commenced a program of tree planting on Rossdale.
- 390 They started with plantings making shelter belts and windbreaks along fence lines and the riverbank. Michael indicates they managed to plant and grow approximately 30,000 trees on Rossdale and to a much lesser extent on Gostwyck Flats as a means to improving the agricultural value and productivity of the farms: CB 2.1/262.
- 391 In 1998 the deceased (through the company) and Michael renovated and/or did repairs on the Greenhouse on Rossdale: CB 2.1/168 – 169. This included replacing veranda boards, constructing a transpiration pit, renovating the toilet and laundry, installing a new hot water system, removing dilapidated sheds, fencing the curtilage to the Greenhouse and constructing a new driveway entrance: CB 2.1/266.
- 392 In about March 1998 Michael and Adele purchased property at Cory Street Martins Creek (**Cory**) for \$40,000 using funds borrowed from the Greater Bank secured by mortgage over both Cory and Lennoxton. They did this to secure some off-farm income and build some investments of their own: CB 2.1/170. They renovated Cory and leased it.

2000s the Gostwyck Flats Arrangement

- 393 In about May 2000, Michael says an arrangement (similar to the Rossdale Arrangement) was reached with the deceased with respect to Gostwyck Flats, such that Michael and/or Adele would also run the Gostwyck Flats as a farm and pay the deceased the sum of \$500 per month.
- 394 Michael indicates that he, Adele and his father were at Gostwyck Flats and says that there was a conversation with the deceased to the following effect:

“Dad: I'm getting too old to run Gostwyck Flats. You can either take it on or we'll sell it and I'll give you half.

Me: No don't sell it. I'll take it on.

Dad: OK. It will all come to you when I die anyway. I'll start selling my livestock and you can take up the paddocks as they're sold.” (CB 2.1/264[181])

395 Adele's version of the conversation with the deceased regarding Gostwyck Flats is as follows (CB 2.1/170):

“Ross: I'm getting too old and slow for this I've been thinking about this for a while, I don't want to keep running Gostwyck Flats. You can take it on if you want or we'll sell it and I'll give you half.

Michael: No I don't want to sell it. I'll take it on.

Adele: We are hoping that one day Nicholas will be able to take it on

Ross: OK. It will all come to you when I die anyway. I'll start selling my cattle when they are ready to sell and you can put your own cattle on here.” (CB 2.1/170[95])

396 On or about 9 May 2000 the deceased gave Michael a letter addressing him taking over Gostwyck Flats: CB 2.1/264.

397 Likewise Adele says a couple of days after the conversation the deceased visited them and gave Michael a letter about taking over Gostwyck Flats. He asked them to read it and let him know what they thought: CB 2.1/170 – 171.

398 The handwritten note of the deceased dated 9 May 2000 (CB 3/2 – 3) was for the purposes of the proceedings typed (see MFI 1) and is in the following terms:

“9/5/2000

Michael

I (Ross) would like to stop looking after 'Gostwyck Flats' – I will sell all stock – Tractor – Grader Blade – Slasher and Scoop.

If you (Michael) would like to take over the management of "Gostwyck Flats" – stock it etc and profits will be yours to do whatever you like with it. I would prefer not to have any part in the management of "Gostwyck Flats".

I would like to retain the use of the small shed in the corner of the "Shed yard" and the "high" shed that your mother keeps embroidery "gear" in. The big shed would be left vacant and some hay will be left on the property.

From time to time I would dump a load of garden refuse wherever you consider convenient. find the air strip paddock where I dump it now is convenient - and I'll burn it when it is dry enough.

I would still like to get my firewood from the property as I do now.

I thought I would like the change to take place on September 30th 2000. I would have all stock sold by then with the exception of 10 small steers which I would like to keep until Christmas time. (They are not ready to sell yet).

I will be happy to do whatever work you would like me to do on the property (as well as on the ex dairy). I intend keeping the jobs at school two days a week.

I think it best to keep the spraying unit so I can rid both properties of "blue weed" and catheads on the river bank at the ex dairy.

I would appreciate it if you could pay me \$500 a month – but the first of these payments need not happen until February 2001.

If the above is suitable you could start and put cattle in any of the empty paddocks now.

The proceeds of the stock and equipment I sell will remain in the Company in an interest bearing building society account - from these interest payments I will draw my directors fees.

I would like to withdraw all responsibility of the house on Rossdale – to take effect when Elaine vacates. I shall pass over to you the House Building Society account for collection of rents and to pay for maintenance. I shall notify the Dungog Shire and the Rural Lands Board that all rates notices be sent to you and it will be your responsibility for paying these. This will be effective when Elaine leaves."

399 They read the letter and a couple of days later when the deceased visited them they had a conversation in words to the following effect (CB 2.1/171):

"Michael: Adele and I have read the letter and had a talk about it. It looks ok to us.

Ross: Ok then you can take over in September I should have most of my cattle sold by then." (CB 2.1/171[97])

400 On or about 26 May 2000 Michael and Adele registered an ABN for their partnership: CB 1/66.

401 From about 2000 until it was subdivided and part of it (being Lot 6) sold in 2018, Michael and Adele carried out a number of improvements to Gostwyck Flats: CB 2.1/265.

402 They constructed a track for vehicle use along "Rocky Ridge", fenced the boundary, constructed four new dams, removed an old shed, extended the existing hay shed, gravelled existing roads, increased road networks to allow semitrailer access to yards, constructed yards with a new cattle crush, roof and weigh box and a concreted work/walking area, planted about 3,000 trees, cleaned out and enlarged 14 dams, constructed a new creek crossing and

changed internal fencing to give more productive paddocks and lane ways: CB 2.1/265.

- 403 Adele indicates that after receiving the letter and the (subsequent) conversation they started making preparations for farming on Gostwyck Flats and carried out the improvements Michael referred to: CB 2.1/171.
- 404 Much of this work, according to Michael was done early on.
- 405 On 1 September 2000 each of Michael and Adele attended a Water Wise Irrigation Management Course at Murrumbidgee College of Agriculture and were provided with certificates of attendance: exhibit P5; T 641; cf CB 2.1/177, 270.
- 406 In about October 2000 Michael and Adele started (in earnest) farming Gostwyck Flats: CB 2.1/264.
- 407 In order to have the funds for the improvements and to get a herd going on Gostwyck Flats Michael and Adele sold Cory for about \$82,000 and with the net proceeds and the benefit of an overdraft of \$150,000 from Elders they purchased cattle: CB 2.1/172.
- 408 In around December 2000 Barry died and Elaine moved out of the Greenhouse some 12 months later. There is some conflict between Michael's and Adele's evidence regarding the timing for this: CB 2.1/169, 267. However, the precise timing is not vital to determine.
- 409 When Elaine moved out of the Greenhouse, Michael and Adele carried out further renovations to the Greenhouse using their joint savings and earnings including removing the internal walls, putting in a new kitchen and renovating a bathroom, painting the interior of the house and installing new floor coverings and carpeting for the whole house and installing a new water tank and pressure system: CB 2.1/169, 267.
- 410 In about 2001 Michael and Adele changed their farming model from cows and calves to steers: CB 2.1/266.

411 From about February 2001 Michael says he and Adele paid the outgoings for Gostwyck Flats and gave the deceased cheques of \$1,000 per month for both Rossdale and Gostwyck Flats: CB 2.1/265.

2002 plans to build on Rossdale

412 In 2002 Michael and Adele visited his parents at their residence in Lorn and had a conversation, he says, to the following effect:

“Me: Adele and I are thinking that we should move on to Rossdale so we can manage it better. I am wasting a lot of time going backwards and forwards and the road is getting busier and harder to cross and go along with the tractor. We'd sell our place and build on the bottom side of the road. We'd also want to put a new irrigation system in. Have a think about it and let us know.

Dad: Sounds like a good idea to me. I'll consider it and come and see you in the next few days.” (CB 2.1/268[199])

413 Michael in his affidavit evidence indicated that the meeting took place in late 2002: CB 2.1/268[199].

414 Adele's version of the 2002 Lorn meeting is that a conversation occurred in words to the following effect:

“Michael: This drought is still going on. Things aren't too good. The rates and irrigation have doubled what they were over the last couple of years. The \$1,000 we have to pay you is getting difficult. We're probably going to have to borrow some more money

Me: Michael needs me to help with feeding cattle and irrigation so I have left work for the time being until the drought breaks.

Ross: Don't worry about paying me anything anymore. How about you just pay all the Company's expenses. Your mother wants to get out of the company. We're finding it difficult to keep up with it all. I don't want to have to deal with GST and all that.

Barbara: You're running it all anyway, so it makes sense for you and Adele to replace me in the company.

Ross: It will all be yours one day anyway.

Me: That will really be of help to us.” (CB 2.1/172-173[104])

415 Michael states that about three or so days later the deceased visited himself and Adele at Lennoxton and had a further conversation as follows:

“Dad: I'm happy for you to build a house on Rossdale if you want to. It's probably a good idea. It will come across to you anyway when I pass anyway.”
CB 2.1/268[200]

416 Adele says a few days later the deceased visited them and told them (CB 2.1/174):

"I'm happy for you to build a house on Rossdale if you want to. It sounds like it might be a good idea. It will become yours anyway when I die".

- 417 After that conversation Michael and Adele went ahead with planning to build a house on Rossdale.
- 418 Adele says not long after the meeting regarding payments Barbara resigned as a director and secretary of the company and Michael became a director and Adele became secretary of the company: CB 2.1/173.
- 419 Later in 2002 Adele gave up work as a radiographer (she was earning about \$1,200 for a five day fortnight) to work full-time on the farms: CB 2.1/173.
- 420 On 5 September 2003 Neil Nelson, an agricultural consultant, prepared on the instructions of Michael and Adele an Irrigation & Drainage Management Plan (**IDM Plan**) in respect of Rossdale which IDM Plan was lodged with the NSW Agriculture Advisory Body at Tocal: exhibit P5; T 641. The IDM Plan cost about \$6,000: CB 2.1/177, 270.
- 421 The IDM plan discloses that as at that time Rossdale had an irrigated area of 30 ha/75 acres and dryland grazing area of 91 ha/228 acres making a total of 121 ha/303 acres: exhibit P5 page 7. The then current irrigation system was unable to efficiently irrigate the farm and recommendations were made to increase irrigation with a proposed action plan.
- 422 From about September 2003 (exhibit P5) Michael and Adele carried out an upgrade of the Rossdale irrigation system at a cost of about \$70,000: CB 2.1/177, 270.
- 423 The irrigation upgrade involved them undertaking compulsory courses and training for the installation, removing asbestos irrigation mains and replacing them with other mains, moving an irrigation pump to the centre of the property for better flow of water, moving an electricity supply and transformer to provide power for an upgraded system and installing new mains and hydrants: CB 2.1/270.
- 424 Upon completion of the works the Rossdale property had twice the area available for irrigation and irrigation could be done with greater efficiency than previously: CB 2.1/270.

425 By February 2004 through the company Michael arranged for consolidation of the titles for Rossdale to make a single title of about 300 acres to meet planning requirements for having two houses on Rossdale, being the Greenhouse and the house they were intending to build: CB 2.1/269.

2004 residing on Rossdale

426 In about June 2004 Michael and Adele sold the Lennoxton property for about \$517,000 and they moved on to Rossdale: CB 2.1/269. They lived in a caravan for about 12 weeks while they built the Rossdale house at a cost of about \$280,000 for labour and materials. The house is a two story, four-bedroom Colorbond and steel house: CB 2.1/176, 269.

427 Adele describes the building of the Rossdale home noting it came in a kit form like a giant "mechano" set which, mostly by their own labour but with the help of some tradesmen, they bolted together. Adele did all of the waterproofing under the instruction of the builder and Michael and Adele sanded the plaster and did all the painting: CB 2.1/176.

428 On 1 July 2004 Michael and Adele were given development approval for the house on Rossdale: CB 3/4 – 18.

429 In about September 2004 Michael and Adele commenced residence in the new house: CB 2.1/269.

430 In about 2006 Michael says that Barbara telephoned him and informed him that she and the deceased had updated their wills indicating that the shares in the company would go to him and that their house and investments would go to Philippa: CB 2.1/270.

431 Michael says that a couple of days after this conversation, the deceased visited Adele and him at Rossdale and they had a conversation in which words to this effect were spoken (CB 2.1/270):

Dad: "We've just updated our wills. The Company and the farms go to you. But if *anything happens to you Michael it goes to you Adele. Our house and Mum's things go to Philippa. Hamish gets whatever car I'm driving at the time because he's always hard done by.*"

432 Michael says that what the deceased told him in this regard gave him reassurance that everything was "okay": CB 2.1/271.

433 Adele also refers to being told about the update to the deceased's and Barbara's Wills. Adele says in about 2006 she took Danika and Nicholas to visit Barbara and the deceased at their home in Lorn. During the visit the deceased and Barbara spoke with Adele. The deceased informed her "the shares in the company and the farms will go to Michael" and "if anything were to happen to Michael the shares will go to you and the children": CB 2.1/177 – 178.

434 Adele says about a week after that conversation the deceased visited Michael and Adele at Rossdale and stated as follows:

“Ross: Barbara and I have updated our wills. The company and the farms go to you Michael. But if anything happens to Michael it will all go to you Adele and the children. Our house and Barbara's investments will go to Phillipa. I'm going to give Hamish whatever car I'm driving at the time because he is the middle child and always hard done by.” (CB 2.1/178[128])

2008 construction of a workshop and other works on Rossdale

435 In about 2008 Adele wanted to go back to radiography on a part-time basis to help supplement the farm income. However, she was unable to do so as there had been a lot of changes since 2002 and she would have been required to have been reaccredited and retrained: CB 2.1/173.

436 In about early to mid-2008 Michael and Adele constructed a workshop with a concrete floor and three-phase power on Rossdale and converted the old dairy into an office. They use the office to commence trading from Rossdale as Valley Machinery Service, repairing and servicing agricultural machinery: CB 2.1/181, 271.

437 From 2008 to 2010 Michael also worked as a roving NRMA road service mechanic one weekend per month for extra income: CB 2.1/271 – 272.

2009-2010 pension discussions and intergenerational transfer

438 From about August 2009 to August 2010 Adele indicates that she, Michael and the deceased had discussions about the prospect of an intergenerational transfer of Rossdale and Gostwyck Flats to Michael. They had learnt about such transfers in a course they had done at Tocal "Farming for the Future" which included a subject on succession planning: CB 2.1/178.

439 In August 2009 each of Michael and Adele say there was an initial discussion in which the deceased indicated that he was looking at getting his name out of the company so he could receive the pension: CB 2.1/178, 272.

440 Michael says they had a conversation to the following effect:

“Dad: I have to get my name out of the Company so I can get the pension. It all goes to you anyway so we might as well do it now. Can you go and see what needs to be done? That would really help me out.” (CB 2.1/272[220])

441 Michael and Adele looked into the matter and received advice from their solicitor Waller Fry about carrying out an intergenerational transfer: CB 2.1/179, 272.

442 Adele says a month or so later the deceased visited them at Rossdale and had a conversation as follows:

“Ross: I still can't get the pension for 5 years even if we transfer the properties. Can we sell the Tillimby paddock?

Michael: No Dad council won't let you. We had to have 300 acres to have two houses on here.

Adele: With New council rules you would have to sell a minimum of 150 acres, so half the farm. Remember we consolidated it before we built our house, so it is all in one title now.

Ross: Flaming Council.” (CB 2.1/179[131])

443 The deceased had made enquiries at Centrelink and on 30 June 2010 and 5 July 2010 received letters essentially to the effect that as long as he held shares in the company he could not receive the pension: CB 2.1/273.

444 In June-July 2010 (but most likely mid-July 2010) Michael and Adele had a conversation with the deceased at Rossdale.

445 Michael's version of the conversation is as follows:

Me: "The interest on the cattle mortgage is killing me. How about we do the intergenerational transfer? I'll get a mortgage on one of the properties instead and when I do, I'll give you \$30,000 to cover you at \$500 per month for the next 5 years and by then you'll be able to get the pension. I'll also use the money to do a few things to the Greenhouse and the sheds. Here it is in writing have a think about it and get back to me. (CB 2.1/273[224])

446 Adele's version of the conversation is as follows:

“Michael: The interest on the cattle mortgage is killing us. How about we do the intergenerational transfer. I'll get a mortgage on one of the properties instead and then if we give you \$30,000 that will give you \$500 per month for

the next 5 years and by then you'll be able to get the pension. We also need the money to do a few things to the Greenhouse and the sheds.

Me: I've written it down so you can have a think about it and let us know." (CB 2.1/179[133])

447 Adele had typed up a letter with Michael which they gave to the deceased: CB 2.1/179.

448 On or about 25 July 2010 (about a week or so later) the deceased visited Michael at Rossdale and gave Michael and Adele a letter dated 25 July 2010: CB 2.1/179; CB 3/22 and MFI 1.

449 The letter was in the following terms:

"Michael-

I put this in writing so we both know what we are talking about and don't get things mixed up.

I do not want you to give me the \$30,000 under any circumstance (although it would be nice to have) as it will make it too hard for you to repay your loan.

I could and would like it now if you are agreeable to give me \$5,000 as I could live on that for a few years as I have car registration and insurance and medical expenses to pay soon. By the same token if say in two or three years time (if I'm still alive) should I be short of \$100 or \$200 you may see your way clear to give me that, but only if I ask for it.

If you have to mortgage the properties - only mortgage one not both.

Another proposal - when next buying cattle could I pay for two head (as an ongoing commitment) and when these two head are sold could I have the money - it would give me a little bit of packet money.

The agistment for these two head could the work I do cutting out thistles and anything else that needs doing pay for the agistment?

Forget about selling the 76 acres down near the Dungog turnoff and if you want to go ahead with the intergenerational transfer do so if you wish.

I hope these proposals are fair as I always strive for fairness. The properties and shares I own all go to you when I die.

Dad - Ross Horn."

450 In early August 2010 the deceased visited again and had a conversation during which the deceased indicated that he did not wish to do the intergenerational transfer. Nonetheless Michael says he still proposed to give the deceased \$30,000: CB 2.1/274.

451 Adele says there was a conversation in words to the following effect:

“Ross: I don't want to do the intergenerational transfer. It takes too long and I'll probably be dead by then. You are trying to kick me out of the company. Barbara's got too much money invested anyway

Michael: I'm not trying to kick you out. But if you don't want to do the transfer, we won't do anything more about it.

Ross: You will just have to wait until after I die before it comes to you.” (CB 2.1/180[136])

452 In late 2010 Adele (in evidence limited to belief under s 136 *Evidence Act*) indicates that in reliance upon the deceased's letter of 25 July 2010 she and Michael took out a mortgage with the NAB secured against Gostwyck Flats and with the money borrowed purchased more steers, extended the workshop and machinery shed on Rosssdale, purchased a new tractor and carried out more renovations to the Greenhouse: CB 2.1/180.

453 After floods and droughts Michael and Adele planted trees on the riverbank and shelter belts along fence lines. Adele indicates that across the years since about 1998 to present they had planted and grown approximately 30,000 trees on both Rosssdale and Gostwyck Flats as a means to improve the agricultural value of the properties: CB 2.1/180 – 181.

2012-2013 further works on Rosssdale

454 In about 2012 Michael and Adele at their expense put solar systems on their house and the machinery workshop: CB 2.1/181, 275.

455 In about 2013 with the intention of allowing and or assisting Nicholas to establish a horse business Michael and Adele levelled part of the Rosssdale property and put in a horse arena and constructed eight stables in the hay shed: CB 2.1/181, 275.

2015 & 2017 flooding and drought

456 In about April 2015 there was a massive flooding event in the Vacy area including storms which did a lot of damage to Rosssdale and Gostwyck Flats. There were no fences left along any waterways on either of the properties. Trees along the riverbank were either severely damaged, covered in debris or totally uprooted and gone. There was a large amount of debris and sand covering the paddocks: CB 2.1/182, 276. After the storm passed Michael and Adele attempted to fix up the damage. Michael and Adele say the clean-up

went on for years and cost them thousands (or tens of thousands) of dollars:
CB 2.1/182, 276.

457 Michael and Adele pulled several kilometres of fencing including steel posts out of the dams at Gostwyck Flats. They re-fenced approximately 6 km of fencing along Gostwyck Flats and 3 km of fencing on Rossdale, re-fencing boundary sections, cleaning the debris out of paddocks and the riverbank, replanting approximately 2,000 trees along the bend in the riverbank at Rossdale, replanting lucerne paddocks at Rossdale and repairing dams and roads on both properties: CB 2.1/182, 276.

458 By 2017 severe drought was affecting the farms: CB 2.1/276.

2017-2018 proposed subdivision of Gostwyck Flats

459 Nicholas had a "gift" with horses which deceased and also Barbara recognised. They wished to assist Nicholas at least in starting a business and raising and training horses.

460 From about September 2017 through to December 2018 a number of meetings took place in a number of locations with the deceased, the plaintiffs, Barbara and a number of other participants regarding possible subdivision of Gostwyck Flats.

461 In about September 2017 the deceased came and saw Michael and Adele at Rossdale and had a conversation. Michael's version is as follows:

"Dad: Can we look into subdividing off a small parcel of land off for Nicholas to build a house on.

Me: I don't think council will let you do it but I'll look into it and let you know anyway." CB 2.1/276[238]

462 There were a number of discussions and meetings. Michael and Adele met with Dungog Council, Mr Smart and Mr Meredith to gather information to take that back to the deceased: CB 2.1/183.

463 At least one of the issues was Council restriction on the size of subdivision which precluded subdivision into anything less than 150 acres: CB 2.1/183 – 186.

- 464 On or about 4 December 2017 Michael and Adele went to Lorn to speak with his parents regarding subdividing Gostwyck Flats. They prepared a typewritten note which was taken at the meeting and in evidence.
- 465 Michael's version of events is that he read out the note essentially verbatim and there was discussion regarding it: CB 2.1/277 – 279.
- 466 Ultimately Michael indicates that there was prospect of Gostwyck Flats being subdivided to enable Nicholas to build a house and horse arena and says that his parents were agreeable to them moving forward with such a proposal: CB 2.1/279. Subsequent to the meeting Michael indicates that he and Adele started to plan the subdivision of Gostwyck Flats: CB 2.1/279.
- 467 On 29 March 2018 Mr Killingly met with the deceased and Barbara and Alasdair Smart was present. Mr Killingly's notes of the meeting include reference to the fact that the deceased "is about to transfer the units/shares in his trading company (rural enterprises) to his son Michael" (CB 3/26.17) and that Mr Smart had estimated the shares to be worth approximately \$5M (CB 3/26.17) or \$6M: CB 3/26.35
- 468 On 16 April 2018 Mr Meredith provided a cost disclosure document to Michael and the deceased regarding the proposed sale of Gostwyck Flats: CB 3/63.12. There was some cross examination of Michael regarding the letter. Michael accepted that he did not pass it on to his father and that prior to the purchase of Failford he never discussed its purchase with the deceased: T 239-240.
- 469 On 18 April 2018 Michael emailed Mr Meredith noting that Mr Smart had indicated that the monies from the sale were to go into an NAB bank account in the name of the company (account number not reproduced) and to be transferred to a trust account so that it was clear what had happened: CB 3/64.1.
- 470 On or about 24 April 2018 Michael and Adele went to Lorn to speak with his parents further about subdividing Gostwyck Flats. They had prepared another note titled "Succession Plan Update 24/4/2018" (CB 3/65.1) which they took to the meeting.

- 471 Part of the discussion according to Michael involved trust arrangements including a proposal to set up a trust for Danika. He says his father was informed about this and generally agreeable to it: CB 2.1/281 – 283.
- 472 Adele sets out in detail conversations which took place at the meeting which were interspersed with Michael reading from the prepared note: CB 2.1/186 – 188.
- 473 I have some doubt as to Adele's ability to recall the details of the conversations with the precision she has in her affidavit. Nonetheless, I accept that at least part of the discussion involved the topics raised in the note (CB 3/65.1) including about cost and timing for the subdivision and advice from Mr Smart and Mr Meredith about how any such subdivision could be done in a tax efficient manner.
- 474 In any event after the meeting Michael and Adele started to go ahead with the subdivision of Gostwyck Flats. To pay for the subdivision costs they drew down on the mortgage over Gostwyck Flats: CB 2.1/283.
- 475 In early and mid-2018 Michael and Adele had discussions with Nicholas and Kate about leasing Gostwyck Remnant to Nicholas: CB 2.1/283.
- 476 In May 2018, as mentioned above contracts for the purchase of Failford and the sale of the then proposed Lot 6 in an unregistered plan were entered.
- 477 In about August 2018 Barbara came to see Michael and Adele at Rossdale indicating that she had received a letter from Danika and it was "upsetting what is going on with Gostwyck Flats": CB 2.1/284.
- 478 Michael and Adele prepared a note titled "Background Gostwyck Flats Split" and gave it to Barbara: CB 2.1/284.
- 479 On or about 7 August 2018 a development consent in relation to the Gostwyck Flats subdivision was determined: CB 3/81.5
- 480 In about September 2018 the deceased and Barbara sold their house at Lorn to Philippa and Steve: CB 2.1/188, 286.
- 481 On 27 September 2018 Michael and Adele had a meeting with Nicholas and Kate essentially according to Michael to clarify the transitional arrangements

for Nicholas and Kate to move from Rossdale onto the Gostwyck Remnant: CB 2.1/284.

482 On 10 October 2018 the deceased's and Barbara's sale of the Lorn residence to Philippa and Steve was completed: CB 3/80.4.

483 On or about 18 October 2018 Dungog Shire Council approved the subdivision of Gostwyck Flats: CB 3/80.5

484 In or about late October 2018 Michael and Adele further progressed with arrangements for Danika for the setting up of the DFT and completion of the purchase of Failford: CB 2.1/286.

485 On 26 November 2018 Gostwyck Flats was subdivided into two parts being Lot 6 (Gostwyck Sold) and Lot 5 (Gostwyck Remnant): CB 5/123; T 753. The subdivision costed Michael and Adele about \$35,626 which they paid for by drawing down on the mortgage on the part of Gostwyck Flats which is now Gostwyck Remnant. They service the mortgage repayments: CB 2.1/188, 286.

2018 a move to Closebourne Village

486 On or about 28 November 2018 the deceased and Barbara settled the purchase of their retirement residence at "Closebourne" at Morpeth and moved into the residence (CB 2.1/188, 3/83.3-83.7) it being a 99 year leasehold interest with the deceased and Barbara being lessees as joint tenants: CB 3/83.8.

Early 2019 the proposed sale of Rossdale

487 In about February 2019 Adele indicates that she and Michael had a number of discussions with the deceased regarding interest of a developer in purchasing Rossdale. Adele sets out three conversations regarding this in early, mid and late February 2019: CB 2.1/193 – 194.

488 Michael deposes that the deceased came and saw him in February 2019 at Rossdale and had conversations with him regarding interest in a developer by the name of Cornish in purchasing Rossdale: CB 2.1/289-290.

489 On or about 12 February 2019 Michael and Adele prepared a typewritten note with the intention of explaining to his parents the purchase of Failford by Damah: CB 2.1/290. The note records in part:

“With the sale of half of Gostwyck Flats we have purchased 100 acres at Failford. Had to invest in primary production land to avoid paying ongoing land taxes as advised by Alasdair.

...

This property was purchased in a Family trust (as advised by Alasdair and Jim Meredith) which we have control over. At any time in the future we can transfer control over to Danika so she can do what she wants with it. (Control of this is also willed to Danika).

In the mean time we run it. We had to borrow a small amount of money to purchase it.” [CB 3/86]

490 They were not able to hand the note to Barbara for various reasons.

491 At the end of February 2019 Adele indicates that the deceased came to Rossdale and there was a conversation to the following effect:

Ross: Michael said the other day about getting a real estate agent. What was that for again?

Me: The guy who bought Donny Vickers and Denis Rapsons might be trying to buy us out. He sends his own real estate to talk to you and if you agree to sell he charges you very high commission. If we send our own agent to tell him he has to talk to them, if he is interested, then we pay less.

Ross: Okay what agent would you use?

Me: Probably Greg Lidbury.

Ross: Oh goodo He and his wife are very nice we see them at church sometimes.” (CB 2.1/194[191])

492 On or about 5 March 2019 the deceased and Barbara visited Michael and Adele at Rossdale and Barbara informed them according to Michael that they were going to see Mr Meredith to update their Wills and to do a power of attorney "because Closebourne wants it". Michael says that the deceased informed them that "it's the same as the other Will. The company goes to you. The house and mum's side goes to Philippa": CB 2.1/290-291.

493 On about 7 March 2019 a mini tornado hit Rossdale causing damage to the plaintiffs' residence and the sheds and also the Greenhouse. The Greenhouse was damaged upon beyond repair. Ultimately Michael and Adele decided to demolish the Greenhouse which he says he did with his father's consent. He

says they used insurance proceeds to repair the sheds and the Rossdale house: CB 2.1/291.

494 There were ongoing discussions regarding Nicholas receiving the remaining part of Gostwyck Flats namely Lot 5.

495 On 11 March 2019 a proposal discussed with Mr Meredith included Nicholas receiving Lot 5 subject to paying CGT (CB 3/86.12): T 749-750.

496 On or about 13 March 2019 Mr Lidbury came out to Rossdale and Michael signed an agency agreement for the proposed sale of Rossdale: CB 2.1/195 – 196, 291.

497 The agency agreement was tendered: exhibit P12; T 1038. It is signed by Michael. I note that the price at which the property was to be offered was \$3.8M (albeit that the agent gave an opinion as to a lower estimated selling price of \$3.2M to \$3.4M). Of some significance is that the agency agreement notes that the WALs for the Paterson River were an inclusion as specified in the contract for sale: exhibit P12.

498 On or about 21 March 2019 Barbara transferred her 6 management shares to the deceased: CB 1/59; CB 2.1/233.

499 Further on 21 March 2019 Mr Meredith had a number of conversations with the parties and made file notes of the conversations.

500 In particular at 3:17 PM Mr Meredith telephoned Michael. The file note records (as indicated above) that Barbara was transferring her management shares to the deceased. Mr Meredith noted that Michael's parents had been in to discuss their concerns regarding the fact that Danika had received the benefit of her "half share" (of the "Gostwyck property") but that Nicholas had not.

501 Michael was seemingly uncertain as to whether Danika was a beneficiary of the DFT. Michael was not complimentary about Nicholas and was not sure what he wanted to do in the circumstances: exhibit P7-1.

502 Mr Meredith's file note records (CB 86.20.4; exhibit P7-1) the following:

"They are concerned that Danika has received the benefit of her half share but Nicholas has not. They are also concerned about the effort he is putting into a property he doesn't own the fact that the construction works create assets that

he doesn't own and the fact that he can't borrow against the value of the property"

- 503 However, later that afternoon at 4:10 PM there is another file note of Mr Meredith recording a telephone conversation with Barbara. Relevantly the file note indicates that he had spoken with Michael and clarified a few points with Mr Smart: exhibit P7-2.
- 504 The file note indicates or suggests that Mr Meredith informed Barbara that Danika's interest was in a trust that she had no control of the trust was not named as a beneficiary but fell within the class of beneficiaries and seemingly that Barbara was "HAPPY WITH THAT": exhibit P7-2. Barbara was asked whether she agreed that that was her response. Following further questions she said "We weren't happy with it being in a trust. But, if that's what Danika wanted, okay.": T 811.
- 505 Other matters were discussed. It appears that Michael was happy to discuss issues with Barbara and did not wish her to be concerned. He also felt it was important for the deceased's shares in the company to be transferred to him (Michael) so that if the deceased ended up in aged care they would not take 30% of the value of his shares: exhibit P7-2.
- 506 The file note records Mr Meredith seemingly telling Barbara that Michael may have a purchaser for the "Vacy" property to which Barbara apparently responded "OK": exhibit P7-2.
- 507 In about late March or early April 2019 Michael indicates that Barbara contacted him again indicating the necessity of "getting Dad out of the company": CB 2.1/292.
- 508 In early April 2019 the deceased and Barbara visited Michael and Adele at Rossdale indicating to them that they had done their Wills and that they were the same as before: CB 2.1/292.
- 509 Adele says a conversation occurred as follows:
- "Barbara: We've done our wills. They're the same as before. We also had to do powers of Attorney for Closebourne. We've made Philippa one attorney and made Hamish the other one because of his accountancy training. Michael you are the attorney for the Company. Have you found out anything about getting Dad out of the Company?"

Michael: I've been too busy with the greenhouse and sheds and cleaning everything up. Do you realise how much money one third of your assets is? If Dad goes in, we'll probably have to sell at least one of the farms?

Barbara: oh dear.

Me: We also need to sit down with you both and show you what we have done for Danika.

Barbara: Whatever you've decided for Danika is fine with us. We don't need to know the details." (CB 2.1/196-197[199])

510 On or about 12 June 2019 Michael and Adele prepared a further note dealing with arrangements for Danika. Michael indicates Adele had provided the note to the deceased "a day or so later": CB 2.1/293[303].

July- October 2019 listing of Rossdale for sale and various meetings

511 Barbara states that in or about June 2019 Philippa showed herself and the deceased a real estate website from Bowe & Lidbury advertising the sale of Rossdale noting that it was listed as "Paterson" not Vacy: CB 2.1/408.

Barbara's dating of this event is likely incorrect. I find the listing took place a little later, being on 5 July 2019.

512 Barbara states that the deceased was very hurt that it was for sale and that he knew nothing about it: CB 2.1/408.

513 On about 1 July 2019 Michael and Adele went to Closebourne and had a meeting with the deceased and Barbara "about everything with Rossdale and Gostwyck Flats": CB 2.1/197.

514 Before they went to the meeting Adele and Michael had prepared a note titled "Succession Plans" which they took to the meeting and gave a copy to each of Barbara and the deceased.

515 Michael and Adele depose to detailed discussions at that meeting. Adele indicates that they had a conversation going through the note in the order as per the note with Michael reading it out and such reading being interspersed with conversation, which Adele listed under four headings being: Nicholas and GF; Rossdale; the company and words spoken at the end of the meeting: CB 2.1/197 – 199.

516 In relation to Rossdale Adele indicates that Michael stated that they had heard that a developer Cornish had been looking to buy Rossdale for about 9 months and stated (CB 2.1/198)

“Michael: ... We feel that it would be in everyone’s best interests to look seriously at selling Rossdale when the offer is made. It will make our lives so much easier

Barbara: that makes sense

Ross: some cash would be good”

517 Adele, in relation to words spoken at the end of the meeting, records the conversation as follows (CB 2.1/199):

Michael: *"Selling Rossdale and putting the Company into my name will stop the possibility of people contesting wills and property settlements from marriage split ups. We think that Katie will push Nicholas to contest Dads' will. Katie thinks Nicholas shouldn't be paying rent because it's family owned. They've been telling people that his grandfather has given it to him."*

Ross: *"I haven't given Gostwyck Flats to him"* Michael then read out the rest of the letter word for word.

Ross: *"What agent would you use?"*

Michael: *"Probably Greg Lidbury because he's said a few similar properties in the area recently."*

Ross: *"I would be happy with him. Greg and his wife Cindy go to church sometimes and he always comes and talks to us"*.

Michael: *"I don't want to put a heap of signs up or anything. I just want to test the waters and see how much interest there is if we need to sell it other than to Cornish."*

Barbara: *"we don't want to have a fire sale so I think testing the waters is a good idea"*.

518 I have doubt as to Adele's ability to recall the precision of all of the conversation that she deposed to. Nonetheless I accept that in all likelihood topics and matters as raised in the note were discussed.

519 Barbara in cross examination essentially accepted that Adele’s evidence in respect of the discussion on the section of the note dealing with Nicholas and Gostwyck Flats was accurate other than making a minor qualification in relation to the council rates. Her evidence was as follows (T 718):

“Q. Do you agree that that accurately reflects the conversation that occurred on that first point of the note?

A. Well, as far as I can remember, but we had since found that it was in the middle of the drought, and the Dungog Shire didn't charge rates that year, so

whatever they said the rates that were charged, you know, there were no Dungog Shire council rates.”

520 Barbara in relation to the discussion in respect of Rossdale accepted:

“I was aware. They made us Ross and I aware that there was a developer interested or operating in the area, not specifically interested in Rossdale” [T 719].

521 However, Barbara disputes that she would have agreed with the proposal “because we liked to manage our own financial affairs ourselves”: T 722.

522 On 3 July 2019 Michael instructed Mr Lidbury to list Rossdale for sale which listing occurred on 5 July 2019. Michael for his part asserts that he was not aware that the listing happened “that quickly”: CB 2.1/295.

523 On 8 July 2019 Michael indicates that Barbara telephoned him having become aware from a truck driver that Rossdale was for sale and asserting that he needed to have told his father before everyone else knew about it: CB 2.1/296.

524 On or about 16 July 2019 the deceased had a car accident at Bolwarra. Barbara was a passenger in the car. Adele became aware of the accident and Michael attended at the site and indicates that Barbara gave him a copy of the “Succession Plans” document and said “*Here take this, it was in Dad’s car I don’t want anyone to see it*”: CB 2.1/296.

525 Barbara on the other hand states that she knew they had some documents in the car and she asked Michael to take them as they did not want them taken away with the car when the tow truck came. She states that she had already discussed the documents with Philippa: CB 2.1/410.

526 Despite Mr Simpson asserting that his evidence was implausible in this respect Michael confirmed in re-examination that Barbara had said “that dad had it in his car because he’d quite, he’d quite often go and read it” then she gave it to him (Michael) and said “Here. Don’t let anyone, anyone see that”: T 415. I accept Michael’s evidence regarding this.

527 A couple of days after the car accident Michael and Adele went to Morpeth and gave his parents a copy of a notice titled “Sale of Rossdale” which Michael and Adele had prepared, they say, prior to 16 July 2019. On this occasion Michael

said he did not read out the note but did have a brief discussion about what was written: CB 2.1/297.

528 Michael says the conversation was in the following terms:

“Me: Jim said it's best for us to have our own agent to protect us from the developer. Greg is doing the right thing. He's good.

Dad: Knowing Greg he will do the right thing.

Me: We've had one person have a look and Greg has another lined up for this week.” (CB 2.1/297[311])

529 Michael indicates that he tried to return to Barbara the "Succession Plans" document but she refused.

530 On or about 21 August 2019 the deceased made a new Will with Michael indicating that he only became aware of its existence after the deceased's death: CB 2.1/297.

531 On or about 11 October 2019 Michael indicates that Mr Smart telephoned him informing that he had a meeting with Michael's parents, Nicholas and Hamish.

532 Subsequently after receiving some meeting notes Michael says he telephoned Barbara making complaint about not having been told of the meeting especially having regard to the fact that it raised company business: CB 2.1/297 – 298.

533 Between 13 and 21 October 2019 Michael and Philippa exchanged text messages attempting to organise a meeting and agreement between family members: CB 2.1/298; 3/121.

534 On 20 October 2019 the deceased signed a typed letter (CB 3/127,129) in his capacity as director and main shareholder of the company to Mr Lidbury instructing that Rossdale be removed from sale until further notice: CB 2.1/298.

22 October 2019 meeting and October 2019 Agreement

535 On or about 22 October 2019 Michael and Adele prepared the form of the October 2019 Agreement and went to Morpeth to discuss it with his parents: CB 2.1/2994. I set out the terms of the October 2019 Agreement below, which was signed by each of Michael, Adele, the deceased and Barbara.

“22nd October 2019

Agreement for Sale of Rossdale and beyond to avoid confusion.

This agreement is between Ross, Barbara and Michael Horn.

Sale of Rossdale

We are all in agreeance that due to the issues surrounding any possible full time care being required for either Ross or Barbara that 'Rossdale' 598 Gresford Road Vacy, is to be sold in order to reduce the company assets.

Michael is responsible for the sale including agent, advertising, all negotiations and inclusions.

Michael will keep Ross and Barbara updated via either phone, email or meeting.

Proceeds of sale

As advised by Alasdair (our accountant) any lump sum would adversely affect Barbara and Ross's situation.

He advised that the proceeds therefore should go to the other shareholder being Michael.

Based on that advise, after the sale and all costs have been taken out, the proceeds will go to Michael.

With some of the proceeds A portfolio or similar, will be set up that Michael pays the tax on in conjunction with advise from Alasdair and Bruce (financial adviser) so that Ross and Barbara can gain some financial benefit without adversely affecting their situation.

On Ross's passing, the portfolio will be divided equally between Tristan, Hamish & Pru.

Exactly how this will be setup is unclear at the moment, but will be arranged after consultation with Ross, Barbara, Alasdair, Bruce and Michael after the sale.

Gostwyck Flats and GA & RG Horn P/L (The Company)

Gostwyck flats will not be sold in the foreseeable future and will remain in the company as is.

Michael will remain responsible for all company ongoings and the Company will remain willed to Michael.

This will only change if Ross or Barbara needs to go into full time aged care.

Then Ross's shares will be moved to Michael at Michaels expense.”
(handwriting italicised) (CB 3/140)

536 The meeting according to Michael went for 1.5 hours and he asserts that each of his parents was happy to sign the October 2019 Agreement albeit that there was no talk about the size of the portfolio although Michael indicates he had in mind the sum of \$100,000: CB 2.1/299 – 300.

537 Barbara states that Michael and Adele attended for about 20 minutes. She cannot recall the conversation she and the deceased had with Michael and Adele. She recalls being provided with the document which they wanted them

to sign and states that she did not know what the document related to and recalls the deceased being quite confused by it, "as was she": CB 2.1/403.

538 Clearly there were different recollections regarding the length of the 22 October 2019 meeting. Barbara accepted in cross-examination that truth (regarding duration of the meeting) might be that it was somewhere in between (20 minutes and 1.5 hours): T 815.

Events after the meeting

539 In the afternoon of 22 October 2019 at 3:20PM Mr Meredith received a telephone call from Barbara. Mr Meredith's file note of the telephone call records relevantly (exhibit P7-3; T 822):

"Met with Michael. All good.

POA is now fully functional again. (No longer suspended)

....

Discussed the Agreement that Michael had sent to me. I said important to get advice so they don't inadvertently break the law re Tax Social Security etc".

540 The following morning Michael received an email from Philippa asserting that their parents did not know what they had signed: CB 2.1/300.

541 About 27 October 2019 Mr Meredith sent Michael an email enclosing a letter from Ms Banks of Thompson Madden: CB 2.1/300.

28 October 2019 a letter from Michael and medical certificates

542 On 28 October 2019 a medical practitioner Donna Booth prepared two separate documents in essentially the same terms addressing the capacity of the deceased and Barbara: CB 2.1/300; 3/146 – 147.

543 The letters from Dr Booth are relevantly in the following terms:

"I have known [Ross/Barbara] on a professional basis for over 7 years. Over this time [Ross/Barbara] has experienced some age related issues and has developed cognitive impairment. As part of this process [he/she] has reduced memory and reduced capacity to understand complex legal and financial information. For this reason I do not believe [he/she] has capacity to make these decisions without [his/her] legal guardian being physically present".

544 On 28 October 2019 Michael wrote a letter to his parents which he delivered to them. In fact he handed it to Barbara at the door of their unit at Closebourne: CB 2.1/300. I address the contents (CB 3/148 – 149) below.

30 October 2019 the deceased's letter

- 545 On 30 October 2019 Mr Meredith prepared a number of diagrams raising possibilities regarding a sale of Rossdale and Gostwyck Flats: CB 3/149.2.
- 546 On 30 October 2019 the deceased prepared a handwritten letter: CB 3/170.2 – 172. The letter bears the handwritten date of 30 November 2019. However by reference to email correspondence it appears clear that the letter was in fact written on 30 October 2019 (most likely in response to Michael's letter dated 28 October 2019).
- 547 On or about 30-31 October 2019 the deceased provided this to Michael: CB 2.1/301.
- 548 A typed version of the letter formed part of MFI 1 and later in these reasons I will set out the full version of the letter.
- 549 On 31 October 2019 Michael emailed the letter to Mr Meredith: CB 2.1/301; CB 3/150.
- 550 On 31 October 2019 Mr Meredith had a number of telephone conversations with Barbara.
- 551 Initially he telephoned Barbara noting he had received an email from Philippa with the two letters from Dr Booth concerning the deceased and Barbara. Mr Meredith made a note suggestive that Barbara thought it was "high-handed": CB 3/150.3.
- 552 In the second phone conversation in which Barbara telephoned Mr Meredith he made a note to the effect that Barbara wanted to know if she could still do personal banking to which he responded that until she loses capacity she could "function as normal": CB 3/150.4.
- 553 On 31 October 2019 Mr Meredith responded to Ms Banks' letter dated 27 October 2019: CB 3/150.5.

November-December 2019 attempts to stop the sale of Rossdale

- 554 On 3 November 2019 Michael sent an email to Mr Smart noting that had a few weeks of "hell". He requested Mr Smart to work out the cost to transfer the deceased's shares in the company to Michael as is and estimated the value of

both properties being Rossdale at \$3.5M and Gostwyck Remnant at \$850,000: CB 3/156.

555 In or about November 2019 a draft typed form of document headed "Family" was produced for the deceased: CB 3/172.1A. The draft has handwritten amendments is addressed to Philippa, Michael and the five grandchildren.

556 It addressed the proposed sale of Rossdale and the allocation of funds from Gostwyck Flats and expressed some sentiments including (CB 3/172.1A):

"I feel a little bit of giving by all parties concerned needs to take place"

557 However, it is unclear to me whether it was authored by the deceased. Further, the handwriting does not appear to be that of the deceased: e.g. compare CB/170.2 and 195.

558 Throughout November 2019 there was email correspondence as between Michael and Mr Meredith touching upon a number of issues including Philippa's purported authority to use the power of attorney. Philippa also engaged in correspondence with Hamish: CB 3/163.1 – 170.1.

559 On or about 26 November 2019 Michael indicates that Barbara contacted him and had a conversation in which she indicated that she and the deceased had seen Mr Meredith and that the deceased wanted to sign paperwork to put Rossdale back on the market: CB 2.1/302.

560 On or about 27 November 2019 Michael and Adele went to his parents at Morpeth. He indicates that with his father's willing consent they attended to see Mr Lidbury and his father and he signed an agency agreement for the sale of Rossdale: CB 2.1/302; T 832 (Barbara).

561 The agency agreement was tendered: exhibit P4; T 639. Other than the fact that it was additionally signed by the deceased (as well as Michael), is in the same form and essential content as the agency agreement that Michael alone had signed on 13 March 2019.

562 On 3 December 2019 Mr Meredith made a file note of telephone conversation with Barbara. The note records that Barbara informed him that she had now changed her doctor and was very happy and was meeting with a geriatrician soon: CB 3/172.11.

- 563 In early December 2019 there was further correspondence as between Mr Meredith and Ms Banks regarding the capacity of the deceased and Barbara: CB 3/170.12 – 170.18.1.
- 564 On 5 December 2019 Mr Killingly provided a record of advice to the deceased and Barbara: CB 3/172.21.
- 565 The advice was consequent upon a meeting earlier that day at 9 AM at their Closebourne unit in which there were a number of discussion points including regarding cash flow issues, investments and potential costs of aged care including in-home and residential care: CB 3/172.23 – 172.24.
- 566 Throughout the early part of December 2019 there was further correspondence between Hamish and Mr Smart: CB 3/172.26 – 172.33.
- 567 In early December 2019 the deceased and Barbara attended at Rossdale and Adele was upset regarding Philippa's involvement to prevent the sale of Rossdale based on doubts regarding the deceased's capacity to sign documents: CB 2.1/302 – 303.
- 568 On 27 December 2019 Philippa emailed Mr Lidbury requesting a copy of the latest agency agreement: CB 3/173, 175.
- 569 On 31 December 2019 Dr Adam Jackel provided referral letters for each of the deceased and Barbara to Dr Bernard Walsh for general review of their competence: CB 3/175.1 – 175.4.
- 570 In December 2019 – January 2020 Mr Meredith had told the deceased and Barbara that they needed to change solicitors due to a conflict of interest: CB 2.1/414.

January 2020 company EGMs

- 571 In early January 2020 there was correspondence as between Mr Lidbury and Philippa and Hamish in which Mr Lidbury was reticent to provide a copy of the agency agreement without authorisation and Philippa and Hamish expressed their disappointment: CB 3/176 – 182.1.

572 On or about 6 (or 7) January 2020 Philippa emailed Michael a notice of an extraordinary general meeting (**EGM**) of the company to be held on 14 January 2020, which notice was signed by the deceased: CB 2.1/303; 3/192.

573 In relation to the proposed EGM Barbara indicates that the deceased was going to attend the meeting with Philippa and Hamish to support him. She states that the deceased showed her a list of questions he was working on in early January: CB 2.1/14.

574 The proposed agenda for the EGM on 14 January 2020 apart from formal matters included an outline of the company's current position and discussion of a succession plan.

575 There were two special resolutions proposed (a) and (b): CB 3/191.

576 Proposed special resolution (a) was in the following terms:

“Special resolution (a):

The property known as ‘Rosssdale/Tillimby’ be put up for sale. Upon the sale of the property known as ‘Rosssdale/Tillimby’

1. Current company debts and liabilities will be paid in full upon receipt of documentation.

2. The reserve bank balance of \$30,000 will be maintained.

3. The remaining funds will be paid as a dividend to both Michael George Horne and Ross George Horne according to:*

a. Current share structure

b. Length of time of management of properties by each (Ross 40 years, Michael 20 years).

c. Equally – 50% (Managing Director endorsed option)

* decided by vote

4. Ross and Michael will transfer their shares to Nicholas Horne and remove themselves as directors of G.A. and R.G. Horn Pty Ltd”

577 The second special resolution (CB 3/191) proposed that:

“The proceeds of the sale of Lot 6 of the ‘Gostwyck Flats’ property be transferred to Danika Horn by 30th June 2020”.

578 On about 10 January 2020 Michael received through Mr Smart a notice (CB 3/183) dated 9 January 2020 signed by Philippa and Hamish appointing Hamish as proxy for the deceased for the meeting to be called: CB 2.1/34.

- 579 On 12 January 2020 Michael telephoned Barbara wanting to know if she and the deceased would be home the following morning at about 8:30 AM. She states that shortly afterwards she received another call from Michael indicating that he proposed to bring a solicitor with him: CB 2.1/411.
- 580 I pause to note that if Michael had intended to ambush his parents with documentation and a lawyer it is entirely unclear why he would have given his parents forewarning of that.
- 581 In any event Barbara rang Philippa which also led to Hamish then calling Barbara. Hamish suggested that the meeting be called off. However Barbara says she was reluctant to do that having already agreed to the meeting. Hamish and Philippa then agreed to come to the house the following morning: CB 2.1/411.
- 582 On 13 January 2020 an urgent directors' meeting was held at Morpeth with Michael and Adele, the deceased, Barbara, Philippa and Hamish present. Adam Slattery (the plaintiffs' lawyer) attended the meeting: CB 2.1/304.
- 583 Philippa and Hamish arrived early at the deceased and Barbara's residence. Barbara asked Philippa to send Michael a message indicating that they did not want a business meeting in their home. At approximately 8:30 AM Michael and Adele arrived. There was clearly a degree of tension and upset. Barbara says nonetheless the solicitor arrived and the meeting went ahead and minutes were taken: CB 2.1/304, 412.
- 584 Mr Meredith was away and unable to attend the meeting. Mr Slattery advised that if the meeting the following day was to go ahead there would be possible litigation. He explained decisions were made about trying to keep the family assets safe within the family by use of trusts. The deceased expressed concern about family trusts and was unsure as to how they worked: CB 3/187.
- 585 The deceased stated that he wished to get out of the company: CB 3/188.
- 586 Following that meeting an extraordinary general meeting of the company was held and it was resolved to cancel the proposed EGM of the company for the following day: CB 2.1/304.

587 On 17 January 2020 the deceased sent a handwritten note to Mr Smart noting that he had requested Philippa and Hamish as his attorneys to address poor communications in relation to the company: CB 3/202.

588 In late January 2020 there was correspondence between Mr Smart and Mr Meredith regarding potential sale of the company's properties. There was also correspondence from Michael and Adele and Mr Slattery with Mr Meredith: CB 3/202.1 – 202.6.

589 On 27 January 2020 the deceased sent Mr Meredith a handwritten note (CB 3/205) noting that he had decided to revoke Michael's power of attorney over the company after a family meeting "when all documentary information is to be tabled".

590 He expressed his reason for doing so as follows:

"I have been unhappy with the lack of communication about the sale of our properties and the rental being charged for the other property (Lot 5 Gostwyck flats) I am concerned with variations of the information given to me about the company".

591 The deceased noted that if Mr Meredith had any reason why the power of attorney should not be revoked he should let the deceased know: CB 3/205 – 206.

592 On 28 January 2020 Philippa emailed Michael informing him of his father's communication with Mr Meredith: CB 3/207.

593 On 29 January 2020 the deceased sent a typed letter to Mr Smart requesting him to provide the deceased with a copy of the company binder and tax returns from 2012 to the present noting that he had serious concerns that Michael had acted in contravention to the power of attorney granted to him on 8 April 2019 specifically in relation to his lack of authority to deal with real property owned by the company: CB 3/208, 213.5 (signed version).

594 During this time Mr Meredith was still communicating with Mr Slattery, Mr Smart and Barbara: CB 3/213.2 – 213.4.

595 On 30 January 2020 the deceased sent a handwritten note to Mr Meredith noting that he wished to revoke Philippa's and Hamish's power of attorney until a family meeting resolved the future of the company: CB 3/213.10, 214.

- 596 On 31 January 2020 Philippa provided to Mr Singh, who had seen her parents, some flowchart diagrams (regarding the company and properties) that had been prepared by Mr Meredith: CB 3/214.3-214.5.
- 597 On 3 February 2020 the deceased sent a further handwritten note to Mr Meredith noting that he wished to reinstate Philippa and Hamish as his power of attorney immediately: CB 3/215.
- 598 The deceased's variability in his instructions over the period of January-February 2020 regarding who had his agency perhaps reflected his agonising over tensions within the family regarding the affairs of the company and the proposals regarding sale of the properties, as various family members were pursuing various interests in engaging with each other and professionals during this time.

14 February 2020 meeting and the deceased's handwritten note

- 599 It seemingly took some time to arrange a family meeting. Eventually a meeting was proposed to occur on 14 February 2020.
- 600 For the purposes of the meeting on 14 February 2020 the deceased prepared a handwritten note.
- 601 Barbara indicates that the deceased practised his speech a number of times (because of his impediment): CB 2.1/413.
- 602 On 14 February 2020 the family meeting was held at Mr Meredith's office in Maitland. The meeting was attended by the deceased, Adele, Hamish, Philippa, Mr Meredith, Mr Smart, Mr Slattery and Mr Singh. Mr Meredith chaired the meeting. According to Michael nothing was resolved at the meeting and what occurred is disputed: CB 2.1/305.
- 603 The deceased's note (CB 3/195 – 196; 220 – 221; MFI 1) was in the following terms:

“Ross Horn

This meeting today was called so that a few things could be ironed out - without any unpleasantness.

I would like to be the "first cab" off the rank so that you will all hear my point of view.

I am far from being happy as to what has been happening over the last couple of weeks and it has to stop NOW.

If my Dad was alive now he would be absolutely discussed as what has been happening. When he decided to form our family company [GA + RG Horn Pty LTD] he didn't mean for all the unpleasantness that has been going on. When my Dad died 40 odd years ago I was to be in charge, this unfortunately has not happened so I now want this to be so and to be told everything that is to happen.

My first priority is that Nicholas is to be given the balance of Gostwyck Flats - Lot 5 consisting of 220.4 acres and our solicitor Jim will be given the task to do this - with no tax to be given or need to be paid. I will give Jim all necessary descriptions of the land etc.

Danika's section of Gostwyck Flats (Lot 6) has been put in trust and she has sold that to a neighbour but she has not received the money for it although Danika is happy with the investment so I accept her wishes. I still do not know the full implications of this investment.

a lot has been said about family trusts - I am not in favour of them as from what I have been told they cannot be trusted. In my opinion They should be called "untrustworthy accounts."

I have lost a lot of sleep as well as all family members over what has been happening and I've prayed to God that this will be rectified.

I think it is worth noting that the intention of leaving all GA & RG Horn Pty Ltd as stated in my will was presuming I had passed away and no longer requiring any financial consideration. This proposed sale is in different circumstances as at near 90 years of age I am facing declining health so would like to be considered in some financial benefit.

Ross G Horn"

- 604 Mr Meredith made notes of the meeting which occurred recording various issues being discussed including relating to the company and its assets and powers of attorney both personal (seemingly from the deceased) and in relation to the company: CB 3/223.1A.
- 605 The deceased read his speech out loud at the meeting and came home with his head downcast indicating to Barbara that "they just didn't even listen to me": CB 2.1/413.
- 606 Throughout the latter part of February 2020 there was further correspondence between the family members and the respective professionals acting for them. The correspondence reveals ongoing proposals for Gostwyck Remnant to be transferred to Nick, for the mortgage to be transferred from Gostwyck Remnant to Rossdale and for the sale of Rossdale potentially to a third party: CB 3/223.24.

607 Between 23 and 27 February 2020 Mr Singh corresponded with Philippa and Hamish by email. Mr Singh had prepared a draft email addressing a number of matters including his summary of an agreed path forward from meeting. Of interest is that one of the proposed steps forward was the setting up of a trust for the benefit of the deceased and Barbara - which sits somewhat uneasily with one of the themes in the case being that the deceased was suspicious of trusts: exhibit P10: T 948.

March 2020 deceased's heart attack and death

608 From 3 to 11 March 2020 the correspondence regarding the proposals for the sale of Rossdale and in relation to Gostwyck Remnant continued between the parties and the respective legal advisers: CB 3/223.26 – 223.40.

609 On 11 March 2020 the deceased had a series of heart attacks was admitted to John Hunter Hospital at Newcastle: CB 2.1/413.

610 On 13 March 2020 the treating medical staff spoke with Barbara and explained options to her. A decision was made to stop all active treatment for the deceased and move him to palliative care: CB 2.1/414.

611 On 15 March 2020 Philippa sent an email to Mr Singh (copied to Hamish) which email indicated that the deceased was very bright and “with it” today. The email notes that Ms Mudd was “very happy to sign [the Will], she was confident he understood --- she was at the hospital for nearly 2 hours”: exhibit P 11; T 948.

612 Early on 16 March 2020 according to Barbara the deceased went downhill very quickly: CB 2.1/414.

613 On 20 March 2020 the deceased passed away.

614 On 23 March 2020 Barbara signed an authority for Pearson Smart to forward all documents held on behalf of the deceased to Tranter Lawyers: CB 3/251.2.4.

615 On 24 March 2020 Mr Singh met with Barbara, Philippa and Hamish. Barbara informed him that she had given a lot of paperwork to Hamish to sort out and deal with on her behalf. Mr Singh arranged for Barbara to sign authorities for

documents held for the deceased to be delivered to his office: exhibit P 11; T 948.

616 On 27 March 2020 a funeral was held for the deceased at St James' Anglican Church Morpeth: CB 3/240.

April 2020 correspondence between parties and their legal representatives

617 On or about 31 March 2020 Michael received via Mr Smart a letter from Tranter Lawyers enclosing a copy of the last Will and seeking the transmission of shares: CB 2.1/305.

618 Michael says he spoke that afternoon with Mr Meredith and then telephoned Barbara that evening and had a conversation with her: CB 2.1/305.

619 On or about 5 April 2020 Barbara telephoned Michael and according to Michael they had a conversation to the following effect:

“Me: Mum what's going on? Dad promised me those shares.

Mum: He did, and you have worked very hard. When I get the legal authority, I will transfer them to you.” (CB 2.1/306[355])

620 Subsequent to the deceased's death correspondence between the legal representatives for the various parties ensued with Sarah Young acting on behalf of Barbara and Mr Slattery acting on behalf of the plaintiffs.

621 On 17 April 2020 Barbara made a new Will with Tranter Lawyers.

622 The Will appoints Philippa and Hamish as executors. In the event that Philippa survives Barbara the Will provides for the balance of Barbara's estate after payment of debts and testamentary expenses to be distributed to Philippa: CB 3/251.8 – 251.9.

623 The Will is somewhat curious in that the first clause declares that it is made in contemplation of marriage: CB 3/251.8. That appears to have been a “pro forma” general provision that has been mistakenly included.

624 On or about 18 April 2020 Hamish became aware that Adele had been “installed” as a director of the company and says that at this time Barbara asked him if he was willing to be a director of the company to which he responded that he would: CB 2.1/337.

- 625 Seemingly at the suggestion of Tranter Lawyers the notion of having a third "independent" director was raised. In this regard Hamish contacted Andrew Saide who he requested to be a director of the company to which Mr Saide agreed: CB 2.1/337.
- 626 On 21 April 2020 Ms Young sent to Mr Smart a letter enclosing a notice for transmission of shares executed by Barbara electing pursuant to article 32 of the company's constitution for the shares to be transmitted to her in her personal capacity: CB 3/252 – 253.
- 627 On 28 April 2020 Ms Young sent a letter to the company directed to the attention of Mr Smart noting that her letter dated 21 April 2020 had remained unanswered and requested that the company attend to transmission of the shares and to indicate any reason why that could not be done immediately: CB 3/255.4.
- 628 In May 2020 correspondence continued between Mr Slattery, Ms Young and Mr Meredith: CB 3/255.8 – 260.2.

December 2020 letters of administration CTA

- 629 On 17 December 2020 letters of administration CTA were granted to Barbara: CB 2.2/1.
- 630 On 5 January 2021 Ms Young sent to Mr Meredith a certified copy of the letters of administration and requested in accordance with an authority previously provided for him to deliver any documents held by his office on behalf of the deceased to Ms Young: CB 3/263.16.

February 2021 litigation and other steps regarding control of the company

- 631 On 15 February 2021 Barbara by an originating process filed in this Court sought an order pursuant to s 1071F(2)(a) *Corporations Act 2001* (Cth) requiring the company to register the transmission of shares in it to Barbara: CB 3/265.
- 632 On 5 and 25 January 2021 Barbara further requested the company to register the transmission of shares: CB 3/265.

- 633 On 26 February 2021 Arnold Lawyers wrote to Tranter Lawyers stating that the directors agreed with the transmission of the shares to Barbara in her capacity as administrator: CB 3/265.
- 634 On or about 1 March 2021 the company notified Barbara that the shares were in the process of being transmitted to her and on 2 March 2021 the transmission was in fact registered: CB 3/265.
- 635 On 2 March 2021 the originating process was listed for hearing.
- 636 The proceedings were dismissed in the context in which the shares had on that morning been registered: CB 3/265 – 266.
- 637 On 10 March 2021 Williams J dealt with the question of costs of the proceedings on the papers directing that each party pay their own costs of the proceedings: CB 3/264 – 268; *In the matter of GA and RG Horn Pty Ltd* [2021] NSWSC 210.
- 638 On 17 March 2021 Barbara requisitioned the company by notice to Mr Smart seeking the directors convene an extraordinary general meeting of the company such meeting to be conducted by Zoom videoconference.
- 639 The proposed requisition requested that 5 resolutions be considered essentially: 1 for the removal of Michael as a director; 2 the removal of Adele as director and secretary; 3 the election of Barbara as a director; 4 the election of Andrew Saide as a director; and 5 the election of Hamish as a director and secretary of the company: CB 3/270 – 271.
- 640 On 18 March 2021 Mr Singh on behalf of Barbara sent the request to the company care of Mr Smart also enclosing proposed consents for Barbara, Hamish and Mr Saide to act in the capacities proposed: CB 2.1/338; 3/269 – 282.
- 641 On 9 April 2021 Barbara provided consent for short notice for the meeting of the company: CB 3/291. It was proposed that the meeting take place on 12 April 2021: CB 3/289.
- 642 On 12 April 2021 Michael and Adele did not attend the EGM and a quorum was not met. The EGM was rescheduled for 19 April 2021: CB 2.1/338.

- 643 On 13 April 2021 Michael and Adele prepared and signed a note addressed to Barbara resigning respectively as director and director and secretary of the company: CB 3/301.
- 644 On 19 April 2021 the meeting was held and all the proposed resolutions passed and minuted: CB 3/288, 302 – 303.
- 645 On 19 April 2021 changes to the company details to reflect the resolutions that had been passed were lodged in the appropriate form with ASIC: CB 3/283 – 287.
- 646 On 20 April 2021 Barbara convened a directors meeting of the company at which Mr Saide and Hamish were present. The directors unanimously resolved to pass the same resolutions as had been passed in the extraordinary general meeting: CB 3/288.
- 647 On 26 April 2021 Mr Carr wrote to Mr Smart noting that he had been approached on behalf of the company to attend to the future accounting and taxation requirements of the company and requesting Mr Smart's advice if there was any professional or ethical reason preventing Anova from accepting the appointment. The letter requested provision to Anova of the last prepared financial statements and income tax returns on behalf of the company and any permanent company records (electronic and/or physical) and any other client records held: exhibit D10.
- 648 On 9 June 2021 Mr Smart responded to Mr Carr advising that he (and the firm) had no professional objection to Mr Carr accepting the appointment and provided a copy of the financial statements and tax return for the company for the 2020 financial year. It was noted that the company binder was available for collection: exhibit D10.

August 2021 financial advice given to Barbara

- 649 On 5 August 2021 Mr Killingly attended Barbara's home at Morpeth to review her financial position. Philippa was present: CB 3/318.54.
- 650 On 9 September 2021 Mr Killingly provided Barbara with a record of advice: CB 3/320.1 – 320.23.

Opening submissions

Plaintiffs' submissions

651 Dr Mantziaris in the POS described the claim by the plaintiffs in the proceedings as proprietary estoppel [42], which he characterised [44] as falling into the following categories:

- (1) encouragement by express representations — written and oral;
- (2) encouragement by conduct; and
- (3) acquiescence — most apparent in the circumstance of the construction of the house upon the Company's land; more than two decades of agricultural improvements on the farms; and in the general conduct of the deceased over the many years in which he handed over all management of the farms to Michael.

Defendants' submissions

652 The defendants' opening submissions elaborated on the disentitling conduct and the unclean hands defence.

653 In particular the critical events said to make good the defence include the following:

- “(a) the undue influence and unconscionable conduct exercised by Michael and Adele over Ross and Barbara to sign a document entitled “Agreement for sale of Rossdale and beyond to avoid confusion” dated on or around 21 October 2019, which up until the Plaintiffs' submissions, was designed to form the basis for a further claim to equitable estoppel against the Company;
- (b) the proposed sale of Rossdale during mid-June 2019 was contrary to the representation made by Ross' during the mid 1990s and prior to his death;
- (c) the active concealment and failure of Michael and Adele to disclose the proposed sale of a major asset of the Company, namely Rossdale;
- (d) the failure to disclose the creation of the Danmah Trust to be used to hold another major asset of the Company, namely Gostwyck Flats;
- (e) the failure to disclose to Ross and/or the Company the purchase of the Failford Property being a purchase funded through assets of the Company;
- (f) Michael's breach of his financial obligations agreed with Ross as a condition of any transfer of Rossdale and/or Gostwyck;
- (g) the incurring of liabilities to the Company by way [of] mortgage over Gostwyck Flats without Ross and/or the Company's knowledge and approval;
- (h) seeking of legal and financial advice in relation to assets of Ross, Barbara and/or the Company by Ross' and Barbara's own advisers without the knowledge and approval of Ross and Barbara.”

654 A recurring theme of the defence of both the company and Barbara is that the plaintiffs failed to remunerate the deceased.

655 Further, Barbara in relation to the October 2019 Agreement claims that this was signed by herself and the deceased in circumstances where they did not obtain legal and financial advice and were not permitted to do so, that they suffered from reduced memory and capacity to understand the arrangements and were in a position of dependence upon the plaintiffs such that their signing of the agreement was not a free, voluntary and independent act.

656 The DOS sought to reinforce the claim that the promises of the deceased were subject to conditions in particular a condition of payments to the deceased: DOS[48].

657 The DOS claimed that the representations in the plaintiffs' case changed in content and had been resiled from by the plaintiffs pointing to an example of the attempted sale of Rosssdale prior to the deceased's death and also the selling off of parts of Gostwyck Flats gradually placing assets of the company outside its remit: DOS[51],[57].

Plaintiffs' reply submissions

658 In reply Dr Mantziaris made a number of "overarching observations" regarding the defendants' case and then made a number of specific rebuttals.

659 The overarching observations are essentially as follows (POR [3], [9], [11], [12], [14], [15]):

- (1) that the defendants' submissions depart significantly from the pleaded case converting what are essentially denials on the pleadings to assertions that the representations were subject to two conditions namely that the plaintiffs pay the deceased a remuneration for the remainder of his life and that the plaintiffs would continue to work the farms for the remainder of the deceased's life;
- (2) the deceased no longer required financial consideration for his old age consequent upon his death;
- (3) despite arrangements being made by the deceased to attempt to gift Nicholas property the defendants' submissions are silent on this;
- (4) the defence of unclean hands is "misplaced";
- (5) the defendants' submissions are silent on the circumstances of the last Will; and

- (6) the defendants have declined the plaintiffs' invitation to address a wide-ranging challenge to the authenticity of documents and the plaintiffs case.

660 In relation to specific rebuttals the plaintiffs say the core propositions advanced by the defendants in their submissions can be rebutted efficiently on the documentary evidence in the case. Specifically the plaintiffs dispute that:

- (1) the company's assets in the estate hands are worth only \$2.5M;
- (2) the mortgage over Gostwyck Flats was unauthorised;
- (3) the plaintiffs failed to disclose the DFT and the purchase of Failford to the deceased;
- (4) the deceased did not know that Rossdale had been put up for sale;
- (5) the plaintiffs improperly forced the deceased and Barbara to sign the October 2019 Agreement; and
- (6) the plaintiffs never paid the deceased any remuneration.

661 One aspect of the reply submissions is the assertion that the deceased waived any obligation to be paid in 2002 and thereafter the plaintiffs were not asked to pay the deceased on several occasions: POR [53]-[64].

Closing submissions

662 The parties written closing submissions are detailed. Further, as I note below I gave the parties an opportunity to further address on relief and the impact of the \$817,417 amount. I have recorded the closing submissions of the parties more particularly under the headings that follow respectively dealing with the determinations on the issues in the proceedings.

Credibility and reliability of witnesses

Submissions

663 Mr Simpson invited the court to make adverse findings in relation to the credit and reliability of Michael, Adele and Mr Smart. He submitted that Barbara, Philippa and Hamish on the other hand were honest and truthful witnesses and that their evidence should be accepted in the context of any conflict between their evidence and that of Michael, Adele and Mr Smart: DCS[11]-[12].

664 Mr Simpson submitted that there had been collusion between Michael and Adele in the preparation of their evidence: DCS [15]-[16]: T 589.

665 Dr Mantziaris submitted as a number of the events were historic and allowances must be made for the fallibility of human memory which increases over time, particularly when disputes and litigation intervene. He submitted the documentary material allowed the memory and credibility of witnesses to be tested by reference to objective facts: PCS App A page 25/59.

666 In relation to the respective witnesses Dr Mantziaris submitted as follows:

- (1) Michael was candid in his evidence, eager to answer questions and demonstrated clear and detailed recollection of events. Although Michael did not have a precise understanding of bookkeeping and financial concepts he was able to give evidence about basic accounting information. Michael acted with integrity in working to accommodate the deceased's wishes in relation to Nicholas and aged care costs, and he remained steadfast and credible in response to vigorous cross-examination: PCS App A page 25-26/59;
- (2) Adele was "completely credible" and gave due consideration to questions put and responded clearly and promptly, giving her evidence without gloss. Adele had a clear understanding of the method and timing of payments and was not unsettled by questioning regarding non-payment of money to the deceased and (alleged) tax fraud: PCS App A page 26-27/59.
- (3) Mr Smart was also "completely credible" and gave his evidence without hesitation or prevarication despite some questioning of his professionalism. Mr Smart should be accepted as witness of truth labouring under the obvious difficulty of dealing with unfolding of events contrary to what he understood from his dealings with the deceased over the years: PCS App A page 27/59.
- (4) Barbara should be accepted as truthful in relation to evidence regarding the deceased's intentions, the improvements on Rossdale and other matters to do with the deceased and Michael. However her evidence in relation to the events from about early July 2019 until the death of the deceased in which Philippa and Hamish were involved should be approached with caution. Barbara's evidence lacked credit on occasions attempting to either suit the defendants' case and or her standing with Hamish and or Philippa (T964), citing examples including her inconsistent account of the Dr Booth episode (T 822, 827-830) and the engagement of a geriatrician (T 855-865): PCS App A page 28/59.
- (5) Hamish gave evidence in a polite, direct manner without too much hesitation and made concessions: T 880. However when challenged he gave the impression that anything which did not conform with his reasons for his actions and judgments in events was insignificant: T901, 903. Hamish's assertion that he never had anything to do with the deceased's Wills was contradicted by Exhibit 11 (in fact Exhibit JP-2) (pages 43, 57-60, 65), that his accounts of the deceased's intentions in relation to the 6-7 January 2020 notice of EGM was not credible and

that he “is the driving force within the camp of the defendants in so far as the defence seeks a result that was not in contemplation of the deceased, Barbara, Michael and Adele”. The credibility of his evidence particularly regarding his account of the production of the notice of the EGM and proxy form was strained (T913-927): PCS App A page 29/59.

- (6) Philippa sought to present her actions in the period from late July 2019 as merely that of a daughter who was seeking to provide more information to her father about company affairs so he could exercise a choice. However this did not square with her account of the deceased going in and out of legal capacity or her evidence on the five 1.5 hour meetings she claimed to have had with the deceased in relation to the 6-7 January 2020 notice of EGM: T 975-976; 1,000-1,020. Her evidence regarding the options in the EGM special resolutions was strained and her evidence generally tainted by her advocacy of an outcome that would benefit her financially as sole beneficiary of Barbara’s 17 April 2020 Will: PCS App A page 29/59.

Some general observations

667 Each of the principal witnesses in the proceedings being Michael, Adele and Barbara supported their case through the affidavit evidence that I have referred to above.

668 A significant amount of the material produced by Michael and Adele addressed historical matters leading up to the Rossdale Arrangement and Gostwyck Arrangement and subsequent events which are not ultimately essential to their case.

669 Each of Michael, Adele and Barbara were cross-examined at length.

670 None of them emerged completely unscathed from the cross examination.

671 Barbara’s recollection was poor in respect of matters I note below. Michael and Adele had clearly discussed aspects of the events in the case between themselves and gave almost identical evidence of many conversations taking place years ago.

672 More generally I have approached and weighed the evidence having regard to objective surrounding facts which are either undisputed or established by contemporaneous documents and the inherent probabilities of life as it bears upon the events: e.g. *In the matter of Hoju Jobs Pty Ltd* [2021] NSWSC 302 per Williams J at [77] citing *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* [1999] HCA 15; (1999) 161 ALR 599 at [15]; *Fox v Percy* (2003) 214 CLR

118 at 129; [2003] HCA 22; *In the matter of Hillsea Pty Ltd* [2019] NSWSC 1152 at [16].

673 In relation to the conversations underpinning the estoppel case there was little or no occasion in which the need arises to make findings over conflicting versions of conversations as between Michael and the deceased. As I note below, Barbara, Philippa and Hamish had little or no involvement in any of those events giving rise to the critical discussions regarding the estoppel case.

Evidence of meetings from mid-late 2019

674 With the exception of handwritten notes of the deceased (as distinct from documents typed for the deceased and presented to him for signature), I approach both the documentary evidence and testimonial evidence from family members regarding events and the meetings from about mid-late 2019 until the deceased's death with some degree of caution.

675 That is because each of the family members in their own way had different interests and motivations in securing outcomes relating to the properties, the company and finances generally.

676 Michael and Adele on the one hand not unnaturally seemed mindful of attempting to accommodate some of the deceased's changing concerns regarding having availability of some cash resources for his remaining years and also his desire to assist some of the grandchildren in certain ways and in particular Nicholas.

677 Michael and Adele were also seemingly mindful of retaining and securing the investment that they had put into the properties over the years.

678 Philippa and Hamish were becoming increasingly involved in taking steps to prevent sale of Rossdale and Philippa was conscious of where the financial resources of her parents might be destined.

679 Barbara was hurt by what she had regarded as being the nondisclosure of the sale of Rossdale and some tensions in having to fund the expenses of her lifestyle with the deceased out of her own resources.

Michael

680 Michael was cross-examined across 3 days (14, 15 and 16 September 2022).

681 Michael used a hearing loop whilst being cross examined: T86. Sometimes there were issues with Michael hearing questions: T 88. On one occasion, I adjourned because there were issues with Michael hearing: T 156. Those were resolved. Overall, Michael was able to complete his evidence and I had good opportunity to assess his evidence in a context in which I was confident that he was able to hear understand and respond to questions.

682 In relation to Michael's evidence, Mr Simpson submitted:

- (1) that I should exercise caution in accepting Michael's professed ability to recall events when he was a young child around the age of 12: DCS[8]-[9] citing inter alia *Watson v Foxman* (1995) 49 NSWLR 315 at 319, and *Wheatley v Salmon* [2022] NSWSC 395 at [14]-[15]; and
- (2) his evidence was hopelessly unreliable and could not be relied upon except where it was adverse to his own interests: DCS[14].

683 In *Wheatley v Salmon* (an estoppel case) Kunc J in finding that each of the witness's evidence was coloured by perceptions of self-interest as well as conscious consideration of what should and could have been said. However, an important point of distinction is that his Honour found in that case that there was no contemporaneous written or independent testimonial evidence of the contested events: [16], [14].

684 Mr Simpson submitted that I should reject Michael's evidence and in particular referred to Michael's disregard of his obligations to the Court, general evasiveness and argumentativeness in the following respects (DCS[15]):

- (1) non-compliance with the notice to produce - in particular failing to provide documents for access to the company's password until the commencement of the hearing (T88), misleading the Court about his solicitors conveying concerns over the company email account (T92) whilst understanding the obligation to comply with the notice to produce, providing no explanation for failure to comply (T90, 93), and misleading the Court that there was no further material to produce: T 1999;
- (2) concealing his true financial resources - comparing Michael's affidavit evidence with his tax returns for the financial years ended 2020 and 2021, and undervaluing the Forster Property;
- (3) making serious and unfounded allegations against Philippa: T228-229;

- (4) being argumentative during cross-examination: T217, 345;
- (5) making misleading statements to the NAB in relation to the purpose of a farm loan (T411, exhibit D9) and misleading the Court as to whether the NAB mortgage remained on the Gostwyck Remnant: exhibit D7;
- (6) failing to disclose the gift of the Lennoxton property in the family provision affidavits: T393;
- (7) failing to disclose as a gift the \$817,417 amount from the deceased to him being placed in the DFT as a loan to the trust: T396; CB 4[760], [786], [798];
- (8) failing to disclose that he and Adele were named as beneficiaries of the DFT;
- (9) misleading about not communicating with Mr Smart regarding the proceedings: T149-151; and
- (10) verifying the statement of claim asserting that no rent was paid in relation to the property, contrary to the evidence given in the proceedings: T234-236, exhibit D12.

685 Mr Simpson tendered as a separate document headed "Prior Inconsistent Statements of the Plaintiffs to Tender By the Defendants" extracts of paragraphs 65(a) and 66 (particulars): exhibit D12; T 700.

686 In his evidence Michael dates discussions with his father regarding his getting involved with the farms from 1978 when he was about 12 years old: CB 2.1/245.

687 In his affidavit he sets out a number of discussions that occurred at that time and subsequently including discussions between the deceased and Colleen Ryan and Alwyn Horne and Max Coyle.

688 It was put to Michael that he could not truly remember the details of the conversations and that they did not occur. Michael said he had difficulties recalling precise dates but could recall events: T 108-109, 111.

689 Michael asserted that he could recall the conversations and gave some reasons for that. For example in relation to:

- (1) a conversation when he was 12 with Colleen Ryan (CB 2.1/246) Michael replied (T 109):

"A. No, I remember that conversation, because that was the side of the hill with fallen timber."

- (2) a conversation with his father when he was about 14 to 16 years of age (CB 2.1/247) Michael replied (T 110)

“A. Sorry, we were having, it was on a, what I call now the bike shift, there was, and I remember on top of the, top of the hill, we were having a cup of tea because dad had wanted it spot on 10 o'clock, that was his, that was his thing, and that conversation happened, because dad actually sort of repeated that conversation a couple of times to me”;

- (3) a conversation with his father in about 1988 regarding taking over the farms he recalled “this conversation took place when I was building the front fence”: T 111

690 Whilst I doubt that Michael could recall the precise detail of the conversations that he and his father were involved in with Colleen Ryan, Alwyn Horne and Max Coyle, I do not doubt that, broadly speaking, conversations to the effect that he deposed to did occur at least in the sense of his father making comment that Michael would at some point take over the operation of the farms and that such comment had an effect on Michael as being memorable.

691 However, whilst Michael professed to be able to recall conversations when he was much younger, there were some critical events such as a meeting to resolve the password issue regarding the notice to produce that he could not recall: T 92.39.

692 Michael had some difficulty least initially recalling that his father had acted to stop the sale of Rossdale by letter to Mr Lidbury on or about 20 October 2019 (CB 3/127, 129): T264-265.

693 Michael had “no idea” regarding whether he had relodged the mortgage over Gostwyck Remnant in November 2010 (CB 5/108): T 293.

694 Some of the other criticisms made by Mr Simpson have force. The failure by Michael to comply with the notice to produce was far from ideal: e.g. T 88.

695 However, I do not consider that the criticisms of Michael and Adele in relation to alleged concealment of their true financial position demonstrated deceitfulness (DCS 15).

696 It is clear that Michael was not adept at accounting or a "numbers person" and Adele did the bookwork: e.g. T 93. Contrary to the submissions, Michael did in his evidence in chief disclose receipt of the \$817,417 amount: CB 2.1[244].

697 A copy of the DFT was provided in the proceedings and whilst it is true that Michael and Adele are named as beneficiaries, it is also true that Danika is

listed within one of the categories of relation to Michael and Adele, which would define her as a beneficiary: CB 3[34].

698 Eventually, the tax returns of Adele were provided and I do not accept that there was any serious instance of financial nondisclosure in Michael and Adele's positions.

699 Michael acknowledged in cross examination that for the purposes of the preparation of the statement of claim that he "must've had a lot of discussions with Adele to understand what it is you wanted to bring in this case in terms of what your claim's going to be": T128 – 29.

700 It is clear that Michael and Adele discussed the facts of the purposes of preparation of the statement of claim although when it came to dealing with their affidavits (at a later point) he asserted that they did theirs separately. His evidence regarding this discussion in respect of the statement of claim and doing affidavit separately was as follows (T 129):

“Q. You both discussed a lot of the detail in all of this?

A. Yeah we discussed the case, yeah. Always have.

Q. And the facts involved in the case?

A. Mm.

Q. Sort of ironed things out, is that fair to say?

A. Probably yep.

Q. And both of you to get a handle on what's the narrative, do you agree with that, what's the story?

A. What the story is?

Q. Yes?

A. Yeah.

Q. Both of you got together to do that, is that correct?

A. No.

Q. Well--

A. No, no, no, no, no. Because I did my - hang on this is - no, I did mine and Del's done hers.”

701 It is also true that Adele accepted that conversations as recorded as between her affidavits and Michael's affidavits, at least in relation to the Arrangements were nearly identical: T589. Adele denied that that was because she and

Michael had discussed their evidence before swearing the affidavits. Her explanation was that the nearly identical conversations was "because it's the truth": T589.

702 There are many examples of essentially identical evidence as between Michael and Adele. This includes:

- (1) their version of the discussions on about 5 March 2019 when the deceased and Barbara visited Michael and Adele at Rossdale: CB 2.1/195[193], 291[290];
- (2) their version of the conversation with the deceased in July 2010 prior to the deceased giving them the letter dated 25 July 2010: CB 2.1/179, 273;
- (3) their description of work done when in about 2012 and 2013 they put solar systems on their house and the machinery workshop, levelled part of Rossdale and put in a horse arena and constructed stables: CB 2.1/181, 275; and
- (4) the work carried out by them consequent upon the damage caused by the 2015 flood: CB 2.1/182, 276.

703 In some circumstances, I accept that discussion between two witnesses of events for the purpose of the preparation of a pleading and similarity of material may cast doubt on the reliability of their evidence.

704 However, apart from the conversations with the deceased, much of the critical evidence in the proceedings was otherwise corroborated by documentary material and in the case of work done by them in reliance upon promises otherwise evidenced by the photographs and acknowledgement by Barbara of that work on the properties.

705 In considering their evidence of the critical earlier conversations, I have considered their account of what was discussed in May 2000 against the handwritten document of the deceased dated 9 May 2000 which is essentially the only contemporaneous document of the earlier critical discussions.

706 I have mentioned doubts about Michael's ability to recall precisely wording of conversations. Nonetheless, I accept the gist of what he recalls regarding discussions.

707 Overall, I gained the impression that Michael was attempting to give a truthful account of his recollection of events. Except as I have otherwise indicated

below or qualified my findings, I accept Michael's evidence as truthful and in any respect in which his evidence conflicts with Barbara's recollection I accept Michael's recollection as being more reliable than that of Barbara.

Adele

- 708 Adele was cross-examined across 3 days (16, 19 and 20 September 2022).
- 709 Adele indicates that she and Michael worked very closely on the "land" and that she was present during a lot of the conversations that Michael had with the deceased about the properties and what was to happen to the properties in the future: CB 2.1/153.
- 710 Mr Simpson submitted that Adele was similarly unreliable as Michael, argumentative and combative: DCS[16]. In particular Mr Simpson pointed to her failure to comply with the notice to produce (T427-428) and inconsistencies between her evidence and Michael's evidence in respect of preparation of Michael's financial position in his family provision affidavits: T 629-631.
- 711 My impression was that Adele was an honest witness. Clearly there were times when Adele was frustrated under what was quite testing cross-examination. I did not regard her responses as being necessarily "argumentative and combative" if what is meant by that that her evidence was not credible or reliable.
- 712 There were occasions when Adele's recollection was impaired. For example, Adele was asked about the notices to produce addressed to Michael and herself dated 16 November 2021 (CB 1/240-241). She could not remember whether she had seen the document or not or whether it had been provided to her. She indicated she could not remember seeing it but remembered being told about it. However, she could not indicate whether she had been told about it this year or last year eventually stating "I don't really remember exactly when there is so much going on": T 422-423.
- 713 Adele was further asked about production of materials in particular bank statements demonstrating cattle cheques prior to 2010. Initially she said she was not sure. A bit later her evidence was

“A. And I can't remember everything. There's millions of documents. I can't remember every single thing.

Q. Is your evidence that you just can't recall that there's anything in that? Anything in the evidence? Anything in the bank statements about cattle cheques pre-2010. Is that right?

A. Yes.”

714 Adele was asked about the 13 January 2020 urgent directors meeting held at Morpeth with Michael and Adele, the deceased, Barbara, Philippa, Hamish and Mr Slattery present. In that context Adele was questioned in relation to the letter dated 25 July 2010 and in particular whether any of the monies referred to in the letter were not paid to the deceased. She indicated that she could not be certain and whilst she asserted that monies were paid she could not remember what was paid and when: T 615-616.

715 In relation to the 14 February 2020 meeting, Adele, who was present, recalled that the deceased had read out his speech could not but remember whether anyone in the room disagreed or voiced any objections to what the deceased had raised: T 619.

716 Adele could not recall when she had last seen Mr Lidbury: T 623.

717 Adele could not initially recall whether the “Gostwyck Flats Time Frame” document (CB 3/26) had been provided to the deceased or Barbara and could not recall whether she had any discussions with Barbara about it: T 632.

718 On the whole whilst I have doubts about Adele’s ability to recall precisely wording of conversations I accept the gist of what she recalls regarding discussions.

719 Overall, I accept Adele as a truthful witness although my sense was that generally her recollection was not quite as good as Michael’s recollection but better than Barbara’s recollection.

Barbara

720 Barbara was cross-examined across 4 days (20-22 September 2022 and 4 October 2022).

721 Mr Simpson submitted that consideration should be given to the length of time over which Barbara was cross-examined and her age in explaining any inconsistencies with her evidence: DCS[13].

722 Barbara's addressing of the events regarding the arrangements between Michael and the deceased over the three decades from the early 1990s until 2020 lacked the degree of detail that Michael and Adele provided in their evidence.

723 A curious aspect of the case was the evidence in the form of a letter from Dr Booth dated 28 October 2019 as follows (CB 3/146, 149.6):

“I have known Barbara Horn on a professional basis for over 7 years. Over this time Barbara has experienced some age related issues and has developed cognitive impairment. As part of this process she has reduced memory and reduced capacity to understand complex legal and financial information. For this reason I do not believe she has capacity to make these decisions without her legal guardian being physically present.”

724 I note that no tutor was appointed for Barbara in the proceedings. Clearly those Barbara had instructed had formed the view that Barbara is not a person who is under a legal incapacity in relation to the conduct of legal proceedings: s 3 CPA.

725 Barbara throughout the evidence had moments of clarity. However on other occasions Barbara had difficulty with recalling matters even when her attention was directed to particular documents in evidence. Examples of this included as follows:

- (1) Barbara had difficulty recalling specific dates for example placing even approximately when Amos had died: T 653;
- (2) Barbara could not recall the sale of part of Tillimby in 1992: T 657-658;
- (3) Barbara in her affidavit evidence had stated that “During May 2000, Ross wrote a note to Michael requesting that a payment of \$500 to be paid to him from February 2001”: CB 2.1/402. When asked whether the document at CB 3/2-3 (which is a handwritten note by the deceased dated 9/5/2000) was the note she was referring to, her initial response was “I honestly don’t know”: T 663. When Barbara was taken to a typed version of the note in MFI 1 in the hope that it might be easier for her to follow and jog her memory. Barbara then responded “No, because there are probably numerous ones and I don't recall which one was which”: T 663.

- (4) A similar response occurred when Barbara was taken to another handwritten note by the deceased dated 25 July 2010 in which the deceased referred to a number of financial matters. Barbara's response was "A. I wouldn't know. I have no idea" and when taken to a further part of the note Barbara's response was "A. Well, this is all unbeknown to me": T 664.
- (5) The next little part of Barbara's evidence was somewhat telling (T 664):
- "Q. Other than these two written notes that I've just shown you is there any other written demand that Ross made to Michael for payments?
- A. Well, I've just said I don't know what went on between Michael and Ross, you know? Well, yes, I do, right, in so much as Ross would tell me. But, what's turned up in documentary evidence I can't recall Ross specifically saying, or he told me and I just didn't listen."
- (6) Barbara's response was surprising. It is evident on the totality of the documentation in the case that the only document that could conceivably qualify as being the document she had referred to in her affidavit evidence was the handwritten note at CB 3/2-3. Her response on this pointed up the variability of Barbara's recall which pervaded her evidence.
- (7) When Barbara was asked about the part of the conversation which Adele deposed to regarding the 1 July 2019 meeting (dealing with the "Succession Plan" in relation to the company and sale of Rosssdale options: CB 2.1/199) Barbara had no independent recollection of the conversation: T 733.

726 Dr Mantziaris suggested to Barbara that by the October 2019 Agreement Michael was asking them to acknowledge that the selling of Rosssdale was, firstly, to cover any potential aged care needs that might arise for the deceased, and secondly, to follow the accounting advice that the land had to be taken out of the company?: T 814-815. Barbara indicated that she could not recall that part of it: T 815. Upon further questioning Barbara stated (T 816):

"A. I agree we would have been told but I don't agree with our reciprocation."

727 A bit later Barbara started to backtrack and stated (T 817):

"A. Well I don't recall having time to read it. If I did read it, well I didn't comprehend it.

(and)

A. I honestly can't recall this taking place.

(and a bit later T 818-819)

Q. I'm asking you about the specific document in front of you which you signed--

A. I don't understand it.

Q. --on 22 October. Sorry, your answer is?

A. I don't understand it.

Q. You don't understand that document?

A. No.

Q. Not at all?

A. No.

Q. Well that's not true Mrs Horn.

A. Because I've signed it at the bottom and as I said they come in with these documents and you know have a conversation for two minutes, and we've got to hurry off and do this and trying to catch up and you chit chat and--

Q. So you're saying that you didn't understand any part of this document. Is that what you're saying?

A. Well it was mainly left to Ross, because I only, I was only concerned with Ross' things, Ross was concerned with Ross' things. So if Ross signed it I probably would have signed it but I certainly didn't understand it."

- 728 To some extent this later evidence is consistent with Barbara's affidavit at CB 2.1/403[39]. However, the variability of her recollection did not fill me with confidence as to the reliability of her memory.
- 729 Critically at this point Barbara was shown and cross-examined on a file note of Mr Meredith dated 22 October 2019 at 3:20PM (15:20): CB 3/142.1; exhibit P7-3.
- 730 The evidence revealed that Michael had sent the agreement to Mr Meredith and Barbara had discussed the agreement with Mr Meredith in the afternoon of 22 October 2019 when Michael and Adele had met with his parents. Mr Meredith recorded that Barbara stated "met with Michael, all good": T 820.
- 731 However, Barbara stated she could not recall any telephone call to Mr Meredith and effect stated "I don't recall ever speaking to Mr Meredith directly on the phone": T 820, also T 821, 828.
- 732 On the whole, I consider that Barbara's recollection of events was poorer than that of Michael and Adele and except as I have otherwise indicated or qualified my findings, I accept Michael's and Adele's recollections as being more reliable than that of Barbara.
- 733 Further, Barbara's approach to the proceedings appears to have been influenced by her view that as between Michael and Philippa that Philippa, from

Barbara's perspective, was more reliable at least in relation to convey to Barbara an accurate or truthful account of events: T 709, 832.

734 My assessment is that Barbara in light of her inclination to favour Philippa but in any event her reliance upon Philippa has allowed her inclination in support of Philippa to influence her approach to the proceedings.

Mr Smart

735 Mr Smart was interposed as witness on the sixth day (19 September 2022) and cross-examined.

736 Mr Simpson submitted that Mr Smart lacked impartiality in giving his evidence and was argumentative referring to various matters including: describing other professionals as "fuckwits" and seeking "maximum advantage" for Michael and Adele: T506-508, CB 3/255.3; general argumentativeness: T508, 515; referring to communications with Philippa as a "saga press[ing] on": T509 and, alleging that the deceased's heart attack and hospitalisation have been caused by Hamish and Philippa: T518.

737 Mr Smart indicated that he was a bit "short with things" in his language acknowledging that he probably should not have used the language he did: T561.

738 Nonetheless, despite some instances of Mr Smart engaging in insensitive and discourteous correspondence with others, I did not doubt that Mr Smart gave his evidence other than as he honestly recalled the position to be. I accept his evidence as being reliable.

Hamish and Philippa

739 Each of Hamish and Philippa gave their evidence in a considered way albeit sometimes they were guarded. On occasion they made what appeared to me to be appropriate concessions.

740 Nonetheless, I do consider that their involvement in the family affairs late in the piece (by which I mean from approximately January 2019 until the deceased's death, and after), however well-intentioned and considered to be in Barbara's interests from their perspective, was an involvement on their part without any

serious and deep reflection on the claims of Michael and Adele to the properties in the prior two decades.

- 741 One matter in which I did doubt the reliability of their evidence related to their account of the drafting and production of the notice of the EGM and proxy form. I accept the criticisms by Dr Mantziaris of Hamish and Philippa of their evidence regarding this (T913-927 Hamish) and (T 975-976; 1,000-1,020 Philippa PCS App A page 28-29/59).
- 742 Dr Mantziaris spent some degree of timing cross-examining Hamish and Philippa about this.
- 743 Part of the context for understanding this evidence relates to Barbara's evidence about what the deceased wanted in terms of available monies in late 2019.
- 744 Barbara indicated that once the deceased found out about the sale of Rossdale and had "simmered down" (T 736, T 835) the deceased was agreeable to Rossdale being sold and for Michael and Adele to have and do what they liked with Rossdale if the deceased was given some monetary consideration which she could not quantify but described in terms of him wanting to buy a "little Suzuki car" (T 736) and have "some pocket money to.. be able to contribute to housekeeping a bit": T 729-730, T 736.
- 745 Certainly the deceased expressed in the 30 (October 2019) letter that Rossdale was Michael's to do with what he wished.
- 746 Seemingly as at February 2020 (but in any event no earlier than 30 October 2019) the deceased was looking to receiving very little out of the company or more particularly Rossdale if he was given some monetary consideration.
- 747 Barbara as noted could not quantify the "monetary consideration" but described in terms of the deceased wanting to buy a "little Suzuki car" (T 736, 730) and have "some pocket money to.. be able to contribute to housekeeping a bit": T 729-730, T 736.
- 748 However, by early January 2020 the involvement of Hamish and Philippa in the matter gave rise to important questions regarding what the deceased was actually needing or wanting in the form of any money out of the company.

- 749 An agenda for the EGM of the company was prepared and signed by the deceased on or prior to 6 January 2020 (CB 3/191), and emailed by Philippa on either 6 or 7 January 2020: CB 2.1/374; T 1016-1017.
- 750 On 9 January 2020 Philippa and Hamish purportedly pursuant to the power of attorney for the deceased signed a proxy form for him as a director of the company appointing Hamish to vote at the proposed EGM on 14 January 2020: CB 3/183.
- 751 I asked Philippa about her understanding of what the "current company debts and liabilities" were: T 920. She was not able to quantify them.
- 752 At the end of Day 11 I noted to counsel that the company's liabilities as at 30 June 2019 appear to have been \$142,848, and the liabilities as at 30 June 2020 appear to be about \$146,318: CB 4/756 and 785.
- 753 The nature of balance sheets are such that one could not necessarily draw an inference that the liabilities of the company in January 2020 (roughly between those two dates) was of a similar order to \$142,848 to \$146,318.
- 754 Nonetheless, I observed that there was no obvious evidence that there were any significant debts or liabilities of the company beyond those figures at January 2020.
- 755 I requested counsel to indicate to me if there was any suggestion or contention that any very significant liability incurred during the course of that year: T 946-947. Neither counsel suggested that was any such significant liability.
- 756 I asked Philippa about the value of the property. She indicated it was listed for over \$3M "from memory, but we never spoke to the agent about what he actually believed it was worth": T 921.
- 757 If the EGM meeting had occurred and Hamish had voted in favour of special resolution (a) "3c" an amount to be distributed to the deceased as a dividend would have been in the order of \$1.3M (based on 50% being \$1.5M less sale costs less debts of about \$146,000 less \$30,000).
- 758 Had Hamish voted for special resolution (a) "3a" or "3b" the amount to be distributed to the deceased would have radically increased beyond that.

- 759 No adequate explanation was proffered on the evidence as to why the deceased would have signed an agenda which if special resolution (a) had been voted for by Hamish, would have resulted in the deceased receiving such a large sum of money when according to Barbara all he wanted was to buy a “car and ... have some pocket money ... to be able to contribute to housekeeping a bit”: T 730, 736.
- 760 Dr Mantziaris ultimately submitted that the deceased did not in fact authorise to endorse the special resolution, had no real idea about it and was given no access to legal or accounting advice: T 1057.
- 761 There is much force in that submission. I have serious doubts that the deceased understood the contents of the Notice of EGM (CB 3/190-191) in the sense of understanding the monetary consequences to him of proposed resolutions if any of them were to be passed.
- 762 The content of the resolutions regarding dealing with the sale proceeds of Rossdale are to my mind very seriously at odds with the handwritten documents of the deceased expressing his views of Michael’s entitlement to Rossdale both pre-dating and post-dating the Notice of EGM document.
- 763 I do not accept that the deceased intended that if Rossdale was sold an acceptable outcome would be Hamish voting for him to receive no less than 50% of the proceeds.
- 764 To the extent that Philippa and/or Hamish asserted that the deceased understood the potential monetary consequences to him of what he was signing, I reject that the deceased had such an understanding of the Notice of EGM.
- 765 That finding does not necessarily mean that Philippa and Hamish might not have in their own minds had a view that the deceased understood what he was doing. I make further comment regarding the separate resolution regarding the proceeds of sale of Lot 6 below.

Legal principles

Plaintiffs’ submissions

- 766 Dr Mantziaris submitted that:

- (1) to establish a claim of proprietary estoppel by encouragement, it must be shown that an owner of property as representor has encouraged another by way of a representation to alter his or her position in the expectation of obtaining a proprietary interest, and that the representee has to their detriment changed his or her position in reliance on the expectation, such that it is unconscionable for the representor to resile from the representation citing *Trentelman v The Owners – Strata Plan No 76700* (2021) 106 NSWLR 227; [2021] NSWCA 242 (**Trentelman**) at [116]-[118], [170], [171]: POS [42];
- (2) the present facts are common in cases involving family farms, where a child or a de facto spouse is encouraged to work on a farm with an inducement or representation that he or she will be rewarded by a gift of an interest in the farm. The principles have been laid out clearly in a series of decisions such as *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 at [79]-[86]; *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10 at [42], [50]; and *Flinn v Flinn* [1999] 3 VR 712; [1999] VSCA 109: POS [43];
- (3) the distinction between estoppel by encouragement and estoppel by acquiescence was explored by Ward CJ in Eq in *Bassett v Cameron* [2021] NSWSC 207 at [417]-[418] and by Macfarlan JA in *Priestley v Priestley* [2017] NSWCA 155 at [7]-[16]: POS [45]; and
- (4) the detriment in an estoppel by encouragement case is *not* the loss flowing from the non-fulfilment of the promise or the assumption. The requirement for proof of detriment '*must be approached as part of a broad inquiry as to whether departure from a promise would be unconscionable in all the circumstances*': *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84 at [42]; *Donis v Donis* (2007) 19 VR 577; [2007] VSCA 89 at [20] (Nettle JA); *Wantagong Farms Pty Ltd as Trustee for the Bulle Family Trust v Bulle* [2015] NSWSC 1603 (**Wantagong**) at [68]; and *Basset* at [417]-[418]: POS [46].

767 Dr Mantziaris referred to the decision of Brereton J (as his Honour then was) in *Vukic v Grbin* [2006] NSWSC 41 at [33]-[38] regarding the fashioning of relief: POS [48].

768 Dr Mantziaris referred to statements made in *Wantagong* at [70]-[71] and *Basset* at [418] and noted that approving the general principles relating to relief following from *Giumelli*, the Court of Appeal in *Trentelman* (an easement case) stated at [165] (per Bathurst CJ, Bell P at [170] and Leeming JA at [171] agreeing):

“It is now clear that in the case of proprietary estoppel, it is not necessary to mould the relief to reflect the minimum equity necessary to remove the detriment, provided that the relief granted was not out of all proportion to the detriment suffered: *Giumelli v Giumelli* at [41]-[48]; *Sidhu v Van Dyke* at

[85]; *DeLaforce v Simpson-Cook* at [56]-[57]; *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12 at [142].”

Defendants’ submissions

769 Mr Simpson submitted equitable estoppel is a general doctrine that serves the purpose of “protection against detriment which would flow from a party’s change of position if the assumption (or expectation) that led to it were deserted” citing *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; [1988] HCA 7 (***Waltons v Maher***) at 419: DOS [30].

770 Mr Simpson referred to *Waltons v Maher* at 428-429 noting equitable estoppel generally requires a plaintiff to prove:

- (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship;
- (2) the defendant induced the plaintiff to adopt that assumption or expectation;
- (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation;
- (4) the defendant knew or intended him to do so;
- (5) the plaintiff’s action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and
- (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

771 Mr Simpson also referred to the decision of Brereton J (as his Honour then was) in *Vukic v Grbin* at [28] for the purposes of summarising the matters a plaintiff must establish to find equitable estoppel:

“First, in relation to the plaintiff’s conduct: that the plaintiff acted (or abstained from acting) in reliance upon an assumption or expectation that a particular legal relationship existed or would exist between the plaintiff and the defendant, or that the plaintiff had or would acquire some interest in the defendant’s property;

Secondly, in relation to the defendant’s conduct: that the defendant induced the plaintiff to adopt the assumption or expectation and encouraged the reliant activities of the plaintiff, or at least failed to deny the assumption or expectation with knowledge that the plaintiff was relying on it to the plaintiff’s potential detriment and that it could be fulfilled only by transfer of the defendant’s property, a diminution of the defendant’s rights or an increase in the defendant’s obligations;

Thirdly, in relation to the interest or property: that the assumption or expectation was one which the defendant could lawfully satisfy.

[See generally, *Waltons v Maher*, 428-429 (Brennan J); Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies*, (4th ed., 2002), [17-105]].

772 Mr Simpson indicated that although the above three elements usually need to be satisfied, they should not be treated rigidly as independent requirements citing *Gillett v Holt* [2001] Ch 210 at 225: DOS [33].

773 In relation to the elements of equitable estoppel Mr Simpson submitted as follows: DOS [34]-[39]:

- (1) an alleged representation or promise must be assessed by reference to the circumstances of each case citing *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472;
- (2) although the representation may be based on express or implied words or conduct and need not be “susceptible to precise legal analysis it must nevertheless be sufficiently certain to support the equitable estoppel”: citing *Grant v Roberts* [2019] NSWSC 843 (***Grant v Roberts***) at [113];
- (3) reliance in relation to proprietary estoppel was commented on by Ward CJ in Eq (as her Honour then was) in *Grant v Roberts* at [120]:

“As to reliance upon the relevant assumption or expectation, there is no presumption of reliance; reliance is a fact to be found (*Sidhu v Van Dyke* at [58]). What is required is satisfaction from the whole of the evidence of the fact of reliance on the balance of probabilities (see *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 at [55]). Reliance in the context of estoppel by encouragement was considered by the High Court in *Sidhu v Van Dyke*. It is not necessary that the relevant assumption be the “sole inducement operating on the mind of the party setting up the estoppel” (*Sidhu v Van Dyke* at [71]); the threshold is lower: it need only be a “contributing cause” (at [71]-[73] (French CJ, Kiefel, Bell and Keane JJ); [90] (Gageler J)).”

- (4) the reliance element requires the Court to engage in a factual enquiry to determine actual reliance by the promisee and the state of affairs created: *Brown v Barber* [2020] WASC 84 at [226];
- (5) detriment must be established on the balance of probabilities. Ward CJ in Eq in *Grant v Roberts* at [123] relying upon *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 415; [1990] HCA 39 per Mason CJ and observing:

“When a person relies upon the correctness of an assumption which is subsequently denied by the party who has induced the making of the assumption, two distinct types of detriment may be caused. In a broad sense, there is the detriment which *would result* from the denial of the correctness of the assumption upon which the person has relied. In a narrower sense, there is the detriment which the person *has suffered* as a result of his reliance upon the correctness of the assumption.” [Ward CJ in Eq emphasis]

- (6) the bedrock of any claim in Equity is unconscionability, per Brereton J in *Vukic v Grbin* at [27]:

“Equity comes to the relief of a plaintiff who has acted to his or her detriment on the basis of a fundamental assumption in the adoption of which the defendant has played such a part that it would be unfair or unjust if he or she were left free to ignore it, on the footing that it would be unconscionable for the defendant to deny the assumption [*Grundt v Great Boulder Pty Gold Mines Limited* (1937) 59 CLR 641, 675; *Thompson v Palmer* (1933) 49 CLR 507, 547; *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J)].”

Estoppel

774 I considered the principles of estoppel in *Shymko v Lach* [2022] NSWSC 1096 at [550]-[556]. I stated as follows:

“550. ... Brereton J (as his Honour then was) in *Vukic v Grbin* [2006] NSWSC 41 at [28] (stated);

“Although numerous attempts have been made to identify the various components of equitable estoppel, for present purposes, the matters which a plaintiff must establish to found an equitable estoppel may conveniently be summarised, in the present context, as follows:-

- *First*, in relation to the plaintiff’s conduct: that the plaintiff acted (or abstained from acting) in reliance upon an assumption or expectation that a particular legal relationship existed or would exist between the plaintiff and the defendant, or that the plaintiff had or would acquire some interest in the defendant’s property;
- *Secondly*, in relation to the defendant’s conduct: that the defendant induced the plaintiff to adopt the assumption or expectation and encouraged the reliant activities of the plaintiff, or at least failed to deny the assumption or expectation with knowledge that the plaintiff was relying on it to the plaintiff’s potential detriment and that it could be fulfilled only by transfer of the defendant’s property, a diminution of the defendant’s rights or an increase in the defendant’s obligations;
- *Thirdly*, in relation to the interest or property: that the assumption or expectation was one which the defendant could lawfully satisfy.

[See generally, *Waltons v Maher*, 428-429 (Brennan J); Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies*, (4th ed., 2002), [17-105]].”

551. The precise nature of the estoppel was not identified other than by reference to the decision of the Court of Appeal, and in particular that of Barrett JA, in *Van Dyke v Sidhu* [2013] NSWCA 198; (2013) 301 ALR 769 at [40]:

“The principles to be applied in determining the appellant's claim are not in dispute and were set out by the primary judge at [117] to [135]. As noted above, her Honour proceeded on the basis (at [135]) that the appellant had to establish the following to succeed in her estoppel claim:

- (a) the making of a clear and unequivocal promise (such that it was objectively reasonable for the appellant to interpret the promise in a particular way and to act in reliance on that interpretation);
- (b) that the respondent's promise caused the appellant reasonably to assume that a particular legal relationship existed between her and the respondent;
- (c) that the appellant acted reasonably in reliance on the promise;
- (d) that the respondent knew or intended that the appellant would act in reliance on the promise;
- (e) that the appellant's reliance on the promise was to her detriment; and
- (f) that the respondent acted unconscionably in not honouring the promise."

552. Barrett JA in *Sidhu v Van Dyke* at [38]-[39] prior to the above passage referred to both proprietary estoppel and promissory estoppel. The reference to differing estoppel principles invites some consideration of the nature of the estoppel.

553. His Honour noted that Ward J (as her Honour then was) had drawn the principles from various authorities, including the judgment of Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-429; [1988] HCA 7 in describing the requirements for establishing equitable estoppel in the following terms:

"In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that 1 the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; 2 the defendant has induced the plaintiff to adopt that assumption or expectation; 3 the plaintiff acts or abstains from acting in reliance on the assumption or expectation; 4 the defendant knew or intended him to do so; 5 the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and 6 the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs."

554. Traditionally proprietary estoppel has been used to refer to one or other or both of two established forms of equitable estoppel being the doctrines descended from *Dillwyn v Llewellyn* (1862) 4 De GF&J 517; 45 ER 1285 and *Ramsden v Dyson* (1866) LR 1 HL 129. In simple terms, the doctrine associated with *Dillwyn v Llewellyn* is otherwise known as estoppel by encouragement and the estoppel descended from *Ramsden v Dyson* is

otherwise known as estoppel by acquiescence or standing by: see generally JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrine & Remedies* (5th ed, 2014, LexisNexis) (MGL) at page 519.

555. Promissory estoppel on the other hand is originally concerned with the exercise of rights arising from or said to arise from presently subsisting contractual (or legal) relations between the parties: MGL at page 532.

556. Proprietary estoppel enables a court to grant positive relief to a promisee by, for example, ordering a transfer of promised property by the promisor. Promissory estoppel, on the other hand, entails restraint upon enforcement of existing legal rights inconsistently with a promise: see *Van Dyke v Sidhu* (Barrett JA at [39]).”

Reliance

775 I also considered the principles of reliance in *Shymko v Lach* at [558]-[572] and stated as follows:

“558. The appeal to the High Court in *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 in particular focused upon the question of reliance.

559. The majority described one of the questions arising in the appeal as concerning the sufficiency of proof of detrimental reliance required to give rise to a sound claim for relief based on equitable estoppel: at [2].

560. The majority said in relation to reliance (at [58]):

“In point of principle, to speak of deploying a presumption of reliance in the context of equitable estoppel is to fail to recognise that it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention. Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact. It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank *Jorden v Money* by dispensing with the need for consideration if a promise is to be enforceable as a contract. It is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise. In *Giumelli v Giumelli*, Gleeson CJ, McHugh, Gummow and Callinan JJ approved the statement of McPherson J in *Riches v Hogben* that:

‘It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise.’” (footnotes omitted)

561. In the joint judgment their Honours' formulation is set at [84] as follows:

“If the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay. But this case is one to which the observations of Nettle JA in *Donis v Donis* are apposite:

'[H]ere, the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature ... beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based.'" (footnote omitted)

562. Gageler J who agreed with the joint reasons stated at [90]–[91] as follows:

"90. Paraphrasing Dixon J in *Thompson v Palmer*, the respondent bore the onus of establishing that she believed the appellant's representations and that, on the faith of that belief, she took a course of action or inaction which would turn out to be to her detriment were the appellant to be permitted to depart from those representations. The respondent did not need to establish that the belief to which she was induced by the appellant's representations was the sole or predominant cause of the course of action or inaction she took but, in the language of Rich, Dixon and Evatt JJ in *Newbon v City Mutual Life Assurance Society Ltd*, she did need to establish that the belief was a "contributing cause".

91. To establish that the belief to which she was induced by the appellant's representations was a contributing cause to the course of action or inaction which she took, the respondent needed to establish more than that she had the belief and took the belief into account when she acted or refrained from acting. She needed to establish that having the belief and taking the belief into account made a difference to her taking the course of action or inaction: that she would not have so acted or refrained from acting if she did not have the belief."

563. His Honour then stated at [93] that the question of causation is ordinarily framed in the following terms:

"The question of causation is therefore ordinarily appropriately framed, as it was implicitly framed by the primary judge in the present case, as being: 'Despite any other contributing factors, would the party seeking to establish the estoppel have adopted a different course (of either action or refraining from action) to that which [the party] did had the relevant assumption not been induced?'" (footnote omitted)

564. Recently in *Maxwell v Maxwell* [2022] NSWSC 1028, Ward P made reference to the comments of French CJ, Kiefel, Bell and Keane JJ in *Sidhu v Van Dyke* at [84]. In *Maxwell v Maxwell* her Honour did not accept that there had been detrimental reliance in the sense of a life changing decision in reliance upon the assumption: at [252].

565. Often the question of reliance can be difficult to factually assess.

566. Anna Lawson in her article "The things we do for love: detrimental reliance in the family home" (1996) 16 *Legal Studies* 218 at 230-231 made the following observation:

"The detrimental reliance requirement of constructive trusts and proprietary estoppel seems to cause few problems when applied to dealings between strangers. However, when the parties concerned are not strangers, but have lived together in a relationship akin to

marriage, it is almost impossible to determine whether or not there was any detrimental reliance on that assurance. During the course of such relationships, the parties will inevitably change their positions in all sorts of ways and for all sorts of reasons. Allegations of detrimental reliance require judges to decide which of these changes of position would be factually disadvantageous to a claimant, should an assurance of ownership subsequently be denied, and to decide which of them were motivated by beliefs arising from that assurance. Not surprisingly, the results arrived at in the reported cases appear to be arbitrary and unrealistic.” (footnote omitted)

567. In the context of family circumstances comments or statements that are said to give rise to obligations, there is ordinarily a question regarding whether statements are intended to create legal relations.

568. Whilst historically there have been presumptions that family arrangements are not intended to give rise to legal obligations, the High Court has rejected the utility of using the language of presumptions. Rather, there is more particular question of who bears the onus of proof: *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 at [26] (per Gaudron, McHugh, Hayne and Callinan JJ).

569. In *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12 (*Ashton v Pratt* (CA)), Bathurst CJ at [140]-[142], [147] stated as follows:

“140 However, it is unnecessary to resolve these issues as to my mind Ms Ashton has failed to establish that she suffered detriment as a result of Mr Pratt resiling from his promise such as to give rise to the relief claimed. The detriment said to have been suffered in the present case was that Ms Ashton became Mr Pratt’s mistress and did not return to the escort business.

141 The relevant detriment is that which the party asserting the estoppel would suffer, as a result of her original change of position, if the assumption which induced it was repudiated by the party estopped: *DeLaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483 at [42], *Grundt v The Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674–675 and *Sidhu* at [81].

142 What now appears clear is that there is no need to mould any remedy in the case of equitable estoppel to reflect the minimum relief necessary to remove the detriment: *Giumelli* at [48], *DeLaforce* at [56]–[57] and *Sidhu* at [85]. Prima facie the courts should enforce a reasonable expectation which the party bound created or encouraged. However, relief will be limited where the enforcement of a plaintiff’s expectation would be out of all proportion to the detriment: *DeLaforce* at [62] and *Sidhu* at [85]. This is because in those circumstances good conscience does not require the promisor be held to his or her promise.

...

147 As was stated by Gageler J in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 88 ALJR 552 at [150] the detriment or harm required to ground an estoppel can be any material disadvantage. Such material disadvantage must be substantial, although it need not be quantifiable in the same way as an order of damages. In the present case Ms Ashton suffered no material

disadvantage, certainly not one which could be described as substantial.”

570. McColl JA at [222] and Meagher JA at [223] agreed with Bathurst CJ.

571. Meagher JA stated that the question of any intention to create legal relations turns on whether in the circumstances the participants (by what they said and did) conveyed such an intention in the sense that reasonable persons in their position would have understood that to have been intended: Meagher JA at [224] citing *Ermogenous* and also *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35.

572. However, the fact that at no stage in a conversation anything is said by one party that conveys to the other that what is being promised is to be legally enforceable is not determinative of the matter: Meagher JA at [225] citing *Placer Development Ltd v Commonwealth of Australia* (1969) 121 CLR 353 at 367; [1969] HCA 29 per Windeyer J.”

Unclean hands

776 In relation to unclean hands, Mr Simpson referred to the decision of Campbell J in *Black Uhlans Inc v New South Wales Crime Commission* [2002] NSWSC 1060 (***Black Uhlans***) Campbell J at [181] identifying two tests that apply to determine whether the unclean hands defence has been established: DOS [40].

777 It appeared that the defendants accepted the burden of proving or establishing that the plaintiffs' claim for equitable relief should be refused because of what was alleged to be the plaintiffs' unclean hands. The defendants generally made reference to the question of onus in this regard: see *Currie v Dempsey* [1967] 2 NSW 532 at 539 per Walsh JA.

778 I note that *Curry v Dempsey* involved the question of whether an applicant or an objector had the onus of proof in respect of an objection taken under a particular provision of the *Liquor Act 1912* (NSW).

779 The defence to the plaintiffs' claim raised the maxim that a plaintiff who comes to Equity must do so with clean hands.

780 Without attempting to be precise I will refer to the operation of the maxim as the “unclean hands defence” or simply as the “maxim”.

781 It is relatively easy to find statements in cases and texts which indicate that the Court will examine the conduct of the party seeking equitable relief in considering whether to grant such relief. Normally that is formalised in some

way particularly where the proceedings have pleadings and the maxim is raised by a defence.

782 It is also relatively common to see the maxim referred to as a defence: e.g. *Paycorp Payment Solutions Pty Ltd v Chai* [2011] NSWSC 1290 at [1], [2] per Brereton J.

783 However, it is less common to see discussion of the unclean hands defence in terms of onus of proof.

784 Nonetheless, it is relatively clear how the Court approaches an unclean hands defence if it is raised whether in pleadings or in agreed issues of hearing or otherwise in the context of a hearing.

785 The operation of maxim was classically discussed by Campbell J (as his Honour then was) in *Black Uhlands* at [157] – [185].

786 At [158]-[159] his Honour stated as follows:

“158 That someone who comes to equity must have clean hands is an equitable maxim. Such a maxim provides an explanation for the circumstances in which equity recognises rights, and confers remedies, across a broad range of equity’s jurisdiction. The approach to the recognition of rights and conferring of remedies which the maxim articulates has resulted in various specific principles of law which are recognised as part of the substantive law of equity. The law of promissory estoppel provides one example. However, the maxim remains of ongoing importance, as a guide to how cases not governed by specific rules of substantive law ought be decided, or as a guide to how specific rules of substantive law ought be extrapolated.

159 The unclean hands maxim requires the Court to look at the conduct of the litigant who seeks the assistance of equity, rather than the conduct of the defendant. Further, it is conduct which the litigant who seeks the assistance of equity has engaged in in the past which is required to be looked at. In this way it differs from the maxim that he who seeks equity must do equity, which looks at the conduct which a litigant who seeks the assistance of equity undertakes to engage in in the future.”

787 The maxim applies to a claimant seeking an equitable remedy. It does not apply for example to declaratory relief: J D Heydon, M J Leeming and P G Turner Meagher, *Gummow & Lehane’s Equity: Doctrine & Remedies* (5th ed, 2014, LexisNexis) (**MGL**) at 644.

788 The Court has statutory power to make declarations: s 75 *Supreme Court Act 1970* (NSW).

789 As is noted in MGL at 644:

“.. declaratory relief can be called ‘equitable’ for the purpose of acknowledging its general law antecedents in equity rather than common law. But those modes of expression do not determine whether traditional equitable barriers to relief apply to declaratory relief. .. But even though on authority and principle the traditional equitable barriers to relief do not apply to declaratory relief as such, circumstances that may engage traditional equitable barriers to relief may be relevant to the wide discretion whether to grant or refuse declaratory orders under the court’s statutory powers. ... The character of a statutory power, such as a power to make declarations, does not become ‘legal’ or ‘equitable’ according to the character of its subject matter.”

(see my comments at [246] in *Aviani v Loh (No 2)* [2022] NSWSC 1148).

790 There are instances where this Court has recognised that the maxim may be used as a defence against a party seeking equitable relief based on estoppel: e.g. *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641; *Hypac v Mead* [2004] NSWCA 221 at [81] per Tobias JA (Sheller and Ipp JJA agreeing).

791 Generally an unclean hands defence requires that the defendant prove that the plaintiff’s hands are, in the relevant sense, unclean: *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464; [2002] NSWSC 170 per Campbell J at [212]. Ultimately, that requires proof not mere allegation, that the plaintiff has engaged in conduct which disentitles it to claim Equity’s intervention: *AG Australia Holdings Ltd v Burton* at [212].

792 Further, it has been said that the fact that a plaintiff leads evidence of its own bad conduct may be taken into account when considering whether or not the relief sought should be granted: *Nu Line Construction Group Pty Ltd v Fowler (aka Grippaudo)* [2012] NSWSC 587; (2012) 16 BPR 31,011 at [307] per Ward J (as her Honour then was).

Issue 1 - What promises were made by the deceased?

793 As I have noted above, the POS indicated that representations 1 and 5 are the dominant representations and items of encouragement: POS[24(b)].

794 Representation 2 was described by Dr Mantziaris as attempting to qualify representation 1 and “has no active role in the claim as it folds back into Representation 1” (POS[24(c)]) and “is now inoperative due to the death of the deceased”: POS[29].

- 795 It is said that representation 4 deals with speculation about transactions in the period 1993 to 2000 which did not come to pass: POS[24(d)].
- 796 Ultimately in closing submissions the plaintiffs' case was pressed on the basis that representations 1, 3 and 5 were said to be admitted: PCS[A.1]. By "admission" it is meant that there was evidence from Barbara supporting the evidence, as well as other evidence in support of the representations.
- 797 In light of the above other than I have commented so far, I do not propose to deal further with representations 2 and 4.
- 798 The gist of the representations were that Michael should come onto the farm (variant 1A) and continue to farm at his own expense (variant 1B) including building his house on Rossdale (representation 3) and if he did so he could do what he wished with the properties (representation 5) as they would be Michael's when the deceased died (representation 1).
- 799 In support of the representations Dr Mantziaris provided a schedule to the POS giving oral and documentary evidence in support of the representations: POS appendix B CB 7/38-40.
- 800 The dating of the oral evidence proceeded the documentary material and I will deal with it first.
- 801 The oral evidence relied upon included 7 conversations deposed by Michael in the period between 1978 and 1992: CB 2.1/246-251; CB 7/39.
- 802 Whilst I accept that some generalised comments were made by the deceased to Michael at that stage it does not seem to me that they were enunciated by the deceased as being promises as distinct from generalised statements of intention.
- 803 To my mind of the conversations relied upon by the plaintiffs, the first really critical conversation was a discussion between Michael and the deceased on or around the middle of 1991 regarding Rossdale: CB 2.1/253-254.
- 804 The discussion which I have set out above was an enquiry by the deceased whether Michael would be interested in taking on Rossdale as a dairy. Michael indicated that he would take it on but not as a dairy. The deceased indicated

that he would not in that context spend any money on the “ice bank” the deceased said:

“That way you'll have Rossdale and I'll keep running Gostwyck Flats. When I'm finished there, you'll have both of them. It'll all go to you when I die anyway.”
(CB 2.1/254[140])

805 Michael then outlines his evidence at least in a general way of the work he did from about 1991 prior to taking over Rossdale: CB 2.1/257.

806 I accept the substance of Michael and Adele's evidence regarding the conversations in respect of Rossdale in March and June 1993 (CB 2.1/163-165 Adele; 255-256 Michael) and also in relation to Gostwyck Flats in or about May 2000 (CB 2.1/170-171 Adele; 263-264 Michael) particularly in the later case having regard to the deceased's letter dated 9 May 2000.

807 Of some significance is the fact that in the versions of the March 1993 discussions it seems that there was still some degree of ambiguity in the mind of the deceased as to whether Michael and Adele were committed to the idea of using Rossdale for farming activities.

808 This is evident in the discussions at Lennoxton by the very fact that the deceased essentially poses the question to Michael and Adele:

“Are you still going to take it [Rossdale] on or do you want to sell it?”

809 The deceased's question provokes a number of responses from Michael and Adele. Importantly there is a response of Michael by reference to the fact that he understood there was a promise and then a statement of unequivocal commitment to Michael “taking on” Rossdale.

“Me: No way, I want to take it on, you promised me I could take it on.

Dad: If you don't, we can sell it and give you half the proceeds.

Me: No. I still want to take it on.”

810 Adele then informs or reminds the deceased that already they have taken steps in reliance upon the promise by raising heifer calves:

“Adele: We have already been raising heifer calves to start our herd.

Dad: Alright then. I told Barry to finish up in about June, so I will arrange for a clearing sale and you can start then. Barry and Elaine are to stay on in the house for as long as they wish.” (CB 2.1/255[146])

811 I note that Adele's version of the June 1993 conversation is that the deceased would document the Rossdale Arrangement:

"Ross: I will put it down in a letter and give it to you so we all know what is expected." (CB 2.1/164-165[68])

812 No such documentation was produced in the proceedings. However, as I have referred to, there was documentation (in the form of the deceased's letter dated 9 May 2000) in relation to the Gostwyck Arrangement.

813 There is additional material from Barbara which essentially is confirmatory of the promises. It included the following.

- (1) Barbara seemingly agreed that the "plan" as between the deceased and Michael was that land (i.e. the properties) would be transferred through the company by means of transfer of the shares from the deceased to Michael at least "up to the last three years": T 653-654.
- (2) Dr Mantziaris cross-examined Barbara regarding a Will instruction sheet of Mr Meredith dated 11 March 2019 in which the note was made that "the clients are aware that Michael is getting more than Philippa, but important to them that the farmland goes to him...": T 749.
- (3) Barbara agreed that Mr Meredith's (11 March 2019) note "pretty well" reflected what she and the deceased had told him: T 750. Barbara accepted that the unequal (testamentary) distribution of assets between Michael and Philippa reflected the understanding between the deceased, herself, Michael and Adele from the time that Michael moved on to Rossdale in 1993: T 755.
- (4) Barbara accepted that the deceased had told Michael from the time that he had moved on to the land in or about 1993 in respect of Rossdale "you're going to get it anyway. You should do what you want with it" and he "probably" said the same with regard to Gostwyck (Flats): T 756.

814 Philippa referred to a conversation with her parents and Steve in 1992 in which deceased referred to the changing of the milk quota system and discussions with Barry White. At the conclusion of the discussion she indicates that the deceased said (CB 2.1/355):

"Michael is going to take it on".

815 That evidence is at least consistent with Michael both coming onto the farm and some form of arrangement of a more formal nature. Philippa says that from this she understood that the deceased and Michael agreed that Rossdale would be kept for the time being as a working farm with Michael managing it:

CB 2.1/355. The evidence regarding her understanding was limited under s 136 of the *Evidence Act*.

816 Other than as I have just noted that Philippa did not in her affidavit evidence address in any particular way her knowledge of discussions between Michael and Adele and the deceased for the period between 1993 and June 2019: CB 2.1/355 – 357.

817 The documentary evidence relied upon by the plaintiffs included as follows:

- (1) the handwritten letter dated 9 May 2000: CB 3/2 (see also MFI 1);
- (2) the deceased's 2006 Will: CB 18.1; and
- (3) the handwritten letter of the deceased to Michael dated 25 July 2010: CB 3/22 (see also MFI 1).

818 The handwritten letter dated 9 May 2000 (CB 3/2 & MFI 1) to my mind was compelling of a promise being made by the deceased. I have set out the contents above and had regard to the letter of in its totality.

819 The letter opens with the essential offer:

"If you (Michael) would like to take over the management of "Gostwyck Flats" – stock it etc and profits will be yours to do whatever you like with it. I would prefer not to have any part in the management of "Gostwyck Flats".

820 The letter continues with a number of paragraphs which set out aspects which indicates some continued involvement of the deceased with and on the property in relation to retaining use of a small shed, dumping garden refuse, collecting firewood, having some stocks still in the property, and the offer of some labour help from the deceased such as spraying.

821 The letter contains some aspects dealing with payment, which I will refer to more below.

822 The letter issued an invitation in the third last paragraph in the following terms:

"If the above is suitable you could start and put cattle in any of the empty paddocks now."

823 The statement in the second paragraph regarding taking on the management of Gostwyck Flats and reference to stocking it and profits being Michael's to do whatever he liked with it finds resonance with the statement in the letter dated 30 (October) 2019 CB 3/170.2-172 and MFI 1:

"I have always said [M]ichael and [A]dele to have the ex dairy known as "Rossdale" for Michael to do whatever he wished to do with it".

- 824 The 2006 Will of the deceased is significant in a number of ways.
- 825 In clause 3iii the deceased gave all the shares that he may own at the time of his death in the company to Michael absolutely should Michael survive him. There was a proviso that if Michael predeceased leaving children that such child would take a substitutionary share in the deceased's residuary estate: CB 3/18.3-4.
- 826 The handwritten note dated 25 July 2010 (CB 3/33 and MFI 1) is also significant.
- 827 The letter dealt in part with payment obligations which I refer to below.
- 828 The concluding paragraph essentially reinforced what had been promised, namely:
- "I hope these proposals are fair as I always strive for fairness.
The properties and shares I own all go to you when I die."
- 829 Other documentary material was also relied upon. This included the following:
- (1) Mr Killingly's planning meeting records of 29 March 2018 which included: "ensure all non—property (direct) assets pass to Philippa" (CB 3/26.13). However, at best that is equivocal of any promise regarding the claimed shares; and
 - (2) the typed notes of the Lorn meeting 4 December 2017 (CB 3/24). This was prepared by Adele. However, the notes do not per se refer to the promises.
- 830 Reliance was also placed upon the April 2019 Will (clause 3(a) CB 3/94) and August 2019 Will: CB 3/113. The nature of this material, if not expressly confirmatory of promises, is at least consistent with earlier promises.
- 831 Overall, I accept that in substance promises were made by the deceased in the form of representations that in 1991, 1993 and 2000 Michael should come onto the farm (variant 1A) and farm at his own expense (variant 1B) as the properties (via the shares in the company) would be Michael's when the deceased died (representation 1). I further accept that the deceased conveyed to Michael if he did so (come onto the properties) he could do what he wished

with the properties (representation 5) including approval in 2002 for Michael to build a house on Rossdale (representation 3).

- 832 Although the actual wording of conversations that Michael refers to in 1991, 1993 and 2000 does not expressly state that Michael could do with the properties what he wished, the letter of the deceased dated 30 (October) 2019 (CB 3/170.2-172 and MFI 1) provides "*I have always said [M]ichael and [A]dele to have the ex dairy known as "Rossdale" for Michael to do whatever he wished to do with it"* (my emphasis). It seems to me that the notion that Michael could do what he wished with the properties was conveyed at least impliedly by the deceased in 1991, 1993 and 2000 discussions.
- 833 I accept that in 2002 after Michael had initially raised with the deceased the prospect of moving on to Rossdale to better manage it and to build a place there the deceased initially indicated to Michael that it sounded like a good idea and would consider it and come and see him in the next few days. I further accept that the deceased did come and see Michael and linked his approval for Michael to do that with the statement that it (Rossdale) would "come across to you [Michael] when I pass anyway": CB 2.1/268[200].
- 834 I have noted that it was further pleaded that there was an additional representation (**representation 6**) that should Michael predecease the deceased Adele would receive what Michael was to receive under the first representation: CB 1/78-79 [99].
- 835 I do not accept that promises were made to that effect. Adele gave evidence of her discussion with Michael in 1992 when Michael told her that the deceased had said when died he would get all the shares in the company: CB 2.1/162[59]. Adele is not mentioned as getting the shares. The conversations in May and June 1993 do not refer to Adele getting the properties or claimed. Nor does the conversation in May 2000 refer to Adele as a recipient of that property.
- 836 Indeed on Adele's version she stated "We are hoping that one day Nicholas will be able to take it on": CB 2.1/170[95].
- 837 The 2006 Will does not provide for a gift over to Adele: CB 3/18.2-.3.

Issue 2 - Were the promises clear and unequivocal promises regarding the shares and or properties?

- 838 I am satisfied that the promises that I have referred to above being representations 1 (including variants), 3 and 5 were sufficiently clear and unequivocal within the meaning of the authorities.
- 839 Principally it seems to me that the deceased in the early discussions promised the properties. That is the tenor of the conversations in 1993 and 2000.
- 840 However it may be noted that the 2006 Will (CB 3/18.2-.3) refers to the deceased shares and the handwritten letter dated 25 July 2010 (CB 3/33 and MFI 1) refers to both the properties and the shares.
- 841 It seems to me that the deceased in his discussions with Michael more naturally referred to the properties and possibly at least in discussions did not particularly pause to think about the niceties of distinctions between the properties and shares in discussions.
- 842 Nonetheless, because the case has been advanced in a formal way and the trust is sought both in relation to the claimed property and the claimed shares, I find that essentially what was promised is the shares.
- 843 In this regard, it seems to me the 2006 Will is important, it being really the first opportunity that the deceased formalised what was being gifted with the assistance of a legal practitioner.
- 844 I note that the promise was one of “shares” is certainly the way that the defendants approached the matter in final submissions: DCS [18],[19].

Issue 3 - Were the promises conditional upon aspects of the Arrangements?

- 845 In relation to the promises Mr Simpson submitted that there was a connection between the estoppel case and the Arrangements.
- 846 Leaving aside the disputation regarding whether the promises were made (which I have relevantly found in the plaintiffs’ favour) the amended defences plead that there was no unconscionability that would give rise to an estoppel at least by reason of the failure of the plaintiffs to pay the deceased a director’s remuneration “in the sums referred to” or at all (CB 1/149-150 [102(b)], [108(b)]; CB 1/175-176 [102(b)], [108(b)]) and further plead the failure to pay

the director's remuneration as being a form of disentiing conduct and or unclean hands: CB 1/150[112(a)]; CB 1/177 [112(c)].

- 847 Notwithstanding a reference to the "equity sued for" (CB 1/150 [113(a)]; CB 1/178 [113(a)]) I understood the reference to "disentiing conduct" as distinct from "unclean hands" as being directed to defence of the (alternative) family provision claim: CB 1/178 [114].
- 848 The defendants' opening and closing submissions submitted that the promises made by the deceased were subject to various conditions: DOS[48]; DCS[18].
- 849 The linking of the conditions in the Arrangements and the estoppel case was not strictly speaking pleaded on the statement of claim. A fact acknowledged in the DOS: DOS[48].
- 850 Dr Mantziaris certainly disputed any linking of the Arrangements and the estoppel case (Day 6) T 555: POR[3]-[10]; PCS[13]-[17].
- 851 Nonetheless, Dr Mantziaris understood from the DOS (e.g. DOS[48]) that the defendants were claiming that the representations were subject to two conditions namely that the plaintiffs pay the deceased a remuneration for the remainder of his life and that the plaintiffs would continue to work the farms for the remainder of the deceased's life: POR[3].
- 852 The DCS made this clear: DCS[18(a),(b)]. Despite there being various parts to the Arrangements those are really the only two conditions that were seriously pressed by the defendants as being matters crueing the prospects of the estoppel case.
- 853 For the above reasons I will deal with these two aspects of the matter namely whether the promises were conditional upon payment or the plaintiffs' continuing to work the farms under the headings of issues 4 and 5.
- 854 I note that Adele disagreed with Mr Simpson's suggestion that they needed to adhere to the conditions of the Arrangements in order for the properties to be transferred after the deceased's death: T 590.43 – .47.

Issue 4 - Were the promises conditional upon the plaintiffs paying the deceased a remuneration for the remainder of his life?

Was payment essential?

855 Mr Simpson submitted that in order for Michael to receive the shares in the company he needed to pay the deceased a monthly amount for each of the properties: DCS[18].

856 Dr Mantziaris submitted before, during and at the end of the hearing that the payments were not part of his case, rather they were what he described as Mr Simpson's "conditional representation defence": (Day 6) T 555: POR[3]-[10]; PCS[13]-[17].

857 It is necessary to examine the evidence. The starting point is to my mind is a discussion between Michael and the deceased in or the middle of 1991 regarding Rossdale: CB 2.1/253-254.

858 That discussion was critical because Michael then outlines his evidence at least in a general way of the work he did from about 1991 prior to taking over Rossdale: CB 2.1/257.

859 That 1991 discussion does not refer to any payment obligation.

860 Neither of the conversations that Michael and Adele depose to with the deceased in May 1993 refer to payment requirements.

861 Michael's version of the June 1993 conversation is (relevantly) as follows:

"Dad: When you take over Rossdale it's for you to make whatever improvements you like so long as you pay for them. You can keep all the profits but unfortunately, you're still going to have to pay me some money so I can survive. It's going to be \$500 per month. You'll also have to pay half of the accounting fees for the Company as well as the rates and everything like that.

Me: No worries Dad. We can do that.

..." CB 2.1/256[147]

862 Adele's version of the conversation is to following effect:

"Ross: When you take Rossdale over you can make whatever improvements you like so long as you pay for them. You keep all the profits that you make off the farm. But you're going to have to pay me some money so I can survive. I would appreciate it if you could pay me \$500 per month. You'll also have to pay half of the accounting fees for the Company as well as half the rates as both farms are together on the one rates notice.

Michael: No Worries Dad. We can do that.

..." (CB 2.1/164-165[68])

- 863 The above versions suggest that from the deceased's perspective he had an expectation that some monies would be paid to him so he could "survive".
- 864 Dr Mantziaris disconnects what he describes as "management arrangements" in the form of the Arrangements from the estoppel case.
- 865 Certainly by June 1993 there had already been some degree of reliance placed by Michael and Adele on the 1991 discussions.
- 866 There was no close attention in the case directed to establishing precisely what degree of work had been done by Michael and Adele beyond the generalised evidence that I have referred to above.
- 867 Neither of the conversations which Michael and Adele depose to in May 2002 with the deceased refer to payment.
- 868 However, the handwritten letter dated 9 May 2000 (CB 3/2 & MFI 1) addressed payment in the following terms :

"I would appreciate it if you could pay me \$500 a month – but the first of these payments need not happen until February 2001.

...

The proceeds of the stock and equipment I sell will remain in the Company in an interest bearing building society account - from these interest payments I will draw my directors fees.

I would like to withdraw all responsibility of the house on Rossdale – to take effect when Elaine vacates. I shall pass over to you the House Building Society account for collection of rents and to pay for maintenance. I shall notify the Dungog Shire and the Rural Lands Board that all rates notices be sent to you and it will be your responsibility for paying these. This [w]ill be effective when Elaine leaves."

- 869 Dr Mantziaris essentially submitted that payments were either non-essential or waived, referring to the statements in handwritten letter dated 9 May 2000 that the deceased "would appreciate if" he could be paid the additional sum of \$500 per month, and that "payments need not happen until February 2001" (CB 3/3): PCS page 35/59.
- 870 The wording of the discussions in June 1993 is suggestive of a conditionality between payment and the promise of property.

871 In approaching the question as to whether the estoppel case was *conditioned* upon payments of remuneration to the deceased, the context is important and I will comment more on this later.

872 However, I find that based on the discussions deposed to by Michael and Adele, in June 1993 the deceased introduced a condition of payment regarding the promises. That is consistent with Michael's evidence that from about July 1993 he started paying his father \$500 per month: CB 2.1/258.

873 In finding there was a condition of payment from 1993, there is a further question regarding whether payment was an essential part of the promises or Rossdale Arrangement.

874 A difficulty with that is that the parties themselves did not seemingly at the time address that issue. The deceased certainly did not expressly indicate that scrupulous payment was required otherwise the promise of the properties or shares would be forfeited.

875 On balance, I find that there was no essentiality of the payment arrangements such that anything falling short of the payment matters referred to in the June 1993 discussions would preclude the estoppel case.

Were such payments made?

876 Because of the way the defendants oppose the estoppel case it is relevant to consider what payments were made by Michael and Adele.

877 Mr Simpson disputed that Michael and Adele had made payments as contemplated and he approached that by comparing the evidence of Michael and Adele as against the pleaded case: DCS[20(a)].

878 Mr Simpson pointed to the lack of primary records and lack of documents produced pursuant to notices to produce proving any payment. He pointed to conduct of Michael and Adele allegedly inconsistent with payment indicating that when cattle cheques were received substantial amounts of the proceeds were not necessarily paid to the deceased: DCS[26] citing exhibit D2-A.

879 Mr Simpson also relied (DCS[26]) upon other materials including: comparison between company and partnership financials (as summarised in MFI 4); Barbara's affidavit evidence (see CB 2.1/401 – 402, T 743 – 745); the company

binder which did not contain any bank statements (exhibit D11); the documents handed over from Pearson Smart (exhibit D10) and the evidence of Mr Smart relying upon the instructions of Michael and Adele for completion of partnership documents: T 536.

880 Mr Simpson also submitted that a *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 inference should be drawn from the absence of the provision of bank statements of the partnership asserting that production would not have assisted the plaintiffs' case: see *RHG Mortgage Ltd v Rosario Ianni* [2015] NSWCA 56 at [75] – [79].

881 Michael says that from about July 1993 until 2000 he paid his father \$500 per month, usually by cheque and also paid rates for Rossdale and half the accounting fees: CB 2.1/258.

882 Barbara indicates that she recalls numerous conversations with the deceased after 2010 up to 2020 in which after she had given him some money he said to her:

"Thank you for that [in reference to money I had given him] Michael hasn't given me anything. I wish I could repay you": CB 2.1/401.

883 Barbara states that on another occasion which she cannot recall the deceased said to her (CB 2.1/401 – 402):

"I would like to help out with housekeeping but Michael hasn't given me the money he promised".

884 Barbara asserted in her affidavit in chief that "we have never received any money or rent from Michael" claiming that the deceased had one bank book and she never recalled seeing any money recorded in it from Michael and/or Adele. She states "instead, I would give Ross \$500 per month as requested": CB 2.1/417.

885 Barbara was questioned regarding her assertion that Michael never paid the deceased the money that the deceased asked him to pay. When asked whether she discussed Michael's (alleged) failure to pay the \$500 amount with the deceased her responses were essentially as follows:

"A. Well, we wouldn't have discussed them but I was the one that was standing in with supplementing what Ross didn't get": T 659.

“A. I would (sic) say discuss it. We just agreed on it. Ross didn’t like it but it just had to be”: T660.

886 Barbara accepted that the deceased knew that he was not being paid the amount by Michael: T 660.

887 Barbara was then questioned regarding the assertion in her affidavit that “based on my review of Ross and my records, I cannot find any record of funds received”: CB 2.1/402[32]. Barbara’s responses revealed that she did not review the deceased’s personal passbook but only her own: T 666. The evidence continued as follows (T 666)

“Q. Only your own records?

A. Yes. And Ross would tell me verbally how short, you know, if we were short, that we’d need to check it.

Q. So, you didn’t review any other bank account that Ross held, did you?

A. I never looked in his bank account.

Q. You wouldn’t know whether Ross received any money directly into any other account that he had, would you?

A. Well, as far as I know he only had one bank account to start off with, and secondly, if Ross was particularly after, from the beginning of 2000 on when he was so desperate for money, he would have told me if he received any money. It was more so that he didn’t have to ask more of me.”

888 Philippa addressed in her reply affidavit evidence issues regarding payments to the deceased.

889 She indicates that her father tried to get money from Centrelink and had finished working as a general assistant at schools. She confirms that the global financial crisis took a huge toll on her parents' investments and refers to a conversation with her father (CB 2.1/389) to the following effect:

“Dad: I can't get any money from Centrelink.

Me: Yes, because of your assets with the Company.

Dad: I wish I was given some money from the Company, like I did with my father, Michael and Adele haven't paid me a thing.” (CB 2.1/389[184])

890 Each of Michael and Adele in reply affidavits sworn on 21 January 2022 address payment to the deceased/company: CB 2.1/428; 2.1/437.

891 Adele's evidence in this regard was somewhat more detailed.

- 892 She indicates that when they started farming Rossdale in 1993 she and Michael agreed to pay the deceased \$500 per month as well as half of the outgoings for the property in relation to council rates, water for the irrigation, rural lands and accounting and legal fees: CB 2.1/428.
- 893 She indicates that in 2000 when they took over Gostwyck Flats the amount increased by another \$500 per month to make it \$1,000 per month but they still only paid half of the outgoings: CB 2.1/428.
- 894 Then after the 2002 Lorn meeting Adele indicates they stopped paying the \$1,000 per month and paid all of the outgoings for the company: CB 2.1/428. Adele states that then up until 2010 they kept paying the deceased by cheques made out to the company, all of which cheques were written out by Adele and signed by her and made out from her and Michael's joint savings account from which they ran all their finances including the partnership: CB 2.1/428 – 49.
- 895 From 2010 Adele indicates that they no longer made payments to the deceased but continued to pay all of the outgoings and expenses for the company: CB 2.1/49.
- 896 Adele indicates that the payments made to the deceased were not strictly paid each month as they did not have a regular cash flow. Sometimes the cheques would be for \$500 and at other times they could be \$1,000 or \$1,500 or after the 2002 Lorn meeting more varied amounts. Adele indicates that three months was about the longest time that they would go without making a payment: CB 2.1/429.
- 897 In particular one of the means of payments was consequent upon receiving a cattle cheque. She states she usually told the deceased words to the effect "we should get a cattle cheque next week (or however far off she thought it was)" and the deceased would reply with words to the effect of "okay" and/or "no problem" and/or "that'll be good": CB 2.1/49.
- 898 The implication was that at some time proximate to receiving the cattle cheque Adele handed the deceased a cheque in payment: CB 2.1/429.
- 899 Adele indicates that sometimes when reconciling accounts she could see that the deceased had not cashed the cheque. She further indicates that on a

couple of times when there was a delay she gave the deceased a cheque for \$1,000 or \$1,500 for example and he gave the cheque back saying words to the effect "no just give me the \$500" though at other times he would take the cheques proffered: CB 2.1/430.

- 900 Adele says that she accounted for the payment through their business partnership referring to it as "agistment": CB 2.1/430. Michael in his evidence refers to his understanding (as limited under s 136 *Evidence Act*) that "agistment" was the phrase that he and Adele used to describe the payment and that the deceased would draw "directors fees" and "wages": CB 2.1/438. Michael went on to indicate that his understanding that these descriptions appeared in different sides of the accounts with agistment being on the partnership side and directors fees and wages being on the company side: CB 2.1/439.
- 901 The evidence in chief did not reveal how it is that Michael and Adele accounted for the monies in this way.
- 902 There was no evidence in chief that the deceased had asked Michael and Adele to describe the payment for their own expenses as "agistment".
- 903 During the cross-examination I formed the impression that Michael had no real idea of accounting and he was content to leave this to Adele.
- 904 Mr Smart through his initial affidavit (30 July 2021) exhibited financial statements and tax returns for the financial years from 1998 to 2020 for the company and from 1997 to 2019 for the M & A Horn Partnership: CB 2.1/131 – 134.
- 905 Mr Smart indicated that Michael from the time of being a director of the company was effectively running the company's affairs on a day-to-day basis "through the partnership". He stated that Michael and Adele paid the company's rates for the land and accounting fees and all its other expenses: CB 2.1/134 – 135. He indicates that the deceased was present for many of the meetings between 2000 to 2002: CB 2.1/135.

- 906 Much of Mr Smart's affidavit evidence was in substance comment upon descriptions in the various accounts and limited as such to pursuant to s 136 *Evidence Act*.
- 907 Broadly speaking Mr Smart's understanding was that initially between 2000 and 2001 Michael ceased livestock trading and received reducing income from other sources: CB 2.1/137. Mr Smart indicates that by 2005 the only income the company was receiving was rent which he understood to be from the Greenhouse cottage: CB 2.1/138.
- 908 Mr Smart also commented upon the accounts highlighting costs paid by Michael and Adele in relation to the Greenhouse cottage and for other improvements on Rossdale and Gostwyck Flats: CB 2.1/139 – 141.
- 909 In relation to payments from Michael and Adele to the deceased via the company Mr Smart address this in his affidavit affirmed 21 January 2022.
- 910 Relevantly Mr Smart's evidence (which was admitted on a limited basis pursuant to s 136 *Evidence Act* as comment) was as follows:

“42. By in about 2001, the income received by the Company received from cattle sales (that being its predominant income source previously) went to \$Nil at: p 9.

43. By around 2003, almost all of the cash still in the Company had been paid out to Ross. These payments were recorded as wages at p. 56. In effect in about that time a decision was made that the Company transfer its cash and have it all paid to Ross.

44. The returns and statements show that between the years 2000 to about 2011, there are records for payment in the Company for "directors fees" and "wages". There are also income sources for "rent" or to a lesser degree "Agistment" from 1998 which is as far back as the records I had went. The Partnership returns and statement also contain entries for "Agistment". From these observations, it is my understanding and recollection that:

(a) the "directors fees" and "wages" were payments made by the Company to Ross;

(b) that the income for "rent" in the Company was a payment from the Partnership;

(c) that payment by the Partnership was the expense for the Partnership for agistment; and

(d) that this was the mechanism by which the Partnership (Michael and Adele) paid money to the Company (Ross).

45. For example, looking at 2003, 2005 and 2007 and 2009 as a selection, I can see that for 2003 at p. 56, the rent or agistment received by the Company

is the same amount as the Agistment expense of the Partnership at p. 376. Similarly, the same occurs, for 2005 at p. 76 and p. 397, 2007 at p. 3 and p. 422 and 2009 at p. 125 and p. 448." (CB 2.1/462[42]-[45])

- 911 Further Mr Smart states that he was instructed by the deceased and Michael to convert the deceased's payment of "directors fees" to "wages" he says because the amounts that were being paid in directors fees was becoming disproportionately large to the amount of work involved in (the deceased) being a director of the company: CB 2.1/462.
- 912 In an affidavit affirmed on 10 September 2022 (just before the commencement of the hearing) Mr Smart deposed to the fact that whilst the deceased was alive the deceased routinely provided bank statements for the company to Mr Smart or his staff and that the firm then prepared the company's financial statements and tax returns based on the bank statements and instructions from the deceased as to how to treat the transactions contained in the bank statements: affidavit 10 September 2022 [6].
- 913 Mr Smart indicates that the instructions from the deceased in particular informed how his firm would characterise various transactions including the entries for "directors fees" and "wages". He states he does not recall instructions as to the contents of the company's bank statements and in particular the entries for "directors fees" and "wages" as coming from anyone other than the deceased: affidavit 10 September 2022 [7].
- 914 The affidavit was sworn purportedly "further to the matters stated in paragraphs 41 to 46" of Mr Smart's second affidavit and in that regard appears to have been a qualification on Mr Smart's assertion that Michael gave instructions regarding "directors fees" and "wages".
- 915 Dr Mantziaris in addressing evidence on payments made by the plaintiffs made a number of submissions in relation to the initial payments in relation to the use of Rossdale from 1993 to 2000: PCS page 34/59.
- 916 He referred to payments by Michael and Adele to the deceased and the company but at times eliding the two (deceased/the company).
- 917 Attempts were made to explain the so-called payment system in relation to the Rossdale Arrangement including submitting by reference to the evidence that

Michael and Adele understood their liability for payment was to pay an amount equivalent to \$500 “a month”: PCS page 34/59, T 457.

- 918 It was said that the deceased controlled the company accounts (T 530) and that Michael and Adele did not and this meant that it was at the deceased’s discretion as to when and what amount he would withdraw from the company as director’s fees or wages: PCS page 35/59.
- 919 Dr Mantziaris by reference to the evidence that I have outlined above, indicates that when the company bank accounts were closed off (whether it be in 2010 or 2012) the company ceased to receive physical payments but nonetheless Michael and Adele still paid costs of the company essentially out of the partnership: T 553 (Mr Smart).
- 920 Dr Mantziaris submitted by reference to Michael’s and Adele’s evidence that after 2010 Michael and Adele continued to provide indirect support to the deceased being for motor vehicle expenses such as registration or an account for new tires or by using their “fuel account at Stockers” which was a fuel dealership in Paterson: CB 2.1/430, 439; PCS page 38/59.
- 921 Dr Mantziaris indicated that the explanation of the method by which Michael and Adele transferred payments to the deceased from their business income to him in his capacity as director of the company was provided by the evidence of Mr Smart: CB 2.1/462[42]-[44].
- 922 However that evidence focuses upon payment of wages and/or directors fees out of the company to the deceased with particular focus of the payment of the sum of \$34,119 in the financial year ended 30 June 2003: PCS page 39/59.
- 923 I note in 2003 a sum of \$34,119 was paid out of the company as an expense: Financial statement for the year ended 30 June 2003: CB 4/204.
- 924 Mr Smart indicates that that sum constituted the balance of a bank account that was closed off and transferred to the benefit of the deceased: T 554.
- 925 Precisely the reason for that is unclear. The company accounts nonetheless discloses that at the end of that financial year there were no cash assets (CB 4/204, 209). The monies appear to have been paid as wages as that is the description given in the profit and loss statement (CB4/204) and there is no

suggestion in the same accounts that the monies were lent out to the deceased: CB 4/209, 210.

- 926 Mr Smart suggested in re-examination that the monies may have come from a term deposit that was closed off and transferred to an ordinary working account and from there transferred to the deceased: T554.
- 927 An attempt was made in the POS in reply and the PCS to explain in a table how the payments operated. The PCS (Appendix C: page 34/59) indicated that a revised table represented an updated version of the annexure A to the POS reply dealing with monetary transfers from Michael and Adele to the deceased.
- 928 The PCS include a table (**Table 1**) (pages 41-44/59) described as payments by the partnership to the deceased via the company containing four columns which record respectively: financial year; company payment – directors fees, wages or expenses; company income – rent or agistment and partnership expense – rent or agistment.
- 929 The information in Table 1 is said to be drawn from the company tax returns and financial statements and the partnership tax returns and financial statements: PCS page 41/59.
- 930 The attempt by the plaintiffs to record the arrangements and to draw together what they claim to be evidence of payments is commendable. Nonetheless, the table has various confusing aspects to it.
- 931 I have spent some time attempting to analyse and reconcile the payments in Table 1. Nonetheless, some confusing aspects persist. I note:
- (1) For the 1998 year there is said to be company income in the form of rent in the sum of \$3,780 (I note that the actual tax return itself describes this amount as “Gross rent and other leasing and hiring income”: CB 4/22). However, there is no corresponding entry in the 1998 partnership tax return as an expense of the partnership: CB 4/30,36.
 - (2) For the 1999 financial year there is specific reference in the company tax return to “Michael Horn – rents” of \$2,498: CB 4/45.5. However, there is no corresponding entry in the 1999 partnership tax return as an expense of the partnership: CB 4/39.
 - (3) For the 2003 financial year the table includes reference to the partnership receiving “gross rent” of \$7,443 as income for Rossdale (CB

4/221) without explaining what that figure relates to or why it has been included in the table. Other income entries like this are included in subsequent financial years for 2004-2009.

- 932 The PCS indicate that there are no financial statements of the partnership before 1999: PCS page 40/59. Nonetheless there are partnership tax returns for 1997 (CB 4/12-19) and 1998 (CB 4/28-37).
- 933 The assertion is made in the submissions that the conclusion to be drawn from Table 1 is that in the period from 1999 to about 2009 Adele and Michael paid the deceased (via the company) an average of more than \$6,000 per annum PCS page 40/59.
- 934 That is not self-evident from the payment column in the table which records monies coming into the company via the partnership.
- 935 The only way one gets close to an average of more than \$6,000 per annum is if one looks only at the fees taken for directors fees wages or expenses out of the company.
- 936 A simplified table which I attach as an Appendix to these reasons records apparent rent payments from 1998 to 2016.
- 937 The figures in the Appendix table accords with Table 1 in relation to the partnership expense column for payments from the partnership for the years from 1999 to 2009.
- 938 The total of payments from the partnership to the company over that 11 year period is \$48,929 which is an average of \$4,448.09 for each year.
- 939 However, if payments of \$500 per month under each of the Rossdale Arrangement and the Gostwyck Flats Arrangement had been made there would have been from 2000 an amount of \$12,000 per year being paid into the company accounts referable to the arrangements as pleaded.
- 940 Ultimately, I am not satisfied that the plaintiffs are able to demonstrate that the Rossdale Arrangement in the Gostwyck Flats Arrangement were fully or strictly adhered to at least in relation to the payments of \$500 per month purportedly for the “deceased’s Directors’ remuneration”: CB 1/67[71f], 68[75f].

Were payment requirements insisted upon or waived and what was the effect of incomplete payment?

941 Having found that Michael and Adele did not completely and meticulously pay to the company or otherwise to the deceased sums of \$500 per month for each of the properties from 1993 and 2000 respectively, the question arises as to what extent that matters?

942 Mr Simpson's submission was that it precluded success on the plaintiffs' estoppel case. Dr Mantziaris' submission was that default in payments under the Arrangements were not connected to and accordingly were irrelevant to the success of the estoppel case.

943 In any event, Dr Mantziaris submitted that the deceased waived any obligation for payment: DCS[22]. The submissions in this regard were detailed. I have considered them. However, leaving aside the submissions based on the 9 May 2000 letter (PCS page 35/59) which I have already dealt with, in substance the submissions relied upon the 2002 Lorn meeting and discussions in 2010: PCS page 36-37/59. I address the evidence below.

944 In about 2002 Michael and Adele met with his parents at their residence at Lorn had a conversation. He says to the following effect:

“Me: We're in drought. Things aren't too good. The land and irrigation rates have doubled what they were over the last couple of years. The \$1,000 to you is getting difficult. We're probably going to have to extend the overdraft.

Dad: Just pay the Company's expenses. Mum wants to get out of the Company. We are finding it difficult to keep up with it all. I don't want to have to deal with GST and all that.

Mum: You're running it all anyway, so it makes sense for you and Adele to replace me in the Company.

Dad: It will all be yours one day anyway.” (CB 2.1/267-268[196])

945 The findings that I have made above regarding whether such payments were made suggest at the very least that the Arrangements regarding payment of monthly amounts to the deceased worked out in practice ad hoc.

946 At least up until 2009 there is evidence that the deceased was in effective control of the bank accounts of the company. He must have known that he was not being paid regularly. There is no specific evidence that the deceased insisted to Michael or the plaintiffs on being paid regularly.

- 947 However from 2009 onwards with the occurrence of a number of events the deceased's financial position became more stretched.
- 948 Some insight in relation to this is given by Barbara.
- 949 She states that during 2009 when the global financial crisis hit the deceased lost most of his investments and had greatly reduced income. She indicates her investments were receiving very low interest and it was not easy making ends meet: CB 2.1/405; T 745. At this time the deceased tried to get the pension through Centrelink: CB 2.1/405.
- 950 Perhaps for the first time the deceased recognised that the arrangements he had reached with Michael and Adele were impacting upon his lifestyle and ability to provide for his concluding years, in particular should they need to go into some form of assisted care.
- 951 Barbara states that by 2009 she and the deceased assumed that Michael wanted to run Rossdale and Gostwyck Flats as a going concern and felt that they could not ask for the properties to be sold. She states that the deceased regretted that he had given the property Tillimby to the company as he could have later sold this: CB 2.1/405.
- 952 In about June-July 2010 Michael indicates he had a discussion with the deceased proposing the intergenerational transfer and mortgaging one of the properties so as to give the deceased \$30,000 with a view to giving the deceased \$500 per month for the next five years by which time he would get the pension: CB 2.1/273.
- 953 It is not in dispute that after 2010 no more payments were made by Michael and Adele to the deceased: T 580(Adele).
- 954 The handwritten note dated 25 July 2010 (CB 3/33 and MFI 1) dealt in part with payment obligations which I refer to below.

“Michael-

I put this in writing so we both know what we are talking about and don't get things mixed up.

I do not want you to give me the \$30,000 under any circumstance (although it would be nice to have) as it will make it too hard for you to repay your loan.

I could and would like it now if you are agreeable to give me \$5,000 as I could live on that for a few years as I have car registration and insurance and medical expenses to pay soon. By the same token if say in two or three years time (if I'm still alive) should I be short of \$100 or \$200 you may see your way clear to give me that, but only if I ask for it.

If you have to mortgage the properties - only mortgage one not both.

...

I hope these proposals are fair as I always strive for fairness.

The properties and shares I own all go to you when I die.

Dad - Ross Horn."

955 I have referred earlier to the fact that there was a discussion in early August 2010 the deceased visited and indicated that he did not wish to do the intergenerational transfer. Nonetheless Michael says he still proposed to give the deceased \$30,000: CB 2.1/274.

956 Adele says there was a conversation in words to the following effect:

"Ross: I don't want to do the intergenerational transfer. It takes too long and I'll probably be dead by then. You are trying to kick me out of the company. Barbara's got too much money invested anyway

Michael: I'm not trying to kick you out. But if you don't want to do the transfer, we won't do anything more about it.

Ross: You will just have to wait until after I die before it comes to you." (CB 2.1/180[136])

957 In late 2010 Adele (in evidence limited to belief under s 136 *Evidence Act*) indicates that in reliance upon the deceased's letter of 25 July 2010 she and Michael took out a mortgage with the NAB secured against Gostwyck Flats and with the money borrowed purchased more steers, extended the workshop and machinery shed on Rossdale, purchased a new tractor and carried out more renovations to the Greenhouse: CB 2.1/180.

958 Michael indicates that as a result of the August 2010 conversation he understood and accepted that none of the land owned by the company was going to be transferred to him at that point nor the shares and that the deceased wanted Michael to give him \$5,000 and a bit of assistance over the next few years rather than the \$30,000 Michael had offered. Michael says he understood that it was okay for him to keep putting his time and money into the farms on the understanding that when the deceased died he would take over the land owned by the company and the company itself: CB 2.1/274 – 275.

- 959 Michael indicates that subsequently he and Adele took out a mortgage against the Gostwyck Flats property with the NAB and used the mortgage monies to discharge the cattle overdraft: CB 2.1/275.
- 960 From 2011 Mr Smart indicates that the company in substance had no income at all. In relation to the income figure for "agistment" he states that this corresponds to money paid by the partnership against the description of "rent" which he says was "money ... paid by the Partnership to the Company to cover the costs of keeping the company operational": CB 2.1/138.
- 961 The concept of "waiver" has multiple meanings and gives rise to "uncertainties and difficulties": see *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; [2008] HCA 57 per Gummow, Hayne and Kiefel JJ at [54].
- 962 Sometimes it is used to denote an election. In this regard it may be considered as being a "waiver" in the sense of abandoning a right by acting in a manner inconsistent with that right. Although cases described in this way are often applications of the doctrine of election between inconsistent rights or remedies: *Gardiner* at [56].
- 963 The legal basis for any such waiver was not developed in the submissions.
- 964 Further, whether there was technically any waiver of payment was not the subject of precise submissions. Nonetheless, I accept that:
- (1) in May 2000 there was a softening of the deceased's approach to strictness of payment namely "I would appreciate it if you could pay me \$500 a month": CB3/2 and MFI 1;
 - (2) at the Lorn meeting in 2002 the deceased made it clear that payment was not required saying "Don't worry about paying me anything anymore. How about you just pay all the Company's expenses. Your mother wants to get out of the company. We're finding it difficult to keep up with it all. I don't want to have to deal with GST and all that": CB 2.1/172-173[104]; 267[196]; and
 - (3) by 2010, in the 25 July 2010 note the deceased reinforced the lack of the essentiality of payment by the words: "if say in two or three years time (if I'm still alive) should I be short of \$100 or \$200 you may see your way clear to give me that, but only if I ask for it": CB3/22.
- 965 Further issues regarding payments and money for the deceased reared their head in particular from October 2019. I have recorded above the events from then leading up to the deceased's death.

966 The deceased's handwritten note prepared for the 14 February 2020 meeting is set out above.

967 The following observations may be made. The deceased was distressed by the events of the few weeks prior to 14 February 2020 evidently relating to the company.

968 In the concluding paragraph of the note the deceased stated as follows:

"I think it is worth noting that the intention of leaving all GA & RG Horn Pty Ltd as stated in my will was presuming I had passed away and no longer requiring any financial consideration. This proposed sale is in different circumstances as at near 90 years of age I am facing declining health so would like to be considered in some financial benefit."

969 I accept that over time and in particular in May 2000, 2002, and July 2010 the deceased certainly intimated to Michael that strict payment was not required or even desired by the deceased.

970 By 14 February 2020 the deceased was mindful of declining health and in that context expressed the view in the note above that he would like to be considered for some financial benefit.

971 However, it seems to me that that expression was not an insistence that Michael provide funds out of Rossdale for the deceased. As I have noted above, Barbara acknowledged the deceased had no need for funds for aged care: T 686.

972 Ultimately, in light of the above evidence, I find that the deceased from at least 2000 did not insist on strict payment and by 2010 did not require payment of the \$500 amounts for each property.

Issue 5 - Were the promises conditional upon the plaintiffs continuing to work the farms for the remainder of the deceased's life?

973 In relation to the promises Mr Simpson submitted that in order for Michael to receive the shares in the company he needed to take over the properties as "working farms": DCS[18].

974 Dr Mantziaris disputed that there was any such condition: POR[3]-[10]; PCS[13]-[17].

975 Mr Simpson referred to the evidence of Barbara, in particular discussions in 1993 when she recalls the deceased telling her that Michael would take over Rossdale after a clearing out sale stating "my father would be happy to know it stays as a farm" and in reference to the arrangements stating "same as we had, look after the boundary fences, pay the rates and insurances. He wants to keep the farm going": see CB 2.1/401.

976 Mr Simpson also relied upon evidence of Barbara during cross-examination (T 743 – 745), the evidence of Mr Smart (T 543, 544), Hamish (T 892, 893, 936) and Philippa in referring to understanding of the property remaining as an "ongoing farm": T 961, 962, 966, 1010, 1026.

977 Dr Mantziaris cross-examined Barbara to the effect that the gift by the deceased to Michael of his shares in the company under the 2006 Will was unconditional and not based on Michael paying \$500 a month to use either of the farms: T 744. Barbara asserted that it was assumed that Michael would keep running the farm and he would be given the shares if he was still running Rossdale: T 744.

978 I have already referred above to Philippa's evidence of a conversation with her parents and Steve in 1992 in which the deceased referred to the changing of the milk quota system and discussions with Barry White.

979 At the conclusion of the discussion Philippa indicates that the deceased said (CB 2.1/355):

"Michael is going to take it on".

980 She says that from this she understood that the deceased and Michael agreed that Rossdale would be kept for the time being as a working farm with Michael managing it: CB 2.1/355. The evidence regarding her understanding was limited under s 136 of the *Evidence Act*.

981 I do not accept that the deceased informed Philippa that there was any *condition* or *essential requirement* that Michael keep the properties as a "working farm".

982 Hamish gave evidence that from his discussions with the deceased he believed their intentions were that the company and properties were to be passed on to

future generations to be kept and farmed stating that the deceased said (CB 2.1/313):

"My Dad and I worked the farms and it will be good that Michael keeps farming then Nic can take it on after him".

- 983 Whilst I do not doubt that some generalised statements were made by the deceased to the above effect, I do not regard any such statements as being "conditions" of the promises which the deceased made to Michael and Adele.
- 984 It is true that on Michael's version of events the deceased did discuss with him whether he would remain on the property or wished to sell it at least initially.
- 985 I accept that from the deceased's perspective initially, the deceased *expected* that Michael and Adele would continue to farm on the land.
- 986 However, I reject the submission that the promise to Michael of the shareholding in the company or the properties was fundamentally conditional upon the properties being held within Michael's family as "working farms" or that there was a requirement that they be "ongoing farms".
- 987 It seems to me that the deceased at least initially was simply attempting to work out whether Michael would wish to take on the properties as farms or sell the properties. There was no suggestion in the proceedings that there was ever any realistic other option available to the deceased within his family other than Michael taking on the farms. No one suggested that Philippa for example would be interested in doing so.
- 988 Indeed, on one view it was the deceased himself who stymied Michael continuing to farm on the land by raising the idea of Gostwyck Flats being subdivided in a way to benefit both Nicholas and Danika.
- 989 Further, the deceased at one later point in October 2019 when there were discussions within the family regarding use of the properties made it quite clear that use of them as an "ongoing farm" was never an essential requirement.
- 990 Specifically, the deceased's letter dated 30 (October) 2019 (CB 3/170.2-172 and MFI 1) states in part:

"I have always said [M]ichael and [A]dele to have the ex dairy known as "Rossdale" for Michael to do whatever he wished to do with it".

991 I find that the deceased did not impose any essential condition that in order for Michael to receive the shareholding in the company that the properties had to be worked as "ongoing farms".

Issue 6 – Was there an assumption that a particular legal relationship existed between the plaintiffs and the deceased?

992 In *Shymko v Lach* I addressed the question of legal relationships within family arrangements. I stated at [567]-[572]:

“567. In the context of family circumstances comments or statements that are said to give rise to obligations, there is ordinarily a question regarding whether statements are intended to create legal relations.

568. Whilst historically there have been presumptions that family arrangements are not intended to give rise to legal obligations, the High Court has rejected the utility of using the language of presumptions. Rather, there is more particular question of who bears the onus of proof: *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 at [26] (per Gaudron, McHugh, Hayne and Callinan JJ).

569. In *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12 (*Ashton v Pratt* (CA)), Bathurst CJ at [140]-[142], [147] stated as follows:

“140 However, it is unnecessary to resolve these issues as to my mind Ms Ashton has failed to establish that she suffered detriment as a result of Mr Pratt resiling from his promise such as to give rise to the relief claimed. The detriment said to have been suffered in the present case was that Ms Ashton became Mr Pratt’s mistress and did not return to the escort business.

141 The relevant detriment is that which the party asserting the estoppel would suffer, as a result of her original change of position, if the assumption which induced it was repudiated by the party estopped: *DeLaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483 at [42], *Grundt v The Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674–675 and *Sidhu* at [81].

142 What now appears clear is that there is no need to mould any remedy in the case of equitable estoppel to reflect the minimum relief necessary to remove the detriment: *Giumelli* at [48], *DeLaforce* at [56]–[57] and *Sidhu* at [85]. Prima facie the courts should enforce a reasonable expectation which the party bound created or encouraged. However, relief will be limited where the enforcement of a plaintiff’s expectation would be out of all proportion to the detriment: *DeLaforce* at [62] and *Sidhu* at [85]. This is because in those circumstances good conscience does not require the promisor be held to his or her promise.

...

147 As was stated by Gageler J in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 88 ALJR 552 at [150] the detriment or harm required to ground an estoppel can be any material disadvantage. Such material disadvantage must be

substantial, although it need not be quantifiable in the same way as an order of damages. In the present case Ms Ashton suffered no material disadvantage, certainly not one which could be described as substantial.”

570. McColl JA at [222] and Meagher JA at [223] agreed with Bathurst CJ.

571. Meagher JA stated that the question of any intention to create legal relations turns on whether in the circumstances the participants (by what they said and did) conveyed such an intention in the sense that reasonable persons in their position would have understood that to have been intended: Meagher JA at [224] citing *Ermogenous* and also *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35.

572. However, the fact that at no stage in a conversation anything is said by one party that conveys to the other that what is being promised is to be legally enforceable is not determinative of the matter: Meagher JA at [225] citing *Placer Development Ltd v Commonwealth of Australia* (1969) 121 CLR 353 at 367; [1969] HCA 29 per Windeyer J.”

993 The plaintiffs’ submissions do not articulate that any particular legal relationship was assumed by Michael and Adele.

994 The evidence is suggestive that in light of the deceased’s comments, they would be beneficiaries of a Will whereby the deceased gave Michael his shareholding in the company which I’ve described as the claimed shares.

995 I have found that the essential genesis for the estoppel case was grounded in the discussions in 1991.

996 In any event, by 1993 it is clear that the parties and in particular the deceased assumed that a serious relationship susceptible to being enforced was being created sufficient for the deceased to seek to document on a number of occasions what was being done.

997 Adele’s evidence of the June 1993 discussions is to the effect that the deceased said:

“I will put it down in a letter and give it to you so we all know what is expected.”
(CB 2.1/165[68])

998 Whilst no document was ultimately adduced in evidence regarding that, the fact that the comment was made is telling.

999 The handwritten note of the deceased dated 9 May 2000 (CB 3/2 – 3) was another formalising of matters which found a more formal legal expression a few years later in his 2006 Will in gifting his shares in the company to Michael: CB 3/18.2.

1000 The 25 July 2010 letter dated 25 July 2010 (CB 2.1/179; CB 3/22 and MFI 1) in a sense reflected the deceased's practice in this regard being prefaced in the following terms:

“Michael-

I put this in writing so we both know what we are talking about and don't get things mixed up.”

1001 The above suffices to satisfy me that Michael and the deceased assumed a relationship between them of sufficient seriousness that it was susceptible to being enforced. The promise on the deceased part, was initially oral and found a more formal legal expression in his 2006 Will in gifting his shares in the company to Michael.

Issue 7 - Did Michael and Adele act reasonably in reliance on the promises?

1002 In relation to the question of reliance Mr Simpson rightly submitted that it is a question of fact and the evidence must be considered in its entirety: DCS [21]-[22].

1003 Mr Simpson submitted that the failure of the plaintiffs to adhere to the conditions attached to the promises under the agreements demonstrated lack of reliance and precluded success on their estoppel case: DCS[26].

1004 The main focus of Mr Simpson's submissions in this regard were lack of primary records on the one hand, a lack of documents produced pursuant to notices to produce and evidence from Michael and Adele indicating that when cattle cheques were received substantial amounts of the proceeds were not necessarily paid to the deceased: DCS[26] citing exhibit D2-A.

1005 I have addressed these submissions above. I do not regard my findings regarding payment under issue 4 as precluding a finding of reliance by the plaintiffs on the deceased's promises.

1006 Mr Simpson submitted that other evidence pointed against actual reliance by Michael and Adele upon taking up the agreements: DCS[22].

1007 In this regard he submitted (DCS[23]) the evidence showed that Michael and Adele:

- (1) were not paying rent for use of the land and not paying the monies as requested by the deceased per month;
- (2) had funded and constructed the residence on Rossdale ultimately from the proceeds of Lennoxton that had been gifted to Michael from the deceased;
- (3) had at least for the period from 1993 to 2000 undertaken work in other occupations outside of farming and then accepted in cross examination that they could undertake other occupations if need be.

1008 Mr Simpson also pointed to the lack of detail in the evidence as to the works performed by Michael and Adele on that properties and lack of evidence as to value of such works: DCS[24].

1009 Further he submitted that the plaintiffs could not rely upon the photographic material to cure deficiencies in their affidavit material and that little context could be gleaned from the photos contained in exhibit P6: DCS[25].

1010 I do not accept that little context could be gleaned from the photos in light of Barbara's evidence regarding them. However, even assuming for the moment that the balance of Mr Simpson's submissions on this issue are correct, that of itself does not to my mind preclude a finding of reliance. The authorities talk of reliance in the context of there being something of sufficient "substance".

1011 For reasons which I have outlined, photographs may be admitted as real evidence either in its own right or otherwise at times assisting testimonial and affidavit evidence.

1012 The photographic evidence (exhibit P6) coupled with the evidence of Barbara and Philippa acknowledging the improvements comfortably satisfied me that the works had been carried out as Michael and Adele asserted.

1013 The photographic evidence (exhibit P6) with Barbara's admissions of the work done is compelling evidence which I accept as to the plaintiffs' reliance and of work done of self-evident value in terms of structures build on the properties, trees planted and other works carried out.

1014 Barbara agreed that:

- (1) at the time that Michael took over on Rossdale in 1993 the dairy activity had stopped and he was running a beef cattle operation which required different infrastructure than dairy cattle activity: T 659;

- (2) Michael opened up quite a number of roads and did some dams: T 758;
- (3) Michael and Adele had put a lot of work into improving the Lennoxton property: T 786.

1015 In light of the photographic evidence and Barbara's admissions in cross-examination, I do not consider that it was necessary for Michael and Adele to provide exact details as to how they constructed installations or sheds or fencing or other improvements on the property or the work involved in grading roads or planting trees.

1016 Additionally as to reliance, I have referred above to Michael's evidence outlining what he and Adele did based upon and following discussions with the deceased. Without attempting to be exhaustive the following evidence, which I accept was reliance, is significant as constituting "sufficient substance":

- (1) based on the 1991 discussions, prior to formally moving on to Rossdale in 1993 Michael and Adele purchased and raised calves, purchased and maintained tractors, slashes and other agricultural equipment to use on Rossdale and improved the infrastructure on Gostwyck Flats: CB 2.1/256-257;
- (2) based on the 1992 conversations about taking over Rossdale Michael changed the focus of the earthmoving business to rural contracting, he purchased tractors and other farm machinery for the earthmoving moving business at his expense: CB 2.1/254;
- (3) between March and June 1993 Adele and Michael readied themselves for the eventual start of farming including purchasing calves, tractors, slashes and another agricultural equipment and doing improvements to the property: CB 2.1/164;
- (4) after starting up on Rossdale Michael carried out further work including constructing cattle yards and a race, installing a cattle crush and fencing, replanting paddocks establishing pastures, constructing new dams and new roads, gravelling existing roads, constructing a machinery shed, liming of paddocks, restoration and conversion of an old dairy, replacement gates and the establishment of an irrigation system: CB 2.1/258
- (5) from 1998 the plaintiffs planted trees (CB 2.1/262) and renovated and repaired the Greenhouse on Rossdale: CB 2.1/168 – 169;
- (6) from 2000 when they took over on Gostwyck Flats the plaintiffs constructed a track for vehicles, fenced the boundary, constructed four new dams, removed an old shed, extended the existing hay shed, gravelled existing roads, increased road networks, constructed yards with a new cattle crush, roof and weigh box and a concreted work/walking area, planted about 3,000 trees, cleaned out and enlarged

- 14 dams, constructed a new creek crossing and changed internal fencing to give more productive paddocks and lane ways: CB 2.1/265;
- (7) from October 2000 in order to fund improvements and to get a herd going on Gostwyck Flats Michael and Adele sold Cory for about \$82,000 and with the net proceeds and the benefit of an overdraft of \$150,000 with Elders purchased cattle: CB 2.1/172;
 - (8) in about June 2004 Michael and Adele sold the Lennoxton property for about \$517,000: CB 2.1/269 and they moved onto Rossdale building the Rossdale house at a cost of about \$280,000 for labour and materials: CB 2.1/176, 269;
 - (9) in about early to mid-2008 Michael and Adele constructed a workshop and converted the old dairy into an office: CB 2.1/181, 271;
 - (10) in about 2012 and 2013 Michael and Adele put solar systems on their house and the machinery workshop, levelled part of Rossdale and put in a horse arena and constructed eight stables in the hay shed: CB 2.1/181, 275; and
 - (11) in 2015 Michael and Adele repaired damage on the properties created by the flood: CB 2.1/182, 276.

1017 When one tracks the works done against the chronological narrative, the works carried out by Michael and Adele in the early years at least up to 2004 with the building of the residence on Rossdale correspond in a closely proximate way with the discussions they had with the deceased.

1018 The works carried out are the sort of farming, building and improvement works that one might reasonably expect Michael and Adele to have done in order to carry out their beef cattle and lucerne hay farming activities on the properties, such as preparing paddocks, improving irrigation, installing fences, grading roads and planting trees.

1019 Despite the submissions of Mr Simpson regarding reliance, which I have rejected, I did not detect and do not find that any of the work that Michael and Adele had done was other than a proportionate response to the discussions that Michael and the deceased had which led to them coming onto the properties.

1020 Further, there was no suggestion that the expenditure that they had incurred was disproportionately high or other than commensurate with their farming activities.

1021 Mr Simpson submitted that Adele had accepted in cross-examination that the building of the house on Rossdale did not form part of the promise in relation to transfer of shares to Michael: T 635. He submitted that this defeated representation 3: DCS[46].

1022 I reject the submission. Adele's evidence was as follows (T 634-635):

"Q. A further aspect of your case is that Ross had encouraged you to build on the company, do you accept that?

A. He agreed to it.

HIS HONOUR: He encouraged you to build on the property?

SIMPSON: Yes.

HIS HONOUR

Q. That's the question.

A. I can't really remember, he agreed to it.

SIMPSON

Q. But you don't say that he encouraged you to do that?

A. Okay, yes, he did.

Q. Your evidence is that you believed that if you build a house on Rossdale, you would get both properties. Is that belief both properties to ..(not transcribable).. the shares to Michael, is that the belief with building the house?

A. Sorry, I'm not following your question.

Q. Certainly, so, you built on Rossdale, you recall that?

A. Yes.

Q. You built on Rossdale with the belief - that both you and Michael shared - that Michael would get the shares by building on the property, is that right?

A. Not by building on it, no.

Q. Your belief though was always, just as you say, on the promise by Ross that the shares would be transferred to Michael when he died, that was your belief, correct?

A. Yes.

Q. That was without any other encouragement or suggestions by Ross, is that correct?

A. Yes."

1023 I did not understand Adele's evidence as being evidence that the building of the house on Rossdale was disconnected from the promise by the deceased that shares would be transferred to Michael when he died: see T 635.5 – .16.

1024 Further Mr Simpson submitted that Adele recanted her evidence in reliance upon the representations in the statement of claim: T 636 – 637. I do not regard Adele's evidence as recanting reliance. She disagreed with the proposition that she did not rely upon remaining on the properties on the basis that they would be transferred to her or the shares only transferred if Michael had predeceased the deceased: T 636.7 – .15.

1025 The cross-examination at that point identified contributions that Adele had made to looking after children in the home and using proceeds of sale from the Verona and Cory properties. The fact that Adele would have looked after her children and used the proceeds of sale of the Verona and Cory properties to improve the Lennoxton property does not to my mind demonstrate that Adele recanted evidence of reliance upon the deceased's promises.

1026 Mr Simpson submitted that Michael's election in (1993) and 2000 not to seek the proceeds of the sale of the properties at that stage defeated representation 4: DCS[48]. He submitted that representation 5 cannot be made out on the evidence but rather spoke to a departure from the initial promise which by 2017 was not being followed: DCS 49.

1027 Adele gave evidence that she and Michael did not wish in 1993 and 2000 to receive proceeds from the land at that point rather they wished to farm the property: T 635. I do not regard Michael and Adele's decision in 1993 and 2000 in wishing to farm the properties as later precluding any possibility of sale of the properties.

1028 There were undertones in the case of Barbara not really appreciating the extent of the reliance by Michael and Adele.

1029 Part of Barbara's thinking regarding the estoppel claim was exposed when she was cross-examined regarding the arrangement that been reached at the time Michael moved on to Rossdale in 1993. When asked about the work Michael had put into the land she did not think it was a "great big consideration": T 755. Her view was that Michael and Adele were being reimbursed by running their business on the land and by the wages he was drawing: T 755-756.

1030 In summary, I find that Michael and Adele acted reasonably in reliance on the promises.

Issue 8 - Did the deceased know or intend that Michael and or Adele would act in reliance on the promises (issue 8)?

1031 In light of the evidence I have accepted, there is an issue on the authorities as to whether the deceased knew or intended that Michael and Adele would act on the promises.

1032 I have discussed the evidence that in March 1993 the question posed by the deceased to Michael and Adele as to whether he would take Rossdale on the one hand reflected some ambiguity in the deceased's mind as to what Michael's intentions were.

1033 However, following the robust response of commitment by Michael and indeed the reminder that they had already taken steps (raising heifer calves) in reliance upon the 1991 discussions, by the end of the discussion the deceased's response demonstrates intention that he expected Michael and Adele to act upon what had been discussed. He stated "Alright then" and indicated that he would carry out a clearance sale after Barry White had finished up: CB 2.1/163-164[66]; 255[146]

1034 The handwritten letter dated 9 May 2000 issuing an invitation "If the above is suitable you could start and put cattle in any of the empty paddocks now" evidences the intention of the deceased of action or reliance on the part of Michael and Adele.

1035 Thereafter there are numerous examples of meetings as between Michael and the deceased in which aspects of what they were doing on the properties were discussed and were known by means of those discussions to the deceased.

1036 Further, it is clear that the payments that were made by Michael and Adele to the deceased was done in a context in which the deceased knew that he had committed the properties to Michael and Adele for their farming activities.

1037 On this issue it seems to me clear beyond doubt, and I find, that the deceased both knew and intended that Michael would act upon the promises.

Issue 9 - Was Michael's and Adele's reliance on the promise to their detriment (issue 9)?

1038 I have referred above to the joint judgment of French CJ, Kiefel, Bell and Keane JJ at [84] in *Sidhu v Van Dyke* citing the observations of Nettle JA in *Donis v Donis* (2017) 19 VR 577 at 588-589[34]:

“[H]ere, the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature ... beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based.” (footnote omitted)

1039 Here, as in *Sidhu v Van Dyke*, it seems to me that those remarks are apposite.

1040 In 1991 when what I have described as the first critical conversations occurred Michael and Adele commenced to act in reliance upon the invitation to take “take it [Rosssdale] on” (but not as a dairy). They were then both aged approximately 25.

1041 What they undertook at that point was a life-changing decision. Initially there was a step in 1991 of purchasing and raising calves and tractors, slashes and other agricultural equipment: CB 2.1/256-257.

1042 Following the particular conversations regarding Rosssdale in 1993 and Gostwyck Flats in 2000, and the building of the house on Rosssdale in 2004 with the work, effort steps and expense carried out by them as I have described above (in issue 7), very substantial steps were taken by them which I accept comfortably fall within the description of substantial detriment.

1043 By the time that the house was built in 2004 they had already by that stage committed some 13 years of their lives to the venture in a very significant way.

1044 In my assessment the building of the house on Rosssdale was in a sense a “crossing of the Rubicon”, by which Michael and Adele had taken essentially irrevocable or practically irreversible steps committing not merely their working lives but their residence to the Rosssdale property.

1045 By 2010 following the discussions regarding intergenerational transfer and the taking out of the mortgage against Gostwyck Flats the detrimental reliance had increased as I have explained.

1046 I find that the detrimental reliance continued for much of the next 5 to 6 years (2010 – September 2017). Without being exhaustive this includes the work and expense:

- (1) in about 2012 and 2013 when Michael and Adele put solar systems on their house and the machinery workshop, levelled part of Rossdale and putting in a horse arena and constructing eight stables in the hay shed: CB 2.1/181, 275; and
- (2) in 2015 with the detailed work carried out to repair damage created by the flood 2.1/182, 276.

1047 The defendants in particular point to actions taken by Michael and Adele after 2017 said to be at odds with the promises. However in my assessment at least by 2010 the steps taken in detrimental reliance can readily be described as steps of a “profoundly personal nature beyond the measure of money” (*Donis v Donis* at [34]).

1048 Michael and Adele had at that point spent almost 26 years of the prime of their working life acting upon the promises.

1049 In summary, I find that Michael and Adele’s reliance was detrimental.

Issue 10 - Did the deceased, and/or Barbara (in her capacity as executor and sole beneficiary of his estate) act unconscionably in not honouring the promises?

1050 Mr Simpson submitted that the deceased did not act unconscionably regarding them promises in the matter (DCS[32]) and that the deceased was trying to accommodate Michael's requests whilst retaining funds for his own personal and financial circumstances: DCS[33].

1051 It seems to me, as I note and find below in relation to issue 11, that the proper understanding of the events is that it was in fact Michael that was attempting to accommodate the deceased's requests.

1052 Mr Simpson further submitted that in circumstances where Michael and Adele did not comply with the payment terms of the Arrangements it cannot be said to be unconscionable on part of the deceased for the promise of the shares not to be honoured in circumstances where they "merely derived a benefit" from the properties to the deceased's detriment: DCS[35].

1053 However the unconscionability on the part of the deceased lay in the attempts to control the disposition of Gostwyck Flats in circumstances in which Michael and Adele had to the deceased's knowledge improved Gostwyck Flats and outlaid considerable monies in it and effort in so doing.

1054 The deceased had made promises on which Michael and Adele relied to their detriment. Further, by not insisting on payments at an early stage, the deceased encouraged Michael and Adele to carry out other work and incur other expenditure (which would be to their detriment if the promises were not fulfilled).

1055 By 2017 Michael and Adele had significantly altered their lives and invested time, effort and resources including financial resources into the operation of Rossdale and Gostwyck Flats for a period to then of almost 26 years.

1056 Ultimately, in my assessment even by that stage it would have been unconscionable for the deceased to renege on his arrangements with Michael and Adele. Further I find that, subject to the remaining issues, it is unconscionable for Barbara in her capacity as executor and sole beneficiary of his estate to hold the claimed shares (or the claimed property) other than on trust for Michael.

Issue 11 - What if any effect did the post 2017 events have on the estoppel case?

1057 Mr Simpson submitted that:

- (1) at least by 2017 the plaintiffs were consciously departing from the content of the promise made by the deceased: DCS[29]; and
- (2) the alteration of representation 2 was of Michael's and Adele's making: DCS[47].

1058 In this regard Mr Simpson (DCS[29]-[30]) pointed to various materials in volume 3 of the court books including: the typed document dated 4 December 2017 (3/24); the Gostwyck Flats timeframe document (3/25); the Succession Plan Update (3/65.1); the background Gostwyck Flats split up document (3/77); the minutes dated 27 September 2018 (3/78); the net settlement adjustment sheet dated 10 December 2018 in respect of Gostwyck sold (3/83.12); the Succession Plan and Sale Rossdale documents (3/105 – 107A); the October 2019 Agreement (3/140); Michael's "Dear Mum and Dad" letter (3/148); the

agenda for the EGM (3/191); the 14 February 2020 speech of the deceased (3/195, MFI 1); the diagrams prepared for the meeting 14 February 2020 (3/223.3A and the email from Mr Singh to Mr Meredith and others dated 27 February 2020: 3/223.19.

1059 Mr Simpson submitted that the documents were not consistent with a promise that the claimed shares would be transferred to Michael upon the deceased's death and represented an active attempt on Michael and Adele's part to depart from the promise of the deceased: DCS[30]-[31].

1060 I do not accept the submissions.

1061 As I have noted above, and find, the proper understanding of the events is that it was in fact Michael who was attempting to accommodate the deceased's requests.

1062 The two main matters that were focused upon by the defendants as evidencing departure by the plaintiffs from the arrangements for Michael and Adele to come on to the properties and farm them related to:

- (1) the discussions which ultimately led to the subdivision of Gostwyck Flats; and
- (2) the proposed sale of Rossdale.

1063 I proceed to address these matters.

The Gostwyck Flats subdivision

1064 The deceased captivated by Nick's talent or 'gift' with horses sought to provide a means of assisting Nick in that venture: CB 2.1/406; T 746.

1065 In September 2017, the deceased spoke with Michael and Adele regarding this at Rossdale. I have referred to this evidence above: CB 2.1/183, 276.

1066 It is clear from the evidence that following the deceased's request Michael and Adele met with Mr Smart and Mr Meredith to explore what could be done to accommodate the deceased's request in relation to this.

1067 In December 2017 Michael and Adele met with his parents at Lorn and relayed the advice received including advice in respect of limitations on subdivision.

1068 Michael indicates that in 2018 he understood that his parents had agreed to the subdivision of Gostwyck Flats to enable Nicholas to get assistance in starting up his horse business by getting access to Gostwyck Remnant and Danika getting some capital from the proceeds of Gostwyck Sold with those monies going into the DFT: CB 2.1/287.

1069 Michael states that on his understanding this did not change anything in the arrangements that the deceased would leave the farms to him when he died and he was happy to assist Nicholas getting on in life by using some of the land that would ultimately come to him: CB 2.1/287 – 288. The evidence was limited under s 136 of the *Evidence Act* to Michael's understanding.

1070 Barbara in explaining the issues that arose after 2017 with the proposed sale of Rossdale and Gostwyck Flats and the proposed transfer of Lot 5 to Nicholas and the financial assistance for the deceased and herself indicated that she decided to support the deceased "as I had always done and ensure that his wishes as they related to the company, Rossdale, Gostwyck Flats were carried out": CB 2.1/402.

1071 Barbara and the deceased did not so much oppose the subdivision of Gostwyck Flats for the benefit of Nicholas and Danika. Rather the complaint at least of Barbara appears to have been that they assumed that the property would go directly to Nicholas and Danika: CB 2.1/405.

1072 Ultimately Barbara agreed that although the deceased had promised Michael shares in the company, when the deceased realised Nicholas' great gift with horses he wanted to change "a bit of the promise that he'd made with Michael... to ensure that Nicholas got some of the company's land": T 746-747, see also T 751, T 755.

1073 To the extent that it is said that Michael and Adele breached the so-called notion keeping the farms ongoing and working on the land I have already rejected the notion that there was any such condition or requirement by the deceased that would be the case.

1074 Further I reject the submission that the Gostwyck Flats subdivision was instigated by them or demonstrated any impermissible departure by them from the promises of the deceased.

1075 The deceased's undated handwritten note produced for the 14 February 2020 meeting in its terms expresses the deceased's intentions for Nicholas and Danika to benefit from Gostwyck Flats.

1076 The following observations may be made:

- (1) the deceased's main priority was for Nicholas to be given Lot 5 of Gostwyck Flats;
- (2) the deceased was aware and not particularly happy that Danika's "section of Gostwyck Flats" had been sold and she had not received the money for it but he was aware that the proceeds had been put into a trust and she was happy with that investment and he accepted her wishes.

1077 However, in light of Michael and Adele's detrimental reliance upon the deceased's earlier promises in relation to Gostwyck Flats, I do not accept that the deceased was entitled at September 2017 to require a subdivision of Gostwyck Flats nor require Michael to act in a way to ensure that Nicholas received Lot 5 or Danika received the net proceeds of sale of Lot 6.

1078 I find that Michael and Adele from 2017, without being obliged to, acted in ways to accommodate the deceased's wishes regarding Nicholas and Danika and that as 14 February 2020 and persisting to his death the deceased did not regard Michael as having acted impermissibly in relation to Gostwyck Flats.

The proposed sale of Rossdale

1079 From approximately the start of 2019 the activity within the family regarding meetings, preparation of documents and legal arrangements including Wills and an agreement intensified.

1080 The arrangements included involvement from Mr Meredith (who was not called in the proceedings) and Mr Smart.

1081 I accept that in about early, mid and late February 2019 Michael and Adele had a number of discussions with the deceased regarding interest of a developer in purchasing Rossdale: CB 2.1/193-194/289-290.

1082 Barbara was cross-examined about a particular conversation that Michael says he had with the deceased in late February 2019: CB 2.1/290[291].

“Me: I've heard that Cornish wants to buy us out.

Dad: Oh he bought Doug Cardow's place.

Me: Yeah. He also own Torryburn Hose Stud. He's a developer. We might have to put an agent in place.

Dad: O'rightio.”

1083 She stated that she could not recall the deceased mentioning this to her: T 813.

1084 Barbara accepted nonetheless there were such conversations (about a developer) such that Michael and the deceased “might have to put an agent in place” but indicated that “it's not specific enough to refer to anything about his own land”: T 813.

1085 When she was pressed about this the following exchange occurred (T 813):

“Q. The first line in this conversation is, "I've heard that Cornish wants to buy us out". So, there was conversation in February 2019 about Cornish buying properties around Rossdale and potentially wanting to buy Rossdale, weren't there?

A. I would say yes there were conversations about Cornish buying properties around. But, Ross didn't, wouldn't have comprehended that it was specific for Rossdale.”

1086 Adele's evidence on this is more detailed than Michael's evidence.

1087 Adele indicates that a few days after the deceased had saw them in late February 2019 the deceased came to Rossdale and she but not Michael was present and had a conversation with the deceased.

1088 The deceased asked her about Michael's comment “the other day about getting an agent” and asked “What was that for again?”. However the conversation essentially indicated that the developer had bought out some neighbours and might be trying to buy them out and Adele explained:

“Me: The guy who bought Donny Vickers and Denis Rapsons might be trying to buy us out. He sends his own real estate to talk to you and if you agree to sell he charges you very high commission. If we send our own agent to tell him he has to talk to them, if he is interested, then we pay less.

Ross: Okay what agent would you use?

Me: Probably Greg Lidbury.

Ross: Oh goodo He and his wife are very nice we see them at church sometimes." (CB 2.1/194[191])

1089 I find that by late February 2019 that Michael and Adele had raised with the deceased at least the prospect of developer interest in Rossdale and the possibility of putting an agent "probably Greg Lidbury" in place for Rossdale: CB 2.1/290 [291].

1090 What the evidence does not disclose is quite why Michael and Adele were willing to entertain the notion of selling Rossdale at that point.

1091 It effectively came hot on the heels of the subdivision of Gostwyck Flats.

1092 I asked about the catalyst for this: T 1093. Dr Mantziaris preferred the terminology of "causal factors" (T 1093) because "catalyst", he said, "has a connotation of [being] unicausal": T 1095.

1093 He referred back to the deceased's wish to give Nicholas some land to run horses and to tax advice received by Michael and Adele regarding the company, and then to the developer interest: T 1095.

1094 Dr Mantziaris also referred to concerns expressed by Barbara to Michael about aged care. However that appears to have occurred after the agency agreement was signed by Michael which occurred on 13 March 2019.

1095 I think it is fair to say that once the deceased had to use the expression of Dr Mantziaris "set off the chain" (T 1095) with the subdivision of Gostwyck Flats the likely compelling factor was the tax advice that had been received which according to Dr Mantziaris was that "basically ... if you start the process, you've got to continue to get the assets out of the company": T 1094.

1096 This accords at least in part with the evidence of Mr Smart who appears to have been concerned that there may be tax consequences arising from the operation of Division 7A loan. He stated if monies were not repaid by the "end of ... June of the following year of the transaction that happened, the tax department can view that as a deemed dividend to the shareholder": T 538.

1097 I refer below (issue 13) to some of Mr Smart's evidence regarding the accounting treatment of the Gostwyck Sold transaction.

1098 It appears from a file note of a family meeting on 11 October 2019 prepared by Mr Smart that that at least some advice regarding tax issues had been given by Mr Smart to Michael and Adele in February 2018, almost certainly in relation to Gostwyck Flats: CB 3/117

1099 On about 5 March 2019 the deceased and Barbara visited Michael and Adele at Rossdale. They informed them that they were going to see Mr Meredith and needed to update their wills.

1100 Michael's version of the conversation is as follows (CB 2.1/291[290]):

Dad: *"It's the same as the other will. The company goes to you. The house and mum's side goes to Philippa".*

Mum: *"We need to get Dad right out of the Company. Can you find out how to do it? If either of us needs to go into aged care at Closebourne we're assessed on a third of our combined assets".*

Dad: *"We have to get my name out of the Company."*

Me: *"Righto. I'll find out. I'll talk to Alisdair [sic]."*

1101 Adele's version is virtually identical: CB 2.1/195[193].

1102 On 11 March 2019 the deceased and Barbara met with Mr Meredith to review their wills. The file note of Mr Meredith records regarding "Testator" (CB 3/86.9):

"Shares in GA &RG Horne to Michael

Balance to Barbara

Residue to Philippa"

1103 The file note further records under the broad general heading of "Family Provision Orders" seemingly that Mr Meredith raised with the deceased and Barbara the prospect of family provision claims and noted:

"Aware that Michael is getting more than Philippa but important to them that the farm land goes to him. Philippa got to purchase house at Lorn from them at lower end of valuation and will get substantial cash gifts from estate.

Considering giving Nicholas the Gostwyck Property out of the Co – Nick to pay any CGT"

1104 In late March early April 2019 Barbara telephoned Michael and they had a conversation in which Barbara asked Michael how he was getting on with getting the deceased out of the company and Michael indicated that they had

not had a chance to look into it yet (as they had been flat out dealing with the damage to the Greenhouse): CB 2.1/292.

1105 On 21 March 2019 at 3:17 PM Mr Meredith telephoned Michael and had a conversation. Much of the discussion still focused upon his parents' concerns regarding Gostwyck Remnant.

1106 Relevantly regarding Rossdale the file note also records "Michael also said he may have a purchaser of the Vacy property", to which Barbara's response is recorded as being "OK" (exhibit P7-2). Barbara in cross-examination said she could not recall the conversation and thinks it is unlikely that it took place. However, I find that Barbara responded as indicted in the file note.

1107 In early April 2019 the deceased and Barbara visited Michael and Adele at Rossdale noting they had completed their Wills: CB 2.1/291.

1108 On 5 April 2019 the deceased made his Will giving the shares in the company to Michael with a gift over to Adele, Nicholas and Danika: CB 3/94.

1109 On 8 April 2019 there was a Directors' meeting of the company at which the deceased and Michael present and the deceased as chair of the meeting tabled a power of attorney for the company: CB 2.1/291-292: CB 3/97.6, 98.

1110 I note that the power of attorney contained a limitation that the attorney was not authorised to "transfer; lease; license... or [act on] any other dealing affecting; the real property owned by the Company": CB 3/97.8, 101.

1111 On or about 12 June 2019 Michael and Adele typed up a note about arrangements for Danika that they had been wanting to talk to his parents about: CB 2.1/293; 3/104. Adele informed Michael a few days later that the deceased had dropped in and she had given him the note.

1112 On a date which is seemingly 18 June 2019 Michael and Adele prepared a typed note headed "Succession Plans": CB 2.1/293; 3/105. The note addresses in part an update regarding Nicholas and Gostwyck Remnant.

1113 However, the note also records the following regarding Rossdale:

"About 9 months ago we found out that a developer was looking to buy the property and would approach us in the near future.

We decided to be prepared and explore what we should do about it when that happened. We had it valued and set down with Bruce (financial advisor) and Alastair so that we are well informed before any decisions are made.

If this were to happen, Alastair advised us that any lump sum of money given to you (Mum & Dad) would adversely affect your situation. But, we can pay bills for you ie Rates, electricity car rego etc. This should make your life easier.

There would be enough for us to slow down and have a life, free up our time so we can visit friends and family more than we do now.

We would still have to bring in some income (part-time) until we are 60.

We feel it would be in everyones [sic] best interests to look seriously at selling Rossdale when the offer is made. We can do the above and make all our lives a lot easier.”

1114 The note does not in its terms indicate that an agency agreement had been signed with Mr Lidbury: CB 3/105.

1115 On 1 July 2019 Michael and Adele met with his parents at Closebourne and provided to them the “Succession Plans” document: CB 2.1/197, 293.

1116 The discussions deposed to by Michael and Adele do not in their terms indicate that either of them told the deceased or Barbara that an agency agreement had been signed with Mr Lidbury: CB 2.1/197-199, 293-295.

1117 Indeed towards the end of the meeting Michael and Adele indicate that Michael told the deceased and Barbara that selling Rossdale and putting the company into Michael’s name would stop the possibility of people contesting Wills and property settlements from marriage split ups.

1118 Michael’s version records (and Adele’s version is virtually identical): CB 2.1/199, 295:

“Dad: What agent are you using?

Me: Greg Lidbury because he’s sold a couple of big properties in the area.

Dad: I know Greg and his wife Cindy. They go to church. I think Greg would be the right person to sell it.

Me: I don’t want to put a heap of signs up or anything. I just want to test the waters and see what interest is out there.

Mum: If we need to go into age care we don’t want to have a fire sale so testing the waters is a good thing.”

1119 There is contest about the date for listing of Rossdale.

1120 Barbara emphasised that the deceased was “extremely hurt” (T 655) and “absolutely furious” (T 682) in finding out about the sale of Rossdale. They

were “terribly, terribly shocked” that they did not know anything about the property being put on the market: T 705. Barbara regarded it as being “a very deceitful matter”: T 706: see also T 707, T 709, T 736. Even though Barbara acknowledged that Rosssdale had not been sold the mere fact that it had been advertised, without their knowledge, was upsetting for her: T 724.

1121 Barbara was cross-examined about the fact that Michael had given the deceased the document “Succession Plan” dated 18 June 2019 (CB 3/105) and by having a conversation about it Michael and Adele were letting them know that there was developer interest in Rosssdale: T 714-719. Barbara accepted at least that Michael and Adele had made them aware that there was developer interest “in the area, not specifically interested in Rosssdale” T 719.

1122 Barbara accepted that at least Michael was telling them that they should be prepared (for developer interest) in the future: T 719. Barbara seemingly accepted that Michael was making reference to the effects of any lump sum of money that will be given to (the deceased and Barbara) from the potential sale of Rosssdale: T 721.

1123 Barbara also accepted that Michael and Adele by the document were giving their recommendation to them about what the company should do when the developer made the offer (to buy) Rosssdale: T 722.

1124 Michael indicates he instructed Mr Lidbury to list Rosssdale for sale and that occurred on 5 July 2019: CB 2.1/295.

1125 On or about 8 July 2019 he says that Barbara telephoned him and informed him that they become aware that Rosssdale was for sale via information passed on initially from a truck driver: CB 2.1/296.

1126 Barbara indicated that once the deceased found out about the sale the deceased was agreeable to Rosssdale being sold and for Michael and Adele to “have and do what they like with Rosssdale” if the deceased was given some monetary consideration which I have referred to above: T 729.

1127 A considerable amount of effort in the case was directed to addressing when Rosssdale was in fact listed and when Michael and/or Adele had informed his parents of the listing.

1128 As noted above, I accept Michael's evidence (CB 2.1/295) as to the date of the listing of Rossdale as being on or about 5 July 2019.

1129 However, I find that Michael had not told the deceased prior to 8 July 2019 that he had either signed the agency agreement with Mr Lidbury in March 2019 or arranged for the listing of Rossdale for sale on 5 July 2019.

1130 On 10 July 2019 a sale instructions document was prepared relating to Rossdale which seemingly contains a sticker note also referring to the WALs: CB 3/111.4A.

1131 On 11 October 2019 there was a meeting as between Mr Smart, the deceased, Barbara and Nicholas. This appears to have been to address some issues in relation to Nicholas and Lot 5: CB 3/117.

1132 On 22 October 2019 there was a meeting in which Michael and Adele went to Closebourne.

1133 I set out above some of the details regarding that. What was discussed and the understanding of the deceased and Barbara regarding the October 2019 Agreement was the subject of dispute in the proceedings.

1134 In the afternoon of 22 October 2019 at 3:20PM Mr Meredith received a telephone call from Barbara. Mr Meredith's file note of the telephone call records relevantly that Barbara stated "Met with Michael. All good" and that he suggested they seek advice: exhibit P7-3; CB 3/142.1; T 822.

1135 It is clear at this point that Philippa intervened in the matter. I do not propose to go deeply into her involvement.

1136 Clearly Philippa and Hamish acted in a manner to attempt to slow down or stop the process of the sale of Rossdale.

1137 On 28 October 2019 Michael in a state of upset prepared a typed letter to his parents. He delivered it delivered it to Barbara at Morpeth: CB 2.1/300. The letter addresses a number of matters. Without being exhaustive it relevantly notes and/or asserts the following in giving his version of events to that point:

"I have spent the last 25 plus years, most of my working life, on both properties and I think I improved them on the promise they will be mine one day"

"I have NO savings, I still owe money and I have NO super because I have put everything I have been into this land on a promise"

"This whole process started a few years ago when dad came to me and asked me to find out how to subdivide some land off so Nic could build a house..."

"I looked into it and found out what we could do and came back to you to discuss it"

"Then the two of you came to me and told me about the aged care issues ... saying to me 'We have to get Dads [sic] name out of the company, find out how to do that..."

"I found out the ways we could do it. Before I came to you with the options, I looked into them all. It was a very, very big decision, not only financially, but emotionally even to suggest that to sell Rossdale was the best option for everyone concerned"

"Throughout all of this, I have sort [sic] professional advi[c]e to get the best result for everyone and not adversely effect [sic] anyone"

"I feel that I have done nothing wrong..." (CB 3/148)

1138 The deceased's response on 30 (October) 2019 (CB 3/170.2-170.3 and MFI 1) gave expression to his views and intentions at that stage regarding Rossdale (and Gostwyck Flats).

1139 The full version of the letter is set out below:

"Over the last two weeks things are getting out of hand and it isn't my idea to change anything that was discussed in the past. I am confident in Jim Meredith and alastair Smarts professional services.

I have always said michael and adele to have the ex dairy known as "Rossdale" for Michael to do whatever he wished to do with it.

We didn't know that "Rossdale" was going to be sold although when I found out I thought it a good idea and was happy for Michael to manage the sale.

I have the running of Gostwyck Flats and when Nicholas had his horse business at Rossdale and he ran out of room at Rossdale and thought it a good idea for him to take his horse business to Gostwyck Flats and for him to build horse yards and areas and whatever else he needed there. Michael agreed to let him do that.

Because of the downturn in horse sales and horse education of horses he had to get further employment driving trucks. [Gostwyck Flats area 89.2 Ha or 220.4 acres].

To be fair to his sister Danika I was happy for her to sell her area of Gostwyck Flats [Lot 6 64 Ha or 158 acres].

Now that Rossdale and Tillimby are to be sold the inheritance to our 3 grandchildren is very unequal so could we consider giving these children a small portion of the sale (when it happens) to them. These 3 children have been very good to us and helped us do many things.

After the wind storm at the old share farmers house was blown down and michael and I decided to pull the rest of the house down as it was too old to rebuild it.

Michael bore the cost of getting rid of the old house

- removal of old house \$14,300
- Other demolition fees \$14,500
- Dump fees \$2,500

Total \$31,300

Michael paid for this out of his own "pocket". Michael's sheds that were damaged were paid for by the insurance company.

We didn't know that "Rossdale" was to be sold but found out later.

Most of what is happening with Philippa I do not understand it - it is over my head. I Think in all of these legal matters if it is kept simple it is the best for everyone concerned. Philippa has got Thompson Madden to act for her (why I don't know) so I hope I haven't to pay for these people.

Much is being said about me going to a nursing home when the time comes - I think it is better to wait and see what happens.

I think it is better to get my name out of the company - (GA & RG Horn Pty Ltd) as soon as possible.

In my opinion Michael has not done anything wrong - he has accounts to pay and he has paid for them out of his hard earned [sic] money.

Ross G Horn

30/11/19"

1140 I note the following regarding the letter:

- (1) the deceased expressed his confidence in Mr Meredith and Mr Smart as professional advisers;
- (2) the deceased emphasised that he had always regarded Rossdale as Michael's to do whatever he wished with;
- (3) although the deceased did not know that Rossdale was going to be sold when he found out he considered it a good idea and was happy for Michael to manage the sale;
- (4) he recognised that Michael had earlier in the year expended monies consequent upon the wind storm damage to the Sharefarmers cottage;
- (5) he did not at that stage understand Philippa's involvement in matters, rather he wanted to keep things simple and not have to pay for the expense of Philippa's engagement of legal representatives; and
- (6) he concluded that "[i]n my opinion Michael has not done anything wrong..." - being is very likely a reference back to the assertion in Michael's letter dated 28 October 2019.

1141 Particularly in light of the 30 (October) 2019 handwritten letter of the deceased I find that the deceased was by 30 October 2019 well apprised of what was happening in relation to the potential sale of Rossdale.

1142 By the time of the 14 February 2020 meeting the deceased note suggests not that he had considered that Michael had done anything irretrievably wrong regarding Rossdale but rather that he might need and would like to be considered for some financial benefit from the benefit of the proposed sale (CB 3/195 – 196; 220 – 221; MFI 1) in the concluding part of the note:

“This proposed sale is in different circumstances as at near 90 years of age I am facing declining health so would like to be considered in some financial benefit.”

1143 Clearly the flurry of activity associated with Philippa and Hamish’s involvement from at least 28 October 2019 until 14 February 2020 resulted in some variability of the deceased’s conduct regarding sale of Rossdale.

1144 However, I am not satisfied that the deceased as at 14 February 2020 and persisting to his death regarded Michael as having acted in any impermissible way in relation to the proposed sale of Rossdale so as to disable Michael from the relief sought in relation to the claimed shares (or claimed property).

Issue 12 - Are the plaintiffs guilty of unclean hands so as to preclude equitable relief?

1145 The material aspects of the unclean hands defence (CB 1/150-151[112]; 176-178[112] is alleged to be conduct of the plaintiffs as follows (**unclean hands conduct**):

- (1) breach of the alleged obligation to pay director’s remuneration to the deceased as agreed or at all as a condition of any transfer of Rossdale and/or Gostwyck Flats to the plaintiffs;
- (2) active concealment and failure of the plaintiffs to disclose the proposed sale of Rossdale to the deceased;
- (3) failure to disclose the creation of the DFT said to hold the assets of Michael including the sale proceeds of Gostwyck Sold, transferred without the authority or knowledge of the deceased and the company;
- (4) failure to disclose to the deceased the purchase of Failford, being a purchase funded through assets of the company;
- (5) taking out a mortgage over Gostwyck Flats without the deceased and/or the company’s knowledge and approval; and

- (6) the undertaking of legal and financial decision-making by the plaintiffs in relation to Rossdale, Gostwyck Flats and the company without disclosure to, or consultation with, or with the authority of the deceased.

1146 The defendants plead that the unclean hands conduct had an immediate and necessary relation to the equity sued for and was underpinned by impropriety in both illegal and/or moral sense so as to preclude equitable relief: CB 1/150-151[112],[113]; 176-178[112],[113].

1147 I have noted above that an unclean hands defence is applicable to equitable relief but does not apply to declaratory relief. I further noted that there are instances where this Court has recognised that the maxim may be used as a defence against a party seeking equitable relief based on estoppel (e.g. *Official Trustee in Bankruptcy v Tooheys Ltd* supra; *Hypac v Mead* supra).

1148 It was not suggested on behalf of the plaintiffs that conceptually the defendants could not rely upon the unclean hands defence but rather that factually speaking there was no basis for the defence.

1149 In the above circumstances, I will proceed on the basis that conceptually such a defence may be raised to address the plaintiffs' claims.

Payment obligation

1150 As to payment of the remuneration (issue 4) I have found that:

- (1) at least from 1993 there was a condition of payment regarding Rossdale;
- (2) there was no essentiality of the payment arrangements such that anything falling short of the payment matters referred to in the June 1993 discussions would preclude the estoppel case;
- (3) Michael and Adele did not completely and meticulously pay to the company or otherwise to the deceased sums of \$500 for each of the properties from 1993 and 2000 respectively; and
- (4) the deceased from at least 2000 did not insist on strict payment and by 2010 did not require payment of the \$500 amounts for each property.

1151 Contrary to the plaintiffs' submissions, I accept that the alleged unclean hands conduct would have had an immediate and necessary relation to the equity sued for if the payment obligations had been essential.

1152 However, in light of my findings, that the payment was not “essential” and that the deceased did not ultimately require such payment, I reject the submission that this aspect of the unclean hands defence precludes equitable relief.

Alleged concealment of the proposed sale of Rossdale

1153 In relation to the proposed sale of Rossdale (issue 11) I have found that:

- (1) in about early, mid and late February 2019 Michael and Adele had a number of discussions with the deceased regarding interest of a developer in purchasing Rossdale;
- (2) by late February 2019 Michael and Adele had raised with the deceased at least the prospect of developer interest in Rossdale and the possibility of putting an agent “probably Greg Lidbury” in place for Rossdale;
- (3) Michael had not told the deceased prior to 8 July 2019 that he had either signed the agency agreement with Mr Lidbury in March 2019 or arranged for the listing of Rossdale for sale on 5 July 2019;
- (4) I am not satisfied that the deceased as at 14 February 2020 and persisting to his death regarded Michael as having acted in any impermissible way in relation to the proposed sale of Rossdale so as to disable Michael from the relief sought in relation to the claimed property and claimed shares

1154 I reject the submission that this aspect of the alleged unclean hands conduct precludes equitable relief in favour of Michael or the plaintiffs.

Alleged non-disclosure of the DFT and use of Gostwyck Sold proceeds

1155 In relation to Gostwyck Flats I have found that:

- (1) the deceased instigated the issue of subdividing Gostwyck Flats and by 14 February 2020:
 - (a) the deceased’s main priority was for Nicholas to be given Lot 5 of Gostwyck Flats;
 - (b) the deceased was aware and not particularly happy that Danika’s “section of Gostwyck Flats” had been sold and she had not received the money for it but he was aware that the proceeds had been put into a trust and she was happy with that investment and he accepted her wishes.
- (2) in light of Michael and Adele’s detrimental reliance upon the deceased’s earlier promises in relation to Gostwyck Flats, the deceased was not entitled at September 2017 to require a subdivision of Gostwyck Flats nor require Michael to act in a way to ensure that Nicholas received Lot 5 or Danika received the net proceeds of sale of Lot 6.

- (3) Michael and Adele from 2017, without being obliged to, acted in ways to accommodate the deceased's wishes regarding Nicholas and Danika and that as 14 February 2020 and persisting to his death the deceased did not regard Michael as having acted impermissibly in relation to Gostwyck Flats.

1156 I reject the submission that this aspect of the alleged unclean hands conduct precludes equitable relief in favour of Michael or the plaintiffs.

Alleged nondisclosure of purchase of Failure through company assets

1157 The findings I have made regarding the deceased's awareness of the DFT in relation to Danika and acceptance of her decision regarding that as per the note the deceased prepared for the 14 February 2020 meeting disposes of the alleged nondisclosure of the DFT as unclean hands conduct precluding equitable relief in favour of Michael or the plaintiffs.

1158 My findings below dealing with issue 13 address the use of Gostwyck Sold proceeds and in particular the \$817,417 amount.

1159 Whilst I accept that it was not until 12 February 2019 at the earliest that the deceased became aware of the purchase of Failford per se, I find that the deceased gifted the proceeds of sale of Lot 6 and in particular the \$817,417 amount to Michael.

1160 I reject the submission that the part of the unclean hands defence alleging failure to disclose to the deceased the purchase of Failford being funded through assets of the company precludes equitable relief in favour of Michael or the plaintiffs.

Mortgage in relation to the Gostwyck Flats.

1161 I find that in July 2010 Michael and Adele had a conversation with the deceased substantially in the terms of the conversation Michael alleges (CB 2.1/273[224]) indicating that the interest on the cattle mortgage was burdensome and he would seek to get a mortgage on one of the properties to give the deceased some monies

1162 Adele had typed up a letter with Michael which they gave to the deceased: CB 2.1/179.

1163 It is evident from the deceased's own handwriting that on or about 25 July 2010 when the deceased visited Michael at Rossdale and gave him the letter dated 25 July 2010: CB 2.1/179; CB 3/22 and MFI 1, the deceased was aware of the possibility of mortgage and to the extent that he was required to authorise it the deceased did so by expressing to Michael in the letter "in writing so we both know what we are talking about and don't get things mixed up" that "If you have to mortgage the properties - only mortgage one not both".

1164 I reject the submission that this aspect of the alleged unclean hands conduct precludes equitable relief in favour of Michael or the plaintiffs.

Alleged undertaking of legal and financial decision-making without disclosure to, consultation with or the authority of the deceased

1165 The findings that I have made in relation to Rossdale, Gostwyck Flats and Michael's dealings with those properties through the company and the deceased's contemporaneous or subsequent awareness and approval of them, suffices to dispose of this part of the defence. I deal with the \$817,417 amount below.

1166 I reject the submission that this aspect of the alleged unclean hands conduct precludes equitable relief in favour of Michael or the plaintiffs.

Issue 13 - Was a loan of \$817,417 made to the deceased and then gifted to Michael or the plaintiffs (issue 13)?

1167 On the final day of the hearing, I raised with the counsel for the parties questions regarding the sum of \$817,417 amount connected with the purchase of Failford: T 1073.

1168 I indicated in the course of the parties' closing submissions that it would not seem right to me that in the event that I found that the plaintiffs' case was made out and the deceased's shares were held on trust for Michael and Adele that they should by reason of those shares have access to the claimed property and in addition a debt owed by the deceased to the company: T 1074.

1169 I made a direction for the provision of particular submissions in relation to this as follows:

"Direct the parties to provide limited written submissions... addressing the question of the relief sought by the plaintiffs and in particular, in respect of the

sum of \$817,417 connected with the purchase of (Failford) and how it is said that the loan amounts recorded in the accounts of the company and Damah as trustee for the DFT (following the purchase of Failford to date) impact the claim for a declaration that the deceased's shares in the company are held on trust and whether it is said that the deceased or his estate owes funds to the company".

1170 The defendants submit that a finding of fact is essential in relation to the issue of the "so-called company loan": DSSR [3]. I agree and make findings below.

Submissions

1171 The plaintiffs submit (PCR page 33/59; PSSR [6]) regarding the \$817,417 amount that:

- (1) it is recorded in the 2019 company financial statements as a non-current asset and as an 'associated loan' to the deceased: CB 4/759-760;
- (2) in the 2019 Damah financial statements, \$833,643 is recorded under "Current Liabilities" (CB 4/736.4) and more specifically, \$817,417 is recorded as an 'associated loan', to Michael and Adele: CB 4/736.7;
- (3) in the Damah Financial Statements, the proceeds of Gostwyck Sold were recorded as a loan, originally to the "company (Ross)" and then to Michael the next year: CB 4/798; and
- (4) Mr Smart gave evidence that the reason it was recorded as such, was because the loan was both to his understanding and for tax purposes 'gifted' to Michael: T 541.36-50 (Day 6).

1172 I pause to note in relation to the submission that the Damah accounts record the amount as an associated loan to Michael and Adele (PCR page 33/59; PSSR [6]), that is not actually what the accounts state. Rather it is recorded as a loan from Michael and Adele: CB 4/736.7 when read with 736.6 and 736.4.

1173 The defendants submit that:

- (1) the plaintiffs bear the onus of proving the existence of a loan: DSSR [10] citing *Coshott v Sakic* (1998) 44 NSWLR 667 at 671;
- (2) the plaintiffs have failed to discharge the onus of proving the existence of a loan as there is no evidence of (DSSR [10], [11]):
 - (a) a written loan agreement between the company and the deceased,
 - (b) any company resolutions in relation to such a sizeable sum from the company to the deceased,
 - (c) the deceased receiving the monies referred to, and
 - (d) the deceased paying or allocating funds to Michael and Adele;

- (3) the Court should doubt the existence of the alleged loan to the deceased, submitting that the Court cannot be satisfied the deceased even received the monies referred to: DSSR [10].
- (4) none of the witnesses for the plaintiffs were able to shed any light on the provenance of the alleged loan other than it has been recorded in the company financial records as "as ultimately conferring a benefit on the partnership": DSSR [12] citing T 394 – 395 (Michael).

1174 The defendants submit that the evidence before the Court demonstrates that no monies were ever paid, provided or received by the deceased and that very little weight can be placed on the financial records of the company recording the alleged loan as a book entry by the company's then accountant after the deceased's death (DSSR [16]) and that the Court should find that (DSSR [12]):

- (1) the deceased did not receive the \$817,417 amount;
- (2) no loan existed between the deceased and the company nor that any such money should be repaid; and
- (3) only Michael and Adele received the benefit of the \$817,417 amount.

1175 The defendants submit to proceed otherwise involves impermissible speculation: DSSR [15].

Principles regarding loans, book entries and gifts

Loans and book entries

1176 A loan is ordinarily understood to be an advance of money coupled with a contract for its repayment: *Papas v Co* [2018] NSWSC 1404 per Hallen J at [399] citing *Potter v Potter* [2003] 3 NZLR 145 at [13]. The intention of the parties to such a loan, usually, is that ownership in the funds passes to the borrower and the lender is left with an *in personam* right, secured or unsecured, of repayment: *Papas v Co* at [399] citing *Ying v Song* [2010] NSWSC 1500 at [32].

1177 Statutory provisions may extend the concept of a loan beyond that understood under the general law. For example, the provisions of Div 7A of Pt III *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) defines "loan" for the purposes of Div 7A as including not only an advance of money but also: a provision of credit or any other form of financial accommodation; a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and a transaction (whatever

its terms or form) which in substance effects a loan of money: s107D(3) 1936 Act.

1178 Division 7A expands the operation of s 44(1) 1936 Act, which provides that the assessable income of a shareholder in a company includes dividends paid to him by the company: *Di Lorenzo Ceramics Pty Ltd v Federal Commissioner of Taxation* (2007) 161 FCR 198; [2007] FCA 1006 (**Di Lorenzo**) per Lindgren J at [3].

1179 The party asserting a loan bears the onus of proving that the payment of monies should be characterised as a loan or in some way other than as a gift: *Heydon v Perpetual Executors Trustees & Agency Co (WA) Ltd* (1930) 45 CLR 111 at 113; [1930] HCA 26; *Coshott v Sakic* at 671E; *Voce v Deloraine* [2012] NSWSC 1187 (**Voce v Deloraine**) per Lindsay J at [12]; *Steiner v Strang* [2016] NSWSC 395 (**Steiner v Strang**) per Slattery J at [113]-[114]. That onus is not discharged by mere proof of the payment itself: *Schmierer v Taouk* [2004] NSWSC 345; (2004) 207 ALR 301 per White J at [59].

1180 A payment of money may be made by the making of a journal entry in books of account where there is agreement by the relevant parties that payment be made by that means: *Manzi v Smith* (1975) 132 CLR 671; [1975] HCA 35 (**Manzi v Smith**) at 674 per Barwick CJ (Mason J agreeing) referring to *Eyles v Ellis* (1827) 4 Bing 112; 130 ER 710; *Re Harmony and Montague Tin and Copper Mining Company (Spargo's Case)* (1873) 8 Ch App 407; *Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd* (2011) 32 VR 539; [2011] VSCA 167 per Tate JA at [27] (Ashley and Neave JJA agreeing at [1]-[2]).

1181 Often a journal entry is simply a short-hand for money or a cheque being handed across the table and money or a cheque being handed back: *In the matter of York Street Mezzanine Pty Ltd (in liq)* (2007) 162 FCR 358; [2007] FCA 922 per Finkelstein J at 366 [26].

1182 Conversely, a payment of money (purportedly) made by the making of a journal entry in books of account without reference to, or without the agreement of, the persons said to be the recipients of the money or the appropriate parties is

ineffective to establish a debt or any payment of money in discharge of such debt: *Manzi v Smith* at 674.

1183 Sometimes an agreement may be inferred between related companies to make payment by book entries: *De Vries v Timbercorp Finance Pty Ltd (in liq)* [2021] VSCA 265 (**De Vries**) at [52] referring to *P'Auer AG v Polybuild Technologies International Pty Ltd* [2015] VSCA 42 per Whelan JA [9]–[11] (with whom Ferguson and Kaye JJA agreed) citing *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* [2009] FCA 499 (Adnunat) per Sundberg J at [39].

1184 In *Adnunat* (citations omitted) Sundberg J at [39] stated:

“A contract may in certain circumstances be inferred from conduct, even where no offer and acceptance can be identified ... However the existence or otherwise of an enforceable agreement depends ultimately on the manifest intention of the parties, objectively ascertained ... Where mutual promises are sought to be inferred, the conduct relied upon must, on an objective assessment, evince a tacit agreement with sufficiently clear terms. It is not enough that the conduct is *consistent* with what are alleged to be the terms of a binding agreement. The evidence must positively indicate that both parties considered themselves bound by that agreement ...”

1185 In *De Vries* the indicia giving rise to an inferred agreement between related companies to make payment by book entries included the fact that the companies were or part of a wholly-owned group, they shared common directors, the group business was operated through a single bank account, the companies' accounts were all the subject of declarations by directors under the *Corporations Act* stating that they gave a true and fair view of the financial position of the entity in question, and like (similar) directions were made by independent auditors: at [55].

1186 Further, a loan may arise where it is within the scope of the authority of an accountant to characterise a payment as a loan: *Di Lorenzo* at [75].

1187 I note in *Di Lorenzo* (a Div 7A case) a loan was found on the basis of such a characterisation in circumstances (at [74]) where:

- (1) none of the directors or members of the relevant companies gave close attention to the legal character that the payments made by company A on account of the liabilities of a trustee company (being a trustee of a unit trust) was to bear;

- (2) there was no evidence of an express agreement that those amounts were to represent either a loan or a subscription for additional units (no one suggested that they were intended to be a gift);
- (3) there was no agreement that the amounts were to be repaid by a particular date; and
- (4) there was no agreement that any particular number of additional units was to be issued.

1188 The directors were content to leave the proper characterisation of the payments to the accountant as he saw fit and to prepare the company's and the Unit Trust's financial statements and tax returns accordingly: *Di Lorenzo* at [74].

1189 Lindgren J noted that evidence of an express instruction in the form of reference to a loan to the trustee company written against entries in company A's bank statements that were provided by a director to the accountant could be regarded as her acquiescence in the course that the accountant was already taking: *Di Lorenzo* at [74].

Gifts

1190 There is a presumption that a parent who provides moneys to a child (including adult children) has advanced the money as a gift: e.g. *Calverley v Green* (1984) 155 CLR 242; [1984] HCA 81.

1191 In family or domestic transactions there is always a preliminary issue for the party seeking to challenge a payment as to whether it is accompanied by any intention to create or affect legal relations: *Voce v Deloraine* at [19]-[25].

1192 It is no longer presumed that in domestic transactions the parties do not intend to create legal relations. The modern principle is that the issue is one of onus of proof for the plaintiff, who must prove that there was an intention to create legal relations: *Steiner v Strang* at [117]; *Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95 at 105-106; [2002] HCA 8 (joint judgment of Gaudron, McHugh, Hayne and Callinan JJ).

1193 A payee cannot, by subsequently describing an advance in language consistent with a loan, alter the status of the advance if it was in fact a gift, although the payee can gift (or forgive) monies that were originally the subject of a loan: see e.g. Sackar J in *Kemi v Wood* [2013] NSWSC 180.

1194 Generally, once moneys are gifted they cannot be recalled. As was said in *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400 (cited by Pembroke J in *Ballenden v Bryant (No 2)* [2013] NSWSC 454 at [19]; *Ballenden v Bryant* [2012] NSWSC 1471 at [22]):

“Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor”.

The deceased’s awareness of the sale of Lot 6

1195 There is evidence which I accept indicating that the deceased was involved in and informed about arrangements regarding the sale of Lot 6. I note as follows:

- (1) On or about 4 December 2017 Michael and Adele went to Lorn to speak with his parents regarding subdividing Gostwyck Flats and prepared a typewritten note and Michael says that his parents were agreeable to them moving forward with such a proposal: CB 2.1/279.
- (2) On 18 April 2018 Michael emailed Mr Meredith noting that Mr Smart had indicated that the monies from the sale were to go into an NAB bank account in the name of the company (account number not reproduced) and to be transferred to a trust account so that it was clear what had happened: CB 3/64.1
- (3) On or about 24 April 2018 Michael and Adele went to Lorn to speak with his parents further about subdividing Gostwyck Flats. They had prepared another note titled "Succession Plan Update 24/4/2018" which they took to the meeting. Part of the discussion according to Michael involved trust arrangements including a proposal to set up a trust for Danika. He says his father was informed about this and generally agreeable to it: CB 2.1/281 – 283.
- (4) On 17 May 2018 the deceased signed a contract for sale of the then proposed Lot 6 in unregistered plan (Gostwyck Sold) on behalf the company as vendor: CB 3/66.10, 66.12. The settlement date was to be advised in due course: CB 3/66.13.
- (5) On 21 June 2018 Mr Killingly prepared a statement of financial planning advice for the deceased and Barbara: CB 3/76.1. The plan was discussed with the deceased and Barbara on that day at 2PM: CB 76.43. The assets which are ascribed to the deceased in that financial plan do not include any component for monies being lent out of the company to the deceased as an asset: CB 76.9. However, by that stage the contract for sale of proposed Lot 6 had been entered and it was known that monies would come into the company from that sale. The monies if lent out to the deceased would have been considered to be an

asset of the deceased unless he thought he (the deceased) had no claim on them because Michael had a claim on them.

- (6) In August-September 2018 Adele provided the deceased and Barbara with note “Background of Gostwyck Flats Split up” which included reference to the fact that there had been discussions with a solicitor and accountant (in context Mr Meredith and Mr Smart): CB 2.1/191[177], 3/77. The note recorded:

- (a) in relation to Lot 6

“It was decided to sell and invest the money in another asset owned by the family trust. This will be decided in discussion with accountant and financial planners to get the best possible outcome.

Nobody gets any money from the sale of this.

This trust and its assets will become Danikas share of Gostwyck flats” [CB 3/77];

- (b) the advice regarding the “family trust” had effectively come from Mr Meredith and that Mr Smart:

“also agrees with this advi[c]e plus not to leave large amounts of money in accounts for too long as [it] will be heavily taxed” [CB 3/77].

- (7) On 6 December 2018 Mr Meredith sent a letter to Michael and the deceased care of the company regarding the proposed settlement of the sale of Lot 6 providing settlement figures: CB 3/83.10. The letter:

- (a) stated in part:

“Please ensure that you are in agreement with the calculations and let me know if you disagree or are uncertain about any of the figures.

On settlement we should receive the ‘Amount Due on Settlement’ ...”.

- (b) enclosed Mr Meredith’s account and a copy of the trust matter ledger and noted:

“I note this account will be paid from settlement monies as *agreed*” (my emphasis)

Please contact me to discuss anything which may be of concern to you”.

1196 One version of the proposed settlement adjustment sheet envisaged that there would be a bank cheque in favour of the NAB on the account of the company for \$796,767.23: CB 3/68, 75. A later version provided on or about 6 December 2018 does not contain those cheque details: CB 3/83.12.

Records and evidence regarding the \$817,417 amount

- 1197 The company financial statements record the \$817,417 amount as an associated loan to the deceased on the one hand and a non-current asset of the company on the other hand in both the financial statements for the years ended 30 June 2019 (CB 4/759–760) and for the year ended 30 June 2020: CB 4/788, 789.
- 1198 The financial accounts for the company for the year ended 30 June 2019 were signed by Michael and Adele as directors of the company on 13 July 2020: CB 4/761.
- 1199 The company's tax return for the financial year ended 30 June 2019 is said by the defendants to have been lodged on 1 June 2021: DSSR [17] footnote 8. It is not clear that that date otherwise appears from the evidence.
- 1200 The financial statements of Damah atf DFT record a loan from "M&A Horne" (i.e. Michael and Adele) as a loan to Damah and a liability of the company as trustee for each of the financial years ended 30 June 2019 (CB 4/736.4, 736.6, 736.7) and 30 June 2020: CB 4/795, 797, 798.
- 1201 On or about 10 December 2018 the sale of Gostwyck Sold for \$840,000 was completed: CB 2.1/243-244.
- 1202 On 11 December 2018 the company received into its NAB account the sum of \$796,767.23 being part of the proceeds of sale of Gostwyck Sold: exhibit P2. The company also received the sum of \$21,000 (seemingly referable to some part of the deposit monies). The company then paid out of its account \$796,417.23: exhibit P2.
- 1203 On 11 December 2018 Damah received into its NAB account the sum of \$796,417.23. On the same day amount of \$75,000 was paid out seemingly in repayment of a loan): exhibit P1 page 18. Although it is not precisely clear it is possible that these monies were paid to Michael and Adele in repayment of the funding that they had earlier provided.
- 1204 On 12 December 2018 the company paid out of its account a further sum of \$21,000: exhibit P2.
- 1205 On 12 December 2018 (exhibit P1 page 18), Damah:

- (1) received into its NAB account the sum of \$21,000;
- (2) paid out of its NAB account an amount of \$15,000, it appears to Michael for costs associated with a machinery shed;
- (3) paid out of its NAB account an amount of \$663,869.49 (and some other associated funds) being a payment in apparent connection with completion of the purchase of Failford.

1206 On 12 December 2018 Damah completed the purchase of Failford. Taking into account the deposit and adjustments, the amount due on settlement was \$836,683.11: CB 2.1/244: exhibit P1 page 22.

1207 Michael gives evidence that from the proceeds of sale of \$840,000, the company received \$817,417 which was transferred to the deceased and gifted by the deceased to him: CB 2.1/244[94]. As Michael understands it "this method of transferring the Gostwyck Fund to me gave a taxation advantage relating to capital gains tax to the company": CB 2.1/244[94].

1208 Barbara in response to Michael's evidence deposed as follows (CB 416[114]):

"..I do not agree with this paragraph. Ross would have told me about this. Ross would have asked to keep some of these funds so that he could use to contribute to our living expenses. Ross did not have any meetings with Alasdair Smart, the Company's former accountant."

1209 Barbara's evidence was limited under s 136 *Evidence Act* to her belief: T 40.

1210 Philippa responded to this part of Michael's evidence (CB 386[156]), but following objection her response was not read: T 39 .

1211 Hamish in response to Michael's evidence deposed as follows (CB 342-343[198]):

"The funds were not transferred to Papa at all and instead were transferred directly to Danmah Family Trust, a company controlled by Michael and Adele. As Papa did not receive the money, he also did not transfer any money to Michael. Michael's claim to there being some tax advantage relating to capital gains by structuring these transactions in this way is false as Gostwyck Flats was purchased before 20 September 1985 and, therefore, the Company is not liable to pay capital gains tax on the sale of the property. Even if the Company was liable to pay tax because of the sale of Lot 5, the Company loaning money to a director does not overcome or avoid that tax liability".

1212 The passage up to the point "Adele" was admitted and the balance (from "As papa did not receive" to the end) was limited under s 136 *Evidence Act* as comment: T 35.

1213 On 12 February 2019 Michael and Adele prepared the typewritten note (CB 3/86) in part set out above with the intention of explaining to his parents the purchase of Failford by Damah: CB 2.1/290.

1214 On 24 January 2020, Mr Smart sent an email to Mr Meredith in the following terms (CB 3/202.1)

“Hello Jim

Welcome back! Hope you enjoyed your break.

I was just talking to Michael a few minutes ago and he asked that I send the following to you for your consideration.

As I see things the company property at Vacy needs to be sold in its entirety and the proceeds from the sale go into a bank account in the company name ie real estate asset converted to cash asset. A pre CGT capital dividend would be paid to the ordinary shareholders ie Ross Horn - I do not believe there are any tax implications for Ross receiving this money. Once in Ross's possession I believe the cash would be transferred to Michael Horn as a gift (NOT a loan) and the cash used for the benefit of Michael at his discretion. My understanding is you feel a document needs to be drafted to evidence Ross' wish to do that - I agree this is a very good especially given all that has preceded this.

Also I think you know this but in case you do not Michael & Adele Horn reside on this Vacy property in a house owned by them personally but on land owned by the company - there is considerable shedding & yards etc that fall into this category too.

Finally, the remainder of the Gostwyk Flats property that is earmarked for the benefit of Nick Horn needs to be transferred to some entity other than GA & RG Horn Pty Ltd - GA & RG Horn Pty Ltd must be wound up at the earliest opportunity once real estate assets have been disposed of or transferred.

I suggest a registered liquidator be used to wind up GA & RG Horn Pty Ltd when the time comes

I hope this helps. If any questions please let me know.

Regards”

Cross-examination

1215 Michael was cross-examined regarding the sum of \$817,417 in Damah's accounts as at 30 June 2020: CB 4/798; T 395. He asserted that the monies had been gifted to him: T395–396. However, he also stated that he gave it to the trust: T395–397.

1216 Despite rigorous cross-examination, Michael was consistently adamant that the \$817,417 amount had been gifted from his father to him and that it went into

the DFT. The Damah financial records in describing the amount as “Loan – M & A Horn” suggest that it was lent by Michael and Adele to the DFT.

1217 Mr Smart was cross-examined regarding the \$817,417 amount recorded in the 2019 financial statements of the company as an “associated loan”: T 537-538.

1218 He explained his understanding of what was supposed to happen as follows (T 538):

“A. ... all the assets that were in the company were to be transferred. So, the two Gostwyck Flats properties were to go to the, to the two grandchildren, and the other property was to go to Michael. That was all happening in the one - if that all happens in the one year they, when the sale happens in the company it's pre capital gains tax as well. When it comes out of the company, so long as it's done, preferably, before 30 June of the following year by the registered liquidator to the shareholder that retains its pre capital gains tax status”.

and:

“...If you, once you start this process in taking one property out you must continue the whole thing otherwise you end up with these loan account issues, which is a very sensitive area with the tax department”.

1219 Mr Smart did not know whether there was any loan agreement prepared between the deceased and the company: T 539. However, he gave advice regarding the transactions before the purchase of Failford (i.e. before May 2018): T 539.

1220 It was put to Mr Smart that no resolution was passed in relation to the “so-called loan agreement” with the deceased. He said (T 539):

“There wouldn't have been because it was that his, his wishes were the ones that were being fulfilled. So, there was no reason to doubt what was, what he wished to have happen. So, this was the starting point.”

1221 It was then put to him that an amount of \$817,000 is a sizeable sum of money not to have a directors resolution about it (T540). Mr Smart said:

“Yeah, if, if you're doing everything under great scrutiny then of course you would put that in place. But, if there's trust and belief this is what needs to happen it's, and it was only going to be for a very short period of time, which was, which is what it was supposed to be in this particular case, then it not, is probably not necessary for, for that to happen.”

1222 Mr Smart emphasised that in a perfect world and if the matters were under scrutiny there would have been recorded a loan agreement and resolutions but “when there was trust and belief this is what had to happen then not necessarily so”: T 540.

1223 Mr Smart indicated that it was not supposed to be a Division 7A loan (at the time) but had become a Division 7A loan “now”: T 540.

1224 He disputed that there would need to be recorded payments of interest in the first year of the loan. However, because he was no longer the accountant for the company he did not know whether there were records regarding interest: T 541.

1225 Critically, Mr Smart was then referred to the \$817,417 amount in the accounts of Damah as trustee for the DFT for the 2020 financial year: CB 4/798.

1226 Mr Smart indicated that it reflected a gift between the deceased and Michael. The cross examination included the following (T541):

“A. That is the same figure and it’s a gift between Ross Horn and Michael Horn, that’s why it’s there.

Q. What records did you retain that such a sizeable sum of money was a gift from Ross to Michael Horn?

A. I don’t have any records to that effect, it was an understanding.”

1227 It is then put to Mr Smart that it was never a gift and did not stand up to close scrutiny. Mr Smart responded (T 542):

“A. Why that is what that is there is because Ross had aspirations of getting a pension if he possibly could. So, if he has assets sitting and things, that, that, that doesn’t bode well from that regard, but it was also an understanding that the reason behind the trust is to try and protect Danika, basically, should she - and I think you’re aware of the reasons behind why this was set up, to protect Danika should she have a family law breakdown or something like that. Reflecting it like a gift was like a sensible way to reflect it for Ross and also a sensible way to reflect the loan account here.

The reason it shows as a loan account in here rather than as capital, is if ever that property was to be sold or anything sold in that trust, taxwise, it could be very difficult to get all that money back out again. So, if you have the loan, a loan can be repaid. If the loan doesn’t exist and you wanted - and she wanted to get that money out at some future point, that could cause - it could’ve created a very large tax bill for her..”

1228 In re-examination Mr Smart gave evidence regarding the accounting treatment of the Gostwyck Sold transaction and he stated as follows:

“A. Yeah, yes, thank you. Because it was Ross and Barbara’s wish to make a nice gesture to Nicholas, the transaction, as I understand it, that happened with Danika was like a secondary transaction. Their immediate wish was to help Nicholas in his equine business. To transfer, whether it was to the property that was in - ultimately became Danika’s in that Danmah Trust or that property that was ultimately supposed to go to Nicholas, you’re actually taking

an asset that's owned by the company and you're transferring that asset to another person. But, the company is not getting - under normal circumstances when that happens, someone gets a piece of land and then the company gets some cash that comes back into it after that.

In this particular case, there was to be no cash to come back into it, because there was no cash to come into it. So, what was to happen was, within relatively close succession, both properties that were in the Gostwyck Flats were to be transferred to either Nicholas or potentially his trust or Danika, to the trust and at the same time, the property that was Rossdale would then be transferred to Michael, as per what the original wishes were and stuff like that. In both so doing, you've transferred all the assets out of the company, you haven't replaced it with anything.

What you have replaced it with is a pre-capital gains tax reserve account and when you have a pre-capital gains tax reserve account and a registered liquidator liquidates the company, those pre-capital gains tax assets that - because the company has paid no tax on it, they flow through to the shareholder. Not to Danika, not to Nicholas, but to the shareholder and the shareholder is Ross and that's why Ross' name is reflected in there as well. *Plus the fact that Ross wanted this transaction to happen as well.* But, because of Ross having the shares and only having the shares and an entitlement to receive this sort of dividend assets on wind up, that's why Ross' name was there. So, you can't start this process and then change your mind partway through, you must - once you've decided this is what you're doing, you must continue on or if you don't, you end up with a division 7A loan issue" [T 557]. (my emphasis)

1229 Mr Smart's evidence continued (T 557-558):

"A. Effectively, Ross, but it doesn't physically have to go to Ross, but effectively it channels through Ross so that all the other assets came out of there, Ross' loan account would be an enormous figure because it'll be all transferred out at market value, but as soon as the liquidation was to happen, a capital gains tax distribution would be made to Ross and that extinguishes that liability.

Q. How many steps were there in this sequence of transactions until they reached their end?

A. It's literally all they had to do was, Nicholas, out, Danika, out, Michael, out. That's it and they're stopped.

HIS HONOUR

Q. But the company is not wound up?

A. That's what I'm saying. It needed to be wound up though to extinguish all his loan accounts. They're all supposed to happen.

Q. But the company hasn't been wound up.

A. My understanding was they're all supposed to happen in quite close succession, but that didn't happen. There was a, a stumbling block with Nicholas and that's where everything stopped at that point."

1230 Barbara was also cross-examined about the sale proceeds from Gostwyck Sold (T 752) and her evidence was as follows:

“Q. Then that money came back into the company; is that right?

A. Well, we don't know because a, a wall of silence came up then, so, or Ross wasn't, Ross was asking how much they got for - you know, how much they got for Danika's section and we were never told. I wouldn't be able to tell you.

Q. Was it your understanding that that money was going to go to Danika in one form or another; is that right?

A. Yeah, well, that's what we understood, that it was to go to Danika and, you know, she could decide herself what to do with it on proviso that Nick was treated the same way and the other half of Gostwyck Flats was to go to him.”

1231 A bit later Barbara said (T 753):

“Q. You were going to get legal advice and financial advice about the best way to go about it; is that right?

A. Well, Michael and Adele went ahead with that. We didn't know anything about it. All I can remember is around about the, in, end of October coming into November Ross was saying, “I don't know when I'll be told how much they got for Danika's section,” and it was just a wall of silence then. We didn't know anything. Well, then the next part was Nick coming to us and asking us when can he take possession of it. Well, we have a letter from I think it was Jim Meredith quoting that the Dungog Shire could, you know, was, had passed the subdivision or were going to pass the subdivision on 31 October and Nick was anxious to get horses he had on agistment, you know, onto it.”

Determination

1232 Ideally such an important transaction as the \$817,417 amount would have been more appropriately documented.

1233 Further, regrettably none of the affidavit evidence nor the testimonial evidence during the hearing descended to elucidating the actual conversations that occurred as between Michael and the deceased on one hand and the deceased and Mr Smart on the other hand.

1234 Thus, I am left to decide the matter without evidence of actual conversations but with documentary materials in the company and DFT accounts, the evidence by Michael in his affidavit, and the responses by Michael and Mr Smart in testimonial evidence during the hearing.

1235 The 2019 and 2020 company financial statements record the \$817,417 amount as a loan to the deceased. Each of Mr Smart and Michael asserted that the deceased gifted the monies to Michael. Despite testing of them in cross-examination, they did not waver from that characterisation.

- 1236 Whilst it is prudent to document gifts of very large amounts of money, to avoid disputes, it is not unknown for large amounts to be gifted without any documented “gift” description. In *Steiner v Strang*, Slattery J accepted that a cheque for \$1,227,941, without accompanying documentation, was paid as a gift despite a serious dispute on the facts.
- 1237 Consequent upon the deceased’s idea to benefit Nicholas and Danika with a division of Gostwyck Flats between them, Mr Smart gave advice to Michael and Adele. The advice was to the effect that once any property was to be transferred out of the company that process would need to continue, to avoid adverse tax consequences: T 538-539, 557.
- 1238 The informality of documenting the \$817,417 amount (as a loan to the deceased, a gift to Michael and then a loan to the DFT) is explained by a number of matters raised by Mr Smart.
- 1239 First, he had advised that if the transactions were effected within a year in the sense of all the property being transferred out of the company and the company wound up, no Division 7A loan was intended by him to arise and there was no need for documentation: T 538-540.
- 1240 Secondly, there was no need for documentation because there was “trust” as between the deceased and Michael and initially there was no scrutiny from other family members: T 540.
- 1241 Thirdly, the deceased had aspirations of getting the pension “if he possibly could” (T 542) and was not keen on having “assets sitting” (in his name): T 542.
- 1242 This last point has some resonance with the 18 June 2019 “Succession Plans” document which records (albeit in the context of Rossdale) that Mr Smart advised Michael and Adele that any lump sum of money given to the deceased and Barbara would adversely affect their situation: CB 3/105, 108.
- 1243 It is true that the evidence discloses that the proceeds of sale of Gostwyck Sold was received into the company’s bank account (CB 3/84) and then transferred from the company’s bank account to Damah: CB 4/722.1. However the fact that

a book entry is made recording a loan and that the deceased did not "in his hands" receive funds does not necessarily mean that there was no loan.

1244 Whilst it is not in ideal form, I accept the evidence of Michael and Mr Smart that there was a loan and gift and find that the loan and gift was consequent upon an agreement and understanding between Michael and the deceased.

1245 I accept that Mr Smart within the scope of his authority made the relevant entries in the accounts, which accounts Michael (and Adele) subsequently verified by declarations.

1246 That accords with his evidence (which I accept) that at least whilst the deceased was alive the deceased routinely provided bank statements for the company to Mr Smart or his staff and that the firm then prepared the company's financial statements and tax returns based on the bank statements and instructions from the deceased as to how to treat the transactions contained in the bank statements: affidavit 10 September 2022 [6]. However, I note in context, I understand Mr Smart's evidence in this regard to relate at least up to the time that the company bank accounts were closed off (whether it be in 2010 or 2012).

1247 Whilst I have accepted the evidence of Michael and Mr Smart there was a gift, in any event there is very arguably a presumption of advancement regarding the \$817,417 amount as between the deceased and Michael. The evidence does not rebut any such presumption. Further, I note that what they say regarding the loan and gift is somewhat consistent with what Mr Smart proposed to Mr Meredith regarding the potential sale of Rossdale in the email dated 24 January 2020 which I have set out above.

1248 In that email Mr Smart addressed the potential sale of Rossdale (in the email described as the "Vacy property") and proposed that the proceeds of sale go into the company's bank account with a dividend being paid to the deceased and the monies once in the deceased's possession would be transferred to Michael "as a gift (NOT a loan)" and then used by Michael at his discretion.

1249 The email whilst not evidence of a gift in relation to the proceeds of sale of Lot 6, does indicate that a similar sort of arrangement was subsequently proposed in relation to Rossdale.

1250 In finding that the deceased gifted the monies back to Michael on or about 11 December 2018, I do not suggest that the deceased *then* knew Michael would be using the proceeds gifted back in order to on-lend the monies to Damah to complete the purchase of Failford on 12 December 2018: CB 2.1/244; exhibit P1 page 22.

1251 The evidence suggests that it is not before 12 February 2019 when Michael and Adele prepared the typewritten note (CB 3/86) with the intention of explaining to his parents the purchase of Failford by Damah (CB 2.1/290) that the deceased became aware of the purchase of Failford.

1252 Rather, I find that on or prior to 11 December 2018 the deceased knew that the sale of Lot 6 had been completed or was due to complete on 10 December 2018 and had discussed with Michael that monies to come into the company would be lent out to the deceased and would be gifted by the deceased to Michael. It is not necessary to find that the deceased knew precisely what Michael would do with the monies.

1253 There is one curious piece of evidence suggestive that the deceased had not earlier gifted the proceeds of sale of Lot 6 to Michael. That is the proposed special resolution (b) in the Notice of EGM prepared with the input of Philippa and Hamish on or about 6 January 2020 and signed by the deceased: CB 190-191. The proposed resolution was in the following terms (CB 3/190):

“The proceeds of the sale of Lot 6 of the ‘Gostwyck Flats’ property be transferred to Danika Horn by 30th June 2020”.

1254 As I have earlier stated I have serious doubts that the deceased understood the contents of the Notice of EGM and in particular those proposed resolutions. To the extent that the Notice of EGM suggests the deceased had not by that stage discussed with Michael the gifting back to him of the proceeds of sale of Lot 6 I find that he did not know what he was signing.

1255 Even if I am incorrect regarding accepting the evidence of Michael and Mr Smart of a loan and a gift coupled with the 2019 and 2020 accounts of both the

company and the DFT, and the proper inference is that there was discussion about the matter but no close attention paid by the deceased and Michael regarding the arrangements, nonetheless there would be an alternative argument supporting the validity of the transactions.

1256 The argument being that Michael and the deceased were content to leave the characterisation of the transactions to Mr Smart in the manner described by Lindgren J in *Di Lorenzo*. Namely, they as directors left it to Mr Smart as the company's and Damah's accountant to characterise the payments as he saw fit and to prepare the company's and the Damah's financial statements and tax returns accordingly: *Di Lorenzo* at [74]

1257 In summary, on balance I accept:

- (1) the informality regarding the \$817,417 amount is explained in the manner described by Mr Smart; and
- (2) the evidence of Michael and Mr Smart coupled with the 2019 and 2020 accounts of both the company and the DFT establish that the \$817,417 amount was a loan from the company to the deceased, a gift from the deceased to Michael and a loan from Michael to the DFT.

Issue 14 - If the estoppel case succeeds what remedy is appropriate and in particular what order ought be made regarding the \$817,417 amount (issue 14)?

The estoppel claim

1258 I find that the elements of the plaintiffs' estoppel case are made out.

1259 In the case of proprietary estoppel it is not necessary to mould the relief to reflect the minimum equity necessary to remove the detriment, provided that the relief granted is not out of all proportion to the detriment suffered: [165] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

1260 This case was essentially fought as one of absolutes in outcome.

1261 The plaintiffs for their part sought the claimed shares and did not provide any mathematical calculations regarding detriment suffered nor seriously contend for or venture any other outcome other than receipt of the claimed shares (or alternatively the claimed property).

1262 The defendants for their part sought dismissal of the claim, and did not provide any mathematical calculations regarding detriment suffered nor seriously contend for or venture any other outcome other than such dismissal.

1263 In light of the way the case was fought I do not propose to address relief other than by reference to the \$817,417 amount and claimed shares,

1264 Subject to noting Michael's acceptance that if he obtains relief regarding the claimed shares, he should not be permitted to also enforce a claim against the estate in respect of the \$817,417 amount (see PSSR[5]), it seems to me that the appropriate relief is for a declaration that Barbara as administratrix holds the claimed shares on trust for Michael.

1265 I do not regard that outcome in those circumstances as being "disproportionate" or "out of all proportion" to the detriment suffered.

1266 However, there are a number of issues that bear upon the particular relief to be given. I address these below.

Date on which trust arises

1267 The issue as to the time from which a constructive trust arises, where a claim in proprietary estoppel has been made out, was not the subject of specific submissions.

1268 Leaving aside cases where the intervention of third party interests might need to be considered, Equity recognises in an estoppel context that the relevant constructive trust comes into existence from the time the conduct which gives rise to the trust occurs, namely, when the plaintiff acts in reliance on the promise or expectation such that it later became unconscionable or unconscientious for the promisor or the inducer of the expectation to resile from it: *E Co [a pseudonym] v Q [a pseudonym] (No 4)* [2019] NSWSC 429 (***E Co v Q***) at [607]-[615] (especially [615]) per Ward CJ in Eq (as her Honour then was) citing inter alia *McNab v Graham* (2017) 53 VR 311; [2017] VSCA 352 (***McNab v Graham***) per Tate JA at [107].

1269 On occasion, the intervention of third party interests might lead to a different conclusion: *E Co v Q* at [615] citing *Parsons v Bain* (2001) 109 FCR 120;

[2001] FCA 376 per Black CJ, Kiefel J, has her Honour then was, and Finkelstein J at [15].

1270 Such dating it is not a matter of a Court engaging in ‘backdating’ the trust arbitrarily. Rather, it is a matter of the Court declaring, as with all applications of the maxim *nunc pro tunc*, the appropriate date on which that which ought to have been done is to be regarded as having been done. Once so declared, the effect of the maxim is that it *was* done at that time: *McNab v Graham* at [109]; *E Co v Q* at [608].

Specific orders sought

1271 The PSSR submissions confirm that the primary relief sought by the plaintiffs is an order in relation to the claimed shares: PSSR[2].

1272 Specifically, the relief sought by the plaintiffs is:

- (1) an order that Barbara (as administrator of the estate) transfer all shares held in the company to the plaintiffs as joint tenants within 14 days;
- (2) an order empowering the Registrar of the Court to execute the necessary documents for the transfer should Barbara fail to do so;
- (3) a declaration that the estate holds the shares in the company on a constructive trust for the plaintiffs as joint tenants, pending the transfer;
- (4) an order that the estate pay any duty assessed on the transfer of the shares; and
- (5) a declaration addressing the outstanding company loan to the deceased.

1273 Further relief was sought by the plaintiffs being (**further relief**): an order preserving the company's ownership of the claimed property pending the transfer of the shares to the plaintiff (**ancillary relief**) (PSSR [3]); relief regarding the \$817,417 amount being a *nunc pro tunc* declaration (PSSR [7]); orders relieving the plaintiffs of liability for any duty payable on a share transfer (PSSR [17]) as well as a notation regarding the value of the shares: PSSR [18].

1274 The defendants submit that there are four options available to the Court, if it considers that relief should be granted to either or both plaintiffs, namely (DSSR[4]):

- (1) the shareholdings in the Company are transferred pursuant to the Succession Act to Michael less the value of the shares in the sum of \$817,417;
- (2) a declaration transferring the shares to either or both of the plaintiffs less the value of the shares in the sum of \$817,417;
- (3) the shares are transferred, and the Court makes no further orders/notations as contemplated by the plaintiffs; and
- (4) an order be made charging Rossdale and Gostwyck Flats with a subsequent order that the proceedings be directed to the Registrar for submissions and evidence as the value of such a charge.

1275 In addition to the above, the defendants oppose the proposals suggested by the plaintiffs for further relief: DSSR [5].

1276 The defendants refer to the joint reasons of French CJ, Kiefel, Bell and Keane JJ in *Sidhu v Van Dyck* at [84]-[85] noted above. The defendants submit the aim of proprietary estoppel as a detriment based remedy has not been accepted in Australia. Rather the authorities suggest that it is more a concept of proportionality when considering the totality of the circumstances between the parties stating "that is sensibly informed by the maxim of the 'minimum equity to do justice'": DSSR [7].

1277 The defendants cite the decision of the United Kingdom Supreme Court in *Guest v Guest* [2022] UKSC 27 (a farm proprietary estoppel decision) at [74] – [80] emphasising the need to give due proportion to the notion of proportionality: DSSR [8].

1278 The defendants submit that if the Court considers that any of the plaintiffs proposals regarding "windfall gains flowing from the company loan" are incapable of being cured by any terms or conditions upon relief that the proceeding should be dismissed: DSSR [48].

Relief as between Michael and Adele

1279 The promise of the transfer of the shares was a promise to transfer the shares to Michael only at least whilst he was still alive. I find that the claimed shares are held on trust for Michael not for Michael and Adele as joint tenants.

The WALs

1280 Mr Simpson submitted that there is no evidence before the Court of any representations being made by the deceased in relation to the water access licenses and that accordingly that aspect of the claim must fail: DCS[44]. That per se is true. However the water access licenses are property held by the company.

1281 I find that the essential promise of the deceased was in substance a promise to leave the claimed shares to Michael and effectively give him control of the company which held the claimed property. That in a sense is really borne out by the consistent provisions of the deceased Wills gifting his shares to Michael up until the last Will.

1282 The finding that the deceased was estopped from gifting his shares other than to Michael and to the extent necessary imposing a trust over the shares, will in a practical sense enable him to have control over the company and to the extent that it is appropriate the property which is held by the company which includes the WALs.

The \$817,417 loan

1283 The plaintiffs accept that should they obtain equitable relief in the form of a transfer to them of the company shares that they should not be permitted to also enforce a claim against the estate of the deceased in respect of the "director's loan" recorded in the company accounts: PSSR [5].

Signing of transfer

1284 The plaintiffs seek an order empowering the Registrar of the Court to execute the necessary documents for the transfer should Barbara fail to do so.

1285 The Court has power in the event that a person does not comply with an order directing the person to execute any conveyance, contract or other document to order that such document be executed by "such person as the court may nominate for that purpose": s 94(1)(a) CPA.

1286 If any such order is made it is common practice of the Court to appoint the Registrar of the Court to be "such person": e.g. *Hill v Dunn* [2019] NSWSC 419 at [53]-[55].

1287 If such an order is made the instrument executed operates for all purposes as if it had been executed by the person originally directed to execute it: s 94(2) CPA.

1288 Historically the practice of the Court is that orders should not be made under this section merely because of an anticipated refusal to execute a document: e.g. *Savage v Norton* [1908] 1 Ch 290 at 297 per Parker J.

1289 However, it has been recognised that if the circumstances demonstrate the probable futility of any proper request the Court will condition the orders with an “alternative execution” provision to allow for that eventuality: *Commonwealth Bank of Australia v Gaszewski* [2006] NSWSC 772 per Brereton at [14].

1290 I propose that the parties bring in short minutes of order to give effect to my reasons. There are no orders yet requiring any transfer of shares. There is no evidence before me of any anticipated refusal on the part of the defendants to comply with any appropriate orders of the Court let alone evidence of any probable futility of any proper request to sign any transfer document.

1291 It is premature to address any such relief at this point and I do not propose in these reasons to pre-empt any such scenario of a refusal for the defendants to properly comply with any orders of the Court.

Ancillary relief

1292 Further ancillary relief is sought being an order preserving the company's ownership of the claimed property pending the transfer of the shares to the plaintiff (**ancillary relief**): PSSR [3]. It was suggested that this could take the form of an order preventing any alienation of the company's property pending transfer: PSSR [3].

1293 The defendants submit that there is no sound reason for the ancillary relief in respect of the WAL's in circumstances where there is no evidence before the Court of any representations that a separate proprietary interest was to be granted to either of the plaintiffs: DSSR [30]–[31].

1294 There is no suggestion that anybody on the part of the defendants proposes to alienate shares and I do not propose to make any order at this point of time in the nature of the so-called ancillary relief.

Nunc pro tunc declaration

1295 The plaintiffs propose that the Court make a declaration to the following effect:

“A declaration *nunc pro tunc* that the first and second plaintiffs be the debtors to the first defendant in respect of the debt otherwise owed by Ross George Horn to the first defendant in the amount of \$817,417, as recorded on the Financial Statements of the first defendant for the Financial Year Ended 30 June 2019.”

1296 The plaintiffs submit that such an order removes the ability of the plaintiffs to enforce any obligation created by the loan against the estate and allows the plaintiffs to address any taxation obligations arising from the loan whether in respect of their personal taxation or in respect of the company: PSSR [8].

1297 It is said that the order is appropriate in the factual circumstances of the case and will align the position recorded in the company’s 2019 financial statements for the position recorded in the financial statements of Damah: PSSR [9].

1298 The defendants submit that if the Court were to find the deceased received a benefit from the so-called loan there is no explanation for how conceptually in a Court declaration "that the plaintiffs are debtors on the alleged loan" could impact the tax position: DSSR [17]. I note the plaintiffs are not said to be debtors in respect of the alleged loan.

1299 The defendants submit that:

- (1) Division 7A of Pt III 1936 Act operates to create a tax liability on the recipient (being the deceased and then his estate on his passing) by way of deemed dividend, submitting that it is both unfranked and unfrankable: DSSR [17].
- (2) The liability arises on and from "the trigger date" being the earlier of the company's tax return lodgement or due date for lodgement for the year in which the advance occurred, if no compliant loan agreement is in place: ss 109C, 109CA and 109D 1936 Act: DSSR [17].
- (3) Even if there was an oral loan agreement, it would not satisfy the requirements of s 109N of the 1936 Act such that s 109L is not enlivened: DSSR [17] footnote 8.
- (4) A *nunc pro tunc* order does not alter that tax position: DSSR [17].
- (5) If a *nunc pro tunc* order were to be made the Commission of Taxation would need to be heard on the matter and that no such declaration should be granted: DSSR [18], [20].

1300 Further the defendants submit that to allow the plaintiffs to retain the benefit of the purported loan amount and receive a transfer of shares would extend beyond the minimum equity required for the parties and result in the plaintiffs receiving a windfall gain which should not be countenanced: DSSR [19] citing *Ancient Order of Foresters in Victoria Friendly Society Ltd v Life Plan Australia Friendly Society Ltd* (2018) 265 CLR 1; [2018] HCA 43 at [92] and [94] per Gageler J.

1301 I am not prepared to make any *nunc pro tunc* order. It does not accord with the facts as I have found them.

1302 The financial statements show the \$817,417 amount was recorded as a loan to the deceased (and as such is an asset of the company). I have accepted that the deceased gifted that amount to Michael, and that Michael lent the money to Damah as trustee of the DFT, albeit that the records of Damah record the sum as a liability payable to Michael and Adele.

Duty liability

1303 Under Chapter 2 *Duties Act 1997* (NSW) (**Duties Act**) duty is charged on “a transfer of dutiable property”: s 8(1)(a) Duties Act. Duty is also charged on certain identified transactions which include an agreement for transfer of dutiable property, a declaration of trust over dutiable property and a vesting of dutiable property: s 8(1)(b).

1304 Such a transfer or transaction is a “dutiable transaction” for the purposes of the Duties Act: s 8(2) Duties Act.

1305 “Dutiable property” includes shares in a NSW company: s 11(1)(d)(i) *Duties Act*. Such shares are defined as being “marketable securities”: Dictionary, Duties Act. On and from 1 July 2016, marketable securities are not dutiable property (despite s 11): s 34(1) Duties Act.

1306 Nonetheless, landholder duty is charged by Ch 4 Duties Act on certain transactions which are not “dutiable transactions”.

1307 The plaintiffs in their PSSR address various potential duties issues and in particular whether there is any applicable exemption from landholder duty.

1308 In relation to liability for any duty payable on the share transfer, the plaintiffs submit that the transfer of shares in a "land rich" company will now, most likely attract NSW Landholder Duty: PSSR [10]. The submission is made on the assumption that the plaintiffs, or at least Michael, will be successful in the proceedings.

1309 The plaintiffs submit:

- (1) that but for the deceased's resiling from his promise of transferring the shares to Michael any transfer of the shares to him or to Michael and Adele would have fallen within the scope of a revenue exemption: PSSR [10];
- (2) any inter vivos intergenerational transfer of shares in the company from the deceased to Michael (or Michael and Adele) would have attracted an exemption from stamp duty pursuant to ss 163A(1)(e) and 274 Duties Act: PSSR [12];
- (3) such an intergenerational transfer is no longer possible because Barbara is deemed to be the "person directing" the company as transferor and the entitlement "as shareholders to not less than 25% of the assets of the company... that existed for at least three years before the date of the transfer" as required by s 274(4A)(d)(iii)(A) Duties Act cannot be satisfied: PSSR [13].
- (4) alternatively any transfer of shares to Michael occurring under the 5 April 2019 and 21 August 2019 Wills would have qualified for exemption from transfer duty under s 63(1)(a)(i) of the Duties Act being "in conformity with the trusts contained in the will of the deceased person" and that such a transfer would have qualified for exemption from landholder duty under s 163A(1)(d) Duties Act if (relevantly) the interest was acquired solely as a result of the distribution of the estate of the deceased whether affected in the ordinary course of execution of the deceased's Will or pursuant to a family provision order under the Succession Act: PSSR [14].

1310 I note that s 63(1) Duties Act appears inapplicable as it only applies to a transfer of "dutable property" which no longer includes company shares, as I have noted above.

1311 Further, the exemption to landholder duty under s 163A(1)(d) Duties Act, at least by its terms, is not confined in being applicable to an interest acquired as a result of orders by made under the Succession Act. But it is unnecessary to form any concluded view about the proper construction of ss 63(1) and 163A(1)(d).

1312 The plaintiffs submit Michael and Adele should not bear any liability to duty or landholder duty under the *Duties Act* because the exemptions that otherwise should have been available are now no longer available due to the (terms of) last Will of the deceased and seek to be placed in the position they would have been in had there been an inter vivos transfer of the claimed shares or had the claimed shares passed to Michael under any Will of the deceased: PSSR [11], [17].

1313 The defendants:

- (1) oppose any relief that the estate pay duty assessed on the transfer of shares and declaration regarding the \$817,417 amount: DSSR [9];
- (2) dispute that the estate should be liable for any duty on a transfer of shares, contending that this is something that ought to have been addressed when the shares were proposed to be transmitted to Barbara: DSSR [21]; and
- (3) assert that on 29 January 2020 when the deceased requested copies of the company's financial statements (CB 3/208) no response was received and no statements were provided to the deceased or his estate and Barbara was not made aware of the existence of the alleged loan prior to the transmission of the shares: DSSR [22].

1314 The defendants submit that the estate should not be burdened with any duty impost (beyond the normal duty that applied to the transaction: s 63 *Duties Act*) in circumstances where the tax implications for any such transmission were not raised by the plaintiffs with the defendants prior to requests to consent to the transmission of shares to Barbara, which requests were not accepted until 26 February 2021: DSSR [23]/[24]; *In the matter of GA and RG Horn Pty Ltd* [2021] NSWSC 210 at [1].

1315 Four reasons are given for that, namely:

- (1) the uncalculated financial impost unfairly burdens the estate and will make it insolvent;
- (2) such financial impost causes an injustice to Barbara as the sole beneficiary of what remains in the estate;
- (3) if such financial impost causes the estate to be placed into insolvency it will cause an injustice to the ATO given that the relevant tax payable will be unrecoverable; and
- (4) the absence of liability on the plaintiffs does not result in the achievement of the minimum equity given the benefit that the plaintiffs have derived from the so-called loan: DSSR [25] – [28].

1316 The defendants whilst noting that they have made submissions to the effect that the family provision claim should be dismissed based on nondisclosure submit that the Court nonetheless is empowered to grant Michael relief under the *Succession Act* which would have the effect of ameliorating any tax implications raised in the PSSR that stem from an order declaring the trust by dint of ss 8 and 11 Duties Act: DSSR [35], [36a].

1317 The defendants submit that:

- (1) it was never contemplated between Michael and the deceased that Michael would receive the shares prior to death and accordingly the plaintiffs' submission regarding engagement of the intergenerational transfer exemption [PSSR [15]] is not engaged;
- (2) in any event if the shares were transferred by Barbara in her capacity as administrator of the estate then she would relevantly remain the "person directing" for the purposes of s 74(4A)(d)(iii)(A) Duties Act because the deceased until his death held at least 25% of the company shares for three years or longer and therefore ss 274(2)–(4) Duties Act would be satisfied in order to render Michael liable to only \$50 of duty in the ordinary course. If on the other hand Barbara was ordered to transfer the shares in her personal capacity she would not be a "person directing": DSSR [36b and fn 16];
- (3) if the Court were to fashion relief pursuant to the family provision claim under the *Succession Act* then Barbara's circumstances would need to be taken into account (proffering wording for *Succession Act* order): DSSR [38]–[39].

1318 The defendants submit that any declaration made (regarding the claimed shares) can be made on terms or subject to conditions either as a consequence of a positive finding of unclean hands or more generally as a consequence of the jurisdiction to make declaratory relief: DSSR [41].

1319 The defendants in such case submit that such a conditional order could be stated in the following terms (DSSR [42]):

First type of declaration:

"A declaration that the second defendant holds so many of the shares in the first defendant as is equal to the first defendant's value less \$817,417 forming a part of the estate of the late Ross George Horn of Unit 202, 365 Morpeth Road, Morpeth, New South Wales 2321, who died on 20 March 2021 (the deceased the shares, respectively) on trust for the first and/or second plaintiff(s)."

Second type of declaration:

“A declaration that the second defendant holds the shares in the first defendant forming a part of the estate of the late Ross George Horn of Unit 202, 365 Morpeth Road, Morpeth, New South Wales 2321, who died on 20 March 2021 (the deceased the shares, respectively) on trust for the first and/or second plaintiff(s), with such shares being charged in the amount of \$817,417 in favour of Barbara Horn in her capacity as administrator of the Estate.”

An order to implement either of the above:

“An order that the first and second defendant do all things necessary to transfer the shares, as limited in the above order, to the first and/or second plaintiff(s), including, but not limited to, obtaining a valuation to implement the limitation placed upon the transfer.”

1320 Finally, the defendants submit that:

- (1) as the plaintiffs were the sole parties behind the recording of the alleged loan with the sole record being in the company's financial statement signed after the deceased's death and being (allegedly) inconsistent with financial statements prepared whilst he lived, there is no reason why they should not be personally responsible for any tax implications which follow and accordingly a declaration that the claimed shares are held on trust could be made without any further intervention by the Court: DSSR [43]–[45];
- (2) the evidence regarding the alleged loan emerged in a surreptitious way on the evidence, referring to the evidence of Michael's cross-examination at T394–395: DSSR [44]; and
- (3) in the event that the Court is uncomfortable with any of the parties proposals it is available to the Court to charge the properties rather than the shares, to an amount determined by the Court, and that any such charge “can deliver the minimum equity” between the parties to cure any unconscionability said to have been caused by the final change to the deceased's Will: DSSR [46]–[47].

1321 The plaintiffs as noted above seek to be placed in the position they would have been in had there been an inter vivos transfer of the claimed shares or had the claimed shares passed to Michael under any Will of the deceased: PSSR [11], [17].

1322 Whilst I have found that the estoppel case regarding the claimed shares is made out, it is a somewhat different question to address any consequences arising from potential duty issues as sought in the PSSR [11], [17].

1323 First, no such relief was sought in the summons or amended statement of claim.

1324 Secondly, until the final day of the hearing when the \$817,417 amount issue was raised by me with the parties, no submissions had been made regarding

tax or duty consequences of it by either side in either opening or closing written submissions.

1325 Thirdly, no expert evidence has been adduced or addressed to the tax or duty consequences of the findings on \$817,417 amount issue.

1326 Fourthly, there is force in the defendant's submission that the tax implications of any transmission of issues was never raised between the parties in the proceedings.

1327 In this regard, numerous parties were involved in all of the events from September 2017 regarding the deceased's proposal to benefit Nicholas with the property of Gostwyck Flats.

1328 Whilst conceptually a close analysis might possibly reveal responsibility for decisions regarding informality and delays in implementing decisions or wishes which might impact upon duty or tax consequences, no cross examination was particularly addressed to the duty issues during the hearing.

1329 It seems to me that it would be unfair at this point to make orders or propose that relief should be conditioned in a way which may impact upon the position of the defendants or either of them, which proposed relief might have been affected by decisions in running the hearing by the defendants, if the issue had been squarely raised from the outset.

1330 Fifthly, whilst the defendants have raised the prospect of the duty issue being able to be addressed by family provision relief, the plaintiffs, as noted below under issue 15 conducted the proceedings on the basis that family provision relief was only alternative relief and made no submissions whatsoever regarding family provision relief.

1331 The plaintiffs and in particular Michael has accepted that should they obtain equitable relief in the form of the transfer to them of the claimed shares, they (or Michael) should not be permitted to also enforce a claim against the estate in respect of the \$817,417 amount: DSSR[5].

1332 In my assessment the relief given to Michael should be conditioned upon acceptance of that undertaking.

1333 Beyond that, having regard to the above-mentioned considerations, I do not propose to pre-empt what if any duty or tax liability may flow from my finding that the \$817,417 amount was a loan from the company to the deceased, a gift from the deceased to Michael and a loan from Michael to the DFT.

Notation regarding the value of the shares

1334 The plaintiffs submit that a transfer of the shares should proceed on the valuations of Rossdale and Gostwyck Flats put into evidence by the plaintiffs: CB 2.2/30–117. They say these valuations were expressly adopted by the defendants (T6.38) and for the avoidance of any future dispute, these valuations could be made the subject of a notation in the Court order: PSSR[18].

1335 The defendants dispute the necessity for notations to be made as to the values of the shares. Whilst they accepted the valuations of Rossdale and Gostwyck Flats, they submit that it is unlikely that the value of the shares is equal to that of the properties, as liabilities must be taken into account: DSSR [32].

1336 There is no evidence of up-to-date details for all the assets and liabilities of the company as distinct from the estate.

1337 Further, no submissions were made by the parties as to appropriate methods of valuation of the shares.

1338 In those circumstances, I do not propose to make any notations to be made as to the values of the shares.

Issue 15 - If the estoppel case fails, what if any family provision relief should be given?

1339 The family provision case was as I have noted above pleaded as alternative relief.

1340 I have found for the plaintiffs in relation to the estoppel case and on the face of it there is no need for me to address family provision relief.

1341 In any event family provision relief was never seriously pressed by the plaintiff. No family provision submissions were made by Dr Mantziaris in the POS or the POR.

- 1342 Significantly, at the conclusion of the hearing in the very detailed PCS (59 pages) no family provision submissions were made. Nor were any oral submissions made by the plaintiffs (transcript Day 12).
- 1343 Mr Simpson on behalf of the defendants' did in the DOS provide some submissions on the family provision claim: DOS[68]-[82].
- 1344 Those submissions were prefaced in the context in which it was observed that Michael had not included family provision submissions and accordingly the submissions made on behalf of the defendants were outlined only in "basic terms": DOS[68]-[82].
- 1345 Ultimately in closing submissions the defendants submitted that Michael's claim should be dismissed for lack of disclosure citing *Stone v Stone* [2019] NSWSC 233 and in the alternative submitted that if the claim was not dismissed only modest provision should be afforded to Michael in circumstances that recognised Barbara's position as surviving spouse and of her competing needs and circumstances: DCS [59]-[60].
- 1346 In the context of the supplementary submissions on remedy the defendants invited the court to consider potential making of orders under the Succession Act. However, as no submissions were made by the plaintiff in respect of the family provision claim and having regard to the fact that I have found in favour of the estoppel claim, I do not venture any view regarding possible relief regarding the family provision claim.

Referral of papers

- 1347 During the course of the hearing in light of cross-examination by Mr Simpson of Michael and Adele and subsequently of Mr Smart, the nature of the arrangements for payment to the deceased and the description of what was pleaded to be payment of "directors remuneration" (CB 1/67[71f], 68[75f]) with payments being made to the company described as "rent" or agistment" gave rise to a question as to whether for tax purposes the amounts which were being paid were being properly described.

Informing witnesses of rights

- 1348 The *Evidence Act* requires that if it appears to the Court that a witness or a party may have grounds for making an application or objection under a provision of Part 3.10, the Court must satisfy itself, that the witness or party is aware of the effect of that provision: s 132.
- 1349 Section 132 imposes an obligation on a trial judge to inform a witness or party that he or she may have grounds for making an objection to giving evidence. This provision operates to ensure fairness to the witness or party who has a basis for making an objection: *R v Ahmed* [2001] NSWCCA 450 per Bell J at [37] (Heydon JA and Dowd J at [1], [2] agreeing).
- 1350 The provisions of Part 3.10 encompass various privileges including legal advice privilege (s 118), litigation privilege (s 119) as well as privilege in respect of self-incrimination: s 128.
- 1351 Consistent with the obligation, I raised this issue with counsel and I gave “information” to each of Michael (T 176), Adele (T 462) and Mr Smart (T 529) in respect of privilege against self-incrimination during the course of their cross-examinations. Counsel did not seek to qualify the information I gave to Michael (T 180-181) which was in essence, repeated for the benefit of Adele and Mr Smart.
- 1352 Neither of Michael and Mr Smart sought to “object” to giving evidence in relation to the above-mentioned payments. For the most part Adele did not object although on an occasion did raise an objections (T 471). When she did, having made the assessment that there was a reasonable basis for the objection (which was not disputed by counsel), I indicated I required Adele to give the evidence but would nonetheless give a certificate to her in respect of the evidence given.
- 1353 Following the conclusion of the re-examination of Michael I raised with counsel that at some stage they might wish to give consideration as to whether any of the matters touched upon during the cross-examination of Michael (or later Adele and Mr Smart), to put it neutrally, raised a question as to whether the papers ought to be referred to the regulatory authorities specifically the Commissioner of Taxation. I did so at that point so that each counsel could

have some time to consider the matter and not be blindsided by a request at the end of the hearing: T 491.

Submissions

1354 Consistent with what I noted above each counsel addressed the matter in final submissions.

1355 Mr Simpson submitted that the papers in the proceedings should be referred to the ATO by reason of a prima facie breach of s 8K *Taxation Administration Act 1953* (Cth) (relating to commission of an offence by reason of making a statement to a taxation officer which is false or misleading in a material particular): DCS[38]-[39].

1356 He noted that the process of referral is an administrative function and not part of the judicial process: DCS[40]-[41] citing *Paycorp Payment Solutions Pty Ltd v Chai (No 3)* [2011] NSWSC 1632 (***Paycorp (No 3)***) at [4] and *Rafidi v Commonwealth Bank of Australia Ltd* [2017] NSWCA 96 at [16] – [18].

1357 Mr Simpson submitted that Mr Smart's response in cross-examination that stating there was a liability which did not exist constituted a false or misleading statement: DCS[42].

1358 Further Mr Simpson submitted that given the length of time that the statements have been occurring (said to be between 1995 to at least the deceased's death in 2020) that was the matter supporting referral: DCS[43].

1359 Mr Young made submissions. The submissions did not seek to address the evidence in the proceedings by reference to either instances of cases where a specified sum was identified as a deduction to the partnership and included as an amount of assessable income by the company or where amounts were recorded in the company's bank account (or books for that matter) without any necessary correlation to payment receipts for agistment or rent from the partnership paid to the deceased as director and characterised as deductible to the company and assessable to the director: PCS page 45/59.

1360 Mr Young's submissions in summary were as follows. For taxation purposes:

- (1) a deduction is permitted for any loss or outgoing in gaining or producing the taxpayer's assessable income, or necessarily incurred in carrying on

a business for the purpose of gaining or producing assessable income: s 8-1 *Income Tax Assessment Act 1997* (Cth);

- (2) a loss or outgoing is incurred in the course of gaining assessable income if it is "*incidental and relevant to that end*": see *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 56-57; [1949] HCA 15;
- (3) whether expenditure is "necessarily" incurred is for practical purposes for the business owner himself to consider as to what is necessary for carrying on his own business: *Ronpibon Tin* at 56; *Federal Commissioner of Taxation v Snowden & Wilson Pty Ltd* (1958) 99 CLR 431; [1958] HCA 23 per Fullagar J at 443-444;
- (4) for a loss or outgoing to be relevantly "incurred", there is no necessary requirement that the loss or outgoing be incurred under a contract or commercial dealings. Statutory obligations, for example land tax and licence fees can be allowable deductions, as can involuntary payments (*Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation* (1956) 95 CLR 344; [1956] HCA 77) or voluntary payments: *Federal Commissioner of Taxation v Dixon* (1952) 86 CLR 540; [1952] HCA 65;
- (5) the proper characterisation of an arrangement is not predicated or determined by the label or description that the parties put on it: see *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44 (Reference may also be made to *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd* [2022] NSWCA 82 at [76]-[79] to which I referred in *D Capital 2 Pty Ltd v Western (No 2)* [2022] NSWSC 1283 at [280]); and
- (6) what is an outgoing of capital and what is an outgoing on account of revenue depends upon what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process: *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 at 648; [1946] HCA 34 per Dixon J.

1361 Mr Young submitted that in relation to this case:

- (1) the deductibility of the amounts paid by the partnership is not determined by the attached labels of "agistment fees" or "rent" pursuant to a contract but rather whether the expenditure is incurred from the business owner's perspective himself, as necessary in the course of earning primary production income, in either an earlier or later income year, from a practical and business point of view, rather than any exact jurisprudential classification of legal rights: PCS page 47/59;
- (2) it mattered not from a taxation perspective whether the Rossdale Arrangement and Gostwyck Arrangement involved a payment in the context of subjective motive expressed in a family context, that post derivation by the company, amounts might be paid by the company, to the deceased as bonuses, gratuities, directors fee, wages and the like, if in fact Michael and Adele made the payment in the context of grazing

cattle and reasonably considered that necessary for carrying on of the partnership business: PCS pages 47-48/59; and

- (3) a collateral benefit to a family member does not detract from the conclusion the expenditure is "*necessarily incurred*", save and except if it were "grossly excessive": *Ronpibon Tin* at 60; Taxation Ruling TR 2006/2 PCS pages 47-49/59.

1362 Mr Young then submitted that:

- (1) the basis upon which a court may exercise its power to refer a matter to a regulatory authority requires the establishment of "*strong prima facie evidence of fraudulent tax evasion*" per Handley JA in *Page v Vanker* [1990] NSWCA 42 or the existence of "*a scheme designed to defraud the revenue*" (*Rafidi v Commonwealth Bank of Australia Ltd* [2017] NSWCA 96 per Basten JA at [16]);
- (2) the Court would not refer a matter unless it thought that the evidence sufficiently disclosed the crime concerned or that further investigation based on that evidence was very likely to do so. The Court is also entitled to take into account other matters, including the utility of a prosecution overall, and the nature of the offence disclosed and its consequences: *Paycorp (No 3)* per Brereton J at [4];
- (3) some guidance regarding consideration of referral of papers to ATO is provided by consideration of authorities in the family law jurisdiction. In particular he submitted that the approach of courts is only to refer in the case of "more blatant and substantial irregularities" citing *In the Marriage of Malpass & Mayson* [2000] FamCA 1253; (2000) 27 Fam LR 288 at [31]; *Keskin v Keskin* [2019] FamCA 384 at [176] - [178]; and
- (4) the Court draws a distinction between potential criminal offences as opposed to referral to regulatory authorities in her decision: *In the matter of Opal Producers Australia Limited (ACN 112 322 442)* [2011] NSWSC 689 (***Opal Producers***) per Bergin CJ in Eq at [8].

1363 Mr Young qualified the authorities by indicating that on one view

Commonwealth courts are more inclined to refer matters to the ATO (citing *Paycorp Payment Solutions* at [3]) and noting that in family law the proper identification and quantification of liabilities to the ATO goes directly to issues (at least in property cases) relating to the ascertainment of the value and extent of assets available for division between the parties: *Keskin v Keskin* at [31].

1364 I accept the submissions of Mr Young as to the law.

1365 Further I note that in some instances, where the matters arising or evidence suggests possible criminal conduct there is little choice but to refer the papers to prosecuting or regulatory authorities: e. g. s 316 of the Crimes Act 1900 (NSW). However, in other cases in which the circumstances do not involve the

prospect of criminal conduct matters may nonetheless be referred to regulators to ensure that the regulator is aware of conduct about which the Court has deep concern: *Opal Producers* at [8].

1366 Sometimes the Court will exercise its discretion not to refer papers in circumstances in which the Court is satisfied that the relevant parties have in the context of the hearing acknowledged the gravity of their conduct or there has been some other mitigating circumstances such that the Court is satisfied that “salutary lessons” have been taken on board which the parties will take into account in their future lives, both in business and otherwise: *Opal Producers* at [9] (discretion exercised not refer papers to ASIC).

1367 On the facts I have set out in the Appendix details of the payments made recorded as “Rent”.

1368 From a tax perspective it is clear that the characterisation of an arrangement is not predicated on the description parties put on it.

1369 It seems to me, without deciding the issue, there is at least an argument that from a “practical and business” point of view the plaintiffs made the payments in the belief that the payments were “necessarily” incurred in carrying on of the farming business on the properties.

1370 Further, it seems to me that once payments were received by the company the fact that the deceased at some point or points drew monies from the company as director’s fees or the like does not detract from an arguable conclusion the payments as expenditure were “necessarily incurred”. There was no real suggestion by the defendants that any payments made were “grossly excessive” (see *Ronpibon Tin* at 60). If anything the defendants disputed that significant payments were made.

1371 In the above circumstances I do not propose to make any order referring the papers in the proceedings to the ATO.

Conclusion

1372 I find that the plaintiffs’ estoppel case is made out.

Orders

1373 I direct the parties to bring in short minutes of order to give effect to these reasons for judgment.

Costs

1374 Mr Simpson on behalf of the defendants indicated that they wish to be heard on the question of costs: DCS[4]. Dr Mantziaris submits the costs should be determined in a separate hearing following judgment: PSSR[4].

1375 In light of those submissions I will agree to that course. Nonetheless, it is appropriate to briefly mention at this stage the fact that at the commencement of proceedings an open offer was made by Mr Simpson on behalf of the defendants.

1376 The offer essentially provided for:

- (1) Rossdale to be sold with an agreed listing or failing agreement appointment of an independent agent;
- (2) Gostwyck Remnant to be transferred to Nicholas with the transfer cost and stamp duty paid from the net proceeds of the sale of Rossdale;
- (3) the plaintiffs to be responsible for the payment of any debt secured by the mortgage to the NAB over Gostwyck Remnant;
- (4) Barbara to receive from the net proceeds of sale of Rossdale a sum of \$1.5M;
- (5) after the sale of Rossdale and transfer of Gostwyck Remnant all shares in the company to be transferred to the plaintiffs or either of them and for Barbara, Hamish and Mr Saide to resign as officers of the company and the plaintiffs be appointed as officers in their place; and
- (6) each party to bear their own costs.

1377 The open offer had been formalised in a letter dated 11 September 2022 from Tranter Lawyers to Arnold Lawyers and was tendered becoming exhibit D8: T 332.

1378 Mr Simpson submitted that Barbara was attempting to honour the deceased's wishes as conveyed in the 14 February 2020 meeting and indicated the opening offer on 11 September 2022 reflected that: DCS[34].

1379 In light of the request for the parties to address on the question of costs after delivery of these reasons I say nothing further regarding the offer.

1380 In bringing in short minutes of order the parties should include orders regarding proposed cost orders and provide any evidence regarding costs and brief submissions (no more than five pages) addressing costs.

1381 The orders of the Court are:

- (1) Direct the parties to submit agreed short minutes of order to give effect to the reasons for judgment, including as to costs, or if there is no agreement between them, their respective draft orders, submissions (not exceeding five pages) and any affidavits by 4:00 PM on 24 November 2022.
- (2) Adjourn the proceedings to 9:30 AM on 25 November 2022 or such other time as may be arranged with my Associate.

APPENDIX

Year	M & A Partnership Payment	Company income
1998	Nil ¹	\$3,780 ²
1999	Nil ³	\$2,498 ⁴
2000	Nil ⁵	Nil ⁶
2001	\$2,500 ⁷	\$2,500 (recorded as "Rent") ⁸
2002	\$6,000 ⁹	\$6,000 (recorded as "Rent") ¹⁰

¹ CB Vol 4 pp 30, 36

² CB Vol 4 p 22

³ CB Vol 4 pp 39, 43

⁴ CB Vol 4 p 45.5

⁵ CB Vol 4 p 167

⁶ CB Vol 4 p 151 (see entry for "Rent")

⁷ CB Vol 4 p 167

⁸ CB Vol 4 pp 151, 182

⁹ CB Vol 4 p 222

¹⁰ CB Vol 4 pp 182, 204

2003	\$7,667 ¹¹	\$7,667 (recorded as "Rent") ¹²
2004	Nil ¹³	\$11,395 (recorded as "Rent") ¹⁴
2005	\$13,762 (recorded as "Rent") ¹⁵	\$13,762 (recorded as "Rent") ¹⁶
2006	\$9,000 (recorded as "Rent") ¹⁷	\$9,311 (recorded as "Rent") ¹⁸
2007	\$5,000 ¹⁹	\$5,000 (recorded as "Rent") ²⁰
2008	\$3,500 ²¹	\$3,500 ²²
2009	\$1,500 ²³	\$1,500 ²⁴
2010	Nil ²⁵	Nil ²⁶
2011	\$1,642 (recorded as "Rent") ²⁷	\$1,642 ²⁸

¹¹ CB Vol 4 p 222

¹² CB Vol 4 p 204

¹³ CB Vol 4 p 235

¹⁴ CB Vol 4 p 248

¹⁵ CB Vol 4 p 241

¹⁶ CB Vol 4 p 248

¹⁷ CB Vol 4 p 261

¹⁸ CB Vol 4 pp 281, 293

¹⁹ CB Vol 4 p 310

²⁰ CB Vol 4 p 293

²¹ CB Vol 4 p 310

²² CB Vol 4 p 344

²³ CB Vol 4 p 339

²⁴ CB Vol 4 pp 344, 378

²⁵ CB Vol 4 pp 371 (no entry), 419 (see entry for "Rent")

²⁶ CB Vol 4 pp 378, 406

²⁷ CB Vol 4 pp 419, 468

²⁸ CB Vol 4 pp 406, 455

2012	\$2,994 (recorded as "Rent") ²⁹	\$2,994 ³⁰
2013	\$1,362 (recorded as "Rent") ³¹	\$1,362 ³²
2014	\$1,459 (recorded as "Rent") ³³	\$1,459 ³⁴
2015	\$2,272 (recorded as "Rent") ³⁵	\$2,272 ³⁶
2016	\$963 (recorded as "Rent") ³⁷	\$963 ³⁸
2017	\$993 (recorded as "Rent") ³⁹	\$993 ⁴⁰
2018	\$700 (recorded as "Rent") ⁴¹	\$700 ⁴²
2019	\$1,502 (recorded as "Rent") ⁴³	\$1,502 ⁴⁴
2020	\$1,267 (record as "Rent") ⁴⁵	\$1,267 ⁴⁶

²⁹ CB Vol 4 pp 468, 517

³⁰ CB Vol 4 pp 455, 504

³¹ CB Vol 4 p 517

³² CB Vol 4 pp 504, 545

³³ CB Vol 4 p 540

³⁴ CB Vol 4 pp 545, 582

³⁵ CB Vol 4 p 577

³⁶ CB Vol 4 pp 582, 626

³⁷ CB Vol 4 pp 639, 667

³⁸ CB Vol 4 pp 626, 682

³⁹ CB Vol 4 pp 667, 714

⁴⁰ CB Vol 4 pp 682, 704

⁴¹ CB Vol 4 pp 714, 769

⁴² CB Vol 4 pp 704, 757

⁴³ CB Vol 4 p 769

⁴⁴ CB Vol 4 pp 757, 786

⁴⁵ CB Vol 4 p 752

⁴⁶ CB Vol 4 p 786

Total	\$64,083	\$82,067
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