

SUPREME COURT OF QUEENSLAND

CITATION: *Creswick and Ors v Creswick* [2010] QSC 339

PARTIES: **JOHN FRANCIS CRESWICK**
(first plaintiff/first defendant by counterclaim)
and
WILLIAM GERARD CRESWICK
(second plaintiff/second defendant by counterclaim)
and
SHAYNE MARISE CRESWICK
(third plaintiff/third defendant by counterclaim)
and
JANE VERONICA CRESWICK
(fourth plaintiff/fourth defendant by counterclaim)
and
TABTILL PTY LTD
ACN 010 408 545
AS TRUSTEE FOR THE JOHN CRESWICK FAMILY TRUST
(fifth plaintiff)
and
TABTILL PTY LTD
ACN 010 408 545
(fifth defendant by counterclaim)
and
TABTILL NO. 2 PTY LTD
ACN 098 424 741
(sixth defendant by counterclaim)
and
TABTILL NO. 3 PTY LTD
ACN 106 070 948
(seventh defendant by counterclaim)
and
TABTILL NO. 4 PTY LTD
ACN 106 071 096
(eighth defendant by counterclaim)
and
T2 PROJECTS PTY LTD
ACN 109 792 707
(ninth defendant by counterclaim)
and
JAYNE EMMA CRESWICK
(tenth defendant by counterclaim)

v

FELIX ANTHONY CRESWICK
(defendant/plaintiff by counterclaim)

FILE NO: BS 10963 of 2007

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 13 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 7 September 2009 – 11 September 2009;
14 September 2009 – 18 September 2009;
21 September 2009 – 25 September 2009;
28 September 2009 – 2 October 2009;
8 October 2009; and further submissions on 6 November 2009 and 9 November 2009.

JUDGE: Daubney J

ORDER: **1. That the agreement made between the first, second, third and fourth plaintiffs and the defendant dated 26 May 2007 be specifically performed and carried into effect.**

2. That counsel for the parties bring in such orders as may be required to give effect to the decree of specific performance, including but not limited to such orders as may be required for the removal of caveats.

3. That the defendant has liberty to apply to me for permanent injunctive relief against the first plaintiff and the third plaintiff in respect of the defendant's occupation of the property situated at 11 Seahaven Court, Raby Bay for the remainder of his life.

4. The plaintiffs' claim is otherwise dismissed.

5. The defendant's counterclaim is otherwise dismissed.

6. I will hear the parties as to costs.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – PARTIES – GENERAL PRINCIPLES – FORGERY – where the defendant counterclaims that the first plaintiff has forged his signature on a great number of financial documents, contracts for the sale of land and real property transfers – where the disputed signature appeared on many documents, many of which were of benefit only to the plaintiffs and the plaintiffs' companies - where the first plaintiff denied signing the disputed signature on the

documents – where evidence was led by forensic document examiners and many persons who were said to have witnessed the signatures – whether the defendant has proved that the first plaintiff has forged his signature

EQUITY – GENERAL PRINCIPLES – UNCONSCIONABILITY, UNCONSCIONABLE DEALINGS AND OTHER FORMS OF EQUITABLE FRAUD – GENERALLY – where the first, second, third and fourth plaintiffs and the defendant entered into an agreement following the break down of their business and personal relationships – where the first plaintiff and the second plaintiff are the sons of the defendant – where the defendant contends that the agreement ought be set aside because it was unconscientious dealing– where the defendant contends that he was in a position of special disadvantage in relation to the first plaintiff by reason of the nature of their relationship, his physical and mental health, his isolation from his family and an alleged improvidence of the agreement from his perspective – whether the agreement should be set aside on the basis of unconscientious dealing

EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION OF UNDUE INFLUENCE FROM RELATIONSHIP OF PARTIES – GENERALLY – where the first, second, third and fourth plaintiffs and the defendant entered into an agreement following the break down of their business and personal relationships – where the first plaintiff and the second plaintiff are the sons of the defendant – where the defendant contends that the agreement ought be set aside because he was subject to undue influence by the first plaintiff – where the relationship between the parties, that of son and father, does not fall in an established category giving rise to a presumption of undue influence – whether the first plaintiff has made improper use of an ascendancy over the defendant to obtain a benefit – whether the agreement should be set aside on the basis of undue influence

EQUITY – GENERAL PRINCIPLES – MISTAKE – EQUITABLE REMEDIES – RECTIFICATION – EVIDENCE – where the first, second, third and fourth plaintiffs and the defendant entered into an agreement following the break down of their business and personal relationships – where this agreement provided for the transfer of certain properties – where the agreement referred to the “Logan Road properties” – where the plaintiffs contend that agreement ought to be rectified so that the reference to the “Logan Road properties” be read as including reference to the “Crump Street properties” – where the only evidence in

support of this claim was from the first and second plaintiffs – where the plaintiffs’ credibility was in doubt – where there was no independent evidence to corroborate this – whether the agreement ought to be rectified

EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – CREDIBILITY AND WEIGHT – PARTY’S FAILURE TO GIVE OR CALL EVIDENCE – where the partner of the defendant was not called to give evidence – where counsel for the plaintiffs submitted that there were a number of areas of the defendant’s case where it might reasonably have been expected that the defendant’s partner could have, and should have, given evidence – where counsel for the defendant submitted that this witness could not have given admissible evidence relevant to issues in the trial, that her evidence would have been collateral and would have gone only to credit – whether a *Jones v Dunkel* inference that this witness could give no evidence that would assist the defendant in respect of these areas should be made in the circumstances

Evidence Act 1977 (Qld), s17

Property Law Act 1974 (Qld), Part 19

Succession Act 1981 (Qld)

Trade Practices Act 1974 (Cth)

Workers Compensation and Rehabilitation Act 2003 (Qld)

Blomley v Ryan (1956) 99 CLR 362, cited

Briginshaw v Briginshaw (1938) 60 CLR 336, applied

Brusewitz v Brown [1923] NSLR 1106, cited

Commercial Bank of Australia v Amadio (1983) 151 CLR 447, cited

Cook’s Constructions P/L v Stork Food Systems Aust P/L [2008] QSC 179, cited

Jeans v Cleary [2006] NSWSC 647, cited

Johnson v Buttress (1936) 56 CLR 113, cited

Jones v Dunkel (1959) 101 CLR 298, cited

Louth v Diprose (1992) 175 CLR 621, distinguished

Neat Holdings Pty Limited v Karajan Holdings Pty Limited (1992) 67 ALJR 170, applied

Payne v Parker [1976] 1 NSWLR 191, applied

COUNSEL: PH Morrison QC with K Howe and C Heyworth-Smith for the plaintiffs
J Gallagher QC with LF Kelly SC and J Otto for the defendant

SOLICITORS: DLA Phillips Fox for the plaintiffs
Hopgood Ganim Lawyers for the defendant

- [1] Felix Creswick and his son John Creswick are used car salesmen.
- [2] Over a period of about 25 years they, and entities associated with them, built up a considerable business and property portfolio.
- [3] In 2006 and 2007, relations between them soured.
- [4] In May 2007, they executed an agreement (“the May Agreement”) which, on one view at least, was to effect a settlement of their dispute. Felix, however, disavowed that agreement shortly after it was signed. He said that he had signed it under duress.
- [5] That led to the institution of the present proceeding. John, and other affected members of the Creswick family, seek to rectify the May Agreement by including in its terms properties which were not identified in the agreement, and for the agreement to be specifically performed by Felix. They also seek payment of monies said to be owed to them by Felix.
- [6] Felix has counter-claimed, alleging that on many occasions over many years John forged Felix’s signature on bank security, property transfer and other documents. Felix says that this fraud led John and other persons and entities within the Creswick family to obtain benefits at the expense of Felix, and they ought account to him for those benefits. His case on the alleged forgeries is cast in the alternative for relief under the *Trade Practices Act 1974*.
- [7] That rather bland introduction belies the ferocity with which this case was fought. Each of Felix and John went to extreme lengths to traduce one another’s reputation. As will appear, each succeeded in achieving that goal. Other members of the Creswick family have been involved, directly or indirectly, in this unedifying dispute. Much mud was slung between members of the Creswick family and their past and present advisers before and during the trial. Much of that mud stuck to varying degrees on numerous targets.

Dramatis personae

- [8] In view of the fact that many of the interested parties share the surname Creswick, it was agreed early in the trial that members of the family would be referred to simply by their given names.
- [9] It is convenient to list here the affected members of the Creswick family and also some of their associates, and other entities, who will figure in this judgment:

Felix Creswick (“Felix”) – father of the family

John Creswick (“John”) – son and principal protagonist of Felix

Shayne Creswick (“Shayne”) – John’s wife and mother of four of his children; she and Felix loathe one another

William Creswick (“Bill”) – another of Felix’s sons and business associate of John

Jane Creswick (“Jane”) – Bill’s wife

Jayne Creswick (“Jayne”) – daughter of John and Shayne

Frances Creswick (“Frances”) – Felix’s wife, from whom he separated in about 1973 and divorced in about 1978; mother of John and Bill; now deceased

Marcia Banfield (“Marcia”) – Felix’s most recent de facto partner; said to have separated from him, but continues to live under the same roof as Felix; the beneficiary of a property settlement agreement executed by Felix in March 2007 in satisfaction of claims under Part 19 of the *Property Law Act 1974*

Susan Orwell (“Susan”) – John’s long-term mistress and mother of two of his children

Tom Banjanin (“Banjanin”) – real estate agent; associate of both Felix and John

John Mott (“Mott”) – John’s solicitor prior to, at the time of and after the signing of the May Agreement

Joe Ganim (“Ganim”) – Felix’s solicitor after the signing of the May Agreement

Ian West (“West”) – the accountant to John and companies controlled by John

Tabtill Pty Ltd (“Tabtill”) – a company controlled by John; trustee of the John Creswick Family Trust

Tabtill No 2 Pty Ltd (“Tabtill 2”) – incorporated in 2001; controlled by John, but a number of shares were issued in Felix’s name; John says this was a mistake which was subsequently corrected; Felix says he was supposed to get shares in Tabtill 2 but John forged his signature on a share transfer form to fraudulently transfer the shares away from Felix

Tabtill No 3 Pty Ltd (“Tabtill 3”), Tabtill No 4 Pty Ltd (“Tabtill 4”) and T2 Projects Pty Ltd (“T2”) – other companies effectively controlled by John through which John, and later John and Bill, have engaged in property developments.

Building up the Creswick empire

[10] Having had the opportunity to see and hear both Felix and John for extended periods of time in the witness box, I have formed the very strong view that I can put little weight on, and have little faith in, much of the evidence given by either of them. I give further detail below of the reasons why I have reached these conclusions on their credit.

[11] It is, however, possible to sift from the evidence a relatively objective account of the family history.

- [12] Felix immigrated to Australia in the early 1950's. In the late 1950's, he began business as a motor vehicle mechanic. Soon after, he began business as a motor vehicle dealer. He carried on these businesses at various locations in Brisbane and at the Gold Coast, both in his own name and through a number of companies.
- [13] Starting in the late 1950's, Felix also became involved in property investment. During the 1960's and 1970's he (either alone, with Frances or through corporate vehicles) bought and sold numerous properties in South East Queensland. As time went on, he used the properties he had acquired as collateral for the purpose of raising finance, making further property acquisitions and to fund his business expansion.
- [14] John and Bill are two of a sibship of six to Felix and Frances. (The other four children play no role in this saga.) Felix and Frances separated in about 1973 and were divorced in the late 1970's. It is clear that the domestic environment in which John and Bill were children was far from ideal. The family was adversely affected by Felix's consumption of alcohol and gambling and by some domestic violence.
- [15] John was 15 when his parents separated. The other children went to live with Frances, but John stayed with Felix. While growing up, John had spent one year at boarding school and a considerable amount of time at his grandparents' farm at Wellington Point. He attended school and completed Year 12. Bill was sent to boarding school as a young child and spent seven years there. When he left school, Bill became a qualified motor mechanic.
- [16] John completed school in 1975. He said that he considered attending university (whether that is true or not is not relevant for present purposes). After finishing school, he went to work in the used car dealership Felix had at the time. Shortly afterwards, John moved to Caloundra to start his own motor vehicle dealership business with Mr Lloyd Matlin. In 1982, Felix asked John to return to Brisbane and in about the middle of that year John and Mr Matlin relocated their business to the premises from which Felix had previously operated. The partnership between John and Mr Matlin, however, did not last long and was dissolved after a few months. From then on, Felix and John worked together in the car dealership business.
- [17] In April 1975, Felix bought his parents' farm at Wellington Point. The Wellington Point property stayed in Felix's name until it was subdivided and sold over a period of time from 1998. The circumstances surrounding the subdivision, including whether many of the documents associated with the subdivision and sale of lots were actually signed by Felix, and the application of the proceeds of sale of the subdivided lots, are matters in issue in this proceeding.
- [18] Between 1975 and 1978, Felix purchased the properties at 905-911 Logan Road, Holland Park ("the Logan Road properties"). These properties were (and still are) registered in Felix's name. Felix operated his car dealership business from the property at 905 Logan Road in the late 1970's, but he ran into financial difficulty. He liquidated a number of assets, including other real property investments, but kept ownership of the Logan Road properties. In October 1980, Felix's application to renew his motor vehicle dealer's licence was refused and he closed his dealership at 905 Logan Road. He was without his motor vehicle dealer's licence until September 1982. The renewal of his motor vehicle dealer's licence roughly coincided with the dissolution of the partnership between John and

Mr Matlin. As I have said, from late 1982 Felix and John worked together from the premises at 905 Logan Road in a used car dealership. The precise nature of their relationship in this business is also one of the matters in dispute.

- [19] In the meantime, Felix and his then de facto partner, Julie Bird, had purchased a rural property together at Office Lane, Glenmorganvale. The Glenmorganvale property was initially owned by Felix and Ms Bird as joint tenants, but consequent upon a property settlement between them after they split up, it became registered in Felix's name solely.
- [20] In 1986, Tabtill purchased the property at 495 Logan Road. That purchase was financed by Alliance Acceptance. After the purchase of 495 Logan Road, John established a motor vehicle dealership on that site. Felix continued to manage the business on the site at 905 Logan Road.
- [21] In late 1986, Felix and John purchased the property at 796 Main Road, Kangaroo Point as tenants in common in equal shares. This was one of the properties in respect of which Felix claimed in this proceeding that there was a property partnership under which Felix and John were equal partners, the partnership's expenses would be paid by Tabtill but from the motor dealership drawings of each of Felix and John, that the net income from the properties would be shared equally, and that the net proceeds of sale of the properties would be shared equally. Other properties to which this alleged property partnership is claimed by Felix to have applied are:
- (a) 117 Old Cleveland Road;
 - (b) 661 Logan Road (referred to as the "Matilda site");
 - (c) Apartment 5 in "Belle Maison" at Broadbeach, and
 - (d) 503 Logan Road, Stones Corner ("the Stones Corner property") (ownership of which was registered in the names of Felix, John and Bill as equal tenants in common).
- [22] The funds for the acquisition of all these properties were sourced from or financed by Tabtill. Felix made no financial contribution to them.
- [23] In 1996, a vacant, canal-front lot at 35 Sentinel Court, Cleveland was purchased and registered in Felix's name. The funds for the acquisition of this property came from or were financed by Tabtill, and Felix did not contribute financially to the purchase.
- [24] In 1989, the properties at 8-10 Crump Street, Holland Park ("the Crump Street properties") were purchased and registered in Felix's name. Crump Street runs off Logan Road, and the Crump Street properties are contiguous with the Logan Road properties. This acquisition was financed through Tabtill.
- [25] The properties on which Felix's name continues to appear as registered proprietor (or one of the registered proprietors) are:
- the Logan Road properties;
 - 35 Sentinel Court, Cleveland;

- 8-10 Crump Street, Holland Park;
 - the Glenmorganvale property;
 - 503 Logan Road, Greenslopes.
- [26] John, Bill, Shayne and Jane have lodged caveats over the Logan Road properties, the Crump Street properties, 35 Sentinel Court and the Glenmorganvale property. Those caveats are supported by the present proceeding.
- [27] This does not complete the roll-call of properties in which the Creswicks or their companies have had interests over the years. As necessary, I will refer to further properties below in specific contexts.
- [28] I should make it clear that merely because a member of the Creswick family was registered as a proprietor of a particular property did not necessarily mean that that person had personally contributed to the purchase price of, or had a beneficial interest in, the property. The family's modus operandi over the years was to "park" properties in the names of different individual family members and/or corporate entities.
- [29] John and Shayne were married in May 1982, before the dissolution of the partnership with Matlin. Upon returning from their honeymoon, Shayne initially went back to live with her parents until refurbishment of a house situated on 909 Logan Road was complete and John and Shayne moved in to it. Felix was also living in that house. Relations between Shayne and Felix quickly became strained. After some time, John and Shayne purchased their own home at Cedar Creek and moved out of 909 Logan Road.
- [30] The next 20 years or so were, by and large, good for the Creswick family fortunes.
- [31] After leaving school in 1980, Bill trained and became qualified as a motor mechanic, and ended up managing a service station for his employer. In 1990 he bought his own service station business. He sold that business in 1992 and then, at John's request, went to manage and build up the business of the service station on the Matilda site. Bill was, at that stage, an employee of Tabtill. He worked there as an employee until the Matilda site and business were sold in 1994. By that time, he had married Jane. Bill then worked as a salesman in the dealership conducted on the Stones Corner site. In 2000, a property at Capalaba was purchased, the registered proprietors of which were Bill and Tabtill, and from which a car rental business and a motor vehicle dealership managed by Bill were conducted. Over the ensuing years, Tabtill 2, Tabtill 3, Tabtill 4 and T2 were established and used as vehicles for property development projects. T2 then established a recreational vehicle sale yard business at Moorooka. Bill was, and is, the manager of that business.
- [32] It is clear that Tabtill operated, in effect, as the cash box for the members of the Creswick family for many years. At least until the establishment of the other companies, the businesses and property dealings in which they were engaged were run and financed through Tabtill. Shayne and Jane were listed in Tabtill's books as employees. Wages were paid to the Creswick family members. But additionally

each of them was provided with a credit card (and, in at least Felix's case, cheque books) which each could use for personal expenses. Bill described it as follows:

"Okay. Now, in terms of you being paid, how were you paid? – I was on a weekly income.

Like a wage? -- Just a wage.

Did you get commissions on cars? -- No. There wasn't such a thing as – the salesmen got commissions. We didn't receive commissions, it was ----

When you say "we"? -- Okay. I didn't receive commissions. It was calculated in the deals but, I mean, I never received commission because we had a floating account, if you wanted to call it, an expense account that we could draw on and use and it was there to be used and I obviously offset it for what income that I brought in.

When you say a floating at, just explain that to me? -- Oh, if I needed fuel or shoes or clothes or – you know, we had an expense account, a credit card, an American Express card.

You use the word "we" again? -- My wife and I.

Right. An American Express card? -- Yeah.

Chequebook? -- No, never had a chequebook, no signature or nothing.

Just credit card? -- Just an American Express card.

Did you understand anything about what sort of limits there were on your use of that? -- There was no limits.

Okay? -- There was no limits.

All right. Now, was your wife able to use that credit card? -- She used it for fuel. She used it for emergencies, if she needed something from the chemist for the kids, two children at that stage in '96 that were under – under four, so – if she needed to go the chemist or something."

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

[34] Felix and Bill worked in sales, and sometimes management, positions in the various businesses in which the Creswicks were involved over the years, and John became the prime mover in respect of real property acquisitions, sales and developments. He was the one who decided in whose name or names each particular property would be "parked". Those decisions, in turn, seemed to have been driven in part by revenue considerations. For example, in relation to the purchase of a particular property at Raby Bay (in respect of which Felix's signature is in dispute), John said: "Okay. Piermont Place in 2003, that was acquired and Jayne and Felix were put on the title? -- That's right.

How did that come about? -- I got an opportunity to purchase another house at Raby Bay there and I thought it a good idea this time – Jayne was old enough to have the property placed into her name, and if she lived there for 12 months obviously the tax advantages were good.

How would the tax advantages come about? I don't want the technicalities but ----? -- It was her principal place of residence.

All right. So did you discuss the purchase with Felix? -- I told him that I wanted to put it into his name and into Jayne's name.

And did you tell him why? -- Yes, because it was an effective way to buy it and sell it and the profit come out of there with tax advantages on it, which he saw the benefit in, and I asked him if it was okay if I could use -- I am sure it was the 911 property as collateral security on the loan and we -- I set it up and they both borrowed 900,000, which was the purchase price for the house, Tabtill would pay all the payments on it and all the goings and Tabtill would put the -- would retain the profits from that sale.

And did Tabtill pay everything? -- Yes, it did."

- [35] John said, in effect, that the rationale for putting the properties in different names, and different combinations of names, was sourced in warnings from Felix to the effect that this would insulate the properties in the event of John going through a divorce. Felix's rival contention was that it was a tactic adopted by John, who had a second family with his mistress, to protect his assets from attack by either of his families.
- [36] By the early 2000's, the effective division of labour was that Felix was running the dealership at the Logan Road property, Bill was running the dealership at Capalaba and John was at the Stones Corner property engaged principally in property development.
- [37] In 2005, John decided to close down the Logan Road dealership which was being managed by Felix. John said that his reasons for closing it down were, in effect, that Felix was not moving enough stock through the business and it was unprofitable. There were also complaints about the way in which Felix conducted the business. Felix attributed the cause of the business downturn to the types of cars ("big American cars") and spoke of an arrangement he says he reached with John for the amalgamation and redevelopment of the Logan Road properties and Crump Street properties. In any event, the business was closed down.
- [38] As at 2001, Felix and Marcia were living in the house at 909 Logan Road. They moved from there to Raby Bay. The reasons for the move are disputed -- John ties the move to Felix wanting to impress his sister, who was visiting from Italy; Felix asserts it was done preparatory to the amalgamation and redevelopment of the Logan Road properties and the Crump Street properties. Initially, Felix and Marcia moved into a house registered in John's name at 37 Sentinel Court, Raby Bay. John sold that house at the end of 2001, and Felix and Marcia then moved into a house rented by Tabtill at 12 Seahaven Court, Raby Bay. The house at 11 Seahaven Court was subsequently purchased with funds provided, or financed, by Tabtill and was registered in the names of John and Shayne. That house was refurbished and in 2002, Felix and Marcia moved into that house. They are still there. It is not suggested that Felix or Marcia personally contributed directly to the purchase price of 11 Seahaven Court nor have they paid for any of the rates, utilities or any other expenses of that property since they have been in occupation.

[39] After the business on the Logan Road properties was closed down, Felix moved to the business which was being conducted at 503 Logan Road. That business was also closed a short time later. In the meantime, John had negotiated for a well-known motor vehicle retail group to take a lease of the premises at 906 Logan Road. Zupps took a formal lease from Felix of those premises for a term of 2 years from 1 December 2005. In fact, Zupps was in occupation of that site from earlier in 2005 until mid-2007, when it shifted to the 495 Logan Road site. During the couple of years that Zupps occupied the 906 Logan Road site, all of the rental paid by Zupps was paid directly into Felix's personal account – a total of some \$328,000.00.

[40] From at least mid 2006, the relations between the parties went into a downhill slide. On 4 July 2006, John's solicitor, Mott, wrote to Felix's then solicitors, Connor Hunter, saying:

“Dear Sirs,

RE: TENANCY – 11 SEAHAVEN COURT, CLEVELAND

We act on behalf of the Proprietors of premises situate at and known as 11 Seahaven Court, Cleveland, which premises are tenanted under what we believe to be a tenancy at sufferance, by your client, Felix Creswick.

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

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

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

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

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

[41] Mott again wrote to Connor Hunter on 17 August 2006, saying:

“RE: TENANCY – 11 SEAHAVEN COURT, CLEVELAND

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

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

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

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

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

[42] Connor Hunter then replied with a letter dated 25 September 2006:
“RE: PROPERTY AT 11 SEAHAVEN COURT, CLEVELAND

We refer to your letter of 5th July 2006.

Although the registered owners of the property situated at and known as 11 Seahaven Court, Cleveland are our client’s son John Creswick and his wife, our client has an equitable interest in that property and will strenuously oppose any action taken by your clients to remove him and his partner of 13 years, Marcia, from the home at 11 Seahaven Court.

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

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

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

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

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

Our client emphasises that he is owed in commissions and superannuation and rental moneys from properties at least double the value of the house

property at 11 Seahaven Court, Cleveland. He also points out that his own properties were used to progress ventures of John Creswick.

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

John Creswick's excuse for failing to keep his promise to our client was that he did not want our client's partner Marcia to be "part of the house" but assured our client that our client could live in the house for the rest of his life. Our client does not accept John's excuse and since that time our client has made repeated approaches to John Creswick to transfer the house at 11 Seahaven Court into his name but without success. This situation has left our client quite distraught with little faith in the promises made by his son John. Naturally our client has been reluctant to take court action against his own son.

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

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

- (a) the Matilda Greenslopes Garage in which our client held a one half share;
- (b) the Gold Coast Unit at 23 Surf Parade, Broadbeach in which our client held a one third share;
- (c) the house at Piermont Parade, Raby Bay in which our client held a one half share;
- (d) the property at 503 Logan Road, Stones Corner in which our client held a one third share;
- (e) the Jaguar motor vehicle the value of which our client estimates was \$80,000.00;
- (f) our client's interest in the development at 450 Mains Road, Wellington Point;
- (g) the farm which was owned by our client for over 20 years in respect of which John Creswick has had the use thereof and in respect of which no money has ever been paid to our client;

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

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

[43] Mott responded with a letter dated 27 September 2006:

"RE: TENANCY – 11 SEAHAVEN COURT, CLEVELAND

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

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

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

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

[44] On 2 October 2006, Felix wrote directly to John and Shayne, saying:

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

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

Clearly I am not a greedy man.

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

- | | |
|---|-----------|
| 1. Kangaroo Point property sold to McDonald's – estimated profit of \$500,000. My half: | 250,000 |
| 2. Interest on the \$250,000: | 400,000 |
| 3. Sale of Broadbeach unit. My half share of profit: | 120,000 |
| 4. Sale of Greenslopes garage. My half share of profit: | 175,000 |
| 5. Greenslopes garage rent received over 8 years. My half share: | 250,000 |
| 6. Interest on the \$250,000: | 100,000 |
| 7. Sale of Wellington Point farm to you: | 1,000,000 |
| 8. Interest on the \$1,000,000: | 600,000 |
| 9. Sale of house at 17 Piermont Place, Raby Bay. My half share of profit: | 200,000 |

10. 18 years' rent of the Holland Park car yard at \$7,000/month:	1,512,000
11. Interest on the \$1,512,000:	2,100,000
12. Commission on sale of cars for 18 years (approximately):	588,000
13. Long service leave:	12,000
14. Superannuation:	50,000
15. Third share of the market value of the car yard at 503 Logan Road, Stones Corner	400,000
16. Jaguar XJ8:	<u>80,000</u>
	<u>\$7,837,000</u>

After carefully considering my position, I propose that –

1. You transfer 11 Seahaven Court to me free and clear of all encumbrances.
2. You transfer to me \$1,300,000 in cash.
3. You lift the encumbrances on my properties, specifically:
 - (a) 903-913 Logan Road
 - (b) Glenmorganvale farm
 - (c) 8 Crump Street
 - (d) 10 Crump Street
 - (e) Vacant block at Sentinel Court.

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

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

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

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

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

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

[45] Mott responded with a letter dated 6 October 2006 to Connor Hunter, saying:
“RE: TENANCY – 11 SEAHAVEN COURT, CLEVELAND

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

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

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

1. The house at Piermont Street, Raby Bay was originally purchased by your client and his granddaughter Jayne Emma Creswick. We are given to understand that Jayne Creswick paid a deposit of \$20,000.00 from her personal account and was promised a contribution of one half from your client. Our instructions are that your client has made no attempt to repay this amount nor the usual outgoings associated with the acquisition and use of the dwelling such as the payment of rates interest in mortgage debt, stamp duty etc. However that may be, your client should deal with Jayne Creswick in relation to this matter.
2. With regard to the Jaguar XJ8. If your client would be good enough to supply a receipt for the purchase of the Jaguar for \$80,000.00, our client will promptly return the vehicle to him.
3. Our instructions are that your client received a number of cash loans from ours including but limited to a sum of \$36,000.00 lent to your client for the acquisition of a race horse named "Romantic Journey". Your client acquired a one third share in that animal.

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

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

[46] On 12 October 2006, Mott wrote again to Connor Hunter saying:
"RE: FELIX CRESWICK

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

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

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

This lease had to be negotiated as recently as July because of a requirement of the Brisbane City Council deeming 60% of the property being not suitable for its current use. Our client's prompt action prevented the immediate termination of the lease by Zupps which of course, would have resulted in a truncation of your client's income.

Our client is attending a meeting with Zupps on Tuesday 17th October next. It appears from your correspondence that our client's capacity to negotiate on behalf of your client, has been totally withdrawn. It has been made clear to our client that Zupps will not deal with your client for reasons best known to representatives of Zupps.

Our client is concerned about his position with regard to Zupps in circumstances where your client has withdrawn his full authority to act on your client's behalf. In the event that Zupps chooses to vacate the Holland Park premises, the result would be, needless to say, a total loss of income to your client. However, my client is in a position to influence Zupps favourably, provided he is given the motivation to do so as has been done on two previous occasions.

We find ourselves in a position of having to reiterate the demand that your client vacate the dwelling at Seahaven Drive to avoid costly and embarrassing legal action."

[47] On 13 October 2006, Connor Hunter sent two letters to Mott. The first responded to Mott's letter of 6 October 2006, saying:

"We refer to your letter of 6th October 2006.

Our client's comments in relation to items 1, 2 and 3 of your letter are as follows:

1. In relation to the Contract of Sale dated 8th February 2003 for the purchase of the house at 17 Piermont Street, Raby Bay, our client points out that the house was purchased for \$880,000.00 in the names of himself and Jayne Creswick and was then sold under a Contract of Sale dated 30th November 2004 for \$1,380,000.00. When the property was purchased, our client did enquire of his son John as to his one half contribution of the deposit and was informed by John not to worry about that at that stage and that John would be paying the outgoings such as rates and mortgage debts on the property and that upon the property being on sold, these would all be accounted for as well as any contributions towards deposit money. Our client and Jayne Creswick should have been properly accounted to as registered owners of the property for the considerable profit made on the sale. Our client states that he was never accounted to in relation to such profit and requests that evidence be provided forthwith as to distribution of the proceeds of sale of the property pursuant to the Contract dated 30th November 2004.
2. Our client is aware that upon the land sales being effected in relation to the property at 450 Main Road, Wellington Point, one of the disbursements was for the purchase of the Jaguar SJ8 for \$80,000.00. Your client John Creswick handled the development of the relevant

estate even though the property was developed under our client's name.

As pointed out in our letter of 3rd October 2006, our instructions are that our client requires a full accounting to be made to him regarding the development of the property at 450 Main Road, Wellington Point including details of every transaction whereby the lots into which that farm property was subdivided, were sold off to the various purchasers so that our client's interest in the profit arising from that development can be accurately ascertained. **This matter has now become most urgent since our client is being pressed to enter into a settlement arrangement with his former defacto spouse as a matter of urgency and we therefore request that your client provide us with full details of where the proceeds of sale of each of the transactions associated with the development of the property at Wellington Point were deposited and the proper accounting to him in relation to this interest in the profit as abovementioned within fourteen (14) days of today's date.**

3. It is untrue that our client received a sum of \$36,000.00 by way of a loan for the acquisition of a race horse named "Romantic Journey". It is also untrue that our client acquired a one third share in that animal. Our client has explained that he entered into an arrangement with his son Bill Creswick. He and Bill purchased the race horse named "Romantic Journey", Bill having advanced the purchase price of \$37,423.69 on or about the 27th February 2004 and our client having provided approximately \$18,000.00 for the training and breaking in of the horse. The arrangement was that Bill Creswick and our client each have a one half share in that animal. It was only some time subsequent to the arrangement with Bill for the purchase of the horse that our client was informed that Bill had borrowed money from Tabtill Pty Ltd in order to advance the purchase price of the horse. Our client certainly did not know of any arrangements with Tabtill Pty Ltd nor is he responsible to Tabtill Pty Ltd in any way for the purchase of the horse.

Our correspondence of 25th September 2006, combined with those matters contained in our correspondence of 3rd October 2006 clearly reflect on our client's rights to remain in the house property at 11 Seahaven Court until his claim against your client John Creswick is settled.

We reiterate that our client requires full accounting to him in relation to the proceeds of the development of the property at 450 Mains Road, Wellington Point within fourteen (14) days from today's date. Our client also requires a full response to the other various matters which have been raised in our abovementioned correspondence and is prepared to allow twenty one (21) days from today's date of obtaining such full response. For our client's claim in relation to such matters to be properly resolved, we point out it is difficult to deal with piecemeal responses to those various matters and we ask that you ensure that all matters are responded to within the above time frames."

[48] The second letter sent by Connor Hunter to Mott on 13 October 2006 said:
"RE: FELIX CRESWICK – LEASE TO ZUPPS MOTORS

We refer to your letter of 12th October 2006.

We confirm that our client does not wish Mr John Creswick to act any further on his behalf because of the issues existing between our client and Mr John Creswick which need to be resolved as you are well aware.

Our client does not know any reason why Zupps cannot deal with him personally as the landlord in respect of the relevant lease and our client requires that a copy of the Lease be made available immediately to us as his solicitors.

Our client has also received assurance from his son Mr Bill Creswick that the Lease by Zupps is in place until at least June 2007.

We remind you that if our client is deprived of the income currently received from Zupps as a result of the Lease, by actions taken by your client Mr John Creswick, then our client will be holding Mr John Creswick totally responsible for any such detriment in these circumstances.

With regard to the penultimate paragraph of your letter, we refer you to our separate letter of today's date and reiterate that our client will certainly not be vacating the dwelling at Seahaven Drive until the issues between himself and Mr John Creswick and Tabtill Pty Ltd are resolved."

[49] By the end of 2006, Felix was 76 years of age. He had a long-standing history of coronary artery disease. Felix had been under the care of Dr. Hossack, cardiologist, since 1996 when he presented complaining of angina. Even at that time, Felix had previously had a myocardial infarction. An angiogram performed in 1996 demonstrated that Felix had severe blockages in all three coronary arteries. He subsequently had a total of six bypasses.

[50] Apart from deteriorating relations with his sons and their families, the relationship between Felix and Marcia was troubled. He was undoubtedly drinking more than was good for him, was also experiencing blackouts (which Dr Hossack attributed to his cardiac condition) and was depressed. In late 2006, Felix was referred to Dr Apel, psychiatrist, who saw Felix for the first time in November 2006. At that time, Felix had made a WorkCover claim (to which I will refer later). On 30 November 2006, Dr Apel wrote to Dr Brett Towner of the Capalaba Medical Centre, saying:

"Dr Cliff Quinn originally referred this gentleman to me however I understand Mr Creswick's son had objected to his WorkCover claim and suggested that he change medical practitioners.

Mr Creswick has a mild Adjustment Disorder with mixed Anxiety and depressed mood secondary to a series of domestic stressors within his family.

Apparently Mr Creswick has a property mortgaged to benefit his son and states that he is now left without a roof over his head that he owes money and lacks the financial support. Family arguments are causing considerable distress, as his partner Marsha has been rejected by his son's wife. His Adjustment Disorder is unlikely to settle until such times that his financial security is more guaranteed.

In the interim, I have left him on Stilnox 10 mg 1 to 2 Nocte and Lexotan 6mg half as required."

- [51] Interestingly, Dr Apel also wrote to the referring medical practitioner, Dr Quinn, on 2 November 2006, saying:

“Thank you for referring the abovementioned. He certainly has an interesting family history. While his current Adjustment Disorder symptoms are related to his son John’s attitude to him in sacking him in May this year from his car business, it also likely that he has been fairly ruthless in his dealings with family members in the past.

I have lodged his WorkCover certificates with a letter to WorkCover and suggested they contact him to proceed with the claim. I suspect a lot of his proceedings are being done in order to punish his son John who also from all reports is no angel.”

- [52] In March 2007, Marcia and Felix executed a property settlement agreement under Part 19 of the *Property Law Act*. The recitals to that agreement provided:

- A. The Applicant filed a complaint against the Respondent in the Supreme Court for the State of Queensland, Matter Number BS1927 of 2005 (the “Complaint”), seeking to recover monetary payment and the rights and entitlements to and the interests in property held by or on behalf of the Respondent pursuant to Section 286 of the Property Law Act 1974.
- B. The parties desire to enter into this Settlement Agreement in order to provide for certain payments and or conditions in full settlement and discharge of all claims which are, or might have been, the subject matter of the Complaint, upon the terms and conditions set forth below.
- C. Whereas the Applicant and the Respondent (collectively “the Parties”) wish to implement this Settlement Agreement (“Agreement”) to avoid protracted and costly litigation and to preserve judicial resources.
- D. Now therefore, the parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:”

This agreement imposed the following obligations on Felix:

“2.0 Payments and Considerations:

- 2.1 In consideration of the release set forth above, the respondent, Felix Anthony Creswick, agrees:
- 2.2 To provide for the applicant a new dwelling house on a portion/block of land valued at five hundred thousand dollars \$500,000 at no cost or outlay to the applicant in any way or manner whatsoever. This dwelling house and the land that it stands upon shall be registered as Marcia Dianne Banfield being the sole owner of that property.
- 2.3 The provision of five hundred dollars nett (\$500.00) per week indexed for the rest of her natural life.
- 2.4 Continual payments of Health Insurance for Marcia Dianne Banfield for the rest of her natural life to a Health Insurer of her choice.
- 2.5 That the property consisting of an area of 44.7 Hectares at Office Lane, Wanora Queensland 4306 property ID 401914 on RPD L21 RP118094: in the parish of Walloon be converted to ownership in the joint names of Felix Anthony Creswick (the Respondent) and Marcia Dianne Banfield (the Applicant).
- 2.6 The provision of a motor vehicle to the value of fifty thousand dollars. (\$50,000).

2.7 That the above agreement provisions be completed within a period of 120 days (one hundred and twenty days) or a period that is considered reasonable which shall be no longer than 150 days from the date that the Respondent and the Applicant sign this Agreement.”

[53] John and Bill found out about Felix having entered into this agreement with Marcia. Apart from anything else, the agreement required that a \$500,000 house and a \$50,000 motor vehicle be procured for Marcia within 120-150 days from the date of the agreement. The chronology is not completely clear on the evidence, but it would appear that Felix discussed with John the need for Felix to make provision for a house for Marcia, and John took Felix to look at a “spec” house John had built at Schonrock Street, Wellington Point. John says that Felix, in colourful terms, rejected this property, indicating that the house was below a standard appropriate for Marcia. Felix effectively agreed with this as the reason he rejected that property.

[54] Felix and John then had a number of arguments about various matters, culminating in a telephone call in which John accused Felix of having called John’s daughters “sluts” or “whores”. Felix denied having used those words in reference to John’s daughters although it was equally clear that Felix disapproved, and expressed his disapproval of, his granddaughter Jayne’s intimate relationship with her then boyfriend.

[55] After that phone call, John, in late March 2007, wrote the following letter to Felix:

“To
Felix Creswick
11 Seahaven Crt
Raby Bay QLD

To the Family Man you call yourself ...

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

You are a complete Liar and a dishonest person in all your dealings both personally and in family matters and you will stop at nothing to achieve your own personal satisfaction from any situation no matter who you have to use or expend along the way. Most intelligent people stay away from you as they see you for what you are, however you still manage to gather a few unfortunate people with similar dysfunctional problems and be-friend them as our allies, however eventually you end up burning them also.

Take a good look at yourself “Mr. Family Man” “Cane Cutter Millionaire” and ask what have you done over the past 25 year? Did you find 1 property? (did you have the financial capabilities to settle a deal?) Did you contribute to the betterment of the family? I bet you are thinking right now “I WORK LIKE A SLAVE AND GIVE MY BLOOD AT HOLLAND PARK” Well these are the facts and on the record you have 90 plus complaints with Office of Fair Trading, you have or had court cases involving a (Jaguar, LEE) (Rolls Royce) (Kallis) (Matilda) (Fadoulis)

(Spranklin) (Gunther) (Geary) (Narm Corp) and so on and so on, all of which were never your fault as u say and furthermore u are responsible for the near loss of my Dealers Licence THRU YOUR DISHONEST Motor Dealing at Holland Park and over charging REV's certificates. Are you starting to get the picture & do u remember these events or have u got memory loss again? In business you were consider a dud! Even Ronnie Wanless jokes how you touched him up and so many people consider you not a smart person! Just a dishonest person who never keeps his word and rob people for some lousy crumbs. How about the fake insurance claim with Dr Quinn for stress or the fake insurance claim... Remember now.

Today you hit rock bottom by attacking my wife and children.. Did u even know that Jayne is 1 year off being a Doctor and Sarah is a qualified Beauty Therapist and Emily is 2nd year university and James is at Nudgee Boarding. Harry is off to Nudgee. Next year Isabella sings like a bird and Amelia is bright as a button like Jayne and guess what? They all LOVE their fathers and live at HOME with their Parent's like normal families do. You will never until the day you die, you miserable bastard! Be able to take that from me or Bill and more importantly you will never in your life experience the Love or children give to us as fathers. All you have is 2 dogs in this world because they cannot fend for themselves or speak their minds. You must be a proud man right now, Mr. Family Man!!

I even have to put a ROOF over your miserable head at no. 11 Seahaven and organize the Holland Park rental income for the past 3 years so you can merrily gamble and drink the lot away and now you want to further cause havoc in our lives by demanding outrages settlements and further by not keeping your word by settling up Bill ... Well Mr Family man!! You no longer have a hold on me emotionally or financially and you can pull whatever you want and which ever way it all goes everyone will know finally what you are!! Take a good look at yourself and ask did I have a successful family life? Do I have the love of my children? Did I do my best for the family? Have I done anything outstanding in business? Did I leave anything in Business for my children to build on? You must now be getting the picture as clear as a bell!!! "YOU HAVE ACHIEVED NOTHING!!!! But created misery & embarresmant for this family.

Bill and myself are building up a family business to pass on to our children and then their children, that is something you won't understand however you will understand that I will protect Bills and my family from going down the path you and Francis took and I will use everything in my power and whatever resources required no matter what it takes to keep our Family's together!!!! I have over the passed several years turned elsewhere for advise on how to be successful and to be quite frank with you. I am fed up with hearing you bad mouthing me around the place and although that only shows how stupid you really are I suggest you keep your worthless opinions to yourself!!!

None of my children want to have anything to do with such a miserable person such as yourself and that is their decision, as unlike you I give them the time of day to decide who they can and can't associate with.

I sincerely hope you and your Millions and all your properties and whatever worldly possessions YOU THINK you have enjoy the remaining days you have left!!!!

May you live and enjoy your life

Goodbye!!!

John”

[56] Felix responded (in a letter also addressed to Bill) dated 2 April 2007:

“After receiving your very emotional and angry letter I also feel very hurt that you would say and think such things about me. It has caused me a great deal of heartache and distress.

We all make some mistakes in life that we don’t mean to make but that is the way life goes sometimes. You have expressed your feelings to me and I am not going to reply to them as such as it will not achieve anything. The only thing I will say is that they are not true and as for your comment about me bad-mouthing you, I have praised your achievements to other people and commented on how hard you work.

You say that you and Bill are building up a family business to pass on to your children and I hope you are very successful.

I want to point out to you that without my business you would not have been able to build up a business. I am very concerned that you are and have been using my assets to build your business, and am very concerned about the way you may have gone about it. Because my properties are so heavily mortgaged I am left with nothing.

I am the registered owner of the property at Logan Road. I am the registered owner of the property at Glenmorganvale. I am the registered owner of the land at Sentinel Court and I am one third owner of the property at 441 Logan Road Stones Corner.

You have been building your own business on my assets and borrowing money on them where they are now mortgaged to the full.

I have also been speaking with certain people who have advised me that certain documents have been signed on my behalf and without my knowledge in order to obtain money from my assets.

I do not want to cause you or Bill or your families any distress and want you all to be happy and successful, but not at yours or my expense. I am entitled to my share of what is rightfully mine.

I am lead to believe that numerous transactions and business dealings have been done without my knowledge and may involve people within the financial institutions that money has been borrowed from.

My farm at Wellington Point was developed and sold by you and I received absolutely no financial return.

How was this done without my knowledge and authority.

All I want is what is rightfully mine and I believe as sensible adults we can come to some compromise on this so that neither me or your families suffer.

I do not want to have to resort to taking action that could be hurtful to us all, but if I have to I will have no choice but to do so.

Unless we can settle this matter as sensible adults I can only see myself taking the following actions.

1. Having the business dealings concerning my assets investigated.
2. Obtaining documents that relate to those business dealings, particularly where money has been borrowed against my assets.
3. If there is any evidence of serious fraud or unethical business practices report them to the appropriate authorities.
4. Advise the financial institutions of what I am doing.
5. As a last resort declare myself bankrupt.

I have kept records of all payments that I have made in the way of rates and land taxes that I was responsible for and have kept other documents.

You and Bill can continue to build your business and you can keep whatever you want to continue to be successful provided I am given my fair share of what I am entitled to.

I don't know why you would say that I have millions and properties that I think I have. I know I have the properties.

To think it has come to this is beyond my belief, and I am happy for you and Bill to be happy and successful provided I can walk away with what I am entitled to so I can be assured of a comfortable life in my twilight years. Is this too much to ask?

I am shocked to think that you are so bitter towards me as I have never intended to be bitter to you or Bill or any of my family.

It seems as though I have been deliberately bypassed and I have been stripped of all my assets without my knowledge or consent on a number of occasions. I hope this is not true but if it is it will all have to come out unless we can settle this in a sensible manner.

I sincerely hope that you will take the time to discuss this with Bill and come to a sensible conclusion instead of continuing with this unnecessary bitterness.

I never intended not to set Bill up as you have said, however I must be entitled to what part of any properties are mine.

I know that during our phone conversations with both you and Bill last week it became heated and a lot of things are said when emotions are running high. I am also under a lot of stress and pressure with regards my future security also.

I am not bitter and I am not stupid and I do not want to be left to rot and die as you seem to want me to do. This is all so unnecessary.

Signed

Felix Creswick"

[57] After Felix resiled from the May Agreement (the circumstances of which are set out below), John sent Felix a fax dated 4 June 2007. The typed part of the fax was a copy of an email which John had sent to Bill for Bill to see, but was, in fact, a letter from John to Felix. This letter said:

“Dear Dad

I would like to say my Final Goodbye’s to you as my father “now” before we start a battle which I never thought I would have to enter against you of all people in this world because of a Marcia Benfield or for any reason on this earth.

From the time I lefty Sunnybank with you until a few years ago I had the deepest respect for you as a Father and a hard Business man and I thank you for teaching me the principals of how to do a deal and make a success.

It is unfortunate the events of the past few years has seen you and me fall apart as a team and more important as Father and son. We have had a lot of people try and bring us down over the past 30 years but we stood together and not 1 ever came near us and we successfully built a solid empire. Now it is time as Father’s for Bill and myself to carry forward this success and pass on to our Son’s and Daughters the knowledge for their future’s.

However!!!!

James came home from Nudgee College the other day and asked me “why have you and Grandpa started to fight each other” ... I had not answer. I could not tell my son WHY and I did not want him to experience the thought of a Father and Son having to fight each other.

Later I sat with him and Explained.

James FAMILY is First and then there is every one else in the World. Unfortunately Grandpa is getting older and is being “Conned” and has decided that Marcia Benfield and her Daughter Evyette along with Richard who is grandpa’s great advisor are the only people in the World who care for him and are more Important than the Creswick Family and he has decided to be listen to their advise and eventually when they are finished with him and cleaned him out they to will Leave him to rot like a dog with nothing and all Alone to live his last days a sad man without Family.

James then asked me to Stop this and Talk to You Grandpa and Fix up the dispute. I told him that I had tried to fix up the problem between Grandpa and me and you know, like the day I went to court when You and “Frances” got divorced ... your grandson James said he will try and fix the problem between us. I said to him thanks, but Grandpa has made his decision to stay with Marcia and Evyette and listen to Richard’s advise and what happens from here will be decided by the courts.

Life has made a full circle however I make a “Solemn Oath” to never be like you Dad and destroy my Son and or the Family but I will guide my Son and the Family till the day I die and Love them all with all my Heart. I also will never become a Gambler an Alcoholic or a man who goes back on any deal or my word to anyone and that is why I am successful today and will be in the future after you finish this useless fight with me.

No MAN will win this fight in court DAD “only” Marcia Benfield and her Daughter Yvette will enjoy the fruits of your money and properties, AND even after they leave you after the Settlement, you will live the rest of your life a lonely old man. I will not stop any of the family who want to see you and I will still let you live in my House at Seahaven and keep a roof over your head and food on the table however I cannot and will not ever have anything to do with you again. For this I am not sorry and you will understand my reasons.

As for “The Creswick Family” we will succeed and grow even bigger and better and learn from this experience and I will guide them to be the very opposite to My Mother and you my Father.

Goodbye Dad!!! May u live many many more years on this planet but to me sadly my Dad left me a few years.”

John handwrote a message to Felix on this fax:

“Felix. I have the \$600,000 cash ready to settle by Wednesday 6/6/07 and you can pay Marcia straight away if this helps.”

- [58] On 6 June 2007, John sent Marcia a handwritten fax, in which he said:
 “Happy now Marcia
 Why not just go and leave us alone
 JC

You have managed to & succeeded to destroy what was left of our family.
 Your money is ready to collect. Have your solicitor make arrangements.”

- [59] I have not attempted to recount the entire history of the members of the Creswick family over the 25 years or so with which this litigation has been concerned. The matters I have set out above are a sufficient statement of the background to the circumstances surrounding the execution of the May Agreement. Nor have I attempted to give details of the many properties in which members and associates of the Creswick family have had interests over the years. To the extent that particular properties are relevant to the particular matters in issue, those properties have been referred to already or will be identified in the reasons below.
- [60] It is, however, appropriate to pause at this point to say something about the credit of the Creswick witnesses.

The Creswick witnesses

- [61] I had ample opportunity in the course of this trial to see, hear and assess the demeanour of each of Felix, John, Shayne, Bill and Jane.
- [62] John’s evidence-in-chief occupied about a day of court time. He was then cross-examined for the best part of five days. Felix’s oral testimony was of similar duration.
- [63] No topic was out of bounds for these witnesses. The personal character of each of John and Felix was in play from the outset. Each was clearly intent on portraying the other as dishonest and immoral.

- [64] I do not propose rehearsing every individual allegation and admission made in the course of these witnesses evidence. Nor do I propose setting out the submissions made by counsel. It is sufficient to note that:
- (a) the written submissions in chief by counsel for the plaintiffs run to 180 pages, of which about one quarter is devoted to the evidence of the Creswick witnesses on various aspects of the case. Some 30 pages alone directly address issues of credit concerning John, Felix and Jane;
 - (b) The written submissions in chief on behalf of Felix run to 151 pages. Pages 6-22 of those submissions are devoted solely to issues of credit in respect of the Creswick family, while issues of credit in respect of them are subsequently raised and argued in respect of each discreet aspect of the case subsequently referred to in those submissions;
 - (c) Ten of the plaintiffs' 40 page submissions in reply dealt solely with the credit of the Creswick witnesses;
 - (d) Six of the 65 pages of Felix's submissions in reply addressed the credit of the Creswick witnesses directly, while there were many more submissions on their credit throughout the rest of the document.

[65] In short, I think it can fairly be said that everything that each of the Creswicks could possibly want to say about one another has been said.

[66] In what follows I will deal with the Creswick witnesses in the order in which their names appear in the court heading to this proceeding, state my assessment of their credibility and give at least examples of the matters which, apart from my own observation of them as witnesses, have led me to make these assessments.

John

[67] John gave his evidence-in-chief in a measured and confident way. He was cross-examined at great length and in great detail. On occasion, the attack of the cross-examiner was intensely hostile. It is not surprising that, in response, John was occasionally truculent.

[68] But John was, I find, prepared to say in evidence whatever he thought was necessary to advance his own interests, to protect himself from attack, and to blacken Felix's character. My assessment of John is that he is a bully in his business and personal lives. One example of this emerged in a video¹ taken by officers of the Office of Fair Trading when they executed a warrant on the Capalaba yard on 26 May 2003. The video clearly shows John physically and verbally intimidating the officers, and referring to at least one, if not both, of the officers as "dogs". John explanation that his demeanour at the time was affected by the flu was quite unconvincing.

[69] Another significant indicator for me, in conjunction with my observations of John, was the language he used in his correspondence with Felix, particularly the letter of March 2007 and the subsequent letter of April 2007. Even if one accepts that John thought he heard Felix refer to his daughters as "sluts", the language and tone of the

¹ Exhibit 17.

March letter were not only extreme, but served to highlight the depth of feeling which John then had for Felix and which endured through their subsequent dealings and throughout the current litigation. I suppose, as John suggested when cross-examined about the March letter, that one could imagine a son writing a more hateful letter to a father, but that just highlights John's tacit acceptance of the fact that his letter itself was "hateful".

[70] Felix's counsel sought to make much of the fact, as it emerged, that John had a second family with his long term mistress, Susan. I am prepared to accept that, when initially questioned on the number of children he had, the answer he gave (i.e. four) related to his children by Shayne, that relationship being the immediate context of the questioning. Nor do the facts that John had a second family with his mistress, or even that he had commenced this extramarital relationship early in his marriage to Shayne, of themselves mean that his evidence is unreliable. It might, as was submitted by Felix's counsel, be used as a pointer to his character – the fact that he was prepared to cheat for so long and so systematically on his wife would support a finding that he would be prepared to cheat on his father. But ultimately, what undermined John's credibility as a witness were the evasive, and indeed ridiculous, answers he gave when questioned on the topic of his second family:

"How long were you involved with Susan Orwell, Mr Creswick? -- Several years.

Several years. It started when she was 19 years old? -- I don't recall.

You don't recall. You give us the dates, Mr Creswick, when the relationship started and when it ended? -- I don't recall the dates.

You can't recall the dates? -- No, I can't.

That's a lie, Mr Creswick. You are not telling the truth? -- I am telling the truth.

Do you think that the sort of behaviour you can get away with in a used car sales lot works in Court? -- Could you clarify that?

Do you think that you can insult his Honour's intelligence by saying you don't remember these things? -- I don't recall the length of term that Susan Orwell and myself had an affair.

I am suggesting to you that you started having a sexual relationship with her when she was 19 years old, is that correct? -- I don't recall.

You don't recall? You don't recall how old she was when you began having a relationship with her? -- No, I don't.

You were married at the time to Shayne. Do you recall that? -- I was married May of '82.

Can you answer the question? -- I was married while I was having a sexual relationship with Susan Orwell, yes."

[71] These answers (or non-answers) stood in stark contrast to the confidence with which John was able to give evidence about the details of his childhood and of his early years in business with Felix. In fact, as it emerged in evidence, John's relationship

with Susan was for years, and he arranged for support and accommodation for his second family to be financed through Tabtill.

- [72] The evidence also disclosed at least one occasion when John had lied under oath. On 2 February 2008, he swore an affidavit in which he stated, inter alia, that he had not spoken with Felix since about June 2007. But in his oral evidence before me, he said that he had spoken to Felix in July 2007. It was necessary for him to say this in order to explain the existence of a Suncorp letter of offer dated 18 July 2007 which bore a signature which John asserted was Felix's signature. John's counsel's submission that "the phone records show that there was contact between John and Felix in July 2007" goes no way to explaining the sworn statement John had made in February 2008.

Bill

- [73] Bill was a bit player in the Creswick family drama. It was clear that Bill relied on John completely. Bill left the business and property development sides of the family business to John. Bill was criticised by Felix's counsel for giving confused and confusing evidence about the arrangements for Bill and Jane to acquire 35 Sentinel Court. I do not think Bill was being deliberately evasive; I consider it more likely that he did not have a proper understanding of the arrangement itself.

- [74] I do not regard the fact that Bill, through his solicitors, flagged the prospect of bringing a family provision application under the *Succession Act* in respect of his mother's deceased estate is of itself emblematic of him being an "avaricious man", as was submitted by Felix's counsel. But the questioning of him on this topic revealed to me that Bill was intent on ensuring that he not be seen as such a character. On 29 May 2009, Mott, acting for Bill, wrote to the solicitors for the executors of Frances' deceased estate, saying that he had received instructions from Bill that Bill "wishes to make an application under the family provisions of the *Succession Act* for provision from the estate of his late mother". Mott sought financial information from the estate's solicitors and correspondence then ensued between the solicitors. On 21 August 2009, after having received some information from the estate solicitors, Mott wrote to the estate solicitors advising that Bill was "currently absent from Brisbane" and saying:

"I believe it is my client's intention to obtain counsel's opinion in relation to this matter which he will attend to as soon as practicable. In the meantime, I am instructed to advise that it is my client's intention to pursue his claim in this matter."

- [75] When cross-examined, Bill was careful to say that he had not actually made a claim on his mother's estate. After having been shown the correspondence which passed between the solicitors, there then ensued a passage of evidence which dealt both with that topic and also contact between Bill and Felix on the evening of 25 May 2007, i.e. after Felix had signed the May Agreement. It is necessary to set out that evidence at some length:

"MR KELLY: So what I am putting to you – are you aware from the fact that you are making – or you – maybe you haven't made one formally, but you have intimated that you wish to make a claim for family provision? -- I received a phone call from my sister in Rockhampton, who I hadn't spoken to for some time, although I had spoken to her husband, and this was after my mother's funeral, and on the day of my mother's funeral she spoke to me and she indicated that she was slightly concerned with the area

of my mother's will and I asked her if she wanted me to have – if she would like me to look into it, I will. If not, then I won't. So I simply asked Mr Mott to pen a letter, forward a letter, and just asking what was in it. I have no claim against my mother's will. I won't be making a claim against my mother's will. It is not my intention to make a claim against my mother's will.

That is just dishonest evidence, Mr Creswick? -- I don't want to make a claim against my mother's will.

But the course of correspondence I have just shown you, taken you through quite carefully ----? -- I understand the correspondence you have shown me ----

---- shows your solicitor ----? -- I understand what you have just shown me but I have spoken to Mr Mott and I have told him that I will not be going ahead.

I thought your answer just previously was you hadn't had a chance to speak to Mr Mott about the last letter from ----? -- I had been away at shows interstate and Mr Mott had contacted me by phone. I have not had a chance to speak to Mr Mott directly about it in person.

So when you gave that answer, did you mean that you had spoken to him on the telephone but not in person? -- Mr Mott contacted me by phone.

So when you said you hadn't spoken to Mr Mott, that means "I haven't spoken to him in person, face-to-face"? -- That's what I refer to.

You are just being silly with these answers, aren't you, Mr Creswick? -- No, I am not being silly, Mr Kelly. You are trying to paint a picture that I am going after my mother's will. I am not going after my mother's will.

Well, Mr Mott seems to have very successfully painted that picture in those letters that I just gave you – showed you? -- Mr Mott sent a letter to a solicitor and got a reply. That's as far as it has gone.

Is Mr Mott, in your experience, the sort of solicitor who goes off on frolics of his own without getting instructions? -- I can't answer that. I can't speak on behalf of Mr Mott.

Your evidence, Mr Creswick, can I say, about that particular subject is really not only dishonest, but silly? -- It is not dishonest.

Now, are you on good terms with your father? -- I was on good terms with my father, yes.

You were on or you are on? -- I was.

And you ceased to be on good terms with him once he communicated his intention to you that he would not be going through with the May agreement, as it is called? -- Sorry, say that again?

You ceased to be on good terms with your father once he told you he wasn't going to go ahead with the May agreement. Do you know what I mean by the May agreement? -- Yes.

The May 2007 agreement? -- Uh-huh.

Once your father told you that after he's signed it he wasn't going to go ahead with it, you ceased to be on good terms with him? -- Communications ceased on a regular basis, yes.

And you are angry at him – when he told you that? -- No, I wasn't angry with my father. I was disappointed with my father.

Sorry, when your father told you that he was not going to go ahead with the May agreement, were you very angry with him? -- You just asked me that, I said no. My father never had direct conversations with me regarding the May agreement.

Alright. I am putting it to you your father rang you at – on the evening of 25 May 2007 at 10 past six? -- Correct.

Do you recall that? -- I have seen the phone records.

And he told you in that conversation that he was not going to go ahead with the May agreement? -- I can't recall the conversation but I ----

You weren't talking about the weather were you? -- I don't know what I was talking about, Mr Kelly.

You weren't talking about how the Broncos were going? -- It was two and a half years ago. I don't know what we were talking about.

It is an hour – literally an hour after he signed an agreement that is very important for him, has very important consequences. Can I suggest to you you must have been talking about the May agreement? -- Well, we possibly could have been talking about the May agreement. I can't recall the conversation in full detail.

If you were being honest with his Honour and not trying to insult the intelligence of the Court you would accept that it is very likely you were talking about the May agreement in that phone call? -- We were obviously talking about the day's events that had just occurred.

Are you changing your evidence now? Are you accepting that you're talking about the May agreement? -- I don't know what we were talking about, Mr Kelly. I can't recall the conversation.

All right. The conversation, can I say, puts you – went like this: your father said he wasn't going to go ahead with the May agreement and you said, "Thanks, Dad. You have fucked me and my family over. I hope that you have a good life and you die soon."? -- That's incorrect, Mr Kelly.

That's what you said to your father? -- That's incorrect.

And it's a very – I am putting to you not only did you say it, but it's a disgraceful thing to say to your father? -- That's incorrect, Mr Kelly.

You knew that your father at this time was an old man? -- I knew his age at the time.

And he was trying – when he said he was not going ahead with the May agreement, which came to you – came to your attention at some stage, didn't it, that he was not going to go ahead with it? -- The May agreement was signed on – he signed it on Friday and we signed it on Saturday. So, how – how on Friday night could you conclude that he wasn't going to go ahead with it?

Because he rang you and told you? -- That's not correct. I can't recall the conversation.

All right. Let's go back again. At some stage you became aware that your father was not going to go ahead with the May agreement. Okay. You accept that? -- Not on that night, no.

Yeah. I understand you are rejecting that I'm putting to you that it happened on that night. What I'm saying to you is that even on your evidence you must have become aware at some time that your father was not going ahead with the May agreement? -- We weren't – I wasn't aware that he wasn't going ahead with the May agreement until some days later.

When? -- Some days later, when we were informed.

And from that time, there was no real contact between you and your father for business reasons or for social reasons? -- No, that's not correct.

What contact did you have after that with your father? -- My father rang me on – my father would ring on specific days. The phone records will show you when he rang. He rang me in September to inform me that our friend of ours wife had died.

Your father when you knew that he was not going ahead with the May agreement, you would recognised that he was an old man trying to protect himself from a position that he's got into by signing the agreement? -- I would have recognised?

That he was an old man trying to protect himself from a position he got into by signing the May agreement? -- What position was he?

The position that the May agreement stood for to him, the consequences of the May agreement for him? -- I don't understand your question.

You understand – when your father decided not to go ahead with the May agreement, he was trying to protect himself from the consequences of that agreement for himself? -- Well, he – he penned the May agreement.

What, do you mean he penned it, he wrote it? -- he discussed and set up the May agreement. How would he – defending himself on it.

Well, why would you say he penned it? What do you mean by that, he wrote it? -- Okay. It was a phrase that I used "pen", he discussed it or organised it himself.

It's a bad phrase because it's actually a dishonest answer, isn't it? -- Oh, okay.

The May agreement was drawn up by Mr Mott, your solicitor? -- I'm not aware -- the May agreement was drawn up by Mr Mr Coolwell, I think, wasn't it?

Mr Mott. Mr Coolwell somebody who works for Mr Mott? -- No, Mr Coolwell is another solicitor.

Do you mean Colville? -- Yeah, sorry, Colville, sorry.

Mr Creswick, you are not seriously suggesting that Mr Colville drew up the May agreement? -- The May agreement was being discussed by my brother and my father. It was not being directly discussed with me."

[76] This passage of evidence is indicative of the evasive nature of many of the answers given by Bill in cross-examination.

[77] I also do not accept Bill's denial of having made the majority of the statements in the course of the telephone conversation referred to in that passage of evidence. His assertion that he could not recall the conversation was quite unconvincing. It is clear, on the telephone records, that he and Felix had a telephone conversation that evening. This sort of abusive statement is consistent with the degree of animosity which had arisen between John and Bill on the one hand and Felix on the other. There is also a contemporaneous note of that statement having been made in a diary note made by Marcia at the time Felix was having this discussion.

[78] Bill's interests clearly coincided with John's in this case. On any view of the evidence, Bill was in John's camp prior to the signing of the May Agreement and after the parties fell into dispute after Felix disavowed the agreement. On 1 May 2009, in the course of without prejudice settlement negotiations, Bill put up a settlement proposal which contained the following proviso:

"IF THIS OFFER IS NOT ACCEPTED BY FELIX WE (JOHN AND BILL) WILL OFFER TO PAY BOTH THE 'WANLESS' ACCOUNT AND 'GANIM' ACCOUNT IN TWENTY-ONE DAYS, ON THE PROVISO THAT YOU BOTH CEASE FUNDING FELIX IN THIS MATTER."

[79] Bill was cross-examined on having made this offer:

"I'm suggesting this was sent through, and I'm suggesting to you that what it says is, "If this offer is not accepted by Felix, we, John and Bill, will offer to pay both the Wanless account and Ganim account in 21 days on the proviso that you both cease funding Felix in this matter." I am putting it to you that the proposition was never put to you by Mr Gay or Mr Wanless? -- It was put to me by Mr Wanless.

And I'm also putting it to you that you have put it as a proposition, because the way you have written it is, "If this offer is not accepted, we will offer to pay." You weren't recording a proposal that had been put to you, you were making an offer? -- No. The first offer at the -- the first discussions we had at Mr Wanless's -- that I had with Mr Wanless, Mr Wanless's offer, these were Mr Wanless's words.

Well, I'm suggesting to you that's a lie? -- No.

And I'm also suggesting to you that what you were seeking to do was to reach a situation where you could pay Mr Wanless what he was owed and

pay Mr Ganim what he was owed and leave your father without the ability to protect himself with legal representation? -- No, that's not correct.

What other possible purpose could it have, Mr Creswick? Can you think of another reason you'd make an offer like that? -- Well, you have got – there's – Mr Gay and both Mr – both Mr Wanless and Mr Gay have given statements relating to this. It was not our intention to – it was not my intention to go there and damage my father. It was my intention to go there and try and come up with a solution and it was Mr Wanless's words that – these are Mr Wanless's words, not mine.

I'm putting to you that they are your words, not Mr Wanless's? -- I have said it twice, I will say it three times: these are Mr Wanless's words from our first meeting, not mine.

And I'm saying to you this proposal you put had the purpose of leaving your father in a defenceless position? -- That's incorrect.

And that's where you wanted him? -- That's incorrect."

- [80] Other parties to the settlement negotiations were Mr Wanless and Mr Gay – both friends of Felix. Mr Wanless had provided Felix with financial assistance to conduct this litigation. Despite the fact that it appears that Bill's solicitors had been in contact with and even subpoenaed, Mr Wanless and Mr Gay, I decline to accede to the submission by Felix's counsel that I ought draw a *Jones v Dunkel* inference by reason of Bill's side not calling either Wanless or Gay to give evidence about this offer. There is no allegation in the pleadings about this line of cross-examination² and in any event, both Wanless and Gay ought properly objectively be regarded as having naturally been in Felix's camp, given the nature of their personal and financial relationships. Neither of them were called in Felix's case.
- [81] Regardless of that, however, and regardless even of whether Mr Wanless had in fact suggested that an offer in these terms be made, the fact that Bill was prepared to make an offer in these terms which, if accepted by Wanless and Gamin, would have left Felix completely adrift indicates to my mind the depth of Bill's hostility towards Felix in the course of this litigation.
- [82] In short, Bill's evidence was demonstrably coloured by his patent support for John's position.

Shayne

- [83] Shayne came across as a woman of strong character and strong convictions. The strength of her character was undoubtedly tested by John's long-term infidelity, and she was frank in her evidence in describing the difficulties she had encountered in dealing with that issue in her personal life. Whatever her feelings for John may be, however, her evidence was patently imbued with, and informed by, the depth of her dislike for Felix. She was quite candid about that. It is sufficient to refer to the following relatively brief passage in her cross-examination:

"Now, you have been – you haven't been exactly backward in denigrating Felix in your evidence-in-chief, have you? -- No. No. I have been honest.

² *Cooks Constructions Pty Ltd v StorkFood Systems Australia Pty Ltd* [2008] QSC 179 at [51].

You have a very intense dislike for him? -- Yes.

And you were aware in December 2007 that – he knew you had an intense dislike for him? -- As he did for me.

Yes. So, when you came to his house and where he was living and came in with your husband, John -----? -- Yes.

----- that was quite a provocative act, can I suggest? -- I don't think so.

And you didn't come in on the basis that it was John who was going to stay the night, you came in on the basis that you and John were going to move in to the house with Felix? -- No. Why would I move into the house with a man that I couldn't stand?

To intimidate him? -- No. I couldn't stand being anywhere near him.

You did it to make him feel uncomfortable about living in that house? -- No. I would never, ever, ever move in to that house with him."

[84] On the evening of 13 December 2007, Shayne and John turned up unannounced at the 11 Seahaven Court property in which Felix and Marcia were living. Their arrival at those premises led to an urgent application being made to this Court that evening for an order to restrain John and Shayne from retaking possession of the property and evicting Felix and Marcia. John and Shayne's version of events was that they had had an argument, and John had said that he was moving out of their matrimonial home and moving in with Felix. On their version, what then happened was that Shayne drove John the 600 metres or so from their home to the house at 11 Seahaven Court. But, despite having had what she described as a "bitter fight" with John, Shayne did not merely deposit him at the door of 11 Seahaven Court. She went inside, sat down, and made herself at home. The following passage of her cross-examination on this point is instructive:

"And in relation to what happened on 13th December 2007, how far is the house where Felix lives at 11 Seahaven Court from where you and John live? Would it be 500 metres? -- Oh, probably a little bit over that.

500 to 700 metres? -- Close to – something like that.

Alright. Your evidence is that on the afternoon of 13th December 2007 you had such a strong and bitter argument with John that you told him to get out of the house and go and live with Felix? -- Uh-huh.

It was a very bitter argument? -- Uh-huh.

You were angry? -- Uh-huh. We both were.

Okay. And then you say that as a courtesy to John, you then drove him – got in the car and drove him down the road -----? -- Uh-huh.

----- 700 metres to Felix's house? -- Uh-huh.

That's just a lie, Mrs Creswick, that you were doing that out of kindness for John? -- What, that I drove him there?

Not that you drove him there, but it is a lie that you would be driving there out of kindness after you'd had a very bitter argument? -- I didn't drive him there out of kindness. I took him there to stay there.

And when you came in, it wasn't for him to stay there, you told Marcia that you and he were here to stay – were there to stay? -- As I told you the other day, why would I want to live with a man I didn't stand? I have done that already. I wasn't doing that again.

Why would you go into the house of someone who you couldn't stand and sit in their house when you knew that you have a very, very intense dislike for him? Why would you do that? -- Why not? It is my house.

And that's the message? -- I had been in that house before several times.

But that's exactly the message you wanted to communicate to Felix and Marcia, was that it was your house and you could go there any time you wanted. That's what you wanted to communicate to them? -- No. I was going there to drop John off and I had never been to that house unless I was gone for a reason.

Yes? -- I never dropped in just to say hello and have a cup of tea. I have never been invited to go and have a cup of tea.

Please understand, Mrs Creswick, I am not suggesting you didn't go there for a reason. I am suggesting -----? -- That was the reason, to take John.

I am suggesting you went there for a very particular reason which was to make a point to Felix and Marcia that you owned the home and you could come n any time you liked? -- No.

To do such a thing, can I suggest, was a very provocative act given that you had a very strong dislike for Felix? -- No.

And you were aware that Felix would have been aware that you had a strong dislike for him? -- Yes.

And in that situation it is a very provocative act to go to someone's house and sit in their house when they haven't invited you in? -- Sit in their house?

Sit in a house where they are living without them having invited you in? -- I wasn't doing anything provocative. I was sitting on my couches, which I might add.

Well -----? -- In the house.

I am putting to you it was very intimidating and aggressive? – Well, he may have thought it was intimidating. That was not my intention.

You must have realised that a man of that age and Marcia would find that intimidating? – No.

Didn't even cross your mind? -- Didn't even cross my mind. I was still very angry.

You are not being honest with the Court in these last answers? -- I am answering you as you are asking me the questions.

It was aggressive behaviour. You would agree with that? -- I would say we were both pretty fired up and aggressive, yes.

It was aggressive by you towards Felix and Marcia? -- I wasn't even thinking of Felix and Marcia at that stage. I was thinking of John going to that house.

You known when you said last Friday that you waited there to find out what the outcome of the Court case would be? -- Uh-huh.

That was a lie, too, wasn't it? -- No.

Well, if it was correct, were you waiting there so that if the Court case result was that you could stay there, you were just going to keep staying there? -- No.

Well, that's -----? -- Why would I want to stay there?

Well, when the Court case result was communicated to you -----? -- Uh-huh.

----- you were going to have a sit-in, weren't you, and make it unpleasant for them? -- No, I wouldn't want to live with them.

And you made yourself so much at home at their house that while you were waiting there during the Court proceedings you had one of your daughter's boyfriends go and get you dinner? -- Uh-huh.

And you ate your dinner there in their house? -- Uh-huh.

All the time knowing that Felix had his solicitors in Court trying to get a Court order to have you removed from the house? -- I didn't know that at that stage. I didn't know what they were working on.

Well, you must have had a fair idea, fair inkling that that was what Felix was doing; he was going to Court to get you and John out of the house where he was residing? -- As I said, I didn't know the terminology. I didn't know what was going on in the Court. I just knew that they were against each other.

Mrs Creswick, I am not asking you about terminology. I am asking you to deal with the substance of the question. And I am not putting any fine words to you or difficult concepts. I am saying you knew that Felix was getting his solicitors to go to Court to have you removed from the house. That's what you knew? -- I knew they were gone to Court but I didn't know that was going to come out of it. That's why I waited.

That's not answering the question. You knew why they were going to Court? -- That's answering the question as best as -- I knew that they weren't happy that John was there, exactly.

You knew they were going to Court so that he would have to leave the house? -- I knew they were going to Court to see what was going to happen.”

- [85] Shayne’s counsel fairly makes the point that the criticism levelled at Shayne by Felix’s counsel for her long-standing dislike of Felix does not allow for the fact that Felix feels the same way about her, and has done so for an equally long period of time. That is quite right, and is a fact which will be taken into account when assessing the credibility of Felix’s evidence so far as it concerned Shayne. Having had the extended opportunity to hear and observe Shayne, who was regularly forceful in emphasising the bad points she wished to sheet home against Felix in the course of her evidence, however, I am quite satisfied that the credibility of her evidence was undermined by the overwhelming enmity which existed between her and Felix.

Jane

- [86] Jane’s evidence, which was relatively brief in scope, really did not add much to the dispute. She was undoubtedly generally supportive of Bill’s position but, in quite stark contrast to the other Creswick witnesses, I do not consider that she gave her evidence with a view to pushing a particular barrow or settling any scores. Jane was appropriately responsive when giving her evidence, and I have no reason to doubt that she did her best to answer questions truthfully.
- [87] I would therefore not be prepared to make any adverse findings about Jane’s credibility, although, as I have already said, her evidence was in fact of quite limited assistance in the context of this case.

Felix

- [88] Counsel for Felix sought to portray their client as an old man, rendered frail by physical and psychiatric ailments. The Felix who took the witness stand and was cross-examined at great length before me, however, appeared to suffer from little of the frailty for which his counsel urged. True it is that he was not in his first blush of youth, but he presented to me as an intelligent and wily man who was demonstrably prepared to say whatever he thought would assist him in the case. On occasion, his guard slipped, and he made statements in evidence against his own interests. Perversely, those statements against interest were the parts of his evidence which I considered most likely represented the truth.
- [89] Felix’s personal character was on trial. Having had the opportunity to observe him and his demeanour at great length during this trial, I conclude that he is a selfish and self-centred person. I am fortified in reaching that conclusion by the opinions expressed by both Dr Apel, Felix’s treating psychiatrist, and Dr Reddan, a psychiatrist who examined Felix during the course of the trial, who agreed that Felix has narcissistic personality traits. Dr Apel described this in his evidence:
- “You see where she talks about, “Felix has some grandiose ideas and statements.”? Would you agree with that?-- Grandiose, no. I certainly think he has some overvalued ideas. I didn’t think the personality traits were sufficient to warrant a diagnosis of a personality disorder, they’re more a question of personality traits.

But are they narcissistic traits?-- They are. They are self-centred.

All right. So, he has narcissistic personality traits?-- He does, yes.

Would you say it's a narcissistic - I withdraw that. Like, he's told you things like one son stole \$14 million, another \$11 million, 14 caryards at a time, and so forth. Now, if we accept that those things are wrong-----?-- Mmm.

-----is that an example of the narcissistic traits? -- Yes, it would be.

Are narcissists prone to telling lies if they believe someone is acting – telling lies if they think someone's in the wrong or they don't like that person?-- Well, they certainly tend to do things that support their own self-image.

So if they get a set against someone, are they prone to exaggeration and lying?—Exaggeration, yes.”

[90] Felix's physical problems, particularly his heart problems, undoubtedly impacted on his life in the years prior to 2007. The medical evidence links his heart condition to the blackouts he suffered from time to time. Whilst respectfully noting Dr Reddan's hesitation in accepting Dr Apel's psychiatric diagnosis, I do however accept the evidence of Dr Apel, as Felix's treating psychiatrist, that Felix suffered from a chronic adjustment disorder with mixed anxiety and depressed mood, which fluctuated in the moderately severe range following his initial referral to Dr Apel in late 2006 and through 2007. Dr Apel stated, however, that Felix's condition had improved in 2008 to the "mild to moderate range" and when seen in August 2009, Felix's condition was at the milder end of the spectrum "but still pervasive and partially disabling". It is also important to note that Dr Apel reported on Felix's psychiatric condition at the time Felix was actually giving evidence before me. Clearly, any concern about Felix's psychiatric state when giving evidence would have some effect on my assessment of him as a witness. Dr Apel examined Felix on 28 September 2009. (This was in the middle of Felix's evidence in chief. A weekend had intervened, and an incident had occurred which gave rise to some concern as to Felix's state of mind. Accordingly on 28 September 2009, the Court stood down to enable Felix to be examined by his psychiatrist.) Dr Apel's report was as follows:

“On examination today Mr Creswick was mentally alert, fully orientated in time and place and capable of performing Serial 7's quickly apart from an initial hesitation, calculations were performed to 72 when the test was ceased.

Mr Creswick discussed in detail aspects of his settlement pursuing past business situations and arrangements in a somewhat stubborn and uncompromising manner.

Although able to have his thoughts mixed up under pressure given time he is capable of responding in a lucid manner to question.

Mr Creswick's thoughts were coherent, his thinking constructed and his sensorium clear. Bearing in mind he is physically compromised to a mild disease as evidenced by his brief confusional episode on Sunday morning and past history of blackouts and coronary artery bypass surgery.”

- [91] Even allowing for Felix's age and physical constraints, I have no reason to conclude that he was in any way compromised when giving his evidence before me. If anything, Dr Apel's observation of him as describing matters "in a somewhat stubborn and uncompromising manner" could equally be applied to the way in which he gave evidence before me.
- [92] The nature of Felix's personality showed through in many ways. He has been estranged from most of his children, apart from John and Bill, for many years, going so far as to allege that one of his other sons was the first man that "tricked me, robbed me, robbed my mother and his wife". In relation to dealings with that particular son, Felix denied in evidence before me that he had either read or signed documents connected with the transaction with that son. Apart from the resonance with Felix's assertion in the present case, this was one of several instances in the course of the evidence when Felix asserted that he had not read documents he had signed. Felix's narcissistic personality also drove him to enjoy what might be described as the "high life". Over many years prior to the breakdown of relations between him and John, Felix virtually had unfettered access to a constant stream of money. It is clear on the evidence that Felix drank and gambled heavily. (His denial in evidence of the extent of his gambling habit was comprehensively dispelled by the online betting records which were tendered in evidence.)
- [93] Leaving those peccadilloes to one side, however, it is quite clear that Felix will lie whenever it suits his purpose and that when confronted with the truth he diverts blame onto others. The following matters are sufficient to exemplify these findings:
- (a) In 1994, Felix was involved in a dispute with Mr William Kallis arising out of the dissolution of the partnership under which Felix and Mr Kallis conducted the service station business at the Matilda site. In an affidavit filed in those District Court proceedings dated 24 December 1996, Felix swore:
- “2. At all times relevant to these proceedings I was employed by Tabtill Pty Ltd as the Manager of its car yard situate at 905 Logan Road, Holland Park trading under the name of “Motor Trading Centre”.
 3. Tabtill Pty Ltd conducts the business of “Motor Trading Centre” at 495 Logan Road, Stones Corner and 905 Logan Road, Holland Park.
 4. I do not have nor have I every (sic) had a financial or proprietary interest in the company Tabtill Pty Ltd or the business “Motor Trading Centre” at any time relevant to these proceedings.
 5. At all relevant times I did not conduct any business on my own account save and except for my interest in “Greenslopes Garage”.

When cross-examined on having sworn to these matters, which are completely at odds with the case being advanced before me, Felix was evasive and blamed John and his then solicitor for the contents of the affidavit.

- (b) On 14 December 2007, for the purposes of the present proceedings, Ganim swore an affidavit in which he (clearly on instructions) deposed to certain matters on behalf of his client, Felix. That affidavit said, relevantly:

“6. My client and his sons used to work with each other wherein my client was a motor dealer and his sons worked in the business and subsequently became businessmen in their own right. John holds a motor dealer’s licence (“John’s licence”). Using John’s licence he trades as a motor dealer and/or through corporate entities (“John’s companies”).

...

15. Years ago my client executed security of documents designed to assist John and/or Bill and/or corporations with which they were involved to undertake business. Specifically my client guaranteed a floor plan for business owned and/or operated by John and/or Bill and/or corporations under their control. The initial amount guaranteed was \$750,000. Third party security was taken over property owned by my client at the time to support the guarantee.”

Felix was cross-examined on these statements by Ganim (which are inconsistent with the case being advanced on behalf of Felix), and sought to retreat from or distance himself from the matters that Ganim had deposed to. It is sufficient to refer to the following passage of evidence:

“And I’m suggesting to you that you told Mr Ganim that John traded as a motor dealer either himself or through his companies, that he traded as a motor dealer, not in partnership with you, it was John’s business?-- That’s not true, that’s a partnership.

Did you tell Mr Ganim that?-- I do not recall that I told that to Mr Ganim.”

- (c) In respect of the Wellington Point property, Felix’s pleaded claim was to the effect that in about 1998, Felix and John agreed to subdivide and sell the farm at Wellington Point which Felix had acquired from his parents. His case was that he and John entered into a joint venture for that purpose pursuant to which Felix was to contribute the Wellington Point farm, and John was to manage and undertake the subdivision at his cost. Felix asserted that upon the completion of the subdivision and sale of the resulting lots, Felix was to be paid \$1,000,000 and a Jaguar motor vehicle valued at \$80,000 was to be transferred to him, and John was to retain the net sale proceeds which remained.

Despite the passage of many years from the occurrence of the subdivision and sale of the lots (which Felix undoubtedly knew was occurring) the first articulation of these claims is found in Felix’s letter of 2 October 2006 (quoted above). In relatively contemporaneous correspondence from his then solicitors, however, what Felix sought was an accounting of the profits arising from the Wellington Point development. In their letter of 13 October 2006, for example, Connor Hunter said:

“As pointed out in our letter of 3rd October 2006, our instructions are that our client requires a full accounting to be made to him regarding the development of the property at 450 Main Road, Wellington Point including details of every transaction whereby the lots into which that farm property was subdivided were sold off to the various purchasers so that our client’s interest in the profit arising from that development can be accurately ascertained.”

When challenged on this request by Connor Hunter for there to be an account of profits, Felix denied having instructed Connor Hunter that he would get a share of the profits from Wellington Point, and referred to Connor Hunter as “liars”, and, after further intervention from me, reaffirmed that it was not true that he had told Connor Hunter that the deal was that he would get a share of the profits.

- (d) There were numerous examples in the course of Felix’s evidence when he denied having given particular instructions to his solicitors. For example, in reference to a letter from Hopgood & Ganim to Mott dated 5 July 2007, in which it was said, inter alia, that Felix did not believe he had signed any documents in connection with on-sales in the Wellington Point subdivision, the following evidence was given by Felix:

“Okay. Thank you. Now, in this letter - I just want to get the right place for you. Would your Honour just give me a second? I have lost my place. Yes. You told Mr Ganim that your affairs, that's your business affairs, were being managed by John and Bill for the benefit of you, John and Bill; correct?-- No, not correct.

You didn't tell him that?-- No.

I suggest you did, that you told Mr Ganim - I ask your Honour to look at the bottom of page 3 - you told Mr Ganim that your affairs were being honestly managed by your sons for their - your two sons' and your mutual equal benefit?-- Nope. I don't recall that and I don't think that that was ever said in 1957.

Mmm-hmm?-- In 19 - 2007.

What I'm suggesting to you, Mr Creswick, is this, that what you told Mr Ganim certainly does not sit with an equal partnership just between you and John. You told him something different; correct?-- No. It's not correct.

Mmm. All right. And you told Mr Ganim at about that time that you did not believe that you had signed any documents with reference to the sales at Wellington Point. That's what you told Mr Ganim, you did not believe that you had signed any documents with reference to those sales?-- I did not sign any documents.

You told Mr Ganim - sorry?-- I did not sign any document.

Are you saying you told him that?-- No, I didn't told him that.”

On 28 September 2007, Ganim wrote to Mott, enclosing a bundle of documents which were asserted to contain false or forged signatures of Felix. With respect to Wellington Point, this letter stated:

“16. At pages [103] to [121] are copies of the Form 1 Transfers for each of the 19 lots. You will note that on each of the Transfers our client, as the registered proprietor, is noted as the Transferor and has purported to sign for the Transferor. Our client did not sign *any* of these Form 1 Transfers. The signature on each of the Transfers, purporting to be the signature of our client, is not his signature. The false signature appears on each Transfer except the Transfers relating to Lots 1, 3 and 9. The signature on these Transfers bears more or a resemblance to that of our client but it is not the same as his signature. Our client has specifically confirmed that he did not sign the Transfers for Lots 1, 3 and 9. You will also note that only *one day* (in the case of Lots 1 and 2) separates distinctly different signatures.”

It emerged in evidence that Felix accepted that he had, in fact, signed several of these Transfers. When challenged on the unequivocal statements made (undoubtedly on instructions) in Ganim’s letter, the following evidence was given by Felix:

“You told Mr Ganim that you had not signed any transfers at all, didn't you?-- Well, could very well be.

Look at page 8. Now, there's two things I want to talk about in this. Page 8?-- Yes.

Paragraph 16?-- Yes.

Which is at the bottom of the page?-- Yes, yes. Yes.

Now, Mr Ganim enclosed copies of the transfers for each of the 19 lots in Wellington Point?-- That's right.

And then went on to say, two sentences later, "Our client did not sign any of these transfers." Now, he said that because that's what you told him, that you had not signed any of them?-- I don't remember I told him. I don't recall I told him, but after seeing the signatures yesterday down there, I did sign the document, but I do not recall that I told that Joe.

Now, Mr Ganim took you through the actual documents too, didn't he?-- Yeah.

Because if you look at the end of that paragraph - sorry, the next sentence says, "The signature on each of the transfers purporting to be the signature of", you, "is not your signature." That's what he says?-- That maybe is not mine.

The next sentence, not the next page, page 8 paragraph 16?-- What page?

Page 8 paragraph 16?-- Page 8 paragraph 16. 16, yes.

Okay. Were you looking at the sentence I asked you to look at a minute ago, or were you at a different page?-- No, 8, 16?

Yes, you have got it. And Mr Ganim said that the signature was not yours on every transfer; correct? That's what you told him?-- I don't recall - I don't remember, but the point here is - if I - at that time, I believe I didn't sign nothing, I never sign a transfer, I never sign - saw a contract, but after you show me the document yesterday, I disclose - not disclose, I did find that there's a couple of signatures on two of the documents.

Mr Ganim showed you every transfer, Mr Creswick, didn't he?-- Mr Ganim didn't show me every transfer.

Well, look at the last few lines?-- Yeah.

The second last and last - second last sentence says, "Our client", that's you, Mr Creswick, "has specifically confirmed that he did not sign the transfers for lots 1, 3 and 9."?-- Well, as a matter of fact I did receive a letter from Mr Joe Ganim regard the lot 1, 3 and 9.

Mmm?-- I received a letter and at that time I don't know the reason why, maybe I - I don't know what has happened. I did say that I didn't sign that document.

That you didn't?-- Yes.

Didn't?-- Yeah, I didn't, no.

And lots 1 and 3----?-- But then when I went through the - proper to the - when I started to read the books, the letters and everything, I did - I said, "They are my signatures." See, "They're my signatures.", and that's what they are.

At this time, Mr Creswick, you had looked at every transfer, I suggest?-- I did not look at every transfer.

And you had told Mr Ganim expressly that you did not sign 1 and 3, for lots 1 and 3. That's what he said----?-- I definitely told him that I didn't sign 1 and 3. I still remember that, yes.

Yes?-- I remember that.

That was just untrue, wasn't it?-- That wasn't true."

- (e) In November 2006, Felix signed an application for WorkCover benefits pursuant to the *Workers Compensation and Rehabilitation Act 2003*. The injury in respect of which he made claim was that of mild stress, depression and anxiety. He stated in this WorkCover application that he was employed as a manager by "Tabtill John Creswick Family Trust", and that his employer's trading name was "Motor Trading Centre". When cross-examined on this WorkCover claim, however, Felix claimed that it was, in fact, connected with something to do with his knees or legs. He was also challenged on his claim to WorkCover that the incident had occurred in 2006 when, on any view of the evidence, the Holland Park car yard had closed

down in 2005. Felix's preparedness to make statements, and discard them, when it suits him became apparent in the following passage of evidence:

"And when the investigators interviewed you-----?-- Yes.

-----and then discussed this with you?-- Yes.

You told them on the 29th of November that you had discussed it with your wife - you meant Marcia - and you would like to withdraw your claim?-- That's not true. That's not true. Bill Creswick come to me and he say, "Dad, I just heard from Richard that you put an application in for your knees and everything to the government. That's bad for the family." I said, "Don't go through.", and I just tore the documents and throw it away.

Bad for the family, only because it's a lie?-- But there's no a lie. It was the truth. I was had it. I couldn't walk. I could not walk.

It was a lie to say to WorkCover that you were employed and working at Holland Park-----?-- Well, maybe I made a-----

-----on 7 June 2006. That was false, wasn't it?-- Well, maybe - I do not remember. If I made a mistake, I made a mistake, but I just don't recall, I don't remember everything. It's impossible to remember everything that's happened 10, 15 years ago.

And you would have continued with the lie but for the fact that either the investigators or Bill pulled you up?-- Nobody investigated. Bill, my son. Not investigator. Investigator they want me to go through, the doctors want me to go through, they were all happy to go through, and I believe in Bill and I said, "No, I'm not going to."

HIS HONOUR: The WorkCover claim dated 23 November 2006-----?-- And I cut it up.

-----is Exhibit 150.

ADMITTED AND MARKED "EXHIBIT 150"

WITNESS: And I dump it away, I break it and throw it away. Could very well made a mistake on the date, I don't know.

- (f) Felix vehemently denied having given Ganim instructions to tell John and Bill that they were not to have contact with Felix and also denied giving instructions to Ganim to threaten an injunction to restrain contact. It was clear, however, that Ganim had communicated precisely these instructions to John's side.
- (g) Felix flatly contradicted evidence that he had previously given on affidavit, in which he had said that his intimate relationship with Marcia had ceased in 2003 but they had "continued to live amicably together as companions". My observation was that, when confronted with this, Felix became defensive, and asserted that "we were sleeping together, we was a husband and wife" and said that the suggestion that

he and Marcia had stopped sleeping together but still lived amicably as companions was not true.

[94] The examples I have just given could be multiplied, and have been dealt with at length in counsel's submissions. These examples do, however, serve to underline the very firm impression I formed as to Felix's capacity to dissemble.

[95] One of the most poignant examples of Felix shifting blame onto others came with his flat out denial of having given his solicitors instructions to sue Jayne, his granddaughter, in respect of the Piermont Place property transaction. He referred under cross-examination to his granddaughter spending time with him when she was little, listening to the races on the radio. There was then the following evidence:

"This is the little Jayne that you have a view about because she lives with her boyfriend?-- That's right, because I was not happy about it, yeah.

Yes. This is the little Jayne you sued for some time in this case alleging she'd been the recipient of fraudulent benefits. That's the little Jayne?-- I never sued Jayne. I never sued Jayne.

You did so?-- I did not sue Jayne. I didn't took any action against Jayne as yet because Jayne and I were partners in a house we bought a house. We sold the house, made a big profit. I never received a penny. All the money went to Tabtill or John Creswick, but I took no action against her. I never rang her or nothing.

Did you tell your lawyers to sue Jayne?-- Sue her?

Did you tell your lawyers to bring proceedings against Jayne, to sue her in this Court?-- No. That's a lie.

That's a lie?-- Yes."

[96] There is no doubt that Felix disliked Shayne as much as she disliked him. On numerous occasions in the course of his evidence, Felix freely admitted, and indeed volunteered, to having called her "a bitch".

[97] It will be apparent from what I have written that I generally reject Felix's credibility as a witness. There is, however, one particular topic on which I find that Felix not only told the truth, but accurately summarised the true nature of the dealings between him, John and the other members of the family from 1982 up until the time they fell into dispute. The statements in question were clearly against Felix's interest, and indeed undermined the basis upon which significant parts of his claim were based. The first passage of evidence in this regard was as follows:

"Is that right? '88? But your case is that the dealership partnership continued right the way through to 2005/2006; isn't that right?-- Well, it was not actually a partnership at that time. At that time, John and I, we work together. He was selling and I was selling and we were try trading as Motor Trading Centre at - Holland Park Motor Trading Centre and Jon was trading Motor Traders at Stones Corner.

When did that start?-- That started when John Creswick bought his first caryard.

At Stones Corner?-- Stones Corner.

So you are saying then that the dealership partnership ended then, and you became, as it were, separate traders?-- At that time we didn't even discuss the partnership. At that time we didn't discuss the partnership. We were working as a family business, it was a family business. It was not a partnership, it was a family business.

Not a partnership?-- All right. Now, John, at other time there, could draw - he could pay wages, he could draw money from the family business, I could draw money from the business, but we were working as a family business, not as a family partnership.

And you were running Holland Park?-- I was running the organisation, Holland Park, yes.

So what basis did you have for claiming from John 18 years of rent for Holland Park?-- Well, that's why is this one here was, when we were split up, John and Eric - I never been taking any commission out of the cars that I was selling.

Because you----?-- I was leaving everything in the family, in the family business.

Well, are you saying there was no basis for this claim for 18 years rent? You just made it up?-- I did not made it up. I worked this one here, how many cars I sold, what I'd done, what I should be entitlement, when we completely split with John, you know, split with John as a family business, and I was entitled to this money here for the effort I put in to run this business. I was running the business.

His business?-- Yes.

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

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

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

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

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

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

I understand. Now, the next thing you claimed was number 12, commission on the sale of cars for 18 years?-- Yes. I work it out with my accountant and then - roughly, I mean, how many cars I sold, roughly what we made and one thing and another, and I think I was in - in - entitled, you know what I mean, some compensation, some commission, out of the cars that I sold. Now, I was their only salesman that were selling more cars than anybody else. I sold a lot of cars, but I never took a commission out, nothing. I just left everything there for the family business, family, family. I believed in my family. I want the family to grow. The family was living well. That was it. It was no agreement made. It was not a verbal agreement made, was not - was not even discussed. We were just running as the Creswick family.”

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

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

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

[100] It is also appropriate at this point to say something about the fact that Marcia was not called to give evidence. Counsel for the plaintiffs submitted that there were a number of areas of Felix’s case where it might reasonably have been expected that Marcia could have, and should have, given evidence, including:

- (a) As to Felix’s physical and mental condition in 2006 and 2007;
- (b) His condition on 24 and 25 May 2007;
- (c) The circumstances surrounding the negotiation of her property settlements with Felix;
- (d) Felix’s conduct and condition on the evening of 25 May, when he returned from having signed the May Agreement;

- (e) What Felix communicated regarding what he thought he had signed, particularly whether it was a guarantee or something else;
- (f) The events of 13 December 2007, when John and Shayne arrived at 11 Seahaven Court;
- (g) The true nature of her relationship with Felix, and when it broke down (if indeed it did).

It was submitted that the failure to call Marcia on these matters was very significant, and that I should draw the conclusion that Marcia could give no evidence that would assist Felix on any of these matters. Particular emphasis was laid on the evidence that Marcia could have given of her observations of Felix around the time of, and particularly shortly after, the signing of the May Agreement.

[101] One of the fundamental issues in this case was whether Felix's signature was forged on a large number of documents, including documents said to have been signed by Felix at various times during the 18 years when Felix and Marcia were together. It was submitted that Marcia undoubtedly could have given evidence as to whether the disputed signature looked like his customary signature, or at least could have said that the disputed signature was one that she had never seen Felix sign. It was submitted that, at worst, one could expect that Marcia would say that the signature which was identified in the course of evidence as undoubtedly being a "genuine" signature of Felix was the only one she had ever seen. Counsel submitted, however, that Marcia was not called even to say that much, and therefore it must be the case that her evidence was not going to assist Felix, even by saying that she had not seen him use the disputed form of signature. It was submitted that the absence of her evidence in this area was a most telling factor against Felix's forgery case.

[102] Felix's counsel submitted that Marcia could not have given admissible evidence relevant to issues in the trial, that her evidence would have been collateral, and would have gone only to credit. It was pointed out that:

- (a) She is not a handwriting expert;
- (b) The events of 13 December 2007 were not in issue on the pleadings – it was an issue about credit, and her evidence would have been merely collateral and inadmissible;
- (c) She is not a medical expert and her opinion about Felix's health would not have been admissible and no doubt would have been successfully objected to;
- (d) The question of the circumstances of the negotiation of her own contract for a property settlement with Felix was not an issue in the case – the fact of her agreement with Felix was admitted on the pleadings;
- (e) The amount Marcia received from Tabtill was not an issue on the pleadings;
- (f) In relation to business arrangements, neither Shayne nor Jane knew very much about them so why would Marcia "particularly when, on the plaintiffs'

case, Felix was a misogynist who would not share such information with a woman”;

- (g) The plaintiffs do not accept the evidence of Mr West, the party’s accountant for 18 years, in relation to Felix’s signature so they are unlikely to accept that of Marcia;
- (h) Felix’s motivation for not proceeding with the May Agreement was not in issue on the pleadings;
- (i) The phone records from May 2007 show the contact that occurred between the parties.

[103] Felix’s counsel submitted that if Marcia had been called to address these issues, “it would have been a classic example of prolonging litigation to pursue hearsay inquiries, collateral or irrelevant issues”.

[104] The so-called rule in *Jones v Dunkel*³ is, as Martin J observed in *Cooks Constructions Pty Ltd v Stork Food Systems Aust Pty Ltd*⁴ subject to many exceptions and variations. The basic conditions for the application of the rule were summarised by Glass JA in *Payne v Parker*:⁵

“(6) Whether the principle can or should be applied depends upon whether the conditions for its operation exist. These conditions are three in number: (a) the missing witness would be expected to be called by one party rather than the other, (b) his evidence would elucidate a particular matter, (c) his absence is unexplained.

(7) The first condition is also described as existing where it would be natural for one party to produce the witness: ..., or the witness would be expected to be available to one party rather than the other: ..., or where the circumstances excuse one party from calling the witness, but require the other party to call him: ... or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him: ..., or where the witness’ knowledge may be regarded as the knowledge of one party rather than the other: ..., or where his absence should be regarded as adverse to the case of one party rather than the other: It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary: If the witness is equally available to both parties, for example, a police officer, the condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so: Evidence capable of satisfying this condition has been held to exist in relation to a party’s foreman: ...; his safety officer: ...; his accountant: ...; his treating doctor:

(8) According to *Wigmore*..., the second condition is fulfilled where the party or his opponent claims that the facts would thereby be elucidated. Under other formulations, the condition is made out when the witness is presumably able to put a true complexion on the facts; ..., might have proved the contrary; ... would have a close knowledge of the facts: ..., or where it appears that he had knowledge; I would think it insufficient to meet the requirements of principle that one party merely claims that the

³ (1959) 101 CLR 298.

⁴ [2008] QSC 179 at [41].

⁵ [1976] 1 NSWLR 191 at 201-202 (omitting citations).

missing witness has knowledge, or that, upon the evidence, he may have knowledge. Unless, upon the evidence, the tribunal of fact is entitled to conclude that he probably would have knowledge, there would seem to be no basis for any adverse deduction from the failure to call him.

(9) The third condition is satisfied if no explanation is offered for the absence of the witness, or the tribunal thinks that the explanation given is unsatisfactory. The explanation tendered may be that the witness is ill, overseas, dead or refuses to waive his privilege:”

- [105] No explanation was given for Marcia not being called as a witness by Felix.
- [106] It is, I think, correct that most of the matters to which the plaintiffs’ counsel referred went solely to collateral issues or matters concerned only with credit. An example of that is any evidence which Marcia might have given concerning the events on 13 December 2007. There are, however, two factual areas of dispute between the parties in respect of which it can properly be said that Marcia probably would have had knowledge, namely:
- (a) The events of the evening of 25 May, after Felix returned from signing the May Agreement; and
 - (b) The identity of Felix’s signature.
- [107] As to the first of these, there is a clear inference available on the evidence that Felix became motivated to disavow the May Agreement as a consequence of Marcia’s reaction when he went back to 11 Sentinel Court that evening. He himself described her as reacting hysterically when he told her what he had done. She was also undoubtedly proximate to Felix that evening, at least in connection with the conversation he had with Bill. Indeed, Felix’s side tendered and relied on the diary note she had kept, on Felix’s instructions, of what Bill had said to Felix that evening and used that diary note to attack Bill’s credibility.
- [108] As to the second matter, Felix’s case at trial was not merely that Felix’s signature had been forged on many occasions, but that it was John who did the forging. John was the first witness in the trial, and it was his positive evidence not only that the signatures had not been forged by him but that they were signed by Felix. As will appear below, the impugned signature was quite distinctive in appearance. Particularly in view of the evidence which had fallen from John, and having regard to the length of the relationship between Marcia and Felix, I consider that Marcia probably would have had knowledge and that, even if she had not been able to identify the impugned signature, she would at least have been able to give evidence as to her own observation of the signature or signatures she saw Felix use over many years.
- [109] Accordingly, at least in respect to these two aspects of the case, I find that, by reason of the failure to call Marcia, it should be inferred that Marcia’s evidence would not have assisted Felix’s case.

Conclusion on the Creswick witnesses

- [110] My conclusion on the credit of the Creswick witnesses can therefore, for the reasons I have given, be stated shortly. In respect of each of John, Bill, Shayne and Felix, I do not accept their evidence on matters in issue unless:

- (a) It consists of an admission against their respective interests, or
- (b) Their evidence is corroborated by independent evidence which, in turn, is evidence I am prepared to accept.

The forgery case

- [111] Whilst the forgery case is raised as the principal plank of Felix’s counter-claim, it is appropriate to deal with it at this juncture. Felix’s counsel submitted that the forgery issue played a pivotal role and overshadowed all other matters in the case. A great deal of the evidence in the trial was directed to this issue.
- [112] The case run by Felix at trial was that John forged Felix’s signature over many years on a great number of financial documents (including finance approval forms, mortgages and guarantees), contracts for the sale of land and real property transfers. The disputed “signature”, which Felix alleged was signed by John, was a particular cipher which, by reason of its appearance, came to be referred to as the “FC” signature. (I will, for convenience, refer to it as “the disputed FC signature”). Felix’s counsel submitted that, with one exception (the lease of 905 Logan Road to Zupps, under which rent was paid directly to Felix), the disputed FC signature did not appear on a document which was of concern only to Felix or for his sole benefit, but rather appeared only on documents which were of concern to or benefit for John, Bill, their wives or the Tabtill companies. It was submitted that there was an overwhelming inference that the disputed FC signature was forged by John, that he had lied about those forgeries on oath and instructed his lawyers to run a dishonest case in relation to the forgeries, and that the outcome of the case, on that basis, had to be for a complete unwinding of the effect and impact of those forgeries on Felix’s properties.
- [113] It was not in issue that Felix bore the onus of establishing that the disputed FC signature in these documents was forged by John. It was also accepted that the standard of proof which Felix was required to discharge for that purpose was stringent. It is sufficient in that regard to refer to the judgment of Johnson J in *Jeans v Cleary*:⁶
- “Accordingly, the standard of proof to be applied is the civil standard, proof on the balance of probabilities, being qualified having regard to the gravity of the questions to be determined. The test has been said to be whether the issue has been proved to the reasonable satisfaction of the Court, such satisfaction not being produced by inexact proofs, indefinite testimony or indirect inferences: *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Helton v Allen* (1940) 63 CLR 691 at 701; *Rejfeek v McElroy* (1965) 112 CLR 517 at 521. The Court should be comfortably satisfied on the balance of probabilities before such a finding is made: *Bannister v Walton* [1993] 30 NSWLR 699 at 711-712.”
- [114] Johnson J quoted the following passage from *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*:⁷
- “The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involved criminal conduct or fraud. On the other hand, the strength of the evidence necessary to

⁶ [2006] NSWSC 647 at [28] – [29].

⁷ (1992) 67 ALJR 170, per Mason CJ, Brennan, Deane and Gaudron JJ at 170-171 (citations omitted).

establish a fact or facts on the balance of probabilities may vary according to the nature of what is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.”

- [115] In short, the assessment of the evidence concerning forgery in the present case falls to be determined according to the *Briginshaw*⁸ standard. It must be firmly kept in mind, however, that the application of the *Briginshaw* standard does not mean that Felix is required to prove his case to the criminal standard of proof. The appropriate test is “on the balance of probabilities”, but satisfaction of that onus requires application of the *Briginshaw* standard.
- [116] It is, therefore, necessary to review the evidence which was led in relation to the disputed signature in order to ascertain whether Felix has proved his case to the necessary standard.

The evidence of Felix and John

- [117] Felix stoutly denied that he had signed the disputed signature on the documents. John, similarly, stoutly denied that he had signed the disputed signature on the documents. In view of my findings with respect to each of their credit, however, it is unnecessary for me to say anything further.

Handwriting experts

- [118] Mr John Heath and Mr Gregory Marheine are each well-qualified forensic document examiners. Mr Heath was retained by Felix and Mr Marheine was retained by John to give reports in respect of the disputed FC signature. Each of them produced lengthy reports. In the course of the trial, Mr Heath and Mr Marheine participated in a conclave, from which they produced a joint report identifying the areas on which they agreed and those on which they disagreed. Their evidence before me was given concurrently.
- [119] In their joint report, Mr Heath and Mr Marheine said:
- “2. We agree on the following issues that:
- (i) the collection of disputed signatures and initials purporting to be of Felix Creswick ... are consistent with being written by one and the same writer.
 - (ii) the collection of disputed signatures and initials purporting to be of Felix Creswick cannot be identified by comparison with the collection of specimen signatures of Felix Creswick. They bear no structural or pictorial likeness, or handwriting characteristics to the collection of specimen signatures. This difference in the pictorial and structural appearance of this

⁸ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

collection of disputed signatures and initials raises three theoretical and practical considerations:

1. the disputed signatures and initials are another variation of a specimen signature of Felix Creswick.
2. the disputed signatures and initials are a form of disguised signature, written by Felix Creswick.
3. the disputed signatures and initials are a collection of forged (or false) signatures, not written by Felix Creswick.”

[120] The joint report then went on to identify matters on which Mr Heath and Mr Marheine disagreed. I should say, for completeness, that, to the extent that Mr Marheine expressed opinions in reliance on instructions he had been given with respect to evidence being led as to particular initials being those of Felix, his evidence should be discounted for that purpose. This topic was traversed with Mr Marheine in the course of the concurrent evidence and he accepted that to be the case.

[121] In short, as was confirmed by Mr Heath and Mr Marheine in their concurrent evidence, they were agreed that the disputed FC signature had been written by the one person. Mr Marheine said that he and Mr Heath could not connect the disputed FC signature by handwriting comparisons with the admitted known specimen signatures of Felix Creswick (of which there were numerous in evidence), and said further that he (Mr Marheine) could not say who had written the disputed FC signature. Mr Heath elaborated on his report, saying that he had found a series of documents containing individual initials which he was able to examine with specimens from John, and formed the opinion that there was “evidence there that linked him (John) to the completion of that particular pattern range of initials”. This topic was the subject of concurrent evidence by the experts, in the course of which it became apparent that there was a need for them to have a further brief discussion in order to clear up what seemed to be a misunderstanding as to the signatures in question. When the experts returned from this further conclave, they were still in disagreement on this topic. Mr Heath then explained to me the methodology by which he reached his conclusion, identifying his examination of particular signatures of John and particular disputed FC signatures. The resolution (or non-resolution) of this issue is encapsulated in the following passage of the concurrent evidence:

“MR HEATH: Yes. An examination of all of the questioned signatures and initials-----

HIS HONOUR: What, within the one document or across-----

MR HEATH: Within the one and within all of-----

HIS HONOUR: Many documents.

MR HEATH: Within all of the documents.

HIS HONOUR: Yeah.

MR HEATH: Showed a significant range of variation between the completion of the signatures. That range of variation, which Mr Marheine and I agree with, that they're all by the one writer-----

HIS HONOUR: Yeah.

MR HEATH: -----encompasses a substantial range of variation in their completion. Bearing in mind, as I said, we have agreed on this, that there's a large range that are by the one writer. So, within this large range by the one writer, are the stick form of the signature, and a curved six form of the signature.

HIS HONOUR: Well, the one that I'm looking at at the bottom of - at the page before annexure A, is that one a six form?

MR HEATH: Again it's somewhere in between, your Honour. It's a variation within the range of completion of all of those suspect-----

HIS HONOUR: Yes, I understand that.

MR HEATH: Yeah.

HIS HONOUR: But how do you make the next jump for you, which is to say and that signature, or that initial, was written by the same person who did the John Creswick initial on the next page?

MR HEATH: Within the group of questioned documents, there was a bundle within the centre - they are about the middle group of documents I received - that contained both the stick form of the signature and a more curved six initialing style of signature; and as I was able to identify across the whole range of questioned signatures common authorship, this particular group of documents were very, very - in my report they were listed as documents 33 to 38. I'm just not sure what numbers they are in-----
-

HIS HONOUR: Yeah, but just let's stick with the ones we've got. Those two don't even look similar to me. The John Creswick initial on the page that says "annexure A" and the disputed initial on the previous page.

MR HEATH: Just looking at those two, your Honour, you would be right.

HIS HONOUR: So this is what I'm trying to get to.

MR HEATH: Yes.

HIS HONOUR: How do-----

MR HEATH: 'Cause I looked at more than two of them. I looked at a hundred of them.

HIS HONOUR: Yeah, but what is it? I mean, apart from just looking at them-----

MR HEATH: After examining them, yes.

HIS HONOUR: Yeah.

MR HEATH: Okay. Well, I found, as I said, a large range within the completion of that particular - or of all of the questioned signatures, I found the upright stick formation, then I found-----

HIS HONOUR: Yeah, I know. You told me all that, but what-----

MR HEATH: Then they all changed.

HIS HONOUR: But-----

MR HEATH: Yeah.

HIS HONOUR: -----what - what particular characteristics? Is there an upstroke here, or a cross stroke there, or here a stroke, there a stroke, what?

MR HEATH: It was - it was the actual structure of it being the same as many of the stick form, but in a more curved and a more six style. So it actually had all of the parts and then they appeared within John's handwriting as well.

HIS HONOUR: Okay, all right. I understand that. So - yeah, all right. Mr Marheine, what did you want to say about that?

MR MARHEINE: Your Honour, as outlined in my - in our joint report, I state that the rule of thumb in document examination practice is the identity - no, to enable - it's impossible, if not difficult, to identify the author of a forged signature. It's my view that I can understand what Mr Heath is saying. I can't see the similarities between the initials of John Creswick and the - and the disputed initials and signatures, simply because they're relatively simple in their design and I repeat again that anyone with a modicum of skill could imitate that. There's just not sufficient material to enable such an identification and to - to identify the author of a forged signature, is my view, that you need compelling, wide range of natural handwriting and not just a symbol.

HIS HONOUR: But Mr Heath had a lot of initials to look at, as did you.

MR MARHEINE: Yes.

HIS HONOUR: Well, what - weren't there enough?

MR MARHEINE: I think the difficulty in this - the way I see things is that the - the disputed Felix Creswick initials on our disputed documents are basically of simple design. You know, we've got quite a lot of them and they're all internally consistent with each other, but I can see no relationship in any of them with any of the John Creswick material, none at all. Sure, John Creswick's initials are a simple symbolic stick form, but there's just nothing in there that persuades me either way."

Witnesses to the disputed FC signature

- [122] Most of the 105 documents which were said to contain forged signatures also bore the signatures of the persons who were said to be the witnesses to that signature. Many of those witnesses were called in this case, some by Felix and some by John. I shall review their evidence in the order in which they were called.

Douglas Ryan Porteous

- [123] Mr Porteous was called by John. At the time he gave his evidence he was retired and was about to embark on a road trip around Australia. In 2005-2007 he was a finance broker who worked mainly in the motor industry, providing finance for dealers' customers. Through that connection, he knew John, Bill and Felix. He said he met John, Bill and Felix in about the late 1990's when he started doing business with them. He said that prior to 2005, he had had dealings with Felix, particularly witnessing documents for Felix in regard to vehicles that Felix had sold and the transfer of registration. Infringements notices for offences such as speeding and driving through red lights in respect of vehicles which had been sold were occasionally received and a statutory declaration would need to be completed to verify that the particular vehicle had been sold prior to the offence being committed. Mr Porteous said that prior to 2005, he had witnessed signatures of each of Bill, John and Felix on such statutory declarations. In respect of his practice as a Justice of the Peace when witnessing signatures, he said that he had to establish the identity of the person signing and then have them sign in front of him, but it got to the point where he knew the members of the Creswell family and it was not necessary in later years to obtain identification from them. He said that he required identification to be provided by the person signing, and that he probably required such identification from Felix initially, but as he got to know the Creswicks over the years there was not much point in asking for identification.
- [124] Mr Porteous was taken to documents on which he had witnessed the disputed FC signature. He confirmed that the signature he had witnessed was that of Felix, and said that he would never have witnessed the signature if it had been pre-signed, nor would he have witnessed that signature if someone else had signed it. He said that he was familiar with the disputed FC signature as that of Felix, having seen it prior to 2005 on the statutory declarations relating to infringement notices.
- [125] Under cross-examination, Mr Porteous was challenged as to his independence, particularly by reason of the fact that, when approached at Court by Felix's solicitor on the morning he gave evidence, he refused to speak with the solicitor, saying that whatever the solicitor wanted to ask he could ask while Mr Porteous was in the witness box. He was cross-examined on his business relationship with John, confirming that it was a "mutually beneficial business relationship" and that John did a much larger volume of sales than Felix did. He did not consider himself a friend of either John or Bill, had never been to their homes or socialized with them, and might have had a beer once or twice at a hotel if they happened to be in the same place at the same time. Mr Porteous said that he could not remember the time, place or circumstance in which he witnessed any of the documents on which the disputed FC signature appeared. He was challenged on the effect that an illness he had suffered since 2005 might have had on his memory. He was also asked to compare the disputed FC signature with one of Felix's specimen signatures (appearing on Felix's passport). He said that the signature on the passport was not the signature that Felix signed in front of him. When shown other of Felix's specimen signatures, he gave similar evidence. In particular, Mr Porteous was taken to the disputed FC signature which appeared on the last of the disputed documents (a Suncorp facility signed on 24 July 2007)⁹ which was witnessed by Mr Porteous, and asked to compare that signature on that document with the

⁹ Exhibit 22 tab 105.

signature on Felix's passport. When asked about the Suncorp facility dated 24 July 2007, on which Mr Porteous' signature appears four times as a witness, he said that he could not remember where the document was signed and whether all of the signatories were present at the same time. A scenario was put to him under which it was suggested that John gave Mr Porteous the document to witness and John signed it instead of Felix, asking Mr Porteous to witness his signature and that, trusting John, Mr Porteous just witnessed the document. Mr Porteous denied this outright. The following passage of evidence then ensued:

"Were you very careful about examining people's signatures?-- Look, my credibility's at stake here. I don't do those sorts of things. I was always witnessed a signature with a person in front of me.

And that's why I'm putting to you that is it possible that Mr John Creswick, if he'd been minded to - assuming he was minded to trick you - could have said to you, "Mr Porteous, will you witness my signature?", sign and put the document in front of you and you would have witnessed it without paying very careful scrutiny to what the signature looked like?-- John's?

No, just the one that appears as Felix?-- As Felix. I would not have signed it.

Is it possible that if Mr John Creswick - I'm asking you to assume was trying to trick you and you trusted him. I have got to ask you to make that assumption, Mr Porteous. You can't sort of rule out the assumption, it's an assumption I'm asking you to make?-- Mmm.

If he was minded to trick you and he signed the document and he presented to you and said, "Witness my signature in front of you.", he would be in front of you-----?-- Yes.

-----you'd see nothing untoward about it because you trust him, is it possible you would have witnessed if he'd done that?-- Only John's signature. I wouldn't have witnessed anybody else that wasn't there.

If John said to you, "I am just signing this document."?-- As Felix?

"Can you witness my signature?"?-- As Felix you are saying?

Yes?-- No.

Why, would you have checked that document that carefully?-- Well, you don't sign - you don't put your name to something that you don't know what it's all about. I don't read the contents of the document, but you always look at the - you know, what you are signing, and I wouldn't sign something that John said was - Felix had signed it. I just don't work that way.

Mr Porteous, I'm putting it to you that there was absolutely - it's absolutely incorrect to say that Felix Creswick signed that document on the 24th of July 2007. It's absolutely incorrect?-- It's not incorrect.

And your evidence to the Court, given in quite categorical terms, is untrue?-- It's not untrue.

Are you concerned about the fact that you didn't do things properly as a JP and you are concerned about getting into trouble if you admit to doing so?-- Not at all. I'm not concerned about that. I have done the right thing so I have got no concerns about getting into trouble.

Well, what I have got to suggest to you, Mr Porteous, is that either John Creswick signed that document - the first alternative is this: John Creswick signed that document, said, "Will you witness my signature?", and you innocently did so, thinking that you could trust John and you didn't look - pay close attention to what the signature looked like?-- No.

You have ruled that out?-- Yeah. I'm not - you know, it's a practice I have done. I have always made sure I have the person in front of me that's signing the document.

And the other alternative is you knew that - it's a worse alternative but the other alternative I put to you is that you actually knew that John Creswick was signing for Felix and you were happy to go along with him because he was in a business relationship with you that was profitable?-- Not at all. It's completely wrong."

[126] Mr Porteous was then cross-examined on an affidavit he had sworn on 11 February 2008 in which he had said, amongst other things, that "it has not been my practice to ascertain the content of the document which I am witnessing, but merely to witness the signature of the signatory to that document". When cross-examined on this, he explained that his practice was to read from the signatures down, but he did not read the actual content of the document. He was further pressed on having been given documents by John in a pre-signed form and affixing his signature as witness, which he strenuously rejected. He was asked whether he would have had the same degree of vigilance for what he was doing with John "as if a stranger you'd never met before came in off the street", and when asked to assume that John wanted to trick him, said "I can't see John doing that." Ultimately, Mr Porteous made the following concession:

"You say it's highly improbable or improbable because you have got that assumption about him not trying to trick you, but what I'm asking about is please assume, without feeling you are doing any disservice to Mr John Creswick, please assume he was trying to trick you for the sake of my question. Just as a mechanical process in signing, it would have been possible for someone trying to trick you in that situation where there's some chat going on and there's a number of people in the room to slip a document in front of you, sign it and get you to witness it?-- I suppose that was possible, yeah."

[127] My assessment is that Mr Porteous was a credible witness who withstood significant challenge under cross-examination.

Kurt Dieter Faust

[128] Mr Faust had retired some months before this trial, having been in the used car business for more than 30 years. He was employed by John in around 2001-2002 at the Stones Corner yard. Prior to that he worked for Denmac Ford in Ipswich. He knew Felix, having met him occasionally when Felix dropped into the Stones Corner office. He said that occasionally he had to witness documents and that his

practice was to make sure that all parties were present, and that he knew them or that they identified themselves by drivers licence. He said, however, that in the case of the Creswicks identification was not necessary because he knew all of the parties involved. Mr Faust had been a Justice of the Peace since about 1982, converting to Commissioner for Declarations in 1995. He was shown a particular document¹⁰ on which he had witnessed a number of signatures which he identified as John, Bill, Felix and Shayne. He said that he recalled the circumstances under which he witnessed those signatures, having been called to John's office at Stones Corner. He said he specifically recalled that occasion, and everyone, including Felix, was present. He said that Felix signed in front of him. When it was suggested that Felix's signature had been pre-signed, he said: "I would not witness anything that would not be signed by a person present and by a person that's not identified by myself through knowing them or a drivers licence."

[129] Under cross-examination, Mr Faust was challenged, it appearing that he had mixed up the location of some of the particular signatures on the document when he was giving his evidence in chief. He reasserted positively, however, that he did witness Felix's signature on that day. It was put to him that he was giving evidence to protect himself from blame in case it be found that he had wrongly purported to witness someone's signature, and said:

"I am not here to protect myself at all. I was asked to come here to be present here at the court to tell you that I witnessed Felix's and other parties' signatures."

[130] He was challenged on his answer, specifically as to whether he had been told to tell the Court that he had witnessed Felix's signature, and responded: "No. I was told to be here at Court today to face you people."

[131] He was further challenged under cross-examination on the basis that he had co-operated with John's lawyers but not Felix's lawyers. It emerged under cross-examination that he had been contacted by mail by both sets of solicitors, but only John's solicitors had followed him up by telephone and then in person. Felix's solicitors only wrote, but did not follow up further. Mr Faust said:

"It's up to them to follow me up. It's not my business to do that."

It was then suggested to him that the reason he did not respond to Felix's solicitors' letter was because he knew it was being alleged that documents he had witnessed had not been witnessed properly. He denied that strenuously, asserting again that the other solicitors (i.e. John's solicitors) did their job and followed him up and got Mr Faust to court to answer the questions posed by Felix's counsel.

[132] There was further trenchant cross-examination of Mr Faust, including it being put to him that he was not an independent witness telling the truth. Mr Faust denied all such allegations that were put to him. When it was suggested that he did not even have a clear recollection of the event about which he had given evidence, he responded "Yes it is very clear to me". The cross-examination concluded:

"And your self interest that motivates you in giving your evidence is that you may have made a serious mistake in witnessing the signature and you are concerned about the consequences for you of that mistake? -- I have not made a mistake at all. That's what you say."

¹⁰ Exhibit 22 tab 61.

[133] When re-examined, he confirmed that, had he received a telephone call from Felix's solicitors asking him to come in for an interview, he would "of course" have done that.

[134] My assessment of Mr Faust is that he was an honest witness.

Tom Banjanin

[135] I will deal further with Banjanin's evidence when discussing the circumstances of the execution of the May Agreement. So far as the forgery allegations are concerned, Banjanin gave evidence about witnessing the signatures on the contract for sale to Felix and Jayne of the Piermont Place property. He confirmed that both Felix and Jayne signed the contract in his presence. He denied witnessing documents that had been pre-signed and expressly denied that Felix had not signed the Piermont Place contract in front of him.

[136] Under cross-examination, Banjanin was also challenged on what Felix's counsel described as his voluntary co-operation with John's solicitors, and his lack of co-operation with Felix's solicitors. It transpired, however, that the contact from Felix's solicitors occurred only two days before Banjanin gave evidence (on the eleventh day of the trial). The contact occurred on a Saturday morning, when Ganim phoned Banjanin and introduced himself. Banjanin said that when he asked how he could help, Ganim "then mentioned the Creswicks and he sounded very aggressive to me and he wanted to meet with me, and I did refuse to meet with him". Later on that Saturday, Ganim sent a fax to Banjanin which, due to the fact that it was a weekend, Banjanin did not see until Sunday afternoon. I note in passing that it was not suggested that there had been any earlier attempt on the part of Felix's solicitors to contact Banjanin, nor was any evidence led to explain why there had been no earlier attempt to contact Banjanin.

[137] In any event, Banjanin was then cross-examined on his witnessing of the disputed FC signature on the Piermont Place contract. He denied that he had given false evidence and reasserted that he witnessed Felix's signature in his presence.

[138] I accept that Banjanin is a credible witness on this aspect of the case.

[139] I also mention in passing that despite it being asserted that the Piermont Place contract contained a disputed FC signature, it was quite clear on Felix's own evidence that he was fully aware of having done this deal with Jayne.

Stephen Phillip Zeller

[140] Mr Zeller is a regional manager with the Bank of Queensland. In 2001-2002, while working in the Bank of Queensland business banking section, he had dealings with Tabtill's account and met both John and Felix. He described having face-to-face meetings with both of them, which occurred either in Mr Zeller's office or at their car yards. He described the particular commercial rate facility which Tabtill held, and confirmed that on occasion he witnessed documents signed by John and signed by Felix. He was taken to a particular document containing the disputed FC signature which he had witnessed and confirmed that Felix would have been in front of him when he witnessed that document. When it was suggested that the document could have been pre-signed and Mr Zeller then signed it as witness, he said:

“That would be impossible. My practice in terms of signing documents, I do not witness unless there’s the person in front of me signing the document.”

- [141] When it was suggested that he may have been tricked and John had signed the document, he said “That would be unlikely”, and explained that unless he had “sighted the person signing the document” he would not witness it. He said he was very careful in ensuring that the person whose signature he was witnessing was in front of him.
- [142] Mr Zeller was strongly challenged on the basis that if it were found that he had witnessed a pre-signed document, there could be serious consequences; indeed it could be a “sacking offence”. It was put to him that he was concerned about “the potential ramifications” that his evidence could have for him personally, to which he responded “No, not at all”. He was asked whether he trusted John in his dealings and said that he did, and had no reason not to. He was again tested on the proposition that he may have been tricked by John into witnessing the signature, and he said “I can’t see how. I always read the document that I was witnessing and if it wasn’t his name there I wouldn’t have witnessed the document.”
- [143] When pressed as to whether it was possible, he grudgingly conceded “It’s unlikely”. When challenged as to whether he was prepared to concede the possibility that he may have made an honest error in relation to the matter, he said:
- “No. No. My practice was always straightforward. I never detracted from that. I realise in my capacity as a lender that the ramifications, as you put it, and the responsibilities that go along with witnessing documents. I am also a Commissioner for Declarations and I understand that as well.”
- [144] Again, Mr Zeller was further pressed on the possibility that he had been tricked by John, and similarly grudgingly conceded that it was “highly unlikely” that that would occur.
- [145] Mr Zeller was a completely independent person who withstood serious challenges to his professional integrity. My assessment is that he gave truthful evidence.

Mark Kurbatoff

- [146] Mr Kurbatoff is a property finance manager at Suncorp. In 2004-2005, he was a development finance account manager at Suncorp to the Tabtill companies. In the course of his duties he initially had contact with John and subsequently had contact with Felix. He recalled meeting Felix on one occasion in 2006 and spoke with him on a few occasions on the telephone between 2006 and mid-2007. He described the telephone conversations in which Felix asked Mr Kurbatoff to provide him with details of the “reliance” the bank had placed on the mortgaged properties. A letter to Felix detailing the extent of security held by Suncorp was tendered through Mr Kurbatoff.
- [147] Mr Kurbatoff was taken to one of the documents containing the disputed FC signature, being a variation of an existing letter of offer dated 4 October 2006¹¹ which had been witnessed by Mr Kurbatoff. He said that his practice was to witness the signature “once it’s been signed by the party in front of me.” He said he never departed from that practice. When it was suggested to him that this document had

¹¹ Exhibit 22 tab 103.

been pre-signed and put in front of him, he said “I wouldn’t witness it.” He was then asked:

“What do you say that you may have been tricked or misled in that Mr John Creswick may have signed it and it was then put in front of you? -- I can’t say yes or no. I am sure – I can’t say yes or no.”

[148] Otherwise, Mr Kurbatoff had no recollection of the occasion on which this document was signed.

[149] These answers were explored under cross-examination, and Mr Kurbatoff confirmed that he could not recall the occasion at all. He was then asked to assume that John wanted to trick him and was forging Felix’s signature. He was asked:

“It could have been possible for him to have signed the signature in front of you and just said ‘Mr Kurbatoff will you witness my signature?’, and that could have slipped under your guard, so to speak, as an innocent person trusting Mr Creswick. That’s a possibility? -- Anything’s a possibility.”

[150] This was not a ringing endorsement of the hypothesis that was being put to him.

[151] Mr Kurbatoff was then asked about a number of credit approval requests produced by Suncorp over 2006 and 2007, particularly going to concerns which were raised within Suncorp concerning Tabtill’s financial position and concerns as a result of allegations of forgery that had been made.

[152] On the question of forgery, however, Mr Kurbatoff gave the following evidence in re-examination:

“MR HOWE: Mr Kurbatoff, you were asked a number of questions by my learned friend about trickery and John Creswick perhaps having forged Felix’s signature. Now, were there any steps that you followed with your practice of witnessing signatures to avoid such trickery?-- Unless I had any doubt about the customer, I would not take any extra precautions other than what I said my normal process was yesterday.

What was that again?-- That I would watch the customer or person sign and then I would witness.”

[153] My assessment of Mr Kurbatoff is that he gave truthful evidence.

Tracey Leanne Ashton

[154] Mrs Ashton, a sole director (since the death of her husband) of Ashton Developments Pty Ltd, has been a friend of John and Shayne for more than 20 years. She did not know Felix, but had had him pointed out to her.

[155] Mrs Ashton was taken to a document containing the disputed FC signature¹² which she had signed in connection with a development done with Tabtill No 2. Mr John Aronis was the witness to the signatories. The extent of Mrs Ashton’s evidence was really to say that she thought she saw Felix sitting in one of the adjacent offices.

[156] She was also taken to documents she had signed concerning a development at Coomera. These documents also contained a disputed FC signature. The witness to those signatures was George McMahon. These documents were signed at the

¹² Exhibit 22 tab 67.

Capalaba yard. Mrs Ashton said that she saw Felix “in a glass office”. She said that she herself did not see Felix sign, nor did she see Shayne or Bill sign. When she signed the document, one of the staff members witnessed it. In relation to another document she had signed¹³ she said that “Ziggy” (which I take to be a reference to Mr Ziegenfusz) had brought the documents to her house, that she signed the documents and then “Ziggy signed them”.

[157] Mrs Ashton was cross-examined on the financial relationship between her company and John’s company, and was also challenged on whether she had recognised the person she identified as Felix at the offices. These challenges did not shake her credibility as a witness.

[158] In short, Mrs Ashton’s evidence puts Felix in proximity to a “signing event” in respect of the documents on which she was cross-examined.

George Lawrence McMahon

[159] Mr McMahon was employed as a salesman at the Capalaba yard. He has known John, having “worked for him on and off since 2001”. He said he had also known Felix for a long time, probably since about 2001, but he was not as close to Felix as John. He ceased his employment with Tabtill in May 2006. He was shown one of the documents containing the disputed FC signature,¹⁴ and confirmed having witnessed the signatures of John, Bill, Felix, Tracey Ashton and Jayne. He did not remember whether Shayne was there at the time. He said, however, that Felix was definitely there, and had a recollection that Felix was the first one to sign. He watched all of the signatories sign their names, and then signed his signature as witness. In response to the suggestion that Felix was not there and had not signed in front of him, Mr McMahon responded “Oh, he was there. Yes”.

[160] Under cross-examination, it was put to him that he could not really remember Felix signing the document, and responded “I can, Sir”. It was then expressly suggested to him that this was dishonest evidence which he was giving “out of loyalty to Mr John Creswick”, to which he responded “Not in the slightest, Sir”. It was put to him that he was concerned to have witnessed a document containing a signature which was not that of Felix and that he did not want John to get into trouble because of that. He denied this assertion. He initially denied having been prepared to “sign things that would help John in a dispute with someone else, but was challenged on this when shown a reference that he had provided¹⁵ at a time when John was having a dispute with someone by the name of Richard Philp. He did, however, affirm that he had signed the reference and that he would “stand by it 100%”.

[161] In his evidence in chief, Mr McMahon was asked to describe the process by which he witnessed the signatures, and his answer was as follows:

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

¹³ Exhibit 22 tab 79.

¹⁴ Exhibit 22 tab 73.

¹⁵ Exhibit 111.

- [162] He was cross-examined on his statement that he “can’t remember what happened after that but I do remember Bill stood up and let me sit in his chair”, and he said that he was referring to the short space of time from standing to sitting. He was strongly challenged on this, it being suggested that he was dishonest and giving silly evidence, and further that he was “prepared to be dishonest to protect Mr John Creswick”. These allegations were strenuously denied. It was put to him that his evidence that he did not remember what happened between when he was standing up and when he went to sit down was “nonsense”, to which he responded “Well, I am sorry, Sir. That’s how it was.” It was then suggested to him that he had just given false evidence, to which he again responded: “I am sorry, Sir, that’s how it was.”
- [163] It will be apparent from the passages of cross-examination that I have just set out that this witness was subjected to extreme challenge under cross-examination. I should say that I did not regard the answer that he had given, which provoked such a strong challenge, as being particularly extraordinary. In any event, Mr McMahon was not shaken in terms of the testimony he gave, and I regard him generally as having sought to give truthful evidence.

David Anthony McGee

- [164] At the time of trial, Mr McGee was a business development manager with BankWest. Until 2004, he had spent 10 years as a business banking manager at Suncorp. He said that he had been in the banking industry for 25 or 26 years. He confirmed having looked after the Tabtill/Creswick file for about 12 years, and said that he knew Bill and John and had met Felix. He thought he had met John and Bill about 12 years previously, and said that he would have met Felix seven to ten years ago. He confirmed that, in the course of looking after the Tabtill/Creswick accounts, he regularly witnessed documents. He described his practice with witnessing documents as “generally the practice is to have the person designated on the document to sign the document in my presence.” He could recall no occasion on which he had departed from that practice.
- [165] He was shown one of the mortgages containing the disputed FC signature.¹⁶ Mr McGee had signed this document as the witnessing officer and confirmed that it appeared that he had witnessed the signature of Felix Creswick. He said that he did not actually recall witnessing this particular document, but said that it was his signature as the witnessing officer. He confirmed that, to the best of his knowledge, he followed the procedure of having the person who signed the document in front of him at the time of signing.
- [166] Under cross-examination, Mr McGee affirmed that if something was possible then he would admit it. He said that he did not recall the particular occasion of Felix actually signing the document because it was about six and a half years ago and he had witnessed a lot of signatures over the years. He also confirmed that when he was at Suncorp at the period of the document in question (2003) he was mainly dealing with John, not Felix. He was then asked the hypothetical:
- ‘If Mr John Creswick had asked you to witness his signature and he put a document in front of you and signed his signature and given it to you, it’s possible you may have witnessed that signature without paying careful

¹⁶ Exhibit 22 tab 64.

attention to the fact that it was meant to be Felix who was signing it? -- It's possible but unlikely."

[167] He was then asked:

"And also it might be possible that over the years these things happen and this could be one situation where you trust someone like Mr John Creswick, you get to know him and you trust him, and assuming he brought a document in that had been signed already and he said, 'That's my father's signature. Would you mind witnessing it', it's possible that you might have done so? -- Again possible but unlikely yes."

[168] It re-examination, Mr McGee was asked about his responses that things were possible but unlikely, and the following passage of evidence ensued:

"MR HOWE: I will. Thank you. You have given evidence before about a practice you followed to ensure that the signature that you are witnessing for the person whose signature you are witnessing is, in fact-----?-- Yes.

-----the person signing. All right?-- Yes.

And it was put to you before that, well, you trusted Mr John Creswick and he may have signed Felix's name and that you may have missed that and you said - I think your evidence was that it was unlikely?-- I think my words was it was possible but unlikely.

Possible but unlikely?-- Yes, yes.

I beg your pardon. Are you able to say what the degree of likelihood would have been or otherwise as to that occurring, given your practice?-- I would suggest it would be very unlikely, simply because I didn't make a practice of it. My point in saying that it was possible but unlikely is that I can't sit here and categorically say I have never done it or never would have happened, hence - I can't recall the specific instance. So, it would be very unlikely."

[169] Mr McGee was, in my assessment, a truthful witness.

Karen Elizabeth Smeal

[170] At the time of trial, Ms Smeal was John's personal assistant. She started working for Tabtill in April 2005 as a receptionist and had been his personal assistant since 2007. She confirmed knowing Bill and Felix. She said that her practice in terms of witnessing signatures was:

"If I witnessed signatures, the person is standing next to me or in front of me and they will sign it and then I will witness it."

She denied ever having witnessed pre-signed documents.

[171] She was shown a document on which she had witnessed one of the disputed FC signatures.¹⁷ She did not remember the occasion, but said "He would have been there for me to witness it" and that she would not have witnessed it if it was not Felix who was signing. She also confirmed witnessing Felix's signature on another document containing a disputed FC signature,¹⁸ and again, in response to a

¹⁷ Exhibit 22 tab 97.

¹⁸ Exhibit 22 tab 99.

suggestion that this document may have been pre-signed said “No, it wouldn’t happen”.

- [172] Under cross-examination, she was challenged on her trust and loyalty for John when it was put to her that if John told her to witness a document and then stood in front of her and signed it, that she trusted him enough that she would not bother reading the document or checking it carefully, to which she responded that she would “make sure that it’s his signature”. She said that she knew his signature “off by heart” but in any event “he wouldn’t do it”. She was then asked to assume that she could be tricked by John, which she rejected, and was then asked whether she recognised the particular mark as being Felix’s signature. She said: “I don’t know Felix Creswick’s signature, but if I signed it, if I witnessed that, he signed it in front of me.” She said that she did not just believe that she followed her practice on this occasion, she knew it. She confirmed that she would not otherwise know what Felix’s signature looked like. When she was referred to the two documents that she had witnessed, apparent differences between the Felix signatures on that document were pointed out to her and she said that she could not explain the differences. The following evidence was given:

“But you know that when you said you checked that it’s a person’s signature when they’re signing? -- I check that they are signing it.

Yes? -- I can’t tell them how – how to sign it.

You will agree with me that those two signatures are very different? -- Absolutely.”

- [173] She was then asked about a hypothetical scenario under which John signed a document in front of her which he then asked her to witness, and she did without further identifying the signature, but she denied that it was possible that this had happened in the present case. She rejected the possibility that John could have tricked her in such a way.

- [174] In final submissions, counsel for Felix strongly criticised Ms Smeale on the basis of her demeanour when giving evidence. True it is that Ms Smeale appeared to giggle, and perhaps was even chewing gum, as she commenced her evidence. That may have been a nervous reaction to the very tense courtroom atmosphere in which she found herself. Be that as it may, I was quite satisfied, having observed her demeanour throughout her evidence, that she approached the task of giving evidence seriously and to the best of her ability, and that she was a credible witness.

Catherine Rita Stephens

- [175] Mrs Stephens is a real estate agent and the principal of Ray White Wellington Point. At the time of trial, she had been involved in real estate for 13 years. Prior to that, she was a registered nurse for 23 years. She got into real estate after her husband collapsed and was unable to work. She confirmed having been interviewed by both the solicitors for Felix and the solicitors for John. She said that she did not know Felix; she had seen him but never met him. She said that her practice, when witnessing documents, was that the person had to be in her presence. In her evidence in chief she said that she had never witnessed a signature for Felix. She was then referred to a bundle of contracts relating to the Wellington Point

development, and specifically to the contract for the sale of Lot 6.¹⁹ She recognised that John had signed for the seller on that contract. In her evidence in chief she said that this was the first block that she had sold in the estate and when she did the contract she took it to John, saying that it was in Felix's name, and that John said he had authority to sign on behalf of Felix. She said in evidence in chief that she and John met on the Sovereign Waters development at Wellington Point, that John was driving a four wheel drive and his wife was in the vehicle. She described John's car as being on the block itself, but her car would not go up onto the property. She said she took the contract to John and he and she signed it on the bonnet of the car. She further identified initials on the contract as those of John and also of the purchasers under that contract.

[176] Further in her evidence in chief, Mrs Stephens identified John's signature and initials on other contracts of sale relating to Wellington Point lots.

[177] Under cross-examination by John's counsel, however, Mrs Stephens retreated from her degree of certainty as to which contract it was that had been signed when she met John at the Sovereign Waters estate. She was certain that she had met him there to sign a contract and she could not be 100 per cent certain that it was the contract that she had originally identified, although she said she was "90 per cent" certain. There were, in all, nine contracts relating to the Wellington Point development. One of those had Bill's signature on it. Of the remaining eight, she identified seven as having John's signature and initials. The remaining one, containing the disputed FC signature, was the one that she conceded was possibly not the one to which she was referring when giving evidence about signing a contract on the bonnet of John's vehicle.

[178] Otherwise, Mrs Stephens really had no great recollection of the circumstances under which the particular contracts were signed.

[179] Mrs Stephens was cross-examined on the possibility of the particular contract having been "pre-signed", before she affixed her signature as witness. She denied this possibility. This line of cross-examination concluded with the following:

"Just listen to my question. If it was the case that you had done so and you confessed to it, as it were, you said that you had signed but not in the presence of the person, is it your belief that would put your licence in jeopardy? -- No.

You don't think so? Okay. Alright. Now, can I suggest to you that this particular one Lot 6 is one that was signed not by Mr Creswick, that is Mr John Creswick; that's correct, isn't it? --- I can't say who signed it."

[180] Ms Stephens was a credible witness who sought to tell the truth.

Dawn Moore

[181] Ms Moore was formerly employed as the office manager of the law firm Macfie Curlewis Spiro. She was a Commissioner for Declarations. She was shown one of the documents containing the disputed FC signature²⁰ which she had witnessed. The particular document was a memorandum of transfer. She said she had no recollection as to who signed as transferor. She was shown several other

¹⁹ Exhibit 22 tab 25.

²⁰ Exhibit 22 tab 24.

memoranda of transfer on which the disputed FC signature appeared as the signature of the transferor and which she had witnessed, and on each occasion she said she had no recollection of the person who signed as transferor. She described the practice for people wanting documents witnessed as being that the person would have to sign in the presence of the witness. She said she was regularly called upon to witness documents and she would follow the procedure. She said that she believed John was a client of the firm at the time and that she had never met Felix and did not know who he was. She was shown a photograph of John and recognised it as a photo of a client who regularly came into the firm. She was also shown a photograph of Felix and said she did not recognise him.

[182] In terms of the process that she followed when witnessing, she said that she did not require the person to provide identification, nor would she read the document to see what kind of document it was. She said that she would simply ask the person to sign and then she would witness their signature.

[183] When pressed in cross-examination, however, Ms Moore confirmed having previously stated that she just did not remember either John or Felix. She confirmed that this was, in fact, still the case. She said that she was first asked to revisit these events and think about John and Felix a couple of months prior to the trial and conceded that a lot of events had occurred between then and the previous eight years. She said she did not have a specific recollection of these particular circumstances or who might or might not have come in to get documents signed or witnessed. She said that because of the time period she could not recall, and agreed with the proposition that “it really is difficult for you and hazy for you to say whether John Creswick was or Felix Creswick went into that office”.

[184] I accept that Ms Moore was seeking to be truthful when she gave evidence before me.

Jane Elizabeth Spiro

[185] Ms Spiro was one of the principals of Macfie Curlewis Spiro. She recalled that in the period 2000-2002 business was being transacted between her office and John relating to the Wellington Point subdivision. She said that she met John, but did not believe that she had ever met Felix. She was unable to give any evidence of assistance concerning the procedure followed by staff members who witnessed documents; in particular, she did not know whether the staff members verified the identity of the persons signing. Ms Spiro’s evidence was uncontentious.

Terrence James Flynn

[186] Mr Flynn was formerly employed by Tabtill as an accountant. He did most of his work for John, and had very little to do with Felix. He was a Justice of the Peace. When asked whether he was careful or not when he went about witnessing documents as a Justice of the Peace, he said: “Well in the outside world I was meticulous, but in the Creswick family I was – let’s say I might have been a bit lax.”

[187] Mr Flynn then gave the following evidence:

“In the outside world situation where someone who wasn't part of the Creswick family wanted a document witnessed, what procedure would you adopt?-- Well, I'd read the document carefully and then - well, no, not

necessarily, but I would make sure that they were the people that were supposed to be signing.

Right. And that they were in front of you in your presence?-- Oh, yes.

Now, did you - because of the Creswick family, they were an exception to that rule, so to speak?-- Well, yes. I would have signed on Felix's premises, I would have gone there to witness documents that he signed alone, but I think in the main the documents that I witnessed were signed by both father and son.

And can you give his Honour some help, is this document signed in your presence by both father and son or would Mr John Creswick do something with the documents?-- Mr John Creswick would give me a document that already had his Dad's signature on it at times."

- [188] When asked why he would witness documents in that form, he said that the father and the son "got on very well and there was no reason to think that there would be anything wrong with it".
- [189] He confirmed being prepared to subscribe as witness to a document that had been pre-signed. He was then shown documents he had signed as witness²¹ and identified John's signature. He was then asked about the disputed FC signature on the document and said:
 "That's the signature I often saw from the father, but I was never particularly - I didn't inspect his signatures so particularly scrupulously because it was a relaxed situation."
- [190] In respect of another document he had signed as witness, he was asked whether he recalled seeing Felix sign that document in his presence, to which he responded that he could not say.
- [191] Mr Flynn was shown other documents containing disputed FC signatures. On one of those he identified what he described as "another variety of Felix's signature".
- [192] Mr Flynn then gave evidence about discussions he had with Felix's solicitor. He said that after he had spoken with the solicitor, he spoke with John and told John that he had told Felix's solicitor that he had witnessed signatures of John and Felix without strictly requiring Felix to be present. He said that John responded, "I didn't do anything wrong. I haven't signed any signatures I shouldn't have, so I'm not worried at all". He also said words to the effect "Oh well, Felix had more - other signatures".
- [193] When cross-examined, Mr Flynn confirmed that he had told Felix's solicitor that he would be phoning John. He was also shown a document containing the disputed FC signature²² and confirmed that he recognised it as Felix's signature.
- [194] He was then shown documents containing the disputed FC signature which had been witnessed by Eric Ross. (Mr Flynn confirmed in re-examination that Mr Ross had been deceased for about eight years at the time of trial.) Mr Flynn gave the following evidence:

²¹ Exhibit 22 tab 1.

²² Exhibit 22 tab 3.

“Okay. Now, it’s the case, isn’t it, that you knew a Mr Eric Ross? -- That’s right.

And it’s the case that Mr Eric Ross and Felix Creswick hated each other; is that correct? -- Yes.

And it’s the case that you knew that Eric Ross would never sign a document that Felix had to sign without Felix – if Felix was the signatory – without him being present? -- Eric Ross would have applied that to anyone, but certainly Felix, yes.

Particularly to Felix? -- Yes.”

[195] Further, in respect of the documents that he was shown containing the disputed FC signature, he gave the following evidence:

“And you will certainly accepting for all of those documents that you have witnessed that it could very well be the case that Felix did sign in your presence? -- Absolutely.”

[196] In my assessment, Mr Flynn presented as an honest witness, even to the extent of admitting shortcomings in his own processes.

Ian Robert Foote

[197] Mr Foote, a solicitor, has been employed by the Queensland Law Society since 2001. For 20 years prior to that, he was in private practice, as a partner of Kreis Barry & Foote. He described his practice of witnessing documents, saying that he would “witness documents when the person was standing in front of me”. He recalled having business dealings with John when he was a solicitor in private practice. He acted in a range of matters, namely conveyancing, preparation of leases and litigation. He was not personally involved in the Wellington Point subdivision, but recalled John mentioning it in conversation. He said, in his evidence in chief, that he did not recall ever witnessing a document for Felix. He was shown a mortgage containing the disputed FC signature²³ on which his signature appeared as witness. He gave this evidence:

“And to the best of your belief, who is it – who was the person who signed in front of you when you witnessed that document? -- Well, I can’t recall witnessing the document.

Right? -- So I can’t recall who the person was.

With Mr Felix Creswick, when you say you can’t recall it, is it – you didn’t witness a document for him or that you just can’t remember? -- I’m confident I didn’t witness any documents for Felix Creswick.

Alright. Did you witness any documents for Mr John Creswick? -- Yes.”

[198] Mr Foote’s memory of his dealings with the Creswick family was tested under cross-examination. It emerged that, until discussions with John’s solicitors on the morning that Mr Foote gave evidence, he had not recalled acting for Felix in the District Court litigation with Mr Kallis. Mr Foote said that he previously assumed that that litigation was in the name of Tabtill. He initially affirmed under cross-examination that if he had witnessed a signature for Felix, he would recall Felix

²³ Exhibit 22 tab 36.

being there because of Mr Foote's close association with John. He conceded, however, having told John's solicitors that he could not recall Felix having signed the document because he had not acted for him since the 80's, but when further challenged on his practice of requiring a signatory to sign in his presence, Mr Foote stated that he was confident that he had not attended on Felix to witness any documents. He did agree that he would not necessarily check the identity of the person who was signing the document in his presence. He also could give no explanation as to how it was that the disputed FC signature appeared next to Felix's printed name on the page witnessed by Mr Foote. The only explanation he could give was that he did not look at the printed name:

"But you can't remember whether you looked at it or not, can you? -- I can't remember signing the document.

You're guessing on that, aren't you? -- I can't remember signing the document."

[199] In re-examination, Mr Foote said that his degree of scrutiny of what was happening would depend upon how familiar he was with the person that he was dealing with. He agreed that if John, whom Mr Foote knew well, asked him to sign the document, he would not have been suspicious of John.

[200] Mr Foote was an honest witness. I note, however, that it was neither volunteered by Mr Foote, nor was it put to him, that it was, in fact, John who had signed the disputed FC signature above the typed name "Felix Creswick" on the particular mortgage. Mr Foote's evidence, as I have said, was that he did not remember signing this document.

Donna Joy Taylor

[201] Ms Taylor worked for the Creswicks for about six years between 1994 and 2000. For about the first four years she worked for Felix at Holland Park and her last two years were as office manager for John at Stones Corner. She became qualified as a Justice of the Peace in 1998. Before becoming a qualified Justice of the Peace, she was occasionally asked by John to arrange for documents to be witnessed. She says that these were documents that were pre-signed by John and she would take them to "Ricky Ross" (presumably the same Mr Eric Ross previously referred to) and Mr Ross would witness these documents even though they had been pre-signed. She said that after she became a Justice of the Peace, she herself witnessed documents. She said that generally they were signed when the signatories were signing them "but on occasions that didn't happen". She could not recall any particular occasion when that had not happened. She said that the documents would be put in front of her by John, and he would ask her to witness signatures on the document. She was taken to a number of the documents containing the disputed FC signature that bore her signature as witness. She identified her own signature, but otherwise said that she had no recollection at all of the individual documents to which she was directed. She said that she had had lots of documents put in front of her, and had witnessed many signatures. She did not recall the identities of the persons who had signed the documents. She said:

"As I said, it was a long time ago and I witnessed a lot of documents in the process of my job and just to nominate one or two or three or four, whatever, I wouldn't with any honesty be able to verify what they're asking."

- [202] She described the Creswick signatures as similar.
- [203] On application by counsel for Felix, who had called Ms Taylor as a witness, leave was given under s 17 of the *Evidence Act* to seek to impeach Ms Taylor's credit on the basis of a prior inconsistent statement.
- [204] In July 2009, Mrs Taylor had sworn an affidavit prepared by Felix's solicitor. In that affidavit she said:
- “5. During the Creswick Employment I witnessed many signatures. I am familiar with the signatures of John, Felix and Bill Creswick (Bill). Prior to becoming a JP during the Creswick Employment, I took documents given to me by John and/or Bill on many occasions to a Justice of the Peace I knew as Rick Ross. I believe his correct name is Eric Ross. Rick is now dead.
 6. On those occasions I would take documents that had already been signed which needed witnessing and Rick would witness them while I waited for the documents. He did not witness those documents in the presence of the parties who signed and as stated, they were given to me by John Creswick and/or Bill for this purpose, but they had already been signed. I cannot say who the signatories were as I simply took them to him for that purpose. That was common practice.
 7. When I became a JP, it was very convenient for John and Bill because I was there and able to witness documents. On many occasions at the request of John and/or Bill, I witnessed documents that had already been signed. ...
 - ...
 11. The initial document forwarded to me by Mr Ganim [pages 001 – 002] contains a signature purporting to be that of Felix and I witnessed that signature. That signature is definitely not that of Felix (false signature). I told Mr Ganim so in that conversation.
 12. Mr Ganim subsequently sent me a document [page 003] and when Mr Ganim phoned me back after it had been sent to me, I told Mr Ganim that although I had not witnessed that signature, the document contained the genuine signature (genuine signature) of Felix. At that stage I was concerned with what the discussion was about as the first document troubled me as Mr Ganim informed me it was asserted by Mr Creswick that it was signed by Felix and I cannot recall having any further discussions with Mr Ganim wherein we discussed further the issue of the witnessing of the false signature. I do recall saying to Mr Ganim that I did not feel comfortable getting involved in a Creswick family dispute.
 - ...
 15. During the course of the Cricket Club Meeting, Mr Ganim showed me a sample of the document that he had sent me in my first dialogue with him as detailed above, where I had witnessed the false signature. He also showed me documents where I had witnessed the genuine signature of Felix. I so told Mr Ganim that the genuine signature was that of Mr Creswick and that the false signature definitely was not

that of Felix. I reminded him that I had so told him that when he had phoned after sending copies to me by fax.

...

22. If I am subpoenaed for the purposes of giving evidence at the trial, I will tell the truth. The truth is that I signed many documents containing the genuine signature of Felix. Mr Ganim has now produced numerous examples of where I have signed documents containing the false signature. The latter was signed in the context of which I have explained above and in that honest belief.

...

29. Rick Ross who was not employed by John signed many documents that I took to him at the direction of John and witnessed signatures that were already on those documents and not in the presence of the signatories.”

[205] Ms Taylor was directed to paragraph 5 of this affidavit. In response to questioning on this paragraph, she said: “I mentioned this to Mr Ganim and wanted this destroyed and they had another new one drawn up.” She was asked then about paragraph 29, and particularly the reference in that paragraph to taking documents with “signatures” to Mr Ross, and it was put to her that they were documents with signatures not just of Mr Creswick. She said that the words in the affidavit had been written by the law firm and stated that she took no other signatures to Mr Ross other than John’s. Further in reference to that affidavit, when she was questioned about paragraphs 6 and 7, she said:

“As I’ve mentioned many times, I wasn’t happy with this document and it was signed under duress. My husband was life threatening in hospital, so was my son.”

[206] She elaborated:

“... I said duress from the fact that my husband and son were in hospital. I am not saying anyone was putting me under duress. It was my own personal duress as to get this. I was under duress from my personal point of view and – and Mr Ganim needed this signed ... at the same time.”

[207] When cross-examined on paragraph 11, she again said that she had not wanted this affidavit to be “submitted” because she was not happy with it. She said that she “expressed concerns to the rightness of the complete affidavit”. It was put to her that she was lying. She said that the truth was that she could not sit in court and say whether or not the disputed signature was Felix’s signature. It was put to her that what she had sworn in paragraph 11 of her affidavit was correct and she said: “Well, I made a mistake. It is not correct, in my honest opinion. I have looked at these and looked at them since July and I think I made a mistake at that time – particular point in time, because I really can’t say whether it is or isn’t.”

[208] When it was suggested to her that she well knew the difference between Felix’s genuine signature and the false signature, she said:

“No, I don’t. That’s why I’ve decided over the course of the time that I really don’t know what’s false, and that’s the whole truth of the matter. False is a very bad word, so I cannot attest to something being false if I don’t fully believe it is ... and I’m not got to here today.”

[209] She denied outright the suggestion that she was tailoring her evidence because of the concern of getting John “offside”.

[210] When cross-examined by counsel for John, Ms Taylor confirmed that she had told Mr Ganim that the affidavit was incorrect and she wanted it changed.

[211] She was shown an affidavit she had sworn on 11 February 2008 which contained a copy of an “acknowledgment of guarantor of further liability” which contained the disputed FC signature. In this affidavit she said:

“4. On the 6th March 2000 I was requested to witness this document and attest to the execution of this document by Felix Antonio Creswick.

5. I have been asked to confirm the circumstances in which I witnessed the signature of Felix Antonio Creswick and attested my having witnessed that signature. I confirm that I witnessed Felix Antonio Creswick write his signature on the document previously referred to on the 6th March 2000.

6. I do not now recall the time, place or circumstances in which I saw Felix Antonio Creswick sign the document previously referred to. I am, however, able to affirm positively that Felix Antonio Creswick signed the document. He is a person who is well known to me and I have witnessed his signature on a number of occasions in respect of a number of different documents. It has not been my practice to ascertain the content of the document but merely to witness the signature of the signatory to that document.

7. I am aware of the laws of the State of Queensland applying to the way in which a qualified witness attests to the execution of the document by a signatory. It is my invariable practice to identify the signatory by photo identification if the signatory is not well known to me. I insist upon the signatory executing the document by signing in my presence and in my sight. I have never departed from this practice.

8. I did not on the occasion referred to in this my affidavit, require any identification from Felix Antonio Creswick since he has been well known to me. I was employed by Felix Antonio Creswick for a period of six years.

9. I do not at any time nor did I in this case, depart from my invariable practice of having a signatory to a document sign that document in my sight and presence in circumstances where I am being asked to witness that signature and attest my having witnessed that signature by signing that document myself.”

[212] She further said in evidence before me that she “just used to sign documents in the course of my business, believing that to be true”. She said that her practice was to make sure that whoever signed was the actual person in the document.

[213] When re-examined by counsel for Felix, Ms Taylor was asked to explain the inconsistencies between the two affidavits. She said she was unable to explain the inconsistencies except:

“ ... only to say that since 2000 my personal life has been in turmoil with my – the illness of my husband and on most occasions I’ve had – I’ve had

to go back in time since all this has come about and to look at why I would sign something that I wasn't – what I was unaware of two years previous, and I came up with the answers that those the times when my husband was at his worst and I was under undue personal pressure.”

- [214] She identified the time to which she was referred as from February 2007, when her husband was put in hospital with a deep vein thrombosis, and again in July 2009, when her husband was taken to hospital with a life threatening condition. She also referred to the fact that in February 2008 her daughter had come back to Australia from Canada “because we thought he [the husband] was gone at that stage”.
- [215] My observation of Ms Taylor was that she was genuine in the concerns she had about the accuracy of the affidavit which had initially been prepared by Felix’s solicitors. It is, of course, unfortunate that she signed the affidavit in that form, but I also accepted that her explanation about the other stresses in her personal life was genuine. My assessment was that she gave truthful evidence before me.

Paul Anthony Ziegenfusz

- [216] At the time of giving his evidence, Mr Ziegenfusz had been employed by John for a few years as a driver. He worked from a car yard at Ipswich Road, Moorooka. He gave evidence of having witnessed documents, and said:

“All right. Now, what I want to ask you is this question: were there ever occasions when you were given documents to be witnessed, such as bank documents, which were in a presigned form when they were given to you?--
- Well, I have signed a lot of documents but I never really looked at them. So, I don't know if they were bank documents or whatever at the time. I am aware of that now, but I wasn't at the time.

All right. Leaving aside my expression that they were bank documents, were there ever documents given to you to witness where the person who had signed had already signed before you were given the document?-- I'm not sure exactly, but maybe on a couple of occasions, yes.

And who gave you those documents to-----?-- I'd expect it would have been John, yes.

Mr John Creswick?-- Yes.

All right. Do you recognise the signatures of Mr John Creswick?-- I know John's signature very well, yes.

Do you know Mr Felix Creswick's signature?-- No, I don't.

So, it would be no help to the Court if I asked you to identify it?-- No.”

- [217] Mr Ziegenfusz was shown a number of documents containing the disputed FC signature on which his signature appeared as witness and it was put to him that these documents were presented to him in a “pre-signed form”. He denied any knowledge of the documents and said that he did not recognise the signature and did not know Felix’s signature.
- [218] Counsel for Felix was then given leave under s 17 of the *Evidence Act* to seek to impeach Mr Ziegenfusz on the basis of a previous inconsistent statement, namely an

affidavit prepared by Felix's solicitors which Mr Ziegenfusz had sworn on 18 June 2009. That affidavit stated:

"3. Over the years, I have, on numerous occasions, witnessed signatures on documents provided to me by John where the person signing the document was not present. That included documents purportedly signed by Felix Creswick and, indeed, included other people as well.

...

5. However, on many other occasions I have simply signed documents as a witness without Felix Creswick being present. Exhibit PAZ-001 to this Affidavit are examples of such documents."

[219] When cross-examined by Felix's counsel on paragraph 3 of this affidavit, Mr Ziegenfusz denied using the word "numerous" and denied knowledge of the documents referred to in paragraph 5 of the affidavit.

[220] Mr Ziegenfusz confirmed that when he gave that affidavit to Felix's solicitor, he was very concerned about not being caught up in a family dispute between the Creswicks. More recently he had told Felix's solicitor that he "felt like Judas". He said that he was "distinctly uncomfortable" giving evidence, but denied that he was hostile.

[221] Mr Ziegenfusz was cross-examined by John's counsel on his practice of witnessing documents. He described undertaking a "milk run" when he would drive from Stones Corner to Holland Park, Capalaba and sometimes the Creswick residence at Raby Bay. This enabled him to go to various people who needed to sign the documents. He said that his practice was that whoever was named on the document signed in front of him. He confirmed that, from time to time, he would go to Felix at Holland Park and that Felix would sign in front of him. In relation to the affidavit that he had sworn in June 2009, he said that the reference to "many other occasions" in paragraph 5 was simply wrong, that he had not referred to "numerous" and that he thought that he had said "maybe on a few occasions".

[222] He was then shown a further affidavit that he swore on 13 September 2009 (just over two weeks before he gave evidence) in which he referred to the affidavit of 18 June 2009. He said:

"4. I signed the affidavit without having gone through the bundle of documents which is PAZ-1.

5. I do not say and cannot say that any of those documents are documents I signed as witness when I did not see Felix sign.

6. I would normally go from Stones Corner to Holland Park down to Raby Bay and then Capalaba to gather all of the signatures ("the milk run").

7. I never read the actual documents as it was none of my business.

8. I would often then sign as witness once I was back at Stones Corner. Sometimes this was because I had not signed as witness as I went because no-one told me to. When I got back to Stones Corner, John would say 'Look you have to sign as witness' and I would then sign.

9. In paragraph 3 of the affidavit I am referring to the circumstances like those I have mentioned above.
10. I have also referred to a couple or a few occasions where John has asked me to witness a signature where I do not know whether the document was one where I had done the “milk run” to gather the signature or not. This is because I never read the documents.
11. The word ‘numerous’ in paragraph 3 is wrong. I had told them ‘a couple or a few’.
12. As I said above, paragraph 5 is also wrong.”

[223] When re-examined, Mr Ziegenfusz confirmed having attended at Felix’s counsel’s chambers only a few days previously for a conference and that he had not mentioned to Felix’s counsel or instructing solicitors that he had given the further affidavit of 13 September 2009. He said he was not aware that he had to tell them of this further affidavit.

[224] My assessment of Mr Ziegenfusz is that, of all the witnesses who were called on both sides of the case as the persons who had witnessed the disputed FC signature, Mr Ziegenfusz was the only one who was positively unreliable. His unreliability was such, however, that I am unable to determine whether he was telling the truth when he gave the affidavit to Felix’s solicitor, when he gave the further affidavit in September 2009, or whether he was simply overborne by the whole situation, particularly having regard to the status of his employment with John and his acknowledged friendliness towards Felix, and was simply seeking not to be seen to be either supporting or detracting from either side.

Ian Melville West

[225] West was the long-term external accountant for Tabtill and John. He was not called in the capacity of having been a witness to one of the disputed FC signatures, but rather for the purposes of identifying Felix’s signature, which he said he had seen “a few times”. He was shown one of the disputed FC signatures²⁴ and said that he did not recognise it as Felix’s signature.

Alleged objective indicia of forgery

[226] Counsel for Felix contended that the forgery case fell to be determined not only on issues of credit but also by reference to “objective indicia of forgery”.

[227] The most important of these was said to be the presence of the disputed FC signature on a Suncorp letter dated 18 July 2007, said to have been signed on 24 July 2007.²⁵ This letter effected an extension of the loan account held by Tabtill No. 2 with Suncorp. The disputed FC signature represents the acceptance by Felix, as a guarantor of that facility, of that variation.

[228] Counsel for Felix submitted that this document was signed well after Felix’s solicitors had asserted instances of forgery in a letter dated 5 July 2007 and was the same form of signature as had been identified by them as a forgery. It was

²⁴ Exhibit 22 tab 104.

²⁵ Exhibit 22 tab 105.

submitted that for Felix to sign the Suncorp letter with that form of signature would have been “utterly inconsistent” with the instructions he had given his solicitors, and that he would have had to have been “completely irrational or demented” to have signed the document. It was forcefully submitted that he was neither and the only conclusion to be drawn was that the signature on the Suncorp letter was forged. Reference was also made to an affidavit which Felix had sworn on 3 July 2007²⁶ in an application brought by Marcia to restrain dealings with properties registered in Felix’s name, in which Felix referred to his properties being mortgaged by John, Bill, Shayne and Jane without his knowledge or consent and by falsifying his signature. It was submitted that it would be ludicrous to accept that Felix then went on and signed the Suncorp letter of 24 July 2007 and that there could be no rational explanation for Felix to have signed the Suncorp document. Counsel also referred to the fact that by 24 July 2007, Felix and John were in deep dispute and were said to be not speaking.

[229] A similar submission was made in respect of the disputed FC signature on a similar Suncorp document dated 4 May 2007, signed on 14 May 2007.²⁷ It was said that this occurred after Felix had written his letter of 2 April 2007, in which he had complained about John and Bill building their fortunes by mortgaging Felix’s property “to the full”.

[230] Felix’s attack on the Suncorp document signed on 24 July 2007, however, assumes that I would reject the evidence of Mr Porteous, who was the witness to the signature on that document. Mr Porteous was criticised by counsel for Felix as being a partisan witness who favoured John and who gave evidence to protect his own credibility. In fact, Mr Porteous had nothing to lose in respect of the evidence he gave – when he gave evidence before me, he was no longer in any business relationship with John, was retired, and in fact had to be interposed as a witness to enable him and his wife to set off on a long-planned driving holiday. He was cross-examined at length and I have quoted above some of the searching and challenging cross-examination to which he was subjected. His evidence was consistent and believable – even to the concession that he finally made to the notion that he had been tricked by John, namely that whilst it was not impossible it was “highly improbable”.

[231] I am not prepared to reject Mr Porteous’ evidence in the way submitted by Felix’s counsel.

[232] The Suncorp document of May 2007 is in a slightly different category. The disputed FC signature was witnessed by Mr Ziegenfusz. I have referred to my assessment of his reliability above. In short, I do not regard his evidence as reliable for assessing the matter one way or the other.

[233] Needless to say, Felix denied signing these Suncorp documents. The terms of his denial concerning the July 2007 document were as follows:

“I’m suggesting to you, Mr Creswick - would you mind looking at me? I’m suggesting to you that you signed this document in July 2007?-- I did not sign this document in July 2000.

That's not my signature.

²⁶ Exhibit 165.

²⁷ Exhibit 22 tab 104.

And you were in touch with Suncorp in July '07, as you can see from the other letter?-- Yeah.

So, getting a document from Suncorp that you needed to sign off on the securities would not come as any news to you, you were inquiring about those things yourself, I suggest to you?-- I did not sign this signature. If I made an inquiry, perhaps I was inquiry to find out what the properties worth and everything, because I was considering maybe to maybe a deal with John to buy it, or make on still a deal. I don't know. I don't remember, what was all about, see.

All right. You can hand those documents back?-- That is not my signature.”

[234] Clearly enough, what was being put to Felix was that he was, in fact, in contact with Suncorp in July 2007. What is notable is the explanation that he gave for having been in contact with Suncorp in July 2007, namely because he “was considering maybe to maybe [do] a deal with John to buy it, or make on still a deal”. In other words, Felix himself was keeping his options open. The signing of the Suncorp document later in July would have been completely consistent with an objective of keeping the Creswick family business running while he extracted the best possible settlement from John. Moreover, counsel’s submission that the ferocity of the attacks between John and Felix was such as to render it incredible that Felix would assist his sons by signing these documents was undermined by Felix’s own evidence. Specifically in the context of having been engaged in dispute with John as at May 2007 (i.e. after John’s “hateful” letter of March), Felix said:

“Now, you went to Banjanin in May, maybe even a bit earlier, because you weren't getting on with John. You couldn't go direct to John, you thought, because you were spating, you were fighting?-- Why I should never go back to John? We fight before, two or three little fights before. I went back to John. Why not? If I didn't need something - and I am sure, and I'm positive sure, 100 per cent, if I went to John, even after we have a big fight, the next day after I write my letter to him to say that, "That's silly what you write there.", you know what I mean, "I know it can happen and everything." - you saw the letter, and I'm positive sure if I went back to John the next day and ask him for \$100, he will give me \$100.

And if he asked you for help even after that letter, you'd give it to him?-- I will give it to him.”

[235] Felix then went on to deny giving assistance in July, but did so in emotive and hyperbolic terms which characterised much of the evidence that he gave before me when denying the position being advanced on behalf of John:

“That's right. And you did, didn't you, in July, when you needed to sign up for some more security?-- No. That didn't happen. I was set up on that. I was set up. I was a sick man, a very, very, sick man, I was falling apart, like bananas. I smash my arm, I smash hip, I smash everything, I was - I was completely had it. I was true - heavy medications and plus more I was breaching the rule, the doctor's rule - every time they give me prescription for medication, say, "Mr Creswick, the medication, you don't drink, that you can't touch that." That's, you know, but instead I'm - still have a little drink and that's what I destroy myself.”

- [236] In fact, Felix had a very good reason for at least wanting to keep his options open for the purposes of procuring a settlement with John, namely the substantial financial obligations which Felix was compelled to perform under the property agreement he had entered into with Marcia. In the absence of a settlement with John, Felix had no way of performing that agreement and, in turn, Marcia had no prospect of receiving that which she had been promised by Felix.
- [237] Considerable weight was placed on the terms of the correspondence which Felix's solicitors wrote, on Felix's instructions, in July 2007. The content of that correspondence, however, needs to be approached with some caution, given Felix's demonstrated long-standing capacity to resile from instructions he gave to his lawyers. That is a roundabout way of saying that, in the particular Creswick matrix within which these events were unfolding, it was not beyond the realm of possibility for Felix, either on his own initiative or with the urgings of others, to have sought to set up the issue of the validity of his signature for the purposes of escalating pressure to obtain a settlement. In postulating this possibility, I am expressly not making a finding in this regard, but mention it as a possibility which would have been consistent with the way both Felix and John conducted themselves.
- [238] Counsel for Felix also pointed to the fact that, with limited exception, the documents on which the disputed FC signature appears were largely for the benefit of John, Bill and the Tabtill companies and not directly of benefit for Felix. Moreover, it was submitted that the disputed FC signature and what is called Felix's real signature, appeared in the series of documents without any logical pattern.
- [239] The exception, however, was a very major exception, and one which cannot be ignored. The exception related to the lease of the premises to Zupps, from which Felix alone derived a very significant amount of money (more than \$300,000) in a relatively short period of time. That is not an exception which can be disregarded. It is also true that the disputed FC signature appears sporadically and with no apparent logical sequencing. But, again, that lack of logic is not all one way. For example, there are series of documents relating to particular finance facilities, and the variations on and expansions to those facilities, which span many years, and within those series are documents which contain the disputed FC signature and documents which also contain what is admitted to be Felix's genuine signature. It is just as consistent with the theory that the disputed FC signature was forged by someone else to say that the form of the disputed FC signature was an alternative short form of signature which Felix himself used occasionally.
- [240] There is some, but not overwhelming support for the theory that the disputed FC signature was, in fact, an alternative form of signature used by Felix. Counsel for John pointed me to a number of documents in evidence which bore a non-disputed Felix signature, being forms of signature which had varying strengths of resemblance to the disputed FC signature. These include:
- (a) Exhibit 75 – a used vehicle order form signed by Felix, which contains an upright "FC" signature similar to the disputed FC signature;
 - (b) Exhibit 78 – the power of attorney given by Felix to John in 1979. The signature of Felix on that power of attorney bears close resemblance to the disputed FC signature;

- (c) Exhibit 165 – an affidavit sworn by Felix in the Banfield proceedings, containing initialling (apparently by Felix) which bears some (but not close) resemblance to the disputed FC signature.

- [241] I was also referred to Exhibit 159 (a statutory declaration made by Felix on 9 May 1996). This statutory declaration and the mortgage to which it related (Exhibit 157) were witnessed by a Mr Dixon, apparently on the same day. It was signed for the purpose of declaring that the person named as “Felix Creswick” in the mortgage and contract (Exhibit 158) was one and the same as the “Felix Antonio Creswick” making the statutory declaration. That contract, however, bears a signature which is very close to the disputed FC signature. Counsel for John submitted that either the oath he made on the statutory declaration was true, and that the contract was truly his, supporting the notion that Felix occasionally used the form of disputed FC signature, or alternatively went again to Felix’s credit in that he was prepared to sign the statutory declaration regardless of the truth or otherwise of its contents.
- [242] Counsel for Felix also invited me to look carefully at the contract which was signed in respect of Lot 6 at Wellington Point.²⁸ This was the contract referred to in Ms Stephens’ evidence above, and about which she was ultimately not sure as to whether it was the one she had signed with John on site. Felix’s counsel pointed to initials which appear on the first and second pages of annexure A to that contract. The initials appear to be confirming the deletion of a GST clause in that contract. Counsel pointed out that, on John’s evidence, the initials appearing at the bottom of the first page of the annexure are his, but that the initials at the top of the next page are those of Felix. It was said that not only was this improbable in any objective sense, but the initials are so similar as to appear to have been written by the same person. With respect, I disagree. To my eye, the two initials referred to are quite different in shape. Moreover, contrary to the submissions for Felix’s counsel, I do not consider that the form of initial identified by John as his own on the Lot 6 Wellington Point contract is so similar in shape and appearance to the initials which appear on the contract said to have been signed by Felix for 35 Sentinel Court as to persuade me with the necessarily high degree of assurance that it is more likely than not that all of these initials were written by John.
- [243] Felix’s counsel also referred to the terms of recital M in the May Agreement. That recital provided:
- “Felix has from time to time consented to John and William pledging 905 Logan Road and 503 Logan Road as security for certain advances for the purpose of conducting used car sales businesses from the respective locations and has acquiesced in John’s executing security documentation on Felix’s behalf.”
- [244] It was submitted that this recital can be explained only as a consequence of the forgeries having occurred, and is a clear sign of John’s (and, necessarily Bill’s) consciousness of wrongdoing.
- [245] By the time the terms of the May Agreement were settled, however, an allegation by Felix that assets in his name had improperly been used as security was well and truly “in play”, not least by reason of his letter of 2 April 2007, in which he said:

²⁸ Exhibit 22 tab 25.

“You have been building your own business on my assets and borrowing money on them where they are now mortgaged to the full.

I have also been speaking with certain people who have advised me that certain documents have been signed on my behalf and without my knowledge in order to obtain money from my assets.

I am lead to believe that numerous transactions and business dealings have been done without my knowledge and may involve people within the financial institutions that money has been borrowed from.”

- [246] The submission advanced by counsel for Felix as to the import to be assigned to recital M in the May Agreement is one explanation for the presence of that recital. Another explanation is that it was included in order to close off any residual allegations which might be made by Felix such as those which appeared in his letter of 2 April 2007.
- [247] Counsel for Felix also sought to have me draw conclusions as to forgery on the basis of what were contended to be forged signatures of Shayne and Bill in the documentation. I expressly decline to do so. This was no part of the pleaded case. In any event, when Mr Heath and Mr Marheine were giving evidence concurrently before me, they were asked to undertake such a comparative exercise in respect of Shayne’s signature, and refused to do so on the basis that, in effect, it was not appropriate for them to undertake such an exercise “on the run” while giving evidence.

Conclusions on the forgery case

- [248] The evidence of Mr Heath and Mr Marheine clearly point to a conclusion that the disputed FC signature where it appears in the 105 documents relied on by Felix was made by one person. Beyond that, however, the experts were unable to give me a high degree of assurance as to the identity of the person who had written the disputed FC signature. Mr Heath expressed a view, based on examination of signatures, which tended to support a conclusion that the disputed FC may have been written by John. Mr Marheine, an equally eminent expert, declined to subscribe to Mr Heath’s opinion in this regard, and gave cogent reasons for so doing.
- [249] I have related at length the evidence given by the witnesses to the disputed FC signature. It is quite clear that there is no common thread. Witnesses who gave evidence which was not supportive of Felix’s case were subjected to strenuous cross-examination with a view to exposing them as being either partisan or self-interested when giving evidence. With the exception of Mr Ziegenfusz, on whose evidence I have specifically commented above, I consider that each of the witnesses did his or her best to give truthful evidence before me. Occasionally, those witnesses were shown to have been mistaken in their evidence. That did not, however, detract from their overall credibility.
- [250] The closest that Felix’s side got to uncovering a “smoking gun” was the evidence of Mrs Stephens and that of Mr Foote. Of course, the absence of direct evidence of fraud is not determinative. The *Briginshaw* standard can be, and often is, satisfied by reference to circumstantial evidence or the drawing of inferences. At its best for Felix’s case, Foote and Stephens could be relied on to refute the notion that the

disputed FC signature had been subscribed by Felix. But neither of them implicated John.

- [251] One of the realistic difficulties which Felix's side also face is that, in order be persuaded to accept the argument that John was the forger of the disputed FC signature, I would effectively need to find that not just one or two but a large series of bank officers from a number of institutions and other independent witnesses were either tricked by John or were so lax in their own witnessing procedures as to allow the alleged serial forgery to occur in front of so many witnesses over so many years. My assessment of the evidence of these witnesses does not allow me to reach that conclusion.
- [252] In terms of the objective indicia that were pointed to by counsel for Felix, it is clear that, whilst some of those at least were persuasive to the argument being advanced, there were alternative credible arguments available to explain away the inconsistencies referred to.
- [253] The allegations made by Felix were serious indeed. Proof of the forgeries by John required something more than "inexact proofs, indefinite testimony, or indirect inferences".²⁹ In the case which was run by Felix at trial, Felix needed, in order to succeed on the forgery claims, to persuade me on the balance of probabilities that John had committed these forgeries. My adjudication of whether he has met that standard of proof, however, needs to be made having regard to the seriousness of, and consequence of, the allegations. The evidence in this case provided some support for the proposition that the disputed FC signatures were not written by Felix. Having considered the evidence as a whole, however, I consider that I cannot be satisfied to the requisite standard that Felix has proved that John forged the disputed FC signatures.
- [254] Accordingly, Felix has failed to establish the forgery case.

The May Agreement

- [255] On 25 May 2007, Felix executed, and on 26 May 2007, John, Bill, Shayne and Jane executed, the form of agreement which has been referred to in this case as the May Agreement. The May Agreement, as signed, was based on a draft which had been prepared by Mott on John's instructions. The final version of the May Agreement, however, contained hand written amendments and additions which were inserted by Felix's solicitor on his instructions.
- [256] The May Agreement does not refer to the Crump Street properties. John contends that the agreement should be rectified so as to include those properties with the references in the agreement to the Logan Road properties, and that the May Agreement, as rectified, ought be specifically performed.
- [257] Felix says that the May Agreement should be set aside as an unconscientious dealing or by reason of John's under influence over him.

The terms of the May Agreement as executed

²⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at 362.

[258] The operative parts of the May Agreement provided (including hand written amendments):

- “1. John and William hereby agree to pay to Felix within 3 months of the date of this Agreement the sum of Six Hundred Thousand Dollars (\$600,000.00) in full and final satisfaction of any alleged obligation which John and William might bear to Felix and as a once only contribution to the reduction or resolution of any liabilities or indebtedness which Felix might have to any person or entity including but not limited to the resolution of a dispute between Felix and one Marcia Banfield. Felix for his part, acknowledges that upon receipt of the said sum of \$600,000.00 John and William will be under no liability to Felix of any description or in respect of any matter or obligation which Felix might now have or might afterwards incur.
2. John and William will pay to Felix the sum of \$1250.00 per week for the whole of the rest of Felix’s natural life, payments to be made to Felix or as he may direct on that day of the week which Felix finds most convenient and is notified by Felix to John and William in writing.
3. (a) In consideration of these presents and in consideration of John’s agreeing to assign to Felix all his right title and interest in Seahaven Court (being described in Item 1 of the Schedule hereto) to be held by Felix and Shayne Marise Creswick as joint tenants until the demise of either Felix or Shayne Marise Creswick. Felix hereby unconditionally agrees to assign and transfer to William and Jane the property known as Sentinel Court.
4. Felix agrees with John that the value to be ascribed to Sentinel Court (being described in Item 2 of the Schedule hereto) being vacant land, for the purposes of this transaction is ONE MILLION DOLLARS (\$1,000,000.00)
5. John agrees with Felix that the value to be ascribed to John’s half interest in Seahaven Court being a dwelling and other improvements on the relevant land together with Felix’s right to reside in Seahaven Court until his demise is ONE MILLION DOLLARS (\$1,000,000.00).
6. Felix agrees irrevocably to maintain Seahaven Court in an unencumbered condition for the duration of his lifetime and further agrees not to assign, transfer or set over or attempt to assign, transfer or set over his interest in Seahaven Court in any way to any person or corporation without Shayne Marise Creswick’s consent in writing first had and obtained.
7. Felix agrees irrevocably and unconditionally not to apply to the Registrar of Titles for a severance of the joint tenancy between Felix and Shayne Marise Creswick pursuant to S.59 of the Land Title Act 1994 (as amended).
8. To more effectively secure the conditions and agreements herein contained, Felix and Shayne Marise Creswick will consent to and will endorse their consent upon a caveat to be lodged in the Land

Titles Office against the title to Seahaven Court by John which caveat is to remain in force until such time as Felix and Shayne Marise Creswick jointly apply and consent in writing to the withdrawal of the caveat.

9.
 - (a) In the event that any competent court should order the removal of the caveat provided for in paragraph 6 hereof or in the event that any application is made to such a court for such an order Felix will transfer and assign his interest in Seahaven Court to John Francis Creswick and Shayne Marise Creswick forthwith upon the making of any such application.
 - (b) To effectively secure the obligation imposed upon Felix under the provisions of this clause both Felix and Shayne Marise Creswick will execute a transfer of the said property to John Francis Creswick and Shayne Marise Creswick as joint tenants.
 - (c) Such transfer to be held in escrow by John's solicitors from time to time or by an agreed escrow holder and failing agreement an escrow holder to be nominated by the President for the time being of the Queensland Law Society Incorporated.
 - (d) The relevant transfer referred to in 9(a) (b) and (c) hereof will be held in escrow and will not be released to John or Shayne Marise Creswick until such time as a court of competent jurisdiction makes an order for the removal of the caveat whereupon John and Shayne Marise Creswick will be at liberty to lodge immediately in the Land Titles Office the relevant transfer.
 - (e) Proof of the circumstances under which the transfer held in escrow is to be released to John and Shayne Marise Creswick will be an Affidavit executed by John setting out the circumstances to which Affidavit is exhibited a copy of the relevant court order or a copy of any application for any such court order for the removal of the caveat. The affidavit and exhibits will be conclusive evidence of its contents and will be sufficient grounds for the escrow order to release the relevant transfer to John and Shayne Marise Creswick.

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

[Clause 11 struck through in original].

12. Felix does hereby irrevocably make nominate constitute and appoint and in his place and stead put and depute John to be his attorney for the purpose of allowing and enabling John to deal

with any interests Felix may have in any properties which may have been pledged as security for an advance of monies for the purpose of carrying on business on properties in which Felix has an interest.

13. The respective transfer and assignments of land pursuant to this agreement will be deemed to be subject to the standard terms and conditions of the form of Contract of Sale currently approved by the Real Estate Institute of Queensland and the Queensland Law Society Incorporated. The conditions of any such form of Contract shall be deemed to have been imported into and to apply unequivocally to this agreement.”

[259] There were also extra hand written clauses by which John and Bill agreed to indemnify Felix in respect of the conduct of the businesses on 503 and 905 Logan Road and also for them to indemnify Felix in respect of costs, stamp duty and fees consequent upon the performance of the May Agreement.

The signing of the May Agreement

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

[261] It is also clear on the evidence that the topic of Felix, John and Bill reaching some sort of financial settlement had been under discussion for some time. West, John’s accountant, identified a schedule which listed the terms of a proposition which had been communicated to Mr West by Bill and John and then passed on to Felix in about October 2006. The terms of that proposition were:

- “1. The house at 11 Seahaven Court be put in two names (JC and FC) free of any encumbrances as joint tenants.
2. The land at 35 Sentinel Court be transferred to Bill Creswick.
3. The 905 Logan Road, Holland Park car yard be transferred to John Creswick and Bill Creswick.
4. John Creswick and Bill Creswick negotiate with Felix Creswick an income for him for the rest of his life.
5. John Creswick and Bill Creswick pay all conveyancing fees and expenses involved with the proposition.”

[262] The rudimentary synergy between the terms of that proposal and the final terms of the May Agreement is notable.

[263] Also in the interim, as I have outlined at length above, by the end of 2006 each of Felix and John were engaging in significant sabre-rattling via their respective solicitors. Each of them had threatened court action against the other.

[264] The already mecurial relationship between John and Felix suffered in the phone call in March 2007 in which John thought that Felix had called his granddaughters “sluts”. This was a most unfortunate episode, which I think significantly contributed to the way in which events subsequently unfolded, including in the trial

in this Court. Despite the findings as to credibility which I have made in respect of each of John and Felix, I do not think it likely that Felix actually referred to his granddaughters as “sluts”. What I think is far more likely is that, in the course of an animated telephone conversation, Felix misspoke himself when speaking about his granddaughters, but John heard (or thought he heard) whatever Felix said as Felix denigrating the granddaughters. In other words, just as I do not think that Felix intended to insult his granddaughters in that way, John was genuine in his perception of what he thought Felix had said. It is unnecessary for me to make findings about this topic, but mention it because, as I have said, it goes a long way to explaining the events which subsequently unfolded between Felix and John.

- [265] Another significant factor in the escalating dispute between John and Felix was Felix’s perception of John’s attitude to Marcia. This was summed up in the following passage of evidence from Felix:

“Can you recall why Connor Hunter were - why you were seeing them as solicitors, why you - why you were using them as your solicitors?-- I was trying - been like a solicitors, I approached them and I meant to sort out, you know, I mean the differences between John and me, I was trying to settle, you see, with John, and I really was - prepared what I wanted and I gave that to them to act as the solicitors for me, so.

All right. What was the difference - when you say sort out the difference between you and John, what was the difference?-- Well, the difference and John - the difference was John didn't want to give me anything because, you know, he didn't want Marcia to get anything.

That was your interpretation?-- That's right.”

- [266] In terms of the circumstances of the signing of the May Agreement, there were two witnesses (apart from Felix), namely Banjanin and Steven Colville.

Tom Banjanin

- [267] Banjanin had been a real estate agent at Cleveland for about 25 years. He had known John through property dealings for about 15 or 16 years. He was also a friend of Felix. They had common interests in horse racing and, due to their similar ethnic backgrounds, both spoke the Croatian language. His evidence in chief was as follows.
- [268] Prior to the events of 25 May 2007, Banjanin saw Felix in the TAB quite regularly. He said that in early May 2007 he was contacted by Felix, who asked Banjanin to help Felix “get his life in order in relation to his sons”. Felix said that he needed some money. He said Felix asked him to broker a deal with John because he wanted some money, and that Felix made about a half a dozen phone calls asking Banjanin to discuss matters with John.
- [269] Banjanin finally telephoned John and explained what his father had requested. John’s response was to tell Banjanin not to get involved and to mind his own business. He said he met with John and John told him that he and Felix had been “down this path before” and he did not really want Banjanin becoming involved. Banjanin reported this back to Felix. Banjanin said, in effect, that he eventually convinced John to listen to what Felix had to say because of the age that Felix was at.

- [270] Banjanin said that on the morning of 24 May 2007, he picked Felix up from Sentinel Court, took him to a bakery/coffee shop, and in the course of their discussion Felix explained to Banjanin what Felix wanted. Banjanin understood that he was to convey these requests to John. He said:
- “He [Felix] just wanted some money and a large sum in – up front, basically, and then X amount, I think from memory it was \$1,000 a week, and I think it was three or four hundred thousand in a lump sum, and also to reside in the house at Seahaven.”
- [271] He did not recall any discussion with Felix about other properties.
- [272] Banjanin explained that he had taken Felix to this coffee shop because Felix did not want to discuss matters at his home: “He didn’t want me discussing anything in front of Marcia, Marcia Banfield”. He said that Felix explained that this was because of past “friction” between the parties.
- [273] Banjanin denied that he had initiated these meetings with Felix on instructions from John. He had, in fact, previously had a falling out with John and they had not spoken for some two years. They were only reconciled after John attended when Banjanin was showing Bill a property at 39 Sentinel Court.
- [274] After receiving the list of requests from Felix, Banjanin telephoned John and conveyed Felix’s requests. He said that John told him that they had been down this path before, but an agreement would be “formed” for Felix’s consideration.
- [275] On the morning of 25 May 2007, Banjanin again picked Felix up from his home and they again went to the same coffee shop. He said that they again discussed the list of requests that Felix had spoken about the previous day. There was then a series of phone calls between Banjanin and John in which Banjanin conveyed Felix’s requests. John expressed frustration with the way in which Felix was conducting himself, and finally said to Banjanin words to the effect “Look, whatever he wants” and “get him to tell me and I will draw up an agreement”.
- [276] John told Banjanin that Mott would prepare the necessary agreement.
- [277] Banjanin said that he told Felix that he should sign the agreement in front of a solicitor, and asked Felix who his solicitor was. Felix told him it was Connor Hunter but he did not want to use them. He then asked Banjanin for a recommendation and he suggested Steven Colville. Banjanin made an appointment for Felix to see Mr Colville that afternoon.
- [278] Banjanin was then contacted (either by Mott or John) and was advised that the agreement was ready. This was late in the afternoon and he was with Felix. He described arriving at Mott’s office and having to wait 15 minutes or so before Mott came out with the agreement. (There was some inconsequential differences between witnesses as to whether Felix and Banjanin stayed inside Mott’s office or waited for Mott outside. Nothing turns on this.)
- [279] In any event, when Mott handed over the agreement, he asked whether Felix had a solicitor and Banjanin replied in the affirmative, saying “We are now going to see Steven Colville”.

- [280] Banjanin said that he then drove to Mr Colville's office; he said they probably could have walked it, because it was only a few hundred metres away, but they did drive.
- [281] Banjanin then described going into the office with Felix and introducing him to Mr Colville. He handed the agreement to Mr Colville, who started reading it. He said Mr Colville went through the agreement, and as he did so, Felix expressed dissatisfaction with particular items and numbers in the agreement. When Felix did this, Banjanin would telephone John to advise of the changes. He did so on numerous occasions until John finally said to him "Tom don't bother me ... just get Felix to sign whatever he is happy with and we will consider it once it's been signed". He described Mr Colville reading each clause out loud to Felix and changes being made when Felix was not happy. He said that Felix was "not at all" confused about what the agreement was about. Banjanin gave evidence about the particular changes that were made to the draft agreement in light of Felix's instructions. He confirmed not only that Felix had no difficulty in understanding what Mr Colville was saying to him, but Felix was the one instructing Mr Colville.
- [282] After Felix had signed the agreement Banjanin drove Felix home. He could not recall what had happened to the agreement, but said that he did deliver it.
- [283] Banjanin said that at about 8.30 pm that evening, Felix telephoned him to thank him for his help in the matter. Felix then telephoned Banjanin on the following day, the Saturday, and told Banjanin that he was unhappy with the agreement. He gave this evidence:
"And what did you say to him?-- I said to him - I said, "Felix", I said, "how can you be unhappy?" I said, "You signed the agreement in the presence of your solicitor. You made various changes in front of your solicitor which you signed, he witnessed", and he then said to me - he said, "What solicitor?" I said, "The solicitor I took you to yesterday afternoon." His response was, "I have never seen him in my life.""
- [284] Banjanin denied that he had approached Felix and also denied that on 25 May he said to Felix that he had a cheque for \$200,000 in his pocket that was supposed to be the deposit on John's house at 39 Sentinel Court. He described that as "absolute rubbish". He confirmed that the property at 39 Sentinel Court was on the market at that time, but did not sell until about one year later. He said that on 25 May 2007, he absolutely did not have any deposit moneys or a cheque relating to the purchase of that property.
- [285] He also denied saying to Felix that the reason he was there was because "the boys need help; they are in trouble", and denied telling Felix that "GE are going to close them down, foreclose them". Banjanin said that he had dealt with John and Bill for quite a number of years. He said that no transaction in which John had dealt with Banjanin had been a "subject to finance" contract. Banjanin said he did not even know who John's and Bill's financiers were, and he knew nothing about GE.
- [286] He also denied saying to Felix that John and Bill wanted Felix to be a guarantor to GE and that he would prepare the documents and collect Felix that afternoon because the documents had to be at GE's office by 6 pm that day. He similarly denied saying to Felix that if the documents were not at GE's office by that time "the boys are finished". Banjanin denied shouting at Felix and demanding that he sign the agreement.

- [287] Banjanin was another of the witnesses who was subjected to searching cross-examination by Felix's counsel. He was also sought to be criticised on the basis of non-co-operation with Felix's solicitors. I have already described his evidence in that regard, from which it appears that the first attempt to contact him by Felix's solicitors occurred only on the Saturday prior to the Monday on which Banjanin gave evidence before me.
- [288] Banjanin was cross-examined on the records of his mobile phone calls. These indicated that he had telephoned John's mobile phone twice on 4 May 2007 and that he had telephoned Felix on 14 May 2007.
- [289] He was cross-examined about the meeting in Mr Colville's office, and said that he was there "in a sort of friendship capacity". He said that he was with Felix and Mr Colville for the whole time, apart from when he went outside to have a cigarette or to speak to John. He confirmed that when he spoke with John on the phone he would step out of the room. He denied the suggestion that he had not told Felix that John had said that whatever changes Felix wanted to make were fine and that they would then be put to John for his consideration.
- [290] Banjanin was then cross-examined on the transaction in which he acted in the purchase by John of the property at 32 Sentinel Court for \$5.8 million. He confirmed having previously had discussions with John about that property. The settlement period was some nine months. Banjanin was also the agent acting in the transaction by which Bill and Jane purchased their Raby Bay property for some \$2.1 million. He was also cross-examined on the circumstances under which he had had the falling out with John, which occurred about two years prior to Bill and Jane purchasing their house.
- [291] Banjanin denied the suggestion that he had not met with Felix on both 24 and 25 May. He also denied the suggestion that Felix appeared "very agitated and upset looking at the time that he signed the agreement in Mr Colville's office". He said that Felix was upset at some of the content of the document, but he was not agitated.
- [292] It was put to Banjanin that he was lying when he said that Felix had phoned him on the evening of 25 May to thank him for helping in the agreement. It was put to him that Felix phoned him and told him that Felix was not going ahead with the agreement. Banjanin denied this completely, and repeated the substance of the evidence that he had given about the phone call he had received from Felix on the Saturday in which Felix effectively denied having signed the document in front of a solicitor.
- [293] Banjanin said that he did not see himself as having a role to negotiate on behalf of Felix, but rather was there "merely as a go-between between him and John". He denied the suggestion that his reason for arranging a solicitor was to make sure that the agreement was enforceable. He similarly denied being an agent for either John or Felix. He denied creating a false sense of an atmosphere of urgency, and in response to repeated suggestions that he had made statements about the necessity of having the documents signed to satisfy GE, repeated that not only was that not correct, but he was totally unaware of John's financial dealings.
- [294] It was also put to him that Mr Colville had asked for time to think about the document over the weekend and Banjanin had responded that there was no time

because it had to be signed within a very short period. Banjanin denied this, saying it was not correct and that Felix wanted the document signed.

[295] Banjanin denied the suggestion that, when he spoke with John twice on the evening of 25 May, “the cat was out of the bag”, in that Felix was not going ahead with the deal. He reaffirmed that it was not until the following day that Felix told him that he was unhappy with the agreement.

[296] Banjanin was then cross-examined on the number of telephone calls (some 19) that he had made to John and Shayne’s telephones between 27 May and 29 June 2007. He said that he sometimes spoke with John when they were doing business. I note, in passing, that these telephone calls coincided with the period prior to the sale of the property at 39 Sentinel Court.

[297] I do not propose recounting the balance of the cross-examination at length. Some of it was repetitive of matters that had already been put to Banjanin either in evidence in chief or previously in cross-examination. The following passage is indicative of the questions and answers:

“And you told Felix that you had a \$200,000 cheque in your pocket that was supposed to be a deposit on John’s house at 39 Sentinel Court?-- Absolute rubbish.

That might not be rubbish if there had been a contract on that property that had not completed and that could be the deposit money you had?-- Your information is totally incorrect. The property was sold I think in 2008. There had been no transaction done on 39 Sentinel Court.

You told Felix the purchaser would not go through with the sale?-- Absolutely not. There was no sale.

And you said the reason you had called the meeting was because Felix’s boys, John and Bill, needed help?-- That’s not correct.

And you told Felix that they were in big trouble?-- That’s not correct.

And you said to them that GE, the finance company, was going to close them down, foreclose on them?-- Like I said earlier, that’s not correct, but I - to this day I don’t know who finances John or Bill Creswick.

Felix asked you what help John and Bill needed. Do you remember that?-- Not at all.

And you said that all they needed was that he would be a guarantor for them to GE to prevent this financial collapse?-- Not correct.

And Felix said to you that he would be prepared to help them and do that?-- Not correct.

You told Felix that you would look after getting the documents prepared. Do you recall that?-- Not correct.

And you said to him that you would come and collect them that afternoon because the document had to be at GE’s office by 6 o’clock p.m. that day?-- That’s not correct.

And you said that if the documents were not at GE's office by 6 p.m., then the boys would be finished?-- That's not correct.

So you were really - can I put to you you were really ramping up the pressure on this 79 year old man and so-called friend of yours so that he would feel a lot of anxiety for his sons' welfare and would be prepared to sign an agreement that was put in front of him?-- Absolutely not correct, because, like I said earlier, I was the one that when I rang John Creswick I was the one that suggested that he should listen to what I had to say after my dealings talking to Felix, and I was the one who said, "He is a 77 year old man and he wants to get on with his life."

Steven Colville

- [298] Mr Colville was admitted as a solicitor in 1970. He practices at Cleveland. He recalled meeting with Felix and Banjanin on 25 May 2007. An appointment had been made by Banjanin with his secretary for 3.45 pm. Banjanin arrived at about 4.15 pm with Felix.
- [299] Mr Colville thought that Banjanin was carrying two copies of the draft agreement and said that Banjanin had told him that Felix wanted advice on the documents. Mr Colville said he glanced briefly and saw that there was a six or seven page agreement and also a number of Form 1 Transfers in respect of various properties. He skimmed through the agreement and then asked Felix if the documents could be left with him over the weekend so that he could have a proper read of them, and for them then to meet again on Monday so he could advise. Banjanin responded saying that the documents "had to be signed that evening because they were tied in with a finance deal that Mr John Creswick was putting together at that time". Mr Colville thought that Banjanin mentioned GE as the financier.
- [300] Mr Colville said that he then read through each clause of the agreement with Felix and asked if he had any comments or changes. He said that a few things were changed and other clauses were acceptable to Felix. He described Banjanin being in the office, sitting beside Felix for some of the time, and that from time to time Banjanin left the conference room, spoke on his mobile phone, and would then come back into the room. Mr Colville did not recall Banjanin saying anything to Felix. He said Felix became "quite agitated and, I suppose, hot under the collar". He said that Felix "seemed to become angrier and angrier and more and more upset as I went through the clauses of the agreement with him". He described Felix becoming red in the face, perspiring and occasionally swearing. Mr Colville did not, however, recall any discussion between Felix and Banjanin about Felix signing the agreement.
- [301] Mr Colville gave evidence about his concern about the timeframe in which he was required to advise, saying that he believed the agreement contained quite significant provisions and this concerned him in terms of his observation of Felix that afternoon.
- [302] Mr Colville referred to a diary note which he had made on the following Monday concerning his attendance on Felix and Banjanin on the Friday afternoon. The diary note recorded:
- "FC asked me to check over a document prepared by his son's solicitor, John Mott, requiring transfers of certain properties.

SC [Colville] asked to be allowed a few days to peruse document and advise.

TB explained that document had to be signed that evening, together with transfers of properties as sons' financier was waiting for copies of documents to be faxed to them.

Went through documents clause by clause.

FC not happy about number of clauses – becoming quite agitated.

Telephone conversations between TB and John (?) Creswick to discuss amendments required.

Extra clauses hand written by SHC [Colville] (no staff available due to late hour).

Advised FC and TB that I was not happy with FC signing the agreement, even with hand written amendments made by me.

Discussed other issues not covered by amendments (escrow of transfer docs).

Advised FC not to sign transfer docs.

Telephone conversations in foyer of office TB & John (?) C and FC & John C.

FC now very agitated – strong words used in connection with son.

TB & FC left office at 5.45 pm.”

[303] Mr Colville also kept a diary note of a telephone attendance he had on Felix on 28 May, when Felix instructed him to “do nothing on the file until he advises”. Felix also asked for a copy of the agreement to be faxed to him.

[304] Mr Colville's office also received a telephone message on 29 May 2007 from Felix, in which he left a message that he was not prepared to go ahead with the deal even though his sons had agreed to all the amendments to the documentation.

[305] On 4 June 2007, Mr Colville wrote to Felix, saying:
 “I note that you did not keep your appointment at my office last Wednesday and I have been unable to contact you by telephone since then.

I have also heard from your sons' solicitor, John Mott, that your partner, Marcia, obtained a restraining order against you in the Supreme Court late last week preventing you from dealing with any of your assets.

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

As I do not practice in Family Law I am unable to act for you in relation to those proceedings. However if you do not already have a solicitor I can refer you to a local Family Law specialist.

Enclosed is a memo of my fees for the work which I carried out on the file. You will note that the account also refers to a number of letters and telephone calls from Mr John Mott, your sons' solicitor. Also enclosed is a copy of a letter which I received from Mr Mott on 30 May confirming that his clients were in a position to implement the terms of the agreement immediately, which would have overcome one of the problems which I referred you to at our meeting, namely what would happen if the properties were transferred to your sons and they failed to make payment of the property settlement moneys. Again however the issue is academic only in light of the restraining order.

Thank you for your instructions.”

[306] On 4 June 2007, Mr Colville also wrote to Mr Mott, saying:

“I refer to the correspondence which I received from you last week in relation to this matter, and our various telephone conversations.

For the record I confirm that in my opinion the agreement which Mr Felix Creswick signed at my office on the evening of Friday 25 May was signed under duress, and would not therefore be enforceable in a Court of law. However I note that Mr Creswick's partner secured a restraining order against him in the Supreme Court last week preventing him from dealing with his assets so the status of the agreement is probably of academic interest only.

I confirm also that Mr Creswick did not keep his appointment with me on Wednesday morning (no doubt because of the pending proceedings by his partner) and that I have not been able to contact him by telephone since then.

In the circumstances I am now closing my file.”

[307] Mr Colville was asked about the reasons for including the reference to duress in his letter, and said that, apart from the concern he had about the timeframe within which the agreement was to be signed, he believed that the agreement related to Felix's occupational residence in the house at Raby Bay that might have been put at risk if he did not sign the particular document. Felix's side, quite rightly in my opinion, did not seek to elevate Mr Colville's reference to “duress” to any level of conclusiveness.

[308] I note also that these letters from Mr Colville refer to the fact that Marcia had, in the interim, obtained some sort of injunction against Felix to prevent him from dealing with his assets. In fact, as it emerged subsequently in Felix's evidence, Marcia brought this application at Felix's urging.

[309] Mr Colville was cross-examined about Felix's appearance and demeanour when he saw him. He said that he appeared calm (initially, at least), and did not seem confused or dizzy. He agreed with the proposition that there was no doubt that what Felix was signing and what Mr Colville was advising on was not a guarantee, and Mr Colville volunteered: “I don't think he could have had that opinion or that impression.”

[310] Mr Colville then confirmed the sequence in which he took Felix through the document and the manner in which Felix instructed him to make the amendments which increased the amount paid to Felix from \$1000 to \$1,250 per week and increased Felix's proportional interest in the Logan Road properties from 10% to 33¹/₃%. He said that Felix was "quite calm" when he arrived at the office. Mr Colville also said:

"If I had any doubts about Mr Creswick's state of mind or mental health I would not have let him sign the agreement in my presence."

He said that over the years he had dealt with many business people and negotiated agreements and deals for those people. He then gave the following evidence:

"All right. Is it fair to say that, when Felix got agitated or angry, it was when he was reading through the agreement as you were explaining it, and he was insisting on changes?-- Yes.

So the - however we label it, the anger or agitation was one of him expressing that he didn't think it was a fair enough deal or that the particular term wasn't good enough for him?-- He - he didn't make that statement, but that was certainly the impression he gave, yes.

All right, but what I'm endeavouring to say is starts out calm but, as he's going through the agreement with you and reading the terms, he's getting angry as he's insisting on better terms?-- Yes, that's correct, yes."

[311] In connection with the reference to "GE", Mr Colville initially said that he was sure that the words "GE" had been used at some stage of the conversation on the Friday evening, but then conceded that he could not remember who had said it and "it could have even been John Mott when I spoke to him the following week". He confirmed that he heard reference to GE some time later when speaking with Mr Ganim, but did not think that this was the first time that GE was mentioned. He confirmed that the truth was that he did not know who mentioned GE but he did recall that it was mentioned "at about the time of this meeting taking place", but it could have been Mott, could have been Banjanin, or could have been Felix.

[312] Further in terms of the meeting itself, Mr Colville gave the following evidence:

"Thank you. Now, in terms of the general tone of the meeting, but for Felix getting angry or agitated when he was insisting on changes, the course of the meeting was Banjanin would go outside to make a phone call when Felix was instructing or insisting on certain amendments; is that correct?-- That's correct, yes.

And, presumably, to get instructions from Mr John Creswick?-- Well, I think he may have even left the room when we were just going through the document together.

All right. But for Felix being angry or agitated, there was no shouting or screaming in the room?-- Oh, no, no, no.

All right, and in terms of where you've got at the bottom of 171 "strong words used in conversation with son", you don't know that, do you?-- I heard - I heard the strong words, but I couldn't say that they were being used to Mr John Creswick, obviously because I didn't know who was on the phone.

I'd just like to explore that with you. What are you saying, what Felix goes into the foyer, does he, and gets on the telephone, on the mobile?-- When the meeting was finished, I ushered them out of my conference room into the foyer and Mr Banjanin, I think, had been on the mobile phone at that time, on his mobile phone, and Mr Creswick took over the phone and spoke to the person on the other end and he was quite agitated.

Again you don't know who he was speaking to?-- I don't know who he was talking to. No.

All right. Can I ask you this? It's the case, isn't it, that you advised Felix not to sign it that afternoon?-- I advised Mr Creswick not to sign the agreement on, I think, two occasions, if he was not happy with its terms. After he signed the agreement and was leaving my office, I again advised him not to return the agreement or the transfer documents, which had not been signed, to his son's solicitor, if he wasn't happy with the terms.

And is it fair to say that on each occasion when you tell Mr Creswick, Mr Felix Creswick not to sign, he insists he wants to?-- I don't recall that he insisted that he wanted to but he certainly didn't take my advice.

All right. He ignores your advice and wants to sign it is probably a more accurate way to put it?-- Yes, yes.

So you tell him your advice is not to sign it but, in effect, he ignores that and wants to? You say that on two occasions; that's correct, isn't it?-- That's correct, yes.

And then you also say, what, after it is all signed, "Look, don't deliver the transfer documents to your son if you're not happy." Is that-----?-- "Or the agreement".

"Or the agreement"?-- As he was leaving my office, that's what I said to him."

- [313] Mr Colville was, however, sure that comment concerning the sons' financiers waiting for copies of documents to be faxed to them was made on the evening.

Felix Creswick

- [314] In his evidence in chief, Felix denied that he had asked Banjanin to act as his agent in sorting out a deal with John. He said he recalled a time shortly before the May Agreement when Marcia decided to take some time away from him, and went to live with her daughter who was sick. He said Marcia was away for a couple of weeks. He recalled signing the May Agreement on a Friday evening at Mr Colville's office. He described receiving a telephone call from Banjanin at 8.35 am on 24 May, and said that Banjanin asked whether Marcia was there. When Felix responded affirmatively, Banjanin told Felix not to tell her anything and that he would like to pick Felix up and buy him coffee because he had something important to tell him. He said that Banjanin came to his home as Felix was taking the last of his morning medication and they went to a café. He said that Banjanin told him that he had \$200,000 in his pocket because the sale of John's house was falling through and the boys were in trouble. He said that Banjanin said that GE wanted to foreclose on them. Felix asked why, and said that Banjanin responded simply that GE wanted to foreclose and the boys needed Felix's help and asked

whether he was prepared to help them. Felix said that he responded that "of course" he would help them and asked what sort of help, to which Banjanin said that they wanted a guarantee for the money that they owed. Felix said he agreed to this and Banjanin said that he would prepare the documentation which should be ready at about 3 o'clock and that he would pick Felix up afterwards.

[315] Felix appeared to confuse his dates at this point in his evidence, because he then referred to Banjanin collecting him in the afternoon. It was clear that Felix was referring to the Friday, not the Thursday. He then spoke of receiving a number of phone calls from Banjanin in which Banjanin said that the documents were not yet ready, and finally one advising that they would be ready at about 3 o'clock and it was arranged that Banjanin would pick Felix up at 3 o'clock. Felix then described being taken by Banjanin to Mott's office and, after a short wait, Mott came out of the office and handed documents to Banjanin. Felix said that he and Banjanin walked 200 or 300 metres to Mr Colville's office. (Subsequently in his evidence Felix said that they drove there.) He described what happened after he was introduced to Mr Colville, saying that Mr Colville had a quick look at the documents. He said that Banjanin told Mr Colville that the documents had to be signed by 6 o'clock tonight "because is a problem with the boys with the finance company". Felix said that Mr Colville said that he would like to keep the documents for the weekend to peruse, but Banjanin insisted that they had to be signed tonight. Felix then gave the following evidence:

"Right. All right. All right. So then what happens? You go in with Mr Colville and Mr Banjanin, do you, into Mr Colville's office?-- Went to Mr - little small office down there. I sat down.

Mr Colville's office?-- Mr Colville's office, yeah.

Yes?-- I sit down and Banjanin was on the left side down there, with his phone in his hand, he just ringing, ringing, something, talking, ringing, talking, and Mr Colville read this document, you know.

Yes?-- And I notice some figures there "10 per cent", "40 per cent", "40 per cent", and I query, "What's that?", you know I mean? I felt, you know what I mean, that we are guarantor we should be equally, you know what I mean.

Right?-- And I don't know if Mr Colville heard me or not, but I overheard - and I'm quite positive sure that Mr Colville said, "Mr Creswick give everything away.", and then Mr-----

HIS HONOUR: Sorry? He said what?-- Mr Colville.

Mr Colville said what, Mr Creswick?-- Yeah. "You give everything away."

What did he say?-- "You give everything away."

"You give everything away."?-- Everything away, and I - he looked at the figure and he put "33, 33, 33", see.

MR KELLY: Yes?-- Actually what they actually - the document originally they showing that they were getting 10 per cent of my assets, you know, I - no assets. I was thinking this a guarantee.

Yes?-- Yeah, 10 per cent, 40 per cent, 40 per cent, he alter. I believe he alter, I'm not sure, but was a - I didn't alter. They alter. I will say that he altered and he put "33, 33, 33". I was not happy to sign, you know what I mean.

All right?-- I was not really happy to sign, you know what I mean, because when one was screaming on one side, "Sign, sign, sign, sign.", the phone was ringing, "Sign, sign, sign. We running out of time, 10 minutes to go.", one thing or another and at the end, you know I mean, I just signed.

Did - now, did you have a conversation on the telephone with anyone during that meeting or-----?-- Yes. My - my wife, my wife Marcia ring me up, say, "Where you are, Felix?" I say, "Well, I'm busy."

What time? Sorry. What time was this, Mr Creswick? What time was this conversation?-- That was between - we were there about 5 o'clock. I think half past 5 or sometime in the afternoon.

All right, all right?-- And I said to Marcia, I said, "Look, I'm sorry. I can't talk to you. I'll talk to you when I come home.""

[316] Felix said that he was very depressed at the time and he believed he was signing a guarantee. He said that Banjanin drove him home, and then gave the following evidence:

"All right. Now, then what happened when you got home?-- Well, when I got home, the first thing Marcia asked me - say, "What's happened? What's going on? What have you done?" I say, "Well, I signed some documents." I said, "One.", and she became very, very upset, very hysterical, and she, "Just tell me what you're signing." I said, "Well, I signed a guarantor for the boys and the business they going bad, something happened."

Just - can you please just slow down a bit, please, Mr Creswick?-- Yeah.

And a bit more - a bit more louder, a bit more louder?-- Well, I said to Marcia, I say - Marcia was asking, "Why did you sign?", and I say, "Well, I signed the guarantor for the boys because I believed GE, they close them down." I say, "You must be mad."

Who said - who said, "You must be mad."?-- Marcia.

Right?-- I say "You remember what you're saying.", and she was just mad, you know.

And what happened then?-- Well, I - after about - may - I don't know, a little while, I grabbed the phone and I rang Banjanin. I rang Banjanin, I had his number in my phone, and I said, "Look, are there any paper there that I signed - any guarantee that I sign, you can dump it in the rubbish."

Just - sorry. It's a bit - it's a bit quick. It's coming out a bit quickly?-- Yeah.

Mr Creswick, please. You rang Mr Banjanin?-- I rang-----

Sorry. You rang Mr Banjanin and did you have a conversation with him?--
Yes.

All right. Now, please slowly tell his Honour what the conversation was about?-- The conversation was very short, I just say, "Tom, while I sign the documents, while I signed the papers there, you can dump them in the rubbish tin. I am not going through with the deal."

All right. Did he say anything back to you?-- "I will tell that John."

He said?-- That's all.

All right. Now, did you try to speak to John or Bill that night?-- No.

Did either of them-----?-- As far as I remember, no.

Did either of them speak to you?-- Yes, Bill rang - Bill rang and he - he give me a mouthful.

He gave you a mouthful?-- Yeah.

Of what? What did he say? Rather - what did he say?-- Say straight out?

Yes?-- He say, "You fucked me. You fucked my family. I hope that you fucking die soon. I hope that you fucking die soon.""

[317] When cross-examined, Felix confirmed that he knew Banjanin, and conceded that Banjanin was a friend because they had met so many times in the TAB, in the street and in the garden. He also confirmed their common interest in punting and their shared Croatian language.

[318] Felix was asked about whether he was the one who had initially made contact with Banjanin in relation to this matter, and gave the following evidence:

"And I'm suggesting to you, Mr Creswick, that that is why you went to Mr Banjanin in May to get his help to do a deal with John, Bill and so forth?-- That's the biggest liar I ever heard and you telling it right now. That's not true.

See, Mr Creswick, you knew by May that two months of your four months had already ticked off and you had to - had to find a house, obtain the house, have it settle so that you could hand it over to Marcia?-- That's not true. Marcia didn't put any pressure. Her lawyers didn't put any pressure on me. No-one put any pressure on me. That's not true and I did not contact Tom Banjanin. I didn't discuss with Tom Banjanin nothing.

The truth is Mr-----?-- But Tom Banjanin contact me at 7.45 in the morning - I'm sorry, the night before on the 24th that he wanted to buy me a coffee the next day, he want to talk to me about something. That's the first time that Tom Banjanin did try to talk to me about something, and I don't know what it was still the next morning.

Mr Creswick, you were caught in a dilemma?-- I was in what?

As at May, because you had obligations to settle with Marcia?-- That's not true.

Now, please listen to me. You did have obligations to settle. They're in that contract?-- I got obligation, but I was not pressed.

No. The contract required you to perform your obligation in July or, at the latest, 30 days after that?-- I was not pressed. I was not given limit time by her solicitor. Her solicitor never once rang me or pushed me or give me time or nothing. Marcia knew that I was trying to organise the money. He knew that I couldn't get it from John and I dealt with it. I was not pushed by Marcia to settle. Were quite-----

Who were you trying to organise the money with?-- Huh?

Who were you trying to organise the money with?-- I was trying to get some money from John.

No, no, you said I couldn't get it from John. You just said you couldn't?-- No. I just say I been trying to organise the money to settle the matter from John.

From John?-- Yes.

Okay?-- John always claimed there, "I got no money. We've got no money. We've got no money."

Now, I'm suggesting to you that the dilemma you found yourself in was that you knew you had to perform your obligations to Marcia, but, if you did, Marcia was likely to leave you?-- No. That's not true.

And you didn't want that at all?-- No, I didn't want Marcia to leave and Marcia didn't put any pressure on me at all either.

Even as late as 18 May, when you thought Marcia had left you for a short time, you were quite distraught about that, weren't you?-- Marcia didn't left - Marcia left me, she took two weeks off, she went to Cairns, you know what I mean, and it was not through - I don't know. She just need time. She just needed a relaxation, just took two weeks, and went away.

You thought-----?-- And I was thinking - at that time I was thought that maybe Marcia left away for good. Marcia-----

Left you for good?-- Yeah.”

[319] Felix was pressed on this a little later in the cross-examination and gave the following evidence:

“You went to Banjanin to assist you to do a deal with John?-- That's not true. That's a lie.

You certainly thought on the 25th of May that Banjanin was assisting you?
-- He was not assisting me at all whatsoever.

That's what you thought?-- Like, he was bribing me, not assisting me, bribing me.

Listen to me carefully, Mr-----?-- I'm listening very careful.

On the 25th of May when those negotiations were going on, you thought Banjanin was assisting you. That was what-----?-- That's not true.

It is true?-- That's not true.

Mr Creswick-----?-- John Banjanin was working for John.

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

Banjanin was telling lies?-- Yes.

Okay?-- Telling me that the boys were in trouble. That was not true. They were not in trouble.

And you knew that when he said it? When he said it, you realised it was untrue?-- wasn't true. Of course it was not true. It was not true."

[320] I pause to note the significance of this evidence. Even if it be found that Banjanin had made the representations to Felix about the supposed urgency in connection with the finance company, Felix's unequivocal assertion was that he did not believe what Banjanin was telling him, and expressly stated that he did not believe that the boys were in trouble.

[321] In any event, under further cross-examination, Felix repeated his version of the initial discussion with Banjanin, in which Banjanin asserted having a cheque for \$200,000 in his pocket because John just lost a deal on a house and that the boys needed his help because they were in trouble with GE. He was pressed on the discussions that he had with Banjanin, and denied having told Banjanin of the elements that he wanted in the agreement, namely the adjustment in interests on the Holland Park properties, to be paid a thousand dollars a week, and wanting a lump sum payment of \$400,000 or \$600,000 in cash. Felix repeatedly asserted that he did not discuss these things with Banjanin and said that he was told by Banjanin that a guarantee document was being prepared.

[322] Felix was then cross-examined on his attendance on Mr Colville. In this part of his evidence, he related the changing of the "10, 40, 40" apportionments to signing equally as guarantors. He also conceded that he had told Mr Colville to change \$1,000 to \$1,250. He gave the following evidence:

"There was no-one else there but you and Banjanin and Colville, was, there? Just the three of you?-- I don't know who was there. I think was a lot of - was a lot of confusion. The phone was ringing. John was screaming on the phone. Banjanin was screaming, "Sign, sign, he's running late, sign, sign, we got to sign, sign. Hurry up. Sign, sign, sign, sign.", but is there and I heard from behind somebody say, "Mr Creswick, you give everything away." That I'm quite sure I heard that and then in a moment of - I don't know - with the screaming here and yelling I just signed, I just signed. I didn't want to sign. I didn't want to sign because I couldn't understand what was really going on, but then I changed and I signed.

But knew it wasn't a guarantee; didn't you?-- A guarantee. I believe one million to one that was a guarantee.

No, Mr Creswick?-- Yes sir.

You had signed guarantees before in history in your business?-- That was a guarantee.

Guarantees normally have the word "guarantee" written on them?-- Well, I didn't look upstairs, downstairs, or one thing and another. I was convinced that was a guarantor, that's what Banjanin asked me in the morning and I sign as a guarantor.

Why would a guarantee be giving you a thousand dollars a week, Mr Creswick?-- Why the guarantee? We didn't think-----

Why would a guarantee have a clause in it giving you one thousand dollars a week for life?-- Well, the point is he have to give a thousand a week, a week, you know what I mean? I guarantee something. Just want to be happy to pay me, to pay me. I was living - I got no income at the time or nothing. I need the money. I need to live, so that's what they give me, yeah.

You knew this was a document which was transferring property back and forth?-- No. I never saw the property. I not - a question. I only knew that that was a guarantor.

You gave instructions to Mr Colville to make changes and he did in handwriting?-- I didn't make him - he - I don't know if he done it or somebody else done it, but they change from "10" to "33", "33", "33".

Because you told him to?-- Oh, I guess so."

[323] Felix was pressed further on the meeting with Mr Colville and denied outright giving instructions to Mr Colville to include the handwritten clauses. It is fair to say that when giving evidence and being cross-examined on this topic, Felix became more agitated and strident in his responses to questions. The following evidence was given:

"And you gave instructions to Mr Colville about the extra clauses he wrote in?-- I did not give Mr Colville any instruction whatsoever. I was surprised when I saw a couple of days after, or I don't know, a week after, or when I was in the hospital, I saw another page, you know what I mean, written by hand. I never saw that at Mr Colville.

He did in your presence?-- I didn't see it. Maybe he was writing in back, but I didn't see it.

He - he read - he read the clauses out to you once he had written them?-- He did not read the clause to me.

He went through them to make sure you understood?-- He did not do that.

And he read them out to you?-- He did not read out to me.

And when you and he discussed a change like the percentages, or like the money, the thousand dollars, Mr Banjanin was phoning John to see if John

would agree?-- That's not true. John was screaming on phone, "Just make him sign. Make him sign." Banjanin told him, you know what I mean, he want to "Give him anything, give him anything. Get - make him sign, make him sign." That was the big screaming and yelling.

Yes?-- "Make him sign, make him sign. Push and push and push. We're running out of the time, running out of time. It's nearly 6 o'clock, nearly 6 o'clock."

This is the big screaming in the presence of Mr Colville?-- In front of Mr Colville, yes.

Big screaming from John, big screaming from Mr Banjanin?-- John, Banjanin, early, yes. It was just confusing. I was completely confused throughout, so.

Mr - Mr Creswick, you went through the document clause by clause with Mr Colville?-- I did not go through with Mr Colville clause by clause.

And on all the changes?-- Mr Clause - Mr Colville read, but I didn't go clause by clause by clause. I was mainly facing, you know what I mean, the thing down there. I was - yeah.

On all the changes he made, he read them out to you to get your agreement to them?-- No. He didn't read them to me. The only thing he altered at the figure. He - if it was him. I'm not sure."

- [324] Felix denied that Mr Colville had told him not to sign the agreement, saying that if he had been told that he would not have signed it. Felix said "I didn't want to sign it", and said:

"I sign it in the last ... few seconds of Banjanin screaming and yelling and - and the phone ringing here, and Marcia rang a couple of times, 'What you doing?'. I say, 'I ring you back. I ring you back', and she rang. Then I didn't answer the phone, but the phone here was consistently - and yelling, 'sign, make him sign. Make him sign. Make him sign. Was here - he still here now. Make him sign.' Even dream at night, 'make it sign?', that was Banjanin."

- [325] Felix repeated that he did not want to sign the document, but when challenged that he had previously given evidence that he wanted to help the boys said:

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

- [326] He was then again asked about Marcia being hysterical when he went home and told her that he had signed, and gave the following evidence:

"She was hysterical?-- Yes.

Yes, at the mere mention of the fact----?-- Mmm.

That you'd gone and signed some document?-- Something that without she knew - actually she didn't knew.

She went nuts on you?-- And she asked me, she say, "What did you sign?" I say, "Well, I don't know what I sign. I think the boys down - they think

that they are in trouble but I don't think so, you know what I mean?", and then she was still very, very upset and everything, so I grabbed the phone and I rang Banjanin.

Well, just stop there for a minute. I want to concentrate on Marcia for a minute?-- Yeah.

You say she was hysterical, you didn't have a copy of the document with you?-- Nothing. I got nothing.

So you didn't even tell her what it was you signed?-- Nothing.

And she went hysterical on you?-- That's right. She was not happy. She was - she was - she said, "Well, how you can sign things if you don't know what you're signing?"

The truth is, Mr Creswick, you didn't want to tell her what you'd signed up to, did you?-- Oh, that's not right.

Because you'd done a better deal with John than you had with Marcia?-- That's not right."

[327] Felix was pressed on the detail of that, and also challenged as to whether he had, in fact, phoned Banjanin that evening. I interpolate here that the telephone records³⁰ disclose that a three minute call was made from Felix's mobile phone to Banjanin's mobile phone at 8.33 pm on 25 May 2007.

[328] Later in his cross-examination, Felix referred to phoning Mr Colville and telling him that he was not going through with the deal. He gave the following evidence:
 "What you said to him was that you were not prepared to go ahead with the deal, even though your sons had agreed to all the amendments?-- That's not true. That's a liar.

That's a lie?-- Yes.

Okay?-- No. I didn't use that word that to Mr Colville.

And you told Mr Colville that he should take no further action in respect of the agreement until you gave him more advice?-- That's not true. That's another fabrication that you making.

A fabrication?-- Yes.

Thank you?-- That's not true."

[329] This evidence is completely at odds with Mr Colville's contemporaneous diary note of what Felix had instructed him in that call.

[330] A little later in the cross-examination, Felix was further questioned about the attendance at Mr Colville's office, and challenged on the evidence he had previously given about people screaming on the phone or shouting on the phone. He said:

³⁰ Exhibit 77.

“Mr Creswick, nobody was screaming on the phone or shouting on the phone, "Sign, sign, sign."?-- The room was vibrating in the way Banjanin talk to John and John talking to Banjanin.

The room was vibrating?-- Not one phone call, you can double-check on the telephone, was dozen of phones, "Sign. Make him sign. Just make him. Just make him sign. Just make him in." I can still feel it now, you know what I mean. That's how I - the scream was, the yelling was.”

Findings in respect of the May Agreement

- [331] Having seen and heard these witnesses, I accept, and give significant weight to, Mr Colville’s evidence about the events which occurred in his office on the afternoon of 25 May 2007. I also generally accept Banjanin’s evidence, subject, however, to matters in which his evidence conflicts with that of Mr Colville. I have already expressed the view that I regarded Felix’s evidence as unreliable, save to the extent that it comprised admissions against interest or could be independently corroborated.
- [332] I accept that it was Felix who initiated contact with Banjanin with respect to this matter. Despite his protestations, Felix was undoubtedly under pressure, not the least being the financial pressure caused by the property settlement he had reached with Marcia. That pressure was exacerbated by Marcia leaving him; he thought at the time that she had left him for good. Felix needed to have access to money to make good on his deal with Marcia. That was, in my assessment, more than sufficient reason for him to ask Banjanin, as a friend, to intervene with John. On the other side of the coin, there was little incentive for John to bring his dealings with Felix to closure. The acrimonious correspondence between their solicitors had been in abeyance for some months. Felix and John had certainly had a major falling-out at the end of March and beginning of April but, despite that, there was no discernible benefit for John in agitating to have Felix conclude a settlement with him.
- [333] I also reject Felix’s version of having been told by Banjanin that he had a cheque for \$200,000 in his pocket because the sale of the property had fallen through. Not only does this not make sense, it simply does not align with the fact that the house was not actually sold until a considerable time after the events in question. Nor do I accept the version that Banjanin told Felix that GE was foreclosing on John and Bill, that they were in trouble and that they needed Felix to sign a guarantee. But in any event, as noted above, Felix said that he did not believe the statements he asserted Banjanin had made about the financier foreclosing and the boys being in trouble.
- [334] I consider it much more likely, and accept, that the course of events on 24 and 25 May 2007 between Felix and Banjanin was generally as described by Banjanin. In particular, I accept that on the morning of 25 May, and going into later in that day, Banjanin made numerous phone calls to John relaying Felix’s various requests. The telephone records³¹ disclose that Banjanin phoned John at 10.23 am and again at 10.27 am. These calls were of short duration. At 11.40 am there was a short call from Shayne’s phone to Banjanin’s phone. I think it reasonable to infer that these were all either very short calls or that voicemail messages were left. But

³¹ Exhibits 77 and 100.

at 11.16 am there was a nine minute call from John to Banjanin. That was followed at 11.31 am by an 18 minute call from John to Mott. This pattern is consistent with Banjanin relaying Felix's requests to John, and John in turn giving instructions to Mott for preparation of the agreement. During the course of the early afternoon there were also numerous calls recorded from Banjanin to Felix and from Banjanin to John. There were also a number of calls between about 2 pm and 2.30 pm between Banjanin's phone and Bill's phone, although it is quite possible (indeed, I think it likely) that John was using Bill's phone during that period. There were enough calls backwards and forwards between Banjanin and John, interspersed with numerous calls from Banjanin to Felix, to satisfy me that this pattern was consistent with Banjanin relaying information back and forth between Felix and John about what was to be contained in the agreement.

[335] Nothing turns on the differences in detail concerning the attendance at Mott's office to collect the draft agreement.

[336] I have already indicated that I generally accept Mr Colville's evidence about what transpired in his office. Mr Colville was a prudent and diligent solicitor. I accept that he asked for the weekend to peruse the documentation. I also consider it likely that Banjanin said that the documentation needed to be signed that evening and is likely to have mentioned financiers in that context. Banjanin had a personal interest in having the matter finished; it was late on a Friday afternoon and he had already spent considerable time with Felix and in the to-and-fro with John. But I think it was also likely that John had conveyed to Banjanin a need for the documentation to be completed for the purposes of arranging finance. Apart from anything else, given the protracted history of the dealings, John would have seen this as a way of impelling matters to finality. But again, from Felix's perspective, it did not matter even if Banjanin was saying that the documents were needed urgently to prevent foreclosure by the financiers and to get the boys out of trouble, because Felix said he did not believe any such statements to be true.

[337] Otherwise, I accept the evidence of Mr Colville and Banjanin as to the events which transpired in Mr Colville's office. Mr Colville did explain each clause in detail and Felix did give instructions to make amendments to the agreement. Each of the amendments considerably improved Felix's position under the agreement, not least by raising the weekly allowance from \$1,000 to \$1,250 and recalibrating in Felix's favour, the proportion of the interests held by Felix, John and Bill in the Logan Road properties. The indemnities which were included in the agreement on Felix's instructions were also palpably to his benefit. There was none of the noise and shouting which Felix described. As amendments were made, Banjanin left the room to telephone John. Felix did become agitated when dealing with clauses with which he disagreed, but nevertheless gave instructions for their amendment. I consider that what Mr Colville saw by way of Felix's agitation was what I observed of Felix when he was giving some of his more colourful evidence. Felix, as a veteran businessman with a lifetime of experience, could not possibly have thought that he was signing a guarantee, particularly in view of Mr Colville's careful explanation of each of the clauses of the document. Felix's evidence when challenged on this point, in the context of the amendments he instructed Mr Colville to make, was evasive and not credible. Banjanin did not repeatedly shout at Felix demanding that he sign the agreement. In fact, Mr Colville did not hear Banjanin say anything to Felix. It is also clear that, despite Mr Colville's two warnings, it was Felix who deliberately decided to sign the May Agreement

containing the amendments he had requested (all being amendments for his own financial benefit).

- [338] It is also, in my judgment, clear that the catalyst for Felix seeking to resile from the agreement he had signed was Marcia's "hysterical" reaction to the news he gave her when he was dropped home that evening. I have already noted the consequences of Felix's decision not to call Marcia to give evidence on this point. I accept, on the basis of the telephone records, that Felix informed at least Bill of his change of heart that evening, and that this provoked the outburst from Bill which was recorded in the note written by Marcia. A suggestion that this conversation occurred on 28 May is not supported by reference to the telephone records. It is, however, unnecessary to make further findings with respect to Felix's conduct in seeking to resile from the May Agreement he signed, because no case was advanced on his behalf on reliance of his change of mind.

Felix seeks to avoid the May Agreement

- [339] Counsel for Felix contended that the May Agreement ought be set aside because:

- (a) it was an unconscientious dealing; or
- (b) Felix was subject to undue influence by John.

- [340] In support of these arguments, Felix's counsel pointed to a number of factors which were said to support the setting aside of the agreement. These factors were:

- (a) the relationship between Felix and John, with particular reference to Felix's age and state of health, and the fact that John had for many years effectively managed the family's business affairs;
- (b) the allegations of fraudulent conduct against John by reason of the alleged forgeries (although in light of my findings above, I give no weight to this factor);
- (c) a desire for Felix to have "a house of his own";
- (d) the hostile nature of the relationships within the Creswick family;
- (e) Felix's increasing isolation, both personal and financial, from the rest of the Creswick family;
- (f) Felix's state of physical and mental health;
- (g) Felix's assertions concerning the method by which the execution of the May Agreement was procured (although, in view of the findings I have made above, much of the sting in this aspect of the argument has been diluted);
- (h) the alleged "improvidence" of the May Agreement from Felix's perspective. In this regard much emphasis was laid on what Felix was "giving up" under the terms of the May Agreement. On the other hand, no credit was given either for the value of the cash and property which Felix was to receive under the agreement or for the very significant sums which Felix had received

through the family business over many years. In this regard, it is sufficient again to refer to Felix's receipt of more than \$300,000 over a relatively short period of time from the Zupps lease.

[341] Felix's side did not argue this aspect of the case on the basis of common law duress. Rather, it was submitted that the claim to specifically enforce the May Agreement should be rejected for these reasons:

“(a) First, the May agreement was the result of the unconscientious taking advantage of Felix by John and Bill when he was in a position of special disadvantage in relation to them;

(b) Secondly, the May agreement was procured by undue influence, being a result of duress applied to Felix such that his entry into it cannot be described as the result of the free, voluntary and independent exercise of his will.”

[342] As to the first of these arguments, it is appropriate to cite the well-known passage in the judgment of Fullager J in *Blomley v Ryan*,³² in which his Honour said:

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

[343] An unconscientious dealing does not occur, however, simply because parties are in unequal bargaining positions, or even merely because of one party suffering from some form or degree of infirmity or disability. In *Commercial Bank of Australia v Amadio*,³³ Mason J,³⁴ having quoted this passage from *Blomley v Ryan*, emphasised that the word “disadvantage” needs to be qualified by the adjective “special” in order “to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasise that the disabling condition or circumstance is one which **seriously** affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party” (emphasis added).

[344] Unlike the circumstances in *Louth v Diprose*,³⁵ to which I was also referred by Felix's counsel, I do not consider that the circumstances of the execution of the May Agreement by Felix were marked by some false sense of crisis which had been manufactured by John. As I have found above, it was Felix who, through Banjanin,

³² (1956) 99 CLR 362 at 405.

³³ (1983) 151 CLR 447.

³⁴ At 462.

³⁵ (1992) 175 CLR 621.

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

- [345] Nor do I consider that the May Agreement represented an improvident transaction from Felix's perspective. I have already mentioned above the fact that Felix ignores the significant financial benefits he had obtained from the family business over many years, including the years immediately preceding the execution of the May Agreement. On any view, the May Agreement provided for Felix to receive a considerable value of cash and property. The fact that a large part of the lump sum being paid to Felix was to be applied by Felix in satisfaction of the obligations he owed Marcia under the settlement agreement he had reached with her is hardly a matter which can be visited upon John and Bill. That is the price that Felix agreed to pay to Marcia as a consequence of the failure of their relationship.
- [346] Nor do I consider that Felix was under a "special disadvantage" in relation to John. Felix may have been of advanced years, but he was a sharp businessman. He used solicitors to his advantage, when required. He was not backwards in making extravagant claims. Importantly, when the final terms of the May Agreement were being negotiated and settled, Felix secured for himself even more advantages under the agreement than had been previously provided for. His conduct in Mr Colville's office in securing an even better deal for himself indicates that he was not suffering from any condition which seriously affected his ability to make a judgment as to his own best interests.
- [347] I would, therefore, reject the argument that the May Agreement ought be set aside as an unconscientious dealing between Felix and John.
- [348] This is also, in my view, not a case in which it can successfully be argued that the May Agreement ought be set aside on the basis of undue influence. The doctrine of undue influence provides for a remedy in equity in circumstances where one party has made improper use of an ascendancy over the other party to obtain a benefit that it would be unconscientious to retain.³⁶ As Felix's counsel properly submitted, the remedy focuses on the relationship of the parties at the time of the transaction in question so as to identify whether that relationship impaired the judgment or free will of the weaker party. The remedy does not lie simply because the transaction in question was improvident, unjust or lacking in consideration. It provides relief for a party whose intention to enter a transaction was the result of a relationship of confidence, control, domination, influence or some other form of superiority.³⁷
- [349] Counsel for Felix argued that the facts of this case supported a finding that John, as the stronger party, had exerted actual influence over Felix, as the weaker party. Much of that submission, however, depended on Felix having the benefit of findings of fraudulent forgery against John and, for the reasons that I have set out length above, that argument has been rejected. Similarly, the arguments advanced on behalf of Felix seeking to demonstrate actual undue influence in the events surrounding the execution of the May Agreement depend on an acceptance of

³⁶ *Louth v Diprose* (1992) 175 CLR 621; *Johnson v Buttress* (1936) 56 CLR 113.

³⁷ *Brusewitz v Brown* [1923] NZLR 1106 at 1109.

Felix's version of what occurred. It will be clear from what I have written above that this position cannot be maintained.

[350] It was alternatively argued that the nature of Felix's and John's antecedent relationship was such that Felix was an unequal weaker party who was influenced by the relationship in his decision to enter into the transaction. It was conceded on behalf of Felix that the relationship between Felix and John was not within any of the well-established categories of relationship which are identified as giving rise to the presumption of undue influence (including the relationship between solicitor and client, physician and patient, and parent and child, but not, relevantly, as between child and parent). These categories are, however, not fixed.³⁸

[351] The principle for invocation of the doctrine of undue influence in this context was, and remains, the authoritative statement by Dixon J in *Johnson v Buttress*:³⁹

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

[352] After referring to the notion that the categories of relationship in which the principle might apply is not fixed, Dixon J observed that the doctrine rests upon a principle:⁴⁰

“It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequality between them which must arise from his special position. He may be taken to possess a peculiar knowledge not only of the disposition itself but of the circumstances which should affect its validity; he has chosen to accept a benefit which may well proceed from an abuse of the authority conceded to him, or the confidence reposed in him; and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour. But except in the well-recognized relations of influence, the circumstances relied upon to establish an antecedent relation between the parties of such a nature as to necessitate a justification of the transaction will be almost certain to cast upon it at least some measure of suspicion that active circumvention has been practised. This often will be so even when the case falls within the list of established relations of influence. Because of the presence of circumstances which might be regarded as presumptive proof of express influence, cases outside the list but nevertheless importing a special relationship of influence sometimes

³⁸ See *Johnson v Buttress* (1936) 56 CLR 113 per Latham CJ at 119.

³⁹ (1936) 56 CLR 113 at 134.

⁴⁰ (1936) 56 CLR 113 at 134-136.

are treated as if they were not governed by the presumption but depended on an inference of fact. ... Further, when the transaction is not one of gift but of purchase or other contract, the matters affecting its validity are necessarily somewhat different. Adequacy of consideration becomes a material question. Instead of inquiring how the subordinate party came to confer a benefit, the court examines the propriety of what wears the appearance of a business dealing. These differences form an additional cause why cases which really illustrate the effect of a special relation of influence in raising a presumption of invalidity are often taken to decide that express influence which is undue should be inferred from the circumstances.”

- [353] This is not a case, in my view, in which it can properly be said that the relationship between John and Felix gave rise to a presumption of undue influence. I acknowledge that Felix was considerably older than John and suffered health and emotional issues. A significant contributor to the emotional state in which Felix found himself leading up to the execution of the May Agreement, however, had nothing to do with John; it was, rather, by reason of the difficulties which Felix faced as a consequence of the troubles in his relationship with Marcia. Felix was quite capable of dealing robustly with John and was canny enough to enlist professional assistance when required. True it is that John was effectively the manager of the Creswick family business affairs, but that of itself did not put him in a position of ascendancy over Felix. On the contrary, Felix had for many years enjoyed the benefits of John having assumed that position. I decline to find that John was in the necessary position of ascendancy over Felix such as to give rise to a relationship in which undue influence would be presumed.
- [354] Accordingly, I reject the arguments advanced on behalf of Felix for the setting aside of the May Agreement.

The claim for rectification

- [355] John’s side claims that the May Agreement ought to be rectified such that references in the May Agreement to the Logan Road properties ought to be read as including references to the Crump Street properties.
- [356] The only evidence in support of this rectification claim was from each of John, Bill and Shayne who said, in effect, that there was a convention or practice within the Creswick family that when one spoke of “Holland Park”, one was referring to both the Logan Road properties and the Crump Street properties. This evidence was not, however, independently corroborated. In view of my findings as to the credit of each of these witnesses, I am not prepared to accept this evidence. That finding is sufficient to dispose of the rectification claim.
- [357] For completeness, however, I should additionally note that the evidence before me discloses that at all times prior to the execution of the May Agreement, the only instructions given by John to Mott in connection with the drafting of that agreement encompassed details of the Logan Road properties. Mott was not provided with any detail concerning the Crump Street properties until well after the agreement had been signed.

Conclusions on the May agreement

[358] It follows from my findings above that I conclude that the May Agreement, in the form executed by Felix on 25 May 2007 and by the other parties on 26 May 2007 was, and remains, a binding agreement between the parties.

[359] In light of this conclusion, it is unnecessary for me to consider the plaintiff's alternative case concerning constructive and resulting trusts.

Other relief claimed by John

[360] John's side also claimed:

- (a) for a declaration that Felix's one third interest in the property at 503 Logan Road is held on trust for John and/or Tabtill; and
- (b) for the repayment of some \$140,945.77 which it was said was money wrongly paid to Felix and which ought to have been paid to Tabtill.

[361] In oral argument, however, John's counsel accepted that, if I upheld the May Agreement, then it ought be regarded as representing what was described in argument as a "wash up" between the parties. To put that more accurately, it is objectively clear that the parties, by the terms of the May Agreement, intended once and for all to regularise their intra-family affairs and settle their disputes. Objectively viewed, the May Agreement was also to be regarded as satisfying any claims which the parties might have had as between one another concerning, inter alia, precisely the sorts of further claims which John's side seek to advance separately.

[362] In those circumstances, it is appropriate to refuse the relief sought by John's side in connection with the 503 Logan Road property and the claim for repayment of \$140,945.77.

Felix's other claims

[363] Felix also advanced alternative claims that there should be an accounting to him of what he asserted were partnerships entered into between him and John with respect to property development and with respect to the businesses.

[364] As the evidence fell from Felix, however, these claims can really only faintly be advanced, and cannot succeed. Apart from anything else, not only are the objective indicia of the partnerships contended for by Felix not supported even by Felix's own evidence, the claims fly in the face of the business structures under which the parties operated for many years. These structures were reflected in the books of account and tax returns for the members of the family and the associated entities which were carefully prepared and submitted by their accountant, West. One would certainly have expected West to have known if Felix and John were in the partnerships contended for. West's evidence, which I accept, was quite to the contrary.

[365] Felix also advanced a case to the effect that John owed Felix fiduciary duties independent of the dealership and property partnerships, and that John breached these duties by the forgeries which Felix alleged were committed by John. In view of my findings with respect to the forgery case, however, it is unnecessary to make any further findings on this argument.

- [366] I should say that it also follows from my findings with respect to the forgery case that Felix's contention that the transfer of shares initially registered in Felix's name in Tabtill No 2 to John ought be undone, also falls away.
- [367] It also necessarily follows that I reject Felix's claim to be reimbursed in respect of the Wellington Point subdivision. His evidence about an agreement that he be paid \$1 million and be provided with a car was not only uncorroborated, he gave quite contradictory evidence on this point.

Other matters

- [368] Despite the length of this judgment, I have sought to limit my recitation of evidence to those matters which I considered directly relevant to the issues which have been determined. There was, however, more – much more – evidence put before me, both orally and in documentary form, but I do not consider it either necessary or desirable to traverse that evidence here. For example, both sides obtained expert accounting evidence, and their accountants gave evidence concurrently before me. The report by the accountants called by John's side, Ernst & Young, runs to five lever arch folders (including annexures) alone. There is no need for me, in view of my findings, to have reference to those or the other expert accounting reports and evidence put before me. I should say that I am not criticising the parties' advisers for obtaining these reports. On the contrary, they would have come to the fore had it been necessary to go into the alternative trust and partnership claims advanced by John and Felix. But in view of my findings, that evidence is now otiose.
- [369] A significant amount of evidence was also put before me concerning the dealings between the parties in the months after the May Agreement was signed. This included evidence concerning attendances on Felix while he was in hospital to deliver transfer documents required under the May Agreement, increasingly aggressive correspondence between the parties' solicitors, the tendering of performance by John's side under the May Agreement and the incident in December 2007 when John and Shayne turned up at 11 Seahaven Court. This was the incident to which I have referred to above, and which was the catalyst for an application being made that evening by Felix's solicitor for urgent injunctive relief.
- [370] Each side, and particularly Felix's side, relied on this evidence to a greater or lesser degree to seek to impeach the credibility of the other side (and their advisers). In view of the findings I have already made, however, I do not consider it necessary to discuss these matters any further.
- [371] One of the unfortunate aspects of this case was the degree of frank acrimony which permeated the dealings between the parties' solicitors for a considerable period of time prior to the trial. Thankfully, I was insulated from this to a large degree at trial by the responsible manner in which counsel for both parties conducted the hearing. That is not to say that the trial was pleasant; far from it. To pick up on an observation I made in the course of the trial, each party can be well satisfied that every skerrick of dirty Creswick laundry was publicly aired. That does not mean, however, that I need to dignify all of those matters by unnecessarily recording them in this judgment.
- [372] I should also mention that Felix made serious assertions in the course of evidence and in submissions concerning Mott's credibility and professionalism. Mott left himself open for this criticism – it became apparent that, in many respects, Mott

acted as little more than John's cipher. When explaining correspondence he had sent to Connor Hunter in 2006, Mott said that John would tell him the response and Mott would "just tidy up his verbiage for the purposes of putting it in legal form". He said, "I just mouthed what he told me to say", and agreed with the description that he was "a hired gun".

[373] Mott was also attacked for his conduct in the urgent injunction hearing on 13 December 2010. Initially that attack (made in the course of cross-examination of John) was to the effect that Mott had misled the Court about whether Shayne was at the 11 Seahaven Court property. A subsequent examination of the transcript of that hearing, however, revealed that the factual premise for this attack was wrong.

[374] When Mott was cross-examined, a further attack was made on him to the effect that he had told the Court that there had been no attempts by John to evict Felix from the property when, in fact, in 2006, Mott had written several letters to Felix's then solicitors demanding possession of the property. Mott conceded that he had, in fact, misinformed the judge on 13 December 2007 in this regard, but explained it by saying that he was appearing before the Court on very short notice and with no time to prepare (which was true), that his responses to the Court were in the context of the events since the signing of the May Agreement, that the events of 2007 were the subject of his attention, and that he simply did not turn his mind to what had happened in 2006.

[375] In fairness to Mott, the subject exchange with Philippides J on 13 December 2007 came in the course of argument when her Honour asked Mott whether there was any difficulty with Felix remaining in the property for the immediate future, to which Mott responded, "The applicant [Felix] has never been required to move out", and he then went on to give her Honour a précis of the events of the previous day or so. I accept that, in that context, Mott was intending to refer to the fact that there had not been any recent or proximate demands made for Felix to move out. Having heard Mott give evidence and be seriously challenged on this point, I am satisfied that he did not deliberately set out to deceive the Court on 13 December 2007. Mott was placed in the difficult position of appearing on an urgent application as a consequence of the completely unnecessary conduct of John and Shayne in turning up on Felix and Marcia's doorstep.

[376] Finally, I note that just prior to the commencement of this trial, Felix's side indicated that they would not be pursuing the case pleaded against Jayne. That claim will accordingly be dismissed.

Relief

[377] I have given careful consideration to the question whether, in light of the findings I have made about both John and Felix, there ought be any orders made in relation to the May Agreement. It seems to me, however, that in the particular and peculiar circumstances of this case there is an overriding interest in achieving finality and making plain what is required of the parties to give effect to the May Agreement, which I regard as representing, and which I consider was intended to be, the "once and for all" settlement as between the parties. There will, therefore, be a decree for specific performance of the May Agreement.

[378] There will obviously be consequential orders required, including with respect to the removal of caveats which John's side have placed over properties affected by the

May Agreement. I will hear from counsel as to the appropriate orders for removal which need to be made for the purposes of giving effect to the decree for specific performance.

[379] At the end of oral argument, Felix's counsel, anticipating that the May Agreement might be upheld, invited John's side to offer undertakings to the Court to the effect that Shayne undertook not to interfere with Felix's quiet possession of the 11 Seahaven Court property for the remainder of Felix's life and that John undertook not to exercise the power of attorney contained in clause 12 of the May Agreement so as to effect the interest of Felix in 11 Seahaven Court for the remainder of Felix's life.

[380] No response to that invitation has, so far as I am aware, come from John and Shayne.

[381] It is, on any view of the May Agreement, abundantly clear that the parties intended that Felix should have that property as his home for the rest of his life. Recital E to the agreement stated:

"Felix is concerned to secure for himself a place of residence for the remainder of his natural life."

[382] There was also, on the evidence, enough in the previous conduct of John and Shayne, and indeed from Shayne's admitted enmity of Felix, to warrant Felix's concerns about the security of his ongoing tenure in 11 Seahaven Court.

[383] As I have said, I am not aware as to whether there was a response to Felix's invitation. It may be that it will be unnecessary for Felix to pursue this aspect. In the circumstances, then, it seems to me that the appropriate thing is simply to give Felix liberty to apply to me for permanent injunctive relief against John and Shayne concerning his occupation of 11 Seahaven Court for the remainder of his life.

Orders

[384] There will be the following orders:

1. That the agreement made between the first, second, third and fourth plaintiffs and the defendant dated 26 May 2007 be specifically performed and carried into effect.
2. That counsel for the parties bring in such orders as may be required to give effect to the decree of specific performance, including but not limited to such orders as may be required for the removal of caveats.
3. That the defendant has liberty to apply to me for permanent injunctive relief against the first plaintiff and the third plaintiff in respect of the defendant's occupation of the property situated at 11 Seahaven Court, Raby Bay for the remainder of his life.
4. The plaintiffs' claim is otherwise dismissed.
5. The defendant's counterclaim is otherwise dismissed.
6. I will hear the parties as to costs.