SUPREME COURT OF QUEENSLAND

CITATION:	*Herrod & Ors v Johnston & Anor* [2012] QCA 360
PARTIES:	**HAREL JOSEPH HERROD** (first appellant) **ROBERT MATTHEW HERROD** (second appellant) **RACHAEL REBECCA HOLLINGSWORTH** (third appellant) **v** **HARELLA CAROLINE JOHNSTON** (first respondent) **LEAH DELILAH FELSMAN** (second respondent)
FILE NO/S:	Appeal No 4369 of 2012 SC No 501 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2012
JUDGES:	Muir and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. Paragraphs 3(b) and 5 of the declarations and orders at first instance be varied by substituting $273,851 for $433,709.67.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where parties to the proceedings are siblings and deceased was their father – where deceased in a cattle property partnership with first and second defendants – where deceased's interest in partnership and residue was left to third appellant and respondents in equal shares – where there were meetings in which discussions took place with respect to the respondents assigning their interest in partnership to first and second appellants for monetary sum – where first respondent signed agreement to this effect but second respondent did not – where partnership agreement

provided for an option to purchase share of partnership – where partnership agreement provided for the giving of notice when exercising option – where appellant submitted primary judge erred in law in finding that the first and second appellants had not validly exercised option because the notice of exercise of option was not given in accordance with partnership agreement – where appellants submitted primary judge erred in law in declaring that an oral agreement entered into by the second respondent was unenforceable and ought to be set aside and concluding that no legally binding agreement had been made – whether option validly exercised – whether legally binding and enforceable agreement created with second respondent

EQUITY – EQUITABLE REMEDIES – GENERALLY – where primary judge concluded that respondents entitled to award of equitable compensation – where appellants submitted primary judge erred in declaring that respondents each entitled to elect to have an account of profits which accrued to the appellants by reason of their breach of duty or equitable compensation of $433,709.67 after allowing compound interest on the basis that the first and second appellants made the most profitable use of the shares of the deceased in the partnership – whether primary judge erred in making such declaration

EQUITY – EQUITABLE REMEDIES – GENERALLY – where appellants identified delay on the part of the respondents with respect to, *inter alia*, the institution and trial of proceedings – where appellant submitted respondents should be denied equitable relief on account of delay – whether such relief should be denied

APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDING OF FACT – PROOF AND EVIDENCE – where primary judge found value of herd to be $1,214,370 – where primary judge made findings with respect to the value of the partnership plant and equipment – where appellants submitted the partnership had debt of $62,000 at the time of the deceased's death and that this was a liability that had to be taken into account when determining the value of the deceased's partnership share – where primary judge found that there was no acceptable evidence that debt was subsisting as at the date of the death of the deceased – where appellants submitted these findings were erroneous – whether valuation with respect to herd accurate – whether findings with respect to partnership plant and equipment erroneous – whether finding with respect to debt erroneous

APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – GENERALLY – where appellant's alleged first respondent's daughter typed a document which reflected the agreement entered into

between the first respondent and the appellants with respect to purchasing her interest in the partnership – where first respondent's daughter was not called to give evidence – where appellant's submitted primary judge erred in not drawing an inference adverse to respondents from their failure to call the first respondent's daughter as a witness – whether primary judge erred in not drawing inference

Uniform Civil Procedure *Rules* 1999 (Qld), s 225(1)(a)

Alemite Lubrequip Pty Ltd v Adams (1997) 41 NSWLR 45, cited
Australian Securities and Investments Commission v Hellicar (2012) 86 ALJR 522; (2012) 286 ALR 501; [2012] HCA 17, cited
Baburin v Baburin (No 2) [1991] 2 Qd R 240, cited
Bailey v Namol Pty Ltd (1994) 53 FCR 102; (1995) 125 ALR 228; [1994] FCA 1401, considered
BM Auto Sales Pty Ltd v Budget Rent A Car System Pty Ltd (1976) 51 ALJR 254; (1976) 12 ALR 363, considered
Bridgewater v Leahy (1998) 194 CLR 457; [1998] HCA 66, cited
Burdick v Garrick (1870) LR 5 Ch App 233, considered
Cureton v Blackshaw Services Pty Ltd [2002] NSWCA 187, considered
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588; [2011] HCA 21, cited
Duke Group Ltd (In liq) v Pilmer (1999) 73 SASR 64; (1999) 153 FLR 1; [1999] SASC 97, considered
Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; (2012) 287 ALR 22; [2012] FCAFC 6, considered
Guerin v The Queen [1984] 2 SCR 335, cited
Haas Timber & Trading Co Pty Ltd v Wade (1954) 94 CLR 593; [1954] HCA 39, cited
Hagan v Waterhouse (1991) 34 NSWLR 308, considered
Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298; (2003) 197 ALR 626; [2003] NSWCA 10, considered
Harrison v Schipp [2001] NSWCA 13, cited
Hourigan v Trustees Executors and Agency Co Ltd (1934) 51 CLR 619; [1934] HCA 25, considered
Hungerfords v Walker (1989) 171 CLR 125; [1989] HCA 8, considered
Johnston & Anor v Herrod & Ors [2012] QSC 98, considered
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Lamshed v Lamshed (1963) 109 CLR 440; [1963] HCA 60, cited
Lewis v Nortex Pty Ltd (In liq) [2006] NSWSC 480, considered
Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221, considered
Louth v Diprose (1992) 175 CLR 621; [1992] HCA 61, cited
Maguire v Makaronis (1997) 188 CLR 449; [1997] HCA 23, considered

Orr v Ford (1989) 167 CLR 316; [1989] HCA 4, considered
President of India v La Pintada Compania Navigacion SA [1985] AC 104, cited
Re Hatte [1943] St R Qd 1, cited
Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd([1966] 2 NSWR 211, considered
Southern Cross Commodities Pty Ltd (In Liq) v Ewing (1987) 11 ACLR 818, cited
The Commonwealth v SCI Operations Pty Ltd (1998) 192 CLR 285; [1998] HCA 20, considered
Wallersteiner v Moir (No 2) (1975) 2 WLR 389; [1975] 1 All ER 849, cited
Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18, cited
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669; [1996] UKHL 12, considered

COUNSEL: D Fraser QC for the appellants
R N Traves SC, with C C Heyworth-Smith, for the respondents

SOLICITORS: Connolly Suthers Lawyers for the appellants
de Groots Wills and Estate Lawyers for the respondents

[1] **MUIR JA**: **Introduction** The respondents sued the appellants, their siblings, in the Supreme Court claiming declarations which included a declaration that:

1. the agreement entered into by each respondent to forego her interest in the estate of her deceased father and in the Moonoomoo Cattle Partnership was unenforceable and should be set aside;

2. a declaration that each of the appellants breached his or her fiduciary duty to each respondent, whether as executor of the estate of their late father or as a partner in a partnership;

3. each respondent was entitled at her election to an account of profits or equitable compensation.

[2] After a three day trial, the primary judge found generally for the respondents and made declarations in their favour. The appellants have appealed against the declarations and related orders.

[3] Before identifying the grounds of appeal and the issues to which they give rise, it is desirable to state the facts. That can be done conveniently by quoting from the primary judge's reasons for judgment:[1]

> "[1] This proceeding, commenced on 30 July 2007, arises out of events following the death on 14 February 1999 of Harel Robert Herrod. The deceased then lived with his wife Edith on a cattle property called Moonoomoo Station. They had five

[1] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at 3–5.

children, the parties to this proceeding. Of course without affecting undue familiarity, I will in these reasons refer to the children by their first names, daughters Harella and Leah who are the plaintiffs, sons Harel and Robert, the first and second defendants, and daughter Rachael who is the third defendant. Their present ages are, respectively, 54 years, 56 years, 5l years, 55 years and 59 years.

[2] The deceased owned a leasehold interest in the property, and ran the cattle business on the land in partnership with Harel and Robert. The property of the partnership comprised the cattle, plant and equipment.

[3] The partnership agreement dated 7 December 1983 provided that the death of a partner would not dissolve the partnership, but that the partnership would in that event continue to be carried on by the surviving partners and the executor of the deceased partner. The surviving partners were in that situation accorded a right to purchase the share of the deceased partner, by giving notice in writing within three months of the death (that is the proper construction of clauses 18 and l9). That date was 14 May 1999. The purchase price would be a net amount agreed upon, or failing agreement, as determined by a stock and station agent.

…

[5] By his will dated 4 September 1989, the deceased appointed Rachael and Harel as his executors. The deceased's widow Edith was to receive 'ready monies and cash investments', motor vehicles, an annuity in the amount of $7,200, and the right to reside in the homestead at Moonoomoo. The deceased's partners, his sons Harel and Robert, were to receive the land (subject to a charge to secure the annuity), including all machinery and equipment, as tenants in common in equal shares. The deceased's daughters, Rachael, Leah and Harella, were to receive the deceased's interest in the partnership together with the rest and residue of the estate, as tenants in common in equal shares.

[6] Harella and Leah claim that shortly after their father's death, their brothers told them that their one-ninth share in the partnership was worth $50,000, and not more than $55,000, based on there being approximately 2,400 head of cattle on Moonoomoo, worth between $200 and $220 per head, and that their brothers pressed them to enter into agreements surrendering their respective interests for $55,000, in Leah's case not to be payable until she reached 60 years of age. Harella signed a document on 24 March 1999 said to evidence that agreement, although Leah did not. Harella and Leah challenge on various bases the enforceability of any such agreement.

[7] Harella and Leah have not received any distribution from the estate. Indeed, the proceeds of insurance policies which should have been treated as residue, in which they were therefore entitled to share, were paid out to the widow Edith in May and June 1999. On 11 May 1999, the executors paid Edith the sum of $13,316, in respect of AXA National Mutual policy 655,935/5, and on 9 June 1999, they paid her $10,173.66, the proceeds of Colonial/Prudential policy number 1094277. Those amounts total $23,489.66 which should be taken into account in calculating the value of the residue in which the plaintiffs were entitled to share.

[8] Harella and Leah commenced a family provision application on 25 October 1999 (number 805/1999), which was within the statutorily prescribed limitation period. That proceeding has been stayed pending the completion of the instant proceeding. The executors, Harel and Rachael, claim that the estate has been distributed.

[9] Harel and Robert transferred the deceased's share in the partnership to themselves as from 18 October 1999, and thereafter carried on the partnership business in their own names, as sole partners, under the name Moonoomoo Cattle Company. Notice was not given for the purchase of the deceased's share within three months of the death of the deceased (although Harel and Robert claim to have given notice to the executors on 17 July 1999). As I have said, properly construed, cl 18 and cl 19 of the partnership agreement required notice in writing within three months of death. The deceased's executors did not get in any sum reflecting the market value of the deceased's interest in the partnership.

[10] On 30 June 2002, Harel and Robert dissolved their new partnership. The year before, they had purchased the neighbouring property Carmichael. On 11 October 2002, Harel transferred his one-half interest in Moonoomoo to Robert for $722,500, and Robert transferred his interest in Carmichael to Harel for $557,500. They split the herd between them. On 5 November 2004, Robert sold Moonoomoo to a third party for $2,710,000."

[4] I now turn to the first ground of appeal.

Ground 1 – the primary judge erred in law in finding that Robert and Harel had not validly exercised the option because the notice of exercise of option was not given within three months of the date of death of the deceased partner

[5] It is now convenient to set out clauses 18, 19 and 20 of the Partnership Agreement:

"18. If the partnership be determined by notice pursuant to Clause 12 of those presents or be dissolved by the bankruptcy of a partner or by reason of his having suffered his share to be

charged under 'The Partnership Act 1891 - 1976' for his separate debts or be dissolved by the court under Section 38 of the said Act on account of the incapacity or misconduct of a partner the other partners may purchase the share of the partner who so determines the partnership as aforesaid or whose bankruptcy, insanity or misconduct or the charging of whose share has caused such dissolution (hereinafter referred to as 'the retiring partner') in the partnership property upon giving to the retiring partner notice in writing of his intention in that behalf at any time within THREE (3) calendar months from the date of the dissolution such purchase to take effect from the date of dissolution. A notice left at the usual or last known place of abode or business of the person for whom it is intended shall be deemed to be given to him for the purpose of this paragraph.

19. The death of a partner shall not dissolve the partnership but it shall thereafter be carried on between the surviving partners and a personal representative of the deceased partner and the surviving partners may purchase the share of such deceased partner in equal shares or as otherwise agreed upon giving notice of their desire to purchase the same to such personal representative in the same way as is provided for in Clause 18 hereof and then the provisions of Clause l8 and 19[2] hereof shall apply to such purchase as if it were a purchase pursuant to a determination of the partnership as set forth in Clause 18 hereof.

20. The sum to be paid for the purchase of the said share of the retiring partner shall be the nett value thereof as agreed at the date of the dissolution after providing for the debts and liabilities of the firm or failing agreement as determined by a stock and station agent agreed upon by the parties PROVIDED THAT no value will be placed upon goodwill as a partnership asset. The purchase price of the share of the retiring partner shall be payable either in one sum or by such instalments as may be agreed upon spread over a period of FIVE (5) years with interest at FIVE (5) per centum per annum between the parties or failing such agreement in manner to be determined by arbitration as set out in Clause 22 of these presents PROVIDED THAT the partner so purchasing the share of the retiring partner shall indemnify the said retiring partner against all matters and proceedings arising in respect of the partnership property after the completion of such sale."

[6] The primary judge found that on the proper construction of cl 18 and cl 19 of the Partnership Agreement, the right of the surviving partners to purchase the share of a deceased partner, was dependent on the giving of notice in writing under cl 19 within three months of the deceased partner's death. The deceased died on 14 February 1999, but Harel and Robert failed to give notice until 17 July 1999.

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2 The parties are in agreement that it was intended that this reference be to clause 20.

The appellant's arguments

[7] The appellants' arguments were to the following effect. The words giving notice of their desire to purchase "**in the same way as is provided for in Clause 18**" in cl 19 are not appropriate to accommodate a requirement that notice be given within a particular time. Those words, more obviously, refer to the obligation to give the notice in writing. Clause 18 is concerned with a situation where a dissolution has already occurred and the other partners wish to purchase the share of "the retiring partner". The cl 19 option involves two stages: the giving of notice; and then the application of cl 18 and cl 20. Unlike cl 18, there is no "date of the dissolution" which can serve as a commencing date for a period of notice as the partnership continues after the death of a partner. Nor is there any textual or other basis requiring that the words "date of death" replace the words "the date of the dissolution".

[8] In applying cl 18 there is no justification for treating "the date of dissolution" as referring to the date of death. If the surviving partners give notice under cl 19 the partnership will be dissolved when the sale of the personal representatives' partnership stake is completed and the purchase, by operation of law, will take effect from that time.

[9] Under cl 19, the value of the deceased partner's share is determined as at the date of sale. That is commercially sensible and is why the concluding words of cl 19 provide for a **deemed** operation of cl 18 and cl 20. There is no urgency about the giving of notice under cl 19, as the surviving partners and the personal representative of the deceased partner are in a continuing partnership.

[10] On the primary judge's construction the words "as if it were a purchase pursuant to a determination of the partnership as set forth in Clause 18 hereof" are otiose. The words "in the same way as is provided for in Clause 18" qualify "upon giving notice". On the primary judge's construction there is no need for the words "in the same way". Also there would be no sufficient reason for the option to be conferred by a separate clause. The death of a partner could be nominated as another event triggering the right to give notice under cl 18.

Consideration

[11] In my view, the appellants' construction gives an unduly restrictive meaning to the words "in the same way" in cl 19. Those words are concerned with the methodology of giving notice and are apt to catch the timing of a notice as well as a requirement that it be in writing. The point is made by counsel for the respondents that if all that was intended to be achieved was to provide for written notice, it would have been simpler to add the words "in writing" after notice. However, that argument loses some of its force once it is recognised that it is fairly obvious that "in the same way" also picks up the last sentence of cl 18 dealing with service. The fairly obvious rationale behind the reference to cl 18 is the avoidance of unnecessary verbiage and the ensuring of conformity of approach in the notice provisions.

[12] In cl 18, the words relating to the timing of the notice are as much a part of the provisions of the clause relating to the giving of notice as are the provisions for the notice to be in writing and the stipulations relating to service. The appellants reliance on the words "and then" is misguided. The concluding words of cl 19

concern only the purchase of the partnership share held by the personal representative, not the mechanism by which the right to purchase comes into existence. Unless the concluding words pick up the time at which a purchase is to take effect, they fulfil no function.

[13] Under the appellants' construction, the importation by cl 19 of the provisions of cl 18 and cl 20 cannot fulfil the important function of setting a specified date for valuing the partnership interest to be disposed of. If the interest is to be valued at the date of completion of the sale, a valuer cannot properly determine the value unless a completion date is agreed. That problem would not arise if, as the appellants contended, the surviving partners could fix a completion date at any time in the future suitable to them. But that, with respect, would be a remarkable result. It would also be unsatisfactory if it was to be implied that completion would take place within a reasonable time as the fixing of the date may give rise to a dispute which requires litigation to resolve.

[14] The argument that the words "purchase to take effect from the date of dissolution" mean that the purchase takes effect from the date of completion of the purchase; that is, it takes effect when it takes effect, has only to be stated to be seen as less than compelling. It fails to have regard to the stipulation that on the giving of due notice, cl 18 applies to the purchase "as if it were a purchase pursuant to a determination of the partnership" under cl 18. In the case of such a determination, there would be a date of dissolution from which the purchase would take effect. Clause 18 contemplates that a purchase pursuant to a notice under cl 19 proceed in the same way as purchase pursuant to a notice under cl 18. That can be achieved only if the "date of death" is treated as the "date of dissolution".

[15] Contrary to the appellants' argument, there are good reasons for limiting the time within which the surviving partners must give notice under cl 19. Unless there is a time limitation, the administration of the deceased partner's estate may be rendered uncertain or delayed. Moreover, there would appear to be no good reason why the parties to the partnership agreement would have wished to give the surviving partners an option exercisable at a time best suited to them and perhaps disadvantageous to the beneficiaries under the Will.

[16] There was thus good reason for a contractual intention to afford the continuing partners only three months from the date of death within which to exercise their option to purchase and to provide that the purchase take effect from the date of death.

[17] This ground of appeal was not established.

Ground 2 – the primary judge erred in declaring that each respondent was entitled to elect to have an account of the profits which accrued to the appellants by reason of their breach of duty or to equitable compensation assessed in the amount of $433,709.67 after allowing compound interest on the basis that Robert and Harel had made the most profitable use of the shares of the deceased in the partnership

[18] After concluding that the respondents were entitled to an award of equitable compensation or, at their election, an account of profits, the primary judge considered the question of interest as follows:[3]

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[3] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at 21–22.

"[123] Each of the plaintiffs has sworn to the use she would have made of the monies had they been distributed to her properly from the estate by the executors. I find that each of the plaintiffs would have put those monies to the best profitable use. Each had led a particularly frugal life with no inclination to waste financial resources when they became available. The intended uses were not advanced by the plaintiffs to found a claim for a loss of profits in particular ventures which were intended but not pursued, but as the basis for a computation of compensation in equity on a basis which surpasses the nominal.

[124] In *Maguire v Makaronis*, … after considering the judgment of Browne-Wilkinson LJ in *Target Holding Ltd v Redferns* [1996] 1 AC 421 at 434, Brennan CJ, Gaudron, McHugh and Gummow JJ considered the effect of a trustee's failure to make restitution for what had been lost to the trust and said (p 470):

> 'Until restitution is made, it is presumed that the default continues. In *Guerin v The Queen* (1984) 2 SCR 335, the Crown, in what was held to be a breach of a fiduciary duty to the plaintiffs, leased certain land for a term of seventy-five years and on other unsatisfactory terms. The Supreme Court of Canada evaluated the loss to the plaintiffs by presuming against the Crown that the plaintiffs would have made the most profitable use of the land by letting it for residential development not, as had the Crown, for use by a golf club. Thus, the presumption assisted in indicating the extent of the loss by relieving the plaintiffs from the need to prove that they would have let the land for such development.
>
> In all these instances, presumptions, some elevated to rules, operate in aid of the underlying policy of the law in holding trustees to their duties and thereby protecting the interests of beneficiary.'

[125] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 confirms that in a case like this, the court has a discretion in computing equitable compensation to allow compound interest on the primary loss. That is because of the default of the defendants as fiduciaries in improperly generating profits utilizing trust property to the detriment of the plaintiffs as beneficiaries. See for example pages 684 and 701.

[126] This case is a prime candidate for an award of compound interest: where the defendants invoke, as justification for their failure to discharge their fiduciary duties as executors or trustees, an agreement induced by fraudulent misrepresentation and tainted by unconscionability. Even if they ever believed that agreement was truly binding, they ignored it: no payment was ever tendered to Harella, for example. The brothers arrogated the deceased's interest in the partnership to

> themselves, without return to the estate, and Rachael at the very least acquiesced in that, as she did in the diversion to Edith of monies (albeit not of substantial amount) to which she knew the plaintiffs were entitled. The brothers effectively took the benefits intended by the testator for his daughters and used them as a springboard for the acquisition of assets now of substantial worth, fulfilling, if for a time and subject to the judgment of this court, the forecast often expressed by Robert that the daughters would get nothing from the estate – notwithstanding the clear testamentary intention of their father."

The appellant's arguments

[19] The appellants challenged the ordering of compound interest. It was argued that the primary judge had misapplied relevant principles by basing the award on what the respondents would have done with the subject monies had the estate been fully administered instead of focussing on the profits that the respondents made or are assumed to have made.[4]

[20] The appellants' argument continued as follows. The fundamental principle is that the liability to pay compensation must be sufficient to put the trust estate (and the beneficiaries) back to the position it would have been in had the breach not been committed.[5] *Guerin v The Queen*[6] is an application of the principle that the trust property could have been put to more profitable use and the restoration of the trust property required an assessment on that basis. It was not appropriate to look to the more profitable and quite distinct businesses which might be conducted by the beneficiaries. Equity models the remedy to suit the circumstances where a "sufficient connection" is demonstrated, such as where a business opportunity is wrongly taken by the fiduciary resulting in a loss of profits to the beneficiary which are greater than the profit made by the fiduciary or able to be linked to the breach and recovered. No attempt to demonstrate a "sufficient connection" was made here.[7] Nor was any attempt made to demonstrate that the loss suffered by the respondents was greater than the profits to be accounted for.[8]

[21] In the light of the election made on behalf of the respondents at the commencement of the trial [not to pursue a claim based on what the respondents would have done with their entitlements had they received them in a timely way], it was not open to the respondents to seek to sustain the claim for equitable compensation on that basis. The respondents deliberately did not establish a factual basis for equitable compensation.

[22] The primary judge's invocation of an agreement induced by fraudulent misrepresentation and tainted by unconscionability as a reason why the case was "a prime candidate for an award of compound interest" wrongly introduced concepts of punishment.[9] The finding of fraudulent conduct did not merit departure from well established principles.

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4 *Maguire v Makaronis* (1997) 188 CLR 449 at 470; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 701.

5 *Re Dawson* [1966] 2 NSWR 211.

6 [1984] 2 SCR 335.

7 Cf *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [710]–[742].

8 Cf *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

9 Cf *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557.

The respondents' arguments

[23] The respondents argued that the appellants' contention "conflates an account of profits with an award of equitable compensation". The respondents elected for equitable compensation at the commencement of the trial, abandoning their pleaded claim for compensation on the basis of what they would have done with their entitlements had they received them in a timely way. However, the respondents were not limited to proving an entitlement to compound interest by evidence of what they would have done with the money themselves. They had the benefit of the presumption referred to in the passage from the reasons in *Maguire v Makaronis*,[10] quoted in paragraph 124 of the primary judge's reasons.

[24] The primary judge found that there had been a breach of duty which had caused loss. The requirement of *Maguire v Makaronis* that there be a "substantial connection" was fulfilled. The question was, then, how should "full restitution" be achieved. This led to the primary judge's observation that "This case is a prime candidate for an award of compound interest". The appellants did not adduce evidence on the trial of what might be an appropriate rate of interest. Nor did the appellants adduce evidence of the profits they were in fact able to derive. Nor was it contested that the appellants had used the profits derived from their breach to advance to their own financial positions.

Consideration

[25] I am unable to accept the appellants' insufficient connection argument. The reference to "sufficient connection" comes from the following passage from the reasons of Brennan CJ, Gaudron, McHugh and Gummow JJ in *Maguire v Makaronis*:[11]

> "Different considerations arise where the plaintiff seeks one or other of the further remedies referred to by the Lord Chancellor in *Nocton v Lord Ashburton*, namely an account of profits, as a personal rather than proprietary remedy, or, as another personal remedy, compensation for that which the plaintiff has lost 'by [the fiduciary] acting', to use the Lord Chancellor's phrase, in breach of duty. Likewise where what is sought is a proprietary remedy in the nature of a constructive trust. In these instances, there directly arises a need to specify criteria for a **sufficient connection** (or 'causation') between breach of duty and the profit derived, the loss sustained, or the asset held.
>
> Where the plaintiff seeks recovery of a profit, the necessary connection has been identified in this Court by asking whether the profit was obtained 'by reason of [the defendant's] fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position'. Particularly where a complex course of dealing is in issue, minds reasonably may differ as to the outcome of the application of these principles." (emphasis added)

[26] The respondents suffered an obvious loss through being denied the monies to which they were entitled. Because of the way in which the case was conducted, the

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10 (1997) 188 CLR 449 at 470.

11 At 468.

respondents (unless they elected for an account of profits) were not entitled to the profits derived by the appellants through use of the fund or to the loss calculated with regard to the specific use the respondents asserted that they would have made of the fund had they received it. But the respondents did not seek compensation on such basis. Nor did the primary judge order it.

[27] Counsel for the appellants seemed to be arguing that compound interest could be awarded only in respect of a claim for profits and then in the circumstances referred to in the following passages from the reasons in *Grimaldi v Chameleon Mining NL (No 2)*[12] and *Burdick v Garrick*.[13] In *Grimaldi*, Finn, Stone and Perram JJ said:[14]

> "In this class of case, the object of a compound interest award and the use of periodic rests, is to reflect in the award a crude approximation of the profit likely to have been made by the fiduciary or trustee from the money misused where that profit could reasonably be supposed to exceed in value a simple interest award only."

[28] The passage from *Burdick* on which reliance was placed is contained in the following paragraph of the reasons in *Grimaldi*:[15]

> "One of the circumstances in which compound interest is awarded with or without periodic rests (eg weekly, monthly, quarterly or yearly), is where trust money is misused by a trustee or fiduciary in his or her own trade or business. The informing principles here reflect those employed in accounting for profits. So in one of the foundational modern cases, *Burdick v Garrick* (1870) LR 5 Ch App 233, where an agent to receive money paid it into the common account of a firm of solicitors of which he was a partner, Lord Hatherley LC observed (at 241-242):
>
> > '… that the money received has been invested in an ordinary trade, the whole course of decision has tended to this, that the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made … [I]t must not be forgotten that a solicitor's business is not such a business as I have described; it is not one in which they could make compound interest on the money embarked, or in which half yearly rests, or yearly rests, as the case may be, would be made in making up the account. A solicitor's profit arises from the time and labour which he bestows upon cases in which he is engaged. There is nothing like compound interest obtained upon the money employed by a solicitor … [No] case arises here in which you could say that a profit has been made, or necessarily is to be inferred, and consequently … there was an error committed in directing compound interest.'"

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12 (2012) 200 FCR 296.
13 (1870) LR 5 Ch App 233.
14 (2012) 200 FCR 296 at 414 [551].
15 (2012) 200 FCR 296 at 414 [550].

The above passage also explains what was meant by "this class of case" in the preceding paragraph.

[29] In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[16] Lord Browne-Wilkinson, with whose reasons Lord Slynn and Lord Lloyd agreed, discussed the limited bases on which compound interest was traditionally awarded:[17]

> "In the absence of fraud courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. Equity awarded simple interest at a time when courts of law had no right under common law or statute to award any interest. The award of compound interest was restricted to cases where the award was in lieu of an account of profits improperly made by the trustee. We were not referred to any case where compound interest had been awarded in the absence of fiduciary accountability for a profit. The principle is clearly stated by Lord Hatherley L.C. in *Burdick v. Garrick*, L.R. 5 Ch.App. 233, 241:
>
> > 'the court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money by directing rests, or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made, 5 per cent., or compound interest, as the case may be.'
>
> The principle was more fully stated by Buckley L.J. in *Wallersteiner v. Moir (No. 2)* [1975] Q.B. 373, 397:
>
> > 'Where a trustee has retained trust money in his own hands, he will be accountable for the profit which he has made or which he is assumed to have made from the use of the money. In *Attorney-General v. Alford*, 4 De G.M. & G. 843, 851 Lord Cranworth L.C. said: "What the court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it." This is an application of the doctrine that the court will not allow a trustee to make any profit from his trust. **The defaulting trustee is normally charged with simple interest only, but if it is established that he has used the money in trade he may be charged compound interest. … The justification for charging compound interest normally lies in the fact that profits earned in trade would be likely to be used as working capital for earning further profits.** Precisely similar equitable

[16] [1996] AC 669.
[17] At 701–702.

> principles apply to an agent who has retained moneys of his principal in his hands and used them for his own purposes: *Burdick v. Garrick.*'" (emphasis added)

[30] After also discussing *President of India v La Pintada Compania Navigacion SA*,[18] Lord Browne-Wilkinson observed:[19]

> "These authorities establish that in the absence of fraud equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him. It is unnecessary to decide whether in such a case compound interest can only be paid where the defendant has used trust moneys in his own trade or (as I tend to think) extends to all cases where a fiduciary has improperly profited from his trust."

[31] It may thus be seen that *Westdeutsche Landesbank* and *Wallersteiner* do not support the conclusion that the power to award compound interest is as restricted as the appellants' argument suggests. Nor do the Australian authorities support the appellants' position.

[32] In *Hungerfords v Walker*,[20] Mason CJ and Wilson J observed:

> "Equity has adopted a broad approach to the award of interest. It has long been accepted that the equitable right to interest exists independently of statute: *Wallersteiner v. Moir* [No. 2]. Equity courts have regularly awarded interest, including not only simple interest but also compound interest, when justice so demanded, e.g., money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary: *La Pintada*. In admiralty, simple interest has been awarded in a variety of cases standing outside the authority conferred by statute. As Sir Robert Phillimore said in *The Northumbria*:
>
> > 'The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, ex mora of the obligor; and that, whether the obligation arose ex contractu or ex delicto.'" (citations omitted)

[33] In *The Commonwealth v SCI Operations Pty Ltd*,[21] McHugh and Gummow JJ referred to the above passage in *Hungerfords* saying:

> "It is true that in the administration of its remedies, equity followed a different path to the common law with respect to the award of interest. In cases of money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary, the decree might require payment of compound interest."

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18 [1985] AC 104.

19 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 702.

20 (1989) 171 CLR 125 at 148.

21 (1998) 192 CLR 285 at 316.

[34] The learned authors of *Jacobs' Law of Trusts in Australia*,[22] state the following proposition in relation to the awarding of compound interest against defaulting trustees:

> "In certain circumstances trustees will be charged with compound interest instead of simple interest. It is a matter entirely in the discretion of the court.
>
> (1) Compound interest is allowed where there is a direction to accumulate or where, from the circumstances, it was the duty of the trustee to reinvest the interest.[23]
>
> (2) Compound interest is also allowed against a trustee where he had employed the trust funds in trade or speculation for his own benefit.[24]
>
> (3) Compound interest may be allowed in other cases where the court considers the circumstances justify such interest.[25]"

[35] In *Hagan v Waterhouse*,[26] Kearney J said of the principles under consideration:

> "In instances where I consider that compound interest rather than simple interest should be applied I have so specified. I have done so on the basis of the proposition stated in *Southern Cross Commodities Pty Ltd (In Liq) v Ewing* (at 843; 1,133):
>
> > '… that a trustee may, and normally will, be charged with compound interest with yearly rests not only where he has used the money for his own commercial purposes but also where he has been guilty of fraud or serious misconduct.'
>
> …
>
> As commented by Ford and Lee, *Principles of the Law of Trusts*, 2nd ed, (1990), par 1713.2 at 733: '… Then an award of compound interest is a device of equity to minimise the possibility that any profit can remain in the trustee's hands.'"

[36] The above expression of principle in *Southern Cross v Ewing* was referred to with apparent approval in *Cureton v Blackshaw Services Pty Ltd*.[27]

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22 6th ed, para [2209].

23 *Knott v Cottee* (1852) 16 BEAV 77; 51 ER 705 where 4 per cent was allowed; *Re Barclay; Barclay v Andrew* [1899] 1 Ch 674 where 3 per cent was allowed. In *Raphael v Boehm* (1805) 11 Ves 92; 32 ER 1023, 5 per cent compound interest with half-yearly rests was decreed against an executor, but this was an exceptional case. See *Raphael v Boehm* (1807) 13 Ves 407; 33 ER 347. *Gilroy v Stephens* (1882) 46 LT 761, was another case where compound interest with half-yearly rests was allowed, but at 3 per cent. See also *Moss v Moss* (1898) 19 LR (NSW) Eq 146.

24 *Jones v Foxhall* (1852) 15 Beav 388, 51 ER 588; *Re Davis* [1902] 2 Ch 314. See also *Burdick v Garrick* (1870) 5 LR Ch App 233; *Williams v Powell* (1852) 15 Beav 416, 51 ER 616; *Wallersteiner v Moir* [1975] 1 All ER 849; *Ninety Five Pty Ltd v Banque Nationale de Paris* [1988] WAR 132; *Southern Cross Commodities Pty Ltd (In Liq) v Ewing* (1987) 11 ACLR 818, 5 ACLC 1,110; *Ledger v Petagna Nominees Pty Ltd* (1989) 1 WAR 300.

25 As in *Wroe v Seed* (1863) 4 Giff 425; 66 ER 773 and *Stacpoole v Stacpoole* (1816) 4 Dow 209; 3 ER 1140, both cases of gross breach of trust.

26 (1991) 34 NSWLR 308 at 393.

27 [2002] NSWCA 187 at [115].

[37] The principles stated by Kearney J in *Hagan* were also approved of generally by Handley JA, Gleeson CJ and Shelley JA agreeing, in *Alemite Lubrequip Pty Ltd v Adams t/as Price Waterhouse*.[28] However, their Honours did not give express consideration to the passage just quoted or, for that matter, the circumstances in which an award of compound rather than simple interest was justified.

[38] The passage from *Jacobs* quoted above was referred to with general approval in the reasons of the Court in *Duke Group Ltd (In liq) v Pilmer* in which it was said:[29]

> "Compound interest is awarded where the trustee has been fraudulent or has been involved in a gross breach of trust, where the trustee is under a direction to accumulate income, or where it can be established that the trustee has used the money in a trade or business. See generally Jacobs (at 667), Dal Pont and Chalmers (at 533).
>
> In circumstances of breach of trust, the assessment of the rate of interest thus bears features similar to those adopted by the High Court in *Hungerfords v Walker*, and whether the interest should be compound or simple turns largely on discretionary factors related to the nature of the breach."

[39] In exploring the question whether an award of compound interest rather than simple interest was appropriate the Court said:[30]

> "As to whether the interest should be compound or simple, we refer again to what Lord Denning MR said in *Wallersteiner v Moir (No 2)* (at 388):
>
> > 'On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf *Armory v Delamirie* (1723) 1 Stra 505. It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, ie, compound interest.
> >
> > Applying these principles to the present case, I think we should award interest at the rate of one per cent per annum above the official bank rate or minimum lending rate in operation from time to time and with yearly rests.'
>
> The presumption to which Lord Denning referred would, of course, be rebuttable. In *Southern Cross Commodities Pty Ltd v Ewing* (1988) 91 FLR 271 this Court had to consider the award of interest where there had been a fraudulent misapplication of company property. The circumstances were somewhat unusual, as appears in

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28 (1997) 41 NSWLR 45 at 47.

29 (1999) 73 SASR 64 at 237.

30 At 238–239.

the judgment of von Doussa J. Nevertheless, the relevant principles were identified by White J. He referred to the passage we have just quoted from *Wallersteiner v Moir (No 2)* and considered that they were consistent with what the House of Lords had said in *Spence v Crawford* [1939] 3 All ER 271 at 288, per Lord Wright:

> 'The Court must fix its eyes on the goal of doing what is "practically just". How that goal may be reached must depend on the circumstances of the case, *but the court will be more drastic in exercising its discretionary powers in a case of fraud* than in a case of innocent misrepresentation … There is no doubt good reason for the distinction. A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud . . . *whereas in the case of fraud, the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff*.' (Italics supplied by White J.)

White J concluded at 285:

> 'High authority confirms that fraud and serious misconduct by a trustee or fiduciary in a trustee-like position will lead to an award of compound interest where it can be safely presumed that commercial use has been made of the money in the meantime. A constructive trust exists here in favour of Commodities and it can safely be presumed that Manufacturers made a profit in the use of Commodities' moneys.'

Of course White J was dealing with a misapplication of assets akin to those of a trust estate. Here, we are dealing with loss to a company caused by breach of fiduciary duty. But there is no reason why the same principles should not apply, including the presumption to which White J refers, unless there is evidence to rebut that presumption."

[40] The compensatory nature of an award of equitable compensation to beneficiaries of a trust estate was explained in the following passage from the reasons of Brennan CJ, Gaudron, McHugh and Gummow JJ in *Maguire v Makaronis*:[31]

> "The obligation of a defaulting trustee is essentially one of effecting restitution to the trust estate. In *Target Holdings Ltd v Redferns*, Lord Browne-Wilkinson said:
>
> > 'The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the

[31] (1997) 188 CLR 449 at 469–470.

> trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate.'

His Lordship continued, with reference to decisions of Lord Eldon (when Master of the Rolls) in *Caffrey v Darby*, Lord Cottenham LC in *Clough v Bond*, Street J in *Re Dawson (deceased)* and Brightman LJ in *Bartlett v Barclays Trust Co [Nos 1 and 2]*:

> 'If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed ... Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred.'" (citations omitted)

[41] Many other authorities emphasise the restitutionary nature of equitable compensation.[32]

[42] Where, as is the case here, specific restitution of the trust property is not possible, "Then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed".[33]

[43] In the course of explaining the absence of support in the authorities for the awarding of interest at a higher rate against fiduciaries on a punitive basis, Heydon JA in *Harris v Digital Pulse Pty Ltd*[34] recognised that such interest may be awarded in cases of gross misapplication of trust funds and to ensure that the defendant does not retain a profit. His Honour said:[35]

> "The award of the higher rate of interest in cases of gross misapplication of trust funds thus rests not on ideas of punishment or penalty, but on two other bases. The first was articulated by the Full Federal Court (Burchett J, Gummow J and O'Loughlin J) in *Bailey v Namol Pty Ltd* (at 112): the award of the higher rate of interest in cases of gross misapplication of trust funds rests 'on the footing not that a penalty is imposed but that the defendant is estopped from denying that he received interest at such a rate which he ought to have received'. The second is that the award ensures that the fiduciary retains no profit. Thus in *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1987) 11 ACLR 818 at 848; 5 ACLC 1,110 at 1,137, Acting Master Boehm, sitting in the Supreme Court of South

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32 *Re Dawson* (1966) 2 NSWR 211; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298; *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187; and *Harrison v Schipp* [2001] NSWCA 13 at [128]–[130].

33 *Maguire v Makaronis* (1997) 188 CLR 449 at 470.

34 (2003) 56 NSWLR 298.

35 At 367–369.

Australia, in awarding compound interest at the higher rate, said: 'It is not punishment. It is not compensation. It is equity's way of ensuring, as far as possible, that no profit should remain in the hands of the trustee from so gross a breach of trust'. An appeal was dismissed by the South Australian Full Court: *Southern Cross Commodities Pty Ltd (In Liq) v Ewing* (1988) 91 FLR 271. That approach was approved by Kearney J in *Hagen v Waterhouse* (1991) 34 NSWLR 308 at 393, a case which was itself approved by this Court (Gleeson CJ, Handley JA and Sheller JA) in *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45 at 47. In *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388, Lord Denning MR combined the two bases when he said, after citing *Jones v Foxall*, *Attorney-General v Alford*, *Burdick v Garrick* and *Vyse v Foster*:

> '… Those judgments show that, in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position – who has misapplied the money and made use of it himself for his own benefit. The court:
>
> > "'presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in these cases the court directs rests to be made,' ie, compound interest: see *Burdick v Garrick*, 5 Ch App 233, 242, per Lord Hatherley LC."
>
> The reason is because a person in a fiduciary position is not allowed to make a profit out of his trust: and, if he does, he is liable to account for that profit or interest in lieu thereof.
>
> In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money — years later — is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. That was done by Sir William Page Wood V-C (afterwards Lord Hatherley) in one of the leading cases on the subject, *Atwool v Merryweather* (1867) LR 5 Eq 464n, 468–469. But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf *Armory v Delamirie* (1723) 1 Stra 505. It may be that the company would have used it in its own trading operations; or that it

> would have used it to help its subsidiaries. **Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it.** But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, ie, compound interest.'
>
> Buckley LJ (at 397) followed the line of cases under discussion and said: 'The justification for charging compound interest normally lies in the fact that profits earned in trade would be likely to be used as working capital for earning further profits. Precisely similar equitable principles apply to an agent who has retained moneys of his principal in his hands and used them for his own purposes …'. Buckley LJ (at 398) said: 'In cases of this kind interest is not … given to compensate for loss of profit but in order to ensure as far as possible that the defendant retains no profit for which he ought to account' (emphasis added)

[44] Heydon JA noted that "All these cases were approved and applied by this Court (Meagher JA, Sheller JA and Beazley JA) in *Cureton v Blackshaw Services Pty Ltd*. In particular, the Court said that compound interest awarded against fiduciaries 'is not awarded as a punishment'".

[45] In *Cureton*, Sheller JA, Meagher and Beazley JJA agreeing, regarded the charging of compound interest in that case as "a method for determining the appropriate compensation" for the profit that the appellant had made in breach of his fiduciary obligations.[36] Their Honours then said:[37]

> "In Ford and Lee, *Principles of the Law of Trusts*, 3rd ed (1996) the editors say in para 17140:
>
> > '….compound interest will be awarded where the trustee *ought to have* obtained compound interest and where the trustee *has* obtained compound interest. A compensation claim may show that the trustee was required to invest in a security bearing compound interest but failed to do so: *Re Barclay* [1899] 1 Ch 674; *Public Trustee v Merry* [1934] NZLR 934. Then an award of compound interest in a compensation claim reflects the restitutionary measure of loss. Where the trustee has misapplied the trust fund compound interest is awarded because the trustee is presumed to have received compound interest, or perhaps as a device of equity to minimise the possibility that any profit can remain in the trustee's hands: *President of India v La Pintada Compania* [1985] AC 104 per Lord Brandon at 116, the misconduct of the trustee being seen as so gross as to warrant it: *Gordon v Gonda* [1955] 1 WLR 885 at 896 per Evershed MR;

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36 *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 at [101].

37 At [102].

> compare *Southern Cross Pty Limited v Ewing* (1987) 91 FLR 271; *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 393; *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45 at 46...'"

[46] The breadth of the discretion as to the awarding of compound interest was described by Hamilton J in *Lewis v Nortex Pty Ltd (in liq)*[38] as follows:

> "As to the first of these questions [whether an order should be made for the payment of interest on monies ordered to be paid into the subject trust fund], a person committing a breach of trust may be made liable to compound rather than simple interest entirely in the discretion of the court: Jacobs' Law of Trusts in Australia (6th ed, 1997) [2209] … counsel for the Liquidator, submitted that two circumstances in which courts of equity have exercised their discretion in favour of compound interest in cases of breach of trust are: (1) where the breach is of a particularly wilful or heinous kind; (2) where the trust has been engaged in a business income earning activity, so that, had the misappropriation not occurred, the amount misappropriated would have earned income for the trust. In general terms, this submission is correct: see Ford and Lee, Principles of the Law of Trusts (3rd ed, 1996, looseleaf) [17140]. In my view, either of these considerations individually would justify compound interest in the present case."

[47] The linking of a higher award of interest to the gravity of the defaulting fiduciaries misconduct also receives support from the reasons of Burchett, Gummow and O'Loughlin JJ in *Bailey v Namol Pty Ltd*:[39]

> "It is true that in some circumstances the degree of dishonesty on the part of the erring fiduciary will be of importance in assessing a pecuniary remedy. An allowance for his work and skill may be made in favour of a fiduciary who is ordered to account for his profits made in breach of duty. That degree of liberality will be reduced to reflect any element of dishonesty: *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 32; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1. Again, a higher rate of interest may be allowed in cases of gross misapplication of trust funds; however, it appears that this is on the footing not that a penalty is imposed but that the defendant is estopped from denying that he received interest at such a rate which he ought to have received: Ashburner, 'Principles of Equity', 2nd ed, pp 147-148."

[48] The trust property, of which the respondents were deprived, subject to the exceptions mentioned later, was the share in the partnership. The partnership assets were essentially the livestock and the plant and equipment. The evidence is that the partnership income was modest. The appellants argued that the best measure on the evidence of the profit made from the alleged receipt of trust property (which essentially comprised the herd) was the evidence of Mr Currie as to what the herd (with accretions) would be worth at the date of trial. It was submitted that this

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38 [2006] NSWSC 480 at [11].

39 (1994) 53 FCR 102 at 112.

presumably represents the most profitable use of the herd by the male appellants. That calculation has no great relevance. It ignores the value of the plant and equipment and partnership profits delivered from year to year.

[49] The above authorities support the awarding of compound interest. Harel and Robert used the financial resources available to them (through the failure to properly account to the respondents) in the partnership business and in the related acquisition of "Carmichael" (the property next door). Until October 2002, Harel and Robert had the respondents' share of the partnership income available to them. When Robert transferred his interest in "Carmichael" to Harel in October 2002, the principal partnership asset, the herd, was divided between them. Consequently, the subject monies were misused by Harel and Robert in the conduct of a business.

[50] The strong findings of breach of duty and of contumelious disregard of the interests of beneficiaries also support the award of compound interest. The orders made by the primary judge were not imposed as a penalty, but with a view to ensuring that the respondents were properly compensated and that no profit from the appellants' gross breach of trust remained in their hands.[40]

[51] However, it appears to me, with respect, that the rate of 8 per cent was selected in error. As the primary judge said, 8 per cent was the rate pleaded by the respondents. The fixing of that rate was not acquiesced in by the appellants' counsel on the trial. He submitted that if there was to be a payment of interest, further submissions should be made after findings of liability. He submitted that compound interest would, in any event, be inappropriate.

[52] The primary judge was not given a great deal of assistance in the selection of an appropriate interest rate. There was, however, a body of evidence from which it could be inferred that the partnership profits, on average, were unlikely to approach 8 per cent of the value of partnership assets.

[53] The partnership accounts show a loss of $908 in 1996; a profit of $8,081 in 1997; a profit of $6,176 in 1998; a profit of $40,318 in 1999; and a profit of $24,567 in 2000.

[54] Later partnership returns of Robert and Harella which were in evidence also support the conclusion that the partnership's return on capital was rather less than 8 per cent, as does the oral evidence. For example, Harella accepted in cross-examination that the partnership produced "a very modest income" even though the property was well run.

[55] In order to more nearly reflect the gains of Harel and Robert (including the gains they could have been expected to have received) and the respondents' respective losses (the respondents were deprived of the trust fund and its annual income, such as it was) a rate of 5 per cent is appropriate.

[56] The appellants also argued that the primary judge erred in applying compound interest to the value of insurance policies which were wrongly paid by the insurers to the deceased's widow and to the value of shares which was assessed by the primary judge as at the date of the trial. The circumstances relating to the payments in respect of the insurance policies were not explored at all in written submissions

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40 Cf *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 367.

or orally on the hearing of the appeal. Nothing has been identified which would demonstrate that the primary judge erred in ordering compound interest on the wrongly paid out policies. In fact, the appellants' written submissions at first instance states that "the Colonial/Prudential Policy [value $10,173.66] was paid to the estate and then paid by the estate to the wife of the deceased". The argument advanced at first instance was that the benefit of the other policies did not form part of the estate. That argument was not pursued on appeal.

[57] It was conceded at first instance that the respondents were entitled to their respective interests in certain shares. The primary judge valued the shares, together with a cash payment made consequent of a merger, at $3,396.97 as at 16 March 2012. The cash component was $1,540.57 and the share price was $1,856.40. The amounts involved are relatively insignificant and it was not explained why the respondents, having been held out of the money and the proceeds of realisation of the shares, should not be entitled to interest. It was not suggested that the appellants did not have the use of this money.

Ground 3 – equitable relief should be denied to the respondents on account of delay

[58] The primary judge disposed of the appellants' claim of laches at first instance by referring to the following correspondence between the parties then solicitors in late 2002 and early 2003:

- A letter from the respondents' solicitors to the appellants' solicitors dated 5 December 2002 in which the former alleged that the agreement Harella had entered into was unenforceable and that this had been acknowledged by the appellants. The letter asked for confirmation of the matter alleged. There was no response.

- A letter dated 4 February 2003 from the respondent's solicitors to the appellants' solicitors stating that as the appellants had acknowledged to the respondents that the agreement was not enforceable and would not be relied on and the respondent would "prepare the matter for trial" on that basis unless their solicitors heard to the contrary from the appellants' solicitors within 14 days. There was no response to the letter.

- A letter dated 25 February 2003 from the respondents' solicitors to the appellants' solicitors in which the former said that as there had been no responses to their letters, they would proceed on the basis that the unenforceability of the agreement entered into by Harella was not contested.

[59] The primary judge concluded that the appellants' silence, maintained in a situation "where [they were] obliged to speak were they to advance a contrary position, amounted to a representation that they did not consider the agreement to be binding, and that they would not be asserting that the agreements were binding".

[60] The primary judge also based his conclusions in relation to the laches argument on the particulars given by the respondents of the allegations in paragraph 13 of the Statement of Claim, which he found substantiated by the evidence. These particulars included:

- Allegations that the appellants gave false and misleading information to the respondents relating to the number and value of partnership cattle and that the true position only emerged, and then not clearly, from documents obtained from financial institutions through non-party disclosure.

- False and misleading statements were made by the respondents to the appellants as to the nature, value and entitlement to partnership plant and equipment. Knowledge to the true state of affairs in relation to such equipment was also gleaned by the respondents through non-party disclosure.

- Despite repeated requests, the appellants failed to provide the respondents with a complete, legible copy of the partnership agreement until 22 September 2003. The respondents were unable to obtain reliable information in relation to the financial affairs of the partnership and, in particular, in relation to stock values and numbers and plant and equipment except by a laborious process of requests and applications for disclosure. When documentation was provided, it was often incomplete and not such as to enable the respondents to form a clear view of their entitlements.

The appellants' arguments

[61] Counsel for the appellants argued that the absence of any response from the appellants in relation to the family provision application was irrelevant as relief claimed under the application was not barred by the alleged agreements or by any notice to executors.[41] It was submitted that, in the circumstances, the respondents should be debarred from obtaining equitable relief. The circumstances identified were: the eight year gap between a purported decision in 2002 and the instituting of proceedings to set aside the agreements; the delay of almost five years between commencement of the subject proceedings and the trial of the proceedings; changes in the status quo brought about by the borrowing of monies by Robert and Harel, their acquisition of "Carmichael" and more cattle and the conclusion of their partnership; and the fact that Harel and Robert both proceeded after 2002 on the basis that the deceased's partnership share had been acquired by them. It was further submitted that the conduct of the respondents in litigating at length on another inconsistent basis rather than prosecuting these proceedings occasioned delay and obvious expense. Moreover, the partnership business was property "of a fluctuating nature" and required personal commitment and the taking of risks for minimal reward. In support of these arguments, reliance was placed on the following passage from the reasons of Dixon CJ, Fullagar and Kitto JJ in *Haas Timber & Trading Co Pty Ltd v Wade*:[42]

> "It is necessarily a matter of degree and must depend on the circumstances of the given case… The reasonableness of the course taken by the shareholder must be determined by reference not only to the facts affecting his conduct but also to its probable consequences upon the company and others."

[62] The appellants argued that the primary judge erred in not finding that the relief claimed should be denied to the respondents because of their delay in prosecuting their claim. That contention was developed in the following way. After the

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41 *Re Hatte* [1943] St R Qd 1.

42 (1954) 94 CLR 593 at 602.

partnership sale agreements were made, Robert and Harel made substantial borrowings, acquired many more cattle and purchased "Carmichael". They concluded their arrangements in relation to partnership property in 2002 and proceeded on the basis that they had acquired the respondents' shares in the partnership. Nevertheless, the respondents stood by and did not prosecute their claim, but chose to litigate their rights under the *Family Provision Act* causing delay and expense.

[63] The reference to property "of a fluctuating nature" is derived from a passage in *Equitable Remedies*,[43] cited with approval by Williams J in *Baburin v Baburin (No 2)*:[44]

> "Where, moreover, the material contract concerns a disposition of an interest in property of a fluctuating nature, such as shares in companies or other property of a varying nature or value, then greater expedition is appropriate than might otherwise have been the case, and delay that would otherwise be held not to be material may be held to give rise to laches."

[64] In advancing this argument, counsel for the appellants stressed that the relief claimed under the *Family Provision Act* was not barred by the partnership sale agreements and that, although purporting to rescind those agreements in 2002, the respondents took more than five years before instituting proceedings to set them aside.

Consideration

[65] The arguments advanced on behalf of the appellants go far beyond their pleaded case which, understandably, the primary judge addressed.

[66] The pleaded case was that the respondents' rights or entitlements to any interest in the partnership, or to any damages or remedies in relation thereto, were waived by the respondents or, alternatively, that the respondents were estopped from asserting or claiming any such interest, rights or entitlements. The pleaded matters relied on in that regard were:

1. the alleged agreements in respect of the partnership interest which induced the first and second appellants to believe that they were the sole partners in the partnership and could manage, conduct and arrange the affairs of the partnership and their own affairs on that basis;

2. the first and second appellants arranged their affairs in reliance on such conduct on the part of the respondents;

3. the third appellant performed her duties as executor and trustee in reliance upon and with the knowledge of the circumstances referred to above;

4. in the premises the respondents waived their rights and entitlements to any interest in the partnership and to any damages or remedies relating thereto or concerning the administration of the estate; and

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43 Dr Spry, 4th ed (1990) at 226.

44 [1991] 2 Qd R 240 at 259–260.

5. in the premises the respondents are estopped from asserting or claiming any interest in the partnership and any damages or remedies relating thereto or concerning the administration of the estate.

[67] In *BM Auto Sales Pty Ltd v Budget Rent A Car System Pty Ltd*,[45] Gibbs J, Barwick CJ and Murphy J agreeing, observed that the following passage from the judgment of the Privy Council in *Lindsay Petroleum Co v Hurd*,[46] contained a "classic statement of the law as to laches":

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

[68] Deane J in *Orr v Ford*,[47] stated that this passage contained "the ultimate test". His Honour referred also to the following statement of Rich J in *Hourigan v The Trustees Executors and Agency Co Ltd*:[48]

> "If a party in a position to claim an equitable right which is not undisputed lies by and acts in such a way as to lead to the belief that he has no such claim, or will not set it up, and thus encourages the party in possession to so deal with his own affairs that it would be unfair to him and to others claiming under him to tear up the transactions and go back to the position which might originally have obtained, the Court of equity will not, even where the claim is that an express trust is created, disregard the election of the party not to institute his claim and treat as unimportant the length of time during which he has slept upon his rights and induced the common assumption that he does not possess any."

[69] The respondents' delay in pursuing their claims against the appellants was undoubtedly extensive. As counsel for the appellants pointed out, the male respondents ended their partnership relationship and engaged in significant business dealings together and separately between the deceased's death and the date of trial. However, the circumstances are not such that the respondents by their inaction placed the appellants in a situation "in which it would be inequitable and

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45 (1976) 51 ALJR 254 at 259.
46 (1874) LR 5 PC 221 at 239 – 240.
47 (1989) 167 CLR 316 at 341.
48 (1934) 51 CLR 619 at 629 – 630.

unreasonable to place [them] if the [remedies claimed by the respondents] were afterwards to be asserted".[49]

[70] Before the appellants took any steps which were arguably to their disadvantage, they were aware that it was being contended by the respondent that there was either no agreement with respect to the partnership share or that any such agreement was unenforceable. Although laches may arise from a party's dilatory conduct of a proceeding,[50] the circumstances here do not warrant that result.

[71] The appellants were aware, or ought reasonably to have been aware, throughout that the respondents were determined to vindicate their rights in respect of the partnership share and the deceased's will. As is implicit in the primary judge's findings, the appellants' conduct in relation to the family provision proceedings and these proceedings were calculated to hinder, frustrate and delay the respondents. Information and documents material to the respondents' claims were routinely withheld and/or misrepresented.

[72] Harel and Robert, by virtue of their position as partners, and Harel and Rachael, by virtue of their roles as executors, had personal and detailed knowledge of the true facts relevant to the disputes between the parties. Compared with the appellants, the respondents were in a position of disadvantage in pursuing their claims unless the appellants acted fairly, diligently and honestly and complied with disclosure obligations under the *Uniform Civil Procedures Rules*. They did none of these things. If the appellants acted to their disadvantage during the period of the dispute between the parties, they did so, not in reliance on any conduct or inaction on the part of the respondents, but despite the respondents claims and without regard to the respondents' rights and interests. In particular, they made no attempt to pay the respondents or any of them the money, which on the appellants' own case, was payable in respect of the deceased's partnership share.

[73] The appellants have not shown that the primary judge erred in finding as he did in relation to this ground.

Ground 4 – the primary judge erred in finding that the value of the herd was $1,214,370

[74] Four days after the death of the deceased, Harel told his sisters that there were approximately 2,400 head of cattle on the property valued at between $200 and $220 a head. The financial statements for each of 1998 and 1999 record cattle numbers of 2,425. The primary judge pointed out in his reasons that the figure of 2,400 was inconsistent with numbers stated in loan applications lodged by Robert and Harel for funds for the purchase of "Carmichael" and 1,000 head of cattle. The primary judge noted that a QIDC loan/credit application dated 31 March 1999 lists 3,213 head of cattle as an asset in the statement of financial position as at that date and that the apportionment of that sum between specific categories of animals suggested reference to an existing herd. He noted also that a Suncorp credit approval request of 14 April 1999, filled out by a Mr Nowland of Suncorp on the basis of information given to him by the male respondents, referred to "3,268 cattle de-pastured at Moonoomoo Station".

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49 *Orr v Ford* (1989) 167 CLR 316 at 341.

50 *Lamshed v Lamshed* (1963) 109 CLR 440 at 456 per Kitto J and at 457 per Windeyer J.

[75] The primary judge rejected an explanation by the male respondents to the effect that the figures included in those documents included cattle yet to be purchased, cattle owned by them or other family members, but not the partnership, and cattle to be given to them by their cousin Kevin Herrod. Also relevant to the primary judge's determination of cattle numbers was the fact that the Suncorp credit approval request stated that the property was "fully stocked" and there was evidence from Mr Currie, a jointly appointed expert, that the carrying capacity was up to 3,300 head.

[76] Mr Currie gave evidence that, as at February 1999, notwithstanding periods of drought, the property would have been in good condition and therefore able to support that carrying capacity. The primary judge did not accept that the partnership financial statements for the years ended 30 June 1998 and 1999 which recorded cattle numbers of 2,425 were accurate. He found that the accounts were completed after Leah and Harella had challenged the accuracy of the figure of 2,400 head and after the commencement of family provision proceedings.

[77] In accepting the figure of 2,988 put forward by the respondents, the primary judge placed substantial reliance on the evidence of Mr Currie, in respect of which he said:[51]

> "Mr Currie adopted a generally conservative approach to his determination of the likely numbers on the property as at the date of death. He worked from the figure of 2,405 provided in a notebook dated 30th June 1999 (which was mentioned in evidence), on the basis that a muster had been carried out. Mr Currie considered that figure would represent 80 per cent of the actual herd, with the musterers trying harder than normal (a normal muster might reveal only 60 per cent of the herd). Adding 20 per cent led him to a herd of 2,883, to which he added calves sold after l4 February 1999 (194) and subtracted the calves which would not have dropped by that date (169). His total of 2,908 sits comfortably, if conservatively, with a report from Pickard & Associates of 29 June 2001, obtained for the purpose of the family provision proceeding, which put the likely figure as at the date of death at 3,190 head."

The appellant's arguments

[78] Counsel for the appellants argued that the primary judge erred in concluding that the statements for the year ended 30 June 1998 had not been completed until after Leah and Harella had challenged the accuracy of the stock figure provided by Harel and after the family provision application had been made. It was asserted that the evidence disclosed that the 1998 statements were prepared on 26 March 1999, whereas notice of the prospect of family provision proceedings was first given on 16 August 1999. This point is a peripheral one and probably cannot be substantiated in any event. The 1998 financial statements, although dated 26 March 1999, were not signed and were not provided until 11 April 2000. No evidence was adduced by the appellants as to when the financial statements were in fact created.

[79] Counsel for the appellants submitted that the primary judge's concern about the accuracy of the 1999 financial statements was unfounded. He referred to the oral

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51 *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [31].

evidence of Robert supporting their accuracy and claiming that the opening and closing stock figures for the 1998 and 1999 statements were based on musters. The difficulty with this challenge to the findings is that the financial statements are, on their face, inherently unreliable. An analysis of the 1997, 1998 and 1999 trading accounts is as follows:

No.	Purported date	Sales	Rations	Closing stock	Losses	Stock contributed to partnership/purchases /opening stock	Natural increase
1.	1997	269	13	2,443	113	2,378	460
2.	1998	366	13	2,425	101	2,445	460
3.	1999	366	13	2,425	101	2,445	460

[80] If these figures are to be believed, the natural increase of the Moonoomoo herd and the number of beasts used for rations were the same in each of the three years under consideration and the numbers of cattle sold and lost in 1998 and 1999 were the same also. The primary judge found the evidence of the appellants unsatisfactory. He remarked that the oral evidence of the male appellants "was marked by evasiveness and defensiveness" and that he had "the distinct impression that the [appellants] gave the answers they believed would advance their case, or do it the least damage".

[81] Counsel for the appellants submitted that the application documents, properly considered in light of the respondents' evidence, supported the respondent's evidence as to carrying capacity, cattle numbers and cattle values. A letter of offer of 31 March 1999 from the Primary Industry Bank of Australia Limited ("the PI Bank") referred to a carrying capacity of 2,800 adult cattle. The Queensland Industry Development Corporation (QIDC) loan/credit application dated 31 March 1999 dealing with an application for loan to the purchase of "Carmichael" and 1,000 cows with calves at foot, although showing livestock numbers broken down into 1,563 cows, 54 spayed cows, 420 heifers, 206 steers, 859 calves and 165 bulls. The total of adult cattle was 2,468. The value attributed to them in that section of the document headed "Assets" was $1,025,000. Beside that figure, under the sub-heading "Stock/work in Progress" was written "Cattle 3,213 head". The only real property referred to under the heading "Assets" was Moonoomoo. Under the sub-heading "Plant/machinery/vehicles (detail)" was written "vehicles, bikes, etc" and in the corresponding dollar column $40,000 was written twice. In a Suncorp document, under the heading "Credit Approval Request" and sub-heading "Security Summary – This Transaction" there was reference to a registered mortgage over Moonoomoo Station, a registered mortgage over "Carmichael" and a registered stock mortgage "over 3,268 cattle de-pastured at Moonoomoo Station". The document also referred to the loan purposes "purchase rural property "Carmichael" for $750,000 & purchase 1,000 cows with calves at foot for $500,000". A financial analysis in the document stated:

> "The main asset of the partnership are its cattle which, utilising the 1998 financial results are currently valued at $42 per head, far below their current true value."

[82] The same document later recorded:

> "… the operation has been building up over the last 3 years with cattle numbers having increased from 1,928 at the end of the 1995

> financial to 2,425 at end of the 1998 financial year. Additionally it is proposed to increase their core herd numbers by a further 2,000 head which will, in time, substantially increase their income."

[83] Counsel for the appellants argued that the figure of $1,025,000 listed as the value of the cattle in the QIDC statement of position was consistent with the Moonoomoo herd being worth a great deal less than the $1,214,370 estimated by Mr Currie. It was implicit in this submission that the correct cattle numbers were 2,425 stated in the financial statements of the partnership. It was submitted that the primary judge misunderstood Robert's explanation for the number of cattle listed in the QIDC document. Robert said that the 3,213 head did not include 1,000 head to be purchased for "Carmichael" whereas Harel had said in re-examination that the 3,213 head in the QIDC document would include the "Carmichael" cattle. This evidence was explained on the basis that Harel may well have been mistaken in his recollection, particularly as he gave evidence "which confirmed that acquisitions of cattle were made from their cousin Kevin which were included in the 600 sent to Powella to be fattened".

[84] Counsel for the appellant submitted that a figure of over 3,000 adult cattle in the herd as at February 1999 receives no other evidentiary support. Although the Suncorp document makes reference to the property being "fully stocked", it gives no detail of the adult carrying capacity and it was wrongly assumed by the primary judge that the figure of $402,275 referred to the same number of cattle as did the QIDC document.

[85] Another application for finance was made in letter dated 17 April 2000 by Ms Fysh, a farm financial counsellor of the Department of Primary Industries, on behalf of the appellants. The letter stated that the application had been compiled "with technical input from the Herrod family". It stated cattle numbers at 2,799 including 1,349 cows, 660 heifers, 376 steers, 312 calves and 102 bulls. The carrying capacity was said to be 3,300. The document ascribed a value of $1,071,450 to the cattle and $140,250 to "Machinery, Plant and Implements". It was asserted by counsel for the appellants that this document was created after the acquisition of cattle from Kevin Herrod and after another breeding season and that its numbers were more consistent with the oral evidence of the appellants and their financial statements than Mr Currie's assessment.

[86] Counsel for the respondent drew attention to an application for finance made to the Commonwealth Bank, signed by an officer of the bank on 2 December 1999, for the purchase of additional stock which referred to 2,606 head of cattle including 1,349 cows as at 22 November 1999. At a calving rate of 65 per cent of the number of cows, there would be approximately 876 calves or steers which had not been included in the figure of 2,606. It was submitted that the applications for approval thus support the conclusion that the Moonoomoo herd in early 1999 was in excess of 3,000 head. The submission has substance.

[87] The PI Bank document refers to 2,800 head of **adult cattle**. The CBA application refers to 3,300 head as does the DPI application. The Suncorp documents refer to 2,900 mixed head and an advertisement for the sale of Moonoomoo refers to 3,000 breeders with progeny. The financial documents also support the conclusion that the carrying capacity of Moonoomoo was no less than 3,300 head. The primary judge was entitled to reject the oral evidence of the appellants in favour of the

documentary evidence, particularly as Harel, in cross-examination, accepted that he would have been careful to ensure that the information given to Suncorp and QIDC was correct.

[88] I now turn to the expert evidence.

[89] The appellant's counsel mounted a spirited challenge to Mr Currie's evidence. It was submitted that it did not meet the requirements for admissible expert opinion evidence propounded by Heydon J in *Dasreef Pty Ltd v Hawchar*.[52] The principal shortcomings in Mr Currie's evidence were identified as his having based cattle numbers on a muster (sworn by the appellants to have been conducted) on 30 June 1999 and the fact that his opinion as to its efficacy depended on conditions more than four months earlier. There was no problem with admissibility of the evidence as there was no objection to it being admitted. Mr Currie, after all, was an expert jointly appointed by the parties. He was criticised for his conclusion that the number of mustered cattle would represent only approximately 80 per cent of the actual herd, but the primary judge was entitled to accept Mr Currie's evidence.

[90] Mr Currie was appointed no doubt having regard to his expertise. He had worked as a stock and station agent for over 40 years and had been a licensed auctioneer for 40 years. He was the principal of Ray White Rural Townsville and had extensive experience in the buying and selling of cattle and cattle stations in North Queensland. As the primary judge noted, Mr Currie's conclusions were more conservative than those arrived at by Pickard Associates Townsville, chartered accountants. Their calculations which adjusted the cattle numbers given in the partnership financial documents to reflect industry norms, arrived at 3,190 head. The accountant's opinion was tendered as part of a joint bundle provided to Mr Currie. It was not objected to on the trial and no submissions were made as to the use to which it was able to be put.

[91] An objection was also made to the admissibility of a letter from Mr Currie to the respondent's solicitors dated 20 February 2012 in which Mr Currie provided a critique of aspects of Harel's evidence in relation to cattle weights. The objection was on the basis that its tender should have been refused as no leave was sought under r 225(1)(a) of the *Uniform Civil Procedure Rules*. Exhibit 6 was produced the day before the trial commenced. The primary judge offered counsel for the appellants' time in which to consider the document. He declined to accept the offer and an objection made to its tender was not pressed. There is no substance in the point made on appeal. Even if the document should not have been received, its impact on the conclusions of the primary judge was likely to have been exceptionally slight, at best.

Ground 5 – The value of the partnership plant and equipment

[92] The primary judge was confronted with a variety of documentary evidence relating to the value of partnership plant and equipment at the date of the deceased's death. The partnership accounts as at 14 February 1999, which showed a figure after depreciation of $14,049, were relied on by the appellants at first instance. The primary judge did not accept that the accounts were accurate. Moreover, there was no good reason for concluding that they purported to show the current market value of plant and equipment.

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52 (2011) 243 CLR 588.

[93] Referring to evidence, other than the partnership accounts and the letter from Ms Fysh to Suncorp of 17 April 2000, the primary judge said:[53]

> "The other evidence includes varying estimates of the value of plant and equipment. For example, the balance sheet in the 1998 financial statements put the value of non-current assets at cost of $107,654 less depreciation, yielding $49,895. The balance sheet for the following year specified the same cost amount, but continuing depreciation had reduced the net value to $44,696. A depreciation schedule for the period I July 1998 to 28 February 1999, prepared for the defendants and provided to Mr Currie, showed plant and equipment and motor vehicles at cost of $86,623. The QIDC loan application specified a value of $80,000, as did the Suncorp credit approval request. An application for commercial credit to the Commonwealth Bank dated 2 December 1999 specified unencumbered plant at a value of $100,000."

[94] The primary judge concluded that Ms Fysh's letter based on technical input from the Herrod family was the most valuable evidence of market value. The finding was open to the primary judge. It was likely that Ms Fysh, an officer of the Department of Primary Industries, preparing a loan application to submit to a financial institution, would have used figures supplied to her by the first and second appellants. It is also likely that she would not have used the figures so provided had she reason to doubt them.

[95] Accordingly, this ground was not made out.

Ground 6 – The Liabilities of the Partnership

The partnership debt of $62,000

[96] At first instance, the appellants contended that at the date of the deceased's death, his partnership loan account was $62,000 in credit and that this was a liability which had to be brought to account in determining the value of the deceased's partnership share.

[97] The primary judge noted that although the three partners had acknowledged the debt in a document dated 25 September 1989, there was no "acceptable evidence that a debt which accrued as long ago as in 1989 was subsisting as at the date of the death of the deceased a decade later". His Honour found "that the debt was not included in the applications for finance tells against its having subsisted to that point".

[98] Counsel for the appellants submitted that both Leah and Harella gave evidence confirming that the debt of $62,000 remained owing by the partnership to the deceased. They did not. There are references to the alleged debt in Harella's affidavits and the exhibits thereto, but nowhere does she accept the existence of such a debt. To the contrary, she consistently cast doubt on its existence. Leah also exhibited to an affidavit some material prepared by Mr Coco (an accountant), which referred to the debt, but that conduct falls short of confirming or admitting its existence. If there were admissions alleged they would have little probative value as the matters the subject of the admissions were not within the knowledge of Harella or Leah.

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53 Reasons at [44].

[99] The primary judge's implicit finding that there was no reference to the debt in the "applications for finance" was also said to be erroneous. The finding was not shown to be wrong, although, as is later discussed, there may well have been a reference to the debt in a document provided to Suncorp shortly after the deceased's death. There is a reference to the debt in the Suncorp Credit Approval Request document which shows the approval of the subject finance on 5 April 2001, well after the death of the deceased and the commencement of the dispute between the parties.

[100] Exhibited to an affidavit of Leah was an affidavit of Mr Coco. He swore to having been a chartered accountant and to having been employed by the partnership since about 1985 to prepare its Income Tax Returns and Annual Financial Statements. In paragraph 7 of the affidavit, Mr Coco, in effect, swore to the existence of a "Loan Account owing by Partnership to deceased" of $62,000. It was correctly submitted by counsel for the respondents that Mr Coco was not cross-examined. He was not. He could not have been. He did not give evidence. However, because his affidavit went into evidence in the respondents' case, the appellants are entitled to rely on it.

[101] There was no dispute about the authenticity of a "special purpose financial report" dated 4 March 1998 which, it was accepted, bore the deceased's signature. It showed that the deceased's loan account was $75,509 in credit. Copy Financial Statements for the year ended 30 June 1998 prepared by Coco and Stanton Chartered Accountants, shows a reduction in the deceased's loan account to $73,551.

[102] The balance sheet of the partnership as at 14 February 1999 shows a loan to the deceased of $62,000. A pro-forma balance sheet records a loan to the deceased of $62,000.

[103] In addition to these documents, counsel for the appellants relied on the report of Pickard Associates dated 29 June 2001. The focus of that report however was on cattle numbers and it is of little, if any, use for present purposes. However, the Suncorp Credit Approval Request which was recommended for approval in April 1999 notes "Accountant has provided the partnership balance sheets for the last 3 financial years". It is more probable than not that these documents recorded the loan account which has just been discussed.

[104] Having regard to the successful attack on the credit of Harel and Robert, the obvious lack of reliability of the partnership accounts in relation to stock numbers and the general morass of disorganised material with which the primary judge was confronted, the findings under challenge are not surprising. However, they cannot be sustained. There is cogent evidence that the deceased's partnership loan account was in existence in 1989 and continued with fluctuating credit balances up to the date of his death. Although, as discussed earlier, there is good reason to doubt the accuracy of the cattle numbers recorded in relevant partnership accounts, the same considerations do not apply to the deceased's loan account. In my respectful opinion, the primary judge erred in not finding that $62,000 was a liability of the partnership as at the date of the deceased's death.

The overdraft

[105] The appellants claimed at first instance that there was a partnership overdraft of $15,460 at the date of the deceased's death. The primary judge was not satisfied on the balance of probabilities in that regard. His Honour's findings in relation to the

overdraft were said by him to be strongly influenced by the content of the finance applications. He noted that the QIDC application dated 31 March 1999 referred to the overdraft, but indicated that there was no amount owing. The Suncorp application dated 12 April 1999 again referred to the overdraft, but suggested, inferentially, that no monies were owing. The application to the Commonwealth Bank dated 2 December 1999 recorded an overdraft facility "as in use to the extent of $20,336 on 22 November 1999" but a summary of the finances provided to the Commonwealth Bank in respect of the years 1997, 1998 and 1999 "records a liability in 1998 which aligns with the financial statement for that year, a liability in the amount of $15,750, but records there being nil 'liability' for 1999, consistently with the details of financial matters provided to the other financial institutions earlier in the year".[54]

[106] Counsel for the respondents submitted that the non-recording of an overdraft in the summary of finances for the financial year ended 30 June 1999 was consistent with the overdraft having been extinguished after the date of death. Reference was made to Mr Coco's pro-forma balance sheet as at 14 February 1999, which had an overdraft of $15,460 whereas his pro-forma balance sheet as at 18 October 1999 showed a reduction in the overdraft to $850.

[107] Counsel for the respondents pointed out that the figures shown in the financial statements for the year ended 30 June 1999 and for the period ending 14 February 1999 showed different figures for cash at bank. Counsel for the respondents submitted that if the overdraft balance was other than nil as at 14 February 1999, it should not have been difficult for the appellants to prove that by reference to bank statements. The point was made that the value of the estate's interest in the partnership had been in issue since the commencement of the family provision application in 1999. In my view, this point has merit. It was well within the power of the appellants to establish the true facts had they been different to those asserted by the respondents and the primary judge was no doubt conscious of that.

[108] No error in the primary judge's findings in this regard has been demonstrated.

The loan accounts

[109] The respondents claimed that there were partnership liabilities as at the date of death in addition to the sum $66,217 made up and shown as follows in Mr Coco's balance sheet as at 14 February 1999:

Partners' Current Accounts	
Harel Robert Herrod	7,906
Robert M Herrod	25,675
Harel J Herrod	32,637
	66,217

[110] The primary judge said in relation to this claim:[55]

> "I refer now to the alleged other liabilities to the deceased, Harel and Robert. They are variously presented. In the 1997 accounts, they are

[54] Reasons at [61].
[55] Reasons at [56].

> not listed as liabilities, but in the balance sheet section under the heading 'partners' current accounts', and as 'partners' funds'. In the 1998 accounts, they are presented differently: they are termed 'proprietors' funds' represented by various assets less various liabilities. As to the accounts prepared after the dispute had arisen, the first in time calls them 'Proprietors' funds', and the second calls them 'partners' current accounts', with slightly differing amounts. The amounts were not specified as liabilities of the partnership in the applications for finance made following the death. Again, I am not satisfied on the balance of probabilities that these amounts were in truth debts owed as at the date of death."

[111] Essentially, for the reasons given in relation to the $62,000 debt, I have concluded that the primary judge erred in not finding that the above amounts were debts owed at the date of the deceased's death. Although the items under consideration, which vary in amount from year to year, are described differently at times in the different sets of accounts, they always have the character of liabilities. They were shown this way in Mr Coco's working papers. It is also unclear whether Suncorp was provided with accounts showing these liabilities in the application for finance.

Ground 7 – The primary judge erred in not drawing an inference adverse to the respondents from their failure to call Harella's daughter, Kylie, as a witness

[112] Kylie is Harella's daughter. She typed a document which, according to the appellants, reflected the agreement entered into between the appellants and Harella for the sale and purchase of her interest in the partnership. Leah denied giving any instructions for the typing of the document, having seen Kylie type it or having seen the document around the time it was typed. Harella accepted that the document, generally at least, recorded matters agreed between the appellant and herself on 18 February 1999. She said that Robert and Harel asked Kylie to type the document and that she did not see it being produced. She swore in an affidavit that Kylie was present at the "further" meeting.

[113] Counsel for the appellants written submissions state that:

- there were differences between the parties as to who had instructed Kylie;
- the circumstance that Kylie may have been unwell for six months prior to the trial does not explain why she gave no evidence in support of the respondents' case; and
- the "importance of Kylie's evidence" is identified in paragraph 93 of Harel's affidavit.

[114] Harel swears in paragraph 93 that the agreement prepared by Kylie was in the terms that Leah and Harella both requested and that it was they who proposed the terms.

[115] Kylie's evidence, even assuming that she had a detailed recollection of events after the passage of about 10 years, was hardly crucial. It was undisputed that what was contained in the document essentially accorded with the parties' discussion on 18 February 1999. It was not submitted by counsel for the appellants that Kylie was

likely to have been able to give significant evidence in relation to the respondents' claims of undue influence, unconscionability and misrepresentation. In short, it was not demonstrated that Kylie, if called as a witness, had the potential to give evidence which may have had a material bearing on the outcome of the case. Nor was it shown that if the primary judge had drawn the inference that Kylie's evidence would not have assisted the respondents' case,[56] that may have had a material bearing on the critical findings.

[116] This ground of appeal was not made out.

Ground 8 – The primary judge erred in law in declaring that an oral agreement entered into by Leah at Moonoomoo on 18 February 1999 was unenforceable and ought be set aside, the primary judge also concluded, erroneously, that no legally binding agreement had been made by Leah on 18 February 1999

[117] There is a similar ground in respect of Harella which alleges also that a written agreement was entered into on 24 March 1999 and not on 4 March 1999 as the primary judge found.

[118] It was argued that as the primary judge found that there was no binding oral agreement in each case, there was no basis on which an order could be made setting aside an agreement. It is not at all clear that there were inconsistent findings. There is a finding that Harella and Leah each entered into an oral agreement. In Leah's case, there is a finding that "the oral agreement should not be regarded as itself binding". However, as the appellants' written submissions acknowledge, there was a later written agreement entered into by Harella.

[119] Even if the appellants' arguments in respect of Harella could be sustained, which seems not to be the case, it would have no bearing on the outcome of the case.

[120] In Leah's case there is a finding that no legally binding agreement was entered into.[57] Unless that finding is challenged successfully, the appellants' inconsistent argument has no practical point.

[121] Brief written submissions were made in respect of the primary judge's alleged finding that there was no intention to enter into an immediately binding agreement at the time of the discussions on 18 February 1999. Again, I have some difficulty in understanding what this challenge is about in so far as Harella is concerned. The finding[58] is limited to there being no concluded bargain until execution of the formal agreement. Such an agreement was later entered into as the appellants' counsel's written submissions acknowledged.

Undue influence, unconscionability

[122] Counsel for the appellants referred to a passage from the reasons of Gaudron, Gummow and Kirby JJ in *Bridgewater v Leahy*,[59] in which it was said:

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56 *Jones v Dunkel* (1959) 101 CLR 298; *Australian Securities and Investments Commission v Hellicar* (2012) 286 ALR 501.

57 Reasons at [89].

58 Reasons at [89].

59 (1998) 194 CLR 457 at [75].

> "… it has been recognised that unconscionable conduct is a ground of relief which will be available 'whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is taken of the opportunity thereby created'."

[123] Referring to *Louth v Diprose*,[60] it was submitted that the disabling circumstance of the weaker party must be one which seriously affects his or her ability to make a judgment as to his or her own best interests in circumstances where the other party knows or ought to know of the existence of that condition or circumstance and of its affect on the weaker party. Mere pressure is insufficient to constitute unconscionability; there must be a relationship of disability.

[124] In support of the contention that there was no relevant "special disadvantage" counsel for the appellants submitted that: each of the respondents was a married woman engaged in "separate pursuits" to that of the appellants; although husbands may have exercised dominance over their wives decision making under the precepts the parties' faith, brothers of married women did not; Harella's evidence indicated that under the parties' faith, a woman had a free choice, at least insofar as dealings with a brother is concerned; Harella's contention that "we were just doing what we were told" could not stand against her conduct in obtaining stock information from a stock and station agent; much was made in Harella's case of her not having access to the will, but she admitted in her oral evidence that she knew that under the will the daughters were to receive the father's interests in the partnership; Harella declined to execute a draft agreement which was not limited to the sale of her interest in the partnership and sign one which did; Harella accepted that she was free to sign the agreement as she wished.

[125] The primary judge's reasoning in relation to Harella's case did not address or refer to the negotiations and dealings that she had with McDonald and Leong, the solicitors who were retained in the matter and her entering into the agreement on 24 March 1999, more than a month after the alleged oral agreement, cannot be reconciled with the primary judge's findings.

[126] It was submitted that in Leah's case, her contention that she entered into the agreement because that was what she was told she "was entitled to" was contro-verted by her other (unidentified) evidence.

[127] The matters relied on by the primary judge in support his findings of special disadvantage and unconscionability are recorded in paragraphs [92] and [93] of his reasons. Those matters were:

1. the fact, acknowledged by Harel and Robert in evidence, that the respondents had no means independently of them of ascertaining the number and value of cattle on Moonoomoo;

2. the failure of Harel and Robert who stood to benefit financially from the agreement to counsel the respondents to seek independent legal advice;

3. under the Jehovah's Witness faith, to which the parties were devout adherents, men were the primary decision makers and in a position of dominance over their sisters;

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[60] (1992) 175 CLR 621 at 629.

4. the respondents were in a state of considerable grief;

5. there was reason to question Harella's emotional stability;

6. the brothers unreasonably applied pressure after the death and funeral for the matter to be resolved urgently. In that regard there were claims that Moonoomoo would be lost and that the children would go without;

7. the pressure continued after February 1999 and the respondents were reminded of scriptural admonitions against recourse of courts of law;

8. Harel and Robert threatened Leah with "disfellowship" from her faith if she did not sign a draft agreement prepared by a solicitor.

[128] In relation to the findings concerning the precepts of the Jehovah's Witness faith, the primary judge accepted the sisters' evidence as he was entitled to do. He also had recourse to a publication of that faith which supported the respondents' evidence. It was also not the case that Harella had "dealings" with the solicitor Linda Leong, she merely pointed out an error in a draft agreement. Ms Leong was not acting on behalf of Leah and Harella.

[129] There was ample support for the relevant findings of the primary judge which have not been shown to be erroneous, glaringly improbable or inconsistent with facts incontrovertibly established by the evidence.

[130] This ground was not established.

Conclusion

[131] For the above reasons, the value of the partnership assets at the date of death was $1,226,403, being the value found by the primary judge of $1,354,620 less $62,000 and $66,217.

[132] Each respondent's one ninth share of $1,226,403 is $136,267. To that must be added each respondent's share of the residuary estate, $8,962, making $145,229. The respondents are entitled to compound interest calculated on that sum in accordance with the formula applied by the primary judge. The correctness of the formula was not in dispute.

[133] The formula requires this calculation:

$$\$145,229 \times (1 + .05)^{13}$$

which equals $273,851 comprising the principal of $145,229 and interest of $128,622.

[134] The orders will be that:

1. The appeal be allowed.

2. Paragraphs 3(b) and 5 of the declarations and orders at first instance be varied by substituting $273,851 for $433,709.67.

[135] I would make no costs order as, although the appellants have had an appreciable measure of success, most of their arguments have not prevailed and the respondents are left with a substantial award of compensation.

[136] **GOTTERSON JA**: I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[137] **APPLEGARTH J:** I agree with the reasons of Muir JA and with the orders proposed by his Honour.