

SUPREME COURT OF QUEENSLAND

CITATION: *Nowland v Nowland* [2020] QSC 151

PARTIES: **LINDSAY TERRENCE NOWLAND**
(applicant)
v
CYNTHIA FRANCES NOWLAND
(respondent)

FILE NO/S: BS No 12374 of 2016

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 29 and 30 January 2020

JUDGE: Ryan J

ORDERS: **1. The application is dismissed.**
2. The matter is adjourned until Friday, 5 June 2020, for submissions as to the distribution of the monies in court and costs.

CATCHWORDS: ESTOPPEL – ESTOPPEL BY CONDUCT – PROPRIETARY ESTOPPEL – GENERAL PRINCIPLES – UNCONSCIONABLE CONDUCT – where the application concerns the breakdown of an informal partnership between a mother (respondent) and her son (applicant) to run cattle on two properties – where one of those properties was owned by the parties as tenants in common in seven-eighths (respondent) and one-eighth (applicant) shares – where the applicant claims an equitable interest in the property greater than his one-eighth interest as a tenant in common – whether an assurance was made upon which a claim for proprietary estoppel can be founded

EQUITY – EQUITABLE REMEDIES – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – COMMON INTENTION – where the application concerns the breakdown of an informal partnership between a mother (respondent) and her son (applicant) to run cattle on two properties – where one of those properties was owned by the parties as tenants in common in seven-eighths (respondent) and one-eighth (applicant) shares – where the

applicant claims an equitable interest in the property greater than his one-eighth interest as a tenant in common – whether the parties had an actual or inferred common intention in relation to the beneficial ownership of property, upon which the applicant acted to his detriment

EQUITY – EQUITABLE REMEDIES – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – JOINT ENDEAVOUR - UNCONSCIONABLE RETENTION OF BENEFIT – where the application concerns the breakdown of an informal partnership between a mother (respondent) and her son (applicant) to run cattle on two properties – where one of those properties was owned by the parties as tenants in common in seven-eighths (respondent) and one-eighth (applicant) shares – where the applicant claims an equitable interest in the property greater than his one-eighth interest as a tenant in common – whether the applicant made contributions to the gaining, improvement or retention of property for a joint purpose – whether there was a joint venture – whether the joint venture ended without attributable blame – whether it would be unconscionable for the respondent to assert that the applicant had no entitlement at all to the property beyond his share as tenant in common

EQUITY – EQUITABLE REMEDIES – GENERAL PRINCIPLES – where the application concerns the breakdown of an informal partnership between a mother (respondent) and her son (applicant) to run cattle on two properties – where the applicant claims an equitable interest in the net proceeds of sale of the cattle above his half interest as per the partnership agreement – whether in all of the circumstances an equitable remedy would be appropriate

ASIC v Burnard [2007] NSWSC 1217, cited
Baumgartner v Baumgartner (1987) 164 CLR 137, applied
Bennett v Horgan, Supreme Court of NSW, 3 June 1994, unreported, cited
Commonwealth v Verwayen (1990) 170 CLR 394, applied
Engwirda v Engwirda & Ors [2000] QCA 61, cited
Germanotta v Germanotta [2012] QSC 116, considered
Giumelli v Giumelli (1999) 196 CLR 101, cited
Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc [2018] VSC 413, cited
Muschinski v Dodds (1985) 160 CLR 53, applied
Nolan v Nolan & Ors [2014] QSC 218, considered
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, applied
Sidhu v Van Dyke (2014) 251 CLR 505, cited
Swettenham v Wild [2005] QCA 264, cited

COUNSEL: The applicant appeared for himself
SM Gerber for the respondent

SOLICITORS: The applicant appeared for himself
Noosa Family Law for the respondent

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Context for this application

- [1] This matter has a long history and this application is one in a series of applications brought after the breakdown of a partnership between a mother, Cynthia Nowland, and her son, Lindsay Nowland.¹
- [2] In the late 1990s, after the death of Mrs Nowland’s husband (Lindsay’s father), Mrs Nowland and Lindsay entered into an informal, oral, partnership agreement to run cattle on two properties near Monto in Queensland. One of the properties, known as Tellebang, was wholly owned by Mrs Nowland. The other, known as Cannindah, was owned by Mrs Nowland and Lindsay as tenants in common in seven-eighths (Mrs Nowland) and one-eighth (Lindsay) shares.

¹ For clarity, and without disrespect, I will sometimes refer to Mrs Nowland as “Cynthia” and to Mr Nowland as “Lindsay”.

- [3] In broad terms, under the partnership agreement, Lindsay Nowland was to manage the cattle properties. He received no wage for his work but they were to share in the cattle sale proceeds “50:50”. Mr Nowland was to live in the house on Tellebang, with his mother, rent free.² Contributions to the costs of running the properties were never discussed, or at least never in a business-like way. The partnership arrangement was never reduced to writing.
- [4] The personal relationship between Mrs Nowland and her son broke down sometime after 2007. In May 2014, Mrs Nowland applied for a protection order under the *Domestic and Family Violence Protection Act 2012* (Qld), naming Lindsay as the respondent. The order expired in May 2016. Another protection order was made in March 2017. I accept that, since 2014, Lindsay has been threatening his mother, including threatening to kill and harm her.
- [5] By 2016, Mrs Nowland wished to sell both properties. After correspondence from Mrs Nowland’s solicitors to Lindsay went unanswered, Mrs Nowland commenced proceedings.
- [6] On 29 November 2016, she applied to this Court for orders including –
- an order appointing trustees (William Purcell and Stephen Fox) to sell Cannindah (the property she and Lindsay owned as tenants in common); and
 - an order that Lindsay vacate Tellebang (which Mrs Nowland wholly owned).
- [7] On 9 February 2017, Mullins J (as her Honour then was) made orders –
- appointing Purcell and Fox as trustees for the sale of Cannindah; and
 - requiring Lindsay Nowland to vacate Tellebang by 1 March 2017 (thereby giving possession of it to his mother).
- [8] Lindsay Nowland did not vacate Tellebang until April 2017. And in July 2017, he moved back to it.
- [9] On 23 August 2017, Mrs Nowland applied for orders and declarations to achieve the dissolution of her partnership with Lindsay. She also applied for orders that Purcell and Fox be appointed as trustees to sell the “partnership property” – which included the cattle, plant and equipment on both properties.
- [10] On 11 September 2017, Applegarth J made declarations and orders –
- dissolving the partnership;
 - requiring Lindsay Nowland to immediately vacate Tellebang;
 - declaring that *all* of the plant and equipment on *both properties* belonged to Mrs Nowland; and
 - appointing Purcell and Fox to sell the cattle located on *both properties*.³

² There was no house on Cannindah.

³ It may be noted that Mrs Nowland applied to the Court for an order that Purcell and Fox be appointed trustees for the sale of the plant and machinery on the two properties, as well as the cattle. But of course, upon the declaration that Mrs Nowland owned that plant and machinery, she was free to sell it herself.

- [11] On 2 October 2017, Mrs Nowland entered into a contract to sell Tellebang and the cattle on it. The contract price was \$960,000. However, at settlement, certain chattels (which had been part of the sale agreement) were missing from the property. They had been removed by Lindsay, as he admitted in evidence. The price paid by the purchaser was therefore reduced to \$860,000.
- [12] For what it is worth, despite Applegarth J’s declaration, Mr Nowland contended that the property which he removed from Tellebang was his.
- [13] Mr Nowland disputed the ownership of the cattle on Tellebang and the way in which they were valued for the purposes of the sale – that is, at \$500 a head. He said he would not have sold the cattle at that price. At that price, they were being “given away”.
- [14] The trustees sold Cannindah at auction for \$1,060,000, with settlement occurring on 24 April 2018.
- [15] The cattle on it were sold for about \$230,000.
- [16] Purcell and Fox sought orders and directions from the Court about the distribution of the net proceeds of sale of Cannindah and the cattle. The application was heard by Mullins J on 13 December 2018.
- [17] Her Honour’s directions and orders (which follow) included an order for an interim distribution of the net sale proceeds of Cannindah, and a direction to Lindsay Nowland to file a certain application if he wished to receive distributions other than in accordance with his one-eighth interest in Cannindah and the partnership agreement. The direction resulting in the present application is in bold –
- 1 Stephen Fox and William Thomas Purcell are in their capacity as the co-trustees for sale under the order of Mullins J made 9 February 2017 (“the Cannindah Trust”) directed and advised that they are justified in making the following interim distribution of the net proceeds of sale of the Cannindah Trust being:-
 - (a) to Cynthia Frances Nowland – \$110,000;
 - (b) to Lindsay Terrence Nowland – \$110,000.
 - 2 After making the interim distributions ..., the co-trustees for sale are directed and advised to pay the remaining balance of the net proceeds of sale of the Cannindah Trust into Court ...
 - 3 Stephen Fox and William Purcell are in their capacities as the co-trustees for sale under the order of Applegarth J made 11 September 2017 (“the partnership property trust”) directed and advised to pay the net proceeds of sale held by them into Court ...
 - 4 The further hearing of this originating application and of the application for a declaration referred to in order 8 hereof is adjourned to 22 March 2019.
 - 5 The monies to be paid into Court pursuant to orders 2 and 3 are to be paid out of Court in the following order and priority:-

- (a) [essentially, to meet the trustees' expenses];
- (b) [to meet the costs of the application];
- (c) thirdly, from the balance of monies remaining in Court after payments out of court in (a) and (b) hereof, amounts to each of the second and third respondents [that is, Cynthia and Lindsay Nowland], equal to the respective percentage entitlement of each ... in each of the statutory trusts for sale as determined by the Court at the further hearing of this originating application on 22 March 2019.

6 ...

7 ...

8 **Lindsay Terrence Nowland is to file and serve on or before 4.00 pm, 18 February 2019 any application in this proceeding claiming:-**

- (a) **an equitable interest in the Cannindah rural property ... to the extent of more than a 1/8 interest; and**
- (b) **his equitable interest in the proceeds of sale of the partnership property trust; and**

any affidavits upon which he intends to rely to support these claims.

9 ...

10 ...

11 ...

12 ...

- [18] In accordance with her Honour's orders, the net proceeds of sale of Cannindah and the cattle (less the interim distributions) have been paid into court.
- [19] The "partnership property trust" referred to in orders 3 and 8(b) above consisted of the net proceeds of sale of the cattle on both Tellebang and Cannindah. In accordance with the order of Applegarth J dated 11 September 2017, Fox and Purcell were able to sell the cattle "by such means as they deem appropriate in the circumstances including, but not limited to the sale of the cattle as a going concern with the sale of the Tellebang Property, or by auction, or private treaty".
- [20] On 12 April 2019, Lindsay Nowland filed the present application seeking, in effect, that the proceeds of sale of Cannindah held on trust be "divided 15% for the Applicant [Mrs Nowland] and 85% for the Respondent [Lindsay Nowland], or alternatively, in such proportion as this Honourable Court does order".

- [21] He also applied for an order that “the net proceeds of sale of any cattle located on the Cannindah property be distributed in full to [him] or in such other proportion” as the Court sees fit.⁴

Lindsay Nowland’s position

- [22] Mr Nowland, who was self-represented at the hearing, does not articulate a cause of action – although his application claims an equitable interest in Cannindah and the cattle on it greater than his legal interest in the land as a tenant in common and his half-interest in the net proceeds of sale as per the partnership agreement.
- [23] In his affidavit accompanying his application, he asserts “an equitable interest in the properties” for the following reasons –
- (a) I spent a period of approximately 21 years being the only full-time worker on the properties. I had the sole responsibility of managing and maintaining the properties and cattle. I did not receive any wage or salary for my efforts. My only revenue gained was through cattle sales.
 - (b) Any proceeds from the cattle sales were split 50/50 with [my mother], despite [my mother] not having an active involvement in the management or operation of the properties.
 - (c) I was responsible for purchasing the majority of the machinery and equipment to grow the cattle operation and maintain the properties. I was also responsible for purchasing a large number of bulls over the years, to increase the number of cattle. The size of the cattle operation increased due to my contributions.
 - (d) From my 50% proceeds, I invested a considerable amount more than [my mother] to grow the cattle business and to generate further revenue. This investment included the purchase of considerable machinery and equipment, materials to repair fences and other stock, purchase of bulls to increase the number of cattle, and other matters. I estimate I would have incurred 80% of the costs of running the cattle business over the years with [my mother] incurring the remaining 20%. I have not received any additional entitlements to reflect my contributions.
 - (e) The value of the properties has increased over the years, due to the properties being maintained. But for my management of the properties, the condition of the properties would have deteriorated, or [my mother] would have had to incur significant expense to engage another person to manage and care for the properties. I have not received any additional entitlement to reflect my works performed on the two properties.
 - (f) 248 head of cattle on Tellebang were sold by [my mother] at \$500 per head, which was considerably less than the market value at the time. I have not received any of the proceeds of sale of cattle on either Tellebang or Cannindah.
 - (g) I would estimate I would have sold cattle on average 12 times per year across the 21 years. On some occasions, the sale of cattle would generate revenue of approximately \$100,000 per year for both myself and [my mother] (collectively approximately \$200,000).

⁴ The Respondent’s application of 12 April 2019 further seeks an order “that the partnership entered into between the Applicant and Respondent of and relating to the cattle properties and business operations be wound up”. That issue had already been dealt with by Applegarth J on 13 December 2018 as acknowledged by Mr Nowland at the hearing of the present matter.

- (h) Over the years, [my mother] has advised me on a number of occasions that I would be fairly compensated for the works I had performed on the properties. I have not received any additional compensation.
- [24] Mr Nowland was challenged in cross-examination on almost all of the propositions stated above. And I note, with respect to (c) above, that Applegarth J declared the plant and machinery on the properties in 2017 to be owed by Mrs Nowland.
- [25] Apart from very limited book-keeping records, Mr Nowland produced no financial or accounting evidence to support his contentions that –
- he sold cattle on average 12 times a year for 21 years;
 - he purchased “the majority” of the machinery and equipment to grow the business (a contention which has been superseded by the declaration made by Applegarth J);
 - he purchased “a large number of bulls”;
 - he invested a “considerable amount more” than his mother to “grow” the business;
 - he incurred 80 per cent of the running costs of the cattle; or
 - it was his maintenance of the properties which caused them to increase in value.
- [26] The limited book-keeping records which he produced told me very little – although they were consistent with the partnership agreement that the sale proceeds of the cattle were to be split 50:50.
- [27] As I understood the records, they showed that Mr Nowland individually received the following net proceeds of cattle sales from July 2004 until September 2008 –

July – September 2004	\$9262.80
October – December 2004	5497.66 1226.90
January - March 2005	5756.04
April – June 2005	4556.40 5144.48
2004/2005	\$31,444.28
July – September 2005	Nil Income
October – December 2005	3877.35 9000 1977.88 924.00
January – March 2006	11,121.94 (Lindsay only sale) 4388.87 48,437.72 (or 24,237.72)
April – June 2006	57,490.76
2005/2006	\$137,218.52 (or less 24,200 – the entries are

	unclear)
July – September 2006	Nil Income
October – December 2006	Nil Income
January – March 2007	17,254.67
April – June 2007	Nil Income
2006/2007	\$17,254.67
July – September 2007	14,689.58
October – December 2007	no cattle sales – but a \$1000 deposit recorded as “car pay’ts”
January – March 2008	no cattle sales – but 3 x \$1000 deposits recorded as “Loans?”, including a loan to Lindsay from Mrs Nowland of \$1000.
April – June 2008	32,293.57 (Lindsay only sale)
2007/2008	\$46,983.15
July – September 2008	Nil Income

- [28] It may be noted from the above that, at least on two occasions, Mr Nowland does not appear to have shared the sale proceeds with his mother 50:50.
- [29] These records only cover the period from July 2004 until September 2008 of the two decade long partnership. They show the variability of the income earned over the years they deal with, but for obvious reasons, they tell me nothing about the business over the decades it was in operation. Also, the only expense deducted before arriving at these income figures is the cost of the sale in each case. Other business expenses do not appear to have been taken into account.
- [30] Further, as will emerge below, Mr Nowland was unable to provide or point to evidence in support of his contention that his mother had advised him “*on a number of occasions*” that he would be fairly compensated “for the works I had performed on the properties” (as per (h) above).
- [31] The theme which emerged in Mr Nowland’s oral submissions was that he was morally owed what he claimed.
- [32] He considers his entitlement, as expressed in his application, to arise out of the notion that it would be “morally and reprehensibly wrong for [his mother] to assume a position that she owns everything, when [he has] never had any remuneration out of her for [his] sweat, toil, [and] blood”. As he sees it, his mother has behaved in an “unconscionable” way.
- [33] The following extracts from the transcript of the hearing illustrate further his view that he is morally entitled to the interests he claims –

- HER HONOUR: So ... the basis on which you say you are entitled to 85 per cent of the proceeds of sale ... of the Cannindah property [is that] you have built up the property; you worked on it. I mean, that is the thrust of your application, isn't it? --- That's correct, you Honour".
- MR NOWLAND: It was me running the place, responsible for the husbandry and general well-being of everything of the properties at 100 per cent – not half the cattle, one eighth of the cattle, or one eighth of the property".
- After referring to his belief that his mother had a moral obligation to "compensate" him:

HER HONOUR: So you stayed on the property even though you weren't happy with the fifty-fifty arrangement ---? ---Well – Well ... for? --- your Honour, that was never going to be sustainable into the future.

--- Okay. But you stayed regardless, because you considered that ---? --- I had equity in the arrangement, in her obligation to me ... which she has denied ...

- HER HONOUR: You say you continued to work on the property even though she gave you no indication that there would be any change to the partnership agreement, because you considered that, ultimately, you would have to be compensated for the work you did, because she was under a moral, if not legal, if not equitable obligation to pay you for it, in effect? --- Yes. And I thought her actions were unconscionable ... for not having a conversation with me ... when she made a decision to sell properties which I had an interest in, and she completely blindsided me.

Well, that's down the track though? --- It is down the track, but it's all part of the same argument as to the treacherous nature ... of this woman ...

Okay. So you chose not to walk away, even though the arrangement wasn't one that suited you because you thought ... ultimately ... you could bring some sort of application before a court and be compensated, in effect? --- Well – well not necessarily before a court.

Right? --- I wasn't in that, you know, litigant sort of frame of mind. I ... took the view, the longer I stayed there, the more I put into the properties, somebody – put some glasses on, recognise it, see it, and say "Look I'm too old for this. I don't want to play anymore. He does it all anyway. He's offering me money. I think that's a good fare. I'll get out".

- HER HONOUR: So your best argument in support of your application is that, "The split that I propose, the 85/15, is a fair split having regard to everything that I poured into the property, which was my labour as well as the purchase of certain plant and equipment and even though there was a partnership agreement which had a different effect, I didn't like that agreement, and I always hoped that I'd be able to achieve a better financial position for myself"? – Absolutely, your Honour, and I was completely blindsided in this...
- I took the view ... that the longer I stayed on the property – and we're getting up, you know, somewhere into significant years ... And I thought, well – once we got past 10 years, I took the view that she had a moral obligation, if not a legal one, to compensate me for my efforts ...

- [34] Mr Nowland and Mrs Nowland were agreed that they had no conversations about succession planning or any change to the partnership between 1996 and 2016.
- [35] Mr Nowland's evidence was to the effect that while he attempted to initiate a conversation with his mother about the partnership agreement five or six times during the course of the partnership, they did not "talk money". Their conversation did not get to it. He said, "She was firmly holding the reins and was quite happy to do so while her slave was, you know, providing the labour".
- [36] Mr Nowland's argument about his claim to the whole of the net proceeds of sale of the cattle was unclear. He submitted that his mother "could not have her cake and eat it too". He asked, rhetorically "which 50 per cent of the cattle did she own?". He seemed to be arguing that –
- the cattle on Tellebang were sold at an undervalue;
 - he should not suffer that undervalue;
 - nor should he suffer the costs of mustering and counting the cattle, therefore,
 - to compensate him, he should receive the whole of the proceeds of sale of the cattle on Cannindah.
- [37] I note that despite his complaint that the cattle on Tellebang were sold under value, he had been allowed, by Mullins J, 28 days to sell the cattle before he was required to vacate Tellebang – and he did not, or could not, do so.
- [38] In my attempt to understand Mr Nowland's submissions, the following exchange occurred after I asked him why I should grant his application –
- HER HONOUR: ... in terms of the contribution of each of you to the partnership, your mother supplied the property and the ... cattle on it, and you supplied the labour and management skills?
- MR NOWLAND: Yeah
- HER HONOUR: And the deal was, "In exchange for your labour and management skills to make money out of my land and my cows, you will get 50 per cent of the net sale proceeds of the cattle"?
- MR NOWLAND: Yeah. But I spent my – I put my money back into the property ...
- ...
- HER HONOUR: ... without the property and the cows, you ---
- ...
- ... you wouldn't have been able to sell as many cattle as you did.
- MR NOWLAND: Your Honour, I was running over 600 head continuously for, you know – through droughts, floods whatever.
- ...

... And I had to agist properties ... all these come at a cost. I had to provide the truck, all the plant. You know, it's ridiculous to suggest that my mother owned things that she didn't buy and that I've got to use those – use my income in the production of an income. That's part and parcel of it. The cost will kill you if you are using contractors all the time.

HER HONOUR: But that's a business venture, isn't it? You're not an employee.

MR NOWLAND: Yes. But I'm saying is – I provided the – part of the labour and the plant. It's ... more than just toil. It is much, much more ...

- [39] Mr Nowland saw his application as an opportunity to “unscramble the egg” – as I understood it, to undo the previous orders of this Court with which he did not agree.
- [40] My perception of Mr Nowland's initial understanding of this application was that I would, in some way, assess or investigate the way in which he ran the business and reach a determination about a “fair” distribution of the monies in court.
- [41] I had to inform Mr Nowland that the Court was not conducting an investigation of the partnership arrangement or the way in which he ran the business – this was his application and he was required to determine what evidence he wished to present in support of it.

Observations on the evidence presented at the hearing

- [42] Overall, the evidence revealed a vague agreement between Mrs Nowland and Lindsay to run the cattle properties in “partnership”, with the income from cattle sales to be split 50:50 but with no other detail discussed. It seems that, after the partnership was created, Mrs Nowland continued to pay for expenses which had been “in her name” before the partnership was created (such as rates and fuel). She also paid for the items purchased by Lindsay on her account at the local produce store. Other expenses were met by either of them on an *ad hoc* basis.
- [43] Mr Nowland relied upon an assertion that he paid for 80 or 85 per cent of the running costs of the business as a basis for his equitable claims, but he produced no evidence to independently prove that assertion. Nor was it clear what he meant by the “running costs” – although it seems that his focus was on the costs associated directly with animal husbandry, rather than on recurring costs like rates, electricity or fuel, which were paid, or almost always paid, by his mother.
- [44] Similarly, whilst Mrs Nowland asserted that she paid the bulk of, if not all of, the costs of running the cattle property, she produced no financial evidence to support that assertion – although I acknowledge that during cross-examination, Lindsay Nowland conceded that she paid certain ongoing expenses.
- [45] The parties have a very different view of Mr Nowland's performance as the manager of the cattle business and whether his management of the business increased the value of the properties.

- [46] Mr Nowland relies upon an assertion that he built up the business, and thereby improved the value of the real property, as another basis for his claim. In his view, he did a very good job under difficult conditions.
- [47] Mrs Nowland's view was that he did not manage the business well at all – and his poor management of it was reflected in the condition of the cattle and, I presume, their selling price.
- [48] Apart from their conflicting assertions, there was no evidence led which would enable me to assess Mr Nowland's performance as the manager of the cattle business.

Evidence

- [49] Cynthia Nowland, who is now 84 years of age, and her late husband, Arthur, had three children – two daughters and Lindsay.
- [50] Cynthia and Arthur Nowland raised their children in rural Queensland. They ran a large dairy and a piggery. The children helped out with certain chores – although the extent to which Lindsay assisted on the farm during his childhood and teens is in dispute.
- [51] His recollection is that, as a young boy, he worked hard on the properties whilst his sisters did nothing apart from “feed a few poddy calves”. It was “rubbish” to suggest that they were subject to the same expectations when it came to chores. As Lindsay Nowland sees it, he contributed to the economic success of the farm from a young age.
- [52] Mrs Nowland's recollection was that Lindsay did not make a significant contribution to the work on the farm until he was in his twenties.

The properties

- [53] Arthur Nowland died in December 1996. At that time, he and Cynthia owned three farms and two houses, namely –
- the farm at Cannindah;
 - the farm at Tellebang;
 - a farm at Monto (known as Brown's Farm);
 - a rental property at Monto in Kelvin Street; and
 - a holiday house at Tannum Sands.
- [54] By then, Cannindah and Tellebang were operational cattle properties.
- [55] Shortly after his death, it was agreed that –
- each of the three children and the husband of one (his daughter V) would receive a one-eighth share in Cannindah – leaving Mrs Nowland with a half-share in it;
 - Mrs Nowland would assume full ownership of the other properties (which included Tellebang); and
 - Lindsay, V and V's husband would manage the three farms.

- [56] In 1998, a different agreement was reached, in pursuance of which –
- Cynthia Nowland paid \$50,000 to each of her two daughters and to V’s husband – representing the value of each of their one-eighth share in Cannindah;
 - Lindsay Nowland kept his one-eighth share in Cannindah;
 - the title of Cannindah was transferred to Cynthia Nowland (as to seven-eighths) and Lindsay Nowland (as to one-eighth), as tenants-in-common; and
 - Lindsay Nowland and Cynthia Nowland would “run the farms” in partnership.
- [57] The partnership agreement was oral only. Lindsay Nowland described it as a “loose” agreement. He and his mother maintained separate Australian Business Numbers, but ran the farm as one entity.

Terms of the partnership agreement

Lindsay Nowland’s position

- [58] According to Lindsay Nowland’s affidavit, in pursuance of the partnership agreement, he was to be solely responsible for work on the properties and the sale of the cattle. Upon sale of the cattle, the (stock) agent would pay one half of the proceeds of sale into Cynthia Nowland’s account and the other half into his account.
- [59] At one point during the hearing, Lindsay Nowland appeared to dispute any *agreement* to split the sale proceeds 50:50 –

HER HONOUR: And so running the property meant work on your part; you did the work, you would get half of the proceeds of sale of the cattle ---

[LINDSAY NOWLAND]: I dispute that ... My mother has a moving feast in relation to her understanding of the agreement, and the agreement is a verbal agreement. It was never ratified ... It was ... That I owned part of the properties. I also acquired part of the ... ownership of cattle as part of the ... probate proceedings ... I’ve bred those cattle, reared those cattle, and ... subsequently, **marketed those cattle to give my mother a 50 per cent return on the sale price of those cattle ... It does not relate to any loose partnership agreement or understanding.** That was simply my mother’s income. It was the way her income was provided.

- [60] However, his final position at the hearing appeared to be that the benefit to him under the partnership agreement included half of the net proceeds of sale of the cattle. In cross-examination, it was put to Mr Nowland that at the time the partnership agreement was entered into, Cynthia Nowland told him that she could not pay him a wage, but was prepared to share the profits of the business with him “50:50”. Mr Nowland said –

I don’t recall that conversation, but... **it sounds as though there’s some truth in that**, in that there wasn’t a lot of cash around and I wasn’t seeking a wage.

- [61] Lindsay Nowland stated that there was “[a]bsolutely no agreement” about the costs of running the business. At one point, his position was that, as the partnership rolled out, his mother paid *part* of the costs as a matter of “common sense”. But it was not always

“50:50”. Mr Nowland asserted that as time progressed, his mother’s contribution lessened although he produced no evidence to support this assertion. Nor did Mrs Nowland concede that her financial contributions decreased over time.

- [62] It is unclear what division of labour Mr Nowland *anticipated* under the partnership agreement. However, he described himself as the manager and sole full-time worker. He said his mother “downed tools” in 1991.
- [63] Mr Nowland did not seem to appreciate that Mrs Nowland’s contribution to the partnership was valuable, in the form of 15/16^{ths} of the cattle properties themselves and at least whatever cattle, plant and machinery were on the properties at the beginning of the partnership. Mr Nowland does not appear to appreciate that, without the real property (or Mrs Nowland’s 15/16^{ths} of it), there could be no cattle business.

Cynthia Nowland’s position

- [64] Mrs Nowland’s evidence about the terms of the partnership agreement varied.
- [65] In her August 2017 affidavit, she explained the partnership as follows –
- a) in consideration of Lindsay living in the house on Tellebang (solely owned by me) that Lindsay would look after the cattle, maintain the fences (boundary and internal fences) on Cannindah (property owned by Lindsay as to 1/8th and I as to 7/8^{ths}) and on Tellebang (property owned solely by me);
 - b) I owned the plant & equipment on both Cannindah and Tellebang. Lindsay was entitled to use that plant and equipment on both Cannindah and Tellebang in order to be able to carry out works on both properties;
 - c) I would share the proceeds of sale of the cattle, as sold from time to time, with Lindsay 50/50.

- [66] According to her affidavit dated 21 April 2019, its terms were as follows –

... we agreed that we would:

- a) continue to operate the two farms Cannindah and Tellebang;
- b) manage the livestock on both farms;
- c) sell cattle and equally share the income; and
- d) equally share the running costs of both properties.

- [67] At the hearing, Mrs Nowland said –

Well, Lindsay was home. He was unemployed at the time. He had no income ... [H]e, obviously, wanted to run the property, have a go at it. So did my elder daughter and son-in-law. I favoured my son because he was unemployed and the others both had gainful employment at the time. So I asked him ... would he like to, you know, work the property with a 50/50 share of the proceeds. Because I wouldn’t be able to afford a regular wage ...

And what about the expenses?---The expenses. When I made the 50/50 arrangement with my son, I neglected to say, “After all expenses.” So I took it on myself to pay all the expenses....

[68] I attempted to clarify Mrs Nowland’s position –

HER HONOUR: Mrs Nowland ...You said early on in your evidence that, when you were discussing the plan for running the business way back in the 1990s, ... the agreement was that your son would run the properties and that you would split the cattle – the net proceeds of sale of the cattle fifty-fifty?...

And then you said there was no conversation about the costs? --- No.

... Can you tell me a little bit more about that? --- Well, it was – when I first arrived in the district as a bride ... when I was 21, my father-in-law had people working on his property as share farmers. And they would split the cheque fifty-fifty...That was their income for running the property for him ...What I neglected to do was have the bills deducted from that net amount of the proceeds for the sale of cattle ... So, therefore, he was getting 50 per cent of the cattle and I was left with all the bills—

Okay. Now, when you – when did you realise that... you’d made an arrangement that left you with all of the bills? --- I realised it fairly soon. But I knew that I could live within my means.

Implementation of the partnership agreement

[69] Each party disputed the extent to which the other advanced or contributed to the partnership business.

[70] Reflecting the sentiment which lies at the heart of his application, Lindsay Nowland said –

It was me running the place responsible for the husbandry and general well-being of everything on the properties at 100 per cent – not half the cattle, one-eighth of the cattle, one-eighth of the property...

[71] As far as Mr Nowland is concerned he did “the lot”–

- He adequately managed and maintained the properties for about 21 years;
- He assumed responsibility for all aspects of managing the farm, including, but not limited to –
 - dealing with the accounts;
 - repairs and maintenance;
 - the sale of livestock;
 - the purchase of machinery and equipment;
 - the purchase of horses and saddles; and
 - the purchase of bulls.

- He was the only full-time worker – but he would hire part-time staff and contractors from time to time (when contractors were engaged, he and Mrs Nowland split their cost equally);
- He worked long hours – he estimated 60 to 70 hours per week;
- It required a seven-day-a-week commitment, and the hours would vary as required;
- While his mother did contribute some of her proceeds from the sale of cattle to the costs of running the business, he bore the majority of the expenses; and
- He significantly increased the number of cattle on the properties, to make the operation more profitable.

[72] As I understand Mr Nowland’s position, he felt that the 50:50 split of net sale proceeds of the cattle was generous to his mother. He said in his affidavit –

I would sell livestock at sale yards or to meat processing facilities. I split all proceeds of income with the Applicant, on an approximate 50% split. This was despite the Applicant not having any active involvement in the running of the properties.

[73] He disagreed with Mrs Nowland’s assertion that she owned the plant and equipment – he said he purchased the majority of it. However, that matter has been settled by Applegarth J, and I proceed on the basis that the plant and machinery was purchased and owned by Mrs Nowland. Mr Nowland must understand that I cannot revisit that issue.

[74] As to the costs of running the business, he said –

My mother paid for certain items on a regular basis ... If there was a tax deduction to be had, and she ... had previously ... either rebates or deductions and various, you know grants and whatever ... that was always maintained. We didn’t ... change horses halfway across the stream ... I can’t tell you much about my mother’s business, what she did with her money ... I can only know ... it’s my understanding that I apportioned up to 85% of the costs of running the business ...

[75] Notwithstanding his assertion that he paid for 85 per cent of the costs of running the business, under cross-examination, Mr Nowland conceded that his mother paid for the rates; the electricity; telephone bills; and some of the fuel. He agreed that she held accounts in all the local produce stores.

[76] He agreed that his mother paid half of the mustering costs, although he said “as time progressed, her contribution became less and less”.

[77] He accepted that, at least initially (in the first 18 months to two years), his mother “paid the costs of cattle sales and freight” – but any suggestion that she paid those costs beyond the initial period was “Absolute rubbish. A fairy-tale”.

[78] He accepted that his mother paid for lick blocks but claimed they were the “wrong product”. He said that “very late on”, she bought “steel fence posts and fencing line”

but didn't arrange for them to be stuck in the ground. She possibly purchased some cattle troughs. And she bought two bulls.

[79] According to Mrs Nowland, Lindsay Nowland did not manage the farm properly and she bore the bulk of the expenses of running the business.

[80] For the first couple of months of the partnership, she said that she and Lindsay worked on the properties together and had a fairly good relationship. She was present at every muster and provided food for the extra people on the property. Lindsay was imprisoned for a disqualified driving offence for 5 months in 1997 and management of the farm for that period fell to Mrs Nowland and Lindsay's then partner.

[81] Mrs Nowland left Tellebang in 2003. However, she was "quite happy" with the situation until about 2007. Thereafter she had concerns about the way in which Lindsay was running the property, the regularity of musters and weaning, and cows losing condition and value. She felt that he did not "check" the cattle enough. Driving around to check on them was not, she said, engaging in animal husbandry.

[82] Between her moving out and 2014, when the first protection order was made, Mrs Nowland explained that, while her operational involvement decreased, she spoke to Mr Nowland reasonably regularly about the business. She said –

I would go down and have conversations with my son from time to time. We conducted a lot of business over phone. I had a companion by that time and he also accompanied me to the properties. ... I didn't have a lot of involvement because my son didn't wish me to be involved. He always stated that he was running the ... property and I needed to butt out.

[83] In her affidavit of August 2017, she alleged that Mr Nowland –

- failed to maintain the fencing;
- failed to look after the cattle on either Cannindah or Tellebang; and
- failed to inoculate the cattle, causing them to suffer from botulism in about March 2017.

[84] She complained that Mr Nowland did not account to her properly or at all for the sale of the cattle. She did not consider that he "did the books" as he should as manager of the property.

[85] Mrs Nowland said that it was a gross exaggeration for Mr Nowland to claim that he worked 60 to 70 hours a week, at least for the period of the partnership during which Mrs Nowland lived at Tellebang (that is until 2003). According to Mrs Nowland, Lindsay would go out early in the morning, before 7 am, and be back by 9.30 am for a late breakfast. He might go out again for a couple of hours before lunch. He might have a drink at lunch, in which case, he would not go out again. That working pattern became more frequent over the years. Mrs Nowland was not at the property after 2003 and could not say anything about the hours worked or Mr Nowland's routine thereafter. However, she observed that when she went to the property with food for him "he would be sitting in the house". Mrs Nowland said that after 2003 (when she moved out of Tellebang) Lindsay prevented her from participating in the running of the property.

[86] When it came to the costs of running the business, Mrs Nowland initially claimed that she paid for *all* of the farms' running expenses. She elaborated –

I was always of the opinion that I paid 95 per cent of all accounts because I owned the fuel licence. He never bothered to procure one. I owned the [account at the] store where we ... purchased equipment for the farm, like seed spotter. All that – they were my accounts ... Lindsay would buy things from time to time without consulting me. He was, after all, supposed to be managing the property. He had to sign a docket for it and the bills would come to me and I would pay them.

[87] As to other costs, she said –

All the accounts were from livestock and property agents. I would pay cartage on cattle to sales. The bills would come to me or occasionally, they'd be taken out before we received our net profits from the sale. ... In the early days, they would send an account for the cartage. In latter times, it was taken out before by the stock and property agent before we received our monies.

[88] She said that the store where she held an account stocked the cattle feed, treatments, and vet care products which were used on the farm. She gave evidence about her purchase of other items, and of her paying for the cost of new parts for broken farm machinery, after the "bill" was sent to her.

[89] She accepted that she was unaware that Lindsay paid some vet bills. She acknowledged that he purchased "steel post[s] and wire" and paid the rates "once" on the Cannindah property. Otherwise, she paid the rates on both properties.

[90] She acknowledged that Mr Nowland paid his telephone and electricity bill "when he was solvent", but other times, she "would get a reminder notice, so I would pay it because it was in my name".

[91] She accepted that it was more accurate to say that she paid for the *bulk* of, rather than *all* of, the expenses.

[92] On the evidence, I am unable to reach a reliable conclusion about Mr Nowland's financial contributions to the costs of the two-decade long partnership. I am also unable to reach a reliable conclusion about the quality or otherwise of his management of the farm.

Other matter

[93] An affidavit of Sharyn Smith is on the file. It was not read by Mr Nowland.

[94] It would not be appropriate for me to treat this affidavit as evidence in Mr Nowland's case without notifying Mrs Nowland that I intended to do so. However, even if it were appropriate for me to treat Ms Smith's affidavit as evidence in Mr Nowland's case, I would not give it any weight.

[95] Ms Smith's affidavit contains statements about her "awareness" that Mr Nowland had the sole responsibility for the property and cattle and invested significant time and

money in the property. She does not reveal the basis of her “awareness” although she says that she and Mr Nowland are close. It is impossible for me to know whether Ms Smith’s assertions about Mr Nowland are based on her first-hand knowledge of relevant matters; or Mr Nowland’s statements to her; or something else.

- [96] Ms Smith states that Mrs Nowland told her on “multiple occasions” that Mr Nowland was “entitled to one property”. Mrs Nowland was not cross-examined about any conversations with Ms Smith. Nor does Mr Nowland suggest that he was promised one property by his mother or that that outcome was their common intention.
- [97] Ms Smith asserts an “awareness” that Mr Nowland invested a “large amount of money” into plant and equipment “over the years” which was put back into the properties. That assertion is inconsistent with the declaration made by Applegarth J.

Attitude of the parties to the partnership agreement

- [98] Each of Mrs Nowland and Lindsay Nowland considered the partnership agreement to be, as it panned out, unfair.
- [99] Mr Nowland was aggrieved by what he perceived to be his disproportionate contribution of labour over 21 years for which he received no income beyond 50 per cent of the proceeds of the sale of cattle. Mrs Nowland was aggrieved that Lindsay “was getting 50 per cent of the cattle, and I was left with all the bills”.
- [100] At least at the beginning, Mr Nowland was happy enough, to let things “grow on the vine” – to provide his labour, and forego a wage – expecting and understanding – he says – “through conversations I was having with my mother, that we’d sort out a more formal arrangement at a later date”. (Though no conversations which might have led to that understanding were put to Mrs Nowland.)
- [101] He also said that matters never got past the point at which he provided his labour without a wage because “the arrangement suited [Mrs Nowland] down to the ground ... ultimately it didn’t suit me ... because it was all one way traffic”.
- [102] After a while, Mr Nowland tried to raise the issue of “succession planning”, and engage his mother in a conversation about “where the properties are going”, “what lay in the future” and “what was my role”. But no conversations about those matters eventuated.
- [103] Mrs Nowland had a “vague idea” of Mr Nowland’s discontentment with their partnership arrangement and “felt he wanted to discuss the properties – and possibly wanting more – a bigger share of the properties”. Mrs Nowland says that she inferred this, not from any conversations they had, but from his “insistence” that they discuss affairs, and his “habit of telling people that he owned the properties”.
- [104] Nevertheless, both agree – unequivocally – that no alternative arrangement was ever discussed or entered into –

HER HONOUR: Just so I understand, Mr Nowland, your proposition is that there were no conversations between you and your mother about succession planning or any change to the partnership from about 1996 to 2016.

[MR NOWLAND]: It simply didn’t happen.

HER HONOUR: So, Mrs Nowland, it is effectively being put to you that there was no conversation about succession planning or changes to the partnership between about 1996 and 2016. What do you say to that?

[MRS NOWLAND]: There was never any succession discussions with my son ... At any stage of the 21 years.

Breakdown in relationship and partnership agreement and amount of monies in court

[105] Mrs Nowland and Mr Nowland have been estranged since the protection order was made in May 2014.

[106] Because Mr Nowland asserts that he was “blindsided” by his mother’s desire to dissolve the partnership, and suggests that that is relevant to his claim, it is worth considering the evidence about it in a little detail (even though that involves some repetition of matters already set out in these reasons).

[107] On 19 September 2016, Mrs Nowland, through her solicitors, wrote to Mr Nowland –

- advising him that she wished to sell the Tellebang Property;
- demanding that he vacate the property (by 28 October 2016); and
- requesting that he consent to the sale of Cannindah.

[108] The letter said –

[I]f you are prepared to cooperate in vacating Tellebang within the time prescribed ... Attorneys are prepared to endeavour to assist you in obtaining suitable alternate accommodation pending sales of both Cannindah and Tellebang.

[109] The Respondent refused to leave.

[110] On 1 February 2017, Justice Mullins ordered that Mr Nowland vacate the property within 28 days (by 1 March 2017), taking into account Mr Nowland’s request for additional time to sell the cattle, plant and equipment.

[111] Notwithstanding her Honour’s order, and except for a short period between April 2017 and July 2017, Mr Nowland did not leave the property. Nor did he sell the cattle, plant or equipment.

[112] In October 2017, Mrs Nowland entered into a contract to sell Tellebang for \$960,000. The sale included cattle as well as certain chattels which were on the property at the time at which she entered into the contract.

[113] These chattels were removed by Mr Nowland prior to sale, reducing the sale price of the Tellebang property by \$100,000.

- [114] Mr Nowland complains about the cattle having been sold under value. According to Mrs Nowland, Mr Nowland's refusal to vacate the property impeded the purchaser's ability to inspect and muster the cattle, which ultimately influenced the sale price. As she explained –

The purchaser knew that we were in severe drought, that the cattle were not in the best condition at that particular time and he had said he was keen to buy the place, [and] that... he would like to do a muster to ascertain the number of cattle on the property. But as my son was opposed to the sale of the property, he could not do that. ... The overall price was suggested at \$500 [a head] ... I agreed to that. It was a deal sweetener, if you like. But it was way too much of an imposition because no one was allowed on the property to do any mustering or get ... a headcount on what was actually there.

- [115] In November 2017, after an Enforcement Warrant was issued on 23 October 2017 to remove Mr Nowland from Tellebang, a muster was undertaken to ascertain the number of head of cattle on the property. Mrs Nowland bore the cost of the muster – an amount of \$1320.00. The muster determined that there were 248 cattle on the property (248 x 500 = \$124,000).

- [116] Around this time, Mrs Nowland wrote to Lindsay Nowland advising him of the sale of the farm and informing him that he would receive 50 per cent of the proceeds of sale of the cattle. Mr Nowland emphasises his mother's reference in the letter to his fair compensation. She wrote –

Dear Lindsay,

I have to tell you that the farm has been sold. I will compensate you for ½ of all the cattle. When it is all worked out you will be fairly compensated for everything.

The monies will be paid into a trust account that only I will have access to. Noone else will be entitled to any monies.

That includes the [K] family & the [S] family.

You will have to exit the property – the buyer wants to inspect everything on the 16th of this month. He is keen to take over as soon as possible. You don't know him – you will learn of his identity in due course.

I am sorry for all that has gone on before but it is truly all for the best in the long run.

I will be leaving Monto and I think it will be in your best interests if you do the same and make a fresh start.

You have not been happy in Monto – you may find contentment in another field or place.

I will always care about you as any mother cares about her children.

Love Always

- [117] Shortly after the sale of Tellebang, in April 2018 the Cannindah property and the cattle on it were sold.
- [118] The balance of the proceeds of sale of Cannindah and the cattle on it, after interim distributions of \$110,000 were made to both parties, were paid into court (in the amount of \$1,027,258.71). After funds were released to pay the trustees' costs and expenses, as at 27 May 2020, the funds held on trust in court amount to \$905,830.05, with interest of \$1630.88 having accrued.

Cynthia Nowland's submissions

- [119] Mrs Nowland reasonably presumes, through her lawyers, that Mr Nowland's claim "is intended to be founded upon an alleged 'common intention' or a 'joint endeavour' constructive trust."
- [120] Focusing on his claim to more than a one-eighth share in Cannindah, Mrs Nowland submits that Mr Nowland must fail because –
- He has not alleged, nor given any evidence about, any common intention as to the ownership of the property;
 - He has not acted to his detriment based on any common intention;
 - He has not alleged, nor given any evidence about, any unconscionable behaviour by Mrs Nowland;
 - He conceded that no variation to the partnership was agreed;
 - The partnership was operated in accordance with its agreed terms, and that cannot be said to constitute unconscionable conduct and cannot form the basis of a common intention as to the ownership of the property;
 - There has been no "holding out" by Mrs Nowland that her son had or would obtain any interest in the property, and no inducement that caused Mr Nowland to act to his detriment has been alleged or deposed to;
 - No property was purchased or acquired and no repairs or renovations were paid for by Mr Nowland for the purpose of any "joint endeavour".
- [121] Orally, it was submitted that nothing said or done by Mrs Nowland would cause me to conclude that it would be unconscionable to allow the monies in court to be distributed other than in accordance with Mr Nowland's share as a tenant in common of Cannindah and the partnership agreement. It was not necessary to delve into the minutiae of who paid what by reference to accounts. In any event, it was Mr Nowland's application and his evidence fell well short of proving his claim.
- [122] Counsel also said –
- ... there was a partnership agreement. There was reward for the input. To the extent that the reward was unfair, it should be my client that has a constructive trust claim because she was making an uneven contribution to the running of the property. She was the one who actually, against her case, conceded that it was a mistake when the partnership agreement was entered

into. And it was, in fact, Mr Nowland who benefited from receiving half of the proceeds of sale, but not having to pay half the costs of that.

The Court's approach to Mr Nowland's application

- [123] Although Mr Nowland was forceful in his arguments, he had no sense of what he might need to prove to establish the equitable interests he claimed.
- [124] With assistance from the submissions made by Mrs Nowland's counsel, I have identified potential legal bases upon which Lindsay Nowland *might* have an equitable claim. I have then considered whether he was able to make a viable equitable claim. As will emerge from my reasons below – he was not, and I will dismiss his application.

Discussion

Preliminary comment on the credit of the parties

- [125] Mr Nowland was an aggrieved and difficult witness.
- [126] He said the problem was his mother's "attitude" – she did not know what he did on the farm and her position was therefore "all a fantasy". His submission to me was that he did not think it was unreasonable to ask for what he had asked for.
- [127] His testimony contained hyperbole and sweeping generalisations about the way in which he ran the farm for two decades.
- [128] His belief that the current hearing might be an opportunity to undo previous orders of the court, or to achieve some sort of redress for all the ways in which (as he saw it) he had been wronged in the past, caused him to attempt to revisit issues which had already been determined or which were irrelevant to this application. For example, he wanted to re-visit the ownership of the bulldozer, which was one of the chattels he removed from Tellebang prior to settlement. And he argued with his mother (as he cross-examined her) about the way in which he managed the property during a certain flood; the frequency of his musters; and who bought how many bulls and when.
- [129] He said that proving his case – because it was so complex – would involve an affidavit "the size of ... the [court] room" (which he had not prepared). When I explained to him the importance of documentary evidence to support his assertions that he had, for example, paid 85 per cent of the costs of running the operation, he attempted to hand up a bundle of documents for me to look through, which Mrs Nowland had not seen and which were not in any particular order.
- [130] When I attempted to assist him by asking him to present relevant documents to me in chronological order, all he was able to produce were the book keeping records I have already discussed. He said, in effect, that everything else was with the accountants. In cross-examination, he said that he had not submitted a tax return for five or six years.
- [131] When I asked him what his pattern of expenditure looked like after July 2008, he said that it fluctuated from season to season: no two years were the same.

- [132] He attempted to tender waybills which showed the movement of the cattle for two separate, brief periods but I upheld an objection that they were irrelevant to the issues for me.
- [133] He claimed to have documentation which showed that he had passed some sort of biosecurity “audit” “with flying colours”. The documents about the audit which he attempted to tender did not relate to an actual audit of the farm. When I asked Mr Nowland about proof that he had satisfied the relevant biosecurity requirements (and “passed” the audit), he told me that I could “ring up” the relevant people – it would be “in the database in the whatever”.
- [134] He asserted that his bank statements would show that he reimbursed his mother for payments she made under a hire-purchase agreement for the acquisition of the bulldozer which he removed from Tellebang. In fact, his bank statements showed that his mother put money into his account to meet the cost of the hire-purchase agreement. He then claimed that he reimbursed her through the proceeds of cattle sales, paid by cheque directly into her account by the stock agents. He said that whilst his bank accounts showed some reimbursement by him to her – it would “take all day to explain it”.
- [135] He claimed he had, in the court room, a “port full” of little notes from his mother which supported his claim. It is enough to say that he did not.
- [136] He got his back up easily in cross-examination – although I acknowledge that cross-examination about his drinking and the protection orders would have been uncomfortable for him.
- [137] His inability to articulate a claim (albeit understandable without the assistance of a lawyer) and his being convinced that he had been the victim of a moral wrong meant that he was combative – rather than purposive – in his cross-examination of his mother.
- [138] I have already mentioned some of their arguments. He also argued with her about whether a spring ran through the middle of the property, impeding his ability to muster during a flood. He argued with her about the hour of the night he attempted to speak to her about changes to the partnership arrangement. And he questioned her about the amount of work he had done on the farm as a school boy.
- [139] It seemed to me that it was difficult for Mr Nowland to engage meaningfully on relevant issues because he did not seem to appreciate or accept that there was value in his mother’s initial or continuing contribution to their partnership. Nor would he accept Applegarth J’s declaration as to the ownership of the plant and machinery on the farm.
- [140] I did not consider Mr Nowland to be a reliable witness. I was not prepared to act on his assertions about the partnership agreement, his mother’s conduct, or his own contributions to the business without supporting evidence.
- [141] Overall, I found Mrs Nowland to be a reasonably reliable witness. I am satisfied that any unreliability or inconsistency in her evidence was a product of either the looseness of the partnership arrangement or the passage of time. She made appropriate concessions. I found her description of her relationship with Mr Nowland and its deterioration, and the way in which they managed the partnership over the years, inherently believable.

[142] As it turned out, the parties gave almost identical evidence about a matter critical to Mr Nowland's equitable claim. They both said that they had no conversation about any change to the partnership agreement or "succession planning". Indeed, they each gave evidence to the effect that Mrs Nowland clearly indicated that she did not want to talk about it.

[143] I asked Mr Nowland whether he had presented a concrete proposal to his mother. The effect of his evidence was that he had not. He said –

I can remember compiling figures ... I can't recall whether they were delivered or ... how far we got. I wasn't going to disclose my hand when I couldn't get full communication ... I think that ... there may have been figures talked about. She just wasn't interested ... So I need[ed] to go and sharpen the pencil or... it just wasn't going to happen ... So what I needed to do was create some money, come back to her and give her an offer she couldn't refuse.

[144] It is worth noting that, in this part of his evidence, Mr Nowland is plainly suggesting that his plan was to persuade his mother to *sell* the farm to him at a good price. That is consistent with his appreciating that his mother was *not* prepared to *give* him anything more than his one-eighth interest in Cannindah.

[145] He also said that, the last time he tried to talk to her about it, there were no raised voices, although she left the property and rolled the car and it was not spoken about again. But he took the view that the longer he stayed on the property, the point would be reached (and in his view, had been reached) at which his mother was obliged to "compensate" him for "his efforts".

Potential claims

[146] In the context of informal, family arrangements regarding land, it is common for promises to be made as inducements to keep land in the family, particularly where farming businesses are concerned. Agreements are rarely recorded in writing, and frequently the parties do not discuss what is to happen if the arrangement needs to be undone, or the promises are not fulfilled.

[147] In cases, such as this, where the situation sours to the point of litigation, a plaintiff (or applicant) may bring a claim on the basis that a constructive trust exists over the disputed property. A trust may arise as –

- a constructive trust, imposed remedially upon a finding of estoppel;
- a common intention constructive trust; or
- a joint endeavour constructive trust.

[148] While Lindsay Nowland did not cast his application or his argument in these terms, it is clear that he seeks an equitable remedy. Because of his position of disadvantage as a self-represented litigant, I must ensure that he is given a fair hearing by providing him with due assistance, including by way of identifying any potential claims he might have.

[149] Counsel for Mrs Nowland took a similar approach by identifying, in his submissions, potential legal bases for Mr Nowland's claimed entitlement – namely a common intention or joint endeavour constructive trust.

[150] I will consider each of the bases upon which a constructive trust might arise in this matter.

Equitable estoppel

[151] I considered whether an equitable estoppel arose. A claim in equitable estoppel may be based upon an *expectation* in the claimant that he or she will obtain an interest in another person's land – if the source of that expectation is statements by, or the conduct of, that other person.

[152] The relevant principles have been discussed by the High Court in a number of decisions including *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394; *Giumelli v Giumelli* (1999) 196 CLR 101; and *Sidhu v Van Dyke* (2014) 251 CLR 505.

[153] They were also discussed by A Lyons J (as her Honour then was) in *Nolan v Nolan & Ors* [2014] QSC 218.

[154] As her Honour explained at [48] (footnotes omitted) –

[48] ... In *Waltons Stores (Interstate) Ltd v Maher* the Court held that a person whose conduct creates an assumption by another that he will obtain an interest in the first person's land and on the basis of that expectation alters his position or acts to his detriment then that conduct may bring into existence an equity in favour of the second person. The nature and extent of the equity depends on the circumstances. The Court stated:

“One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction had ‘played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it’: per Dixon J. in *Grundt*, at p 675; ... Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.”

[49] The relevant legal principles were recently examined by McMeekin J in *Germanotta v Germanotta* [[2012] QSC 116]. As his Honour explained, generally a plaintiff must show three things namely an assurance by the defendants, a reasonable reliance on that assurance and detriment by the plaintiff ...

[155] In *Germanotta*, his Honour continued (at [6]):

... The detriment in question is that which he would suffer if the defendants resiled from any assurances made and it “is no narrow or technical concept.

It need not consist of expenditure of money or other quantifiable disadvantage so long as it is something substantial. The requirement must be approached as part of a broad enquiry as to whether departure from a promise would be unconscionable in all the circumstances”.⁵Also, there must be either knowledge or intention on the part of the person creating the assumption that it will be acted upon.⁶

[156] Both *Nolan v Nolan* and *Germanotta v Germanotta* were cases arising out of a breakdown in family relationships, where children – or children-in-law – contributed to a family’s farming business by hard work and, directly or indirectly, contributed to the acquisition, conservation and improvement of the family assets. At the core of the arguments in each case was the claim that parents acted unconscionably in denying the plaintiffs’ claims to greater compensation for their contributions.

[157] Similarly, here, it seems that the essence of Lindsay Nowland’s claim is that he worked over 21 years to improve the real property, and his mother is acting unconscionably in denying his claims.

[158] Mr Nowland says, in effect, that he expected that he would receive “fair compensation” for his labour over the years in the form of an increased interest in Cannindah (and perhaps in Tellebang). He contends now that fair compensation amounts to up to 85 per cent of the net sale proceeds of Cannindah.

[159] When asked what, if anything, was said or done by Cynthia Nowland which caused him to have that expectation, Mr Nowland suggested that such an entitlement had been promised to him, albeit in a vague way. He said –

She never gets to that level of detail. It’s always innocuous. “You will be compensated for everything. You will receive half of this, half of that”. Lots of little notes ... They’re vague. That’s the way my mother writes ... You never, ever get to the rub of things, because it’s all so in the breeze.

[160] Mr Nowland said that these assurances were made to him “many, many times”, “over the years” and “on a number of occasions”.

[161] However, no such assurances were put to Mrs Nowland. Nor, as noted, was any conversation she might have had with Ms Smith. And only one letter from Mrs Nowland was produced, which was written after the dissolution of the partnership.

[162] The evidence revealed that Mrs Nowland shut down any conversation initiated by Mr Nowland about succession planning. As Mr Nowland said, they were not conversations which Mrs Nowland was prepared to have. They were “not lengthy affairs”, never got to money and ended promptly with Mrs Nowland walking out of the room.

[163] Although the letter written after the partnership had been dissolved foreshadowed that Mr Nowland would receive fair compensation “when it is all worked out”, Mrs Nowland was not asked what she meant by “fair compensation” in that context.

⁵ citing *Donis v Donis* (2007) 19 VR 577 at 583 [20].

⁶ see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 406 and 423.

- [164] Mr Nowland's expectation that he ought to receive something more than his one-eighth share in Cannindah appears to be based on his own assumptions, formed independently of – and indeed despite – his mother's conduct. As he said, "I took the view ... that the longer I stayed on the property ... well, once we got past 10 years, I took the view that she had a moral obligation, if not a legal one, to compensate me for my efforts".
- [165] He also *hoped* his mother, as she grew older, would tire of the arrangement, and allow him to buy Cannindah at a favourable price. But this hope was self-induced – rather than induced by anything said or done by Mrs Nowland. As Mr Nowland said, "I took the view, the longer I stayed there, the more I put into the properties, somebody – put some glasses on, recognise it, see it, and say, 'Look, I'm too old for this. I don't want to play anymore. He does it all anyway. He's offering me money. I think that's a good fare. I'll get out'".
- [166] An assurance can found a claim for proprietary estoppel, even if it is vague,⁷ "not precisely defined" or "difficult to quantify".⁸
- [167] However, Mr Nowland faces more than the absence of a precisely formulated assurance.
- [168] On his own evidence, Mrs Nowland gave him no oral or written assurance that he would receive anything more than his one-eighth share of Cannindah as compensation for his work on the farm or otherwise, either before the partnership was formed or at any time during it.
- [169] On his own evidence, Mrs Nowland said nothing that would amount to even a vague assurance that Mr Nowland would receive more than that share.
- [170] The effect of the evidence of them both is that there was *no* discussion ever of farm succession or changes to the partnership arrangements – beyond some attempts by Mr Nowland to raise it which went nowhere.
- [171] I am not prepared to infer that Mrs Nowland's reference to fair compensation in her letter to Mr Nowland was a reference to anything said by her to him before, or in the course of, the partnership, upon which he might have based his expectation. The reference in that letter to Mr Nowland being fairly compensated is consistent with her position that he would be compensated in accordance with their partnership arrangement – which, if anything, she considered was unfair to her. And of course, having been sent after the dissolution of the partnership means that Mr Nowland cannot suggest that, on its face, it contained the assurance upon which he relied.
- [172] On Mr Nowland's evidence, Mrs Nowland's conduct – in shutting down or abbreviating any conversation about succession planning or changes to the partnership – clearly communicated to him that he was *not* assured of anything beyond his one-eighth interest in Cannindah and his share of the net proceeds of sale of the cattle as per the partnership agreement. Mr Nowland conceded that he should have been warned against entertaining such a hope –

⁷ See *Nolan v Nolan & Ors* [2014] QSC 218 at [66].

⁸ See *Flinn v Flinn* [1999] 3 VR 712 at [80] – [81].

As I've just said to you... [she] just walks out of the room.... It's over – conversation over. You know, that – I should have had alarm bells ringing everywhere.

- [173] Further, his stance – that he could, in effect, enforce a change to the succession or partnership arrangements by remaining on the property and working it – is consistent with his appreciating that his mother had given him no such assurance.
- [174] Thus, having recognised that he received no relevant assurance from Mrs Nowland, Mr Nowland is not able to rely on equitable estoppel in support of his application.

Common intention constructive trust

- [175] A constructive trust may be imposed according to the actual or inferred common intention of the parties in relation to the beneficial ownership of property, upon which a claimant has acted to his or her detriment.
- [176] The first inquiry in a claim on this basis is as to the actual intention of the parties.
- [177] That intention may be found in the parties' agreement or it may be inferred by their conduct (such as evidence of them both making a financial contribution to the property) – *cf Engwirda v Engwirda & Ors* [2000] QCA 61.
- [178] In this case, Mr Nowland has failed to produce any evidence that his and his mother's common intention in relation to the ownership of Cannindah was other than in accordance with their interests as tenants in common. It was not something they discussed.
- [179] Thus, Mr Nowland is not able to rely on a common intention that his mother would hold a share of her seven-eighths of Cannindah in trust for him in support of his application.

Joint endeavour constructive trust

- [180] I have considered, as an alternative to a claim based on common intention, whether Mr Nowland has a claim based on a failed joint endeavour. Such a claim depends upon, among other things, joint contributions to the gaining, improvement or retention of property for a joint purpose.
- [181] A constructive trust may be imposed when a court determines that there has been an *inequity* arising out of a relationship breakdown, in circumstances where it would be unconscionable for one party to enjoy contributions made by the other party to a joint endeavour or venture. A constructive trust provides a means of protecting the pecuniary interest of a contributor to property in circumstances where the legal title to property does not provide that protection.⁹
- [182] A joint endeavour constructive trust will be “imposed regardless of the actual or presumed intention to create a trust”.¹⁰

⁹ See *ASIC v Burnard* [2007] NSWSC 1217 at [56]: ‘In the case of a constructive trust, there is no beneficial interest until the court, having determined upon the remedy necessary and appropriate to redress the activating unconscionability imposes that remedy.’

¹⁰ *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [401].

- [183] Such a constructive trust may be imposed when a joint endeavour breaks down, without attributable blame, in circumstances not contemplated by the parties at the commencement of their endeavour.
- [184] However, a constructive trust is not imposed just because a court perceives that there has been some unfairness to one party to a relationship upon its breakdown. In *Muschinski v Dodds* (1985) 160 CLR 53 at 608, Brennan J explained (in a passage relied upon by Mrs Nowland) –
- A constructive trust does not arise and cannot be imposed on the grounds of mere fairness ... There is no jurisdiction in an Australian court of equity to declare an owner of property to be a trustee of that property for another merely on the ground that, having regard to all of the circumstances, it would be fair so to declare ... The flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair.
- [185] A constructive trust will only be imposed to prevent one party from *unconscionably* relying on the exercise of their legal rights and denying the other their beneficial interest in property – as explained in *Baumgartner v Baumgartner* (1987) 164 CLR 137.
- [186] Deane J in *Commonwealth v Verwayen* explained that unconscionable conduct will commonly involve the use of, or insistence upon, legal entitlement to take advantage of another’s special vulnerability or misadventure in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing. The question whether conduct is unconscionable in the circumstances of a particular case ‘involves a “real process of consideration and judgment” in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case such as the present.’¹¹
- [187] In *Muschinski v Dodds*, Deane J explained that equity would not permit one party to benefit unconscionably where –
- the substratum of a joint relationship or endeavour is removed;
 - without attributable blame; and
 - where the benefit of money or other property contributed by one party, on the basis and for the purposes of the relationship or endeavour, would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it.
- [188] *Baumgartner v Baumgartner* concerned a de facto couple who had lived together for four years; at first, in a unit owned by the man, before purchasing a property (land only) from the net proceeds of sale of that unit. The land and the house which was built on it were in the man’s name only.
- [189] During their relationship, the couple pooled their earnings (in proportions roughly of 55 per cent by the man and 45 per cent by the woman), which were used, in part, to pay the mortgage on the property. It was not in dispute that the house was acquired and

¹¹ (1990) 170 CLR 394 at 441(citations omitted).

developed as their home. When the relationship failed, the question was whether the woman was entitled to an interest in the house – with relief provided to her by way of a constructive trust. The High Court held that it was unconscionable for the man to assert that the woman had no entitlement at all to the property and imposed a constructive trust.

[190] Mason CJ, Wilson and Deane JJ, characterised the case as follows –

The case is ... one in which the parties have pooled their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child. Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.¹²

[191] While the failed relationships in both *Muschinski v Dodds* and *Baumgartner* were de facto relationships, these principles have been applied between parents and children: see, for example, *Nolan v Nolan* [2014] QSC 218; *Swettenham v Wild* [2005] QCA 264; and *Hill v Hill* [2005] NSWSC 863.

[192] I am prepared to proceed on the basis that the partnership was a joint venture – even though Mr Nowland and his mother's intentions, at least initially, may have been different: The Tellebang and Cannindah farm was an operational cattle property for more than twenty years.

[193] I proceed on the basis that they each contributed to that joint venture – in Mrs Nowland's case, primarily by the provision of the real property and whatever cattle, plant and machinery were on it at the commencement of the partnership, and in Mr Nowland's case by his labour and management of the property. I am prepared to proceed on this basis without making a finding about whether Mr Nowland performed his role satisfactorily or not.

[194] As to whether the joint venture ended “without attributable blame”, I have had regard to Bryson J's remarks in *Bennett v Horgan* (Supreme Court of NSW, 3 June 1994, unreported) at 11 (applied in *Hill v Hill*) (my emphasis) in which his Honour explains that the notion of blame involves something criminal or reprehensible –

The concept of attributable blame must be understood and applied with some tolerance; in my view **it does not call for a judgment attributing blame among members of a family for the continuing relationship becoming intolerable, unless perhaps in particularly gross cases.** Such judgment would be difficult and unreliable, as it is rare indeed that something or other which could be said to be a ground for blame cannot be

¹² (1987) 164 CLR 137 at 149.

identified and laid to the charge of each of the persons concerned. **Leaving gross cases involving criminality or similarly reprehensible behaviour on one side**, it should usually be understood, in my opinion, that where personal relationships deteriorate and the sharing of a dwelling becomes intolerable to some or all of those concerned, there is, within the meaning of Deane J's expressions, no attributable blame and the case is one for an equitable adjustment. It is a sadly recurring judicial experience to see that family relationships do deteriorate and become intolerable, and that the persons involved did not foresee that this might happen.

- [195] There is evidence here of Mr Nowland reprehensible conduct towards his mother contained in Mrs Nowland's affidavits. However, it was not submitted by Mrs Nowland that I ought to determine the question of whether equity would impose a joint venture constructive trust on the basis that Mr Nowland was to blame for the end of the partnership.
- [196] In the present case, the farm was effectively (15/16^{ths}) wholly owned by Mrs Nowland at the beginning of the partnership. As in *Hill v Hill*, there is no room therefore for a trust arising out of any contributions by Mr Nowland to the purchase price of the property. He relies on an assertion that, via his labour and management of the cattle/the farm, the value of the property has improved.
- [197] Mr Nowland does not suggest that he made any capital improvements to the real property – although in his affidavit, he mentions having to replace 85 per cent of the fences on Tellebang. Regardless, I will assume, without deciding, that the “improvement” to the property which Mr Nowland asserts he has achieved is a relevant improvement for present purposes.
- [198] There is no doubt that the farm has increased in value over the 20-odd years of the partnership. However, the difficulty for Mr Nowland is that he presented no evidence which would allow me to draw a conclusion that his labour and management did in fact lead to an increase in its value over and above its capital appreciation over time. It is not enough for Mr Nowland to simply assert that it did. And of course, Mrs Nowland's evidence is to the effect that Mr Nowland did not look after the property or the cattle in a satisfactory way.
- [199] Also, on evidence which consisted of little more than general assertions by the parties about their financial and non-financial contributions to the business, it is simply not possible for me to assess the respective proportions in which the parties' contributions resulted in the improvement of the property (and its value) if at all. On the evidence, I am in a position similar to that of the Court of Appeal in *Engwirda v Engwirda*.
- [200] Further, as explained in *Hill v Hill*, the making of a contribution does not automatically result in a trust (or a charge) in an amount equal to the contribution. The fundamental question is whether it would be unconscionable for the parties' rights to be simply in accordance with their legal rights. It is impossible for me to reach that conclusion in Mr Nowland's favour.
- [201] I can reach no conclusion about his financial contributions to the partnership/property. I can reach no conclusion about whether his non-financial contributions added to, or detracted from, the value which the property would have had without them.

[202] His mother allowed him to live on the farm rent free for decades. When he was imprisoned, she managed the farm for several months. In lieu of wages, he shared equally in the proceeds of sale of the cattle, and it is more probable than not that his mother bore the bulk of the business and property costs and expenses. There is, in my view, nothing unconscionable in that arrangement.

[203] Mr Nowland is unable to succeed on a claim based on a joint endeavour.

The cattle

[204] As I understand it, Mr Nowland seeks to be compensated in equity for the sale of the cattle on Tellebang at an under value, by way of this Court ordering the payment to him of the whole of the net proceeds of sale of the cattle on Cannindah. He was unable to articulate any basis for his equitable claim.

[205] For the purposes of argument, I am prepared to accept that the cattle were sold at an undervalue to the purchaser of Tellebang – by way of a deal sweetener, as Mrs Nowland put it.

[206] However, even if there were some claim in equity upon which Mr Nowland could assert an entitlement to the whole of the net proceeds of sale of the cattle on Cannindah, he faces two difficulties. The first is an absence of relevant evidence. The second is the impact of his own conduct on the sale price of the cattle on Tellebang.

[207] For Mr Nowland to succeed, the evidence which I consider he would need to produce to enable a calculation of his fair or proper share of the net proceeds of sale of the cattle on Cannindah would include at least –

- evidence that there was another purchaser ready and able to pay more than \$500 a head for the cattle at the time at which they were sold by Mrs Nowland;
- evidence about how much more another purchaser would have been ready and able to pay; and
- reliable evidence of the respective contributions of both parties to the costs and expenses of running the cattle on the land.

[208] I might also need to consider offsetting claims.

[209] On the evidence presented at this hearing, it is simply impossible for me to undertake a calculation which would achieve a proper result.

[210] Also, bearing in mind that –

- Mr Nowland was given time by Mullins J to sell the Tellebang cattle and did not do so;
- he failed to comply with the court order to vacate Tellebang;
- he failed to co-operate with his mother's efforts to have the cattle on Tellebang mustered and counted,
- he was responsible for their condition; and

- the cattle were sold in accordance with the order of Applegarth J, which permitted them to be sold as a going concern with the sale of Tellebang,

I do not consider it appropriate for this Court to intervene in the 50:50 distribution of the net sale proceeds.

Orders

[211] The application is dismissed.

[212] The matter is adjourned until Friday, 5 June 2020, for submissions as to the distribution of the monies in court and costs.