SUPREME COURT OF QUEENSLAND

CITATION: *Goomboorian Transport Pty Ltd & Ors v Hanson & Ors* [2018] QSC 135

PARTIES: **GOOMBOORIAN TRANSPORT PTY LTD ACN 011 054 658**
(first plaintiff)

AND

J & M LOGHANDLING PTY LTD ACN 011 054 667
(second plaintiff)

AND

BELLING INVESTMENTS PTY LTD ACN 123 710 734
(third plaintiff)

AND

GOOMBOORIAN LOGGING PTY LTD ACN 076 970 995
(fourth plaintiff)

AND

LITTLE YABBA DROUGHTMASTER STUD PTY LTD ACN 086 875 845
(fifth plaintiff)

AND

EMMERDALE FARMING PTY LTD ACN 151 515 909
(sixth plaintiff)

AND

JILRAY PTY LTD ACN 058 181 463
(seventh plaintiff)

AND

J & M FARMING PTY LTD ACN 086 991 291
(eighth plaintiff)

AND

J & M FARMING PTY LTD and LITTLE YABBA DROUGHTMASTER STUD PTY LTD ABN 89 152 178 639
(ninth plaintiff)

AND

JOHN GERHARD BELLING
(tenth plaintiff)

AND

MARLENE ANNE BELLING

(eleventh plaintiff)

v

ESTATE OF NORMA RENEE HANSON, DECEASED
(first defendant)

AND

DOROTHY MAUREEN HANSON
(second defendant)

AND

NORMAN RICHARD HANSON
(third defendant)

FILE NO/S:	SC No 4392 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	12 June 2018
DELIVERED AT:	Cairns
HEARING DATE:	3 April 2017; 4 April 2017; 5 April 2017; 6 April 2017; 30 January 2018
JUDGE:	Bond J

ORDER: **The orders of the Court are:**

1. **I will hear the plaintiffs further on the form of order which should be made in relation to the first defendant.**
2. **It is declared that the proceeds of the Asteron term life policy 81318923 were received by the second and third defendants as trustees for the third and sixth plaintiffs.**
3. **I will hear the parties further on the plaintiffs' claims to the relief identified at paragraphs B, C and D of the claims to relief made in the plaintiffs' amended statement of claim.**
4. **The plaintiffs' claim for declaratory relief in respect of the BT death benefit amount is refused.**
5. **It is declared that the second and third defendants hold their interest in the home located at 22 Parkland Drive, Chatsworth, subject to an equitable lien in favour of the plaintiffs in the amount of $12,622.22.**
6. **The plaintiffs' claim for declaratory relief in respect of the chattels listed at paragraph [110](e) of the Court's reasons for judgment is refused.**
7. **The plaintiffs' application to re-open the case is**

dismissed.

8. I will hear the parties as to the costs of the application to re-open and of the proceeding.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – TRACING TRUST PROPERTY – IDENTIFICATION OF PROPERTY – where employee misappropriated funds from employer – where employee held a life insurance policy – whether certain premiums on the life insurance policy were paid using stolen funds

EQUITY – TRUSTS AND TRUSTEES – TRACING TRUST PROPERTY – GENERALLY – where employee misappropriated funds from employer – where employee used misappropriated funds to pay premiums on life insurance policy – where employee now deceased – where proceeds of life insurance policy were paid out to the employee's parents – whether the employer can trace the stolen funds into the proceeds of the life insurance policy

INSURANCE – LIFE INSURANCE – THE POLICY – CONSTRUCTION – where employee misappropriated funds from employer – where employee used misappropriated funds to pay premiums on her life insurance policy – where employee now deceased – where proceeds of life insurance policy were paid out to the employee's parents – where the final premium paid before the employee died was paid with misappropriated funds – where the life insurance policy was a term policy – where premiums were paid monthly in advance – where the life insurance policy provided a mechanism for the insurer to cancel the policy if premiums were not paid – whether the policy is properly construed as providing cover on a month by month basis – whether the whole of the proceeds paid out from the policy are referable to the payment of the final premium

EQUITY – TRUSTS AND TRUSTEES – TRACING TRUST PROPERTY – IDENTIFICATION OF PROPERTY – where employee misappropriated funds from employer – where employee purchased chattels using stolen funds – whether employee purchased chattels for her parents - whether a declaration should be made that the chattels were held on trust by the employee's parents for the employer -

SUPERANNUATION – PRIVATE SECTOR FUNDS – TRUSTEES – GENERALLY – where employee held two superannuation accounts – where trustee entity was trustee for both superannuation accounts – where the trust deed provided that a residual death benefit must be paid to the employee's legal personal representative or to the employee's dependants where there is no legal personal representative – where the trustee entity paid the total death benefit of both accounts to the employee's parents in equal shares – whether the trustee erred in determining to pay the death benefit to the

employee's parents as dependents rather than to the employee's legal personal representative – whether a declaration should be made that the death benefit is available to settle the debts of the employee's estate

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PROCEDURAL ASPECTS OF EVIDENCE – OTHER MATTERS – where plaintiffs brought an application to re-open their case for a limited purpose of tendering certain documents – where the documents sought to be tendered were only disclosed by the defendants to the plaintiffs after the close of the trial – whether the additional documents are probative of any claim in issue – whether the application to re-open should be allowed

Uniform Civil Procedure Rules 1999 (Qld) r 71, r 150(2), r 166(6)

Distinctive FX Pty Ltd v Van Der Slot [2015] VSCA 328, cited

Foskett v McKeown [2001] 1 AC 102, distinguished

Fradianni v Protective Life Ins. Co., 145 Conn. App. 90 (2013), considered

New York Life Ins. Co. v Statham, 93 U.S. 24, (1876), considered

Re Hallett (1880) 13 Ch D 696, cited

Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd [2017] VSC 101, cited

Willis v Commonwealth (1946) 73 CLR 105, cited

COUNSEL: C Heyworth-Smith QC, with N H Ferrett, for the plaintiffs
D J Morgan for the first defendant
G J Handran, with K W Wylie, for the second and third defendants

SOLICITORS: Griffith Hack for the plaintiffs
Mullins Lawyers for the first defendant
Baldwins Lawyers for the second and third defendants

Introduction

[1] The tenth plaintiff, John Belling, was a truck driver who developed a successful business which resulted in him being a director and shareholder of a number of corporations. Those corporations are the corporate plaintiffs. The eleventh plaintiff is Mr Belling's wife.

[2] Through the corporate plaintiffs, Mr Belling operated a number of business enterprises including logging, road haulage, harvesting and farming as follows:

(a) Goomboorian Transport Pty Ltd was primarily engaged in haulage of logs and woodchip, at least from early 2000 onward.

(b) J & M Loghandling Pty Ltd used front end loaders in three mills running a 24 hour operation.

(c) Belling Investments Pty Ltd was set up to hold an investment portfolio but never became active.

(d) Goomboorian Logging Pty Ltd started out using operators to cut down trees using chainsaws; advanced to mechanical harvesting, and followed through to being an import company of used equipment.

(e) Little Yabba Droughtmaster Stud Pty Ltd conducted a farming operation in partnership with J & M Farming Pty Ltd.

(f) Emmerdale Farming Pty Ltd was a company set up to run a sugarcane farm for a superannuation company.

(g) Jilray Pty Ltd was the trustee for the J & M Loghandling superannuation fund, as well as the trustee for Belling Investments and Belling Family Trust.

(h) J & M Farming Pty Ltd conducted a farming operation in partnership with Little Yabba Droughtmaster Stud Pty Ltd.

[3] Goomboorian Transport first employed Norma Hanson in July 2002 as a receptionist. At that time she was 19 years old. She was eventually promoted to the role of office manager and accorded much trust and responsibility. She remained employed in that role until the date of her death on 23 September 2014, aged 31.

[4] Unfortunately, the plaintiffs' trust in Ms Hanson was misplaced. As will appear, she stole more than $2.5 million from the plaintiff companies.

[5] The first defendant to this proceeding is identified as "The estate of [Ms Hanson], deceased". As to this:

(a) This form of identification complied with the requirements of r 71 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) because Ms Hanson was deceased, no grant of representation had been made, and any cause of action against Ms Hanson would survive her death.

(b) The pleading seeks a declaration that the estate is indebted to them in particular amounts; or alternatively judgment against the estate in those amounts.

(c) Ms Hanson's sister, Christa Moxey, appeared by her counsel as personal representative of the estate of Ms Hanson and sought leave to withdraw.

(d) In support of that application, Ms Moxey deposed that –

(i) Ms Hanson had left a will which, after some of the persons named in the will as executors had renounced that role, operated to name her as executor of the will;

(ii) she had not applied for probate of the will; and

(iii) the estate did not have sufficient resources to investigate the claims made, defend the claims made, or to participate in the trial.

(e) At her counsel's request, there being no submissions against that course by any other party, the order I made was "upon the first defendant by her counsel undertaking to abide by any order of the court in the trial of this proceeding, I excuse the first defendant from further attendance during the course of the trial of this proceeding."

(f) Thereafter there was no appearance on behalf of the first defendant at the trial.

[6] The second and third defendants are Ms Hanson's parents. They were represented before me but did not give evidence, although they tendered some documents. They received the proceeds of a valuable insurance policy consequent upon the death of their daughter. The

plaintiffs' principal claim in this proceeding seeks a declaration that they received the proceeds of the insurance policy as trustees for the third and sixth plaintiffs. There are other, subsidiary, claims for declaratory relief advanced in which they are interested parties, including claims which assert that they must have known of their daughter's misconduct, to which I will turn in due course.

Ms Hanson's fraud

[7] The plaintiffs' principal witness was Mr Belling, whose evidence I accept, with one exception (as to which see [15] below). Mrs Belling was also called, and, so far as it went, I accept her evidence. She was a director of the plaintiff companies also, but it was evident that her husband had the responsibility for running the companies.

[8] Mr Belling explained how Ms Hanson became a trusted employee who was given responsibilities which she ultimately exploited to her own advantage.

[9] Ms Hanson was originally employed in a minor clerical role in 2002, by Goomboorian Transport. She was one of 2 or 3 office staff.

[10] Mr Belling had very little to do with the day-to-day hiring of staff. However he said that he made a policy decision early on that all employees should be paid on "award" rates. From his point of view, award rates were preferable to rates in which remuneration was directly tied to productivity because (particularly where employees might be using heavy machinery) that might encourage unsafe work practices. Of course that explanation had nothing to do with office staff, but he said that the policy decision nevertheless applied to them.

[11] Mr Belling was not familiar with the award rates for employees doing clerical office work. His evidence did not connect up his conception of "award rates" with any particular award, or even any particular amounts. For example, he was not familiar with the terms of the actual "Clerical Employees Award". The best he could say when asked whether he was familiar with the award rates was:

> Q: Were you familiar with the award rates?
>
> A: I was familiar to the fact that a junior employee is someone that comes in and does the most menial task. A grade 2 secretary is a slight improvement. Grade 3 should be able to do a fair amount of entering of data and stuff into computers and that type of thing. Grade 4 should be able to do most things, including bank records and all that type of stuff. And grade 5 should be doing what I do.
>
> Q: When you saying what you do, can you just explain your understanding a little more?
>
> A: They should be able to authorise loans, documents, legal matters, all sorts of things.

[12] In December 2007 when the office manager left, Mr Belling told Ms Hanson (at that stage a grade 3 employee) that she could have a three month trial in the role of office manager. If she performed well in the trial period, she would be promoted to become the office manager, which was a grade 4 secretary role. That is what happened, and in about April 2008 Ms Hanson was promoted to that role. She stayed in that role until her death on 23 September 2014, although her formal employer became J & M Loghandling after a business restructure in 2011.

[13] Both before and after the restructure, her role as office manager involved –

(a) managing the office from which the plaintiffs operated their businesses;

(b) calculating the payroll and making arrangements for staff to be paid;

(c) entering all data to computer using the plaintiffs' MYOB software;

(d) managing the plaintiffs' business transactions including:

(i) invoicing;

(ii) payments of creditors, including suppliers;

(iii) the purchase and sale of equipment;

(iv) the purchase and sale of stock;

(v) liaising with financial institutions on the plaintiffs' behalf.

[14] Importantly, in order to perform her duties, Ms Hanson was given the capacity to perform online and telephone banking in relation to the plaintiffs' accounts. During Ms Hanson's period of employment she and Mr Belling shared the same large desk in the company office: he on one side and she on the other. But Mr Belling said that she performed her roles with minimal direction or supervision.

[15] There were two periods of time during which her supervision would have been even less than normal because Mr Belling was not actively engaged in running the business. First, in July 2008 and consequent his having a heart attack, he was not actively engaged in the business for about 8 months. Second, he also took time away from the business between July 2012 and April / March 2014 consequent upon suffering other illnesses. In making this finding I prefer the evidence contained in Mr Belling's affidavit sworn in June 2015[1] to the oral evidence he gave before me. In his oral evidence during cross-examination he sought to minimize the extent of his lack of involvement during illness in a way which I did not find to be persuasive.

[16] The businesses used the MYOB software accounting package. Mr Belling was not familiar with the MYOB accounts, although he did look at the fortnightly payroll summary documents which identified what all employees were being paid, with columns for wages, deductions, taxes, net pay and expenses.[2] In this way he saw what the company accounts recorded as the amounts paid to Ms Hanson for her fortnightly wages, and it must be inferred that those amounts were in order with what he expected.

[17] Mr Belling and his wife lived in Gympie, as did Ms Hanson. Although they did not socialize together they did frequent the same entertainment venues. Thus they regularly saw her at the Gympie RSL, the Freemasons Hotel, or the Jockey Club. They observed that she was often in the company of her parents. They observed her gambling, but thought nothing of it.

[18] In 2010, Mr Belling found that the businesses had inexplicable cash flow problems. He took some investigative steps. Amongst other things, he asked his accountant to check the books on Ms Hanson to see if gambling was a problem. The evidence did not address what was the outcome of that enquiry. In light of the fact that Ms Hanson continued in her role after 2010, I infer that, whatever was the outcome, her conduct was not called into question.

[19] On the day Ms Hanson died in 2014, Mr Belling had called her early in the morning because a creditor that he had not heard of had been ringing him to pursue payment. He spoke to her and she said she would be in to work later that day. However she did not come to work. She died that day at about 3:00pm. The evidence did not address the cause of her death.

---

[1] Paragraphs 1 to 5 of this affidavit formed exhibit 2.

[2] For example: Exhibit 1 tabs 23 and 24.

[20] Mr Belling caused investigations to commence into Ms Hanson's handling of company monies, consequent upon some comments[3] which were made to him at Ms Hanson's funeral. First, a Westpac bank manager mentioned a meeting which had been scheduled to occur on the date of Ms Hanson's death to address the Westpac accounts which were in arrears, but Mr Belling had not been told about the meeting and knew nothing about the accounts being in arrears. Second, the manager mentioned other accounts into which monies had been transferred, but Mr Belling knew nothing about those other accounts. Third, Ms Hanson's uncle suggested that Mr Belling should have a close look at his books, because "gambling was involved here".

[21] The outcome of the investigation conducted thereafter is, presumably, reflected in the evidence before me.

[22] It must first be observed that the evidence demonstrates the truth of the comment made by Ms Hanson's uncle. In the period from 2005 to 2014, Ms Hanson lost $805,444.63, gambling on poker machines. She could not have funded the extent of such losses from her lawful earnings. I infer that Ms Hanson's gambling formed at least part of the explanation for the fact that she caused the plaintiff companies to transfer a total of $2,805,794.18 into accounts under her control. The earliest transfer encompassed by that amount is on 10 July 2006 and the latest is on 14 October 2014.

[23] One question is how much of the total amount transferred represents stolen funds. Ms Hanson's parents concede that at least $2,447,306.42 was stolen. The plaintiffs contend the figure is a little higher. They contend, and subject to one caveat, I agree, that the appropriate methodology to identify the total amount stolen by Ms Hanson was to calculate the amount to which Ms Hanson was lawfully entitled for wages over the period commencing with the financial year ending 30 June 2007 to and concluding on the date of her death, and then to deduct that figure from the total amount transferred to all her accounts from the plaintiffs' companies. The caveat is that I would deduct from the $2,805,794.18 total amount transferred the two amounts (totalling $3,256.50) which were transferred into Ms Hanson's wages account after the date of Ms Hanson's death. My attention was not drawn to any basis from which it might be inferred that those amounts could have been stolen by her. That would give a figure of $2,802,537.68 from which lawful entitlements should be deducted.

[24] But there is a difficulty in identifying the amount to which Ms Hanson was lawfully entitled for wages. Mr Belling conceded that apart from the payroll summaries, which are tabs 23 and 24 from exhibit 1, the plaintiffs had no note or record of the employment conditions or wages applicable to Ms Hanson's employment. The only direct evidence as to the terms of her contract of employment was the proposition that when she was promoted to office manager she would move to a grade 4 level.

[25] For their part, and based on the hypothesis that Ms Hanson's contractual entitlement was to be paid strictly in accordance with the application of the applicable clerical award, the plaintiffs performed a calculation which applied the award rates which were applicable to the grades of clerical staff to which reference was made in Mr Belling's evidence. They derived a total amount of $266,316.59 and contended that that total must be regarded as the total of her lawful entitlement. The difference between her lawful entitlements so calculated and what she took was $2,539,477.59.[4] The plaintiffs contended that was the total amount stolen.

---

[3] The evidence of the comments made by the bank manager and Ms Hanson's uncle was not received as proof of the truth of what was said, but only as part of the explanation for why Mr Belling caused investigations to occur after the funeral.

[4] The plaintiffs' calculation does not deduct the two payments made after the date of Ms Hanson's death.

[26] I am not persuaded that the strict application of the relevant awards is the appropriate way to calculate what must have been Ms Hanson's lawful entitlements. As to this:

(a) Mr Belling's evidence was not a satisfactory basis from which to conclude that Ms Hanson's lawful contractual entitlements should be calculated by reference to award rates.

(b) Although Mr Belling said he made a policy decision that staff would be paid "award rates", he did not prove that Ms Hanson's contract of employment was struck in a way which included a reference to "award rates". Indeed, he did not seem to know what award rates were. He did not identify the applicable awards. His evidence did not equate his conception of "award rates" with the strict application of the applicable awards. Indeed, the awards refer to "levels" not "grades" of employees. What Mr Belling and his business conceived was a grade 3 or 4 employee was not necessarily the same as what the award conceived was a level 3 or level 4 employee.

(c) However, Mr Belling did see MYOB summaries which identified the total amount Ms Hanson and other staff members were paid as wages. Although those amounts were broadly consistent with the quantum which would flow from a strict application of the awards, they were not identical. Indeed the plaintiffs' own written submissions reveal that in 2005, Ms Hanson was paid at a rate a little under the legal award.

(d) I would infer that Mr Belling knew and approved of the rates of pay which gave rise to the amounts identified in the MYOB summaries he saw. I think that the appropriate inference is that the payments to Ms Hanson which are identified by those summaries are the amounts to which she was lawfully entitled as wages, because they are payments which should be regarded as having been authorized by Mr Belling.

[27] The summaries which appear in exhibit 1 at tabs 23 and 24 may be used to identify the amount to which Ms Hanson was lawfully entitled for wages over the financial years ending 30 June 2007 up to the last period with which they deal, namely 1 July 2014 to 13 August 2014. The total net pay revealed in those documents which is referable to Ms Hanson is $273,874.08. However account must be also be taken of her lawful entitlements between 13 August 2014 and her death on 23 September 2014, a period of 6 weeks. The evidence contains payroll advices covering that period, which record her being paid at the rates which were consistent with what is revealed by the summaries at that time. She was paid $1,530 net per fortnight, which would require adding $4,590 to the total lawful entitlement to get $278,464.08. The difference between her lawful entitlements so calculated and the $2,802,537.68 referred to at [23] above, is $2,524,073.60.

[28] I find that $2,524,073.60 is the total amount stolen.

[29] I will hear the plaintiffs on the form of judgment which should be made consequent upon that finding.

The claim in respect of the proceeds of the insurance policy

Introduction

[30] In October 2006, Ms Hanson effected a term life insurance policy with Asteron Life Ltd (**the insurer**) nominating her parents as beneficiaries in equal shares.

[31] Exhibit 5 tab D3 is the insurer's statement of the ninety-five premiums paid by Ms Hanson from the commencement of the policy to the time the final premium was paid on 1 September 2014. On about 9 February 2015, the insurer paid the policy benefit out to Ms Hanson's parents. Each received a little over $713,550.

[32] The plaintiffs contend that the final premium was paid out of funds stolen by Ms Hanson from the third and sixth plaintiffs' accounts. They claim a declaration that the proceeds of the policy were received by Ms Hanson's parents as trustees for the third and sixth plaintiffs.

[33] Shortly stated, the plaintiffs' case theory is this:

(a) Any money which Ms Hanson stolen was to be regarded as held on trust for the plaintiffs.

(b) Ms Hanson used stolen money to pay the final premium.

(c) By payment of that premium, she obtained insurance cover for the month in which she died.

(d) Therefore the entirety of the insurance benefit constitutes the form into which the stolen monies was converted, and thus the plaintiffs' property in equity.

[34] The remedy sought by the plaintiffs was "a declaration that the proceeds of the Asteron Life Policy were received by [Ms Hanson's parents] as trustees for [Belling Investments and Emmerdale Farming]", being the particular plaintiffs from whom the plaintiffs assert I should conclude the monies were taken.

[35] In the event that I was against the plaintiffs on the principal contention, they sought a declaration that they were entitled to 4/95^{ths} of the proceeds, on the hypothesis that 4 of the 95 premium payments were payments which should be regarded as payments made with stolen monies. I will come back to this alternative case.

[36] It is appropriate first to examine the terms of the policy.

<u>The policy as entered into on 31 October 2006</u>

[37] By a policy document issued 31 October 2006 Ms Hanson entered into a term life insurance policy with the insurer. At that time Ms Hanson was 23 years old.

[38] The policy document contained these parts:

(a) a cover sheet and an end sheet;

(b) a letter to Ms Hanson dated 31 October 2006;

(c) a single page schedule (**the schedule**)

(d) a page headed "Special Conditions on the policy";

(e) a page contained certain terms in relation to nominated beneficiaries (**the nominated beneficiaries terms**);

(f) the body of the policy, comprised of an index and 29 pages of policy conditions (**the policy conditions**).

[39] Only the documents referred to in (c), (e) and (f) are presently relevant.

[40] As to the schedule, the following observations should be made:

(a) The policy was described as a "term life policy".

(b) The benefit was described as "term life cover" for a sum insured of $1,000,000 for a monthly premium of $37.61 (including policy fee) and a policy expiry date of 30 October 2082 (when Ms Hanson would be 99, if she lived).

(c) The premium would be debited from a particular Westpac Banking Corporation Gympie account. (Other evidence revealed this was the same account into which Ms Hanson's legitimate wages were electronically transferred).

(d) The "Insured Person" was identified as Ms Hanson, a non-smoker born on 12 June 1983.

(e) The "Policy Owner" was also described as Ms Hanson.

(f) Important dates were identified as:

(i) the "policy anniversary" was 30 October each year;

(ii) the "policy commencement" was 30 October 2006;

(iii) the "policy issue" was 31 October 2006.

(g) The schedule also stated that the policy provided other benefits and features, namely:

(i) Stepped premium;

(ii) Funeral advancement benefit;

(iii) Automatic increase benefit;

(iv) Special events increase benefit.

(h) As will appear, the meaning of those benefits and features is set out in the policy conditions.

[41] As to the nominated beneficiaries terms:

(a) The terms provided as follows:

> **Nominated Beneficiaries**
>
> You can change the beneficiaries and the proportions paid at any time. Any change will not come into effect until we have confirmed it in writing. You can nominate up to 10 beneficiaries. A beneficiary must be an individual, company or a charitable institution.
>
> **When we will pay a Nominated Beneficiary**
>
> In the event of the death of the insured person while this policy is current and before the expiry date specified in the schedule, we will pay each nominated beneficiary the proportion of the sum insured allocated to them.
>
> If we have paid you a terminal illness benefit, any remaining sum insured will be payable to the nominated beneficiaries on the death of the insured person. If the full sum insured is paid there will be no further benefit payable.
>
> If a nominated beneficiary dies before the insured person we will pay the estate of the nominated beneficiary. If a nominated beneficiary is under the age of 18, we will pay their guardian.
>
> **When we will not pay a Nominated Beneficiary**
>
> If you transfer your policy, the sum insured will be paid to the new policy owner on the death of the insured person. The new policy owner cannot nominate beneficiaries under this endorsement.
>
> **Nominated Beneficiary** details

Name of Nominated Beneficiary	**Relationship to Owner**	**Date of birth of Beneficiary**	**Proportion of Sum Insured**
Norman Richard Hanson	Father	20/01/1945	50.00%
Dorothy Maureen Hanson	Mother	07/07/1950	50.00%
		Total	**100.00%**

(b) It can be seen that the second paragraph was, in effect, an insuring clause by which the insurer undertook to pay Ms Hanson's parents 50 per cent each of the $1,000,000 sum insured in the event of Ms Hanson's death and on the conditions that –

(i) the policy was current at the time of death; and

(ii) the death occurred before the expiry date, namely 30 October 2082.

(c) As will appear, the concept of policy currency was elaborated upon in the other policy terms.

[42] It is appropriate now to identify the relevant policy conditions.

[43] Clause 1.6 provided:

> 1.6 Who we will pay
>
> If you are the Policy Owner and have made a valid nomination which we have confirmed to you in writing, with the exception of the Funeral Advancement Benefit (please refer to section 5.7) and the Loyalty Funeral Benefit (please refer to section 5.8 if applicable), we will pay any benefit payable as a consequence of your death in accordance with that nomination.
>
> Other than in these circumstances, or unless otherwise indicated in this policy, payments by us will be made to the Policy Owner or, if that person has died, his or her legal personal representative, or a person we are authorised to pay under the relevant law.

[44] It may be noted that this clause operated in conjunction with the nomination of beneficiaries to which I have earlier referred.

[45] Clause 2.2 provided:

> 2.2 Paying for this policy
>
> To start and retain the cover provided under this policy, the premiums payable must be paid to us, as provided in section 8.

[46] It may be observed that this provision is the start of a number of provisions which (unsurprisingly) condition the continued retention (or currency) of the policy cover with the payment of premiums in accordance with section 8.

[47] Clauses 3 and 4 provided as follows:

> **3.0 Our obligations under this policy**
>
> 3.1 We guarantee to upgrade this policy
>
> From time to time we may make improvements to the Life Cover policy which are offered to you with no resulting increase in the premium. Where these offers are made and you are suffering a *pre-existing condition* at the time of the improvement, it will not apply in respect of any claim made which is affected by the *pre-existing condition*.
>
> In the event of a claim, you can be assessed against the terms of this policy before any upgrade on this policy, if in your opinion the improvements are less favourable.
>
> 3.2 We guarantee to continue this policy
>
> Except where otherwise expressly stated in this policy, if the premiums payable under this policy are paid in accordance with section 8, we will continue this policy until cover ends (please refer to section 4) without any more restrictive terms being included, regardless of:
>
> - the number of claims made; or
> - any changes to your health, occupation or pastimes.
>
> **4.0 When cover begins and ends**
>
> This policy commences on the *commencement date*, subject to our receipt of the first premium.
>
> Cover for death and *terminal illness* will end on the earliest of:
>
> - the date we received the Policy Owner's written request to cancel this policy;
> - the date of cancellation of this policy for non-payment of the premium (please refer to section 8.6);
> - the date of full payment of the *sum insured* for Life Cover;

- …
- the *expiry date* for Life Cover;
- the date of your death.

…

[48] Clause 3.2 is another express statement that the continuation of the policy cover is conditional upon payment of the premiums in accordance with section 8. Then clause 4.0 provides that so long as the first premium is received, the policy will commence on the commencement date and continue until cover ends in one or other of the means specified in the dot points. Specific reference to the possibility of cancellation of the policy for non-payment of the premium as set out in clause 8.6 is made.

[49] I earlier mentioned that the schedule specified that the policy provided certain other benefits and features, the details of which were set out in the policy conditions. They were:

(a) Stepped premium: The policy terms covering this benefit were set out in clause 8.2.1. The premium was not fixed until the policy expiry date in 2082. Rather, clause 8.2.1 set out a mechanism for the recalculation of the policy premium on each anniversary of the commencement date based on –

(i) the insurer's standard stepped premium rates for life cover applying at the date of recalculation;

(ii) Ms Hanson's sex, occupation and smoking status;

(iii) the then sum insured; and

(iv) Ms Hanson's age on her next birthday on or after the recalculation.

(b) Funeral advancement benefit: The policy terms covering this benefit were set out in clause 5.7. That clause set out a mechanism for payment of funeral expenses to the personal representative of Ms Hanson in the event of her accidental death during the first 3 years after the commencement date (or the date the policy was most recently reinstated) or, thereafter, on her death from any cause.

(c) Automatic increase benefit: The policy terms covering this benefit were set out in clause 5.4. That clause set out a mechanism by which, on each anniversary of the commencement date whilst the policy was in force, the insurer was obliged to offer to increase the sum insured by the greater of the "indexation factor" (being a CPI measure) and 5%, without any account being taken of Ms Hanson's age or any changes to her health, occupation or pastimes. Premiums would increase accordingly. The benefit applied unless Ms Hanson elected not to accept the offer.

(d) Special events increase benefit: The policy terms covering this benefit were set out in clause 5.6. That clause set out a mechanism by which on the occurrence of certain specified "special events" (e.g. marriage; birth or adoption of a child), and so long as Ms Hanson was 60 years old or less, she had the option of increasing the sum insured for life cover, without the need for further medical evidence.

[50] The insured was obliged to pay for the policy in accordance with section 8. Relevantly that section provided:

8.0 Paying for this policy

…

8.1 Payment of premiums

The Policy Owner must pay premiums on a monthly, quarterly, half-yearly or yearly basis. The payment frequency applying when this policy starts is shown in the schedule. The Policy Owner may select one of

> the other available payment frequencies listed above, or payment method, if premium payments are up to date, by providing a written request to us (please refer to section 1.4 for our contact details).
>
> …
>
> The Policy Owner must pay premiums in advance on or before the due date. The due date is:
>
> - the same date in the month the premium is payable as the *commencement date*; or
> - if the *commencement date* is the 29th, 30th or 31st, and there is no such date in the month the premium is payable, the due date is the last day of that month.
>
> …
>
> 8.6 We may cancel this policy if the premium is not paid
>
> If a premium payable under this policy is not paid, we will send the Policy Owner a notice at the address last notified to us by the Policy Owner specifying a date on which all cover will cease if the payment is not made. If we have not received the payment by that date we may cancel this policy by giving written notice of cancellation to the Policy Owner at the last known address. In some cases we will also send these notices to you (please refer to section 1.5).
>
> We may (but are not obliged to) reinstate this policy within 12 months of cancellation if the Policy Owner asks us to, in writing, and complies with any terms we imposed. If we determine to reinstate this policy, we will confirm the reinstatement and any further terms in writing to the Policy Owner.

[51] Clause 8.1 operated to oblige Ms Hanson to pay the nominated premiums in advance on or before the due date. The due date was the 30th of the month because that was the commencement date. That means, for example, the premium for the month of December in any one year would have to be paid on or before 30 November, or, if the month in which the payment was due was a February, the payment would have to be paid in the last day of February. Although policy payment was a contractual obligation, the obligation could be voluntarily and immediately terminated by giving the insurer notice under clause 4.0. The insurer, however, did not have any equivalent option for voluntary termination.

[52] The terms of clause 8.6 reveal the intention that an insured will still be regarded as "covered under this policy" (cf clause 5.1) in the event that a premium has not been paid monthly in advance as required by clause 8.1 but that a mechanism is set out by which the insurer can cause coverage to "cease" (to use the language of clause 8.6). (The plaintiffs contended that insurance cover automatically ceased in the event of non-payment of the premium by the due date, but that argument flew in the face of the terms of clauses 4.0 and 8.0 and had no merit.) It is only when notice has been given, and the insured has not responded by payment, that the insurer may cancel the policy. It is only if that procedure has occurred that the insured should be regarded as not covered under the policy. I do not think that the reference to "currency" in the special condition or the reference to "retention" in clause 2.2 should be taken to refer to anything different.

<u>The policy was current as at the date of death on 23 September 2014</u>

[53] The first premium under the policy was paid by direct debit on 31 October 2006. Thereafter the premium was paid each month, up to and including the payment which was made for the month of September 2014. In this regard:

(a) Ms Hanson's bank statement for that Westpac account records that payment was made to the insurer on 1 September 2014 in an amount of $62.66. The plaintiffs allege and Ms Hanson's parents admit that this payment was the last premium paid before Ms Hanson's death.

(b) The insurer recorded that payment as having been made by direct debit from the Westpac bank account on 31 August 2014 in an amount of $36.97 and that the payment meant that the policy was "paid to 30 September 2014". An equivalent recording was made in respect of all of the earlier monthly payments.

(c) The evidence did not explain the discrepancy in the date the payment was deducted or the amount which was attributable to the premium. So far as the amount was concerned, I was told from the bar table that the explanation may have been that the insurer was being paid for two policies, one being a term life policy and the other being a total and permanent disablement policy (the latter policy being unrelated to these proceedings).

[54] The payment made to the insurer (whether on 31 August or 1 September) was the 95th payment of the monthly premium, including the first premium.

Was the final premium paid using stolen money?

[55] For the plaintiffs' principal claim, the first critical question is whether the final premium was paid using stolen money.

[56] Ms Hanson's Westpac account from which the premium was paid was slightly in overdraft as at 6 August 2014, which gives a starting point for the exercise of determining whether the premium was paid out of stolen funds.

[57] Ms Hanson's payroll advices record and the Westpac account records reveal:

Pay period	Pay date	Amount	Date received into Westpac account
23 June to 6 July 2014	7 July	$1,530	9 July
7 July to 20 July 2014	22 July	$1,530	22 July
21 July to 3 August 2014	4 August	$1,530	30 July
4 August to 17 August 2014	19 August	$1,530	19 August
18 August 2014 to 31 August 2014	2 September	$1,520	2 September
1 September to 14 September 2014	16 September	$1,520	16 September

[58] Between 6 August 2014 and 1 September 2014 (the day on which the premium was deducted):

(a) a total of $11,254.12 was credited to the account, consisting of:

(i) a payment of $4,644.12 from the Australian Taxation Office;

(ii) $5,760.00 from the plaintiffs, which Norma had caused to be paid to herself; and

(iii) $850.00 from Ms Hanson's sister, Ms Moxey;

(b) a total of $10,010.56 was debited from the account (not including the final premium).

[59] Yet during that period, by the application of the approach on which I calculated the total amount stolen, Ms Hanson was entitled to be paid at the rates in the MYOB records, including her payroll advices, at least to the extent they were consistent with the summary documents which Mr Belling saw. At best during that period she was entitled to be paid one payment of $1,530 on 19 August, or two if the payment which was supposed to be made on 4 August arrived in the account late. But she had caused that payment to be made to herself early and the only payment received consistent with the net wages payment she was entitled to receive during the relevant period was one payment of $1,530 which was received on 19 August. I infer that the other payments which she caused the plaintiffs to make to her, namely payments of $1,000 made on 7, 8 and 27 August and a payment of $1,230 made on 29 August, represent stolen monies. (I reject as baseless the argument

advanced by Ms Hanson's parents that anything identified as a transfer for wages should be regarded as Ms Hanson's lawful entitlements as such.)

[60] When one does a day-by-day analysis of the transactions in the Westpac account in the period between 6 August 2014 and the date on which the final premium was paid, in accordance with the rule in *Re Hallett* (1880) 13 Ch D 696, one is left with the conclusion that the balance of the account immediately prior to the payment of the premium was entirely reflective of stolen monies. The same conclusion could be reached by reference to the more flexible approach discussed in *Distinctive FX Pty Ltd v Van Der Slot* [2015] VSCA 328 per Beach, McLeish JJA and Ginnane AJA at [49] and *Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd* [2017] VSC 101 per Hargrave J at [408] et seq.

[61] It follows that I conclude that the final premium was paid from stolen monies.

[62] The plaintiffs' pleading asserts that the plaintiffs have identified that the monies must have been taken from accounts in the name of the third and sixth plaintiffs (i.e. Belling Investments and Emmerdale Farming) and that is why, if otherwise they persuade me of the merits of their case, they seek declarations that the proceeds of the policy are held on trust for those two companies.

[63] I received no detailed examination of documents demonstrating the correctness of the allegation concerning source of funds, although a summary which seemed to refer to source documents not contained in evidence was set out in tab 97 of exhibit 1. It supported the plaintiffs' allegation concerning source of funds.

[64] I should observe, however, that I would not regard the course of pleading as a satisfactory basis for regarding the allegation as to source of payments as still in issue at the trial:

(a) The amended statement of claim pleads the accuracy of the information in schedule A at [12] and [14].

(b) Those allegations are traversed by non-admission in the defence at [5].

(c) The assertion that the details which are set out in schedule A as to the payments made into the Westpac account is repeated in the amended statement of claim at [23].

(d) Those allegations are traversed by non-admission in the defence at [19].

(e) In each case the only explanation for the traverse is that "the records in [the defendants'] possession and under their control do not reveal the truth or otherwise of those matters."

(f) By the time of trial, and absent any complaint about disclosure, I would not regard that as a satisfactory explanation for the continuation of the traverse by non-admission as to the source of funds. Rule 166(6) of the UCPR imposes a continuing duty on defendants.

[65] It is not necessary however to resolve whether the defendants should be treated as having admitted the allegations made about the source of funds, because, during the course of trial, I directed the second and third defendants to prepare a document which identified by reference to the written trial submissions which had been prepared on behalf of the plaintiffs, which of the factual submissions there made were opposed, and why. In due course they provided me with a marked up form of submission which did that. That document did not indicate that the allegation about the third and sixth plaintiffs being the source of funds was disputed. The issue identified was whether it could be demonstrated that the final premium was paid out of stolen funds, not from whom the monies were stolen. There is no reason not to accept the plaintiffs' allegations concerning source of funds.

[66] The result is that I conclude that the final premium was paid from funds which Ms Hanson stole from the third and sixth plaintiffs.

Tracing the payment made from stolen funds

[67] The plaintiffs' argument starts with the proposition that the analysis conducted by application of *Re Hallett* justifies the conclusion that the monies in the Westpac account immediately before the payment of the final premium must be regarded as held on trust for the plaintiffs.[5] Stolen monies are trust monies in the hands of the thief.[6] When Ms Hanson caused the final premium to be paid out of the account at that time, the possibility of tracing was enlivened.[7] Tracing is authoritatively described for present purposes by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102 at 128:

> Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim.

[68] Thus far in the analysis, the plaintiffs and Ms Hanson's parents would not be in dispute. Both sides accepted the authority for present purposes of *Foskett v McKeown*. The difference between them lay in the application of the law as there explained.

[69] For Ms Hanson's parents, the application was straight-forward. In *Foskett v McKeown* the majority supported the following basic rule stated by Lord Millett at 131 (Lord Browne-Wilkinson agreeing at 108 and Lord Hoffman at 115-116) (original emphasis):

> Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled *at his option* either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset.

[70] Ms Hanson's parents contended that the present policy was acquired by the payment of all 95 premiums, so that at most the plaintiff was entitled to a proportionate share of the death benefit, the appropriate proportion being determined either by the number of premiums paid with trust monies as against the total number of premiums paid, or by the sum of all of the premiums paid with trust monies as against the sum of all premiums paid.

[71] The plaintiffs, on the other hand, contended that the asset concerned was insurance cover for the month of September 2014, and that insurance cover was acquired by the payment of the premium which was paid in advance for that month; that premium was paid entirely from trust monies; and, accordingly, the entitlement is to 100% of that asset (and 100% of the proceeds which derived from it).

[72] In terms of causation, there is something to be said for both arguments, because each looks at the causation proposition from a different perspective on the timeline of events leading up to Ms Hanson being insured at the time of her death. It makes sense to say that the only reason the insurance cover was in place at the time of Ms Hanson's death was because she had caused it to be maintained from its inception, and at a cost of paying the 95 monthly premiums, without a gap. On the other hand, it makes just as much sense to say that the cover obtained for September 2014 was retained because Ms Hanson stole enough money

---

[5] or, more accurately, Ms Hanson's chose in action as against Westpac for those monies, would be held on trust for the plaintiffs.

[6] *Black v S Freedman & Co* (1910) 12 CLR 105 per O'Connor J at 110.

[7] *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 per Leeming JA (Bathurst CJ and Sackville AJA agreeing) at [39].

that the automatic debit operated to pay the premium, as opposed to her deciding voluntarily to cancel the cover by notice under clause 4.0 (because she could not afford it) or placing the insurer in a position of itself cancelling the policy under clause 8.6.

[73] But Lord Millett wrote that the question was "one of attribution not causation".[8] He wrote:[9]

> The question is not whether the same death benefit would have been payable if the last premium or last few premiums had not been paid. It is whether the death benefit is attributable to all the premiums or only to some of them. The answer is the death benefit is attributable to all of them because it represents the proceeds of realizing the policy, and the policy in turn represents the product of all the premiums.

[74] How does one go about the process of attribution? It seems to me that the focus is on identification of the nature of the asset, and its cost.

[75] It is evident that Lord Millett regarded it to be critical to appreciate the nature of the asset into which the plaintiffs contend the ability to trace. In circumstances of tracing into proceeds of an insurance policy, he regarded it as critical to appreciate that the plaintiffs trace first into the policy and thence into the proceeds.[10] The "policy" was a short-hand description for the asset into which the misappropriated funds could be traced. He wrote:[11]

> The word "policy" is here used to describe the bundle of rights to which the policyholder is entitled in return for the premiums. These rights, which may be very complex, together constitute a chose in action, viz, the right to payment of a debt payable on a future event and contingent upon the continued payment of further premiums until the happening of the event. That chose in action represents the traceable proceeds of the premiums; its current value fluctuates from time to time.

[76] One needs, accordingly, to examine the nature of the contract which gave rise to the chose in action.

[77] In *Foskett v McKeown* the insurance policy under consideration was a whole life insurance policy which also had the additional feature of a particular investment content. The policy provided that, in consideration of the first premium and of the further premiums payable under the policy, a specified death benefit was to be paid on the insured's death, namely whichever was greater of £1,000,000 and the aggregate value of units notionally allocated to the policy. The policy provided for those units to be allocated on receipt of each premium, and that units were to be cancelled each year in order to meet the cost of the life cover for that year. The surrender value of the policy was the aggregate value of the uncancelled units from time to time.

[78] Lord Browne-Wilkinson noted that (emphasis added):[12]

> **Although primarily a whole-life policy assuring the sum assured of £1m, the policy had an additional feature, viz, a notional investment content** which served three purposes. First, it determined the surrender value of the policy. Second, it determined the alternative calculation of the death benefit if the value of the notionally allocated units exceeded the sum assured of £1m. Third, the investment element was used to pay for the cost of life cover after the payment of the second premium in November 1987.

[79] Lord Millett wrote (bold emphasis added):[13]

> In the case of **an ordinary whole life policy the insurance company undertakes to pay a stated sum on the death of the assured in return for fixed annual premiums payable throughout his life. Such a policy is an entire contract, not a contract for a year with a right of renewal. It is not a series of single premium policies for one year term assurance. It is not like an indemnity policy where each premium buys cover for a year after which the policyholder must renew or the cover expires.** The

---

[8] *Foskett v McKewon* per Lord Millett at 137.
[9] *Foskett v McKeown* per Lord Millett at 137.
[10] *Foskett v McKeown* per Lord Millett at 134.
[11] *Foskett v McKeown* per Lord Millett at 134.
[12] *Foskett v McKeown* per Lord Browne-Wilkinson at 106.
[13] *Foskett v McKeown* per Lord Millett at 133.

> fact that the policy will lapse if the premiums are not paid makes no difference. The amounts of the annual premiums and of the sum assured are fixed in advance at the outset and assume the payment of annual premiums throughout the term of the policy. The relationship between them is based on the life expectancy of the assured and the rates of interest available on long term government securities at the inception of the policy.
>
> In the present case the benefits specified in the policy are expressed to be payable "in consideration of the payment of the first premium already made and of the further premiums payable". The premiums are stated to be "£10,220 payable at annual intervals from 6 November 1985 throughout the lifetime of the life assured". It is beyond argument that the death benefit of £1m. paid on Mr Murphy's death was paid in consideration for *all* the premiums which had been paid before that date, including those paid with the plaintiffs' money, and not just some of them. Part of that sum, therefore, represented the traceable proceeds of the plaintiffs' money.

[80] The idea of the whole life insurance policy being an entire contract was similar to that which had been earlier expressed by the Supreme Court of the United States in *New York Life Ins. Co. v Statham*, 93 U.S. 24, (1876). The majority opinion was delivered by Bradley J:

> We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,-as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

[81] The proposition that whole life policies should be regarded as indivisible advanced in *New York Life Ins. Co. v. Statham* has been consistently followed in the United States. It has been cited with approval in Australia: see *Willis v Commonwealth* (1946) 73 CLR 105 per Starke J at 115.

[82] On the other hand, in *Fradianni v Protective Life Ins. Co*., 145 Conn. App. 90 (2013), the Appellate Court of Connecticut noted that there were substantial differences between different types of life insurance policies, and seemed to countenance the proposition that all life insurance policies might not necessarily be regarded in the way as outlined in *New York Life Ins. Co. v. Statham*:

> Because it is not necessary to the resolution of this appeal, we do not pass on the question of whether a variable universal life insurance policy, such as the plaintiff's, is, in fact, indivisible, as with whole life or term life insurance policies. We do note, however, that there are substantial differences among these kinds of policies. "Term life insurance is pure protection. The policyholder pays the insurance company a premium to protect against the risk of death for a limited time period ... renewable at the insured's option.... Whole life was developed to solve the problem caused by individuals living to older ages when the premiums for term insurance became prohibitively expensive. With whole life the insured pays a level premium over the life of the policy. In early years the premium substantially exceeds the risk of mortality and policy expenses, and the insurance company uses this excess premium for investment and development of a policy reserve or cash value. The reserve value increases constantly over the life of the policy and makes up part of the policy death benefit. The insurance company's risk as measured by the difference between the policy death benefit and reserve value decreases over the life of the policy. At older ages the insurance company need not collect a 'term' type premium for the entire policy death benefit. Rather, it merely needs a premium sufficient to cover its decreasing risk exposure....

[83] The plaintiffs in the present case point out that the present insurance policy was very different to that which was dealt with in *Foskett v McKeown* (and, it would follow from that submission, to the whole life policy discussed in *New York Life Ins. Co. v Statham)*. That submission may be accepted. There was no aspect of investment involved. There was no surrender value. There was no statement that the benefits payable were in consideration of the first premium and all other premiums payable. Premiums were not level for the whole of the life of the policy, but were re-evaluated, at least by reference to some risk factors, on an annual basis. The policy was, as the policy schedule stated, a "term life policy" which provided a benefit described as "term life cover". Term life insurance is life insurance which pays a benefit in the event of the death of the insured during a specified term. In this case, clause 2.2 was explicit: "To start and retain the cover provided under this policy, the premiums payable must be paid to us, as provided in section 8." Section 8, when read with the schedule, obliged the payment of premiums monthly in advance. In a very real sense, and consistently with the wording of clause 2.2, the consideration for the retention of cover for any particular month was the payment in advance of the premium for that month. The plaintiffs suggest the tracing rules apply for the cover obtained for any particular month in the same way that they would if trust monies were used to purchase a winning lottery ticket.

[84] In my view the plaintiffs correctly contend that on the specific terms of this policy, cover was provided on a month by month basis by paying the monthly premiums in advance as required. The cover commenced on 30 October 2006, the payment for which was received by the insurer on 31 October 2006. That payment ensured cover until 30 November 2006. The cover for the period up to 30 November 2006 was attributable to that first payment. That process of payment in advance, securing cover for the following month continued on a month by month basis until Ms Hanson died. The amount of the cover varied over time, with the occurrence of other events for which the policy provided.[14] The cost to the insured of insurance cover for any particular month, was the payment in advance of the premium for that month. In the present case, the insured met the cost for the month in which she died entirely out of an asset she held on trust for the third and sixth plaintiffs. The fact that Ms Hanson had insurance cover for the month she died was attributable, as the plaintiffs contend, to the payment which was made in advance for that month.

[85] To put it another way, the right to any benefits which might flow from the insurance cover for September 2014 – which, to my mind, was the chose in action concerned – was an asset the retention of which was attributable to the fact that Ms Hanson stole money from the third and sixth plaintiffs and used it to pay the premium which ensured its retention. The point might have been more obvious if the payment was made in response to a notice from the insurer threatening cancellation, but there is no difference in kind between that scenario and what actually happened. In my view, that chose in action should properly be regarded as representing the property of the particular plaintiffs whose monies had been taken and used to pay the premium. So may the proceeds of the chose in action, namely the proceeds which were paid out to Ms Hanson's parents on Ms Hanson's death. They took those proceeds as volunteers.

[86] The plaintiffs are entitled to the declaration they seek, namely that the proceeds of the Asteron term life policy 81318923 were received by Ms Hanson's parents as trustees for the third and sixth plaintiffs.

[87] It was common ground that Ms Hanson's parents had conducted the following transactions with funds which they had obtained from receipt of the insurance proceeds:

---

[14] That is the reason why, by the time of Ms Hanson's final premium payment, the sum insured had increased from the initial sum of $1,000,000.

(a) on 12 February 2015, payment of Ms Hanson's funeral expenses in the amount of $13,843.50;

(b) on 26 February 2015, a gift to Glen Hanson in the amount of $148,300;

(c) on 26 February 2015, repayment of their home loan in respect of the family home in the amount of $51,833.61;

(d) on 3 March 2015, purchase of a motor vehicle in the amount of $61,495;

(e) on 28 March 2015, deposit into a term deposit at Bendigo Bank in the name of Mr Hanson, in the amount of $80,000;

(f) on 2 April 2015, deposit into Mrs Hanson's First Colonial superannuation account in the amount of $540,000;

(g) on 2 April 2015, deposit into Mr Hanson's First Colonial superannuation account in the amount of $180,000;

(h) on 13 April 2015, a loan to John Hanson repayable by July 2015 in the amount of $200,000;

(i) on 4 May 2015, a deposit to their solicitors' trust account in the amount of $20,000; and

(j) on 6 May 2015, a deposit to their solicitors' trust account in the amount of $100,000.

[88] The statement of claim also sought declarations which might be thought to be ancillary to the primary declaration as to the proceeds of the policy, and consequent upon the agreed facts concerning the disposition of the proceeds, as follows:

(a) a declaration that so much of Ms Hanson's parents' interest in the family home as represents the ratio between –

(i) the amount of the $51,833.61 payment referred to at [87](c); and

(ii) the value of the family home at the time of the payment,

is held on trust by Ms Hanson's parents for the third and sixth plaintiffs;

(b) a declaration that the motor car referred to at [87](d) is held on trust by Ms Hanson's parents for the third and sixth plaintiffs;

(c) a declaration that the amounts identified at [87](e), [87](f), [87](g), [87](i) and [87](j) are held on trust by Ms Hanson's parents for the third and sixth plaintiffs.

[89] I did not receive any substantive written or oral submissions from either side addressing the plaintiffs' claim to those declarations. Now that they have the benefit of my reasoning and conclusions as to the principal claim in relation to the proceeds, I will hear the parties on those questions.

Findings referable to the plaintiffs' alternate case in relation to the proceeds

[90] There were four premiums which the plaintiffs contended could be identified as paid from monies stolen by Ms Hanson. In case I am wrong in the analysis carried out under the previous heading, I should find the facts which may permit an appeal court to make an appropriate declaration in relation to the plaintiffs' alternate case. I do so below.

[91] I have already dealt with the final premium: see [55]-[66] above.

[92] As to the payment made from the Westpac account on 31 October 2011:

(a) The premium of $57.32 was paid from the Westpac account on 31 October 2011.

(b) The appropriate inference as to Ms Hanson's lawful entitlement is that the amounts recorded as being owed as identified in the payroll advice for that period were her lawful entitlements, namely two payment of $1,432.80 made on 11 October 2012 and 25 October 2012 (of which payments of $1,362.80 were in fact made).

(c) On that basis, as at 27 October 2011, there was $4,793.58 in the account, of which $2,000 had been stolen from the tenth plaintiff and deposited on that day and, it may be assumed conservatively, the balance was Ms Hanson's own funds.

(d) Assuming she spent her own monies first, and preserved the $2,000 as she was obliged to do, by the time of the payment of the premium there was only $916.40 in the account. That amount must be regarded as comprised entirely of monies held on trust for the tenth plaintiff.

(e) Accordingly I find this payment was made from those funds.

[93] As to the payment made from the Westpac account on 3 January 2012:

(a) The premium of $57.32 was paid from the Westpac account on 3 January 2012.

(b) It should be inferred that the payments of $1,362.80 paid on 6 December 2011 and 20 December 2011 were payments of Ms Hanson's lawful entitlements from the plaintiff companies.

(c) On that basis, on 2 December 2011, $4,000 deposited that day had been stolen from the tenth plaintiff. And on 20 December 2011, $696.37 deposited that day had been stolen from the second plaintiff.

(d) Assuming Ms Hanson spent her own monies first, and preserved monies she held on trust as she was obliged to do, by the time of the payment of the insurance premium on 3 January 2012, there was only $3,363.28 in the account. That amount must be regarded as comprised entirely of monies held on trust for the second and tenth plaintiffs.

(e) Accordingly I find this payment was made from those funds.

[94] As to the payment made from the Westpac account on 1 March 2013:

(a) The premium of $58.74 was paid from the Westpac account on 1 March 2013.

(b) It should be inferred that the payments of $1,414.00 paid on 5 February 2013 and 19 February 2013 were payments of Ms Hanson's lawful entitlements from the plaintiff companies.

(c) On that basis, on 4 February 2013, $2,000 deposited that day had been stolen from the tenth plaintiff. And on 14 February 2013, $1,250 deposited that day had been stolen from the second plaintiff.

(d) Assuming Ms Hanson spent her own monies first, and preserved monies she held on trust as she was obliged to do, by the time of the payment of the insurance premium on 1 March 2013, there was only $895.26 in the account. That amount must be regarded as comprised entirely of monies held on trust for the second and tenth plaintiffs.

(e) Accordingly I find this payment was made from those funds.

[95] In case it matters, I observe that, just as was the case in relation to the final premium, the payments for each of the foregoing premiums was greater than the amounts recorded by the insurer as premiums which it received in respect of the policy: see exhibit 5 tab D3. The discrepancy was not explained in the evidence. As I have earlier mentioned, the explanation may have been the existence of a further unrelated policy with the insurer.

The claim in relation to the BT death benefit

[96] The plaintiff companies who paid to Ms Hanson her lawful entitlements also made superannuation contributions. By this process she held two superannuation accounts with BT Business Super.

[97] The plaintiffs sought a declaration that the death benefit amount payable under the superannuation plan is available to settle the debts of Ms Hanson's estate.

[98] The evidence before me reveals the following.

[99] Ms Hanson held two BT Business Super accounts (account numbers 600008292562 and 600002170360). Westpac Securities Administration was the Trustee of the BT Business Super Plan.

[100] Ms Hanson had not nominated any beneficiary in respect of either account.

[101] Section 6.3(k) of the governing deed (**the Trust Deed**) provides:

> The Trustee must pay a Residual Death Benefit to:
>
> (i) the Member's or Beneficiary's Legal Personal Representative; or
>
> (ii) if there is no Legal Personal Representative:
>
> (A) one or more of the Member's or Beneficiary's Dependants in proportions determined by the Trustee; or
>
> (B) if none, such other persons as are permitted under the Relevant Law.

[102] The term "Legal Personal Representative" was defined as follows:

> "Legal Personal Representative" has the meaning given to that term in SIS and, for the purposes of the Rules, a deceased Member may be deemed not to have a Legal Personal Representative if:
>
> (a) the Death Benefit is greater than the Probate Limit and, to the trustee's knowledge:
>
> (i) the Member dies with a valid will; and
>
> (ii) probate has not been granted within 6 months of the Member's death; or
>
> (b) the Trustee has a reasonable belief that the Member died without a valid will and letters of administration have not been issued within 6 months of the Member's death.

[103] "SIS" was a reference to the *Superannuation Industry (Supervision) Act* 1993 (Cth). Section 10 of that Act relevantly provided:

> ***legal personal representative*** means the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person.

[104] Purporting to act in accordance with s 6.3(k) of the Trust Deed, the Trustee of the BT Business Super Plan determined in April 2016 to pay the total death benefit of both accounts to Ms Hanson's parents in equal shares. It appeared to be common ground that the death benefit was an amount which an insurer paid to the Trustee pursuant to an insurance policy.

[105] The plaintiffs speculated that the Trustee might have been misled into paying the death benefit, but there was no evidence to support that proposition. As Ms Hanson's parents point out:

(a) Under the Trust Deed, the Probate Limit referred to in the definition of Legal Personal Representative was deemed to be zero unless otherwise set by the Trustee. There being no evidence that that had occurred, there is no reason not to conclude that it was not deemed to be zero.

(b) On that basis, the Death Benefit would have been greater than the Probate Limit, and given the evidence adduced by Ms Moxey at the beginning of the trial, it may well have been to the trustees' knowledge that Ms Hanson had died with a valid will and probate had not been granted. Certainly there was no evidence to suggest the contrary.

(c) If that were so, it would have been permissible for the Trustee to deem Ms Hanson not to have had a Legal Personal Representative, and, accordingly, to exercise the discretion conferred by s 6.3(k).

[106] There is no reason to think that the Trustee erred in determining to pay the death benefit out to Ms Hanson's parents rather than to Ms Hanson's estate. Accordingly, there is no reason to think that any right to receive the death benefit from the Trustee constituted an asset of the estate, or, if it did, the right was not subject to the possibility of an exercise of discretion to pay the benefit to someone else, which, given that that has happened, means that there is now no utility in making any declaration. Accordingly, I decline to make the declaration which the plaintiffs seek.

[107] If the evidence had suggested that the death benefit was an asset of the estate, it would have been necessary to consider whether s 205 of the *Life Insurance Act* 1995 (Cth) precluded the use of the benefit to meet the debts of the estate. If it did, then that would have been another reason not to make the declaration sought. In light of the state of the evidence concerning the disposition of the death benefit and my conclusion as expressed in the previous paragraph, it is not necessary to consider this issue.

Claims for benefits allegedly received from Ms Hanson with knowledge of her wrong-doing

[108] The plaintiffs' pleaded case sought the following declarations, the struck through elements of which were abandoned at the trial:

(a) A declaration that the following amounts (which were said to have been amounts paid by Ms Hanson on behalf of her parents) were amounts received by Ms Hanson's parents as trustees for the plaintiffs:

(i) in 2014, home loan payments in the amount of $12,180;

~~(ii) between 2006 and 2013, telephone bills in the amount of $12,324.83;~~

~~(iii) between 2006 and 2014, electricity bills in the total amount of $7,440.62;~~

~~(iv) between 2012 and the date of her death, home and contents insurance payments for the family home, in the total amount of $3,308.84; and~~

~~(v) between 2012 and the date of her death, car insurance for Suzuki Jimny Sierra, registration number 921 SCA owned by Mrs Hanson, in the total amount of $1,092.12.~~

(b) A declaration that such of the following chattels (which were said to have been purchased by Ms Hanson for her parents) as remains in the possession of Ms Hanson's parents is held on trust by them for the plaintiffs:

(i) between 2009 and 2014, furniture from Harvey Norman, to the total value of $43,802;[15]

[15] The figure mentioned in the amended statement of claim was $27,121.26, but that figure was altered to $46,206 by particulars delivered in April 2016, although the figure mentioned in the amended statement of claim was not formally altered. During the trial the plaintiffs sought leave to amend the figure. I granted that leave, permitting them to insert the slightly smaller figure of $43,802 which had been demonstrated by the documentary evidence.

(ii) ~~between March and September 2009, furniture from Beds R Us in the amount of $957.00;~~

(iii) ~~between August 2009 and December 2009, furniture from Super A Mart in the amount of $3,578.75; and~~

(iv) on or about 24 October 2013, an aboveground pool from Gympie Pool World for the amount of $6,875.

[109] I make the following further observations as to those claims:

(a) Ms Hanson's parents admitted that in 2014, Ms Hanson had made home loan payments on their behalf in the amount of $7,540. Accordingly the declaration identified at [108](a)(i) was pressed only to the extent of the admitted amount. During the course of the trial it became common ground that the plaintiffs could demonstrate apart from one payment for $290, the source of the funds for those payments must have been stolen funds.

(b) Ms Hanson's parents admitted that she purchased the aboveground pool for them referred to in [108](b)(iv). During the trial the parties agreed that the appropriate value was $5,372.22 and that the source of the funds for payment was stolen funds.

(c) There was no dispute between the parties that the appropriate remedy was a declaration that Ms Hanson's parents hold their interest in the family home subject to an equitable lien in favour of the plaintiffs in the amount of $12,622.22.

[110] The result was that the only issue outstanding was whether there should be any remedy in respect of the Harvey Norman payments. As to this:

(a) The relief claimed was "such of the property purchased as alleged in paragraph 35(b) as remains in the possession of [Ms Hanson's parents] is held on trust by them for the Plaintiffs". Relevantly paragraph 35(b) stated "between 2009 and 2014, furniture from Harvey Norman, to the total value of $$43,802".

(b) During the course of the trial I pointed out to the plaintiffs' counsel that I thought there was some difficulty in being persuaded to make a declaration that property was held on trust, but without identifying which property was said to be held on trust.

(c) On the last day of trial, counsel for the plaintiffs flagged for the first time the possibility that Ms Hanson's parents should be required to account to the plaintiffs in respect of the various unidentified items making up that expenditure.

(d) Two alterations to the relief claimed were then proposed. First, a claim for a declaration that specific identified items were held on trust by Ms Hanson's parents. Second, that they "account to the plaintiffs for each item of property purchased by Ms Hanson from Harvey Normal between 21 June 2009 and 23 September 2014, received by them", save for those covered by the first claim.

(e) Both formulations were opposed by Ms Hanson's parents. Ultimately an application for leave to amend was made in relation to the first formulation. I granted that application. The sole relief claimed in respect of those payments became:

> A declaration that the following items of property are held on trust by the second and third defendants for the plaintiff:
>
> (a) LG 42" FHD LCD Television;
>
> (b) Breville Automated Teamaker;
>
> (c) Remington Professional Pro D2020 Hairdryer;
>
> (d) Nespresso Citizen Coffee Maker;

(e) Electrolux Vacuum Cleaner;

(f) Sony Blu-Ray Player;

(g) Sony Bravia Television;

(h) Samsung Blu Ray player;

(i) Tauris 1.5m HDMI Cable;

(j) Satellite Laptop Computer;

(k) Belkin 15.6" Notebook Computer Bag;

(1) Electrolux Ergospace Vacuum Cleaner;

(m) Samsung Washing Machine;

(n) Midea Portable Cooling Unit;

(o) Compaq Personal Computer.

[111] That remedy was sought on the basis that the evidence demonstrated that those chattels were purchased by Ms Hanson for her parents, by using funds stolen from the plaintiffs. As pleaded, the plaintiffs advanced a case which sought to prove that Ms Hanson's parents must have known that stolen monies were being used to buy the chattels concerned: see amended statement of claim at [34]-[36]. But, as the defendants correctly pointed out, if stolen monies were used to buy these things "for" Ms Hanson's parents, knowledge would not have to be proved: the parents would have taken as volunteers.

[112] The plaintiffs' documentary evidence proved up the details set out in schedule 4 appended to their written submissions. That schedule identified that during the period from July 2009 to February 2014 Ms Hanson made a miscellany of minor expenditures at Harvey Norman which together totalled $43,802.52. The schedule identifies the particular accounts from which the payments were made, and, for the most part, linked up with the particulars which had previously been provided.

[113] But although the documentary evidence proved that payments of those amounts were made, it did not descend into saying what the payments were for, except for the handful of items in respect of which invoices were found and matched up with the payments. Those items were the items listed in the amended form of relief claimed. The total amount expended was $6,546.85. The invoices concerned were:

(a) 12 December 2009 invoice for "Electrolux ergospace vacu" and "Bissell Pet Odour Formula" for $339.95;

(b) 13 December 2009 invoice for "Samsung 7 kg Front Load Wa" and extended warranty for $938;

(c) 24 December 2009 invoice for "Midea Portable Cooling" for $720;

(d) 19 June 2010 invoice for "LG 42 FHD LCD" for $960;

(e) 12 September 2010 invoice for "Remington Professional PR" and "Nespresso Citiz Coffee" for $525.95;

(f) 14 May 2011 invoice for "Electrolux ultraactive" and "Sony Entry USB Bluray" for $928.95;

(g) 14 June 2011 invoice for "Compaq CQ3420AN PC" for $533;

(h) 5 May 2012 invoice for "Breville automated tea maker" for $289;

(i) 29 September 2012 invoice for "Sony Bravia 26 HX550" and "Samsung 2D Bluray Player" and "Tauris 1.5m HDMI cable" for $497;

(j) 5 July 2014 invoice for "Satellite C50-B02F DNX" and "Belkin 15.6 NBK Bag + Pocket" for $815.

[114] The defendants accepted that any of the items which were the subject of those invoices which were paid for from any of Ms Hanson's accounts other than the Westpac account, must have been paid for out of stolen funds. That meant that the defendants accepted that all of the items, except the two items the subject of the invoices in 12 and 13 December 2009, were paid for out of stolen funds, and those two items were only partially paid for out of stolen funds.

[115] I make the following observations as to this claim.

[116] First, although the evidence proved that Ms Hanson paid Harvey Norman for these items, it did not demonstrate that she did so for her parents (as opposed to for herself or as gifts for someone else). I was asked to infer that she did so because (1) Ms Hanson lived with her parents; (2) the items were not listed in a statement of assets and liabilities for Ms Hanson's estate; and (3) the unexplained failure of either of Ms Hanson's parents to give evidence entitled me more readily to draw any inference fairly to be drawn from the other evidence by reason of their being able to prove the contrary had they chosen to give evidence. But, for the following reasons, I find myself unable to reach a reasonable and definite inference that the plaintiffs' contention is correct:

(a) The only evidence of the statement of assets and liabilities of the estate was a statement of assets and liabilities which had been prepared "for distribution purposes". What that meant was unexplained. What degree of materiality went into the preparation of the document was unexplained. The items were all items which may be regarded as consumer electrical items. Given the age and comparative value of the items it would hardly be surprising if they were not listed in the statement of assets and liabilities.

(b) Even if I used the absence of reference to the items in the statement of assets and liabilities to conclude that Ms Hanson did not buy the items for herself, I do not think that the inference can fairly be drawn from the material to which the plaintiffs point that the items were bought for Ms Hanson's parents, notwithstanding the fact that they lived together. The possibility that they were gifts for someone else could not be excluded.

(c) The *Jones v Dunkel* inference cannot be employed to fill gaps in the evidence, or to convert conjecture and suspicion into inference.

[117] Second, even if I were to infer that Ms Hanson had given the items to her parents, there was no evidence to demonstrate that her parents still possessed the items. Absent that evidence, and even if they were still to be regarded as valuable, there would be no utility in making the declaration.

[118] Third, given the nature and age of the items, and their comparatively minor value even when they were new, the notion that they would still be of real value sufficient for me to conclude that there was utility in making a declaration is strongly to be doubted.

[119] I refuse to make the declaration sought.

The application for re-opening

[120] On 30 January 2018, I received submissions from both parties on an application made by the plaintiffs to re-open their case for the limited purposes of tendering certain documents disclosed for the first time by Ms Hanson's parents after the close of the trial on the grounds that the documents related to the allegations contained in the amended statement

of claim at [34]-[36]. It was common ground that I should rule on the application in the course of my judgment.

[121] The case pleaded in those paragraphs was:

(a) The particular expenditures which the plaintiffs identified (and which have been listed in [108] above) were paid by Ms Hanson from funds she had misappropriated from the plaintiffs.[16]

(b) The misappropriated funds were received by Ms Hanson's parents because –

(i) payments were made on their behalf;[17] and

(ii) chattels were purchased for them.[18]

(c) Ms Hanson's parents had the requisite knowledge because they in fact knew or it is to be inferred that they knew[19] –

(i) that Ms Hanson had caused the plaintiffs to pay her an amount over and above her lawful entitlements to the extent that the plaintiffs alleged; and

(ii) that the particular expenditures which the plaintiffs' identified (and which have been listed in [108] above) were of funds "from such misappropriation".

[122] There was no direct evidence that Ms Hanson's parents knew of either of those matters. The plaintiffs' case pleaded both actual knowledge and that knowledge was an inference from identified matters. Those matters were:

(a) Norma's misappropriation extended over the period from 2006 to 2014, particulars of which are contained in Schedule A.

(b) Norma shared a close relationship with her parents and was often in their company (particulars of which are in sub-paragraphs (c)(ii) and (iv) to (vii) below).

(c) During the period from 2005 to 2014:

(i) Norman and Dorothy knew that Norma was employed in clerical roles by GT or J&M (or at least the business group of which those companies were members);

(ii) Norman and Dorothy often attended the Gympie RSL in company with Norma to gamble by playing poker machines, or by playing Keno;

(iii) Norma withdrew funds at the Gympie RSL totalling $2,622,934.03;

(iv) Norma spent $805,444.63 gambling on poker machines at the Gympie RSL;

(v) Norman spent $146,108.47 gambling on poker machines at the Gympie RSL;

(vi) Dorothy spent $87,859.11 gambling on poker machines at the Gympie RSL;

(vii) Norma lived with her parents at 22 Parkland Drive, Gympie (**the Family Home**);

(viii) Norma spent large amounts of money on her credit cards, purchasing goods:

(1) of a kind which would ordinarily be kept at the purchaser's place of residence; and

(2) which would have made apparent her spending far more than would be possible on a receptionist's, and then accounts/office manager's wage (particulars of such spending being set out in the Schedule).

(d) The amounts spent by Norman and Dorothy at the Gympie RSL were well beyond their means, given that:

(i) their combined income per annum averaged approximately $32,000;

---

[16] Amended statement of claim at [36].
[17] Amended statement of claim at [35](a).
[18] Amended statement of claim at [35](b).
[19] Amended statement of claim at [34].

(ii) their combined expenses per annum averaged approximately $38,000; and

(iii) their own withdrawals from the ATM at the Gympie RSL totalled just $13,996.25 over the entire period.

(e) Norman and Dorothy had access to Norma's ANZ account 506858864 and were able to, and did, make withdrawals from that account;

Particulars

While Norma was in Scotland between 13 and 25 September 2011 the following withdrawals were made at the Gympie RSL from Norma's ANZ account 506858864:

(i) $100 on 19 September 2011; and

(ii) $60 on 22 September 2011.

(f) The amount spent by Norma on gambling at the Gympie RSL was obviously beyond her means given her employment situation.

(g) That extravagance would have been apparent to any person regularly in company with her at the Gympie RSL.

(h) Norma did not have, and Norman and Dorothy were aware that she did not have, any other source of moneys other than the Plaintiffs.

(i) The matters pleaded at paragraph 35 below.

[123] The evidence which the plaintiffs seek to adduce was annexed to a solicitors' affidavit. Broadly speaking it comprised documents passing between BT Financial Group (**BT**), the lawyers for the estate, and the lawyers for Ms Hanson's parents, by which the latter ultimately progressed their successful claim to the BT death benefits, consequent upon asserting the very close relationship which Ms Hanson had with her parents. It suffices to make the following observations:

(a) On 3 July 2015, BT wrote to the lawyers for Ms Hanson's estate requesting details from them to allow BT to assess a claim by Ms Hanson's parents to the proceeds of the BT Super and death benefit.

(b) On 12 October 2015, Mullins Lawyers wrote to BT contemplating the possibility that Mr and Mrs Hanson may receive the death benefit.

(c) In an e-mail chain dated 3 November 2015 to which BT, and both sets of lawyers were parties, BT advised that the Trustee was unlikely to pay the parents directly unless they could prove interdependency and qualify as a SIS Act Dependant.

(d) On 6 January 2016, Ms Hanson's parents' solicitors wrote to BT in the following terms:

> We now enclose Claim Form completed by Mr and Mrs Hanson together with additional information supporting the claim together with copies of documents going back a number of years in support of the fact that Mr and Mrs Hanson and the deceased lived together at the same address over a period of years.

(e) On 11 January 2016, BT replied as follows (original emphasis):

> Individuals will be considered to have an interdependency relationship if:
>
> • they have a close personal relationship; and
>
> • they live together; and
>
> • **one or each of them provides the other with financial support**; and
>
> • one or each of them provides the other with domestic support and personal care.
>
> Three points have been addressed but the Trustee will not consider an interdependency relationship unless all four points can be proven.

> Therefore can you please provide documents to support that Norma and her parents provided her or each other with financial support at the time of her death. …

(f) On 4 April 2016, Ms Hanson's parents' solicitors wrote to BT indicating that Mr and Mrs Hanson wanted to prove "interdependency", using the language of BT's correspondence. (Obviously enough that involved the implicit assertion that each of the four dot points in the previous paragraph could be established.) Amongst other things they advised:

(i) for at least the year leading up to her death, Ms Hanson made financial contributions to her parents' home loan obligations;

(ii) from at least 2006, the account for the home phone was in Ms Hanson's name and she was solely responsible for this expense;

(iii) Ms Hanson provided a mobile phone to her father and attended to the financial obligations of so doing;

(iv) since at least 2006 Ms Hanson was solely responsible for the home electricity accounts;

(v) for the two years leading up to her death, she attended to payment of her parents' home and contents insurance premiums and to payment of the insurance premiums for the Suzuki vehicle registration 921 SCA.

(g) On 15 April 2016, BT informed Ms Hanson's parents' solicitors that the trustee had decided to pay both the proceeds of the superannuation policy and the death benefit to Ms Hanson's parents' and documents revealed that that in fact occurred.

[124] In my view Ms Hanson's parents were plainly at fault for not disclosing the documents concerned at an earlier time. I accept the submissions as to relevance of the evidence on the face of the pleadings advanced in the schedule appended to the plaintiffs' written submissions in reply on the application to re-open. Moreover, it was clear on the face of the statement of claim that the plea of the matters from which the inference of knowledge was to be drawn was a plea made in compliance with UCPR r 150(2). It was a plea which could only be taken as asserting the truth of each of the matters asserted in the particulars, and asserting them as material facts which justified the alleged material fact that the requisite knowledge was to be inferred. The documents concerned were directly relevant at least to the proof of the closeness of the relationship between Ms Hanson and her parents. Nor does it lie in the mouths of a defendant making disclosure on the basis of material facts in dispute on the face of the pleadings, to fail to disclose documents on the basis that the allegation in dispute was not necessary for the plaintiff to prove. If such a defendant wants to avoid disclosure, it should seek to strike out the allegedly irrelevant allegation.

[125] But that was not the only basis on which the material would have been relevant to be disclosed before trial. At least some the material should also have been disclosed in relation to the traverse of the allegation earlier made that the BT death benefit had been paid out to the estate.

[126] The plaintiffs already had a substantial case that an inference should be drawn about the extent of knowledge which Ms Hanson's parents had as to their daughter's wrong-doing, but the evidence which ought to have disclosed would have added weight to that case. Had the material the subject of the application for re-opening been disclosed at the time it ought to have been disclosed if the on-going disclosure duty had been met, that might well have influenced the decisions which were made at or prior to trial in relation to how the plaintiffs framed their claims for relief.

[127] The difficulty with the application for re-opening is that by the time it was made, the issues had narrowed in relation to the claims made in reliance on the allegations pleaded in the amended statement of claim at [34]-[36]. The only remaining claim in issue was the declaration as to ten particular chattels which I dealt with under the previous heading of this judgment. The material not disclosed was not probative of anything relevant to that claim. And, critically, the plaintiffs did not advance the application to re-open on the basis that they would seek to reinstitute any of the claims which they had abandoned during a trial which was conducted on the basis of disclosure now proven to be flawed, or that they would otherwise amend the claims for relief which they had pressed at trial.

[128] In those circumstances, in my view there is no utility in the application to re-open. It should be refused.

Conclusion

[129] The orders of the Court are:

(a) I will hear the plaintiffs further on the form of order which should be made in relation to the first defendant.

(b) It is declared that the proceeds of the Asteron term life policy 81318923 were received by the second and third defendants as trustees for the third and sixth plaintiffs.

(c) I will hear the parties further on the plaintiffs' claims to the relief identified at paragraphs B, C and D of the claims to relief made in the plaintiffs' amended statement of claim.

(d) The plaintiffs' claim for declaratory relief in respect of the BT death benefit amount is refused.

(e) It is declared that the second and third defendants hold their interest in the home located at 22 Parkland Drive, Chatsworth, subject to an equitable lien in favour of the plaintiffs in the amount of $12,622.22.

(f) The plaintiffs' claim for declaratory relief in respect of the chattels listed at paragraph [110](e) of the Court's reasons for judgment is refused.

(g) The plaintiffs' application to re-open the case is dismissed.

(h) I will hear the parties as to the costs of the application to re-open and as to the costs of the proceeding.