

SUPREME COURT OF QUEENSLAND

CITATION: *Kennedy & Hunt v Griffiths* [2011] QSC 369

PARTIES: **BRUCE JAMES KENNEDY**
(first plaintiff)

BARBARA MARJORY HUNT
(second plaintiff)

v

PAMELA ANNE GRIFFITHS
(defendant)

FILE NO: 1268 of 2010

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 28, 29 July and 1, 2, 3, 4, 5 August 2011, written submissions from 12 August 2011 to 22 August 2011.

JUDGE: Ann Lyons J

ORDERS:

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – CONTRACTS – where the parties are siblings raised by the same parents – where the second plaintiff was the father’s daughter from a previous marriage – where there is evidence that the parties’ parents made an agreement that upon death the surviving parent would divide their estate equally between the three children – where there is evidence the parents communicated their intention to the first plaintiff – where the father predeceased the mother leaving his estate to her – where there is evidence that both prior and subsequent to the father’s death the mother changed her will to favour her biological daughter, the defendant – whether the agreement between the parents is valid and enforceable by the plaintiffs

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – where there is evidence the first plaintiff and the defendant made an oral agreement to divide their parents’ estate equally between the three siblings regardless of what was contained in the mother’s will – where the second plaintiff and the defendant later made the agreement in writing – where the defendant now

claims no such oral agreement existed and the written agreement was made under duress – whether the agreement existed and can be enforced

Evidence Act 1977 (Qld), s 92

Property Law Act 1974 (Qld), s 55

Baird v Smee [2000] NSWCA 253

Bigg v Queensland Trustees Pty Ltd [1990] 2 Qd R 11

Birmingham v Renfrew (1937) 57 CLR 666

Dore (as executor of the will of W H B Chenhall dec'd) [2006] QCA 494

Dufour v Pereira (1729) 21 ER 332

[1981] 1 WLR 939

Laver v Fielder (1862) 21 Beav 1

Re Cleaver [1981] 1 WLR 939

Re Newey [1994] 2 NZLR 590

Sorbello & Ors v Sorbello & Anor [2005] QSC 219

Staib v Powell [1979] Qd R 151

COUNSEL: T W Quinn with A Fraser for the plaintiffs
K Fleming QC with T Somers for the defendant

SOLICITORS: Broadley Rees Hogan Lawyers for the plaintiffs
Griffiths Parry Lawyers for the defendant

ANN LYONS J:

The current claim

- [1] Frank and Thelma Kennedy married in 1947 and had two children Bruce and Pamela. Frank had a daughter Barbara from an earlier marriage and she was raised with the two children of the marriage. Substantial assets were acquired during the marriage and when Frank died in 1992 he and Thelma owned as joint tenants a large property at Kenmore, and a beach house at Caloundra. Pursuant to his 1981 Will Frank left everything to Thelma and if she predeceased him he left all of his assets equally to his three children. Frank died in 1992 and the jointly owned properties at Caloundra and at Kenmore, passed to Thelma by survivorship. She inherited an extensive share portfolio and cash deposits pursuant to the 1981 Will.
- [2] Thelma died in 2009 leaving an estate valued at approximately \$2.3 million. In her last will executed in 2001 she substantially favoured her daughter Pamela as she left the Caloundra property worth approximately \$1.25 million at the date of death to Pamela absolutely. The residue of her assets, which included the Kenmore property (worth approximately \$800,000) and some cash and shares (worth approximately \$270,000) was left to Pamela, Bruce and Barbara to be divided equally. Essentially Pamela inherited about \$1.5 million in assets whilst Barbara and Bruce inherited less than \$400,000 each.
- [3] Bruce and Barbara argue that enforceable agreements made between Frank and Thelma in 1974 and between the three siblings both orally and in writing at various times between 1974 and 2009 prevent the property passing according to the 2001

Will. The question to be determined is whether those agreements are legally enforceable and whether Thelma's estate is therefore subject to those agreements.

The family background

- [4] Frank was born in 1913 and initially married Marjory Wighton in 1941. Their daughter Barbara was born in 1942 while Frank was serving with the Australian Army in New Guinea. During that time Marjory left the marriage leaving Barbara in the care of Frank's family. Frank and Marjory divorced in 1946 prior to Frank's marriage to Thelma.
- [5] On his return from active service Frank worked as a public servant and eventually held the significant position of Secretary of the Royal National Association (RNA). Thelma was a gregarious extrovert who was well known in RNA circles. She wore big wigs and bright, colourful clothes. She was also a well known figure around her local shopping centre at Kenmore. Some witnesses referred to her as "quirky" or "eccentric". She loved to talk and witnesses referred to her as speaking both "fast" and "loud".
- [6] Frank was a more reserved man who was often referred to as an "old fashioned gentleman". There is no doubt he appeared to be devoted to Thelma. They had a happy marriage and Thelma cared for Frank when he had a debilitating stroke at the age of 65 in 1978.
- [7] Pamela, Bruce, Barbara and their cousin Iris Gillingham, who grew up across the road from their Ekibin house, all gave evidence that at numerous times when Barbara was growing up Thelma treated her 'differently' to Bruce and Pamela. They agreed that Barbara was given significant responsibility at a very early age and was required to do most of the household chores. All similarly agreed that Pamela was the preferred child and clearly spoilt.
- [8] There is no doubt that Thelma was at times nice to Barbara but I also consider that on the evidence before me, Thelma was at times clearly harsh and indeed nasty to Barbara on many occasions. There were a number of specific instances that were outlined in the evidence which support a conclusion that at times Thelma's behaviour towards Barbara was in fact appalling. On other occasions however her behaviour was more appropriate and in fact Barbara lived in the family home until she was 24 years of age. Barbara and Pamela both attended the Girls Grammar School with Barbara leaving after completing junior to work in a bank and Pamela leaving after grade eleven. Bruce attended university and qualified as a dentist. He served with the Australian Army from December 1969 until December 1974 and spent a year in Vietnam from November 1970 to November 1971.

Previous Wills

Frank's previous wills

- [9] Frank died almost twenty years ago and it is not known how many wills he made. The only will which was found, apart from his last will, was a will dated 23 August 1949 which was located at the office of the Public Trustee. Pursuant to that will he left the whole of his estate to Thelma.

- [10] Frank's last will was made in 1981. This will was made with Malcolm McComb at Griffiths, Parry and McComb solicitors after his 1978 stroke. Pursuant to this will, which was signed on 18 September 1981 Frank bequeathed his estate to Thelma and in the event that she did not survive him essentially the estate was to pass to Barbara, Bruce and Pamela in equal shares. This was the will which was operative at the time Frank died on 6 April 1992.

Thelma's Previous Wills

- [11] Thelma made two wills with the Public Curator of Queensland in the 1950s. On 1 September 1953 she made a will leaving her estate to Frank but in the event of his predeceasing her she left the estate on trust to "my children in equal shares". On 3 July 1956 Thelma made another will that left her estate to Frank, but stated that in the event of his predeceasing her, the estate was to be left on trust to "my stepdaughter and my children and any children born after the will in equal shares".
- [12] Thelma then made a will on the same day as Frank on 18 September 1981 but her will made no reference to Barbara. Pursuant to that will, Thelma bequeathed her estate to Bruce and Pamela in equal shares. She and Frank had attended together to make their wills and those wills were executed at the office of Griffiths, McComb and Siemon, solicitors at Caloundra. The instructions for the will were taken by Malcolm McComb and he also witnessed the signatures of both Thelma and Frank. Mr McComb was a partner in the law firm with Mr Ian Griffiths who is the husband of Frank and Thelma's daughter Pamela. Pamela and Ian Griffiths were overseas at the time the wills were made.
- [13] Mr McComb gave evidence at the hearing. He stated that there is no file note on the file in relation to the taking of those instructions. He also states that he has no independent memory of witnessing the wills or of taking instructions. The wills were also witnessed by Patricia Costigan who worked there at the time. Ms Costigan gave evidence that Thelma and Frank were present together for the signing of the wills but that those wills were not read out to them aloud in her presence. She simply does not recall whether they gave instructions for the wills separately.
- [14] In terms of Frank's capacity at the time of the signing in September 1981 Ms Costigan's evidence was as follows:¹

"MR QUINN: Witness, you've been at the offices over two periods for a number of years. You must have had the opportunity to observe Mrs Kennedy from time to time?-- Yes.

And she was a fairly unusual character, wasn't she?-- Unusual's a fairly broad term. As I said, gregarious is something that I would describe her as. She was-----

It would be fair to say she was always talking?-- Yes.

That she spoke very fast?-- Yes.

And she was loud?-- Yes.

¹ Transcript Day 6-69-70.

That she, according to your observation of things, exhibited a fairly strong character?-- Yes, she did.

And it wouldn't be putting it too highly, I suggest, to say that in the way that she treated her husband she was somewhat overwhelming?--
- Yes, I guess, to some extent. I mean, I hadn't seen them, you know, together apart from the two periods that I've mentioned. So overwhelming from a person to person, I couldn't say that, but, as I mentioned in my statement, the references were generally in the third person.

Well, Mr Kennedy, on the other hand, was a quiet, elderly man who shuffled around?-- Yes, that was my observation.

And did you ever hear him say anything?-- No, I didn't.

And you're aware that he'd suffered a stroke?-- Yes.

And, according to your observation, he seemed - his stroke seemed to have affected him such that he didn't speak?-- Yes.

Your recollection of Thelma was that she, in fact, would speak on his behalf?-- Yes, that's right.

And she spoke of him almost as if he wasn't there. She talked about Frank-----?-- She talked about him in - as I said, in the third person which I understood to be the case because Frank had some speech impediment or something. It's not something I asked about.

All right?-- It was my observation.

But she seemed to speak on his behalf treating him as if he couldn't speak for himself. I'm not asking you to say whether he could, but just as to your observation?-- Well, yes, that's my observation."

- [15] Following the execution of the wills on 18 September 1981 a letter dated 22 September 1981 was sent to Thelma and Frank informing them that their original wills were being held in safe custody at the firm. The letter continued "we note that you shall obtain your previous original wills from the solicitors presently holding them and destroy those wills". Copies of the 1981 wills were enclosed with the letter. The safe custody receipt held by the firm however indicates that the original wills were taken out of safe custody six days later on 28 September 1981.
- [16] After Frank's death Thelma made a further will dated 15 April 1994 which appointed Bruce and Pamela as her executors. After leaving jewellery and bronzeware to two of her granddaughters and the balance of her jewellery and personal possessions to Pamela, she left the property at Caloundra to Pamela and Bruce in equal shares, and then left the residue of her estate to be divided equally amongst Bruce, Pamela and Barbara.
- [17] Thelma subsequently executed a new will on 20 December 2001. Pursuant to that will she appointed Bruce and Pamela as her executors. She left all of her jewellery

and silverware as well as the property at Caloundra solely to Pamela. The residue of the estate she left to Bruce, Pamela and Barbara in equal shares.

- [18] Pursuant to a codicil dated 26 March 2007 Thelma deleted clause 2 of her will, which had appointed both Bruce and Pamela as her executors and in lieu thereof she appointed Pamela as her sole executor. Bruce was appointed as successive executor if Pamela were deceased at Thelma's death.
- [19] Thelma died on 10 April 2009.
- [20] The 2001 Will and 2007 Codicil was admitted to Probate six weeks later on 27 May 2009.
- [21] The following day on 28 May 2009 Pamela's transmission application for registration as devisee of the Caloundra property was lodged at the Titles Office.
- [22] On 5 October 2009 Pamela mortgaged the property to the Bank of Queensland. In November 2010 Pamela paid the ATO \$84,192.25 capital gains tax on the Caloundra property based on a value of \$1.5 million at the date of Thelma's death. That documentation indicated that the value of the property in 1985 was \$500,000.
- [23] As I have indicated Bruce and Barbara argue that the Caloundra property was unable to be devised to Pamela pursuant to Thelma's will as it was subject to a number of agreements which required that all of Thelma's property at the date of her death be dealt with equally as between the three siblings.
- [24] These agreements can be conveniently categorised as follows:
- (a) The 1974 oral agreement between Frank and Thelma.
 - (b) The oral agreements between Bruce and Pamela made between 1974 and February 2009.
 - (c) The 21 February 2009 written agreement between Bruce and Pamela which confirmed the previous oral agreements.
- [25] Before I turn to my specific factual findings I would like to make it very clear that this task of assessing the evidence and the credit of the witnesses is a matter which I have approached very seriously. In *Staub v Powell*² which concerned a promise by a testator to leave his estate pursuant to his will in a certain way to include his daughter in law and not to revoke it, Lucas J referred to this onerous task as follows:³
- “I bear in mind what was said by Brett M. R. in *In re Garnett. Gandy v Macaulay* (1885) 31 Ch.D.1 at p.9:
- ‘The law is that when an attempt is made to charge a dead person in a matter in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witness is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd’.”

² [1979] Qd R 151.

³ At 155.

- [26] I initially approached my task with a great deal of suspicion as required and I have also endeavoured to sift the evidence thoroughly and have carefully gone through the transcript of evidence. I also accept the statement principle by Latham CJ in *Birmingham v Renfrew*⁴ that those who undertake to establish such an agreement where both parties to the agreement have since died, assume a heavy burden of proof because “Their case depends upon a contract to which they were not parties and upon which prima facie they cannot sue.” Neither Frank nor Thelma are alive to give evidence of their agreement.
- [27] In this case it is also clear that the question as to whether there was an agreement in 1974 and whether there was a subsequent agreement between Bruce and Pamela which was ultimately evidenced in writing in 2009, depends very much on my assessment of the credit of Bruce, Barbara and Ailsa on the one hand and my assessment of the credit of Pamela and Ian Griffiths on the other.
- [28] Furthermore as Dixon J also indicated in *Birmingham v Renfrew* there must indeed be “clear evidence”. However, as he said in that case⁵, the particular circumstances of a case can “invest the story told on the part of the respondents with some probability.” I also consider that the circumstances of Thelma’s actions in her life and in leaving her estate in the way she in fact did also invest the account of one side with a high degree of probability.

The 1974 Agreement between Thelma and Frank

- [29] Bruce Kennedy gave evidence that in late 1974 he returned to Brisbane to be discharged from the army. He stated that he, his wife Ailsa and young son Matthew visited Frank and Thelma at the Kenmore house. Bruce stated that during this visit Frank asked him if he had updated his will given the recent birth of his first child Matthew. When he said that he had not, his father said that he should change his will and make it current. It was at that point that his father said to him that he and Thelma had agreed that they would leave their assets to each other and that after they both died they would leave it equally amongst the three children.
- [30] Bruce’s evidence was that when his father said this Thelma was at the sink and Ailsa was nearby. Bruce gave evidence that at that point Frank called Thelma over to them and asked her to sit down because he had something ‘important’ to say. Bruce stated that Frank then repeated what he said about the agreement he and Thelma had to divide the assets equally amongst the three children so that none of the children “would be advantaged or disadvantaged”. Bruce states that Frank asked Thelma specifically if she agreed. Thelma replied that she agreed that they would leave their estates equally amongst the three children. Bruce said that his father then said to him⁶ “Bruce, now that you have heard that, I would like you to make sure it happens”. Bruce says he has a very clear memory of that occasion and of what was said.
- [31] Ailsa Kennedy was unable to give oral evidence at the trial due to her recent hospitalisation for a heart condition and her evidence was contained in an affidavit dated 27 July 2011. This evidence was admitted pursuant to s 92 of the *Evidence Act 1977* over the objection of Counsel for the defendant. Ailsa’s affidavit

⁴ (1937) 57 CLR 666.

⁵ At p 682.

⁶ Transcript day 2 p 68 l 42.

confirmed that a conversation about Frank and Thelma's estate occurred whilst they were visiting them in 1974 after a meal in the kitchen. She states that Frank called Thelma over to the kitchen table and stated that what he was about to say was 'important'. He then asked her to confirm their agreement to divide their estate equally amongst the three children and that there would be no favouritism. Ailsa stated that "At first Thelma made a joke about it but then said words to Frank to the effect that she agreed that the three children would equally inherit their estate."⁷

- [32] Counsel for the defendant argues that Ailsa is the only person who corroborates Bruce's evidence and that the inability to cross-examine her affects the weight of her evidence. Counsel also argues that the incident in the kitchen occurred some 37 years ago and yet both Bruce and Ailsa state they have strong recollections of what was said. Counsel for the defendant submits that such a recollection would be unlikely given the passage of time and argues that Bruce's memory about more recent events is less certain.
- [33] Whilst I accept Counsel's argument about the weight of Ailsa's evidence I consider that Bruce was an impressive witness. He was very careful in the evidence he gave and thoughtfully considered each question before responding. He also conceded propositions put to him by Counsel for the defendant on many occasions. He agreed that Pamela and her daughters had a very close relationship with Thelma and he confirmed the extent of the contact between Pamela and Thelma particularly in her later years.
- [34] In terms of the 1974 Agreement Bruce had a very specific memory of not only the conversation but the circumstances surrounding it including the year in which the conversation occurred, the specific occasion during which it occurred as well as the location of all the relevant parties during the conversation. Significantly there is also some objective evidence to indicate why such a conversation would have occurred. It is clear that in 1968 Frank had been diagnosed with high blood pressure and the indication was that he probably only had 10 years of good health. Furthermore, given Thelma's clear and continuing preference for Pamela there was a good reason why Frank would give such a direction to Bruce. It is also significant that on her father's death Barbara would have ceased to be Thelma's stepchild and would not have had any legal entitlement to Thelma's estate upon intestacy.
- [35] There were reasons therefore why in 1974 Frank would be concerned to make arrangements for Barbara given his ill health, Thelma's conduct to Barbara of which he was well aware, and Barbara's limited legal recourse. Given Thelma's subsequent conduct he was correct to be concerned.
- [36] I consider that given Frank's exhortations about the "importance" of what was being said that Bruce would indeed remember it. Furthermore, Bruce was given a specific direction by Frank to "make sure it happens". It is also apparent from Bruce's conduct as well as his evidence that Bruce took Frank's instruction seriously. Ailsa's statement is substantially in accordance with Bruce's evidence but does contain some subtle variation including the fact that initially Thelma treated it in a joking fashion but subsequently agreed.

⁷ Paragraph 13 affidavit sworn 27 July 2011.

- [37] I accept Bruce's evidence of the 1974 Agreement as well as Ailsa's statement acknowledging the making of that agreement.
- [38] I consider therefore that, by at least 1974, there was a clear agreement between Frank and Thelma to leave their assets equally between the three children. I consider that this agreement was intended to be a serious commitment between them. Furthermore they reiterated their agreement orally in front of witnesses in 1974 to emphasise the seriousness of the agreement.
- [39] Frank also clearly believed that Bruce would take steps to make sure that agreement was carried out if necessary. In my view an agreement was not only made between Frank and Thelma but Bruce was charged with the responsibility of ensuring the agreement was carried out.
- [40] The question of course ultimately is whether this agreement was in fact legally binding. Before turning to a consideration of that issue it is clear that Bruce and Barbara also rely on a further agreement to restrict the operation of Thelma's will namely a series of oral agreements between Bruce and Pamela which culminated in a written agreement on 21 February 2009.

The 1974/75 oral agreement between Bruce and Pamela

- [41] Bruce gave evidence that he first mentioned the 1974 Agreement between Frank and Thelma to Pamela prior to Christmas 1974 when they were alone on the front deck of the Caloundra house. During this period he was living at the Caloundra house whilst working for three months as a locum prior to the family's departure for England where he was going to work. Bruce's evidence was that he and Pamela discussed Thelma's attitude to Barbara and the fact that Frank was obviously worried about what Thelma might do in the event of his death. Bruce stated that Pamela was surprised about the content of the conversation and the 1974 Agreement between Thelma and Frank. Bruce stated that Pamela asked for lots of details about what had occurred.
- [42] Bruce stated⁸ that he "proposed to Pam that we have an agreement that we would look after Barbara in the event of Thelma not doing the right thing in her will and that we would share equally everything between the three of us". Bruce said that Pamela was fully supportive of looking after Barbara and making sure she was catered for in the event that the will was such that there was an unfair distribution by Thelma.
- [43] This conversation is disputed by Pamela. She stated in clear terms that she did not at any time prior to 2009 have any discussion with Bruce about an agreement their parents might have reached about their wills.⁹ Pamela's evidence is essentially that the first time she heard about the alleged 1974 Agreement was on 14 February 2009 at Bruce's house on the day of her mother's operation. She agreed however that she did have discussions with Bruce about the fact that Barbara had been removed from Thelma's will at various times. Pamela's evidence was that she told Bruce that she would try to make sure that Barbara received "a share" and disputes that she ever talked of Barbara receiving an "equal" share.

⁸ Transcript Day 2 -69 ll 25-30.

⁹ Transcript Day 5 -775 l 4.

- [44] I consider that Pamela did not have a reliable memory on many occasions during the hearing. She in fact conceded that her memory of events around 1974 was poor. Indeed she had no recollection of seeing Bruce at Caloundra in late 1974 despite the fact he lived there for three months prior to his departure for England. She was living in Caloundra at the time. She was also unable to recall that her parents had attended Barbara's wedding in Sydney. She firmly believed that she and Ian were the only ones who attended. The wedding photo however showed Frank and Thelma in attendance. Furthermore she could not remember details in relation to her own taxation affairs until prompted. She also had an inaccurate recollection about her management of her mother's estate. She further asserted in her evidence that she always signed important documents as "Pam Griffiths" but agreed when shown the documents that she had in fact signed Trust Tax Return documents as "P Griffiths".
- [45] Whilst Pamela does not have a good recall of that period she did agree that she and Barbara had a very close relationship during those years. There is also evidence that Pamela considered that Barbara was not being treated fairly by Thelma. Pamela also gave evidence that she consistently tried to get Thelma to put Barbara back in the will every time Thelma took her out of it.
- [46] I accept Bruce's evidence that he told Pamela of the 1974 agreement between his parents at Christmas 1974. I prefer Bruce's precise recollection of the discussion he had with Pamela at Christmas 1974. He has a very clear memory of it. I also consider that the action which Bruce took around Christmas 1974 to discuss the agreement with Pamela is a relatively contemporaneous corroboration of the making of the 1974 Agreement.
- [47] Furthermore the fact that Bruce and Pamela had come to an agreement is substantiated by Barbara. I note counsel for the defendant's argument that this evidence was self serving. I accept this evidence however because it is substantiated in several respects. Bruce gave evidence that he returned from working overseas in about October 1976 and bought a house at Buderim. In mid 1977 he stated that Barbara, her husband Rick and their son Anthony came to visit them and stayed at the house. During that visit Bruce stated that he outlined to Barbara what had occurred in 1974. He stated that he specifically told her of his parent's agreement which he had witnessed. He said, "I also outlined to Barbara that I had spoken to Pam about that and what we had agreed and what we were doing in that we were making sure that Barbara was looked after and that each of us would get our equal third in the event of, well, Thelma dying."¹⁰
- [48] Barbara confirmed this evidence by reference to the fact that she had been in Brisbane in July 1977 to attend the wine tasting prior to the Brisbane Exhibition and had stayed with Bruce and Ailsa at Buderim. She recalls the conversation with Bruce during a night out when he told her of the agreement he had witnessed between his parents and his subsequent agreement with Pamela that the estate would be divided into thirds.
- [49] I accept the evidence that Bruce informed Barbara of the 1974 Agreement between his parents and his 1974 oral agreement with Pamela by mid 1977.

The 1982 affirmation of the Bruce and Pamela agreement

¹⁰ Transcript Day 3-11 1-5.

[50] Bruce gave evidence that around early 1982 he and Pamela had a further conversation when she came to his house in Caloundra. Bruce stated that Pamela was quite upset during this conversation and conveyed to him that Thelma had told her that she had cut Barbara out of her will totally. Bruce related that both he and Pamela were appalled. He continued:¹¹

“We were shocked, both of us. And indicated that perhaps maybe dad had some inkling of this happening in the light of the fact that the agreement that we’d had [sic] talked about in ’74 that he’d said. So Pam and I talked about it. We talked about many things at that stage, quite a lot of things that had happened to Barbara, some particularly damaging incidents that Pam brought up with me of a nature with Barbara”.

[51] Bruce stated that the conversation turned to the unfairness to Barbara and that they discussed that they would “make sure that Barbara was looked after and that everybody got their equal third”.¹²

[52] Pamela states that she cannot recall dates but agrees that she had discussions with Bruce specifically about Barbara. She agrees “I did tell him that I was trying to make sure that Barbara would get her share from the will.” Pamela however denies that there was ever any discussion about the estate being “divided into three equal shares”.¹³ Pamela asserts that Barbara was reasonably comfortably off and that Thelma “wanted Barbara to have a third of Dad’s share”¹⁴ which was an approach of which she approved. She stated in response to questions from Mr Quinn:

“Barbara is reasonably comfortably off. So, I probably never really thought that it made a difference as far as that goes. Mum wanted Barbara to have a third of Dad's share.

Now-----?-- And I agree with Mum.

So, your theory about what Mum wanted was that the Kennedy family property was half your father's and half hers?-- Correct.

Is that the approach?-- Yes.

And Barbara could have a third of her Dad's half share?-- Yes.

But she was going to get zero-----?-- Yes.

-----from your mother?-- Yes.

So, she must have had a fairly harsh attitude to her, mustn't she?-- She must have.

And, in fact, as a matter of observation, you could see that?-- That - yes.”

[53] In my view Pamela’s evidence that she and her mother always thought that Barbara should get a one-third share of her father’s half-share in the total asset pool is a recent invention. It is clear from the evidence that this was never raised in any discussion between the parties at any time between 1974 and 2009. This assertion has not appeared in any of the pleadings or in any particulars of pleadings. The statement surfaced for the first time during Pamela’s evidence at the hearing.

¹¹ Transcript Day 3- 13 ll 25- 33.

¹² Transcript Day 3- 14 ll 1-9.

¹³ Transcript Day 5-74 ll 45-55.

¹⁴ Transcript Day 6-62 ll 20-45.

- [54] It is clear that in 1981 Thelma changed her will to leave her estate essentially to Bruce and Pamela in equal shares. This apparently became known to both Bruce and Pamela in 1982 when Frank was still alive. There was no evidence led from Bruce as to why he did not raise this issue directly with Frank in 1982 when he became aware of it given it breached the 1974 Agreement. The inferences would seem to be that given his stroke in 1978 he did not wish to raise the issue directly with him and that he and Pamela had a ‘solution’ to the problem in any event.
- [55] Ultimately I accept Bruce’s evidence that around early 1982 the oral agreement that he, Barbara and Pamela were to share the survivor’s estate equally, was affirmed at his house in Caloundra.
- [56] I also accept Barbara’s evidence that this agreement was conveyed to her by Pamela around Easter 1983 when Pamela assured her that she did not need to worry about what Thelma had done in her will as she and Bruce had agreed that the assets remaining at Thelma’s death would be shared equally between them. Barbara had a very clear memory of the circumstances surrounding this conversation and the fact that it had occurred during a visit to Caloundra around the time of her son Anthony’s seventh birthday and produced a photo of him on the beach at Caloundra with the birthday cake. Pamela in fact confirmed that the visit occurred around that time.
- [57] Given I accept the evidence of Bruce and Barbara I do not consider it necessary to consider the evidence of Rhonda Smith, Bruce’s receptionist who states she was told of the agreement between the siblings in the 1980 or the evidence of Barbara’s friend, Anne Lamm, which was in the same vein.
- [58] I also consider that there were a number of other occasions where this agreement was similarly affirmed as detailed below.

The 1994 affirmation of the Bruce and Pamela agreement

- [59] Bruce gave evidence that around the time of his son Matthew’s 21st birthday in June 1994 Pamela visited him at his surgery with a gift and told him that Thelma had made another will and that Barbara was “back in” the will. He also referred to the fact that they discussed how Thelma seemed to ‘swap and change’ and how they specifically mentioned that it was a good thing that they had their agreement in case Thelma changed it again. They referred to the need to ensure that Barbara was protected.
- [60] Barbara also gave evidence that in 1994 she was staying at the Caloundra house and Thelma told her that whilst she had previously excluded her from her will she had now put her back in as she wanted the three of them “always to be the best of friends”.¹⁵
- [61] Barbara and Bruce gave evidence of an evening out at an Indian restaurant at Point Cartwright with Pamela and their respective partners during the 1994 visit. Bruce indicated that it was during this meal that he revealed that Thelma had told him that she would urinate in the bath before Barbara used the bath water and that Barbara was very upset about this revelation. Bruce indicated that he subsequently regretted

¹⁵ Transcript Day 4-52 l 40.

ever mentioning it given how upset Barbara was about it. Barbara states that after the meal she was beside the restaurant in a vacant lot and Pamela came up to her and said “Barb you don’t have to worry. Bruce and I will make sure you get your third.”¹⁶

- [62] I accept Barbara’s very clear recollection of what occurred that evening given the surrounding circumstances given the devastating impact the conversation had on her.

The 1997 affirmation of the Bruce and Pamela agreement

- [63] In 1997 Pamela had a long separation from her husband Ian Griffiths. During that period Pamela concedes that Bruce was very good to her and provided her with significant support. He also paid her rent for 6 months and took her to see a solicitor on a number of occasions. Bruce has never asked for a repayment of any of the money he had outlaid to assist her and clearly Pamela never initially considered she needed to reimburse him. The issue of repayment was only raised by Ian Griffiths a decade later during an argument with Bruce.

- [64] Bruce gave evidence that during the period of her separation Pamela was upset with Thelma as she had not offered Pamela a place to stay when she left Ian despite the fact she owned two houses. He stated that he and Pamela discussed Thelma’s attitude at the time as follows:

“Pam then brought out to me about the situation about how Thelma not only now was not favouring Barbara but she also was not favouring Pam because she was not letting Pam stay in either of her houses even though Thelma had three bedrooms in the Kenmore one and owned a vacant house at Caloundra. Pam then was very upset about this and we talked about Thel’s unfairness - and it was. It was unfair to Pam. She’d been unfair to Barbara. I had never ever seen her be unfair to Pam before and Pam threw in a line along the lines of, ‘Well, I’ll probably get cut out of her Will now as well.’ And I said, ‘Well, Pam, lucky we’ve got our agreement to make sure that you are looked after and each of us would get our equal thirds.’ Something along those lines.

Did Pam respond to that in some way?-- Yes, in that she was pleased with that, and thank Heaven she had that support.”¹⁷

- [65] Whilst Pamela denied the conversation occurred and says she was never concerned she would be cut out of the will she accepts that she was upset that her mother did not offer her accommodation at that time.¹⁸ Pamela stated that she had in fact forgotten about being upset with Thelma’s attitude at the time of her separation until she was reminded of it by Bruce. I accept Bruce’s very clear recollection of this conversation.

Christmas 1998 affirmation of the Bruce and Pamela agreement

¹⁶ Transcript Day 4-56 l 15.

¹⁷ Transcript Day 3-16 l 50.

¹⁸ Transcript Day 5-78 l 54.

- [66] After a year's separation Pamela returned to live with her husband. Barbara, Bruce and Pamela agree that after Christmas 1998 they spent an evening together at the Hyatt at Coolum. They all agree that it was a memorable evening as Ian was recovering with a broken leg after being injured in the Sydney to Hobart yacht race. Barbara was present with her husband Rick and their children. Pamela, Ian and two of their daughters Gillian and Kirsten were also present as were Bruce and Ailsa. They all agreed that the conversation inevitably turned to Thelma and her behaviour. Pamela agreed that in the course of the conversation she made a statement to the effect that she thought that Thelma was a better grandmother than she was a mother. Bruce states that during the discussion he said to Pamela it was good that they had their agreement and that Pamela responded by smiling and nodding. Barbara confirmed this.
- [67] Pamela denies the conversation. Her daughter Kirsten categorically states that the conversation could not have occurred as she was present in the room throughout the whole evening and heard every word spoken. Neither she nor Gillian however can recall a statement that Pamela agrees she made. Anthony's evidence of the evening was that he does not recall the conversations referred to.
- [68] I prefer Bruce and Barbara's recollection of the evening and I accept that at Christmas 1998 Pamela confirmed the agreement to divide Thelma's estate into thirds.

2001 affirmation of the Bruce and Pamela agreement

- [69] In 2001 Pamela approached both Bruce and Barbara with a proposal to buy the Caloundra property from Thelma at a price of \$250,000. Pamela considered that this was a generous offer and well above its market value. It was proposed that she and Ian would build a residence for themselves and a granny flat for Thelma. Thelma was very supportive of the proposal. Bruce gave evidence that his independent investigation revealed the property was worth between \$450,000 and \$500,000. Ian Griffith's sister, Jenny McCarthy, who was close to Thelma, gave evidence that Thelma was upset and angry when this proposal was rejected as she did not want to ever move to a nursing home and she knew she would need to be looked after in the future.
- [70] Bruce gave evidence that in 2001, after the request to buy the land but before Barbara's husband Rick died in June 2001, he telephoned Pamela. During that conversation he told Pamela that he had recently spoken to Thelma at the Kenmore house and Thelma had indicated that she was going to cut Barbara out of the will. Bruce stated that the conversation went as follows:¹⁹
- "As she often did, she was having a down about Barbara or her family, or something along those lines, and she came out with this statement, 'I'm going to make sure Barbara is cut out of my will and get nothing.'
- And did the-----?-- And I then said to her, 'You can't do that.' She said, 'I can do what I want, it's mine.' I said, "That goes against totally the agreement that you had with dad." She said, "I don't care.", and then I said to her, 'Well, it doesn't matter anyway, that

¹⁹ Transcript Day 3-41 ll 1-33.

Pam and I have the agreement that no matter what you do we will make sure that Barbara's equally looked after amongst the three of us.' and she indicated, 'You cannot do that.', and I said, 'We can do that', and we had a heated discussion and I left.

So, when you say you had an altercation with her, you're referring to the conversation in heated terms?-- To the heated conversation, yes. It wasn't pleasant.

Now, did you have any contact with your sister Pam subsequent to that----?-- Yes, I did.

----altercation with your mother?-- Yes, I did. It was the next day or so after I phoned Pam, explained to her what I had - what had transpired between Thel and myself, indicated what had happened and I said to Pam that I had explained to her about our agreement between Pam and I and Thel was not happy about the situation. Pam then - I then said to Pam, 'Have you told mum about our agreement?', and she said, 'Yes, I have.', and I said, 'What did mum say?', and she used the words along the lines of she was annoyed or something along those lines."

- [71] Pamela agreed in her evidence that there was an occasion that Thelma was upset because Bruce told her that it did not matter what she put in the will because they would do what they wanted after she died. It would appear however that Pamela otherwise denies the agreement with Bruce referred to.
- [72] I accept Bruce's evidence about the conversation he had with Thelma in 2001. The fact of the conversation and Thelma's angry response to it is in fact confirmed by both Pamela and Jenny McCarthy. I accept that Thelma announced that Barbara was out of her will. Furthermore I accept that, when challenged, she declared her intention to do what she wished and indicated she would not comply with the 1974 Agreement. I also accept that Bruce had a conversation with Pamela in 2001 during which he told her that he had told Thelma of their plan to share her estate equally and during which Pamela confirmed to Bruce she had also had a conversation with Thelma to that effect.
- [73] There is a further instance which I consider indicates that there was an agreement between Bruce and Pamela to share the estate equally on Thelma's death. In November 2003, both Bruce and Barbara received a letter from Pamela in which she proposed a complicated arrangement whereby she and Ian would build a house for themselves on the land at Moffatt Beach, Caloundra with a granny flat for Thelma. This option involved Pamela being reimbursed the cost for the house after Thelma died together with a right to purchase the property at market value at the time of her death. Whilst this option was rejected by Bruce and Barbara as "too complicated" it would seem to me that at that stage Pamela was in fact conveying to both Bruce and Barbara that all three of them had an interest in the property.

Written Agreement dated 21 February 2009

- [74] There is no dispute that Thelma was hospitalised on 9 February 2009 after she was seen in a dazed state at the Kenmore Shopping Centre. It was discovered that she

had a perforated cecum and that the contents of the bowel had been leaking into her stomach. She was hospitalised and subsequently underwent surgery on 14 February 2009. She remained in hospital for a period of about eight weeks and was ultimately discharged to a nursing home near Caloundra. During that hospitalisation it became clear that Thelma had been dementing for some time and that the family needed to make arrangements for her future care. The doctors caring for her indicated that it was not going to be likely that she would be allowed to go back to her home and that she would need nursing home care.

- [75] On the evening of 14 February, after Thelma's operation, Pamela and two of her daughters Gillian and Kirsten had dinner with Bruce and Ailsa at the Kennedy's Indooroopilly home. During the meal the issue of Thelma's future care was raised. It was agreed that Bruce and Pamela would meet the next weekend and discuss a range of issues including arrangements for Thelma's future care as well as the management of her property and finances. Bruce also asked Pamela to provide a copy of the enduring power of attorney (EPA) dated 4 November 1998. Thelma had signed that document on that date and appointed both Bruce and Pamela "severally" as her attorneys for health and financial matters. That document stated it was to commence immediately. Pamela signed her acceptance of that appointment in writing on 5 November 1998 and Bruce did so on 9 November 1998.
- [76] However Thelma executed a general power of attorney document subsequently signed on 26 March 2007. That document appointed Pamela and Bruce "successively" for "financial matters only". It was also to commence immediately and would continue only whilst Thelma had capacity. A document revoking the EPA previously executed was not signed and there was certainly no evidence of any notification to either of the attorneys of the revocation of the EPA or of their new appointments. Whilst Pamela and Bruce may have been aware of the import of that document there was no evidence of that before me. Essentially the effect of those documents would appear to be that Pamela could make financial decisions whilst her mother had capacity but when Thelma lost capacity decisions about her finances and her health could be made by "either" Pamela or Bruce.
- [77] Bruce stated that whilst his mother was in hospital she requested that he obtain a particular photo of Frank from her home. He therefore went to the house to get it and to feed his mother's dog on 14 February 2009. Bruce stated that he also intended to find out who the house was insured with, as well as to gather the bills which had come in. Whilst he was at the house on 14 February 2009 he saw Ian Griffith's niece, Catherine, who arrived to do some cleaning as the house was in a bad state.
- [78] Prior to the proposed meeting on 21 February between Pamela and Bruce, Bruce stated that he prepared an agenda of matters they needed to discuss in relation to their mother's ongoing care and her finances. He also stated that he found a copy of a 2001 Will at the house on 19 February 2009 during a further visit.
- [79] On 21 February 2009 Bruce and Pamela met at the "Plum" coffee shop at Kenmore. Bruce stated that he indicated to Pamela that he and Ailsa had made some inquiries with nursing homes and had ascertained that the cost of the bond required for entry would be in the order of \$400,000. When they discussed the financing of the bond, Pamela made it clear that all her money was tied up "in the bloody boat" and she would not be able to assist. They then discussed the various options of selling the

Kenmore property or of selling the Caloundra property. Bruce stated that Pamela indicated that she wanted the estate kept intact. He said it became clear to him that he would be paying the bond. He then asked Pamela, whether she knew “what was in Thel’s will” and she told him that she had never seen it.

[80] Bruce indicated that whilst he had found a copy of a will at the Kenmore home on 19 February 2009 he was not sure if it was the last will or not. In this regard, given that he was considering paying the nursing home bond, he asked Pam, whether they still had the agreement “that related to the parents’ 74 agreement whereby we will share everything equally to equal thirds”. Pamela said “Yes we do”. His evidence was that he then said “Pam how about we shake on that” and that he put his hand over and she shook it. After they shook hands Bruce said that he reiterated with Pamela the unfairness of the way Barbara had been treated by Thelma. He also said that he indicated to her that it was important that their oral agreement be documented in case one of them was “run over by a bus”.

[81] Bruce said that he told Pamela that it was important that members of their families knew what their wishes and intentions were. He stated that it was important that Barbara was looked after and that it was important that their children, his and Pamela’s, respected their wishes and followed the agreement in the event of Thelma not doing the right thing with her will. Bruce said that he told Pamela it would be preferable to have something in writing that consolidated their views. He stated that whilst he was sure that their children would follow what they had agreed to, he was not sure that their partners would also agree. It was at that point Bruce said that Pamela indicated something to the effect that Ian sees disputes between partners and children in relation to family issues “all the time”.

[82] Bruce stated that he told Pamela that the night before their meeting he had typed up a simple agreement that consolidated their oral agreement so that they could show the children, particularly Barbara’s children, that this was their intention in the event of Thelma’s not doing the right thing with the will.

[83] Bruce states that he then showed the document to Pamela who read it and looked at it and said that she would like Ian to have a look at it before she signed. Bruce stated that he then said to Pamela that it was a document that was between them and that it had nothing to do with their spouses. When Pamela was hesitant, Bruce said that he reminded her that she had already agreed and that they had just shaken on it a short time before. Bruce stated that Pamela then read the documents and then signed the three copies. She commented that she agreed with him that it was “None of Ian’s business”.

[84] That document recorded the following:

“AGREEMENT BETWEEN BRUCE KENNEDY AND PAMELA GRIFFITHS

We the undersigned BRUCE JAMES KENNEDY and PAMELA ANNE GRIFFITHS agree, that after the death of our mother THELMA AMELIA KENNEDY of 35 Brookfield Rd, Kenmore the following will be enacted.

We agree that regardless of the allocation of assets of her estate as outlined in her last Will namely; the land at 34 McIlwraith St. Caloundra, the land at 35 Brookfield Rd Kenmore, and bank deposits and shares, we will agree to all these assets being divided equally as follows;

One-third to BARBARA MARJORY HUNT,
 One-third to PAMELA ANNE GRIFFITHS, and
 One-third to BRUCE JAMES KENNEDY

We also agree that in the event of one or both of us dying before our mother, that this agreement will be binding on both our families.”²⁰

- [85] Bruce gave evidence that after the documents were signed they spent a further hour or so at the café before they finished up their discussion about Thelma’s affairs.
- [86] Bruce stated that a short time after Pamela left the coffee shop he received a very abusive phone call from Pamela’s husband, Ian, whilst he was in his car.
- [87] Bruce stated that later that day he received an email from Pamela dated 21 February 2009 with a copy to Barbara Hunt, Pamela Griffiths and Ian Griffiths.

“Bruce

As I told you this morning when you insisted that I sign the agreement about Barbara's share in Mum's estate, I wanted to have Ian as my lawyer see it first.

However, you continued to badger and intimidate me to sign it to such an extent I finally gave in and signed. However, the paper was signed by me under duress, against my will, without legal advice and I withdraw any offer I made in the document.

I never sign any document without referring it to Ian for his advice and opinion and I would not have signed this one unless you had forced me to do so. You told me that it would not be legally binding and I relied on that statement by you in signing,

It is entirely inappropriate for us to be discussing the division of Mum's estate when she is lying ill in hospital and I will consider what action to take when Mum finally passes on which will hopefully be a long way into the future,

Please do not raise the issue with me again. We must now simply work towards doing the best thing for our mother and it is going to be difficult enough as it is without your trying to dictate how the estate is to be divided at this stage.

Pam”²¹

- [88] Bruce’s version of the phone call with Ian is recorded in a letter he sent to Pamela on 12 March 2009. That letter stated in part the following:
- “I have waited a couple of weeks to cool down somewhat before communicated with you. Whilst we don’t normally write to each other as our form of communication, I feel so strongly about the aftermath of our talk over coffee at Plum, I want to put, some things on the record.

²⁰ Ex C.4.2

²¹ Ex C.4.5

Firstly, I was appalled and amazed by Ian's vitriolic and abusive phone call to me as I was driving home after our coffee. I felt you and I had a good productive chat about how to work together to help Thel, jointly manage her affairs whilst she was in hospital, secure the house, pay accounts etc.- all the things we discussed. I felt good that we had agreed to be closer, hugged each other as we said goodbye - in fact I was thinking that this crisis of Thel's would increase our closeness, just as Ian phoned.

I don't know what you said to Ian, or misrepresented in our conversation, but his vicious and extreme verbal attack on me was absolutely out of the blue - and in such contrast to our two hour chat. There is no other word for it Pam, but appalling! I saw (or rather heard) a side of Ian I had not known before- and it wasn't pretty, I had no idea that he had harboured this intense dislike of me for all these years.

To me it was bizarre that I was receiving a hysterical phone call from Ian;

- a) stating he was your lawyer.
- b) demanding our agreement on the will be rescinded and retracted
- c) and attempting to portray himself hypocritically as taking the moral high ground

This was from a man who

- a) left you destitute and penniless when you separated,
- b) called Thel to her face a 'fucking bitch' who had destroyed his life
- c) was accused by his sister Jenny as not doing enough for his ageing mother.

The reason I said to him I had supported you financially when you separated was not to request the money back. I was merely making the point that his hypocrisy was unbelievable-in that you were left destitute after 25 years plus of marriage and three children by him. Thel refused to let you stay with her and if I hadn't paid your rent, provisions and the legal representation, how would you have existed at the time? In this situation I was more than happy to look after you both financially and morally.

Thus, as Ian incorrectly stated in his letter it was not a 'loan'. After due consideration I decided to cash the cheque that was sent with the letter of 22 February and you can assure Ian I will give it to a good cause.

I am extremely angry with Ian, and his hypocritical holier than thou unprovoked verbal assault, which included ridiculous insulting and untrue allegations, and a total misrepresentation of our amicable discussion. As you are aware, he then followed this up with a legal letter. I assume you typed this or have at least seen it, but I am enclosing a copy on the off - chance you haven't.

Not only am I extremely angry with Ian, but I am also angry with you. I feel complete disbelief that you could have twisted or misrepresented our discussion the way you appear to have done. In fact I feel absolutely betrayed by you Pam. How can I have any form of conversation with you in future without wondering how you will present all of it or part of it to other people with such complete lack of truth or twisted to make me look the bad guy ? What on earth are your motives ? When did you become so deceitful? How can I have a relationship with you without trust ?

For the record, as both you and I know, our two hour amicable discussion was primarily focused on the practicalities of coping with Thel's hospitalization, securing the house, possibility of residential care if necessary etc. We divided the tasks and agreed to have regular get togethers.

Also, as you are fully aware Pam, we discussed Thel's financial situation as known to us, regarding how to fund a care facility if needed. It was within that context that we discussed Thel's will, and reiterated the long standing agreement between us (of which Bar was aware) of the equal sharing of our parent's estate amongst the three of us (ie. Bar, you and me). You agreed again that this would be carried out and we even shook hands on it. I felt we needed to show our children (and partners of children) what we intended in the event of something happening to us. I proposed that we sign a simple agreement to show our intention. You even stated that Ian had handled many situations where partners of children caused problems.

You certainly never were subjected in the surroundings of a busy coffee shop to 'a prolonged period of intimidation, harassment and bullying' by me. Neither did you submit to my 'intimidation and duress in signing the document,' as stated in Ian's letter. Get real Pam. You and I know that is just bullshit. Why did you do it? I can't believe that you lied and allowed, encouraged or enabled Ian to make those serious allegations about me both verbally and then in writing.

It is obvious that at this stage Thel has lost capacity. Dr Whiting informed me over two weeks ago that he felt she had 'been dementing for some time'. The nursing staff have informed me that she is a lot of time not with it. Her charts show her 'Falls Risk Assessment' ratings from 19 Feb, 24 Feb and others, place her mental status at a 4 (the range of 0 - 4) with 4 being 'confusion at all times'. In this rating also her emotional status (range 0 - 2) she is rated a 2 - being 'moderately agitated'. You are also aware she said she was visited by Frank several times and you and I were present when she was convinced you were her 'mother' Kathleen.

Ian was probably not aware when he wrote his letter of 22 February that Thel's mental capacity had deteriorated to the degree it had. It is obvious that she is beyond the point of managing her own affairs and as such the enduring Power of Attorney is certainly applicable. As

Ian stated in his letter, you and I now must work together to ensure the best outcome for Thel. ...”

- [89] Bruce had previously received a letter from Pamela’s husband, Ian Griffiths dated 22 February 2009 which was in the following terms:

“PO Box 1680,
Buddina, Qld, 4575
22February 2009

Bruce,

Thank you for telling me about the loan which you made to Pam for rental purposes some years ago. I apologise for the delay in repayment. I was actually unaware of this loan. Pam tells me that she recalls the loan was to cover approximately 6 months of rent at \$200 per week.

You said that you paid some legal fees for Pam as well but Pam believes that she paid them herself from our Joint account. On the other hand Pam recalls that you drove her in to see the solicitor.

I now enclose a cheque for \$5,200 to cover the rent as set out above. If there are any further monies owing to you which you can verify, I will pay you immediately.

Pam has been ill in bed today partly as a result of your disgraceful bullying and intimidation tactics yesterday along with the stress of Thel’s situation.

As Pam's legal representative, I remind you of your obligations as an enduring attorney pursuant to the Powers of Attorney Act. However, since Thel has not yet been found to be incapable of looking after her own affairs, her General Power of Attorney remains in force and I now enclose a copy of that document herewith. You will note that it appoints Pam in the first instance with you as the alternative or ‘Successive’ attorney should she be incapable or deceased.

Consequently, unless and until Thel is no longer capable of looking after her own affairs, Pam is her Attorney and you are not authorized to do anything or to sign any documents on her behalf as her attorney.

If Thel does become incapable of managing her affairs, Pam requires all decisions concerning Thel of either a Financial or Personal Health nature to be made jointly by the two of you. In that regard, since Pam will have the principal care and control of her mother and her affairs on a day to day basis, it is appropriate that she should be in primary charge of those matters effecting Thel’s affairs including banking and investment, collection of her mail etc. upon the basis that you will be consulted and your approval sought for all relevant decisions.

In relation to the document which you had Pam sign yesterday as Pam's legal representative, you are advised as follows:-

1. The so called 'Agreement' was signed by Pam after a prolonged period of intimidation, harassment and bullying by you. The document was clearly signed under duress after Pam repeatedly told you she did not agree with its contents and did not wish to sign it.
2. Pam does not recall the arrangement which you claim in relation to the alleged discussion with Frank (in 1974) and she was not a party to it. In any event, Frank did not make any reference in his will or otherwise to an arrangement alleged by you which precludes The from leaving her estate in any manner she wishes.
3. Pam told you that she wished to take the document to me to review as her lawyer but you refused to allow her to do so and in fact you told her it was not legally enforceable and represented a 'moral' obligation only, despite the contrary provisions contained in the document. Clearly, if Pam had been permitted to take legal advice, there is no way that she would have submitted to your intimidation and duress in signing the document.
4. The "Agreement" clearly falls for lack of consideration for any covenant on Pam's part to distribute the Estate in the manner set out in the document.

The document referred to herein is, for the reasons set out above, void, unenforceable and of no legal force and effect.

Yours faithfully,
Ian Griffiths."²²

Did Pamela sign the 2009 document under duress?

- [90] It is clear from those documents that Pamela asserts she was intimidated and only signed the document under duress. In her evidence²³ she states the circumstances of the signing were as follows:

"He showed me the document. He did talk about it and I looked absolutely horrified because I did know about mum's Will. He did say to me, "Have you seen mum's Will?", and I honestly answered, "No. I have never seen the will.", and I never had, so I wasn't lying, and then he - he did - I looked at it, but I was sort of dazed, I was sort of stunned, and, you know, I didn't know I was ever going there to sign any documents, I thought it was a discussion on mum's affairs, and my first reaction was that I do not sign any document unless my husband or a solicitor - as he is my solicitor, too - was present with me and he said, "Oh, don't worry. It's not legally binding.", and we actually argued about this for about an hour because I was just totally dazed that this document had been thrown at me and the fact I did have the knowledge of the Will as well and I

²²

Ex C.5

²³

Transcript Day 6, p 412.

thought eventually, after he continually harassed me and kept saying, "You have to sign this. You have to sign this document.", and I was sort of very shaky - and Bruce has always overpowered me in any time and I was just totally dazed, confused and didn't know what to do, but he kept enforcing, "Look, don't worry. It's not legally binding.", you know, and he did say, "It's for the children.", and it just went on and on and-----

What did you do?-- Eventually I did - I did sign it, but as I was signing it in my mind I kept thinking, "Can I sign this a way that Bruce won't know" - if I signed it, you know, so that it's not a correct way, so I didn't sign my normal signature which is always "Pam Griffiths" and I signed it "P Griffiths" thinking, well, maybe - then he kept telling me, "It's not legally binding. Don't worry, it's not legally binding.", and I really didn't know what to do. I just - he was my brother and I thought, oh, well, you know, and I just felt I couldn't get up and leave. He just kept saying, "You can't leave. You've got to stay. You cannot go until we've settled this document."²⁴

- [91] Pamela gave evidence that she was extremely agitated and “befuddled”. She stated she was dazed and confused. I note however Pamela in her evidence confirmed in general terms the content of the conversation she had with Bruce about the nursing home bond, the amount of the bond and the need to raise the funds and how they would do that. She also indicated that she told Bruce that, on the basis of information she had received from Ian, that they could defer the payment of the bond for six months. She also confirmed that there was a discussion about the sale of some property. Pamela confirmed that she shook hands with Bruce during the meeting and that at the end of the meeting she had hugged her brother and left.
- [92] Pamela stated however, that as soon as she left the meeting she went to her car and burst into tears and then rang her husband and told him of the circumstances of signing the document. She stated that she then went to her sister-in-law’s place, arriving there distressed and crying. At that point she typed up an email on her sister-in-law’s computer. Pamela also stated that after the meeting with Bruce on 21 February, she drove back to Caloundra that night and during that trip had rung Barbara in a distressed state. That distress is confirmed by Barbara.
- [93] Pamela stated that she also received a telephone call the next day from Barbara who said that she had received Pamela’s email. During that phone call Barbara asked Pamela would she honour the agreement and Pamela indicated that she would not. In that conversation, however, Pamela agreed that “I said to her I would always make sure that she got her share of the estate no matter what happened”. It would appear that this meant ‘a share’ but not an ‘equal share’ of Thelma’s estate.
- [94] I accept that Pamela was in a distressed state when she arrived at her sister-in-law’s place and that she was also in a distressed state when she was driving home to Caloundra on the evening of 21 February 2009. However, I find it inherently implausible that such a distressed state was the result of her meeting with Bruce on that day. Pamela was free to leave and also free to decline to sign the document. She stayed at the coffee shop for over two hours, had a rational discussion and left the

²⁴ Transcript 6-4 ll 2-36.

meeting after a hug with her brother, having given him no indication at all that she was distressed in any way. I find it inherently unlikely that Bruce said that she could not leave and had to stay until she signed the document. I do not accept Pamela's evidence to that effect.

[95] In her evidence Pamela initially stated that she could not remember how her husband had reacted when she rang him and told him she had signed the document. She later said he was "surprised" and then finally admitted that he had told her she was "stupid to sign it."²⁵ Given the abusive tone of Ian Griffith's conversation with Bruce and the similarly abusive letter to Bruce, I consider that the inference to be drawn is that Pamela was subject to similar treatment when she phoned her husband. I consider it far more likely that Pamela's distress was a result of her phone call to Ian, rather than her meeting with Bruce. I consider that that inference is an inference which is reasonably open on the evidence before me.

[96] Furthermore, there is absolutely no objective evidence before me that Pamela was ever intimidated or dominated by Bruce in any way. She was his patient at his dental practice and allowed all of her daughters to be his patients over a number of years. Bruce was fully supportive of her when she left her husband Ian in 1997 for about a year. Bruce had paid for her rent for six months and paid her solicitors' fees. Bruce had also taken her to solicitors on at least three separate occasions. There is no indication in any of the material before me that Bruce was an intimidating or dominating person. He had never asked to be repaid money when Pamela had returned to Ian which is obvious from Ian's letter. Neither is the tone of Ian Griffith's phone call and letter consistent with him being intimidated by Bruce. I do not accept their evidence in this regard.

[97] There is evidence before me, however, of an aggressive phone call initiated by Ian Griffiths immediately after he spoke to his wife as well as an aggressive letter from him sent the next day. I also consider that the letter of 22 February 2009 was designed to intimidate. In my view it also contains inappropriate and bullying assertions as to the state of the law. I also consider it contained assertions contrary to the known fact that Thelma clearly was not capable of managing her affairs given her recent surgery and evidence of a dementing process which prevented her returning home. Not only are the legal and factual assertions incorrect they were clearly designed to warn Bruce off.

[98] When Ian Griffiths gave evidence at the trial he also attempted to downplay the vitriol in his conversation with Bruce as shown in the following exchange with Mr Quinn:

"Now, I suggest to you that in terms of anger nothing would surpass your expression of anger to him when you telephoned him on the 21st of February 2009?-- Yes, something would surpass that. That was his response to me.

All right?-- He was angrier.

Well, he would get the gold medal, but you get the silver?-- That's a fair summation. We were pretty angry with each other.

²⁵ Transcript Day 6-93 ll 15-41.

You abused him?-- I did not abuse him.

You used foul language towards him?-- No, I did not. He used foul language towards me. Has he said that he-----

You told him that you never liked him?-- I did not. I've always liked him. That's - that's not the truth.

You're feigning now, aren't you, Mr Griffiths?-- I'm sorry?

You're feigning when you say, "I've always liked him."?-- No, look, Bruce - he's always - I've been nervous around him all my life, but I've quite liked the man. I've never disliked him.

You were nervous to the point that you would have the Court believe it was necessary for you to be physically proximate to your wife in his presence?-- No, I didn't - I don't think I said that. I think that - the both of us were probably - we clung to each other a bit in the presence of Bruce because we were nervous of both Bruce and Ailsa and their - the controlling sort of culture that they seemed to display.

I suggest to you that when you telephoned him - you did telephone him on his mobile phone on the 21st of February?-- Sorry, I didn't catch that. Telephoned?

You telephoned your brother-in-law Bruce Kennedy-----?-- I did, yes.

-----on the 21st of February 2009 on his mobile phone?-- Yes.

You had had a conversation with your wife?-- Before that, yes.

Yes. Was she at that time at your sister's place?-- No, no, she was in a car.

She went to her - your sister's place?-- Yes.

You - I suggest to you that you telephoned him, he answered, "Hello", and you began to abuse him?-- Didn't abuse him.

You said to him, "You fucking bastard, you thug, you scum. You've always been a bully and I've never liked you."?-- Did he say that?

Do you find that amusing?-- I do because it's a complete lie, an absolute untruth.

But it amuses you, that's your reaction?-- Not - only that he could say something which is so untrue. He said to me at one point during the conversation, "F off", and called me an "f'ing bastard".

I suggest to you Mr Griffiths-----?-- I called him a low-life scumbag.

I suggest to you, Mr Griffiths, that if it was true that you had not used that language towards him your reaction wouldn't be to laugh, you would be shocked?-- I just found it so ludicrous that he would say that, I'm sorry. I am shocked.

You told him you thought he had always been a bully?-- Yes, I told him he was a bully and a control freak.

You told him you never liked him?-- That is not true, I did not say that. It's inconsequential, of course, but I never said that.

Now, part of his response to you was to the effect this related to the agreement, "What are you worried about if it doesn't have any legal effect?"?-- He did say - he said that it wasn't legally binding and he may have said that. He may have. That does - does have a - that does strike a cord, yes.

I suggest to you that he did not say it wasn't legally binding?-- No, he did say that.

Well, you took the view it was, didn't you?-- I didn't, actually, no, no, but I was concerned about the fact that he had forced her to sign that obviously.

Now-----?-- Without me being there ensuring that I wasn't there, of course.

Now, did you - do you agree that this was a matter between the family members concerned, not their spouses?-- Well, my wife and I share all of these sorts of issues and I am - I am her lawyer as well as her husband and it would have been appropriate for me to have accompanied her on that particular occasion if she had - certainly if she had known that she was going to be asked or tricked into signing a document like that there's no question that she would have taken me along."²⁶

[99] Ian Griffiths endeavoured to give the impression that he was the person who was intimidated and bullied by Bruce. I do not accept his evidence. I consider that he gave his evidence in an insincere fashion. He was often dismissive of questions that were put to him. At times his responses were glib at other times they appeared to me to be flippant. I also consider his evidence that he and his wife were always "afraid" of Bruce and found him to be "controlling" to be completely implausible. I was not impressed by him as a witness and I have not attributed any weight to his evidence unless substantiated by other evidence.

[100] Counsel for the defendant also essentially submitted that Bruce's credit was in question because he was seen at Thelma's Kenmore home on Saturday 14 February by Ian's niece Catherine McCarthy who went there to clean up the house. It is not

contested that the Kenmore house was in a dreadful state. It was covered in mould and all agreed it was filthy. It is essentially alleged by counsel that Bruce was “surprised” at the Kenmore house by Ian’s niece. Bruce made no secret of the fact he went there to obtain a photo, feed the dog, check for bills and the status of the insurance. As Thelma’s attorney he had a right to be there for those purposes. An attorney under an EPA may well need to know the contents of a person’s will to try and ensure that financial decisions that have to be made during an adult’s incapacity do not adversely impact on bequests made in the will if at all possible. As decisions needed to be made about the possible sale of assets to fund the nursing home bond Bruce needed to make that decision conscious of her wishes as expressed in the will. As an executor under the original 2001 Will he was also entitled to look for the will. In the circumstances I also consider that he and Pamela would both have been entitled to ask Thelma’s solicitors to allow them to view the most recent will so decisions could be made about funding the nursing home bond. Accordingly I find the assertion that such conduct was inappropriate to be a remarkable one in the circumstances.

- [101] Bruce also gave evidence that before his meeting with Pamela on 21 February he showed a copy of the 2001 Will to a friend who was a solicitor. He gave evidence that, whilst he showed a friend who was a solicitor a copy of the will before he meet with Pamela, he did not get legal advice in relation to the will before he saw Pamela on 21 February 2009. I do not find those statements to be inconsistent. Showing a solicitor friend a copy of a will and obtaining legal advice are two completely different things. Indeed it is highly likely that the friend advised him to get legal advice.
- [102] It is also asserted that Bruce’s credit is in doubt because he did not immediately give evidence as to the date on which he found the will. When initially asked the question by his counsel he stated he knew it was before the 21 February meeting because he knew the contents of the 2001 Will at that meeting. When pressed in cross examination he stated that it was Thursday 19 February. I do not consider that there is any substance in the submission that Bruce must have found the 2001 Will on 14 February because he did not immediately offer 19 February as the date. Neither do I consider that the date of finding a copy of the 2001 Will on 19 February 2009 to be a material fact which should have been pleaded.
- [103] The evidence from Pamela’s daughter Jacqueline Goldston was that she did not find the copy of 2001 Will at the house when she was there on 18 February 2009. I do not accept the submission that this means Bruce was lying when he said he found the copy on 19 February 2009. Given the state of the house it is hardly surprising that it may not have been found on the occasion Ms Goldston searched for it.
- [104] Furthermore I am not sure why Ms Goldston was looking for a copy of a will when she said she already knew the contents of the will as her grandmother had told her what was in it. Why look for a copy when the original was in safe custody at her father’s legal firm. Neither am I clear why as a granddaughter she believed she was entitled to search for the copy of the will. Furthermore if she was searching for it for her mother Pamela it would also seem pointless as Pamela said she already knew the contents of the will and indeed the original was in Caloundra where Pamela lived. It is not apparent to me why either Pamela or Jacqueline Goldston needed to search the Kenmore house for a copy of the will.

- [105] It is also submitted by counsel for the defendant that the timing of the finding of the will by Bruce is highly significant as it gives a “motive” for the discussion on 14 February 2009 at dinner about the 1974 Agreement. The contention is that the agreement was manufactured because Bruce had found the 2001 Will that day and knew that Thelma was proposing to substantially favour Pamela in the will.
- [106] I find that argument to very tenuous. Bruce would have had no means of knowing whether the 2001 copy that he found was in fact a copy of Thelma’s last will. It had been signed eight years previously. It is also clear from the evidence that Thelma had a history of taking Barbara out of her will and then subsequently putting her back in. The very real likelihood was that the 2001 Will was not in fact the current will given Barbara was mentioned. Furthermore Thelma had in fact altered the 2001 Will pursuant to a codicil she executed in 2007 which Bruce was unaware of.
- [107] Counsel for the defendant made much of the fact that Bruce organised a memorial service for Thelma in great haste. It was alleged that his actions were disrespectful. Thelma died on Good Friday 10 April 2009. It was clear that many family members were gathered at Caloundra over Easter given Thelma’s decline in health. It was clear from the evidence that many family members could not return for her cremation which, I note from the death certificate, took place some four days later on Tuesday 14 April 2009. I would have thought that in those circumstances a family memorial service made perfectly good sense and was in fact appropriate in the circumstances. I do not accept that this was evidence of Bruce’s “controlling behaviour” as alleged.
- [108] Doubt was also cast on Bruce’s character because he endeavoured to obtain Thelma’s bank statements after her death. As joint executor of the 2001 Will he was clearly entitled to do so. I am not certain on the evidence before me when he was advised about the contents of the 2007 Codicil which removed him as joint executor and proposed him as the default executor. In any event as attorney under the EPA he would have had to account to an executor for financial transactions up to the time of Thelma’s death. Given that background I would have thought it was not inappropriate that he obtain the bank statements involving transactions up to the time of her death.
- [109] It was also argued by counsel for the defendant that it was significant that Bruce and Ailsa’s children did not give evidence about the 1974 Agreement and that this gives rise to a “*Jones v Dunkel*” point. I do not accept that submission. Bruce gave clear evidence that the grandchildren knew nothing about Frank and Thelma’s affairs and that was why he wanted to put the agreement between himself and Pamela in writing.
- [110] I also have great difficulty with Pamela’s explanation that she was intimidated into signing the document by Bruce. It is clear that when she signed the 2009 agreement she actually knew the contents of her mother’s 2001 Will because Thelma had told her what she was proposing. Her reluctance was obviously due to her knowledge she was going to inherit Caloundra solely. She ultimately agreed with the plaintiff’s counsel Mr Quinn that she gave a false explanation for her reluctance to sign as follows:²⁷

²⁷ Transcript 6-21 ll 31-51.

“----that, again, that the reason you signed the document this day was that it was the right thing to do in your mind?-- No. the right thing to do in my mind would have been to honour Mum's - Mum's - Mum's agreement of the signing of the Will. Mum's - what Mum - Mum's wishes were more important, in my mind, and so I didn't want to sign it because it was against Mum's wishes.

Because you knew----?-- I knew what was in the Will.

----you knew what was in the Will. All right. So it didn't have anything to do with looking to your own interest, you say, your reluctance to sign the document?-- It was more what Mum wanted to do. Mum wanted me to have it and why - why shouldn't Mum allow me to have it.

But you didn't say that to Bruce, did you?-- No, I didn't because I had not told Bruce what was in the Will.

So you gave him a false explanation as to why you were reluctant to sign the document?-- I - yes.”

Pamela's evidence as a whole

- [111] Just as I was not impressed by Ian Griffith's evidence I was similarly unimpressed by Pamela as a witness. She was disorganised and constantly refused to listen to the questions being put. She was more interested in aggressively putting her point of view than in thoughtfully responding to the questions that were being asked of her. She would often respond to a question with a retort or pose a question to Counsel. There were many instances where she would make a statement about her view of events but not actually answer the question.
- [112] Contrary to her own assertions, I do not consider Pamela was easily intimidated. She was very forthright in her evidence in chief. She was very assertive during extensive cross examination by very experienced counsel.
- [113] I also consider that Pamela had an unreliable and imprecise memory of events a number of times. On some occasions those imprecise answers may have been due to the passage of time or confusion. I agree however with the contention by counsel for the plaintiffs that on many occasions she simply made no attempt to try and recall what had actually occurred. I was particularly unimpressed by her evidence as to her recollection and understanding of the payment through her accountant of the capital gains tax on the Caloundra property. Put simply she was either totally confused or did not actually understand what in fact had transpired with respect to the capital gains tax issue .
- [114] There were other occasions during her evidence however when she gave answers which she must have known were an incorrect version of events. In my view she consistently gave answers which she thought would be to her advantage. In her evidence she stated that she came to Brisbane with her daughters on Easter Sunday 2009 after her mother's death to find her mother's jewellery and to look for the will. It was clear however that she already knew that the will was not there having searched for it on 18 February 2009. Pamela conceded in cross-examination that she

already knew the will was not at Kenmore when she stated in her evidence that she went to search for it. Her answer to counsel as to the reason for her visit was clearly false.

- [115] She also gave evidence that the document she signed on 21 February was on “flowery paper” and was accordingly an informal document. She had a copy of the document and she must have known or could have easily ascertained that it was on plain white paper. There was no need to embellish the evidence. In essence I consider that Pamela remembered or would add details that suited her case but was consistently not able to recall matters which did not assist her case. This was particularly so with respect to her initial inability to recall her husband’s reaction to her phone call on 21 February 2009 when she had advised him that she had signed a document agreeing to split the estate three ways. Initially she indicated she couldn’t recall his reaction then ultimately indicated he was “surprised”.
- [116] Pamela was obviously very close to her mother and very attentive to her. I have no doubt that she was a loving daughter and that she actually provided a lot of the care in Thelma’s later years. However I consider that Pamela’s evidence indicates that she has a very fixed view that she has an absolute entitlement to the Caloundra property irrespective any prior agreements that may have been entered into in relation to it. This view may well have been based on views that Thelma expressed to her. It was very apparent that Pamela had a very clear view that Thelma could leave her estate to her as she wished unaffected by any prior agreement either between Thelma and Frank or as between herself and either Bruce or Barbara. In my view Pamela’s evidence and her perspective on the issues in dispute was affected by these views.
- [117] There is no doubt that the evidence of Pamela’s three daughters confirmed their close relationship with and their love for their grandmother and indeed their mother. They were all very emotional in the evidence they gave and I accept they all have strongly held views. It was clear from their evidence however that they had a number of preconceived ideas. The first was they were convinced that their mother had been very badly treated by the rest of the family. In particular Jacqueline Goldston, in her evidence, emotionally referred to “so many lies in so many letters” and that Bruce had done “so many horrible things”. I note that there was simply no evidence of any such letters.
- [118] It was also clear that they considered that Thelma’s very clear preference for Pamela should prevail and their view was that their mother was absolutely entitled to the Caloundra property.
- [119] I do not consider that they approached their task of giving evidence in an objective fashion. Rather they gave their evidence as advocates for their mothers ‘cause’. They had a very fixed view of the case even though they did not know all the relevant facts. Gillian Griffith’s statement about “this fabricated 1974 Agreement” was particularly telling in this regard.
- [120] In my view Pamela and Ian Griffiths (and to a large extent their daughters) did not give objective evidence.
- [121] I accept the evidence of Catherine McCarthy and Jennifer McCarthy. The evidence would not appear to be contested by any party and did not involve any real issues of

controversy. As I have indicated, I accept that Pamela was upset when she arrived at Jennifer McCarthy's home on 21 February. I also accept the evidence that Thelma was upset and angry that Bruce and Barbara did not agree with Pamela's proposal in 2001 to buy the Caloundra land.

- [122] There is no doubt that in this case a great deal rests on my assessment of the credit of the witnesses. Having considered the evidence in this case I do not consider that Pamela and Ian Griffiths were completely truthful witnesses. I do however accept Bruce and Barbara as truthful witnesses.
- [123] I acknowledge the submissions of counsel for the defendant that the only evidence about the 1974 Agreement is by a disappointed beneficiary and that many of the crucial conversations relied upon are hearsay. It is also clear that Ailsa's evidence due to her recent heart attack was given pursuant to s 92 of the *Evidence Act 1974*. I also accept that there is no evidence from Bruce that in the intervening years between the agreement in 1974 Agreement and the stroke in 1978 that the agreement was ever discussed again.
- [124] I consider however that the conversation between Frank and Thelma in front of Bruce and Ailsa is admissible because it is an exception to the hearsay rule. In my view it is admissible pursuant to the principle that that an admission by an owner of property that he or she is not entitled to a particular right or interest in that property is in fact evidence that is binding on a person who succeeds to the interest of that predecessor in title. It is also admissible because it is a statement made by a deceased person against his or her own interest.
- [125] As I have indicated because I accept Bruce and Ailsa's account I accept that Frank and Thelma made an agreement that they would each leave their estates to the other and that on the death of the survivor the assets would be shared equally amongst Barbara, Bruce and Pamela. I also accept that they communicated this fact to Bruce and Ailsa in 1974. I also, as I have indicated, generally accept the evidence of the oral and written agreements between Bruce and Pamela between 1974 and 2009. I also make the following specific findings.

Findings

- [126] I am satisfied of the following factual matters:
- (1) Thelma treated Barbara differently to Bruce and Pamela and she clearly preferred her own children. Thelma was critical of Barbara and had a history of being harsh to her.
 - (2) By 1974 Frank and Thelma agreed between themselves to leave their assets equally between the three children.
 - (3) In 1974 Frank and Thelma told Bruce and Ailsa of their agreement in circumstances which indicated it was intended to be a serious commitment. Frank entrusted Bruce with the enforcement of the arrangement.
 - (4) Bruce told Pamela of the 1974 Agreement between their parents at Christmas 1974 and they agreed to share the estate equally with Barbara.

- (5) Bruce informed Barbara of the 1974 decision by his parents and his oral agreement with Pamela by mid 1977.
- (6) In early 1982 the earlier oral agreement between Bruce and Pamela was affirmed by them at Caloundra.
- (7) Around Easter 1983 Pamela informed Barbara that she did not need to worry about what Thelma had done in her will as the three of them agreed it would be shared equally between them.
- (8) In June 1994 Pamela and Bruce confirmed their agreement to divide Thelma's estate equally into thirds.
- (9) In the Christmas/New year period of 1994 Pamela confirmed to Barbara the agreement she had with Bruce to divide Thelma's estate into thirds.
- (10) During Pamela's separation from Ian Griffiths in 1997 Bruce and Pamela confirmed their agreement to divide Thelma's estate into thirds.
- (11) At Christmas 1998 Pamela confirmed with Bruce the agreement to divide Thelma's estate into thirds.
- (12) In 2001 Bruce had a conversation with Thelma and told her that irrespective of what she put in her will there was an agreement to divide her estate equally between the 3 siblings.
- (13) Bruce had a conversation with Pamela in 2001 where he indicated that he had told Thelma of their plan to share her estate equally irrespective of her wishes and that Thelma was upset by this statement.
- (14) On 21 February 2009 Bruce and Pamela agreed in writing that on their mother's death and regardless of her will, they would allocate all of Thelma's assets equally. They agreed the arrangement would be binding on their families.
- (15) Pamela freely entered into the 2009 written agreement but changed her mind after speaking to her husband Ian Griffiths shortly after she left the meeting.

The plaintiffs' argument

[127] The plaintiffs' essential claim is in contract but the plaintiffs also advance an additional claim in estoppel in relation to the circumstances surrounding the 1974 Agreement. The plaintiffs argue that Pamela is obliged to share all of Thelma's estate including the Caloundra property equally with them pursuant to each of the Parent's 1974 Agreement, the Oral Agreements between Bruce and Pamela and the Written Agreement of 21 February 2009.

[128] The 1974 Agreement relied upon is not in fact a contract to make 'mutual wills' in identical terms but rather an agreement that the property in the hands of the survivor would be shared equally between the 3 children. There are of course a number of different ways in which a person may bind their estate pursuant to contracts that they have made in their lifetime. The real dispute in this case is whether Thelma contractually bound her estate in the way contended. It is clear as McPherson J held

in *Bigg v Queensland Trustees Ltd*²⁸ that “It is the contract rather than the form of the wills that attracts relief at law or in equity.”

- [129] The plaintiffs argue that each of those contracts concerned an interest in property and that just as equity may order specific performance in the exercise of its jurisdiction over agreements, the plaintiffs are entitled to the declarations sought to vindicate their respective interests under the agreements.
- [130] The plaintiffs argue that the right to a remedy in each case is contractual in nature and that each of the agreements relied upon constitutes a valid and enforceable agreement at common law as there is present:
- (a) an agreement;
 - (b) an intention to create legal relations;
 - (c) consideration; and
 - (d) certainty.
- [131] The plaintiffs argue that while Bruce and Barbara are not parties to the Parents 1974 Agreement, pursuant to the principles espoused in the High Court decision of *Birmingham v Renfrew*²⁹ that is not an impediment to each being able to obtain the benefit of the agreement.
- [132] The plaintiffs submit that:
- (a) Frank entered into the agreement as trustee for and on behalf of the plaintiffs. The agreement was necessarily for their benefit as it operated to secure their rights to the family wealth upon the event of his, and ultimately Thelma's, death;
 - (b) Pursuant to the agreement, and upon Frank complying with its terms, a constructive trust attached to the assets upon Thelma's death. Pamela, as a volunteer taking from Thelma, takes the assets (Thelma's estate) subject to the pre-existing equitable interest in favour of (relevantly) Bruce and Pamela; and
 - (c) As the beneficiaries in whose favour the equitable interest was created, Bruce and Pamela are entitled to enforce the constructive trust (cf. the agreement to which they were not parties).
- [133] It is also argued that the same considerations apply with respect to the position of Barbara under the Bruce and Pamela Agreements to which Barbara is not a party. While the agreements were entered into by each of Bruce and Pamela for their benefit (as the final disposition of Thelma's estate was an unknown until the event of her death), the agreements also operated to confer benefits on Barbara.
- [134] On that basis it is submitted that:
- (a) Each of Bruce and Pamela entered into the agreements as trustee for Barbara such that Barbara is entitled to enforce the terms of the trust as against (relevantly) Pamela; and
 - (b) In the alternative, Barbara is entitled to enforce the agreements pursuant to s 55 of the *Property Law Act 1974* (Qld).
- [135] The defendant argues however that there was no agreement made in 1974 as contended for and that even if there was such an agreement there was never any

²⁸ [1990] 2 Qd R 11 at [13].

²⁹ (1937) 57 CLR 666.

intention to create legal relations. It is also argued that any consideration would have been insufficient and in any event the agreement is void for uncertainty. In terms of the oral agreements between Bruce and Pamela which eventually resulted in the 2009 written agreement the defendant states that it was an informal agreement which is void for uncertainty. It is also asserted that no party has ever relied on the agreement to their detriment.

- [136] There is no doubt that in 1981 Frank made his final will in accordance with the agreement. Thelma's 1981 will however indicated, that if Frank should predecease her then essentially her estate on her death would only be divided between Bruce and Pamela. The plaintiffs argue that Frank did not have notice of this fact due to his stroke in 1978. It is also argued that despite Thelma's 1981 will there is a valid and enforceable contract at law even if Frank had notice of Thelma's anticipatory breach by the execution of her 1981 will. It is argued that even if Frank had notice of the anticipatory breach such notice has no consequence unless Frank acted on that breach and unequivocally elected to terminate.
- [137] The plaintiffs further argue that if it is considered that the Parents' 1974 Agreement gave rise to something other than an enforceable contract at law, the plaintiffs advance a claim in estoppel on the same facts giving rise to their cause of action under the Parents' 1974 Agreement. That claim is advanced on a basis analogous to that considered by McPherson J in *Bigg v Queensland Trustees Pty Ltd.*³⁰

The onus of proof

- [138] There is no doubt that the plaintiffs bear the onus of proof in relation to the claims they seek. As Dixon J stated in *Birmingham v Renfrew*³¹:
- “... an agreement can be established only by clear and satisfactory evidence. It is obvious that there is a great need for caution in accepting proofs advanced in support of an agreement affecting and possibly defeating testamentary dispositions of valuable property.”
- [139] Chief Justice Latham CJ also noted the ease with which such an agreement can be alleged “after the parties to it have both died” and indicated that a court should be careful in accepting the evidence of interested parties upon such a question.³²
- [140] The civil standard of proof applies namely ‘on the balance of probabilities’. In *Re Cleaver*³³ Nourse LJ made the following observations in relation to the onus of proof by reference to *Birmingham v Renfrew*.
- “It is clear from that case, if from nowhere else, that an enforceable agreement to dispose of property in pursuance of mutual wills can be established only by clear and satisfactory evidence. That seems to me to be no more than a particular application of the general rule that all claims relating to the property of deceased persons must be scrutinised with very great care. However, that does not mean that there has to be a departure from the ordinary standard of proof required in civil proceedings. I have to be satisfied on the balance of probabilities that the alleged agreement was made, but before I can

³⁰ [1990] 2 Qd R 11.

³¹ (1937) 57 CLR 666 at 681-2.

³² At 674-5.

³³ [1981] 1 WLR 939.

be satisfied of that I must find clear and satisfactory evidence to that effect.”

- [141] Jerrard JA endorsed that approach in the contested probate case of *Dore (as executor of the will of W H B Chenhall dec'd)*³⁴ as did Hammond J in *Re Newey*.³⁵ Whilst there was a reference to a “heavy onus” it was accepted that the usual civil standard of proof applied and that it was dangerous to try and split the normal civil standard of proof into subcategories.³⁶

Was a Legally Binding Agreement made in 1974?

- [142] In order to determine whether there was an enforceable contract it is necessary to determine whether the essential components required to establish a binding contract are present. In *Birmingham v Renfrew*, Dixon J stated:

“It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligations to the property. The effect is, I think, that the survivor becomes a constructive trustee, and the terms of the trust are those of the will which he undertook to be his last will.”

Was there an intention to create legal relations?

- [143] In *Birmingham v Renfrew* the husband had no property and the wife inherited substantial property solely from her uncle. There was an oral agreement between the husband and wife that the wife would leave her property to her husband and that in consideration thereof the husband agreed he would make a will leaving the property to four of his wife’s relatives on his death and that he would not revoke his will. When the wife died the husband inherited the property and he subsequently revoked his will and left the property other than to his wife’s relatives.
- [144] Dixon J in his reasons indicated that the issue in question was whether the distribution of the testator’s estate is governed or controlled by an agreement said to have been made between himself and his wife. It was held that the agreement created a constructive trust which was enforceable and that the wife had succeeded to a large amount of property in consequence of some predilection in her favour on the part of an uncle who “might have spread his gifts more widely among the members of the family”. It was held by Dixon J that legal relations were intended and that the trial judge was correct in so finding.

“So far as this is a question of fact, I think he was fully justified in taking the view that the wife meant to obtain from her husband a promise and meant that it should be communicated to the intended beneficiaries in order the [sic] better to ensure its fulfilment. I think

³⁴ [2006] QCA 494.

³⁵ [1994] 2 NZLR 590.

³⁶ at 494-5.

the legal result was a contract between husband and wife. The contract bound him, I think, during her lifetime not to revoke his will without notice to her. If she died without altering her will, then he was bound after her death not to revoke his will at all. She on her part afforded the consideration for his promise by making her will. His obligation not to revoke his will during her life without notice to her is to be implied. For I think the express promise should be understood as meaning that if she died leaving her will unrevoked then he would not revoke his. But the agreement readily assumes that neither party will alter his or her will without the knowledge of the other. It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions.”

- [145] As I have indicated I accept Bruce and Ailsa’s evidence that Frank and Thelma stated to them in 1974 that they had an agreement that their assets were to be shared equally between the three children after the death of the survivor. It would seem clear that at the time of the 1974 Agreement, Thelma’s 1956 Will was in those terms. It is clear that Frank’s final 1981 Will reflected the 1974 Agreement. However the content of any wills made between 1974 and 1981 are simply not known as those wills were destroyed. Accordingly there is no clear evidence that mutual wills were actually made after the Frank and Thelma’s 1974 acknowledgment to Bruce and Ailsa but of course the 1974 Agreement may have simply acknowledged the reality of arrangements that were already in place.
- [146] There is also no doubt that Frank would have been concerned that he would die first given he was older than Thelma and that he had suffered from high blood pressure since the mid 1960s. He ultimately had a severe stroke just four years later in 1978 and became significantly incapacitated and reliant on Thelma. There is clear evidence that his speech, comprehension and physical movement were affected.
- [147] I consider that in 1974 Frank had very real concerns that Thelma might outlive him given his health issues.
- [148] I also consider that in 1974 it would also have been clear to Frank that Thelma would become the absolute owner of all the real estate given she would receive his share in the joint tenancies through survivorship on his death. It is also clear that Barbara was not Thelma’s daughter and that Thelma obviously preferred her own children and had indeed been blatantly unfair to Barbara on a number of occasions.
- [149] Given those circumstances I consider it highly likely that if Frank had not extracted the promise from Thelma that his three children would equally share the jointly owned assets, he would have taken other steps to secure Barbara’s interests. Indeed he could have considered making a bequest of cash or shares to Barbara in his will if Thelma had refused to agree. I consider that he refrained from making other arrangements due to the promise made by Thelma that his three children would receive an equal share of her estate should she survive him.
- [150] The issue which needs to be determined is whether there was an intention to create legal relationships between Frank and Thelma when the 1974 Agreement was

entered into. I note that in the decision of *Baird v Smee*³⁷ Handley JA set out the issue of intention to create legal relations in that case as follows:

[21] Each will gave the maker's estate to the survivor, and in default half the estate went to the children of Mr McDonnell and the other half to the children of Mrs McDonnell. This was an eminently sensible and fair arrangement which ensured that the order in which the couple died did not affect the inheritance of the next generation on either side. This was not to be a case of survivor take all but an equal division independent of time and chance.

[22] As it happened Mrs McDonnell was the survivor and if Mr McDonnell's age had been proved this may always have been the probable outcome. Mrs McDonnell had, at the very least, a strong moral obligation to respect the arrangement she had made with her husband, whether or not it was legally binding. Unfortunately her wish to maximise the inheritance of her own children, or their importunities, prevailed, and within 12 months of Mr McDonnell's death she had made a new will leaving her whole estate to her children. She died 3 years later without changing that will.

[23] Mr McDonnell's children sued the executrix of Mrs McDonnell's will seeking to enforce a constructive trust arising from an alleged contract between Mr and Mrs McDonnell to make mutual wills and leave them unrevoked. Their case was dismissed by Master Macready and they have appealed to this Court. I wish that I could have found a proper legal basis for upholding their appeal.

[24] In order to succeed the appellants had to establish that Mr and Mrs McDonnell made a contract. One may readily infer from the form of the wills, the history of their making and their simultaneous execution that Mr and Mrs McDonnell had agreed on the plan of distribution evidenced in their wills. However mere consensus is not enough. There is a legal presumption of some strength that informal agreements between spouses are not intended to be legally binding: *see Balfour v Balfour* [1919] 2 KB 571; *Cohen v Cohen* [1929] HCA 15; (1929) 42 CLR 91, 96; *Birmingham v Renfrew* [1937] HCA 52; (1937) 57 CLR 666, 682. In the same case Latham CJ said at 674-5: "Perhaps most husbands and wives make wills 'by agreement', but they do not bind themselves not to revoke their wills. They do not intend to undertake or impose any kind of binding obligation".

[25] In cases of the present kind, as Viscount Haldane said in *Gray v Perpetual Trustee Co Limited* [1928] AC 391 at 400 a definite agreement to constitute equitable interests must be shown to have been made "and without such a definite agreement there can no more be a trust in equity than a right to damages at law".

[26] The need to prove a legally binding contract has always been insisted upon in these cases. See *In re Cleaver* [1981] 1 WLR 939,

³⁷

[2000] NSWCA 253.

947, 949. In a number of the earlier cases the Judges referred to agreements to make mutual wills and leave them unrevoked, but they made it clear, as Viscount Haldane did in the passage quoted above from *Gray v Perpetual Trustee Co Limited*, that the agreement had to be legally binding. In some recent cases the judges have referred to the need for plaintiffs in such cases to prove "a contract at law". See *In re Dale* [1994] Ch 31, 38; *Aslan v Kopf* (CA 16 May 1995 unrep per Gleeson CJ at pp 3-4); *In re Goodchild* [1997] EWCA Civ 1611; [1997] 1 WLR 1216, 1224 CA; *Bigg v Queensland Trustees Ltd* [1990] 2 QdR 11, 13. However in the seminal case *Dufour v Pereira* (1769) Dick 419 [21 ER 332] Lord Camden, in the passage quoted by Dixon J in *Birmingham v Renfrew* [1937] HCA 52; (1937) 57 CLR 666 at 686, referred to contract more than once."

- [151] I note that in *Baird v Smee* it was held that there was insufficient evidence to indicate that the husband and wife had in fact intended to create a contract and agreed not to revoke their wills in which they left their property to each other and then equally amongst all their children. In particular Handley JA held:
 "Thirdly, there is absence of any hard evidence that Derek and Gwendoline perceived the need to take the matter beyond trusting the survivor in point of honour to deal fairly and reasonably in the light of circumstances as they might arise during the survivor's lifetime."
- [152] In the present case I consider that there was indeed a perceived need to take the matter beyond trusting Thelma to do the right thing given her previous behaviour. As Hammond J said in *Re Newey*:³⁸
 "All the surrounding circumstances, the history, the factual matrix, are to be taken into account in deciding whether there was such an arrangement. The Court will look at all the circumstances and draw any appropriate inferences."
- [153] I consider that given the history of Thelma's clear preference for her own children the available inference open to me is that Frank wanted to bind Thelma to an agreement.
- [154] The present facts are quite different to the factual scenario in *Sorbello & Ors v Sorbello & Anor*³⁹ where Mullins J found there was no intention to create legal relationships when a husband was discussing with his dying wife options in relation to an anticipated insurance payout on her death. It was clear that she trusted him to care for their three children as he had always done. That was not the background in the present case. In fact the background history of Thelma's treatment of Barbara would have given rise to a very real concern on Frank's part about the possibility that Barbara would be treated in a different fashion to Bruce and Pamela should he die before Thelma.
- [155] Frank's actions in making the declaration of the agreement in front of Bruce and Ailsa and in having Thelma acknowledge the agreement, make it clear to me that this was a serious occasion and that legal relations were intended. Furthermore Frank charged Bruce with the responsibility of ensuring that the agreement was

³⁸ [1994] 2 NZLR 590 at 595.

³⁹ [2005] QSC 219.

honoured. I consider these circumstances indicate very clearly that there was an intention to create legal relations and that it indeed went beyond trusting the other as a point of honour given that a third person was charged with a responsibility to ensure the promise was kept. It is clearly an obligation Bruce took seriously.

Consideration

- [156] A further essential element of a contract is the requirement of consideration.
- [157] I am satisfied that the consideration in this case were the mutual promises to leave the estate to each other and then equally amongst the three children. That consideration also necessarily involved a promise to refrain from severing the joint tenancies because a promise not to proceed in a way a person is entitled to proceed constitutes valid consideration.

Was there revocation on notice in 1981?

- [158] The defendant bears the evidentiary onus of establishing that Frank was aware of the terms of Thelma's 1981 Will. There was in fact no direct evidence that he was aware of the contents of her will. Frank was obviously suffering the effects of a debilitating stroke at the time of the preparation and execution of those wills. The solicitor who prepared the wills has no independent memory of the preparation and signing of the wills and there is no file note still in existence. The secretary Patricia Costigan who witnessed the wills remembers Frank and Thelma attending together but her evidence was that the wills were not read over to them in her presence. Her evidence was that Frank did not speak and that Thelma did all the talking. There was also clear evidence before me that Frank's speech was affected because of the stroke and that at times he would become confused. He also tired easily and had trouble maintaining concentration. Both Bruce and Barbara considered that his personality changed.
- [159] Whilst the wills were then sent to the Kenmore address several days after they were executed I do not consider that fact gives rise to an inference that Frank therefore knew the contents of Thelma's will. There was evidence before me of the physical impact that the stroke had on Frank. He was very obviously physically affected as he could no longer drive, he could not dress himself or comb his hair. He was very dependent on Thelma. The evidence was that Thelma totally took over the management of their financial affairs. Pamela agreed that Thelma did everything for Frank after the stroke. I do not consider that factual background supports an inference that he would have known the contents of a letter that was sent to his home address when the evidence was that he could not even get to the letter box.
- [160] I do not consider therefore that the evidence established that Frank had notice of Thelma's anticipatory breach. Further, such a case was not pleaded by the defendant.
- [161] In any event even if Frank was aware of the anticipatory breach, as the innocent party he was not bound to accept Thelma's repudiation of their agreement. There is no evidence of an unequivocal act by Frank accepting Thelma's repudiation and terminating the contract. Whilst he was entitled to elect to rescind for Thelma's breach he was not bound to do so.

[162] If he did not elect to rescind then the contract remained on foot with each party remaining bound to perform it notwithstanding Thelma's breach. *Theobald on Wills*⁴⁰ expresses the relevant principles very concisely as follows:

“Before the death of the first to die, the agreement is a contractual one made in consideration of mutual promises. It can, therefore, at this stage, be revoked by mutual agreement. It will also be revoked by unilateral breach, which will give the other party the right to treat himself as discharged from the agreement by reason of the breach. (Fn: *Hobley, Re, The Times*, June 16, 1997). The unilateral breach cannot give rise to an action for damages, provided that the other party has had notice of the breach, and the opportunity to change his own will. (Fn: *Stone v Hoskings* [1905] P. 194.7a) If there is a claim for damages, then on general principles (Fn: Subject now to the Contracts (Rights of Third Parties) Act 1999) only the parties to the agreement can make it.”

Is the Agreement enforceable?

[163] It is clear that this is not in fact a classic “mutual wills case”. Indeed the doctrine of mutual wills usually arises in circumstances where two or more people make a will containing reciprocal provisions pursuant to an agreement that particular wills are to be made and not revoked.

[164] The doctrine of mutual wills was first discussed in 1729 by Lord Camden in *Dufour v Pereira*⁴¹ in the following way:

“The parties by mutual will do each of them devise, upon the engagement of the other, that he will likewise devise in manner therein mentioned. The instrument itself is evidence of the agreement; and he that dies first does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice.”

[165] In this case, however, there is simply no evidence that subsequent to the 1974 statement by Frank and Thelma of their agreement that they specifically went out and made mutual wills in similar terms. Frank and Thelma may have done that but because all of their previous testamentary documents have not survived it is not possible to know if that was in fact the case. It is clear that we do not have all the wills that Thelma and Frank made over the years and no documents exist from the 1970s. The 1974 Agreement may well have reflected what the state of their wills was at that point in time but that is no longer able to be ascertained. Indeed the letter from the solicitors dated 22 September 1981 enclosing copies of the 1981 wills indicated that they obtain their previous wills from the solicitor holding them and then directed them to “destroy” them.

[166] There is in my view however, a statement in very clear terms of an agreement between Frank and Thelma that they would leave their estates in a particular way and they agreed that the agreement would not be revoked. Indeed we have Frank’s final will dated 18 September 1981 and it was in those terms.

⁴⁰ 17th Ed at p 10-11.

⁴¹ (1729) 21 ER 332 at 333.

- [167] It is also clear that the 1974 Agreement is one to which none of the current parties were a party. It was a contract between Frank and Thelma which could not be rescinded unless there was consent from the both of them. It is clear in cases such as this the Court does not set aside the will but makes the executor perform the contract on the basis that Thelma entered into the agreement as trustee for and on behalf of the plaintiffs and therefore the agreement is binding upon and enforceable against the executor of her will.
- [168] In my view Thelma breached the 1974 Agreement she had with Frank by refusing to leave her estate to his three children as she had agreed.
- [169] I consider that the 1974 Agreement is binding and is enforceable against the executor.

Are legally binding agreements created by the oral and written agreements between Bruce and Pamela between 1974 and 2009?

- [170] As I have set out in my specific findings I consider that there were a series of oral agreements between Bruce and Pamela on the occasions referred to.
- [171] I also consider that Pamela freely entered into the 2009 written agreement but that she changed her mind after speaking with her husband Ian Griffiths.

Intention to create legal relationships

- [172] It was clear that by 21 February 2009 Bruce knew the contents of the 2001 Will which left the Caloundra property solely to Pamela. There was clearly no way of knowing however if the 2001 Will was Thelma's final will. Bruce also knew that Thelma had a history of changing her will and a history of changing the provisions of her will particularly as they related to Barbara. By the time of the 21 February 2009 meeting it was clear that arrangements had to be made to place Thelma in a nursing home and that the bond would be in the order of \$400,000. It was also obvious to Bruce that he would probably be the only one who would pay the bond given Pamela's clear refusal at the meeting to sell any of the properties and also her insistence that the estate be kept "intact".
- [173] During the meeting on 21 February 2009, given the distinct possibility he would be paying the bond, Bruce wanted an assurance that their oral agreement to divide the estate equally was still on foot. Pamela knew that she was not in a position to pay the bond, given their money was "tied up in the boat" and that Thelma's cash reserves were insufficient to pay it. I consider that in those circumstances Bruce wanted a binding assurance as to the state of their agreement given it was foreseeable that he was going to act to his detriment and advance significant cash reserves in pursuance of his mother's care.
- [174] I consider that being part of a discussion which culminates in an affirming handshake and which then result in each party signing a document in triplicate seems consistent with an intention to create legal relations. Even to a lay person on its face those circumstances suggest an intention to form a binding agreement
- [175] Against that background, I consider that the written agreement was indeed intended to create legal relationships despite what Pamela subsequently said. Put simply, I

consider that given the family circumstances and the history of the discussions with Bruce and Barbara over the years she would have considered that the fair thing to do was to sign the document. For a number of reasons she obviously subsequently changed her mind.

- [176] Having found that there was an intention to create legal relationships at the time of the written agreement in February 2009, it is not necessary to make specific findings in relation to the prior oral agreements. I consider however that, given both Bruce and Pamela were subject to the vagaries of Thelma's personality, they both wanted their interests protected. This was particularly the case at the time Pamela separated from Ian in 1997 and she was not treated kindly by Thelma at the time. In fact Pamela had a concern, which she voiced to Bruce, that Thelma could cut her out of the will. She obviously wanted to keep her options open.
- [177] In my view the most likely explanation of events is that when it became clear that in her final will Thelma had actually substantially favoured her, Pamela denied the oral agreements she made with Bruce after 1974.

Consideration

- [178] In terms of the oral agreements the consideration was the exchange of mutual promises. The consideration provided by each of Bruce and Pamela was that each had a present right to future property namely an entitlement to Thelma's estate as it stood at the time of her death which may or may not have come to fruition depending on the actual terms of the final will. In my view, the right of Bruce and Pamela to a possible future entitlement to Thelma's estate was valuable consideration.

Certainty

- [179] I also consider that there was a certainty of contract. A contract to leave the whole of a testator's estate will usually be construed to mean all property which is beneficially owned by the testator at the time of their death. It is easily assumed that at the time of their oral agreements the subject matter was the estate of Thelma as at the time of her death.
- [180] Pamela now asserts that her oral references to a "share" in the discussions between the siblings, was something other than an equal one third share. As I have indicated that assertion arose for the first time during the trial and I consider it is of recent origin. The plaintiffs argue that even if this evidence was accepted, in *Laver v Fielder*,⁴² Master of the Rolls, Romilly determined that a reference to "*her share*" in respect of an estate meant an equal share (in that case, equal with the individual's brothers and sisters) of the property which by law the individual could take. The plaintiffs argue that the same point can be made here: "*her share*" or "*your share*" in the context of a discussion between siblings may fairly be construed as connoting an equal share, particularly in the absence of an indication of disparity.
- [181] I am satisfied that the estate and its division into equal shares was certain between the parties in their oral agreements and the written agreement.

Duress

⁴² (1862) 32 Beav 1 at 13.

- [182] As I have indicated at paragraphs [94] and [96] I do not consider that the defendant has established that she was subject to duress at the time she signed the written agreement in February 2009. The defendant has not proved on the balance of probabilities that she was procured into signing the document under Bruce's direct verbal intimidation or duress.
- [183] I consider that Pamela has breached the oral and written agreements with Bruce entered into between December 1974 and February 2009 to share Thelma's estate equally amongst the three siblings by failing to share the bequest of the Caloundra land which was made to her only.
- [184] I do not consider it is necessary in the circumstances, given the finding I have made, to turn to a consideration of s 55 of the *Property Law Act*.
- [185] Neither do I consider it necessary to consider the alternative argument of equitable estoppel.

PROPOSED ORDERS

- [186] The plaintiffs seek declarations that the defendant is bound by her agreement with Bruce Kennedy to share the assets of the estate of Thelma Kennedy equally between herself and the plaintiffs in equal shares. A further declaration is also sought in relation to the 1974 Agreement between Frank and Thelma as well as further orders in relation to the release of the current mortgage over the property and orders for the registration of a one-third interest in the Caloundra property as tenants in common in equal shares.
- [187] The plaintiffs are entitled in principle to the declarations sought.
- [188] I will hear from counsel as to the form of the orders and as to costs.