Equity Division
Supreme Court
New South Wales

Case Name:	Yu v Yu
Medium Neutral Citation:	[2020] NSWSC 1904
Hearing Date(s):	7 and 8 December 2020
Date of Orders:	22 December 2020
Date of Decision:	22 December 2020
Jurisdiction:	Equity – Family Provision List
Before:	Williams J
Decision:	Declaration made that the Principal Heads of Agreement and the Collateral Heads of Agreement entered into by the plaintiff/cross-defendant, defendant/first cross-claimant and second cross-claimant on 10 April 2019 are binding. Consequential order made for the enforcement of those agreements.
Catchwords:	EQUITY – equitable remedies – vitiating factors – common mistake – discussion of the existence and scope of jurisdiction to set aside contracts for common mistake in equity – whether parties to an agreement were operating under a common misapprehension that was fundamental to the agreement – no fundamental misapprehension JUDGMENTS AND ORDERS – *res judicata* and cause of action estoppel – no issue of principle CONTRACTS – formation – illegality – no issue of principle CONTRACTS – terms – implied terms – no issue of principle CONTRACTS – construction – no issue of principle
Legislation Cited:	*Civil Procedure Act* 2005 (NSW), ss 73 and 91 *Evidence Act* 1995 (NSW), s 136

	Probate and Administration Act 1898 (NSW), s 81A
Cases Cited:	*Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328 *Bell v Lever Brothers Ltd* [1932] AC 161 *Clayton v Bant* (2020) 95 ALJR 34; [2020] HCA 44 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 *Estate of Baissari; Chehade v El Khoury* [2020] NSWSC 563 *Estate of Kouvakas; Lucas v Konakas* [2014] NSWSC 786 *Gorczynski v Bendigo and Adelaide Bank Ltd* [2016] NSWCA 170 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 *Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA 91 *Hawcroft v Hawcroft General Trading Co Pty Ltd* (2016) 18 BPR 35,863; [2016] NSWSC 555 *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* (2020) 19 BPR 40,463; [2020] NSWCA 161 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 *Rees v Rees* [2016] VSC 452 *Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd* [2019] NSWSC 238 *Solle v Butcher* [1950] 1 KB 671 *Svanosio v McNamara* (1956) 96 CLR 186 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 *Westpork Pty Ltd v Bio-Organics Pty Ltd* [2018] WASC 291 *Zetta Jet Pte Ltd v Ship 'Dragon Pearl' (No 2)* (2018) 265 FCR 290; [2018] FCAFC 132
Texts Cited:	J D Heydon, M J Leeming and P G Turner, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, LexisNexis Butterworths, 2015) K R Handley, *Spencer Bower and Handley: Res Judicata* (5th ed, LexisNexis Butterworths, 2019)
Category:	Procedural and other rulings
Parties:	Kai Yu (Plaintiff/Cross-Defendant/Respondent) Ying-Hsun Yu (First Defendant/First Cross-Claimant/First Applicant)

	Attorney General of New South Wales (Second Defendant) Jau-Shinne Loue (Second Cross-Claimant/Second Applicant)
Representation:	Counsel: Mr R Stoyef, solicitor (Plaintiff/Cross-Defendant/Respondent) Ms N Obrart (First Defendant/First Cross-Claimant/First Applicant and Second Cross-Claimant/Second Applicant) Dr C Mantziaris (Second Defendant) Solicitors: Robert Stoyef (Plaintiff/Cross-Defendant/Respondent) David Kam & Co Solicitors (First Defendant/First Cross-Claimant/First Applicant and Second Cross-Claimant/Second Applicant) NSW Crown Solicitor's Office (Second Defendant)
File Number(s):	2015/190851
Publication Restriction:	N/A

JUDGMENT

Introduction

1 These reasons for judgment relate to a notice of motion filed by the first defendant/first cross-claimant and second cross-claimant on 22 October 2020 seeking declarations and orders giving effect to a Principal Heads of Agreement and Collateral Heads of Agreement they entered into with the plaintiff/first cross-defendant on 10 April 2019 resolving their dispute that is the subject this probate proceeding and dealing with certain assets that they agreed between themselves were not part of the deceased estate.

2 It is necessary to explain a little about the substantive proceeding in the context of which the two agreements were entered into and the genesis of the dispute that has given rise to the application pursuant to s 73.

Context

3 Chia-Wei Yu died on 27 May 2015. He was an Australian citizen, and also a national of the Republic of China (Taiwan). I shall refer to him in these reasons as the **deceased**.

4 On 4 December 2015, the plaintiff commenced these proceedings by filing a statement of claim seeking a grant of probate in solemn form of the will of the deceased dated 10 March 2012, which named the plaintiff as the sole executor of the deceased's estate. It is convenient to refer to this will as the **2012 will**.

5 The plaintiff is a son of the deceased.

6 The deceased was predeceased by another son, Hsieh-Chao Yu, in 2006 and by his wife, Su-Ming Yu Shieh (also referred to in some correspondence as Shieh Su-Ming), in 2005.

7 The statement of claim filed by the plaintiff on 4 December 2015 named the deceased's daughter as the defendant. As the Attorney-General of New South

Wales was subsequently joined to these proceedings as the second defendant, the deceased's daughter is now referred as the first defendant.

8 In her defence, the first defendant denied that the 2012 will was the deceased's last will. By cross-claim filed together with her husband, the first defendant (as first cross-claimant) seeks a grant of probate in solemn form of a will of the deceased dated 15 September 2013, which named her as sole executor of the deceased's estate. It is convenient to refer to this will as the **2013 will**.

9 The plaintiff/cross-defendant contended that the deceased lacked testamentary capacity when he executed the 2013 will and maintained that the 2012 will is the deceased's last valid will.

10 The cross-claim also sought an order by way of restitution that the first defendant (as first cross-claimant) and her husband (the second cross-claimant) be reimbursed out of the deceased's estate for approximately $216,000 in medical, travel and care expenses said to have been paid them on behalf of or for the benefit of the deceased.

11 The plaintiff/cross-defendant denied that the cross-claimants are entitled to be reimbursed for these expenses.

12 The pleadings did not disclose any dispute between the plaintiff on the one hand and the first defendant and second cross-claimant on the other hand as to the identity and value of the assets comprising the deceased estate, save that the first defendant and second cross-claimant contended that the expenses of $216,000 referred to above were liabilities of the deceased estate.

13 It became apparent from a Joint Written Statement filed by the parties on 3 August 2018 in compliance with an order made by Lindsay J that there were other differences between the parties as to the assets comprising the deceased's estate and the value of those assets. However, whilst these other differences would feature in the affidavits required to be filed under s 81A of the

Probate and Administration Act 1898 (NSW), they were not matters requiring to be resolved in determining the pleaded issues in the proceedings.

14 The 2012 will propounded by the plaintiff/cross-defendant was not in evidence.

15 The 2013 will is written in English and is said to have been interpreted to the testator in the Mandarin language before he signed it after indicating that he knew and approved of its contents. The testator's address stated in the 2013 will is an address in New South Wales. The address given by the interpreter and one of the witnesses are also addresses in New South Wales. Curiously, the address given by two other witnesses are in Taiwan. The will states that the testator, the interpreter and the three witnesses were all present at the same time and each witness attested the testator's signature in his presence and in the presence of the interpreter and each other witness.

16 By clause 2 of the 2013 will, the deceased appointed the first defendant as his sole executor and trustee.

17 Clause 3 of the 2013 will provides:

> "I GIVE DEVISE AND BEQUEATH to my Trustee the remaining of my estate of whatsoever nature and wheresoever situate UPON TRUST to pay my funeral and testamentary expenses and debts and all death probate estate succession and other like duties payable in respect of my estate and to hold the residue then remaining (hereinafter called 'my residuary estate') UPON TRUST to any charity at the absolute discretion of my Trustee for the general purposes of that charity AND I DECLARE that the receipt of the secretary, treasurer or other proper officer for the time being shall be a full discharge to my Trustee for the gift nor shall my Trustee be bound to see its application."

18 Thus, the residue of the estate referred to in clause 3 is the whole of the deceased estate after payment of funeral and testamentary expenses, debts and any taxes or duties.

19 On 10 April 2019, at the conclusion of a mediation of the parties' dispute in these proceedings that had been conducted over two days, the plaintiff/cross-defendant, the first defendant/first cross-claimant and the second cross-claimant signed:

(1) a document entitled “Supreme Court proceedings – Principal Heads of Agreement” (the **Principal Agreement**); and

(2) a further document entitled “Supreme Court proceedings – Collateral Heads of Agreement – between the Plaintiff, 1st Defendant and 1st Defendant’s husband (2nd Cross Claimant)” (the **Collateral Agreement**).

20 Clause 1 of each of the Principal Agreement and the Collateral Agreement expressly stated that the agreement was intended to be binding between the parties. It is common ground between the parties that both agreements were binding on the parties at the time they were entered into.

21 Clause 2 of the Principal Agreement provides that the 2013 will is to be admitted to probate. As all parties acknowledged at the hearing before me, the Court is not bound by the parties’ agreement to grant probate of the 2013 will. In circumstances where the parties had propounded different wills in these proceedings, I read clause 2 as an agreement by the parties to join in an application to the Court in these proceedings for a grant of probate in respect of the 2013 will by preparing short minutes of order in accordance with clause 11 of the Principal Agreement for consideration by the Court.

22 Clause 3(a) of the Principal Agreement provides that the 2013 will is varied by appointing the plaintiff as co-executor with the first defendant. The parties to the Principal Agreement do not have power to vary the 2013 will. That will is not their document. It is the testator’s document. I read clause 3(a) as an agreement by the parties to apply to the Court to appoint the plaintiff and first defendant as co-executors, as part of their application for a grant of probate in respect of the 2013 will. Clause 3(b) provides that the co-executors agree to exercise their power to jointly nominate a charitable object, subject to the approval of the Attorney-General.

23 Pursuant to clause 4 of the Principal Agreement, the plaintiff waived an entitlement to payment of $10,000 from the estate of the deceased, being funeral expenses of the deceased paid by the plaintiff.

24 Clause 5 of the Principal Agreement provides (omitting bank account numbers):

> "The parties agree that, they will provide affidavit evidence to the Court of the contents of the residuary estate of the deceased, to the effect that this estate consists of:
>
> a. Monies in ANZ account number … in the deceased's name in the amount of $536,199.97 (as at 2015).
>
> b. Monies in Citigroup account number … in the deceased's name and the name of his wife in the amount of $22,908.52 (as at 2015).
>
> c. Monies held by a Taiwanese lawyer in account … in the amount of $16,893.20 (as at 2015)."

25 Clause 6 of the Principal Agreement provided for the amount claimed in the cross-claim in these proceedings to be reimbursed to the cross-claimants out of monies referred to in the Collateral Agreement as "*the Singapore funds*" rather than out of the residuary estate of the deceased.

26 Clause 7 of the Principal Agreement provided that there would be no order as to the costs of the proceedings, save for an order that the Attorney-General's costs of the proceedings be paid from the residuary estate of the deceased on an indemnity basis. The effect of this clause is that the plaintiff/cross-defendant, first defendant/first cross-claimant and second cross-claimant will each bear their own costs of the proceedings.

27 Clauses 8, 9 and 10 of the Principal Agreement noted an agreement between the parties that a grandchild of the deceased would be paid a specified sum from the Singapore funds, and noted certain matters concerning claims and costs in other proceedings involving the parties.

28 Clause 11 of the Principal Agreement provided:

> "The parties intention is to prepare short minutes to dispose of the entirety of these proceedings to give effect to this Principal Heads of Agreement."

29 It is common ground between the parties that the reference to *"these proceedings"* in clause 11 is a reference to the proceedings that are the subject of these reasons for judgment.

30 It is not necessary to refer to the terms of the Collateral Agreement in any detail. It is common ground between the parties that the Collateral Agreement dealt with the distribution between the parties of assets owned by members of their family which they had agreed did not form part of the deceased estate. The Collateral Agreement included terms providing for the distribution of the Singapore funds comprising approximately AUD$1.4 million after reimbursement of the expenses that are the subject of the cross-claim in these proceedings, and the sale and distribution of the proceeds of sale of a property at Eastwood which the first defendant had previously contended in the Joint Written Statement filed on 3 August 2018 was an asset of the deceased estate.

31 The Attorney-General's solicitor and counsel participated in the mediation that resulted in the Principal Agreement and the Collateral Agreement, but the Attorney-General is not a party to those agreements.

32 Shortly after the Principal Agreement and Collateral Agreement were signed, the Attorney-General's solicitor advised the parties that they would need to review the affidavits required by clause 5 of the Principal Agreement before advising the Attorney-General whether he should consent to a settlement of the proceedings on the terms of the Principal Agreement. The Attorney-General's solicitor also notified the parties of certain matters that he would expect to be addressed in those affidavits. Those matters were directed to the Attorney-General being able to satisfy himself that the affidavits accurately described the assets of the deceased estate and that the assets described in the Collateral Agreement are not assets of the deceased estate.

33 Thereafter, two problems emerged.

34 The first problem concerned the monies referred to in clause 5(c) of the Principal Agreement. It is convenient to refer to those monies as the **Taiwan**

funds. On 12 April 2019, the first defendant's solicitor in Taiwan provided written advice that:

> "Chia Wei Yu is a national of the Republic of China, as well as his successors. In accordance with the law of the Republic of China, the inheritance of Chia Wei Yu's estate in the Republic of China shall comply with the law of the Republic of China. Chia Wei Yu's will dated 15 September 2013 is invalid because it does not comply with any of the forms stated in the Article 1189 of the Civil Code.
>
> Even though Dr Yu, Kai Yu and Australian laws stipulate that Chia Wei Yu's estate in Taiwan shall be repatriated to Australia, the above-mentioned estate is an exception and does not apply to any relevant foreign laws in accordance with Article 58 of the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements. Accordingly, all of Chia Wei Yu's successors shall jointly inherit the amount $16,893.20. Without the permission of all successors, the amount shall not be repatriated to Australia for any charitable purpose."

35 The second problem was that, by August 2019, the plaintiff was contending that the deceased's estate owed a debt of approximately AUD$185,000 to the estate of the deceased's late son Hsieh-Chao Yu. The sum of AUD$185,000 represented the net sale proceeds of a property in Carlingford, New South Wales, owned by Hsieh-Chao Yu and sold by his father (the deceased) after the death of Hsieh-Chao Yu in order to recover a loan of $300,000 secured by mortgage over the property. By March 2020, that contention involved an allegation that a separate loan of AUD$350,000 said to have been made by the first defendant to Hsieh-Chao Yu, and repaid in part by the deceased transferring the AUD$185,000 net sale proceeds of the Carlingford property to the first defendant, was a sham.

36 On 3 March 2020, the plaintiff's solicitor wrote a long letter to the solicitor for the first defendant and second cross-claimant referring to the problem concerning the Taiwan funds and setting out in detail the allegations I have summarised immediately above. The letter stated:

> "… my client takes the view that the agreements are no longer workable since the assumptions held by the parties regarding the assets and liabilities of the Estate of Chia-Wei Yu that formed the basis of the agreements have altered so substantially as to render both Principal Heads of Agreement or the Collateral Heads of Agreement unworkable.

> I submit the changed factual and legal position regarding the assets and liabilities of the Estate of Chia Wei-Yu result in the failure of an implied condition precedent to both the Principal Heads of Agreement and Collateral Heads of Agreement, and would, if put in effect in their current terms, result in a Grant of Probate made contrary to law."

37 On 21 April 2020, the first defendant filed a notice of motion seeking relief pursuant to s 73 of the *Civil Procedure Act* 2005 (NSW) for the enforcement of the Principal Agreement and the Collateral Agreement (the **First Motion**). The orders sought included:

(1) a declaration that the Principal Agreement and the Collateral Agreement are binding between the plaintiff, first defendant and second cross-claimant;

(2) an order that the plaintiff, first defendant and second cross-claimant prepare short minutes of order disposing of the proceedings in accordance with the Principal Agreement and the Collateral Agreement, with a direction that any such short minutes be provided to the Attorney General for his approval; and

(3) in the alternative, a declaration that the Principal Agreement is binding, with consequential orders that the parties provide short minutes of order disposing of the proceeding in accordance with that agreement, subject to the approval of the Attorney General.

38 On 27 April 2020, Hallen J made case management directions to prepare the First Motion for hearing. The proceeding (including the First Motion) was stood over to 1 June 2020 for further directions.

39 The transcript of the directions hearing of 1 June 2020 was tendered as Exhibit 5 on this application. On that occasion, Hallen J observed that a contested hearing of the First Motion *"may ultimately be a futile one"* because even if the Court was satisfied that the Principal Agreement and/or the Collateral Agreement was binding, the Court *"still has to be satisfied that the agreement should be put into effect"*. Having further observed that the dispute between the

parties contemplated an allegation that the deceased did not know or approve the contents of the 2013 will and that any contested final hearing of the probate dispute would likely take around 5 days, his Honour said (at Transcript, page 5, lines 11–20):

> "HIS HONOUR: Would it not be better to really try and get the probate suit on? So, to the extent that it requires it, there be a separate determination of which is the last valid will or the deceased. I know it means that the issue of [the First Motion] is put to one side, but, really, wouldn't it be better to get on with the case? Even if [the First Motion] is successful, the Court may come to the view that there shouldn't be a grant of a probate of what the parties have agreed on.
>
> …
>
> HIS HONOUR: Could I ask you all to consider it, because if you can agree that the issue should be limited to simply the grant of probate, that is, what is the last valid will of the deceased, it may be that I can give you a date for hearing far more quickly, or certainly at the same time, as dealing with all these interlocutory applications that may ultimately prove futile."

40 At the end of this directions hearing, his Honour stood the matter over to 29 June 2020 for further directions and made the following notation:

> "...the Court has recommended that the Probate proceedings be listed for hearing as soon as reasonably possible with the effect that the notices of motion that are currently extant will not proceed to hearing."

41 When the matter returned before Hallen J on 29 June 2020, his Honour made an order dismissing the First Motion with no order as to costs. The transcript of the directions hearing is not in evidence before me on this application. However, it is common ground that the First Motion was dismissed with the consent of the parties.

42 On 22 October 2020, the first defendant and second cross-claimant filed a further notice motion in which they sought essentially the same relief as had been sought in the First Motion. It is convenient to refer to this as the **Second Motion**.

43 Having set out that background to the filing of the Second Motion, I shall now refer to the parties by reference to their role in the Second Motion rather than their role in the substantive proceedings. Accordingly, the first defendant and

second cross-claimant in the substantive proceedings are referred to as the **Applicants** except where it is necessary to distinguish between them, and the plaintiff in the substantive proceedings is referred to as the **Respondent**. I shall continue to refer to the second defendant as the **Attorney-General**.

44 On 24 November 2020, the Second Motion was listed for hearing before me on 7 and 8 December 2020.

45 I emphasise that only the Second Motion was listed for hearing. In the event that the Court granted the relief sought in the Second Motion, it would not necessarily follow that there would be a grant of probate in respect of the 2013 will. As White J (as his Honour then was) said in *Estate of Baissari; Chehade v El Khoury* [2020] NSWSC 563 at [24] (citing *Estate of Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [271] and [272]), a grant of probate or administration (as the case may be) is a public act and the Court will not make orders for either simply because the parties ask for them. In the event that the Court declares that the Principal Agreement or the Collateral Agreement are binding and consequential orders are made for the enforcement of those agreements, the parties will still be required to prove the 2013 will before it is admitted to probate. This is the point that was recognised by Hallen J when he made the observations set out in [39] above.

46 A great deal of affidavit and documentary evidence was sought to be read or tendered by the Respondent at the hearing of this application that went to the issue of whether the deceased knew and approved the contents of the 2013 will. The Respondent relied upon what White J said in *Estate of Baissari; Chehade v El Khoury* (*supra*) at [24] as authority for the proposition that the Court must be satisfied that the 2013 was capable of being admitted into probate before orders for the enforcement of the Principal Agreement and Collateral Agreement will be made.

47 In my opinion, the Respondent's submission fails to appreciate the context of White J's remarks in *Estate of Baissari*. In that case, his Honour was conducting the final hearing of an application for a grant of probate of a will in solemn form

and, at the same time, hearing a notice of motion that had been filed by the plaintiff in that case that shortly before that final hearing seeking orders under s 73 of the *Civil Procedure Act* for the enforcement of a settlement.

48 As amended on 7 December 2020 and as further amended orally on 8 December 2020, the following relief is sought in the Second Motion pursuant to s 73 of the *Civil Procedure Act*:

(1) an order that clause 5(c) of the Principal Heads of Agreement dated 10 April 2019 between the plaintiff, first defendant and second-cross-claimant be severed from that agreement;

(2) a declaration that the Principal Heads of Agreement (after severance of clause 5(c)) and the Collateral Heads of Agreement dated 10 April 2019 are binding as between those parties;

(3) an order that the Principal Heads of Agreement and Collateral Heads of Agreement be performed in accordance with their terms.

49 At the hearing of the Second Motion, counsel for the Applicants stated that the order for the performance of the agreements was sought pursuant to s 73(1)(b) of the *Civil Procedure Act* and that the Applicants were not seeking to invoke the Court's jurisdiction to grant the equitable remedy of specific performance.

50 The Respondent accepts that the Principal Agreement and Collateral Agreement were immediately binding on the parties when entered into on 10 April 2019.

51 However, the Respondent opposes the relief sought in the Second Motion on the following grounds:

(1) the claim for relief under s 73 of the *Civil Procedure Act* in the Second Motion is *res judicata*, or alternatively barred by cause of action estoppel, by reason of the dismissal of the First Motion by consent;

(2) alternatively, the Court should not make the orders sought under s 73 because the Principal Agreement was subject to an implied condition precedent that the assets of the residuary estate of the deceased comprised the assets set out in clause 5 of the Principal Agreement, and that condtion has not been satisfied because:

(a) the Taiwan funds referred to in clause 5(c) of the Principal Agreement do not form part of, or will not be available to be applied as part of, the residuary estate of the deceased for the reasons referred to in [34] above; and

(b) the deceased estate has a liability of approximately AUD$185,000 arising in the manner referred to in [35] above;

(3) further or alternatively, the Court should not make the orders sought under s 73 because the Principal Agreement and Collateral Agreement are voidable by reason of the parties' common mistake concerning the identity and value of the assets of the deceased estate, in that the parties mistakenly believed at the time they entered into the agreements that:

(a) the Taiwan funds referred to in clause 5(c) of the Principal Agreement were an asset of the deceased estate and would be available to be applied as part of the residuary estate, whereas the Taiwanese lawyer subsequently provided the advice referred to in [34] above that those funds will not be repatriated to Australia to form part of the deceased's residuary estate; and

(b) the residuary estate of the deceased comprised the assets set out in clause 5 of the Principal Agreement with no liabilities to be paid out of those assets, whereas the deceased estate in fact has a liability of approximately $185,000;

(4) further or alternatively, the Court should not make the orders sought under s 73 because the Principal Agreement is unenforceable on the

grounds of illegality in that enforcement of clause 5 would *"result in a Grant of Probate that incorrectly describes the assets and liabilities of the Estate, and that such a grant is contrary to s 81A of the Probate and Administration Act 1898"*; and

(5) further or alternatively, the Court should not make the orders sought under s 73 because the Principal Agreement is void as it is not signed by a representative of the Attorney-General.

52 The Attorney-General was not a respondent to the Second Motion, but appeared and made submissions at the hearing on 7 and 8 December 2020 to assist the Court.

Consideration and determination

The jurisdiction to enforce settlement agreements

53 Section 73 of the *Civil Procedure Act* provides:

> "(1) In any proceedings, the court--
>
> (a) has and may exercise jurisdiction to determine any question in dispute between the parties to the proceedings as to whether, and on what terms, the proceedings have been compromised or settled between them, and
>
> (b) may make such orders as it considers appropriate to give effect to any such determination.
>
> (2) This section does not limit the jurisdiction that the court may otherwise have in relation to the determination of any such question."

54 In *Gorczynski v Bendigo and Adelaide Bank Ltd* [2016] NSWCA 170, Basten JA described the nature of the power conferred on the Court by s 73 in the following terms at [6]:

> "Section 73 (and its analogues in other jurisdictions) has been understood to confer power on the court to deal with settlements in the proceedings to which they relate, rather than leaving the parties to commence separate proceedings to enforce a settlement. Accepting that to be the primary purpose of the provision, it is nevertheless expressed in broad terms as to the scope of the power conferred, terms which should not be read down by implied constraints. Rather, the breadth of the power as it operates in the Supreme Court is

> confirmed when it is read in the context of other powers conferred on the Court. Thus, s 56 of the *Civil Procedure Act*, to which the primary judge referred, states that the court must give effect to the overriding purpose of facilitating 'the just, quick and cheap resolution of the real issues in the proceedings.'"

Res judicata or cause of action estoppel

55 The Respondent submitted that the Applicants' claim under s 73 of the *Civil Procedure Act* in the Second Motion is *res judicata*, or alternatively barred by cause of action estoppel, by reason of the dismissal of the First Motion by consent on 29 June 2020.

56 Irrespective of whether a dismissal of a claim or cause of action gives rise to *res judicata* in the strict sense[1] or cause of action estoppel (also known as claim estoppel),[2] the party whose claim or cause of action is dismissed is precluded from litigating the same claim or dismissal again only if the dismissal is, in substance, a final adjudication of the claim or cause of action. Neither *res judicata* nor cause of action estoppel operate to preclude a party from litigating a cause of action that has been previously dismissed where the "*dismissal*" is merely a mechanism by which the party has been permitted to discontinue or is on terms that the party is permitted to bring fresh proceedings.[3]

57 This is reflected in s 91 of the *Civil Procedure Act*, which provides:

> "(1) Dismissal of--
>
> (a) any proceedings, either generally or in relation to any cause of action, or
>
> (b) the whole or any part of a claim for relief in any proceedings,
>
> does not, subject to the terms on which any order for dismissal was made, prevent the plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings.

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[1] See *Zetta Jet Pte Ltd v Ship 'Dragon Pearl' (No 2)* (2018) 265 FCR 290; [2018] FCAFC 132 (***Dragon Pearl***) at [14]–[35] and the authorities there referred to, including *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 (***Tomlinson***) at [20]–[22] (French CJ, Bell, Gageler and Keane JJ).

[2] *Clayton v Bant* (2020) 95 ALJR 34; [2020] HCA 44 at [65]–[67] (Edelman J, also citing *Tomlinson* at [20] and [22]) and [71] (citing K R Handley, *Spencer Bower and Handley: Res Judicata* (5th ed, 2019, LexisNexis Butterworths) at [1.04]); see also *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 at 556E–557G (Clarke JA, Priestley JA agreeing).

[3] *Tomlinson* at [21]; *Dragon Pearl* at [34].

> (2) Despite subsection (1), if, following a determination on the merits in any proceedings, the court dismisses the proceedings, or any claim for relief in the proceedings, the plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in that or any other court."

58 I reject the Respondent's submission that s 91 merely permits the Registry of the Court to accept for filing an originating process for a cause of action or claim referred to in s 91(1) to which s 91(2) does not apply, but says nothing about whether the filing party can then prosecute that claim. The submission is inconsistent with the plain words of s 91 and with the principles I have referred to in [56] above. If the submission were accepted, it would follow that s 91 would have no meaningful operation unless Court Registry staff were to scrutinise each and every originating process presented for filing to determine whether or not the cause of action or claims pleaded had previously been dismissed in other proceedings and, if so, whether that dismissal had followed a hearing on the merits. That is absurd.

59 In this case, the order made by consent on 29 June 2020 dismissing the First Motion was merely a procedural mechanism whereby the Applicants were permitted to discontinue their application in light of the recommendation made by Hallen J on 1 June 2020. It is clear from the transcript of the directions hearing on that date that his Honour's recommendation was driven by a desire to identify the most efficient means of achieving a just resolution of the issues to be determined, and not by any view of the merits of any party's position. For the reasons explained immediately above, that relief sought by the Applicants in the Second Motion is neither *res judicata* nor barred by cause of action estoppel.

Was the Principal Agreement subject to an implied condition that has not been fulfilled?

60 It is common ground that the Principal Agreement and Collateral Agreement were binding on the parties at the time that they were entered into in April 2019.

61 The Respondent submitted that the Principal Agreement was subject to an implied condition precedent that the assets of the deceased estate were

accurately and completely described in clause 5 of the Principal Agreement, including that the estate had no liabilities.

62 I reject that submission.

63 As parties who had propounded claims in the proceedings for a grant of probate in respect of different wills, each of the Respondent and the first defendant were obliged by s 81A(1) of the *Probate and Administration Act* to disclose to the Court the assets and liabilities of the deceased. If probate of the 2013 will is granted to them as co-executors as agreed between them in the Principal Agreement, they will be subject to the same obligation in their capacity as executors pursuant to s 81A(2) of that Act. They are obliged to make a truthful disclosure of the deceased's assets and liabilities. The cumulative effect of these two subsections is to impose continuous disclosure obligations on an applicant for probate who subsequently becomes a legal personal representative of a deceased estate.

64 The assets referred in sub-clauses (a) to (c) of clause 5 of the Principal Agreement are specific sums of money in three bank accounts as at 2015. As at the date of the Principal Agreement, the amount in each account was highly likely to have varied since 2015 on account of interest credited and/or bank fees and charges debited. The implied condition precedent propounded by the Respondent is capable of being interpreted as meaning that any such change would cause the parties' agreement to fail. Discovery of any new information concerning the deceased's assets and liabilities would have the same result, irrespective of whether the discovery concerned an additional asset or liability or the value of a known asset or liability, and irrespective of the magnitude of the change on the overall net asset position compared to the position set out in clause 5 of the Principal Agreement. The implied condition precedent would therefore undermine the apparent purpose of the Principal Agreement, which was to bring to an end the parties' dispute in the proceedings in a context where, for the reasons explained below, the parties would be required to take further steps in the proceedings in order to discharge their statutory obligations under the *Probate and Administration Act*.

65 For those reasons, I am of the opinion that the Principal Agreement did not include the implied condition precedent propounded by the Respondent because that condition precedent was neither necessary to give business efficacy to the Parting Agreement nor so obvious that it goes without saying: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347 (Mason J).

66 It remains to consider how clause 5 of the Principal Agreement should be construed. The principles summarised by Bathurst CJ (with whom Bell P and McCallum JA agreed) in *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* (2020) 19 BPR 40,463; [2020] NSWCA 161 at [229] are applicable to the Principal Agreement, substituting a reasonable person for a reasonable businessperson and recognising that the purpose or object of the Principal Agreement was not purely commercial in nature but concerned the financial affairs of the deceased's family:

> "The principles surrounding the construction of commercial contracts are well established. In *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35] the plurality (French CJ, Hayne, Crennan and Kiefel JJ) stated, 'The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean'. The Court stated that 'it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract': see also *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [46]–[49]; *Simic v NSW Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47 at [78]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12 at [16]; *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392; [2016] HCA 5 at [51]."

67 The Applicants and the Respondent were legally represented in the proceedings and at the mediation that concluded with them entering into the Principal Agreement and the Collateral Agreement. I infer that they were well aware of the obligations of the Respondent and the first defendant under s 81A(1) of the *Probate and Administration Act* and the obligations that they would continue to be subject to under s 81A(2) if probate were granted to both of them as co-executors or to either one them.

68 In my opinion, a reasonable person in the position of the parties – that is, understanding the issues in the proceedings and the statutory obligations of the Respondent and first defendant under s 81A – would not have understood the words of clause 5 of the Principal Agreement to mean that any party was obliged to make affidavits deposing that the assets of the deceased were *precisely* as set out in sub-clauses (a) to (c) of clause 5 and that there were no liabilities if information to the contrary came to the deponent's knowledge before the affidavit under s 81A(1) was sworn and filed (and, if the Respondent and/or first defendant are ultimately appointed co-executors, before the swearing and filing of a further affidavit under s 81A(2)).

69 I also infer that the Applicants and the Respondent understood that the Attorney-General would not be bound to accept their evidence concerning the assets and liabilities of the deceased estate if he considered that the evidence was inaccurate or untruthful. On the contrary, they would have been well aware when they entered into the Principal Agreement and Collateral Agreement that the Attorney-General would exercise an independent mind and would make such submissions as he considered would assist the Court in the Court's determination whether to grant probate of the 2013 will, as agreed between the plaintiff and first defendant, and in any other matter to be determined by the Court in the course of the administration of the deceased estate.

70 In my opinion, clause 5, properly construed, requires the parties to comply with their disclosure obligations under s 81A of the *Probate and Administration Act* and records the parties' agreement as at the date of the Principal Agreement of what the substance of that disclosure will be based on their knowledge at that time which I assume was informed by extensive inquiries. To put it another way, clause 5 does not preclude any party from making a disclosure under s 81A of assets and liabilities that differ from those set out in sub-clauses (a) to (c) if that party has cause to believe at the time that the affidavit is to be sworn that those sub-clauses do not completely and accurately describe all of the assets and liabilities of the deceased.

71 Although it is irrelevant to the construction of the Principal Agreement, which falls to be considered by reference to the parties' intentions objectively ascertained from the language used, the surrounding circumstances and the purpose and object of the agreement at the time it was entered into, I note that the Respondent did in fact file and serve an affidavit on 27 September 2019 that set out what he considered at that time to be the assets of the deceased estate, which differed from clause 5 of the Principal Agreement, and addressed the matters raised by the Attorney-General. The Applicants do not allege that the Respondent has breached the Principal Agreement by doing so. The evidence disclosed that the first defendant had filed and served an affidavit in reply to the Respondent's affidavit, although the first defendant's affidavit did not itself form part of the evidence on the hearing of the notice of motion. I assume that the first defendant's affidavit disclosed the position that is now known in relation to the Taiwan funds rather than adhering to the position that was expected at the time that the Principal Agreement was entered into.

Common mistake

72 As I have referred to in [51] above, the Respondent contends that the parties entered into the Principal Agreement and Collateral Agreement under the common mistake that:

(1) the Taiwan funds referred to in clause 5(c) of the Principal Agreement were an asset of the deceased estate and would be available to be applied as part of the residuary estate; and

(2) the residuary estate of the deceased comprised the assets set out in clause 5 of the Principal Agreement with no liabilities to be paid out of those assets.

73 The Respondent's written submissions stated that the agreements were either void or voidable. During oral closing submissions, the Respondent's solicitor refined his argument to a submission that the Principal Agreement is voidable by reason of common mistake. The Respondent did not seek a declaration to this effect, but made this submission as one of the grounds on which he

opposes the relief sought by the Applicants declaratory and other relief sought by the Applicants relying on s 73 of the *Civil Procedure Act*.

74 By confining his submission to one that the agreements are voidable, rather than void, for common mistake, I understand that the Respondent is relying on the equitable jurisdiction to rescind for common mistake as described by Denning LJ in the well-known decision of the English Court of Appeal in *Solle v Butcher* [1950] 1 KB 671 rather than the principles pursuant to which common mistake may avoid a contract at law.

75 Both the Applicants and the Respondent submitted that *Solle v Butcher* remains good law in Australia, notwithstanding that the majority of the Queensland Court of Appeal in *Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328 (***Australia Estates***) expressed the view that *Solle v Butcher* is no longer good law in Australia.

76 In the context of discussing grounds on which contracts may be set aside in equity in *Solle v Butcher*, Denning LJ said (at 693):

> "A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault."

77 In the subsequent decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 (***Great Peace Shipping***), the English Court of Appeal declined to follow *Solle v Butcher*, holding that there was no equitable jurisdiction to set aside contracts for common mistake beyond the comparatively more restrictive approach at common law. Lord Phillips of Worth Matravers MR, writing for the English Court of Appeal, reviewed the state of authorities concerning the doctrine of mistake at common law (including the House of Lords decision in *Bell v Lever Brothers Ltd* [1932] AC 161 and the High Court of Australia decision in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377) and formulated the following elements that must be present if common mistake is to avoid a contract at law (at [76]):

> "(i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."

78 *Great Peace Shipping* represents the law as it currently stands in England and Wales.

79 The decision of the Queensland Court of Appeal in *Australia Estates* is the most recent decision of an Australian intermediate appellate court following the English Court of Appeal's decision in *Great Peace Shipping*.

80 In *Australia Estates*, Atkinson J conducted a detailed analysis of the English and Australian authorities that bear on the question whether there is an equitable doctrine of common mistake.

81 Atkinson J considered that the reasoning in *Great Peace* was persuasive and that the approach to *Solle v Butcher* in the High Court of Australia had been *"somewhat qualified"*.[4] Her Honour concluded that the test in *Solle v Butcher* – that is, whether the parties' common mistake as to the facts or their respective rights was fundamental and the party seeking to set aside the contract was not at fault – was *"no longer the appropriate test"*. The question posed by the appeal was therefore whether the contract was void at common law for common mistake. The answer to the question turned on whether the five elements identified in *Great Peace Shipping* were satisfied.[5]

82 Jerrard JA agreed with Aktinson J's analysis of the law. However, the outcome of *Australia Estates* ultimately turned on McMurdo P and Jerrard JA concluding that the evidence did not establish any common mistake.

[4] [2005] QCA 328 at [52]–[62].
[5] Ibid at [63]–[64].

83 The learned authors of *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, LexisNexis Butterworths, 2015) state (at [14–080]):

> "Save perhaps for one matter, it may now confidently be said that the views of Lord Denning that there was a jurisdiction in equity to rescind for common mistake, although they were followed in a number of cases, do not represent the law …
>
> The possible qualification is whether, as a matter of precedent, it remains free to Australian courts below the High Court to disregard *Solle v Butcher* as has occurred in England because of the reliance upon it in *Taylor v Johnson*. However, the reasons of Atkinson J in the Queensland Court of Appeal in *Australia Estates Pty Ltd v Cairns City Council*, with whom Jerrard JA agreed, carefully address the English and Australian authorities and conclude not only that *Solle v Butcher* is no longer good law in Australia either, but also that because *Taylor v Johnson* was a case of unilateral mistake, courts other than the High Court were free to follow the earlier scepticism of *Solle v Butcher* to be found the *McRae* and *Svansio* decisions. Whether it was open to that intermediate appellate court of appeal to take that step is no doubt debatable …"

84 In *Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd* [2019] NSWSC 238 (***Schwartz Family Co***), Wright J referred to *Great Peace Shipping* and *Australia Estates* and the subsequent judgments of Australian courts at first instance in the years since *Australia Estates*. His Honour referred to:

(1) *Hawcroft v Hawcroft General Trading Co Pty Ltd* (2016) 18 BPR 35,863; [2016] NSWSC 555 (***Hawcroft***), in which it was not strictly necessary for Young AJ to decide whether equity would give relief in respect of an operative common mistake, but his Honour expressed the view that *"despite what is said in Great Peace Shipping, there must be some room for the operation of equitable principles"*.[6] As Wright J observed in *Schwarz Family Co*, the New South Wales Court of Appeal allowed the appeal in *Hawcroft* on grounds that did not relate to common mistake, and Emmett AJA (with whom Basten and Leeming JJA agreed) made no adverse comment on the part of Young AJ's judgment addressing common mistake: *Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA 91 at [160]–[164];

[6] (2016) 18 BPR 35,863; [2016] NSWSC 555 at [31]–[69], especially [31] and [52].

(2) *Rees v Rees* [2016] VSC 452 (***Rees***), in which McMillan J found that the parties were operating under two common mistakes when they executed the settlement deed in question. Her Honour acknowledged the *"debate about the existence and extent of the jurisdiction at equity to set aside contracts on account of common mistake"* and concluded that there is such jurisdiction although the circumstances in which it may be exercised are not clearly defined. McMillan J declined to follow *Australia Estates "[t]o the extent that [it] says otherwise"*;[7]

(3) *Westpork Pty Ltd v Bio-Organics Pty Ltd* [2018] WASC 291 in which Kenneth Martin J concluded that the High Court had not yet spoken definitively to endorse all of *Solle v Butcher* or, at least, had not spoken in terms that were inconsistent with Atkinson J's analysis in *Australia Estates*, and followed the five elements test in *Great Peace Shipping* that Atkinson J identified as representing the law in *Australia Estates*.[8] The judgment contains no reference to *Hawcroft* or *Rees*.

85 Wright J stated in *Schwartz Family Co* that the law in Australia in relation to common mistake *"is in an unclear, if not quite unsatisfactory, state"* and that *"there may be some doubt whether there exists any equitable jurisdiction to set aside a contract for common mistake"*.[9] I respectfully agree. The uncertainty arises from the possible qualification referred to by the learned authors of *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* to which I have already referred above.

86 Ultimately, Wright J did not need to resolve the controversy in *Schwartz Family Co* because the party seeking to set aside the contract in question relied on alleged fundamental misconceptions going to the root of the contract. His Honour found that there were no such fundamental misconceptions in that case, and nor were any misconceptions shared by both parties to the contract. Accordingly, the circumstances of the case did not attract the exercise of any

[7] [2016] VSC 452 at [82]–[106].
[8] [2018] WASC 291 at [107]–[118].
[9] [2019] NSWSC 238 at [91]–[92].

equitable to jurisdiction to set aside a contract on the grounds that the parties were under a common misapprehension that was fundamental and the party seeking to set it aside was not at fault, if such jurisdiction exists.[10]

87 Wright J added that if, contrary to his Honour's finding, the parties did enter into the contract under a misapprehension that was fundamental to the contract, it would not follow that equity would set aside the contract, assuming that the equitable jurisdiction referred to in *Solle v Butcher* exists. His Honour considered that Lord Denning's statement of principle in *Solle v Butcher* had not been endorsed by the High Court in either *McRae v Commonwealth Disposals Commission* (*supra*) or *Svanosio v McNamara* (1956) 96 CLR 186 and it follows from those decisions of the High Court that any equitable jurisdiction to rescind contracts for common mistake is limited to circumstances in which it would be so inequitable for a party to be held to his contract that equity would set it aside, and that equity will rarely grant that relief outside circumstances involving equitable fraud or misrepresentation on the part of the party seeking to uphold the contract.[11]

88 In the present case, the Respondent submitted that the Principal Agreement and Collateral Agreement are voidable by reason of the parties' common mistake at the time that they entered into those agreements that:

(1) the assets of the residuary estate of the deceased included the Taiwan funds referred to in clause 5(c) of the Principal Agreement; and

(2) clause 5 of the Principal Agreement set out the entirety of the asset position of the residuary estate of the deceased, such that the estate had no liabilities.

89 It was common ground that, contrary to the parties' expectations at the time that they entered into the Principal Agreement and Collateral Agreement, the Taiwan funds will not be available to be held together with the rest of the

[10] [2019] NSWSC 238 at [97]–[101].
[11] Ibid at [102]–[115].

deceased's residuary estate on trust for a charity in accordance with clause 3 of the 2013 will (assuming that the Court grants probate in respect of the 2013 will).[12]

90 In my opinion, the parties' common misapprehension that the Taiwan funds would be held on trust for a charity as part of the deceased's residuary estate was not fundamental to the Principal Agreement and Collateral Agreement.

91 First, the misapprehension concerns an asset of approximately $16,893, which is of relatively little significance in the context of the parties' understanding recorded in clause 5 of the Principal Agreement that the residuary estate would comprise assets with a total value of approximately $576,600.

92 Second, even if the Taiwan funds had represented a greater proportion of the residuary estate assets referred to in clause 5, neither the Applicants nor the Respondent suffer any disadvantage by reason of a lesser sum being available to be held on trust for a charity than they had believed to be the case when they entered into the agreements. Thus, assuming in favour of the Respondent (without deciding) that Denning LJ's statement of principle in *Solle v Butcher* represents the law in Australia unless and until the High Court decides otherwise, the common misapprehension concerning the Taiwan funds would not attract the exercise of that jurisdiction.

93 That conclusion is even more compelling if the equitable jurisdiction exists but is limited in the manner indicated by Wright J in *Schwartz Family Co*. The evidence in the present case does not demonstrate equitable fraud or misrepresentation on the part of the Applicants in relation to the Taiwan funds

[12] There was some debate about whether the correct analysis is that the Taiwan funds do not form part of the deceased estate as a result of the legal analysis set out in the solicitor's letter extracted at [34] above, or whether the Taiwan funds do form part of the deceased estate but will not be remitted to Australia and so will not be able to be held by the executors on the trust established by clause 3 of the 2013 will. It is unnecessary to resolve that question. In any event, the parties did not provide the expert evidence of the relevant foreign law or make the detailed submissions that would be necessary to determine the issue.

or any other circumstances in which it would be so inequitable that the Respondent should be held to the agreements that equity would set them aside.

94 Third, for all of the reasons explained in [66]–[70] above, clause 5 of the Principal Agreement, properly construed, did not preclude the parties from making a disclosure under s 81A of the *Probate and Administration Act* of assets and liabilities that differ from those set out in clause 5 if that party has cause to believe at the time that the affidavit is to be sworn that sub-clauses (a) to (c) do not completely and accurately describe all of the assets and liabilities of the deceased estate.

95 The alleged mistake concerning liabilities of the estate was not proved for the following reasons.

96 As I have referred to in [35] above, the Respondent contends that the parties made a common mistake because they did not know that the deceased estate in fact has a liability of approximately $185,000 to the estate of the deceased's late son, Hsieh-Chao Yu.

97 In order to establish the alleged common mistake, it was necessary for the Respondent to prove that the deceased estate does in fact have the alleged liability.

98 The following matters were common ground:

(1) in 1994, the deceased and his wife lent their son Hsieh-Chao Yu the sum of AUD$300,000 to assist him in the purchase a property at Carlingford in New South Wales;

(2) in 1998, Hsieh-Chao Yu executed a mortgage over the Carlingford property in favour of the deceased and his wife securing repayment of the $300,000 loan;

(3) Hsieh-Chao Yu died in August 2006; and

(4) the Carlingford property was sold in 2007.

99 The Respondent's contentions concerning the alleged liability may be summarised as follows:

(1) Hsieh Chao-Yu died intestate in Taiwan. Under the applicable law, his widow was entitled to his estate;

(2) following the death of Hsieh Chao-Yu, his father (the deceased in these proceedings) sold the Carlingford property;

(3) in selling the Carlingford property, the deceased acted as *executor de son tort*;

(4) from the proceeds of sale of the Carlingford property, the deceased caused the sum of $480,154.82 to be paid to the first defendant; and

(5) whilst the deceased was entitled to deal with $300,000 of those sale proceeds (being the amount owing to him under the mortgage securing the loan that he had made to Hsieh-Chao Yu) as he saw fit, the deceased was not entitled to remit the balance (said to be approximately $185,000) to the first defendant and the deceased was therefore liable to the estate of Hsieh-Chao Yu for that amount. That is because the loan of AUD$350,000 from the first defendant to Hsieh-Chao Yu and the mortgage over the Carlingford property securing that loan was a *"sham"*. There was, in truth, no amount owing by Hsieh-Chao Yu to the first defendant.

100 Each of those five contentions was disputed by the Applicants.

101 As to the first contention, there was no evidence that Hsieh Chao-Yu died intestate in Taiwan. In the absence of evidence concerning the circumstances of death and testamentary arrangements (or lack thereof) Hsieh Chao-Yu, the third contention was also not proved.

102 The second and fourth contentions were supported by evidence of the correspondence from the solicitor who acted for the deceased on the sale of Hsieh Chao Yu's property in Carlingford, together with copies of three cheques totalling $480,154.82 made out to *"Momoyo Umemura"*. It was common ground that this is the Japanese name of the first defendant.

103 The fifth contention is critical to the Respondent's argument.

104 The first defendant adduced evidence of a signed deed of loan dated 25 August 2005 between the first defendant (as lender) and Hsieh-Chao Yu (as borrower) recording a loan of $350,000 and a registered mortgage over the Carlingford property bearing the same date, and stamped with duty calculated on an underlying transaction of $350,000. The first defendant deposed that she was entitled to receive the balance of the Carlingford sale proceeds of approximately $185,000 in partial repayment of that $350,000 loan.

105 The Respondent submitted that the first defendant's affidavit evidence about this was untrue. Importantly, this was not put to the first defendant in cross-examination. Indeed, the Respondent did not seek leave to cross-examine the first defendant at all.

106 The only evidence adduced by the Respondent in support of his allegation that the $350,000 loan was a sham was admitted subject to an order under s 136 of the *Evidence Act* 1995 (NSW) limiting the use of the evidence to evidence of the Respondent's belief or state of mind in 2005. That evidence, unsupported by any other evidence to suggest that the first defendant did not in fact make a loan of $350,000 to Hsieh-Chao Yu, carries very little weight.

107 The evidence does not establish on the balance of probabilities that the deceased acted improperly in remitting approximately $185,000 of the sale proceeds of the Carlingford property to the first defendant, who held a registered mortgage over that property securing repayment of $350,000.

108 The Respondent has therefore failed to prove that the deceased estate owes a liability of approximately $185,000 to the estate of the late Hsieh-Chao Yu and that the parties' understanding at the time they entered into the Principal Agreement and Collateral Agreement that the estate had no liabilities was a common mistake.

109 For all of those reasons, the matters relied on by the Respondent as common mistakes do not provide a basis for declining to make the declarations and orders sought by the Applicants giving effect to the Principal Agreement and the Collateral Agreement pursuant to s 73 of the *Civil Procedure Act*.

Illegality

110 The Respondent submitted that it if the Court made orders for the enforcement of clause 5(c) of the Principal Agreement, this would require the parties to disclose to the Court an incorrect list of assets and liabilities of the deceased's estate on the application for a grant of probate, contrary to s 81A of the *Probate and Administration Act*. It was submitted that this would undermine public policy as it was fundamental to the administration of deceased estates that applicants for probate at the initial stage inform the Court to the best of their ability and knowledge what the assets and liabilities of the estate are.

111 Little attention was spent by the Respondent in written and oral submissions developing this submission and the Respondent's solicitor candidly acknowledged that he "*did not rest too heavily*" on it. In those circumstances, it can be dealt with briefly.

112 I reject the Respondent's submission for all of the reasons explained in [66]–[70] above.

Attorney-General not a party

113 The Respondent's contention that the Principal Agreement was void at the time it was entered into because the Attorney-General was not a party is inconsistent with the Respondent's acceptance referred to in [50] that the Principal

Agreement and Collateral Agreement were immediately binding on the parties when entered into on 10 April 2019.

114 In oral submissions, the Respondent's solicitor limited the contention to an argument that clause 7 of the Principal Agreement provides for the Attorney-General's costs to be paid out of the residuary estate, but the Attorney-General would be unable to sue on clause 7 to have his costs paid out of that estate because he is not a party to the agreement.

115 In my opinion, the Attorney-General's inability to sue the agreement reached between the Applicants and the Respondent concerning the Attorney-General's costs has nothing to do with whether the Principal Agreement is binding as between the Applicants and the Respondent. I asked the Respondent's solicitor whether it mattered that the Attorney-General is unable to sue to enforce clause 7 of the Principal Agreement. The response was:[13]

> "… the answer is I don't know the answer, your Honour. I'm happy to accept that I might be wrong on that submission. But it seems to me quite important where a document creates in the power of the Attorney-General of New South Wales a right to enforce a money judgment against people, there's no signature on that document on behalf of the Attorney-General."

116 It is difficult to make sense of this answer, and it is inconsistent with the Respondent's submission that the Attorney-General has no right to sue on the Principal Agreement to recover his costs.

117 I remain of the opinion in [115] above.

Should clause 5(c) be severed from the Principal Agreement?

118 In view of the conclusion I have reached concerning the proper construction of clause 5 of the Principal Agreement (see [66]–[70] above), and in circumstances where both the Respondent and the first defendant have already filed and served the affidavits contemplated by that clause 5 (see [71] above),

[13] Transcript, page 55 (lines 1–7).

there is no occasion to consider whether clause 5(c) should be severed from the Principal Agreement.

Exercise of the discretion under s 73

119 For all the reasons above, it is appropriate in my opinion to make a declaration that the Principal Agreement and Collateral Agreement are binding as between the Applicants and the Respondent and an order that those agreements be performed in accordance with their terms.

120 As the Respondent has been wholly unsuccessful in resisting the relief sought by the Applicants, I am not presently aware of any reason why he should not be ordered to pay the costs of the Applicants and the Attorney-General of and incidental to the notice of motion filed on 22 October 2020. However, the orders that I will make will permit any party wishing to contend for different costs orders to address this in a short written submission.

Conclusion and orders

121 I make the following declaration and orders:

(1) Declare that:

(a) the Principal Heads of Agreement dated 10 April 2019; and

(b) the Collateral Heads of Agreement dated 10 April 2019,

signed by the legal representatives of the plaintiff/cross-defendant, first defendant/first cross-claimant and second cross-claimant in this proceeding are binding as between those parties.

(2) Order that the agreements referred to in order 1 above be performed by the plaintiff/cross-defendant, first defendant/first cross-claimant and second cross-claimant in this proceeding in accordance with their terms.

(3) Grant liberty to the parties to apply to Williams J on 7 days' notice in relation to the working out of order 2 above, with such liberty to be exercised by email to the Associate to Williams J in the first instance.

(4) Subject to order 5 below, order that the plaintiff/cross-defendant pay the costs of the first defendant/first cross-claimant, second cross-claimant and second defendant of and incidental to the notice of motion filed on 22 October 2020 by the first defendant/first cross-claimant and second cross-claimant.

(5) In the event that any party contends for a costs order other than order 4 above:

(a) grant liberty to that party to file and serve by 28 January 2021 written submissions of no more than 2 pages directed to the costs order for which that party contends; and

(b) grant liberty to the other parties to file and serve by 3 February 2021 written submissions in reply of no more than 2 pages.

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