DISTRICT COURT OF QUEENSLAND

CITATION:	*Dovedeen Pty Ltd v Maund & anor* [2020] QDC 238
PARTIES:	**DOVEDEEN PTY LTD** (Plaintiff) **v** **RONALD EARLE MAUND** (First Defendant) AND **KAREN-LEE MAUND** (Second Defendant)
FILE NO:	16 of 2017
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Toowoomba District Court
DELIVERED ON:	22 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21 and 22 July 2020
JUDGE:	Porter QC DCJ
ORDER:	**1. Plaintiff's claim is dismissed.** **2. Judgment is entered for the Defendants' on their counterclaim in the amount of $132,000.** **3. The parties file and serve submissions of not more than 4 pages and any supporting affidavits on the questions of interest and costs by Friday 2 October 2020.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – where the plaintiff company was involved in the business of owning and breeding thoroughbred race horses – where the defendants were trainers – where the plaintiff company entered into an agreement with the defendants for the purchase of six brood mares for $150,000 and for the defendants to care for them – whether and to what extent the "care" extended to the servicing of the brood mares with stallions – where the

plaintiff alleges the defendant serviced a particular mare with a particular stallion without the defendant's consent or knowledge – where the particular stallion was alleged to be an inferior stallion – whether the servicing by the alleged inferior stallion resulted in a substantial decrease in value of the brood mare – whether the servicing of the alleged inferior stallion without the defendant's consent or knowledge constituted a breach of the contract – where the defendants claim fees for care of the mares until their disposal – where the plaintiff alleged that the contract was terminated by notice – whether the defendants are entitled to payment of monthly fees under the contract.

CASES:	*Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438
	R v Foley [2000] 1 Qd R 290
	Rees v Bailey Aluminium Products Pty Ltd (2008) 21 VR 478
	Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2006] 2 Qd R 14
COUNSEL:	D Edwards (direct-access) for the Plaintiff Defendants self-represented
SOLICITORS:	D Edwards (direct-access) for the Plaintiff Defendants self-represented

Summary

[1] The plaintiff company (**Dovedeen**) was involved in the business of owning and breeding thoroughbred race horses. In June 2012, it bought six brood mares for $150,000 from persons related to the defendants and entered into a contract with the defendants for their care. The defendants are horse trainers. The male defendant, Mr Maund, arranged for the mares subsequently to be covered by a stallion called Triumphant Choice on a number of occasions.

[2] Dovedeen alleged that the covering of the mares by that stallion required its consent and that it did not consent. Dovedeen alleged that Triumphant Choice was a poorly bred stallion and that the consequence was that the mares became worth only $2000. The cause of action articulated by counsel at trial was breach of contract.

[3] The defendants (the **Maunds**), defended on the basis that Dovedeen (by Mr Hartley, its guiding mind) knew the mares were being serviced by Triumphant Choice and even if he did not, it was within the scope of the contract for the care of the mares for Mr Maund to seek to put the mares in foal and that it was reasonable to use Triumphant Choice for that purpose. The Maunds also counterclaimed for amounts they allege are due under the contract for care of the mares and their progeny.

[4] For the reasons which follow, Dovedeen's claim is dismissed and judgment is given on part of the Maund's counterclaim in the amount of $132,000.

The pleaded cases

[5] The haphazard manner in which the trial was conducted requires particular attention to be given to the case as pleaded, limited though the pleadings were.

The statement of claim

[6] The statement of claim is brief. It provided:

> 1. The plaintiff is the owner and breeder of thoroughbred race horses.
> 2. The plaintiff is the owner of six brood mares purchased from the defendants by the plaintiff at Moranbah for $150,000.
> 3. The plaintiff engaged the defendants to care for the said brood mares which were then in foal.
> 4. Without obtaining the approval of the plaintiff and after the said mares had dropped their foals, the defendants arranged for the said mares to be mated on or about February 2012 [*sic 2013*] with a poorly bred stallion.
> 5. As a result of this, the said mares are now worth only $2,000 each.
>
> The plaintiff claims the following relief:
>
> (i) Payment to him of the sum of $138,000 [*sic 148,000*] being the loss suffered by it as the result of the unauthorised actions of the defendants
>
> (ii) Costs
>
> (iii) Interest pursuant to the Supreme Court Act

[7] It is unclear what cause of action was intended to be pleaded by the statement of claim. At the start of the trial, Mr Edwards nominated breach of contract.[1] That cause of action can be teased out of the statement of claim read with the reply. Some points need to be noted:

(a) The claim and statement of claim were prepared by Mr Edwards and filed on 19 April 2013. He has been retained directly by Dovedeen in the matter since then[2];

(b) Dovedeen alleged that the 6 mares were owned by it and were in foal when purchased from the defendants; and

(c) Dovedeen alleged that the defendants caused the mares to be covered in February 2012 (which is before the 25 June 2012 contract and must be a reference to February 2013).

The defence and counterclaim

[8] The defence and counterclaim relevantly:

(a) Admits paragraph 1 of the statement of claim;

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[1] TS1-8.16
[2] TS1-40.21 to .26

(b) Admits paragraph 2 (that Dovedeen was the owner of six brood mares) but says that the defendants sold them as agents for the sellers;

(c) Admits paragraph 3, that the plaintiffs were engaged to care for the mares which were in foal; and

(d) The defendants then plead the care contract.

[9] The contract is pleaded as follows:

(a) The terms of the engagement were set out in writing in a letter of 25 June 2012 (see paragraph [152] below) and in the monthly tax invoices delivered by the defendant (singular, presumably Mr Maund);

(b) It was an express term of that contract that Dovedeen would pay for services provided by the defendant (though the term is not pleaded); and

(c) It was a term implied to give business efficacy to the contract that the defendant would provide services for each of Dovedeen's horses for life unless the contract was terminated by mutual consent or in accordance with standard terms and conditions contained on the reverse of the tax invoices sent monthly subsequent to the 25 June letter.

[10] Quite how a contract could be formed by an agreement in writing and by tax invoices delivered thereafter for the provision of the services provided for in the original writing was not dealt with. Such a situation is theoretically possible, but unlikely given the terms of the writing (as will be seen). Further, as will be seen, the terms apparently on the reverse of the tax invoices were terms relating to training race horses, not caring for brood mares. They were quite inapposite for the contract contemplated by the 25 June letter.

[11] Quite why the implied term should arise is also unclear on the pleading. The 25 June letter did not refer to termination at all. Ordinarily, the implication would be that the contract could be terminated on reasonable notice, absent some indication to the contrary.[3]

[12] Paragraph 7 of the defence then addresses paragraph 4 of the statement of claim. It alleges that only five out of the six mares were in foal and that the empty mare, ironically named "For Certain", was covered by Triumphant Choice on about 10 November 2012 in Mr Hartley's presence. It alleges the other five mares were then serviced by Triumphant Choice with the express or implied authority of Dovedeen after they had foaled the first time.

[13] Paragraph 8 pleaded an alternative contention in response to the allegation in paragraph 4 of the statement of claim. The defendants relied on an express term of the provision in the invoices which allegedly provided:

> The Defendant's obligations to the Plaintiff were limited by operation of clause 3.1 of the Invoices to providing the Services (defined in clause 1 as training, maintenance, stabling, feeding exercising, running freighting, agisting including gear and additive and prescribed

[3] *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438 at 443 per McHugh JA.

> treatment for the Horse) in such manner as the Defendant in its absolute discretion deemed proper and appropriate.

[14] The defendants then alleged, in effect, that if consent to covering of the mares by Triumphant Choice was without the authority of Dovedeen, then doing so was proper and appropriate provision of the Services and done with reasonable care and skill. The difficulty with this argument on the face of the pleading is that the definition of Services pleaded did not extend to include arranging for covering of mares and it was never made clear by pleading or otherwise what considerations the definition should be extended to that particular service. It might have been argued that such a term was an implication from the express words of the contract read with its object (being to facilitate breeding foals for sale, as explained by Mr O'Connor below) but no such argument was ever pleaded or developed.

[15] As to the damages alleged in paragraph 5 of the statement of claim, the defence by paragraph 9:

(a) Denies that the defendants caused diminution in value of the mares to $2000;

(b) Pleads a limitation clause in the tax invoices which excluded liability for indirect or consequential loss (though why loss in the value of the horses due to a breach of the contract would be indirect loss is unclear); and

(c) Does not admit the current value of the mares.

[16] The defendants then plead a counterclaim. In paragraph 12, the counterclaim has another go at pleading the contract alleged in these terms:

> In or about 2012 the Plaintiff and Defendant entered into an agreement as referred to [*in the statement of claim and defence*] whereby the Defendant was to provide the Plaintiff with services including agistment, training and maintenance service of the Plaintiff's horses (**Services**).

[17] The articulation of the services differs a little from that in paragraph 8 of the defence above. No such term is included in the 23 June letter. Presumably reliance is placed on the terms in the tax invoices.

[18] Paragraph 14 then alleges that pursuant to the contract the defendants provided the Services (presumably as defined in paragraph 12) and was entitled to payment at the rate of $4,000 per month. Paragraph 16 then alleges issue of the "Invoices" for the fees "as agreed to be paid by the Plaintiff".

[19] Paragraph 17 then pleads material terms and conditions of the Invoices (presumably again on the basis that the standard terms they contain were part of the contract) as follows:

(a) Clause 4.1 provided for payment of moneys due within 7 days;

(b) Clause 5.1 provided that the Plaintiff must pay the Training Fee (as defined in the Invoices) including any costs in connection with the Services (as defined in the Invoices: see paragraph [13] above);

(c) Clause 5.2 provided that the Plaintiff was responsible for vet and other fees; and

(d) Clause 7.1 provided, relevantly, for compound interest at 2% if there was default along with recovery of costs incurred in enforcement.

[20] The counterclaim then alleges that the Plaintiff breached the agreement by not paying fees and interest due to 7 May 2017 of $702,690.71 as set out in the schedule to the pleading. The schedule includes claims not only for fees payable under the express terms of the June 2012 agreement of $4000 per month for the mares, but also amounts for each of the foals from those mares. The claims relating to the foals are not referred to anywhere in the pleading except in the schedule, nor is the amount claimed for those foals referred to anywhere in the pleading except in the schedule. The figures seem to have been taken from the tax invoices (which eventually were tendered[4]), but no legal basis for the obligation to pay any sum for the care or training of the foals (much less the sums claimed) was pleaded.

[21] The idea might have been that the contract for the foals arose by implication from the fact that the plaintiff knew the foals were being kept by the defendants and the plaintiff received tax invoices with the attached terms for the care of the foals without objection over time, though nothing to that effect was pleaded. As will be seen, the June 2012 letter makes no mention of them.

[22] Ultimately, the claims advanced were for care of the mares totalling $132,838 and the totalling $163,582 (up to August 2015) and interest of $361,435.71 calculated on a compounding 2% basis. The counterclaim did not explain why fees were not claimed after August 2015, but the evidence disclosed that the parties acted on the basis that the mares were sold at that time for $2000 (whether they were or not is not so clear).

The reply and answer

[23] Dovedeen replied relevantly as follows. By paragraph 2, it admitted the defendants' allegation that they sold the horses as agent for others. There is then a narrative paragraph in the following revealing terms:

> In relation to paragraph 2 of the amended Defence, the plaintiff acknowledges that the defendant sold the said horses as agent for members of his family earning a 5% commission from those members. The plaintiff says the defendants' accountant Michael O'Connor as agent for the defendants met with Mr. and Mrs. Hartley as director and secretary respectively of the plaintiff on Friday 24th June at the Drovers Rest Motel Moranbah. At that meeting agreement was reached by the parties whereby the plaintiff would purchase mares "Jingle Belle" for $25,000, "Monaco Miss" for $30,000, "Way Too Fast" for $25,000, "For Certain" for $20,000, "She Alma" for $30,000 and "Stella Spectre" for $20,000. It was also agreed that the plaintiff would deposit the total of $150,000 plus $15,000 GST into the defendants' bank account on or before 30.06.12 which the plaintiff did.

[24] Paragraph 3 admits the monthly fee of $4000 to manage the mares which was said to be inclusive of all costs. It is then further alleged "it was understood by the parties that this would not include service fees for the mares". Paragraph 4 alleges

[4] Exhibit 11

compliance with all the terms of "any agreement" until termination of the agreement following the defendants' refusal to return the horses. No particulars were provided.

[25] Paragraph 5 denies any implied term that the contract required mutual agreement to be terminated, and pleaded (it appears) a term implied by trade usage in all training agreements that the owner may on reasonable notice require the return of the horses and colours. This allegation assumes that the contract relating to the mares was a training agreement. This is odd because both parties seemed to plead up to that point that the mares were brood mares, for breeding not racing.

[26] As to the allegations in paragraph 7, Dovedeen:

(a) Alleged (it seems) that there was a term implied into the contract by trade usage in the racing industry that a mare could not be covered without the consent of the owner to the stallion and the fee;

(b) That Mr Hartley was present as alleged when a mare was being covered by a stallion but he was not told the name of the stallion nor that the mare belonged to Dovedeen; and

(c) That Mr Hartley never otherwise authorised the service of the mares.

[27] As to the damages allegation in paragraph 9, the reply pleads this: *it is well known in the racing industry that the value of mares serviced by poorly bred stallions is diminished as proved by the sale price of the mare alleged by the defendant*.

[28] As to the answer, it does not plead in accordance with r. 166 UCPR in response to the allegations in the counterclaim. Rather it pleads just two allegations:

(a) That the invoices do not set out fees as agreed to be paid by the defendants (seemingly because) they include out of pocket expenses like agistment, vets fees and servicing charges which were either the defendants' responsibility under the contract or incurred without Dovedeen's consent; and

(b) No money was owing under the agreement (seemingly because once the defendants refused to return the horses, no further liability arose).

Issues arising on the pleadings

[29] The following main issues arise on the pleadings.

[30] **First**, what were the terms of the contract between the parties particularly as relates to:

(a) The services to be provided;

(b) The fee for those services;

(c) Whether the contract permitted the mares to be serviced; and

(d) Termination?

[31] **Second**, was the servicing of the mares by Triumphant Choice done without Mr Hartley's consent and in breach of the contract?

[32] **Third**, if it was, did the servicing of the mares by Triumphant Choice cause loss in value of the mares, and if so, how much?

[33] **Fourth**, were the rights of the defendants to receive fees under the contract terminated at any stage prior to August 2015 and if not, what sum are the defendants entitled to under the contract?

The trial

[34] The Maunds were self-represented and had been for some considerable time. In a directions hearing in the week prior to the commencement of the trial I explained the steps to be followed in the conduct of the trial. Although the Maunds' appeared to grasp the issues in broad terms, they struggled to understand and address the specific issues which arose in the trial.

[35] The Maunds decided that Mr Maund would conduct the case on their behalf. I mean no disrespect when I say that Mr Maund had a poor grasp of how to ask questions, rather than make statements. It was exceedingly difficult to guide his efforts towards proper questions that were related to the issues. As to documents, the Maunds managed eventually to tender the invoices they relied upon; it seemed doubtful any more rigorous analysis of their documents ever had occurred (not least because disclosure had not occurred, as to which see paragraph [36](b) below). They did, however, manage to provide a statement of the expert they sought to rely on at trial (Mr Williams) and to call Mr O'Connor, who gave useful evidence on the genesis of the 23 June letter.

[36] Although represented, Dovedeen's case was not satisfactorily presented either. Some examples:

(a) Mr Edwards opened expert evidence he intended to lead from three witnesses without having given the Maunds any notice of that, much less complying with Chapter 11 Part 5 UCPR. Mr Edwards did not appear to have any understanding of those rules[5] (ultimately he sought leave to lead expert evidence without complying with the Rules, which was refused, in part because the leave application did not identify the specific evidence which it was proposed to lead[6]);

(b) Mr Edwards conceded that disclosure had not occurred in the proceedings. He was unaware of the requirements of r. 226 UCPR[7] specifically and appeared to be unaware of the professional duty it reflects[8];

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[5] TS 1-26, TS1-29

[6] Reasons given at TS2-3.8 to 5.22

[7] **Certificate by solicitor**

1) The solicitor having conduct of a proceeding for a party must give to the court at the trial, a certificate addressed to the court and signed by the solicitor—

(a) stating the duty of disclosure has been explained fully to the party; and

(b) if the party is a corporation—identifying the individual to whom the duty was explained.

(c) Mr Edwards sought to tender documents which were not even arguably admissible.[9] No thought appeared to have been given to questions of admissibility generally, including in respect of expert evidence as already mentioned; and

(d) Insufficient attention had been given to the identification of the issues which arose on the pleadings. On a number of occasions, evidence of tangential relevance at best was sought to be tendered.[10]

[37] Another failure of both parties in preparing for the trial was the lack of any prior planning as to how documents which the parties wished to tender at trial, or use in cross examination, were to be put before the Court and provided to the other side. This created particular difficulty because no party or witness appeared in person.

[38] Rather, the Maunds appeared from their home at Ballina, mostly by video link and once by telephone when their link dropped out. Their technical skills and home computer hardware were limited. They had not thought through how their documents would be provided. They never seemed to master copying in the plaintiff's counsel on their emails to the Court. Trips to Officeworks to create ".pdf" documents were required. These were then put into numbered bundles by my associate and emailed to the parties.

[39] Such might be understandable from unsophisticated persons representing themselves. Unfortunately, however, Dovedeen's performance was little better. Mr Edwards did not appear to have turned his mind to how the plaintiff's documents would be provided in an intelligible form to the Court and the defendants.[11]

The witnesses

Dovedeen's witnesses

[40] Mr and Mrs Hartley are the directors of the plaintiff company which they use as a vehicle for activities relating to horse racing, including owning active race horses and breeding. Each of the Hartleys gave evidence. Dovedeen also called an employee of Dovedeen, Mr Collis and a race horse trainer, Mr Zielke.

Mr Hartley's evidence

[41] Mr Hartley was Dovedeen's key witness. His age was not stated but he was plainly elderly and somewhat incapacitated. He said he had been a trainer of hundreds of horses over many years and held offices in professional trainer bodies. He held a

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(2) The certificate must be prepared and signed at or immediately before the trial.

[8] TS2-39.15 to 40.45 This might have caused real prejudice in respect of the alleged letter from the Hartleys to the Maunds demanding the return of the mares, which was never produced at trial: see paragraph [50] below and TS1-24.40 to .45

[9] For example, Mr Edwards sought to tender Exhibit 8 in its entirety in circumstances which, when challenged, turned out to be almost entirely inadmissible (TS2-21.33 to 22.6). He also sought to tender extracts from the Australian Stud Book which became Exhibit 9 on an unarguable basis: TS2-50.42 to 52.2.

[10] See for example the evidence related to the financial history of the parties dealings (see TS 1-39 to 1-43 and see Mr Edward's effort to lead evidence of the Hartleys' financial standing: TS1-23.28 to .34). Neither matter was able to be shown to be relevant to the issues in the trial.

[11] TS3-11.38 to 12.11.

number two training licence which he said reflected high professional standing. He has owned and bred many horses through Dovedeen and said he was one of the biggest owners of horses in the State.

[42] He gave evidence about lending $25,000 to the Maunds in April 2011, which was the subject of an acknowledgment of debt.[12] He gave evidence of paying a debt of Mr Maund of $15,280 due to Magic Millions on 16 March 2012 to facilitate Mr Maund being able to bid at Magic Millions sales. He gave evidence of lending $200,000 to the Maunds to help them with a default under their mortgage.

[43] Mr Hartley gave evidence of the contract relating to the mares. He said he agreed to purchase the mares in the presence of Mr Maund's accountant, Mr O'Connor. He referred to the letter setting out the conditions (seemingly the 25 June letter at exhibit 2). He then referred to a term which was not in that letter (nor pleaded): that Mr Maund would buy the mares back at some future time. He said at some point he wrote the mares off because they were part of his business. He said he believed they had not been transferred into his name. He did not explain what such a transfer required.

[44] Mr Hartley then said that he recalled a day when a stallion was servicing a mare and that Mr Maund said it was one of Mr Hartley's (Dovedeen's). He recalled saying that it was not one of his mares. He said that a mare should not be serviced without the owner's agreement. He said Mr Maund caused the mare to be served without Mr Hartley's approval and sent a bill which Mr Hartley never agreed to pay. (This evidence appears to refer to the service of "For Certain" referred to in the pleadings.)

[45] Mr Hartley then reiterated that unless there is a written agreement, the owners of a stallion will not let a stallion service a mare. It was at least implied that this was a standard of conduct in the breeding industry.

[46] Mr Hartley then said that he had experience as a pedigree analyst and had worked for studs in that capacity. He said that at the time Triumphant Choice serviced the mares he did not know its pedigree. That since then, the stallion had not been successful in breeding foals. He said (quite wrongly it seems based on Dovedeen's own evidence) that Triumphant Choice turned out to be infertile because it only got one live foal.

[47] There was then ambiguous evidence about Triumphant Choice as a potential stallion in these terms:

> What factors would you have taken into account in saying whether or not Triumphant Choice was a suitable stallion?---He would not have got in the question at all at any time. I know that he bought it at the yearly – at a sale purchase by a Mr Williams, a valuer, for $2000, and the stallion has proven that he can sire winners. That's what makes a – quite a big stud charge the big fees. They give mares the right blood to a horse which was results in better performances at the track.[13]

[48] I do not understand this evidence.

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[12] Exhibit 1
[13] TS1-46.31

[49] Mr Edwards then asked Mr Hartley: "*What effect would that have on the value of the mares by having been serviced by Triumphant Choice*?"[14] It is hard accurately to summarise Mr Hartley's final answer to this question. His answer covers a full page of transcript. So far as I can tell, the gravamen of his evidence was that a stallion which produces successful foals from a mare will increase the mare's value and one which produces no foals or no successful foals, will reduce the mare's value. As Triumphant Choice produced no successful foals, being served by that horse it reduced a mare's value. Mr Hartley's complaint was that he missed the opportunity to mate the mares with other stallions which might have increased or maintained their value. As I discuss below from paragraphs [210] to [211], as evidence directed to making good the damages claim pleaded, this evidence is problematic, seemingly supporting a loss of chance claim rather than a claim for the fixed amount in the statement of claim.

[50] Mr Hartley was then asked about the "termination of the broodmare relationship" with the Maunds. He said there was a meeting in December 2013 at a motel in Toowoomba (the **Toowoomba meeting**). However, Mr Hartley gave no specific evidence of what was said or done at that meeting. He also said that he sent a letter terminating the contract relating to the brood mares and asking for their return. The letter was not tendered in evidence. This would have been a key piece of evidence. No search for it appeared to have been undertaken in preparation for the trial.[15] Mr Hartley did not recall any details of when a demand to return the mares was made: he simply referred to the letter.[16] I consider that he did not have independent recollection of a demand to return the mares.

[51] Mr Hartley then said thereafter he asked Mr Collis to pick up Dovedeen's race horses, but not the mares. He also said that there was no ownership of the mares 'registered' anywhere. (This was an enduring theme in the Dovedeen's case but it was never pleaded, is inconsistent with the statement of claim's allegation that Dovedeen was the owner of the mares, and its relevance was otherwise never explained).

[52] Mr Hartley then said that the mares were sold by order of a Magistrate and that they were of no value in his opinion at that time.

[53] In response to questions I asked, Mr Hartley said that although he was upset about the mares not being returned, he could not recall if he made any further demands for the mares after the alleged letter. He said there were never any discussions about the mares being covered after that.

[54] Mr Hartley's cross examination was conducted by Mr Maund. Mr Maund tended to make a long statement of events as he saw them. I frequently attempted to put Mr Maund's statements into specific questions which Mr Hartley could answer. I could see no other way that would permit a fair cross examination for both parties.

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[14] TS 1-47.1
[15] TS1-24.43; TS1-48.34; TS1-61.45
[16] TS1-49.5 and see TS1

[55] Mr Hartley was asked why he did not arrange to collect the mares at the time he arranged for Mr Collis to collect the race horses. Mr Hartley said in effect that it was not practical to take that many horses at once on the float that was used.

[56] Mr Hartley conceded that he claimed the payment of $150,000 as a tax deduction in accordance with the breeding plan given to him by Mr O'Connor.

[57] Mr Maund suggested to Mr Hartley that the reason the breeding papers (discussed in other evidence) were in Mrs Maund's name was that Dovedeen did not have the 'necessary authorisation'. Mr Hartley disagreed saying that the authorisation could be obtained when the 'transfer' was made. (Again, the nature of the authorisation and transfer were never clearly explained in evidence). Mr Hartley also rejected the suggestion that he asked Mrs Maund to keep particulars of the breeding issue (foals) in her name. He said he never spoke to Mrs Maund about racing matters.

[58] Mr Hartley then gave some vague evidence about the possibility of the mares being bought back from Dovedeen at a later time and the concern of the accountant not to hear about that.[17] This seems to hint again at the so-called collateral contract point raised in opening by Mr Edwards but not pleaded.

[59] Mr Maund then suggested that Mr Hartley wanted the mares in foal because why else would he agreed to pay $4000 per month for their care. Mr Hartley said the amount was paid for Mr Maund to (just) feed them and look after them.

[60] Mr Maund then moved to the servicing of For Certain:

(a) Mr Hartley rejected the suggestion that he agreed by telephone with Mr Maund on attendance on 8.00am 10 October 2012 to watch For Certain be served;

(b) Mr Hartley rejected the suggestion that he had a telephone conversation with a bloodstock expert Mr Williams about the pedigree of Triumphant Choice at around that time;

(c) He said he did not recall ever discussing Triumphant Choice as a breeding stallion with anyone. He said he did not know the name of the horse at the time.

[61] Mr Maund then turned to the pedigree and prospects of Triumphant Choice.

(a) He suggested that Triumphant Choice was sold as a yearling for $1m. Mr Hartley said he did not know that; and

(b) When asked if a horse sold at that value would be a good horse to breed from Mr Hartley said that that was hypothetical:

> Because?---No. I – nobody knows that. That's the – the joy of breeding horses is to breed them and get a [indistinct] race horse.
>
> All right?---Nobody knows that fact, before you breed the horse and get the horse to the racecourse.

[17] TS1-55.35 to .41

[62] Mr Maund then suggested that Mr Hartley never responded to any of the tax invoices (sent after February 2013) complaining that no money was owed. Mr Hartley said that he had already sent the alleged letter and that he had told Mr Maund no further fees would be paid. He rejected the suggestion that he never asked for the mares back. Mr Hartley agreed to the suggestion that if he wanted the mares back he could have just sent the horse float back to get them at any time. However, he maintained that he asked for the mares back.

[63] Mr Hartley denied that he knew the mares were pregnant to Triumphant Choice when he demanded them back and again said (wrongly) that the horse only ever got one foal.

[64] Mr Maund then returned to the pedigree and prospect of Triumphant Choice. He put to Mr Hartley that Triumphant Choice's sire was a successful stallion and his half-brother was a successful stallion and he looked "a well-bred, good race horse". Mr Hartley said that those characteristics might or might not have made Triumphant Choice a good stallion, again referring to the 'breeding lottery' in [61](b) above.

[65] Mr Hartley was then referred to Triumphant Choice's results when racing.[18] He said those results did not support the prospect of Triumphant Choice being a good stallion. The reason he gave was that the breeders who sold the horse, sold it for $2000. He said, "*I just ask you, what could you think about a horse of that quality, that breeding, selling for $2000? If he was any good, they – Harvey and company would have stood the horse*."[19]

[66] Mr Hartley appeared to accept that if a mare is left out of foal for some years, that would reduce their value to some degree. The problem in his view was not that the mare could not produce further foals, but rather speculation in the market as to why it had not done so. Mr Hartley agreed that a rule had been introduced to permit deductibility of the value of mares over 12 years old, but did not know why.

[67] Mr Hartley again emphatically asserted that only one of the mares had a foal to Triumphant Choice. He also emphatically asserted that there is no science to breeding, it is all guesswork.

[68] Mr Hartley said he had met Mr O'Connor at Mr Maund's house to do the "breeding agreement".

[69] In re-examination, Mr Hartley said that when he asked for the mares back he expected they would have been served by Triumphant Choice because Mr Maund had bought the stallion for that purpose.

[70] While I had no reason to doubt that Mr Hartley genuinely held the opinions he expressed on racing and breeding issues, on issues of fact which were in dispute in this proceeding, he was not a reliable historian. His recollection of detail was poor and his recollection appeared to be reconstruction. An example is his confident assertion that Triumphant Choice only ever sired one foal. Dovedeen's own evidence shows that to be completely wrong. Further, the evident falling out

[18] Exhibit 5
[19] TS 1-66.26

between the Hartleys and the Maunds in late 2012/early 2013 involved both race horses being trained and the mares. I am suspicious that details of the issues relating to the race horses (such as the demand for the return of the race horses) has become confused by Mr Hartley with details relating to the mares.

[71] Another problem with the reliability of Mr Hartley's recollection is his assertion that he wanted to recover the mares. This evidence is impossible to reconcile with his failure to take any step to do so. The contrast with his firm action in relation to the race horses is stark.

[72] Finally, as explained in detail in paragraphs [172] - [175] below, he appeared to hold the view that the mares would be sold back to Mr Maund. The consequence seems to have been that he had no need to take any interest in the way they and their offspring were managed. I consider he took little notice of those matters and his recollection is therefore poor on those issues now.

Mrs Hartley's evidence

[73] Mrs Hartley gave evidence about the Toowoomba meeting. She could not recall when that had occurred by date but that it was prompted by the poor performance of the horses which the Maunds were training. She said the discussion was about how the Hartleys and Maunds were going to continue their association. Her account of the Toowoomba meeting was as follows:

> Can you remember what you or Mr Hartley may have said to Mr and Ms Maund?---Well, I know I said that I was unhappy with the way things were progressing and that we would have to do something about it. And, you know, we would have to think about shifting our animals because we couldn't continue just feeding horses and no return.
>
> What response did you get to that suggestion?---Mr Maund wasn't very happy about that, and his comment was that we have to have a think about that because he wasn't going to allow animals that he had been working with to go to another trainer.

[74] Mrs Hartley confirmed that the Magic Millions debt had been paid by Dovedeen for Mr Maund.[20]

[75] Mr Edwards then tried to tender a spreadsheet (part of which was eventually admitted as exhibit 8) through Mrs Hartley, but it quickly became evident that she had not prepared the document and could not give evidence making it admissible.[21]

[76] It is to be noted that although Mrs Hartley gave evidence that she was involved in drafting and typing correspondence from Dovedeen, she was not asked about the letter said to have been sent demanding the return of the mares.

[77] I had no reason to doubt Mrs Hartley's evidence, so far as it went.

Ms Connors' evidence

[78] Ms Connors was called for the sole purpose of trying to prove the spreadsheet at exhibit 8. With the exception of details of the purchase of the mares and the

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[20] Exhibit 7
[21] TS 2-20.45 to 2-22.5 and following

performance of the race horses being trained by Mr Maund, the content of the document was inadmissible.

Mr Zielke's evidence

[79] Mr Zielke is an experienced trainer who trains horses for Dovedeen. He was called to explain extracts from the Australian Stud Book. It emerged however that the records relied upon had not been obtained in advance of Mr Zielke's evidence by Mr Edwards and put in convenient form for tender (much less a convenient form for a trial done by audio visual link), nor provided to the Maunds. After an adjournment, extracts from the Stud Book were admitted into evidence as exhibit 9, initially on a limited basis.[22] Ultimately it appeared that the only matter asserted in the extracts which Mr Maund disputed was whether the identification of a contact for a horse, was evidence of the owner of the horse. Mr Maund contended that it did not necessarily indicate ownership. Mr Zielke gave evidence which agreed with that.[23]

[80] Exhibit 9 contained information about each of the mares sold under the contract along with information about Triumphant Choice. For each mare, the extracts showed:

(a) The contact details;

(b) Pedigree;

(c) Results from last three starts; and

(d) Australian Breeding History, being when the mare was served, by what stallion and the result.

[81] For Triumphant Choice, the extracts contained:

(a) Stallion Fertility Statistics in summary;

(b) Sire Production for each year from 2012/2013[24] to 2015/2016

[82] Mr Zielke gave evidence as to the meaning of the entries in the extracts. Apart from the matter in paragraph [79], his evidence about the extracts was not challenged and consistent with the documents on their face. It is unnecessary to review the whole of his evidence. It is sufficient to note that:

(a) The Stud Book is maintained from returns put in by breeders;

(b) Triumphant Choice had 23 live foals including 6 live foals to the Dovedeen mares, two of which (Stellaron and Black Ink) were raced;

(c) One of the mares, Sha Alma, had been sold, as could be seen from the reference to Hazelwood Stud rather than Mrs Maund as the contact (despite the reference in the reply and answer to 'She' Alma, it is evident from the contract and the birth year that this is the mare sold as part of the contract in 2012);

[22] TS 2-51.38 ff and 2-53.27 ff
[23] T2-45.41
[24] Coverings/Produce

(d) Black Ink was not a success as a race horse; and

(e) Triumphant Choice had a relatively low rate of success at getting mares in foal (30% compared to about 60% as the minimum rate usually accepted).

[83] Mr Zielke gave evidence that a breeders licence can be easily obtained from the Stud Book administration.

[84] Mr Maund cross examined Mr Zielke about whether reference to a contact meant that person was the owner. It might be that they were at cross purposes. As I read Mr Zielke's evidence, the Stud Book compliers needed to know who the owner was, but that was not necessarily the contact shown on the record for a horse. That seems a common sense approach.

Mr Collis' evidence

[85] Mr Collis manages a motel in Moranbah owned by Dovedeen. He has known Mr and Mrs Hartley for 35 years. He said he had been instructed by the Hartleys to go to the Maund's property and collect six race horses.

[86] In evidence, Mr Collis referred to a two page facsimile which he said contained his instructions to that effect. The two pages were supposed to be the same as document 15 (and document 14 I assume) from MFI-B. Mr Edwards sought to tender those documents. However, no step had been seemingly taken to confirm that documents 14 and 15 from MFI-B were the same as the documents to which Mr Collis referred in evidence.

[87] When Mr Collis showed me the version of the document he had, the printed text was the same as document 15 but it was signed and had annotations at the bottom which could not be easily read on the audio-visual link. He did not have document 14 at all. Mr Edwards then abandoned his tender of document 15 from MFI-B, and did not tender any document showing Mr Edwards' instructions, despite him plainly having one.[25] The printed text of document 15 was not in dispute. However, it was not tendered by Mr Edwards, and it was not tendered by Mr Maund. The result is that it was not before me. Neither of the Hartleys gave any evidence about the document. However, Mr Collis did give some secondary evidence of its contents: he said that the letter authorised him to collect the horses.

[88] Mr Collis went to obtain assistance from the Stock Squad before collecting the horses because he feared resistance from Mr Maund. The narrative from this point was unclear. Mr Collis seemed to say that he rang Mr Maund from the stock squad office at Drayton and that Mr Maund gave the all clear for him to pick up the horses. He then said he had a conversation with Mr Maund at his home in Toowoomba, seemingly in the company of the stock squad officer. At some stage, the stock squad officer said he would send two officers to the property.

[89] Mr Collis said he then went to the property where the horses were located with his float and found the two officers there waiting. He said that the stable hand confirmed he had been told to release the horses and that the police officers then left.

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[25] TS2-60.2

[90] He said as he was leading the last horse out, Mr Maund showed up very angry and locked the gate preventing him from loading the last horse. Mr Collis said he left that horse (Who Will) behind, climbed the gate and left with five out of the six horses he went to collect.

[91] Mr Maund's cross examination was emotive. I think he put these propositions:

(a) That Mr Collis never visited him at his house. Mr Collis said he did;

(b) That Mr Collis took more than five horses, it could have been up to 10 to 12. Mr Collis said it could have been more than five.

[92] Thereafter, despite my previous warnings to Mr Hartley not to use cross examination to insult, he did so, and in a manner which in my judgment was deliberate. I stopped Mr Collis' cross examination at that point.[26]

[93] It is difficult to know what to make of Mr Collis' evidence. His cross examination did not help me to assess it. Ultimately, I do not think it matters much. The key point is that he was sent to collect the race horses not the mares. However, I suspect his evidence about talking with Mr Maund beforehand is mistaken in some respect. It seems improbable Mr Maund would agree twice to the collection of the race horses then show up angry later, though that might happen. It also seems improbable that Mr Collis would speak to Mr Maund on the phone and again at his home, though that also might happen. Given that these events occurred 7 years ago, both Mr Maund and Mr Collis might be mistaken on the details. As I have said, it does not matter much.

The defendants' case

[94] The defendants each gave evidence, along with Mr Williams, a person with experience in bloodstock values and pedigrees, and Mr O'Connor, the accountant who advised on taxation aspects of the sale of the mares and put forward the terms of the 23 June letter.

Mr Maund

[95] Mr Maund sought to tender as his evidence in chief, a statement which he had made some three years ago. It is part of MFI–A. Mr Edwards took a number of successful objections and the balance was adopted by Mr Maund. Its formal tender was overlooked. I later made it exhibit 12.

[96] Mr Maund said in his statement that he and his wife were licensed trainers and owned a farm called New Oasis where they trained horses in partnership. Mrs Maund also had a registered breeder's number which meant she could enter foaling dates, the details of each foal and all 'mare returns' (i.e. what mare was serviced by, or paddocked with, which stallion) into the Stud Book.[27]

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[26] TS 2-65.22 to 66.4

[27] Exhibit 12, paragraph 2.

[97] Mr Maund said that he had trained for the Hartleys for some time up to 2012. He explained the background to the contract for the mares as follows:[28]

> In around 2012, Evan had a $300,000.00 tax bill. He asked me to introduce him to Martin O'Connor who was my accountant and the accountant for a number of my clients and well known in the racing industry. He was a noted expert on racing and tax laws.
>
> Evan wanted to look into a breeding arrangement to reduce his tax by $150,000.00.
>
> Evan had two (2) meetings with Martin O'Connor at the Magic Millions sales yard and in June 2012, O'Connor and I went to Moranbah to meet with Evan at his urgent request to put the breeding arrangement in place.
>
> Evan asked me to put a package together to buy broodmares twelve (12) years or older as broodmares in that age bracket would entitle him to a one hundred percent (100%) tax reduction.
>
> The broodmares selected for purchase by the Hartleys were owned by members of Karen and my family as hobby breeders.

[98] Mr Maund said that five out of the six mares purchased had already been serviced and were in foal. They foaled in October/November that year (2012) and were then serviced again by a different stallion, "Triumphant Choice" which stallion was also used to service the empty mare, "For Certain".[29]

[99] Mr Maund's statement explains financial dealings between the Maunds and the Hartleys which appear to be quite contentious. He said that Mr Edwards was involved in those dealings. They do not appear to be relevant to this case.

[100] Mr Maund said that after the sale, the Maunds cared for the mares and their foals, while continuing to train Dovedeen's race horses. He said this happened until February 2013, when he got a call out of the blue that the race horses were being recovered. At that time Dovedeen stopped paying the monthly fee for the mares and left them with the Maunds.

[101] The Maunds continued to care for the mares and invoice for that care until Dovedeen commenced these proceedings on 19 April 2013. He said that after a failed mediation in August 2015, the mares were sold for $2100 with Mr Hartley's consent. He said that was their value because they had not been continually serviced after the dispute with the Hartleys. Their remaining foals were sold to cover expenses.

[102] Mr Maund gave secondary evidence of the letter instructing Mr Collis to collect the horses. He says this:[30]

> The letter dated 2 February 2013 from Dovedeen Pty Ltd to me authorises the collection of the race horses owned by the Hartleys from "New Oasis" but specifically excludes the broodmares and foals.

[103] Mr Maund also refers to other correspondence but says nothing about it which is of assistance.

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[28] Exhibit 12, paragraphs 8 to 12.
[29] Exhibit 12, paragraph 14.
[30] Exhibit 12, paragraph 47.

[104] He deals with the question of loss of value of the mares as follows:[31]

> As to the allegations that I lowered the value of the broodmares through an unauthorised service by a non-descript stallion, I say that the broodmares were serviced by the stallion "Triumphant Choice" recommended by Evan and with his knowledge and consent.
>
> Evan was present at "New Oasis" farm on the morning of 10 October 2012 and witnessed the only empty mare at that stage "For Certain" being hand served. He said he was very impressed with everything including "Triumphant Choice" and the rubber lined serving area. The service and handling was personally undertaken by myself. The other broodmares were paddocked with "Triumphant Choice" after they had foaled, as agreed with Evan. There had never been any communication from the Hartleys to the effect that we were not to breed the mares for the 2012/13 season.
>
> "Triumphant Choice" was one of the top-priced yearlings at the Magic Millions. He was purchased by a well known syndicate called "Dynamic Syndicates" but because the syndicate had connections to an underworld figure, the horse was barred from racing and subsequently purchased by my father-in-law. It was however extremely well bred and not barred because of a lack of ability or pedigree.

[105] Finally, he adopted and stated the correctness of the invoices rendered to Dovedeen. I then identified that Mr Maund had not tendered any of those invoices. After some discussion with me as to how to go about that (and how to prepare to address me at the end of the evidence) the matter was adjourned overnight so that the Maunds could attempt to put the invoices before me. The next day the Maunds had not put together a bundle of the invoices and their audio-visual link was not working. Mr Edwards cross examined Mr Maund over the telephone.

[106] In cross examination, Mr Maund accepted that the Stud Book had a long history of being a reliable source of information for breeders. He did not accept that entries in the Stud Book have to be made on statutory declaration. He did not suggest that Mr Zielke had not accurately downloaded information from the Stud Book.

[107] Mr Maund was then asked to comment on information in the extracts from the Stud Book at Exhibit 9. Mr Maund expressed no reason to doubt most of the information shown in the extracts. He accepted that the information about the mares would have been in returns provided by Mrs Maund. He thought there might have been foals for some mares for which returns were not sent.

[108] Mr Maund then accepted that it was not uncommon to move horses between trainers.

[109] Mr Maund rejected the suggestion that the payment of $150,000 was to assist with buying their training property. Mr Edwards then suggested to Mr Maund that the deal relating to the mares was on the basis that Mr Maund would buy them back at valuation, so he could breed his own horses. Mr Maund rejected that suggestion.

[110] Mr Maund accepted that there was no specific understanding or agreement as to what was to be done with the foals from the mares.

[111] Mr Edwards then asked about the Toowoomba meeting. Mr Maund rejected the suggestion that the Hartleys had expressed concern about the performance of their race horses. Mr Maund recalled the horses were coming up to race again after a

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[31] Exhibit 12, paragraphs 53 to 55.

spell. He rejected the suggestion they said they would be moving their horses to another trainer and that Mr Maund said that he would not co-operate in that regard. He added that Mrs Hartley would never speak up and had no input into things. He said Mr Hartley also did not express concerns about the performance of the horses.

[112] Mr Maund then said that he told Mr Hartley specifically about using Triumphant Choice to cover the mares. He said Mr Hartley agreed to the service fee. He accepted there was no written agreement to either matter. He rejected the suggestion that Mr Hartley did not know on the day For Certain was served, that the horse was one of his. He reiterated that it was necessary to keep older mares in foal because otherwise it can affect their fertility.

[113] Mr Edwards then put a series of propositions to Mr Maund relating to the value of mares and sires. Mr Maund accepted that the success of a mare is affected by having foals which have track success. He accepted that the value of a stallion is increased by its foals having track success. He agreed that a mare has a better chance of having foals that are successful on the track if she is serviced by a stallion who has sired offspring that have also been successful on the track and vice versa.

[114] Mr Edwards then suggested that Triumphant Choice had been a very unsuccessful stallion. Importantly, Mr Maund clarified that that was not true when he first came off the track in 2012/2013, but accepted that he would be rated unsuccessful now.

[115] Mr Edwards then suggested to Mr Hartley that he had failed in entering a Dovedeen horse in an important race in February 2013. He rejected that suggestion. Strangely, no evidence was led by the plaintiff to that effect. So there is no evidence of it at all.

[116] Mr Maund rejected the suggestion that the Hartleys wrote to the Maunds subsequent to taking back the race horses and demanded the return of the mares.

[117] Mr Maund rejected Mr Edwards' suggestion that payments continued from the Hartleys for 4 months after the Toowoomba meeting. That appears to be correct based on the evidence tendered.

[118] Mr Maund was then challenged on his credit in relation to certain racing disciplinary proceedings in Queensland. Mr Maund accepted that he was suspended for 12 months for one of the breaches. Mr Maund has also been dealt with by the police in relation to racing offences. He was convicted but no conviction was recorded.

[119] There was then cross examination directed at establishing that "transfer documents" were not signed for the mares. Ultimately, it seemed Mr Maund agreed that unspecified breeding papers remained with the Maunds but that no formal process attended transfer of title.[32]

[120] Mr Edwards then put Mr Collis' version of collection of the race horses. Mr Maund rejected that version. At the end of those orthodox questions, Mr Edwards put this proposition in relation to something allegedly said by Mr Collis: "And [Mr Collis' evidence] that he did say [sic *so*] is just false".[33] I disallowed the question.

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[32] TS3-39.25 ff
[33] TS 2-41.16

[121] In *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2006] 2 Qd R 145, Justice Chesterman considered the propriety of questioning a witness on a statement of another witness or on a document not of the witness. His Honour concluded that such cross examination was impermissible, extending that conclusion to the less direct technique of simply putting a witness statement (or other document not of the witness) in the hands of the witness and asking him or her if he or she adhered to his or her testimony. That latter conclusion overruled a venerable (if perhaps doubtful) line of authority of some antiquity. In reaching that conclusion, his Honour referred to a line of authority dealing with the kind of proposition put by Mr Edwards. His Honour observed:

> [11] There is a second line of authority which is also relevant to the topic. The Court of Appeal in *R. v. Foley* [2000] 1 Qd.R. 290 at 297 said:
>
> > "The resort by counsel to questions which invite a witness to answer by reference to comment on the truthfulness of other witnesses is to be deprecated. On a level of professional practice, it is regarded as 'not a proper question'. The error, however, goes beyond one of professional practice; such questions are actually inadmissible. The literal object of such a question is to obtain an opinion whether someone else is a liar, and that of course is not an issue in the case or a matter for any other witness to express an opinion, it is a matter for the judge or jury. It is also unfair, because it forces the honest witness into a recrimination and seeks to rely upon the natural reluctance of a person to defame another. It is also a form of bullying, using unfair means to persuade a person to retract his or her evidence. Such questions are inadmissible and we agree … that they are improper."
>
> [12] *North Australian Territory Co. v. Goldsborough, Mort & Co.* [1893] 2 Ch. 381 was the authority cited for the proposition that such questions are inadmissible. In that case Lord Esher, with whom Lindley and Bowen L.JJ. agreed, held that a witness may not be shown the depositions of other witnesses and asked to give evidence contradicting them. It would appear that the prohibition would extend to showing the witness those depositions and asking him, by reference to them, to change his own testimony. Lord Esher said (at 385):
>
> > "But in the present case the witness when examined … was also asked questions as to what other people had said in the previous examination …; that is, he was told what they had said, and was asked whether he contradicted their evidence. Such questions ought never to have been put …"
>
> [13] The questions which were disapproved in *North Australian Territory Co*. were those which invited a witness to contradict, or comment adversely upon, the evidence of other witnesses. *Foley* also condemned this mode of cross-examination, but went further. The prohibition was extended to questions which invited the witness to criticise or change his own testimony by reference to what others had said. I would understand the reason for the extension to be the same as that which prevents a witness being invited to criticise other testimony. If the cross-examinee is confronted with the opposing testimony of other witnesses and asked to admit that he is wrong he can only refuse by condemning the opposing testimony and that course is not permitted. In any event to show a witness another's testimony and demand that he retract his own is a form of hectoring and is objectionable on that ground.
>
> [14] The judgment in *R. v. Leak* [1969] S.A.S.R. 172 at 173–174 supports what was said in *Foley*, though with one inconsistency. The court said:
>
> > "… [A] witness ought not to be asked whether another witness is telling lies or has invented something. Any witness, of course, can be asked if what another witness has said is true. … But if he says that what the other witness has said is not true, he should not be asked to enter into the witness's mind and say whether he thinks the

> inaccuracy is due to invention, malice, mistake or any other cause … No attempt should be made by the cross-examiner to drive any witness … into saying that any other witness … is a liar."
>
> This passage was approved by McHugh J. in his dissenting judgment in *Palmer v. The Queen* (1998) 193 C.L.R. 1 at 25. That part of the judgment which approves questions which ask whether what another witness has said is true does not conform to the principle expressed in *Foley* which deprecates the use of "questions which invite a witness to answer by reference to comment on the truthfulness of other witnesses". *Foley*, of course, is binding on trial judges in this State, but I would respectfully think that it is correct. No witness of fact should be asked to comment upon the evidence of any other witness of fact. That is the province of the court when giving judgment.

[122] The question in this case might be thought to fall within the limited range for such questions to be permissible identified in *R v Leak*. However, Justice Chesterman considered such questions also to be excluded by *Foley*. Further, the tenor of the question here went beyond asking in a neutral way, whether he disagreed with the version given by Mr Collis.[34] Its tenor ("just false") tended to invite comment on Mr Collis' honesty. In my opinion, it was an impermissible question.[35]

[123] Finally, Mr Maund appeared to accept that Dovedeen paid $10,000 at about the time the race horses were collected. Mr Maund also said that that was insufficient to pay the amounts owing for the mares and for other training costs, and that he applied the $10,000 to service fees for Triumphant Choice rather than training fees for the race horses.

[124] In re-examination, Mr Maund said that it was misleading to rely on the Stud Book entries for assessing the value of the mares, where their whole racing history was not revealed.

Mrs Maund

[125] Mrs Maund's evidence was led by Mr Maund. Mrs Maund said that she did the returns for the Stud Book for the mares using her breeder's number and that this was done by other breeders on behalf of owners and was common practice. Mrs Maund said she did not know of discussions about this with the Hartleys, nor was she involved in discussions about the racing activities generally. Mrs Maund said that her dealings with the Hartleys socially were frequent and friendly at all times.

Mr Williams

[126] Mr Williams was called to give both expert evidence and direct evidence. A witness statement was provided for him to the Court and Dovedeen on the morning of the trial.[36] Mr Williams' statement made these statements of opinion:

(a) Triumphant Choice had an outstanding pedigree for a sire (described in the statement), with a useful race record and the physical characteristics and temperament of his successful sire;

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[34] Which seemingly is permissible in Victoria: *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478 at [57]

[35] As was, arguably, Mr Edwards' questioning of Mr Williams: see TS 3-62.31 to .35

[36] Exhibit 10

(b) That good pedigree does not guarantee a successful sire: "purchase of a stallion is buying a ticket in a lottery";

(c) The resale price as a stallion might have been affected by concerns about the bona fides of the owners; and

(d) Mr Williams bid for Triumphant Choice at Magic Millions in 2012 and considered then it was a good choice for a small breeder. He said although Triumphant Choice turned out to fail as a sire, that could not be known at the time.

[127] He also gave evidence about the facts of the case in his statement. He said:[37]

> There was an occasion before and around that time where I was in contact with Mr Evan Hartley who at that point was a race horse owner who had horses with Mr Ron Maund, Mr Hartley is an aficionado of thoroughbred pedigrees – time has past (sic) and exact conversations some 8 years ago can be vague to say the least, the most compelling thing I can say is that the mares that Mr Hartley purchased from Mr Maund and family were at an age were (sic) their purchase was tax affective (sic), I recall occasion when and where I cannot state that Mr Hartley did comment that they were not necessarily worth the purchase price however did suit the purpose of minimising his tax and assisting Mr Maund (Bloodstock valuations are subjective) , there was also positive discussion on the pedigree of Triumphant Choice resulting from Mr Hartley's knowledge of pedigrees and my understanding from the conversations was that he (Mr Hartley) would leave the mares with Mr Maund and leave it up to him.

[128] Mr Edwards initially objected to the expert evidence component of the statement for failure to comply with Chapter 11 Part 5 UCPR. In argument:

(a) I noted that Mr Edwards had had the statement since the morning of trial and made no effort to address the issues raised in it by responsive evidence, beyond having Mr Hartley give evidence that he would never had agreed to Triumphant Choice being used to serve his mares because it was sold by clever people who would not sell a good stallion.[38]; and

(b) Mr Edwards said Mr Zielke was to be called to give such evidence but that I had prevented that by refusing leave to lead expert evidence from him.

[129] The second submission was wrong. That was not what he said Mr Zielke would be dealing with in his application for leave (see footnote 6 above). Mr Edwards later withdrew his objection. (I also note that Mr Maund put the principal considerations in Mr Williams' statement to Mr Hartley: see paragraphs [61], [64] and [65] above).

[130] Mr Williams gave oral evidence of his expertise in pedigree analysis and bloodstock valuation. Mr Edwards accepted his expertise in that area. Mr Williams adopted the correctness of his opinions and evidence in Exhibit 10.

[131] In cross examination, Mr Williams said again that a stallion with a good pedigree might turn out to be unsuccessful and vice versa. He conceded that Triumphant Choice had not been a success but that that was from limited numbers of foals. It

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[37] Exhibit 10
[38] TS3-55.41

seemed to me that Mr Williams did not concede that the stallion should necessarily be written off as a prospect.

[132] Mr Williams then confirmed again that there were times he discussed Triumphant Choice as a stallion with Mr Hartley. One might think his further evidence that he understood Mr Hartley knew Triumphant Choice would be put to Mr Hartley's mares involved some inference and speculation. But if so, it is an inference which might in any event be properly drawn from the evidence if one accepted that Mr Hartley had discussed the pedigree of Triumphant Choice with Mr Williams in the context where the mares were being left with Mr Maund to care for as brood mares and Mr Maund's father in law was the buyer of the stallion.

[133] I had no cause to doubt that Mr Williams' evidence was accurate and reliable.

Mr O'Connor

[134] Mr O'Connor gave evidence from Sydney via telephone. Mr O'Connor gave evidence that he had been a chartered accountant for 40 years with experience in racing and himself had had success as breeder.

[135] He helpfully explained the genesis of the contract as follows:

> RESPONDENT R. MAUND: Do you recall breeding [sic *meeting*] with Evan or [indistinct] Joan Hartley maybe at the Magic Millions sale yards?---I do.
>
> And what were they inquiring about?---They were inquiring about their tax problems that they had, and you have alerted me to it before and asked me if there was anything I could do to solve their tax problem. And I came up with this idea – suggestion – that I verified in my letter dated the 25th of June 2012 whereby a number of your horses and your family's horses would be sold to Evan and Joan and his company for – under certain conditions.
>
> Have you said that would [indistinct] they were – the Hartleys were going to be commercial [indistinct] sales – sellers for the racing stock?---Both because they were racing horses. And they – they would sell yearlings and also race horses later on.
>
> HIS HONOUR: Did Mr Hartley ever say that to you, Mr O'Connor, or was that something - - -?---Yes.
>
> - - - you just understood from Mr Maund?---No, and, in fact, I told them that to be a commercial enterprise for tax purposes, they had to sell yearlings. They couldn't just take over the mares and keep the progeny and race them because the commissioner of taxation doesn't believe that the racing of horses is any more than a hobby. He won't accept it as a business [indistinct *except*] in extraordinary circumstances.

[136] Mr O'Connor then gave evidence that at least two of the mares sold had had some success and that successful foals usually had successful mothers but (consistent with all other witnesses) not always. He then said that the scheme had to be put in place urgently before 30 June 2012, and that the payment of $4000 + GST per month to care for the mares was necessary for the deduction to be secured. Mr O'Connor agreed he had drafted the whole letter of 23 June 2012. There was no cross examination.

Mr Maund and the tax invoices

[137] The Maunds had failed to get their tax invoice bundle into an intelligible form before Mr Maund's evidence was completed. By the end of Mr O'Connor's evidence they had provided the bundle which is exhibit 11. I permitted Mr Maund to go back into the witness box to seek to prove them as business records. Mr Edwards opposed this course because of late tender. I overruled that objection. The Maunds' case had not closed, so I do not see why the tender was "late", except insofar as Mr Maund had to be recalled to prove them.

[138] The real problem seemed to be that Mr Edwards said he had not seen the tax invoices before. If that was correct, it was presumably the result of not calling for disclosure in the proceedings and/or not seeking relevant documents from his own client. While, strictly speaking, r. 225(1)(a) UCPR required leave for the documents to be tendered, neither party had conducted the trial on the basis of that rule and, given that it seemed uncontentious that the tax invoices had been sent, there was no good reason to refuse leave. In any event, I adjourned so Mr Edwards could have time to consider the documents and take instructions.

[139] After the adjournment, Mr Edwards did not press any objection to the tender of the documents, nor did he want to cross-examine or recall Mr Hartley. When Mr Edwards began to address, it became clear he was referring to an earlier incomplete set of tax invoices sent by the Maunds at 1:08pm that day. He had overlooked somehow, even when taking instructions, the document in the form of Exhibit 11 sent to him by my associate at 2:20pm. He was given further time to consider the actual exhibit, but still did not seek to re-open.[39]

Addresses

[140] Mr Edwards began by emphasising that nothing in the contract authorised claims for payment in relation to training or caring for the foals from the mares.

[141] He said I should find that the contract for care of the mares was terminated when their return was demanded and that demand not complied with.

[142] He also said that the contract could have been terminated by:

(a) The termination of the contract at the Toowoomba meeting, (as to which he rightly conceded there was no evidence of any discussion of the contract relating to the mares at that meeting);

(b) The collection of the race horses indicating that the relationship between the parties was at an end (the failure to collect the mares being just a practical issue at the time, though there was no evidence of that being communicated to the Maunds); and

(c) The letter sent in approximately June 2013 demanding the return of the mares which was not complied with.

[143] As to this letter, given it was not produced at trial and its receipt was not accepted by Mr Maund (nor was it suggested to Mrs Maund that it had ever been received), I

[39] TS3-76 to 77.24

asked for any objective indicator that the letter had been sent demanding the return of the mares (ie other than Mr Hartley's assertion). Mr Edwards initially suggested that the cessation of payments in June 2013 was consistent with such a demand. The problem was that the evidence was that payments ceased in March 2013. I asked Mr Edwards why I should infer that the letter was sent given that Mr Hartley took firm steps to recover the race horses and took no steps to recover the mares. Mr Edwards could not point to evidence which addressed that consideration.

[144] Mr Edwards further submitted I should find:

(a) There was no discussion of using Triumphant Choice as a stallion;

(b) At the Toowoomba meeting, the Hartleys wanted to sack the Maunds as trainers and consistent with that sent Mr Collis to get the race horses with those events happening as Mr Collis said;

(c) That Dovedeen paid $10,000 to cover training fees on recovery of the horses;

(d) That Dovedeen subsequently demanded return of the mares;

(e) That the whole of the contract is contained in the 23 June 2012 letter; and

(f) That the mares were devalued by being put to Triumphant Choice.

[145] He also urged me to accept Mr Hartley's evidence that the stallion was not a good choice to cover the mares, but that in any event, no consent was given by Mr Hartley and that the ultimate consequence was the mares produced unsuccessful foals reducing their value. (This appears to depend on events after commencement of the proceedings in April 2013, a matter never adverted to in the trial).

[146] Mr Edwards urged me to accept Mr Collis over Mr Maund, though he could point to nothing but Mr Collis' demeanour as making his evidence more probable than Mr Maunds. He emphasised Mr Maund's conviction and racing misconduct as making him an unreliable witness.

[147] Mr Maund's address need not be considered.

Findings of fact

Before June 2012

[148] As at June 2012, the Hartleys and the Maunds had been friends and associates in the racing and breeding industry for many years. Each of Mr Hartley and Mr Maund had worked as horse racing trainers and had to a greater or lesser degree been involved in breeding.

[149] It is evident by around 2012, the Hartleys had had more financial success than the Maunds, though whether that was from success in breeding and racing alone or from other business or a combination of both was unclear. The Maunds were at that time training race horses for the Hartleys and appeared to have done so for some time.

[150] The relationship between the two couples appears to have been strong. Each witness spoke of a good relationship up to the events which led to this litigation. By about mid-2012, however, the relationship had become marked by some financial support by way of loans and similar assistance given by the Hartleys (whether through Dovedeen or otherwise) to the Maunds. The precise nature of that support and the circumstances in which it led to conflict is irrelevant to this litigation so far as I can tell.

The contract: June 2012

[151] The Hartleys financial success through Dovedeen apparently led to the company facing a large potential income tax bill in the 2012 year. I accept Mr O'Connor's evidence as to how this problem led to the 25 June 2012 letter. I find that at some time prior to 25 June 2012, Mr Maund had mentioned the Hartleys' tax problem to Mr O'Connor. He did so because Mr O'Connor was believed by Mr Maund to have experience in taxation issues affecting racing businesses. I accept that that belief was well founded. Sometime later at the Magic Millions sale yard, Mr Hartley raised the tax exposure with Mr O'Connor directly. Mr O'Connor gave advice, confirmed in his 25 June 2012 letter, as to how Dovedeen could obtain a tax deduction by purchasing older mares for breeding purposes.

[152] He explained to Mr Hartley that that arrangement had to meet certain conditions to be effective, including that for the breeding to be a commercial enterprise for tax purposes, Dovedeen had not only to purchase the mares but to sell the progeny. It was not sufficient if they kept them for racing. While I am uncertain that that was known to the Maunds or otherwise relevant to construction of the contract, it does cast light on Mr Hartley's state of mind.

[153] The arrangement is described in the 25 June 2012 letter which is in the following terms:

> **25th June, 2012**
>
> **Mr. & Mrs. E. Hartley**
>
> **(Address)**
>
> Dear Evan and Joan,
>
> I refer to our meeting at your place on Friday 24th June 2012, whereby the following resolutions were agreed:-
>
> *Your Company Dovedeen Pty.Ltd., would purchase the following mares from Ron and Karen Maund, acting as agent for various members of his family:-
>
> | | | | |
> |---|---|---|---|
> | Jingle Belle (2001) | $25,000 | A/c | L.A. Williams |
> | Monaco Miss (1999) | $30,000 | A/c | J.W. Dureau |
> | Way Too Fast (2000) | $25,000 | A/c | L.A. Williams |
> | For Certain (2000) | $20,000 | A/c | J.W. Dureau |
> | Sha Alma (1998) | $30,000 | A/c | L.A. Williams |
> | Stella Spectre (1998) | $20,000 | A/c | J.W. Dureau |
> | | $150,000 | | |
>
> It was agreed that this amount plus $15,000 GST would be paid into the bank account of Ron and Karen Maund acting as agent on or before 30/6/12.

In the interests of full disclosure, it should be noted that Ron and Karen will charge the family members 5% commission.

- Ron and Karen agree to manage the mares for a monthly fee of $4,000 which covers all expenses including agistment, vet. Etc. to be invoiced each month starting 1st August 2012.
- You and/or an associated company agree to pay out the lease on the motorhome owned by Ron and Karen Maund which is currently $101,300.00. This loan will attract interest at the rate of 10% per annum payable at the expiration of twelve months each year for two years and secured by way of mortgage over the vehicle.

Yours sincerely,

(Signature)

MARTIN O'CONNOR

cc. Ron Maund

[154] Despite the fact that this document was not signed by any of the parties, it was common ground that this document recorded a binding contract between the parties on (at least) the terms it contained. The debate swirled around whether other terms should be implied or incorporated.

[155] Mr O'Connor gave evidence that the payment of $4000 per month plus GST was important to the effectiveness of the arrangement for tax purposes. Mr Hartley freely accepted that the arrangement in the 25 June 2012 letter was entered into to obtain the tax benefit described by Mr O'Connor and that a deduction for the whole of the purchase price of the mares was claimed.

[156] Mr Maund repeatedly suggested that there was something improper about the arrangement provided for in the 25 June 2012 letter. It seems to me that the arrangement was not improper unless Mr O'Connor's advice was wrong (and that was not suggested) or if subsequent conduct by Dovedeen was not consistent with the basis upon which the arrangement gave rise to a deduction for the whole of the purchase price. I have no sufficient basis to reach the latter conclusion, though there are some aspects about Mr Hartley's behaviour in 2013 which sit uncomfortably with Mr O'Connor's statements about what was required for the deduction properly to be claimed.

[157] However, Mr O'Connor's evidence is relevant in another way. It can assist in construing the contract. It does so by identifying that the purpose of the contract was to facilitate the breeding of foals by the mares. I find this was known to both parties: Mr O'Connor told Mr Hartley and Mr Maund says he was aware of that.

[158] The performance of the contract required the sale of the mares to Dovedeen by the owners of those horses. As noted already, Dovedeen contended that the mares were never sold to Dovedeen because unspecified transfer documents were not signed. However it was admitted on the pleadings that Dovedeen was the owner of the mares. In any event, no evidence was led as to any form of title transfer or registration required for title to pass in the horses. The suggestion that the reference in the Stud Book to Mrs Maund as the contact person did not establish that title had

not passed. Further, while the mares appear never to have been physically delivered to Dovedeen:

(a) There was no dispute that the money was in fact paid for the horses;

(b) There was never an assertion by Mr Maund that Dovedeen did not own the horses;

(c) The tax deduction which Dovedeen claimed was lawful only on the basis that the mares were purchased; and

(d) There was no contemporaneous assertion that title had not passed. Indeed the pleadings, even at the date of trial, were to the contrary.

[159] In my view, title to the horses passed on payment. And from that point until the falling out between the parties, the Maunds cared for the mares and invoiced for their care in accordance with the contract and Dovedeen paid for their care.

The breeding performance of the mares

[160] Although little attention was directed to it at trial, it is useful to identify the breeding performance of the mares disclosed in the Stud Book. It shows that as at 2012, only one of the six mares had produced a foal which was named[40] since 2009 (Jingle Belle which produced a foal in 2010 named Moolah Miss).

[161] The contract contemplated that all the mares were in foal and that appeared to be the case for each mare except For Certain. It can be seen from the Stud Book that:

(a) Jingle Belle was served on 1 September 2011 by Morcombe and her foal was born dead;

(b) Monaco Miss was served at the same time by the same stallion and she had a filly born 28 October 2012, which was not named in the Stud Book (and therefore not raced according to the evidence of Mr Zielke);

(c) Sha Alma was served by Court Command on 14 November 2011 and her foal was a colt born 30 October 2012 which was not raced;

(d) Stellar Spectra was served by Morcombe on 1 September 2011 and her foal was a filly born 29 October 2012 who was not raced;

(e) Way Too Fast was served by Morcombe on 1 September 2011 and her foal was a filly born 2 December 2012 who was not raced.

[162] It is evident from the above that none of the mares were served by Triumphant Choice until at least September 2012. Further, none of the foals which were born from Morcombe and Court Command were named. (Given the evidence of all parties, the failure of the 2012/2013 breeding would have reduced the mares' value. In those circumstances, it seems impossible on any view to lay any demonstrated reduction in value entirely at Triumphant Choice's door.)

[40] Recalling that naming a foal in the Stud Book indicates that it was raced (or perhaps prepared for racing).

[163] The Stud Book reveals that all six mares were serviced by Triumphant Choice on 1 September 2012 with the following results: For Certain missed, Jingle Belle missed, Monaco Miss had an un-named colt, Sha Alma had an un-named filly, Stella Spectra had a colt named Stellaron and Way Too Fast missed. Thus three out of the six mares delivered foals from the September 2012 covering by Triumphant Choice, with one being named. This disproves Mr Hartley's continual assertion that Triumphant Choice produced only one foal. As I find below, it seems unlikely that the date of service is accurate. I have no reason to otherwise doubt the Stud Book entries in this regard.

Acquisition of Triumphant Choice

[164] This is a convenient point to make findings about acquisition of Triumphant Choice and his apparent prospects at the time. Triumphant Choice was purchased by Mr Williams at the Magic Millions sales in 2012. Mr Williams opined in his statement that the horse had an outstanding pedigree. He explains why in his statement: in short his sire and half-brother were both champion sires by reference, inter alia, to their stud fee which was in the hundreds of thousands. This evidence was not contradicted. Mr Williams also observed that:

(a) The horse's potential was also reflected in his yearling sale price of $1m in 2008;

(b) The horse had a useful race record (being a Melbourne metropolitan winner, seemingly a good characteristic); and

(c) He had the physical and temperament characteristics of his sire.

[165] None of this was challenged.

[166] Mr Williams said he acquired Triumphant Choice on behalf of its purchaser in 2012. He did not name the price that was paid nor the buyer. He merely said it was a very affordable stallion with good bloodlines for a small breeder's broodmare band. Mr Maund says the purchaser was his father in law. There is no reason to doubt this. Similarly, Mr Hartley said the horse was purchased for $2000. This was not disputed in cross examination by Mr Maund. I accept that was the price.

[167] That raises the question of what happened to Triumphant Choice between 2008 and 2012. It is a remarkable fall from financial grace, especially as it appears he had a reasonable race history in the meantime. The explanation which Mr Maund and Mr Williams gave was that the horse had been barred from racing because of questions about the bona fides of the then owners.

[168] While this might explain the fall in value as a race horse, it seems an inadequate explanation for the loss in value as a potential sire, given his pedigree. This was not addressed in the evidence. Mr Hartley said that the horse must have been no good because his owners would have stood the horse (presumably used it as a sire) if he was any good. That was put forward as a reason why he would not have agreed to Triumphant Choice being the stallion used for his mares. There is some logic in the observation. Unfortunately, this was not explored with Mr Williams.

[169] It is difficult to avoid the suspicion that something must have happened which affected Triumphant Choice's efficacy as a stallion, though there is no evidence as to what that might be. He was not used as a sire until September 2012 (according to the Stud Book), so it could not be failure as a sire. Ultimately, I have no reason to doubt Mr Williams' evidence that the horse was a good buy for a small breeder because of his pedigree and performance, albeit that there must have been something in the horse's history other than the questions over his owners which contributed to the fall in value of the horse from $1m to $2000.

[170] The other matter to resolve is the extent to which Mr Hartley was aware that Triumphant Choice was purchased to be used for servicing the mares under the contract. Mr Hartley denied he knew that the stallion had been bought at all. Mr Williams recalled discussing it with Mr Hartley. I prefer Mr Williams' evidence on that matter. There was no reason given why he would be unreliable on the subject and his account of a discussion about pedigree is consistent with the good pedigree of the horse and with Mr Hartley's interest in such matters.

[171] I also accept Mr Williams' evidence that Mr Hartley said he would leave the mares with Mr Maund and leave the decision about covering them up to Mr Maund. That is an important finding because it involves rejecting Mr Hartley's evidence that he knew nothing about Triumphant Choice being used as a stallion for his mares. Mr Williams' version is consistent with what happened in key respects, in that:

(a) The mares were left with Mr Maund; and

(b) Although the contract was a breeding contract, Mr Hartley never took any step to inquire as to what stallion would be used to cover the mares after they foaled in late 2012.

Mr Hartley's lack of interest in the mare project

[172] Mr Hartley's apparent lack of interest in the stallion to be used for the mares Dovedeen acquired is matched by his lack of interest in a number of other aspects of the transaction:

(a) He took no interest in the offspring of the brood mares. This is particularly odd given that Mr O'Connor told him that Dovedeen had to sell the foals to justify the basis for deductibility of the purchase price;

(b) He wrongly believed that Triumphant Choice had only ever got one foal; and

(c) As is discussed in paragraphs [186] - [187] below, he made no effort to recover possession of the mares after the relationship broke down with the Maunds, despite the fact that at the time the relationship did break down (March 2013), he acted vigorously and quickly to retake possession of the race horses.

[173] This is not the conduct one would expect of a person who had a genuine interest in the carrying out of the breeding business advised by Mr O'Connor and contemplated by the contract. Particularly one who paid $150,000 to acquire the mares.

[174] One possible explanation of his conduct arises from his evidence (see paragraphs [43] and [58] above) that there had been an agreement that Mr Maund would re-purchase the mares at some future time. Such an arrangement would have made the deductibility of the purchase price doubtful, if Mr O'Connor's apparent response to the suggestion is anything to go by. That does not mean that the arrangement did not exist, but it makes it less likely I think. Another problem with accepting that any such agreement or understanding existed is that Mr Hartley did not act consistently with its existence. It was not pleaded in this proceeding as a basis for any relief and it was not raised in any correspondence tendered in evidence at any stage. Further, Mr Maund denied any such agreement was ever made, and his conduct was consistent with that position in that he continued to send bills for the horses and to breed them.[41]

[175] The evidence does not persuade me that there was any such understanding between Mr Hartley and Mr Maund, much less any binding agreement. However, I do think it possible that Mr Hartley came to believe that some such arrangement was in place, or would be put in place. Not only did he say as much, but it also consistent with Mr Hartley's lack of interest in the progress of the brood mare business which Dovedeen was supposedly undertaking for the purposes of obtaining properly the a tax advantage secured from the contract.

The incident relating to For Certain

[176] Those findings lead conveniently to the contested events involving the covering of For Certain by Triumphant Choice, (on 10 October 2012 according to Mr Maund, on 1 September 2012 according to the Stud Book).

[177] Both Mr Maund and Mr Hartley agree that Mr Hartley was present at around that time at Mr Maund's property and observed a stallion service a mare. Mr Hartley said he was not told that it was Triumphant Choice and said he did not know it was one of his mares. Mr Maund on the other hand, says that the event happened on a specific date at 8.00am and that Mr Hartley witnessed Triumphant Choice serving For Certain and was told that was what was happening.

[178] One oddity about this evidence is that Mr Maund's statement says For Certain was served because she was the only empty mare, but the Stud Book says all the mares were served by Triumphant Choice at the same time. Further, the Stud Book records the service at 1 September 2012, not 10 October 2012. This gives cause for doubt as to the accuracy of either the Stud Book or Mr Maund's recollection as to date. It might also be that dates in returns to the Stud Book were only approximate. Given the dates of birth of the foals in the 2013 year, (taking judicial notice that the gestation period for a foal is 11 to 12 months) it seems likely that the mares were served at different dates between about October and December 2013. Ultimately, I do not think much turns on this given that the plaintiff tendered the entries and Mr Maund accepted that they were generally accurate.

[179] I accept that there was service of For Certain by Triumphant Choice in about October 2012 and that Mr Hartley was there. I also accept that he was informed that

[41] TS3-20.13 to .16

the stallion was servicing one of the mares sold under the contract. In my view, this is likely what Mr Maund would have told Mr Hartley in that situation. Further, Mr Hartley did not seem to be a regular visitor to the property, so it is an event Mr Maund would be apt to recall. Mr Hartley has likely forgotten the details for the same reason that he has such poor recollection of events relating to the contract: he had little interest in the mares because he had little interest in conducting the business contemplated by the contract.

[180] Accordingly, I find that both Mr Williams and Mr Maund spoke to Mr Hartley about Triumphant Choice servicing the mares. I reject Mr Hartley's evidence that he knew nothing of Triumphant Choice and nothing of him being used to service the mares. I accept he might have thought the stallion a poor one, but I find he was indifferent to that matter at the time. I further find that, given his indifference to the fate of the mares and their foals after securing the deduction for Dovedeen, if asked he would have agreed to Mr Maund covering the mares with Triumphant Choice.

The parties fall out

[181] From June 2012, the Maunds issued invoices in accordance with the contract for care of the mares. Those invoices were paid until March 2013, when the February 2013 invoice became due. Payment was stopped following the falling out between the Maunds and the Hartleys. It is to that event that I now turn.

[182] On the Hartley's version, the genesis of the falling out between the Hartleys and the Maunds appears to have been a meeting at a hotel in Toowoomba. Consistent with his poor recollection, Mr Hartley gave no meaningful evidence about this meeting. Mrs Hartley said that the Hartleys raised the poor performance of the race horses with the Maunds and that if performance did not improve, the race horses should be returned. Mr Maund appeared to accept there may have been a meeting around this time. The two couples met regularly. He denied any such discussion and denied Mrs Hartley ever spoke about matters of substance at any time. It is difficult to be certain as to what the truth is on this aspect of the matter. However, on balance I consider it likely some such conversation of the kind described by Mrs Hartley occurred:

(a) The Hartleys' subsequent acts to recover the race horses are consistent with that discussion. I do not think it likely they would end their long association with the Maunds without discussing their concerns first; and

(b) Further, Mr Collis' care to engage the stock squad is consistent with the Hartleys expecting some trouble. This is also consistent with a fiery response from Mr Maund at the meeting to the suggestion the horses might be recovered.

[183] It is important to keep in mind, however, that no party gave any evidence that this discussion had anything to do with the mares.

[184] The next step in the narrative is the collection of the race horses by Mr Collis. The conflicting versions of this are set out in paragraphs [87] to [93] and [100] to [102]

above. I repeat my comments at [93] above as findings in respect of the collection of the race horses. The main points relevant to this case are that:

(a) Mr Collis' instructions excluded the mares and foals expressly; and

(b) These events demonstrated that when Mr Hartley wanted to take back his horses, he did so with vigour and determination.

[185] Mr Maund gives evidence that the letter held by Mr Collis was dated 2 February 2012. That helpfully identifies the approximate date at which the race horses were collected. As already noted, from about that point on, Dovedeen ceased paying the monthly fee under the contract. It is necessary to make findings about the circumstances in which that occurred.

[186] Mr Hartley gave evidence that he made a demand for the return of the mares by letter. I refer to paragraph [50] above. I do not accept that any such letter was received by the Maunds. It was not produced at trial and it was denied by Mr Maund. Mr Hartley could give no particulars of what the letter said other than it sought the return of the mares. No evidence was led from Mrs Hartley about the letter despite her role as secretary for Dovedeen described in paragraph [76] above, which gives rise to an inference that her evidence would not have assisted in proving the fact or content of the letter. Further, sending of a letter requiring return of the mares would be inconsistent with Mr Hartley's inactivity and lack of interest in the mares before and after March 2013 in every other respect.

[187] Mr Edwards also opened that "*verbally, it was conveyed by Mr Hartley to Mr Maund, and Mr Maund refused to return the horses*".[42] The evidence led of this verbal demand from Mr Hartley was of the most general kind.[43] No specific verbal demand was ever put to Mr Maund. Given my significant reservations about Mr Hartley's evidence, his vague assertion of a verbal demand did not persuade me that any such demand was ever made.

Events after the parties fall out

[188] Dovedeen commenced proceedings in relation to the mares in April 2013, just a couple of months after the parties fell out. The statement of claim was presumably filed on instructions from Mr Hartley, though that was not established at trial. However, given the evidence as to how Dovedeen's affairs were carried out, there is no other reasonable inference.

[189] I have referred to the odd reference to February 2012. In my view, that must have been a mistake. The mares foaled in late 2012. Therefore they must have been served by Triumphant Choice in late 2012 or early 2013. I have already noted that the service date entries in the Stud Book in this regard must not be accurate. It was also alleged that the mares were worth only $2000 in April 2013, before any of the foals to Triumphant Choice had been born, much less been assessed as potential race horses.

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[42] TS1-24.44
[43] TS1-49.25

[190] Thereafter, on 24 October 2013 a defence and counterclaim was filed which relevantly counterclaimed for the sum due under the contract. A reply was filed on 29 January 2014 which alleged the wrongful service by Triumphant Choice and at the time made no allegation about a wrongful failure to return the mares.

[191] In the meantime, the Maunds continued to care for the mares and their foals and to attempt to breed the mares with Triumphant Choice. Mr Maund sent monthly invoices. None were paid.

[192] It was not contentious at the trial that there was a mediation in the Magistrates Court in mid-2015 and that as a result, the mares were sold for $2100 in August 2015.[44] Mr Hartley opined that the mares were only good for dog meat and that he did not want any of the foals from Triumphant Choice (There were also foals from the first generation of foals sire by different stallions as explained above. Mr Hartleys disregard of these offspring is a further example of his lack of interest in the breeding program contemplated by the contract).

[193] Mr Maund acted on the basis that the mares were sold to this extent: he stopped invoicing under the contract. It is hard to be sure that they were sold for $2100 though. The Stud Book shows that a number of the mares were bred with Triumphant Choice in January 2016, that Sha Alma had a foal who was named in November 2016 (Black Ink) and was sold to Hazelwood Stud and that Stella Spectra was bred in September 2018 to a different horse. If these entries are correct, it is difficult to believe that the all horses were sold in August 2015 and difficult to accept that their total value was $2100. But none of these matters were explored at the trial.

Issue 1: The Contract

[194] The terms of the contract included those recorded in the 25 June letter. That was common ground. Further, the contract must be construed in the context of its purpose, known to both parties, being to carry on the activity of breeding foals from the mares to be sold.

[195] I reject the defendants' pleaded contention that the contract included the terms apparently set out on the reverse of the tax invoices sent by Mr Maund and pleaded at paragraph 4 of the amended defence and counterclaim.[45] No evidentiary basis was properly laid for concluding that the parties' objective intention was to be bound by any such terms in addition to the terms in the contract. Further, those terms apply to training race horses. The contract was one to breed race horses.

[196] I also reject the defendants' pleaded contention that the contract included an implied term that it would continue indefinitely absent termination by mutual consent. There is no reason why such a term would be implied to give business efficacy to the contract. Indeed it would be a remarkable implication, binding the parties to their arrangement presumably until the mares could no longer breed. The contract would

[44] Exhibit 12 paragraph 43; TS1-50.25
[45] See MFI-A at page numbered 8

be given business efficacy by an implied term permitting termination on reasonable notice. To the extent necessary, I accept that such a term would be implied.

[197] I also reject Dovedeen's pleaded contention that there is a term implied by trade usage to the effect of that stated in paragraph [25] above. No sufficient evidentiary foundation was laid for such an implication and in any event, this contract concerned breeding not racing.

[198] I also reject Dovedeen's pleaded contention that there is a term implied by trade usage to the effect of that stated in paragraph [26] above. No sufficient evidentiary foundation was laid for such an implication. However, that conclusion is probably moot given my conclusions as to consent to use Triumphant Choice as a sire in 2013. I turn to that issue now.

Issue 2: Consent to servicing by Triumphant Choice

[199] If a mare is placed with a person other than the owner, it is hard to see how breeding the mare without the owner's consent would be lawful. Such an act would amount to conversion, trespass or breach of any bailment. The real issue then is whether there was express or implied consent from Mr Hartley on behalf of Dovedeen either:

(a) Generally, to Mr Maund breeding the mares with the stallion of his choice; or

(b) Specifically, to Mr Maund breeding the mares with the stallion Triumphant Choice.

[200] I do not think the former term would be implied. True it is that the purpose of the contract was to carry on commercial breeding. However, I cannot see why it is necessary to imply consent to Mr Maund to choosing the sire when Mr Hartley was evidently capable of doing so and the role of the Maunds under the contract was apparently to care for the mares (and perhaps their foals to some degree, until they are weaned perhaps).

[201] As to the latter, in my view, Mr Hartley did at least impliedly consent to Triumphant Choice being put to the mares, at least on the first occasion. I reach that conclusion based on my findings in paragraphs [170] to [171] and [176] to [180]. Further to those matters, it must be remembered that Mr Hartley said he considered the horse would be a failure as a sire. However, that could not have been known when Triumphant Choice was first used as a sire in 2013. He had no history at that point, good pedigree as a sire and a reasonable race record. His own evidence was that one could never be sure how a stallion would go as a sire. A horse with Triumphant Choice's pedigree as a sire is one which would be worth trying. Thus Mr Hartley's opinion that he never would have agreed to use of the stallion was in my view reconstructed. Further, absent any withdrawal of that consent, it seems to me that continued in 2014.

[202] As to the servicing of the mares by Triumphant Choice in 2015 and following, it is difficult to see how that is relevant to Dovedeen's case. The only possible interpretation of the statement of claim is that the loss was incurred by reason of the servicing of the mares which had occurred on the first occasion prior to the filing of

the claim in April 2013. Mr Edwards never grappled with this timing issue and I did not advert to it until preparing these reasons. However, as the parties approach this case on the basis that the horses were worth only $2100 in August 2015, it seems I must stop the analysis of the impact of the stallion on that date.

[203] Dovedeen's claim was confined to alleging breach of contract in the Maunds using Triumphant Choice to service the mares without Mr Hartley's consent. As I have found he did consent, Dovedeen's claim must fail.

Issue 3: Did servicing by Triumphant Choice cause the loss alleged by Dovedeen?

[204] However, even if I concluded that there was no consent to servicing by Triumphant Choice, Dovedeen has failed to establish that servicing by Triumphant Choice, whether on one occasion (in late 2012/2013) or on every occasion until August 2015 caused the loss as pleaded. Dovedeen's pleaded contention that the breeding with Triumphant Choice caused the loss in value turns on these propositions:

(a) Triumphant Choice was a poor sire;

(b) Triumphant Choice sired poor and unsuccessful off-spring;

(c) If asked, Mr Maund would not have agreed to breeding with Triumphant Choice; and

(d) Being bred with a poor sire with unsuccessful off-spring on one occasion resulted in the loss in value of the mares from a total of $150,000 to $2100.

[205] The first two steps in the argument fail in respect of the pleaded case (which alleged loss as at April 2013) because at the time the statement of claim was issued, it was impossible to know whether Triumphant Choice was a poor sire producing unsuccessful offspring. None had been produced from the mares and Triumphant Choice had never stood as sire before. Triumphant Choice at that time had a good pedigree as a potential sire. All witnesses agreed that breeding is uncertain. No-one could have known Triumphant Choice would fail as a sire before he had been used as such. Dovedeen's case, as pleaded, must fail on that basis.

[206] However, let us assume that the case extends to the mating with Triumphant Choice until August 2015 and that the contention is that the mares were worth $2100 at that time.

[207] The matter in paragraph [204](c) then arises. As I have already found, Mr Hartley was uninterested in the breeding program contemplated by the contract and would have agreed to Triumphant Choice being used if asked.

[208] Assuming the contrary however, the argument then turns on the conclusion that but for breeding with Triumphant Choice, the mares would still have been worth $150,000. But there is a fundamental flaw in that argument arising from Mr Hartley's own evidence. As he explained, all breeding is a lottery. While pedigree improves the chances of a successful race horse being produced, nothing is guaranteed. Every witness agreed with this assessment.

[209] The purpose of the contract was to breed the mares. The premise of Dovedeen's case cannot therefore be that the counterfactual to be considered is that the mares were not bred with any sire. Further, the evidence suggested that for a mare to remain empty over time tends to reduce its value in any event.

[210] Thus the premise of Dovedeen's case must be that if the mares were bred with another stallion, they would have had sufficient 'success' to maintain their value. Success in this case means producing successful offspring. However, the evidence is that such an outcome could not be guaranteed from any sire, breeding is a lottery. Thus the true loss of Dovedeen is loss of the valuable commercial opportunity to have the mares mated with a different sire and produce foals that succeeded on the race track to a sufficient degree to ensure their value is maintained. The problem that this poses for Dovedeen is that it did not plead a loss of opportunity case. For that further reason Dovedeen's case must fail.

[211] However, even if I was to try to analyse a loss of opportunity case, the factual findings make it difficult to sustain in any event. As I have found, Mr Hartley had little interest in the mares once the tax deduction was secured. That he took no further interest in the breeding or care of the mares until August 2015 is a matter of record. Once Triumphant Choice had had limited success in 2013, he did nothing to improve the prospects of his horses. I find that he would not in fact have sought to breed the mares with another sire if Triumphant Choice had not been used. He gave no evidence that he would have done so.

[212] Another difficulty which seems to arise in respect of the damages claim is that it assumes that the mares would have been worth the same amount in April 2013 as paid for them in June 2012. This assumption seems doubtful. The provision of immediate write off of the whole of the value of the mares in the first year at least suggests the expectation is that the value of the mares would decrease quickly. This tends to be confirmed by the consideration that the deduction was available for older mares, which presumably had more doubtful breeding futures. A fortiori where the mares had failed in the 2012/2013 breeding season as explained in paragraph [162] above. These considerations provide a further reason why Dovedeen's pleaded damages claim cannot succeed.

[213] For these reasons also, Dovedeen's claim must be dismissed.

Issue 4: Entitlement to payment under the Contract

[214] That leaves the Maunds' counterclaims against Dovedeen. It is convenient first to set out the aspects of the Maunds' counterclaim which cannot be established:

(a) **First**, a consequence of the finding that the pleaded tax invoice terms are not terms of the contract is that the claim to contractual interest at 2% compounding monthly must fail.

(b) **Second**, the claim based on out of pocket expenses for care of the mares must fail. The contract provides that the $4,000 per month "covers all expenses including agistment, vet. Etc". I can see no basis upon which the

ordinary costs of caring for the mares can give rise to an additional entitlement to payment.

(c) **Third**, the claim for payment for care of the foals must fail. No fact was pleaded in the counterclaim which sustained an independent claim to payment for care of the foals. Further, I can see no basis to infer any right to payment for care of the foals born to the mares under the contract. It might be that some other claim could have been advanced arising out of unjust enrichment, though it is unclear what the unjust factor would be on the facts as found in this case and no such claim was advanced.

[215] That leaves the claim for the monthly fee due under the contract. That claim is advanced for the months from March 2013 to August 2015 inclusive. Ignoring interest, that amount is claimed at $132,838 in the Schedule to the defence and counterclaim. That amount is not a multiple of $4,400 and it is less than the number of months claimed (31) multiplied by $4,400. I intend to work from the Schedule. On that basis, the odd figure is the amount of $5,238 claimed in November 2013. The tax invoice shows the amount above $4,400 in that tax invoice relates to out of pocket expenses which I consider included in the monthly contract sum. Deducting those sums, the claim for the monthly sums is $132,000.

[216] The question is whether and to what extent the Maunds are entitled to payment under the contract after February 2013.

[217] Dovedeen's contentions were summarised at [141] to [143] above. It is to be noted that the submission was that the contract had been terminated. Although it was never made clear, I infer that the argument was that the contract had not been terminated for breach but had been terminated pursuant to a right to do so by notice requiring return of the mares. The answer fails to plead the term which regulated termination as of right. However, it seems reasonable to infer that the proposition relied upon was that the contract could be terminated by either party on reasonable notice. As I have already observed in paragraph [11] above, that is a term which in my view would be implied.

[218] One of the problems with the failure properly to plead the right to terminate under the contract is that the question of reasonable notice was not examined. This might not be a simple point. There might have been issues going to seasonal or intermittent costs incurred which meant that reasonable notice had to take account of the incurring of large upfront costs which were defrayed over the balance of a year, or some other period. For example, there might be large annual costs associated with veterinary care which were incurred each January such that reasonable notice had to allow for the recovery of such costs. One area where Mr Maund seemed on solid ground was the care of race horses. It might be he could have given relevant evidence if this matter had been raised on the pleadings.

[219] If Dovedeen had otherwise persuaded me that it had communicated to the Maunds that it wanted the mares returned, I would have had to consider recognising a lengthy reasonable notice period to address the potential unfairness to the Maunds of

permitting the matter to be raised without pleading a key material matter: i.e. what length of time comprised reasonable notice.

[220] However, that is not the situation. For the reasons explained in paragraphs [186] and [187] above, I am not persuaded that Dovedeen ever made a demand for the return of the mares. As that demand was the sole basis of Dovedeen's defence to the counterclaim on the contract for the monthly payment, I can see no proper basis to reject that claim. It was otherwise not disputed by Dovedeen.

[221] In the circumstances, judgment should be entered on the Maund's counterclaim for $132,000.

[222] I direct the parties to file and serve submissions of not more than 4 pages and any supporting affidavits on the question of interest and costs by Friday 2 October 2020. That material should also be sent by email direct to my associate by that date.

Performance of duties under direct access brief

[223] I have outlined in this judgment the respects in which the plaintiff's case appeared not to have been properly prepared in basic respects including the failure to give and obtain disclosure, the failure to consider and comply with expert evidence rules and the failure to address how documents would and could be tendered at trial. Further, the Court file did not disclose compliance by counsel for Dovedeen with paragraph 3(c)(i) of Practice Direction No. 2 of 2006. Counsel purported to comply after completion of the trial.

[224] The expressed purpose of the Practice Direction is that it is intended to minimise the risk of disruption to litigation and to promote the orderly conduct of cases where a barrister accepts a brief from a person other than a solicitor retained on behalf of a client. Compliance with its terms is also required to ensure that clients retaining a barrister on a direct access brief receive the benefit of competent representation and to warn them of the risks of not engaging a solicitor. Non-compliance with its terms is apt to frustrate all of those objectives. I am concerned that, in both form and substance, the Practice Direction was not complied with in this case. I direct the Principal Registrar to forward these reasons and a transcript of the proceedings to the Legal Services Commissioner for her consideration as to whether any disciplinary action is called for in this matter, whether for breach of Rule 24B *Barristers Conduct Rules*, or any other professional duty.