

SUPREME COURT OF QUEENSLAND

CITATION: *Nguyen & Anor v Condo & Anor* [2014] QSC 239

PARTIES: **TIEN NGUYEN & TUOI DANG**
(plaintiffs)
v
SALVATORE CONDO & MARIA CONDO
(defendants)

FILE NO: BS9012 of 2006

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 30 September 2014

DELIVERED AT: Brisbane

HEARING DATE: 2-5 and 10 June and 23 July 2014

JUDGE: Mullins J

ORDER: **1. Judgment for the plaintiffs against the defendants for equitable compensation in the sum of \$217,761 together with interest of \$157,119 from 31 December 2006 to the date of judgment.**

2. It is ordered that payment by the defendants to the plaintiffs of the total amount of the equitable compensation and interest of \$374,880 is charged on Lot 7 on RP 177728 in the County of Cavendish Parish of Esk.

3. The defendants' counterclaim is dismissed.

4. Adjourn the issue of the costs of the proceeding to a date to be fixed.

CATCHWORDS: ESTOPPEL – ESTOPPEL BY CONDUCT – EQUITABLE ESTOPPEL GENERALLY – where the defendants agreed to transfer the plaintiffs a one-half share in their property for \$140,000 – where the plaintiffs moved to the defendants' property to establish a vineyard in respect of which the parties intended to share the income – where the defendants agreed that the plaintiffs could pay the purchase price of \$140,000 by the expenditures of the plaintiffs in establishing and maintaining the vineyard – where the plaintiffs gave funds to the defendants and made expenditures in reliance on the defendants' assurances that they would transfer a one-half share in the property to the plaintiffs – where the defendants allowed the plaintiffs to grow vegetables on the property in respect of which the plaintiffs retained all the income to assist the plaintiffs in generating the funds to establish the vineyard

– where the relationship between the parties broke down and the plaintiffs left the property after almost four years – where the plaintiffs seek a declaration that they acquired a beneficial interest in the property – where there were delays in the prosecution of the plaintiffs’ claim – where the parties compromised their dispute in respect of the sale of agricultural produce from the property – whether the plaintiffs are entitled to equitable relief based on equitable estoppel

Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10, considered

Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26; [\[2001\] QCA 191](#), considered

Serisier Investments Pty Limited v English [1989] 1 Qd R 678, considered

COUNSEL: P A Travis for the plaintiffs
S Condo (in person) for the defendants (2-5 and 10 June 2014)
S J English for the defendants (23 July 2014)

SOLICITORS: Axia Litigation Lawyers for the plaintiffs
Gallagher Legal for the defendants (23 July 2014)

- [1] The plaintiffs Mr Nguyen and Ms Dang are formerly Vietnamese nationals who immigrated to Australia and settled in Renmark, South Australia where in 1999 they purchased a family home. In 1999 they also worked on a grape farm owned by the defendants and became acquainted with them. Ms Dang’s sister married the defendants’ son Vincent in December 2001 in Vietnam.
- [2] In 2002 the defendants were attempting to sell a property they owned at Esk in Queensland. Mr Nguyen travelled with Mr Condo to the property. About 10 acres of the property had been set aside and cleared for the purpose of planting grapes and for which an underground watering system had been established.
- [3] Subsequently Mr Nguyen and Mr Condo had discussions about the plaintiffs moving from Renmark and residing on the Esk property and establishing a vineyard on the property. The plaintiffs relocated to the Esk property in or around March 2003. The plaintiffs’ claims against the defendants in this proceeding arise from their disputes over the terms of the agreement between the parties and the parties’ performance of that agreement. This proceeding was commenced in October 2006 by solicitor Mr Brown who was consulted by the plaintiffs after they were given a notice to leave and ordered to vacate the property by the defendants, which the plaintiffs did by December 2006.
- [4] The primary relief the plaintiffs seek is a declaration that they acquired a beneficial interest in the Esk property or, in the alternative, they seek relief on the basis that it is unconscionable of the defendants to deny the plaintiffs’ beneficial interest in the Esk property.

The proceeding

- [5] The proceeding progressed throughout 2007. There were interlocutory applications brought by the plaintiffs against the defendants in relation to disclosure. An order was obtained from the court on 25 June 2007 to facilitate the appointment of a valuer to provide a report concerning the subject property. Pursuant to that order valuer Mr Innes inspected the property on 5 October 2007 and prepared the valuation which is exhibit 6. The solicitors who had been acting for the defendants withdrew in October 2007. The proceeding became the subject of a case flow management intervention notice pursuant to which orders were made in July 2008. New solicitors commenced acting for the defendants and an amended defence and counterclaim was filed on 5 September 2008.
- [6] In December 2008 the parties compromised parts of their respective claims. They signed a deed (exhibits 4 and 5) in which each party agreed not to require the other party to account for moneys received or profits made from the sale of agricultural produce from the Esk property. Clause 2.1 of the deed sets out the covenant by the plaintiffs:
- “The Plaintiff’s covenant, undertake and agree, as follows:
- (a) The Plaintiff’s shall amend their Amended Statement of Claim dated 23 March 2007, and any other relevant pleadings of theirs, in the Proceedings to inter alia delete any and all aspects of their pleading relating to requiring the Defendant’s to account for monies received and/or profits made from the sale of agricultural produce from the Land.
 - (b) That after the Plaintiff’s pleadings are amended as specified in clause 2.1(a), the Plaintiff’s shall not at any stage whatsoever in the course of the future conduct of the Proceedings:
 - (i) by subsequent further amendment to the Plaintiff’s pleadings; or
 - (ii) by way of evidence given or produced by the Plaintiff’s or any persons on behalf of the Plaintiff’s; or
 - (iii) by any other manner whatsoever,
 raise or introduce the issue of the Defendant’s being required to account for monies received and/or profits made from the sale of agricultural produce from the Land.
 - (c) That after the Plaintiff’s pleadings are amended as specified in clause 2.1(a), the Plaintiffs shall not at any time whatsoever in the future make any claim, bring any suit or action or other wise commence any further proceedings against the Defendants seeking inter alia an account from the Defendant’s for monies received and/or profits made from the sale of agricultural produce from the Land.”
- [7] The defendants made a covenant in the plaintiffs’ favour in clause 2.2 of the deed in similar terms to clause 2.1. (There is an error in clause 2.2(b) where the last reference to “Defendant’s” should be a reference to “Plaintiff’s”. Although the plaintiffs have raised whether they should seek rectification of that word, that is unnecessary. It is clear from the balance of the terms of the deed that it is an error and the clause should be read as if the intended word was used.)

- [8] In order to emphasise the effect of the compromise reached by the parties, clause 2.3 of the deed provides:

“(a) For the sake of clarity, once the respective parties have amended their pleadings in accordance with the terms of this Deed:

- (i) the plaintiff’s undertake to abandon any and all causes of action they may have against the defendants that are related to or in any way connected with the subject matter of the proceedings, save to say that the plaintiff’s maintain their right to pursue all causes of action that are pleaded by the plaintiffs in their amended pleading.
- (ii) the defendant’s undertake to abandon any and all causes of action they may have against the plaintiffs that are related to or in any way connected with the subject matter of the proceedings.
- (iii) The defendant’s will not plead nor pursue any form of counterclaim against the plaintiffs in the proceedings.

(b) For the sake of clarity, it is acknowledged that:

- (i) by entering into this Deed, the parties intend to ensure each party forever abandon’s and compromises his/her right to require the other party/s to account to them for monies received and/or profits made from the sale of agricultural produce from the Land; and
- (ii) by entering into this Deed, the parties intend to ensure that neither party will seek to obtain a remedy against another party that is over and above the causes of action the plaintiff will maintain against the defendant pursuant to the terms of this Deed.
- (iii) this Deed shall not be construed in a manner that will have the effect of nullifying, limiting or prejudicing the plaintiff’s rights to pursue the plaintiff for all causes of action presently pleaded against the defendants, save for any cause of action that will require the defendant’s to account to the plaintiffs for monies the defendants have received and/or profits made from the sale of agricultural produce from the land. Should a court of competent jurisdiction find that this Deed operates contrary to the intentions expressed herein, this Deed shall be read down to such an extent as may be required to avoid such an interpretation and, if necessary, the offending parts of the Deed shall be severed so that such an interpretation is unable to be formed.”

- [9] After the plaintiffs provided the further and better particulars of their statement of claim on 27 July 2009, there appears to have been delays in the plaintiffs’ solicitor’s office. Counsel (who was not counsel who appeared in this trial for the plaintiffs) was eventually briefed in November 2009 on behalf of the plaintiffs to advise on evidence and other matters in preparation for trial. There was a delay by counsel and a revised pleading was not received until 6 April 2010. Mr Brown was selling his practice in Toowoomba and the solicitors who acquired his practice took over the conduct of the matter from September 2010. On 3 November 2010 the

plaintiffs' solicitors gave a notice to the defendants of the plaintiffs' intention to proceed with the matter.

- [10] Mr Nguyen swore an affidavit on 7 October 2013 in which he recorded that he had been told by Mr Brown in mid to late 2010 that the case was getting close to being ready to go to court and Mr Nguyen instructed him to do what needed to be done to get the matter ready. Mr Nguyen had moved from the Esk property to his farm at Forest Hill and the farm and home were badly damaged in the January 2011 floods. The plaintiffs lost all their crops and were uninsured. Mr Nguyen then spent the rest of 2011 re-establishing the farm. The farm was flooded twice in January 2012. Mr Nguyen spent the rest of 2012 re-establishing the farm again.
- [11] When Mr Brown found out from Mr Nguyen in January 2013 that the proceeding had not progressed, Mr Brown was instructed by Mr Nguyen to take over the file. A notice of change of solicitors for the plaintiffs was given to the defendants on 18 February 2013. There were some without prejudice discussions between the parties. On 23 September 2014, the plaintiffs applied to the court for leave to take a new step in the proceeding pursuant to r 389(2) of the *Uniform Civil Procedure Rules* 1999 which was given on 14 October 2013, in addition to leave to amend the claim.
- [12] The parties participated unsuccessfully in a mediation during November 2013. Further directions were made by the court on 5 December 2013 to facilitate the matter having a trial. A second further amended statement of claim was filed by the plaintiffs on 13 December 2013. New solicitors acting for the defendants filed an amended defence and counterclaim on 5 February 2014. The plaintiffs filed further amended pleadings on 27 February 2014. Solicitors then acting for the defendants filed an amended defence and counterclaim on 19 March 2014 which was the pleading of the defendants on which the trial was conducted. The defendants gave notice that they were acting in person on 16 April 2014. At the commencement of the trial the plaintiffs were given leave to file the second amended claim, the fourth further amended statement of claim and the reply and answer to the amended defence and counterclaim.
- [13] Mr Condo appeared on behalf of the defendants during the trial. When the evidence was completed, the hearing was adjourned to 10 June 2014 for submissions. On 10 June 2014 the defendants requested an adjournment to enable them to seek legal advice regarding written submissions. The adjournment was allowed and the defendants consulted the firm Gallagher Legal which briefed Mr English of counsel who prepared written submissions on their behalf and appeared on 23 July 2014 to make submissions.

Issues on the pleadings

- [14] It is not in dispute that at all times Mr Nguyen acted on behalf of Ms Dang and himself and that Mr Condo acted on behalf of Mrs Condo and himself.
- [15] It is also not in dispute that the parties originally had an oral agreement, in general terms, that the defendants would transfer a one-half interest in the Esk property to the plaintiffs for the sum of \$140,000. The plaintiffs allege that the agreement

provided for them re-locating to the Esk property, undertaking the day to day conduct, running and maintenance of the Esk property, committing to and continuing long term maintenance and improvement to the Esk property, and establishing a vineyard on the Esk property, and the sum of \$140,000 would be paid by them to the defendants by being spent on improvements and maintenance of the Esk property, including the establishment of the vineyard.

- [16] The dispute over the terms of the agreement between the parties revolves around the following issues derived from the pleadings:
- (a) did the offer of the defendants to give the plaintiffs a one-half interest in the Esk property for the sum of \$140,000 include or exclude the residence on the property?
 - (b) was it a term of the agreement that the plaintiffs would pay to the defendants the sum of \$140,000 in two annual payments of \$70,000 each in December 2003 and December 2004?
 - (c) did the plaintiffs agree to finance and develop within a period of two years, ten acres of Red Globe table grapes on the Esk property on the basis that the plaintiffs met all costs of development, including purchase of vines, pots, posts, trellis and wire, and the defendants to supply the land and irrigation?
 - (d) were the plaintiffs entitled to live in the residence on the Esk property rent free for a period of two years, provided the two payments of \$70,000 were made?
 - (e) was it part of the arrangement that the defendants permitted the plaintiffs access to other parts of the Esk property and water and equipment to grow vegetables to enable the plaintiffs to accumulate profits to pay the agreed sum of \$140,000 within the two year period, with all costs of growing the vegetables to be met by the plaintiffs?
 - (f) what was the arrangement between the parties for the ongoing costs of grape and other crop production and maintenance of the property after the vineyard was established and producing income?
 - (g) the identification and quantification of expenditures of the plaintiffs in respect of the Esk property that can be taken into account as performance by the plaintiffs of the agreement with the defendants.
- [17] Another issue is raised by the subsequent arrangement between the parties in March 2004 whereby the defendants approved the plaintiffs' proposal at their cost to level a sloping part of the Esk property for the purpose of constructing greenhouses. The dispute between the parties as to the accounting of profits from the sale of produce has been compromised, but the issue that remains in relation to the greenhouses is whether the plaintiffs are entitled to any accounting from the defendants for the improvement to the Esk property by the construction of the greenhouses.
- [18] The defendants admit the plaintiffs' allegation that they refused on 9 October 2006 to transfer a one-half interest in the Esk property to the plaintiffs and that one of the reasons for doing so was that the plaintiffs did not agree to give the defendants half of the proceeds from the sale of the vegetables the plaintiffs harvested from the greenhouses, but also rely on what the defendants claim to be the breaches of the original arrangement between the parties and the failure to pay rent after February 2006.

- [19] Despite the deed of compromise, paragraph 26 of the amended defence and counterclaim filed on 19 March 2014 includes an allegation by the defendants that the plaintiffs did not account to them for the income generated from their use of the Esk property and applied that income to their own ends. That allegation cannot be pursued by the defendants as it was the subject of the deed of compromise and should be struck out.
- [20] Ms Dang lodged a caveat on the Esk property on 3 June 2008. By their counterclaim the defendants seek compensation for alleged wrongful lodgement of the caveat. The plaintiffs defend the counterclaim on the basis that such claim was compromised by clause 2.3 of the deed of compromise. That is correct and the counterclaim should therefore be dismissed. In any case, the defendants did not adduce any evidence relevant to matters pleaded as causing them loss from the lodgement of the caveat.
- [21] Submissions were ultimately made on behalf of the defendants that, by reason of the marriage of their son to Ms Dang's sister, there was a family relationship between the plaintiffs and the defendants and family relationships are different to a binding contract. These submissions are not referable to any specific pleaded defence. The existence of the relationships is the context in which the transactions occurred and the evidence is evaluated.

Evidence of Mr Nguyen

- [22] Although Mr Nguyen can speak some English, he gave evidence with the assistance of an interpreter in the Vietnamese language.
- [23] After Mr Nguyen accompanied Mr Condo to the Esk property, Mr Condo told Mr Nguyen that he wanted \$300,000 from auctioning the Esk property and had refused an offer of \$270,000.
- [24] In August 2002 Mr Nguyen was interested in buying a farm at Waikerie in South Australia. He talked about it with Mr Condo. It was a stone fruit farm. Mr Condo told him that stone fruit was hard work, compared to grapes and suggested that he come into the Esk property in partnership. Usually on weekends Mr Nguyen went over to Mr Condo's place for dinner and they had many conversations about the Esk property. Mr Nguyen made an offer to Mr Condo that if the Esk property was worth \$300,000, then he would be prepared to pay \$140,000 for a half-share. Eventually, Mr Condo agreed to let Mr Nguyen have a 50 per cent share of the property for the price of \$140,000. Mr Nguyen stated (at Transcript 2-2):
"He did mention to me that in the first two years while we were setting up the correct finance, there won't be any income and that my contribution will be towards the setting up of the farm as they both don't have any money. And while we're waiting for the farm to be established, I could grow some vegies which will be up to me."
- [25] Mr Nguyen wanted Mr Condo to attend to the paperwork for the transfer of half the share of the property to him and he would apply for a loan with the bank to pay him the lump sum of \$140,000, but Mr Condo suggested that the fees for the transfer

would be a lot and it was better to use that money in investing in the establishment of the vineyard. Mr Nguyen (at Transcript 2-4) said that Mr Condo mentioned to him that the mortgage over the property was about \$200,000 and that he had to take on half of that which was \$100,000 and that the money that Mr Nguyen got after selling his house would be used to invest in establishing the vineyard and whatever was invested in the farm would be “split in two”.

- [26] During cross-examination, Mr Nguyen agreed (at Transcript 2-52) with Mr Condo’s proposition that the first agreement was that \$140,000 was for half the property, but when Mr Condo suggested that the plaintiffs did not have \$140,000, Mr Nguyen explained:

“No, I – at the time, I was going to get a loan, but you didn’t want me to do that. You wanted me to keep my money and use it towards investing into the farm. And not only that, you also subsequently asked us to be responsible for half of the mortgage owing on that land. ...

You told me that 140,000 will – means that half of the whole property. So after I sold the house, instead of giving you 140,000, you said no, just to give you 40,000 and the rest is half the mortgage.”

- [27] Mr Condo initially requested Mr Nguyen for the sum of \$40,000 in cash, because he needed to order the grapevines for the Esk property one year in advance. Mr Nguyen had the sum of \$30,000 in cash and Mr Condo collected it from him in August or September 2002. About a week later, Mr Nguyen had put the further sum of \$10,000 in cash together and handed that over to Mr Condo. (The defendants did not ultimately dispute the payment of \$10,000.)
- [28] The balance of the settlement proceeds from the sale of Mr Nguyen’s house of \$87,531.75 was deposited into the plaintiffs’ bank account on 22 November 2002. On 20 January 2003, Mr Nguyen withdrew the sum of \$20,000 in cash, because Mr Condo had asked him for it, as he needed it for his own purposes. (During the trial, Mr Condo admitted receiving this sum of \$20,000 which he spent on vines for the Renmark property.) After the plaintiffs had sold their house in Renmark, Mr and Mrs Condo invited them and their family to stay at their place, until the tenants in the Esk property had moved out.
- [29] From the time that Mr Nguyen arrived at the Esk property, he cleaned up the farm in preparation for planting the grapevines on the area of 10 acres set aside for the purpose. Soon after arrival, the plaintiffs paid a neighbour around \$3,000 to clear and bulldoze part of the Esk property. After the clearing of the land for the vineyard, Mr Nguyen reserved another two acres of the Esk property for the growing of okra.
- [30] On 12 June 2003 the plaintiffs deposited \$15,850 to the defendants’ bank account, so Mr Condo could buy a tractor for them to use at the Esk property.
- [31] The plaintiffs made a payment of \$23,000 to the defendants’ account on 5 August 2003 to be used to acquire posts, frames and other equipment for the grapevines at

the property. The next day the plaintiffs deposited \$6,000 to the defendants' account that was to purchase trellis wires for the grapevines.

- [32] The first vines were planted on the Esk property in October 2003. Mr Condo came up to the Esk property for a couple of weeks to assist with the planting of the vines.
- [33] In relation to making payments on account of the defendants' mortgage, Mr Nguyen explained (at Transcript 2-24):
“During the first year, all my money was invested into the farm, and I ran out of money so I discussed with Mr and Mrs Condo for them to pay the mortgage in the first two years, and subsequently, they did make the repayments for the first 18 months. And then we made the next 18 months repayments. And then afterwards I told him that I only pay half of that bill.”
- [34] The plaintiffs produced cheque butts (included in exhibit 15) that showed they made payments to the defendants' account for the purpose of meeting the defendants' monthly mortgage payments between 1 November 2004 and 14 March 2006 for a total sum of \$25,550. The payments were usually either \$1,430 or \$1,500. The last payment made by the plaintiffs was a half payment of \$750 on 14 March 2006. After that payment, Mr Nguyen asked Mr Condo again for the transfer of the title to go ahead, and when it did not happen “things went bad so it's been dragging on, and I wasn't happy so I stopped the repayments”.
- [35] The plaintiffs paid for almost all the fertilisers, pesticides and electricity used at the Esk property from the time they arrived until they left the property. The accounts for fertilisers and pesticides purchased from Landmark (Qld) Limited and Elders Limited comprise exhibit 10. They are the accounts that related to the vineyard only. The total amount paid to Landmark by the plaintiffs was \$44,725.21 and the total amount paid to Elders was \$23,140.13.
- [36] Although the plaintiffs are not claiming for the electricity accounts paid by them, the electricity bills in exhibit 11 show the electricity to the property was connected in Mr Nguyen's name in April 2013 and the last account sent to and paid by him was for electricity consumed to 26 July 2006.
- [37] The plaintiffs are claiming for the payment they made to an electrician on 14 July 2003 of \$539 (exhibit 12) for reconnecting the pump in the shed to drive the irrigation system.
- [38] In March 2004 Mr Nguyen proposed to Mr Condo that he would build some greenhouses on the Esk property for which a council approval was required. Mr Condo responded “you do whatever you want”. Mr Nguyen paid \$3,960 to his neighbour to level the property to create a pad for the greenhouses. Mr Nguyen estimates the cost of the steel, some of which he purchased for the steel frame for the greenhouses for which he paid cash and some of which he obtained from friends, at about \$30,000. Mr Nguyen was able to produce the receipts for other expenses incurred in the construction of the ten greenhouses. These included the sum of \$9,202.60 for shade cloth, plastic materials and the like (exhibit 16), additional steel materials at a cost of \$1,651.45 (exhibit 17), transport costs of \$396

for materials used in the greenhouses (exhibit 18), \$3,553 paid to APack Pty Ltd for mesh and wiring (exhibit 19), \$344 paid to the Esk Shire Council for building permit application fees (exhibit 20), sand and concrete for the base of the greenhouses costing \$100 (exhibit 21), and another \$520 on sand, concrete and pebbles (exhibit 22).

- [39] The plaintiffs' first crop was tomatoes. It was not successful. In subsequent years they planted cucumbers.
- [40] Mr Nguyen purchased a cool room in September 2004 for keeping the grapes. It cost \$8,000 (exhibit 13). He paid \$7,000 and Mr Condo paid \$1,000.
- [41] The plaintiffs paid \$630.30 to an electrician on 9 February 2005 (exhibit 14) for rectifying the three phase electricity supply in the shed.
- [42] The first harvest of grapes was in early 2005. The vineyard had its second harvest in December 2005 and January 2006.
- [43] Mrs Condo told the plaintiffs in 2005 that they had to pay half the rates and Ms Dang attended to that.
- [44] The defendants' son Paul Condo moved into the Esk property in May 2006.
- [45] On 10 July 2006 the defendants arrived to take up residence on the property. Soon after Mr Condo returned to Renmark and Mrs Condo remained to help with pruning the vines.
- [46] Mrs Condo signed a notice to the plaintiffs to leave the property dated 18 July 2006 (exhibit 33).
- [47] When Mr Condo returned to the property, Mr Nguyen went to the property on 9 October 2006 and used an MP3 recording device to record the discussion. (The recording is exhibit 2 and the transcript of the recording is exhibit 3.)
- [48] The recording was played during the trial. (The point is made on behalf of the defendants that Mr Nguyen knew that he was recording the conversation and had the opportunity to take care in what he said. The importance of the recording is not the content of Mr Nguyen's statements, but the assertions made by Mr Condo, on which he was cross-examined at the trial. I listened to Mr Condo in the course of the trial as his own advocate and in giving evidence and there is no reason to doubt the authenticity of the recording in respect of what he said. Many of the statements made by Mr Condo during that recording were echoed by his evidence at the trial.)
- [49] The plaintiffs ceased working on the property in December 2006.

Evidence of Ms Dang

- [50] Ms Dang also gave her evidence with the assistance of an interpreter. By 2005 Ms Dang stated that she and Mr Nguyen did not have money for their daily living expenses and they were having to find funds to pay the defendants' mortgage of about \$1,500 each month. Ms Dang signed a Centrelink form on 3 February 2005 (exhibit 28) that required a declaration from the landlord. Mr Condo signed that form on 3 February 2005 as landlord confirming that the details relating to Ms Dang contained in that form that showed rent being paid of \$1,500 per month for the Esk property was true and correct.

Evidence of Mr Condo

- [51] Mr Nguyen asked Mr Condo about a property in Waikerie that he was proposing to purchase for \$185,000. He told Mr Nguyen that Waikerie was prone to frost and that he was taking big risks in growing stone fruit. He told him that he was proposing to put grapes on the Esk property and asked Mr Nguyen if he would be interested to develop the Esk property as a vineyard. There would be an advantage in growing grapes in Esk because they would be harvested two to three weeks earlier than Mildura.
- [52] Mr Condo had purchased the Esk property for \$300,000 with the assistance of a loan secured by a mortgage over the property and spent money in putting three phase wire underground to the sheds and putting in irrigation in the form of a pump and pipeline from the dam to where the vines were to be planted. Mr Condo agreed with Mr Nguyen for Mr Nguyen to pay \$140,000 for coming into the Esk property. One of the reasons Mr Condo "put" Mr Nguyen on the Esk property was that he was a hard worker. Mr Condo said that the sum of \$140,000 was for half of the property and the house was left out, as the defendants were paying for the mortgage at the time and Mr Nguyen was happy to do that. Mr Condo asserted (at Transcript 3-45) that \$140,000 was what he wanted for half the property "because the way I worked it out was, when – the way we worked it out together was that the house would remain – me and I'd pay for the mortgages and that the property itself was 280,000, which – half of that was 140 and that's how we worked it out." Mr Condo agreed to transfer the half-share in the property to the plaintiffs when the sum of \$140,000 was paid and they "were supposed to go halves in everything together".
- [53] In exhibit 2, Mr Condo is recorded as explaining to Mrs Condo "what the deal was". He said "Half the house, half the land. Right. Lee to grow whatever vegetables that he wants ... and 50/50 on the grapes you get – that's what you get. Just the grapes. Half." When cross-examined on that statement, Mr Condo explained at Transcript 3-53 that "... it would have been only for the first two years, because that's what – what I maintained all the time. Because I was expected after the first two years then we'd go half each, but it went four years. And then when he didn't – he didn't want – he – Mr Tien didn't want to go halves in anything. ... he just wanted half of the property." Mr Condo also acknowledged (at Transcript 3-53) that the deal that he first made with Mr Nguyen was that they went halves, but that did not eventuate, because Mr Nguyen was putting money in gradually. Mr Condo clarified (at Transcript 3-61) that there was not a two year cap on making money from the greenhouses, but that the two year cap applied to paying for the purchase of the half-share in the property. Mr Condo gave no evidence about any conversation he

had with Mr Nguyen about payment of the sum of \$140,000 by two payments of \$70,000 each.

- [54] After the plaintiffs sold their Renmark property, Mr Condo helped the plaintiffs move their belongings to the Esk property. The plaintiffs stayed in the shed on the property for three or four weeks until the tenants moved out of the house on the property, and then they moved in “rent free”. Although Mr Condo had previously cleared the land where the vineyard was to be established, there was about 18 months of scrub regrowth that had to be cleared again. Mr Nguyen got a grader in to clear the regrowth.
- [55] Mr Condo told Mr Nguyen that he could grow vegetables on part of the land (which is shown as “vege patch” on exhibit 25) until they started on the vineyard and suggested that he grow okra.
- [56] Mr Condo spent three weeks assisting Mr Nguyen to put the posts, strainers and vines in for the vineyard.
- [57] In addition to the first “vege patch”, Mr Nguyen grew vegetables in between the vines because it was good to make use of the sprinkler system and in another “vege patch” shown on exhibit 25.
- [58] Mr Condo conceded that Mr Nguyen had given him “a certain amount of money”, but (at Transcript 3-43) he promised Mr Nguyen that whatever he had given Mr Condo, he could take that first out of any profits that came off the property and that was why Mr Condo had given him the land to grow the vegetables and make money and survive. Mr Condo’s complaint (at Transcript 3-43) was that the plaintiffs had the land for four years and the defendants received nothing for it.
- [59] Although Mr Condo found the tractor and purchased it with the plaintiffs’ money, it was bought for Mr Nguyen to use.
- [60] By the time Mr Nguyen and Mr Condo had the discussion on 9 October 2006, the plaintiffs had bought another property. That was of concern to Mr Condo who “wanted him off the property because he went and bought ... another property with the money he made ... on [the Esk] property and that – well, that didn’t worry me one bit, but ... when he didn’t want to work there any more ...” (at Transcript 3-74).
- [61] The mortgage payments paid by the plaintiffs in respect of the property was rent and Mr Condo relied on the “papers” he signed, saying that it was rent (exhibit 28). He stated at Transcript 3-62:
- “For the first 18 months I paid for the mortgage and then – and then I asked him to pay rent on the property because I was getting – because I wasn’t receiving any money from the property at all and I had to pay the mortgage, so I asked him to pay at least rent and that’s how it went. And then he stopped – after the 18 months he stopped paying that. He paid that for 18 months and that went to the – to the – it went straight to the mortgage.”

Mrs Condo

- [62] Mrs Condo gave little evidence that was relevant. Mrs Condo asserted (at Transcript 3-79) that the tractor which was left on the Esk property was the plaintiffs and that it was not used by the defendants. Despite the defendants' admission in their defence that on 18 July 2006 they served the plaintiffs with the notice to leave pursuant to the *Residential Tenancies Act* 1994 and ordered the plaintiffs to vacate the Esk property, she claimed that the notice was to have them leave the house, but not the property, on the basis that she was unhappy about the state of the house. The state of the house has never been an issue on the pleadings.

Valuation of the Esk property

- [63] The valuation report of Mr Innes (exhibit 6) was not challenged by the defendants. Apart from inspecting the property, Mr Innes also spoke to both Mr Nguyen and Mr Condo. Mr Innes values the Esk property as at 5 October 2007 as \$470,000 (exclusive of GST) and, on the basis of what he was advised by Mr Nguyen and Mr Condo about the state of the property as at 31 December 2002, values it at that date as \$270,000 (exclusive of GST). Mr Innes' independent research suggested that the cost to replace the greenhouses would be about \$112,000 including labour and the depreciated value of the greenhouses at the date of valuation would be about \$65,000.

Other witnesses

- [64] I have summarised the relevant parts of Mr Brown's evidence in dealing with the history of the proceeding. There was no serious challenge by the defendants to Mr Brown's evidence which was reflected by the court documents and correspondence included in exhibit 34. The plaintiffs called Ms Washband who worked for the Esk Shire Council and was able to confirm that the rates of the Esk property of \$3,233.55 were paid by a Vietnamese woman and Italian woman on 13 December 2005. The evidence called by the defendants from Vincent Condo, Paul Condo and Bevan McLeod was irrelevant to the matters in issue on the pleadings.

What was the agreement between the plaintiffs and the defendants?

- [65] Although Mr Nguyen has some problems with the English language, he is a shrewd and enterprising businessman. There was consistency in Mr Nguyen's evidence and the plaintiffs' claims supported by the written records of many of their expenditures that, despite the effluxion of time since the critical events occurred between 2002 and 2006, convinced me that Mr Nguyen's evidence was largely reliable. There are a couple of small matters on which I was not satisfied by the plaintiffs' evidence in relation to expenditures, but I deal with those when analysing the claims for those expenditures. Both Mr Nguyen and Mr Condo made a mistake in not properly formalising their arrangement in respect of the Esk property. There was good faith on the part of both parties at the outset in their dealings, but the plaintiffs were more successful with growing vegetables on the Esk property than the vineyard that had been the defendants' plan for the property. There was a tendency on Mr Condo's part in the course of giving evidence to rationalise what the transaction should have been with the benefit of knowing what eventuated with the plaintiffs' success in

growing vegetables and that appears to have affected his recollection of relevant discussions in some respects. I therefore have generally not accepted Mr Condo's evidence where it differs from Mr Nguyen's evidence.

- [66] The plaintiffs were in the fortunate position in August 2002 in anticipating being able to invest the proceeds from their Renmark property in buying another property. The defendants needed funds for their farming properties in South Australia and Esk. I am satisfied that Mr Nguyen would not have provided the funds he did to the defendants or expended the funds he did on the Esk property, unless he had entered into the arrangement with Mr Condo on behalf of the defendants that they would transfer a one-half interest in the Esk property to the plaintiffs on payment of \$140,000. Mr Condo kept putting off the formal transfer of the ownership, but had been prepared to make such arrangement, in order to obtain the benefit of the plaintiffs' funds and their labours on the Esk property.
- [67] To the extent that it was asserted by the defendants in this proceeding that the arrangement in respect of the transfer of a one-half interest in the Esk property to the plaintiffs was exclusive of the house, there was no such qualification conveyed by Mr Condo during the conversations in which he made the arrangement with Mr Nguyen, as Mr Condo explained to Mrs Condo on 9 October 2006 (exhibit 2). The assertion that the arrangement excluded the house was an afterthought by the defendants in defending this proceeding and was appropriately abandoned during the submissions.
- [68] The parties contemplated they would establish the vineyard on the property and the plaintiffs would take a one-half interest in the property and share the profits from the vineyard. It was also common ground that the plaintiffs would use their funds for meeting the expenditures to get the vineyard established and provide their labour for that purpose.
- [69] It is consistent with what both Mr Nguyen and Mr Condo recalled about the discussion on the original arrangement that the parties contemplated that it would take about two years to establish the vineyard, but the evidence does not support any finding that it was a condition of their arrangement about the purchase of the one-half interest by the plaintiffs that the purchase price had to be paid within a specific period of two years or in two annual payments of \$70,000 each. It was anticipated by the parties that, after the initial payments to the defendants totalling \$60,000 before the plaintiffs moved to the Esk property, the plaintiffs would be spending their money on establishing the vineyard on arrival at the Esk property and, implicitly, that the balance of the purchase price of \$140,000 would be paid in establishing the vineyard. It is common ground that it was part of the arrangement that the defendants permitted the plaintiffs to grow vegetables on the Esk property to accumulate profits to assist in paying the purchase price of \$140,000.
- [70] The matter was complicated by the fact that the original arrangement negotiated in late 2002 was modified as the parties reached new arrangements on aspects of their dealings. A significant variation to the arrangement was the approval of the defendants to the construction of the greenhouses at the plaintiffs' cost for the purpose of growing vegetables for the plaintiffs' sole benefit.

- [71] The original arrangement between the parties had the plaintiffs giving the defendants (and themselves) the benefit of their labour in establishing the vineyard. The plaintiffs' case is that any payments made by them for establishing and maintaining the vineyard were to be treated as payments on account of the purchase price of \$140,000. It was submitted by Mr English of counsel on behalf of the defendants that was unfair to the defendants, as if the plaintiffs were acquiring a one-half interest in the property, they would get the benefit of one-half of their expenditures in any case as owners and it should only be one-half of their expenditures that came off the purchase price. There is a superficial attraction about that approach, but it overlooks what the parties had arranged between themselves. Apart from spending their funds on the Esk property, the plaintiffs were making a significant contribution by using their labour (without cost) in undertaking the hard work that was required to establish and maintain the vineyard (with a little help from Mr Condo when he visited the property). The approach advanced on behalf of the defendants in submissions, as to how to account for the plaintiffs' expenditures on the vineyard, must be rejected in the light of the parties' arrangement to the contrary that what was spent by the plaintiffs was to be credited towards the purchase price and implicitly gave credit to the plaintiffs for their labour in establishing the vineyard.
- [72] The rationale behind the original arrangement did not endure, however, when less labour was required of the plaintiffs for the vineyard, after the vineyard was established, and the plaintiffs were using a significant portion of the property to generate income from their separate enterprise of growing vegetables in gardens on the property and in the greenhouses.
- [73] There was some confusion in the evidence about the significance of the defendants' existing mortgage on the Esk property. The defendants had a mortgage over the Esk property, as that was how they financed their purchase. The purchase price agreed between the plaintiffs and the defendants for a one-half share of the property represented half the value of the property at the time. The defendants had to repay their loan under the mortgage to have the equity that enabled them to sell one-half share of the property to the plaintiffs for \$140,000. I accept that at the outset one of the ways Mr Nguyen wanted to pay the purchase price was to give the defendants \$40,000 in cash and pay \$100,000 off the mortgage. The payment in that manner of \$100,000 was simply a means of making the payment to the defendants and not an assumption of liability by the plaintiffs of the defendants' mortgage. I do not place any significance on Mr Condo's reference to "your mortgage" during the sometimes heated discussion with Mr Nguyen on 9 October 2006 (exhibit 2).
- [74] Neither Mr Nguyen nor Mr Condo gave any evidence about any discussion before the plaintiffs relocated to the Esk property concerning whether any rent would be paid by the plaintiffs when the plaintiffs did relocate nor about any contribution by the plaintiffs to the defendants' monthly mortgage repayments. The conversation about which Mr Nguyen gave evidence concerning payments under the defendants' mortgage occurred during the first year on the property when the plaintiffs were exhausting their available cash largely in establishing the vineyard.
- [75] There was a lack of any detailed evidence of the conversations that preceded the commencement of the plaintiffs paying the mortgage repayments on 1 November

2004. Some discussion must have taken place for the plaintiffs to commence making regular deposits to the defendants' account equivalent to the defendants' mortgage repayments. That occurred at a time when the defendants were receiving no income from the vineyard, but the plaintiffs were receiving all the income from growing vegetables. The completion and signing of the Centrelink form (exhibit 28) took place three months after the plaintiffs had commenced making the payments to the defendants' account that corresponded with the mortgage repayments. I infer that it was a consequence of the making of those payments, but it does not necessarily assist in characterising the status of the payments as between the plaintiffs and the defendants. It is likely that Mr Condo's recollection that he asked for the repayments to be made by the plaintiffs, because the defendants were not receiving any income from the property is accurate. The payment on one occasion of one-half of the rates followed a request made by Mrs Condo for that to happen.

- [76] I cannot find there was a meeting of the minds between the parties as to the purpose of the payments to the defendants on account of the mortgage and the payment of one-half of the rates paid on 13 December 2005, but I find those payments implicitly related to the change in the circumstances of the parties, as a result of the growth in the plaintiffs' enterprise of growing vegetables. I am therefore not satisfied that the plaintiffs have shown that those payments were made on account of their original arrangement for the purchase of the one-half share of the Esk property.
- [77] Although the defendants admitted in their defence that the tractor was purchased by Mr Condo with the plaintiffs' funds, the admission was qualified in that the defendants allege that the tractor was purchased on the plaintiffs' behalf and, impliedly, that it was not an expenditure that counted towards the plaintiffs' payment of the purchase price for the one-half share of the property. That is consistent with Mr Condo's evidence that Mr Nguyen bought the tractor for himself and Mrs Condo's evidence that the tractor belonged to the plaintiffs. It is also consistent with the demand made by the plaintiffs' solicitors in their letter dated 15 December 2006 (exhibit 31) for the return of the tractor on the basis of the admission made in the defence by the defendants. The defendants refused, however, to allow the tractor to be removed (exhibit 32). In those circumstances, the plaintiffs may have had other rights against the defendants to recover the tractor or damages for its detention, but it is not appropriate to give the plaintiffs a credit for the payment of the tractor as part of the purchase price of their interest in the Esk property.
- [78] Although the plaintiffs are unable to produce receipts for the amounts paid for the steel frame for the greenhouses, the estimated amount spent of \$30,000 in conjunction with the expenses for which there are receipts of \$19,727.05 is consistent with the nature of the ultimate construction and the replacement cost estimated by the valuer.
- [79] The arrangement about the greenhouses was subsequent to the original arrangement between the plaintiffs and the defendants, but the plaintiffs would not have undertaken the construction of the greenhouses on the Esk property had they not had the expectation of acquiring a one-half interest in the Esk property.

[80] It is apparent from the correspondence which passed between the parties' solicitors in November 2006 (exhibits 29 and 30) that the plaintiffs endeavoured to negotiate with the defendants for the removal of the greenhouses from the Esk property, but the defendants took the position that the greenhouses were fixtures and refused to allow the plaintiffs to remove them. From Mr Nguyen's evidence on how the greenhouses were affixed, they are fixtures. The plaintiffs are still entitled to compensation for them, in view of the circumstances in which they were constructed on the Esk property.

[81] I find that the plaintiffs have proved that the following expenditures were made by them in reliance on the defendants' assurances that they would transfer a one-half share in the Esk property to the plaintiffs:

Description	Payment
Payment in August/September 2002 to secure purchase of grapevines	\$30,000
Balance for purchase of grapevines	10,000
Payment made to Mr Condo on 20/1/03	20,000
Clearing of property by neighbour	3,000
Payment on 5/8/03 for posts, frames etc.	23,000
Payment on 6/8/03 for trellis wires	6,000
Fertilisers and pesticides purchased from landmark	44,725
Fertilisers and pesticides purchased from Elders	23,140
Payment to electrician on 14/7/03 to reconnect pump	539
Contribution to purchase of cool room	7,000
Payment to electrician on 9/2/05 to rectify three phase supply	630
Expenditures on greenhouses	49,727
	\$217,761

The relief sought by the plaintiffs

[82] The plaintiffs rely on the equitable remedies that are available by the application of equitable estoppel when one party makes a legally unenforceable promise to grant a proprietary interest in land to another that induces that other to act in reliance on the promise: *Giumelli v Giumelli* (1999) 196 CLR 101 at [35]-[36]. The plaintiffs have shown that they acted to their detriment in relying on the promise of the defendants to transfer them a one-half interest in the Esk property and that in the circumstances it is unconscionable for the defendants to deny the plaintiffs are entitled to a remedy, as a result of the expenditures the defendants induced them to make to the defendants and in respect of the Esk property.

[83] Although the plaintiffs seek as the primary relief an order requiring the defendants as constructive trustees to transfer to them a half-share in the Esk property or such other share in the Esk property as the court determines is held by the defendants on constructive trust for the plaintiffs, the plaintiffs themselves recognised by the end of 2006 that their relationship with the defendants had broken down and they pursued their other farming interests. The delays in the prosecution of the plaintiffs' claim, the fact that the defendants continued to work the property and have borne all the outgoings since 2006, and the compromise by the parties of their claims against each other for profits made from the sale of agricultural produce from the Esk property do not favour the imposition of a constructive trust over the property in the plaintiffs' favour to reflect an appropriate interest in the property.

- [84] The plaintiffs seek as alternative relief equitable compensation for the expenditures made by them on the basis of their arrangement with the defendants and in establishing the greenhouses secured against the Esk property by way of equitable charge.
- [85] Mr Travis of counsel for the plaintiffs notes that their claim for compensation relevantly does not make any adjustment for that portion of the electricity that was attributable to the vineyard. In view of my findings that the amounts spent by the plaintiffs on the tractor, the repayments under the defendants' mortgage and rates were not payments on account of the plaintiffs' arrangement with the defendants to purchase a one-half interest in the Esk property, the amount of equitable compensation should be \$217,761.
- [86] I have considered whether anything should follow from the fact that the amount of equitable compensation (apart from the expenditure on the greenhouses) exceeds the original purchase price of \$140,000. These expenditures totalling \$168,034 were pursuant to the original arrangement, even though payments by the plaintiffs in respect of the maintenance of the vineyard continued for a longer period than the parties had anticipated at the outset of their arrangement. By the time they were all made, they were still less than the notional value of a half interest in the Esk property on the basis of Mr Innes' valuation. The parties did not get to the next stage of their original arrangement of equally sharing income and expenses, because the defendants did not transfer a one-half interest in the property to the plaintiffs and the parties' relationship broke down. There is no reason to confine the plaintiffs' equitable compensation claim (apart from the greenhouses) to a maximum of \$140,000.
- [87] The plaintiffs also seek interest on the total amount of equitable compensation from 31 December 2006.

Interest

- [88] The interest that is claimed by the plaintiffs is under s 47 of the *Supreme Court Act* 1995 (Qld) and its successor s 58 of the *Civil Proceedings Act* 2011 (Qld) at 10 per cent per annum for the period from 31 December 2006 until judgment. The defendants rely on the discretionary nature of the award of interest: *Serisier Investments Pty Limited v English* [1989] 1 Qd R 678, 680. They contend that as there was a delay of over seven and one-half years between the commencement of the proceeding and the trial, it is appropriate to deny the plaintiffs interest for some part of the period on the basis of unreasonable delay in prosecuting the claim.
- [89] Many of the payments made by the plaintiffs in the expectation that they were acquiring one-half of the Esk property were made in 2003 and 2004, but the plaintiffs are seeking interest only from 31 December 2006. It is apparent from exhibit 2, that Mr Condo accepted in October 2006 that the plaintiffs had spent \$130,000 on the Esk property. Notwithstanding the admissions made in the course of that recording and the acceptance during the trial by Mr Condo that the defendants had received the benefit of funds from the plaintiffs, there was no evidence of any attempt by the defendants to repay those moneys when the parties' relationship broke down and the defendants retained the Esk property.

- [90] I did consider whether there should be some part of the pre-judgment period excluded from the calculation of interest, because of the delays by the plaintiffs' lawyers between mid 2009 and the beginning of 2013. The problem is that part of that period coincided with the flooding of the plaintiffs' property in two consecutive years with the consequence that the plaintiffs were understandably focussed on recovering from the setbacks caused by the floods.
- [91] Although the plaintiffs seek interest calculated at 10 per cent per annum which coincides with the default judgment rate for most of the pre-judgment period, I propose in the circumstances to use the various rates used for calculating default judgment interest which was 9 per cent per annum from 31 December 2006 to 30 June 2007 and 10 per cent per annum from 1 July 2007 to 18 April 2013 and thereafter at the default judgment rate calculated in accordance with Practice Direction No 7 of 2013 from 19 April 2013 to the date of judgment which ranges between 6.5 per cent and 7 per cent per annum.
- [92] The purpose of the statutory interest is to compensate the plaintiffs for being kept out of the moneys represented by the judgment sum: *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at [59]. Despite the delays by the plaintiffs in the latter part of the proceeding, the defendants have not repaid the funds in respect of which they obtained benefits prior to 31 December 2006. On the basis of the interest rates I propose to apply to calculate interest, it is appropriate to exercise the discretion not to exclude any part of the pre-judgment period from the calculation of interest.
- [93] I calculate the statutory interest on the equitable compensation of \$217,761 to be \$157,119.
- [94] The payments made by the plaintiffs that are recoverable by them from the defendants as equitable compensation were made in expectation of obtaining a proprietary interest in the Esk property. Although I have declined to impose a constructive trust over the Esk property in the plaintiffs' favour to reflect their interest in the property, it is still appropriate that they get the benefit of an equitable charge on the property for the equitable compensation for the payments they did make in the expectation created by the defendants' promise to transfer them a one-half interest in the Esk property.

Orders

- [95] The orders I propose to make are:
1. Judgment for the plaintiffs against the defendants for equitable compensation in the sum of \$217,761 together with interest of \$157,119 from 31 December 2006 to the date of judgment.
 2. It is ordered that payment by the defendants to the plaintiffs of the total amount of the equitable compensation and interest of \$374,880 is charged on Lot 7 on RP 177728 in the County of Cavendish Parish of Esk.
 3. The defendants' counterclaim is dismissed.
 4. Adjourn the issue of the costs of the proceeding to a date to be fixed.

- [96] I will give the parties an opportunity to consider these reasons and endeavour to agree on the orders for costs or, failing agreement, on a timetable for the exchange of written submissions on costs, or listing the proceeding for oral submissions on costs. To facilitate that, I will adjourn the issue of the costs of the proceeding to a date to be fixed.