

# SUPREME COURT OF QUEENSLAND

CITATION: *Paroz v Paroz & Ors* [2010] QSC 41

PARTIES: **LESLIE PAROZ**  
(plaintiff)  
v  
**IAN PAROZ**  
(first defendant)  
**JENNIFER PAROZ**  
(second defendant)  
**LEWIS PAROZ**  
(third defendant)  
**KAREN PAROZ**  
(fourth defendant)

FILE NO/S: BS 9656 of 2004

DIVISION: Trial Division

PROCEEDING: Claim

DELIVERED ON: 25 February 2010

DELIVERED AT: Brisbane

HEARING DATE: 1- 4, 7 December 2009

JUDGE: Peter Lyons J

ORDER: **1. The claims in paragraphs 1 and 2 of the plaintiff's claim are dismissed.**  
**2. The claims in paragraphs 1 and 2 of the prayer for relief in the plaintiff's substituted statement of claim of 23 October 2009 are dismissed.**

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – UNCONSCIONABLE CONDUCT – where the plaintiff worked for many years in a family farming enterprise for low remuneration - whether plaintiff was at special disadvantage – whether the defendants were aware of any special disadvantage of the plaintiff – whether the defendants unfairly benefited from the plaintiff's labour over a long period of time — whether the plaintiff was entitled to further remuneration for his labour

EQUITY – EQUITABLE REMEDIES – ACCOUNTS AND ENQUIRIES – where the plaintiff seeks the imposition of a constructive trust or some form of equitable compensation – where the plaintiff seeks an account of profits – whether a constructive trust is available as a remedy - whether equitable compensation is available as remedy – whether an account of profits is available as a remedy

*Allcard v Skinner* (1887) 36 Ch D 145, considered

*Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261, considered  
*Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, considered  
*Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66, considered  
*Brusewitz v Brown* [1923] NZLR 1106, considered  
*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14, applied  
*Lee v Mavaddat* [2005] WASC 68, not followed  
*Louth v Diprose* (1992) 175 CLR 621; [1992] HCA 61, applied  
*Muschinski v Dodds* (1985) 160 CLR 583; [1985] HCA 78, not followed

COUNSEL: N Ferrett for the Plaintiff  
 A Collins for the Defendants

SOLICITORS: HopgoodGanim Lawyers for the Plaintiff  
 Ernst & Young Law for the Defendants

- [1] From at least about 1950, Mr Leslie Clement Paroz (*Mr Paroz Senior*) and his wife Olive Jessie Paroz (*Olive*), carried on a mixed farming enterprise on small farms on creek flats and gently sloping country to the east of the township of Laidley. Over time their three sons, Ian, Leslie and Lewis, became more involved with the enterprise, eventually taking it over and expanding it. Leslie alone continued to work fulltime on the farms throughout his working life. He now claims a number of remedies against his brothers and their wives.

### **The claims**

- [2] The farms have been owned by a partnership constituted by the three brothers (*the Land Partnership*, referred to in some of the material as the three-way partnership). The farming activities on the farms have been carried out in a partnership, which from 1982 included the three brothers, Ian's wife Jennifer (referred to as *Jenny*), and Lewis's wife Karen (*the Farming Partnership*, referred to in some of the material as the five-way partnership). Leslie's claim is against the other four members of the Farming Partnership.
- [3] Leslie's claim is based on the alleged unconscionable conduct of the other members of the Farming Partnership. He alleges that by reason of his strong emotional attachment to and affinity for the farming business and the land upon which it had been undertaken, and, in later years, his need to look after his mother, he was at a "special disadvantage" vis-à-vis the defendants, which he alleges was exploited by them. The exploitation was said to be constituted primarily by the low wages paid to him, and the acceptance of the benefit of the appreciation of the value of the farms made possible by his work, and for which he was not reasonably compensated. It will be apparent, therefore, that his case is that his "special disadvantage", and the exploitation of it, continued over a lengthy period. Unlike other cases, it is not limited to single transaction carried out in a relatively short period of time.

- [4] In the current statement of claim<sup>1</sup>, reliance was also placed upon the fiduciary duties owed to him by the other partners, but this did not attract attention at the trial, nor in the submissions made on his behalf.
- [5] The statement of claim alleges that the defendants breached contractual obligations found in each partnership agreement. However, it does not claim damages for those breaches, and in his opening, Mr Ferrett of Counsel, who appeared on behalf of Leslie, acknowledged the difficulties in pursuing a contractual claim when the breaches alleged in the statement of claim extend so far back in time. The allegations would otherwise give rise to a dispute about the construction of a clause in each partnership agreement (Clause 10(d)), which it is not necessary to determine.
- [6] The primary remedies claimed by the statement of claim were the imposition of a constructive trust and an order for equitable compensation.
- [7] The defendants allege that the parties to the Farming Partnership, save for Karen, as well as Mr Paroz Senior and Olive, entered into an oral agreement in 1979, referred to as the McLean's Agreement, relating to the involvement of each of the brothers in carrying on farming work. This agreement is one of the bases on which the defendants contest Leslie's allegation of unconscionable conduct. Alternatively they rely upon the conduct of the parties, in particular, Leslie's conduct until December 2006, to contest that allegation. They also rely on their contributions to the farming operation, both by way of work performed and the provision of funds for the purchase of lands. They deny that Leslie's emotional attachment to and affinity for the farming business, and the land, constituted a special disadvantage. They also deny that they exploited his position.
- [8] The defendants further allege that at times, up to about 1980, Leslie worked outside the partnership; that during the life of the partnership he made decisions without consultation with the other partners, and which were detrimental to the partnership; and that since 2003 he has used partnership assets for his own purposes. However, no relief is sought in the present action in respect of these matters. I was informed that it was considered that they could be dealt with when accounts are taken, it apparently being common ground that the partnerships are to be wound up.
- [9] The defendants also rely on the doctrine of laches.
- [10] The nature of the allegations makes it necessary to provide some account of the history of the Paroz family, and the farming enterprise.

### **General overview**

- [11] Ian was born on 22 September 1950. Leslie and Lewis are twins, born on 23 December 1952. In the later years of primary school, and throughout high school, all three worked on the farms, before and after school hours and on most weekends.
- [12] In the early years, Mr Paroz Senior owned three farms, Berne Farm, Jimmy Stone's Farm and Klibbie's Farm (together the *Home Farms*). In 1966 Mr Paroz Senior and Olive acquired a farm near Hattonvale (*Hattonvale*), and in February 1969 they acquired a farm located on Laidley-Plainland Road (*Plainland Road*).

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<sup>1</sup> Filed on 23 October 2009.

- [13] Ian completed school in 1967. Mr Paroz Senior arranged for him to work in the Laidley branch office of the Commonwealth Bank of Australia.
- [14] Leslie and Lewis completed their schooling in 1968. As with Ian, Mr Paroz Senior encouraged Lewis to seek employment off the farm, resulting in Lewis being employed in Brisbane in the Queensland Public Service, with the Irrigation and Water Supply Commission. Mr Paroz Senior also recommended that Leslie take on a plumbing apprenticeship, but Leslie preferred to work on the farms.
- [15] Mr Paroz Senior encouraged his three sons to obtain off-farm employment, because the farms would not generate sufficient income to support them and their anticipated families; and income earned from such employment could be used to acquire additional farms, enabling all three of the sons to return to full-time farming later in life.
- [16] In 1969, the three sons opened a joint bank account with the Commonwealth Bank at Laidley. Money from this account was used to repay borrowings made for the purchase of Plainland Road. That seemed to reflect the advice of Mr Paroz Senior, it being intended that Plainland Road would be transferred to the three sons. The transfer occurred in 1971. Hattonvale was also transferred to them in 1973.
- [17] In 1973, the three sons opened a cheque account, used as a general fund trading account until 1979.
- [18] Ian worked at the Laidley branch of the Commonwealth Bank in 1968 and 1969. From late 1969 he worked for 12 months as a relieving officer in southern and southwest Queensland. In November 1970, he was transferred to Papua New Guinea, working there for about two years. Throughout this period he worked, when he could, on the farms, though when he was living in New Guinea, this was restricted to his annual leave.
- [19] On his return from New Guinea, Ian worked in Dalby. He used to come home to the farms every couple of weekends initially, relying on public transport; and then from 1973 more frequently, having purchased a car. He would work on the farms when he could do so.
- [20] In this period, including his time in New Guinea, Ian arranged his annual leave to coincide with busy times on the farms.
- [21] Ian and Jenny married in 1975. Ian was transferred to the Laidley branch of the Commonwealth Bank about this time, and he and Jenny lived at Plainland Road. He was subsequently transferred to the Gatton Branch of the Bank. He remained there until 1993, when he was transferred to Toowoomba. He has lived at Plainland Road since 1975, and has, throughout the life of the partnership, worked on the farms before leaving in the morning to go to work at the Bank, and on returning home in the evening; as well as on weekends, and regularly during holidays. Indeed, with few limited exceptions, holidays have been spent working on the farms.
- [22] After finishing school, Leslie continued to live on the farms, and to work with his father. They had disputes, resulting in his leaving the farms and going to work at Monto in 1971 for a period of about 12 months. At his mother's request, he

returned to the farms in 1972. Subsequently, he continued to work on the farms with his father, but did some off-farm contracting work from time to time until about 1980. He then continued to work on the farms on behalf of the Farming Partnership, with some limited off-farm work, done generally on its behalf, until after the present dispute arose.

- [23] Lewis lived in Brisbane, as a result of his employment, from 1969. However, he returned to the farms on weekends and holidays, working there when he did so. He and Karen married on 24 August 1981.
- [24] In 1979, the sons purchased a farming property (*McLean's Farm*) at Mutdapilly, some 25 km to the south of the farms already owned by the family. This property had the advantage of the right to draw water from Warrill Creek. It was purchased for the sum of \$90,000, of which \$30,000 was provided by Mr Paroz Senior and Olive; \$30,000 was funded by a loan from the Commonwealth Bank; \$10,000 was provided by Leslie; \$10,000 was provided by Ian and Jenny; and \$10,000 was provided by way of a bridging loan, to be repaid from the proceeds of the sale of Lewis's house in Brisbane.
- [25] At this time, there was some discussion amongst the family members relating to the purchase of McLean's Farm, and the extent to which the three sons would work on the farms, which will be referred to in more detail later.
- [26] With the benefit of irrigation, operations on McLean's Farm were initially very successful, resulting in a cash surplus. This was used to purchase the adjoining property (*Berry's Farm*). Berry's Farm was purchased in two stages, in 1981, and 1983.
- [27] The three sons executed a Deed of Partnership for the Land Partnership on 24 August 1981.
- [28] The members of the Farming Partnership executed a Deed of Partnership dated 15 July 1981. Leslie says that this deed was executed much later, after April 1992 (when Mr Paroz Senior died). However, the other four partners all state that it was executed on about the date which it bears. While this matter is not of much significance for the claim, I accept their evidence. It is supported by the evidence of Mr Peter Hooper, the solicitor who prepared the deed; by the date stamp on it which appears to be that of the Stamp Duties Office; and by the date of Mr Hooper's invoice for the preparation and stamping of the two deeds. It is also supported by the fact that, in this deed, Karen was referred to by her maiden name. She and Lewis were married in the following month, August 1981.
- [29] In 1984, Lewis and Karen constructed a new home on Berry's Farm. They have resided there since that time.
- [30] In 1985, the Home Farms were transferred to the three sons. A document was prepared recording the right of Mr Paroz Senior and Olive to live there for the rest of their lives.
- [31] Although the Farming Partnership Deed was not signed until 1981, Leslie was paid wages by a partnership (probably constituted by the three brothers) from about March 1980. In the 1980 financial year he was paid \$5,000 (although the first

payment of \$1,500 was made in March 1980, the total for the year seems to include payments for a period prior to March), and he was also paid \$5,000 in the 1981 financial year. In the 1982 financial year this increased to \$7,500. In the 1983 financial year he was paid \$500 on an approximately monthly basis, with an additional \$3,000 bonus at the end of the financial year. The same happened for 1984; and again for 1985, save that the bonus was \$6,000. He continued to be paid in this fashion in subsequent years, with the bonuses varying between \$2,000 and \$9,000, until 1988. For a relatively short time the payments were recorded in a cash book as wages, but later were recorded as drawings.

- [32] In July 1988 the payments increased to \$1,000 a month; and in February 1989 to \$1,500 per month. The payments remained at this level until February 2003, though there were some fluctuations around the end of 1999 and the beginning of 2000. From March 2003 the payments were increased to \$2,000 a month (which included a GST component of approximately \$182), this rate continuing until 8 December 2006, when payments to Leslie ceased.
- [33] In the meantime, in 1989, the three sons purchased another property (*Hiddenvale*). The purchase was financed by a loan of \$250,000. Cattle and a horse on the property were purchased for \$18,500. Funds were provided by members of the Farming Partnership, Ian and Jenny providing \$25,000, Leslie providing \$25,000, and Lewis and Karen \$20,000. This property was essentially a grazing property.
- [34] A lengthy and severe period of drought commenced in about 1990, with 2002 being the year when the drought most severely affected the farming enterprise. The drought came to an end in about 2003.
- [35] In about 1989, Lewis ceased to work for the Irrigation and Water Supply Commission, and commenced to work on the farms. He received the same payments as Leslie. With the advent of the drought, the farms, even with the inclusion of Hattonvale, did not produce enough income to support payments to both of them. In 1992, Lewis decided to seek off-farm employment. Initially, he obtained contract work. There was evidence that he did not take payments from the Farming Partnership for the days on which he performed such work. There was other evidence that his wages from the partnership were reduced by the amount he earned from other work. In either case, it seems that the amounts he was paid in this period for working on the farm during normal working hours were similar to the amounts paid to Leslie. Lewis subsequently obtained regular employment in a meatworks, and ceased to be paid by the Farming Partnership from about June 1992.
- [36] From this time onwards, Lewis would work on the farms before and after his off-farm work, and on holidays. In his oral evidence, Leslie seemed reluctant to accept that Lewis did as much work on the farms as Ian did, but Lewis's evidence about this is supported by Ian, and is consistent with the attitude all three brothers seem to have had to farming work. Lewis's interest in farm work is evidenced by his decision to return to work on the farms full-time in 1989. Leslie's view may have resulted from the fact that he was based for much of the time in recent years at the Home Farms; while Lewis lived some distance away at Mutdapilly. I accept the evidence of Lewis and Ian on this issue, and I also accept that with very few exceptions, Lewis's holidays have been spent working on the farms.

- [37] From about the early 1970s, Ian had maintained the books for the partnership. He had also maintained books for Leslie. He advised Leslie to set up a separate account into which to invest surplus cash. He recommended that Leslie contribute to a superannuation fund, and made arrangements for him to do so.
- [38] In the latter part of the 1990s, Jenny assisted Ian with the bookkeeping work. From about 2000, Jenny was the person primarily responsible for maintaining the partnership accounts. She continued to keep Leslie's books.
- [39] During the drought period in the 1990s, Leslie made decisions about maintaining the stock numbers on the farms, with which the other partners disagreed. Nevertheless, Leslie's view on this matter prevailed.
- [40] Prior to 1996 Leslie made an arrangement to lease land from a Mr Simmons in the Rosewood area, on behalf of the Farming Partnership. This was done without consultation with the other partners, though on learning of it, Ian required the lease to be documented.
- [41] Prior to 1996, farming had been carried out in the relatively traditional way, whereby paddocks were tilled on several occasions prior to planting. Leslie became interested in "no-till" farming. This means that conventional tilling is not carried out. However, heavier machinery is required for planting, greater use is made of chemicals, and other changes were apparently required as well.<sup>2</sup> About the end of 1996, Leslie purchased a no-till planter in shares with a Mr Nick Catlin. He also purchased a larger tractor, necessary to pull the no-till planter. He made an arrangement with Mr Catlin that he would assist with no-till farming on Mr Catlin's property, and Mr Catlin would assist on the partnership properties. Leslie did not consult with the other partners before making this arrangement. They were unhappy with it. The arrangement extended to Mr Catlin receiving a share of the proceeds of the sale of crops, including those grown on partnership lands, and there was unhappiness amongst the other partners based on his alleged failure to pay his share of costs associated with the production of the crops. There was also unhappiness attributed to the fact the Leslie was working on Mr Catlin's property, but Mr Catlin was thought not to carry out his obligation to work on the Paroz farms. The arrangement was brought to an end by Lewis in 2000.
- [42] At some point Leslie purchased a tractor referred to as the 784 tractor, with a forklift, for about \$7000. This was done without consultation with the other partners.
- [43] In 1999, Jenny arranged for Leslie to sit with her while she wrote up the partnership accounts. She states that she did this so that he could understand the costs that were being incurred in the partnership. He states that he assisted her by identifying the chemicals which were purchased for particular crops. This continued for some months.
- [44] In the early years of the Farming Partnership, the partners provided cash for the partnership operations. There was evidence that these were treated as "contributions" and were regarded as unrecoverable by the partners. Both in the latter part of the 1980s, and throughout the drought, additional funds were provided

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<sup>2</sup> Leslie said of the change, "It's new everything, more or less": T 2-81/55.

to the partnership. The funds were advanced by Leslie, Ian and Jenny, and have been recorded in the partnership loan accounts. Generally speaking, at least from 1989, the contributions made by Ian and Jenny matched those made by Leslie. Unlike Leslie, Lewis had a young family, and, unlike Ian, he did not initially have off-farm income, and when after 1992 he worked off-farm, his income was less than Ian's. From about 1990, he and Karen did not match the contributions made by the others. However, they made purchases of farming equipment involving not inconsiderable expenditure. The amount expended is in excess of \$40,000. Their purchases included irrigation pipes, which were placed in the soil on the farms at Mutdapilly. They have not claimed credit in the partnership accounts for this expenditure. Currently, there is to the credit of Leslie in the Farming Partnership loan accounts, an amount of \$72,000; and in the same accounts there is a sum \$84,300 to the credit of Ian and Jenny. There is no amount standing to the credit of Lewis and Karen in those accounts.

- [45] In about 2002, Leslie commenced a relationship with Alison van Ansem. Ms van Ansem had two daughters. Ms van Ansem was prepared to spend her own money to build a house on land owned by the partnership. Leslie approached the others about this proposal, and was upset with their apparent reluctance to agree to it.
- [46] At about this time, Leslie also became upset with the amount of money he was being paid. On about 12 February 2003, he presented a document (exhibit 21) to the other partners, dealing with the partnership property and the continued operation of the partnership. In it, he sought a weekly wage of \$500 together with sick leave and holiday pay. This was to be backdated to a date not specified, but to include an additional 5% "to date for compensation of unpaid wages." This resulted in the increase in his wages to \$2000 per month (inclusive of GST). He also sought compensation for the use of his vehicle back to 1986, apparently with 5% interest, or alternatively the purchase of a new Hilux utility in his name. That resulted in a payment, debited to his loan account, of some \$17,000 towards the purchase of a new vehicle; and an increase in the contribution to his fuel costs from 50% to 75%.
- [47] At about this time, the family solicitor became involved in attempts to resolve the situation. A meeting was held at his office on 21 June 2003, attended by the members of the Farming Partnership and Ms van Ansem. Extensive notes were produced of the meeting. That meeting, and subsequent meetings and discussions, did not lead to a resolution of the dispute which had arisen.
- [48] On 8 December 2006, receivers were appointed to the Farming Partnership. They conducted a sale in March 2007, at which virtually all of the cattle were sold to Leslie. He arranged for the cattle to be returned to the farms, which he continued to use, along with their produce and some partnership property, for his own purposes. He has acknowledged an obligation to account for use of partnership property.
- [49] I should add that, while the farm work was generally done by the three brothers, Jenny and Karen have at times done some of this work, principally related to the harvesting of okra; and the picking and packing of mangoes. They also regularly provided Leslie with meals; and they provided him with transport when he worked on other properties, as happened over much of the life of the partnership. I have previously mentioned the work done by Jenny in relation to keeping the partnership accounts.

- [50] Neither Ian, Jenny, Lewis nor Karen has received any money from the partnerships by way of distribution. I have mentioned that an amount of \$17,000 made available to Leslie in 2002 was debited to his loan account; and I have sought to identify the payments he received in recognition of his greater work on the farms. Otherwise, he received no money by way of distribution from the partnerships. Consolidated financial records prepared for the partnerships by Mr John Thynne, an accountant who gave evidence, indicate not insignificant accumulated losses.

### **Principles relevant to unconscionable conduct claim**

- [51] The term used to identify the basis for granting relief focuses on the position of the person against whom relief is sought. However, the condition of the person claiming relief is of some significance. For reasons which will become apparent, it seems to me to be particularly so in this case. Accordingly, I shall commence with a discussion of this matter.

- [52] In *Louth v Diprose*<sup>3</sup> Brennan J said:

“The jurisdiction of equity to set aside gifts procured by unconscionable conduct ordinarily arises from the concatenation of three factors: a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee; the donee's unconscientious exploitation of the donor's disadvantage; and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interest.”

- [53] His Honour noted<sup>4</sup> that in *Commercial Bank of Australia Ltd. v. Amadio*<sup>5</sup> Mason J had pointed out that, in a case involving unconscionable conduct, “the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.” He also noted a statement by Deane J in *Amadio*<sup>6</sup> that, “Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.”

- [54] Brennan J also said<sup>7</sup>:

“In cases where the relationship is not one of confidentiality, a gift may be impeached where the evidence shows that in fact it was procured by unconscionable conduct. Where a gift is impeached on the ground that it was obtained by unconscionable conduct consisting in an unconscionable exploitation of an antecedent relationship, the relationship is one in which one party stands in a position of special disadvantage vis-à-vis the other. Such relationships are infinitely various, the common feature being that the donor is, to the

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<sup>3</sup> (1992) 175 CLR 621, 626.

<sup>4</sup> At page 627.

<sup>5</sup> (1983) 151 CLR 447, 461.

<sup>6</sup> At page 474.

<sup>7</sup> At p 628-629.

knowledge of the donee, in a position of *special* disadvantage vis-à-vis the donee: that is to say, in matters in which their interests do not coincide, the donor's capacity to make a decision as to his or her own best interest is peculiarly susceptible to control or influence by the donee." (References omitted)

- [55] The emphasis placed by his Honour on the word "special" in the expression "*special* disadvantage" was explained by the following passage cited by his Honour<sup>8</sup>, taken from the judgment of Mason J in *Amadio*:<sup>9</sup>

"I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party."

- [56] Brennan J then noted that in that case, the relationship between donor and donee was, "so different in degree as to be different in kind from the ordinary relationship of a man courting a woman."<sup>10</sup> It is implicit in his Honour's statement that the emotional state of a person engaged in what used to be referred to as "courting" is not of itself sufficient to amount to a special disadvantage.

- [57] Some doubt about the correct approach to be taken to the condition of the donor may be thought to have been raised by the decision of the High Court in *Bridgewater v Leahy*.<sup>11</sup> In that case, the majority found that a nephew had been guilty of unconscionable conduct in relation to his uncle. The nephew had offered to purchase the uncle's interest in land used for a primary production business, which resulted in the uncle transferring his interest in the land to the nephew for \$696,811, at the same time executing a deed of forgiveness in favour of the nephew for \$546,811. It has been suggested that, in reaching their finding, the majority did not give express consideration to the question whether the uncle was at a special disadvantage vis-à-vis his nephew, which seriously affected his ability to make a judgment in his own best interest<sup>12</sup>. However, their Honours cited a number of passages from other authorities referring to "a special disability" or "a special disadvantage" on the part of the person being exploited. They did not suggest that what was stated in them was wrong. Indeed, although they did not accept the approach taken to this question by the learned primary judge, they did not suggest that it was a matter which he was wrong to deal with.

- [58] Subsequently, the doctrine was again considered by the High Court in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*.<sup>13</sup> The Court had to determine whether the conduct of a lessor of a shop in a shopping centre was unconscionable "within the meaning of the unwritten law", in breach of s

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<sup>8</sup> At page 629.

<sup>9</sup> At page 462.

<sup>10</sup> At page 629.

<sup>11</sup> (1998) 194 CLR 457.

<sup>12</sup> See the discussion of this case by G Dal Pont, *The Varying Shades of 'Unconscionable' Conduct – Same Term – Different Meaning in* (2000) 19 Australian Bar Review 135, 144-146.

<sup>13</sup> (2003) 214 CLR 51.

51AA of the *Trade Practices Act 1974* (Cth). The lessor was prepared to grant a renewal of a lease only on condition that the lessees discontinue a damages claim made by them against the lessor. The renewal was of great commercial significance to the lessees. For the purposes of the doctrine of unconscionable conduct, the Court applied the test formulated by Mason J in *Amadio*, including the requirement relating to a “special disadvantage”, explained as meaning an inability to make a judgment in the best interests of the person making it<sup>14</sup>. In adopting that test, their Honours made it plain that a substantial inequality in bargaining power did not itself constitute a “special disadvantage”.

[59] Accordingly, it seems to me that I should proceed on the basis that the plaintiff cannot succeed unless he establishes that he was at a special disadvantage vis-à-vis the defendants, in the sense given to that expression by Mason J in *Amadio*. I understood the position of Counsel for all parties to be consistent with that view.

[60] The relevant disability is quite specific. In *Bridgewater*, the majority held that the fact that the uncle had “the capacity ... to know what he was doing and to make informed decisions about the disposition of his property” was no answer to the claim; and they pointed out that equitable principles might be invoked “to set aside a gift where a donor is perfectly competent to understand and intend what he or she did”.<sup>15</sup> It seems to me that these passages emphasise that the disability must be related to the capacity of the innocent party to make a judgment as to his or her own best interests in the transaction which is challenged, consistent with the formulation of Mason J in *Amadio*, adopted in *Berbatis*. If the innocent party’s capacity is affected in that sense, a special disadvantage exists, even if that party is otherwise completely competent to make decisions.

[61] I turn then to a consideration of the conduct which is alleged to be unconscionable, so that a grant of relief is warranted. In *Louth* Brennan J emphasised that in order to succeed, the donor must establish that “the gift has been procured by unconscionable conduct.”<sup>16</sup> His Honour said:<sup>17</sup>

“At the end of the day, however, it is for the party impeaching the gift to show that it is the product of the donee's exploitative conduct. This is the final and necessary link in the chain of proof of unconscionable conduct leading to a decree setting aside the gift.”  
(reference omitted)

[62] Brennan J in *Louth* considered that the conduct of the donee must have a particular character for relief to be granted. That is apparent from the following passage of his Honour’s judgment:<sup>18</sup>

“Equity intervenes ‘whenever one party to a transaction is at a special disadvantage in dealing with the other party ... and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.’<sup>19</sup> Citing this passage in *Amadio*<sup>20</sup> Dawson J

<sup>14</sup> *Berbatis* at [5], [14] and [15], (Gleeson CJ); [46], [55], [57], (Gummow and Hayne JJ); [184] (Callinan J); Kirby J seemed to apply the same test, though with different results: [115] [117].

<sup>15</sup> See *Bridgewater* at [118], cited in *Lopwell Pty Ltd v Clarke & Ors* [2009] NSWCA 165 at [44].

<sup>16</sup> At pages 631.

<sup>17</sup> At page 632.

<sup>18</sup> At page 630.

<sup>19</sup> *Blomley v. Ryan* (1956) 99 CLR 362, 415, per Kitto J.

said: ‘What is necessary for the application of the principle is exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain.’” (emphasis added)

[63] In *Louth*, the donee’s conduct was found to be highly manipulative, the trial judge saying that it was “dishonest and smacked of fraud.”<sup>21</sup> Spigelman CJ in *Attorney-General of New South Wales v World Best Holdings Ltd*<sup>22</sup> stated of unconscionable conduct that the “concept requires a high level of moral obloquy.”

[64] In *Louth*, Deane J expressed the doctrine as follows:<sup>23</sup>

“It has long been established that the jurisdiction of courts of equity to relieve against unconscionable dealing extends generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party to the transaction with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that special disability was sufficiently evident to the other party to make it prima facie unfair or ‘unconscionable’ that that other party procure, accept or retain the benefit of, the disadvantaged party's assent to the impugned transaction in the circumstances in which he or she procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: ‘the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain’ or retain the benefit of it.” (references omitted)

[65] In that passage, the conduct of the person who obtained the benefit of the transaction was identified as unconscionable if, at the time when that person procured, accepted or retained the benefit of the other party’s assent to the transaction, the special disability of the party assenting, was sufficiently evident to the other party. His Honour’s formulation reduces the level of subjectivity involved, from that which might be attributed to the passages cited from the judgments of Brennan J and Spigelman CJ.

[66] In *Amadio*, Mason J considered it to be sufficient if a party, instead of having actual knowledge that the other party was in a situation of special disadvantage in relation to the transaction, was “aware of the possibility that that situation may exist or (was) aware of facts that would raise that possibility in the mind of any reasonable person...”.<sup>24</sup> Knowledge of this situation, sufficient to enable a party’s conduct to be characterised as unconscionable, may be established by showing that the party shut his or her eyes to the special disadvantage of the other party.<sup>25</sup>

[67] All of this seems to me to indicate that “unconscientiousness” or “moral obloquy” are, in general, not some additional requirements to be established before relief is

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<sup>20</sup> At page 489; and see also pp 462, 474.

<sup>21</sup> *Louth* at page 626.

<sup>22</sup> (2005) 63 NSWLR 557 at [121], cited in *Lopwell* at [38].

<sup>23</sup> At page 637.

<sup>24</sup> *Amadio* at p 467; cited in *Lopwell* at [54].

<sup>25</sup> See *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at [30], cited in *Lopwell* at [54].

granted; rather, they are characterisations of the conduct of a person who procures, accepts or retains a benefit from another when the special disadvantage of that other is sufficiently evident.<sup>26</sup> This I understand to be consistent with the submission from Mr Ferrett, who points out that to regard these expressions as an additional requirement of the grant of relief would work against the concern generally evidenced in the authorities to establish a principled basis for relief, rather than resting it on the subjective views of an individual judicial officer.

[68] I turn then to some other matters. It is not necessary that the party whose conduct is in question has actively set about procuring an advantage. It is apparent from the judgment of Deane J in *Louth* that relief will be granted if a party has accepted or retained a benefit where the special disability of the other party was sufficiently evident to make it *prima facie* unconscionable to do so.<sup>27</sup>

[69] It will also be apparent from the passage from the judgment of Deane J in *Louth* which has been set out above that an order will not be made against a defendant if the defendant demonstrates that the transaction was “fair, just and reasonable”.

[70] In *Louth*, Brennan J quoted two passages to point out the limitations of the doctrine.<sup>28</sup> The first is from *Allcard v. Skinner*:<sup>29</sup>

“Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. ... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects.”

[71] The second is from *Brusewitz v. Brown*:<sup>30</sup>

"The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable, or unjust such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognized invalidating circumstances, such as fraud or undue influence."

[72] The first of these passages refers to the condition of the person claiming relief. It shows that folly or recklessness on the part of that person is not sufficient to warrant relief. The second emphasises the freedom of a person to make an improvident bargain.

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<sup>26</sup> In this case, it is unnecessary to consider whether there are some cases where these expressions might have operation: for example, where a donee encourages the donor to take appropriate steps to deal with the donor’s special disadvantage, such as getting legal or commercial advice, but the donor declines to do so.

<sup>27</sup> *Louth* at 637; *Bridgewater* at [122] cited in *Lopwell* at [52].

<sup>28</sup> At page 631.

<sup>29</sup> (1887) 36 Ch D 145, 182-183.

<sup>30</sup> [1923] NZLR 1106, 1109.

[73] The limited field of operation of the doctrine is also reflected in the following statement by Spigelman CJ in *World Best Holdings*<sup>31</sup>:

“Unconscionability is a well-established but narrow principle in equitable doctrine. It has been applied over the centuries with considerable restraint and in a manner which is consistent with the maintenance of the basic principles of freedom of contract. It is not a principle of what ‘fairness’ or ‘justice’ or ‘good conscience’ requires in the particular circumstances of the case.”

[74] In my view, the following propositions emerge from these cases:-

- (a) It is a condition of the grant of relief that one party to a transaction is at a special disadvantage in relation to the other, in that some condition or circumstance seriously affects the ability of the first party to make a judgment as to his or her own best interests;
- (b) It is not sufficient for the party seeking relief simply to establish that the transaction is seriously disadvantageous to that party;
- (c) No remedy is available unless it is shown that the other party unconscientiously exploited the special disadvantage to which the first party was subjected;
- (d) Unconscientious exploitation occurs, at least in most cases, if a party procures, accepts or retains a benefit, when it is sufficiently evident that the other party is subject to a special disadvantage, to make it unconscientious to retain the benefits; and
- (e) No remedy is available unless it is shown that (in the case of a transaction) the transaction is the product of unconscientious exploitation by the other party;
- (f) Relief will not be granted if it is shown that the transaction was “fair, just and equitable”;
- (g) The encroachment of the doctrine on basic principles relating to freedom of contract is quite limited.

#### **Was Leslie subject to a special disability?**

[75] On this issue, as identified in oral submissions, Leslie’s case was primarily that the special disability was apparent from a consideration of the history of his involvement in the farming enterprise, taken as a whole; though in his oral evidence Leslie made reference to the provisions of the Land Partnership deed. The most significant feature of the farming enterprise history, from the point of view of determining whether Leslie was subject to a special disadvantage, would appear to be the fact that from about 1980 he worked on the farms for the partnership for a relatively low wage. Before looking further at the evidence relating to Leslie’s income, and some related matters, some further observations should be made about events leading up to 1980, and subsequently.

[76] Mr Paroz Senior had instilled in each of his sons the belief that the goal to which they should aspire was to be able to own and work on farms. He also recognised that the farms which the family held, which were relatively small, would not generate sufficient income to support his three sons and their future families (and, no doubt him and his wife for the remainder of their lives). The family farms had

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<sup>31</sup> At [120]; again cited in *Lopwell*, at [40].

not been particularly prosperous: in his oral evidence, Leslie made mention of the fact that when he was young, he had not appreciated the level of debt associated with the farms; and in his early years he had worked to help generate income to reduce that debt.

- [77] Mr Paroz Senior formulated a strategy, to enable the goal to be achieved. It was that his sons would obtain better-paid employment in other types of work; that to the extent they were able, and in particular on week-ends and holidays, they would return to the farms to work; and that using the funds generated by their other employment and the farms, they would buy more land and expand the farming operation.
- [78] Mr Paroz Senior contributed to the achievement of the goal in a number of ways. He advised all three sons to obtain off-farm employment. In particular, he arranged for Ian to obtain employment with the Commonwealth Bank at Laidley. He recommended that Leslie undertake a plumbing apprenticeship, though the evidence does not make clear whether in fact he had taken steps to arrange a position for him. Lewis's employment with the Irrigation and Water Supply Commission was obviously consistent with his father's advice, and had the support of both his parents. Moreover, the farms already held by Mr Paroz Senior and Olive were, over time, transferred to the three sons, sometimes with debt to the parents which was not enforced; and on one occasion a farm was purchased, with part of the purchase moneys being contributed by the parents, but not repaid to them.
- [79] Leslie preferred to continue to work on the family farms. To that extent, he did not follow the strategy recommended by his father. However, this was accommodated within the family. After Leslie returned to the farms in 1972, he continued to work on the farms, primarily with his father. The evidence suggests that he generally performed his work without any pay. However, in this period he performed off-farm contracting work, which no doubt generated some income. He also carried on some on-farm business activities in his own right. He specifically made reference to raising pigs, an activity which he ceased to carry out when the partnership with his brothers was formalised, and he began to receive a regular wage. In the late 1960s and throughout the 1970s, the evidence also suggests that sporadic ventures were carried out by the three brothers in partnership on the farms, such as the occasional fattening and selling of some cattle.
- [80] There is evidence that this state of affairs changed at about the time when McLean's Farm was purchased. There was conflicting evidence about Leslie's involvement in the decision to buy this farm; and about the decision to pay wages to Leslie. Leslie's evidence in chief was to the effect that Lewis had promoted the purchase of this farm, but that he could not remember any real discussion about it. He also did not associate the decision to pay wages to him with this purchase: rather he stated that it was approximately two years later, on 24 August 1981, that he was told he was going to get a wage; and before that, "Les was left to his own devices". Leslie described the wage as a "carrot" to encourage him to sign the Land Partnership deed.
- [81] Ian's evidence was that there were two discussions, in which Leslie was involved, prior to the purchase of McLean's Farm. During these discussions Ian produced budgets and flow charts relating to expected earnings. The projected income was

thought to be sufficient to enable a wage to be paid to Leslie. There was substantially similar evidence from Lewis and Jenny.

- [82] I accept the evidence that Leslie was involved in the discussions which led to the purchase of McLean's Farm; and that a decision was made in those discussions to pay Leslie a wage. I have no real reason to doubt the honesty of any of the witness on this topic. However, Ian's recollection of the discussions is rather specific. It is supported substantially by the evidence of Lewis and of Jenny. As has been stated, Ian gave evidence that he produced projections dealing with the viability of the purchase; and that at this time, it was thought that the income would be sufficient to pay a wage to Leslie. It is inherently probable that Ian, who by then had been working in a bank for more than ten years, would give serious consideration to budgets and income projections to purchase this property, when a not insignificant amount of money had to be borrowed. It is also inherently likely that he would discuss these matters with his partners, who were also members of his family. They had by this time worked together as a family for a significant number of years, and they shared the common goal which Mr Paroz Senior had identified for them. It seems to me to be inherently likely that the means by which it might be advanced would be discussed by the family as a whole.
- [83] Further, this purchase involved not insignificant changes in the farming operation. McLean's Farm had the benefit of irrigation. The soils were quite different (on Leslie's evidence) to those on the properties owned to that time by the family. McLean's Farm was a substantial distance from the other farms. By this time, Mr Paroz Senior was no longer young (Ian's evidence was that he was 65 in mid 1973), and he had had some significant illness in 1972, which played some role in Leslie's return from Monto. By 1979 Leslie was playing a significant role in the farming operation, and was likely to continue to do so in the future. It is difficult to think that the purchase of McLean's Farm occurred without significant discussion with him about it. Further, the purchase required a significant financial contribution by him (\$10,000) and the assumption, with his brothers, of a not insignificant liability, to be repaid over a 15 year period (\$30,000). Again, it is unlikely that this happened without any real participation in the decision by him.
- [84] In my view, the fact that Leslie commenced to be paid a wage by a partnership in the 1980 financial year also provides support for Ian's evidence. This is recorded in the books maintained by Ian; and is supported by cheque butts and Leslie's bank statements. Leslie was cross-examined about the 1980 payments, and taken to these documents, and did not deny that the payments were made at about the dates identified by these records.
- [85] There is another reason why I think it likely that Ian would have advised Leslie of the financial considerations relevant to the purchase of McLean's Farm; and would have discussed with Leslie the decision to pay him a wage. My impression of Ian is that he was, and remains, relatively sympathetic to Leslie. I note that for many years, he did such bookwork as was required in relation to Leslie's affairs. I also note that he recommended to Leslie that he make contributions to superannuation; and that he attempt to save such money as he could from what he earned. There is also evidence, which is not disputed and which I accept, that when Leslie entered into an arrangement with Mr Catlin for the purchase and use of the no-till planter, Ian advised him to have the arrangement recorded in writing to protect his interests. Ian gave evidence that, in the years when the cash flow permitted, he was

responsible for the payment of a bonus to Leslie in recognition of Leslie's work on the farms (reflected in the figures previously quoted). This evidence was not challenged, and was supported by evidence from Jenny. All of this conduct is consistent with a concern for Leslie's interest. It is inconsistent with the notion that the decision to purchase McLean's Farm would have been made without drawing financial considerations relating to the purchase to Leslie's attention; and is inconsistent with the notion that the initial decision to pay Leslie a wage was made without reference to him. It is also consistent with my impression of Ian when he gave evidence.

- [86] It is also clear that Leslie had a significant involvement in the decision to purchase Hiddenvale in 1989. He visited the property, and inspected it, before the purchase. The purchase was, as he described it, "a challenge": it involved borrowing some \$230,000. His evidence was that the others talked about whether the purchase was affordable, but that he "wasn't sort of included in that." However he gave evidence that in respect of this purchase his brothers asked for his advice, and that he thought it was "a great property." He stated that he was concerned about the price, and how the loan would be repaid, but he also said that he undertook to the officer of Queensland Industrial Development Corporation who approved the loan that he would ensure that the loan was repaid.
- [87] Ian gave evidence that, prior to the decision to purchase Hiddenvale, "we went through a similar cashflow exercise to the one we undertook when we purchased (McLean's Farm)". He and Jenny gave evidence of a meeting attended by Mr Paroz Senior, Olive, Ian, Leslie, Lewis, Jenny and Karen where there was discussion about how the purchase could be funded. Lewis gave evidence that "(a)s we had done when we purchased McLean's Farm, we looked at some cash-flow figures that Ian had prepared, and we discussed whether we could afford to buy Hiddenvale and what we would do on the property". There was also discussion at this time about whether the enterprise could afford to pay wages to both Leslie and Lewis, who was contemplating full-time farming work.
- [88] In my view, the evidence establishes that Leslie was included in the discussions about the purchase of Hiddenvale, and in particular whether it could be afforded, and whether it would be possible to pay both Leslie and Lewis if they both worked full-time on the farms. I consider that Ian, Lewis, Jenny and Karen were honest witnesses, and that their evidence on this issue is generally reliable. Moreover, their evidence is inherently likely. I consider it to be highly unlikely that a decision to take on a new property, some distance from the other farms, and requiring, as Leslie's evidence indicated, a considerable amount of work to make it suitable for a grazing operation, was made without any real participation by Leslie. Especially is this so where the purchase involved taking on a considerable amount of debt, and substantial cash contributions by the partners. I note that Leslie gave evidence of a discussion with a representative of the lender. I also consider it quite unlikely that a decision would be made about Lewis's engagement by the partners to work full-time on the farms without any real participation by Leslie. The evidence demonstrates Leslie's involvement in the making of important decisions, both in relation to the purchase of Hiddenvale, Lewis's return to full-time work on the farms, and the wages thereafter to be paid to Leslie and Lewis.
- [89] Leslie was asked in his evidence-in-chief why he continued to work on the farms in the period when he was paid \$1,500 per month. That period was the period between

1989 and 2002; and he had earlier given evidence that he was aware that at some time in that period people were being paid \$50,000 a year for “some sort of a decent job”.<sup>32</sup> His evidence was that he considered that if he breached the partnership deed “even by driving that unregistered tractor, these properties would be sold within three months ... The defendants had that power open to ’em from 1981. *So I had to protect my interest, and my interest was those farms*”.<sup>33</sup> (emphasis added)

- [90] He was then asked to explain why “those farms (were) your interest”. He replied, “Well you may as well say my dad gave me the chalice. That’s it”.<sup>34</sup>
- [91] In addition to his interest in the farms, from 1979 he, along with his partners, had, as has been mentioned, a liability for the funds used to purchase McLean’s Farm; and from 1989 for the funds used to purchase Hiddenvale. The continuation of the farming operation, with his day-to-day involvement, provided a means by which those liabilities could be discharged. It should be noted that in the period between 1981 and 2003, Leslie was able to match Ian’s contributions to the partnership in the sum of \$105,000; and still has a credit balance in his loan account with the partnership of \$74,000.
- [92] The evidence of Leslie which was set out earlier associated his decision to continue working on the farms with his own interest and related that interest to something received from his father which he described as “the chalice”. The answer was not more fully explained. However, it seems to reflect the desire of Mr Paroz Senior that his sons continue to conduct a farming operation. That advice was motivated by an intention to enable them to provide for themselves and their families financially; and to continue to live as farmers, which he obviously regarded as desirable. There is no reason to doubt that that advice was given in what Mr Paroz Senior saw as the interests of each of the sons. A decision to accept it, and act on it, is not likely to be a decision made without sufficient regard to the interests of the son making it. In my view, that was as true for Leslie as it was for the other two sons.
- [93] Leslie’s evidence referred to a power conferred on his partners to sell the farms if he breached the partnership deed. This seems to be based on the provisions of the Land Partnership Deed, dealing with the consequences of a breach of its requirements. Clause 10 of the Deed dealt with the obligations of each partner in relation to partnership business. Although its construction was disputed, Clause 10 imposed the same obligations on each of the three brothers. The Deed did not include an arrangement that Leslie work full-time on the farms for a wage. It is doubtful that any action could have been taken against him simply because he had taken off-farm employment, particularly when his brothers were working elsewhere. There was no evidence to suggest that the others would have attempted to implement the provisions of the Deed relating to a breach if Leslie had taken other employment. The evidence of Ian and Lewis suggested the contrary. When they were asked about what would happen if Leslie had taken that course, there was no suggestion that the provisions of the Partnership Deed might be invoked. Rather, each indicated that the farming operations could be altered, by limiting them to grazing. I consider that Leslie’s evidence about the consequences of his not working full-time on the farms does not reflect what was likely to happen, and

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<sup>32</sup> See Transcript 1-46

<sup>33</sup> See Transcript 1-47

<sup>34</sup> See Transcript 1-47.

played no real part in his working full-time on the farms for the wages paid to him, until the end of 2006.

- [94] It should be noted that this history demonstrates that Leslie was prepared to forgo an opportunity to earn a better income by gaining a trade, so that he could continue to work on the farms. It should also be noted that he had sufficient independence to leave the farms and work in Monto for a year. I am mindful that he returned to the farms at his mother's request, and accept that a sense of duty to his parents played a not insignificant role in his return, and his decision to work on the farms in the 1970s. However, by 1979 he himself had a significant personal interest in the ownership of the farms, increasing through the 1980s.
- [95] By 1979, then, the parents had transferred Plainland Road and Hattonvale to the three sons; and the three sons had purchased McLean's Farm. The three sons purchased the first part of Berry's Farm early in 1981, with an arrangement to purchase the balance 2 years later. They therefore owned just over 400 hectares of land by this time. As has been mentioned, in 1985, the Home Farms were transferred to them, and they purchased Hattonvale in 1989.
- [96] It is likely that from the early days of their farming ventures, the three brothers each hoped that the farms would increase in value. They plainly did. The evidence was that Hiddenvale has been sold for \$1,000,000, and Hattonvale for more than \$4,000,000. Valuation evidence was tendered in respect of the remaining properties, indicating values in excess of \$3.5 million. I was told, without objection, that the pool of assets represented by the farms, including the proceeds of sale of some of them, had a value between \$8,000,000 and \$10,000,000. Figures consistent with these were put to Ian in cross-examination, and he accepted them.
- [97] The arrangements which were made when McLean's Farm was purchased, and which (in substance) continued after the Partnership Deeds were signed in 1981, were not without advantages for Leslie, many of which were likely to have been apparent when the arrangements were made. Though the income was modest, it was regular and relatively certain. As things turned out, it was able to be maintained through droughts in the 1980s, and the long period of drought from about 1992 to 2003. The arrangements enabled the continuation of a business operation which maintained farms in which Leslie had a significant interest, a result no doubt envisaged at the time when it was agreed that Leslie would be paid a wage. That seems to have been at least one of the purposes of Ian's projections. The arrangements enabled Leslie to continue farming, and on land to which he had a special attachment, some of which had been in the family for many years. He was provided with a home. As a consequence of being able to continue to live on the farms, for much of the time his lodging was provided by his parents. In particular, the arrangements which were made at about the time of the purchase of McLean's Farm enabled Leslie to continue in partnerships which had the capacity to buy more land, resulting, as things turned out, in the purchases of Berry's Farm (in two stages); and Hiddenvale in 1989. These purchases were consistent with the plan formulated by Mr Paroz Senior, and adopted by his sons, including Leslie. Further, the partnership was able to pay off the debts on the land which had been purchased, a result envisaged at the time when McLean's Farm was purchased and the initial decision was made to pay wages to Leslie; and again when Hattonvale was purchased, and the payment of wages to Leslie and Lewis was considered.

- [98] I turn then to a consideration of the evidence relating to wages which might have been earned by persons employed in the rural industry. The evidence came from an accountant, Mr John Thynne. He sought to identify an employment position which might be related to the tasks Leslie was carrying out on the farm. He then established a salary which might currently be associated with such a position; and then projected that salary backwards in time, having regard to historical changes in average weekly earnings. Mr Thynne has adopted two scenarios. Scenario 1 relates to a manager with ten to twenty years of experience, who has control of assets with a value of \$1,000,000. For Scenario 1, the base salary adopted by Mr Thynne is \$65,000. The difference with Scenario 2 is the increased value of the assets under management, in this case \$8,000,000, resulting in a base salary adopted by Mr Thynne of \$85,000.
- [99] Mr Thynne's work covers the period from August 1981 to December 2006. For that period, he calculated the difference between remuneration in fact received by Leslie, and the remuneration identified in Scenario 1, as a total of \$609,664. For Scenario 2, the result of the same calculation was \$933,607. These figures do not reflect the incidence of taxation. Mr Thynne also provided interest calculations on the differences over that period.
- [100] It is apparent from Mr Thynne's evidence that persons who would be employed for the salary packages he identifies would ordinarily work very long hours. It is likely that, on a weekly basis, their working hours would be similar to the hours worked by Leslie.
- [101] It is, however, of some significance that Leslie was not in fact employed as a farm manager. There is no suggestions that the money he was paid was intended to reflect the salary package for a person employed in that position. From the outset, he was one of three partners who owned the farms; and he held a one-third share in the partnership which carried on the farming operation. The other partners each made contributions. In essence, for most of the life of the partnership, Ian and Lewis worked on the farms in the mornings before going to work, and in the evenings when they came home; as well as on weekends, and during their holidays (with some limited exceptions). Jenny and Karen also performed farm work, although their contributions in this respect were significantly less than that of their husbands. Ian, and later Jenny, looked after the book work.
- [102] The moneys paid to Leslie were in recognition of the fact that he was working fulltime on the farms, while the working contributions of the other parties were significantly less. However, that circumstance means that the work provided by Mr Thynne is not an appropriate measure for a fair level of remuneration for Leslie in the circumstances. Put another way, recognising that the work performed by Mr Thynne, when it projects so far into the past, has some limitations, but nevertheless, adopting it as a general guide to the level of remuneration that it might have been necessary to pay to employ someone to perform all of the duties performed by Leslie, substantial offsetting allowances would have to be made in recognition of the work-related contributions of the other partners.
- [103] I also note that Leslie had a one-third interest in the Farming Partnership. To the extent that that partnership might be said to have benefited by paying him less than a fair level of remuneration, one-third of that benefit accrued to him as a partner. If

one regards the benefit as being transferred through to the Land Partnership, which is where the substantial assets were accumulated, the same is true.

- [104] In those circumstances, a decision by Leslie to accept the amounts paid, bearing in mind the work-related contributions of the other partners, and the benefits accruing to him as a partner, could not be regarded as seriously improvident. I consider that it would be difficult to reason from this evidence to a conclusion that it reflected a serious impairment of Leslie's capacity to make a decision in his own interests.
- [105] I am conscious that the relevant impairment of capacity is quite specific, and am mindful of the statements which I have previously mentioned from *Bridgewater*. Nevertheless, it seems to me that in the circumstances of this case, Leslie's capacity to make decisions in other areas sheds some light on the question whether his capacity to make a decision in his own interests in relation to continuing to work on the farms was seriously impaired. I also consider some other matters to be relevant.
- [106] I have previously mentioned that Leslie had sufficient independence in 1971, when approximately 19 years of age, to leave the family farms and to work in Monto for approximate one year.
- [107] It also should be noted that Leslie gave evidence that in early times his father would consult him about the possible purchase of other properties. Leslie expressed his views, which his father seemed to accept.
- [108] It is clear from his own evidence that Leslie had a significant involvement in the decision to purchase Berry's Farm. I have reached a similar conclusion about the decisions to purchase McLean's Farm and Hiddenvale; and about the decision made at about the time of the purchase of McLean's Farm to pay him a wage; and about the decision that Lewis would return to work on the farms at about the time Hiddenvale was purchased, for a wage which generally matched that paid to Leslie (though without any payment to Lewis in respect of his vehicle).
- [109] In other areas, Leslie showed a capacity for making independent decisions, about matters of some real significance. In that category I would include his decision to maintain stock numbers during the prolonged drought in the 1990s and afterwards; his decision relating to the Simmons lease; and a series of decisions resulting in the undertaking of no-till farming. In my view, each of these was a matter of some considerable significance to the farming operation of the partnership as a whole, and not simply a matter relating to the day to day operation of the farms. They reflect a capacity for independent decision making on his part.
- [110] On Leslie's behalf it was submitted in relation to a number of these matters that they related to farming operations, and were different in character from a decision to be made by Leslie as to his own best interest, in continuing to work for low remuneration. It is correct to say that a number of these decisions are different in character from the decision (or decisions) in respect of which it is alleged the defendants have behaved unconscionably. However, Leslie continued to work for a relatively low remuneration for a long period of time. It seems to me to be less easy to infer the existence of a serious impairment of the capacity to make a decision in one's own interest, persisting over a long period of time, in a person who displays capacity for independent decision making in matters of some substance, over that period. Moreover, the matters to which I have referred are matters in which Leslie

had a real personal interest. He was a member of the partnership, and its success or failure would affect him. In respect of the matters I have identified, it could not be suggested that he made decisions without regard to his own interests, as well as what he may well have perceived to be the interests of the other partners.

- [111] Having said that, I acknowledge that these decisions were consistent with his desire to continue farming; whereas a decision to cease working for the partnership may not have been. While that consideration may reduce the significance to be attributed to these matters, it seems to me that they remain of some relevance.
- [112] As has been noted, from about 2003 Leslie commenced to make demands for reimbursement for what he by then perceived to be inadequacies in his remuneration. By this time, it is clear that he could not be said to have been suffering from a relevant special disadvantage. However, I do not consider his conduct at this time to be of great assistance in determining whether for all or a substantial part of the period from 1980 he had been subject to a relevant special disability. By 2003, he was in a relationship with Ms van Ansem, and may well have received support in advancing the claim, which had not been available to him in earlier years. That, the passage of time generally, and an individual event which triggered a hostile reaction in him (such as his reaction to the delay of the other partners in agreeing that Ms van Ansem could build a house on partnership land) could explain the termination of a relevant special disability, had he previously been subject to one. On the other hand, these same events, perhaps coinciding with the ending of the drought, might explain why Leslie was willing to take action to advance the claims, when he had not done so in the past.
- [113] In *Louth*, the advantages enjoyed by a trial judge in forming an opinion as to whether a plaintiff was under a special disability at the time of a particular transaction were recognised.<sup>35</sup> It was apparent to me that Leslie held his parents in very high regard. He gave evidence, which is generally consistent with the evidence of the other members of the family, and which I accept, of his strong desire throughout his working life to remain working on the farms. Nevertheless, he presented in court as someone with a relatively strong personality. He was not unintelligent. I observed nothing to suggest that his capacity to make a judgment in his own interests was seriously impaired. However, the present case is concerned with matters which extend back almost 30 years in time. While my observations of Leslie are confirmatory of the view which I have otherwise reached, I give them less weight than would be appropriate in a case involving a single, relatively recent, transaction.
- [114] A submission was made on behalf of Leslie that Ian had significant financial experience by 1981, whereas Leslie was “the ill-educated farmer”. Leslie, like Lewis, continued at school until about his sixteenth birthday. Ian had remained at school, it would seem, for a year longer. While the level of education attained by Leslie may not have been particularly high, neither was it particularly low. It does not seem to me to be at a level which would provide significant evidence that Leslie was subject to a special disadvantage of the kind under consideration in this case. It does not alter the conclusion previously identified on this matter.
- [115] It may be accepted that by 1981, Ian had substantially greater financial experience than Leslie. It may well be that in some cases, differences of this kind might

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<sup>35</sup> At p 633 per Deane J; p 640-642 per Dawson, Gaudron and McHugh JJ; see also Mason CJ at p 626, Brennan J at p 633.

support a finding of special disability, for example, where the allegation is that the party with less experience lacked the capacity for critical consideration of financial recommendations made by the other, and consequently could not make a worthwhile decision in the first party's own interest. No allegation of that kind is made in this case. Rather the case advanced on behalf of Leslie is that his special disadvantage arose from his attachment to the family farms and the related farming business. Ian's greater financial experience has little relevance to that case. While Leslie may not have been able to examine critically the financial projections which Ian at times prepared and presented, that does not mean he was not able to make a worthwhile judgment in his own interest in light of them. There has been no suggestion that the projections were not honestly, and competently, prepared. Indeed, they were intended to enable not just Leslie, but all members of the family, to make informed decisions.

- [116] For completeness, I should add that no evidence was advanced to suggest that Leslie's need to care for Olive played any role in his decision to work full-time on the farms.
- [117] In my view, then, the evidence does not establish that, at the time of his decision or decisions to continue to work on the farms for the remuneration he received, Leslie was subject to any special disadvantage.

#### **Knowledge of other partners relating to Leslie**

- [118] Because I have concluded that Leslie was not under a relevant special disability at any time of significance for this action, it follows that I consider that it was not sufficiently evident to the other partners that that was the case. It may, however, be appropriate to make some comments related to this topic.
- [119] By 1980, Leslie was 29 years of age. With the exception of his year in Monto, he had worked on the family farms since leaving school. Generally, he had helped his father. He had received little remuneration, though he had done some off-farm contracting work and he had conducted the piggery. He had not accepted his father's recommendation that he undertake a plumbing apprenticeship.
- [120] Leslie's wish to remain on the farm was no doubt well known to the other partners. To be a farmer seems to have been a goal instilled by Mr Paroz Senior in each of his three sons.
- [121] Against that background, it is difficult to see how Leslie's preparedness to continue to work on farms for an agreed wage might manifest some impaired capacity to make a decision in his own interest. Prior to 1980, although he knew, and had shown, that he could leave the farms and work elsewhere, he had chosen to remain there working for very little financial reward. The arrangement that was reached was one which undoubtedly improved his position and enabled him to follow his choice of working on the farms. It is difficult to see how it could have been regarded by the remaining partners, other than as a decision made by Leslie in his own interest.
- [122] After 1980, the other brothers, and at times their wives, continued to work for the partnership without remuneration. Leslie continued to work for the partnership, on a full-time basis, but with some remuneration in recognition of his greater work-

based contribution. All of the brothers made financial contributions to the partnership. It was the means of achieving the goal established by their father, intended to give them both assets and income. Leslie participated in the making of significant decisions by the partnership, and at times himself made decisions for the partnership which were made without consultation with his partners, and which did not have their support. If Leslie was at a special disadvantage in relation to his decision to continue to work on the farms, against that background, and Leslie's evident wish to continue to work on the farms rather than seek off-farm employment, I do not consider that such a disadvantage would have been at all evident to his partners. I consider it likely that he appeared to them to be a strong-willed person, capable of making independent decisions, and likely to make decisions having regard to his own interests.

- [123] Indeed, my observations of the other partners did not lead me to form a view that they were likely to have behaved in an exploitative fashion towards Leslie. I have already mentioned my observations of Ian. Lewis did not seem to be as patient towards Leslie as Ian was, but that is hardly surprising. I have previously mentioned the contributions that Lewis made to the farming enterprise. I do not consider it likely that Lewis would, at any time during the 1980s and 1990s, have the belief that Leslie's capacity to make a judgment in his own interest was seriously impaired.
- [124] Both Jenny and Karen seem to me to be relatively independent women. However, their evidence indicated, and I accept, that they by and large left decisions about significant matters in the partnership to the three brothers.
- [125] A submission was made on Leslie's behalf that the other partners had treated him cynically. This was said to be demonstrated by the fact that there was evidence that the amount initially paid to Leslie approximated the off-farm earnings of the other brothers, but they, or in particular Ian, must have known that over time, the amount being paid to Leslie fell well behind what Ian was receiving.
- [126] I do not accept that submission. There is a document (Exhibit 18) said to have been prepared by Jenny, which compared the payments made to Leslie with Ian's income over the life of the partnership; and with Lewis's income for the latter part of that period. In the early years, there was a not insignificant difference between the payments to Leslie (which did not seem to attract tax) and what Ian received fortnightly net of tax. By the late 1980s, that difference had reduced. In the 1990s, Ian's income increased, and increased more significantly from about 2000. Payments to Leslie remained constant generally throughout the 1990s and until 2003. The payments in the early years plainly represented an improvement in Leslie's position. This was a period of expansion of farming operations. It is likely (and this is consistent with the evidence) that in this period, the amount paid to Leslie reflected the financial capacity of the partnership. From about 1989 until about 2002, the partnership was under considerable financial pressure, in part because of the amount borrowed to buy Hiddenvale, and in part because of the long drought. The evidence demonstrates that it could not have paid significantly more to Leslie in this period. These circumstances provide a far more likely explanation for any difference between what Ian earned and what was paid to Leslie, than cynicism on the part of Ian, or the other partners.

- [127] During the period of the long drought, Leslie's conduct demonstrated that he was more concerned with the preservation of partnership assets than with receiving more cash. The other partners wanted to reduce the size of the herd by selling off cattle, which would have provided cash, and enabled the sale of hay produced on the farms. It would have also avoided the need to buy additional feed for the cattle. Leslie, however, resisted this, as he wished to maintain the herd. That was a business judgment which he made. It was accepted, apparently reluctantly, by the other partners. It makes it unlikely that the level of wages paid to Leslie was the product of cynicism on their part.
- [128] Further, my impression of the attitude of the defendants to Leslie is not consistent with the submission. Nor is it consistent with other aspects of their conduct towards Leslie, mentioned previously. I note in particular that the original decision to pay a wage to Leslie seems to have originated with Ian, rather than to have resulted from a demand by Leslie; and that the same is true about some of the decisions to increase the wages or to pay a bonus. Moreover, the submission ignores the fact that, when Lewis worked on the farms between 1989 and 1992, he was paid at the same rate as Leslie (though he did not receive a fuel subsidy); and when he returned to off-farm work, his wages, at least initially, were comparable to what was paid to Leslie.
- [129] While, therefore, I accept that the other partners knew of Leslie's attachment to the farming business and the family farms, I do not accept that the circumstances known to them would indicate that Leslie's ability to make a decision in his own interest about continuing to work on the farms was seriously impaired.

### **Remedies**

- [130] In the usual case, a party relies upon the unconscionable conduct of another party to a transaction, as a basis for having that transaction set aside. In this case, the claim is for the imposition of a constructive trust and associated relief, or for some form of equitable compensation. There are also claims for an account of profits; and for all necessary accounts and inquiries.
- [131] In support of the claim for the imposition of a constructive trust, reliance was placed on the judgment of Deane J in *Muschinski v Dodds*.<sup>36</sup> His Honour there said:<sup>37</sup>
- “...the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do ...”.
- [132] That principle does not apply in the present case. The joint relationship and endeavour continued for many years. Moreover, at the outset, and it would seem throughout the period when the partnerships were in operation, it was intended that

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<sup>36</sup> (1985) 160 CLR 583, 617-621.

<sup>37</sup> At 620.

the partners would retain the interests in the farming properties which were progressively acquired through the life of the partnership. Even in a case of inequality of contribution, Deane J seemed to suggest that the characterisation of the conduct of one party as unconscionable might be negated where the endeavour is carried on over many years.<sup>38</sup> However, it is unnecessary to consider this matter further.

- [133] Where a party seeks to have a transaction set aside on the basis of unconscionable conduct, there is, in many cases, no difficulty about the remedy. Where unconscionable conduct is established, the basic objective of the court is to restore the parties to their original positions, as nearly as may be. But relief may be granted notwithstanding that this cannot be done precisely, as the court will do what fairness requires to achieve an outcome which is practically just.<sup>39</sup> In a case where a party has parted with property as a result of unconscionable conduct, and it no longer exists or is no longer capable of being re-conveyed, it is not surprising that equitable compensation for the loss of the property may be an appropriate remedy.
- [134] There are significant similarities between equitable principles relating to unconscionable conduct, and equitable principles relating to undue influence. In *Mahoney v Purnell*,<sup>40</sup> equitable compensation was awarded to a person who disposed of shares in a company as the result of undue influence. The principal asset of the company was subsequently sold to an unrelated party, and the company was wound up. The relief was described as “an award which is akin to damages”. The granting of this relief was endorsed by J D Heydon QC (as his Honour then was).<sup>41</sup> Although some of the authorities discussed in *Mahoney* also referred to an order for an account of profits (making allowance for contributions of the defendant), this consideration was complicated by references to breaches of fiduciary obligations.
- [135] Mr Ferret relied on two other cases in support of the availability of the relief claimed. They are *Schipp v Cameron*<sup>42</sup> and *Lee v Mavaddat*.<sup>43</sup> In *Schipp*, the plaintiff had entered into a transaction with a solicitor and a real estate agent. She claimed relief on a number of grounds, including unconscionable conduct. The grounds were generally made out, and were described as inter-related by the learned primary judge. The plaintiff was granted equitable compensation, which had three components. One was an amount representing the share of the profit on a transaction which was received by the other two parties. The second was the recovery of an amount lent by the plaintiff to the other two parties. The third was money of the plaintiff which was advanced to another transaction, carried out at a loss.<sup>44</sup> In view of the range of grounds on which relief was granted, it is difficult to come to a clear view about the extent to which relief was granted on the basis of unconscionable conduct. In any event much of it seems to have been intended to restore the plaintiff to the position in which she would have been, but for that conduct.

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<sup>38</sup> See p 622.

<sup>39</sup> 31 Hals (4<sup>th</sup> ed) [865].

<sup>40</sup> [1996] 3 All ER 61.

<sup>41</sup> See “Equitable Compensation for Undue Influence” (1997) 113 LQR 8. To a similar effect is the brief comment in Meagher, Heydon and Leeming, *Equity Doctrines and Remedies* (4<sup>th</sup> ed) p 834.

<sup>42</sup> [1998] NSWSC 997.

<sup>43</sup> [2005] WASC 68.

<sup>44</sup> See *Harrison v Schipp* [2001] NSWCA 13 at [2] and [4].

[136] *Lee v Mavaddat* was also a case in which relief was sought on a variety of grounds. The plaintiff and the defendant had entered into a joint venture agreement to carry out a property development. It was necessary to borrow substantial funds to carry out the venture. They had agreed that each of them would be liable for the debts of the venture, and each would provide security for the loan. The defendant undertook the task of arranging finance. However, the loan which he arranged was one in respect of which the plaintiff alone was liable; and it was secured over the plaintiff's property only. The defendant used a substantial amount of the funds for his own purposes. The venture failed, and a substantial loss was incurred. The plaintiff successfully sued for relief on a number of grounds. The outcome of the trial was described by the Court of Appeal<sup>45</sup> in the following terms:-

“The trial judge concluded that the respondent was entitled to equitable compensation for breach of the appellant's fiduciary obligations, to damages under the *Fair Trading Act 1987* (WA) as a result of the appellant's deceptive and misleading conduct, and to damages for breach of contract.”

[137] This case provides little assistance in identifying what relief should have been granted, had the plaintiff been successful.

[138] While it seems to me that equitable compensation is available in a case where a party has established that it would not have entered into a transaction but for the unconscionable conduct of another party, and where that may result in an award to the claimant of a sum of money in circumstances where the transaction cannot be undone, there are difficulties in identifying appropriate relief in the present case. Where an unconscionable bargain is set aside, it will be set aside on equitable terms.<sup>46</sup> It is difficult to see how Leslie's agreement to work on the farms for a low wage might be set aside, without taking into account the substantial benefits which have accrued to Leslie because the properties have been able to be retained, and have grown in value. Nor is it clear to me how the substantial contributions made by Ian and Lewis, and the not insignificant contributions of their wives, should be recognised. These contributions are undoubtedly important in the retention of the properties and their increase in value. I have also mentioned previously the difficulties associated with using Mr Thynne's evidence as a measure of compensation. However, it is unnecessary to pursue these matters further.

### **Laches**

[139] It is submitted on behalf of the defendants that, if I were otherwise to decide in favour of Leslie, relief would be refused because of his delay in seeking relief, and the fact that the other partners have for a long time conducted their affairs, and made contributions to the partnership, on the basis that the arrangements would continue. I understood the submission made on behalf of Leslie to be that his delay in commencing proceedings was the inevitable product of his being under a special disadvantage, and that it would not preclude granting the relief he seeks. It is unnecessary for me to express conclusions about these submissions.

### **Conclusion**

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<sup>45</sup> *Mavaddat v Lee* [2007] WASCA 141 at [76].

<sup>46</sup> 31 Hals (4<sup>th</sup> ed) at para 865.

[140] In my view, Leslie's claim should fail. I shall hear further submissions about appropriate orders, and costs.