SUPREME COURT OF QUEENSLAND

CITATION:	*Tabtill Pty Ltd v Creswick; Creswick v Creswick & Ors* [2011] QCA 381
PARTIES:	**In the "Tabtill Appeal":** **TABTILL PTY LTD AS TRUSTEE FOR THE JOHN CRESWICK FAMILY TRUST** (appellant) **v** **FELIX ANTONIO CRESWICK** (respondent) **In the "Creswick Appeal":** **FELIX ANTONIO CRESWICK** (appellant/cross respondent) **v** **JOHN FRANCIS CRESWICK** (first respondent/first cross appellant) **WILLIAM GERARD CRESWICK** (second respondent/second cross appellant) **SHAYNE MARISE CRESWICK** (third respondent/third cross appellant) **JANE VERONICA CRESWICK** (fourth respondent/fourth cross appellant) **TABTILL PTY LTD** ACN 010 408 545 (fifth respondent/fifth cross appellant) **TABTILL NO 2 PTY LTD** ACN 098 424 741 (sixth respondent/sixth cross appellant) **TABTILL NO 3 PTY LTD** ACN 106 070 848 (seventh respondent/seventh cross appellant) **TABTILL NO 4 PTY LTD** ACN 106 071 096 (eighth respondent/eighth cross appellant) **T2 PROJECTS PTY LTD** ACN 109 792 707 (ninth respondent/ninth cross appellant)
FILE NO/S:	Appeal No 11039 of 2010 SC No 10963 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED ON: 23 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 1-2 August 2011

JUDGES: Fraser and White JJA and Boddice J
Judgment of the Court

ORDERS:

1. **Dismiss Tabtill Pty Ltd's appeal.**
2. **Allow the appeal by Felix Antonio Creswick.**
3. **Allow the cross appeal by John Francis Creswick, William Gerard Creswick, Shayne Marise Creswick, Jane Veronica Creswick, Tabtill Pty Ltd (ACN 010 408 545), Tabtill No 2 Pty Ltd (ACN 010 408 545), Tabtill No 3 Pty Ltd (ACN 106 070 848), Tabtill No 4 Pty Ltd (ACN 106 071 096), T2 Projects Pty Ltd (ACN 109 792 707).**
4. **Set aside the orders made below.**
5. **Set aside the agreement made between John Francis Creswick, William Gerard Creswick, Shayne Marise Creswick, Jane Veronica Creswick and Felix Antonio Creswick dated 26 May 2007.**
6. **Declare that the purported signature of Felix Antonio Creswick on each of those 105 documents listed in Annexure D to Exhibit 22 to the trial exhibits was affixed by John Francis Creswick without the authority of Felix Antonio Creswick.**
7. **Declare that the transfer authority of Felix Antonio Creswick's shares in Tabtill 2 to John Francis Creswick and William Gerard Creswick is null and void and order that John Francis Creswick and William Gerard Creswick do all things necessary to revest those shares in Felix Antonio Creswick.**
8. **Order that caveats lodged by John Francis Creswick over the Holland Park properties being 905 Logan Road (Lots 1 and 3 on RP 38083, Lots 1 and 2 RP 46140 and Lot 1 on RP 51268 County of Stanley Parish of Yeerongpilly, Title References 16817020, 14851018 and 14853044), 909 Logan Road (Lot 2 on RP 51268 County of Stanley Parish of Yeerongpilly, Title Reference 15966057) and 911 Logan Road (Lots 5 and 6 on RP 38083, County of Stanley, Parish of Yeerongpilly, Title Reference 15871094) and by William Gerard Creswick and John Francis Creswick over 35 Sentinel Court (Lot 416 on SL 12471 County of Stanley Parish of Cleveland, Title Reference 17255029) in reliance on their interest under the agreement made 26 May 2007 be removed.**

9. **Declare that Felix Antonio Creswick holds his interests in the properties situated at 503 Logan Road, Holland Park, more particularly described as Lots 1 and 2 on RP 12943, County of Stanley, Parish of Bulimba, and at 35 Sentinel Court, Cleveland, more particularly described as Lot 416 on Crown Plan SL12471, County of Stanley, Parish of Cleveland, Title Reference 17255029, on trust for Tabtill Pty Ltd ACN 010 408 545.**

10. **Remit the proceedings to the Trial Division for Felix Antonio Creswick to trace any benefits obtained by Tabtill Pty Ltd and the respondents as a result of the purported affixing of Felix Antonio Creswick's signature by John Francis Creswick on the documents identified in Order 6.**

11. **Felix Antonio Creswick be entitled to obtain all accounts, inquiries and disclosure to carry out the tracing referred to in Order 10.**

12. **Leave to the parties to make written submissions, within such time and in such form as a judge of the Court directs, concerning:**

    (a) further or consequential orders in conformity with the Court's reasons, and

    (b) orders as to the costs of the appeals, cross appeal, and the proceedings in the Trial Division.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – PROOF AND EVIDENCE – OTHER MATTERS – where Felix Creswick claimed that his son, John Creswick, had forged his signature on a large number of documents – where two handwriting experts had agreed that the disputed signatures were all written by the same author and bore no resemblance to Felix Creswick's undisputed signature, but disagreed as to whether it was possible to say who had written the disputed signatures – where a number of witnesses to the disputed signatures were called to give evidence – where the effect of John Creswick's argument was that Felix Creswick continued to use the disputed form of signature after he had falsely accused John Creswick of forgery – where the trial judge found that Felix Creswick had not proven the alleged forgery to the *Briginshaw* standard – where Felix Creswick argued on appeal that the trial judge failed to properly analyse the evidence and contemporaneous documentation, and failed to consider the consequences of the respective findings of credit made – whether the allegations of forgery were proven to the requisite standard

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – PARTICULAR CASES – where the trial judge's findings in relation to Felix Creswick's forgery case were made on the basis of general findings as to each of the witness's honesty and credibility – where the trial judge declined to make a finding as to the identity of the writer of the disputed signatures – whether it is appropriate for the Court of Appeal to make specific findings as to who wrote the disputed signatures from an analysis of the evidence given by witnesses found to be honest by the trial judge

EQUITY – EQUITABLE REMEDIES – RESCISSION – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – where the parties entered into an agreement to resolve all matters in dispute between them – where Felix Creswick sought to resile from that agreement shortly after signing it – where the agreement was "brokered" by a real estate agent who had known John Creswick for many years – where Felix Creswick, in the agent's presence, consulted with a lawyer about the draft agreement – where the agent communicated to Felix Creswick and the lawyer that the agreement had to be concluded the same day – where the lawyer advised Felix Creswick not to sign the agreement, and not to deliver it to John Creswick's solicitors – where changes were made to the agreement and Felix Creswick signed it and returned it – where the lawyer later expressed his opinion to Felix Creswick and John Creswick's solicitor that the agreement was signed under duress and would not be enforceable – where the trial judge found that Felix Creswick initiated the signing of the agreement, and that no "false sense of crisis" had been created – whether the trial judge erred in finding that the agreement ought not to be set aside as an unconscientious dealing

EQUITY – EQUITABLE REMEDIES – RESCISSION – UNDUE INFLUENCE OR DURESS – where, in addition to the alleged "false sense of crisis", Felix Creswick, to John Creswick's knowledge, was suffering from ill health and impecuniosity – where the trial judge found that Felix Creswick was capable of dealing robustly with John Creswick, and the nature of their relationship was not such as to give rise to undue influence – whether the trial judge erred in finding that the agreement ought not to be set aside on the basis of undue influence or duress

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – QUESTIONS NOT RAISED ON PLEADINGS

OR IN ARGUMENT – GENERALLY – where Felix Creswick made handwritten changes to the draft agreement provided to him before signing the agreement – where Felix Creswick communicated his intention to resile from the agreement before it had been executed by the respondents – where, on appeal, Felix Creswick argued that his signing of the agreement amounted to a counter-offer which was withdrawn before acceptance by the respondents and there was therefore no concluded agreement – where that argument was not raised on the pleadings or argued below – whether, in the circumstances, Felix Creswick should be entitled to raise that argument for the first time on appeal

EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – WHEN ARISING – PURCHASE IN ANOTHER'S NAME – where Tabtill Pty Ltd and John Creswick argued that a number of the properties registered in Felix Creswick's name were held on resulting trusts for Tabtill Pty Ltd and/or John Creswick – where the basis of the alleged resulting trusts was the presumption of resulting trust arising from the payment of "acquisition costs", rates, land tax, and other outgoings with respect to the properties – where the trial judge made adverse findings with respect to the credibility and reliability of both Felix Creswick and John Creswick – where the trial judge did not decide the issue of resulting trusts on the basis that the May agreement was upheld – whether the presumption of resulting trust is raised in the circumstances – whether resulting trusts ought to be ordered

Blomley v Ryan (1956) 99 CLR 362; [1956] HCA 87, considered
Calverley v Green (1984) 155 CLR 242; [1984] HCA 81, applied
Commercial Bank of Australia Lts v Amadio (1983) 151 CLR 447; [1983] HCA 14, cited
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, considered
Creswick and Ors v Creswick [2010] QSC 339, overrulled
Dickinson v Dodds (1876) 2 Ch D 463, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
Goldsborough Mort & Co. Ltd v Quinn (1910) 10 CLR 674; [1910] HCA 20, cited
IVI Pty Ltd v Baycrown Pty Ltd [2005] QCA 205, cited
Johnson v Buttress (1936) 56 CLR 113; [1936] HCA 41, considered
Louth v Diprose (1992) 175 CLR 621; [1992] HCA 61, applied
Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357; [2010] HCA 31, cited
Neat Holdings Pty Limited v Karajan Holdings Pty Limited (1992) 110 ALR 449; [1992] HCA 66, applied

O'Brien v Komesaroff (1982) 150 CLR 310; [1982] HCA 33, cited
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; [1985] HCA 28, cited
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, applied

COUNSEL: P H Morrison QC, with C C Heyworth-Smith, for the appellant in the Tabtill Appeal and the respondents/cross appellants in the Creswick Appeal
L F Kelly SC, with A C Stumer, for the respondent in the Tabtill Appeal and the appellant/cross respondent in the Creswick Appeal

SOLICITORS: DLA Piper Lawyers for the appellant in the Tabtill Appeal and the respondents/cross appellants in the Creswick Appeal
Hopgood Ganim for the respondent in the Tabtill Appeal and the appellant/cross respondent in the Creswick Appeal

[1] **THE COURT:** These appeals[1] and cross appeal concern findings about the business and personal relationships of a father, two of his sons and their families and other persons associated with them in business and personally over some 25 years. Felix, John and Bill Creswick have principally built up their fortunes through the used car business although Felix invested in property and John engaged in extensive property development. In 2006-2007 the relations between Felix Creswick and his sons soured. In May 2007 they and the sons' wives executed an agreement ("the May agreement") which ostensibly was to effect settlement of their disputes. Felix Creswick disavowed that agreement shortly after he signed it. It was the enforcement of that agreement and its rectification to add further properties as well as the payment of monies by Felix Creswick which led to the institution of these proceedings. Felix Creswick counter-claimed alleging that over many years his son John had forged his signature on bank securities, property transfers and other documents. He maintained that these frauds have led his son and other persons associated with him to obtain benefits at his expense and that they should account to him for those benefits. In the alternative to the claim for specific performance of the May agreement the plaintiff Creswicks and Tabtill Pty Ltd, a company associated with John Creswick, sought orders that Felix Creswick held certain properties of which he was the registered proprietor on trust for Tabtill (or John).

[2] At the trial and in the judgment, because many of those involved in the litigation shared the name Creswick, members of the family were referred to by their given names. It is convenient and appropriate to follow that course in these reasons.

[3] In addition to John, Bill, and their wives Shayne and Jane, John and Shayne's daughter Jayne, and six "Tabtill" companies controlled by John (collectively "the respondents"), joined in these proceedings against Felix. The background to the disputes has been set out conveniently by the trial judge and may be repeated as that summary is not challenged:[2]

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1 The appeal filed by Tabtill Pty Ltd on 11 October 2010, and the cross appeal filed by Felix Creswick on 27 October 2010, which on 14 April 2011 was ordered to stand as an appeal.

2 *Creswick and Ors v Creswick* [2010] QSC 339.

"[12] Felix immigrated to Australia in the early 1950's. In the late 1950's, he began business as a motor vehicle mechanic. Soon after, he began business as a motor vehicle dealer. He carried on these businesses at various locations in Brisbane and at the Gold Coast, both in his own name and through a number of companies.

[13] Starting in the late 1950's, Felix also became involved in property investment. During the 1960's and 1970's he (either alone, with Frances [his wife] or through corporate vehicles) bought and sold numerous properties in South East Queensland. As time went on, he used the properties he had acquired as collateral for the purpose of raising finance, making further property acquisitions and to fund his business expansion.

[14] John and Bill are two of a sibship of six to Felix and Frances. (The other four children play no role in this saga.) Felix and Frances separated in about 1973 and were divorced in the late 1970's. It is clear that the domestic environment in which John and Bill were children was far from ideal. The family was adversely affected by Felix's consumption of alcohol and gambling and by some domestic violence.

[15] John was 15 when his parents separated. The other children went to live with Frances, but John stayed with Felix. While growing up, John had spent one year at boarding school and a considerable amount of time at his grandparents' farm at Wellington Point. He attended school and completed year 12. Bill was sent to boarding school as a young child and spent seven years there. When he left school, Bill became a qualified motor mechanic.

[16] John completed school in 1975. He said that he considered attending university (whether that is true or not is not relevant for present purposes). After finishing school, he went to work in the used car dealership Felix had at the time. Shortly afterwards, John moved to Caloundra to start his own motor vehicle dealership business with Mr Lloyd Matlin. In 1982, Felix asked John to return to Brisbane and in about the middle of that year John and Mr Matlin relocated their business to the premises from which Felix had previously operated. The partnership between John and Mr Matlin, however, did not last long and was dissolved after a few months. From then on, Felix and John worked together in the car dealership business.

[17] In April 1975, Felix bought his parents' farm at Wellington Point. The Wellington Point property stayed in Felix's name until it was subdivided and sold over a period of time from 1998. The circumstances surrounding the subdivision, including whether many of the documents

associated with the subdivision and sale of lots were actually signed by Felix, and the application of the proceeds of sale of the subdivided lots, are matters in issue in this proceeding.

[18] Between 1975 and 1978, Felix purchased the properties at 905-911 Logan Road, Holland Park ("the Logan Road properties"). These properties were (and still are) registered in Felix's name. Felix operated his car dealership business from the property at 905 Logan Road in the late 1970's, but he ran into financial difficulty. He liquidated a number of assets, including other real property investments, but kept ownership of the Logan Road properties. In October 1980, Felix's application to renew his motor vehicle dealer's licence was refused and he closed his dealership at 905 Logan Road. He was without his motor vehicle dealer's licence until September 1982. The renewal of his motor vehicle dealer's licence roughly coincided with the dissolution of the partnership between John and Mr Matlin. As I have said, from late 1982 Felix and John worked together from the premises at 905 Logan Road in a used car dealership. The precise nature of their relationship in this business is also one of the matters in dispute.

[19] In the meantime, Felix and his then de facto partner, Julie Bird, had purchased a rural property together at Office Lane, Glenmorganvale. The Glenmorganvale property was initially owned by Felix and Ms Bird as joint tenants, but consequent upon a property settlement between them after they split up, it became registered in Felix's name solely.

[20] In 1986, Tabtill purchased the property at 495 Logan Road. That purchase was financed by Alliance Acceptance. After the purchase of 495 Logan Road, John established a motor vehicle dealership on that site. Felix continued to manage the business on the site at 905 Logan Road.

[21] In late 1986, Felix and John purchased the property at 796 Main Road, Kangaroo Point as tenants in common in equal shares. This was one of the properties in respect of which Felix claimed in this proceeding that there was a property partnership under which Felix and John were equal partners, the partnership's expenses would be paid by Tabtill but from the motor dealership drawings of each of Felix and John, that the net income from the properties would be shared equally, and that the net proceeds of sale of the properties would be shared equally. Other properties to which this alleged property partnership is claimed by Felix to have applied are:

(a) 117 Old Cleveland Road;

(b) 661 Logan Road (referred to as the "Matilda site");

(c) Apartment 5 in "Belle Maison" at Broadbeach, and

(d) 503 Logan Road, Stones Corner ("the Stones Corner property") (ownership of which was registered in the names of Felix, John and Bill as equal tenants in common).

[22] The funds for the acquisition of all these properties were sourced from or financed by Tabtill. Felix made no financial contribution to them.

[23] In 1996, a vacant, canal-front lot at 35 Sentinel Court, Cleveland was purchased and registered in Felix's name. The funds for the acquisition of this property came from or were financed by Tabtill, and Felix did not contribute financially to the purchase.

[24] In 1989, the properties at 8-10 Crump Street, Holland Park ("the Crump Street properties") were purchased and registered in Felix's name. Crump Street runs off Logan Road, and the Crump Street properties are contiguous with the Logan Road properties. This acquisition was financed through Tabtill.

[25] The properties on which Felix's name continues to appear as registered proprietor (or one of the registered proprietors) are:

- the Logan Road properties;
- 35 Sentinel Court, Cleveland;
- 8-10 Crump Street, Holland Park;
- the Glenmorganvale property;
- 503 Logan Road, Greenslopes.

[26] John, Bill, Shayne and Jane have lodged caveats over the Logan Road properties, the Crump Street properties, 35 Sentinel Court and the Glenmorganvale property. Those caveats are supported by the present proceeding.

[27] This does not complete the roll-call of properties in which the Creswicks or their companies have had interests over the years. As necessary, I will refer to further properties below in specific contexts.

[28] I should make it clear that merely because a member of the Creswick family was registered as a proprietor of a particular property did not necessarily mean that that person had personally contributed to the purchase price of, or had a beneficial interest in, the property. The family's modus operandi over the years was to "park" properties in the names of different individual family members and/or corporate entities.

[29] John and Shayne were married in May 1982, before the dissolution of the partnership with Matlin. Upon returning

from their honeymoon, Shayne initially went back to live with her parents until refurbishment of a house situated on 909 Logan Road was complete and John and Shayne moved in to it. Felix was also living in that house. Relations between Shayne and Felix quickly became strained. After some time, John and Shayne purchased their own home at Cedar Creek and moved out of 909 Logan Road.

[30] The next 20 years or so were, by and large, good for the Creswick family fortunes.

[31] After leaving school in 1980, Bill trained and became qualified as a motor mechanic, and ended up managing a service station for his employer. In 1990 he bought his own service station business. He sold that business in 1992 and then, at John's request, went to manage and build up the business of the service station on the Matilda site. Bill was, at that stage, an employee of Tabtill. He worked there as an employee until the Matilda site and business were sold in 1994. By that time, he had married Jane. Bill then worked as a salesman in the dealership conducted on the Stones Corner site. In 2000, a property at Capalaba was purchased, the registered proprietors of which were Bill and Tabtill, and from which a car rental business and a motor vehicle dealership managed by Bill were conducted. Over the ensuing years, Tabtill 2, Tabtill 3, Tabtill 4 and T2 were established and used as vehicles for property development projects. T2 then established a recreational vehicle sale yard business at Moorooka. Bill was, and is, the manager of that business.

[32] It is clear that Tabtill operated, in effect, as the cash box for the members of the Creswick family for many years. At least until the establishment of the other companies, the businesses and property dealings in which they were engaged were run and financed through Tabtill. Shayne and Jane were listed in Tabtilll's books as employees. Wages were paid to the Creswick family members. But additionally each of them was provided with a credit card (and, in at least Felix's case, cheque books) which each could use for personal expenses. …

[33] Monies drawn by family members under these arrangements were recorded in journals (described within the family as "the green books").

[34] Felix and Bill worked in sales, and sometimes management, positions in the various businesses in which the Creswicks were involved over the years, and John became the prime mover in respect of real property acquisitions, sales and developments. He was the one who decided in whose name or names each particular property would be "parked". Those decisions, in turn, seemed to have been driven in part by revenue considerations. …

[35] John said, in effect, that the rationale for putting the properties in different names, and different combinations of names, was sourced in warnings from Felix to the effect that this would insulate the properties in the event of John going through a divorce. Felix's rival contention was that it was a tactic adopted by John, who had a second family with his mistress, to protect his assets from attack by either of his families.

[36] By the early 2000's, the effective division of labour was that Felix was running the dealership at the Logan Road property, Bill was running the dealership at Capalaba and John was at the Stones Corner property engaged principally in property development.

[37] In 2005, John decided to close down the Logan Road dealership which was being managed by Felix. John said that his reasons for closing it down were, in effect, that Felix was not moving enough stock through the business and it was unprofitable. There were also complaints about the way in which Felix conducted the business. Felix attributed the cause of the business downturn to the types of cars ("big American cars") and spoke of an arrangement he says he reached with John for the amalgamation and redevelopment of the Logan Road properties and Crump Street properties. In any event, the business was closed down.

[38] As at 2001, Felix and Marcia [Banfield - his de facto partner] were living in the house at 909 Logan Road. They moved from there to Raby Bay. The reasons for the move are disputed – John ties the move to Felix wanting to impress his sister, who was visiting from Italy; Felix asserts it was done preparatory to the amalgamation and redevelopment of the Logan Road properties and the Crump Street properties. Initially, Felix and Marcia moved into a house registered in John's name at 37 Sentinel Court, Raby Bay. John sold that house at the end of 2001, and Felix and Marcia then moved into a house rented by Tabtill at 12 Seahaven Court, Raby Bay. The house at 11 Seahaven Court was subsequently purchased with funds provided, or financed, by Tabtill and was registered in the names of John and Shayne. That house was refurbished and in 2002, Felix and Marcia moved into that house. They are still there. It is not suggested that Felix or Marcia personally contributed directly to the purchase price of 11 Seahaven Court nor have they paid for any of the rates, utilities or any other expenses of that property since they have been in occupation.

[39] After the business on the Logan Road properties was closed down, Felix moved to the business which was being conducted at 503 Logan Road. That business was also closed a short time later. In the meantime, John had negotiated for a well-known motor vehicle retail group to

> take a lease of the premises at 906 Logan Road. Zupps took a formal lease from Felix of those premises for a term of 2 years from 1 December 2005. In fact, Zupps was in occupation of that site from earlier in 2005 until mid-2007, when it shifted to the 495 Logan Road site. During the couple of years that Zupps occupied the 906 Logan Road site, all of the rental paid by Zupps was paid directly into Felix's personal account – a total of some $328,000.00.
>
> [40] From at least mid 2006, the relations between the parties went into a downhill slide…"

[4] The trial judge made adverse credit findings against Felix, John, Bill and Shayne.

FELIX'S APPEAL

1. Forgery

[5] As part of his counterclaim, Felix alleged that John had, on many occasions over many years, forged his signature on documents with the consequence that John and others within the Creswick family obtained benefits at his expense.

[6] Felix's case at trial was that John, in each case, was the maker of the signature contained in those documents ("the disputed signature"). John denied making the signature, and contended Felix had written the signatures. Felix accepted he bore the onus of establishing that the disputed signature was forged by John, and that the standard of proof was stringent.[3]

[7] At trial, two handwriting experts, John Heath and Gregory Marheine, gave evidence. Evidence was also given by 15 witnesses who were recorded as having witnessed the disputed signature on various documents. With the exception of one witness, Paul Anthony Ziegenfusz, the trial judge found each of these witnesses honest and credible.

[8] The trial judge found that an assessment of the evidence concerning the forgery case fell to be determined according to the *Briginshaw* standard. The onus to be satisfied was "on the balance of probabilities" not the criminal standard of proof.[4] Applying that test, the trial judge found Felix had not proven that John had forged his signature.

[9] Felix submits the trial judge erred in finding that his forgery case had not been proven to the requisite standard. Whilst numerous grounds of alleged error were identified, the essence of Felix's submission was that the trial judge failed to properly analyse the evidence and contemporaneous documentation. Further, the trial judge failed to consider the consequences of the respective findings of credit made, when determining Felix had not proven his case.

[10] The respondents submit the trial judge correctly applied the law, and properly analysed the documentation and evidence.

Trial judge's findings

[11] The trial judge's reasons for finding that Felix had failed to establish his forgery case were as follows:

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3 Reasons [113].

4 Reasons [115].

"[248] The evidence of Mr Heath and Mr Marheine clearly point to a conclusion that the disputed FC signature where it appears in the 105 documents relied on by Felix was made by one person. Beyond that, however, the experts were unable to give me a high degree of assurance as to the identity of the person who had written the disputed FC signature. Mr Heath expressed a view, based on examination of signatures, which tended to support a conclusion that the disputed FC may have been written by John. Mr Marheine, an equally eminent expert, declined to subscribe to Mr Heath's opinion in this regard, and gave cogent reasons for so doing.

[249] I have related at length the evidence given by the witnesses to the disputed FC signature. It is quite clear that there is no common thread. Witnesses who gave evidence which was not supportive of Felix's case were subjected to strenuous cross-examination with a view to exposing them as being either partisan or self-interested when giving evidence. With the exception of Mr Ziegenfusz, on whose evidence I have specifically commented above, I consider that each of the witnesses did his or her best to give truthful evidence before me. Occasionally, those witnesses were shown to have been mistaken in their evidence. That did not, however, detract from their overall credibility.

[250] The closest that Felix's side got to uncovering a 'smoking gun' was the evidence of Mrs Stephens and that of Mr Foote. Of course, the absence of direct evidence of fraud is not determinative. The *Briginshaw* standard can be, and often is, satisfied by reference to circumstantial evidence or the drawing of inferences. At its best for Felix's case, Foote and Stephens could be relied on to refute the notion that the disputed FC signature had been subscribed by Felix. But neither of them implicated John.

[251] One of the realistic difficulties which Felix's side also face is that, in order be persuaded to accept the argument that John was the forger of the disputed FC signature, I would effectively need to find that not just one or two but a large series of bank officers from a number of institutions and other independent witnesses were either tricked by John or were so lax in their own witnessing procedures as to allow the alleged serial forgery to occur in front of so many witnesses over so many years. My assessment of the evidence of these witnesses does not allow me to reach that conclusion.

[252] In terms of the objective indicia that were pointed to by counsel for Felix, it is clear that, whilst some of those at least were persuasive to the argument being advanced, there were alternative credible arguments available to explain away the inconsistencies referred to.

> [253] The allegations made by Felix were serious indeed. Proof of the forgeries by John required something more than 'inexact proofs, indefinite testimony, or indirect inferences'. In the case which was run by Felix at trial, Felix needed, in order to succeed on the forgery claims, to persuade me on the balance of probabilities that John had committed these forgeries. My adjudication of whether he has met that standard of proof, however, needs to be made having regard to the seriousness of, and consequence of, the allegations. The evidence in this case provided some support for the proposition that the disputed FC signatures were not written by Felix. Having considered the evidence as a whole, however, I consider that I cannot be satisfied to the requisite standard that Felix has proved that John forged the disputed FC signatures."

Evidence

[12] Heath and Marheine prepared individual reports, in addition to a joint report. In their joint report, they agreed the disputed signatures were written by "one and the same writer", and bore "no structural or pictorial likeness, or handwriting characteristics" to samples of Felix's undisputed signature. They disagreed as to whether it was possible to say who had written the disputed signatures.[5]

[13] Marheine could not say who had written the disputed signature. Marheine considered there was some indicia supportive of Felix being the author of the disputed signatures, but they were not persuasive or compelling indicia. He accepted there was no relationship between Felix's signature and the disputed signatures. Marheine disagreed there was evidence linking John to being the writer of the disputed signature. The disputed signature was of simplistic design, and there was nothing on John Creswick's initials that persuaded him either way.

[14] Heath's examination of the various documents allowed him to form the opinion that the writer was not Felix. Heath did not agree that if the trial judge found Felix had more than one signature, it followed that it was possible Felix had signed the disputed signatures. There was no evidence from an examination of the documents to support a conclusion that the author of the disputed signatures was Felix:

> "The two patterns are entirely different, ranging across the years from in the 70s through to current of the Felix Creswick specimen, I have been able to examine the substantial range of his variation from the point where he had a normal signature, a fully written signature, right to early times when he changed it from a fully written signature to a more abbreviated form of a signature, where you get this cursive Y type of effort, looks more like a 'Y' than an 'F', where he actually – the document shows where he started in the '70s actually using that abbreviated formation. So, from the time we wrote a fully written signature to the times he abbreviated into this more symbolic form to current date, there is no evidence in the handwriting, none, that says he has modified his signature radically, extremely, and changed it completely to this other pattern of signature."

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5 Reasons [121].

Heath accepted there wasn't anything in the structure or shape of the signatures which could lead him to exclude the possibility that Felix had a second form of signature that he used on occasion. However, there was evidence that linked John Creswick to the completion of a particular pattern range of initials.

[15] Douglas Porteous witnessed the disputed signature on four documents. He would never witness a document which was pre-signed. The signature he witnessed was that of Felix. He was familiar with that signature having seen it used by Felix on statutory declarations relating to infringement notices. He had never seen Felix use any other signature. He denied John Creswick wrote the signatures witnessed by him.

[16] Kurt Deiter Faust witnessed the disputed signature on one document. He also witnessed other signatures within that document. Felix signed in front of him. He would not witness anything that was not signed by the person present.

[17] Tom Banjanin witnessed the disputed signature on two documents. Felix signed in front of him. He never witnessed documents that had been pre-signed. He denied John had written the signature.

[18] Stephen Phillip Zeller witnessed the disputed signature on one document. He had no recollection of witnessing the document, but considered it unlikely the signature was made by a person other than Felix as his practice was not to witness unless the person in front of him was signing the document.

[19] Mark Kurbatoff witnessed the disputed signature on one document. He would not witness a pre-signed document. He could not recall the occasion of witnessing that document and could not recall any occasion when Felix had signed in front of him. He could not say whether he had ever been tricked or misled by John who may have signed a document and then placed it before him to witness it. He recalled meeting Felix on one occasion.

[20] George Lawrence McMahon witnessed one document containing the disputed signature. That document also contained signatures of John, Bill, Tracey Ashton and Jane Creswick. He had witnessed each of those signatures. Felix was definitely present. He had signed first. It was then signed by Bill, John and Tracey.

[21] David Anthony McGee witnessed one of the documents containing the disputed signature. He did not recall witnessing the document. It was possible John had asked him to witness his signature on a document when it was meant to be Felix signing it, but considered that a very unlikely proposition having regard to his usual practice of requiring the person who was required to sign the document to do so in his presence.

[22] Karen Elizabeth Smeal witnessed the disputed signature on two documents. She did not recall the occasions but would not have witnessed the signature if Felix was not signing the document. She did not accept that John may have asked her to witness a signature he had placed on the document. It was her habit to check the name of the person whose signature she witnessed with the person signing the document.

[23] Catherine Rita Stephens witnessed the disputed signature on several documents. She had never witnessed a signature made by Felix. She had never met Felix. On one occasion John had signed a contract in Felix's name in her presence. She believed it was the contract for Lot 6 of the Wellington Point development. She had noted the contract was in the name of Felix. John said he had authority to sign on

his behalf. John was the only person present on that day. She agreed it was difficult to remember individual contracts, but said some things stick. She could not be 100 per cent certain as to whether it was Lot 6 but was "probably 90%". She denied the contract had come to her pre-signed. Every contract "has been witnessed and signed in front of people". When it was suggested the Lot 6 contract was not signed by John. She replied "I can't say who signed it".

[24] Dawn Moore witnessed the disputed signature on several documents. She had no recollection of the signing of those documents. The procedure in place at the time was that a person would have to sign in the presence of the person witnessing the signature. She followed that practice. She knew of John as a client of the law firm she worked for at the time. She has never met Felix. She did not read the document before witnessing a signature. She did not seek identification of the person as she was "simply witnessing a signature, not the person". She assumed the person signing the document was the person able to sign that document.

[25] Terrence James Flynn witnessed disputed signatures on several documents. When witnessing documents within the Creswick family he would not necessarily require the person signing to do so in his presence. On occasions, John gave him a document that already had his father's signature on it. He did not see anything wrong with witnessing that document as "father and son got on very well and there was no reason to think that there would be anything wrong with it". He recognised the documents as containing the signature he often saw from Felix. There were a variety of signatures in Felix's name, although he would not have noticed the difference at the time. He could not remember whether Felix had signed the documents in his presence.

[26] Ian Robert Foote, a solicitor, witnessed the disputed signature on one document. His practice was to require the person to sign in front of him. He would have followed his normal practice. He was "confident" he did not witness any documents for Felix. He did witness documents for John. If he had witnessed a signature for Felix, he would recall him being there "because of my close association with John". He would not necessarily check that the person signing was the named signatory on the document. He would be satisfied as long as the person signed the document in his presence. It was not possible Felix had signed in his presence. He could not say who had signed the document. He would not have been suspicious of John when being asked to witness a document.

[27] Donna Joy Taylor, who worked for both Felix and John, witnessed several documents containing the disputed signature. She did not recall witnessing any of those documents. John would sign documents and then have her take them to have his signature witnessed by the Justice of the Peace. After she became a Justice of the Peace, John would put documents in front of her and ask her to witness them. Sometimes there were already signatures on them. Ms Taylor subsequently said that it was her invariable practice when witnessing a document to have the person whose signature she was witnessing present before her. She accepted that evidence was inconsistent with earlier affidavit material signed by her.

[28] Paul Anthony Ziegenfusz worked for John. On occasions, John had requested he witness documents that had already been signed before he was given the document. He was unable to say whether the documents containing the disputed signature were documents he had been given in a pre-signed form. He had previously signed an affidavit in which he had said that he witnessed pre-signed documents given to him

by John, including documents purportedly signed by Felix. In cross-examination, he said his practice when witnessing documents was to have the person sign in front of him and then to return to his office where he would witness the signature.

[29] Documentary evidence was also relied upon in support of Felix's counterclaim. This documentary material included letters and a lease. Felix contended it was improbable he would have signed these documents having regard to the time at which those documents came into existence.

Discussion

[30] The trial judge correctly recognised the applicable standard of proof was proof on the balance of probabilities in accordance with the *Briginshaw* standard. However, the trial judge found that on the evidence as a whole he could not be satisfied to the requisite standard that Felix had proven that John forged the disputed signatures.

[31] Having regard to the joint opinion of the experts, accepted by the trial judge, that the disputed signatures were written by "one and the same writer", and bore no structural or pictorial likeness to samples of Felix's undisputed signature, the trial judge had to consider two options. Either, Felix was using two signatures contemporaneously, or John had forged the disputed signatures.

[32] This is not the usual kind of case in which the only question is whether a particular signature is authentic. On John's case Felix was in the habit of using two markedly different signatures at different times. A remarkable feature of John's evidence is that Felix continued to use the disputed signature after he had accused John of forgery by signing the disputed signature. Felix's solicitor made that accusation on 5 July 2007 in a letter to John's solicitor. Yet the effect of John's case was that Felix subsequently applied the disputed signature after 18 July 2007 to Suncorp's letter of that date, thereby accepting (as guarantor) a variation of Tabtill No 2's facility with that financier.

[33] Felix's case was that John forged his signature. On the other hand, John's case required the conclusions that Felix falsely accused John of forgery and, having done so, again used the disputed signature and falsely accused John of forgery.

[34] In circumstances where there were only two distinct options, each involving very discreditable conduct, it was incumbent upon the trial judge to make a determination. In this respect, the observations in the majority judgment in *Neat Holdings* are apposite:[6]

> "When an issue falls for determination on the balance of probabilities and the determination depends on a choice between competing and mutually inconsistent allegations of fraudulent conduct, generalisations about the need for clear and cogent proof are likely to be at best unhelpful and at worst misleading. If such generalisations were to affect the proof required of the party bearing the onus of proving the issue, the issue would be determined not on the balance of probabilities but by an unbalanced standard. The most that can validly be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately, however, it remains incumbent upon the trial judge to determine the issue by reference to the balance of probabilities."

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6 *Neat Holdings Pty Limited v Karajan Holdings Pty Limited* (1992) 110 ALR 449 at 451.

[35] In determining whether Felix had satisfied the onus of proof, it was incumbent upon the trial judge to make a determination as to the identity of the writer of the disputed signatures. That required specific findings as to which evidence was accepted, and the reasons why, not general findings as to the honesty of witnesses, and the cogency of the expert evidence. It was an error of law to make generalised findings that the witnesses to the disputed signature (bar one) were giving evidence honestly, or were credible, where some of those witnesses were giving evidence that they had positively witnessed Felix sign the documents,[7] others were giving evidence that they had never met Felix nor witnessed a signature by him[8] and some were giving evidence they had been given documents by John to witness which had already been signed.[9] To find that these witnesses had each given honest evidence created an inconsistency which required resolution by specific findings.

[36] The failure to make specific findings in respect of the acceptance or rejection of the key parts of a witness's testimony was compounded by the trial judge's treatment of evidence sought to be relied upon as "objective indicia of forgery".[10] Whilst the trial judge dealt with the documents relied upon in support of Felix's submissions, the trial judge made no specific findings relating those items to the other evidence.

[37] Once that conclusion is reached, it is necessary to consider whether this Court should make the requisite findings. An appellate court is slow to make factual findings in circumstances where the findings involve issues of credit and the trial judge has had the advantage of observing the witnesses give evidence. However, an appellate court may overturn a trial judge's determination based on credit findings where the conclusion reached was inconsistent with "incontrovertible facts", "glaringly improbable" or "contrary to compelling inferences".[11]

[38] Where, as here, the trial judge has made general findings as to each of the witness's honesty and credibility, there is no reason why this court is not suitably placed to make the necessary specific findings. Those findings can properly be made from a critical analysis of the evidence given by witnesses found to be honest by the trial judge. It was not submitted by either Felix or the respondents that this Court was unable to make these findings.

[39] Critical to Felix's contention that the only rational conclusion on the evidence was that John forged the disputed signatures is a consideration of the evidence given by Stephens, Foote and Moore. The respondents submit their evidence must be considered having regard to the evidence as a whole, particularly having regard to the evidence of Porteous, Banjanin, McMahon, Faust and Smeal.

[40] Stephens was accepted by the trial judge as an honest witness. There was no reason for her to give evidence favourable to Felix. Stephens gave evidence that she had never witnessed a signature for Felix, that she had never met Felix, and that she had only ever witnessed a signature made in her presence. If that evidence was accepted, it precluded a possibility that Felix had signed any of the disputed signatures witnessed by her. The trial judge made no specific finding as to whether

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7 Porteous, Faust, McMahon and Banjanin.

8 Stephens, Foote and Moore.

9 Flynn and Taylor.

10 Reasons [226] - [247].

11 *Fox v Percy* (2003) 214 CLR 118 [28]-[29]; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 381 [76].

he accepted that evidence. Instead, he made a general finding that Stephens "was a credible witness who sought to tell the truth".[12]

[41] Stephens gave direct evidence of an occasion when she was asked by John to witness a contract where the seller was specified as Felix. John signed as seller. She identified that contract as being for Lot 6 in a Wellington Point development, although she subsequently expressed some uncertainty in relation to whether the contract was in respect of Lot 6. In evidence in chief, Stephens said:

> "Now, you will see – do you recognise that that contract concerns lot 6?-- Yes.
>
> And was that from the Wellington Point subdivision?-- Yes.
>
> Now, is the one that was the earliest in time. It's dated the 10th of September 2000. You see that?-- Yes.
>
> Now, could I ask you to turn to the second page of that document and you will see someone has signed for the seller?-- Mmm-hmm.
>
> Who signed for the seller?-- John.
>
> John Creswick?-- Yes
>
> Now, can you tell his Honour what you recall of that occasion?-- Well, the first contract I did for the main estate-----
>
> You might have to speak a little bit more slowly, just because the shorthand reporter has to take down your words?-- Okay. This was the first block that I sold for the main estate and when I did the contract and got – took it to John, I did say, 'Well, it's in the name of Felix Creswick.', and John said he had authority to sign on his behalf.
>
> All right. And where did the – can you recall where the actual signing took place?-- As far as I can remember, we met on a new subdivision in Wellington Point."

Stephens said that John was the only person there. Stephens later identified other contracts that had been initialled by John.

[42] Whilst Stephens, in cross-examination, conceded she was not 100 per cent certain Lot 6 was the contract in question, she was "90% certain". A later answer, in relation to the Lot 6 contract, that she could not say "who signed it", when viewed in context, did not detract from her evidence that she was 90 per cent certain the contract in question was the contract for Lot 6. The concession from 100 per cent certainty was nothing more than would be expected from a witness endeavouring to give evidence honestly. The trial judge specifically found Stephens was such a witness. An acceptance of Stephens' evidence supported a conclusion that John was the writer of the disputed signature on the Lot 6 contract.

[43] That conclusion is fortified by a consideration of John's evidence that his initials do appear in the Lot 6 contract. Whilst he contended that other initials on that contract were made by Felix, the implausibility of such a scenario meant John's evidence as to Felix having signed this contract should have been rejected. This is particularly so having regard to the trial judge's adverse findings as to John's credit. However,

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12 Reasons [180].

John's concession that he had made initials on the Lot 6 contract, when considered with Stephens' evidence, rendered only one conclusion open – John was the maker of the disputed signatures on the Lot 6 contract.

[44] The highly improbable occurrence of both John and Felix having initialled that contract was noted by the trial judge[13] but not further addressed. Instead, the trial judge dealt with a submission that the initials were so similar as to have been written by the one person. That submission was rejected, based on the trial judge's own eye. However, the improbability of such a scenario, when compared with Stephens' evidence, favoured only one conclusion. The writer of the disputed signatures on that contract was John, not Felix.

[45] Once Stephens' evidence on this critical issue is accepted, there is evidence that John was the writer of one of the disputed signatures. Having regard to the accepted evidence of the joint experts that the disputed signatures were made by one writer, it follows that he was the writer of each disputed signature. This conclusion is supported by inferences properly drawn from the evidence of Foote and Moore.

[46] Foote could not recall witnessing the disputed signature on a mortgage document but had witnessed documents for John. He categorically denied ever witnessing any documents for Felix. The only inference properly to be drawn from the evidence of Foote, who was accepted by the trial judge as an honest witness, was that the disputed signature witnessed by him was not signed by Felix. Whilst it is correct Foote did not give evidence that John had signed the disputed signature, the case conducted at trial was that the writer of the disputed signatures was either Felix or John. Against that background, the only inference to be drawn from Foote's evidence, having regard to his contact with John, was that John had signed the disputed signature witnessed by Foote.

[47] Moore, formerly a Commissioner for Declarations, was shown five examples where she had witnessed the disputed signature. Whilst she did not recall any of those occasions, her practice was to have a person sign in front of her before witnessing the signature. She did not, however, seek identification from that person. She had never met Felix. She recognised John as being a client of the law firm she was working for at the time in question. The trial judge accepted Moore was an honest witness. The only inference from her evidence that she had regularly seen John at the law firm but had never met Felix, and that she required the person to sign in front of her before witnessing the signature, was that the disputed signature was signed by John.

[48] The trial judge did not analyse the consequences of an acceptance of the evidence given by Stephens, Foote and Moore. Whilst the trial judge referred to their evidence as, at best, refuting the notion that the disputed signature had been written by Felix,[14] and as not implicating John, the evidence of Stephens, Foote and Moore, properly analysed, supported a finding that John was the writer of the disputed signatures witnessed by them.

[49] The significance of that evidence necessitated a determination of the conflicting evidence of Heath and Marheine as to whether there was evidence that John was the writer of the disputed signatures. No findings were made by the trial judge as to which expert was to be preferred. At best, there was an acknowledgement of the

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13 Reasons [242].

14 Reasons [250].

cogency of Marheine's reasons for disagreeing with Heath.[15] Marheine's reasons for not agreeing with Heath were based on the simplicity of the formations, and his instructions. Whilst Marheine was asked to put those instructions to one side, his initial reliance on those instructions could not but subconsciously affect his conclusion. Heath's opinion was not so tainted. Heath's evidence was clear and compelling. It ought to have been preferred. It supported the conclusion that John forged the disputed signatures.

[50] There was also other unmistakable evidence pointing to John being the author of the disputed signature. Both Flynn and Taylor gave evidence that John had given them pre-signed documents to witness, or have witnessed by another. Whilst it is correct they did not give evidence John had made those signatures that inference was properly to be drawn once a conclusion was reached that John was the writer of the disputed signature.

[51] The respondents submit the trial judge's findings must be viewed in the context of the acceptance of Porteous, McMahon, Faust and Banjanin as honest witnesses. Each gave evidence they had seen Felix sign the disputed signature. As the expert evidence accepted by the trial judge was that all of the disputed signatures had been signed by the one person, acceptance of their evidence as honest meant the trial judge implicitly rejected the accuracy of the evidence given by Stephens, Foote and Moore.

[52] Whilst the trial judge did find Porteous, McMahon, Faust and Banjanin to be honest witnesses (although in the case of Banjanin there was a qualification to the finding), the trial judge did not make specific findings in relation to an acceptance of their evidence in relation to having witnessed Felix sign the disputed signature. Further, rather than find that the evidence supported a conclusion that Felix had written the disputed signatures, the trial judge specifically found that the evidence in this case provided some support for the proposition that the disputed signatures were not written by Felix.[16] That suggests the trial judge did not accept the reliability of the evidence of Porteous, Faust, McMahon or Banjanin in relation to their having witnessed Felix sign the disputed signatures. Such a conclusion is not inconsistent with the trial judge's finding that each was a credible witness. There was good reason not to accept those witnesses as reliable witnesses.

[53] The trial judge's refusal to reject the evidence of Porteous in respect of witnessing the signature on the Suncorp document on 24 July 2007 was specific. The trial judge was not prepared to reject Porteous's evidence "in the way submitted by Felix's counsel".[17] That was a reference to an attack on Porteous as being a partisan witness who gave evidence to protect his own credibility. It is understandable the trial judge was not prepared to reject Porteous on that basis. It does not mean he accepted Porteous's evidence as reliable. Porteous ultimately accepted it was possible that John could have tricked him by placing the document in front of him, signing it and his witnessing it without the same degree of vigilance as he would undertake in respect of a person he did not know. Having regard to Porteous's close connection with John, that concession was significant.

[54] Faust's evidence was the subject of inconsistencies. In evidence in chief, whilst he had the actual document in front of him, Faust gave evidence he had witnessed the

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15 Reasons [248].

16 Reasons [253].

17 Reasons [231].

signatures of John, Bill and Felix on page 8, and the signatures of Bill, Mrs Creswick and Felix on page 9 of the document. However, the signatures on page 9 were those of Bill, Mrs Creswick and John. Faust sought to explain this inconsistency in re-examination by saying "the explanation would be that I referred to the page 8 when I was asked that question" [sic] and he did not mean page 9. However, the questions in examination in chief were specific:

> "Are you able to tell the Court whose signatures you have witnessed on page 8?-- I have witnessed the signatures of John Creswick, Bill Creswick and Felix Creswick.
>
> Could you go to page 9? Could you tell the Court whose signatures you witnessed?-- That would be Bill Creswick's, Mrs Creswick and Felix Creswick's. All right.
>
> And your signature appears both on pages 8 and 9?—Yes." [sic]

Those responses, when viewed in the context of the document in front of him, rendered his explanation for the inconsistency difficult to accept. That inconsistency ought properly to have called into question Faust's reliability.

[55] Banjanin's evidence covered both witnessing the disputed signature on certain documents, and the circumstances surrounding the signing of the May agreement. The trial judge specifically found that although he generally accepted Banjanin's evidence in respect of the May agreement, he did not accept Banjanin's evidence where it was in conflict with that of Colville. That very significant qualification, in the circumstances of this case, called into question Banjanin's reliability as a witness. Whilst the trial judge accepted that Banjanin was a credible witness on the aspect of witnessing the disputed signature, a finding as to credibility did not deal with his reliability. The trial judge had found Banjanin unreliable in respect of events surrounding the May agreement. That finding properly called into question his reliability generally.

[56] McMahon's evidence also contained inconsistencies. In evidence in chief, he was asked how he went about witnessing the signatures of John, Bill, Felix and a lady named Tracey Ashton. He replied:

> "It was said, 'We were going to sign these documents. We want you to witness them.' I can't remember what happened after that but I do remember Bill stood up and let me sit in his chair, which was the main office. Everyone was standing around and there was a number of – a pile of documents. I don't know how many there were on the desk".

[57] He subsequently said that Felix was definitely present and that Felix had signed first. In cross-examination he explained that the reference to not remembering what happened after that meant "just in that short space of time, from standing there to sitting in his chair". That answer was difficult to reconcile with his unprompted response in chief. It called into question the reliability of McMahon's evidence. The trial judge's response to that challenge was to find that McMahon "generally" sought to give truthful evidence.[18] That finding did not address the issue of the reliability of the evidence he sought to give truthfully.

[58] Other items of alleged objective indicia were referred to by the trial judge. They were Suncorp documents dated May and July 2007 containing the disputed

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[18] Reasons [163].

signatures, the Zupps lease, and recital M to the May agreement.[19] The trial judge correctly noted that there were competing contentions in respect of the significance of these documents. However, once a conclusion is reached that John was the maker of the disputed signature, these documents supported the conclusion that John forged the disputed signatures.

[59] The Suncorp documents were both signed at a time when there was great dispute between Felix and John. There was good reason why John needed both to be signed. There was no good reason why Felix would have signed them. The trial judge recorded the contentions advanced by Felix, but reached no conclusion in relation thereto, instead referring to reasons why Felix may have wished to keep his options open.[20] The contentions advanced by Felix were compelling and ought to have been accepted.

[60] There were strong reasons why it was improbable Felix would have signed the letter dated 24 July 2007. He had recently alleged, through his solicitor's letter of 5 July 2007, forgery by John. There had also been a significant breakdown in the relationship since May. Objectively, it is far more probable John signed the letter dated 24 July 2007. Such a conclusion is entirely consistent with John's perfunctory response, through his solicitor in a letter dated the same date, 24 July 2007, to the allegations of forgery recently made by Felix.

[61] Felix also submitted the Zupps lease was a relevant document. Whilst the trial judge referred to it, it was accepted by the respondents that it was not a determining factor. Recital M to the May agreement was in a different category. It was inserted at John's insistence. If John had forged the disputed signature, there was good reason why John would have included recital M to the May agreement.

[62] The trial judge also referred to other documents as giving some support to Felix being the writer of the disputed signature,[21] but not "overwhelming support" for that theory. Those documents were equivocal, and could not overcome the evidence in support of the conclusion that John had forged the disputed signature. This is particularly so having regard to the expert evidence and the unlikelihood of Felix using two unrelated signatures at the one time.

[63] The evidence, in its entirety, established to the requisite standard that John was the writer of each disputed signature. The decision of the trial judge dismissing this aspect of Felix's claim must be set aside. Felix is entitled to succeed on this aspect of his counterclaim.

2. The May agreement

Background

[64] To appreciate the various factors in play on 25 May 2007 when Felix executed the May agreement, some further background needs to be mentioned. On 4 July 2006, John's solicitor, Mr Mott, wrote to Felix's then solicitors, Connor Hunter:

> "Dear Sirs,
>
> **RE: TENANCY – 11 SEAHAVEN COURT, CLEVELAND**
>
> We act on behalf of the Proprietors of premises situate at and known as 11 Seahaven Court, Cleveland, which premises are tenanted under

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19 Reasons [226] - [247].

20 Reasons [234] - [237].

21 Reasons [240] - [242].

what we believe to be a tenancy at sufferance, by your client, Felix Creswick.

Our clients have instructed us that they wish your client to leave these premises on or before the 6th day of September 2006.

It is clear that your client has no right to the occupation of these premises. He certainly has no title and, at best, occupies the premises with the tolerance of our clients. His occupation or tenancy is liable to be concluded at any time which might suit our clients.

Our clients have, however, indicated their preparedness to treat your client's occupation as a tenancy at sufferance. They will therefore seek to determine this tenancy by Notice to Leave Without Grounds in Form 12 pursuant to the Residential Tenancies Act, thereby giving your client the benefit of the requisite period of notice of two months.

Should your client not be gracious enough to observe this period of notice, our clients will and reserve their right to take whatever action they may be advised and as may seem expedient at the time to enforce your client's vacation of the premises.

Your client's tenancy or occupation of the premises is hereby terminated as of 6th September 2006."

[65] Mr Mott wrote again to Felix's solicitors on 17 August 2006:

"RE: **TENANCY – 11 SEAHAVEN COURT, CLEVELAND**

We refer to our previous letter in relation to Felix Creswick.

Our client has made arrangements to market the relevant house and wants vacant possession forthwith.

Our client is anxious to erect signs advertising the sale of the dwelling. Your client has threatened that he will remove any signs erected by our client.

We invite you to agree with us that it will be an unfortunate and expensive exercise if this [matter] were to become fully litigated, particularly in view of the relationship of the parties and the fact that any litigation can ultimately produce only one result.

With this in mind, we request that you use your good offices with your client to assist in the avoidance of any protracted expenses and embarrassing litigation."

[66] Connor Hunter responded to Mr Mott noting that Felix had an equitable interest in the property and that Felix's properties in Holland Park had been sold to enable John to develop a number of units on the land and setting out his claims:

"**RE: PROPERTY AT 11 SEAHAVEN COURT, CLEVELAND**

We refer to your letter of 5th July 2006.

Although the registered owners of the property situated at and known as 11 Seahaven Court, Cleveland are our client's son John Creswick and his wife, our client has an equitable interest in that property and

will strenuously oppose any action taken by your clients to remove him and his partner of 13 years, Marcia, from the home at 11 Seahaven Court.

It is unconscionable that your client make the allegations that our client is merely a "tenant at sufferance" in the circumstances.

The decision to relocate from Holland Park to Raby Bay/Cleveland was made by our client after 4 houses owned by him were sold in Holland Park to enable your client John Creswick to pursue the development of 60 units on the subject land although subsequently the development was not approved.

John Creswick made a house available for our client's residence at Sentinel Court which John Creswick had previously occupied on the understanding that because our client had sold his Brisbane houses, a transfer would be made into our client's name of the house at Sentinel Court.

Shortly after relocating there, our client went on holiday with his partner Marcia and his sister who was visiting from Italy but on returning home, he was told that John Creswick had sold the property at Sentinal Court and that he and Marcia were to move out and John Creswick made arrangements for our client and Marcia to rent a home at 12 Seahaven Court, Cleveland.

Since our client wished to purchase a property in Raby Bay/Cleveland area he approached the next door neighbour at 11 Seahaven Court to see if that property might be available since the owner lived in Hong Kong and his son in law was living in that house at the time. Our client personally did all the negotiation with a real estate agent and requested that his son John Creswick arrange to have the house put into our client's name as registered owner upon settlement, with no encumbrances on the house whatsoever, in consideration for the services which our client rendered for 18 years working for John Creswick's company Tabtill Pty Ltd, and the assistance our client had personally rendered to his son John Creswick over the years, and John promised to have the house at 11 Seahaven Court placed in our client's name as registered owner.

Our client emphasises that he is owed in commissions and superannuation and rental moneys from properties at least double the value of the house property at 11 Seahaven Court, Cleveland. He also points out that his own properties were used to progress ventures of John Creswick.

However, John Creswick failed to keep his promise to place the property into our client's name on settlement and instead, had the property placed in his own name and that of his wife.

John Creswick's excuse for failing to keep his promise to our client was that he did not want our client's partner Marcia to be "part of the house" but assured our client that our client could live in the house for the rest of his life. Our client does not accept John's excuse and since that time our client has made repeated approaches to

John Creswick to transfer the house at 11 Seahaven Court into his name but without success. This situation has left our client quite distraught with little faith in the promises made by his son John. Naturally our client has been reluctant to take court action against his own son.

Our client is 76 years of age at the present time and he does not have a home or a business of his own due to the fact that he has rendered very substantial financial assistance to his son John over the years. Our client has only a small income in rent and relies upon his credit cards for day to day living. On behalf of our client we make a final request that the house at 11 Seahaven Court be transferred into our client's name forthwith as originally promised by John Creswick free from any debt or encumbrance whatsoever. In exchange, our client is prepared to not proceed to claim against John Creswick and Tabtill Pty Ltd in respect of the surplus moneys owed to him from the company Tabtill Pty Ltd, the amount to our client from the car business and for the services our client has rendered over the lengthy period of 18 years and the personal efforts our client has continued to help John to attain his present financial position and our client also requires that John Creswick cause all encumbrances whatsoever to be removed from all real estate presently in our client's name and make full repayment of monies obtained by him by the mortgaging of our client's properties and which monies have been applied by John Creswick to his own use. In addition, our client requires the following:

Full account to be made by John Creswick to our client immediately for moneys owing to our client for real estate sold in joint names of our client and John Creswick including:

(a) the Matilda Greenslopes Garage in which our client held a one half share;

(b) the Gold Coast Unit at 23 Surf Parade, Broadbeach in which our client held a one third share;

(c) the house at Piermont Parade, Raby Bay in which our client held a one half share;

(d) the property at 503 Logan Road, Stones Corner in which our client held a one third share;

(e) The Jaguar motor vehicle the value of which our client estimates was $80,000.00;

(f) our client's interest in the development at 450 Mains Road, Wellington Point;

(g) the farm which was owned by our client for over 20 years in respect of which John Creswick has had the use thereof and in respect of which no money has ever been paid to our client;

(h) our client's one half share in the profit on the sale of property at Mains Road, Kangaroo Point (sold to Macdonald's).

We now await to hear from you within 21 days from today's date."

[67] Mr Mott responded by letter dated 27 September 2006:

"**RE: TENANCY – 11 SEAHAVEN COURT, CLEVELAND**

We acknowledge receipt of your letter to us of 25 September 2006, a copy of which has been provided to our clients.

At this juncture, if your client is prepared to quantify his claims, our clients will give consideration to settling any valid claims on a CASH SETTLEMENT BASIS only.

Our clients will not consider settling this matter by way of a transfer of real property. This applies particularly to 11 Seahaven Court, Cleveland.

In addition we are instructed to advise that our clients will withdraw the CASH SETTLEMENT only consideration of any proposed settlement in the event that your client's claims are not detailed and quantified within seven (7) days from the date of this letter. "

[68] Felix responded by writing directly to John and his wife, Shayne, on 2 October 2006:

"I am 76 years of age and have now worked for you and Tabtill Pty. Ltd. for 18 years seven days a week. During this time I have given you all my support and have put at risk all my properties for your business deals without my receiving any compensation whatsoever.

At 76 years of age I do not have a home, a business, or money. I drive a $5,000 motor car. I am living on credit cards.

Clearly I am not a greedy man.

The following is a list of moneys that I have estimated you owe me –

		$
1.	Kangaroo Point property sold to McDonald's – estimated profit of $500,000. My half:	250,000
2.	Interest on the $250,000:	400,000
3.	Sale of Broadbeach unit. My half share of profit:	120,000
4.	Sale of Greenslopes garage. My half share of profit:	175,000
5.	Greenslopes garage rent received over 8 years. My half share:	250,000
6.	Interest on the $250,000:	100,000
7.	Sale of Wellington Point farm to you:	1,000,000
8.	Interest on the $1,000,000:	600,000
9.	Sale of house at 17 Piermont Place, Raby Bay. My half share of profit:	200,000
10.	18 years' rent of the Holland Park car yard at $7,000/month:	1,512,000
11.	Interest on the $1,512,000:	2,100,000
12.	Commission on sale of cars for 18 years (approximately):	588,000

13.	Long service leave:	12,000
14.	Superannuation:	50,000
15.	Third share of the market value of the car yard at 503 Logan Road, Stones Corner	400,000
16.	Jaguar XJ8:	80,000
		$7,837,000

After carefully considering my position, I propose that –

1. You transfer 11 Seahaven Court to me free and clear of all encumbrances.

2. You transfer to me $1,300,000 in cash.

3. You lift the encumbrances on my properties, specifically:
   (a) 903-913 Logan Road
   (b) Glenmorganvale farm
   (c) 8 Crump Street
   (d) 10 Crump Street
   (e) Vacant block at Sentinel Court.

In return for the three foregoing actions on your part I will forgive all indebtedness by you and Tabtill Pty. Ltd.

If this proposition is not acceptable to you, I will request that you pay me the $7,837,000 of cash you owe me not later than sixty days from the date of this letter.

In any event, regardless of whether you accept my proposition or not, I will require that you lift all of the encumbrances on my properties as I feel that the way you are conducting your business is putting my properties at risk.

Regrettably, if you do not comply with what I am putting to you, I will have to consider what action to take next.

I never expected that I would come to the point where I would be considering litigation against my own family.

Any communication with me about this matter must be in writing. I will not accept verbal communication."

[69] Mr Mott responded by letter dated 6 October 2006 to Felix's then solicitors:

"**RE: TENANCY – 11 SEAHAVEN COURT, CLEVELAND**

We acknowledge receipt of your letter to us of the 3rd October in relation to this matter.

A copy of your letter and your client's claims have been dispatched to our client. Of course, the complexity and volume of your client's claims will cause our client to have to spend some time in responding.

However, our client can make a brief response to some of the issues raised in your client's log of claims. For example;

1. The house at Piermont Street, Raby Bay was originally purchased by your client and his granddaughter

Jayne Emma Creswick. We are given to understand that Jayne Creswick paid a deposit of $20,000.00 from her personal account and was promised a contribution of one half from your client. Our instructions are that your client has made no attempt to repay this amount nor the usual outgoings associated with the acquisition and use of the dwelling such as the payment of rates interest in mortgage debt, stamp duty etc. However that may be, your client should deal with Jayne Creswick in relation to this matter.

2. With regard to the Jaguar XJ8. If your client would be good enough to supply a receipt for the purchase of the Jaguar for $80,000.00, our client will promptly return the vehicle to him.

3. Our instructions are that your client received a number of cash loans from ours including but limited to a sum of $36,000.00 lent to your client for the acquisition of a race horse named "Romantic Journey". Your client acquired a one third share in that animal.

Our client will address all of the issues contained in your client's log of claims in due course and will be in a position to elaborate upon the matters referred to in 1, 2 and 3 above.

We should point out however that nothing contained in your client's log of claims, your correspondence or any other matter relating to the issues between our respective clients has any bearing upon your client's occupation of the dwelling at 11 Seahaven Court, Raby Bay. Our client requires yours to vacate this dwelling forthwith, failing which our client will institute the necessary proceedings to bring about the same result."

[70] Mr Mott wrote to Felix's solicitors on 12 October 2006 about the lease of Felix's land at Holland Park to Zupps Motors:

"**RE: FELIX CRESWICK**

We refer to previous correspondence in relation to this matter and reiterate that our client is currently having the records of various corporations examined and the company's accountants are preparing in full detail a record of Mr Felix Creswick's expenditure and drawings from the company over the period of some 26 years. Surprisingly these records still exist.

However, a matter of some urgency has occurred. Your client apparently is the proprietor of a property at Holland Park which is currently leased to Zupps Motors. This lease was originally negotiated by our client Mr John Creswick under what our client believed at the time to be a full and pervasive authority from your client to negotiate on your client's behalf.

We are instructed that to date your client has received some $245,000.00 in rental as a result of this lease.

This lease had to be negotiated as recently as July because of a requirement of the Brisbane City Council deeming 60% of the

> property being not suitable for its current use. Our client's prompt action prevented the immediate termination of the lease by Zupps which of course, would have resulted in a truncation of your client's income.
>
> Our client is attending a meeting with Zupps on Tuesday 17th October next. It appears from your correspondence that our client's capacity to negotiate on behalf of your client, has been totally withdrawn. It has been made clear to our client that Zupps will not deal with your client for reasons best known to representatives of Zupps.
>
> Our client is concerned about his position with regard to Zupps in circumstances where your client has withdrawn his full authority to act on your client's behalf. In the event that Zupps chooses to vacate the Holland Park premises, the result would be, needless to say, a total loss of income to your client. However, my client is in a position to influence Zupps favourably, provided he is given the motivation to do so as has been done on two previous occasions.
>
> We find ourselves in a position of having to reiterate the demand that your client vacate the dwelling at Seahaven Drive to avoid costly and embarrassing legal action."

[71] Felix's solicitors responded on 13 October 2006 with two letters. The first concerned the letter of 6 October relating to the purchase of the house at Piermont Street, Raby Bay with Jayne and the property development at Wellington Point for which Felix demanded a full accounting. He denied any obligation to reimburse Tabtill for the purchase of a race horse. The solicitors noted, in emphasis:

> "This matter [the accounting for the sale of land at Wellington Point] has now become most urgent since our client is being pressed to enter into a settlement arrangement with his former defacto spouse as a matter of urgency and we therefore request that your client provide us with full details of where the proceeds of sale of each of the transactions associated with the development of the property at Wellington Point were deposited and the proper accounting to him in relation to this interest in the profit as abovementioned within fourteen (14) days of today's date."

[72] The second letter referred to the lease at Holland Park and confirmed that Felix did not wish John to act on his behalf in respect of that lease. Felix demanded a copy of the lease and noted that it was in place, as assured by Bill, until June 2007. Felix declined to vacate the house at Seahaven Drive "until the issues between himself and Mr John Creswick and Tabtill Pty Ltd are resolved".

[73] Marcia Banfield had commenced proceedings in the Supreme Court against Felix seeking entitlement to certain payments and interests in property. On 18 March 2007 Felix and Marcia entered into an agreement pursuant to Pt 19 of the *Property Law Act* 1974 (Qld). By the agreement Felix agreed to provide her with a new dwelling house on a block of land valued at $500,000 to be registered in her name. He agreed to pay her $500 per week indexed for her life and to continue payments of health insurance; a property in Office Lane, Wanora to be in their joint

names; and the provision of a motor vehicle to the value of $50,000. After John and Bill discovered the existence of this agreement relations between Felix and John deteriorated because he and his wife considered that Marcia Banfield and her daughter were after Felix's property.

[74] John wrote to Felix terminating their relationship in late March 2007. Felix's counsel described it as the "hateful letter". The trial judge has set that letter out in full.[22] It is unnecessary to do so here but the opening paragraph sets the tone:

> "To the Family Man you call yourself ...
>
> > Today marks the final time you and I will ever have any further contact with each other, via phone or any verbal communication. I do not have the time or inclination to cop your verbal abuse and accusations that you make about me and foremost my wife and today, even my children. These are my feelings on your contribution to this family over the past several years and to be quite blunt with you they pretty well express the feelings of anyone who has anything to do with you both personally and financially…".

[75] Felix responded in a letter to John and Bill in which he expressed hurt at the letter from John, accused them of building their own businesses on his assets and borrowing money on them so that they were mortgaged to the full. He said that he had been advised that certain documents had been signed on his behalf without his knowledge in order to obtain money from his assets. He threatened that if matters could not be settled sensibly then he would have the business dealings concerning his assets investigated; if there was evidence of serious fraud, he could report that conduct to the appropriate authorities; advise the financial institutions of what he was proposing; and, as a last resort, declare himself bankrupt. Felix wrote that he was under "a lot of stress and pressure with regards [his] future security also."

[76] It is appropriate at this point to discuss Felix's health. The trial judge said:[23]

> "Counsel for Felix sought to portray their client as an old man, rendered frail by physical and psychiatric ailments. The Felix who took the witness stand and was cross-examined at great length before me, however, appeared to suffer from little of the frailty for which his counsel urged. True it is that he was not in his first blush of youth, but he presented to me as an intelligent and wily man who was demonstrably prepared to say whatever he thought would assist him in the case."

[77] The trial judge accepted Dr Roderick Apel's evidence (Felix's treating psychiatrist) and that of Dr Jill Reddan, a psychiatrist who had examined him during the course of the trial. Dr Apel's opinion was that amongst other conditions Felix had narcissistic personality traits. Felix first attended Dr Apel's practice on 2 November 2006 and consulted him again in January, early April and on 24 May 2007. At the first interview Felix complained of being depressed, anxious and "sick with worry" and suffering from insomnia. An initial diagnosis of an Adjustment Disorder with mixed anxiety and depressed mood was made. Felix had a history of multiple falls and a serious motor vehicle accident on 22 April 2007, the result of a probable blackout. At the consultation on 5 April 2007 Felix had a lack

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22 Reasons [55].

23 Reasons [88].

of balance, was forgetful, anxious and panicky. He was taking medication for anxiety and took anti-depressants. At that stage he had compromised cerebral blood flow resulting in blackouts which was subsequently alleviated with a pacemaker in early June 2007.

[78] The trial judge described the circumstances leading up to the execution of the May agreement:[24]

> "… it will be clear that by May 2007 Felix was under significant personal and physical stress. He had signed a property agreement with Marcia which, absent agreement from John and Bill, he was unable to perform. He had the health and personal issues to which I have already referred. He was also clearly drinking more than was good for him. Earlier in 2007, he crashed his car while driving under the influence of alcohol and lost his licence."

His Honour concluded that the telephone call in March 2007 in which John thought Felix spoke insultingly of John's daughters and Felix's perception that John did not want to give anything to Felix which might go to Marcia Banfield, were important influences on the circumstances leading to the May agreement.

[79] As is apparent from the letters set out above, Felix and John were, broadly, seeking some kind of financial settlement in 2006, even if significantly apart, and even if overlaid with strongly held animus to each other. It seems that Mr Mott, John's solicitor, had prepared, sometime earlier, a draft agreement in late February or early March 2007. The May agreement prepared in Mr Mott's office on instructions from John bore the year 2006. Mr West, John's accountant, identified a document dated 2 October 2006 headed "A Proposition Suggested by John Creswick and put to me by Bill Creswick after He Had Had a Conversation with John Creswick" which proposed that the house at 11 Seahaven Court be put into the joint names of John and Felix as joint tenants; the land at 35 Sentinel Court be transferred to Bill; the land at 905 Logan Road be transferred to John and Bill; John and Bill negotiate with Felix an income for the rest of his life; John and Bill pay all fees and expenses. These proposals bore a striking similarity to the terms of the May agreement. Mr West could not recall if he communicated those topics to Felix but thought that he would have.

The terms of the May agreement

[80] Before considering the circumstances around the signing of the May agreement it is appropriate to set out the "operative" parts of that agreement including handwritten amendments made in Felix's solicitor's office (in parenthesis) and a summary of the recitals. The recitals noted:

(a) John and Shayne are joint owners of 11 Seahaven Court.

(b) Felix is the owner of vacant land at 35 Sentinel Court.

(c) Felix promises to transfer his interest in 35 Sentinel Court to Bill and Jane.

(d) John is desirous of promoting 35 Sentinel Court to Bill and Jane.

(e) Felix is concerned to secure for himself a place of residence.

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[24] Reasons [260].

(f) John has offered to convey his interest in 11 Seahaven Court to be held by Felix as joint tenants with Shayne in consideration of Felix transferring 35 Sentinel Court to Bill and Jane, provided Felix undertakes not to deal with his interest in 11 Seahaven Court in any way.

(g) To secure this undertaking by consenting to Shayne lodging a caveat over 11 Seahaven Court.

(h) Felix is the sole proprietor of 905 Logan Road.

(i) Felix has agreed to convey his interest in 905 Logan Road to John, Bill and Felix to be held in the proportions 45% [33 $^{1}/_{3}$%], 45% [33 $^{1}/_{3}$%], and 10% [33 $^{1}/_{3}$%] as tenants in common.

(j) Felix, John and Bill are the owners of 503 Logan Road.

(k) Felix, John and Bill have agreed to convey their interest in 503 Logan Road to John and Bill to be held as tenants in common in equal shares [struck through entirely].

(l) John and Bill have agreed to provide Felix with an income of $1,000 [$1250] per week for the whole of Felix's life.

(m) Felix from time to time has consented to John and Bill pledging 905 and 503 Logan Road as security and has acquiesced in John executing security documentation on Felix's behalf.

(n) John and Bill have agreed to indemnify Felix against any liability for the repayment of any sums so advanced pursuant to M and the conduct of the businesses from these premises.

(o) John and Bill have agreed to pay Felix $600,000 within three months to liquidate outstanding liabilities including any dispute with Marcia Banfield.

The operative parts are:

"1. John and William hereby agree to pay to Felix within 3 months of the date of this Agreement the sum of Six Hundred Thousand Dollars ($600,000.00) in full and final satisfaction of any alleged obligation which John and William might bear to Felix and as a once only contribution to the reduction or resolution of any liabilities or indebtedness which Felix might have to any person or entity including but not limited to the resolution of a dispute between Felix and one Marcia Banfield. Felix for his part, acknowledges that upon receipt of the said sum of $600,000.00 John and William will be under no liability to Felix of any description or in respect of any matter or obligation which Felix might now have or might afterwards incur.

2. John and William will pay to Felix the sum of $1,000.00 [$1250.00] per week for the whole of the rest of Felix's natural life, payments to be made to Felix or as he may direct on that day of the week which Felix finds most

convenient and is notified by Felix to John and William in writing.

3. (a) In consideration of these presents and in consideration of John's agreeing to assign to Felix all his right title and interest in Seahaven Court (being described in Item 1 of the Schedule hereto) to be held by Felix and Shayne Marise Creswick as joint tenants until the demise of either Felix or Shayne Marise Creswick. Felix hereby unconditionally agrees to assign and transfer to William and Jane the property known as Sentinel Court.

4. Felix agrees with John that the value to be ascribed to Sentinel Court (being described in Item 2 of the Schedule hereto) being vacant land, for the purposes of this transaction is ONE MILLION DOLLARS ($1,000,000.00).

5. John agrees with Felix that the value to be ascribed to John's half interest in Seahaven Court being a dwelling and other improvements on the relevant land together with Felix's right to reside in Seahaven Court until his demise is ONE MILLION DOLLARS ($1,000,000.00).

6. Felix agrees irrevocably to maintain Seahaven Court in an unencumbered condition for the duration of his lifetime and further agrees not to assign, transfer or set over or attempt to assign, transfer or set over his interest in Seahaven Court in any way to any person or corporation without Shayne Marise Creswick's consent in writing first had and obtained.

7. Felix agrees irrevocably and unconditionally not to apply to the Registrar of Titles for a severance of the joint tenancy between Felix and Shayne Marise Creswick pursuant to S.59 of the Land Title Act 1994 (as amended).

8. To more effectively secure the conditions and agreements herein contained, Felix and Shayne Marise Creswick will consent to and will endorse their consent upon a caveat to be lodged in the Land Titles Office against the title to Seahaven Court by John which caveat is to remain in force until such time as Felix and Shayne Marise Creswick jointly apply and consent in writing to the withdrawal of the caveat.

9. (a) In the event that any competent court should order the removal of the caveat provided for in paragraph 6 hereof or in the event that any application is made to such a court for such an order Felix will transfer and assign his interest in Seahaven Court to John Francis Creswick and Shayne Marise Creswick forthwith upon the making of any such application.

(b) To effectively secure the obligation imposed upon Felix under the provisions of this clause both Felix and Shayne Marise Creswick will execute a transfer of the said property

to John Francis Creswick and Shayne Marise Creswick as joint tenants.

(c) Such transfer to be held in escrow by John's solicitors from time to time or by an agreed escrow holder and failing agreement an escrow holder to be nominated by the President for the time being of the Queensland Law Society Incorporated.

(d) The relevant transfer referred to in 9(a) (b) and (c) hereof will be held in escrow and will not be released to John or Shayne Marise Creswick until such time as a court of competent jurisdiction makes an order for the removal of the caveat whereupon John and Shayne Marise Creswick will be at liberty to lodge immediately in the Land Titles Office the relevant transfer.

(e) Proof of the circumstances under which the transfer held in escrow is to be released to John and Shayne Marise Creswick will be an Affidavit executed by John setting out the circumstances to which Affidavit is exhibited a copy of the relevant court order or a copy of any application for any such court order for the removal of the caveat. The affidavit and exhibits will be conclusive evidence of its contents and will be sufficient grounds for the escrow order to release the relevant transfer to John and Shayne Marise Creswick.

10. Felix agrees to transfer and convey to John William and Felix as tenants in common in the proportions of 45% [$33^{1}/_{3}$ %]; 45% [$33^{1}/_{3}$ %] and 10% [$33^{1}/_{3}$ %] respectively the property known as 905 Logan Road, Holland Park (being described in Item 3 in the Schedule hereto) and Felix further agrees to execute all such documents and to do and carry out all measures as may be necessary to implement such a conveyance.

11. Felix agrees to transfer and convey to John and William as tenants in common in equal shares the property known as 503 Logan Road, Greenslopes (being described in Item 4 in the Schedule hereto) and Felix further agrees to execute all such documents and to do and carry out all measures as may be necessary to implement such a conveyance. [Clause 11 struck through.]

12. Felix does hereby irrevocably make nominate constitute and appoint and in his place and stead put and depute John to be his attorney for the purpose of allowing and enabling John to deal with any interests Felix may have in any properties which may have been pledged as security for an advance of monies for the purpose of carrying on business on properties in which Felix has an interest.

13. The respective transfer and assignments of land pursuant to this agreement will be deemed to be subject to the standard

> terms and conditions of the form of Contract of Sale currently approved by the Real Estate Institute of Queensland and the Queensland Law Society Incorporated. The conditions of any such form of Contract shall be deemed to have been imported into and to apply unequivocally to this agreement."

[81] Additions made by Mr Colville, Felix's solicitor, to the document on 25 May provided that John and Bill would indemnify Felix in respect of the businesses conducted at Logan Road and for all costs associated with the May agreement.

The negotiation and execution of the May agreement and immediately thereafter

[82] Tom Banjanin was a real estate agent who had known John Creswick through property dealings for about 15 years. The trial judge accepted his evidence except where it conflicted with that of Steven Colville, Felix's solicitor, and particularly in preference to Felix's evidence. He had been a real estate agent for about 25 years. Through John he met Felix. They spoke a common eastern European language and shared an interest in gambling on race horses. According to Banjanin, in early May 2007 Felix asked Banjanin to approach John to broker a deal so that he, Felix, could obtain some money from John in the vicinity of $300,000 to $400,000 and a weekly payment of about $1,000 per week and the right to reside in the house at Seahaven Court. Banjanin said that initially, John was not interested when he first contacted him because they had "been down this path before" however, John came to Banjanin's house on 23 or 24 May to discuss an agreement with Felix. Banjanin and John both denied that he was John's agent. Banjanin and Felix spoke on 24 May (a day on which Felix had a consultation with Dr Apel). On 25 May, Banjanin collected Felix from his home, they spoke at a local coffee shop, he mentioned figures to John after speaking with Felix and then dropped Felix at home. Banjanin maintained that John had said, "'Look, whatever he [Felix] wants', you know, 'get him to tell me and I will draw up an agreement.', and that's exactly what happened". Banjanin said he told Felix then:

> "'You should sign this agreement once we pick this agreement up from Mott, you should sign this agreement in front of a solicitor.', and I asked him… who his solicitor was, he told me it was Connor Hunter, he said but he did not want to use them. He then asked me and I recommended a solicitor who's based in Cleveland, Steven Colville, and I skid [sic] to him that I would make the appointment with Steven Colville and he was happy with that."

[83] Banjanin was contacted, probably by John, and told that the agreement was ready. Felix was with Banjanin in the later afternoon when they arrived at Mr Mott's office. Mr Mott said the agreement was not ready and would take a few minutes. He asked Felix if he had a solicitor. Banjanin responded that he did and named Mr Colville.

[84] Banjanin said that he and Felix went directly to Mr Colville's office in Cleveland where Banjanin introduced them. They went into an office where he handed the agreement to Mr Colville who started reading it. As Banjanin related, Mr Colville went through the agreement, presumably out aloud, and Felix would say that he was not happy with certain of the numbers in the agreement. Banjanin telephoned John to inform him that certain amounts had been changed. Banjanin said that John replied "Tom, don't bother me", and "Just get Felix to sign whatever he is happy

with and we will consider it once it's been signed". Banjanin thought that the whole meeting from the time they arrived until he took Felix home was a couple of hours. In fact, from commencement to departure was 90 minutes.

[85] Banjanin could not recall if Felix had a copy of the agreement but Mr Colville read it out clause by clause to Felix who wanted some changes. According to Banjanin Felix was not happy with $400,000 and $1,000 a week and wanted $1,250 which was changed in the agreement. Felix wanted a third interest in 905 Logan Road which was changed by Mr Colville. Banjanin saw Felix sign the agreement and Mr Colville witness his signature.

[86] After the agreement was executed Banjanin drove Felix home. He could not recall whether both Felix and himself delivered the agreement but it was delivered, presumably to Mr Mott.

[87] Mr Colville had been in practice as a solicitor in Queensland for over 30 years. The trial judge accepted his evidence. An appointment had been made through his secretary with Mr Banjanin for 3.45 pm on the afternoon of 25 May 2007. Mr Banjanin arrived at 4.15 pm and introduced him to Felix. Mr Colville thought that Mr Banjanin was carrying two copies of the agreement. Banjanin said that Felix wanted advice from him about the documents. Mr Colville glanced at the documents noting that there was a six to seven page agreement and a number of Form 1 Transfers under the *Land Titles Act* in respect of various properties. Mr Colville asked Felix if he would leave the documents with him over the weekend so that he could read them properly and meet again on Monday so that he could go through them with him and advise. Mr Colville said Banjanin "advised me that the documents had to be signed that evening because they were tied in with a finance deal that Mr John Creswick was putting together at that time". He thought the reference was to GE as the financier although he conceded in cross-examination that it might have been mentioned subsequently.

[88] In that circumstance Mr Colville sat down and read each clause of the agreement through with Felix and asked him if he had any comments or if he wanted anything changed. Some changes were made. While this was occurring Banjanin sat beside Felix but from time to time he left the conference room and spoke on his mobile phone in the office foyer. Mr Colville knew nothing about the family situation nor whether Felix owned assets other than those referred to in the agreement. They had no discussion about Felix's health. Mr Colville noted that Felix became quite agitated, "hot under the collar" and that he became "angrier and angrier and more and more upset" as Mr Colville went through the clauses of the agreement with him.

[89] Mr Colville kept a diary note of the meeting:

> "Attendance on Felix Creswick and Tom Banjanin. Engaged one and a half hours.
>
> …
>
> Tom Banjanin (TB) L J Hooker, Cleveland and Felix Creswick (FC) arrived at office at approximately 4.15 p.m. FC asked me to check over a document prepared by his sons' solicitor, John Mott, regarding transfers of certain properties. SC asked to be allowed a few days to peruse document and advise. TB explained that document had to be signed that evening, together with transfers of

> the properties, as sons' financier was waiting for copies of documents to be faxed to them. Went through documents clause by clause. FC not happy about number of clauses. Becoming quite agitated. Telephone conversations between TB and John? Creswick to discuss amendments required? Extra clauses handwritten by SHC (no staff available due to late hour). Advised FC and TB that I was not happy with FC signing the agreement, even with handwritten amendments made by me. Discussed other issues not covered by amendments (escrow of transfer documents). Advised FC not to sign transfer documents. Telephone conversations in foyer of office TB and John? C and FC and John C. FC was very agitated. Strong words used in connection with son. TB and FC left office at about 5.45 p.m."

Mr Colville handed the amended document to Felix. It was his understanding that Felix and Banjanin were returning to Mr Mott's office with the documents.

[90] The telephone records reveal much telephone traffic between Banjanin's mobile and John's mobile leading up to the May agreement on 25 May and subsequently. He said, and the trial judge found, that they were referable to putting Felix's requests to John.

[91] Telephone records reveal that on the evening of 25 May at 8.33 pm Felix telephoned Banjanin. Telephone records also show that Felix's mobile service rang Bill's mobile service at 6.10 pm on 25 May. Felix said Bill abused him to the effect that Felix had messed up his family and he hoped Felix would die soon. There is disagreement about what Felix said. Banjanin said he rang to thank him. Felix said the agreement could be put in the rubbish and he should tell John which Banjanin agreed to do. The trial judge accepted Banjanin's evidence about the purpose of the call, surprisingly, in light of Felix's conversation with Bill two hours earlier. On the day after the agreement was signed, Banjanin recalled that Felix told him he was unhappy with the agreement. He asked Felix "how can you be unhappy?", "You signed the agreement in the presence of your solicitor. You made various changes in front of your solicitor which you signed, he witnessed", to which Felix, according to Banjanin, responded, "What solicitor?" and Banjanin said, "The solicitor I took you to yesterday afternoon". Felix said, "I have never seen him in my life."

[92] Banjanin denied that he told Felix that the agreement had to be signed on 25 May "because the boys need help", "[t]hey are in trouble"; that he told Felix that GE were going to foreclose on John and Bill; that Felix then said that he would help John and Bill; that he would collect Felix that afternoon because the documents had to be at GE's office by 6.00 pm that day; if the documents were not at GE's office by 6.00 pm on 25 May "the boys are finished".

[93] He did agree that during the meeting at Mr Colville's office he would leave from time to time to telephone John to convey any alterations sought by Felix. He agreed that he had had "very substantial dealings with John and Bill Creswick over the years, very, very substantial dealings". He denied that Mr Colville asked for an opportunity to peruse the agreement over the weekend before he advised Felix and that he had responded that there was no time because it had to be signed immediately. Banjanin denied that he received a call from Felix later that night to say that he did not want to go ahead with the agreement. He spoke by telephone

with him the following day, 26 May, but he did not seek instructions from Felix to see if he could re-negotiate the agreement. He did speak to John on the evening of 25 May at about 6.35 pm and between 27 May and 29 June he made 19 telephone calls to John and his wife Shayne but did not speak to Felix again.

[94] On 4 June 2007 Mr Colville wrote to Mr Mott:

> "I refer to the correspondence which I received from you last week in relation to this matter and our various telephone conversations.
>
> For the record I confirm that in my opinion the agreement which Mr. Felix Creswick signed at my office on the evening of Friday 25 May was signed under duress, and would not therefore be enforceable in a Court of law. However, I note that Mr. Creswick's partner secured a restraining order against him in the Supreme Court last week preventing him from dealing with his assets so the status of the agreement is probably of academic interest only.
>
> I confirm also that Mr. Creswick did not keep his appointment with me on Wednesday morning (no doubt because of the pending proceedings by his partner) and that I have not been able to contact him by telephone since then.
>
> In the circumstances I am now closing my file."

[95] On the same day Mr Colville wrote to Felix noting the restraining order communicated to him by Mr Mott. He added:

> "For the record I confirm that the agreement which you signed at my office on the evening of Friday 25 May was in my opinion signed by you under duress, and would not therefore be enforceable in a Court of law. The issue is now however of no real significance in light of the restraining order obtained by your partner."

He noted that John and Bill were able to implement the terms of the agreement immediately

> "which would have overcome one of the problems which I referred you to at our meeting, namely what would happen if the properties were transferred to your sons and they failed to make payment of the property settlement moneys [sic]."

[96] In cross-examination Mr Colville agreed that initially Felix appeared to have all his faculties about him and understood the terms of the agreement. He accepted that Felix made a number of changes to the agreement, for example, the percentage interest in the Logan Road property and the change of provision of payment from $1,000 to $1,250. Mr Colville said that he advised Felix not to sign the agreement on two occasions: in his office if he was not satisfied with the terms, and after he had signed it and was leaving he again advised him not to return the agreement or the transfer documents (which had not been signed) to his son's solicitor if he was not happy with the terms. He accepted that Felix ignored his advice and did sign the agreement and ignored the advice not to deliver the agreement to Mr Mott. In the foyer Mr Colville recalled that Banjanin was on the telephone speaking to an unidentified person. Felix took the phone and used strong words and was quite agitated to whoever was at the other end of the telephone call and was quite upset. Mr Colville was firm in the face of strong cross-examination that Banjanin had

explained that the document had to be signed that evening together with the transfers of properties because the financiers were waiting for copies of the documents to be faxed to them. Mr Colville was also concerned that Felix thought he might lose his residence if the document was not executed immediately.

[97] Felix's evidence about the May agreement is difficult to follow in the transcript and somewhat inconsistent. The trial judge has set out much of it in his reasons.[25] Felix said at the time of the May agreement his relations with John and Bill were not good and that Marcia Banfield, his partner of 18 years, had decided to visit her daughter. He described himself then as feeling lonely and exhausted. He denied that he had approached Banjanin to reach some agreement with his sons. He recalled that on the morning of 24 May at about 8.30 am Banjanan had telephoned him, asked if Marcia was there and when told that she was had said that he would pick Felix up and take him to coffee because he had something important to tell him. According to Felix, Banjanin said he had $200,000 in his pocket because a house that John was selling had fallen through.[26] Banjanin told Felix that "the boys" were in trouble because GE wanted to foreclose on them and they needed Felix's help. He agreed that he would help them and was told that he was to guarantee the money that they owed the financier. Banjanin told Felix that the documentation should be ready in the afternoon. Felix said he believed what Banjanin was telling him. He said he was very concerned about the predicament that his sons were in and he did not want to see that they were down. Banjanin took him home.

[98] Felix said he was telephoned several times in the afternoon to be told that the documents were not yet ready. Banjanin took him to Mr Mott's office; Felix waited on the footpath while Banjanin went in to see if the documents were ready; they were not but shortly after Mr Mott came out to say that the documents would not be very long. Felix had not met Mr Mott before. He asked Felix if he had a solicitor and he said that he did not. According to Felix, Banjanin said that he would organise a solicitor. Shortly afterwards Mr Mott gave some documents to Banjanin and they walked 200 or 300 metres to Mr Colville's office.

[99] Felix said that Banjanin passed the documents to Mr Colville who looked at them quickly and Banjanin then said:

> "… this document has got to be signed by 6 o'clock tonight, you know what I mean, because is a problem with the boys with the finance company."

He related that Mr Colville said he would like to keep the documents for the weekend to look at them but that Banjanin said that they had to be signed that night. His counsel asked Felix if he believed Banjanin when he said they had to be signed that night. He answered, "I believed him in a minute, because I believe that the boys are in trouble, see". Felix then described going into Mr Colville's office; that Banjanin sat next to him with his phone in his hand which he kept ringing and talking while Mr Colville read the documents. Felix thought he heard Mr Colville say that he was giving everything away and changed the percentage entitlement to a third. He said he was not happy to sign, that there was screaming going on and "Sign, sign, sign. We running out of time, 10 minutes to go" being said, presumably by Banjanin. Felix said that he was feeling depressed and believed that he was signing a guarantee.

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25 Reasons [315] - [330].

26 This was denied and what it meant was not clear.

[100] When he got home Felix said Marcia asked him what had happened and he told her that he had signed some documents. She became extremely upset and he told her that he had signed as a guarantor for the boys because the business was going bad, something had happened. Marcia said, "You must be mad". Felix then telephoned Banjanin and told him that the document that he signed "you can dump it in the rubbish". He added that he was not going through with the deal. Banjanin responded that he would tell John. Felix said that Bill telephoned him and abused him.[27] Marcia was present during this conversation which Felix asked her to record. It was made an exhibit. It was an issue at the trial that Marcia Banfield had not been called to give evidence from which the trial judge drew adverse inferences, but he accepted the terms of this conversation.

[101] Felix denied that Banjanin was assisting him to resolve matters with his sons, particularly John. He described him as "bribing" him. He said that Banjanin was working for John. He said of events of 25 May:

> "Banjanin was not assisting me, Banjanin made arrangement to pick me up and drive me to a solicitor after he explaining to me that the boys are in trouble with GE and I didn't believe him. I didn't believe him one little bit that my boys, they with trouble with GE, because I knew the position, I knew John, what John can do, what John can organise, I trusted my son. I knew that he's telling lies. That's as simple as that."

The trial judge relied on this assertion to conclude that Felix had not been unduly pressured into signing.

[102] Felix stated firmly that his sons were not in trouble and when he was told that by Banjanin he knew that it was not true. Felix reiterated that after Banjanin had said that the documents would be prepared he, Felix, said that he was prepared to help the boys but he did not believe Banjanin that they needed help. He denied that they discussed any amounts of money. Felix said in cross-examination that he did not want to sign the agreement and reiterated that Banjanin was screaming and yelling on the phone, that Marcia "rang a couple of times" (in evidence in chief he had said she had rung once). He said if Mr Colville had advised him not to sign he would not have signed the agreement.

> "I want to help the boys but when I saw this document, these figures and everything is in here and the screaming and yelling down there and everything, I was not happy to sign it, because I was just starting to feel there's something wrong here, but I did sign that. I mean I did sign."

[103] Later in his extensive cross-examination Felix said that although Mr Colville read out the agreement "my mind was all over the place and everything, but he was reading, I was not listening what he was reading". He reiterated that he believed it was a guarantee and that the boys needed it. He added that "in the morning I knew" that they were not in trouble and John was "too strong" with GE. He denied that Mr Colville explained the agreement to him.

[104] In his evidence Bill noted the telephone records which showed that Felix's mobile service rang his mobile service at 6.10 pm on 25 May but he said he could not recall the conversation with Felix and certainly could not recall that Felix said he was not

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[27] The telephone records suggest that Felix spoke to Bill then to Banjanin.

going ahead with the agreement. After considerable skirmishing and reluctance, he conceded that since it was only an hour after the agreement had been executed by Felix, they were "obviously talking about the day's events". Marcia Banfield at Felix's request made a note of what Bill said:

> "Thanks Dad. You have fucked me and my family over. I hope you have a good life and you die soon."

[105] The trial judge accepted "and [gave] significant weight to"[28] Mr Colville's evidence about what occurred in his office on the afternoon of 25 May 2007. His Honour generally accepted Banjanin's evidence except where he conflicted with Mr Colville. He regarded Felix's evidence as unreliable, "save to the extent that it comprised admissions against interest or could be independently corroborated". He concluded that Felix initiated contact with Banjanin and was under pressure, not least being the financial pressure caused by the property settlement he had reached with Marcia Banfield, which was exacerbated by her leaving him which, at the time, he thought was for good. Accordingly, Felix needed to have access to money to make good his deal with her. His Honour concluded that that was more than sufficient a reason for him to ask Banjanin as a friend to intervene with John. On the other hand, his Honour concluded that there was little incentive for John to bring his dealings with Felix to closure. His Honour rejected Felix's version of being told by Banjanin that he had a cheque for $200,000 in his pocket as it did not align with any known facts. His Honour then said:[29]

> "Nor do I accept the version that Banjanin told Felix that GE was foreclosing on John and Bill, that they were in trouble and that they needed Felix to sign a guarantee. But in any event, as noted above, Felix said that he did not believe the statements he asserted Banjanin had made about the financier foreclosing and the boys being in trouble."

[106] His Honour accepted that the course of events from 24 and 25 May between Felix and Banjanin was generally as described by Banjanin, and that his calls to John were relaying Felix's various requests. The telephone records were, his Honour thought, supportive of these conclusions being a nine minute call from John to Banjanin in the late morning followed by an 18 minute call from John to Mr Mott. He noted that those records showed calls from Banjanin to Felix and from Banjanin to John, and in the afternoon between Banjanin and Bill but that it was possible that John was using Bill's phone. His Honour concluded:[30]

> "There were enough calls backwards and forwards between Banjanin and John, interspersed with numerous calls from Banjanin to Felix, to satisfy me that this pattern was consistent with Banjanin relaying information back and forth between Felix and John about what was to be contained in the agreement."

[107] The trial judge accepted that Mr Colville had asked for the weekend to peruse the documentation but:[31]

> "I also consider it likely that Banjanin said that the documentation needed to be signed that evening and is likely to have mentioned financiers in that context. Banjanin had a personal interest in having

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28 Reasons [331].

29 Reasons [333].

30 Reasons [334].

31 Reasons [336].

> the matter finished; it was late on a Friday afternoon and he had already spent considerable time with Felix and in the to-and-fro with John. But I think it was also likely that John had conveyed to Banjanin a need for the documentation to be completed for the purposes of arranging finance. Apart from anything else, given the protracted history of the dealings, John would have seen this as a way of impelling matters to finality. But again, from Felix's perspective, it did not matter even if Banjanin was saying that the documents were needed urgently to prevent foreclosure by the financiers and to get the boys out of trouble, because Felix said he did not believe any such statements to be true."

[108] John's evidence was to the effect that Banjanin had approached him on behalf of Felix to reach agreement between them. What Banjanin told him that Felix wanted was communicated by him to Mr Mott to put into the agreement. (This does seem to be at odds with Mr Mott's evidence that he had a draft agreement in terms not dissimilar for quite some time on John's instructions.) He communicated with Banjanin about finding a solicitor but did not nominate one after Felix said he did not wish to use his usual solicitors. Banjanin telephoned him from Mr Colville's office to tell him that Felix wanted to make changes to increase the weekly income and the capital sum, as well as his share in 905 Logan Road to one-third from 10 per cent. John thought that entering into an agreement was a waste of time but Bill had said to just agree to it. In frustration John agreed that whatever Felix wanted, the changes should be made, and Felix should sign it.

[109] John received a facsimile copy of the agreement from Mr Mott's office that day. When asked did he have any further contact with Felix he said he did not recall. On 26 May, he, Bill and their wives executed the agreement witnessed by Mr Mott. At all times they were ready and able to perform the agreement. John was adamant that Banjanin was acting on his father's behalf. He denied that he ever conveyed any sense of urgency to Banjanin or that there was pressure to have the agreement signed because of difficulties with financiers. He said he found out that his father did not wish to go ahead with the agreement on the Monday or Tuesday after the agreement was executed.

[110] It was John's view that his father at that time was "as sharp as a tack". John denied that he had taken advantage of a vulnerable person because Felix had negotiated an improvement in his position. He was aware that before the May agreement his father was a gambler and drinking heavily. He described their relationship, rather disingenuously, it might be thought, in the months previously as "having a spat" at each other and that it was of no great moment; the "hateful letter" in March 2006 was just an example of that spat and the solicitor's letters ordering Felix to leave the house were no more than part of that quarrelling. He accepted that his father had medical problems and that he had had a heart by-pass in 1996 but he was not aware of the extent of his health problems. He was aware that he "desperately wanted" his own home to live in with his own registered title.

[111] The trial judge thought that the agitation which Mr Colville saw in Felix was what his Honour observed when Felix was giving "some of his more colourful evidence".[32] His Honour concluded that Felix was a veteran businessman and he could not possibly have thought he was signing a guarantee, particularly as

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[32] Reasons [337].

Mr Colville explained each clause in the document. His Honour found that, despite Mr Colville's two warnings, Felix deliberately decided to sign the agreement containing the amendments he had requested, all for his own financial benefit. His Honour concluded that the catalyst for Felix seeking to resile from the agreement was Marcia's hysterical reaction to the news he gave her when he went home that evening. His Honour accepted, on the basis of the telephone records, that Felix informed, at least Bill, of his change of heart that evening and this provoked the outburst from Bill which was recorded in the note written by Marcia. His Honour concluded:[33]

> "It is, however, unnecessary to make further findings with respect to Felix's conduct in seeking to resile from the May Agreement he signed, because no case was advanced on his behalf on reliance of his change of mind."

The trial judge's approach

[112] Felix sought to have the May agreement set aside because:

(a) it was an unconscientious dealing; or

(b) he was subject to undue influence by John.

There were submitted to be a number of factors which supported setting aside the agreement:

(a) the relationship between Felix and John, bearing in mind Felix's age and state of health and that John had for many years effectively managed the family's business affairs;

(b) the allegations of fraudulent conduct against John by reason of the forgeries (his Honour gave no weight to that factor since he made no adverse findings against John);

(c) a desire for Felix to have a house of his own;

(d) the hostile nature of the relationships within the Creswick family;

(e) Felix's increasing isolation, personal and financial, from the family;

(f) Felix's state of physical and mental health;

(g) Felix's assertions about the method by which the execution of the May agreement was procured (which his Honour thought diluted since he found that Felix did not believe that there was pressure on his sons); and

(h) the improvidence of the May agreement from Felix's perspective emphasising what Felix was giving up. (His Honour found that no credit was given for the value of the cash and property which Felix was to receive under the agreement or for the significant sums he had received through the family business over many years.)

[113] It was argued that Felix was in a position of special disadvantage in relation to his sons. His Honour cited the well-known passage of Fullagar J in *Blomley v Ryan*:[34]

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33 Reasons [338].

34 (1956) 99 CLR 362 at 405 per Fullagar J; Reasons [342].

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-a-vis* the other. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain. ... But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways – firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion."

As his Honour noted, an unconscientious dealing does not occur because parties are in unequal bargaining positions or even if one is suffering from some infirmity or disability. The disadvantage needs to be such as to affect seriously the ability of the party seeking to set aside the transaction to make a judgment as to his own best interests and the other party knows or ought to know of the existence of that condition or circumstance and of its effect.[35]

[114] The trial judge concluded that Felix was not under a special disadvantage in relation to John because although of advanced years, he was a sharp businessman. His conduct in Mr Colville's office in securing "an even better deal for himself", his Honour concluded, indicated that he was not suffering from any condition which seriously affected his ability to make a judgment as to his own best interests.[36]

[115] His Honour did not consider that the circumstances of the execution of the May agreement by Felix were marked "by some false sense of crisis which had been manufactured by John".[37] Instead, his Honour found that it was Felix, through Banjanin, who initiated the events which led to the signing of the May agreement. His Honour found:[38]

> "As far as Felix was concerned, there could have been no sense of crisis by reason of financial pressure on John; Felix said that he did not believe statements to the effect that the financiers were going to foreclose on John and Bill and that the boys were in trouble."

[116] Neither did his Honour consider that the May agreement represented an improvident transaction from Felix's perspective. Mr L Kelly SC, for Felix, contended that his Honour placed the wrong emphasis on the improvident nature of the transaction, which did not reflect the fact that Felix had set up the business empire. Instead, his Honour paid attention to the "significant financial benefits"[39] that Felix had obtained over many years, including those immediately prior to the May agreement, and what Felix was to obtain from the agreement in terms of cash and property. His

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35 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
36 Reasons [346].
37 Reasons [344].
38 Reasons [344], citing *Louth v Diprose* (1992) 175 CLR 621.
39 Reasons [345].

Honour considered that a large part of the lump sum to be paid to Felix was to satisfy his obligations to Marcia Banfield, and that was not a matter that could be visited upon John and Bill.

[117] His Honour also rejected the contention that the nature of Felix and John's antecedent relationship was such that Felix was an unequal weaker party influenced in his decision to enter into the transaction. The relationship was not within any of the well established categories which give rise to a presumption of undue influence but his Honour recognised that the categories are not fixed.[40] His Honour quoted the authoritative statement by Dixon J in *Johnson v Buttress*:[41]

> "The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practice such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act."

[118] His Honour concluded that the relationship was not such as to give rise to one of undue influence even accepting that Felix was older and suffered health and emotional issues. Many of the difficulties which Felix faced were as a consequence, his Honour found, of the troubled relationship with Marcia Banfield. He concluded that Felix was quite capable of dealing robustly with John "and was canny enough to enlist professional assistance when required".[42] His Honour noted, however, that John was effectively the manager of the Creswick family business affairs but that that did not put him in a position of ascendancy over Felix.

[119] His Honour concluded that the May agreement ought not be set aside as an unconscientious dealing between Felix and John nor that Felix entered into it on the basis of undue influence.

Discussion

[120] The central challenge to the trial judge's conclusions about the May agreement was his Honour's failure to give appropriate weight to Mr Colville's evidence that there was a sense of urgency and crisis about the meeting on 25 May and that Banjanin had plainly lied when he said that the financiers were waiting for the faxed documents that evening or all would be lost. For reasons that are developed subsequently those contentions must be upheld. In conveying this information and thus creating the aura of crisis Banjanin was acting as John's agent. There was no suggestion that he had made up the urgency for his own purposes. The trial judge said that Banjanin was anxious to be rid of the whole agreement late on a Friday but that is not an explanation which Banjanin offered. Banjanin had denied that there was any urgency about the deal. His Honour did conclude that Banjanin had conveyed a sense of urgency which came from John but that John was likely to have urged that the agreement be concluded because he needed to arrange the finance to

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40 Quoting *Johnson v Buttress* (1936) 56 CLR 113 per Latham CJ at 119.

41 Reasons [351].

42 Reasons [353].

pay Felix.[43] That was an unwarranted conclusion because it was not John's evidence and, under the agreement, he and Bill had three months to find $600,000 for Felix.

[121] His Honour did not find that Banjanin lied about there being no sense of urgency at the meeting. Rather his Honour "generally accept[ed] Banjanin's evidence, subject, however, to matters in which his evidence conflicts with that of Mr Colville."[44] The difference in the evidence of the two men was too stark for Banjanin's evidence not to come under more searching scrutiny. It was not a case of an understandable difference in the detail after the passage of time. Banjanin flatly denied any urgency emanating from him. He denied that Mr Colville said he wanted the weekend to peruse the documents. Even though Felix was found to be unworthy of credit by the trial judge, his evidence was much closer to Mr Colville's about the meeting than was Banjanin's. Furthermore, Felix's evidence was supported by the telephone records. Bill, for example, not being able to deny the call from Felix, took refuge in memory loss.

[122] The sense of urgency and immediate crisis permeated the whole approach to the execution of the agreement in Mr Colville's office. His request to read the documents carefully over the weekend and advise on Monday was rejected. Mr Colville believed that the documents had to be signed that afternoon. It was of no importance whether he recalled GE being mentioned as the financier. That urgency and crisis meant that Mr Colville could do little more than read the clauses to Felix. He had no background knowledge of Felix's financial business, personal or health history to assist in weighing those clauses or understanding their meaning in the context of Felix's contribution to the Creswick businesses over some 25 years or, for example, Felix's strongly held desire to own his own residence. By this date Felix had raised concerns with John about his signature being forged on certain security documents.[45] Had there been an opportunity to spend some time discussing the agreement with him, no doubt Mr Colville would have been able to explore Recital M with Felix and its implications. John maintains that it related only to a power of attorney but the language used is curious if that be the case.

[123] The respondents make much of Mr Colville's advice on two occasions at the meeting that Felix should not sign the agreement if he was unhappy with its terms and not return the documents to the solicitors. But since Mr Colville understood the agreement had to be signed that night, as did Felix, then there was no opportunity to defer signing so that advice could be taken. It was a case of either entering into the agreement or not at all and the dire consequences of not doing so had been conveyed.

[124] The trial judge's acceptance of Felix's evidence in cross-examination that he did not really believe that his sons were in trouble with their financiers did not accord with the overall evidence. A reading of the whole of Felix's evidence suggested some bluster at that point in the cross-examination. The evidence in chief was sensible and coherent on that point but, more importantly, the conduct in Mr Colville's office of all parties conveyed that there was a financial crisis in John and Bill's businesses (with likely consequences for Felix) which required that agreement to be signed then. Felix was plainly unhappy with its terms and the evidence indicates

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43 Reasons [336].

44 Reasons [331].

45 In Felix's letter to John dated 2 April 2007, referred to in [75] of these reasons.

that he was doing the best he could for his own interests under that pressure. With the history of his negotiating with John via the correspondence in July, August and October 2006 set out above it is highly unlikely that he would have executed an agreement that afternoon in those terms if he did not believe that it was essential for his sons' financial wellbeing to do so. Counsel for Felix also point to the physical nature of the document which was executed which, since solicitors were involved, was unusual if there was no real urgency. That is, a typed up agreement including the amendments could have been produced for signature on Monday.

[125] The trial judge concluded that Felix was under pressure to execute the agreement because he needed the money to settle with Marcia Banfield. There was, however, no immediate pressure to do so on Friday evening rather than on the following Monday because he still had between one and two months to finalise his Pt 19 agreement.

[126] The respondents contend that the draft May agreement collected from Mr Mott largely reflected what Banjanin had conveyed to John as reflecting what Felix wanted. The evidence suggests that the broad terms of the agreement had been prepared from instructions from John to Mr Mott at least several months earlier. The terms are not at all consistent with what, on one view, might be described as the extravagant claims of Felix in his 2006 correspondence with John. More particularly, the term in the agreement relating to the house at 11 Seahaven Court was quite inconsistent with Felix's desire to own his own home. He and Shayne had a very strong dislike for each other and an arrangement in those terms would have been anathema to Felix.

[127] Although the enforceability or otherwise of the May agreement can stand alone from the forgery case, John's evidence must take on a different colour when considered against the conclusion which we have reached that he was responsible for forging Felix's signature on many occasions over the years. The trial judge was influenced by the failure of the forgery case when considering the May agreement.

[128] There is the further issue of Felix's physical and mental difficulties as at 25 May 2007. The trial judge accepted Dr Apel's evidence about Felix's condition. It is very much to the point that Felix consulted with him on the day before. When reflecting upon Felix's mental and physical state in May 2007 in his report dated 29 September 2009, Dr Apel stated:

> "I would expect numerous transient episodes of impaired cerebral functioning around that period."

Although Mr Colville concluded that he would not have permitted Felix to have executed the document if he had thought that he was mentally incapable, in the relevant sense, he had no familiarity with Felix's medical history and, in particular, Dr Apel's opinion. The trial judge was too greatly influenced by Felix's performance whilst giving evidence at the trial and did not, sufficiently, disengage that view of Felix from a reconstruction of his likely capacities on 25 May 2007. Dr Apel's opinion evidence was likely the most helpful together with Mr Colville's observations that Felix started calm and became more angry and agitated as he was read the clauses. Those observations do not readily suggest that the draft agreement represented Felix's instructions to Banjanin conveyed to John and then to Mr Mott.

[129] The respondents contend that Felix was not known to be financially vulnerable at the time he entered into the May agreement. Felix was said to have income from

a tenant at 905 Logan Road and from a sign on his property and had had a large income from Zupps Motors. As pointed out by Felix's counsel, John had deposed in an affidavit dated 12 February 2008 that the termination of the Zupps lease in March 2007 had left Felix "without any substantial income" and John knew that Felix had no money.

[130] Felix contends that the May agreement was improvident. Amongst other things, the properties which Felix was to retain continued to remain encumbered after the agreement was performed. It meant that Felix would be unlikely to be able to use those properties to raise funds. There is also Recital M which protected John from any action by Felix over John's misuse of Felix's signature. The findings on the forgery case make it clear that this was a large surrender by Felix.

[131] The trial judge concluded that Felix was capable of enlisting professional assistance when required and was capable of dealing robustly with John. As has been mentioned above, this is to diminish the accepted evidence of Dr Apel that until he had his operation Felix was seriously disabled by the occasional blackouts and consequent falls and personal challenges with Marcia Banfield. The changes that were made in Mr Colville's office, although improving Felix's position, did not come anywhere near what he had sought in August and October 2006. But most telling were his earlier demands that 11 Seahaven Court be transferred to him free and clear of all encumbrances and that the encumbrances over his properties at 903 Logan Road, the Office Lane farm, the Crump Street properties and the vacant block at Sentinel Court be lifted.

[132] Making all due allowance for the advantages of the trial judge seeing and hearing the witnesses and the unfolding of the evidence, his Honour failed to analyse the evidence which he accepted and, in the case of Banjanin, to explain how, if he gave demonstrably untrue evidence about important aspects of the meeting in Mr Colville's office, he could otherwise be regarded as a credible witness. Mr Colville was found to be honest and reliable. His evidence was uncontaminated by any self-interest, alliance, allegiance or hope of advancement. He had over 30 years practice as a solicitor. While he agreed that Felix was mentally fit to execute the agreement his opinion that Felix had done so under "duress" was unshaken. That he was moved to write to Mr Mott in the days following supports the strength of that opinion. Yet the trial judge made little of it preferring to express his opinion about Felix's capacity based on broad observations at the trial. He failed to mention the uncontested evidence of Dr Apel about Felix's state of health in May.

[133] The trial judge's conclusion that Felix was not unduly pressured into signing the May agreement was "contrary to compelling inferences."[46] In that circumstance this Court, undertaking the appeal as a rehearing, may give effect to its own conclusion armed with the assistance afforded by the trial judge's findings.[47]

Conclusion on unconscionability and undue influence

[134] The quality of Felix's consent to enter into the agreement was so compromised by the improper pressure brought to bear upon him by John through Banjanin, creating a false crisis, knowing that Felix would not stand by and allow the whole business enterprise to be seriously threatened, and John's knowledge of Felix's

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46 *Fox v Percy* (2003) 214 CLR 118 at 128 [29].

47 *Fox v Percy* (2003) 214 CLR 118 at 128 [29].

impecuniosity, the Pt 19 agreement, and his poor health was such that Felix ought to be relieved of the effect of that agreement. The High Court emphasised in *Louth v Diprose*[48] that it is the analysis of the facts which will dictate whether the relief should be granted, and these facts, when analysed, support that conclusion.

[135] Although the jurisdiction to set aside dealings for unconscionable conduct and undue influence are distinct,[49]

> "they both depend upon the effect of influence (presumed or actual) improperly brought to bear by one party to a relationship on the mind of the other whereby the other disposes of his property. Gifts obtained by unconscionable conduct and gifts obtained by undue influence are set aside by equity on substantially the same basis."[50]

[136] Here the May agreement should be set aside in equity by virtue of the undue influence brought to bear on Felix by John. The facts would also support setting it aside on the basis of John's unconscionable conduct towards Felix.

No concluded agreement?

[137] It was only on appeal that Felix contended that there had been no concluded agreement because Felix had withdrawn his offer (counter-offer) before acceptance by the relevant respondents. There was no pleading to reflect such a case. The known facts would have supported a pleading of that kind. The trial judge was alive to the possibility but concluded that it was not an issue between the parties for him to resolve.

[138] While the trial judge did not accept Felix's evidence, as discussed, there was very little reason why he should have accepted any of Banjanin's evidence when it related to his dealings with Felix, unless otherwise supported. Banjanin's recounting of the content of the telephone call on the evening of 25 May with Felix was not believable, that is, that Felix was ringing to thank him for his assistance with the May agreement. In light of the telephone call with Bill, accepted by his Honour, "Felix informed at least Bill of his change of heart that evening",[51] there was no reasonable basis for not accepting Felix's evidence that he had told Banjanin that the agreement was "rubbish" and he wished to withdraw from it. It is irrelevant that it may have been prompted by Marcia's outrage. Felix's evidence at trial was not entirely coherent but the abuse which he received from Bill in the telephone call and recorded in the contemporaneous note by Marcia Banfield was clear. That statement could only be in the context of Bill understanding that Felix had attempted to withdraw from the May agreement because the agreement was a most desirable outcome for John and Bill.

[139] The agreement was not executed by John and Bill and their wives until 26 May.

[140] The respondents contend that if this issue had been alive at trial then Mr Colville would have been cross-examined about his discussion with Mr Mott on 28 May 2007. It is not easy to see how it would be relevant. Both Felix and Bill were cross-examined about their conversation. The strong inference is that Bill told

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48 (1992) 175 CLR 621.

49 *Louth v Diprose* (1992) 175 CLR 621.

50 Brennan J at 627.

51 Reasons [338].

John that Felix had withdrawn his offer. It is trite law that an offer may be withdrawn at any point up until acceptance of the offer is communicated.[52]

[141] The difficult question is whether Felix, for the first time on appeal, ought be permitted to raise and succeed on this issue. In *Water Board v Moustakas*[53] Mason CJ, Wilson, Brennan and Dawson JJ said:

> "More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied."

There appear to be no new facts to be explored. It is how they may be deployed. On the evidence a conclusion may have been readily available that Felix withdrew his offer before it was accepted by John and Bill and their wives and there was thus no concluded agreement.

[142] However, a party is bound by the conduct of his case at first instance and should not, after the case has been decided against him, except in most exceptional circumstances, be permitted to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing.[54] In *Coulton v Holcombe*,[55] Gibbs CJ, Wilson, Brennan and Dawson JJ observed:

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

[143] Their Honours' following discussion of that principle makes it plain that an intermediate appellate court may allow a new point to be raised on appeal where there are no facts in issue or where the facts are "proved beyond controversy",[56] but that involves an exercise of discretion with reference to the circumstances of each case. Felix now seeks to argue a point which was arguably available on his own evidence at the trial. He failed to take the point at the trial despite the additional support it arguably received from other evidence. Looking at the matter objectively, that could be attributed to a deliberate forensic decision. In a case in which numerous points were pleaded, the trial was conducted with reference to the pleadings, and there was ample opportunity to amend to raise new points if that were desired, it would not be in the interests of justice to allow this new point to be raised for the first time on appeal.

Specific performance of the May agreement

[144] In light of the conclusion that the May agreement should be set aside it is unnecessary to consider this issue at any length but the conclusion that this

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52 *Goldsborough Mort & Co. Ltd v Quinn* (1910) 10 CLR 674 at 678; *Dickinson v Dodds* (1876) 2 Ch D 463; *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QCA 205 per McPherson JA at [1].

53 (1988) 180 CLR 491 at 497.

54 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483.

55 (1986) 162 CLR 1 at 8 - 9.

56 *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.

agreement would bring finality into the relationships between the parties as the reason of the trial judge for ordering its specific performance finds little support. The family hatreds continued to be obvious throughout the trial. This agreement meant that members of the family would still have to deal with each other, particularly Felix and Shayne over 11 Seahaven Court. Furthermore, the respondents wanted other properties brought in, in a rectification application. These matters suggest that specific performance of this agreement would not bring matters to finality. There is then the matter of John's forgery, which would suggest that equitable relief in the form of specific performance is inappropriate so far as he is concerned and the other participants must be affected by his conduct.

TABTILL'S APPEAL AND CROSS APPEAL

[145] In the alternative to the claim for specific performance of the May agreement, the plaintiff Creswicks and Tabtill claimed that Felix held his interest as registered proprietor of 8-10 Crump Street, Holland Park, 905 Logan Road, Holland Park, 35 Sentinel Court, Cleveland, and his interest as registered proprietor of a one third interest in 503 Logan Road, Greenslopes, on trust for Tabtill (or, in respect of 905 Logan Road, for Tabtill or John). They claimed that Felix should convey his interests to Tabtill (or, in respect of 905 Logan Road, Tabtill or John) or he should pay equitable compensation. Because the trial judge found that the May agreement was binding, his Honour found it unnecessary to consider the alternative claim, which was dismissed by the trial judge's order that the "plaintiffs' claim is otherwise dismissed."

[146] The plaintiff Creswicks and Tabtill have cross appealed against that order. Paragraphs 1(i), (ii), (iii) and (iv) of the notice of cross appeal seek a declaration that Felix's interest in each property is held by him on trust in favour of the plaintiff Creswicks or Tabtill. The notice of cross appeal also claims further or alternative relief, namely, a declaration that the plaintiff Creswicks or Tabtill "have an equitable interest in those properties" and "such compensation and/or an adjustment order and/or charging orders as may be appropriate as to the extent of the [plaintiff Creswicks' or Tabtill's] payments and/or contributions towards the properties", but those further or alternative remedies were not pursued either in the amended outline of argument or the oral argument presented in support of the cross appeal. The arguments were instead directed to establishing that Felix held the properties on behalf of Tabtill (or, in respect of 905 Logan Road, on behalf of Tabtill or John). The amended outline of argument confined the remedy sought by the cross appellants to the declarations of trust claimed in paragraphs 1(i), (ii), (iii) and (iv) of the notice of cross appeal.

[147] As Tabtill and John are the parties who would directly benefit from success on the cross appeal, it is convenient from this point to omit reference to the other cross appellants.

1. The evidence about the parties' intentions

[148] The statement of claim included allegations (which Felix denied) that Felix orally represented, and that he and John orally agreed and they intended, that Tabtill or John would hold the beneficial interest in the properties. Tabtill and John alleged that John held the relevant intention on behalf of Tabtill. John and Felix gave some evidence on this topic, but it is not necessary to discuss that case. Nor is it

necessary to discuss Felix's pleaded case that John and Felix orally agreed that 35 Sentinel Court would be bought for Felix and Marcia. The trial judge made it plain that no reliance could be placed upon the uncorroborated evidence of John or Felix, unless the oral evidence consisted of an admission against interest.[57] The allegations about the parties' intentions, representations and agreements were not corroborated by any other evidence accepted by the trial judge. Our conclusions that Felix's allegations about the May agreement and the forgeries were essentially correct do not persuade us to place any faith in Felix's uncorroborated evidence.

[149] Each side sought support for their competing arguments on the cross appeal in some particular findings of fact made by the trial judge. The relevant findings were as follows:[58]

> "[18] Between 1975 and 1978, Felix purchased the properties at 905-911 Logan Road, Holland Park ('the Logan Road properties'). These properties were (and still are) registered in Felix's name. Felix operated his car dealership business from the property at 905 Logan Road in the late 1970's, but he ran into financial difficulty. He liquidated a number of assets, including other real property investments, but kept ownership of the Logan Road properties. In October 1980, Felix's application to renew his motor vehicle dealer's licence was refused and he closed his dealership at 905 Logan Road. He was without his motor vehicle dealer's licence until September 1982. The renewal of his motor vehicle dealer's licence roughly coincided with the dissolution of the partnership between John and Mr Matlin. As I have said, from late 1982 Felix and John worked together from the premises at 905 Logan Road in a used car dealership. The precise nature of their relationship in this business is also one of the matters in dispute.
>
> …
>
> [28] I should make it clear that merely because a member of the Creswick family was registered as a proprietor of a particular property did not necessarily mean that that person had personally contributed to the purchase price of, or had a beneficial interest in, the property. The family's modus operandi over the years was to 'park' properties in the names of different individual family members and/or corporate entities.
>
> …
>
> [32] It is clear that Tabtill operated, in effect, as the cash box for the members of the Creswick family for many years. At least until the establishment of the other companies, the businesses and property dealings in which they were engaged were run and financed through Tabtill. Shayne and Jane were listed in Tabtill's books as employees. Wages

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57 Reasons [110].

58 Reasons [18], [28], [32], [97] - [99].

were paid to the Creswick family members. But additionally each of them was provided with a credit card (and, in at least Felix's case, cheque books) which each could use for personal expenses. Bill described it as follows:

> 'Okay. Now, in terms of you being paid, how were you paid? – I was on a weekly income.
>
> Like a wage? -- Just a wage.
>
> Did you get commissions on cars? -- No. There wasn't such a thing as – the salesmen got commissions. We didn't receive commissions, it was -----
>
> When you say "we"? -- Okay. I didn't receive commissions. It was calculated in the deals but, I mean, I never received commission because we had a floating account, if you wanted to call it, an expense account that we could draw on and use and it was there to be used and I obviously offset it for what income that I brought in.
>
> When you say a floating at, just explain that to me?-- Oh, if I needed fuel or shoes or clothes or – you know, we had an expense account, a credit card, an American Express card.
>
> You use the word "we" again? -- My wife and I.
>
> Right. An American Express card? -- Yeah.
>
> Chequebook? -- No, never had a chequebook, no signature or nothing.
>
> Just credit card? -- Just an American Express card.
>
> Did you understand anything about what sort of limits there were on your use of that? -- There was no limits.
>
> Okay? -- There was no limits.
>
> All right. Now, was your wife able to use that credit card? -- She used it for fuel. She used it for emergencies, if she needed something from the chemist for the kids, two children at that stage in '96 that were under – under four, so – if she needed to go the chemist or something.'

…

[97] It will be apparent from what I have written that I generally reject Felix's credibility as a witness. There is, however, one particular topic on which I find that Felix not only told the truth, but accurately summarised the true nature of the

dealings between him, John and the other members of the family from 1982 up until the time they fell into dispute. The statements in question were clearly against Felix's interest, and indeed undermined the basis upon which significant parts of his claim were based. The first passage of evidence in this regard was as follows:

> 'Is that right? '88? But your case is that the dealership partnership continued right the way through to 2005/2006; isn't that right?-- Well, it was not actually a partnership at that time. At that time, John and I, we work together. He was selling and I was selling and we were try trading as Motor Trading Centre at - Holland Park Motor Trading Centre and Jon was trading Motor Traders at Stones Corner.
>
> When did that start?-- That started when John Creswick bought his first caryard.
>
> At Stones Corner?-- Stones Corner.
>
> So you are saying then that the dealership partnership ended then, and you became, as it were, separate traders?-- At that time we didn't even discuss the partnership. At that time we didn't discuss the partnership. We were working as a family business, it was a family business. It was not a partnership, it was a family business.
>
> Not a partnership?-- All right. Now, John, at other time there, could draw - he could pay wages, he could draw money from the family business, I could draw money from the business, but we were working as a family business, not as a family partnership.
>
> And you were running Holland Park?-- I was running the organisation, Holland Park, yes.
>
> So what basis did you have for claiming from John 18 years of rent for Holland Park?-- Well, that's why is this one here was, when we were split up, John and Eric - I never been taking any commission out of the cars that I was selling.
>
> Because you-----?-- I was leaving everything in the family, in the family business.
>
> Well, are you saying there was no basis for this claim for 18 years rent? You just made it up?-- I did not made it up. I worked this one here, how many cars I sold, what I'd done, what I should be entitlement, when we completely split with John, you know, split with John as a family business, and I was entitled to this money here for the effort I put in to run this business. I was running the business.

His business?-- Yes.

Okay. Now, where did you get 7,000 a month from? That was not an agreed figure, was it?-- I didn't - this was not agreed, no, because I never charged it.

Yeah. Well, it was agreed there would be no rent, wasn't it?-- But was not - I - we - we didn't even discuss then. It was a family business. We didn't discuss these things here. We didn't discuss about the commission. We didn't discuss it with nothing, because he was free to take money, I was free to take money. We were very, very conservative to - to don't spend money, or throw money away, and he was working hard and I was working hard and we were building a family business; and I believe all my life the Creswick Motors, or Felix Creswick, you know what I mean, or the family Creswick will become one of the biggest dealerships in Queensland, and actually did become one of the biggest dealership in Queensland.

Mmm hmm. Now, you then stipulated in your claim that you wanted interest on on that 18 years of rent as well, number 11?-- Well, the pointers were here. After John - after we blew up with John, and one thing and another, well, I was entitled for my effort that I put to the family business, to the family business. I was entitled.

So this - sorry. I don't mean to interrupt. I beg your pardon. Keep going?-- Mmm. Yeah. I was entitled to be compensated for my years that I put into the family business.

This isn't a claim based on any agreement, is it? This is your-----?-- Was not.

-----idea of what were entitled to?-- Was not an agreement made. The agreement was not made. There's no agreement. We just run as a family business.

I understand. Now, the next thing you claimed was number 12, commission on the sale of cars for 18 years?-- Yes. I work it out with my accountant and then - roughly, I mean, how many cars I sold, roughly what we made and one thing and another, and I think I was in - in - entitled, you know what I mean, some compensation, some commission, out of the cars that I sold. Now, I was their only salesman that were selling more cars than anybody else. I sold a lot of cars, but I never took a commission out, nothing. I just left everything

> there for the family business, family, family. I believed in my family. I want the family to grow. The family was living well. That was it. It was no agreement made. It was not a verbal agreement made, was not - was not even discussed. We were just running as the Creswick family.'

[98] There were several other occasions in his evidence when Felix referred to this. For example, shortly after the passage I have just quoted, the following evidence was given:

> 'But none of these items, 10 through to 14, were based on any agreement at all, were they? – Was not agreement made. We were working as a family business, Creswick family business.'

[99] Having heard all the evidence, and considered all of the witnesses, it seems to me that these explanations by Felix most accurately describe the modus operandi by which the Creswicks actually conducted themselves until they fell into dispute. Legal structures and the particular names into which properties were 'parked' from time to time were of no real importance to them. They (by this I mean Felix and John, and later Bill) left to their accountant the task of ensuring that the books of account not only tallied, but reaped for the members of the family the maximum possible revenue benefit. Money was freely available to each member of the family. I am quite satisfied that there was, in fact, no discussion between them, let alone any formalisation, of the basis upon which they were 'doing business together'. While they stuck together, they could repel outsiders (as seen in Felix's defence of the claim made by Mr Kallis)."

[150] The finding that the fact that a family member was registered as a proprietor of a particular property did not necessarily mean that the family member had a beneficial interest in the property did not amount to a finding that any particular property was or was not held upon trust for Tabtill or anyone else. Similarly, the finding that the family's modus operandi was to "park" properties in different names did not amount to a finding that any particular property was or was not beneficially owned by the registered proprietor. The effect of the findings, so far as is presently relevant, is that John and Felix did not advert to or discuss the beneficial ownership of any particular property. The evidence they gave on that topic must be discarded for that reason, and also because of the trial judge's strongly adverse findings about credibility.

[151] Accordingly, Felix could not establish his pleaded case that John and Felix orally agreed that 35 Sentinel Court would be bought for Felix and Marcia. He did not pursue that case in response to the cross appeal. Similarly, Tabtill and John could not succeed in establishing their pleaded case that Felix represented, and that he and John agreed and they intended, that Tabtill or John would hold the beneficial interest in the properties.

[152] Felix argued that Tabtill's claims for compensation, adjustment or charging orders must fail because those claims were dependent upon proof of John's intention. In

any event, Tabtill and John did not pursue those claims in their cross appeal. They confined their argument to reliance upon the rebuttable presumption that, where a person pays the whole purchase price of property which is purchased in the name of another person, the second person holds the property on a resulting trust in favour of the first person.[59] They argued that Tabtill (or, in the case of 905 Logan Road, Tabtill or John) paid all of the acquisition costs and outgoings in relation to the properties. Accordingly, their cross appeal depends entirely on proof that Tabtill or John paid the purchase prices of the properties held in Felix's name.

[153] Felix argued that the presumption did not apply in relation to 8-10 Crump Street and 905 Logan Road because he purchased those properties using money he borrowed from a financier. He argued that if Tabtill or John repaid those loans and paid the outgoings, those payments did not give rise to the presumption upon which the cross appeal is based. We will discuss that argument when we consider the evidence relating to each property.

[154] Felix also advanced a broader argument in relation to each of the four properties. He argued that the trial judge's findings quoted in [149] of these reasons and certain aspects of the evidence made reliance upon the presumption inapt or rebutted it in each case. Felix argued that the trial judge's findings confirm that he made substantial contributions to the fortunes of Tabtill by his work in the family business. He argued that in those circumstances, benefits flowing to him from Tabtill should not be regarded as a gift. Felix also referred to the following matters: with minor exceptions, Tabtill's financial statements did not record that it owned any interest in the properties of which Felix was the registered proprietor; Felix's tax returns, which were prepared by Tabtill's accountant, recorded income from properties registered in Felix's name; the bank witnesses did not give evidence that John claimed that Tabtill owned any of those properties; although John had a strong motive to assert that Felix held the properties on trust for Tabtill once relations soured between Felix and John, no such claim was made until 11 February 2008 in the amended statement of claim; and the May Agreement did not refer to John or Tabtill having a beneficial interest in any of the properties.

[155] That argument must be rejected. The fact that John did not make or cause Tabtill to make any earlier claim to the beneficial ownership of the properties is not particularly significant in the context of the complex issues thrown up by the breakdown of the family relationship, and where the family members had not adverted to the beneficial ownership of the properties over the very long period during which the family operated in the way described by the trial judge. The fact that, in dealings with financiers and others, the properties were recorded as being owned by their registered proprietors is not particularly significant for the same reason, and also because of the trial judge's findings that John and Felix gave the accountant the task of ensuring that the books of account reaped the maximum possible revenue benefit for the family. It was not necessary for the May agreement to advert to the question of beneficial ownership for it to fulfil its function. The trial judge referred to Felix's contributions to Tabtill's finances and nonetheless found that the fact that a particular family member was registered as a proprietor of a particular property did not necessarily mean that the family member had a beneficial interest in it.[60]

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59 *Calverley v Green* (1984) 155 CLR 242.

60 Reasons [28].

[156] Ultimately, the problem which Felix's argument failed to confront is that, in light of the trial judge's uncontested findings of fact and credit, the Court is unable to make any positive finding about the intention of Felix, John or Tabtill as to the beneficial ownership of any of the properties. This is precisely the kind of case in which the equitable presumption does apply.[61] In the result, if Tabtill or John paid the purchase price for a particular property, the presumption arose and was not rebutted. Conversely, if Tabtill or John did not pay the purchase price, the presumption did not arise.

2. 905 Logan Road, Holland Park

[157] Tabtill and John's claim that the presumption of a resulting trust arose in relation to 905 Logan Road must fail because they failed to prove that either of them paid the purchase price. Indeed, the pleadings and the evidence strongly suggest that Felix purchased the property using his own money and money he borrowed from a financier.

[158] Tabtill and John themselves alleged that Felix purchased the property in 1976 or 1977. Tabtill and John also admitted Felix's allegation that he purchased and became the registered owner of 905 Logan Road on or about 25 September 1975. The trial judge found that Felix purchased 905 Logan Road.[62] Felix alleged that he purchased the property for $180,000, of which he provided $80,000 from his own resources and $100,000 from money lent to him by AGC (Advances) for that purpose, the loan being secured by a registered mortgage which he granted over the property to that financier. Tabtill and John admitted that AGC advanced $100,000 to Felix on the security of a mortgage registered over the property. They did not admit Felix's allegation that he paid the balance of the purchase price from his own resources, but they did not allege that either of them paid any part of the purchase price to the vendor. They alleged only that Felix "financed or re-financed the purchase", "by way of loan facilities" in Felix's name, with John's or Tabtill's assistance "from 1979".

[159] In short, Tabtill and John's case that a resulting trust should be presumed was that, from some four years after Felix purchased the property in 1975, Tabtill or John made repayments of the money which Felix had borrowed to pay the purchase price. No such presumption arose from those alleged facts. The presumption upon which the cross appeal is based arises when one person pays the purchase price of property which is purchased in another person's name. For the purposes of that doctrine, the payment of mortgage instalments is not a payment of the purchase price.[63] There are apparent exceptions to that proposition, such as where the parties agree after the purchase to alter the equitable interest acquired at the time of the purchase, and where the parties intend to acquire a particular property free of a mortgage which must subsequently be discharged.[64] The exceptions depend upon the parties' agreement or intention. For the reasons already given, Tabtill and John could not establish any such agreement or intention which was inconsistent with the application of the presumption.

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61 See *Calverley v Green* (1984) 155 CLR 242 at 270 per Deane J.

62 Reasons [18].

63 *Calverley v Green* (1984) 155 CLR 242 at 252 per Gibbs CJ, 257 - 258 per Mason and Brennan JJ, 267 - 268 per Deane J.

64 *Calverley v Green* (1984) 155 CLR 242 at 262 - 263.

[160] Tabtill and John also allege that they paid rates, land taxes and other outgoings in respect of the property until 2005. With some specific exceptions, Felix admitted that allegation. Those payments, like repayments of Felix's debt to the financier, were made after Felix became the legal and beneficial owner of the property when he purchased it from the vendor. No authority was cited for the proposition that a variation in the beneficial ownership of property might be inferred merely from the fact that, after the owner purchased the property, the claimant paid the amounts due by the owner under the owner's mortgage and other outgoings in relation to the property.

[161] The cross appeal in relation to 905 Logan Road fails for those reasons.

3. 8-10 Crump Street, Holland Park

[162] The statement of claim alleged and (subject to qualifications which are not presently relevant) Felix admitted that on or about 27 September 1989 contracts were entered into for the purchase in his name of 8-10 Crump Street. The statement of claim went on to allege that the purchase was made "by way of loan facility (contract number 462165651) from Mercantile Credit Limited", that Tabtill repaid all the principal and interest to discharge "the Defendant's loan with Mercantile Credit Limited", that on 11 January 1991 "the Defendant's loan with Mercantile Credit Limited was refinanced with a loan facility (loan number CO1-104556) from the Bank of Queensland in the name of the Defendant", and that Tabtill repaid all of the principal and interest in respect of "the Defendant's loan with the Bank of Queensland."

[163] Tabtill and John did not allege that either of them borrowed the money necessary to pay the purchase price, or that either of them paid the purchase price to the vendor of the properties. It is evident that Tabtill and John's own case was that Felix entered into a contract to purchase the property, he fulfilled his contractual obligation to pay the purchase price using money he borrowed from Mercantile Credit Limited, and Tabtill repaid the loan and paid the outgoings in relation to the properties. For the reasons given in relation to 905 Logan Road, proof of that case would not establish a presumption that Felix holds those properties on trust for Tabtill.

[164] Tabtill and John argued that Felix admitted that Tabtill purchased and paid for these properties. Tabtill and John referred to Felix's following pleaded response to the allegations summarised in [162] of these reasons:

(a) Felix denied that the purchase of the Crump Street properties was made by way of loan facility contract number 462165651 from Mercantile Credit Limited "because … Crump Street was not purchased with money lent by Mercantile Credits and has never been mortgaged to Mercantile Credits" and the pleaded loan facility "was an extension of an earlier loan facility with Mercantile Credits, which was secured by registered mortgage H965465 over 905 Logan Road."

(b) Felix did not deny that Tabtill made payments to discharge his loan with Mercantile Credit Limited, but he alleged that the payments were made by John or Tabtill on his behalf and were, or ought to have been, debited to his dealership or property partnership drawings

in accordance with the conduct of the dealership and property partnership businesses between Felix and John.

(c) Felix denied that his loan with Mercantile Credit Limited was refinanced with the loan facility alleged by Tabtill and John, and he alleged that he purported to enter into other facilities with the Bank of Queensland on or about 4 December 1990, 21 January 1991, and 15 April 1991.

[165] Those pleadings gave rise to an issue about the identity of the loan agreement under which Felix borrowed the money for his purchase of the property, but it was not in issue that Felix entered into some such loan agreement.

[166] Tabtill and John particularly emphasised the following allegation in Felix's defence:

"102. Felix purchased Crump Street for an aggregate purchase price of $227,500 with money provided by Tabtill on Felix's behalf.

Particulars

At or about the time that Felix negotiated to purchase Crump Street, Felix and John agreed that:

(a) Crump Street would belong to Felix;

(b) the purchase would be financed by an extension of an existing loan facility with Mercantile Credits Limits and secured by a third registered mortgage over Holland Park;

(c) Tabtill would pay the acquisition costs on behalf of Felix from his dealership partnership drawings.

Felix and John thereafter conducted themselves on the basis of that agreement."

[167] In reply to that paragraph, Tabtill and John denied "that Crump Street was purchased on Felix's behalf". They alleged that the allegation was untrue, they relied upon their allegation that there was no "dealership partnership", and they denied "the agreement particularised" by Felix.

[168] Tabtill and John argued that, in consequence of the trial judge's rejection of Felix's case that there was a "dealership partnership", paragraph 102 of the defence amounted to an admission that Tabtill paid the purchase price of the Crump Street properties purchased in Felix's name. That argument failed to take into account: Tabtill and John's denial of the truth of the allegations in paragraph 102; paragraph (b) of the agreement alleged in the particulars of paragraph 102; and Tabtill and John's allegations that Felix borrowed the money for the purchase of the property.

[169] Paragraph (b) of the agreement alleged in the particulars suggested that the acquisition of this property was effected with money borrowed on the security of the third registered mortgage of 905 Logan Road which Felix granted to Mercantile Credits Limited in September 1986. 905 Logan Road was Felix's property, he was the only mortgagor, and the mortgage does not identify any other party as the borrower. The "existing loan facility with Mercantile Credits Limits" referred to in the particulars was presumably one under which, as Tabtill and John alleged in their

statement of claim, that financier lent money to Felix. In the context of Tabtill and John's allegations and Felix's response to them summarised in [162] and [164] of these reasons, Felix's allegation, which Tabtill and John denied, that he "purchased Crump Street … with money provided by Tabtill on Felix's behalf" is insufficient to justify a finding that Tabtill paid the purchase price of the property. As the trial judge found, the acquisition was "financed through Tabtill",[65] but that meant only that Tabtill paid the mortgage instalments which Felix was liable to pay to the financier under his loan agreement and mortgage.

[170] Because Tabtill and John did not prove that Tabtill paid the purchase price for the property, the presumption of a resulting trust did not arise. The cross appeal in relation to 8-10 Crump Street fails for that reason.

[171] Tabtill's written outline of argument in reply in its appeal contended that, if its claimed resulting trust over 8-10 Crump Street was rejected, Tabtill's payment of mortgage instalments for which Felix was liable gave rise to an equitable charge in its favour over Crump Street to secure that contribution. However, in oral argument, Tabtill made it plain that, if, as we have concluded, the order for specific performance of the May agreement should be set aside, Tabtill did not pursue its appeal. As we have mentioned, Tabtill did not pursue the claims for charging orders which were originally made in its cross appeal.

4. 503 Logan Road, Greenslopes and 35 Sentinel Court, Cleveland

[172] Tabtill and John alleged that Tabtill paid the deposit and the balance of the purchase price for the purchase of 503 Logan Road, Greenslopes. Although Felix did not distinctly admit those allegations, he denied them on the grounds, now known to be untenable, that payments made by Tabtill were made from Felix and John's "dealership partnership drawings on behalf of the property partnership" or that the purchase was made pursuant to a joint venture between Felix and John or between Felix, John and Bill. Felix himself pleaded that the purchase price of $200,000 was paid from a larger sum lent by a financier to Tabtill.

[173] As to 35 Sentinel Court, Cleveland, Felix did not deny Tabtill and John's allegations that Tabtill paid the purchase price for that property using its own money, although it was in dispute whether Tabtill obtained some of that money from a term deposit account or from a loan to Tabtill secured by a mortgage over the property.

[174] The trial judge found that:

(a) 503 Logan Road was acquired with money which was "sourced from" or "financed by" Tabtill and "Felix made no financial contribution" to that acquisition.[66]

(b) The funds for the acquisition of 35 Sentinel Court "came from or were financed by Tabtill" and "Felix did not contribute financially to the purchase."[67]

[175] Felix did not contest Tabtill and John's arguments that these amounted to findings that Tabtill paid the purchase price for each property. It was therefore presumed

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65 Reasons [24].

66 Reasons [21] - [22].

67 Reasons [23].

that Felix acquired his interests in those properties on resulting trusts in favour of Tabtill. Those presumptions were not rebutted and there was no suggestion that Tabtill subsequently relinquished its beneficial interests.

[176] Accordingly the cross appeal succeeds in relation to 503 Logan Road, Greenslopes and 35 Sentinel Court, Cleveland.

COSTS AND OTHER ORDERS

[177] It is appropriate to allow the parties an opportunity to make submissions about the appropriate orders for costs of the trial, appeals and cross appeal. Subject to that, our provisional views about the costs of the appeals and cross appeal are as follows.

[178] Because Felix succeeds in his appeal the respondents to that appeal should be ordered to pay Felix's costs. Tabtill should pay the costs of its unsuccessful appeal.

[179] We have held that Tabtill is entitled to important declarations in the cross appeal brought by Tabtill and the plaintiff Creswicks against Felix, but only in relation to two of the four properties. Tabtill was required to bring that cross appeal to vindicate its claim to the two properties and its substantial measure of success should be vindicated by a favourable costs order. The case is unusual, however, since the trial judge did not deal with the issues agitated in the cross appeal. With that in mind, Felix's partial success should be reflected in a diminution of the costs he should be ordered to pay, which we assess at one third. We are conscious that the other cross appellants did not obtain any relief, but their joinder as parties would not have significantly increased the costs incurred by Felix.

[180] Further orders are necessary to give effect to the Court's reasons, particularly orders concerning the resolution of issues flowing from the finding that Felix did not sign many documents which bear what appears to be his signature. The parties should be given the opportunity to make submissions about the appropriate orders.

ORDERS

[181] The orders are:

1. Dismiss Tabtill Pty Ltd's appeal.
2. Allow the appeal by Felix Antonio Creswick.
3. Allow the cross appeal by John Francis Creswick, William Gerard Creswick, Shayne Marise Creswick, Jane Veronica Creswick, Tabtill Pty Ltd (ACN 010 408 545), Tabtill No 2 Pty Ltd (ACN 010 408 545), Tabtill No 3 Pty Ltd (ACN 106 070 848), Tabtill No 4 Pty Ltd (ACN 106 071 096), T2 Projects Pty Ltd (ACN 109 792 707).
4. Set aside the orders made below.
5. Set aside the agreement made between John Francis Creswick, William Gerard Creswick, Shayne Marise Creswick, Jane Veronica Creswick and Felix Antonio Creswick dated 26 May 2007.
6. Declare that the purported signature of Felix Antonio Creswick on each of those 105 documents listed in Annexure D to Exhibit 22 to the trial exhibits was affixed by John Francis Creswick without the authority of Felix Antonio Creswick.

7. Declare that the transfer authority of Felix Antonio Creswick's shares in Tabtill 2 to John Francis Creswick and William Gerard Creswick is null and void and order that John Francis Creswick and William Gerard Creswick do all things necessary to revest those shares in Felix Antonio Creswick.

8. Order that caveats lodged by John Francis Creswick over the Holland Park properties being 905 Logan Road (Lots 1 and 3 on RP 38083, Lots 1 and 2 RP 46140 and Lot 1 on RP 51268 County of Stanley Parish of Yeerongpilly, Title References 16817020, 14851018 and 14853044), 909 Logan Road (Lot 2 on RP 51268 County of Stanley Parish of Yeerongpilly, Title Reference 15966057) and 911 Logan Road (Lots 5 and 6 on RP 38083, County of Stanley, Parish of Yeerongpilly, Title Reference 15871094) and by William Gerard Creswick and John Francis Creswick over 35 Sentinel Court (Lot 416 on SL 12471 County of Stanley Parish of Cleveland, Title Reference 17255029) in reliance on their interest under the agreement made 26 May 2007 be removed.

9. Declare that Felix Antonio Creswick holds his interests in the properties situated at 503 Logan Road, Holland Park, more particularly described as Lots 1 and 2 on RP 12943, County of Stanley, Parish of Bulimba, and at 35 Sentinel Court, Cleveland, more particularly described as Lot 416 on Crown Plan SL12471, County of Stanley, Parish of Cleveland, Title Reference 17255029, on trust for Tabtill Pty Ltd ACN 010 408 545.

10. Remit the proceedings to the Trial Division for Felix Antonio Creswick to trace any benefits obtained by Tabtill Pty Ltd and the respondents as a result of the purported affixing of Felix Antonio Creswick's signature by John Francis Creswick on the documents identified in Order 6.

11. Felix Antonio Creswick be entitled to obtain all accounts, inquiries and disclosure to carry out the tracing referred to in Order 10.

12. Leave to the parties to make written submissions, within such time and in such form as a judge of the Court directs, concerning:

    (a) further or consequential orders in conformity with the Court's reasons, and

    (b) orders as to the costs of the appeals, cross appeal, and the proceedings in the Trial Division.