SUPREME COURT OF QUEENSLAND

CITATION:	*Brice v Chambers & Ors* [2014] QCA 310
PARTIES:	**ROBERT ANDREW CREETH BRICE** (appellant) **v** **JOHN CHARLES CHAMBERS** (first respondent) **DORRIGO PROPERTY PTY LTD** ACN 127 862 033 (second respondent) **HARROD HOLDINGS PTY LTD** ACN 009 611 278 (third respondent) **SUSAN MARGARET CHAMBERS** (fourth respondent)
FILE NO/S:	Appeal No 3839 of 2014 SC No 1317 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2014
JUDGES:	Muir JA and Philippides and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**The appeal be dismissed with costs and the cross-appeal be dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where the first respondent is a qualified veterinarian interested in the breeding and raising of Wagyu cattle – where the appellant and the first respondent had been friends for some years by the time of the dealings between them that gave rise to dispute – where, in late 2005, the appellant telephoned the first respondent concerning the interest of his son-in-law in cattle raising and marketing – where there were dealings between the first respondent and the appellant and his son-in-law concerning the purchase of semen straws and embryos – where the appellant, his son-in-law and the first respondent

met and discussed a proposed purchase of half of the first respondent's Wagyu herd – where there were three telephone conversations and one meeting between the appellant and the first respondent which were found to have constituted an agreement to purchase and a variation – whether the appellant and the first respondent intended to make a concluded, legally binding agreement for the sale and purchase of half of the first respondent's female breeding herd of Wagyu cattle in the course of two telephone conversations in August 2007 – whether the parties succeeded in entering into a legally binding agreement

INTEREST – RATE OF INTEREST AND COMPOUND INTEREST – COMPOUND INTEREST – where the primary judge ordered that the appellant be awarded interest on the sum of $1.5m in the amount of $1,019,920.85 up to the date of judgment – where there was a dispute between the parties as to whether the loan agreement provided for simple interest, as the respondents contended, or for compound interest as the appellant contended – where the time from which interest and default interest respectively commenced to be payable was also in dispute – whether the primary judge erred in his analysis and conclusions in respect of the amount of interest to be paid

Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd (2000) 22 WAR 101; [2000] WASCA 27, cited
Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540, followed
Banque Brussels Lambert SA v Australian National Industries Ltd (1989) 21 NSWLR 502, considered
Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130, distinguished
CE Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd (1993) 176 CLR 535; [1993] HCA 21, cited
Chambers v Brice [2013] QSC 232, considered
County Securities Pty Ltd v Challenger Group Holdings Pty Ltd [2008] NSWCA 193, cited
Domaschenz v Standfield Properties Pty Ltd (1977) 17 SASR 56, distinguished
F & G Sykes (Wessex) Ltd v Fine Fare Ltd [1967] 1 Lloyd's Rep 53, considered
Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd (1995) 7 BPR 14,551, followed
GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631, considered
Inland Revenue Commissioners v Muller & Co's Margarine Ltd [1901] AC 217, applied
Kitchen v HSBC Bank Plc [2000] 1 All ER (Comm) 787, considered
Lym International Pty Ltd v Marcolongo [2011] NSWCA 303, cited
Masters v Cameron (1954) 91 CLR 353; [1954] HCA 72, applied
Meehan v Jones (1982) 149 CLR 571; [1982] HCA 52, cited

Morton v Elgin-Stuczynski (2008) 19 VR 294; [2008] VSCA 25, cited
Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601, considered
Queensland Electricity Generating Board v New Hope Collieries Pty Ltd [1989] 1 Lloyd's Rep 205, followed
Upper Hunter County District Council v Australia Chilling and Freezing Co Ltd (1968) 118 CLR 429; [1968] HCA 8, considered
Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd [2011] 2 Qd R 582; [2011] QCA 150, cited
York Air Conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth (1949) 80 CLR 11; [1949] HCA 23, considered

COUNSEL: W Sofronoff QC, with G Beacham, for the appellant
D Kelly QC, with F Chen, for the respondents

SOLICITORS: TressCox Lawyers for the appellant
HopgoodGanim for the respondents

[1] **MUIR JA**: **Introduction** This appeal primarily concerns the determination of two interrelated questions. The first is whether the appellant Robert Brice and the first respondent John Chambers intended to make a concluded, legally binding agreement for the sale and purchase of half of Mr Chambers' female breeding herd of Wagyu cattle in the course of two telephone conversations in August 2007. The second question is whether they succeeded in doing so.

[2] If those questions are answered in the affirmative it is necessary to decide whether the agreement was varied in the course of discussions between the two men in an accountant's office in March 2008. There is also a question of the interest payable under a loan agreement entered into between Mr Brice as lender and the second respondent as borrower.

Events prior to the telephone conversations in which the subject agreement was alleged to have been made

[3] The first respondent, Mr Chambers, is a qualified veterinarian who was also interested in the breeding and raising of Wagyu cattle. Mr Chambers' practice was carried on through a business and by himself and his wife as trustees for the Darwin Veterinary Hospital Superannuation Fund. The premises from which the practice was conducted was owned by the third respondent, a company controlled by Mr and Mrs Chambers and was referred to as the Darwin Veterinary Hospital.

[4] Mr Brice and Mr Chambers had been friends for some years by the time of the dealings between them in 2007 and 2008 that gave rise to the disputes the subject of these proceedings. They trusted one another.[1] The professional relationship between the two men commenced in about 1990 when Mr Brice was a principal of the accounting firm AH Jackson & Company (AHJ). Mr Brice retired from the firm on 30 June 2004. Ms Catherine Zammit commenced employment as an accountant with AHJ in December 1999 and, from about that time, worked on Mr Chambers' affairs under Mr Brice's supervision until he retired. Ms Zammit became a partner in the firm on 30 June 2009.

1 *Chambers v Brice* [2013] QSC 232 at [166].

[5] Part of the work done by AHJ for Mr Chambers in which Mr Brice was involved was the incorporation of a trustee company, DVH Pharmaceutical Pty Ltd (DVH), to conduct that part of the veterinary practice involving the sale of pharmaceutical products. DVH purchased a commercial property in Smith Street, Darwin in January 2005 for $2,000,000, $1,700,000 of which was borrowed on the security of a mortgage over the Smith Street property and a mortgage over the Chambers' family home.

[6] In late 2005, Mr Brice telephoned Mr Chambers concerning the interest of his son-in-law, Mr Norbury Schwennesen, in cattle raising and marketing. At Mr Chambers' suggestion, he and Mr Schwennesen visited a rural property, *Bogandilla* near Dulacca in January 2006. There the men met Mr Takeda, a significant figure in the Wagyu breeding industry and inspected the Wagyu breeding business Mr Chambers conducted on the property. After that time, Mr Chambers provided advice to Mr Schwennesen relating to the breeding and raising of Wagyu cattle. By early 2006, Mr Chambers had entered into a memorandum of understanding with other parties relating to the fattening of Wagyu cattle in a feedlot and the subsequent marketing of meat under the label "Queensland Longfed Wagyu" (QLW).

[7] In May 2006 Ywagyu Pastoral Co Pty Ltd (YPC) was incorporated and, at about that time, the Ywagyu Pastoral Co (Ywagyu) partnership was established between a trust of which Mr Schwennesen and his wife were trustees and a company which was trustee of the RAC & JD Brice Pastoral Trust. YPC was appointed manager of the partnership.[2]

[8] Throughout 2006, Mr Chambers continued to provide substantial advice in relation to the breeding, raising and sale of Wagyu cattle to Mr Schwennesen.[3] In 2006, there were dealings between the Chambers' interests on the one hand and the Schwennesen and Brice interests on the other concerning the purchase of semen straws.[4] The dealings included an agreement between Ywagyu and Mr Chambers for the purchase of 200 Wagyu embryos and a visit by Mr Schwennesen to Mr Chambers in Darwin to observe the use of software in Mr Chambers' Wagyu business.

[9] In October 2006, Mr Brice purchased *Lockerbie*, a property near Beaudesert. Mr Chambers agreed with Mr Brice to agist some of his cattle on *Lockerbie* for an agreed agistment fee and other payments relating to the management of the property. The first agisted cattle arrived at *Lockerbie* in October 2006.

[10] On 1 June 2007, Mr Brice, Mr Chambers and Mr Schwennesen travelled to Macquarie Downs for a meeting with a Mr Fitzgerald concerning the possible acquisition by Ywagyu of meat from cattle fattened there on behalf of QLW. There was a subsequent telephone conference involving Mr Brice, Mr Schwennesen, Mr Fitzgerald, Mr Chambers and others in relation to the proposed sale of meat to Mr Schwennesen and another.[5]

[11] Early in August 2007, Mr Brice and Mr Schwennesen met with Mr Chambers at the Darwin Veterinary Hospital where they discussed a proposed purchase of part of Mr Chambers' Wagyu herd. One matter discussed was the valuation of the herd. Mr Schwennesen demonstrated the use of a cash flow model in that regard. Mr Chambers expressed the view that his full blood Wagyu breeding cows were worth approximately $10,000 a head.

---

2 *Chambers v Brice* [2013] QSC 232 at [20].
3 *Chambers v Brice* [2013] QSC 232 at [21].
4 *Chambers v Brice* [2013] QSC 232 at [22].
5 *Chambers v Brice* [2013] QSC 232 at [27].

[12] Mr Chambers' evidence was to the effect that Mr Brice said at the Darwin meeting that if a substantial number of animals were involved in the purchase a premium would attach because the number would permit a viable business operation. Mr Chambers also gave evidence that Mr Brice said that he wanted to identify goodwill in relation to the possible sale and suggested three years as a period over which information was to be transferred to himself and Mr Schwennesen. Mr Brice did not accept that those things were said.[6] On this visit Mr Brice saw the Smith Street property and appreciated that it was not lettable in its present condition.[7]

[13] On 19 August 2007, Mr Schwennesen sent an email to Mr Brice in which he calculated prices per head for Mr Chambers' cattle on various assumptions as to numbers to be sold and purchased. The email included the statement, "John was talking $10k per head over 470 so ½ would be 2.35m – NB not including Bulls or straws". Mr Schwennesen emailed Mr Chambers on 26 August 2007 attaching a document valuing the whole of Mr Chambers' herd at $5,374,947 and half at $2,687,473.27. The document set out the basis for the calculation. The values provided in the document were the same as those communicated to Mr Brice in the email of 19 August 2007.[8]

[14] It is common ground that there were then three telephone conversations between Mr Brice and Mr Chambers (the August conversations). Mr Chambers swore that the first of the conversations took place just after he received the 26 August 2007 email from Mr Schwennesen. His relevant evidence-in-chief in this regard is as follows.

The first conversation

> "[Mr Brice] was interested in half the female breeding herd, but he suggested to me that he'd be prepared to pay 2.5 million … that was calculated basically on the number of cattle and Mr Schwennesen had done some valuations … The 2.5 million was to be split into a good will component of $1 million and the advantage of that, Mr Brice indicated, that it would be tax free in my hands and – and it was a component that he'd previously suggested he wanted to be able to recognise because it was information … I said to him, 'It doesn't throw on a green light for me.'
>
> … was there any discussion with Mr Brice about what was the Smith Street problem?-- Well, Mr Brice had previously come to Darwin and on the Sunday morning before he came out to – before I picked him up to come out to the veterinary hospital for the meeting we spoke about yesterday, Mr Brice and Mr Schwennesen had a walk around the central city area and they walked past the building in 61 Smith Street and it was all boarded up and Mr Brice's comments were that – it had 'for sale' and 'for lease' signs on it and he said it looks like a distressed situation there, you know, and he felt that to – in order to rent that building I would probably need to do some renovations. He suggested I might contact some real estate agents interstate, but that was – that was some – a previous conversation there."

---

6 *Chambers v Brice* [2013] QSC 232 at [28].
7 *Chambers v Brice* [2013] QSC 232 at [29].
8 *Chambers v Brice* [2013] QSC 232 at [31].

[15] It was alleged in the fifth further amended statement of claim (the statement of claim) that an agreement was reached in the course of the second and third conversations (the first agreement). Mr Chambers' relevant evidence-in-chief of the content of these conversations appears below. In some cases, the questions which elicited the evidence have been included to make the evidence more intelligible.

The second conversation

> "… the second telephone conversation … might have been a day or so [after the first]… Mr Brice suggested a figure of $1 million that would be identified as a good will component and it would be tax free in my hands as such…
>
> Was there a discussion about leasing cattle?-- Yes… There was a discussion that related to the lease – leasing of the cattle over three years and that conjoined with a loan over a similar period of time and – and that those two, those two components of the transaction could be done in either order… *What he said was it would be in effect a round robin transaction where one would wipe the other out and when brought together they would – they would be a combined transaction and they would mutualise each other, they would be offset…*
>
> As those matters were being discussed, can you recall whether you understood the tax implications of what was being proposed?-- I didn't fully understand, no… it was also discussed the lease was over three years, there was some management fees, maybe there was a mention of some money for embryos, but that telephone call needed to be cut a bit short." (emphasis added)

The third conversation

> "Mr Brice said that the million dollars goodwill was an advantage to me, but it wasn't – it wasn't an advantage to him and there was not the benefit for him that there was for me and for that reason he didn't want to look at any more than that amount of money in the goodwill … This conversation relates to half of the female breeding herd and there was mention of bull semen, but not – but no bulls – no bulls in it, just female breeding herd… The answer to that question, is there any mention of bulls and steers; bulls and steers, no…
>
> [Asked what he recalled] of the discussion of the different components of the transaction… [Mr Chambers responded] Mr Brice said that no matter – components of the transaction, he said he could pay $300,000 for the semen straws and that money would go into the super fund.
>
> Did you say anything in response to that?-- Yes, I was writing it down. Yeah, I was happy with that, yes.
>
> My question was when that price was nominated, did you say anything in response to Mr Brice?-- I acknowledged.

Can you recall what words you said to acknowledge that?-- Yes, because I was writing it down…

Was there any discussion about a price for goodwill?-- Well, the goodwill was $1 million and that was agreed on.

Why do you say it - what can you recall of the conversation which agreed upon that price?-- Mr Brice wasn't prepared to go any more than that because he said, 'John, that's an advantage for you, but there's no advantage for me.', so I accepted that.

You say, 'I accepted that.' How did you communicate that to Mr Brice? What did you say?-- I said, 'Yes.' He was going through the different points… Well, Mr Brice suggested $300,000 [for management fees] spread over three years and that'd be paid $100,000 at the end of June – June '08, June '09, June '10.

What did you say in response to that?-- Yes…

What do you recall of the discussion about embryos?-- Mr Brice said, 'I'll give you $100,000 for a hundred embryos, but you don't give me the embryos.' I don't recall much more detail than that.

How did you respond to that proposition?-- It was a 'Yes', affirmative.

… based upon what was said to you by Mr Brice over the course of the three telephone conversations which you have just given evidence about, did you have any belief as to whether you had entered into an agreement with Mr Brice?-- There was an agreement … Yes… That we had an agreement. We had reached a deal… as Mr Brice was talking I just made dot points, scribbled it down as best I could…Well, in the respects of parts I didn't fully understand and still don't. It's the structure aspects that Mr Brice was running past me; the options with regards to structure… Well, in the bottom half of the page it says, 'Harrod Holdings', then it says 'tax, not taxable', then I think a question mark, 'if liquidated, return of capital, retained earnings taxed, need to pay 16 per cent', then it has '900 plus imputation credits'. I don't really know what that's about other than the possibility that it refers to Harrods Holdings selling the veterinary hospital to the super fund, but further on, on the top right-hand side it says 'Harold Holdings keeps the vet – DVH – hospital and then 50 per cent – 50 per cent for the trust, 50 per cent for the super fund and that's secured against the land at 2 million, I just assumes relates to the land talking of buying. Then, then underneath it's got there on the right-hand side, 'Lender Andrew', underneath that again it's has got 'lease of cattle over three years', then following that line right in the centre page, back to the left-hand side, it's got 'land, lend money, before or after lease of cattle over three years'. So that's – that's – that's what we were talking of doing…

Having looked at those notes, do they refresh your memory of the third conversation?-- Yes, Mr Kelly, yeah..."

Events after the August conversations

[16] Dorrigo Property Pty Ltd was incorporated on 5 October 2007 and appointed trustee of a discretionary trust with a view to the purchase of a property at Dorrigo (Big Top). In an email from Ms Zammit to Mr Brice of 24 October 2007, Ms Zammit stated that the debt of $1,700,000 on Smith Street was "really bothering/stressing" Mr Chambers and inquired whether the debt should be reduced by the use of "funds from the sale of the business". She also sought Mr Brice's views on a proposal relating to the payment of pensions from the superannuation fund. Ms Zammit informed Mr Chambers by email on 30 October 2007 that Mr Brice was "cool with everything".[9] Ms Zammit sent Mr Chambers an email advising that the superannuation fund had a cash balance of $1,040,000; that amount "plus the $300K from the sale of the embryos" would make $1,340,000 for the purchase of the land including associated costs.[10]

[17] The reasons describe some of the activity surrounding the proposed purchase of Big Top and the proposed loan from Mr Brice to Mr Chambers in that regard:[11]

> "It is clear that in the latter part of 2007, Mr Chambers had an expectation that Mr Brice would provide money to be used towards the purchase of Big Top. On 19 November 2007, Ms Zammit sent an email to Mr Brice. The subject line referred to that purchase. The body of the document stated that Mr Chambers had asked Ms Zammit to let Mr Brice know that the vendor would like to exchange and sign the contract on 13 December, with settlement on 20 December. Mr Brice replied on 22 November 2007. The subject line contained the same reference. The text of the email simply was, 'need to confirm the no's Catherine'. Ms Zamitt's billing worksheet records a discussion on 23 November 2007 with Mr Brice, for a period of an hour. The subject is unidentified. The worksheet also records a discussion for half an hour with Mr Brice on the 26 November 2007. The subject matter was identified as 'sale of jcc Cattle Business'. On 28 November 2007 Ms Zammit sent an email to Mr Chambers, which set out the proposed terms of the loan between him and Mr Brice, including the amount ($1.5 million); the interest rate (payable annually on arrears on 1 July 2008, 1 July 2009 and 1 July 2010); the period of the loan (three years); a repayment schedule ($500,000 on 1 July 2008, 1 July 2009, and 1 July 2010); and specifying the security. The letter stated that Mr Brice had drawn a cheque for $1,500,000 payable to the Trust Account of Stubbs Barbeler, a firm of solicitors, part to be available at settlement of the purchase. The email asked whether Mr Chambers had any comments; and sought certain information if Mr Chambers agreed to the proposed security. The email envisaged that, of the funds provided by Mr Brice, $800,000 would be used for the purpose of the purchase of Big Top, and the remaining $700,000 would become available to Mr Chambers on settlement."

[18] A tax invoice dated 20 December 2007 for the sale of 911 semen straws by the superannuation fund to Mr Brice for the sum of $330,000 was prepared. Mr Brice

---

9 *Chambers v Brice* [2013] QSC 232 at [35].
10 *Chambers v Brice* [2013] QSC 232 at [36].
11 *Chambers v Brice* [2013] QSC 232 at [37].

signed a cheque for the same amount in favour of the superannuation fund on that day. Mr Chambers contended that this was pursuant to the agreement reached at the end of August 2007. Mr Brice alleged that the payment was the result of an offer made by Ms Zammit on behalf of the superannuation fund to sell semen straws accepted by Mr Brice in December 2007.[12]

[19] The purchase of Big Top settled on 30 January 2008.[13] Of the $1,500,000 advanced by Mr Brice, $762,624.54 was used in the purchase. The loan agreement was executed by Dorrigo Property as borrower and Harrod Holdings as guarantor by the end of December 2007 but not executed by Mr Brice until 15 July 2008.

The 28 March 2008 meeting at AHJ's offices

[20] It is common ground that on 28 March 2008 Mr Chambers, Mr Brice and Mr Schwennesen met at the offices of AHJ. Mr Chambers' relevant evidence concerning that meeting is as follows:

> "The conversation began by Mr Brice talking and what he did was he updated Norbury on the details of our agreement. He talked about – he talked about the straws. He talked about the management fee. He called the management fee 200,000 instead of 300,000, but he talked about the goodwill. He talked about the different components… and he said words to the effect, 'Will I write you a cheque now for a million dollars?' or 'Will I write you a cheque for the goodwill for a million dollars?'… I didn't say, 'Yes.'… I gave Mr Brice and Mr Schwennesen details of the DPI website that gives information on tick fever vaccinations so they could familiarise themselves with that… Mr Brice said to Mr Schwennesen, 'From this month don't charge John any more agistment.'… he said it about three times… We were looking at identifying the animals, the female breeding animals in the herd, and putting them into two groups on the basis that whichever group Mr Brice selected, that was the group that would go and end up at Lockerbie. At the time some of the herd was at Ron Fitzgerald's property at Wandoan and at Mr Fitzgerald's property, those female breeding cattle were being treated and they were in an artificial breeding situation and we were collecting embryos from those cattle and I asked Mr Brice what he wanted me to do about the fact that he were doing this embryo work and the decision was that I would keep going with flushing those cattle at Ron Fitzgerald on the basis that Mr Brice would get half the embryos produced and I would get half the embryos produced and he would pay – he would pay half the costs, just the raw costs, of doing that work, of getting the embryos.
>
> Was there any discussion about leasing payments?-- Well, the lease – time sort of moved on a bit, but the lease was supposed to have been loan lease and Mr Brice had started to use the word 'repayments'. He used the word sort of 'repayments', 'payments' rather than lease – lease payments…

---

12 *Chambers v Brice* [2013] QSC 232 at [37].

13 *Chambers v Brice* [2013] QSC 232 at [45].

> What do you recall of that end part of the conversation regarding lists of cattle?-- I was to go away and work to get the cattle divided into two groups which were as fairly and evenly divided as was possible such that either party would be happy with either group and the plan was that Mr Brice probably would select one of the two groups. So he would have half the female breeding herd and I would have half the female breeding herd.
>
> Now, in respect of how the meeting concluded, do you recall how the conversation ended with regard to the leasing of the cattle?-- No.
>
> Do you recall how the conversation ended with regard to the payments for the herd and how they were to be characterised?-- *The payments for the herd - the payments for the herd were not going to be lease payments, but just repayments.* I didn't know the tax situation of all that.
>
> Do you recall how the conversation ended or concluded with regard to agistment or management fees?-- Well, it was agreed that each party would look after the cattle they had in their possession as if they were their own cattle and there would be no - there would be no agistment or fees charged to each other while the herd was being divided and then moved.
>
> Do you recall how the conversation at the meeting concluded with regard to embryo production?-- Well, I was to continue with the embryo production, Mr Brice was to get half of the production on the basis that he owned half the herd, he would pay half the costs of that production. I asked him why would he pay $100,000 for embryos if he could just get them for production costs now and he said, 'It's just a way to get $100,000 into your hands.', and I said, 'Yeah, okay.'
>
> At the conclusion of the meeting do you recall Mr Schwennesen saying anything?-- Mr Schwennesen hadn't said anything until then and he said to me he just wanted to make sure that any trucks coming to Lockerbie with the cattle would be - would be economical in the respect that they would be - there wouldn't be wasted space … He said, 'Make sure the decks are full.'…
>
> At the time of the meeting did you consider in your own mind that there was any need for you to obtain independent advice in relation to the matters the subject of what you were discussing?-- No.
>
> Why not?-- Well, Mr Brice just ran through everything with [Mr Schwennesen]. He just confirmed everything that was in the agreement and we were working towards the part 2, if you like, of the agreement." (emphasis added)

[21] The primary judge held that the first agreement was generally in accordance with Mr Chambers' evidence, "save with respect to the allegation that payments to be made for cattle and repayments under the loan could be set off against each other".[14] His Honour accepted that the first agreement was varied at the 28 March 2008 meeting as alleged by Mr Chambers (the second agreement).[15]

---

14 *Chambers v Brice* [2013] QSC 232 at [183].

15 *Chambers v Brice* [2013] QSC 232 at [184].

The conduct of the parties after the second agreement

[22] The embryo production program was carried out through to October 2008 and the embryos which became available to the parties were divided evenly between Mr Chambers and Mr Brice.[16] On 1 April 2008, a tax invoice for $100,000 plus GST was issued by Mr Chambers to Mr Brice for 100 Wagyu embryos. Mr Brice paid $100,000 to Mr Chambers on 24 April 2008. It is common ground that no embryos were provided to Mr Brice.[17]

[23] Mr Chambers continued to provide assistance to Mr Schwennesen in relation to his cattle breeding activities. He also communicated with Mr Brice in that regard.[18]

[24] Work on the division of the herd commenced before 20 May 2008.[19] In late July or early August 2008, Mr Chambers and Mr Brice had a telephone call in which it was agreed that the herd be divided by Ms Jane Radeski into an X list and a Y list of the same quality.[20] On 27 August 2008, Mr Brice emailed Mr Chambers stating, inter alia:

> "Going thru all lists, checking the mechanics and using the exercise to understand the breeding (trying). Before we decide what goes where and how and why we need to document the financial transactions. We have had a couple of discussions around my desire to not spend more money and the possibility to sell stock to generate cash and thereby reduce the investment ..ie is there a commercial position whereby we could sell cattle to say the Hammonds and those Funds go to you and I get less cattle.
>
> I do not want to put you in a position where you need to feed more cattle than you planned.
>
> Appreciated that this has to be [resolved] ASAP."

[25] The 27 August email appears to be a response to an email from Mr Chambers of 25 August stating:

> "THIS ALL LOOKS A BIT MIND BOGGLING ,ANDREW (sic).
>
> But if you look at Beaudesert full list FB females, then find full X list and full Y list the rest are sub lists to create these
>
> [A]ny comments welcome any questions likewise Jane wanted to start with Beaudesert when I told her Terry may need to box up some of the Beaudesert cattle to keep the new trucked cattle separate & if so I'm trying to plan so this is olderly (sic)"

[26] In about late August 2008, Mr Chambers and Mr Brice had a telephone discussion relating to the preparation of sale documentation and the solicitor who should be engaged to act in the transaction.[21] Mr Brice emailed Mr Chambers on 9 September 2008 as follows:

---

16 *Chambers v Brice* [2013] QSC 232 at [51].
17 *Chambers v Brice* [2013] QSC 232 at [53].
18 *Chambers v Brice* [2013] QSC 232 at [54].
19 *Chambers v Brice* [2013] QSC 232 at [55].
20 *Chambers v Brice* [2013] QSC 232 at [55].
21 *Chambers v Brice* [2013] QSC 232 at [57].

> "My toss came up Y. We will need to discuss the cattle that [Ms Radeski] did not include on either X or Y lists. I am writing you to set a moratorium on the interest and repayments due under the loan agreement on 19th July 2008 until 19th October 2008. Between now and then we need to engage Solicitors to docuement (sic) the proposed acquisition of part of your Wagyu business.
>
> [Mr Schwennesen] and I are visiting [Mr Tegg (property manager)] today to discuss future employment. It is likely we will go to the market place before we make an appointment. In the interim between [Mr Schwennesen], Chris, Terry and myself we can manage cattle movement. I have not got my head around the timing and logic of moving Cattle Group B<C or those at Ron Fitzgeralds."

[27] The subject of the email was "Re Plan for cattle movement". Communications between Mr Chambers and Mr Brice concerning the division of the herd and the transportation of cattle from Shiro and Bogandilla to Lockerbie continued. Mr Chambers advised Mr Brice of the arrival of three decks of cattle at Lockerbie on 7 October by an email of 8 October. The draft contract in relation to the sale of the cattle was attached to the email.

[28] A similar email was sent by Mr Brice to Mr Chambers on 8 October at 11.42 am. He commented, in relation to the solicitor's draft, "…I thought at least it provides the base to change, add, delete, cut & paste". Mr Brice responded by email of 14 October 2008 stating, inter alia:

> "Before I foward (sic) the solicitors proforma precedent contract to my advisors there needs to be cattle no, values, timing and other details inserted."

[29] Further communications occurred in relation to the cattle that had arrived at Lockerbie. An email of 3 November 2008 discussed the recipient heifers being used for the embryo transplant program at Lockerbie; the Wagyu cattle which were to be pregnancy tested; and the identification of cattle suitable for artificial insemination. Further email communications took place between Mr Chambers and Mr Schwennesen between 7 and 16 November 2008 concerning the insemination of cattle, including cattle shipped on 7 October 2008. Mr Brice was copied with each of the emails.[22]

[30] On 14 November 2008, Ms Zammit sent to Mr Chambers tax invoices addressed to Mr Brice for the cost of the embryo flushing program and for the transport of cattle from Bogandilla to Beaudesert.[23] Costs for the embryo flushing program were apportioned until 11 September 2008. Recipient costs were not apportioned nor were the transport costs. Mr Brice paid the amount claimed by cheque dated 17 November 2008.[24] Mr Chambers continued to provide assistance in relation to their cattle business to Mr Brice and Mr Schwennesen throughout 2008.[25]

[31] On 20 January 2009, Mr Chambers sent an email to Mr Brice setting out his understanding of the agreements reached between them. It traced Mr Chambers' recollection of the history of the relevant dealings. Although conciliatory in tone,

---

22 *Chambers v Brice* [2013] QSC 232 at [66].
23 *Chambers v Brice* [2013] QSC 232 at [68].
24 *Chambers v Brice* [2013] QSC 232 at [68].
25 *Chambers v Brice* [2013] QSC 232 at [69].

the email called for the implementation of the parties' agreement. Mr Brice responded to the email on 21 February 2009. He denied the existence of any legally binding agreement, except in respect of the loan, and suggested that the parties attempt to come to an acceptable commercial agreement.

The primary judge's findings on credibility

[32] The primary judge was highly critical of the evidence of Mr Brice in a number of specific respects. He said of Mr Brice:[26]

> "At times he appeared to me to be attempting to give his honest and genuine recollection of events. However, in a number of areas adverse to his case, he gave the impression of a person determined to maintain a particular position, rather than of someone attempting to give an honest account of events."

[33] This statement appears to be more a comment on Mr Brice's demeanour than on the overall reliability of his evidence. It is, however, apparent from a number of more specific findings made by the primary judge that he did not regard Mr Brice as a credit worthy witness.

[34] The primary judge considered, in detail, submissions made by the appellant on Mr Chambers' credibility but made no general findings in that regard. It is obvious, however, that he generally preferred his evidence to that of Mr Brice and that he did not consider that Mr Chambers had given dishonest answers.

The primary judge's reasons

[35] The primary judge discussed the allegations in the amended pleadings at considerable length.[27] He then dealt with credit issues in paragraphs [98]–[132] inclusive. Those paragraphs also include extensive discussion of factual matters. Principles and authorities relating to the determination of the issues identified by the primary judge occupied paragraphs [133]–[143] inclusive. The issues identified by the primary judge were:[28]

> "(a) Did Mr Chambers and Mr Brice reach any agreement?
>
> (b) Were any terms on which they agreed sufficiently certain to be capable of having contractual effect?
>
> (c) If they reached agreement, did they intend the agreement to be contractually binding?
>
> (d) Did they agree on sufficient terms to constitute a contract?"

[36] The primary judge discussed Mr Chambers' evidence in respect of the August telephone conversations at length.[29] Mr Brice's evidence in that regard was then discussed.[30]

---

26 *Chambers v Brice* [2013] QSC 232 at [112].
27 *Chambers v Brice* [2013] QSC 232 at [32], [33], [49], [50] and [77]–[97].
28 *Chambers v Brice* [2013] QSC 232 at [133].
29 *Chambers v Brice* [2013] QSC 232 at [149]–[151].
30 *Chambers v Brice* [2013] QSC 232 at [152]–[158].

[37] The primary judge then dealt with the evidence in respect of the March 2008 meeting.[31] The conduct of the parties after the August telephone conversations was discussed in light of the respondents' submissions that the primary judge said relied heavily on the conduct of the parties after that time.[32]

[38] The primary judge accepted the submission by the respondents that the loan was "uncommercial". He found that the likely explanation for it was:[33]

> "… the fact that there was an agreement between Mr Chambers and Mr Brice under which Mr Chambers was to be paid amounts by Mr Brice over that period, matching his obligations in relation to the loan."

[39] His Honour concluded that the failure of Mr Brice to make demand for the three payments of $500,000 due in July 2008 and July 2009 until November 2009 at the earliest supported the existence of an agreement under which Mr Brice was to make payments of corresponding amounts to Mr Chambers. He noted that interest payments were not pursued before November 2009.[34]

[40] The primary judge noted that the lack of specific agreement about an interest rate and the absence of agreement about the provision of security counted against the agreement alleged by Mr Chambers. His Honour held that it was likely that the parties expected that there would be a written loan agreement but that its terms had not been settled in the August 2007 telephone conversations.[35]

[41] The primary judge considered that the absence of a written record of the agreement to make the loan and the failure to agree upon more detailed terms lacked the significance that it would normally have. The reasons for this were:

- the agreement between the parties that Mr Brice would be liable to pay corresponding amounts to Mr Chambers;
- the loan was part of the mechanism by which Mr Chambers was to be paid;
- by the time of the telephone conversations, Mr Brice had shown strong interest in buying the cattle; and
- the parties had been friends for some time and trusted one another.[36]

[42] It was found that Mr Brice's payment of $330,000 to the superannuation fund for semen straws on 20 December 2007 was made to provide money for the purchase of Big Top. The primary judge noted that the semen straws were not delivered at about that time and that Mr Brice did not inquire about delivery or attempt to discuss what was to be done about the straws with Mr Chambers. He took no action with a view to obtaining the semen straws until 10 December 2010.[37] In this regard, dealing with the submission by Mr Brice that the transaction alleged was in the nature of a sham and unlikely, the primary judge concluded:[38]

---

31 *Chambers v Brice* [2013] QSC 232 at [159]–[161].
32 *Chambers v Brice* [2013] QSC 232 at [162].
33 *Chambers v Brice* [2013] QSC 232 at [163].
34 *Chambers v Brice* [2013] QSC 232 at [164].
35 *Chambers v Brice* [2013] QSC 232 at [165].
36 *Chambers v Brice* [2013] QSC 232 at [166].
37 *Chambers v Brice* [2013] QSC 232 at [167].
38 *Chambers v Brice* [2013] QSC 232 at [168].

"Once it is accepted that the payment was not the product of an agreement made with Ms Zammit in December 2007, the only explanation for it is an earlier agreement; and the only evidence of an earlier agreement is that given by Mr Chambers. The transaction was intended to be another means by which money could be made available to Mr Chambers, in relation to the sale of half of his herd."

[43] The primary judge then dealt with the transaction concerning the embryo flushing program. His Honour said in this regard:[39]

"[169] It is clear that at the meeting at Jackson's offices in March 2008, Mr Brice and Mr Chambers agreed that Mr Brice would receive half of the embryos from the embryo flushing program being conducted at the property of Mr Ron Fitzgerald, on the basis that he would pay half of the associated costs. That agreement was carried out. No sensible explanation was given for this arrangement by Mr Brice. I note that in July 2006, Ywagyu had purchased 200 embryos at $500 each; and in April 2008, paid $100,000 (plus GST) for 100 embryos. It seems to me that the likely explanation for the agreement in relation to the sharing of embryos from female breeders in Mr Chambers' herd is that the parties had by then reached an agreement involving a series of transactions, under which Mr Brice (or his associated interests) would acquire one half of the female breeding herd, some parts of which had been carried out, and the remainder of which was expected to be carried out in the relatively near future.

[170] It is also clear that at this meeting, Mr Brice said he would cease charging agistment fees for the cattle which had earlier been taken to Lockerbie. Indeed, the effect of Mr Schwennesen's evidence was that each party would look after the cattle under his control as if there were his own. These things are consistent with the parties taking the view that Wagyu breeders on agistment at Lockerbie included cattle which would remain the property of Mr Chambers, though some would become Mr Brice's cattle; and that the remaining breeders for which Mr Chambers was responsible included cattle which would become Mr Brice's. While Mr Brice's explanation may not be improbable, it seems to me to be less likely. It also sits uncomfortably with his statement in his email of 21 February 2009, in relation to his dealings with Mr Chambers, that business and benefaction are mutually exclusive and should not be mixed. For these reasons, in view of my conclusion about the credit of the parties, and in light of the other matters which in my view support a conclusion that there was a concluded agreement as alleged by Mr Chambers, I reject this explanation.

[171] In my view, the fact that there was discussion at this meeting about the means by which the herd was to be divided is itself

---

39 *Chambers v Brice* [2013] QSC 232 at [169]–[171].

> some evidence of the existence of a concluded agreement. It seems to me that what was under discussion was the means by which the agreement might be implemented. Otherwise, there was no need for concern about whether a fair division of the herd took place; rather Mr Chambers could have identified the cattle which he wished to sell, and Mr Brice could then have decided what amount he was prepared to pay for them."

[44] The primary judge concluded that the transaction in April 2008 under which Mr Brice paid $100,000 plus GST for 100 embryos was "in a number of respects, similar to the transaction relating to semen straws" and that it provided "some support" for the existence of the agreement alleged by Mr Chambers.[40]

[45] The primary judge found that the existence of an agreement relating to the sale of cattle was also supported by:

- Mr Brice's communication on 9 September 2008 of his decision to take the Y list (also a step in performance of the agreement);[41]
- email correspondence in October and November 2009 relating to the management of Wagyu cattle at Beaudesert including a breeding program, indicated that the Wagyu cattle delivered by Mr Chambers to Mr Brice's properties would be Mr Brice's;[42] and
- the insemination of Y list cattle using straws owned by Ywagyu in the latter part of 2008 including cattle delivered on 7 October 2008 from Shiro and Bogandilla.[43]

[46] It was remarked that Mr Brice's email of 21 February 2009 did not deny that the parties had reached agreement: it simply asserted that there was no legally binding contract.[44]

[47] In the primary judge's view, considered overall, the conduct of the parties after the August conversations pointed strongly to the existence of an agreement between them intended to be binding.[45] He concluded that that view was consistent with Mr Chambers' evidence about the telephone conversations.[46] After finding that it was not intended that the agreement as a whole be recorded in a single document, his Honour said:[47]

> "Accordingly, I am satisfied that the parties reached agreement in the August 2007 telephone conversations, generally as alleged by Mr Chambers, *save with respect to the allegation that payments to be made for cattle and repayments under the loan could be set off against each other*." (emphasis added)

[48] What was meant by the emphasised qualification is not entirely clear. It is apparent from paragraphs [163], [164] and [166] of his reasons that the primary judge accepted that "there was an agreement between Mr Chambers and Mr Brice under

---

40 *Chambers v Brice* [2013] QSC 232 at [172].
41 *Chambers v Brice* [2013] QSC 232 at [173].
42 *Chambers v Brice* [2013] QSC 232 at [174].
43 *Chambers v Brice* [2013] QSC 232 at [175].
44 *Chambers v Brice* [2013] QSC 232 at [177].
45 *Chambers v Brice* [2013] QSC 232 at [183].
46 *Chambers v Brice* [2013] QSC 232 at [183].
47 *Chambers v Brice* [2013] QSC 232 at [183].

which Mr Chambers was to be paid amounts by Mr Brice over [the three years' term of the loan], matching his obligations in relation to the loan".[48] The primary judge also noted that agreement on the provision of security and the interest rate was not reached in the August 2007 meeting and that the "loan was part of the mechanism by which Mr Chambers was to be paid".[49] What his Honour appears to be adverting to in the emphasised qualification in paragraph [183] is that the terms of the proposed lease remained to be agreed.

[49] The primary judge then turned to a consideration of the March 2008 variation. He accepted Mr Chambers' evidence that bulls were not included in the first agreement or the second agreement.[50] He held that the method of division of the herd "into two halves of equal quality was a matter about which the parties expected to be (and were) able to reach subsequent agreement".[51] He observed "[t]he mechanism for doing this did not appear to be of any particular significance to either of them; though no doubt it can be assumed they expected it to be fair".[52]

[50] The primary judge's conclusions with respect to the contemplated lease were as follows. Its obvious purpose was to permit Mr Brice to have the benefit of the calves produced during the period of the lease. The lease proposal was abandoned at the March 2008 meeting. Although the respondents' pleaded case was that ownership of the cattle was not to pass until the end of the three year period of the lease that was not supported by the evidence. If it was the case that property in the breeders was not to pass for three years, the intention of the parties was that Mr Brice was to have the benefit of the calves produced by the cattle after delivery as he was paying to have the benefit of half of a herd of female breeders.[53] Mr Chambers knew that Mr Brice and Mr Schwennesen were anxious to secure a supply of Wagyu meat and that the price for the cattle had been developed by reference to discounted cash flow which took into account the value of calves from the first year of the period under consideration.[54]

[51] The primary judge's conclusions in respect of the second agreement were:[55]

> "The agreement which was reached between Mr Chambers and Mr Brice resulted from the fact that Mr Chambers was not prepared to sell half his herd for $2.5 million, and accordingly Mr Brice sought to develop a structured agreement which would have made available to Mr Chambers the amount of money he wanted. That resulted in a substantial amount being included for what was described as 'goodwill'. Moreover, Mr Brice wished to have the benefit of Mr Chambers' continued assistance in relation to the effective use of the cattle Mr Brice was purchasing; and the continuation of the assistance he had received in the past. Against that background, it seems to me, that there was sufficient definition of what was to be provided by Mr Chambers in relation to what the parties described as goodwill; and as to the management services to

---

48 *Chambers v Brice* [2013] QSC 232 at [163].
49 *Chambers v Brice* [2013] QSC 232 at [166].
50 *Chambers v Brice* [2013] QSC 232 at [186].
51 *Chambers v Brice* [2013] QSC 232 at [187].
52 *Chambers v Brice* [2013] QSC 232 at [187].
53 *Chambers v Brice* [2013] QSC 232 at [189].
54 *Chambers v Brice* [2013] QSC 232 at [189].
55 *Chambers v Brice* [2013] QSC 232 at [190].

> be provided by him; although there was no clear definition between the two. I do not accept the submissions advanced on behalf of Mr Brice, that no binding agreement was reached, or that any agreement was of no effect by reason of uncertainty, in relation to these matters."

[52] The primary judge dealt with the appellant's "sham" argument in relation to the embryos and semen straws as follows:[56]

> "As previously mentioned, it has been submitted on Mr Brice's behalf that the transactions relating to embryos and semen straws, as alleged by Mr Chambers, amount to a 'sham'; and were unlikely to have been entered into by Mr Brice. It may be accepted that one would start with a predisposition not to accept that an experienced accountant would enter into a transaction which involved a payment for property which was not in fact to be transferred; or where the transfer is to be matched by a transfer, without further consideration, of similar property from the accountant. Some aspects of the evidence would reduce the significance of that predisposition. I refer in particular to Mr Brice's evidence in relation to the gift to the University of Queensland; and the evidence about how he came to be involved in the Wotif venture. I also take into account the fact that monies were paid in respect of the semen straws and embryos, without any arrangement for their transfer or delivery; and that no effort was made by Mr Brice to obtain the straws or the embryos for a long time, and indeed until well after the action commenced. In the end, I have come to the view that Mr Chambers' evidence about this aspect of the transaction is to be accepted. It must be borne in mind that the question for me to determine is whether an agreement was reached in the terms alleged by Mr Chambers; and not what view might be taken by the Commissioner of Taxation about the significance of the transactions for income tax purposes. I also note that the case is not one about a number of separate contracts; so that the obligations imposed on Mr Brice to pay the sums of $300,000 and $100,000 do not necessarily fail for absence of consideration."

[53] The discussion about whether the first and second agreements were contractually binding concluded:[57]

> "Accordingly I find that Mr Chambers and Mr Brice entered into a binding contract in the August 2007 telephone conversations, varied at the meeting in March 2008. Mr Brice repudiated that contract on 21 February 2009, since which date his attitude to its performance has remained unchanged. The contract came to an end when the repudiation was accepted as having that effect, in the course of the trial. Mr Brice is accordingly liable for any damages for its breach."

Analysis of the terms of the Agreement alleged in the Statement of Claim

[54] Paragraph 19 of the statement of claim alleged that an agreement (the Agreement) was made during the second and third of the August conversations.

---

56 *Chambers v Brice* [2013] QSC 232 at [193].

57 *Chambers v Brice* [2013] QSC 232 at [194].

[55] Paragraph 20 sets out express terms of the Agreement. The relevant allegations appear below followed by observations on whether they were supported by the evidence.

(a) Mr Brice would pay $3.2 million to Mr Chambers for half of Mr Chambers' Wagyu business

[56] The total agreed sum was $3.2m. The appellant contended that it was consideration for the sale of half the herd of Wagyu cattle, other than bulls and steers rather than consideration for the sale of half Mr Chambers' business. The primary judge, accepting Mr Chambers' evidence, held that bulls and steers were not included in the transaction. It is apparent on Mr Chambers' evidence that the property sold was not an interest in Mr Chambers' Wagyu business. He retained half the female breeding herd and all the bulls and steers. No interests in agreements or other personal property of or in respect of Mr Chambers' business, other than cattle, were agreed to be assigned. No real property was assigned. There were no restrictions placed Mr Chambers' rights in respect of his intellectual property or on the ability of Mr Chambers to carry on his Wagyu business as he considered fit.

(a) The purchase price referred to in (a) above was to be treated by the parties as comprising the following:

(1) $1 million for the goodwill associated with half of Mr Chambers' business

[57] One million dollars was to be paid on account of "goodwill" but, as was submitted by the appellant, the "goodwill" was not what would normally be recognised as such: "the benefit and advantage of the good name, reputation and connection of a business … the attractive force which brings in custom … goodwill … cannot subsist by itself. It must be attached to a business".[58] Mr Chambers retained his business name or names, stock brands, agreement and all other assets of his business.

[58] It is probable that the attribution of part of the sale price of the cattle to "goodwill" was done for tax minimisation purposes. "Goodwill", as used by Mr Brice, meant the imparting by Mr Chambers of his knowledge of and relating to his business so that it could be applied by Ywagyu in its business. The primary judge held that Mr Brice wished to have the benefit of Mr Chambers' continuing assistance "in relation to the effective use of the cattle [he] was purchasing; and the continuation of the assistance he had received in the past".[59] Mr Brice and Mr Chambers allowed three years as a suitable period in which to complete this process.

(2) $100,000 for embryos

[59] Mr Chambers' evidence supports this allegation.

(3) $300,000 payable in three annual instalments of $100,000 to be treated as management fees;

Particulars

The agreed dates for each of the three annual instalments of $100,000 comprising the management fees were: June 2008; June 2009; and June 2010

---

58 *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 223–224 per Lord Macnaughton.

59 *Chambers v Brice* [2013] QSC 232 at [190].

[60] Mr Chambers' evidence supports this allegation. Mr Chambers claimed in cross-examination that in response to his asking what he would have to do for the management fees, Mr Brice said "when [Mr Lindgard] gets the shits with [Mr Schwennesen], you keep him on-line". If that was said, it was most probably a facetious remark. Mr Brice said in evidence-in-chief that in the course of the August telephone conversations there was discussion of "…trying to capture [Mr Chambers'] intellectual property which expressed itself in a concept of management fee and intellectual property that I used the word [goodwill]". It appears from the evidence that "goodwill" and "management" had overlapping meanings and that the parties had a common, if general, understanding of what they meant by "goodwill" and "management".

[61] The primary judge found there to be sufficient definition "of what was to be provided by Mr Chambers in relation to what the parties described as goodwill; and as to the management services to be provided by him; although there was no clear definition between the two".[60]

(4) $300,000 for semen straws;

Particulars

(A) the semen straws were semen straws owned by the Trustees which Mr Chambers promised to cause the Trustees to supply to Mr Brice in exchange for the supply to Mr Chambers of semen straws of an equivalent value owned by Mr Brice;

(B) …

(C) the semen straws which Mr Brice promised to supply were separate but equivalent straws of semen extracted from the same two bulls as those referred to in the annexure marked 'B';

(D) …

[62] Mr Chambers' evidence supports this allegation.

(5) $1.5 million payable as three annual instalments of $500,000 to be treated as leasing payments;

Particulars

The agreed dates for each of the three annual instalments of $500,000 were: June 2008; June 2009; and June 2010

[63] Mr Chambers' evidence-in-chief in respect of the first and second August conversations did not mention rent or "leasing payments". He spoke in the second conversation of a three year lease of cattle "cojoined with a loan over a similar period where one would wipe the other out". In the third conversation, Mr Brice was reported as having said that when the loan and the lease "come together" the monies owing under the lease agreement will offset the monies owing under the loan agreement over three years and that would include any interest that was applicable to the loan. It may be inferred that "monies owing under the lease" would be or include "leasing payments" or rent.

---

60 *Chambers v Brice* [2013] QSC 232 at [190].

[64] There was no mention in Mr Chambers' evidence in respect of the three conversations of any statement by Mr Brice about the dates of the proposed lease payments except to the extent that in cross-examination Mr Chambers said that Mr Brice "went into details … when the payments would be and those payments would offset the loan and … would include at each time any interest that had been earned on the loan money".

[65] As noted above, the primary judge found "an agreement … under which Mr Chambers was to be paid amounts by Mr Brice over [the three year] period, matching his obligations in relation to the loan".[61] He did not find an agreement that such amounts be "treated as leasing payments".

(b) The Wagyu herd would be divided into two halves of the same quality and one half of the herd would be delivered by Mr Chambers to Mr Brice at the end of the third year, ownership in that half of the herd would be transferred to Mr Brice

[66] There was no mention by Mr Chambers in his evidence-in-chief about the August conversations of the timing of the transfer of ownership of half of the herd delivered to Mr Brice. It would seem to be implicit in the concept of a three year lease that Mr Brice would get ownership of half the cattle at the conclusion of the term of the lease. However, it was also implicit in the conversations reported by Mr Chambers that, during the term of the lease, Mr Brice would effectively enjoy the rights and benefits which went with full ownership of the cattle he was acquiring.

[67] The primary judge held that the evidence did not support the pleading in relation to the timing of the change in ownership.[62] He noted that the intention was that Mr Brice have the benefit of the calves, that he was paying for half the herd of female breeders and that Mr Chambers was aware that Mr Brice and Mr Schwennesen were anxious to secure a supply of Wagyu meat.[63]

[68] In evidence-in-chief and cross-examination Mr Chambers did not assert that anything was said in those conversations about the halves being of the same quality. He said in cross-examination that this had been discussed earlier.

(c) Mr Brice would loan $1.5 million to Mr Chambers to be secured against … the Darwin Veterinary Hospital … and a property that Mr Chambers intended purchasing in New South Wales

[69] There was no mention of security over any property in Mr Chambers' evidence-in-chief relating to the content of the August conversations. The appellant's submission that, on Mr Chambers account of the arrangement, neither security nor interest served any useful purpose has much to commend it. The lease payments were to provide the monies to repay the capital and to meet any interest payments under the loan. The purpose of the taking of security and the provision for interest would appear to be the creation of an impression that the loan and lease were normal commercial transactions.

---

61 *Chambers v Brice* [2013] QSC 232 at [163]; see also at [166].

62 *Chambers v Brice* [2013] QSC 232 at [189].

63 *Chambers v Brice* [2013] QSC 232 at [189].

(d) Mr Brice and Mr Chambers could use their nominees for the purpose of performance of the Agreement;

(e) any interest payable by Mr Chambers or his nominees to Mr Brice or his nominees under the loan would be met by equivalent amounts to be paid by Mr Brice or his nominees in addition to and at the same time as the payments referred to in sub paragraph 20(b)(5)

[70] This accords in substance with Mr Chambers' evidence and with the primary judge's findings except as stated under paragraph (5) above.

(g) The payments referred to in sub-paragraph 20(b)(5) above, together with any equivalent amounts for interest under the loan, would be set off against any amounts otherwise payable by Mr Chambers or his nominees to Mr Brice or his nominees under the loan together with any accrued interest

[71] This appears to be a reformulation of the alleged term that payments under the lease were to offset payments of loan monies and interest. The pleading, implicitly, acknowledges that the proposed set off was of lease payments against loan repayments and interest payments.

[72] The following explanation was advanced in relation to embryos:

> "(a) [Mr Chambers] and [Mr Brice] did not intend there to be an actual transfer of embryos;
>
> …
>
> (f) there was no transfer of embryos;
>
> (g) at no point prior to the commencement of this proceeding has [Mr Brice] requested that the transfer of embryos occur;
>
> (h) the consideration for the payment was provided by the matters referred to in paragraph 20(c) above."

[73] It was alleged that:

> "21. It was an implied term of the Agreement that the payments referred to in paragraphs 20(b)(1), 20(b)(2) and 20(b)(4) were payable within a reasonable time."

[74] It was alleged that during the March 2008 meeting, Mr Brice and Mr Chambers entered into a further oral agreement (the second agreement) the material terms of which were that:

> "(a) the parties would prepare lists to evenly divide [Mr Chambers'] Wagyu herd pursuant to the Agreement;
>
> (b) by way of variation of the Agreement [Mr Brice] would purchase half of [Mr Chambers'] Wagyu herd as set out on one of the lists and the three annual payments contemplated by the Agreement as being lease payments would be regarded as instalments of the purchase price;

(c) the process of moving the cattle to [Mr Brice's] Lockerbie property would commence;

(d) no further agistment or management fees would be charged to [Mr Chambers] because [Mr Chambers] would be looking after some of [Mr Brice's] cattle while the division occurred;

(e) [Mr Chambers] and [Mr Brice] would each look after the other's cattle pending the division;

(f) [Mr Chambers] and [Mr Brice] would share evenly the costs of the embryo production for the entire herd that was already underway at Mr Ron Fitzgerald's Wandoan property."

[75] Mr Chambers' evidence of conversations at the meeting in March 2008 supports the allegation in (a). In relation to (b), Mr Chambers was asked, "Do you recall how the conversation ended with regard to the payments for the herd and how they were to be characterised?" He responded, "… the payments for the herd were not going to be lease payments, but just repayments. I didn't know the tax situation of all that". The oral evidence supports (c), (d), (e) and (f) except that the agreed moratorium was stated to be fees charged to each other while the herd were being divided then moved.

[76] The primary judge held that the lease proposal was abandoned at the March 2008 agreement. The evidence supports that finding.

[77] It was alleged:

"In relation to the embryos referred to in paragraph 42(f) [above] … that in accordance with the Second Agreement:

(a) the embryos were distinct from the embryos referred to in paragraph 20(b)(2) [the pleading];…

(g) the embryos were subsequently flushed, processed in the laboratory, frozen and later distributed [as described in a table within paragraph 42A(g) of the pleading];

(h) [Mr Chambers] and [Mr Brice] evenly shared the costs of the activities pleaded in 42A(b) [the pleading];

(i) [Mr Chambers] became the legal owner of 451 embryos;

(j) [Mr Brice] became the legal owner of 451 embryos."

These allegations were supported by Mr Chambers' evidence.

Did the parties intend to conclude a legally binding agreement in August 2007?

[78] Although paragraph 20(a) refers to the sale and purchase of Mr Chambers' Wagyu business, as explained earlier, it was always apparent to the parties that the subject transaction was concerned with the sale and purchase of half Mr Chambers' female Wagyu herd. The misdescription has little, if any, bearing on the parties' contractual intent.

[79] The $1m "goodwill" component of the sale price was a misnomer as explained above. However, the evidence of both Mr Brice and Mr Chambers discloses the general nature of what the parties had in mind. The same observation applies to the provision for "management fees".

[80] The most problematic terms, from the point of view of determining the existence of an intention to be legally bound by the first and second agreements, are those relating to the leasing by Mr Chambers to Mr Brice of the half of the female herd that Mr Brice was purchasing such that the monies payable under the lease equalled the total of the principal sum repayable under the loan agreement plus interest on that sum.

[81] Mr Chambers was unable to explain how the proposed lease and loan agreements could achieve the stated objective. On the face of it, income tax would be payable on the rent paid under the lease and on the interest paid pursuant to the loan. Perhaps even stranger was the essence of the arrangement: a sale of cattle under which the purchaser would not acquire clear title to the cattle for three years but would, in the intervening period, lease the cattle from the vendor. The purchaser/lessee would, however, enjoy all the rights in respect of the cattle he would have enjoyed had there been an immediate settlement of the sale and purchase.

[82] It emerges from Mr Chambers' evidence and the obvious lack of commerciality in these arrangements that the loan/lease arrangement was a tax minimisation device designed to cloak the true nature of the transaction: a relatively straight forward sale and purchase of part of a herd of Wagyu cattle including an agreement for the provision of information and assistance in the operation of the purchaser's Wagyu cattle business after completion of the sale.

[83] At the time of the August conversations, the loan/lease arrangement was no more than a concept as Mr Chambers implicitly acknowledged in the following passage from his evidence-in-chief in respect of the third conversation:

> "Was there discussion as to how that $1.5 million loan was to be repaid?-- Well, that was the cattle lease. It was – it was lease the cattle over three years. Three years provided the opportunity for the – all the information to be given to Mr Brice and Mr Schwennesen and the lease and the loan were intended to be equivalent transactions…
>
> [Objection was taken to this answer and the question was rephrased.]
>
> [Mr Brice] said, 'It makes no difference to me whether you do the loan component or the lease part first, *but the concept is they should be identified and documented separately and spaced by a reasonable period of time and then when they come together, the moneys owing under the lease agreement will offset the moneys owing on the Loan Agreement over the three years and that would include any interest that was applicable to the loan…*
>
> What did you say to Mr Brice?-- *I agreed with the concept of the lease and the loan situation.*" (emphasis added)

[84] Earlier in his evidence-in-chief in respect of the second conversation, Mr Chambers said:

> "Mr Brice said that this conversation, *this agreement we were working on,* would provide the opportunity for semen straws that were owned in the super fund to be bought out of the super fund and this could happen as part of *the transaction we were currently discussing*…
>
> Mr Brice said to me, 'I have the same straws as those, don't I?', [the semen straws which Mr Brice owned] and I said, 'Yes.' He said, 'Well, if the super fund is paid a specific amount of dollars, then if you give me from a super fund your straws, then I can replace them with my straws and that puts them into the straws – equivalent straws into your name rather than being in the super fund name.' So it was a round – on these round robin transactions." (emphasis added)

[85] The respondents' senior counsel, referring to notes said by Mr Chambers to have been made during the second conversation, asked Mr Chambers if looking at the notes refreshed his memory about that conversation. Mr Chambers responded: "Well, in the respects of parts I didn't fully understand and still don't. It's the structure aspects that Mr Brice was running past me; the options with regards to structure".

[86] After referring to notes said by him to have been made during the third conversation, Mr Chambers said, in evidence-in-chief:

> "… it's got 'Good will, $1 million AB', meaning Andrew Brice, 'no tax deduction.' … So he started off and he was thinking and – he was thinking aloud and he was talking and suggesting this arrangement and he started off by saying, 'Well, the best can-do, 2.7 for the cattle, that's 300', that says management fee, 100 for 100 embryos, he said, 'That comes to 3.1', and then – and then he said, 'We pay 100 for embryos, 300 to the super fund for straws', and I've got written Mr Brice must have said tax 10 per cent – 1 million in good will, 300 in management fees, 100 in June '08, 100 in June '09, 100 in June '10. Then he said the difference between that and – he said, 'The difference between those figures and the total amount is what I'll – what I'll lend to you – lend to JCC', and I've written that twice – 'lend to JCC 1.5', I have got crossed out 1.6, because this is juggling the numbers, and 'lend to JCC', I don't know what that 100 '09 means, but the 3 by 500 loan lease is the reference to three payments over five years where the transactions would negate each other. Will I go on the next page because it continues on?…
>
> This page continues. Then that loan lease then, 'lease of' – 'lease cattle off JCC, first three' – 'first three', well, I think I wrote – I think that's 'components', but it indicates 'eight or nine months' time, residual, July '08, 500 – 500,000', and Mr Brice suggested that there be an advantage in putting that $100,000 into super fund – I'm not sure where that was to come from, but – the second – the second lease – says 'second lease', 18 months repayment or residual, 'lease payment', July '09, 500, 100 into super, third lease, 30 months, July '10', haven't written it, but meant to be the same, and then Mr Brice said it's a loan of offset by the lease repayments. He said then I have 3.1 – actually comes to 3.2 – and the effect of

> pay, the value to me, he said was 3.6 or 3.7. He said – well, I've written there and he said, 'There's no bulls in the transaction. There's no straws and no embryos.' I don't know what the 450 and the 450 means and there's a 900 written on the bottom of that first page and I don't know if there's a connection but."

[87] It is apparent from the foregoing that some terms of the proposed agreement had been identified only in a broad conceptual way. It was intended that they were to be documented but how they were to be documented remained to be determined. Whether it was possible for them to be documented so as to achieve their intended effect was also unknown.

[88] The parties contemplated that any agreement arrived at in relation to the cattle would be documented by a loan agreement which would contain provision for interest and security. If the evidence established that the parties reached agreement on contractual terms it would be necessary to determine whether they reached:[64]

> "… finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect."

[89] There are two interrelated questions for determination. The first is whether the parties intended to make a concluded agreement. The second is whether they succeeded in doing so.

[90] In *Masters v Cameron*,[65] the Court identified three classes of dealings with a view to arriving at a concluded agreement:

> "Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."

[91] Here, as the parties had in contemplation the recording of some or all of the terms of their bargain in a formal contract or contracts, it is relevant to determine whether the facts fall within class 1 or class 3 of the classes identified in *Masters v Cameron*.

---

64 *Masters v Cameron* (1954) 91 CLR 353 at 360.

65 (1954) 91 CLR 353 at 360.

[92] The circumstances in which a binding agreement may come into existence, notwithstanding that the parties expect to reach agreement on further terms, was explored by Bingham J in *Pagnan SpA v Feed Products Ltd*:[66]

> "But just as it is open to parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may by their words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often or usually be agreed before a binding contract is made: see *Love and Stewart*, sup,. per Lord Loreburn LC at p. 476."

[93] On appeal, Lloyd LJ, the other members of the Court concurring, relevantly said:[67]

> "(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see *Love and Stewart v Instone* per Lord Loreburn at p. 476).
>
> (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
>
> (6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over."

[94] In *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*,[68] McHugh JA, discussing whether an exchange of letters established that the parties intended to be contractually bound, said:

> "However, the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances: *Godecke v Kirwan* (1973) 129 CLR 629 at 638; *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 332-334, 337. If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction."

[95] Although McHugh JA was concerned with whether the parties intended to be bound by a written document, his words, with appropriate adaptation, apply equally to oral communications said to show an intention to be contractually bound and, of course, regard may be had to the conduct of the parties as well as their words.[69]

[96] The relevant communications between the parties must be considered in light of the context in which they occur. Subsequent communications may form part of that context.[70] Kirby P, in *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd*,[71] said with reference to authority:

---

66 [1987] 2 Lloyd's Rep 601 at 611.
67 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619.
68 (1986) 40 NSWLR 631 at 634.
69 *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 549.
70 *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 550.
71 (1995) 7 BPR 14,551 at 14,573.

> "It is well settled that a court may have regard to the parties' communications after the formation of an allegedly binding agreement in order to determine, objectively, whether or not the parties intended to form a binding agreement … Gleeson CJ pointed out in *Lezabar Pty Ltd v Hogan* (1989) 2 BPR 9498 (CA) at 9500–9501, that where the parties have made an informal agreement which amounts to a 'limited consensus', and it is necessary for the Court to determine whether a concluded contract subsists 'the Court will construe their language, and characterise their conduct, where appropriate, by reference to any surrounding circumstances which are properly to be regarded as throwing light upon their intention'.

The appellant's argument in relation to contractual intention

[97] It is useful here to set out the substance of the appellant's argument in relation to contractual intention.

[98] On the issue of the content of the August telephone conversations and as to the agreement he held was formed during such conversations, which was central to the determination of the case, the primary judge made no factual findings, nor any ultimate finding about the content or terms of the contract said to have been made. As a result of this failure, there is no analysis of the evidence given by Mr Chambers and of whether it proved the pleaded contract (or any contract). The August telephone conversations, as described by Mr Chambers, did not involve language consistent with the making of a contract by which the parties intended to be immediately bound.

[99] Mr Chambers acknowledged that he did not understand what was being proposed by Mr Brice and that he still does not understand it. That is unsurprising, as the conversation described by him makes no sense in contractual terms. His evidence involves a number of references to what was said being merely something "we discussed" and it is impossible to identify any concluded agreement about anything which could result in a contract. The notes Mr Chambers claims to have made during the second and third conversations evidence a discussion rather than a concluded agreement and record matters inconsistent with the alleged agreement.

[100] Mr Chambers claimed that the agreement involved the cattle lease neutralising or eliminating his loan from Mr Brice, including interest. The primary judge concluded that this evidence was directed to the "practical effect" of the proposed transaction.[72] That left open the question: how was the proposed transaction to have this effect? The lease payments could not offset the loan, including interest, unless the lease payments were increased over time at the same rate as the interest under the loan (which was never suggested). Nor could Mr Chambers receive $1,500,000 from the lease if he had to pay any tax on that income and tax was referred to in the notes. Similarly, the notes referred to putting some payments under the agreement into Mr Chambers' superannuation fund. Consequently, they could not be used to reduce the loan. The transactions described made no commercial sense.

[101] If there was to be a finding that a contract was made during the August 2007 telephone conversations, it was necessary that these matters be analysed and findings be made about what was said and actually agreed: that was not done.

---

72 *Chambers v Brice* [2013] QSC 232 at [216].

[102] The clear tenor of Mr Brice's email of 21 February 2009 is that there is no agreement.

[103] Whether or not the parties reached agreement and the terms of the agreement had to be made by reference to the relevant conversations: it was not pleaded that the agreement was one made by or inferred from conduct. The primary judge erred in not making findings about what was said during the August 2007 telephone conversations and as to the agreement, if any, that was reached during those conversations. Once this was done, the primary judge was entitled to have regard to the subsequent conduct of the parties in order to determine whether or not they intended to be contractually bound by any agreement they had reached.[73]

[104] Authorities which conclude that subsequent conduct may be used to found an inference that the parties made an agreement of particular terms have been decided in circumstances where there is no direct evidence of the agreement.[74]

[105] The findings about the terms of the alleged contract were also necessary in order to consider whether it was likely that the parties intended to be bound by such terms and whether their subsequent conduct was consistent with such an intention.

[106] There was evidence that the parties contemplated documenting the various transactions. The loan transaction was documented. The transactions were ones which were objectively likely to be documented: some tax benefits were intended. Documentation was necessary to afford Mr Chambers the tax advantages he claimed were promised to him as part of the overall arrangement.

[107] The alleged contract was substantial and complex. It involved:

- an agreement to pay over $3m to Mr Chambers;
- the sale of hundreds of cattle;
- the transfer of an intangible, described as "goodwill";
- a loan on commercial terms for $1.5m; and
- some further, apparently complex, transactions such as a "swap of" semen straws associated with payment by Mr Brice to Mr Chambers of $330,000 and a payment of $110,000 by Mr Brice to Mr Chambers for embryos that would not be delivered.

[108] The consensus reached during the August 2007 telephone conversations was incomplete. There was no identification of the tasks that would be undertaken in return for the management fees, the nature of the "goodwill" that would have to be delivered in return for $1m or the cattle to be leased (save for "half the herd" – as to which there was no agreement as to the way in which the division would occur). The semen straws "swapped" and payment for embryos that would not be delivered were complex and ill-defined, confusing and unworkable. It is objectively unlikely that the parties would have intended to be bound by such terms.

[109] The above matters have a cumulative effect and many of them were not considered by the primary judge.

---

73 *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 at [26]; *Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd* [2011] 2 Qd R 582 at [38].

74 See e.g. *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193; *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303.

[110] The conduct that the primary judge considered was consistent with the alleged contract was equally consistent with an advanced stage of negotiations or an expectation that a contract would be entered into in due course. The primary judge did not consider these possibilities and did not explain why he considered the conduct to be more consistent with the existence of a binding contract.

[111] The repayment terms of three annual instalments of $500,000 was consistent with both parties' expectation that they would soon enter into a contract along lines discussed in August 2007.

[112] The payment for the semen straws occurred on 20 December 2007 and the payment for the embryos in April 2008. The absence of any inquiry about the delivery of the straws or embryos is consistent with a previous embryo purchase in which Mr Chambers had overseen the storage and use of the "genetics" purchased. The absence of identification of the embryos to be delivered could be explained by the fact that Ywagyu had previously purchased embryos from Mr Chambers for $110,000. There was, therefore, certainty as to what was expected in return for a payment of this amount. Mr Chambers told Mr Brice in emails that he did not feel that he needed all of the embryos that would be produced and offered to give Mr Brice more than half the embryos if he agreed to pay more than half the costs. The explanation for Mr Brice's participation was that Mr Chambers did not need all the embryos and wished to share the cost of the flushing program.

[113] The offer to cease charging agistment fees was consistent with a gratuitous gesture. To be consistent with the alleged contract, Mr Brice should have ceased charging agistment from August 2007. He made other such gratuitous gestures, for example, setting a moratorium on interest and loan repayments in September 2008.

[114] The division of the herd and Mr Brice's selection of the Y list were equally consistent with parties who were attempting to finalise a negotiation and conclude an agreement. That is especially so as the parties had already discussed the fact that Mr Chambers would be organising sale documentation and arranging a solicitor.

[115] Assistance from Mr Chambers in relation to the management of the cattle located on Mr Brice's property was consistent with the assistance Mr Chambers had gratuitously given to Mr Brice from well before August 2007. The insemination program could not be consistent with Mr Brice's ownership of the cattle because it involved doing the same thing for cattle which were never to be transferred: non Y list cattle.

Did the parties intend the first agreement to be contractually binding? – consideration

[116] The pleaded agreement was substantial in monetary terms but, in essence, was far from complex. Mr Brice wanted to purchase half Mr Chambers' Wagyu female breeding herd and obtain expertise and assistance in using his herd for breeding and meat production. Mr Chambers was prepared to sell half the female breeding herd for $3.2m and to provide the assistance, expertise and relevant information. The subject matter of the sale was thus identified as was the purchase price.

[117] The terms involving monetary payments were included in the bargain, in most cases, as a mechanism or device for apportioning the purchase price so as to minimise tax. That was plainly so in the case of the goodwill and management components. They were not a reflection of the parties' appreciation of the value of the information and services to be provided under the agreement.

[118] The $300,000 for semen straws and the $100,000 for embryos, as the primary judge found, did not lead to Mr Brice receiving more semen straws and embryos than he originally had.

[119] The mechanism for dividing the herd was not discussed in the August conversations. It had been discussed before. Although the parties may well have documented that part of their bargain, had the proposed lease been documented, it was hardly a requirement absent the fulfilment of which they would not regard themselves as contractually bound. Having regard to prior discussions and their close personal and working relationship, it was clearly implicit that the division of the Wagyu herd be effected equally, both quantitatively and qualitatively.

[120] The term that there was to be a secured loan of $1.5m was supported by the evidence. It is plain from Mr Chambers' evidence that the loan repayments were in fact payments of part of the purchase price of the herd. Any interest was to be treated in such a way as not to cause Mr Chambers to receive less than the sale price of $3.2m.

[121] It was argued, in effect, that the obvious problems in devising a contractual structure to accommodate the set off of loan repayments and interest payments against lease payments made it unlikely that the parties intended to be contractually bound until the formal documentation had been agreed. This argument has force. However, its force is diminished somewhat when regard is had to the evidence which suggests that Mr Brice was recommending that the proposed lease and the proposed loan agreement be documented separately and entered into at different times.[75]

[122] Considerable emphasis was placed by the appellant on the language used by Mr Chambers when discussing the proposed lease/loan arrangement. In relation to the third conversation, he referred to the "concept" and said, "I agreed with the concept of the lease and the loan situation". Plainly the details and even fundamental aspects of the proposed lease and loan remained to be decided. It must be borne in mind, however, that the proposed lease and the proposed loan were intended to be mechanisms for the payment of the agreed purchase price of $3.2m to be paid by Mr Brice and received by Mr Chambers.

[123] Of particular significance was the parties' acceptance that the loan agreement might be entered into before the entering into of the proposed lease. That, in itself, is a strong indication that the parties did not intend that they would not be contractually bound until the whole of their bargain was recorded in formal contracts. It is also highly significant that the documentation of the transaction was placed by Mr Chambers in Mr Brice's hands. Mr Chambers trusted Mr Brice to arrange the transaction in such a way as to provide him with a sale price of $3.2m. Mr Chambers was largely indifferent as to how that was to be achieved.

[124] The abandonment of the lease concept in the meeting of March 2008, apparently without any prior negotiation, expressed qualms or regrets, tends to suggest that the parties had never placed much store by the mechanism chosen to provide for the payment of the purchase price for the property to be sold and purchased.

[125] In my view, the absence of a concluded agreement about the terms of the proposed lease, whilst obviously relevant, is not determinative of the existence or otherwise of an intention to be contractually bound.

---

75 *Chambers v Brice* [2013] QSC 232 at [70], [71] and [76].

[126] The complaint about the primary judge's use of the conduct of the parties after the first agreement lacks justification.

[127] The primary judge's statement of applicable principles in paragraphs [135], [136] and [140] of his reasons by reference to relevant authorities was not criticised. His Honour mentioned a number of aspects of the parties' conduct after the first agreement that he considered favoured the appellant's case.[76] It is correct, as the appellant argued, that some of the conduct accepted by the primary judge as consistent with the existence of an intention to be contractually bound was also consistent with an expectation that a contract would be entered into in due course. Whether such matters considered as a whole, as they must be, point more in one direction than another is a factual question. In deciding that question, the primary judge, who saw and heard the witnesses and was exposed to the detail of the evidence as it unfolded, enjoys an advantage over this Court.

[128] One matter which appears to have impressed the primary judge as favouring the respondents' case was that the loan agreement provided for repayment of the principal sum by three equal instalments over three years. The primary judge considered that there was no commercial explanation for this provision and that it was explicable as the partial implementation of "an agreement under which Mr Brice was to make payments of corresponding amounts to Mr Chambers".[77]

[129] The primary judge's finding that the "uncommercial" loan was "one which Mr Chambers was unlikely to enter into in other circumstances"[78] was not successfully challenged. There was evidence that Mr Chambers was already stressed by the debt of $1.7m in respect of the Smith Street property.[79] Mr Chambers proceeded with the acquisition of Big Top but, as the primary judge pointed out, the borrowing of $1.5m "was not determined by the amount needed to meet the costs of the purchase of Big Top. Rather, it reflects the amount which, on Mr Chamber's evidence, was agreed in the August 2007 telephone conversations to be lent; matching the amount to be paid for the cattle".[80] It is reasonable to conclude that Mr Chambers would not have entered into the loan agreement had he anticipated that the consequence of his doing so would have been to increase his liabilities by $1.5m. It is reasonable to conclude also that Mr Brice was conscious of this. The other aspect of the loan favouring the respondents' case is that despite the first instalments of principal becoming repayable on 19 July 2008, no demand for payment was made by Mr Brice until November 2009. The latter date was well after 21 February 2009, when Mr Brice disputed the existence of "a legally binding contract",[81] not, as the primary judge pointed out, that there was no deal, bargain or consensus.

[130] The selection by Mr Brice on 9 September 2008 of the cattle to be taken by him and the commencement on 7 October 2008 of their transportation to Lockerbie were both consistent with an agreement in August 2007 as pleaded.

[131] The semen straws and embryos transactions were also consistent with conduct under a binding agreement. The primary judge rejected the evidence of Mr Brice that payments made in respect of these transactions were made pursuant to

---

76 *Chambers v Brice* [2013] QSC 232 at [178]–[180].
77 *Chambers v Brice* [2013] QSC 232 at [164].
78 *Chambers v Brice* [2013] QSC 232 at [163].
79 *Chambers v Brice* [2013] QSC 232 at [162].
80 *Chambers v Brice* [2013] QSC 232 at [162].
81 *Chambers v Brice* [2013] QSC 232 at [72].

arrangements quite separate from the subject agreements.[82] In relation to the embryos, the primary judge specifically found that at the 28 March 2008 meeting Mr Brice said, "it's just a way to get $100,000 into your hands".[83] The respondents submitted, with some validity, that Mr Chambers' case as pleaded and conducted was consistent with the view that these transactions and other alleged acts of performance of the agreements relied on by the respondents were consistent with an expectation that the entering into of a binding agreement was imminent.

[132] There was thus a distinct pattern of behaviour in which the parties engaged in conduct consistent with the existence of the agreement or the agreement as varied. Over time, as more payments were made and the parties' respective positions changed, it became more likely that their conduct is to be explained by the existence of the binding agreement alleged by the respondents rather than by an expectation that one would be entered into in due course. The amounts of money involved were substantial, increasing the likelihood that the parties considered themselves to be implementing an agreement.

[133] It is relevant also that the loan monies of $1.5m were advanced in January 2008[84] and there was only a short period prior to the second agreement on 21 March 2008.

Were the first and second agreements uncertain?

[134] In his argument based on uncertainty of contract the appellant relied on:

- a lack of definition of the content of "goodwill" and of what was required in respect of "management fees"; and
- the absence of any agreement about how the division of the herd was to occur.

[135] The division of the herd has been discussed. It was implicit that the half of the female breeding herd to be transferred pursuant to the agreement would be equal in quality as well as quantity to the remaining half.

[136] In relation to: "goodwill" and "management fees", the appellant complained of the lack of definition of the tasks Mr Chambers was to perform. It was submitted that reference to his past conduct could not determine such matters to whether he would be obliged to undertake all of the tasks he had previously performed or only some of them; and whether he would be obliged to undertake them only as often as he had in the past. In the past Mr Chambers had not been paid for his services. Under the agreement, if there was one, he was to be paid a significant sum. It was contended that the Court was being asked to spell out to an unacceptable extent that which the parties themselves had failed to agree.[85]

[137] As mentioned earlier, the primary purpose of allocating part of the purchase price to "goodwill" and "management fees" was tax minimisation. No management, as such, was contemplated by either party. The parties understood that Mr Chambers would pass on his knowledge of and relating to his wagyu business so that it could be applied by Ywagyu in its business. That was the essence of the continuing assistance to be provided by Mr Chambers. The assistance given in the past was

---

82 *Chambers v Brice* [2013] QSC 232 at [167] and [169].
83 *Chambers v Brice* [2013] QSC 232 at [172].
84 *Chambers v Brice* [2013] QSC 232 at [42]–[43].
85 C.f. *Biotechnology Australia Blythe v Pace* (1988) 15 NSWLR 130 at 135.

readily identifiable. There is no good reason why, as the appellant's argument suggests, the nature and extent of that assistance should change. Mr Chambers, as Mr Brice was aware, had his own business to run. The evidence does not support the conclusion that the parties had any expectation that Mr Chambers would actually work in the Ywagyu business or devote an ascertainable number of hours per week to it.

[138] The fact that there is a lack of clarity in what the parties had said and a measure of difficulty in defining the extent of the parties' rights and obligations under a contractual term does not lead, necessarily, to the conclusion that the term is uncertain.

[139] Courts nowadays strive to uphold commercial bargains wherever possible. Sir Robin Cooke, in delivering the judgment of the Privy Council in *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd*,[86] explained:

> "Arguments involving alleged uncertainty, or alleged inadequacy in the machinery available to the Courts for making contractual rights effective, exert minimal attraction. *Sudbrook* is now the leading English case in the field. The same tendency has been apparent elsewhere in the Commonwealth, as illustrated by *Calvan Consolidated Oil and Gas Co Ltd v Manning*, [1959] SCR 253; *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495; and *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*, [1982] 56 ALJR 825."

[140] Rogers CJ Comm D remarked in *Banque Brussels Lambert SA v Australian National Industries Ltd*:[87]

> "The whole thrust of the law today is to attempt to give proper effect to commercial transactions. It is for this reason that uncertainty, a concept so much loved by lawyers, has fallen into disfavour as a tool for striking down commercial bargains. If the statements are appropriately promissory in character, courts should enforce them when they are uttered in the course of business and there is no clear indication that they are not intended to be legally enforceable."

[141] Perhaps the best known exposition of the principle on the court's function in resolving contractual ambiguities and difficulties in construction of terms is the following passage from the reasons of Barwick CJ in *Upper Hunter County District Council v Australia Chilling and Freezing Co Ltd*:[88]

> "But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining

---

86 [1989] 1 Lloyd's Rep 205.

87 (1989) 21 NSWLR 502 at 523.

88 (1968) 118 CLR 429 at 436–437; see also *Meehan v Jones* (1982) 149 CLR 571.

> the intention of the parties, and of applying it. Lord Tomlin's words in this connexion in *Hillas & Co. Ltd. v. Arcos Ltd.* [1932] 147 LT 503, at p 512 ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G.) & Nephew Ltd. v. Outston* (1941) AC 251 is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved."

[142] A similar statement of principle is to be found in the following passage from Williams J in *York Air Conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth*:[89]

> "If the court comes to the conclusion that parties intended to make a contract, it will if possible give effect to their intention no matter what difficulties of construction arise. In *Scammell and Nephew Ltd. v. Ouston* (1941) AC, at pp 268, 269 Lord Wright said 'the object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation'. …"

[143] It is also worth recalling Lord Denning's observation in *F & G Sykes (Wessex) Ltd v Fine Fare Ltd*:[90]

> " … In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed…"

[144] For the above reasons no error has been demonstrated in the primary judge's findings that the first and second agreements were both entered into and were legally binding.

Interest on the loan agreement

[145] The primary judge gave judgment on 27 March 2014 for Mr Brice against the second and third respondents in the sum $1.5m together with interest to be determined. After further argument, it was ordered on 31 March 2014 that Mr Brice be awarded interest on the sum of $1.5m in the amount of $1,019,920.85 up to the date of judgment, namely 27 March 2014.

---

89 (1949) 80 CLR 11 at 26.

90 [1967] 1 Lloyd's Rep 53 at 57–58.

[146] There was a dispute between the parties as to whether the loan agreement provided for simple interest, as the respondents contended, or for compound interest as Mr Brice contended. The time from which interest and default interest respectively commenced to be payable was also in dispute.

[147] It is convenient to quote paragraph [20] of the primary judge's reasons in which the provisions of the loan agreement which are presently relevant are set out:[91]

> "[20] ….
>
> 'Loan — Subject to this agreement and in reliance on the representations and warranties in this agreement, the Lender agrees to make the Loan set out below in the Loan Details available to the Borrower.
>
> **LOAN DETAILS**
>
> Interpretation – definitions are at the end of the General Terms.
>
> | | |
> |---|---|
> | Loan Amount | $1,500,000.00 (One million five hundred thousand dollars) |
> | Repayment date | 19 July 2010 |
> | Mandatory Repayment | The Borrower must repay the Loan by repaying:
• $500,000 on 19 July 2008;
• $500,000 on 19 July 2009; and
• $500,000 on 19 July 2010. |
> | Interest Rate | 8.5% per annum |
> | Interest Payments | The Borrower must pay interest at the Interest Rate on the Amount Owing calculated monthly and payable in arrears on the following dates:
• 19 July 2008; and
• 19 July 2009; and
• 19 July 2010. |
> | Default Rate | 10.5% per annum |
>
> …

[91] *Chambers v Brice* [2014] QSC 52 at [20].

Definitions

Unless the context otherwise requires:

(1) **Amount Owing** means all monies owing to the Lender by the Borrower on any account, and includes all interest and moneys lent or advanced by the Lender to the Borrower pursuant to this agreement and which have not been repaid to the Lender including the Loan and all other money which the Borrower agrees to pay the Lender including all interest accrued.

…

(6) **Default Rate** has the same meaning as in the Loan Details.

…

(8) **Event of Default** has the meaning given to it in clause 9.

…

(10) **Interest Rate** means the rate specified as such in the Loan Details.

…

(12) **Loan** means loan granted by the Lender to the Borrower under this agreement.

(13) **Loan Amount** means the amount specified as such in the Loan Details.

…

(18) **Repayment Date** means the date specified as such in the Loan Details.

…

2. AGREEMENT TO LEND

2.1 The Loan

The Lender grants the Borrower the Loan as set out in the Loan Details to be used in accordance with this agreement.

…

4. INTEREST

4.1 Interest payable on Loan

The Borrower must pay interest on the Loan in accordance with the Loan Details.

4.2 Interest on late payments

Following an Event of Default, the Borrower agrees to pay interest on the Amount Owing at the Default Rate. The interest accrues daily from (and including) the due date to (but excluding) the date of actual payment and is calculated on actual days elapsed and a year of 365 days. The Borrower agrees to pay interest under this clause on demand from the Lender.

…

9. DEFAULT

9.1 Default

The Borrower will, at the option of the Lender, be immediately in default upon the occurrence of any of the following:

(1) If there is default (other than by the Lender) in the performance of any term, covenant, agreement or condition contained in or implied by the Transaction Documents;

(2) If the Borroweer or the Guarantor defaults in duly and punctually paying when due any amount owing or if any indebtedness of the Borrower or the Guarantor to any person is not paid when due or becomes due and payable prior to its specified maturity or any creditor of the Borrower or the Guarantor becomes entitled to declare any indebtedness of the Borrower or the Guarantor due or the Borrower or the Guarantor makes default under any charge or security in favour of any person;

…

9.2 Consequence of Default

If any Event of Default occurs the Lender may, by written notice to the Borrower declare:

(1) the Loan and Lender's obligations under this agreement to be immediately cancelled; and

(2) all Amount Owing payable together with any interest accrued as is outstanding be repaid immediately.'"

[148] The primary judge's reasons were to the following effect. Clause 4.1 required Dorrigo Property to pay interest on "the loan". The clause thus requires the payment of interest to be calculated by reference to the amount lent. Interest was

not part of the amount lent[92] although the schedule provides for interest to be paid "on the Amount Owing" and "Amount Owing" is defined so as to include interest as well as principal. Clause 1.1 makes it plain that the definitions are to operate unless the context otherwise requires.

[149] *Prima facie*, the entry in the Loan Details relating to "Interest Payments" is intended to identify the dates on which interest is to be paid, and to provide some further specificity about the obligation to pay interest created by the Loan Agreement. It is not likely that an entry in the Loan Details was intended to vary the obligation created in a clause such as 4.1 and, in particular, to convert an obligation to pay simple interest, into one that requires the payment of compound interest.[93]

[150] The primary judge concluded:[94]

> "[30] Clause 4.1 requires the payment of interest on the loan "in accordance with the Loan Details". It seems to me that latter phrase is intended to make applicable the interest rate, method of calculation, and dates for payment, identified in the Schedule; but not to vary the effect of the obligation in clause 4.1 to pay interest on the amount lent.
>
> [31] Accordingly, in my view, clause 4.1 required the payment of interest on the amount lent, and did not have the effect of changing the operation of clause 4.1 so that interest also became payable on interest.
>
> [32] The expression 'calculated monthly' in the entry for Interest Payments, in my view, meant that the interest was to be calculated at the end of each month; notwithstanding that Interest Payments were to be made on a day other than the end of each month; or that monies might have been utilised under the Loan Agreement on dates other than the beginning of the month. There is a distinction between the computation of interest, and the compounding of interest." (citations omitted)

[151] The primary judge held that interest became payable at the default rate only when one of the events identified in clause 9.1 occurred and Mr Brice had exercised his option to have the occurrence treated as an "Event of Default".[95] The primary judge concluded that an email from Mr Brice to Mr Chambers sent on 29 March 2010 attaching a document bearing that date headed "Notice Under Clause 9.2 Loan Agreement" constituted the first exercise of an option under clause 9.1. The document stated, in formal terms, that by reason of the borrower's default in repaying the "Mandatory Repayment" and the interest payments under the Loan Agreement an "Event of Default had occurred". It went on to declare:

> "1. The Loan and the Lender's obligations under the Loan Agreement to be immediately cancelled;
>
> 2. All of the amount owing together with interest accrued as is outstanding, particulars of which are contained in the **attached** schedule, be repaid immediately."

---

92 *Chambers v Brice* [2014] QSC 52 at [27].
93 *Chambers v Brice* [2014] QSC 52 at [28].
94 *Chambers v Brice* [2014] QSC 52 at [30]–[32].
95 *Chambers v Brice* [2014] QSC 52 at [34].

[152] Mr Brice argued that the primary judge erred in not holding that default interest became payable from 19 July 2008, or alternatively from 19 November 2009. 19 July 2010 was the last repayment date stated in the Loan Details. The primary judge, with respect, was correct in holding that default interest did not commence to be payable on the Repayment Date. Under clause 4.2 the "Default Rate" of interest commenced to be payable only after an "Event of Default". That term was stated in the definition clause of the Loan Agreement to have "the meaning given to it in clause 9". The effect of clause 9 was to require an act of the lender to trigger any consequences of a breach of any term of the Loan Agreement. On 10 November and 1 December 2009, Mr Brice sent to Mr Chambers a document stating:

> "Enclosed is calculation of amounts outstanding on your loan as at [31 October 2009 in the case of the 10 November document] [30 November 2009 in the case of the 1 December document] Please advise if you disagree with the calculation of interest owing."

[153] These documents may be contrasted with the notice stated to be given under clause 9.2. As the primary judge noted, neither of the 10 November and 1 December documents stated that an option was being exercised or referred to clause 9.1 or 9.2. Neither document called for immediate payment. The relationship between Mr Brice and Mr Chambers was relevant. They were in disagreement over whether there was a binding agreement between them in respect of the acquisition by Mr Brice of half of Mr Chambers' Wagyu herd. However, at the time of the November and December 2009 notices, neither had taken a step calculated to cement the rift between them and reduce the prospect of an amicable settlement of their differences.

[154] Returning to the construction of clause 4.1 of the Loan Agreement and the Schedule, it seems to me that the primary judge was correct in concluding that, on its proper construction, the Loan Agreement did not provide for the payment of compound interest on the principal monies outstanding. When the Loan Agreement was entered into Mr Brice and Mr Chambers were friends. To a degree, Mr Brice in providing the loan was helping out Mr Chambers. Mr Chambers had helped, and was continuing to help, Mr Brice and Mr Schwennesen by generously providing his time and expertise in relation to the Wagyu cattle business those men were proposing to establish. Nothing in the parties' dealings prior to the entering into of the loan agreement suggested the possibility of compound interest. On the contrary, the fact that the loan was part of the mechanism by which the purchase price of half the Wagyu herd was to be paid suggests that compound interest was not contemplated.

[155] As the primary judge concluded, the natural meaning of "the Loan" in clause 4.1 is the capital advanced and remaining unpaid under the loan. I note that the approach to interest under clause 4.2 may be different to that under clause 4.1. The former specifically provides for the payment of interest "on the amount owing". The latter provides for payment of interest "on the Loan". That lends support to the primary judge's conclusion that the context required that the definition of "Amount Owing" did not apply in construing that term when used in relation to interest under clause 4.1.

[156] The definition of "Amount Owing" is not happily worded. Included within the meaning of those words are "all interest" and "all interest accrued". The former appears to mean interest on monies owing to the lender other than under the loan agreement. The latter appears to mean interest accrued under the loan. It is most

improbable that, absent any default by the borrower, it would have an obligation to pay interest on interest accrued under the loan but not due and payable. This further suggests that the context requires that the definition of "Amount Owing" has no application to Clause 4.1. As there is an ambiguity in the provisions under consideration, they should be construed against Mr Brice, whose solicitors drew them on his behalf.[96]

[157] The primary judge explained the operation of clause 4.2 as follows:[97]

> "In the end, I have come to the view that clause 4.2, read in the light of clause 9.1, has the following effect. Once Mr Brice exercised his option in respect of an event identified in clause 9.1, Dorrigo Property became bound at that point to pay interest on the Amount Owing at that time, at the Default Rate. The interest, at the Default Rate, was to be calculated daily; but in respect of the Amount Owing, when the option was exercised. It was payable for each day which passed until (but excluding) the date of payment. The interest was payable on demand.
>
> The Loan Agreement was prepared by a lawyer. Had it been intended that the interest would be compound interest, the Loan Agreement could have made that clear. If Default Interest were to be compounded, then it would seem it has to be compounded daily. That seems to me an unlikely intention to attribute to the parties, particularly in the context in which they entered into the Loan Agreement." (citations omitted)

[158] It is explicitly stated in clause 4.2 that following an "event of Default, the Borrower agrees to pay interest on the Amount Owing". The "Amount Owing" relevantly means the monies lent under the loan agreement and not repaid and "all interest accrued" on the loan. The amount advanced under the loan agreement was $1.5m. On the giving of Notice of Default under clause 9.2, as the primary judge found, Mr Brice became entitled to payment of $1.5m. Mr Brice also became entitled to payment of "any interest accrued as is outstanding". These monies were claimed in the Notice of Default. Accrued interest is within the scope of "Amount Owing".

[159] The interest that had accrued at the date of Notice of Default was simple interest on the monies advanced from the dates of the advances ($762,694.54 on 30 January 2008 and $737,375.46 on 5 February 2008) until the date of the notice. The appellant contended that it was a strained construction of "Amount Owing" to conclude that interest was payable on principal and interest accrued up to the time of default but not upon interest accruing thereafter. The obvious intention of clause 4.2 is to calculate interest on whatever is owing each day. If, after default, Mr Chambers had made a partial repayment of the interest or principal, it could not be imagined that he would be expected to continue to pay interest on the full amount accrued at the time his default commenced.

[160] In my opinion, the primary judge's analysis and conclusions were correct. The fact that interest was stated in clause 4.2 to accrue from day to day is neutral.[98] As the

---

96 See e.g. *CE Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd* (1993) 176 CLR 535 at 541–542.

97 *Chambers v Brice* [2014] QSC 52 at [44]–[45].

98 *Morton v Elgin-Stuczynski* (2008) 19 VR 294 at 303.

primary judge pointed out, the computation of interest must be distinguished from the compounding of interest. The latter is the capitalisation of interest so that interest itself yields interest.[99]

[161] If it was the intention of the parties that the interest accruing after the date of the Notice of Default making capital and accrued interest immediately payable be capitalised, it is surprising that there was no reference to compound interest, capitalisation or rests.[100] In *Kitchen v HSBC Bank plc*,[101] Brooke LJ, with whose reasons Sedley LJ agreed) quoted the following passage from *Paget's Law of Banking*[102] with approval:

> "An express contract for the payment of interest will normally specify the rate, and it may further specify the method of computing interest and whether interest is to be compounded. There are three generally recognised bases of computing annual interest: [1] 365/365. Under this method the rate of interest is divided by 365 to produce a daily interest factor. The number of days that the loan is outstanding is then multiplied by this factor. Under this method different amounts of interest are charged for months of different lengths … The *computing* of interest must be distinguished form *compounding*, which is the capitalisation of interest, so that interest itself yields interest."

[162] The loan agreement under consideration in *Kitchen* relevantly provided:[103]

> "Interest shall *accrue daily* and be *debited* and *compounded* in accordance with the Bank's current practice from time to time." (emphasis added)

[163] The language of clause 4.2 is generally similar to that used in precedents for the payment of simple interest under mortgages in *The Australian Encyclopaedia of Forms and Precedents*.[104] Where default interest under a loan is to be capitalised, as one would expect, there is express provision for compounding at stated intervals.[105]

[164] The primary judge's construction of clause 4.2 and the definition of "Amount Owing" are not strained. Clause 4.2 specifies that after an event of default, interest is payable at "the Default Rate" of "10.5% per annum" on the unpaid capital and "all interest accrued" on the unpaid capital. Those monies are required to be paid immediately on the giving of a notice under clause 9.2. If payment is not made, interest on the total amount accrues daily from the due date to the date of payment "calculated on actual days elapsed and a year of 365 days". As simple interest at a default rate was contemplated, there is no reference to rests or capitalisation. Nor did the appellant's argument explain why the parties would wish to capitalise the

---

99 J R Paget, *Paget's Law of Banking*, 14th ed, Lexis Nexis, London, 2014 citing *Kitchen v HSBC Bank plc* [2000] 1 All ER (Comm) 787 at 792.

100 C.f. The observations of the Court in *Domaschenz v Standfield Properties Pty Ltd* (1977) 17 SASR 56 at 64.

101 [2000] 1 All ER (Comm) 787 at 792.

102 11th ed, Butterworths, London, 1996.

103 *Kitchen v HSBC Bank plc* [2000] 1 All ER (Comm) 787 at 787.

104 3rd ed, Butterworths, Sydney, 1988, see e.g. 10.5 and 10.31.

105 See e.g. *The Australian Encyclopaedia of Forms and Precedents*, 3rd ed, Butterworths, Sydney, 1988 at 20.5.

interest accruing after default when the default rate applied to that interest as well as the unpaid balance of the loan and the capitalised interest.

[165] Accordingly, this ground of appeal must be rejected.

Conclusion

[166] The respondents cross-appealed with a view to relying on claims for estoppel and for equitable compensation in respect of alleged breaches of fiduciary duty in the event that the judgment for Mr Chambers against Mr Brice was set aside. It was not and the cross-appeal does not need to be considered.

[167] As none of the grounds of appeal has been made out, I would order that the appeal be dismissed with costs and that the cross-appeal be dismissed.

[168] **PHILIPPIDES J:** I agree for the reasons given by Muir JA that the appeal should be dismissed with costs and that the cross appeal should also be dismissed.

[169] **HENRY J:** I have read the reasons of Muir JA. I agree with those reasons and the orders proposed.