
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : WOODLEY -v- WOODLEY [2018] WASC 333

CORAM : TOTTLE J

HEARD : 6 - 9 NOVEMBER 2017
23 & 25 JANUARY 2018
13 APRIL 2018 & 4 OCTOBER 2018

DELIVERED : 2 NOVEMBER 2018

FILE NO/S : CIV 1406 of 2016
CIV 2850 of 2017

BETWEEN : WAYNE CHARLES WOODLEY
Plaintiff

AND

TERRY RAY WOODLEY
Defendant

AND

TERRY RAY WOODLEY
Plaintiff by counterclaim

AND

WAYNE CHARLES WOODLEY
First Defendant by counterclaim

ROSS MAXWELL WOODLEY & RAYMOND
THOMAS WOODLEY as executors of the estate of
SHIRLEY GRACE MAY WOODLEY
Second Defendants by counterclaim

Catchwords:

Trespass - Doctrine of trespass by relation - Defences - Whether defendant acting as executor of estate

Damages - Mesne profits - Where defendant made improvements to property - Calculation of lost rental value

Standing - Beneficiary making claim on behalf of estate - Whether special or exceptional circumstances present

Equity - Resulting trusts - Presumption of advancement - No resulting trust

Legislation:

Nil

Result:

Application granted
Counterclaim dismissed

Category: B

Representation:

Original Action

Counsel:

Plaintiff : Mr S J Davis
Defendant : In Person

Solicitors:

Plaintiff : MGD Law
Defendant : In Person

Counterclaim

Counsel:

Plaintiff by counterclaim : In person
First Defendant by counterclaim : Mr S J Davis
Second Defendants by counterclaim : Mr C R Bailey

Solicitors:

Plaintiff by counterclaim : In person
First Defendant by counterclaim : MGD Law
Second Defendants by counterclaim : Williams & Hughes

Case(s) referred to in decision(s):

Abrugiato v Hansen [2012] WASC 362
Alexander v Perpetual Trustees WA Ltd [2004] HCA 7; (2004) 216 CLR 109
Anderson v McPherson [No 2] [2012] WASC 19
Barker v The Queen [1983] HCA 18; (1983) 153 CLR 338
Basely v Clarkson (1681) 3 Lev 37
Broadway Pty Ltd v Lewis [2012] WASC 373
Calverley v Green [1984] HCA 81; (1984) 155 CLR 242
Carson v John Fairfax & Sons Ltd [1993] HCA 31; (1993) 178 CLR 44
Charles Marshall Pty Ltd v Grimsley [1956] HCA 28; (1956) 95 CLR 353
Coco v The Queen [1994] HCA 15; (1994) 179 CLR 427
Esperance Cattle Company Pty Ltd v Granite Hill Pty Ltd [2014] WASC 279
Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 784
Field v Firmenich & Co [1971] 1 All ER 1104; [1971] 1 WLR 555
Glynn v Commissioner of Stamp Duties [1977] 2 NSWLR 673
Halliday v Nevill [1984] HCA 80; (1984) 155 CLR 1
Hampton v BHP Billiton Minerals Pty Ltd (No 2) [2012] WASC 285
Hancock Family Memorial Foundation Ltd v Porteous [1999] WASC 55; (1999)
151 FLR 191
Hardie Finance Corporation Pty Ltd v Ahern [2010] WASC 403
Hayim v Citibank NA [1987] AC 730
Lamb v Cotogno [1987] HCA 47; (1987) 164 CLR 1
Lollis v Loulatzis [2007] VSC 547
Lord Cawdor v Lewis (1835) 160 ER 174
Martin v Martin [1959] HCA 62; (1959) 110 CLR 297
Napier v Public Trustee (Western Australia) (1980) 32 ALR 153
Nelson v Nelson [1995] HCA 25; (1995) 184 CLR 538

Official Receiver in Bankruptcy v Schultz [1990] HCA 45; (1990) 170 CLR 306
Osborne v Landpower Development Pty Ltd [2003] WASC 117
Perth Airport Pty Ltd v Ridgepoint Corporation Pty Ltd [2013] WASC 33
Peruvian Guano Co Limited v Dreyfus Brothers & Co [1892] AC 166
Plenty v Dillon [1991] HCA 5; (1991) 171 CLR 635
Powell v McFarlane (1979) 38 P & CR 452
Ramage v Waclaw (1988) 12 NSWLR 84
Rodrigues v Ufton (1894) 20 VLR 539
SSYBA Pty Ltd v Lane [2013] WASC 445
Swordheath Properties Ltd v Tabet [1979] 1 WLR 285
Traian v Ware [1957] VR 200
Triggell v Pheeney [1951] HCA 23; (1951) 82 CLR 497
Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; (1966) 117 CLR 118
Warren v Lawton [2016] WASC 285
Watson v Foxman (1995) 49 NSWLR 315
Wilkins v Wilkins [2007] VSC 100
Woodley v Woodley [No 2] [2017] WASC 94
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd [1985] HCA 12;
(1985) 155 CLR 448
Yeatman v Yeatman (1877) 7 Ch D 201

TOTTLE J:

Introduction

1 Two brothers, the plaintiff, Mr Wayne Woodley, and the defendant, Mr Terry Woodley, are in dispute over adjoining properties in Waroona - 14 and 16 Fitzpatrick Street. There are two units on each property. Wayne is the registered proprietor of both properties and he has sued Terry for damages for trespass arising from the latter's possession of units 14A and 14B Fitzpatrick Street. Terry does not challenge the primary facts upon which the trespass action is based but by his counterclaim contends that Wayne holds the beneficial interest in both properties on trust for the estate of their late mother, Shirley Grace May Woodley. Shirley's husband, Thomas, predeceased her. Two other brothers, Ross and Ray, are the executors of Shirley's estate (the Estate) and, in that capacity, have been joined as second defendants to the counterclaim. In using the first names of members of the Woodley family I am following the course adopted at trial and by so doing I intend no disrespect.

2 In 1978 Thomas and Shirley paid the purchase price for the Fitzpatrick Street properties and they were transferred into Wayne's name. The issue at the centre of this bitter family dispute is whether Thomas and Shirley intended that, subject to a life interest in their favour, Wayne was to own the properties absolutely - as Wayne contends - or whether it was their intention that Wayne should hold the properties on trust for them - as Terry contends. There is a threshold issue as to whether Terry has standing to raise this claim against Wayne on behalf of the Estate.

3 This action is one of a number of proceedings in this court between Terry and his brothers concerning the Estate and dispositions of property made by Thomas and Shirley in their lifetimes. A fundamental grievance on Terry's part is that those dispositions, combined with the terms of Shirley's will, have had the effect of a division of his parents' property that he contends is unfair to him and his sister, Ann.¹

4 Shirley named Terry, Ross and Ray as executors and as trustees of a testamentary trust created by her will. Earlier proceedings about the Estate (the Estate proceedings) between Terry as plaintiff and Ross,

¹ Ms Ann Lewis nee Woodley.

Ray and Wayne as defendants have some significance. Terry applied to the court for a grant of probate of Shirley's will and for orders that Ross and Ray be passed over as executors and as trustees of the testamentary trust. Wayne did not participate in the Estate proceedings as he agreed to abide by the outcome. By counterclaim Ross and his wife, Roslyn, applied for orders that probate of the will be granted to Ross and Ray and Terry be passed over as an executor and trustee of the testamentary trust. Terry's application was dismissed and the application that he be passed over was granted.² Ross and Ray were granted probate of Shirley's will on 22 June 2017. In the course of her Honour's judgment in the Estate proceedings, Pritchard J set out in some detail the history of the disputes between Terry and Ross, Ray and Wayne. Many of the allegations made by Terry against Ross and Ray in these proceedings were made against them in the Estate proceedings and those allegations were determined in favour of Ross and Ray and against Terry.

5 Terry has represented himself throughout these proceedings.

6 My conclusions on the central issues are as follows:

- (a) Terry's possession of 14A and 14B Fitzpatrick Street was as trespasser and he is liable to Wayne for damages.
- (b) I assess Wayne's damages at \$48,964.68.
- (c) Terry does not have standing to make a claim against Wayne on behalf of the Estate for a declaration that Wayne holds the Fitzpatrick Street properties on trust for the Estate.
- (d) Wayne owns the Fitzpatrick Street properties absolutely. Whilst it is strictly unnecessary for me to have stated this conclusion, I have done so because having heard the evidence and considered the arguments advanced by Terry, stating my conclusion and giving brief reasons for it may - though I am not optimistic - assist in quelling this controversy between the parties.

7 The structure of these reasons is as follows:

- (a) First, I have set out my assessment of the key witnesses.
- (b) Second, I record my factual findings.

² *Woodley v Woodley [No 2]* [2017] WASC 94.

- (c) Third, I deal with the issue of Terry's standing.
- (d) Fourth, I set out my reasons for concluding that Wayne is the absolute owner of the Fitzpatrick Street properties.
- (e) Fifth, I set out my conclusions in relation to the liability issues in the trespass claim.
- (f) Sixth, I set out my conclusions as to damages.
- (g) Seventh, I deal with Terry's application to adduce 'new and fresh evidence', which was dismissed.

I have adopted this structure as the essence of Terry's defence to the trespass claim was that the Fitzpatrick Street properties were owned by the Estate.

Assessment of credit and reliability

8 This case involves a consideration of relations between family members over a period of approximately 50 years. Having regard to the fallibility of human memory and to the danger that the processes of memory may be overlaid, subconsciously or otherwise, by perceptions of self-interest,³ in making factual findings I have had regard wherever possible to the objective factual circumstances and to the inferences that may be drawn from the contemporaneous documents, though these were limited in number.

9 One of the bases upon which Wayne's case as to the ownership of the Fitzpatrick Street properties rests involves a consideration of his account of conversations with Thomas and Shirley. Courts have emphasised the need for careful scrutiny of evidence about what was said by those who have subsequently died when the evidence is relied upon to establish the intention of the deceased.⁴ As stated by McLelland CJ in Eq in *Eyota Pty Ltd v Hanave Pty Ltd* the approach to be taken is as follows:⁵

[I]n a claim based on communications with a deceased person, the court will treat uncorroborated evidence of such communications with considerable caution, and will regard as of particular significance any failure of the claimant to bring forward corroborative evidence which was, or ought to have been, available.

³ *Watson v Foxman* (1995) 49 NSWLR 315, 318-319 (McLelland CJ in Eq).

⁴ *Abrugiato v Hansen* [2012] WASC 362 [192] (Corboy J).

⁵ *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 784, 789.

10 Wayne's evidence-in-chief comprised, principally, five affidavits sworn by him.⁶ This was supplemented by some oral evidence during which he corrected some errors in an affidavit of 29 January 2016 as to the order in which certain events following Shirley's death occurred. These corrections were not matters that reflected adversely on Wayne's credit or on the reliability of his evidence more generally.

11 Wayne answered questions put to him in cross-examination frankly and without hesitation. He had a tendency to provide answers that were longer than required and which included a justification for his conduct when none was necessary. Once again, this tendency did not reflect adversely on Wayne's credit. My impression is that it was a consequence of the emotional pressure engendered by questions concerning his relationship with his parents and the ill feeling between him and Terry. Wayne did not pretend to have a better recollection of events that occurred many years ago than might be expected given the passage of time. I find that Wayne was a truthful witness and his evidence was reliable.

12 Ross gave evidence on behalf of Wayne. His evidence-in-chief was constituted by three affidavits sworn by him.⁷ Other than to ask Ross whether bank accounts had been established for the estates of Thomas and Shirley, Terry did not ask Ross any questions in cross-examination. As there was nothing inherently implausible about Ross's evidence, I accept it.

13 Terry's evidence-in-chief comprised two lengthy affidavits.⁸ The affidavits contained a great deal of material that was not admissible, primarily because it was not relevant. Terry's affidavit evidence was supplemented by oral evidence-in-chief. Terry sought to supplement his own testimony by relying on a bundle of documents of over 2,500 pages, many of which were irrelevant. I am unable to rely on Terry's evidence on any material issue unless it is supported by other reliable evidence. My reasons are as follows. Having observed Terry present his case and give evidence, the conclusion that I have reached is that he is unable to view his relations with his siblings and their and his own relations with Thomas and Shirley with any objectivity. Whilst this may be understandable - and it is certainly not an uncommon in family

⁶ Exhibits P3 (sworn 24 October 2014), P4 (sworn 29 January 2016), P5 (sworn 29 November 2016), P6 (sworn 14 September 2017) and P7 (sworn 1 November 2017).

⁷ Exhibits P8 (sworn 27 January 2016), P9 (sworn 14 September 2017) and 2D1 (sworn 3 October 2017).

⁸ Exhibits D10 (sworn 28 August 2017) and D11 (sworn 25 October 2017).

disputes - it is the primary reason why I consider that I cannot rely on his evidence.

14 Where Terry was unable to give direct evidence about a matter, he was prepared to advance an account based on speculation. I refer below to Terry's speculation as to why his parents arranged for the Fitzpatrick Street properties to be transferred into Wayne's name. Moreover, in his evidence Terry suggested that he could recall discussions about his parents' financial affairs going back to the late 1970s, that is, when he was only about 11 years old. Whilst I accept that some memories from childhood are retained into adulthood, I am not persuaded that Terry had the degree of recall professed by him. I found his evidence in this respect implausible.

15 A further matter of concern was that Terry gave evidence that '[Thomas] offered the units to me in 2001'.⁹ In cross-examination Terry said that Shirley had told him that she wanted nothing more to do with the units and that they would be going to him and Ann anyway.¹⁰ Terry made no mention of these conversations in his affidavits. When challenged in cross-examination about his failure to do so, he said that he did not do so because he was concerned about including hearsay evidence in his affidavit.¹¹ I found Terry's evidence in this respect unconvincing.

The factual background

16 In 1947 Thomas established a building business that traded under the name T R Woodley & Co. The business name was registered in the names of Thomas and Shirley, and I infer that they traded in partnership. Thomas and Shirley also ran a dairy farming business.

17 Wayne was born in 1951. In 1967, when he was 16 years of age, Wayne joined T R Woodley & Co and thereafter Thomas, Shirley and Wayne carried on business in partnership.¹² There was no written partnership agreement.

18 Terry was born in 1967.

19 For the first five years Wayne worked as an apprentice in the business. His evidence, which I accept, was that he was paid very little

⁹ Exhibit D10 [106].

¹⁰ ts 601.

¹¹ ts 620 - 621.

¹² Ex D16, 116.

for his work. He said that he was paid the minimum award rate and did not receive any share of the profits after he became a partner.

20 Wayne's evidence, which I accept, was that in about 1976 or 1977 he spoke to Thomas about purchasing land in the Waroona town site and building houses on the land, as he foresaw that there would be a demand for residential accommodation to house workers for the proposed Alcoa refinery at Wagerup. His evidence was that Thomas thought it was a good idea, although they did not act on the idea immediately.

21 Some time later, they identified the Fitzpatrick Street properties as potentially suitable land.

22 Having deposed that he and Thomas did not immediately act on the idea that they should acquire land in Waroona on which to build, Wayne gave the following evidence about a conversation with Thomas:

16. Shortly after I had another conversation with my father about the purchase of the properties.

17. I do not recall the exact words used in the conversation but I can recall the substance of the words used. My father said to me words to the effect that:

(a) we would use the partnership's funds to purchase the properties;

(b) the properties would be purchased in my name;

(c) registering ownership of the properties in my name was a reward for my hard work in the business and for giving him a hand whenever he needed it, including on a dairy farm that he also operated with other family members.

23 On 14 February 1978 the Fitzpatrick Street properties were purchased and transferred into Wayne's name. Thomas and Shirley paid the purchase price of \$11,800, the stamp duty and other expenses associated with the purchase. Banking records of Thomas and Shirley show that the purchase price was funded by a withdrawal of funds from a deposit account maintained by them. The funds were deposited in the T R Woodley & Co bank account shortly before the settlement. There is no evidence, however, to suggest that the partnership - as opposed to Thomas and Shirley in their personal capacities - funded the purchase.

24 Wayne deposed that:

22. My parents and I had an agreement regarding the units.
23. That agreement was a verbal agreement reached in multiple conversations between my mother and my father and I in the period before and during the construction of the units.
24. The agreement was to the effect that:
 - (a) the partnership would pay all the costs associated with the units including the costs of their construction and the costs of running, letting and managing the units;
 - (b) the income, if any, received by the partnership in respect of the units would be enjoyed by my parents;
 - (c) I would not receive any income derived from the units;
 - (d) the agreement would continue for the balance of my parents' lifetime and when they passed away I, being the sole surviving partner, would be entitled to any profits or benefits generated by or arising from the units; and
 - (e) I would continue to be the registered proprietor of the properties (and of the units) after their death.

25 Terry did not cross-examine Wayne on his account of his conversations with Thomas and Shirley. In Terry's written submissions at the conclusion of the trial, however, he argued that Wayne's evidence lacked 'conviction, detail, collaboration [sic] and explanation'. Terry submitted that Wayne had not produced any documentary evidence 'to support his claims of under paid wages, long hours etc to prove his claim'. He also argued that Wayne's case was weakened by his failure to give evidence about any dealings with the vendors of the Fitzpatrick Street properties or any evidence about the acquisition of the properties more generally. Further, Terry pointed out that the partnership had not declared the income from the units on the Fitzpatrick Street properties as partnership income - a fact which he contended undermined the probability of the existence of an arrangement of the nature referred to in the conversations to which Wayne deposed.

26 I accept Wayne's evidence that he had conversations with Thomas and Shirley as recounted by him in his evidence. I accept the evidence for two reasons. First, because, as will appear from the account of events that followed the purchase of the Fitzpatrick Street properties and the construction of the units, Thomas, Shirley and Wayne, with a limited exception, conducted themselves in accordance

with the arrangement described in Wayne's evidence. The limited exception is that during their lifetimes Thomas and Shirley paid the expenses associated with maintaining the units and received the income - as opposed to the expenses being paid by the partnership and the income being treated as partnership income. Those are objective facts which, inferentially, support Wayne's evidence. Secondly, whilst alive to the importance of scrutinising Wayne's evidence carefully, in my assessment, Wayne was a truthful witness and I am persuaded that his account of his conversations with his parents is evidence on which I can rely. Given the passage of time, it is understandable that Wayne was unable to give more detailed evidence about the conversations.

27 Between 1978 and 1980 T R Woodley & Co built the units on the Fitzpatrick Street properties.

28 In September 1978 Wayne bought a newsagency in Mandurah. Thomas and Shirley provided financial assistance to Wayne. Wayne's evidence was that the assistance was a gift and not a loan. I accept Wayne's evidence. Wayne stopped work in the building business and thereafter derived his livelihood from newsagency businesses. Wayne moved from Waroona to Halls Head and lived in a beach house owned by Thomas and Shirley. Wayne did not pay any rent for his occupation of the beach house. In the 1980s Wayne purchased the adjoining lot and, using his own funds, extended his parents' house over the adjoining lot. His evidence, accepted by me, is that before spending money on developing the beach house he wanted to make sure that he would inherit it. Wayne, therefore, spoke to Thomas and Shirley, who said that they would leave him the property in their wills, which is what occurred.

29 The T R Woodley & Co partnership continued to trade, although Wayne was not an active partner. Wayne maintains that he did not retire as a partner. The last financial year in which Wayne was recorded as a partner in the partnership financial statements was 1995. Those financial statements were prepared by Terry and their accuracy was not accepted by Wayne. It is not necessary to make a finding about whether Wayne ceased to be a partner before Thomas died.

30 Between 1980 and July 2011, Thomas and Shirley (and after Thomas died, Shirley) paid all the expenses associated with the Fitzpatrick Street properties (other than land tax that was paid by Wayne), and received all the income derived from the units. Thomas and Shirley also undertook and paid for improvements to the properties.

TOTTLE J

31 The Fitzpatrick Street properties were not recorded as assets in the balance sheets of the T R Woodley & Co partnership. As I have already stated, the rental income was not recorded as income and the expenses were not recorded as expense items in the profit and loss statements of the partnership.

32 On various dates between November 1995 and October 1999 Wayne mortgaged the Fitzpatrick Street properties as security for borrowings by him or corporate entities controlled by him.

33 Throughout the course of their lives Thomas and Shirley acquired a number of properties.

34 Thomas died on 9 January 2010. After Thomas died, Shirley lived with Wayne and was cared for by him. In March 2010 Shirley applied for a grant of probate in relation to Thomas's estate. Shirley annexed to her affidavit sworn on 26 March 2010, in support of the probate application, a statement of assets and liabilities of Thomas's estate that did not include the Fitzpatrick Street properties.

35 Shortly after Thomas died Shirley spoke to Ross and said that she would like to transfer properties owned by her to her family whilst she was still alive rather than waiting until after she had passed away. Ross said that he would obtain valuations of the properties. Ross spoke to Wayne about Shirley's wishes and Wayne said that he was prepared to include the Fitzpatrick Street units in the 'pot of properties' to be divided amongst the family. Wayne prepared a handwritten document described by him as a draft agreement that read as follows:

I SHIRLEY WOODLEY WISH TO HAVE MY SHARED ASSETS DELT [sic] WITH IN THE FOLLOWING MANNER

ROSS TO SURRENDER HIS SHARE IN FARM BLOCK

WAYNE TO SELL THE DUPLEX BLOCKS IN FITZPATRIC [sic] ST WAROONA - THE CASH FROM THIS SALE BE COMBINED WITH THE OTHER LAND TO BE VALUED & ALL ASSETS TO BE SHARD [sic] BEWEEN [sic]

ROSS) TO BE AGREED)
ANN) WITHIN THE FAMILY)
RAYMOND) ROSS ANN RAYMOND TERRY)
TERRY)

WAYNE TO RECEIVE [sic] THE LAND ALONE AT 28 JANIS ST. HALLS HEAD

SIGNED BY

SHIRLEY WOODLEY
ROSS WOODLEY
ANN LEWIS
RAYMOND WOODLEY

TERRY WOODLEY
WAYNE WOODLEY

36 Neither Wayne nor Ross provided the handwritten document to Shirley, nor to any other family member. Wayne's evidence was that the document was left on his coffee table at his home in Halls Head. By some means, not revealed by the evidence, the document was provided to Nicholson Clement, the solicitors who were initially involved in the affairs of the Estate. Wayne said he did not provide the document to Nicholson Clement. In cross-examination Terry suggested to Wayne that Shirley took the document to Nicholson Clement and that it expressed 'her wishes in respect of the assets of the estate of Thomas Woodley and herself'.¹³ Wayne did not accept that suggestion. I find it unlikely that Shirley provided the document to Nicholson Clement. Had she done so, I think it would have been likely that there would have been some record of that and some explanation of the provenance of the document would have been forthcoming from the solicitors. Terry also suggested in submissions that Shirley did not include the Fitzpatrick Street properties in the statement of assets and liabilities prepared for probate purposes because she thought that she had already disposed of the properties in accordance with the handwritten document referred to in the preceding paragraph. This was speculation on Terry's part for which there was no support in the evidence. In my view, the simpler, and more probable, explanation is that Shirley did not include the Fitzpatrick Street properties in the statement of assets and liabilities of Thomas's estate because she knew that they were owned by Wayne.

37 In 2010 Ross obtained an appraisal of the Fitzpatrick Street properties and provided it to Wayne. Wayne's evidence, which I accept, was that relations with his siblings were amicable at the time and he was contemplating distributing the ownership of the properties amongst his siblings because his parents had been kind enough to leave the beach house to him. Wayne was aware that at this time - 2010 and 2011 - Terry and Ann were carrying out some work on the units. Terry was working on 14A and 14B and Ann on 16A and 16B.

¹³ ts 263.

38 Shirley died on 31 July 2011. Hours after Shirley died a conversation took place between Ann and Wayne about the Fitzpatrick Street units which upset and angered Wayne. A couple of weeks after Shirley died Ross spoke to Wayne and Wayne told him that he was withdrawing his offer to allow his units to be considered part of the 'pot of properties' for distribution amongst family members.

39 Before Shirley died Terry took possession of the units on 14 Fitzpatrick Street.¹⁴ Ann and her husband, Greg, took possession of the units on 16 Fitzpatrick Street. Terry paid for maintenance and repair work carried out on 14A and 14B Fitzpatrick Street and Ann paid for maintenance and repair work on 16A and 16B Fitzpatrick Street. Terry collected rent from tenants occupying 14A and 14B Fitzpatrick Street. On one occasion after Shirley had died, Terry commenced proceedings to recover rent due from a tenant but the proceedings were dismissed because Terry was unable to prove that he was the registered proprietor or otherwise entitled to the rent.

40 Following Shirley's death a dispute arose between Wayne and Terry over the ownership of the Fitzpatrick Street properties. On 25 October 2011 Wayne wrote to Terry protesting that Terry had prepared a list of Shirley's assets that included the Fitzpatrick Street properties. Wayne wrote:

When and only when the Estate of our late parents has come to a mutually beneficial conclusion for all concerned shall I consider signing the land titles to those properties for redistribution. Not forgetting there is no legal obligation to do so.

41 In a separate letter that also appears to have been sent by Wayne to Terry in about October 2011, Wayne gave Terry notice that he would give the tenants in the units notice to vacate and would be seeking the rent received by Terry from the tenants.

42 Wayne did not take immediate steps to evict the tenants of the units but on 2 November 2012 his solicitors wrote to the tenants putting them on notice that Terry did not have authority to lease the premises to them but that he, Wayne, was happy to consider entering into formal lease arrangements, failing which he would seek court orders for possession. The letters to the tenants generated correspondence from Terry to Wayne's solicitors in which Terry raised a number of

¹⁴ Exhibit D10 [229].

complaints about Wayne. It is unnecessary to refer to the correspondence in any detail - it was acrimonious.

43 In 2013 Wayne commenced Magistrates Court proceedings against Terry to obtain possession of the units on 14 Fitzpatrick Street. I refer to those proceedings in more detail later in these reasons.

44 As noted earlier, Ross and Ray obtained a grant of probate of Shirley's will on 22 June 2017. Ross deposed that he and Ray had sought and obtained legal advice on the issue of whether the Estate had a claim against Wayne in respect of the ownership of the Fitzpatrick Street properties. Ross deposed that Terry had provided copies of his discovered documents to the Estate's lawyers. Ross deposed that, having obtained the legal advice, he and Ray discussed the matter and decided that the Estate should not make a claim. He identified the following factors as being significant in their decision:

- (a) Wayne became the registered proprietor in 1978 and it would be difficult to obtain evidence about the transaction and the intentions of Thomas, Shirley and Wayne at the time the properties were acquired. Ross deposed that he and Ray did not have any financial or tax records for Thomas, Shirley or the partnership for the years preceding 1995.
- (b) The size of the Estate is modest - the value of the residuary estate is about \$1 million, leaving aside the claims that Terry contends should be made.
- (c) The potential legal costs of making a claim against Wayne and the potential costs orders that might be made against the Estate in the event that the claim was unsuccessful would diminish the funds available to beneficiaries of the Estate, including the beneficiaries of the testamentary trust established by Shirley's will.

Terry does not have standing to make the claim against Wayne on the Estate's behalf

45 Amongst the other relief sought in his counterclaim, Terry sought a declaration that Wayne held the Fitzpatrick Street properties on trust for Thomas and Shirley and that Wayne now holds the properties on trust for the Estate.

TOTTLE J

46 Wayne, Ross and Ray submitted that Terry does not have standing to apply for the declarations sought by him as he is only a beneficiary of the Estate.

47 Terry seeks to overcome the objection to his standing by alleging:¹⁵

The Executors of the Estate of the Late Shirley Grace May Woodley have colluded with the Plaintiff to fail to show the true assets of the estate, fail [sic] to call in loans that were given in evidence before this Honourable Court as being payable within 30 days and failing to act in the interests of the beneficiaries, not communicating and putting themselves in direct actual conflict with the estate and failing to perform their fiduciary duties thus jeopardising the estate and thus giving the Defendant standing on behalf of the beneficiaries of the Estate and on behalf of the Executors.

Legal principles

48 There was no dispute about the applicable legal principles. The following summary is drawn from the submissions made on Wayne's behalf.

49 Prior to administration of the deceased estate, there is no specific property capable of constituting the subject property of any trust in favour of the beneficiary and consequently the beneficiary does not have a proprietary interest in the assets.¹⁶ A beneficiary is entitled, however, to the due and proper administration of the estate by an executor - a right which is 'the concomitant of the duty of the executor to perform his or her functions in a proper manner'.¹⁷

50 While the general principle is that the trustee or personal representative is the person with standing to take proceedings on behalf of the estate, it is accepted that a beneficiary may institute proceedings where special or exceptional circumstances exist.¹⁸ 'Special or exceptional circumstances' may include:

- (a) a failure by the trustees to perform their duty to the beneficiaries to protect the trust estate or the interests of the beneficiary

¹⁵ Further Further Further Re-amended Statement of Defence and Counterclaim filed 24 October 2017.

¹⁶ *Official Receiver in Bankruptcy v Schultz* [1990] HCA 45; (1990) 170 CLR 306, 312.

¹⁷ *Official Receiver in Bankruptcy v Schultz* [1990] HCA 45; (1990) 170 CLR 306, 316.

¹⁸ *Ramage v Waclaw* (1988) 12 NSWLR 84, 91-93.

therein, where there is collusion between the trustee and debtor, or where the trustee is insolvent;¹⁹

- (b) situations where the executors handed over assets 'hastily, improvidently and not in conformity with their duty' or where the relationship between the executor and third parties creates a 'substantial impediment' to the prosecution by the executors of the rights of the parties interested in the estate;²⁰
- (c) where the personal representative has refused to sue and, upon an inquiry directed at whether any and what proceedings should be taken, the court would come to the conclusion that it was a proper case for proceedings to be commenced, although not necessarily and absolutely certain that the beneficiary would be successful;²¹
- (d) where a trustee commits a breach of trust or is involved in a conflict of interest and duty.²²

51 As long as the trustee is ready and willing to take the proper proceedings against the third person, the beneficiaries cannot maintain a suit against him.²³

52 Counsel for Ross and Raymond referred to authorities which highlighted the undesirable consequences of 'too readily' allowing a beneficiary to sue. Such consequences may include derogating from the powers of the trustee to handle the management of the trust, giving rise to a potential multiplicity of suits, and the potential prejudice to third parties who may be exposed to suits.²⁴

Terry's submissions on standing

53 Terry submitted that:

- (a) Ross is not a fit and proper person capable of acting as executor of the estate as he is indebted to the Estate and has not repaid

¹⁹ *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 CLR 109 [56] (Gleeson CJ, Gummow and Hayne JJ), [163] (Callinan J).

²⁰ *Ramage v Waclaw* (1988) 12 NSWLR 84, 91-92.

²¹ *Field v Firmenich & Co* [1971] 1 All ER 1104; [1971] 1 WLR 555, 559 citing *Yeatman v Yeatman* (1877) 7 Ch D 201, 216.

²² *Hayim v Citibank NA* [1987] AC 730, 748 (PC) (Lord Templeman).

²³ *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 CLR 109 [55] citing *Scott on Trusts*, (4th ed, 1989) 282.

²⁴ ts 707-8.

the debt since giving an undertaking to do so in the Estate proceedings.

- (b) Ray is self-employed and incapable of repaying debts owed by him to the Estate.
- (c) By reasons of their indebtedness to the Estate, the personal interests of Ross and Ray conflict with the interests of the Estate and the conflict jeopardises the administration of the Estate.
- (d) a number of other alleged shortcomings on the part of Ross and Ray mean that they are conflicted, those shortcomings are as follows:
 - (i) they failed to investigate the valuations of the assets of the Estate;
 - (ii) they failed to undertake a proper stocktake of cattle, hay and other assets;
 - (iii) they dealt with assets prior to having any equitable proprietary interest in them; and,
 - (iv) they involved themselves in unconscionable conduct in relation to property transfers with Shirley who was suffering from diminished capacity.

Analysis and disposition

54 I start by observing that in these proceedings Terry first raised the claim that Wayne held the Fitzpatrick Street properties on trust for the Estate in his amended defence and counterclaim filed and served on 12 May 2016, that is, 14 months before Ross and Ray obtained a grant of probate. It is not possible for Terry to justify making the claim against Wayne on the Estate's behalf on the basis that Ross and Ray had taken no action before May 2016 as until probate was granted in their favour, they had no authority to act on behalf of the Estate.

55 I am satisfied that once Ross and Ray obtained a grant of probate they acted properly in their approach to, and consideration of, the possibility of making a claim against Wayne in relation to the ownership of the Fitzpatrick Street properties. They obtained legal advice on the possible claim and the factors Ross identified as being significant in their decision not to proceed were relevant and appropriate factors for them to take into account. They were factors

that weighed heavily against making a claim. I would add that support for the decision made by Ross and Ray not to commence proceedings is to be found in the judgment of Pritchard J in the Estate proceedings. On the subject of the ownership of 14 and 16 Fitzpatrick Street her Honour observed:²⁵

Having regard to the evidence at the trial, it is not at all apparent that the Estate would be able to establish any interest in the Fitzpatrick Street units and land. That is because the only persons with direct knowledge of the arrangement, apart from Wayne, were Thomas and Shirley. Wayne has been the registered proprietor of the land in question for over 30 years. And the fact that Thomas and Shirley maintained the units during their lifetimes, and received all of the income from the units, is entirely consistent with the 'arrangement' described by Wayne.

In the course of cross-examination, Terry sought to demonstrate that Ross and Ray had failed to make adequate enquiries into the ownership of the Fitzpatrick Street units. Ross' evidence was that his understanding at the time was that Wayne was the registered proprietor of the Fitzpatrick Street units. He did not have any direct knowledge of the arrangements between his parents and Wayne in relation to the Fitzpatrick Street units. Rather, Ross' understanding of the position was based solely on discussions he had had with his parents and Wayne, and his understanding was that Thomas and Shirley received the rental income of the Fitzpatrick Street units during their lifetimes pursuant to an agreement with Wayne. Ross acknowledged that he had simply relied on his discussions with Wayne as to his ownership of the Fitzpatrick Street units, and had not undertaken any more investigations into the question of the ownership of the units. In the circumstances, I do not consider that it was unreasonable for Ross and Ray to have failed to make any further inquiries into that question. In any event, Terry did not suggest what those further enquiries should have been and there was nothing to suggest that any further enquiries would have advanced Ross' and Ray's understanding of the position beyond their existing understanding.

Finally, Ross' position is that if Terry has evidence to establish that the Estate has an interest in the Fitzpatrick Street properties, then he will take legal advice in respect of that issue. He confirmed that if a Court accepted that the Fitzpatrick Street units were an asset of the Estate, then he would deal with that land as part of the assets of the testamentary trust established under Shirley's will.

In all of the circumstances, there is no basis for concluding that the approach taken by Ross and Ray to the question of the ownership of the Fitzpatrick Street units - at either the meeting of the Executors on

²⁵ *Woodley v Woodley* [No 2] [2017] WASC 94 [317] - [320].

20 October 2011 or since - warrants their being passed over as executors of Shirley's will.

56 I am not satisfied that there is any cogent evidence to support the conclusion that Ross and Ray have colluded with Wayne in relation to the ownership of the Fitzpatrick Street properties. It was not suggested by Terry when he cross-examined Wayne and Ross that either of them had colluded in any way. The allegation of collusion should not have been made by Terry.

57 Further, the status of Ross and Ray as actual or potential debtors of the Estate does not support the conclusion that they failed to discharge their obligations as executors in relation to their approach to the potential claim against Wayne regarding the ownership of the Fitzpatrick Street properties. In the Estate proceedings Ross admitted that he was indebted to the Estate, though not in the amount contended for by Terry, and said that he would pay the Estate the amount he owed. On the evidence, it was unclear whether Ross had paid the debt by the time of the decision not to pursue the claim against Wayne. As to Ray's position, in the Estate proceedings he disputed that he was indebted to the Estate - he said that money that had been advanced to him by his parents was a gift and not a loan - he said, however, that if there was evidence that the amount advanced to him was a loan, he would repay it to the Estate. The indebtedness (if there is any) or, to the extent to which the indebtedness is disputed, the alleged indebtedness, does not provide a basis to draw an inference that the decision made by Ross and Ray about the claim against Wayne was affected by any actual or potential conflict of interest.

58 Further, the allegations made by Terry about the indebtedness of Ross and Ray to the Estate were raised by Terry in the Estate proceedings. Pritchard J gave detailed consideration to the allegations in the course of her Honour's reasons for holding that probate of Shirley's will should be granted to Ross and Ray and that Terry be passed over as an executor. None of the matters raised by Terry in these proceedings gave me cause to reach a different conclusion about the suitability of Ross and Ray to act as executors of the Estate.

59 For the reasons I have outlined, I hold that Terry does not have standing to make the claim that Wayne holds the Fitzpatrick Street properties on trust for the Estate.

Wayne owns the Fitzpatrick Street properties absolutely

60 Terry's argument that the Estate owns the Fitzpatrick Street properties rests upon the proposition that, in respect of the acquisition of the properties, Wayne was a 'volunteer', that is, he did not contribute to the cost of acquiring the properties and thus held them on 'resulting trust' for Thomas and Shirley. A resulting trust arising in these circumstances is sometimes referred to as a 'purchase money resulting trust'.²⁶

61 Terry pleaded that there were a number of reasons why Thomas and Shirley purchased the Fitzpatrick Street properties in Wayne's name. The reasons set out in Terry's pleading were as follows:²⁷

Thomas Ross Woodley and Shirley Grace May Woodley purchased the property in the name of the Plaintiff, who was a volunteer, so as to:

- (i) protect their assets from creditors as they had no Public Liability insurance.
- (ii) avoid land tax.
- (iii) ensure the safety of their dependants in the event of their death and a prolonged estate probate.
- (iv) the Plaintiff was not a minor and was removed from the scene so as to not draw the suspicion of creditors.
- (v) the plaintiffs name was not in the advertised name of T R Woodley & Co.
- (vi) provide for their own retirement and not have to declare the asset to Social Security so as to obtain the Old Age Pension.
- (vii) to help the Plaintiff obtain credit from a bank when he purchased a business as they did subsequently for Mr Raymond Thomas Woodley, another son, when he applied for a housing mortgage.
- (viii) to conceal the true identity of the beneficial owner as Thomas Ross Woodley and Shirley Grace May Woodley had identified other adjacent properties as possible acquisitions.
- (ix) to avoid paying income tax under the Income Tax Assessment Act 1936 s26(a) first limb for any profit that may arise by the sale of 14 and/or 16 Fitzpatrick Street Waroona. ITAA s26(a)

²⁶ *Hancock Family Memorial Foundation Ltd v Porteous* [1999] WASC 55; (1999) 151 FLR 191 [68].

²⁷ Further Further Further Re-amended Statement of Defence and Counterclaim filed 24 October 2017 [9(r)].

Omitted by No 47 of 1984 and s25A(1) - (12) inserted by No 47 of 1984. The Plaintiff acquired the property as a volunteer in trust and therefore cannot be said to of have acquired it for profit making,

- (x) to avoid paying income tax under the Income Tax Assessment Act 1936 s26(a) second limb for any profit that may arise by the sale of 14 and/or 16 Fitzpatrick Street Waroona from carrying out of any profit- making undertaking or scheme. ITAA s26(a) Omitted by No 47 of 1984 and s25A(1) - (12) inserted by No 47 of 1984. The Plaintiff acquired the property as a volunteer in trust and therefore cannot be said to of have been carrying out a profit-making undertaking or scheme.
- (xi) to avoid state and federal death duties in force and levied at that time.

62 In the course of his submissions Terry made a number of other points in support of his argument that Wayne held the Fitzpatrick Street properties on a resulting trust. Without being exhaustive Terry argued that:

- (a) there was no evidence that Wayne referred to the Fitzpatrick Street properties as being owned by him - Terry submitted that Wayne was probably surprised to find that he was recorded as the registered proprietor on the Certificate of Title;
- (b) correspondence concerning the properties was addressed to Thomas and Shirley;
- (c) Wayne acknowledged the existence of a trust because he did not put income from the Fitzpatrick Street properties in his own tax returns;
- (d) the case that Thomas and Shirley owned the units absolutely was supported by:
 - (i) the evidence of Hayden Slee (Terry's son) to the effect that in casual conversations with family members, including Thomas and Shirley, he only heard the 'units' being referred to a 'Nana and Pops' units';²⁸
 - (ii) the evidence of Leonard Clyde Walton, a friend of Thomas and Shirley for over 40 years, to the effect that Thomas spoke to him from time to time about 'his units'

²⁸ Exhibit D9.

and when visiting him told him that he had been collecting the rent for the units or doing repairs on them;²⁹

- (iii) the evidence of Ann's husband, Mr Greg Lewis to the effect that during his lifetime Thomas stated to Greg that all of his children were getting a unit each and Wayne was getting something else;³⁰
 - (iv) Terry's own evidence that Thomas 'offered him the units' in 2001;³¹
 - (v) Terry's evidence that when Thomas offered him the units, Terry suggested to his father that some paperwork should be done in this regard;³²
 - (vi) Terry's evidence that in 2003, he (Terry) lent \$22,000 to Thomas to make capital improvements to the units; and³³
 - (vii) Terry's evidence in cross-examination that in 2011 Shirley told him that the units would be going to him and Ann.³⁴
- (e) the presumption of advancement should not be applied in Wayne's favour for two reasons: first, on Wayne's evidence the transfer of the Fitzpatrick Street properties into his name was expressed to be a reward for his hard work; secondly, Wayne received other generous benefits from Thomas and Shirley and it cannot have been Thomas and Shirley's intention to confer additional benefits on Wayne.

Applicable legal principles

⁶³ The applicable legal principles were not in dispute.³⁵ They are as follows:

²⁹ Exhibit D7.

³⁰ ts 387.9

³¹ Exhibit D10 [106]; Exhibit D11 [67].

³² ts 557, 607.

³³ ts 553, 582-584.

³⁴ ts 600-601, 619-621.

³⁵ *Wilkins v Wilkins* [2007] VSC 100 [8] (Kaye J) citing *Charles Marshall Pty Ltd v Grimsley* [1956] HCA 28; (1956) 95 CLR 353, 63-6; *Martin v Martin* [1959] HCA 62; (1959) 110 CLR 297, 303-304; *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242, 247 (Gibbs CJ), 255-6 (Mason and Brennan JJ), 266-7 (Deane

- (a) In the absence of evidence to the contrary, a registered proprietor of real estate is presumed to own the equitable interest in it. The equitable estate follows the legal estate and is said to be 'at home' with the legal title.³⁶
- (b) Where, however, a person purchases property in the name of another, or jointly with another, the legal title holder who has not provided the purchase money will only obtain a beneficial interest in the property where that is the intention of the purchaser.³⁷ This principle was stated by Aickin J (with whom Mason, Murphy and Wilson JJ agreed) in *Napier v Public Trustee (Western Australia)* as follows:³⁸

The law with respect to resulting trusts is not in doubt. Where property is transferred by one person into the name of another without consideration, and where a purchaser pays the vendor and directs him to transfer the property into the name of another person without consideration passing from that person, there is a presumption that the transferee holds the property upon trust for the transferor or the purchaser as the case may be. This proposition is subject to the exception that in the case of transfers to a wife or a child (including someone with respect to whom the transferor or purchaser stands in loco parentis) there is a presumption of advancement so that the beneficial as well as the legal interest will pass. Each of the presumptions may be rebutted by evidence. (citations omitted)

- (c) The court is concerned to ascertain the objective, manifest intention of the purchaser not an unexpressed subjective intention.³⁹
- (d) In ascertaining the true intention of the purchaser the court may admit evidence of the relationship between the parties and their acts and declarations before or at the time of the purchase, or so immediately after it that those acts or declarations constitute a part of the transaction - evidence of subsequent acts and declarations relating to a purchaser's intention is only admissible as admissions *against* the donor's interest.⁴⁰ In

J); *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538, 547-8 (Deane and Gummow JJ), 584 (Toohey J); 600-601 (McHugh J).

³⁶ *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538, 547 (Deane and Gummow JJ).

³⁷ *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242, 246 (Gibbs CJ).

³⁸ *Napier v Public Trustee (Western Australia)* (1980) 32 ALR 153, 158.

³⁹ *Anderson v McPherson* [No 2] [2012] WASC 19 [98] (Edelman J) and the authorities there cited.

⁴⁰ *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242, 262 (Mason and Brennan JJ) citing *Shephard v Cartwright* [1955] AC 431, 445; *Charles Marshall Pty Ltd v Grimsley* [1956] HCA 28; (1956) 95 CLR 353, 365; Heydon J D and Leeming M J, *Jacobs' Law of Trusts in Australia* (8th ed, 2016) [12.13].

Glynn v Commissioner of Stamp Duties Reynolds JA summarised this limitation on the evidence that is admissible as follows:⁴¹

The law is clear that the only admissible and relevant evidence (apart from admissions to which I will later refer) comprises the acts and declarations of the parties before or at the time of the purchase, or so immediately thereafter as to constitute a part of the transaction. 'If that evidence is insufficient to rebut the presumption the beneficial gift, absolute or subject only to qualifications imposed upon it at the time, is complete and no subsequent changes of mind or dealings with the property inconsistent with the trust by the donor can as between himself and the donees alter the beneficial interest.' (citations omitted)

- (e) If the relationship between the purchaser and the person to whom the legal title of property is transferred is one which the law recognises as attracting the 'presumption of advancement' then there is no resulting trust in favour of the purchaser.⁴² One such relationship is the relationship between parents and a child including an adult child.

Analysis and disposition

64 I am not persuaded by Terry's argument that Wayne holds the Fitzpatrick Street properties on trust for the Estate. My reasons are:

- (a) As recorded earlier in this judgment I am satisfied that the discussions between Wayne and his parents about the acquisition, ownership and development of the Fitzpatrick Street properties took place as Wayne deposed. I infer from those discussions and from the way in which Thomas, Shirley and Wayne subsequently dealt with the properties that it was Thomas and Shirley's intention that they should benefit from the net rental income obtained during their lifetime but that after the survivor of them died Wayne should have absolute ownership of the Fitzpatrick Street properties. In short, assessed objectively, I am satisfied that it was the intention of Thomas and Shirley that Wayne should hold the properties on trust for them during their lifetimes but that after their deaths Wayne should be the absolute owner.

⁴¹ *Glynn v Commissioner of Stamp Duties* [1977] 2 NSWLR 673, 680, citing *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353.

⁴² *Anderson v McPherson* [No 2] [2012] WASC 19 [98] (Edelman J) and the authorities there cited; Heydon J D and Leeming M J, *Jacobs' Law of Trusts in Australia* (8th ed, 2016) [12.13].

- (b) Even if the evidence of the actual intention on the part of Thomas and Shirley - upon which I have relied - was disregarded, I would reach the same ultimate conclusion because the relationship between Thomas and Shirley and Wayne attracted the presumption of advancement and no resulting trust arose in respect of the equitable interests in the properties. I am not persuaded that the generosity shown by Thomas and Shirley towards Wayne in the form of assistance with the purchase of a newsagency in 1978 or by allowing him to live rent free in their beach house, or in any of the other ways referred to by Terry, is sufficient to displace the presumption of advancement.
- (c) I am not persuaded that the various reasons identified by Terry in his pleading and in his submissions constitute a basis from which an inference could be drawn that Thomas and Shirley did not intend Wayne to have absolute ownership of the properties subject only to their life interest. The matters identified by Terry are the product of speculation by him as to his parents' intentions many years after the relevant events and are not supported by any cogent evidence.
- (d) The fact that Thomas and Shirley managed the properties in their lifetimes and that they may have referred to the units as their units or in other similar ways is entirely in keeping with the arrangement between them and Wayne.
- (e) My concerns about the reliability of Terry's evidence are such that I am not satisfied that Thomas offered him the units or that Shirley told him that the units would be given to him and Ann anyway. In any event statements made by Thomas and Shirley (including the statements allegedly made by Thomas to Mr Lewis, by Thomas to Terry, and by Shirley to Terry) about their intentions to gift the properties to them were made long after the acquisition of the properties and are not admissible to prove the intention held by Thomas and Shirley when the Fitzpatrick Street properties were acquired. For the reasons explained at par [63(d)] above such statements removed in time from the transaction are only admissible as admissions *against* the Estate's interest. They cannot be relied upon in support of a claim that the Estate owns the properties absolutely.

The trespass claim

Magistrates Court proceedings

65 On 9 December 2013 Wayne commenced two sets of proceedings in the Mandurah Magistrates Court. By proceedings MH1010 of 2013 Wayne sought possession of the Fitzpatrick Street properties and other relief. By proceedings MH1011 of 2013 Wayne sought payment of the money received by Terry from tenants for rent from 31 July 2011.

66 On 24 June 2015 Wayne obtained judgment against Terry in each of the Magistrates Court claims. Terry appealed against the judgments. By consent order made in the District Court on 8 March 2016 the appeals were allowed. On 29 March 2016 the Magistrates Court proceedings were transferred to this court and numbered CIV 1406 of 2016 so that they could be dealt with concurrently with an application by Wayne to remove caveats lodged against the titles of the Fitzpatrick Street properties by Terry. Terry had maintained that he was entitled to maintain the caveats on behalf of Estate. In proceedings CIV 1406 of 2016 Wayne filed and served a statement of claim claiming damages for trespass to land. Wayne also maintained a claim to the effect that Terry held rent received by him on constructive trust for Wayne.

A preliminary point - Wayne's entitlement to sue

67 Before commencing proceedings for damages for trespass a plaintiff must first obtain legal possession of the land in question (either by taking physical occupation or obtaining an order of the court).⁴³ The trespass is then 'deemed to have occurred from the time when the [plaintiff] was first entitled to possession (rather than from the time when the [plaintiff] regained possession)'.⁴⁴ This legal fiction is known as the doctrine of trespass by relation.

68 In the course of final preparations for trial Wayne's lawyers became concerned that Wayne's cause of action for damages for trespass had not arisen at the time the Magistrates Court claims were commenced. Wayne commenced new proceedings (CIV 2850 of 2017) by a writ of summons issued on 1 November 2017. The statement of claim indorsed on the writ pleaded the same claims as were contained in the statement of claim in CIV 1406 of 2016. Wayne applied for

⁴³ *Esperance Cattle Company Pty Ltd v Granite Hill Pty Ltd* [2014] WASC 279 [445].

⁴⁴ *Broadway Pty Ltd v Lewis* [2012] WASC 373 [124] citing *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* [2012] WASC 285 [270] - [323].

orders to enable the action in CIV 2850 of 2017 to be heard and determined at the same time as the action in CIV 1406 of 2016 (an application to consolidate the proceedings was not pressed). Terry was content for the two actions to be determined at the same time and I made orders facilitating this.

69 In October 2015 Wayne entered the Fitzpatrick Street properties and changed the locks.⁴⁵ The doctrine of trespass by relation means Wayne's entitlement to sue for trespass relates back to the time at which the right of entry accrued, that is, 31 July 2011, the date on which Shirley died.

Legal principles

70 The applicable principles relating to trespass were not in dispute and can be summarised as follows.

71 Amongst other circumstances, a trespass to land occurs when a person intentionally or negligently enters into or remains on land which is in the possession of another.⁴⁶ Unless a person who enters the property of another can justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises, that person commits an act of trespass.⁴⁷ Every unauthorised entry upon private property is a trespass.⁴⁸

72 In *Rodrigues v Ufton*, Hodges J stated 'an action of trespass is an action for the disturbance of possession, and ... the persons who can maintain it are those whose possession are disturbed'.⁴⁹ In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.⁵⁰

73 A person may trespass on land intentionally or negligently, but a trespasser who honestly (but mistakenly) believes he is entitled to possession is nonetheless guilty of unlawful entry.⁵¹

⁴⁵ Exhibit P7 [3].

⁴⁶ *Hardie Finance Corporation Pty Ltd v Ahern* [2010] WASC 403 [222] (Pritchard J).

⁴⁷ *Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635, 647 (Gaudron and McHugh JJ); *Barker v The Queen* [1983] HCA 18; (1983) 153 CLR 338, 356 (Brennan and Deane JJ).

⁴⁸ See *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1, 10 (Brennan J).

⁴⁹ *Rodrigues v Ufton* (1894) 20 VLR 539, 543 - 544.

⁵⁰ *Powell v McFarlane* (1979) 38 P & CR 452, 471 - 472 (Slade J).

⁵¹ *Warren v Lawton* [2016] WASC 285 [210]; *Basely v Clarkson* (1681) 3 Lev 37.

Analysis and disposition

74 Terry did not dispute that following Shirley's death he retained possession of units 14A and 14B, undertook repair work and collected rent from the tenants to whom he had let the units.

75 Terry's primary response to the trespass claim was that the Fitzpatrick Street properties were owned by the Estate and he was acting to preserve and maintain the assets of the Estate as one of the named joint executors, alternatively as an executor de son tort. During closing submissions Terry correctly accepted that even in the event that he was found to be acting as an executor this would only be relevant if the properties formed part of the Estate.⁵² Given my conclusion in relation to the ownership of the properties, Terry's argument that he took possession as an executor affords him no defence. Further, as Wayne submitted, Terry's claim that in taking possession of the units he was acting as an executor of the Estate, is undermined by the fact that Terry has not accounted to the Estate for the rental income he received.⁵³ In cross-examination Terry agreed that the rent derived from the units was paid into his general account,⁵⁴ and that he did not account to the Estate for the rent collected by him.⁵⁵ He said that this was because he had counterclaims against the Estate for amounts he spent on the units but I do not find that explanation persuasive. Terry's readiness to criticise Ross and Ray for their alleged shortcomings as executors demonstrates a keen awareness on his part of the responsibilities of executors and if Terry's concern in taking possession of the units was to preserve the interests of the Estate he would have accounted to the Estate for the rental income.

76 Terry gave evidence that Ross 'offered [him] the units at 14 and 16 Fitzpatrick Street' in early or mid-February 2010⁵⁶ and that in November 2010 at a meeting at the Fitzpatrick Street properties between Ross, Ann, Terry, Terry's wife, Valentina, and Ms Kerrie Birch, a real estate agent, Ross told Terry and Ann that they were going to 'get the units' and they should choose a set of units each and do them up. Assuming for present purposes that these conversations occurred, the statements attributed to Ross do not amount to consent from Wayne to Terry's possession of 14 Fitzpatrick Street after Shirley had died. I do not accept that Terry retained possession of 14 Fitzpatrick Street

⁵² ts 701.

⁵³ ts 308 - 309.

⁵⁴ ts 594.

⁵⁵ ts 611 - 612.

⁵⁶ Exhibit D11 [29].

because he considered that he had Wayne's consent to do so. Terry's position was that the Fitzpatrick Street properties were owned by the Estate. On his view of the matter, Wayne's consent was not necessary.

77 In any event, any belief Terry held that Wayne consented to Terry being in possession of 14 Fitzpatrick Street after Shirley's death was a mistaken belief. Moreover, as noted earlier in these reasons, in October 2011 Wayne asserted his ownership of the Fitzpatrick Street properties in a letter to Terry. Any belief Terry held that he had Wayne's consent to occupy the property should have been dispelled by this and subsequent letters sent by Wayne to Terry in late 2011.⁵⁷ I find that Wayne did not consent to Terry being in possession of 14 Fitzpatrick Street after Shirley's death.

78 I have found that 14 Fitzpatrick Street did not form part of the Estate and for the reasons given above it is no defence to the trespass claim for Terry to assert that he was acting as an executor to preserve and maintain the Estate. As stated above, even if Terry had a belief that he had Wayne's consent to retain possession of 14 Fitzpatrick Street, that was a mistaken belief, and mistaken belief as to entitlement to possession is not a defence to a claim for trespass.

79 On the basis of the doctrine of trespass by relation, Wayne's entitlement to sue commenced on 31 July 2011. By retaining possession of 14 Fitzpatrick Street after Shirley's death, Terry was interfering with or disturbing Wayne's possession and the claim against Terry for trespass succeeds.

Assessment of damages

80 Wayne seeks, amongst other things, the following:

- (a) damages for trespass (mesne profits);
- (b) exemplary and/or aggravated damages;
- (c) further and/or in the alternative, an account for all monies received by Terry for and in respect of the property on a constructive and/or resulting trust;
- (d) an injunction restraining Terry from trespassing on the Fitzpatrick Street properties.

⁵⁷ Exhibit D16, 156 - 157.

Damages

Legal principles

81 Damages awarded for trespass to land are often referred to as 'mesne profits'.⁵⁸ A trespass to land will always involve an award of damages - even if the amount is nominal - on the basis that the trespass 'vindicates the owner's right to quiet possession'.⁵⁹ The basic measure of damages where there is no actual damage is the 'use value' of the land, regardless of whether and how the owner would otherwise have exploited it.⁶⁰

82 The use value will often be the reasonable rental value of the land during the time of the defendant's occupancy. It is not necessary for the plaintiff to show that he or she would have been able or willing to lease the property during the period of trespass.⁶¹ In *Lollis v Loulatzis*, Kaye J stated the principle as follows:

... the law relating to the assessment of damages for trespass is well settled. Damages awarded for trespass to land are sometimes described as 'mesne' profits. The usual measure of such damages is constituted by the value of the market rent for the premises which the trespasser should have paid during the period of the trespasser's occupation of the premises. In order to prove an entitlement to such damages, it is not necessary for the plaintiff to establish that the property has been damaged, or that the plaintiff would have been able, or indeed willing, to lease the premises during the period of the trespass.

83 The authorities make it clear that in calculating an award of mesne profits, a deduction may be made where a defendant has made contributions to the premises. In *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* Edelman J referred to established authorities on this point in the following terms:⁶²

In *Doe v Hare*, an award of mesne profits for trespass was made against the defendant. The jury, following the direction of Lord Lyndhurst, then Chief Baron, had allowed a deduction from the award of a ground rent payment made by the defendant during the period the defendant was in occupation. The plaintiff appealed and submitted that the deduction should not have been allowed. Baron Bayley, in the leading judgment, said that the defendant 'only paid what the plaintiff must have paid; and if so, the plaintiff is not hurt'. The decision was

⁵⁸ *Lollis v Loulatzis* [2007] VSC 547 [219].

⁵⁹ *SSYBA Pty Ltd v Lane* [2013] WASC 445 [81].

⁶⁰ *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285.

⁶¹ *Lollis v Loulatzis* [2007] VSC 547 [219].

⁶² *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* [2012] WASC 285 [339] (citations omitted).

approved in *Barber v Brown*, where the court explained that if, after ejection, the defendants had been sued for mesne profits then an award would be reduced by the amount of any rates and taxes which had been paid by the defendant.

84 A similar approach was taken in *Lollis v Loulatzis*, where the plaintiff's son had undertaken renovations against the plaintiff's wishes which had 'substantially enhanced the value of the property'. In that case, Kaye J stated:⁶³

Thus, on either view of the juridical basis of an award of damages in a case such as this, as a matter of principle, it would seem to me that, in an appropriate case, the Court may and should take into account either the cost or value of improvements effected by the defendant trespasser.

85 However, Kaye J also noted that reductions in favour of the trespasser are awarded where the circumstances of the case are 'unusual', and had previously stated:⁶⁴

In the large majority of cases, it would be unjust and erroneous to take into account, in favour of the trespasser, expenses and costs incurred by the trespasser in effecting improvement to the property without the permission of the owner. In many, if not most of, such cases the improvements would have enured to the immediate benefit of the trespasser, during the period of the trespass complained of.

86 In an action for trespass, the damages may be mitigated or reduced by any amount which the defendant has paid, but which the plaintiff would have had to pay had he or she retained possession.⁶⁵

Wayne's claim

87 Wayne's claim is as follows:

a. for the period from August 2011 to December 2014 (inclusive):

(i) Unit 14A - \$276 per week x 164 weeks = \$45,264.00

(ii) Unit 14B - \$276 per week x 164 weeks = \$45,264.00

Subtotal = \$90,528.00

b. for the period from January 2015 to October 2015 (inclusive):

(i) Unit 14A - \$230 per week x 40 weeks = \$9,200.00

⁶³ *Lollis v Loulatzis* [2007] VSC 547 [231].

⁶⁴ *Lollis v Loulatzis* [229]. See also *Lord Cawdor v Lewis* (1835) 160 ER 174.

⁶⁵ *Peruvian Guano Co Limited v Dreyfus Brothers & Co* [1892] AC 166 as cited in R P Balkin and J L R Davies, *Law of Torts* (5th ed, 2013) 27.19.

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(ii) Unit 14B - \$230 per week x 40 weeks = \$9,200.00

Subtotal = \$18,400.00

c. for the period from November 2015 to January 2018 (inclusive):

(i) Unit 14A - \$230 per week x 108 weeks = \$24,840.00

(ii) Unit 14B - \$230 per week x 108 weeks = \$24,840.00

Subtotal = \$49,680.00

TOTAL = \$158,608.00

88 Wayne's claim for the period November 2015 to January 2018 is based upon the proposition that he deferred his plan of renovating the units and letting them out to retirees because of the uncertainty over his title to the property created by the claim advanced by Terry purportedly on the Estate's behalf.

89 Wayne supported his claim for damages with opinion evidence about the rental income that the units could have generated in the relevant periods. This evidence was given by Ms Heather Lee, a senior residential property manager employed by a real estate agency, 'Professionals Waroona'. Ms Lee had worked in Waroona for just over 12 months. She had worked in real estate agencies dealing with rental properties in the Perth Metropolitan area for a number of years. She said that for the purposes of forming an opinion of the rental income that could be realised from the units over the relevant period, she had spoken to the owner of the agency and to her sales representative colleagues. She had also looked at the records kept by the agency as to tenancies of similar properties in the relevant period. Ms Lee produced copies of four tenancy agreements in respect of properties in Waroona that she considered to be similar.⁶⁶ The tenancy periods and rental income for those tenancies were as follows:

| Property | Rental income |
|---------------------------|--|
| Unit 2/20 Jackson Street | \$260 per week (8 February - 7 August 2012) |
| Unit 3/61 Thatcher Street | \$295 per week (7 June - 6 December 2013) |

⁶⁶ Exhibit P2.

| | |
|---------------------------|---|
| 63D Hill Street | \$240 per week (25 May 2016 - 24 May 2018) |
| Unit 3/61 Thatcher Street | \$300 per week (24 January 2017 - 23 January 2018) |

90 Ms Lee's opinion was expressed as follows:

It is in our opinion as of the 13th of October that the expected rental income for 14 A & B Fitzpatrick St 2 x1 bedroom duplexes with the renovations would be around the \$220.00 to \$240.00 in the current market. In regards to the period between 2011 and 2014 we would have been able to add an extra 20% onto this price range due [to the fact that] the market was high during this period.

Also as for 16 A & B Fitzpatrick St the expected rental income for the 3x1 bedroom duplexes would be around the \$230.00 to \$250.00 in the current rental market with the renovations completed. Also for the period between 2011-2014 we also would have added an extra 20% onto these prices due to the market at that time.

91 14A and 14B Fitzpatrick Street each have two bedrooms and one bathroom.

92 In her oral evidence-in-chief Ms Lee agreed that unit 3, 61 Thatcher Street had a second bathroom and that was why the rent was \$300 per week.

93 In cross-examination Mr Woodley showed Ms Lee photographs of the units which he had taken between January 2012 and January 2014.⁶⁷ Ms Lee's evidence was that the units could not have been let out in the condition which they were in as shown in the photographs. In the course of re-examination she estimated that it would cost approximately \$3,500 to re-carpet each unit and install roller blinds.⁶⁸ She estimated that it would have cost between \$2,800 and \$3,500 to repaint each unit and that up to \$500 might be required to repair damaged shelving and between \$800 and \$1,500 would be required to replace the kitchen island bench.⁶⁹ In summary, the range for the cost of carpets, blinds and painting on 14A and 14B Fitzpatrick Street was \$12,600 to \$14,000 and an allowance of between \$1,300 and \$2,000 should be made for the cost of repairing shelving and kitchen cabinetry.

⁶⁷ Exhibit D1.

⁶⁸ ts 206.

⁶⁹ ts 207.

Ms Lee's evidence was that it would take two to three weeks to undertake this work.

94 Ms Lee said that her firm charged 9.35% of the rental income as a fee for managing properties. Her evidence was to the effect that owners who did not employ agents to let and manage their properties generally received lower rents.⁷⁰

95 In cross-examination Terry referred Ms Lee to information in relation to unit 3, 20 Jackson Street, Waroona which was derived from a real estate information service known as RP Data. Terry asked Ms Lee to compare the external appearance of the group of six units at 20 Jackson Street to the units at 14A Fitzpatrick Street. The RP data for units 3, 4 and 6 of 20 Jackson Street was tendered.⁷¹ The RP data records that units 3, 4 and 6 have three bedrooms, two bathrooms (one en suite), a lounge room, a dining room, a car parking space and a lock-up garage. Unfortunately, the RP data for unit 2 (the unit relied upon by Ms Lee as a comparable for rental value purposes) was not tendered. I infer, however, from the RP data in respect of units 3, 4 and 6 and from Ms Lee's evidence that the external appearances of all the units were similar in nature that unit 2 also had three bedrooms, two bathrooms (one en suite), a lounge room, a dining room, a car parking space and a lock-up garage. I have some confidence in drawing this inference because Ms Lee did not say that the accommodation offered by the units differed between them when she was referred to the RP data for unit 3 or when she was asked questions about the units at 20 Jackson Street. If the units were of different sizes or were configured differently I would have expected Ms Lee to have volunteered this.

96 In the alternative to the claim based on Ms Lee's evidence Wayne seeks damages in the amount of rental income actually received by Terry. Terry set out in his defence the rental income received by him as follows:

The net proceeds from 14A and 14B have been negligible [sic]. The premises are difficult to rent given the on-going behaviour of the plaintiff. The premises have remained untenanted for lengthy periods due to the plaintiffs [sic] behaviour in trying to frustrate the preserving and maintaining of the assets of the Estates.

⁷⁰ ts 207

⁷¹ Exhibit D16, 1345 - 1351.

Particulars

...

(d) From 9 January 2010, Mr Raymond Thomas Woodley, Joint named Executor in the Will of Thomas Woodley and the Will of Shirley Woodley collected the rent, if any, from 14 and 16 Fitzpatrick Street Waroona to about February 2012.

...

(i) There were no tenants [sic] in 14A, 14B or 16A Fitzpatrick Street Waroona for the period about December 2010 to April 2012.

...

(k) The Defendant collected Gross Rent of \$4,725 for the year ended 30 June 2012.

(l) The Defendant collected Gross Rent of \$7,600 for the year ended 30 June 2013.

(m) The Defendant collected Gross Rent of \$10,400 for the year ended 30 June 2014.

(n) The Defendant collected Gross Rent of \$10,400 for the year ended 30 June 2015.

(o) The Defendant collected Gross Rent of \$33,125 for the entire period and incurred expenses such as roof repairs \$7,599.40, repay bonds held by Thomas Ross Woodley with interest, glass windows, locks, electrical, plumbing, earthmoving, tip fees, rates, insurance, cleaning, painting, hot water system, tree removal and pruning, fire alarm system, court costs for rent recovery from tenants [sic], carpet cleaning totalling approximately \$20,000 for the entire period.

97 It was not suggested on Wayne's behalf that Terry had collected more rent than was particularised in his pleading.

98 The expenses incurred by Terry were the subject of affidavit and oral evidence. Terry gave evidence that he had paid amounts for the following:⁷²

| | |
|------------------------------------|------------|
| Repair of the roof on both 14A and | \$7,599.40 |
|------------------------------------|------------|

⁷² Exhibit D10 [229] - [239].

| | |
|-------------------------------|------------|
| 14B | |
| Tip fees | \$1,925.00 |
| Water rates | \$1,187.00 |
| Stove | \$ 680.00 |
| Shire rates | \$1,788.23 |
| Gas bottle rental | \$ 56.00 |
| Repayment of outstanding bond | \$ 940.00 |
| Elder's Insurance | \$1,062.31 |

99 Terry's evidence was that he had paid cash for many of his expenses and would keep his receipts in a bag which was stored in an old car on his farm, and that a fire in January 2016 had destroyed those receipts.⁷³ He did, however, produce a receipt for the cost of renewing the guttering and downpipes on 14 Fitzpatrick Street - \$3,974.40.⁷⁴ Terry also produced a quotation for restoring the roof of both the 14 Fitzpatrick Street units for a cost of \$3,625, but there is no satisfactory evidence that the roof repairs were undertaken and thus that an expense of this nature was incurred.⁷⁵

100 Counsel for Wayne submitted that Terry's contribution to the units should not be taken into account,⁷⁶ but if the cost of repairs and maintenance were to be taken into account, that an allowance of \$2,838.92 was an appropriate amount. This figure was reached by comparing amounts listed in ledgers produced by Terry to debits in Terry's NAB FlexiPlus Mortgage Bank Account bank statements. That table is reproduced below:

| Date | Amount | Description | Trial Book Page Ref | |
|------|--------|-------------|---------------------|--------------|
| | | | Ledger | Bank Account |
| | | | | |

⁷³ Exhibit D10 [240]; ts 558 - 561.

⁷⁴ D16, 730.

⁷⁵ Exhibit D13.

⁷⁶ ts 745.

| | | | | |
|--------------|-------------------|-----------------------------|-----|------|
| 12.02.13 | \$60.50 | Gas Bottle | 759 | 2309 |
| 10.04.12 | \$851.13 | Electrical repairs unit 14A | 758 | 2274 |
| 03.05.12 | \$236.31 | Electrical repairs unit 14A | 758 | 2278 |
| 08.02.12 | \$123.75 | Rental clean unit 14B | 758 | 2267 |
| 20.04.12 | \$71.00 | Kleenheat Gas unit 14B | 758 | 2275 |
| 10.04.13 | \$90.00 | Carpet clean unit 14A | 759 | 2315 |
| 12.04.13 | \$75.50 | Gas unit 14A | 759 | 2316 |
| 19.02.13 | \$199.16 | Security light unit 14B | 759 | 2310 |
| 12.11.13 | \$100.00 | Carpet clean unit 14B | 760 | 2337 |
| 18.11.13 | \$230.57 | Electrical unit 14B | 760 | 2337 |
| 20.01.14 | \$720.00 | Fly wire doors unit 14B | 760 | 2344 |
| 07.07.14 | \$81.00 | Gas unit 14A | 761 | 2362 |
| Total | \$2,838.92 | | | |

Analysis and disposition

101 I have reservations about an unqualified acceptance of Ms Lee's opinion as to rental values. The factual foundation for the opinions expressed by her - that is, the rental value of comparable properties over the relevant period - is very limited. Her report does not disclose the information provided to her by her colleagues on which her opinion is based. The statement to the effect that rental incomes in the period 2011 - 2014 were 20% higher than in later years was not supported by

empirical evidence. Unit 2, 20 Jackson Street offered better accommodation than 14A and 14B Fitzpatrick Street. Moreover, the rent that Ms Lee considered achievable were significantly in excess of the rent actually achieved by Terry. Whilst I have reservations about Ms Lee's evidence, it does, however, provide some guidance and I do not discount it completely. Doing the best I can with the evidence, I find that the rental income that could have been achieved for each of the units at 14 Fitzpatrick Street was \$200 per week.

102 The starting point for calculating Wayne's loss is a gross rental for each unit of \$200 per week. An allowance should be made for the cost of a letting agent and property manager and, in this respect, I find that the figure of 9.35% of the gross rental referred to by Ms Lee in her evidence is an appropriate figure.

103 I find that the period over which the loss was suffered is 1 October 2011 to 13 July 2015 inclusive. At the time of Shirley's death, the Fitzpatrick Street properties were inhabitable. I find it would have taken two to three months for Wayne to renovate the properties so that they were in a leasable condition. Until the units were in a condition in which they could be let they had no rental value. The evidence as to when in 2015 the units were vacated so that Wayne could have taken possession is unsatisfactory. Wayne deposed that he entered into possession of 14A and B 'in about October 2015 when [he] entered onto the property and changed the locks'.⁷⁷ When questioned as to why it took three to four months from the date of the order of possession to take actual possession, Wayne explained that he would go to the properties 'on a weekly basis' and would not enter if there were still tenants residing in the properties.⁷⁸

104 Terry's evidence was that when Wayne obtained the order for possession on 24 June 2015, he immediately advised the current tenant, who vacated within two weeks.⁷⁹ In cross-examination, Terry put to Wayne that the tenants vacated within 'two weeks at the most' after the order for possession was made, to which Wayne responded 'I couldn't be sure of the timeframe at all, I'm sorry'.⁸⁰ In the light of this evidence from Wayne, I am unable to conclude that Terry denied him possession beyond the second week in July 2015.

⁷⁷ Exhibit P7 [3].

⁷⁸ ts 251 - 2.

⁷⁹ D10 [255].

⁸⁰ ts 269.

105 I do not accept that the period over which damages may be claimed can be extended as Wayne contends by relying on the uncertainty as to his title as a basis for not undertaking the work required to put the units into a state in which they could be let. Wayne is confined to losses suffered as a result of his possession of the property being disturbed or interfered with and, on that basis, he is not entitled to losses for a period extending beyond the date on which he could have resumed possession.

106 In summary the elements of my calculation for the loss of rental income are as follows. First I will calculate the gross rental at the weekly rate of \$200 for each unit. Secondly, I will deduct from this figure an allowance for the fee of the letting/agent property manager at 9.35%. Thirdly, the period over which the lost rental income is to be calculated is 1 October 2011 to 13 July 2015 – a total of 197 weeks and 3 days. Fourth, I will deduct from the aggregate lost rental income the amount required to repair and renovate the units to enable a rental income to be derived from them. In this respect I will take the upper end of the range of Ms Lee's estimates - \$16,000. The additional costs (excluding carpet cleaning costs) of \$2,648 that Wayne accepted were incurred by Terry should also be deducted as should the sum of \$3,974 spent by Terry on replacing the guttering and downpipes. The calculation is as follows:

| | |
|-----------------------------|---|
| Gross lost rental | \$200 per week for 197 weeks and 3 days = \$78,971.40 |
| Less | |
| Agent's fees | \$7,383.80 |
| Repair and renovation costs | \$22,622.92 |
| Balance | \$48,964.68 |

Wayne's claim for exemplary or aggravated damages

Legal principles and disposition

107 The distinction between aggravated and exemplary damages was explained by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*:⁸¹

[A]ggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment - moral retribution or deterrence.

108 Aggravated damages may be awarded where the conduct of the defendant is 'high-handed, oppressive, insulting or contumelious',⁸² or is in some sense improper, lacking in bona fides or unjustifiable.⁸³ When considering whether an award of aggravated damages should be made, the circumstances of each particular case are relevant,⁸⁴ including the conduct of the defendant from the time that the tort is committed up until the judgment is handed down.⁸⁵

109 Exemplary damages may be awarded where the defendant's conduct amounts to 'a conscious and contumelious disregard for the plaintiff's rights'.⁸⁶ When undertaking an assessment of exemplary damages courts will often consider all the circumstances of the case.⁸⁷

110 Although the circumstances which may justify an award of aggravated damages are often the same as those which justify the granting of exemplary damages, the two are distinct and should generally be assessed separately.⁸⁸

111 Both exemplary damages and aggravated damages may be awarded in an action for trespass to land.⁸⁹

⁸¹ *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118, 49.

⁸² *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44, 71.

⁸³ *Triggell v Pheeney* [1951] HCA 23; (1951) 82 CLR 497.

⁸⁴ *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 10; (1966) 117 CLR 118, 151.

⁸⁵ *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44, 71 (Brennan J).

⁸⁶ *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* [1985] HCA 12; (1985) 155 CLR 448, 471 (Brennan J).

⁸⁷ *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* [1985] HCA 12; (1985) 155 CLR 448, 463 (Gibbs CJ).

⁸⁸ R P Balkin and J L R Davies, *Law of Torts* (5th ed, 2013) [27.10].

⁸⁹ *Lamb v Cotogno* [1987] HCA 47; (1987) 164 CLR 1, 8 (exemplary damages); *Traian v Ware* [1957] VR 200 (aggravated damages).

112 Wayne relied upon the 'intentional and continued conduct' of Terry in applying for an award of aggravated or exemplary damages. Wayne submitted that Terry:

- (a) pleaded a defence incapable of constituting a proper defence to the trespass claim;
- (b) by his counterclaim, purported to seek declaratory relief on behalf of the Estate in circumstances where he was not an executor and had no authority to do so;
- (c) advanced his defence and counterclaim on little, if any, admissible evidence; and
- (d) aggravated Wayne's loss by raising a 'multitude of irrelevant matters and continuing to delay the proceedings throughout'.

113 I am not persuaded that this is a case in which aggravated or exemplary damages should be awarded. In my view, Wayne's submissions in support of his claim for aggravated or exemplary damages are submissions that are more appropriately made in respect of an application for some form of special costs order.

Terry's application to adduce 'new and fresh evidence'

114 On 30 August 2018 Terry applied for leave to 'adduce and rely upon new and fresh evidence'. In support of his application, Terry relied upon three affidavits sworn by him.⁹⁰ In addition, Terry filed written submissions. In those submissions Terry argued:

A large proportion of the Plaintiff's evidence and that of his witnesses is verbal or uncollaborated [sic]. It is unfair when any of the Plaintiff's Witnesses subsequently present themselves before another court and under oath gives evidence which is contradictory, significant, material and/or produces documentary evidence which was available and in their possession at the date of the trial before this Honourable Court which supports or assists the Defendant's defence at trial.

115 The reference in Terry's written submissions to evidence given before another court was a reference to evidence given by Ross in proceedings brought against him by Terry concerning a farming property formerly owned by Thomas and Shirley known as the

⁹⁰ Affidavits sworn on 29 August 2018, 6 September 2018 and 25 September 2018.

Coronation Road farm. Those proceedings were heard by Allanson J on various dates between 19 June and 21 August 2018.

116 Terry submitted that the fresh and new evidence that he wished to rely upon did not raise a new claim, was material in nature, would allow the court to provide a speedy and efficient resolution of the matter, and that a deliberate decision had been made by Wayne and Ross not to produce the evidence previously and, but for that decision, the evidence would have been available. Terry submitted that it was in the interests of justice to allow his application.

117 In the course of oral submissions, Terry agreed that the new and fresh evidence that he sought to rely upon fell into the following categories:

(a) the evidence contained in par 455 of Ross's witness statement dated 23 May 2018, filed and relied upon in the Coronation Road proceedings. To understand the significance Terry attaches to par 455 it is necessary to set it in the context of the proceeding paragraphs. Paragraphs 450 to 457 of Ross's witness statement read as follows:

450. I also had a further conversation with Wayne about our mother's proposal of transferring her properties to the family prior to her death.

451. I am not sure when this conversation occurred, but it was some time in February or March 2010.

452. I do not recall the exact words spoken in the conversation I had with Wayne but I recall the substance of what was said.

453. Wayne said that he was prepared to include his Fitzpatrick Street units in the pot of properties to be divided amongst the family.

454. He said that he felt he had enough because he was getting the Mandurah property.

455. Wayne told me to tell Terry and Ann.

456. A few days after speaking with Wayne, I had a further conversation with Ann. I do not recall the exact words used, but I recall the substance of what was said.

457. I told Ann that Wayne was going to put the Fitzpatrick Street units into the pot of properties to be divided up amongst the family.

(b) evidence contained in Ross's statement to the effect that Ross wrote a note following his discussions with Wayne described in [35] of this judgment in which he, Ross, had referred to himself as a 'big loser' if the division of properties discussed with Wayne proceeded. Ross's evidence was as follows:

411. I wrote a note where I listed the vehicles, the boat, and the properties and my estimate of their values.

412. I then reflected my mother's wish for Nathan to get the Waroona house, Morgan to get a Waroona block and Wayne to get the Halls Head house.

413. I calculated what the share for each of the five children would be if the River Block (Coronation Road) and the Fitzpatrick Street (Wayne's) Units were included, being \$475,000.

414. I noted that on such a scenario, Ray, Terry and Ann would be 'big winners' and that the 'losers' would be Wayne and me. I would be the 'big loser' because, if I agreed to Coronation Road being included, I would be getting significantly less than the value of my share of Coronation Road and my share of other assets.

(c) evidence that Terry wished to give which was to the effect that his parents had promised him various assets, including the Fitzpatrick Street properties, in 1992 but the promise was not acted upon. Terry wished to give evidence to the effect that one of the reasons why the promise was not acted upon was that in about 1996 his marriage broke down. He wished to give evidence about a visit made by his family law barrister to Waroona to inspect the property and meet Thomas and Shirley.

(d) evidence contained in Terry's affidavit of 25 September 2018 covering a miscellany of matters including the establishment of trusts by Terry, the fact that Terry had seen an envelope on Shirley's kitchen table days after Thomas had died, of which Terry took a photograph, and which he wondered might contain another will, and other matters that it is not necessary to detail.

118 Wayne, Ross and Raymond opposed the application and relied upon an affidavit sworn by Mr Christopher Bailey of the solicitors

instructed by Ross and Raymond. Mr Bailey attached to his affidavit a copy of Ross's witness statement dated 23 May 2018 together with a copy of a witness statement filed on Ross's behalf in the estate proceedings dated 10 June 2016 that had been served on Terry. Mr Bailey deposed that he had compared the two witness statements prepared by Ross and that most of the paragraphs in the 2018 witness statement were contained in the 2016 statement. Included in the 2016 witness statement was a paragraph in identical terms to par 455 of the 2018 statement.

119 The principles which govern applications to adduce new and fresh evidence were not in dispute. In *Osborne v Landpower Developments Pty Ltd* McLure J (as her Honour then was) stated:⁹¹

There is some uncertainty as to the test to be applied to the exercise of the Court's discretion to permit the re-opening of a matter before orders are made. The High Court in *Smith v New South Wales Bar Association* said:

'If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete, or one in which reasons for judgment have been delivered. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side. In the latter situation the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised.'

The rules relating to fresh evidence on appeal are well known. The appellant would need to show that there was a real possibility that the further evidence would have produced a different result if it had been admitted and that the further evidence would not have been available at the original hearing by the exercise of reasonable diligence: *Australian Electrical Electronics Foundry & Engineering Union (WA Branch) v Hamersley Iron Pty Ltd*. A similar test was applied in *Watson v Metropolitan (Perth) Passenger Transport Trust* on an application to re-open before judgment.

It is to be expected that a less stringent test would apply when leave to re-open is sought before reasons are delivered and

⁹¹ *Osborne v Landpower Development Pty Ltd* [2003] WASC 117 [12] - [14].

orders made because the policy in favour of finality does not have the same force. In this case there was no deliberate decision not to adduce the evidence in the March affidavit but it may have been available at the earlier hearing by the exercise of reasonable diligence. It is unnecessary for me to decide that question because I propose to apply the less stringent test referred to by the High Court in *Smith* (*supra*). Relevant factors in the exercise of the discretion include the materiality of the evidence and whether the interests of justice would be advanced by its admission: *Joyce v GIO (NSW)* reported in *Ritchie's Supreme Court Procedure, New South Wales* and cited with approval by the High Court in *Smith* (*supra*). (citations omitted)

120 The principles stated by McLure J were cited with approval by Kenneth Martin J in *Perth Airport Pty Ltd v Ridgepoint Corporation Pty Ltd*.⁹²

121 Leave to adduce fresh evidence is refused. My reasons are as follows.

- (a) The evidence is not new and fresh. In the course of oral submissions Terry accepted that he had, in fact, seen the evidence contained in par 455 of Ross's May 2018 statement, because the evidence was contained in Ross's 2016 statement.⁹³
- (b) The evidence that Ross had described himself as the 'big loser' in a note written by him in 2010 or 2011 is irrelevant.
- (c) Contrary to Terry's submissions, the evidence that Terry wishes to give about his conversations with his parents in 1992, the involvement of his family law barrister in 1996 and 1997, the break-up of his marriage and the creation of trusts is not evidence which was available to Wayne or Ross which they did not disclose. It was evidence available to Terry which, he admitted in the course of his oral submissions, had slipped his mind at the time he was preparing for trial. It is evidence which is irrelevant and inadmissible. The same may be said of the evidence contained in Terry's 25 September 2018 affidavit.

122 I will hear the parties in relation to the terms of the orders and costs.

⁹² *Perth Airport Pty Ltd v Ridgepoint Corporation Pty Ltd* [2013] WASC 33 [214] - [216].

⁹³ ts 767 - 8, 793.

TOTTLE J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JB
ASSOCIATE TO THE HONOURABLE JUSTICE TOTTLE

2 NOVEMBER 2018