

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TRUSTS, EQUITY & PROBATE LIST

Not Restricted

S CI 2016 03041

GRAEME DAVID LINKE, AGNES MARIE BAENSCH,
PETER MICHAEL LINKE and ANDREW CORNISH

Plaintiffs

v

VICTOR HAROLD LINKE, JUDITH ANN LINKE,
COLIN MICHAEL LINKE, MARIA GRACE LINKE,
GLENIS WALTER LINKE and IAN DAVID LINKE

Defendants

<u>JUDGE:</u>	KEOGH J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	16, 17, 18, 19, 20 October 2017
<u>DATE OF JUDGMENT:</u>	4 September 2018
<u>CASE MAY BE CITED AS:</u>	Linke & Ors v Linke & Ors
<u>MEDIUM NEUTRAL CITATION:</u>	[2018] VSC 505

EQUITY – Constructive or resulting trust – Estate assets transferred by trustees to a beneficiary – Remaining beneficiaries claim the assets are held on trust for them – Whether power in the will to sell trust assets – Whether trust arises from involuntary transfer of assets – *Black v S Freedman & Co* (1910) 12 CLR 105 – *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 – *Sze Tu v Lowe* (2014) 89 NSWLR 317 – Whether beneficiary took transfer of estate assets in breach of fiduciary duty owed as de facto trustee – *Nolan v Nolan* [2004] VSCA 109 (10 June 2004) – *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 – *Parkview Qld Pty Ltd v Commonwealth Bank of Australia* [2013] NSWCA 422 (11 December 2013) – Whether consideration for transfer of estate assets false – Whether assets received by beneficiaries for less than full value – Allegations of unconscionability and fraudulent concealment – Whether estate property later transferred to volunteers held on trust by them – *Evidence Act 2008* (Vic) s 140 – *Briginshaw v Briginshaw* (1938) 60 CLR 336 – *NOM v DPP & Ors* (2012) 38 VR 618 – Where release entered by parties – Whether release effective to defeat the plaintiffs' claim – Where relevant document destroyed or discovered after release – *The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Limited and Ors (No 2)* [2012] NSWSC 322 (5 April 2012) – *MCT Dairies Inc v Probiotec Ltd* [2009] FCA 1385 – *Katsilis v Broken Hill Pty Co Ltd* (1977) 18 ALR 181.

LIMITATION OF ACTIONS – Trustee liabilities – Allegations of fraud and unconscionable conduct – Laches and acquiescence – Delay – Knowledge of wrongdoing – *Limitation of Actions Act 1958* (Vic) ss 21, 27 – *Reader & Ors v Fried & Ors* [2001] VSC 495 (19 December 2001) – *Orr v Ford* (1989) 167 CLR 316.

ADMINISTRATION & PROBATE – Where no evidence of distribution of estate – Plaintiff beneficiaries seek order appointing trustee to investigate and administer estate – Where only estate asset sold in 1979 – Delay by plaintiffs – Lack of utility of orders sought.

APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

T Mitchell

Stephen Peter Byrne

For the First and Second
Defendants

P N Crofts

Taits Legal

For the Third and Fourth
Defendants

J Rizzi

Dwyer Robinson Pty Ltd

For the Fifth and Sixth
Defendants

No appearance

Introduction

- 1 When he died in 1962, Johannes Linke owned a farm located near Hawkesdale in Western Victoria known as Abbey Hills (Abbey Hills), and the grazing business he operated there (the grazing business). Johannes' will appointed as executors and trustees his wife Emma Linke and brother Walter Linke, and provided that they hold the estate on trust to pay the income derived to Emma, until his youngest child reached 21 years of age, when, subject to payment of an annuity to Emma, Johannes' real and personal estate was to be divided among his children.
- 2 Johannes had five children: Leonard Linke, the first defendant Victor Linke and the first, second and third plaintiffs, Graeme Linke, Agnes Baensch and Peter Linke. Graeme, who is the youngest sibling, turned 21 in 1972. Leonard died in 1965 before the estate was distributed. The fourth plaintiff, Andrew Cornish, is Leonard's son, though this only became known in recent years.
- 3 Following Johannes' death Emma and Walter decided to carry on the grazing business. Most of the work on Abbey Hills was done by Victor. Emma and Victor entered a partnership to operate the grazing business, which was later varied to include Victor's wife, Judith (the second defendant). The grazing business overdraft was extended, and loans were taken out to pay federal and state duties imposed on the estate and to fund the purchase of a residence at 9 Myrtle Avenue, Newcomb (Myrtle Avenue) for Emma.
- 4 After Graeme turned 21 Abbey Hills was transferred to Victor and Judith, and they assumed ownership of the other estate assets, and responsibility for estate debts. Payments were made to Agnes, Peter and Graeme as distributions from Johannes' estate. Victor and Judith have since continued to farm Abbey Hills, more recently in partnership with the third and fourth defendants, their son, Colin, and his wife, Maria. Part of Abbey Hills has been transferred to Colin and Maria.

- 5 Emma died in 1979. Her will appointed Victor and Peter executors and trustees, and provided for payment to Victor of \$9,000, with the residuary estate to be divided among her children. The only estate asset of significant value was Myrtle Avenue, which was sold later the same year. There is no evidence that Emma's estate was distributed to the beneficiaries.
- 6 In 2015 Victor made further payments to each of Agnes, Peter and Graeme on account of what he understood to be an unsatisfied entitlement of each to further distribution from Johannes' estate. A dispute then arose between the parties in relation to the estate entitlements of Agnes, Peter and Graeme, and the circumstances of transfer of estate assets to Victor and Judith. After family discussion and negotiations, Victor and Judith paid a further \$50,000 to each of Agnes, Peter and Graeme, and a deed of release was prepared and executed.
- 7 After the release was signed and the further payments were made the dispute continued. The plaintiffs bring this proceeding alleging, in relation to Johannes' estate, that:
- (a) there was no power in Johannes' will to transfer Abbey Hills and the other estate assets to Victor and Judith, and the involuntary transfer of those assets resulted in a trust arising in their favour;
 - (b) the purchase price recorded in the transfer of Abbey Hills to Victor and Judith was not paid and was a false consideration, and nothing was paid by Victor and Judith for the grazing business, with the consequence that they hold the estate assets on trust for the beneficiaries of the estate;
 - (c) in the alternative, Victor and Judith obtained transfer of the estate assets by fraudulent concealment, and are liable to compensate the plaintiffs; and
 - (d) Colin and Maria received the part of Abbey Hills transferred to them as volunteers, are now fixed with the knowledge of the trust on which the property is held, and accordingly hold the property on trust for the plaintiffs.

The plaintiffs allege Emma's estate has not been administered and distributed, and a new trustee should now be appointed to administer the estate.

8 In response Victor and Judith submitted that:

- (a) the seriousness of the allegations made against them, and the consequences flowing from adverse findings, require that the plaintiffs establish the facts on which their claim is based by something more than indirect testimony and inferences;
- (b) their capacity to resist the claim by the plaintiffs has been seriously prejudiced by the delay in bringing proceedings and in those circumstances the Court should be cautious before finding for the plaintiffs;
- (c) Johannes' will gave the trustees power to transfer the estate assets to Victor and Judith;
- (d) the plaintiffs have not established failure by them to pay for the transfer of Abbey Hills and other estate assets, fraud or other conduct which gives rise to a constructive trust; and
- (e) Agnes, Peter and Graeme are not entitled to the relief sought because they are bound by the release.

In relation to Emma's estate, Victor and Judith argue that delay by the plaintiffs in bringing the claim has rendered it all but impossible to resolve what happened to the proceeds of sale of Myrtle Avenue, the delay arose from the plaintiffs' inaction and they should be shut out of any claim in respect of Emma's estate. Colin and Maria adopted the same position as Victor and Judith and in addition argued they did not take transfer of part of Abbey Hills as volunteers, and no trust should be imposed on assets which they hold.

9 The parties agree that if the plaintiffs establish an entitlement to relief, the remaining issues raised by the pleadings, including the form of relief, the entitlement if any of

Andrew Cornish, and whether a constructive trust extends to other farm property subsequently purchased by Victor and Judith, will need to be determined.

- 10 The fifth and sixth defendants, Johannes' executors by devolution, agreed to abide the outcome of the proceeding and took no part in the trial.

Factual background

- 11 Johannes purchased Abbey Hills in 1946. A dwelling occupied by the Linke family was situated on the property. Johannes' grazing business consisted principally of a flock of Corriedale and Merino sheep producing wool and lambs, and a much smaller herd of Hereford and dairy cows. The grazing business assets included the stock, motor vehicles, tractors and farm plant and equipment. Johannes held an account with an overdraft facility (the farm account) at the Penshurst branch of the National Bank of Australasia Ltd (the bank), and an account with wool-brokers Strachan & Co Ltd (the wool-brokers' account).

Johannes' will

- 12 Johannes' last will was dated 23 December 1941. Clause 1 of the will revoked previous wills and clause 2 appointed Emma and Walter as executors and trustees. Clause 3 recorded a gift of Johannes' furniture and household effects to Emma. Pursuant to clause 4, Johannes' residuary estate was to be held on trust on the following terms:

I GIVE DEVISE AND BEQUEATH all my real and residuary personal estate unto my trustees upon the following trusts, namely –

- (a) To carry on the farming and/or grazing business carried on by me prior to my death either solely or jointly with any other person or persons with whom I shall be then carrying on such business until my youngest child for the time being, attains twentyone years of age or during such shorter period as my trustees think it desirable to carry on the same with liberty for that purpose to occupy and use my real estate and employ my live stock and plant and such part of my personal estate as they shall think fit with power to buy and sell live stock and generally act in all matters relating to any such property as if they were the absolute owners thereof AND I DECLARE that my trustees shall not be responsible for any loss or lessening in value in the carrying on of such business.

- (b) Subject to the foregoing provision for carrying on my said farming and/or grazing business to stand possessed of my real and residuary personal estate UPON TRUST to sell call in collect and convert the same into money in such manner and upon such terms and conditions as they shall think fit with power to give time for the payment of any purchase money and to postpone the sale calling in or conversion of the whole or any part or parts thereof during such period as they shall think fit and to retain the same or any part thereof in its then present form of investment without being responsible for loss.
- (c) After payment of my just debts funeral and testamentary expenses and all duties payable on my death in respect of my estate to invest the residue of the moneys arising from such sale calling in and conversion in the names of my Trustees in any of the forms of investment for the time being authorised by the law of the State of Victoria for the investment of trust moneys or upon fixed deposit with any Banking Company carrying on business in the Commonwealth of Australia with power to vary such investments at their discretion.
- (d) To pay the net income derived from my estate whether from carrying on my farming and/or grazing business or from the investment of moneys forming part of my estate (after payment of all rents taxes rates insurances repairs expenses of management and such other outgoings as in the opinion of my trustees are properly chargeable to income) to my wife during her widowhood until my youngest child for the time being attains twentyone years of age but charged with the maintenance education and bringing up in a manner suitable to their station in life of my sons for the time being under the age of twentyone years and my daughters for the time being under that age who have not married.

13 Clause 5, which had effect upon the youngest child attaining 21 years of age, reads:

ON my youngest child for the time being attaining twenty one years of age I DIRECT my Trustees to stand possessed of my real and residuary personal estate including any parts of my real and personal estate for the time being unconverted and the investments for the time being representing such part thereof as has been converted UPON TRUST

- (a) to pay to my wife Emma Marie Linke so long as she remains my widow an annuity of One hundred and fifty pounds to begin upon my youngest child for the time being attaining twentyone years of age and to be payable by equal halfyearly payments, the first payment to be made on the expiration of six months, and subject thereto
- (b) to hold my said real and residuary personal property for all or any my children or child living at my death who attain the age of twenty one years if more than one as tenants in common but so that the share of each son of mine shall be half as much again as the share of each daughter PROVIDED ALWAYS AND I HEREBY DECLARE that if any child of mine shall die whether in my lifetime or after my death before attaining a vested interest in my estate leaving a child or children who attain the age of twentyone years such child or children shall stand in place of such deceased child of mine and take if more than one as tenants in common in equal shares the share in my estate which their

parent would have taken had he or she survived me and attained a vested interest.

- 14 Clause 6 gave the trustees certain powers, which were expressed to be in addition to powers conferred by statute. Clause 7 empowered the trustees to appropriate any part of the estate necessary to fund the annuity payable to Emma pursuant to clause 5(a).
- 15 Following Johannes' death, Victor and Judith became aware of the terms of his will. Agnes, Peter and Graeme did not see Johannes' will until 2015 and were not aware until then of its terms, or of the detail of their entitlements as beneficiaries.

The grant of probate and inventory of assets

- 16 Johannes died on 19 August 1962. An order granting probate of his will to Emma and Walter was made by this Court on 9 April 1963. The estate solicitor was Mr Joe Collery of Melville Orton & Lewis, solicitors of Hamilton.
- 17 The following inventory of assets and list of liabilities was lodged in support of the application for probate:

ASSET	VALUATION
Real property (Abbey Hills)	£34,031.12 shillings zero pence
Motor cars, trucks and other vehicles	£2,190.00 shillings zero pence
Livestock	£6,225.14 shillings zero pence
Farming implements and plant	£980.07 shillings six pence
TOTAL:	£43,427.01 shillings six pence

LIABILITY	AMOUNT
List of creditors	£586.15 shillings ten pence
National Bank of Australasia Ltd overdraft	£8,521.18 shillings five pence
Mrs Emma Marie Linke loan to deceased in June 1958	£706.10 shillings eleven pence
Strachan & Co Ltd Wool Brokers Geelong - advance	£1,080.06 shillings two pence
TOTAL:	£10,895.11 shillings four pence

Work on Abbey Hills

- 18 Prior to his death, Johannes operated the grazing business and was the principal worker on Abbey Hills. Leonard was born in 1936 and Victor in 1938. They both left school at a young age to work on Abbey Hills. Before Johannes' death, Leonard suffered serious ill health, was unable to continue most farm work, and obtained a job driving a local school bus. Victor continued to work on the farm with his father.
- 19 Victor said that after his father's death his mother asked him to stay on and run the farm for her. He had planned to leave Abbey Hills and work in Port Fairy, but he discussed his mother's request with Judith, to whom he was then engaged, and they reluctantly agreed to stay and work on the farm for ten years, when the estate was to be wound up. Victor and Judith married in 1963 and from that time Judith lived at Abbey Hills. For the first two years following Johannes' death, Victor was paid a wage for his work on the farm. He said in the first year or so after Johannes' death, Emma played a very active role on the farm, helping him with feeding out stock, fencing, milking cows and general farm duties. As time went by Emma became less active on the farm, and in 1965 she moved with Graeme to live at Myrtle Avenue. At Emma's request, Victor and Judith kept ledger books recording farm income, outgoings, assets and liabilities. Judith did not perform farm work, and was not paid for her book work.
- 20 Agnes, who was born in 1940, was still living at Abbey Hills in 1962. She left home within six months of her father's death and moved first to Adelaide and later to Geelong, where she worked as a kitchen aid in a private hospital, and later as a nurse. Agnes returned to Abbey Hills most years during shearing season. Peter was born in 1949; he was 13 years old when his father died. At that time he was already working on the farm outside school hours. Peter left school when he was 14 to work full time on the farm with his brother Victor. In 1968 he left Abbey Hills and moved to Geelong to play football and to work. Graeme was born in 1951; he was 10 years old when his father died. He said it was decided he would leave school in Geelong and return to Abbey Hills to replace Peter in 1968. He remained working on the farm for one year, then moved to Geelong to play football, and to work.

Estate duties

- 21 State and federal duties were levied on Johannes' estate. Victor said that he and Emma discussed the need to arrange a loan through Melville Orton & Lewis to pay the estate duties.
- 22 A farm account cheque butt dated February 1964 records a state probate duty payment of £3,222. In May 1964 a loan of £6,000 was arranged through Melville Orton & Lewis (the estate duty loan). Of the funds advanced, just over £2,800 was paid by Melville Orton & Lewis for federal estate duty and a small additional amount of state probate duty. The loan balance of just over £3,000 was paid to the farm account, most likely to cover the earlier payment of state probate duty from the account.
- 23 The estate duty loan was advanced by two private lenders, and was secured by mortgages registered on Abby Hills titles on 22 June 1964. One lender was replaced in April 1970. The mortgages securing the estate duty loan were finally discharged on 29 July 1974.

Partnership agreement

- 24 A partnership agreement, which was prepared by Melville Orton & Lewis and executed by Emma and Victor on 31 August 1964, records commencement of the partnership between them on 1 July that year. Clause 5 of the partnership agreement provided:

DURING the continuance of the partnership the firm shall have the exclusive right to use free of occupation rent for the purposes of the partnership business the lands livestock and plant described in the Schedule hereto. Such lands livestock and plant shall remain the sole and separate property of the estate of the said Johannes Reinhold Linke deceased and nothing herein contained shall be deemed or intended to create any partnership in or joint ownership of the said lands livestock and plant or constitute the Trustee of the Estate of Johannes Reinhold Linke deceased an agent or trustee of or for the partnership in relation to such lands livestock and plant it being expressly agreed that it is only the right to use the said lands livestock and plant during the continuance of the partnership that is brought into the partnership.

The property, livestock and plant listed in the schedule to the partnership agreement are all of the assets in the estate inventory referred to in paragraph [17].

- 25 The partnership agreement provided that:
- (a) the partnership was responsible for payment of all 'rates, taxes and outgoings payable in respect of' Abbey Hills, and was obliged to maintain the estate assets;
 - (b) if improvements in carrying capacity led to an increase in livestock numbers, the additional livestock belonged to the partners in equal shares;
 - (c) a partnership account was to be maintained at the National Bank of Australasia, Penshurst branch; and
 - (d) the partners were both obliged to devote their whole available time to the partnership business, and were entitled to the net profits in equal shares.
- 26 The partnership agreement was varied effective 1 July 1969 to remove the requirement that Emma devote her time to the partnership business and to provide for distribution of each year's profit as to the first \$500 to Emma, the next \$7,500 to Victor, and of the balance, 25 per cent to Emma and 75 per cent to Victor. A further variation of the partnership agreement effective 1 July 1970 admitted Judith as a partner.

Purchase of Myrtle Avenue and Emma's move from Abbey Hills to Geelong

- 27 In 1965 Emma decided to leave Abbey Hills to live in Geelong with her youngest child Graeme. Victor said an arrangement was made between him, his mother and Walter to buy Emma a house in Geelong, and that he went to Geelong for that purpose. Victor kept detailed diaries of farm work and other events. An entry on 24 August 1965 reads:

Walter I and mum went to Geelong looking for house.

An entry on 1 September 1965 reads:

Went to Geelong about house.

Victor identified these entries as relating to the purchase of Myrtle Avenue.

28 On 1 November 1965 an amount of £3,000 was advanced on the wool-brokers' account and paid to the farm account. The notation on the Strachan & Co statement reads:

To advance for purchase of house, chq. CR Nat. Bank of Aust. Ltd.,
Penshurst.

A receipt dated 3 November 1965 from Whyte, Just & Moore, solicitors of Geelong, records payment from Emma of just under £3,000 for:

Balance purchase money and adjustment purchase from Wood.

It is likely that the advance from the wool-brokers' account funded the sum paid by Emma towards the purchase of Myrtle Avenue. A loan arranged through Whyte, Just & Moore, secured by a mortgage registered on Myrtle Avenue, financed the balance of the purchase price. The interest payments on that loan were paid from the farm account.

29 A Whyte, Just & Moore receipt records payment by cheque from Emma of \$6,240 on 9 April 1974, being six months' interest of \$240 and a principal sum of \$6,000. A discharge of the mortgage was registered on 28 June 1974. Judith said Victor paid out the mortgage on Myrtle Avenue to give his mother a sense of security because Johannes had only left her \$300 a year.

The farm account

30 Victor said the farm account continued to be used to operate the grazing business after Johannes' death. He said he and his mother had to make financial arrangements to carry on the farm, and they went to the bank and obtained an agreement that the overdraft would be extended by £500 to allow them to carry on the business in the short term. After Johannes' death, the farm account was operated under the name *Estate J R Linke*.

31 After the partnership agreement commenced in 1964, the partnership continued to use the farm account for all grazing business transactions. The farm account was

still being used until at least August 1973. It is not clear when Victor and Judith started to operate a farm account in their own names.

- 32 After Johannes' death, Emma and Victor had joint authority to sign farm account cheques. At least from the time Emma left Abbey Hills in 1965 cheques could be signed solely by Victor, and from that time he undertook almost all transactions on the farm account.
- 33 Non-grazing business payments made from the farm account included payment of stamp duty, mortgage interest and rates relating to Myrtle Avenue, and interest on the estate duty loan.
- 34 After commencement of the partnership, money was drawn from the farm account by both Emma and Victor for their personal needs. Farm machinery and motor vehicles were also purchased from the farm account.
- 35 At the time of Johannes' death, the farm account was not secured by mortgage registered against Abbey Hills. However, the list of liabilities lodged in support of the application for probate of Johannes' will records that the overdraft was 'secured by lodgement of titles to real estate', which I understand to mean that the titles to Abbey Hills were held by the bank. A mortgage in favour of the bank was registered against one of the Abbey Hills titles on 13 August 1964. Victor said that in the two years after Johannes' death an application to extend the farm account overdraft was made, and the bank required some security. I conclude the mortgage registered in favour of the bank was to secure the farm account overdraft. The bank mortgage was discharged before the transfer to Victor and Judith was registered. However the date of discharge on the title is indistinct.

The wool-brokers' account

- 36 The account held by Johannes with wool-brokers Strachan & Co Ltd continued after his death in the name *Estate J R Linke*. The grazing business was transacted on the wool-broking account. Throughout each year, farm merchandise and stock were purchased and funds were advanced, resulting in a debit balance with interest

accruing. Proceeds from the sale of wool and stock by the grazing business were paid into the wool-brokers' account. The major credit in each year came from wool sales in December or January. These funds were used to pay off any debit balance and the remaining credit was then paid into the farm account.

37 For example, the debit balance of £1,080 at the date of Johannes' death increased by late November 1962 to just under £1,500. A wool cheque for just over £4,800, paid into the account on 8 December 1962, resulted in a credit balance. Victor said a cheque for just over £3,300 was then drawn on the wool-brokers' account and paid into the farm account.

38 Victor said that in the mid 1960s the grazing business changed wool-broking firms from Strachan & Co Ltd to Dennys, Lascelles Limited. The Dennys, Lascelles Limited account was in the name *Estate J R Linke*. Victor said that Walter had insisted, much to his displeasure, on the change in wool-broking firms. He said Walter ran a similar grazing business to Abbey Hills, was a more experienced farmer, and used Dennys, Lascelles Limited as his wool-broking firm. Victor said Walter thought it would be more advantageous to change firms so that he could have a greater input into stock purchases, and so that Walter's stock agent could also be the stock agent for Abbey Hills.

39 The partnership used the wool-brokers account for grazing business transactions.

Farm improvements and payment of estate debts

40 In cross-examination, when asked whether he could recall having any contact with Melville Orton & Lewis throughout the 1960s, Victor said that in the mid sixties he went to see solicitor Joe Collery about estate matters. The following exchange occurred:

Do you remember what those matters were?---Um, they were in regard to improvements that were being made on the farm by myself.

Yes?---And I asked Mum about - my mother about what were we doing - she was involved in it as well - whether it would add to the value the property when the property was wound up. So I went and asked him,

and he said no, I wouldn't be - I would be credited for the improvements that we made.

So can I just make sure I've got this clear? You saw him because you were improving the estate property and you wanted to make sure that you'd be compensated when the time came for distributions?---Yes.

When Judith was being questioned in cross-examination about payments made for transfer of the farm to her and Victor, the following exchange occurred:

So your evidence is now then, even though you've said you have no specific recollection, that that \$39,000 was paid, and you and Victor took all the property?---After the solicitors had taken out all the accounts that Victor and his - that in that ten years had been honoured on behalf of the father and all the capital improvement that he had been that we would be reimbursed for.

Now, I'll stop you for a second. You weren't at this meeting, were you?---Not that meeting, but we were - I said we went there is 65, and we were told all this before Victor put his plantations in, that just as he had been told he would be paid back, reimbursed for all the father's debts, that he paid the interest on the probate loans. He would be reimbursed for the capital improvements when he purchased the property, and they took that amount off, and this is what was remaining for him to pay, and when he paid that we owned the farm.

So from 1965 onwards it was your view that the land was always going to be yours?---No, it wasn't. It was Victor's view that he was interested. He had learnt to love farming. I didn't like farming, but I was married to him. He wanted to continue with farming, and he wanted to see - work towards - fine, but if he started doing these things, he didn't want to buy back what he was doing.

No evidence was given of the value of improvements made to Abbey Hills or the amount paid to service or repay estate debts during the period from Johannes' death to the transfer to Victor and Judith.

Relevant documents

- 41 From June 1963, Victor and Judith kept ledger books for the grazing business. Most entries were made by Judith. The first ledger book spanning the period 1963 to 1965, and the ledger book commencing in 1972, were available at trial, and pages from those ledgers were tendered. The ledger book covering the period 1966 to 1972 has been destroyed. There is no document which reconciles entries in the ledger book with the farm account bank statements.

- 42 Some cheque and deposit butts for the farm account were available, however, the farm account bank statements have been destroyed. The estate and grazing business tax returns, which were prepared by Melville, Orton & Lewis, no longer exist. Judith said each year Melville Orton & Lewis sent out a partially completed tax sheet, which she would fill in with details from the cheque book. She said she then gave the tax sheet to Emma, who took it to Melville Orton & Lewis. The first ledger book records grazing business profit figures for 1962–63 of £3,286, 1963–64 of £4,026 and 1964–65 of £5,195. Judith said these profit calculations were made by her for her own benefit, and that the taxable income figures came back from the accountant.
- 43 The partnership accounts and tax returns, and Emma, Victor and Judith’s individual tax returns no longer exist. There is no evidence of what assets were owned by the partnership, and no reconciliation of partnership drawings against entitlements to partnership profits.
- 44 Relatively comprehensive diaries maintained by Victor were still available.
- 45 Judith said after Johannes’ estate was finalised, Walter came to the farm with a handful of papers. Those papers, and others from the farm office, were put in a cardboard box which was placed in the top of a cupboard, and only recently discovered by Judith. The box contained some cheque and deposit butts for the farm account, correspondence and other documents from Melville Orton & Lewis, and some statements from Strachan & Co Ltd and Dennys, Lascelles Limited in relation to the wool-brokers’ account.
- 46 The Melville Orton & Lewis files have not been located.
- 47 Judith said in recent years she cleaned financial documents from a cupboard, leaving only seven years of tax files. She said the documents disposed of included bank statements for the farm account for the years 1962 to 1973. Judith said she put the documents in a bag and gave them to Victor, who burnt them.

Winding up the estate

48 Graeme turned 21 on 17 November 1972. Victor said he knew, because he was familiar with the terms of Johannes' will, that the estate was to be wound up after Graeme turned 21. However, he could not recall any discussions which took place about winding up the estate. Victor's diary entry on 28 November 1972 reads:

Went to Hamilton about winding up the estate. Uncle Walter came with.

An entry on 11 December 1972 reads:

Went to Hamilton re winding up of the estate. Agreed that I pay out Peter \$8,000, Graeme \$8,000 and Agnes \$5,000, also probate debt \$12,000 and house Geelong \$6,000 and keep all the property.

In cross-examination in relation to the second diary entry Victor was asked:

Now that you've read that note, do you have any better recollection of that meeting or is it a complete blank?---It's a complete blank.

Do you remember - and perhaps it didn't happen at this meeting, I don't know, but do you remember how you got to the agreement described in that diary entry?---Our solicitor worked it out and just told us what to do.

So if the solicitor just told you what to do, then you'd agree with me that you didn't negotiate with them?---I didn't negotiate with them, no. They worked it all out, and when they visited them they gave us the details.

Was Judith involved in the process?---No.

Later, Victor agreed he had no recollection of negotiations to work out a purchase price for the farm.

49 The following payments are recorded in the farm ledger book:

29 December 1972	Peter Linke	\$7,500
10 January 1973	Graeme Linke	\$2,000
22 January 1973	Agnes	\$1,000
3 March 1973	Agnes	\$1,000
29 March 1973	Agnes	\$3,000
25 May 1973	Graeme Linke	\$6,000
10 December 1976	Peter Linke final payment	\$2,020
30 December 1976	Graeme Linke last payment	\$2,000
30 December 1976	Agnes Baensch last payment	\$2,000

Victor had little memory of making these payments. He could not recall telling Graeme that his inheritance was \$10,000. Victor did recall asking Graeme to leave him \$2,000 so that he could continue farming, and he said Graeme agreed to that. He said the payments made in 1976 were the final payments to his siblings of the amounts they had left in the farm for him in 1972.

50 The transfer of the Abbey Hills titles is signed by Emma and Walter as transferors and Victor and Judith as transferees, and is dated 2 July 1973. Mr Collery is the witness to each person's signature. The transfer records consideration of \$100,800 paid by Victor and Judith. Victor said he could not recall how the transfer came to be signed, what arrangements led to the property being transferred, or who he made payments to for the transfer. He was asked:

Is there anything you can tell the court about what you recall the arrangement was that led to the property being transferred? And by the property, I mean the farm?

No I can't.

In cross-examination Victor was asked about transfer of the estate stock, plant and equipment, and the following exchange occurred:

So what I'm suggesting to you, Mr Linke, is there was no separate deal for you to pay anything for the stock, the plant, the equipment of the farm, was there?---That deal was always done in Hamilton by Mr Collery.

Well, Mr Collery's unfortunately not here to tell us what was said. We'll need to make do with your memory. Do you have any recollection of a separate deal to pay anything for the stock, the plant, the equipment and the farm business as at 1972?---It was paid for, but I'm not quite sure how, but, as I said, he worked it out for us.

I see. Do we get back to the point then that you don't know what the deal was, but whatever Mr Collery said it was, you just agreed with that?--
-Yes.

51 Judith was asked about arrangements she and Victor made to facilitate purchase of Abbey Hills, and she said the bank manager came to the farm, put them on a very strict budget, and allowed them an overdraft of \$40,000. Judith said Emma visited the farm and brought a great friend of the family, Albert Uebergang, who sat in their

kitchen and said to Victor, 'I — your mother's told me you're buying the boys out. Um, I've got a \$10,000 loan coming due at 5 per cent interest. Would you like it?', and Victor thanked him and accepted. Judith said she and Victor then had confidence with some money matters to go ahead with the purchase. She said she had no memory of how the purchase price was worked out, and that she was not involved in negotiations about how the estate would be divided up. Judith agreed that she did not recall paying \$100,800 for transfer of the land, but said she and Victor paid the full price they were asked to pay.

52 As I stated in paragraph [23], the mortgages securing the loans to pay estate duties were discharged on 29 July 1974. The transfer of Abbey Hills was not registered until 18 December 1974. Mortgages to the bank and to Albert and Edith Uebergang were also registered on the same day.

53 Graeme said that around his 21st birthday he had a conversation with Victor who told him he was entitled to \$10,000 from their father's estate. He said Victor asked if he could leave \$2,000 behind to help him carry on farming, which Graeme agreed to do. Agnes said that after Graeme turned 21 she received a cheque from the farm account, which she thought was for the amount of \$8,000. Agnes could not recall having any discussion in relation to what the cheque was for. It was put to Agnes that, consistent with the ledger, she received a number of cheques rather than just one, and she disagreed. Peter said in 1973 he received a phone call from Victor explaining there was some money for him from the farm, and that he later received a cheque for \$8,000. He said his father's estate was not mentioned in that conversation, and he understood Victor and Judith were running the farm because it had been left to them. Peter agreed he did receive a further cheque of \$2,020 in December 1976.

2015 Payments

54 In early 2015 Victor paid \$7,000 to each of Agnes, Peter and Graeme. He explained that at the time he thought he owed each of his siblings \$2,000 from Johannes' estate, and he allowed the additional \$5,000 for interest. Victor said, having looked at the

journal entries from late 1976 recording 'last payments' to each sibling, he was no longer of the view he owed money to Agnes, Peter and Graeme in 2015.

55 When he received the \$7,000, Graeme was unhappy because Victor had delayed so long in making the payment, and he felt the interest component was inadequate. Graeme wrote to Victor on 11 April 2015 detailing his complaints. He said at the time his belief, which had not changed since 1972, was that his entitlement from Johannes' estate was \$10,000, and that he had left \$2,000 to assist Victor to continue to operate the farm. Graeme said, at Victor's request, he calculated his entitlement to interest on the \$2,000 at a round sum of \$100,000.

56 A number of family meetings then occurred, at which discussion extended beyond the adequacy of the recent payments made by Victor to the administration of Johannes' estate and the entitlements of the beneficiaries. It was at this time that Agnes, Peter and Graeme first obtained copies of Johannes' will. Victor agreed his siblings were pressing him for an explanation of what happened to Johannes' estate. He said that he had no explanation to give them, because he had no memory of the winding up of the estate, and that he had tried to find out but was unsuccessful.

57 In May 2015 Agnes, Peter, Graeme, Victor, Judith, Colin and Maria entered a release agreeing to resolve their dispute in relation to Johannes' estate and Abbey Hills on the basis of Victor and Judith paying \$50,000 to each of Agnes, Peter and Graeme (the release).

58 However, the family dispute was not resolved by execution of the release and the further payments. A further family meeting involving all siblings occurred at Mortlake on 29 August 2017. A note made at that meeting by Peter was signed by the four siblings and reads:

- Victor accepts that Andy is family member [Len = Val's son]. Andy Cornish
- Vic accepts that Graeme does not hold the funds from Mum's estate
- Vic accepts –
Mum's house in Geelong was purchased out of dads [sic] estate funds

- Vic accepts –
At all times mum believed that Victor purchased Geelong house with non estate funds – funds other than dads [sic] Estate J R Linke

Graeme said the four dot points accurately reflected what was agreed at the meeting. Victor said he felt under a great deal of pressure at the meeting, that he went with the idea of it being a meeting to unite the family and thought by signing the note ‘... it might have helped things along.’ Victor was asked the following questions in relation to the August 2017 meeting:

Can you look at the second dot point for me? “Vic accepts that Graeme does not hold the funds from Mum’s estate.” What made you accept that?--
-That was my - my belief.

On what basis?---Just on a personal basis.

When, during the course of the meeting, were you asked to sign this note?---
Uh, at the end.

How long was the meeting?---Three, three and a half hours.

The third dot point reads, “Mum’s house in Geelong was purchased out of Dad’s estate funds.” Why do you accept that to be true?---Well, I was mixed up there, I’m afraid, and I didn’t really understand the question.

How do you say that house was purchased?---The house was purchased from farm funds.

Victor’s health

59 Victor was assessed by clinical neuropsychologist Dr Judy Tang on 21 September 2017. Dr Tang’s report dated 28 September was tendered. In that report Dr Tang recorded the following opinion:

It is my opinion that Victor’s cognitive weaknesses are due to a combination of mood difficulties (anxiety and depression), resolving delirium and ischaemic changes and noted generalised reduction in brain volume by his CT scan dated 16/02/2017.

His mood difficulties and cognitive weaknesses mean that he will appear confused and flustered if asked to recall events surrounding the death of his parents and the administration of their affairs, especially under the pressure of a cross-examination. His verbal responses may not be clearly expressed, and requested for clarification is likely to exacerbate his anxiety.

Compared to same-aged peers, Victor is also likely to:

- Be slower to process information presented to him.

- Have mild difficulty understanding verbal information presented to him – especially if complex, abstract information is provided.
- Have difficulty switching between ideas and topics.
- Have some difficulty generating responses “on the spot”.

My observations of Victor during the period he gave evidence are consistent with the opinion expressed by Dr Tang. Victor was visibly tired while he was in the witness box, and it was necessary for him to give evidence over three separate mornings. He often appeared to struggle to comprehend questions and information put to him, and at times he appeared confused. I am confident Victor was doing his best to answer questions addressed to him, but at times he struggled.

Section 140 of the *Evidence Act*

60 Victor and Judith relied on the well-known passage in the judgment of Dixon J in *Briginshaw v Briginshaw*:¹

But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.²

61 The standard of proof in civil proceedings is governed by s 140 of the *Evidence Act 2008* (Vic):

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account -
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject-matter of the proceeding; and

¹ (1938) 60 CLR 336 (*‘Briginshaw’*).

² Ibid 362.

(c) the gravity of the matters alleged.

In *NOM v DPP & Ors*,³ the Victorian Court of Appeal concluded s 140(2) of the *Evidence Act*⁴ should be construed as embracing the principle in *Briginshaw*.⁵ Discussing the requirements of s 140(2) the Court said:

While a fact finder may take into account a number of considerations for the purposes of informing the statutory standard of proof under s 140(2), he or she must take into account the three specified considerations set out in s 140(2)(a)-(c). While these do not include all the considerations Dixon J proffered as informing the civil standard of proof in *Briginshaw*, it is open to the fact finder under s 140(2) to take into account additional relevant matters to those specifically identified, such as the inherent unlikelihood, or otherwise, of the occurrence of the matter of fact alleged.⁶

The plaintiffs' claims are to be determined on this basis.

62 The plaintiffs allege that by unconscionable conduct or fraud, Victor and Judith deprived them of their entitlements under Johannes' will. Those allegations are serious. Victor and Judith submitted the scenario alleged by the plaintiffs is inherently unlikely because the estate assets were transferred to Victor and Judith by the trustees Emma and Walter with assistance and advice from the estate solicitors Melville, Orton and Lewis. The consequences to Victor, Judith, Colin and Maria of the plaintiffs' claims succeeding may be loss of Abbey Hills. I agree these considerations are relevant to whether many of the facts on which the plaintiffs' case rests have been proved.

Johannes' estate

63 The plaintiffs put their case against Victor and Judith in four ways:

(a) The plaintiffs' interest in the estate assets was involuntarily transferred to Victor and Judith, giving rise to a *Black v Freedman*⁷ constructive or resulting trust in their favour.

³ (2012) 38 VR 618.

⁴ 2008 (Vic).

⁵ (1938) 60 CLR 336.

⁶ Ibid 119, citing *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 (citations omitted).

⁷ *Black v S Freedman & Co* (1910) 12 CLR 105 ('*Black v Freedman*').

- (b) The circumstances of the transfer made it unconscionable for Victor and Judith to assert beneficial title, and equity imposes a constructive trust over Johannes' estate in favour of the plaintiffs.
- (c) By reason of prior de facto trusteeship, Victor and Judith breached existing trust obligations owed to the beneficiaries directly (or to Emma and Walter on whose behalf the plaintiffs seek leave to sue derivatively) when the estate assets were transferred to them, so that they hold the assets on trust for the plaintiffs.
- (d) Victor and Judith fraudulently concealed the impropriety of the transfer to them of estate assets, and are liable for the loss suffered by the plaintiffs as a consequence of the transfer.

I will deal with these cases in the following order: first the *Black v Freedman*⁸ trust, second, breach of obligations owed as de facto trustees, and third, unconscionability constructive trust and fraudulent concealment.

Black v Freedman constructive or resulting trust

Agnes, Peter and Graeme

- 64 The plaintiffs submitted first that the only power of sale in Johannes' will is conferred by clause 4(a). Clause 6(f) should be construed as only conferring incidental or ancillary powers on the trustees in relation to the exercise of the power of sale in clause 4(a).
- 65 Second, the power of sale in clause 4(a) was limited to Johannes' personal estate. The will did not confer power on the trustees to sell Abbey Hills.
- 66 Third, when Graeme turned 21, the clause 5 trust came into effect and all beneficiaries had a vested interest in possession in Abbey Hills and the other estate assets. The terms of clause 5 required that the trustees convey the estate property to

⁸ Ibid.

the beneficiaries as tenants in common in their respective shares. Victor knew the terms of the will, and that his siblings were entitled to their shares in the property. Fourth, instead of transferring Abbey Hills and the other assets to the beneficiaries in their respective shares, Walter and Emma transferred the assets to Victor and Judith. The transfer of Abbey Hills and other estate assets to Victor and Judith occurred without the plaintiffs' knowledge or consent. Fifth, a trust arises when property is transferred through fraud, or without the owners' knowledge or consent.⁹ From the time of the transfer, the property is automatically considered to be held for the beneficial owner. A trust arose from the involuntary transfer of the estate assets to Victor and Judith and it was no defence that Victor and Judith paid the plaintiffs some money for their share of the estate. Agnes, Peter and Graeme did not bargain for the amount paid and no trustee could fix a price to deprive them of their interests vested in possession.

Victor and Judith

- 67 Victor and Judith submitted that the plaintiffs' contention, that upon Graeme's 21st birthday each beneficiary had a vested interest in possession and was entitled to immediate enjoyment of their respective share of the estate assets, was wrong. First, the estate was still charged with payment of debts, whether to original creditors, or to the partnership to the extent it paid debts on behalf of the estate. Second, the powers of sale and appropriation granted to the trustees must have remained after the clause 5 trust came into effect in order to enable the trustees to pay estate debts and facilitate payment of the annuity to Emma. Third, the correct reading of clause 6(f) is that it confers a power of sale. Fourth, the trustees sold the estate assets to Victor and Judith pursuant to that power, and organised for distribution to each of the beneficiaries of their proportionate interest. Fifth, the trustees sold the estate assets to Victor and Judith and administered the estate on advice from their solicitors. Victor and Judith should not bear the consequences if there was

⁹ *Evans v European Bank Ltd* (2004) 61 NSWLR 75 [113]; *Fistar v Riverwood Legion and Community Club Ltd* (2006) 91 NSWLR 732 [37] – [39].

impropriety in the way in which that process was undertaken. In the absence of fraud or unconscionability on the part of Victor and Judith, there is no basis for equity to intervene.

Analysis

68 This case, which was not pleaded or argued by the plaintiffs in opening, was first raised by the plaintiffs in their closing address. For the case to succeed it must be that Emma and Walter did not have power under Johannes' will to sell Abbey Hills and the other estate assets to Victor and Judith.

69 The principles applicable to construction of Johannes' will are not in doubt. The words of the will should be given their plain meaning, understood in a context of the document read as a whole, to reveal the intention of the testator.¹⁰

70 Relying on the contention that the only power of sale in the will was contained in clause 4(a), the plaintiffs submitted:

... the power of sale isn't found in Clause 6(f). [T]here is an express power of sale not in respect of the farm land but in respect of other assets which is found in Clause 4(a) of the will and so the trustees had, under Clause 4(a), the right to sell and call in other assets but not the farm land and it's perhaps not surprising that for a farming family, and Johannes's intended to pass on the farm to all of his children in stated shares, it's not surprising that the will wouldn't provide the trustees the right to sell it out from under them. This has been the family business.

So the operation of Clause 6(f) is that while the Clause 4 trusts are in effect, there is a power of sale in respect of personal but not real property.

This submission, which seemed to be the foundation upon which the plaintiffs attempted to build this case, is inconsistent with the terms of the will, and cannot be accepted. I have set out the relevant parts of clause 4 of the will at paragraph [12] above. Clause 4(a) gave the trustees the power to carry on the grazing business until Graeme turned 21, or for such shorter period as they thought desirable. The only express power of sale in clause 4(a) was to buy and sell livestock. Clause 4(b) of the

¹⁰ *Perrin v Morgan* (1943) AC 399, 402; *Fell v Fell* (1922) 31 CLR 269; *Byrnes v Kendle* (2011) 243 CLR 253 [103]–[106].

will directed the trustees to 'stand possessed of my real and residuary personal estate UPON TRUST to sell call in collect and convert the same into money'. That direction was subject to the trustees exercising the power granted by clause 4(a) to carry on the grazing business. For so long as they chose to carry on the grazing business the trustees would not sell Abbey Hills or the grazing business assets. However, when the trustees considered it was no longer desirable to carry on the grazing business, they were to sell Abbey Hills and the business assets.

71 The power of sale in clause 4 was not limited to Johannes' personal estate. The phrase 'all my real and residuary personal estate', which governs clause 4(b), can only be read to mean all of the estate assets remaining after the clause 3 gift, including Abbey Hills. That same phrase is used in the opening paragraph of clause 4, which related to the trust on which the estate assets were to be held prior to distribution, and in clause 5 which deals with distribution of all Johannes' residuary estate.

72 The construction of the power of sale in clause 4(b) is further confirmed by clause 6(f) of Johannes' will, which reads:

6. I confer the following powers on my trustees in connection with every part of my real and personal property such powers to be in addition to and not in substitution for any powers conferred on them by statute –
 - (f) all powers which would be conferred upon them by statute had my real and personal estate been devised and bequeathed to my trustees upon trust for sale.

Sub-clause (f) confers on the trustees all powers as upon a trust for sale. Those powers were not limited to Johannes' personal estate, but applied to all of the estate assets. Clause 6 is not expressed to be limited to powers which are incidental or ancillary to the power of sale. Nor is clause 6(f) limited to the period before the clause 5 trust came into effect. A trustee of a trust for sale has power to sell the trust assets. In my view, the plain meaning of the words in clauses 4(b) and 6(f), is to confer on the trustees a power to sell all of the estate assets.

- 73 The first call on the clause 5 trust was the annuity payable to Emma. The will contemplated debts being owed by the estate, including debt owed by Johannes at the date of his death, debt which may have accumulated by operation of the grazing business, and debt associated with payment of estate duties. It may not have been possible, given the need to facilitate payment of the annuity and the estate debts, for Abbey Hills and the grazing business to be transferred to the beneficiaries as tenants in common in their respective shares. It does not make sense that the power to sell the estate assets should cease when Graeme turned 21, or should be limited only to personal assets. In my view, the broader context of the will supports the construction of clauses 4(b) and 6(f) as conferring on the trustees power to sell all assets in Johannes' estate which remained after Graeme turned 21.
- 74 For the above reasons I conclude that the trustees had the power to sell Abbey Hills and the grazing business to Victor and Judith. On that basis, this part of the plaintiffs' case fails.
- 75 In case I am wrong, I will consider the outcome of there being no power of sale. The plaintiffs submitted that upon Graeme turning 21 each of them was entitled to an immediate transfer in specie of their shares of Abbey Hills and the other estate assets, and that the transfer of those assets to Victor and Judith was done without their knowledge or consent, and was an involuntary transfer.
- 76 In *Black v Freedman*,¹¹ Mr Black stole money from his employer, some of which he deposited into a bank account in his wife's name. In *Heperu Pty Ltd v Belle*¹² a fraudster, Mr Cincotta, took cheques Heperu Pty Ltd had given him to invest and deposited them into an account in his wife's name, which he controlled. In *Sze Tu v Lowe*,¹³ partnership funds stolen by Kat Sze Tu were used by him to purchase three real properties. In each case the trust which was found to arise depended on the

¹¹ (1910) 12 CLR 105.

¹² (2009) 76 NSWLR 230 ('*Heperu*').

¹³ (2014) 89 NSWLR 317 ('*Sze Tu*').

actions of the thief or fraudster taking possession of the stolen property. In *Sze Tu*,¹⁴ Gleeson JA summarised the position as follows:

Black v Freedman is authority for the proposition that “[w]here money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character” (O’Connor J at 110). See also Griffith CJ at 108-109 (Barton J agreeing at 110).

...

Whether the trust based on a *Black v Freedman* claim is more properly characterised as a resulting trust (*Robb Evans* at [112] – [117]) or a constructive trust (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716 (Lord Browne Wilkinson)), the trust is properly viewed as being of an institutional rather than simply a remedial character. It arises because the conscience of the thief is bound: *Heperu* at [154] – [155]; *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589; 63 ACSR 429 at [40] (White J).

In *Robb Evans*, Spigelman CJ said at [113] that the thief holds any property into which the stolen property has been converted on trust in a manner which should be seen as automatic. That is, a trust arises immediately upon the acquisition of the property, not when recognised by a court. He continued at [115]:

“[115] If appropriately characterised as ‘constructive’, the trust that arises upon receipt of stolen funds by an *active participant* in the theft is of an institutional rather than remedial character.” (Emphasis added)

As Gleeson CJ observed, an ‘active participant in the theft’ may include a volunteer who, though innocent of the theft, later becomes aware of it.

77 In my view it is not sufficient that the estate assets were transferred without the knowledge or consent of the plaintiffs and was an involuntary transfer. As the authorities establish, it is the act of theft or fraud which causes such a trust to arise. The trust arises because the conscience of the thief is bound.

78 I accept, for reasons which appear later in this judgment, that Abbey Hills and the other estate assets were transferred to Victor and Judith pursuant to an agreement and arrangements made between them and Emma and Walter, who acted on advice from the estate solicitor Mr Collery. If the estate assets were stolen from the plaintiffs then Emma, Walter and Mr Collery must have been party to the theft or

¹⁴ Ibid [141], [147] – [148].

fraud. In my view there is no evidence upon which allegations of fraud or theft against Victor, Judith, Emma, Walter or Mr Collery can be made out. It is likely that the parties involved all believed the will gave the trustees the power to sell the estate assets to Victor and Judith, and that the arrangements made to distribute the estate were within power. Victor and Judith did not take the assets as volunteers. I accept, for reasons which appear later in this judgment, that Victor was told by Mr Collery the amount he was required to pay for the estate assets, and that he and Judith made those payments. Distributions were paid to Agnes, Peter and Graeme, and Victor and Judith assumed responsibility for the estate debts.

- 79 Even if the belief that the sale to Victor and Judith was within power was mistaken, the estate assets were not stolen from the beneficiaries, and a constructive or resulting trust did not arise.

Breach of duties owed as de facto trustees

Agnes, Peter and Graeme

- 80 The plaintiffs submitted that in the ten years after Johannes' death, Victor and Judith assumed control of the estate assets and the administration of his estate, held themselves out as executors of the estate, and thereby became de facto trustees of the estate. It was submitted, first, that the partnership between Emma and Victor was not authorised by clause 4 of Johannes' will and consequently the partnership agreement was ineffective to bind Johannes' trustees. Second, the partnership was made by Emma, not the trustees. Because the trustees could only act jointly, the partnership agreement did not bind the estate. Third, the partnership agreement did not give Victor and Judith the right to deal with the grazing business, or to use the estate assets as they did. Emma's misplaced assent to the partnership agreement left Victor and Judith in effective control of all of the trust assets, without proper authority. Fourth, the plaintiffs rely on the following matters: Victor taking it upon himself to ensure all creditors listed in Johannes' estate were paid off; Judith keeping the ledger books and doing the estate book work; Victor operating the farm account and the wool-brokers' account; and Victor and Judith buying and selling plant and

equipment, stock and wool in the name of the estate. Fifth, as Victor and Judith acknowledged, they were maintaining the estate assets not just with the view to earning income, but also to preserve the capital for the beneficiaries of Johannes' estate. In summary, the plaintiffs submitted that Victor and Judith were classically de facto trustees in the sense articulated by Ormiston J in *Nolan v Nolan*.¹⁵

81 Sixth, to the extent action by Victor and Judith to improve Abbey Hills or pay estate debts created a beneficial interest in Abbey Hills in their favour, they held that interest on trust for all the beneficiaries. Seventh, Victor and Judith, as de facto trustees, were not entitled to use their position to acquire the trust property. By taking a transfer of the estate assets for less than proper value, Victor and Judith acted in breach of trust, and they are bound by the trust impressed on the assets prior to their receipt.

Victor and Judith

82 Victor and Judith submitted that the plaintiffs had not established that, without having authority from the trustees, they acted in a way which would cause a reasonable person to think that they were trustees of the estate. First, the partnership agreement was between Victor and Emma, not Victor and the trustees of Johannes' estate, and therefore was not an agreement which turned on the trustees' powers under Johannes' will. A necessary assumption of the partnership agreement was a lease of the estate assets to the partners. Consistent with the partnership agreement, the terms of that lease are likely to have included that the partnership would:

- (a) maintain estate assets;
- (b) have no proprietary interest in those assets;
- (c) pay rates, taxes and outgoings; and

¹⁵ [2004] VSCA 109 (10 June 2004) [27] (Ormiston JA) (*'Nolan'*).

- (d) have no obligation to pay rent.

The trustees had power to enter into the lease by reason of clause 6(c) of Johannes' will. The partnership agreement was drawn by the estate solicitors and, it was submitted, should be seen as an endeavour by the trustees and the solicitors to distinguish two separate roles:

- (a) the trustees who held the estate assets on trust pursuant to the terms of Johannes' will; and
- (b) Victor and Emma, who farmed Abbey Hills at their own risk.

Victor and Judith submitted they were entitled to a presumption of regularity. The partnership could not have farmed the land on the terms it did unless there was an actual or implied lease. The drawing of the partnership document by the estate solicitors, and the execution of that document witnessed by Mr Collery, supports the presumption of the lease.

- 83 Second, Emma and Victor were entitled to the occupation and use of estate assets on the terms set out in the partnership agreement. Third, even as a partner in the farming business, Victor was not at liberty to do as he wanted, but acted at the direction of the trustees. It was submitted Emma maintained a keen interest in the financial affairs of the farm and attended annual wool sales, and Walter attended the farm regularly, advised Victor as to farming matters, and directed him in 1965 to change wool-broking firms. Fourth, the maintenance of the farm account and the wool-brokers' account in the estate's name confirmed the continued existence of the estate and suggested that Victor did not own the farm or the grazing business.

Colin and Maria

- 84 Colin and Maria submitted first that, at all material times, Emma and Walter were trustees of the estate, and in that capacity were registered proprietors of Abbey Hills. Victor and Judith had no power to deal with the property in a legal sense. The claim that Victor and Judith were trustees de son tort must fail for the first reason

identified by Ormiston JA in *Nolan*,¹⁶ namely, that Victor and Judith did not hold property or title to the farm.¹⁷

85 Second, Victor and Judith operated the farm for the benefit of the partners. The evidence does not establish intention on the part of Victor and Judith to operate the grazing business as trustees for the beneficiaries of Johannes' estate. Third, Victor and Judith operated the farm with the authority of Emma and Walter. Fourth, if they were de facto trustees, it is unclear what duties, if any, they owed to the plaintiffs. Fifth, the plaintiffs have not established that Victor and Judith acted in breach of any duty they did owe. Emma and Walter had power to sell the estate assets 'upon such terms and conditions'¹⁸ as they saw fit. The sale was arranged through the estate solicitors. Victor and Judith made the payments they were directed to make. There is no proof they paid less than the value of the assets. However, even if they did, the plaintiffs do not have any claim against Victor and Judith in respect of a decision by Emma and Walter to sell under value.

Analysis

86 As to what constitutes a trustee de son tort, Smith LJ said in *Mara v Browne*:¹⁹

It appears to me that, if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong, that is, a trustee de son tort, or as it is also termed, a constructive trustee.²⁰

In *Nolan*,²¹ Ormiston JA, after reviewing the authorities, which included *Mara*,²² described trustees de son tort:

... What has been described so far, however, supports the conclusion that trustees de son tort intend, by their actions, to assume the role of trustees and, at least in the first place, to take control of trust property for the benefit of others rather than for themselves. If the word "intermeddle" be

¹⁶ Ibid.

¹⁷ Ibid [78].

¹⁸ Clause 4, Johannes' will.

¹⁹ (1896) 1 Ch 199 ('*Mara*').

²⁰ Ibid 209.

²¹ [2004] VSCA 109 (10 June 2004).

²² (1886) 1 Ch 199.

used, it tends to confuse the issue to the extent that it suggests wrongful intermeddling, which frequently gives rise to cases where the question of liability is in issue, rather than circumstances in which the original intention is merely to act in the role of trustee in relation to certain property.²³

87 Colin and Maria relied on the observation in *Nolan*²⁴ by Ormiston JA that obligations imposed on a trustee de son tort 'can only come into existence ordinarily when there is not already a person in whom the relevant legal right is vested'.²⁵ In response the plaintiffs point out that Ormiston JA's observation recognised there may be exceptions. Relying on what was said by Millet LJ in *Paragon Finance plc v DB Thakerar & Co*,²⁶ the plaintiffs submitted one exception is where the beneficial interest is itself held on trust. Discussing the category of trustees de son tort, Millet LJ said in *Paragon*:

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are *McCormick v Grogan* (1869) LR 4 HL 82 (a case of secret trust) and *Rouchefoucauld v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1952] 2 All ER 951, [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.²⁷

In *Parkview Qld Pty Ltd v Commonwealth Bank of Australia*,²⁸ Ward JA, discussing the degree of control necessary for the trust obligations to be imposed, said:

²³ [2004] VSCA 109 (10 June 2004) [29].

²⁴ Ibid.

²⁵ Ibid [78].

²⁶ [1999] 1 All ER 400 ('*Paragon*').

²⁷ Ibid 409.

²⁸ [2013] NSWCA 422 (11 December 2013) ('*Parkview*').

Insofar as reliance was placed on what was said in *In re Barney*, Kekewich J accepted that the obligations of a trustee *de son tort* could extend beyond property actually vested in the trustee *de son tort* to property that was “so far under his control that he has nothing to do but require that, perhaps by one process, perhaps by another, it should be vested in him”, saying at p 276:

I apprehend that when the law says that a man is responsible as a trustee for money under his control, it means money which he can, if he will, put into his own pocket or pay away as he pleases to some one else. That appears to be the test.²⁹

88 For a number of reasons, I conclude that Victor and Judith did not become de facto trustees of Johannes’ estate during the ten years to 1973. First, after Johannes’ death Emma asked Victor to stay on to run the farm for her, and he agreed to do so for ten years until the estate was wound up. During that period, Emma had the right, after payment of outgoings, to income derived from the estate. The partnership agreement was an arrangement made between Emma and Victor to share the income stream to which Emma was entitled in consideration for Victor working on the farm. Second, the partnership agreement was prepared by the estate solicitors. The partners were entitled to the exclusive use of Abbey Hills and the grazing business assets free of rent, but were obliged to pay outgoings in respect of Abbey Hills, and to maintain the estate assets in good order. The partnership agreement expressly provided that the assets:

shall remain the sole and separate property of the estate of the said Johannes Reinhold Linke deceased and nothing herein contained shall be deemed or intended to create any partnership in or joint ownership of the said lands livestock and plant or constitute the Trustee of the Estate of Johannes Reinhold Linke deceased an agent or trustee of or for the partnership in relation to such lands livestock and plant it being expressly agreed that it is only the right to use the said lands livestock and plant during the continuance of the partnership that is brought into the partnership.

The terms of the partnership agreement were not inconsistent with the provisions of Johannes’ will. Fourth, I accept the submission of Victor and Judith that, even after the partnership commenced, they remained subject to the direction of the trustees. Emma maintained an interest in the farm, took the financial records to Melville

²⁹ Ibid [99], citing *In re Barney* [1982] 2 CH 265.

Orton & Lewis each year for preparation of tax returns, and attended annual wool sales. Walter, who lived on a similar farm close by to Abbey Hills, visited regularly, gave farming advice to Victor, and in about 1965 required that Victor change to his own wool-broker so that he could keep track of what Victor was doing. The estate duty mortgage and the mortgage to the bank, both of which were registered in 1964, must have been executed by Emma and Walter. In 1965 Walter went to Geelong with Victor and Emma in relation to the purchase of Myrtle Avenue. Walter had possession of estate documents, which he took to Abbey Hills after the estate was wound up. I infer from the ongoing level of his involvement with Abbey Hills and estate business that Walter was aware of the partnership agreement and approved Victor working Abbey Hills pursuant to that agreement.

89 Fifth, clause 4(a) of Johannes' will, while related to carrying on the grazing business, gave Emma and Walter the power to '...generally act in all matters relating to any such property as if they were the absolute owners thereof ...' The evidence establishes the intention of Emma and Walter, as trustees of Johannes' estate, that the grazing business be carried on by the partnership. I conclude that the partnership agreement did validly allow the partners to occupy and use the estate assets for the purposes of carrying on the grazing business.

90 Sixth, Victor was responsible for working Abbey Hills in the ten years following Johannes' death, first as an employee and later as a partner. Victor's role naturally involved arranging purchase of merchandise, plant and equipment necessary to operate the grazing business, sale of wool and stock, payment of creditors, and operation of the farm account and the wool-brokers' account. Judith prepared the ledger books and performed other book work at Emma's request. By performing these roles Victor and Judith did not assume control of the estate assets or the role of trustees administering Johannes' estate in a manner or to a degree sufficient to constitute as de facto trustees. Nor did Victor and Judith assume the role of trustees by acting for the benefit of others rather than themselves. As partners they operated the grazing business to earn profits for their own benefit.

91 Seventh, the sale of Abbey Hills and the grazing business to Victor and Judith demonstrates that they did not control the estate assets prior to sale. The arrangement pursuant to which the assets were transferred was only made at Melville, Orton and Lewis in November 1972. Prior to the sale to them, any control Victor and Judith had did not allow them to appropriate the estate assets for their own use, or dispose of the assets as they wished.

92 Emma and Walter acted as trustees, held the legal title to the estate assets, and authorised Victor and Judith to occupy Abbey Hills and operate the grazing business. Victor and Judith did not control the estate assets, and did not assume the role of trustees. These circumstances are inconsistent with Victor and Judith being de facto trustees.

93 Further, for reasons which appear below, I conclude the plaintiffs have not established that the estate assets were transferred to Victor and Judith under value.

Unconscionability constructive trust and fraudulent concealment

It is convenient to deal with these cases together.

Agnes, Peter and Graeme

94 The plaintiffs submitted, first, that the consideration of \$100,800 recorded in the transfer of Abbey Hills to Victor and Judith was false, and that no purchase price was paid by Victor and Judith for the other estate assets. Developing that submission, the plaintiffs argued that had Victor and Judith paid the consideration of \$100,800 recorded in the transfer, that payment would have to be made to the trustees, and those funds would have been available for distribution to the beneficiaries. Assuming \$100,800 was to be divided according to the will, each son's share was \$21,600, and Agnes' share was \$14,400. It was submitted there is no evidence those payments were ever made.

95 Second, the entry in Victor's diary on 19 December 1972 recorded a side deal, which demonstrates the falsity of the Abbey Hills transfer, and the unconscionability of the

bargain which allowed Victor and Judith to pay \$39,000 to keep all the estate assets. There is no evidence Emma and Walter attended the meeting at Melville Orton & Lewis on 19 December 1972, or that they were involved in the side deal.

96 Third, Victor and Judith did not assert that they paid more than the amounts recorded in the diary note for transfer of Abbey Hills and other estate assets, and the evidence suggests they paid substantially less, if anything. Valuing Abbey Hills at the time of transfer at \$100,800, and allowing some further amount for the value of the estate stock, plant and equipment also transferred, the amounts paid to Agnes, Peter and Graeme fell so far below the value of assets transferred to them as to leave no doubt that Victor and Judith received the estate assets substantially under value. The plaintiffs submitted there was sufficient evidence before the Court, both documentary and in the recollections of relevant witnesses, to make good this proposition. Fourth, the money used to 'buy' the estate assets was paid from the farm account, and was therefore paid from Johannes' estate, and not by Victor and Judith.

97 Fifth, a second element of unconscionability was that Victor, knowing the terms of the will, did not disclose to the plaintiffs the nature of their rights and deprived them of the choice to take a transfer of their respective shares of Abbey Hills and the grazing business. Victor told Agnes, Peter and Graeme they were entitled to a specific sum as their inheritance from their father's estate and did not show them the will or discuss its contents.

98 Sixth, in the alternative, if the conduct of Victor and Judith did not give rise to a constructive trust in favour of the plaintiffs, then it did amount to fraudulent concealment. They must have known, or at least been recklessly indifferent to, the impropriety of the transfer of the estate assets to them. Victor and Judith signed the transfer to Abbey Hills knowing they were not paying the consideration of \$100,800 or anything like it. They concealed from Agnes, Peter and Graeme their entitlements to the estate. The effect of the transfer was to wrongfully deprive the plaintiffs of their interest in the estate assets, with knowledge that what they were doing was

contrary to the will, all the while making false statements as to the plaintiffs' entitlements under the will.

Victor and Judith

99 Victor and Judith submitted first they are entitled to a presumption against fraud and a presumption of regularity.³⁰ In support of that submission they point to the following evidence:

- (a) the transfer of Abbey Hills was prepared by the estate solicitors and signed by the trustees; the figures recorded in Victor's diary note appear to have been obtained from Melville Orton & Lewis;
- (b) ledgers record that those amounts, and more, were paid by Victor and Judith to Agnes, Peter and Graeme; and
- (c) no query was raised by Victor's siblings or anyone else at the time of winding up the estate and transfer of estate assets, and there has been since a delay of 43 years in bringing this proceeding.

100 Second, for the court to find in favour of the plaintiffs it would require a conclusion that the trustees and the estate solicitors at least facilitated Agnes, Peter and Graeme being deprived of their proper inheritance. There is no evidence this occurred, and it is not open to so conclude.

101 Third, the seriousness of the allegations against Victor and Judith, and the consequences to them including potential loss of the family farm, require that the plaintiffs establish the facts which give rise to their claim by something more than indirect testimony and inference.³¹ Fourth, given the elapse of time before the plaintiffs pressed their claim, and the prejudice suffered by Victor and Judith not being able to call witnesses or produce documents that would aid them resisting the claim, the Court should be wary before finding the existence of a constructive trust

³⁰ *McLean Bros and Rigg Ltd v Grice* (1906) 4 CLR 835.

³¹ *Briginshaw* (1938) 60 CLR 336.

in relation to the estate assets or that there was fraudulent concealment on the part of Victor and Judith.

102 Fifth, there is now an absence of information and records to explain financial arrangements in the ten years following Johannes' death. The following examples were given:

- (a) payments made from the farm account for the estate, such as interest on the probate duty mortgages, may have represented a repayable loan from the farming business to the estate;
- (b) Emma and Victor's drawings from the partnership required reconciliation and may have resulted in a liability by one or other of them, which was repayable;
- (c) payment of estate debt by the partnership may have required reconciliation between the partnership and the estate;
- (d) it is uncertain how capital and interest payments in respect of Myrtle Avenue were accounted for;
- (e) it is uncertain what, if any, recognition was given of improvements to estate assets made by Victor and Judith or the partnership in the ten years to 1973;
- (f) it is uncertain how Leonard's inheritance from Johannes' estate was treated; and
- (g) Victor and Judith appear to have assumed responsibility for payment of the annuity due to Emma from the estate. It is unclear how this was accounted for. It is unclear whether the Myrtle Avenue mortgage was treated as an estate debt, or how the principal and interest payments made in respect of Myrtle Avenue were treated in the winding up of the estate.

On the available evidence it was not open to conclude that the estate assets were transferred to Victor and Judith under value. It is no more than speculation to say

the \$100,800 consideration on the transfer of Abbey Hills was never paid. There is no evidence of impropriety in relation to the transfer of estate assets to Victor and Judith, and the payment by them to Agnes, Peter and Graeme.

Analysis

- 103 The parties proceeded on the basis that the consideration of \$100,800 for transfer of Abbey Hills represented the value of the property. It is difficult to determine the value of other estate assets in late 1972. The motor vehicles and plant, valued at over £3,000 in 1962, are likely to have depreciated after ten years of further use, and may have been of little value by late 1972. The livestock owned by the estate in 1962 is likely to have been sold or disposed of by late 1972. The partnership agreement provided that the partners were obliged to ‘maintain sheep and cattle on [Abbey Hills] in approximately the same numbers ages and sexes’. However, the value of the stock owned by the estate in late 1972 is unknown. The most that can be said about the value of estate assets in late 1972 is that it was \$100,800 plus the value of any stock, plant and equipment still owned by the estate.
- 104 The probate inventory records debt of just under £11,000 owed by Johannes’ estate. A farm account cheque butt dated 13 June 1963 records a payment to Essanda Ltd of £562 for ‘final payment on tractor’. I conclude that amount, which was not recorded on the probate inventory, was a debt owed by the estate. The estate duty loan increased the estate debt by £6,000. Legal fees were charged to the estate by Melville, Orton & Lewis for administration of the estate and extension of the estate duty loan. There is evidence of legal fees which total approximately \$650.
- 105 The trustees had power to raise money required to administer the estate, or for any other purpose of the will, by loans secured against estate assets, and to determine whether money coming into their hands was capital or income. Victor said that shortly after Johannes’ death he and Emma arranged a £500 extension of the farm account overdraft. He said the bank overdraft was extended again in 1964 when a mortgage in favour of the bank was registered on Abbey Hills. The amount of any increase in debt, and the purpose for which the money was used, is not known.

- 106 Funds were borrowed to purchase Myrtle Avenue for Emma in 1965. The plaintiffs submitted this purchase likely represented exercise by the trustees of the power of appropriation to satisfy the annuity due to Emma under Johannes' estate. If that is so, the value of the estate assets were diminished by the amount contributed to the purchase price of Myrtle Avenue, and possibly also by interest payments on the Myrtle Avenue loan and stamp duty and legal costs relating to the purchase.
- 107 Interest on the various debts and loans was paid from the farm account. It is not known how those interest payments were treated. If the interest was paid from farm income, it is possible the amount of the payments was later treated as a debt owed by the estate to Emma or, after the partnership commenced, to Emma and Victor.
- 108 I accept the evidence of Victor and Judith that in about the mid-1960s discussions took place involving Victor, Judith, Emma and Mr Collery in relation to 'credit' or 'reimbursement' to Victor for improvements he made to Abbey Hills in the period before the estate was wound up, and for payment of estate debts. It is possible the value of improvements made to the farm by Victor in the ten years to 1972, and the amount of estate debt he paid, were taken into account when it was determined how much he and Judith had to pay for the estate assets. However, the amount of any credit is completely uncertain.
- 109 The parties agree payments to Agnes, Peter and Graeme recorded in the farm ledger book, which I have set out at paragraph [49], were made on account of their estate entitlements. Those payments total \$26,500. Assuming those payments represent the full value of Agnes, Peter and Graeme's interest in the estate, and allowing for Victor's entitlement, this results in a net value of estate assets of approximately \$36,500.
- 110 For the following reasons I conclude the allegations of unconscionability and fraud have not been made out. The value of Abbey Hills is known, however, the value of other estate assets, the amount of estate debt, and the way in which farm improvements, Emma's annuity and interest payments on debts were treated are

not. There is no direct evidence which established the net value of the assets transferred to Victor and Judith.

111 Victor's diary records that in the month after Graeme's 21st birthday he went to Hamilton twice regarding the winding up of Johannes' estate. It is likely that on those occasions Victor met with estate solicitor Mr Collery, and that the agreement referred to in the second diary entry was reached after discussion with him. The plaintiffs refer to this agreement as a 'side deal', and argue there is no evidence Emma and Walter attended the meeting with Mr Collery on 19 December 1972, or that they were involved in the side deal. I reject this submission. Mr Collery was the estate solicitor, and in that role acted on instruction from Emma and Walter as the estate trustees. Emma and Walter would have been well aware the estate was to be wound up upon Graeme turning 21. Walter attended the meeting on 28 November 1972. The diary note of 11 December 1972 is silent as to who attended the meeting. It is likely either that Emma and Walter attended, or that they were informed by Mr Collery of the outcome of the meeting. The transfer of Abbey Hills to Victor and Judith was part of the agreement made at the meeting in 1972. Emma and Walter signed the Abbey Hills transfer in the presence of Mr Collery, which strongly supports the conclusion they were aware of, and parties to, the agreement. I accept Judith's evidence that Emma brought Mr Uebergang to Victor and Judith to discuss providing a loan to assist with the purchase of Abbey Hills. I conclude that Emma and Walter knew of and were parties to the agreement to transfer the estate assets to Victor and Judith and to wind up Johannes' estate.

112 If the transfer of estate assets was known by Victor and Judith to be under value, then Emma, Walter and Mr Collery must also have known. Consequently, for the plaintiffs to succeed, it must be accepted that Emma, Walter and Mr Collery acted in breach of their duty to the remaining beneficiaries and were party to an unconscionable agreement which deprived Agnes, Peter and Graeme of their estate entitlements. There is no evidence to support this conclusion. It is inherently unlikely.

113 It is likely Victor's diary note of 19 December 1972 is an incomplete summary of the agreement for transfer of the estate assets to Victor and Judith and winding up the estate. The diary note does not deal with estate debts owing when probate was granted, the increase in borrowings from the bank shortly after Johannes' death and again in 1964 when the bank mortgage was registered, interest paid on the estate debts and the loan used to purchase Myrtle Avenue, transfer of the grazing business assets, arrangements for satisfying the annuity due to Emma or treatment of testamentary expenses and estate legal costs. The amounts paid to Agnes, Peter and Graeme as distributions from Johannes' estate were greater than the amounts recorded in the diary note. The diary note does not direct when the payments were to be made, or when transfer of assets was to occur. The agreement was put into effect in stages over a period of time. The first distributions were paid to Agnes, Peter and Graeme in late 1972 and early 1973. Discharge of the Myrtle Avenue mortgage was registered on 28 June 1974, and discharges of mortgages securing the estate duty loan were registered in late July 1974. The transfer of Abbey Hills is dated 2 July 1973 but was not registered until 18 December 1974. The final distributions were paid to Agnes, Peter and Graeme in December 1976. It is unlikely a settlement occurred involving payment of \$100,800 by Victor and Judith in exchange for the transfer and the titles to Abbey Hills. However, this does not mean Victor and Judith paid less than the value of assets transferred to them. It is more likely the consideration recorded in the transfer was satisfied by Victor and Judith over a period of time by them paying the distributions to Agnes, Peter and Graeme, and assuming responsibility for the estate debts and the Myrtle Avenue mortgage. It is possible that the consideration was satisfied in part by Victor and Judith receiving credit for payment of interest, costs or debt on behalf of the estate, and for improvements to Abbey Hills. I accept Victor's evidence that Mr Collery 'worked it out', and that he and Judith paid what was asked of them for purchase of the estate assets.

114 I do not accept the plaintiffs' submission that distributions paid to Agnes, Peter and Graeme from the farm account were, in effect, paid by the estate and not by Victor

and Judith. In the ten years to late 1972, the farm account was used to operate the grazing business. By late 1972 the balance of the farm account represented income generated by the partnership, or by Victor and Judith after the partnership ended. The farm account balance was not an asset of the estate. I conclude the distributions were paid by Victor and Judith; however, it is of no consequence if this conclusion is wrong. Even if the farm account was still an estate asset, payment of distributions from the account would have had the effect of reducing the value of assets transferred to Victor and Judith pursuant to the agreement.

115 For the above reasons, I am not satisfied that Victor and Judith knowingly received the estate assets for less than full value. I have already concluded that Emma and Walter had power under Johannes' will to sell Abbey Hills and the other estate assets to Victor and Judith. Therefore the allegations of unconscionability and fraud are not made out.

116 I have rejected each case the plaintiffs sought to make in relation to Johannes' estate. Although it is not strictly necessary, I should say something in relation to the limitations and laches defences pleaded by the defendants, the release, and the part of Abbey Hills now owned by Colin and Maria.

Defences

Limitations and laches

Agnes, Peter and Graeme

117 The plaintiffs submitted, first, that Victor and Judith are to be regarded as trustees for the purpose of s 21(1)(b) of the *Limitation of Actions Act 1958* (Vic), and accordingly, no period of limitation applied to the action to recover Abbey Hills and the grazing business, which were held on trust for them. Because the constructive trust created a proprietary interest, it came into existence from the time of the conduct which gave rise to the trust.³² Second, in relation to the alternative case of

³² *McNab v Graham* [2017] VSCA 352 (30 November 2017) [107] (Tate JA).

fraudulent concealment, the limitation period did not commence until the plaintiffs had discovered the fraud perpetrated by Victor and Judith.³³ The plaintiffs could not have discovered the fraud until at least 2015 when they became aware of the terms of Johannes' will.

- 118 Third, laches will not extinguish a cause of action when there is a statutory limitation period (whether by analogy or otherwise).³⁴ Fourth, the elements of laches are knowledge of the wrong, delay and unconscionable prejudice caused by the delay.³⁵ The defendants did not establish that the plaintiffs had any knowledge until at least 2015 of the wrong committed against them.

Victor and Judith

- 119 Relying on the principle stated by Deane J in *Orr v Ford*,³⁶ Victor and Judith submitted that unreasonable delay in instituting proceedings gave rise to serious unfair prejudice, because the means by which they could resist the plaintiffs' claim had perished. It was submitted delay by the plaintiffs, and prejudice suffered by Victor and Judith, was sufficient to constitute gross laches.

Colin and Maria

- 120 Colin and Maria submitted, first, that it was highly probable that the plaintiffs knew in the early 1970s, when they received significant sums of money from Victor and Judith, that the payments were made to them as beneficiaries of Johannes' estate. Second, it follows the plaintiffs ought to have known they were entitled to call for accounts relating to Johannes' estate from Emma and Walter. If they had done so, or simply asked for an explanation about their entitlements, their enquiries most likely would have been answered. Relying on the decision in *Edge v Jarvis*³⁷ as analogous

³³ *Limitation of Actions Act 1958* (Vic) s 27B.

³⁴ *Sze Tu* (2014) 89 NSWLR 317 [414].

³⁵ *Crawley v Short* (2009) 262 ALR 654 [163].

³⁶ (1989) 167 CLR 316.

³⁷ [1958] 2 All ER 336 ('*Edge*').

to the present case, Colin and Maria submitted delay by the plaintiffs, and prejudice to the defendants, were such that the plaintiffs' case should be defeated by laches.

Analysis

- 121 Little was said by the defendants in final submissions in support of pleadings that the plaintiffs' claims were barred by operation of the provisions of the *Limitation of Actions Act 1958* (Vic). The plaintiffs assert the estate assets have been held on trust for them by Victor and Judith since the time of the transfer in 1973, or alternatively that Victor and Judith fraudulently concealed the impropriety of the transfer. I accept the plaintiffs' submissions that in the former case no period of limitation is proscribed by the *Limitation of Actions Act 1958* (Vic),³⁸ and in the case of fraud the period of limitation will not commence until the plaintiffs, with reasonable diligence, could discover the fraud.
- 122 The defendants bear the onus of establishing the laches and acquiescence defence. Mere delay will not suffice to make out the defence.³⁹ In this case the question is whether, because delay by the plaintiffs has resulted in detriment to the defendants, it is unjust or inequitable to give the plaintiffs the remedy they seek.⁴⁰
- 123 Victor and Judith submitted prejudice arises from the unavailability of evidence which would explain the distribution of the estate and the transfer of the estate assets. I accept that the death of Mr Collery, the likely destruction of the Melville Orton & Lewis files and other relevant documents, and the absence of other evidence to explain the distribution of the estate prejudiced the defendants in their defence of the plaintiffs' claims.
- 124 However, the relevant delay is measured from the time the plaintiffs were sufficiently aware of the facts which constitute the wrongdoing upon which their claim is based.⁴¹ Graeme said that at the time he received the payments from Victor

³⁸ S 21(1)(b).

³⁹ *Reader & Ors v Fried & Ors* [2001] VSC 495 (19 December 2001) [27] (Pagone J)

⁴⁰ *Orr v Ford* (1989) 167 CLR 316 [337].

⁴¹ *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* [1972] 2 NSWLR 467 [472]

and Judith in 1972 and 1976 he understood those payments related to his entitlement from his father's estate. He accepted that had he wished to find out how the payments were arrived at, he could have asked Walter and Emma, or the estate's solicitors, Melville Orton & Lewis. Although Agnes and Peter's memories are now not so clear, I accept that in the early 1970s they probably had a similar state of knowledge to Graeme. However, in my view it was not unreasonable for Agnes, Peter and Graeme to rely upon the trustees and the estate's solicitors to administer the estate. They were not aware at that time of any fact sufficient to set them on a train of enquiry in relation to the administration of the estate or the possible impropriety of transfer of assets to Victor and Judith. I accept that the plaintiffs first obtained copies of their father's will in 2015. Until then they were unaware of their entitlements as beneficiaries or of the circumstances of transfer of the estate assets to Victor and Judith. It is relevant that the event which sparked the enquiries which led to Agnes, Peter and Graeme becoming aware of those matters was the payments made to them in 2015 by Victor as further distributions from Johannes' estate. There was no significant delay by the plaintiffs in commencing proceedings after they became aware of the facts which they allege constitute the wrongdoing.

- 125 Colin and Maria's reliance on the decision in *Edge*⁴² was misplaced. First, each case in which the defence of laches is taken must be decided on its own facts, and comparison with decisions in previous cases is of limited utility. Second, the plaintiff in *Edge*⁴³ was a joint executor with the defendant of her father's estate, and was aware shortly after his death in 1941 of her entitlement in respect of the estate. John J concluded the plaintiff had delayed by more than six years before commencing her claim. Third, it is important to understand the nature of the claim to which laches is said to be a defence. In *Edge*,⁴⁴ laches did not bar the plaintiff's claim to her share of the trust estate, but did bar her claim to an account for profits in relation to operation of a business. In reaching that conclusion, John J observed that

(Street J).

⁴² [1958] 2 All ER 336.

⁴³ [1958] 2 All ER 336.

⁴⁴ Ibid.

the plaintiff stood by and observed while the defendant took the risk of running the business, incurred debts and liabilities, and paid out the proceeds of the business.

126 Had the plaintiffs succeeded in making out their claim that the assets of Johannes' estate have been held on trust for them since 1972, I would have concluded that claim is not barred by laches. I would also have concluded that the limitation period in relation to the fraudulent concealment claim did not begin to run until 2015 when the plaintiffs could, with reasonable diligence, have discovered the conduct of Victor and Judith upon which the allegations of fraud are based.⁴⁵

127 I note one proviso. As I stated earlier in these reasons, it was agreed that I should determine at this stage of the trial whether the plaintiffs have made out their trust or fraudulent concealment claims, but that I should not proceed to consider the relief to which the plaintiffs are entitled. I note in that regard that the plaintiffs claim an entitlement in relation to land purchased by Victor and Judith in the late 1970s (the Warfe land) and the late 1980s (the Rentsch land). It is possible, had I found for the plaintiffs, that there may have remained a basis for the defendants to rely upon a laches defence in respect of some parts of the relief sought by the plaintiffs.

The release

128 In April and May 2015 Graeme, Agnes and Peter consulted regarding what they might do to get to the bottom of what truly happened to their father's estate. Graeme said they considered their ages and the cost of bringing an action, and '... we came to a conclusion that we might be best to cut our losses and move on.' Graeme said on 1 May 2015 they offered Victor the choice to:

... explain his actions in my father's estate or, alternatively, he could pay the sum of \$50,000 to each of us, and he had to agree to do so by midday that day.

Victor accepted the offer.

⁴⁵ *Limitation of Actions Act 1958* (Vic) s 2.

129 Graeme instructed a solicitor to prepare the release. Agnes, Peter and Graeme were named as First, Second and Third Releasors, Victor as First Releasee, Victor and Judith as Second Releasees, and Victor, Judith, Colin and Maria as Third Releasees. Recital 2 of the release summarised briefly the terms of Johannes' will.

Recital 10 reads:

R10 A number of transactions occurred in relation to Estate between 1962 and distribution date including but not limited to:

- (a) the Trustees raised funds, by way of loan secured by mortgage over Estate land, to pay Probate duty. The Releasors have been informed by the First Releasee that, to the best of his recollection, this amount was in the sum of approximately TWELVE THOUSAND DOLLARS (12,000.00);
- (b) the Trustees and the Second Releasees entered into a farming partnership in respect of the Estate's livestock and plant and equipment, the basis of which partnership and the capital (if any) introduced by the Second Releasees into such partnership is unknown by the Releasors;
- (c) the Trustees permitted the partnership to conduct the farming business on the Estate land on a basis whereby it is unclear to the Releasors whether the partnership paid rental or any other form of recompense to the Estate for use of an Estate asset;
- (d) the Second Releasees acquired the Estate's farming land on a basis which is unclear to the Releasors and in particular as to whether the price paid to acquire the farming land was:
 - A fair market value at the time;
 - B ever paid in full.
- (e) the Second Releasee acquired the Estate's remaining 50% share of the assets of the farming partnership referred to in R10(b) on a basis which is unclear to the Releasors

Recital 15 reads:

- R15** (a) The Releasors are dissatisfied with the responses received from the First Releasee and the Second Releasees about the administration and distribution of the Estate and have formed the view that the payments to each of them in 1972 and 2015 totalling FIFTEEN THOUSAND DOLLARS (\$15,000.00) represent significantly less than the total moneys due to them for each Releasors share of the Estate;

- (b) It is unclear (at best) to the Releasors to what extent (if at all) the directions referred to in R2(c) and (d) have been complied with in the distribution of the Estate.

Recitals 18 to 21 read:

- R18** Accordingly, there is a dispute between the parties about whether the Releasors have received the full extent of their entitlements to a share of the Estate.
- R19** All parties accept and agree that because of:
- (a) the passage of significant time;
 - (b) the death of each Trustee;
 - (c) incomplete records held by third parties such as solicitors
- there are difficulties in definitively establishing the amount which might be due to each of the Releasors.
- R20** All parties wish to avoid this matter escalating into formal legal proceedings.
- R21** Each party has either had, or has had reasonable opportunity to obtain, independent legal advice on the dispute, the issues which need to be clarified in order to definitively resolve the dispute, the cost, inconvenience and further damage to familial relationships which would be caused by legal proceedings and have agreed to the resolution of the dispute contained in this Release.

130 The release provided:

NOW THIS DEED RECORDS:

1. That the First Releasee and Second Releasees jointly and severally agree to pay to each of the Releasors the sum of FIFTY THOUSAND DOLLARS (\$50,000.00), over and above the sum of SEVEN THOUSAND DOLLARD (\$7,000.00) previously paid to each Releasor.

...
3. Upon the payment of the moneys provided in clause 1:
 - (a) each Releasor does **RELEASE AND FOREVER DISCHARGE** the First Releasee, the Second Releasees and the Third Releasees from all claims suits actions or demands which the Releasors or any one or more of them have or might have against the First Releasee and the Second Releasee in respect of the distribution of the Estate;
 - (b) the First Releasee and the Second Releasees indemnify and keep safe each Releasor from all claims (if any) which might be made in the future by Leonard's children (or either of them)

for payment to them or either of them of a share of the Estate pursuant to the gift over provisions of the Will.

4. This Release may be pleaded by any of the Releasees as a complete defence to any future action brought by any of the Releasors against any of the Releasees for the taking of accounts, the production of documents, the payment of moneys or seeking any relief whatsoever relating to the distribution of the Estate.
5. All parties agree that upon execution of this Release and the performance of its terms, this dispute shall be at an end.

The release dated 12 May 2015 was executed by all parties. Victor and Judith paid Agnes, Peter and Graeme each \$50,000 pursuant to the release.

131 Graeme said at the time he signed the release he knew Abbey Hills was owned by Victor and Judith, and that part of the property had been transferred to Colin and Maria, but that he had no knowledge of the payment of the purchase price stated in the transfer of Abbey Hills from Johannes' estate to Victor and Judith, the terms on which the estate livestock, plant and equipment were transferred to Victor and Judith, details of the partnership agreements between Emma, Victor and Judith, or the payment of stamp duty on the transfer of Abbey Hills. Peter said at the time he executed the release he was not aware part of Abbey Hills had been transferred to Colin and Maria, and he did not know anything about the partnership agreement between Emma, Victor and Judith. Agnes said she thought Victor and Judith were responsible for administering Johannes' estate, because they were running the farm. She was not aware Colin and Maria owned part of Abbey Hills.

Agnes Peter and Graeme

132 The plaintiffs submitted Victor and Judith were obliged to fully inform them of their rights and claims before receiving the release.⁴⁶ The release itself records that this did not occur. The box of documents recently discovered by Judith were not made available to the plaintiffs until after the release was signed, and Victor had destroyed bank statements and the farm ledger book for the period 1966 – 1972. A strong presumption arises from destruction of documents by him that the documents

⁴⁶ *Farrant v Blanchford* (1863) 1 De GJ & Sm 107 [119]-[120]; (1863) 46 ER 42 ('*Farrant*').

would have told against Victor.⁴⁷ The unavailability of documents shows the plaintiffs could never have given fully informed consent to the release because material matters were not disclosed to them. The release will only extinguish claims which are in the contemplation of the releasors at the time of entering the release.⁴⁸ It was not contemplated at the time of entering the release that Colin and Maria had been gifted part of Abbey Hills. Further, the cause of action against Colin and Maria only arose when they became fixed with the knowledge that the plaintiffs were deprived of their interest in Abbey Hills by fraud or unconscionable conduct, which must have occurred after the release was executed. Accordingly, Colin and Maria cannot rely on the release to defeat the pleaded claims.

Victor and Judith

- 133 Victor and Judith submitted the plaintiffs have failed to establish what additional material they discovered after executing the release which would justify setting it aside.

Colin and Maria

- 134 Colin and Maria submitted that at the time the release was executed they did not owe a fiduciary duty, so that issues of the plaintiffs' informed consent did not arise in relation to their reliance on the release. The evidence does not support the plaintiffs' contention that they were not aware, when they signed the release, that part of Abbey Hills had been transferred to Colin and Maria. The release ought to be effective in relation to land owned by Colin and Maria.

Analysis

- 135 The scope of a release will be determined by its subject matter. The subject matter of a release may be expressed to cover all possible future disputes, whether or not the basis of a dispute had been disclosed or is known to the parties. In *The Owners*

⁴⁷ *MCT Dairies Inc v Probiotec Ltd* [2009] FCA 1385 [36] (*'MCT Dairies'*).

⁴⁸ *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112.

Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Limited and Ors (No 2),⁴⁹ Pembroke J said:

Significantly however, the joint judgment in *Grant v John Grant & Sons* (supra) also recognised that there will always be cases where, properly characterised, the parties should be taken to have intended that the general words of a release should operate to encompass all conceivable further disputes, whether disclosed or not and whether within the knowledge of a party or both parties, or outside of it: *Grant v John Grant & Sons* (supra) at 129. In such a case there is no room for the application of equitable principle. The equitable principle only has a role to play when it appears from the terms or the context or other admissible evidence, that the enforcement of the legal right would, by a literal application of the general words of the release, be against conscience. It would not be against conscience if the court is satisfied that the parties intended “upon a particular and solemn composition for peace” to release uncertain demands and presently unknown claims: *Salkeld v Vernon* (1758) 1 Eden 64 at 67-68, cited in *Grant v John Grant & Sons* (supra) at 129.

Importantly, in a case such as this where the releasor was represented by skilled solicitors, where the terms of the release were negotiated over a considerable time and where the circumstances tend to suggest that the parties intended that all claims – whether presently known or not – other than those that were specifically excluded and defined, should be released, evidence of the non-awareness of the existence or likelihood of certain claims may not be significant.⁵⁰

136 The release records that Agnes, Peter and Graeme were unclear of the basis on which Abbey Hills and other estate assets were acquired by Victor and Judith, were dissatisfied with responses received from Victor and Judith about administration and distribution of Johannes’ estate, and that there was dispute between the parties about whether Agnes, Peter and Graeme had received their full entitlements to a share of the estate. The parties to the release agreed that because of the passage of time, death of the trustees and unavailability of documents it was now difficult to establish each beneficiary’s entitlement. The release records that each party had the opportunity to obtain legal advice. Graeme said he gave instructions to a solicitor to prepare the release.

137 The plaintiffs rely on the unavailability of documents to them when they entered the release. Although a number of the documents found by Judith were tendered, it is

⁴⁹ [2012] NSWSC 322 (5 April 2012).

⁵⁰ Ibid [30], [34].

not clear to me how those documents, or the documents destroyed by Victor, did or would materially alter the position of Agnes, Peter and Graeme. In any event, the release clearly stated that administration and distribution of the estate had not been explained and that relevant documents were missing. Clauses 4 and 5 of the release express the intention of the parties that the release operate to cover all future disputes in relation to Agnes, Peter and Graeme's entitlements to Johannes' estate, whether or not the factual basis of the disputes were disclosed or known. In my view Agnes, Peter and Graeme did release Victor and Judith from all claims in relation to Johannes' estate.

138 The destruction of documents by Victor does not have the evidentiary effect for which the plaintiffs contend. In *MCT Dairies*,⁵¹ the decision on which the plaintiffs relies, Rares J was considering an allegation that a party to the proceeding deliberately destroyed documents when litigation was in contemplation. In *Katsilis v Broken Hill Pty Co Ltd*,⁵² Barwick CJ, commenting on the passage from *The Ophelia*,⁵³ to which Rares J referred in *MCT Dairies*,⁵⁴ said:

A passage towards the end of their Lordship's advice in *The Ophelia* [1916] 2 AC 206 at 229, may call for comment in this connection. Their Lordships said: "If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which his intention to destroy evidence may fairly be conceded to be rebutted, still he has to suffer. He is in the position that he is without the consideration which might have been expected in his case.

I would make two comments on this passage. First, the use of the word "presumption" might seem to put the matter too high. Of course, in the supposed circumstances the inference that the document, if produced, would not assist the spoliator is, in the circumstances, quite strong. But it merely becomes part of the body of evidence to be considered. Secondly, if the destruction is innocent no such inference can be drawn — that is to say, innocent because the significance of the document is not known or because the destruction was not deliberate but, for example, accidental. But bereft of the opportunity to produce the document to support him, the party who

⁵¹ [2009] FCA 1385 (25 November 2009).

⁵² (1977) 18 ALR 181.

⁵³ [1916] 2 AC 206.

⁵⁴ [2009] FCA 1385 (25 November 2009).

has thus innocently destroyed it is at the disadvantage of its absence. I take no more than this from the quoted passage from their Lordships' advice.⁵⁵

- 139 Victor did not know of the significance of the documents when he destroyed them. No inference should be drawn against Victor and Judith because of Victor's innocent destruction of documents.
- 140 In my view the release is also effective to release Colin and Maria. The subject matter of the release was the entitlement of Agnes, Peter and Graeme under Johannes' estate, including their entitlement to Abbey Hills. The release questioned the basis on which Abbey Hills was transferred to Victor and Judith. The plaintiffs' claims in the proceeding are directed to the same question. Whether Victor and Judith remained the registered owners of all of Abbey Hills, or part had been transferred to Colin and Maria, was not material. The release demonstrated an intention by Agnes, Peter and Graeme to release the releasors in respect of their claims relating to the distribution of Johannes' estate.
- 141 Had the plaintiffs made out their claim, I would have determined the release was effective to release Victor, Judith, Colin and Maria from liability.

Did the transfer to Colin and Maria create a new *Black v Freedman* trust?

Factual background

- 142 Colin has worked on Abbey Hills since 1987, and Maria since 1993. Neither has been paid a wage. In the early years, if Colin needed money he was given a lump sum. He said when further land was purchased by Victor and Judith in 1989, he lived meagrely so that most of the farm earnings could go towards paying off the new land as soon as possible. Since 1993, Colin and Maria have lived with their children in a house on the land purchased in 1989. From around 1990 Colin farmed Abbey Hills in partnership with Victor and Judith. In about 2000 the partnership was extended to include Maria. Colin and Maria drew money from the partnership for

⁵⁵ (1977) 18 ALR 181, 197-198.

their living expenses and improvements to their house were paid by the partnership. In about the early 2000s Colin and Maria purchased an adjoining block of land.

- 143 The transfer of four of the Abbey Hills titles from Victor and Judith to Colin and Maria is dated 1 April 2003, and records as consideration, ‘love and affection of the transferors to the transferees’. Colin and Maria both said that Victor and Judith gave the land to them, and that they did not pay for it.

Agnes, Peter and Graeme

- 144 The plaintiffs submitted that Colin and Maria received a transfer of part of Abbey Hills as volunteers. Because they are now fixed with the knowledge of the trust on which it was held, they too hold the land on a *Black v Freedman*⁵⁶ trust for the plaintiffs.

Colin and Maria

- 145 Colin and Maria submitted the transfer to them of part of Abbey Hills was for the following consideration:

- (a) The mutual love and affection between them and Victor and Judith;
- (b) Colin working on the farm and contributing to the farm partnership for less than fair reward since 1987; and
- (c) Maria working on the farm and contributing to the farm partnership for less than fair reward since 1993.

It was submitted Colin and Maria are not volunteers, and unlike Mr Black’s wife in *Black v Freedman*,⁵⁷ they are not in receipt of stolen money. In the circumstances the Court ought not impose a trust in favour of the plaintiffs on the part of Abbey Hills held by Colin and Maria as registered proprietors.

⁵⁶ (1910) 12 CLR 105.

⁵⁷ Ibid.

Analysis

146 I have no doubt Colin and Maria have worked hard on Abbey Hills for many years, and not always for proper reward. However, the evidence does not enable me to conclude that the Abbey Hills titles were transferred to Colin and Maria in consideration for unpaid work or for improvements they made to other property owned by Victor and Judith. I conclude Colin and Maria received the Abbey Hills titles as volunteers.

147 In *Heperu*,⁵⁸ Allsop P said:

Black v S Freedman & Company is clear authority for the equitable obligation upon the innocent volunteer to restore to the plaintiff the fund identified and remaining (whether in original form or traceable product) in his or her hands. The equitable obligation arises from the later discovered position, not from wrongful conduct. Therefore, the extent of the personal equity involved, created by the circumstance in question, is the touching of the conscience of the volunteer recipient to deal with the property of another comfortably with the interests of the owner, now discovered.⁵⁹

If Colin and Maria, having received the property as volunteers, now discovered the plaintiffs were deprived of their interest in Abbey Hills by fraud or unconscionable conduct by Victor and Judith, equity would oblige them to deal with the property ‘comfortably with the interests of’ the plaintiffs. Had the plaintiffs succeeded with their claim in relation to Johannes’ estate, the Abbey Hills titles now held by Colin and Maria would be subject to the trust in favour of the plaintiffs. However, questions may have remained as to the remedy and form of relief to which the plaintiffs were entitled in respect of the Abbey Hills titles held by Colin and Maria.

Emma’s Estate

Factual background

148 Emma died on 13 February 1979. Probate of her will was granted by this Court to Victor and Peter on 27 April 1979. An inventory of assets attached in support of the application for probate records the only estate asset as Myrtle Avenue. The probate

⁵⁸ (2009) 76 NSWLR 230.

⁵⁹ Ibid [154].

documents make no reference to any estate liabilities. The estate solicitors were Melville Orton & Lewis. Pursuant to Emma's will her jewellery and personal property was left to Agnes and, after payment of debts and expenses, the first \$9,000 of her residuary estate was to be paid to Victor, and the balance to her children in equal shares.

149 Peter said he had no direct dealings with Melville Orton & Lewis, but had some contact with a solicitor's firm in Geelong to sign documents relating to his role as executor of his mother's estate, which he thought were probate documents. He said after signing the documents he had no further involvement in his mother's estate. Peter agreed that Victor was his co-executor, but said he had no conversations with Victor about how Emma's estate would be administered, or about the sale of Myrtle Avenue. Victor said he did not recall attending Melville Orton & Lewis, signing any documents in relation to his mother's estate, or the process of obtaining probate.

150 In 1979 Graeme was working as an agent with Elders Real Estate. He said Victor and Peter appointed his employer as agent for the sale of Myrtle Avenue, and that he had conduct of the sale. A transfer of land dated 14 August 1979 signed by Victor and Peter as transferors discloses that Myrtle Avenue was sold for \$30,000. Victor said the last he could recall about the sale was putting the property in Graeme's hands for sale. Peter said that after signing the probate documents he left everything to do with his mother's estate to Victor, who he said arranged the sale of Myrtle Avenue through Melville Orton & Lewis. Graeme remembered that Myrtle Avenue was sold for \$30,000, and said as part of normal practice the deposit would have been paid into the Elders Real Estate trust account. He said he had no further input in the sale from that point, did not attend settlement of the sale, and did not know how Elders Real Estate disbursed the deposit from its trust account.

151 A mortgage to Capital Permanent Building Society was registered on the Myrtle Avenue title on 25 May 1977. Graeme said that his mother had granted him permission to use her property as security for a loan from Capital Permanent Building Society, which he used to purchase a business. He said the business was

sold in around May 1979, and he used the proceeds of sale to repay the loan, but was not aware the discharge was not registered until 4 September 1979.

- 152 There are no documents detailing the administration of Emma's estate or disbursement of the proceeds of sale of Myrtle Avenue. None of the parties can recall receiving a distribution from the estate.
- 153 The farm ledger records a \$9,000 repayment of a farm development loan on 17 October 1979. Victor said that money came from the farm account operated by him and Judith. The ledger records a \$20,000 payment into a term deposit account on 16 February 1982, which Victor explained was surplus proceeds from a wool cheque. Judith gave a similar explanation of these ledger entries.
- 154 Victor agreed he could not recall whether or not he received anything from his mother's estate, but rejected the proposition that he received the proceeds of sale of Myrtle Avenue. Judith said that until recently she had no knowledge of the terms of Emma's will. She rejected the proposition that the \$9,000 repayment of the farm development loan came from Emma's estate.

Agnes, Peter and Graeme

- 155 In opening, the plaintiffs submitted it should be inferred that the farm ledger entries of \$9000 and \$20,000 to which I referred in paragraph [153] represented receipt by Victor of \$29,000, being the net proceeds of the sale of Myrtle Avenue. In closing, the plaintiffs retreated from this position, and submitted that while it remained open on the evidence to infer the \$9000 entry represented distribution to Victor of the amount of the specific bequest from Emma's estate to which he was entitled, it would be unsafe on the evidence to conclude that the \$20,000 entry was evidence of further payment to Victor from Emma's estate. The plaintiffs submitted I should conclude on the evidence that Emma's estate had not been administered and that the residuary estate had not been distributed, and in those circumstances it was appropriate to make an order removing Victor and Peter as executors and trustees of Emma's estate, and an independent trustee should be appointed so that necessary

enquiries could be made to try to ascertain what the estate assets are and where they are, and then to administer the will.

Victor and Judith

156 Victor and Judith submitted, first, that it is likely there had been no accounting for the disposal of Myrtle Avenue, and that neither Victor nor Peter, as executors of Emma's estate, had made the necessary enquiries at the time. Second, each of Emma's children had the opportunity in the period after her death to make enquiry about the distribution of proceeds of sale of Myrtle Avenue. Third, the parties have had the opportunity offered by these proceedings to further investigate the matter. Fourth, there are a number of possibilities, namely:

- (a) all of the proceeds of the sale of Myrtle Avenue were used to discharge the mortgage to Capital Permanent Building Society used by Graeme to secure a business loan;
- (b) some of the proceeds were used to discharge that mortgage, and the balance equal to or less than \$9000 was paid to Victor as his specific bequest; or
- (c) Melville Orton & Lewis acted improperly and allowed all of the proceeds of sale of Myrtle Avenue to be paid to Victor, thus depriving other beneficiaries of their entitlement.

Victor and Judith submitted it is not possible on the evidence to make a positive finding in line with any of these alternatives. Fifth, the Court should not make orders that are incapable of being carried into effect. Delay in bringing the claim has rendered it all but impossible to discover what happened with the proceeds of sale of Myrtle Avenue. The appointment of a new administrator to Emma's estate will not resolve the conundrum. Sixth, given their delay, the plaintiffs should be shut out of their claims in respect of Emma's estate.

Analysis

- 157 I am satisfied that none of the witnesses are now able to recall what occurred with the proceeds of sale of Myrtle Avenue and what steps, if any, were taken in relation to the administration of Emma's estate beyond obtaining probate and arranging for Myrtle Avenue to be sold. In final submissions, Victor and Judith identified three possible explanations for disbursement of the proceeds of sale of Myrtle Avenue. I agree those possibilities exist. There may be other explanations. The evidence does not enable me to conclude what happened to the proceeds of sale of Myrtle Avenue.
- 158 I agree with Victor and Judith's submission that the proceeding has provided the parties an opportunity to investigate what occurred with the proceeds of sale of Myrtle Avenue and the administration of Emma's estate. The search for an explanation has included a subpoena for production of documents directed to Melville Orton & Lewis. No explanation has been discovered.
- 159 I agree with Victor and Judith that delay by the plaintiffs has contributed to the present inability to discover what occurred with Emma's estate. There has been no adequate explanation for that delay.
- 160 The plaintiffs proposed that an independent trustee be appointed to conduct further investigation. However, the plaintiffs did not identify what further investigations were likely or possible, or how those investigations might resolve the mystery surrounding Emma's estate. I am not satisfied there is any utility in acceding to the plaintiffs' request to appoint an independent trustee of Emma's estate. I will not make the orders sought by the plaintiffs.

Conclusion

- 161 Each claim advanced by the plaintiffs in relation to Johannes' estate fails.
- 162 Had the plaintiffs succeeded with any of these claims, I would have found:
- (a) the claim was not barred by a limitation period having expired, or by laches;

- (b) if Victor and Judith held Abbey Hills on trust, then the Abbey Hills titles transferred to Colin and Maria would be subject to that trust; and
- (c) the release was effective to defeat the claim.

163 The claims for relief made by the plaintiffs in relation to Emma's estate will be dismissed.

164 I will hear from the parties in relation to any consequential orders.