*Townsend & Anor v Townsend & Anor* [2006] NTSC 7

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| PARTIES: | ROBERT RAY TOWNSEND and JULIENNE ANNE TOWNSEND BLAKE<br><br>v<br><br>CHARLIE RAYFORD TOWNSEND and REGISTRAR GENERAL FOR THE NORTHERN TERRITORY |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | No 93 of 1999 (9916032) |
| DELIVERED: | 8 February 2006 |
| HEARING DATES: | 14-16 & 20-23 September 2005 |
| JUDGMENT OF: | MILDREN J |

**CATCHWORDS:**

CONTRACT – contract to leave property by will – anticipatory breach – whether contract enforceable

CONTRACTS – intention to create legal relations – whether presumption of advancement – attempts to have contract reduced to writing – whether concluded agreement reached

CONTRACTS – whether first defendant entered into a contract with the plaintiffs – contract not in writing – whether contract enforceable – Statute of Frauds – whether part performance

DAMAGES – anticipatory breach – contract to leave property by will – measure of damages – contingency that testator's estate might be subject to family provision order allowed for

EQUITY – specific performance – whether contract to make a will enforceable in equity – whether alternative remedy in damages – whether Lord Cairns' Act applies

EVIDENCE – witnesses – admissibility of evidence of habit – whether bolster rule applied

PARTNERSHIP – whether first defendant a partner in the business – whether first defendant entered into a contract with the plaintiffs – extent of partnership

Family Provision Act (NT)
Inheritance (Family Provision) Act 1972 (SA)
Limitation Act, s 12
Lord Cairn's Act (s 2 of the Chancery Amendment Act 1858, 21 and 22 Vict c 27(UK))
Partnership Act 1891 (SA), s 1, s 2, s 2 III (d)
Partnership Act 1997 s 6(1)
Statute of Frauds 1677 (Imp) (now the Law of Property Act 2000 (NT), s 62), s 4
Supreme Court Act, s 62, s 84
Supreme Court Rules, O. 40.02(c)

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*Nelson v Nelson* (1995) 70 ALJR 47
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*R v Connolly* [1991] 2 Qd R 171
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*Wirth v Wirth* (1956) 98 CLR 228

**Followed**
*Armstrong v Commonwealth Bank of Australia* [1999] NSWSC 58 (unreported) BC9903751
*Brooks and Anor v Wyatt* (1994) 99 NTR 12
*Schaefer v Schuhmann* [1972] AC 572
*State Bank of New South Wales v Muir and Anor* (Supreme Court of New South Wales, unreported, 17 June 1997) BC9702524

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | Ms T Kelly |
| Defendant: | Ms T Sutton (by leave) |

*Solicitors:*

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| Plaintiff: | Withnalls |
| Defendant: | Self represented |

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| Judgment category classification: | B |
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Townsend & Anor v Townsend & Anor* [2006] NTSC 7
No. 93 of 1999 (9916032)

BETWEEN:

**TOWNSEND, Robert Ray**

First Plaintiff
And

**TOWNSEND BLAKE, Julienne Anne**

Second Plaintiff

AND:

**TOWNSEND, Charlie Rayford**

First Defendant
And

**REGISTRAR GENERAL FOR THE NORTHERN TERRITORY**

Second Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 8 February 2006)

**Introduction**

[1] Robert Ray Townsend (Robert) and Julienne Anne Townsend Blake (Julienne) are husband and wife. Charlie Rayford Townsend (Ray) is Robert's father. Ray's wife and Robert's mother is Elsie Mae Townsend (Elsie).

[2] In 1995 Ray was the registered proprietor of 29 sections of land in the Hundred of Hart comprising approximately 2460 hectares known as Shilo

Station. The station, located near Batchelor, was run primarily as a small cattle station. Ray and Elsie lived in the homestead on the station which was located on lot 1697 (the homestead lot).

[3] For several years prior to 1993 one of Robert's sisters, Theresa and her husband Daryll Sutton (Daryll) had lived on Shilo Station where they operated a small market garden and cattle herd on the property in partnership with Ray and Elsie.

[4] In February 1993 Daryll and Theresa came to stay at Robert's Noonamah residence for a short while. During this visit Daryll asked Robert to join Ray and Daryll in a new business venture involving the purchasing and butchering of cattle and the sale of the meat to retail outlets. The plaintiffs claim that in about April 1993 a partnership was formed between Robert, Daryll and Ray known as "Shilo Meats". In his defence and counterclaim, Ray denies that he was ever a partner in Shilo Meats. The plaintiffs claim that Ray mortgaged some of the blocks on Shilo Station with the National Australia Bank which was up to then unencumbered, in order to raise capital for Shilo Meats. In his defence, Ray denies this as well. Ray says that the partnership of Shilo Meats was between Daryll and Robert, that he lent money to the partnership which he in turn borrowed from the bank on the security of portion of the land comprising Shilo Station.

[5] The plaintiffs claim that Shilo Meats was unsuccessful and in June 1994 Daryll left the partnership which was then insolvent. Thereafter Robert and

Ray continued the business of Shilo Meats hoping to trade the partnership out of insolvency. They were unsuccessful, leaving creditors, secured and unsecured, totalling about $623,000.00. The bank threatened to exercise its powers of sale under the mortgages which it held and a number of unsecured trade creditors began to issue summonses for their debts.

[6] The plaintiffs claim that in April 1995 Ray decided that he would have to sell Shilo Station and arranged for the property to be sold by auction through a licensed real estate and business agent and auctioneer, Mr David Loveridge. On 20 April 1995 Ray and Elsie signed an agreement appointing Malabar Investments Pty Ltd trading as LMPA Project Marketing Service as sole agent for the sale of the station. This company belongs to Mr Loveridge. At this time Robert was engaged to be married to Julienne, who was working on her own account as a bookkeeper. On the weekend of 7 May 1995 when Robert and Julienne visited Ray and Elsie at the station, Julienne put forward a proposition to save the station. The proposal was that the auction would be cancelled, Julienne would arrange for the orderly resolution of Shilo Meat's affairs and would sell her unit in Omeo Street Brinkin and use the proceeds thereof as her living expenses whilst working on Shilo Meat's affairs and to pay off creditors and that five of the lots comprising the station, *viz* Lots 1699, 1701, 1704, 1765 and 1766 (the back lots) would be sold by Ray and the proceeds of the sale used to repay the loan to the bank; that Julienne would try to market the back lots; that Robert, Julienne, Ray and Elsie would form a new partnership under the

name “Shilo Station”; that Shilo Station would agist cattle on the station and use the income to repay Shilo Meat’s creditors; that Robert and Julienne would arrange for the day to day support and care of Ray and Elsie; that Ray would transfer Lots 1796 and 1457 to Julienne; and that Ray would leave by will all of the remaining lots except the homestead lot to Robert and Julienne, subject to Elsie’s right to live on the property until her death. The plaintiffs claim that this proposal was accepted.

[7] Ray denies that any such arrangement was entered into. To the extent that any discussions took place, he maintains that there was never any concluded binding agreement, that there was no intention to create legal relations and that any agreement reached was in any event unenforceable because it was not in writing so as to satisfy the provisions of s 4 of the Statute of Frauds 1677 (Imp) (now the Law of Property Act 2000 (NT), s 62) which requires contracts for the sale of land to be in writing. He admits that he entered into “an informal arrangement” with the plaintiffs to operate a cattle agistment business on his land with the common intention that any net income therefrom would be applied to the payment of outstanding debts.

[8] The plaintiffs claim that in part performance of the agreement, Julienne *inter alia* sold her unit and used most of the proceeds to pay off creditors of Shilo Meats; worked on the Shilo Meats accounts; sold off the assets of Shilo Meats; managed the repayment of pressing creditors; sold two of the back lots to her sister; received from Ray the certificates of title to Lots

1796 and 1457 as well as other acts of part performance. The plaintiffs claim that the new partnership of Shilo Station also began to trade.

[9] Ray says that he did make an "informal arrangement" in December 1998 to transfer five lots to Robert if the plaintiffs paid out the loan owing to the bank but this the plaintiffs failed to do.

[10] The plaintiffs claim that Julienne also sold Lots 1704, 1765 and 1766 to Julienne's father Maurice Blake. That sale fell through. In September 1995 the plaintiffs say that the agreement between the plaintiffs and Ray was varied by a further oral agreement whereby Julienne would sell a block of land she owned at Howard Springs and use the money to purchase the same three blocks; that Julienne would sell her car and use the money to pay off Shilo Meats' creditors; that Robert and Julienne would obtain a bank loan to refinance Shilo Meats' remaining debts to be repaid out of the profits of the Shilo Station partnership; and that if there was an insufficiency of funds, Robert and Julienne would meet the repayments to the bank. A separate arrangement was allegedly made with reference to one creditor, Tipperary Station. These allegations are denied by Ray in their entirety. Ray also relied upon s 4 of the Statute of Frauds 1677 and the plaintiff's relied on acts of part performance as to which Ray says he has no knowledge, but denies they were acts made in the part performance of any binding agreement.

[11] The plaintiffs were married on 27 January 1996.

[12] The plaintiffs claim that there was a further agreement made in June 1997 to refinance the loan to the bank and that in further part performance of the agreement as varied the plaintiffs made repayments on the second refinancing loan out of their own income and used the income from the Shilo Station partnership to meet the living costs of Ray and Elsie and to make repayments to the bank, as well as performed other acts of part performance. Ray says that he either has no knowledge of these matters or denies that they were in part performance of any alleged contract.

[13] In late November or early December 1998, an argument ensued between the plaintiffs and Ray over the sale of some cattle from Shilo Station. The plaintiffs insisted that the cheque should be paid into Shilo Station's account, but Ray claimed that these cattle were his and that he was entitled to the proceeds of the sale. This led to a further argument over the blocks when Ray denied his promises to give Julienne the blocks she asserted she was entitled to and denied that he had ever promised to leave the plaintiffs any of the station lots in his will.

[14] The plaintiffs, in response, placed caveats over the titles and brought these proceedings to enforce the agreement as varied.

[15] Ray has filed a counterclaim in which he seeks repayment of $100,000.00 he claims to have lent to Robert and Daryll as capital for the business Shilo Meats at "some time" in 1992 as well as compensation for 147 cattle he agreed to provide by way of a contribution to the business, in kind.

[16] He further claims that in May 1995 he agreed to mortgage a number of the blocks on Shilo Station "to pay some creditors" of the business. He claims:

(1) that he made further advances to Robert through refinancing of the loans to the bank, but is unaware of the amounts thereof;

(2) that any agreements he allegedly entered into with the plaintiffs relating to Shilo Meats were made "in circumstances of duress or unconscionability that entitle [him] to have the agreements set aside in equity";

(3) that the plaintiffs exercised effective control over his financial affairs and owed to him a fiduciary duty to act in his interests;

(4) that in breach of that fiduciary duty he suffered losses equal to the aggregates of the outstanding loans to the bank;

(5) a taking of accounts;

(6) equitable restitution; as well as

(7) other relief.

[17] By way of reply, apart from denials, the plaintiffs raise s 12 of the Limitation Act in response to the counterclaim for the repayments of the loans or monies owing relating to the business of Shilo Meats.

[18] At the end of the hearing, the plaintiffs elected not to seek specific performance of the alleged contract as varied but to seek damages for breach of contract, or alternatively restitution for unjust enrichment.

[19] The plaintiffs' action was commenced in this Court in 1999 by way of originating motion to support caveats lodged over the land by the plaintiffs. In accordance with O. 40.02(c) of the Supreme Court Rules (which requires that evidence at the trial of an action brought by originating motion is to be upon affidavit unless otherwise ordered) a large number of affidavits were filed on both sides. There were a number of problems with the contents of the affidavits filed and the Judge who was then caseflow managing this matter ordered that fresh affidavits be filed limited only to the issues involved in this case and a timeframe was set which required formal pleadings. For most of the time between 1999 and 2005 Ray was legally represented and had at one time engaged counsel.

[20] Ray is now 78 years of age. He appeared before me about three weeks before trial to seek an adjournment of the trial. He claims to be forgetful. He claims also to be unable to afford to engage a solicitor or counsel. Having regard to all of the circumstances put to me, I refused his application because I considered that he had no prospects of raising funds either from his own resources or from his family to pay for a solicitor or counsel and that any further delay would prejudice the plaintiffs. However, I also considered that he was quite possibly not competent to run his trial himself because of his physical and mental fragility and poor memory. He sought my leave for his

granddaughter, Ms Tammy Sutton, to represent him at the trial. It would have been less objectionable if Ms Sutton could have acted as his *Mackenzie* friend, but this I considered to be unworkable. Ms Sutton is not legally trained, but she was prepared to do her best to represent her grandfather as his advocate – without a fee, of course. The trial was to be on affidavits and the affidavits for Ray and his witnesses had already been prepared by Ray's former solicitor. His Defence and Counterclaim had been settled by his former counsel. It seemed to me that I should allow the trial to proceed and that in the very unusual circumstances of this case I should permit Ms Sutton to represent him. Ms Sutton appeared for him at the trial. I thought she represented her grandfather with dignity. She appeared to know what she was doing and to make appropriate choices when I explained to her what options were open to Ray who was present in court throughout the trial. I granted adjournments which I considered appropriate whenever necessary to enable Ms Sutton to seek instructions or to prepare her case, even during the trial itself. It is evident to me from the way Ms Sutton ran her grandfather's case that she realised that she had a very difficult client and a very difficult case to run.

**Was Ray one of the Shilo Meats partners?**

[21] Ray gave evidence denying that he was ever a partner in Shilo Meats. His evidence was he was not a co-owner of the business. He said he gave his property to the bank as collateral security for a loan that the bank had made to Daryll and Robert.

[22] The business name Shilo Meats was registered in 1993. The application showed that the individuals who were carrying on the business under that name were Ray, Robert and Daryll (spelled Darrell) Sutton. The signatures on that document included a signature purporting to be Ray's. Ray initially denied that he had applied to be registered as one of the owners of Shilo Meats. When the application form was shown to him he said that could not remember signing the application form. He conceded that the signature on that document, on the notice filed on 13 July 1994 giving notice that Daryll had ceased to be a proprietor of the business and on the notice of cessation of the business name filed in December 1995 looked like his signature (these documents became tendered as Ext P13). Comparing each of the signatures on those documents with the signatures on his affidavit (Ext D1) leaves me in no doubt that each of the signatures on the documents in Ext P13 were his.

[23] Ray also refused to acknowledge that the loan from the bank was made to him, Robert and Daryll jointly. The bank's documentation relating to the loan plainly shows otherwise. There is a wealth of evidence showing that Ray was a partner in Shilo Meats, including copies of the partnership's taxation returns. As against that, Daryll gave evidence for Ray that Ray was not a "working partner" of Shilo Meats. I reject the evidence of Daryll on this issue for reasons which I will explain later.

[24] Ms Sutton submitted that no partnership existed. She referred me to the Partnership Act 1997 and in particular to s 6(1). At the time Shilo Meats was

in operation (1993-1995) the Partnership Act 1997 was not in force but a very similar provision was contained in s 2 of the Partnership Act 1891 (SA) which was then still in force in the Northern Territory. Section 2 prescribed certain rules for determining whether or not there was a partnership. The only rule of possible relevance is s 2 III (d) which provides:

> "The advance of money by way of loan to a person engaged or about to engage in any business, on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such: Provided that the contract is in writing, and signed by or on behalf of all the parties hereto."

[25] There is no evidence that there was a contract in writing so as to bring Ray within the proviso. There is also no evidence that Ray ever lent any money to Robert in relation to Shilo Meats. The evidence is clear that the loans by the bank were made to Robert, Daryll and Ray who the bank described as the proprietors of Shilo Meats: see especially Ext P5 annexures Q, R and S.

[26] In this case there is no written partnership agreement. However, it is very common for partnerships to be formed without a written agreement. The principal evidence in favour of a partnership is the evidence I have already mentioned. There is also evidence which I accept from Robert that Ray participated in partnership meetings and voted with Daryll against him on whether or not the business should acquire a mobile kill facility. There is also evidence that Shilo Meats operated bank accounts in the names of all three partners and after the resignation of Daryll, in the name of Robert and

Ray. This evidence does not specifically deal with whether there was an agreement to distribute profits between the partners. The definition of a partnership in the Partnership Act 1891, s 1 is "the relation which subsists between persons carrying on a business in common with a view of profit". There is evidence from Daryll that Ray never received anything from the business, but as the business never made a profit, that evidence is unhelpful. However I think it is clear that the inference to be drawn from the evidence is that there was a partnership and that had there been a profit each of the partners would have shared the profits equally. Clearly they were in business together to sell meat for a profit. I find therefore that Ray was at all times a partner in the business Shilo Meats.

**The business of Shilo Meats is closed down and the Station put up for auction**

[27] I am satisfied that the business of Shilo Meats never made a profit. I am satisfied also, that at the time Daryll retired from the partnership there were liabilities to the bank of approximately $334,000 and to trade creditors of $212,000. In June or July 1994, Daryll left the partnership and left Darwin. He had no assets and contributed nothing to the losses of the partnership. The business was carried on by Robert and Ray.

[28] Robert and Ray tried to trade their way into profit but were unsuccessful. There were other difficulties. The lease on the premises occupied by Shilo Meats had expired. Robert and Ray decided to ask for a further lease. On 20 August 1994 Ray and Elsie met with John Anictomatis who said he

would instruct a solicitor, Mr Parish, to prepare a new lease. On 31 August Ray called upon Mr Parish, collected the new lease and delivered it to Mark Bruce, Ray's bank manager, with instructions to send it on to another solicitor, Richard Giles. According to Ray he personally delivered the lease to Mr Giles. Nothing turns on this. Mr Giles was acting for Robert and Ray on this occasion.

[29] For reasons which are unexplained, a new lease was not entered into. Ray and Robert decided to close down the business and this was done on 13 October 1994. I find that by this time, the creditors of Shilo Meats amounted to $623,000. Ray probably did not know then exactly how much was owed, but he was well aware that the debts were very large. In early 1995 Ray received a number of summonses from trade creditors and the bank was threatening to exercise its power of sale under the mortgages it held over Shilo Station. Robert and Ray discussed what was to be done. Various proposals to sell off some of the land were discussed. Finally, in April 1995 it was decided to sell the station together with the plant and equipment. Notwithstanding Ray's denials, I accept the evidence of Mr Loveridge and of the plaintiffs that on 20 April 1995 Ray signed a sole agency agreement with Malabar Investments Pty Ltd trading as LMPA Project Marketing Service to sell the property. The sole agency agreement was signed by Ray in the presence of both plaintiffs and Mr Loveridge and witnessed by Elsie.

**The proposal to save the Station**

[30] On 10 October 1994 Robert and Julienne, who had known each other as children, met up again and shortly thereafter commenced to have a relationship. From about March 1995 Julienne began assisting Robert and Ray to sort out the financial affairs of Shilo Meats. On 4 April 1995, Julienne obtained a written authority from Ray to act on his behalf in relation to the affairs of Shilo Meats.

[31] On about 5 May 1995 the plaintiffs visited Ray and Elsie at the station. According to the plaintiffs an agreement was reached in the terms alleged and set out in paragraph [6] above. The terms of this agreement will be referred to as "the May agreement". In his statement Ray says that in May 1995 he was "traumatised by the debacle of Shilo Meats and desperate to avoid losing all of my land as the plaintiffs well know and I was willing to accept their suggestion and direction in all respects in terms of the Shilo Meats indebtedness, as I considered they were in charge of this aspect, however, I did not ever agree to any proposal to alter my will. I recall a proposed sale of the five outer blocks being discussed, although again I do not recall the detail of this and I do not have a diary note of this, which confirms to me that nothing final was agreed by me in any respect at any family discussion, as it was at this time my habit to record any matter of significance to me in my diary, where it related to social, family or work".

[32] The evidence of Elsie is that from her "direct observation and knowledge of [her] husband's habits that at the times referred to in his affidavit he did

keep diaries and would record any matter of significance to him in his diary at the time and the annexures to his affidavit which annex copies of his diary are in his hand".

[33] Counsel for the plaintiff, Ms Kelly, objected to this (and to similar passages in Ray's affidavit, Ext D1) on the ground that they offend the bolster rule: see *R v Turner* [1975] QB 834 at 342 per Lawton LJ; *Palmer v R* (1998) 193 CLR 1 at [47] per McHugh J; *R v Connolly* [1991] 2 Qd R 171 at 173-174 per Thomas J. However, I do not consider that this evidence does offend that rule. Ray's evidence is that he cannot recall what is alleged to have happened and if it had happened, he would have made a note of it in accordance with his habit. Evidence of habit is admissible to prove whether or not a particular event occurred: see generally *Cross on Evidence* (loose-leaf edition), paras [1130] and [1135]. Evidence of habit is admissible to prove what was said on a particular occasion if the witness is unable to recall what was said. In *State Bank of New South Wales v Muir and Anor* (Supreme Court of New South Wales, unreported, 17 June 1997) BC9702524, McLelland CJ in Eq admitted evidence of the practice of a solicitor as to whether or not he explained a particular transaction about to be entered into by a guarantor and the nature of the explanation given. In *Armstrong v Commonwealth Bank of Australia* (17 June 1999) NSWSC 58 (unreported) BC9903751, Hamilton J admitted evidence of a bank officer who had no recollection of witnessing the mortgagors' signature on a mortgage, as to his practice in never witnessing a signature unless the

document is signed in his presence and what explanation he habitually gave on such occasions. In both cases, as it turned out, little weight was given to the evidence, but that is a matter of weight not admissibility. In my opinion this (and similar evidence given by Ray) is admissible.

[34] On the other hand, it is most improbable that Julienne would have agreed to have sold her unit and used most of the proceeds of the money to pay off the Shilo Meats creditors as well as given up her business and only source of income to take on the affairs of Shilo Meats for nothing in return. Elsie sought to cast doubt on the plaintiffs' case by suggesting that Julienne "would have done anything to get Robert", a remark echoed by Ray in his evidence. These comments do nothing to enhance their credit as witnesses. If Julienne had had concern only for Robert, she would have been wiser to allow the property to be sold and to have kept her own assets and business intact. Her offer of help is directed not only at Robert, but to Ray and Elsie and makes sense only if she was working to save the station ultimately for the benefit of Robert and herself.

[35] It was submitted on Ray's behalf that there was no intention to create legal relations because this was an offer of help from a future daughter-in-law. There is no presumption of advancement in the case of a future daughter-in-law to her future father-in-law: see *Calverley v Green* (1984) 155 CLR 242 at 268 per Deane J. Although the categories in which the presumption operates is not closed (see *Nelson v Nelson* (1995) 70 ALJR 47 at 68 per Dawson J) there is no good reason to extend the presumption this far.

However, there can be a presumption of advancement in the case of a disposition of property in contemplation of marriage: see *Wirth v Wirth* (1956) 98 CLR 228 at 237-238 per Dixon CJ; at 241 per McTiernan J. But the facts do not suggest that such a presumption operates in this case. Although Julienne's money and assistance would have benefited Robert in so far as he was one of the principal debtors to the creditors of the partnership, it would also have benefited Ray and Elsie. Moreover, the terms of the offer indicate that Julienne expected to obtain a benefit for herself in that in return for her assistance she was to receive title to two lots in her own name only and receive all but one lot of the rest of the land as a joint beneficiary with Robert under the terms of Ray's will.

[36] There are other objective indications that such an agreement as asserted by the plaintiffs was in fact made. Ray accepted that at about the time of the May meeting an agreement was formed between the parties (including Elsie) to agist cattle on the station as a means of generating income to assist with the payments of Shilo Meat's debts. The business name, Shilo Station, was registered in early July 1995. On 4 July 1995, Elsie retired from the partnership (although a notice of change was not lodged until November 1995 with the Office of Business Affairs). Plainly there was an intention by the parties to form a legally binding partnership at this time. As Ms Kelly submitted, this partnership agreement makes no sense outside of the context of the agreement which the plaintiffs assert. The purpose of this partnership was to raise funds to pay off the debts of Shilo Meats. Why

include Julienne in the partnership unless there was some other arrangement such as the plaintiffs allege?

[37] The evidence is that on 15 May 1995 the plaintiffs instructed a solicitor, Mr Paul Maher, to document the agreement which had already been reached. Robert states in his affidavit that by letter dated 22 May 1995 Mr Maher wrote to Ray about the agreement. A copy of the letter is annexed to Robert's affidavit as Ext PP, but there are difficulties with this document. On its face it appears to be a draft with a number of corrections noted. The plaintiffs cannot assert that the letter was ever sent to Ray. There is no evidence that Ray ever received this letter. The draft letter is a proposal of a vastly different kind than the alleged agreement. Mr Maher was not called as a witness. The evidence of Julienne suggests that Mr Maher may have advised some alterations to the arrangements, but the terms of the draft letter would suggest otherwise. No cross-examination was directed to either plaintiff about this letter. It is possible that when the letter was written on Robert's instructions, no final agreement had yet been reached. It is also possible that the letter was a draft which was never sent and did not represent the plaintiff's instructions although Robert's affidavit would make that unlikely.

[38] There are also other potential difficulties facing the plaintiffs. It appears that as at May 1995, Ray had granted a mortgage over lots 1457 and 1796 to secure an overdraft facility in favour of his daughter Donna Mathrick. Julienne's evidence is that she prepared two letters addressed to Ray

regarding her purchase of these lots. The terms of the first of the letters dated 31 May 1995, is as follows:

> "I hereby wish to purchase the two Freehold (sic) blocks of land, being Section 1457 and 1796 for the sum of $155,000.00 comprising my capital of $130,000.00 in addition to the loan taken out by Robert Townsend of $25,000.00. We would like to purchase these blocks late in October 1995 with your approval.
>
> Kind Regards
>
> Julienne Blake"

[39] The second letter provides:

> "I hereby agree to loan you the sum of $130,000.00 with the following conditions:
>
> 1. The titles of Freehold Land Sections 1457 and 1796 to be held as security for this loan.
>
> 2. The mortgage taken over these titles to secure an overdraft facility of $30,000.00 for Donna Mathrick to be transferred to the property owned by Donna Mathrick.
>
> 3. The titles of Freehold Land Sections 1457 and 1796 to remain unencumbered (except for mortgage held for $25,000.00 loan undertaken by Robert Townsend) during the period June 1995 to October 1995.
>
> Dated this 1st day of June 1995 at Darwin.
>
> (signed) Julienne A. Blake
>
> I, Charles Rayford Townsend, hereby agree to the terms of this loan.
>
> (signed) Charles Rayford Townsend"

[40] Ray denied ever receiving the first letter. He also denies ever seeing the second letter and that the signature thereon was his signature. I find that it is his signature. The evidence of Julienne was that she prepared the second letter to evidence a loan because she was concerned that if the two lots were sold to her, Ray would be liable to pay commission to LMPA.

**Credibility of the witnesses**

[41] In the end, the objective evidence does no enable me to find positively that there was, or was not, a concluded agreement between the plaintiffs and Ray and it comes down to whether I believe the evidence of the plaintiffs rather than the evidence of Ray and his witnesses. Ray's recollection was clearly very poor, but I consider that his recollection was not nearly as poor as he made out. On a number of occasions I considered he tailored his evidence to best advance his own interests. His denial that he had signed documents which plainly bore his signature was not explicable by lack of memory. The signatures were plainly his. During cross-examination he tried to obfuscate to avoid having to answer awkward questions. At trial he denied signing the sole agency agreement with LMPA, yet in an earlier affidavit he admitted he had signed a sole agency agreement. His credit was not enhanced by numerous comments made which were non-responsive to the cross-examiner. By way of example, he was asked in cross-examination to look at a paragraph in Robert's affidavit and said, "Well, it wouldn't be truthful if Robert signed it."

[42] The evidence of Elsie did not assist Ray. Elsie was no mere witness. Her demeanour during the giving of evidence was that of a supporter. At the end of the case, Ms Sutton during submissions handed up a lengthy handwritten document prepared by Elsie which was a combination of submissions on the evidence and matters of evidence, much of which was utterly irrelevant. Those matters of evidence, to which I refer, had not been led at trial and were not the subject of cross-examination. One might, to a large extent, ignore this given that Ray was not represented by counsel, but I had explained to Ms Sutton in the presence of Elsie what may be put by way of final submissions. Plainly Ms Sutton understood her position even if Elsie did not. My impression of Elsie is that, whilst she did not deliberately lie to assist her husband, her memory of what had occurred at which she had been present was unreliable and she was plainly biased against the plaintiffs and in favour of her husband.

[43] There was obviously considerable ill-feeling by Ray and Elsie towards the plaintiffs, particularly Robert. On the other hand Ray showed no ill-will towards Daryll. Yet it was Daryll's mismanagement which had generated almost all of the losses of Shilo Meats, a fact which Ray and Elsie seemed reluctant to believe. Further, Daryll abandoned the partnership and left to go to Tennant Creek leaving Robert and Ray to bear the losses. Of Ray's family only the plaintiffs made any effort to recoup the losses and pay out Shilo Meat's creditors. It appears that when, at a later family meeting, the arrangements reached between the plaintiffs and Ray "to save the property"

were explained, one of the other children of Ray, Elsie Modena Allan (Modena), objected to the balance of the property being left to the plaintiffs by Ray's will. The evidence of Modena (Ext D4) was to the effect that at this family meeting she expressed her dissatisfaction with what she called a proposal rather than an explanation of an agreement which had already been reached. Modena did not give evidence. Her statement was admitted by consent. Another of Robert's sisters, Donna Mathrick, was called by the plaintiffs to give evidence. She was plainly a reluctant witness, but she says that Modena was upset because Modena wanted one of the blocks for herself, but she believed that this proposal reflected her parents' wishes. It is likely that Ray, having agreed to the proposals put by the plaintiff and having seen the proposals put into practice by the plaintiffs, felt secure about no longer losing the property, but reluctant to carry out his side of the bargain partly because of a not unnatural desire not to be seen as favouring Robert over his siblings and partly because, having spent much of his working life building up the property, he was reluctant to lose control over it. There is also an undercurrent that Elsie believes that she is entitled to a share of the property as the result of all of her efforts as Ray's wife over the years. Clearly Ray feels obliged now to honour these obligations to his wife and other children: see paras 63 and 64 of Ray's affidavit. No effort was made to plead such a case or to join Elsie or the other children as parties. These are matters which are likely, perhaps unconsciously, to cause memories to become distorted over time.

[44] Daryll gave evidence for Ray. I was not impressed with this witness. Daryll's attempt to suggest that the reason for the failure of Shilo Meats was because Robert was a spendthrift who had his hand in the till demonstrates the sort of person he is. None of this was put to Robert. The records of Shilo Meats were available to the accountants who prepared its tax returns. There is no evidence to support Daryll's allegations either in the records or elsewhere. He was forced to admit that the evidence in his statement about who owned the Isuzu truck was incorrect. It is difficult to believe that he did not know that this truck was a partnership asset when he took it with him to Tennant Creek. As to Daryll's evidence that Ray was not a partner in Shilo Meat's, but a mere financier, it was he who instructed the accountants, Parnell, Kerr and Forster, to prepare the application for the registration of the business name Shilo Meats. Daryll's explanation was that when the business application was put to him, "this is the first time I've seen this piece of paper other than signing it". That may be so, but he did not say that he did not read it at the time he signed it, nor did he say that he did not appreciate that, at the time he signed it, it showed Ray as a partner. I reject this witness' evidence.

[45] On the other hand I consider the evidence of the plaintiffs to be truthful and reliable. They were not shaken in cross-examination. Although some of the evidence is equivocal, I find that there was an agreement concluded in early May 1995 in the terms alleged.

[46] In reaching this conclusion I have not overlooked the fact that the agreement was not reduced to writing and that subsequent efforts to have the agreement documented in a suitable form came to nothing. In *Masters and Anor v Cameron* (1954) 91 CLR 353 the High Court discussed the possibilities which arise where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be made the subject of a formal contract. At pp 360-361 Dixon CJ, McTiernan and Kitto JJ said that there are three common classes of situations. First, the parties may have reached finality in arranging all of the terms of their agreements and intend to be bound immediately, but at the same time intend that the terms be re-stated more fully or more precisely but not different in effect. Secondly, the parties may have agreed all of the terms and intend no departure from them but have made performance of one or more of the terms conditional upon the execution of a formal document. Thirdly, the intention may be not to have a concluded bargain at all unless and until a formal agreement has been executed.

[47] In this case Ray denies the existence of any agreement at all, although he does not entirely deny that he instructed solicitors to advise him concerning draft documents prepared by Mr Maher in 1996. On 9 September 1996 Ray and his wife signed a letter addressed to Mr Bill Parish, Ray's solicitor, in the following terms:

> "Both myself and Elsie would like to continue with completing an agreement with my son, Robert, and his wife, Julienne, concerning the station and our business, Shilo Station.

> Could you please forward another copy of the document pertaining to this so that we are able to finalise our agreements."

[48] A meeting was held on 17 October 1996 to review the documents in detail, at which Julienne's evidence is that Ray (with some minor alterations which she noted) approved of the documents and authorised Julienne to instruct Mr Maher to "go ahead now". Ray denied signing the letter of 9 September and implied his signature was a forgery. I reject that suggestion. He claimed to have some memory of reading the draft documents at some time but denied any meeting with the plaintiffs about the drafts. I prefer the evidence of the plaintiffs.

[49] On the plaintiff's account, the agreement had been reached in May 1995 and they had partly performed it thereafter. I will come to the evidence of part performance later. There is no suggestion in their evidence that the agreement was in any way subject to a written agreement and this was never suggested to them in cross-examination. I am not prepared to draw the inference that there was an understanding that the agreement reached was subject to a written agreement in either the second or third classes of situations discussed in *Masters v Cameron*. I conclude that the parties intended to be bound immediately, notwithstanding that part of the agreement related to the sale of land, because the matter was urgent given that the property had already been listed for sale by a land agent and it was necessary to withdraw the property from sale and take prompt action to satisfy Shilo Meat's creditors. I have no doubt that the plaintiffs trusted Ray

to perform his part of the bargain and because of their close relationship with him did not feel the need for any immediacy in having written contracts prepared.

**The property is withdrawn from sale and the plaintiffs perform acts of part performance**

[50] Following the May agreement, Shilo Station was withdrawn from sale. Julienne sold her unit and used most of the proceeds of the sale towards paying off Shilo Meats. She also worked on the accounts of Shilo Meats, realised the assets of the partnership and attended to paying off the more pressing creditors. She procured an offer from her sister, Marion Leggo, to purchase two of the back blocks and an offer to purchase the other three back blocks for $170,000.00 from her father, Maurice Blake. Ray accepted both offers. The contract with Marion Leggo proceeded to completion. The proceeds of sale were used towards the payment of Shilo Meat's creditors. The parties registered the business name "Shilo Station" and opened a partnership bank account. Robert arranged agistment contracts for the station and Robert, Ray and Elsie worked the cattle.

[51] I have previously referred to s 4 of the Statute of Frauds 1677 (Imp) which requires contracts for the sale of land to be in writing. Courts of Equity, however, have long enforced oral contracts where there has been "part performance". I have approached the evidence in this case on the basis that evidence of an oral agreement is admissible without first adducing evidence of part performance: see the discussion in Cheshire and Fifoot, *Law of*

*Contracts*, 7th Aust ed, Butterworths, Sydney, 1997, p 168 (para 16.66) footnote 308. In my opinion, in a case before a judge without a jury, it does not matter in what order the evidence is led, or, for that matter, considered by the Court. I do not see how, sensibly, a Court can look at acts of part performance first and then decide whether they unequivocally point to the contract alleged unless one knows what contract is alleged. The alleged contract can be ascertained from the pleadings in any event. Surely it is more convenient to hear the evidence as to the alleged contract as part of the evidence in the trial going to all issues, rather than to engage in an arcane bifurcation of the evidence.

[52] The test as to what acts may amount to part performance is that the acts must be unequivocally, and in their own nature, referable to some such agreement of the general nature of that alleged and in this regard it is not necessary that the acts of part performance should have been done in compliance with a requirement of the contract: *Regent and Anor v Millett and Anor* (1976) 133 CLR 679 at 683 per Gibbs J. Applying that test, I consider that the acts relied upon are acts of part performance. I can conceive of no other explanation as to why Julienne, who was at that stage not married to Robert, would sell her property, use the proceeds of sale to pay off the partnership creditors, give up her business and perform the work referred to for no remuneration except that it is referable to some such contract as that which is alleged.

**The Shilo Station partnership buys cattle**

[53] It was the plaintiffs' evidence that, subsequently in 1995, the scope of the partnership altered so that, instead of merely earning income from agistment, the partnership purchased cattle for breeding and fattening for sale. The evidence is that at this stage Ray had a small herd on the station – only some 30 odd cattle – under the CRT brand. Julienne's evidence was that prior to the commencement date of the Shilo Station partnership, agreement was reached at an impromptu meeting at the station homestead to transfer these cattle to the new partnership. Robert's evidence was that he and Julienne agreed to buy cattle in August 1995 when a small herd was purchased from a Mr Shadforth. This herd was agisted on the property at the time. Ray denied any knowledge of any agreement for the partnership to become involved in the purchase and breeding of cattle. The partnership records indicate that the small herd belonging to Ray was recorded as a capital contribution in the partnership accounts, that from time to time other cattle were purchased from partnership funds, that the partnership met expenses related to these cattle and that the net proceeds of the sale were paid into the partnership account.

[54] In October 1998, Robert's evidence is that Ray asked the plaintiffs about selling "a few head" of cattle so that he might have "some Christmas money". Robert said that if it was only a few head he and Julienne would be happy for him to have the money. It was agreed that the plaintiffs would return to the station the following week to worm the cattle and to spray and

discharge them from the yards a fortnight later. He said that he attended to treating the cattle, which turned out to be 32 head and not the smaller number which the parties previously had in mind and arranged for their sale to Fares Rural Co for $13,982.00. The partnership spent $2,000 on the treatment of the cattle.

[55] When Julienne contacted Fares Rural Co to obtain payment she was advised that Ray had told them that the cattle were his and that he demanded the cheque. This resulted in a dispute between the parties which was initially resolved by agreement being reached that the cheque would be deposited into the partnership account and Ray would receive half of the proceeds. At this stage it is common ground that Ray and Elsie were living mainly off Ray's service pension, although the partnership records show that some expenses were also met on their behalf.

[56] In his affidavit Ray did not deal directly with the plaintiffs' assertions other than to say he did not recall that there were any discussions at any time about the ownership of cattle. His evidence in cross-examination was much more assertively expressed as a denial. However, although he initially denied any knowledge of the purchase of cattle by the partnership, at one stage, whilst being asked about 35 head of cattle purchased, he said that Robert did purchase these cattle "… and I know who he bought them from and that wasn't paid very readily".

[57] The evidence of Elsie is that she knew nothing about the sale of the Shilo Station cattle to the partnership, even though she believed she had an interest in the cattle. Julienne also asserted that her understanding was that the herd on the station belonged to Ray and Elsie.

[58] I am unable to find that there was any agreement reached to sell the 30 odd cattle under the CRT brand to the partnership. The evidence is too confusing and contradictory to reach any firm conclusion one way or the other. Clearly Ray, if he had agreed to bring those cattle into the partnership, had forgotten about that arrangement by 1998. In any event, the dispute over those cattle was resolved in that the parties agreed that Ray would receive half of the proceeds and it appears that that is what occurred. So far as the other cattle purchases are concerned, these were purchased with partnership funds and whether there was strictly speaking an agreement to expand the partnership in this way or not, the cattle, their progeny and the proceeds of any subsequent sales were properly partnership assets.

**The sale to Maurice Blake does not eventuate and new terms are agreed**

[59] Despite having paid most of the purchase price for lots 1766, 1764 and1704 Maurice Blake changed his mind about going on with the sale. As a result, in September 1995 a further meeting was held between the plaintiffs and Ray and Elsie. Julienne owned land at Howard Springs. She offered to sell that land and to use the proceeds to purchase two of the blocks from Ray. She said she anticipated realising $100,000 for the Howard Springs block.

Ray said, according to Julienne, that if she sold her block she could have all three blocks as she had already done so much on Shilo Meat's affairs; and that she accepted this offer. It was also agreed that rather than selling off any more of the lots, they should try to refinance the remaining part of the Shilo Meats' debts with the bank. Julienne's affidavit is supported by Robert's affidavit.

[60] In his affidavit Ray does not deny that those matters were discussed. He says that he recalls that the proposed sale to Maurice Blake failed and also that the Shilo Meats debt was to be refinanced and "some discussion to the effect that I would give the plaintiffs a number of my land blocks if they paid off the balance of debt due to the bank".

[61] Subsequently, Julienne prepared a loan application to refinance the Shilo Meats debt. She believed that she needed a deposit to obtain the loan. She offered to sell her car for this purpose. Ray agreed to contribute $500 from his US Navy pension. The loan was to be made to the plaintiffs, with Ray acting as guarantor, secured by mortgage in favour of the Bank over the station. The loan ("the second loan") went ahead, Julienne sold her car for $4,000 and Ray contributed the $500 he promised. All of the funds were used in the manner contemplated by the parties.

[62] In December 1995, Julienne sold her land at Howard Springs. The net proceeds of $108,132.23 were used to repay Maurice Blake, whose funds had been applied by the bank in part payment of a pre-existing Shilo Meats

Business Investment Loan. Julienne did not receive transfers to lots 1765, 1766 and 1704 because these lots were subject to mortgages to the bank to support the second loan and also because Julienne did not have the funds to pay stamp duty on the transfers. Ms Kelly submitted that these also are acts of part performance. Applying the test in *Regent v Millett*, I accept Ms Kelly's submission.

[63] The only creditor of Shilo Meats remaining unpaid after drawing down on the second loan was a debt to Tipperary Station. With the knowledge and approval of Robert and Ray, Julienne entered into an arrangement with Tipperary station to reduce this debt by monthly repayments by the Shilo Station partnership. These payments amounted to $500 per month in 1995 and $400 per month in 1996. The partnership continued profitably until early 1997 when a down-turn in the overseas export market for livestock affected the agistment of cattle on the property. From March 1997 to March 2000 the Tipperary Station debt was repaid either from the plaintiffs' personal incomes or from the Shilo Station partnership account. As at 14 March 2000 when the plaintiffs made the last payment to Tipperary Station, the balance of the debt then outstanding was $5,995.56.

[64] Subsequently, the mortgage over lots 1457 and 1796 granted by Ray to secure the loan to Modena was discharged. Ray obtained the certificates of title which he gave to Julienne. These were the two lots to be transferred to Julienne pursuant to the May agreement. Julienne still has possession of the certificates of title. In my opinion this is also an act of part performance

referable to the May agreement. Ray signed a letter dated 25 December 1998 written in Elsie's handwriting in the following terms:

> "This is to confirm I have given Julienne Anne Townsend two three hundred and twenty acre Block (sic) of land. Block no. 1796 and Block no. 1457. This land is to help compensate for personal assets sold to pay on Shilo Meats Debts. I thank you for all your help in the Shilo Meats deal.
>
> (signed) Charlie R, Townsend"

**A third loan**

[65] In mid 1997, there was another meeting between the parties at the homestead to discuss refinancing of the loans to the National Australia Bank. The proposal was to amalgamate the loans previously taken out by the plaintiffs with a fully drawn advance taken out by Ray, as well as to borrow some further funds to purchase approximately 400 head of weaners from NACC Pty Ltd which were agisted on the property. As part of that agreement Ray promised to give Robert blocks 1702 and 1703.

[66] The loan documents were duly executed and the funds drawn down on about 9 July 1997. As the income from the partnership was insufficient to meet the loan repayments, the plaintiffs, who were by this time working in other paid employment, contributed towards the running costs of the partnership business from their own resources. Between July 1997 and May 2000 Robert contributed $69,670.00 and Julienne $14,580.37 from the monies earned by them outside of the partnership. In addition the Shilo partnership earned income which was used to purchase assets and to meet Ray and Elsie's

living costs. Further, Julienne contributed monies in order to pay out Ray and Elsie's credit cards and to meet some of the partnership's running costs.

[67] On 25 December 1998, Ray signed another letter written in Elsie's handwriting as follows:

> "To Whom it Concerns:
>
> If I decease (sic) before all Shilo Meats Debts are paid I want everyone to know I have given my son Robert Ray Townsend five three hundred and twenty acre Blocks of land. Blocks no. 1764, 1765, 1704, 1703 and 1702. This land is to Compensate (sic) Robert for taking responsibility to pay all of Shilo Meats Debts.
>
> Thanks Robert for all you have done.
>
> (signed) Charlie R. Townsend"

[68] The two letters of 25 December 1998 followed closely upon the dispute over the sale of the 30 odd head of cattle to Fares Rural Co, which I have previously referred to paras [54] to [57] above. The plaintiffs had been at the homestead on Christmas Day. Nothing was said that day, except that Ray gave Robert the two letters after Julienne had retired to go to bed. The plaintiffs considered that the letters did not go far enough and did not adequately reflect the terms of the agreement they had made with Ray. There was a heated discussion the following day between the plaintiffs and Ray and Elsie, but nothing was resolved. I think that at least part of the animus which had developed between the parties was related to the fact that, whilst Julienne had, as the partnership bookkeeper, an intimate understanding and

knowledge of the partnership's affairs, Ray and Elsie, who had become virtually totally reliant upon the plaintiffs for their living, had little knowledge or understanding of where the money was all going. However that may be, up to this time, Julienne had not been asked to provide any such information to Ray or Elsie.

**The relationship finally breaks down**

[69] In January 1999, the plaintiffs sought legal advice as a result of which caveats were lodged over Ray's titles to protect the plaintiffs' interests. Shortly after that Ray denied the plaintiffs access to the property and the partnership business came to an end. The plaintiffs nevertheless continued to make repayments of the refinanced loan until 12 May 2000 and Julienne continued to perform work on preparing the partnership's financial statements. On 15 June 2000 following an interim agreement between the parties and by leave of the Court, Ray sold five lots (lots 1702, 1703, 1704, 1765 and 1766) to his son Bubba. The proceeds were used to discharge the refinanced debt.

**Breach of the agreement**

[70] It is common ground that Ray has refused to transfer the five lots to Julienne and the two lots to Robert. Ray's position is that he would do so only if the plaintiffs had completely discharged the whole of the Shilo Meats debt. In the argument that ensued on 26 December 1998, Ray denied the existence of the original agreement as varied and he has continued to deny its existence

in these proceedings. The denial by a party of the very existence of an agreement amounts to a repudiation of the contract and gives rise to a right in the other party to elect to treat the agreement as on foot and sue for specific performance or to accept the repudiation which brings the contract to an end, but with a right to sue for damages for breach: see, for example, *The Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board* (1989) 1 Qd R 499 at 504-505 per Connelly J; at 513 per Ryan J; *Foran and Anor v Wight and Anor* (1989) 168 CLR 385 at 441-442.

[71] In this case it is clear that in May or June 2000 the plaintiffs agreed to the sale of five of the lots to William Asa (Bubba) Townsend, albeit that that agreement was without prejudice to their claim in these proceedings. The Statement of Claim was amended to seek only specific performance of the contract so far as the remaining land in concerned. At the conclusion of the trial, counsel for the plaintiffs abandoned the claim for specific performance and claimed instead, damages pursuant to Lord Cairn's Act (s 2 of the Chancery Amendment Act 1858, 21 and 22 Vict c 27(UK)). That provision empowered the Court of Chancery to award damages in addition to or in substitution for equitable relief, which, of course, includes a decree of specific performance. Section 62 of the Supreme Court Act provides that where a plaintiff claims to be entitled to an equitable estate or right the Court shall give to the plaintiff the same relief as ought to have been given immediately before the commencement of the Judicature Act by the English Court of Chancery in a proceeding for the like purpose. Notwithstanding a

comment by the learned authors of Greig and Davis, *The Law of Contract*, Law Book Co, Sydney, 1987 at pp 1499-1500 expressing doubt in the power of this Court to award damages when ordering specific performance, Kearney J held, in *Brooks and Anor v Wyatt* (1994) 99 NTR 12 at 27-30, that this Court had power to award damages under s 62 of the Supreme Court Act which in effect re-enacted Lord Cairn's Act by reference. Cheshire and Fifoot, *Law of Contract*, op cit, at p 829 (para 24.24) says that the power to grant such an alternative or additional remedy in damages may be exercised by the Supreme Courts in all jurisdictions except the Northern Territory. However, the learned authors cite no authority for this proposition and do not refer to *Brooks v Wyatt*. I consider that the reasoning of Kearney J is compelling and that I should follow this decision.

**Duress or unconscionability**

[72] Ray has pleaded that at the time when the partnership of Shilo Meats was entered into and at all times subsequently, he was without legal advice as to the legal consequences of the loans and other support he had intended to give Robert and Daryll, was of advancing years, not well versed in legal arrangements needed to document such loans and agreements, was trusting, gullible and dependant upon Robert and Daryll to provide proper documentation and timely and accurate reporting of the business affairs of Shilo Meats. As well it is pleaded that Ray was psychologically dependant on the plaintiffs, was intimidated by their overbearing and threatening conduct, unable to comprehend the accounting and business advice of

Julienne and unaware that the plaintiffs' efforts might give rise to a constructive trust.

[73] No effort was made to lay any factual foundation for any of these assertions in Ray's affidavit or otherwise and it is apparent that facts emerged which showed a quite different picture. Ray did not assert that either of the plaintiffs threatened or intimidated him. There was no evidence that at the time of these transactions he did not understand the arrangements due to his age or for any other reason. There is no plea of undue influence and in any case, there is no evidence of that either and the relationship between a man and his future daughter-in-law is not one where there is a deemed relationship of influence, although the same might not be said of the relationship between father and son. However, this is not a case of a gift and whilst there is presumption of influence, there is nothing in the evidence to show that the agreements reached were the result of any "undue" influence; see Meagher, Gummow and Lehane's, *Equity, Doctrines and Remedies*, 4th ed, Butterworths LexisNexis, Sydney, 2002, paras 15-030; 15-055.

**Counterclaim**

[74] Ray has also filed a counterclaim the essence of which is that, far from being a partner in Shilo Meats, he agreed to provide a loan to Robert and Daryll of $100,000 on certain terms; that the advance was made on those terms; that, in addition, Ray by way of loan provided 147 cattle to the partnership; that subsequently he agreed to two requests from Robert and

Daryll to borrow funds from the National Australia Bank which he on-loaned to the partners; that he subsequently made a further advance of $25,000 when he sold 102 cattle to Tom Starr of Bambra Springs and paid the proceeds to the bank in reduction of the Shilo Meats debt; that he has never been repaid those loans and he seeks various relief including repayment of the total debts.

[75] It is not disputed that he sold the 102 cattle to Tom Starr and used the proceeds of $25,000 to reduce the debt owing to the bank.

[76] No evidence was led to support any of the allegations in the counterclaim. No relief is sought by Ray for a taking of accounts of the Shilo Meats partnership, nor for contribution from the other parties to share in the Shilo Meats losses. The evidence is the accounts have taken those losses into account and I will come to that later. I have already found that Ray was a partner in Shilo Meats. The counterclaim must be dismissed.

[77] It is clear that the plaintiffs have done nothing to disentitle themselves to relief in equity on discretionary grounds. The plaintiffs have done everything they could to keep the contract as amended on foot. The variation agreed to in June 2000 meant that the plaintiffs were no longer required to meet any of the remaining financial obligations of Shilo Meats and that the partnership of Shilo Station had no longer any continued purpose. I see no reason why the plaintiffs would not have been entitled to specific performance of the contract so far as it related to the land already promised.

**Are there equitable remedies for anticipatory breach of the contract to leave the property to the plaintiffs by will?**

[78] It is well established that Lord Cairns Act damages are not available if the remedies of specific performance or injunction are not available: *King v Poggioli* (1923) 32 CLR 222 at 247 per Starke J; and see Cheshire and Fifoot, op cit, para 24.25 and especially the cases in footnote 215. Are such remedies available in the event of a claim based on anticipatory breach of contract to leave real property by will?

[79] A leading authority on this topic appears to be *Synge v Synge* [1894] 1 QB 466 which held that an action for damages for anticipatory breach may lie in respect of a covenant to leave particular property by will. However, that established a cause of action for damages at common law; it does not deal with equitable remedies.

[80] In *Schaefer v Schuhmann* [1972] AC 572 at 586, Lord Cross of Chelsea who delivered the majority judgment of the Privy Council said:

> "If the contract is to devise or bequeath specific property the position of the promisee during the testator's lifetime is stronger than if the contract is simply to leave a legacy. If the testator sells the property during his lifetime the promisee can treat the sale as a repudiation of the contract and recover damages at law which will be assessed subject to a reduction for the acceleration of the benefit and also if the benefit of the contract is personal to the promisee subject to a deduction for the contingency of his failing to survive the promisor. But if he can intervene before a purchaser for value without notice obtains an interest in the property he can obtain a declaration of his right to have it left to him by will and an injunction to restrain the testator from disposing of it in breach of contract."

[81] In dissent, Lord Simon of Glaisdale said, at pp 597-598:

> "In so far a *Synge v Synge* [1894] 1 QB 466 appears to decide that a promisee has any interest before the death of the promisor, it not only seems to depend on *Hochster v De la Tour* (1853) 2 E&B 678 being good law, but also to be inconsistent with the line of authorities which establishes that the promise must survive the promisor in order to have any remedy: *Jones v How* (1850) 7 Hare 267; (1850) 9 CB 1 and *In re Brookman's trust* (1869) LR 5 Ch App 182."

[82] It is surprising to me that his Lordship might appear to be casting doubt upon *Hochster v De la Tour* which has stood unchallenged and accepted as correct now for over 150 years. *Jones v How* is a most unsatisfactory case, as no reasons for the decision are given; but to the extent that the decision appeared to have rested on *Laughter's Case* 5 Rep 21, the decision was based upon the terms of the covenant, rather than any principle of law precluding an action for anticipatory breach. *In re Brookman's Trust* also turned on the construction to be given to the covenant.

[83] *Schaefer v Schuhmann* was not followed by the High Court in *Barns v Barns and Ors* (2003) 214 CLR 169; (2003) 196 ALR 65. However, the point in issue in *Barns v Barns* was whether or not a contract to devise or bequeath property by will resulted in the property no longer forming part of the promisor's estate at the time of his death so as to prevent the property from being considered as part of the deceased's estate out of which provision could be made under the Inheritance (Family Provision) Act 1972 (SA). A majority of the High Court preferred the reasoning of the Privy Council's earlier decision in *Dillon v Public Trustee of New Zealand and Ors* [1941] AC 294 on this question. This in turn depended upon the true construction to

be given to the Act rather than the correctness or otherwise of the dictum of Lord Cross which I have cited above. Further, it was not doubted by their Lordships in *Dillon* that if the testator, in breach of his contract, failed to perform his bargain, the damages will be assessed taking into account the contingency that there may be an amount awarded by the Court under the legislation to other family members (see (1941) AC at 305). In the majority opinion in *Schaefer* ((1972) AC 572 at 587) it was seen as a difficulty in making any deduction for this contingency because at the date of the breach sued on "it would be quite uncertain whether or not any occasion for exercise of the court's powers under the [NSW] Act would arise on the testator's death". In *Barns v Barns*, Gummow and Hayne JJ dryly observed, at [110]:

> "The cases in the past concerning the valuation of remarriage prospects suggest that such a task would not be beyond the wit of common lawyers."

[84] There is nothing in *Barns v Barns* or in *Dillon* to suggest that the dictum of Lord Cross of Chelsea in *Schaefer v Schuhmann* cited above should be rejected as incorrect. It follows from this that equity would grant an injunction to restrain Ray from disposing of his interest otherwise than in accordance with the contract. It therefore follows that damages under Lord Cairn's Act is available as an alternative remedy.

[85] As a matter of completeness, I should mention that the fact that part of the property has been disposed of since these proceedings have been

commenced, by consent of the parties and with the sanction of the Court, does not prevent the Court from awarding damages under Lord Cairn's Act, or for that matter at common law: see *Johnson and Anor v Agnew* [1980] AC 367; *Emeness Pty Ltd v Rigg* [1984] 1 Qd R 172 at 174-175; *Shevill and Anor v The Builders Licensing Board* (1981-1982) 149 CLR 620 at 625-626. The plaintiffs are therefore entitled to treat Ray's breach as relieving them from further performance and to recover damages either at common law or in equity. The measure of damages is precisely the same in either case: *Johnson v Agnew* (supra) at 400 per Lord Wilberforce. However, the Court has a discretion to award damages at a date later than the date of the breach if the plaintiffs have acted reasonably in trying to continue the have the contract completed: *Johnson v Agnew* (supra) at 401; *Emeness Pty Ltd v Rigg* (supra) at 177.

**Damages**

[86] The general principle for the assessment of damages is that damages are compensatory: i.e. the plaintiffs are to be put in the same position as if the contract had been performed so far as money can do so.

[87] In this case I have had the benefit of the evidence of Ms Rosemary Campbell, chartered accountant, who has calculated the quantum of damages due to the plaintiffs in her reports Ext P4 and P8. The damages have been calculated as at the date of trial. In my opinion this is reasonable and in accordance with the authorities I have mentioned. In my opinion the correct

base figure is that contained in the report Ext P8 which has made allowance for the fact that, if the contract had been performed most of the land would not have been inherited until after the deaths of both Ray and Elsie. I consider that the approach of using three per cent tables and a presumed inflation rate of three per cent per annum is reasonable. This results in an amount of $69,405 for Robert and $267,255 for Julienne.

[88] However, some allowance has to be made for the possibility that a claim might have been made under the Family Provision Act (NT). In this case the potential claimants are Elsie and Robert's brothers and sisters. Elsie was born on 1 January 1928 and is now aged 78. She is in good health and according to Luntz's life expectancy tables (Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, Sydney, 2002, Table 7) she has a life expectancy of 10.49 years. Ray was born on 20 April 1927 and is now aged 78. He has a life expectancy of 8.46 years. He also appears to be in good health. There are five other children: Cora Marie Reborse, born 7 November 1948; William Asa II Townsend, born 23 May 1950 (Bubba); Donna Christine Mathrick, born 31 October 1955; Maria Theresa Sutton, born 20 January 1959; and Elsie Modena Allan, born 22 January 1965. Ray says that his wife and their other children have all assisted him in the acquisition and retention of the property, but there are no details as to the levels of assistance provided.

[89] All of the other children have married. Donna Mathrick and Maria Theresa Sutton are now separated from their husbands. Only Elsie Modena Allan

showed an interest in or opposition to the agreement at the family meeting in November 1995. There is nothing in her affidavit (Ext D4) to indicate that she is in need of assistance and might make a claim under the Act.

[90] It is tolerably clear that Elsie has spent her life on Ray's properties. Under the agreement she was entitled to a life interest in the property after Ray's death. The arrangement did not include the homestead lot (lot 1697). Ray's only source of income, apart from what might be earned from breeding or agisting cattle on the station, is his pension. I do not know if Elsie will receive anything from this pension after Ray dies. I do not know if Elsie has any assets of her own. I think it is likely that she does not have any significant property. I think there is a good chance that she would have been entitled to an annuity to live on if the property had been left to the plaintiffs and assuming that she had a life interest in lot 1697. I consider I should allow for the possibility of a modest annuity commencing from Ray's death for a period of a few years. Doing the best I can and making a small allowance for the possibility that Elsie may in fact predecease Ray, I allow an amount of $20,000. In arriving at this sum I have also considered the possibility that both of the plaintiffs might predecease Ray. I see no reason to make any other allowances. I consider that this allowance should be borne principally out of Robert's share given the much larger contributions made by Julienne. I will therefore reduce the figure of $69,405 relating to Robert by $15,000 and reduce the figure of $267,255 for Julienne by $5,000.

Accordingly I award damages to Robert in the sum of $54,405.00 and to Julienne in the sum of $262,255.00.

**The Shilo Station partnership**

[91] I am satisfied that this partnership was dissolved in June 2000 when the last of the Shilo Meats creditors were paid out. According to Mrs Campbell's calculations, as at the dissolution of the partnership, the value of Robert's interest in that partnership as at 30 June 2000 was $46,971 and the value of Julienne's interest in the partnership was $37,195. Calculations have been made to reflect interest thereon to 31 August 2005 at commercial rates but the calculation has taken the form of compound interest. I consider that it would be fairer to allow interest at commercial rates under s 84 of the Supreme Court Act (which does not allow for compound interest). Allowing an average interest rate of 5.28 per cent over this period, I have allowed $13,640 interest to Robert and $10,801.36 interest to Julienne.

[92] It is clear from the accounts prepared by Mrs Campbell that these amounts are owed by Ray as they represent a liability in the accounts after making all appropriate adjustments to the partners' capital accounts and take into account the losses of the partners in the Shilo Meats partnership. The plaintiff Robert Townsend is therefore entitled to a further sum of $60,611.75 and the plaintiff Julienne Blake a further sum of $47,996.11 from Charlie Rayford Townsend.

**Conclusion**

[93] Accordingly:

(1) There will be judgment for the plaintiff Robert Townsend against the first defendant for the sum of $115,016.75 calculated as follows:

| | |
|---|---|
| Damages | $54,405.00 |
| Share of Partnership (including interest) | $60,611.75 |
| Total | $115,016.75 |

(2) There will be judgment for the plaintiff Julienne Anne Townsend Blake against Ray for the sum of $310,251.11 calculated as follows:

| | |
|---|---|
| Damages | $262,255.00 |
| Share of Partnership (including interest) | $47,996.11 |
| Total | $310,251.11 |

(3) There will be a declaration that the Shilo Station partnership was dissolved on 30 June 2000.

(4) The counterclaim is dismissed.

(5) The Defendant, Charlie Rayford Townsend, is to pay the plaintiffs' costs to be taxed.

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