On v On [2002] NTSC 18

PARTIES:	ON, Darren Charles and ON, Margaret Joyce (As Administrators of the Estate of Charles On) v ON, Alfred
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	8 of 1997 (9700997)
DELIVERED:	21 March 2002
HEARING DATES:	13, 14, 15 16, 19 & 20 November 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

LAND TITLES UNDER THE TORRENS SYSTEM

Joint tenancy and tenancy in common – severance of joint tenancy generally – agreement as to whether severance can be express or implied – course of conduct - course of dealing.

LAND TITLES UNDER THE TORRENS SYSTEM

Acting in a way inconsistent with maintenance of the right of survivorship.

LAND TITLES UNDER THE TORRENS SYSTEM

Statutory declarations and severance - severance operating for all time.

CONTRACTS

Parol evidence

CONTRACTS

Generally – agreement – "family arrangement"

Greenwood v Greenwood (1863) 46 ER 285, referred to.
Trippe Investments Pty Ltd v Henderson Investments (1992) 106 FLR 214, applied.

CONTRACTS

Words and conduct not amounting to an agreement

EVIDENCE

Generally – parol evidence rule – exclusion of extrinsic matter – subtract from, add to, vary or contradict language of a written instrument.

Codelfa Construction Pty Ltd v State Rail Authority (1982) 149 CLR 337, applied

EVIDENCE

Generally – estoppel – admission of evidence of matters extrinsic to the document.

ESTOPPEL

Generally – estoppel by representation – representation of fact – promissory estoppel.

Waltons Stores (Interstate) Limited v Maher (1987-88) 164 CLR 387

INTERPRETATION

Admissibility of extrinsic evidence in relation to instruments.

REPRESENTATION:

Counsel:

Plaintiffs:	J Reeves QC
Defendant:	J Kelly

Solicitors:

Plaintiffs:	Ward Keller
Defendant:	Hunt and Hunt

Judgment category classification:	B
Judgment ID Number:	mar0208
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Mar0208

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

On v On [2002] NTSC 18
No. 8 of 1997 (9700997)

BETWEEN:

DARREN CHARLES ON and MARGARET JOYCE ON (As Administrators of the Estate of CHARLES ON)
Plaintiffs

AND:

ALFRED ON
Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 21 March 2002)

[1] This case concerns two blocks of land, sections 1453 and 3219, situated in the rural area near Darwin. The title to both blocks has been in the names of brothers, Charles On and Alfred On, as joint tenants for many years (with the exception of a short period brought about by error, as to which, see later).

[2] In May 1984 each of the brothers signed separate documents which the plaintiffs say together evidenced a common intention to sever the joint tenancies and effected severance. The defendant denies that the documents expressed such an intention and had that effect.

[3] Charles On died on 12 December 1994. The plaintiffs as administrators of his estate seek a declaration that the properties be held upon statutory trust for partition in such manner as the court may deem fit. The defendant says he became entitled to the whole of the estate and the land by survivorship upon the death of his brother. That is the first issue in the case.

[4] The defendant also pleads that the plaintiffs are estopped from denying that he is entitled to be registered as the sole proprietor of the land. That estoppel is said to arise from discussions between the parties on 12 February 1996 and subsequent events. That is the second issue.

[5] Given the onus attaching to each party in relation to the separate issues, the hearing proceeded to deal firstly with the severance issue and then the estoppel. At the close of evidence and addresses on the severance issue, I said I was satisfied that the plaintiffs had made out their case. The reasons for that decision follow, after which I will return to consider the second issue.

[6] Henceforth I will refer to the deceased, with the approval of the administrators, as Charlie On, the name by which he was commonly known.

The land in dispute will be referred to as "the two blocks". The plaintiffs are his widow and one of his sons, the administrators of his estate.

[7] The evidence-in-chief of each witness was received by way of statement in writing. Each statement was received as an exhibit. Objection to any of the contents of each statement was dealt with as it was tendered. The passages struck out in the exhibits are those in respect of which objections were upheld.

Severance of joint tenancies

[8] It is plain from the evidence that the brothers had a number of property interests, solely and jointly, and that matters personal to them caused a falling out. That is common ground between the parties and it is unnecessary to go into detail. However, it led to their each executing the documents in the form of statutory declarations, Charlie On, on 16 May 1984 and Alfred On, on 21 May 1984.

[9] The documents were prepared by an accountant, William Fong. He was called by the defendant. I am satisfied Mr Fong did his best to assist the court, but it is plain that most of his evidence understandably was not derived from present, personal recollection of the meeting which took place in May 1984. Rather, he largely reconstructed the events by reference to what was recorded in the statutory declarations prepared by him. As such his evidence carries little weight beyond that he was present at the meeting when the disputes between the brothers were discussed, the dates upon

which things were discussed and the order in which they signed the declarations. In so far as his evidence conflicts with the contents of the declarations, I reject it as being inadmissible. Neither party sought to make anything of his evidence.

[10] The evidence of Alfred On in regard to that meeting was that at the meeting he said to Charlie On words to the effect:

> "My wife said you could have 473 and also that we should divide all the remaining rural blocks that we own together. I want all the rural blocks finalised and each have our own share of it so that we can go our own way".

[11] He could not recall the exact words used by his brother, but it was to the effect of "OK". He added that they did not use the words "joint tenancies" and "tenancies in common" at the meeting. Both he and his brother used expressions such as "all those properties we own together in the rural block" or "those rural blocks we own together". His recollection was tested in cross-examination, but he adhered to his evidence and I accept the substance of what he said, notwithstanding the lapse in time. The words used are reflected in the documents. The declarations, in the order in which they were signed, follow:

Original at Bar Moore 3/4/97

THE NORTHERN TERRITORY OF AUSTRALIA

OATHS ACT

STATUTORY DECLARATION

(1) Here insert name and address of person making the declaration.

I,(1) CHARLIE ON, PRIMARY PRODUCER AND PROPERTY OWNER OF 7 PARAP ROAD, DARWIN N.

(2) Here insert the matter declared to, either directly following the word "declare" or, if the matter is lengthy, insert the words "as follows" and thereafter set out the matter in numbered paragraphs.

do solemnly and sincerely declare (2)hereby that I now apologise to my brother ALFRED ON for assaulting him and also regret all the inconvenience I have caused him over recent occassions.

On condition that the block of land under dispute at Humpty Doo is transferred forthwith to my name, I hereby promise that the subject of our father's last published WILL shall never be mentioned again. Furthermore, neither ALFRED ON nor CHARLES ON shall ever raise these matters again at any time to any other person.

I hereby agree to dissolve all presently existing joint shareholdings and partnerships with my brother ALFRED ON, including dissolving our association in Hodgeson River Pastoral Company Pty. Ltd., the "Norman Ross Building" property in Cavenagh Street, the Smith Street West properties, etc., and the net proceeds from dissolution shall be divided equally.

I undertake to have the Humpty Doo Farm block, the subject of this dispute, to be valued independantly by a licensed valuer and I agree to pay the full transfer fees and stamp duty on the said block of land, upon the execution of transfer of title from Alfred On to me.

In regard to the properties held jointly in both our names situated in the Hundred of Strangways and Colton, I agree to dissolve our partnership in these properties and to divide the properties equally to Charlie On's satisfaction.

This will ensure that both parties have separate titles to their respective properties.

Also, the portion of land in the Hundred of Colton, Block 380 held jointly by MAY ON and MARGARET ON will also be divided equally, giving each other separate title.

And I make this solemn declaration by virtue of the *Oaths Act* and conscientiously believing the statements contained in this declaration to be true in every particular.

(3) Signature of person making the declaration.

(3) .....

Declared at DARWIN

the SIXTEENTH

day of MAY

19 94

(4) Signature of person before whom the declaration is made.

Before me,

(4) .....

(5) Here insert title of person before whom the declaration is made.

(5) COMMISSIONER OF OATHS IN THE NORTHERN TERRITORY OF AUSTRALIA

NOTE 1.—A person wilfully making a false statement in a statutory declaration is liable to a penalty of $1000 or imprisonment for six months, or both.

NOTE 2.—A Statutory Declaration may be made before—(a) a Commissioner for Oaths; (b) a Justice of the Peace; (c) a Commissioner for Declarations; (d) a barrister or solicitor; (e) a member of the Police Force of the Northern Territory; (f) a bank manager; (g) a judge; (h) a magistrate; (i) a notary public; (j) a Commissioner for taking Affidavits in the Supreme Court of a State or Territory; (k) a clerk of the court appointed under the *Local Courts Act*; or (l) a person before whom an oath may be made under the law of the State or Territory in which the declaration is made.

10888 a/v A. B. CAUDELL, Government Printer of the Northern Territory

THE NORTHERN TERRITORY OF AUSTRALIA

OATHS ACT

STATUTORY DECLARATION

I,(1) ALFRED ON, BUSINESSMAN AND PROPERTY OWNER, OF 5 PARAP ROAD, DARWIN N.T.

do solemnly and sincerely declare (2) hereby that I willingly accept the Statutory Declaration and written apology from my brother CHARLIE ON concerning our personal dispute.

I further hereby declare that I will transfer Section 473 of Hundred of Strangways over to my brother CHARLIE ON immediately and according to the terms set down in the Statutory Declaration, by instructing my Solicitor to prepare and execute the property transfer documents on my behalf.

I hereby agree to dissolve all presently existing joint shareholdings and partnerships with my brother CHARLIE ON, including dissolving our association in Hodgeson River Pastoral Company Pty. Ltd., the "Norman Ross Building", property in Cavenagh Street, the Smith Street West properties, etc., and the net proceeds from dissolution shall be divided equally.

In regard to the properties held jointly in both our names situated in the Hundred of Strangways and Colton, I agree to dissolve our partnership in these properties and to divide the properties equally to ALFRED ON'S satisfaction.

This will ensure that both parties have separate titles to their respective properties.

Also, the portion of land in the Hundred of Colton, Block 380 held jointly by MAY ON and MARGARET ON will also be divided equally giving each other separate titles.

And I make this solemn declaration by virtue of the *Oaths Act* and conscientiously believing the statements contained in this declaration to be true in every particular.

(3) .....

Declared at DARWIN the Twenty-First

day of MAY 19 87

Before me, (4) .....

(5) COMMISSIONER OF OATHS IN THE NORTHERN TERRITORY OF AUSTRALIA

(1) Here insert name and address of person making the declaration.

(2) Here insert the matter declared to, either directly following the word "declare" or, if the matter is lengthy, insert the words "as follows" and thereafter set out the matter in numbered paragraphs.

(3) Signature of person making the declaration.

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[12] It is common ground that there were other properties, lots 470, 469 and 483 in the rural area, the title to which stood in the names of the brothers as tenants in common. Lot 380 stood in the names of their respective wives as joint tenants.

[13] The most significant parts of each document is the paragraph beginning "In regard to the properties held jointly in both our names … " and the following: "This will ensure that both parties have separate titles to their respective properties". I find that the two blocks were encompassed by the description "properties held jointly in both our names". Alfred On's evidence confirms it. There is a mis-description by reference to the "Hundred of Strangways and Colton". Lot 1453 is in the Hundred Guy, but that does not assume any significance in the case. The error would appear to have arisen because the boundary of the Hundred of Guy and Colton run along the southern boundary of lot 1453. The dispute is about the two blocks.

[14] I regard those parts of the document as evidencing an agreement or arrangement between the brothers which fell into two parts. One was what they termed "the dissolution of the partnership" in the properties held jointly in both names, and the other the equal division of all properties to the satisfaction of each brother. Those steps would result in both brothers having separate titles to the properties so equally divided.

[15] Both parties agree that the common law in Australia with respect to the severance of a joint tenancy is to be found in *Williams v Hensman* (1861) 1 J&H 546 (70 ER 862) cited with evident approval in *Corin v Patton* (1990) 169 CLR 540. Mason CJ and McHugh J at p 546 considered the various ways in which a joint tenancy can be severed by reference to the judgment of Page Wood VC in *Williams v Hensman*:

> "A joint-tenancy may be severed in three ways: in the fist place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested."

[16] By reference to what was said by Stirling J in *In Re Wilks; Chal v Bulmer* (1891) 3 Ch 59 at p 61 and p 62, Toohey J, at p 587, pointed out that agreement between joint tenants as to severance may be express or implied from a course of conduct.

[17] The plaintiffs submit that whether the language contained in each of the declarations be regarded as evidence of mutual agreement, or a course of dealing sufficient to intimate that the interests of both brothers were mutually treated as constituting a tenancy in common they had the effect of

severing the joint tenancies. The manner in which it was agreed that the two blocks should be dealt with operates to bring about the severance, or might reveal the parties' shared intention to sever their joint proprietorship (per Kaye J in *Public Trustee v Pfeiffle* (1991) 1 VR 19 at p 23). His Honour there referred to *Burgess v Rawnsley* (1975) Ch 429 where at p 447 Sir John Pennycuick was of the view that it may be possible to infer from negotiations for rearrangement of interests a common intention to sever. That proposition stands notwithstanding the legislation then operating, which sometimes is a reason to distinguish that case.

[18] In *Sprott v Harper* (2000) QCA 391 the Queensland Court of Appeal was dealing with an agreement which obviously envisaged further events occurring before it was completed. The agreement related to division of property between husband and wife and covered a number of matters, including as to a house "We do both agree that the property be sold if Larry can not afford to pay me out".

[19] With reference to the third way posed by Page Wood VC, that Court held that it was not a precondition of effecting a severance of a joint tenancy that a binding agreement be made between the parties. It is sufficient if there was a course of dealing to intimate that the interests of all would be treated as constituting a tenancy in common. The court concluded its discussion on this aspect of the matter by saying that the real question is whether the parties have acted in a way that the law regards as inconsistent with the maintenance of joint tenancy. I take that to mean that the parties have acted

in a way that was inconsistent with the maintenance of the right of survivorship.

[20] The plaintiffs also rely upon the commentary by Professor Peter Butt, "Conveyancing and Property" (2001) 71 Australian Law Journal 6, where it was put that the judgment in *Sprott v Harper* indicated:

> "All that is required is that the parties, by agreement or conduct, have treated themselves as if they were separate owners of their interests. That then puts an end to the joint tenancy, and with it the right of survivorship".

[21] If the conduct of the brothers relied upon by the plaintiffs did not evidence an agreement to sever, but showed a common intention that the joint tenancies be severed, then severance was thereby effected (per Rath J in *Abela v Public Trustee* (1983) 1 NSWLR 308 at 315. This view was supported by Simos AJA in *Magill v Magill* in the Supreme Court of New South Wales, Court of Appeal, VC 9603940).

[22] The defendant submits that the words contained in the statutory declarations amount to no more than a proposal by each that they agree there will be a physical division of the land so that each would get separate title to some of the land. Put another way, it is submitted that Alfred On's declaration is a statement of intent that he will reach an agreement with his brother on the physical division of all of the land, likewise for the late Charlie On, such that both brothers have to be satisfied with the proposed division before anything happened. In other words, there was no more than an agreement to

agree. Attention was drawn to evidence of discussions long after the declarations were signed and after the death of Charlie On as to the division of properties between his estate and the defendant. Leaving aside for the moment whether those discussions embraced the two blocks, it seems to me that, for reasons already given, the agreement to agree was confined to the second step in the process.

[23] It is true, as the defendant submits, that there is no evidence that either brother directed his mind to the distinction between properties held as joint tenants and those held by them as tenants in common. However, I am not persuaded that that is a relevant consideration. They were talking about all of the properties held jointly in both their names without distinction and thus included the two blocks. Neither of them wished the successor to obtain title by survivorship. The defendant has referred to cases which show a course of dealing does not necessarily give rise to an inference that a joint tenancy has been severed. That is right, as examination of the various cases show. It is very much a matter of looking at the circumstances in each case.

[24] The defendants also rely upon observations of McInerney AJ in *Lyons v Lyons* (1967) VR 169 at 172 where his Honour said:

> "The course of conduct must be such as to give rise to the inference that there existed between the joint tenants an enforceable contract. Conduct falling short of a contract will not, in my view, suffice to sever the tenancy."

With respect to his Honour I am unable to accept that proposition if it was intended to be of general application rather than confined to the facts in that case. The facts, in so far as they rely upon an agreement between the parties, are set out on p 172.

> "The agreement so recorded is not one for the immediate severance of the joint tenancy; it is an agreement that if and when a stranger offers to purchase the land for a price which at that time is a reasonable price for the land, she will concur in accepting that offer and in signing any documents necessary to effectuate the sale."

[25] Here, I am satisfied that the joint tenancies were severed, as the plaintiffs claim. The brothers acted in a way which was inconsistent with the maintenance of the right of survivorship. The fact that they did not come to agreement as to the division of the properties held jointly in both their names thereafter is irrelevant. It would not matter had either of them indicated after the declarations were signed that he had changed his mind about dissolving the partnership in the properties in the rural area, or even if limited to the two blocks. Once the severance had taken place it operated for all time. There was no condition precedent to the severance. If anything severance was a condition precedent to the agreement for equal division of the properties.

Estoppel - Facts

[26] I turn now to the estoppel issue.

[27] The defendant alleges that if the joint tenancy was severed, then the defendant is entitled to become the registered proprietor of the two blocks by virtue of an agreement between the parties that the plaintiffs should have certain properties referred to in a Deed of Agreement dated 21 August 1996 ("the Deed"), that the defendant should have certain other properties referred to in the Deed and the two blocks, and that the plaintiffs would discontinue actions numbered 95 of 1989 and 350 of 1989 then pending in this Court. The particulars given are that the agreement was reached at the kitchen meeting at which it was said it was stated by Darren On, and agreed by the defendant, that the two blocks were owned by the defendant, and, consequently, it was not necessary to include those properties in the Deed which provided for the division of all properties owned by the defendant and the late Charles On and for settlement of the proceedings.

[28] It is pleaded in the alternative that at that meeting Darren On, in his capacity as an administrator of the estate of the late Charles On, represented to the defendant that the two blocks were owned by the defendant and that, consequently, it was not necessary to include those properties in the Deed. This is called the first representation. The defendant goes on to allege that Darren On knew, or ought to have known, that the defendant would rely on that representation and intended him so to rely, and acting on the faith of the representation and induced thereby, the defendant acted to his detriment by entering into the Deed which contained no reference to the two blocks, and by carrying out the terms of the Deed by transferring to the plaintiffs all of

his right, title and interest in the properties known as sections 469, 470 and 34325 Hundred Strangways and allowing the plaintiffs to discontinue the proceedings with no order as to costs.

[29] The defendant then says that if the joint tenancies were severed, and if the plaintiffs were permitted to deny the truth of that representation, then the defendant would suffer loss and damage and that it would be unconscionable for the plaintiffs to deny the truth of the representation such that the plaintiffs are estopped from asserting that the defendant is not the sole owner of, and entitled to be registered, as the proprietor of the two blocks.

[30] There are further and alternative pleas relating to later events which are also said to amount to an estoppel to the same effect, but I now turn to some of the history leading up to the kitchen meeting.

Litigation and Settlements

[31] The first of the recorded disputes between Charlie On and his brother Alfred, after that referred to in the statutory declarations executed in May 1984, concerned property at lot 1809 Parap Road, Parap. It was alleged in proceedings between the brothers and others that in consideration of Charlie On agreeing to execute a Deed of Settlement which provided for lot 1809 to be transferred to his brother, the brother agreed to build a house for Charlie On upon his land at lot 474 Humpty Doo to the value of lot 1809. The agreement was alleged to have been made in 1985 and resolved into a Deed of 20 February 1986.

[32] A Deed of 19 September 1986 was between Hodgson River Pastoral Company Pty Ltd, Mr Summers as liquidator of the company, May On Nominees Pty Ltd, Charlie On and his wife. The Deed recited that the company was registered as proprietor of an estate in fee simple in lots 2330 and 2331 called "the Cavenagh Street property", and lot 2781 called "the Dashwood Crescent property". It had been resolved that the company be wound up and that the properties be distributed by way of distribution in specie as to the Cavenagh Street property to May On Nominees Pty Ltd and the Dashwood Crescent property to Charlie On and Margaret On. The Deed ratified and confirmed the resolution of the members of the company in regard to that distribution. It was acknowledged by the parties that the Deed should be effectual and binding upon each of them, notwithstanding that there may be discrepancies in the balances of shareholders loan accounts as at the date of distribution, and notwithstanding some other disputes between them in relation to application of certain funds of the company.

[33] In proceedings commenced in 1989, Charlie On alleged that he had transferred the property at lot 1809 Parap Road, Parap to his brother, but that his brother had not complied with his side of the bargain. The defendants denied the agreement to build the house and the proceedings were brought by Charlie On with a view to obtaining an order for rectification of the Deed. The writ was issued on 17 February 1989, but the Statement of Claim was not filed until 4 June 1992 and the Defences and Reply were filed during the period to 12 August 1992.

[34] On 7 June 1989 Mr Charlie On and his wife issued a writ claiming repayment of $50,000 from the defendants and others said to have been advanced by way of loan. That action was defended, the pleading showing a dispute about the terms upon which the sum of $50,000 was advanced.

The Kitchen Meeting

[35] The first factual issue that arises is what transpired between the parties at a meeting held in the kitchen of 7 Parap Road, Parap on 12 February 1996. It has been referred to by many of the witnesses to those events as "the kitchen meeting". The defendant was present together with his sons, Dennis, Kelvin and David. The plaintiffs also attended. All of the foregoing gave evidence. Charles On Jnr and Melissa On were also present, but neither was called to give evidence. Nothing arises on that account.

[36] The evidence of Mr Alfred On is that Darren On telephoned him to arrange a meeting, "to discuss the ongoing disputes between our families rather than going through solicitors". He simply agreed. It was arranged it would be held at 7 Parap Road, Parap. When the participants had gathered Dennis On produced a map and, inter alia, discussion took place about the two blocks. Alfred On gave evidence that he said: "Those are to come to me because of the joint tenancy" and that Darren On replied: "That's OK they're yours anyway. We don't have to worry about those".

[37] Dennis On's evidence was that all the participants sat at the kitchen table and there was no small talk. He said that Darren spoke first, raising

questions about the forgery of his grandfather's will, the dispute about the $50,000, which Charlie On had paid to Alfred On, the subject of one of the legal proceedings, about the building of a house at Humpty Doo, another matter subject to litigation, and the distribution upon the winding up of Hodgson Downs Pty Ltd. Argument developed around those issues. Dennis On said that he then said to Darren On: "What do you want?" and that he produced a map identifying various properties owned by members of Alfred On's family and owned by members of Charlie On's family, and those owned by the brothers as tenants in common and as joint tenants. When the two blocks were identified, he or his father said that they were joint tenancies which go to Alfred On by survivorship, or words to that effect, whereupon Darren On had replied "OK, we don't need to discuss those because they're yours anyway", or words to that effect.

[38] Discussion ensued about property (not including the two blocks), but including property owned by the widow of Charlie On and the wife of Alfred On, not only those in the rural area, but also some in the city of Darwin.

[39] Dennis On was the only participant at the meeting who made notes as the meeting progressed. He later transcribed them and they were tendered by the plaintiff. His evidence was consistent with the notes, with one exception. It was to be the evidence of Darren On that prior to all parties embarking upon discussions at that meeting, he had had an exchange with Alfred On at a time which he described as, "before the meeting started". He

said he asked Alfred On for his father's share in the two blocks and was refused, whereupon he responded: "Well we won't have to worry about those then". Alfred On denied any such conversation. However, Dennis On's notes indicate as the first item "Discussed blocks at Humpty Doo and ownership. Nothing achieved". The notes then go on to refer to the dispute between the two brothers which Darren On raised, and as the meeting was not going anywhere, he asked Darren what he wanted. I consider that Darren On's recollection of the discussion with Alfred On at the commencement of the gathering to be accurate, corroborated as it is by the note prepared by Dennis On. I think it likely that the subject also arose in much the same manner later in the meeting when Dennis On produced the maps, and attention turned to the two blocks.

[40] Kelvin On did not remember much about the meeting except Darren On saying something like "That's yours anyway" and the evidence of David On was to like effect. He added that sometime later Darren On had said to him, in relation to the joint tenancies, "I did agree at the meeting, but I didn't then know that your dad was supposed to have signed a stat dec saying that they were supposed to be split in half".

[41] For the plaintiffs, Darren On said that in the course of his duties as one of the administrators of his late father's estate he was advised in 1995 by his solicitors that the two blocks were held by the brothers as joint tenants, and that upon his father's death his interest passed to Alfred On by survivorship. He says, and Alfred On denies, that he telephoned Alfred On in October

1995 asking for his father's share, but that was refused and that he telephoned Alfred On again about a week before the date of the kitchen meeting to discuss prospects of settlement of the various disputes. Alfred On denies that any discussion took place in October 1995, but I think it is likely that there was a discussion between Darren On and his uncle in which the issue about the two blocks was raised some time prior to date of the meeting. Dennis On came to the meeting equipped with searches of the titles, including the joint tenancies. Whether such an earlier discussion took place does not much matter in that Alfred On has consistently maintained then and since that his late brother's interest in the two blocks passed to him by survivorship.

[42] No mention was made of the two blocks in the Deed which formalised the agreement reached at the kitchen meeting. Darren On said that the Deed was completed by all parties before he found the statutory declarations amongst his late father's papers. He said that his late father had told him nothing about that transaction and that he had not been told by his uncle.

[43] Margaret On, the widow of Charlie On, and one of the administrators of his estate, said that she had no involvement in her late husband's business affairs, and in particular she knew nothing of a statutory declaration. She confirmed that "before the meeting" Darren On had asked his uncle about getting his father's half share, and Alfred had refused asserting, "There're mine" to which Darren responded, "OK then".

[44] The kitchen meeting led to the execution of a Deed dated 21 August 1996. The parties included the plaintiffs and the defendant and others who had various interests in the outcome. It recited the proceedings seeking rectification of the Deed of 20 February 1986, the action for recovery of the $50,000, the death of Charlie On on 12 December 1994, the fact that the proceedings remained on foot and that agreement had been reached for the discontinuance of those proceedings, agreement between the plaintiffs as administrators of the estate of Charlie On and as between Margaret On and Alfred On in regard to the transfer of title to certain properties, and in respect of the occupation of the premises at 7 Parap Road. The Deed then proceeded to provide for the implementation of the various agreements. As to the properties affected thereby, the following:

(a) The plaintiffs to transfer the one half interest held by them as administrators of the estate of Charlie On in property known as lot 1810 Darwin, 6 McKillop Street, Parap, to Alfred On.

(b) Margaret Joyce On to transfer her half share in property at lot 380 Acacia Hills to Alfred On.

(c) Alfred On to transfer his half share in property at sections 469, 470 and 3435 Hundred of Strangways to the estate of Charles On.

(d) The defendant discharged the plaintiffs and other members of the family of Charlie On in respect of occupation of the premises at 7 Parap Road, Parap

(e) The plaintiffs agreed to discontinue the two sets of proceedings without orders as to costs. The defendant and other defendants to those proceedings were to endorse the notice of discontinuance in those terms.

(f) The plaintiff to transfer to the defendant the interest of the estate of Charlie On in the premises at 6 McKillop Street.

(g) Margaret Joyce On to transfer her interest in lot 380 Acacia Hills to Alfred On.

(h) Alfred On to transfer his interest in the property known as sections 469, 470 and 3435 Hundred of Strangway to the plaintiffs as administrators of the estate of Charlie On.

[45] The Deed arising from the kitchen meeting did not deal exclusively with property in which the brothers held joint interests and as already mentioned, the two blocks are not mentioned.

[46] I find that at no stage did Darren On assert or make any representation to Alfred On that he was entitled to the two blocks by survivorship. Alfred On asserted that to be his legal position, Darren On accepted it. Alfred On was, at the least, mistaken, Darren On did not then have knowledge by which he could contest his uncle's stand. Alfred On well knew that Darren On was endeavouring to have the two blocks brought into account with the others to be discussed at the meeting, but he refused. When cross-examined, Alfred

On affirmed that before the meeting he thought he was entitled to the two blocks by survivorship and he was not effected by anything Darren On said about that at the meeting.

[47] I now turn to examine the question of the knowledge of the parties regarding the statutory declarations. It is undoubted that Alfred On knew of the statutory declarations, he had not forgotten about them, his evidence was that there was no need to mention them. He acknowledged that there was nothing said at the meeting by Darren On or Margaret On to indicate that either of them knew about the statutory declarations, and indeed nothing that either of them had said at any other time after the date of death of Charlie On indicated either of them knew anything about those documents prior to February 1996. During the course of his evidence he suggested that his brother had reneged on the arrangement regarding the joint tenancies disclosed by the statutory declarations. Alfred On acknowledged that he knew of the doctrine of survivorship when the declarations were signed, but his position was that the arrangement recorded in the statutory declarations concerning the two blocks did not apply in February 1996. It was unnecessary for him to mention them.

[48] Alfred On acknowledged that in October 1994 he had made discovery of the statutory declarations, amongst other things, in relation to the 1989 proceedings instituted by Charlie On. Charlie On did likewise. I note that those proceedings involved a number of issues, and I do not think it was inconsistent with the position taken by Alfred On in relation to the two

blocks for him to make that discovery which could related in part to those issues. It is not shown that either of the plaintiffs were aware of the statutory declarations by reason of those discoveries.

[49] In February 1995 the plaintiffs initiated negotiations with a view to settling the proceedings. A letter was written by their solicitors, Ward Keller, to the solicitors for the defendant, Elston and Gilchrist, on 10 February 1995. It is not necessary to go into detail, except to note that at par 3 of the proposed settlement was that Alfred On "will transfer the whole of his interest as surviving joint tenant to" the plaintiffs in the two blocks. There is no indication in that letter that the solicitors for the plaintiffs were aware of the statutory declarations. The response from Elston and Gilchrist a few days later rejected the offer and went on:

> "It is unclear from the letter the basis upon which your clients purport to be entitled to a transfer of all jointly held properties particularly in view of the fact that those which were held by Alfred On and Charles On Jnr jointly vest entirely in our client as a result of your client's death. It is also not in keeping with the statutory declaration sworn by your client of 16 May 1994 which evinces a clear intention to divide all properties held jointly equally between our respective clients."

[50] I note that the declarations were executed in 1984, not 1994, and that Charlie On died on 12 December 1994.

[51] I think Alfred On had forgotten about the 1995 negotiations at trial, or at least the detail of them, but that letter shows that he then relied upon his claims to survivorship in the two blocks. The reference to the statutory

declarations and their purported effect was made in the context of rejection of the administrators offer to settle the proceedings. There is no evidence as to what occurred in relation to that negotiation after the exchange of correspondence referred to.

[52] Darren On said, in cross-examination, that he had read those words, however he did not enquire of his solicitors as to what was being referred to and further it was of no interest to him.

[53] All of Alfred On's sons gave evidence that they did not know of the statutory declarations at the time of the kitchen meeting. Their knowledge came about some months later.

[54] The evidence of Darren On is that he did not learn of the joint tenancies until after his father's death when he received advice that his late father's interest in the two blocks had passed to his uncle. As to the statutory declarations, his evidence was that he found them on 19 November 1996 when he conducted a "last look" through his late father's papers after a conference with his solicitor that day relating to the titles of the two blocks which the plaintiffs had instructed be handed to the solicitors for the defendant (see later).

[55] He was also cross-examined about his searches amongst his late father's papers as administrator of his estate. He acknowledged he had searched for a will in his father's office and in boxes and suitcases in which he kept his papers, including the suitcase under the bed. He said, however, that he did

not look very carefully through the documents. He was looking for a will and he denied that he looked very carefully at any document in the suitcase that appeared to be on a form or official looking, containing his father's signature. He was not challenged directly as to his discovery of the statutory declaration. I accept what he says. I find that he did not find the statutory declarations until after the execution of the Deed consequent upon the kitchen meeting. I cannot image why he would have chosen to ignore the documents had he known of their contents previously. I fail to see that he achieved any advantage by hiding his knowledge of the 1984 arrangements at any time leading up to the kitchen meeting or at that meeting. Those arrangements would obviously have been an important factor to bring to account to lend weight to his suggestion that there be a transfer of his late father's interest in the two blocks to the estate. It is not suggested that anything Darren On said in broaching the question of his father's interest in the two blocks prior to or at that meeting was motivated by his knowledge of the contents or effect of the declarations.

[56] Margaret On's evidence was that she had no knowledge of the statutory declarations until she was informed by her son about them in 1996. She said that her late husband's papers were in a mess. I accept what she says.

The other representations

[57] The third matter to be considered in the defendant's case arises from events which followed the execution of the Deed by all parties. It was dated 21 August 1996.

[58] It relies upon the evidence of solicitor, Meredith Clare Day Huntingford, ("Ms Day"). From 1991 to the end of 2000 she worked as a legal practitioner in Darwin, and during those years had the carriage of matters on behalf of the defendant involving the dispute between him and his brother, and later his brother's estate. She first received instructions from him as defendant in the two Supreme Court actions.

[59] On about 26 September 1996, her client brought the executed Deed, prepared by the solicitor for the estate, to her. On examining the document the solicitor noted that the two blocks were not mentioned. She knew of the properties which were in dispute as between her client and Charlie On. She said her instructions had always been that Alfred On wanted all the properties divided up so that there was no longer any joint ownership and it struck her that the two blocks were missing.

[60] She telephoned Mr Davies of Ward Keller, the solicitors for the plaintiffs, and raised that matter, saying that the two blocks should go to her client by survivorship. Mr Davies said that he would check it out with his clients. On 30 September a letter was written by Ms Day to Mr Davies with Memoranda of Transfer for execution by the plaintiffs in relation to the two

properties to be transferred to Alfred On pursuant to the Deed. The question of the two blocks was mentioned as not being dealt with in the Deed, the solicitor saying in the letter that she presumed that that was because the two properties were jointly owned and therefore were then owned by Alfred On by survivorship. A search of the titles had been carried out and it was discovered that, by error, the plaintiffs had been registered as the proprietors of the interest of Charlie On. The solicitors for the plaintiffs were asked to rectify that error. An enquiry was made regarding the titles to the various properties, the subject of the Deed.

[61] The solicitors for the administrators replied advising that the title to the two blocks would be corrected and they would then hold them, whereupon a settlement date could be arranged.

[62] On 12 November 1996 the solicitors met to effect settlement of the transfers pursuant to the Deed, after which Ms Day asked Mr Davies for the titles to the two blocks. She says Mr Davies responded that he did not have formal instructions to release them and that he needed a letter of request from her. He said he needed something for his file, but added that he did not expect there would be any problem. As requested Ms Day wrote requesting the titles on 18 November.

[63] On 25 November Ms Day was advised by letter from the solicitors for the administrators that the estate of Charlie On claimed an interest in the two blocks. They enclosed copies of the statutory declarations and informed

Ms Day that they had only recently come to their attention. They enclosed a Memorandum of Transfer, "To enable the severance of the joint tenancies to be registered in respect of each title". In that letter the solicitors for the plaintiffs concluded: "We trust that this matter can be finalised amicably to reflect the spirit of the parties' agreement as evidenced by their respective statutory declarations". The timing of that letter from the solicitors for the plaintiffs to Ms Day is consistent with the evidence of Darren On as to when he found the statutory declaration amongst his father's papers.

[64] Ms Day also produced a copy of the letter of 10 February 1995 referred to above from Ward Keller to her suggesting the transfer of the interest of Alfred On as surviving joint tenant to the plaintiffs as part of the settlement then proposed.

[65] The important matter arising from what transpired between the two solicitors are that, apart from the 1995 letter, all that occurred after the Deed had been executed by all parties, the plaintiffs were not inconsistent with the position that they had previously accepted, that is, that Alfred On and Charlie On were registered as joint tenants in the two blocks, Alfred On was entitled to his late brother's share by survivorship, and, the parties proceeded to settle their undertakings contained in the Deed. It was only after all that that the evidence shows that the plaintiffs became aware of the statutory declarations and they raised the issue with the defendant's solicitor. Notwithstanding the seeming close coincidence between the

settlement and the discovery of the documents, there is no good reason to reject the evidence of Darren On as to that course of events.

Evidence of subjective state of mind

[66] Reference has already been made to the evidence of Alfred On that if he had known that the plaintiffs would later say that the joint tenancies should be split half and half, he would never have agreed to their having the properties transferred pursuant to the agreement and Deed. That is, if the two blocks were held as tenancies in common, he says, he would have insisted that they be transferred to him, or he would have walked away from the negotiations and the court actions could have continued.

[67] The evidence of Darren On at par 15 of his statement is:

> "I did not believe that the two properties owned by my father and Alfred as joint tenants (namely section 3219 Hundred of Strangways and section 1453 Hundred of Guy) were part of any agreement made at that meeting. I had merely made requests of Alfred to give our family our father's half share in these two properties, notwithstanding that I had been advised by our lawyers that Alfred (as surviving proprietor of those two properties) now had complete ownership of them as sole surviving joint tenant".

[68] It is appropriate, now, to have a look at the detail of the evidence of Darren On in regard to what he says passed between himself and Alfred On regarding the two blocks in the telephone conversation before the kitchen meeting:

> "I said, "Can we have our father's half share back in the two blocks?" He said, "No way. Your father would not do the same if I

> died". I said, "Yes he would have". He said, "No way". I said, "Well we should stop the stupidity with the court proceedings by settling out of court". He said, "That is a good idea, the mediation would cost a bit". I said, "All we want is your half shares in the three billabong blocks so we can get on with our lives. We will buy out your half shares in these. I'll get the 1994 Valuer General's unimproved capital value price on these and pay you your half shares for your amount". He said, "Alright you go ahead and do that and we'll set up another meeting after I've finished my tax returns"."

[69] His evidence as to what transpired "before the meeting started" was in the following terms:

> "I said, "About those two blocks in joint tenants are you willing to give our father's half share back?" He said, "No way boy. If I would have died first your dad would not give my kids my half share." I said, "Yes he would". He said, "No way". I said, "So you are not going to give us back our half?" He said, "No". I said, "Well, we won't have to worry about those then"."

[70] In so far as it is relevant, the state of mind of each of Darren On and Alfred On is disclosed by other evidence. Briefly, Alfred On took the position that Charlie On's interest in the two blocks passed to him by survivorship on Charlie On's death. He took that view notwithstanding the statutory declarations executed in 1984. Darren On, not knowing of those declarations, and relying upon his solicitors advice, knew that the two blocks had been registered in the joint names of the brothers as joint tenants and that his late father's interest had passed to Alfred On by survivorship. The conversation discloses that Darren On proceeded upon the basis of the advice he had received and sought to have his late father's interest transferred to his family, and Alfred On flatly refused to do so. Darren On accepted that refusal.

[71] In my view, the evidence of Darren On does not go to any question relating to his intention, but rather to his state of mind.

[72] It is, I think, important to distinguish between the two grounds upon which the evidence is to be treated. The first, under the parol evidence rule, excludes the use of evidence of extrinsic matter to subtract from, add to, vary or contradict the language of a written instrument (*Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337 at 347 per Mason J). On the other hand, in deciding whether an estoppel arises, the court will admit evidence of matters extrinsic to the document.

[73] In my view the Deed entered into by the parties after the kitchen meeting was intended as a final record of the agreement between the parties in respect of the matters recorded therein. On the whole of the evidence the discussions between Alfred On and Darren On regarding the two blocks did not form any part of the subject matter of the agreement reflected in the Deed. It was a separate issue which Darren On sought to have brought to account and Alfred On refused. It was left at that. It is not shown that as between the defendant and the plaintiffs there was an agreement that the two blocks would not form part of the properties and other issues to be negotiated, or that the execution of the Deed would preclude the plaintiffs from pursuing any remedies they might have in respect of the two blocks. There was no collateral contract. There was nothing in the nature of an undertaking by Darren On that in consideration of Alfred On entering into the negotiations and agreement reached that the plaintiffs would not seek to

pursue their rights if it came to their notice afterwards that the joint tenancy had been severed. There was nothing which transpired in the exchanges between Alfred On and Darren On which can be regarded as forming a contract, nor that that exchange was part of or collateral to the agreement evidenced in the Deed.

[74] Since in my view the exchange referred to was not contractual, questions as to the evidence of either party as to his intention is irrelevant. Had there been a contract then evidence of the objective background comprising facts known to both parties would have been admissible had there been, for example, a need to resolve any ambiguity. Further, nothing which passed between the solicitors for the parties after the Deed had been executed can be a term of the contract evidence by the Deed.

[75] The evidence is admissible in relation to the estoppel.

Estoppel - Law

[76] The defendant's claim against the plaintiffs as pleaded lies in estoppel by representation which, "prevents a person who, by representation of fact, has led another to alter his position, from denying that fact is as represented" per Jordan CJ in *Discount and Finance Limited v Gehrig's NSW Wines Limited* (1940) 40 SR (NSW) 598 at 602. His Honour went on:

> "… Estoppel is a rule of evidence which, in the given circumstances, prevents a person, as a matter of law, from denying or from asserting, as the case may be, the existence of some fact irrespectively of whether it really exists. There is also equitable

> estoppel by acquiescence which prevents a person, who has knowingly permitted another to act, through mistake, to his own detriment and to the advantage of the former from profiting by the other's mistake" *NSW Trotting Club Limited v Gleeb Municipal Council* (1937) 37 SW (NSW) 288 at 308.

[77] Earlier, Jordan CJ in *Franklin v Manufacturers Mutual Insurance Limited* (1935) 36 SR (NSW) 76 at 82, in a well known and often cited passage said:

> "The type of estoppel which became definitely established in the common law by the case of Pickard v Sears (1837) 6 Ad & E 469- estoppel by representation – depends upon different principles. In order that this type of estoppel may arise, it is necessary that (1) by word or conduct, (2) reasonably likely to be understood as a representation of fact, (3) a representation of fact, as contrasted with a mere expression of intention, should be made to another person, either innocently or fraudulently, (4) in such circumstances that a reasonable man would regard himself as invited to act upon it in a particular way, (5) and that the representation should have been material in inducing the person to whom it was made to act on it in that way (6) so that his position would be altered to his detriment if the fact were otherwise than as represented. Such prominence is given to this type of estoppel in the text books that it tends to overshadow more ancient and equally fundamental forms of estoppel. Indeed, there is some tendency to use the representation type of estoppel as a bed of Procrustes, and to endeavour to express all forms of estoppel in pais in terms of representations acted on by a party to his detriment – a tendency which is apt to lead to some confusion, if not of thought at any rate of expression."

[78] It would appear that the estoppel in question is not confined to one in which there was a representation of fact. In *Foran v Wright* (1989) 168 CLR 385 at 435 Dean J said:

> "The distinction between a representation of fact and a representation of law is, in the context of the principles constituting the doctrine of estoppel by conduct, essentially illusory unless one subscribes – and I do not – to the view that the law has no factual existence at all."

[79] The pleading by the defendant asserted that at the kitchen meeting Darren On represented to him that the two blocks were owned by him, "and that, consequently, it was not necessary to include those properties in the Deed". The pleading goes on to assert other matters which go to make up the estoppel. I have already reviewed the evidence and made my findings of fact as to what transpired at the kitchen meeting between Darren On and the defendant. The defendant has not made out his case as pleaded, either as to a representation as alleged, nor as to it not being necessary to include the two blocks in the Deed. Nor do I consider that by the letters, telephone conversations and conduct during the period from February 1995 to November 1996 did the plaintiffs' solicitors represent to the defendant's solicitors that the defendant was the owner of the two blocks and that was unaffected by the Deed. I have already dealt with the letter of February 1995 and the other matters relied upon which occurred after the date of the Deed. In my opinion no combination of the communications alleged amount to a representation such as to found the estoppel as pleaded. Until Darren On found the statutory declarations, which event occurred after all of the matters put on behalf of the defendant, nothing occurred to alter the position which had been adopted by the parties at the kitchen meeting.

[80] In *Giumelli v Giumelli* (1999) 196 CLR 101 at p 112 the High Court declined to consider whether the various "doctrines and remedies in the field of estoppel" are to be brought under what Mason CJ called "a single

overarching doctrine". Accordingly, the various doctrines and remedies in the field remain with their individual elements and characteristics.

[81] The primary submission on behalf of the defendant in closing address was based not upon estoppel by representation, but promissory estoppel as dealt with in *Waltons Stores (Interstate) Limited v Maher* (1987-88) 164 CLR 387 as described by Brennan J at p 428 and 429. Leaving aside for the moment that such an estoppel was not pleaded, and accordingly counsel for the plaintiffs did not have the opportunity to cross examine the defendant in relation to the matters going to make up that form of estoppel, I am not satisfied that the defendant has made it out. He did not, in my view, assume that a particular legal relationship existed between himself and the plaintiffs or expect a particular legal relationship would exist between them. There was no legal relationship between the defendant and the plaintiffs in relation to the two blocks. The plaintiffs had done nothing to induce the defendant to adopt such an assumption nor to induce in him an expectation that a particular legal relationship would exist between them. There is some evidence that the defendant abstained from endeavouring to ensure that that claim in respect of the two blocks was protected by the Deed, but not that the plaintiffs knew or intended him to do so. Undoubtedly the defendant assumed the two blocks belonged to him by right of survivorship, but that did not create a particular legal relationship between him and the plaintiffs, and, as pointed out previously, the plaintiffs did not induce him to adopt that assumption.

[82] The defendant acknowledges that Darren On did not cause him to believe he was the owner of the two blocks, but relies upon his being encouraged in that belief by his statement to the effect that "Those are yours anyway", or "We don't need to worry about those then". In my view he needed no encouragement, the words relied upon do not amount to it.

[83] It is said that Darren On thereby induced Alfred On to assume he could safely negotiate and come to an agreement about the settlement of the blocks which had been tenancies in common without taking the two blocks into account. There is no evidence to support that contention. The defendant said that there was no way that the two blocks were the subject of negotiation. They were excluded. Nothing Darren On said induced him to that view. All Darren On did was to accept what his uncle asserted.

[84] As to reliance, it is important to recall that the defendant acknowledged in cross-examination about the joint tenancies that he knew he was entitled to them by survivorship, that had been his knowledge since at least 1984 and nothing Darren On said to him at the meeting altered that state of knowledge.

> "Before the meeting you thought you were entitled to them, and after the meeting you thought you were entitled to them and you weren't affected by anything Darren said about those two blocks at the meeting. That is so isn't it? Yes".

[85] The defendant's case to prove bad faith and bad conscience against the plaintiffs was lacking in strength and cogency.

[86] Although I do not consider it to be critical to the outcome of this case, I consider that Alfred On made misrepresentations concerning his right to survivorship in the two blocks. They may possibly have been innocent, but looked at in that light, he seeks to hold the plaintiffs to a contract induced by an untruth for which he was responsible. At the least he failed to disclose the statutory declarations, and I think it is likely that that was because he knew that if the plaintiffs were aware of them, then they would have a ground for arguing that the joint tenancies had been severed, and that the interests of the brothers in them should be brought into account in the negotiations. The agreement reached at the kitchen meeting was analogous to a "family arrangement" referred to by Turner LJ in *Greenwood v Greenwood* (1863) 46 ER 285, where he observed at p 290 that:

> "In such a case the parties must be upon an equal footing, and there must be a full and fair communication of all the circumstances affecting the question which forms the subject of the arrangement, and I think that in this case the parties were not upon an equal footing, and that, whether purposely or not, there was not in fact a full and fair communication of all the circumstances which were material to be communicated."

[87] Of more recent vintage and closer to home, the Northern Territory Court of Appeal said:

> "We do not think unconscionability is established in a case where the representation made by the representor is occasioned by misleading (albeit unintentionally so) statements made by the representee" *Trippe Investments Pty Ltd v Henderson Investments* (1992) 106 FLR 214 at 231.

[88] I find that there is no unconscionable conduct on the part of Darren On.

[89] There was evidence and submissions from both sides on the question of material detriment, but it is not necessary for me to consider that matter.

Conclusion

[90] I find:

(a) the joint tenancies in sections 1453 and 3219 have been severed.

(b) objectively assessed, the words and conduct of the parties at the kitchen meeting did not constitute an agreement to the effect claimed by the defendant;

(c) at no stage prior to, at, or after the kitchen meeting were there any representations made by the plaintiffs as alleged by the defendant so as to raise any estoppel contended for by the defendant and, in any event, the defendant has not shown that he relied upon anything which passed between him and Darren On.

[91] I will hear counsel as to the appropriate orders.
