SUPREME COURT OF QUEENSLAND

CITATION:	*Nolan & Ors v Nolan* [2015] QCA 199
PARTIES:	**ANTHONY GERARD NOLAN** (first appellant) **BRIAN KEVIN NOLAN** (second appellant) **MAJELLA ANNE NOLAN** (third appellant) **NOLAN & SON PTY LTD** ACN 010 567 174 (fourth appellant) **v** **DONNA MAREE NOLAN** (respondent)
FILE NO/S:	Appeal No 385 of 2015 SC No 3338 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 218
DELIVERED ON:	20 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2015
JUDGES:	Gotterson and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, Gotterson JA and Boddice J concurring as to the orders made, Morrison JA dissenting
ORDERS:	**1. The appeal be allowed.** **2. The cross-appeal be dismissed.** **3. The orders made on 11 December 2014 be set aside.** **4. The second, third and fourth appellants are to pay the respondent the sum of $319,050.** **5. Execution of the order in paragraph (4) be stayed until 11 December 2015 or earlier order.** **6. The second, third and fourth appellants are to indemnify the respondent in respect of her liability under the guarantee and indemnity dated 29 May 2007 in favour of the National Australia Bank.**

7. It is declared that the second, third and fourth appellants hold the following properties and any proceeds of sale on trust for the plaintiff to the extent of $319,050:

(a) Lot 1 on Crown Plan AG2956, County Aubigny, Parish Myall, Title Reference 14499224;

(b) Lot 3 on Registered Plan 98210, County Aubigny, Parish Jimbour, Title Reference 13840096;

(c) Lot 5 on Registered Plan 52015, County Aubigny, Parish Jimbour, Title Reference 16798056;

(d) Lot 6 on Registered Plan 853435, County Aubigny, Parish Dalby, Title Reference 18551228; and

(e) One-half of the net value of the assets of the B&M Trust.

8. If the second, third and fourth appellants have not paid to the respondent the amount referred to in order (7) by 11 December 2015 the second, third and fourth appellants are to pay interest on that amount calculated in accordance with Section 59 of the *Civil Proceedings Act* 2011 (Qld) from 11 December 2014 until the date of payment.

9. Within 14 days of the date of the second, third and fourth appellants filing and serving undertakings to the Court not to sell, mortgage, further encumber or deal with these properties without seven days prior notice in writing to the respondent's solicitors, the respondent cause the following caveats to be removed:

(a) Caveat No 713076635 lodged over Lot 1 on Crown Plan AG2956, County Aubigny, Parish Myall, Title Reference 14499224 on 23 February, 2014;

(b) Caveat No 713076635 lodged over Lot 3 on Registered Plan 98210, County Aubigny, Parish Jimbour, Title Reference 13840096 on 23 February, 2010;

(c) Caveat No 713076635 lodged over Lot 5 on Registered Plan 52015, County Aubigny, Parish Jimbour, Title Reference 16798056 on 23 February, 2010; and

(d) Caveat No 714322633 lodged over Lot 6 on Registered Plan 853435, County Aubigny, Parish Dalby, Title Reference 18551228 on 20 February, 2012.

10. The parties file and serve written submissions on the costs of the trial and the appeal within seven days of the date of this order.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – UNCONSCIONABLE CONDUCT – where the first appellant was the son of the second and third appellants, the fourth appellant was a company effectively controlled by the first, second and third appellants, and where the first appellant and the respondent had been married for eighteen years before separating – where the family had run a farming enterprise together – where the primary Judge found that the appellants and the respondent had carried on the farming enterprise as a common endeavour, and a constructive trust could be imposed in respect of the assets of that farming enterprise – where the respondent had been awarded a sum representing 25 per cent of the net value of those assets, interest on that sum, and costs on an indemnity basis – where the appellants had appealed against the trial Judge's orders – where the appellants challenged the division of the assets, the respondent's entitlement to interest on any sum, and costs – whether the trial Judge's apportionment of the assets was appropriate, given various agreements between the family members and their contributions to any joint enterprise

Baumgartner v Baumgartner (1987) 164 CLR 137; [1987] HCA 59, cited
Engwirda v Engwirda [2000] QCA 61, cited
West v Mead (2003) 13 BPR 24,431; [2003] NSWSC 161, cited

COUNSEL: G J Gibson QC, with P J McCafferty, for the appellants
A J Greinke with G J Watson for the respondent

SOLICITORS: Russells for the appellants
Shine Lawyers for the respondent

[1] **GOTTERSON JA**: I agree with the orders proposed by Boddice J and with the reasons given by his Honour.

[2] **MORRISON JA**: I have read the draft reasons prepared by Boddice J, and the orders he proposes. I have come to a different conclusion as to the outcome of the appeal and in light of his Honour's recitation of the background and facts, I am able to express my own reasons in rather shorter form than might otherwise be necessary.

[3] The parties to the appeal currently share, or have shared, a family relationship. The second and third appellants are Brian and Majella Nolan. Together they have successfully run farming enterprises on the Darling Downs for more than 50 years. The first appellant is Tony Nolan, their son. For about 18 years, Tony was married to the respondent, Donna Nolan. For all of that 18 years, they worked a farm enterprise on Brian and Majella's farm, "Kitcombe", and ran a spraying business on a property outside Dalby. Tony and Donna separated in 2009, and divorced in 2011.

[4] Kitcombe was purchased by Brian and Majella in 1985. After its purchase, Tony worked on the farm, along with his father. When Tony and Donna married in 1991, they resided at Kitcombe and shared responsibility for the operation of the household and the farm in the way described in the reasons of Boddice J.

[5] I am able to gratefully adopt paragraphs [25]-[65] in the reasons of Boddice J. Where I differ from his Honour is in relation to the learned primary judge's reliance upon the agreement reached in 2006 as reflecting an appropriate apportionment of the entitlements to Brian and Majella, Tony and Donna, to reflect the differing contributions made by all of them.

[6] In my view, it is important to bear in mind that the common enterprise, which was the subject of the proceedings, and the findings by the learned primary judge, was the farming business conducted on Kitcombe. The farming business has always been conducted by a partnership of one sort or another, but on the basis of a lease from Brian and Majella who remained as registered owners. Thus the assets of the common enterprise were those of the farming business, including the leasehold, whatever business assets were used on the farm including machinery, and the income from the farm. No doubt there were others that could be listed, but the point being made is that Kitcombe itself was never an asset of the common enterprise.

[7] Whilst the farming enterprise was always carried on by a partnership, that partnership had a number of iterations. In each case, partners did not necessarily pay for their share of the partnership or, for that matter, the shares held in the fourth appellant, Nolan & Son Pty Ltd, a company which conducted the farming enterprise from 2004.

[8] The varying contributions made by each of Brian and Majella on the one part, and Tony and Donna on the other,[1] served to improve the assets of the common enterprise, as well as Kitcombe itself. The farming enterprise worked the land itself. It is not hard to infer that without improvements the land would not have been as productive and no doubt its value, as an improved farm, increased over time and reflected the work put into it. Thus the ability of the land itself to generate farming income was enhanced.

[9] As Boddice J has noted in paragraph [59], part of the contributions by Tony and Donna included putting their assets at risk for the purpose of borrowing for the farming enterprise, i.e. the common endeavour.

[10] In my respectful view, the learned primary judge did not fall into error by adjusting the parties' entitlements in accordance with the agreement made by them in 2006. The significance of that agreement in the current context is not that the parties were bound to it, but that it reflected the parties' own considered apportionment of the entitlements based on the differing contributions made by them all.

[11] The agreement related to the cessation of the common endeavour, that is to say the farming enterprise. It dealt with compensation which Tony and Donna were to receive in the event that the farming enterprise ceased. The fact that those discussions were predicated upon the basis that Kitcombe would be sold out of the family was simply a particular methodology contemplated at the time for the purpose of the cessation of the common endeavour. The central aspect of the agreement, however, was that the common endeavour would cease, that is to say, the farming enterprise conducted by an entity reflecting the interests of Brian and Majella on the one hand, and Tony and Donna on the other would cease.

[12] In that context, the parties gave consideration to what would adequately reflect the contributions of Tony and Donna, balanced against those of Brian and Majella. That necessarily recognised the facts concerning the acquisition of Kitcombe and financing

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1 At least until their separation and divorce.

over the years. After all, whilst Kitcombe was not a farming asset as such, as it was simply leased to the farming enterprise, nonetheless Kitcombe was made available for the purpose of conducting the common endeavour.

[13] The fact that Brian and Majella decided, when Kitcombe did not sell on the two occasions it would put to the market, to keep the property and farm it, simply means that a different methodology was applied to the same issue, i.e. cessation of the common endeavour and allocation of resources to adequately reflect the contributions of each of the parties. The fact that the farming enterprise would continue was common to both methodologies. The proprietor in one would be the buyer from Brian and Majella, and on the other it would be Brian and Majella themselves. But in either case, the critical feature is that the common endeavour ceased.

[14] I am respectfully unable to agree that the adoption of the agreement, as a way to reflect the parties' contributions, does not allow for the contributions made by Brian and Majella, in terms of purchasing Kitcombe and in other ways. It cannot be supposed, in my view, that in balancing the interests of all contributors, Brian and Majella or Tony and Donna, forgot who purchased Kitcombe and in whose name title remained.

[15] Nor can I agree that the circumstances which occurred were materially different because they "did not have the factors of natural love and affection which clearly operated in relation to the circumstances pertaining to the agreement".[2] There is, in my respectful view, no evidentiary basis, or other reason, to conclude that when the parties made the agreement in 2006, their allocation of the benefits according to contributions was disproportionate because of love and affection. They were, at the time, allocating benefits flowing from the cessation of the common endeavour. There is nothing to suggest that that was not a rational or dispassionate exercise.

[16] Support for that conclusion can be drawn from the way in which the parties regulated their interests under the partnerships. From 1993, only two years after Tony and Donna married, the partnership which conducted the common enterprise reflected these interests: Tony 25 per cent, Donna 25 per cent, Brian and Majella 50 per cent. In 2004, Nolan & Son Pty Ltd became the lessee and operated the farming enterprise. However, the previous arrangements were reflected in the shareholding which was one share each as between Brian, Majella, Tony and Donna. The consequence was that the interests were: Tony 25 per cent, Donna 25 per cent, Brian and Majella 50 per cent. That remained the case until the common enterprise ceased.

[17] For these reasons, in my respectful view, the apportionment reached by the learned primary judge should not be disturbed.

[18] Likewise, I would not interfere with the conclusion of the learned primary judge in relation to the interest component. The basis of the relief granted to Donna was equitable relief and consisted of a finding that she was entitled to compensation to reflect the contribution she had made over time, on the basis that it would be unconscionable for Brian, Majella and Tony to receive the benefit of those contributions without giving compensation for them.

[19] Once again, it is important to be reminded that the compensation is for contributions to the common endeavour which ceased when Donna ceased to be a partner in it. The common endeavour existed between May 1991 (when Tony and Donna married) and

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2 See paragraph [67] of the reasons of Boddice J.

December 2009 (when they separated). The common endeavour was alleged to exist as between these dates in Donna's pleading, though that was denied by Brian, Majella and Tony on the basis that there was no common endeavour at all.[3] However Donna alleged, and it was admitted, that various steps had been taken to exclude her from the common enterprise, from January 2010.[4]

[20] Any farming business conducted thereafter was a new endeavour operated by Brian and Majella, and Tony. They chose to keep conducting the farming enterprise on Kitcombe. To do that the assets of the farming enterprise remained where they were and were utilised by Brian and Majella, and Tony. Whilst it is true that they would have borne any costs and losses in that enterprise in the years following the cessation of the common endeavour, on the other hand they also received the benefit of any increase in value and the income and profits earned by the new endeavour's use of the assets of the previous common endeavour.

[21] Given that the compensation which Donna is entitled to be awarded is in respect of her contributions to the common endeavour which had ceased in December 2009 or January 2010, and that after that time Brian and Majella and Tony have kept the benefit of those contributions without paying compensation, that should attract any award of pre-judgment interest. That being so, I respectfully consider that there is no basis to interfere with the exercise of that discretion by the learned primary judge.

[22] It follows that I would equally not interfere with the discretion exercised in respect of the order as to costs.

[23] On the issue of the cross appeal, I agree that it should be dismissed for the reasons set out by Boddice J.

[24] In the result I would order that the appeal and cross appeal be dismissed.

[25] **BODDICE J:** On 29 August 2014, the primary Judge found that the appellants and the respondent had carried on a farming enterprise as a common endeavour, and a constructive trust could be imposed in respect of the assets of that farming enterprise. The respondent was awarded a sum representing 25 per cent of the net value of those assets. Orders were made for the payment of that sum by the applicants. On 25 November 2014, the primary Judge further ordered that the appellants pay interest on that sum, and pay the respondent's costs on an indemnity basis from 11 September 2012.

[26] The appellants appeal against those orders. There is no challenge to the primary Judge's findings that the parties conducted the farming enterprise as a common endeavour. At issue is the primary Judge's findings as to what constituted an appropriate division of that property, the respondent's entitlement to interest on any such sum, and costs.

Background

[27] The first appellant is the son of the second and third appellants. The fourth appellant is a corporate entity effectively controlled by the first, second and third appellants.

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3 Further Amended Statement of Claim, paragraphs 3 and 4; Brian and Majella's defence, paragraphs 42 and 43; Tony's Defence at AB 647.

4 Further Amended Statement of Claim, paragraphs 36A-36E, AB 522; admitted at AB 602. The steps were to cancel Donna's authority to operate bank accounts, cancel the electricity account for the house at Kitcombe, removing her as a director of Nolan & Son, and demanding she surrender her vehicle. The submissions of Brian, Majella and Tony at trial also contended that any farming partnership involving Donna only existed between 1993 and 2010: AB 670, paragraphs 8 and 11.

The respondent married the first appellant in 1991. They separated in 2009 and divorced in 2011.

[28] The second and third appellants, who are now in their seventies, have run farming enterprises on various properties for approximately 50 years. The second and third appellants have owned each of those properties in their own names. The first appellant has worked for, or with, the second and third appellants in those farming enterprises for most of his adult life.

Evidence

[29] The major asset of the farming enterprise found to have been conducted by way of common endeavour was a property known as "Kitcombe". The second and third appellants, purchased Kitcombe in their own names as joint tenants, in 1985. The purchase price of $690,000 was met by a contribution of $490,000 in cash from the second and third appellants. The second and third appellants borrowed the balance from a banking institution.

[30] In 1992, the second and third appellants sold the family home in Toowoomba. Some of the proceeds from the sale were used to reduce the debt on "Kitcombe". The second and third appellants later used the balance to purchase land in Dalby and build a home on that land. That home was completed in 1996.

[31] After the purchase of "Kitcombe", the first appellant lived and worked on "Kitcombe" during the working week. The second appellant also resided at "Kitcombe" during the working week. They returned to the family home in Toowoomba on weekends. After the first appellant and the respondent married in May 1991, they permanently resided at "Kitcombe". Initially, the respondent continued working as a hairdresser. Her income was used to fund the household. After the birth of their children, the respondent undertook domestic and other duties and assisted in the operation of "Kitcombe".

[32] After the purchase of "Kitcombe", farming activities were conducted on it through various partnership structures. However, the second and third appellants always remained the registered owners of "Kitcombe". The various structures leased that property from the second and third appellants.

[33] Initially, the farming business at "Kitcombe" was operated as a partnership between the second, third and fourth appellants. The fourth appellant was the corporate trustee of a discretionary trust which had the second and third appellants as its primary beneficiaries, and their children and grandchildren as secondary beneficiaries. That structure operated between 1985 and 1993.

[34] On 1 July 1993, a new partnership was formed between the first appellant, the respondent and the fourth appellant. The first appellant and the respondent each held a 25 per cent stake. The remaining 50 per cent stake was held by the fourth appellant. No partner made any financial contribution towards the acquisition or maintenance of partnership property at the commencement of that new structure. No monies were paid to become a partner of that structure.

[35] In 1996, the first appellant and his brother commenced an agricultural spray business. Initially, that business was owned in equal shares by the fourth appellant and another corporate entity, which was the trustee of a trust controlled by the first appellant's brother. In 2001, the fourth appellant acquired 100 per cent of that entity. Shortly thereafter, the respondent became a director of the entity operating the agricultural spray business.

[36] In 2001, the respondent commenced working part-time with the Dalby Shire Council. The respondent resumed full-time work in 2004. Again, the respondent's income was used to help fund the household. In 2004, the fourth appellant alone commenced operating the farming enterprise. The first appellant and the respondent became directors and shareholders of the fourth appellant. The consequence of this change was that the shareholding of the fourth appellant was held equally by the first, second and third appellants and the respondent. Each owned one share. The respondent did not pay any money for her share. The farming operation continued to operate under that structure from 2004.

[37] In 2005, the second and third appellants considered retirement. Discussions were held between the appellants and the respondent about selling "Kitcombe". Pursuant to those discussions, part of the proceeds of sale were to be used to purchase a home for the first appellant and the respondent. They were also to receive the agricultural spray business, including its equipment.

[38] "Kitcombe" was offered for sale in 2005, and again in 2008. The asking price was never realised and it was later withdrawn from sale. In late 2009, the marriage between the first appellant and the respondent broke down. The first appellant left the family home and commenced another relationship. The respondent continued to reside rent-free at "Kitcombe". The first appellant and the respondent divorced in 2011. Prior to that divorce, the respondent commenced these proceedings in March 2010.

Judgment at first instance

[39] At trial, the respondent sought an interest in the assets of the farming enterprise on two bases. First, an equitable estoppel founded on the respondent's expectation that she and the first appellant would, in the future, have ownership of "Kitcombe" transferred to them. Second, that the first, second and third appellants and the respondent had engaged in a common endeavour, being the operation of the farming enterprise and the respondent was entitled to a proportion of the net assets of that common endeavour.

[40] The primary Judge rejected the respondent's claim for relief on the first basis. That rejection is not the subject of any appeal. The primary Judge granted the respondent relief on the second basis. In doing so, the primary Judge found that the first, second and third appellants and the respondent had conducted a common endeavour in the form of the farming enterprise; the respondent had contributed to that common endeavour in a variety of ways; the respondent had suffered detriment as a result of her involvement in that common endeavour; and it would be unconscionable for the first, second and third appellants to receive the benefit of the respondent's contribution without compensation to the respondent.

[41] The primary Judge further found that the parties had previously reached an agreement about how all their various contributions should be recognised in the event the farming enterprise was no longer operative. The respondent ought to receive compensation in accordance with that agreement. Accordingly, the primary Judge held that the respondent was to receive a sum equivalent to 25 per cent of those net assets, subject to an adjustment to allow for the fact the respondent had continued to live rent-free at "Kitcombe" for a number of years.

[42] Subsequent to delivery of the reasons for judgment, the primary Judge found that the respondent had been deprived of the use of her share of the common endeavour for a number of years, and she ought to receive interest on that sum. Further, having regard to

the terms of formal offer to settle made by the respondent or, alternatively, a valid Calderbank Offer[5], the respondent was entitled to costs on an indemnity basis from the date of those offers. Orders were made to give effect to the initial findings, and those further findings.

Appellants' submissions

[43] The appellants submit the applicable authorities do not support the proposition that in the case of a common endeavour, the usual rule is that there should be an equal division of property. The correct approach requires an assessment of the respective proportions of each party's contribution to the common endeavour. The primary Judge did not undertake any such assessment, and the evidence led at the trial was insufficient to allow for a proper assessment.

[44] The appellants submit it was insufficient, for the purposes of that assessment, for the trial Judge to identify the type of contributions made by the respondent. The proper approach required a quantification by the trial Judge of those contributions in some objective way. The primary Judge's reasons did not give any, or any sufficient, consideration or weight to the fact that "Kitcombe" was acquired by the second and third appellants from their own resources and the respondent made no financial contribution to the acquisition of that property.

[45] The appellants further submit the primary Judge erred in finding the respondent had suffered detriment as a consequence of the pursuit of the common endeavour. Detriment formed no part of a claim based on common endeavour.

[46] Finally, the appellants submit the primary Judge erred in concluding that the parties had reached an agreement as to how their respective contributions were to be recognised and in finding that that agreement was relevant to a determination of the respondent's claim. The purported agreement did not constitute a consideration by the parties as to their respective contributions, nor did it constitute an agreement that was to be operative in circumstances where the farming enterprise was ongoing.

[47] In respect of interest, the appellants submit the primary Judge erred in awarding interest. The respondent made no claim for interest in the claim or statement of claim. In any event, there were compelling reasons why interest ought not to be awarded in the exercise of the primary Judge's discretion. The remedy was a constructive trust. The respondent had not been held out of a sum of money due and owing to her. An award of interest also failed to have regard to the fact that the burden of the declining value of the property rested on the second and third appellants alone.

[48] In respect of costs, the primary Judge erred in relying upon the formal offer to settle. That offer was not a relevant offer, in accordance with the *Uniform Civil Procedure Rules* 1999 (Qld). Further, the making of a Calderbank Offer did not mean the respondent was entitled to costs on an indemnity basis. Such an order could only be made if the rejection of that offer was unreasonable. The rejection by the appellants of that offer was not unreasonable in all the circumstances.

Respondent's submissions

[49] The respondent submits the primary Judge correctly concluded that a consideration of all of the circumstances supported an equal sharing of the net assets of the common

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5 *Calderbank v Calderbank* [1975] 3 All ER 333 (EWCA).

endeavour. It was a matter for the primary Judge to assess the evidence as a whole in determining the proper effect of those contributions. Contributions include both financial and non-financial contributions.

[50] The respondent further submits the agreement reached between the parties was relevant to a determination of what was an appropriate recognition of the respondent's contribution to the common endeavour. The agreement dealt with how the assets of the common endeavour were to be divided in the event it did not continue in the future. In any event, the primary Judge checked the fairness of that conclusion by a consideration of an alternate methodology, namely, the respondent's share of the net increase in the value of the assets during the period of the common endeavour.

[51] In respect of interest, the respondent submits the appellants did not object to the claim for interest. The claim was, in any event, within the equitable jurisdiction. There was no prejudice by the granting of the claim in all the circumstances. The quantum was properly a matter within the discretion of the primary Judge.

[52] As to costs, the respondent submits the primary Judge correctly found that the applicable formal offer satisfied the Rules. The respondent was entitled to an order for costs on an indemnity basis from the making of that offer. Alternatively, the primary Judge correctly found the rejection of the Calderbank Offer justified an award of costs on an indemnity basis.

Discussion

Unconscionability

[53] The foundation for the imposition of a constructive trust in circumstances where parties have engaged in an enterprise by way of common endeavour is that a refusal to recognise the existence of an equitable interest in favour of one of those parties amounts to unconscionable conduct; the trust is imposed as a remedy to circumvent that unconscionable conduct.[6]

[54] In that event, the Court is to consider the terms of the constructive trust having regard to the respective contributions of the parties, making any necessary adjustment "to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind".[7] A contribution of a party need not be financial. A contribution may be in kind or otherwise, such as contributions to family welfare by way of domestic assistance.

[55] An example of the consideration of the respective contributions and the making of appropriate adjustments is contained in the decision of this Court in *Engwirda v Engwirda*.[8] That case concerned a claim for a constructive trust based on a common intention. However, during the course of the trial leave was given to amend to a certain alternate basis, based on unconscionability. Both claims were dismissed in the first instance, and on appeal. However, in considering the claim based on unconscionability the Court observed:

> "A contention of this kind is usually made and sometimes succeeds in a context in which both parties to a relationship such as this have provided their resources, in money and labour, for the purpose of acquiring or

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6 *Baumgartner v Baumgartner* (1987) 164 CLR 137 per Mason CJ, Wilson and Deane JJ at 147.
7 *Baumgartner* per Mason CJ, Wilson and Deane JJ at 149-150.
8 [2000] QCA 61.

> improving assets to be used by the parties in their joint relationship; usually a residence but sometimes a business in which they were or expected to become involved together. In many of these cases there has been a pooling of funds although that is not essential." (Footnotes omitted)[9]

[56] In *Engwirda*, the claim for a constructive trust based on unconscionability did not succeed because the nature of the assets acquired were of a purely commercial kind, in which there was no expectation that both parties would be involved in their use, and there had been limited pooling of resources for a limited purpose. Those significant distinguishing features rightly caused the primary Judge to observe that the decision in *Engwirda* was not relevant, even though the primary Judge incorrectly characterised it as a case involving common intention trusts.

[57] The true issue to be determined in respect of this ground is whether there is force in the appellants' contention that there was no or no adequate evidence to enable an assessment of the respective proportions of each of the parties' contributions to the common endeavour and, if not, whether the primary Judge failed to make an assessment of those respective proportions and the value of those respective contributions to the assets of the farming endeavour. The respondent concedes that to the extent the primary Judge found the respondent had suffered detriment as a result of her involvement in the farming enterprise, that detriment was irrelevant to the determination of the issues in dispute.

[58] On this aspect the primary Judge correctly noted that the Court could take into consideration "the pooling of financial resources, the contribution of labour and the contributions to family welfare by way of domestic assistance, home making and parenting" and that in taking those matters into account there was no requirement for a "precise accounting".[10] The primary Judge found the personal effects of the first appellant and the respondent were included as assets of the farming enterprise when making submissions to banks and other institutions, and the respondent's income from her later employment was also included at those times. The income from the agricultural spray business was also included as part of those assets.

[59] The primary Judge further found that the respondent met from time to time with the accountants and bankers and assumed responsibilities as co-borrower and guarantor in respect to the farming enterprise. The respondent's wages were contributed to the family unit, thereby allowing the family to live without substantial drawings from the partnership. This income stream was of significant importance to the family unit when drought hit, making it difficult to continue the farming operation. In addition to those contributions, the primary Judge found the respondent helped out with some physical work on the farm, was particularly involved in the administrative activities of the agricultural spray business, and contributed by way of support for the first appellant at the farm and by caring for their children. She had also carried out extensive domestic duties. The primary Judge noted the Wills of the second and third appellants specifically acknowledged the role the respondent and the first appellant had played in relation to the farming enterprise.

[60] Each of these findings was open on the evidence led before the primary Judge. The evidence led, although general, amply supported findings of contributions of the nature described by the respondent throughout the period of the common endeavour.

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9 *Engwirda* at [25].

10 AB 842 at [88].

[61] The various contributions found to have been made by the respondent were relevant contributions when determining whether a constructive trust ought to arise having regard to the finding that the farming enterprise had been conducted by way of common endeavour. As was observed by Campbell J in *West v Mead*:[11]

> "Part of the justification for imposing the *Baumgartner* constructive trust is that the parties have jointly been building up assets, on the basis that those assets will be available for the joint endeavour in future. Part of the reason why it can be unconscionable to let the legal title lie where it falls, if the relationship fails, is that each knew that the other was contributing to a common pool on the basis that the pool, and assets acquired from it, would be used for their ongoing common benefit. It is unconscionable for the party who ends up, at the end of the relationship, with a disproportionate share of the assets which were built up during the relationship, to keep those assets when he or she knew that that was the basis on which the assets were being built up."

Apportionment

[62] The primary Judge had evidence on which to form an assessment of the respective proportions in which each of the first, second and third appellants and the respondent had contributed to the assets of the farming enterprise. However, the primary Judge determined the apportionment of each contribution having regard to an agreement the primary Judge found had been reached between the parties in 2006, at a time when the second and third appellants were considering retirement and it was proposed "Kitcombe" would be sold.

[63] Whilst the appellants contended there was insufficient evidence to support a finding that an agreement had been reached between the parties, whether an agreement was reached was ultimately a matter for the primary Judge, after considering the evidence as a whole. The primary Judge did so, and was satisfied to the requisite standard that an agreement had been reached by the parties. The appellants have not identified any factors which would justify overturning that finding of fact, particularly having regard to the significant adverse findings made by the primary Judge in respect of the reliability of the evidence of the first, second and third appellants.

[64] However, that conclusion does not determine whether the primary Judge erred in the findings as to an appropriate apportionment. The fact the parties may have reached an agreement about how their various contributions should be recognised, should a particular event occur, does not necessarily mean that that agreement, in equity, reflects a proper assessment of the respective contributions of the parties in circumstances not the subject of contemplation of that agreement.

[65] Whilst the intention of the parties is not an essential aspect in findings of a constructive trust imposed to prevent an unconscionable assertion of legal title, an express agreement about what is to happen to the assets of the enterprise conducted by way of common endeavour in particular circumstances may be relevant if there is nothing unconscionable in holding the parties to that agreement. However, the particular circumstances are expressly relevant in determining whether there is unconscionability in holding the parties to that agreement. As Campbell J observed in *West v Mead*:[12]

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11 (2003) 13 BPR 24,431 at [62].

12 At [63].

> "If the parties have expressly contemplated the very situation which has arisen, and have, in advance, agreed how the assets built up as a result of their joint efforts should be divided in that situation, it would often be the case that there is nothing unconscionable in holding the parties to their agreement."

[66] Whilst the primary Judge found that the agreement reached between the parties was an appropriate methodology to adopt when considering what was to be the respective allocations of the parties' contributions to the farming enterprise, the primary Judge did not give any consideration to the differing circumstances which existed at the time of the trial to those the subject of the agreement. The specific agreement reached between the parties was in the context that not only would the farming enterprise no longer be operated as a common endeavour, "Kitcombe" would itself be sold, thereby realising its value for the second and third appellants. The agreement recognised that a consequence of that scenario was that the first appellant and the respondent would lose their family home and their means of income. It was in that context that an agreement was reached whereby the first appellant and the respondent would receive a sum of money to be used to purchase a new family home and would receive the agricultural spray business and its equipment.

[67] That scenario was materially different to the circumstance at trial. At trial, "Kitcombe" was still owned and operated by the appellants. It was not intended that it be sold. The intention was to continue the farming enterprise. That circumstance did not have the factors of natural love and affection which clearly operated in relation to the circumstances pertaining to the agreement in 2006. To comply with the terms of the agreement would require the second and third appellants to borrow heavily against that asset; a materially different circumstance.

[68] The failure of the primary Judge to recognise the significant difference between the circumstances that then existed, and to the circumstances in which the agreement in 2006 had been reached, renders the conclusion that that agreement was the appropriate methodology to adopt erroneous. The correct approach in the circumstances was for the primary Judge to give consideration to the respective contributions of the first, second and third appellants and of the respondent, and to undertake an apportionment which was appropriate in all the circumstances. That required specific consideration of the very significant financial contributions made by the second and third appellants in purchasing "Kitcombe", as well as consideration of the other contributions made by them and by the first appellant and the respondent.

[69] The acceptance of the agreement as the appropriate methodology adopted by the primary Judge did not allow in any material way for that very significant contribution. The check methodology undertaken by the primary Judge also did not allow for that very significant contribution. Whilst the alternate methodology adopted by the primary Judge notionally recognised that contribution by giving consideration to the net increase in the assets of the farming enterprise following the purchase of "Kitcombe", that methodology gave no recognition to the fact that the second and third appellants could otherwise have used those funds to their own advantage over and above the sharing of the net increase in assets.

[70] The failure of the primary Judge to undertake an assessment as to the respective proportions in which each of the first, second and third appellants and the respondent contributed to the assets of the farming enterprise, and to make an apportionment having regard to those respective contributions necessitates a consideration of that issue afresh. There is no reason why this Court cannot undertake that assessment.

[71] Subject to an allowance being made for the significant financial contribution made by the second and third appellants in providing the funds for the purchase of "Kitcombe", the findings of the primary Judge support a conclusion that the respective contributions of the parties are otherwise properly to be reflected on the basis each of their contributions was equivalent, notwithstanding the method of contribution was different.

[72] In reaching that conclusion, it is not necessary to analyse in depth the actual work carried out by the respondent on the farm or in the agricultural spray business. Whilst that work fluctuated, so also would the work undertaken by the appellants depending on the time of year and the prevailing circumstances. Contributions are to be considered globally and with flexibility.

[73] However, that equal contribution must be considered after allowance has been made for the very substantial financial contributions made by the second and third appellants. Without those contributions, "Kitcombe" would not have been available for use in the farming enterprise, and would not have been available as the family home of the first appellant and the respondent. The first appellant would also not have been able to work the farming enterprise for that extended period, thereby denying the first appellant and the respondent of the benefits of the income derived from that enterprise.

[74] Allowing for these factors, an appropriate recognition of the respective contributions of the parties is for the second and third appellants to be initially entitled to 30 per cent of net assets of the farming enterprise. The respective contributions of the first, second and third appellants and the respondent to the common endeavour is then appropriately recognised by dividing the remaining 70 per cent of those assets equally between the first, second and third appellants and the respondent.

[75] Whilst the respondent contended the alternate methodology adopted by the primary Judge reflected the initial financial contributions of the second and third appellants, surely deducting the contributions from the total assets did not appropriately reflect the real and substantial effect of that contribution. Without it, there would have been no property on which the parties could undertake the farming enterprise.

[76] The respondent's contribution to the common endeavour is to be reflected by awarding her a sum equivalent to 17.5 per cent of the net assets of the farming enterprise. The sum to be awarded to the respondent by way of constructive trust, in accordance with that conclusion, is $291,550. After allowing for the value of the motor vehicle of $27,500, the total figure is $319,050.

Interest

[77] The primary Judge awarded the respondent interest on the basis she had been denied access to her share of her contributions to the common endeavour for a considerable period of time, in circumstances where the appellants had access to those funds. However, that conclusion did not give proper consideration to the fact that the appellants had never realised the assets of the farming enterprise. Further, the appellants had borne any costs and any losses in that enterprise in the ensuing years. These considerations were important considerations in determining whether it was appropriate, in the exercise of the discretion, to award the respondent interest.

[78] There was no suggestion the appellants had had access to their share of the assets of the enterprise so as to invest those assets in interest-bearing deposits. Any income generated by the farming enterprise to which the appellants had had access had to be

offset by the costs incurred in operating that enterprise and the risks undertaken in that enterprise. An adjustment to allow for the fact that the respondent had the benefit of living rent-free in the property did not adequately address those significant factors.

[79] The failure to have regard to those competing factors means it is necessary to exercise afresh the discretion in relation to interest. A consideration of the nature of the relief obtained by the respondent together with the fact that that relief necessitated the payment by the appellants of a considerable sum in circumstances where the assets of the farming enterprise had not been realised supports a conclusion that it is not appropriate to award interest on that sum. I would decline, in the exercise of my discretion, to award the respondent interest on that sum before entry of the judgment.

Costs

[80] The primary Judge's conclusions in respect of costs were premised on the effect of a formal offer or, alternatively, a valid Calderbank Offer. Those offers were operative because of the amount awarded in favour of the respondent. As I would review that amount as a consequence of this appeal, the question of costs needs to be addressed afresh.

Cross-Appeal

[81] The respondent filed a cross-appeal in respect of the calculation of interest and costs. The conclusions that interest not be awarded and that costs be determined afresh render it unnecessary to further consider those grounds of the cross-appeal.

[82] The respondent also cross-appealed in respect of the primary Judge's order delaying the awarding of post-judgment interest.

[83] The respondent contends this order was made in circumstances where a delay was not sought, and there was no proper consideration as to the appropriateness of a delay in the awarding of such interest. However, a consideration of the primary Judge's reasons reveals that specific consideration was given to the effect of the order. The primary Judge observed that the appellants had requested a year to sell the property "before the sum of money owing to the plaintiff becomes due and owing" and accepted the force "of this submission".[13]

[84] If the sum to be paid to the respondent was not due and owing until a specified date, it was well within the discretion of the primary Judge to order that interest not be payable on that amount for that period but that interest be payable in the event of non-payment within that period.

[85] I would dismiss the cross-appeal.

Orders

[86] I would order:

1. The appeal be allowed.
2. The cross-appeal be dismissed.
3. The orders made on 11 December 2014 be set aside.

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[13] AB 853 [25]-[26].

4. The second, third and fourth appellants are to pay the respondent the sum of $319,050.

5. Execution of the order in paragraph (4) be stayed until 11 December 2015 or earlier order.

6. The second, third and fourth appellants are to indemnify the respondent in respect of her liability under the guarantee and indemnity dated 29 May 2007 in favour of the National Australia Bank.

7. It is declared that the second, third and fourth appellants hold the following properties and any proceeds of sale on trust for the plaintiff to the extent of $319,050:

   (a) Lot 1 on Crown Plan AG2956, County Aubigny, Parish Myall, Title Reference 14499224;

   (b) Lot 3 on Registered Plan 98210, County Aubigny, Parish Jimbour, Title Reference 13840096;

   (c) Lot 5 on Registered Plan 52015, County Aubigny, Parish Jimbour, Title Reference 16798056;

   (d) Lot 6 on Registered Plan 853435, County Aubigny, Parish Dalby, Title Reference 18551228; and

   (e) One-half of the net value of the assets of the B&M Trust.

8. If the second, third and fourth appellants have not paid to the respondent the amount referred to in order (7) by 11 December 2015 the second, third and fourth appellants are to pay interest on that amount calculated in accordance with Section 59 of the *Civil Proceedings Act* 2011 (Qld) from 11 December 2014 until the date of payment.

9. Within 14 days of the date of the second, third and fourth appellants filing and serving undertakings to the Court not to sell, mortgage, further encumber or deal with these properties without seven days prior notice in writing to the respondent's solicitors, the respondent cause the following caveats to be removed:

   (a) Caveat No 713076635 lodged over Lot 1 on Crown Plan AG2956, County Aubigny, Parish Myall, Title Reference 14499224 on 23 February, 2014;

   (b) Caveat No 713076635 lodged over Lot 3 on Registered Plan 98210, County Aubigny, Parish Jimbour, Title Reference 13840096 on 23 February, 2010;

   (c) Caveat No 713076635 lodged over Lot 5 on Registered Plan 52015, County Aubigny, Parish Jimbour, Title Reference 16798056 on 23 February, 2010; and

   (d) Caveat No 714322633 lodged over Lot 6 on Registered Plan 853435, County Aubigny, Parish Dalby, Title Reference 18551228 on 20 February, 2012.

10. The parties file and serve written submissions on the costs of the trial and the appeal within seven days of the date of this order.