IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2012 05278

IN THE MATTER of Part IV of the *Administration and Probate Act 1958*

- and -

IN THE MATTER of the estate of MARJORIE LILLIAN SWIFT, deceased

ROBYN JOYCE FLOCAS — Plaintiff

v

BIRDIE LORRAINE CARLSON, RAYMOND CHARLES SWIFT and JEFFREY KEITH SWIFT (as executors of the will and estate of MARJORIE LILLIAN SWIFT, deceased) — Defendants

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JUDGE:	McMillan J
WHERE HELD:	Melbourne
DATE OF HEARING:	25–26, 28 September 2014
DATE OF JUDGMENT:	4 June 2015
CASE MAY BE CITED AS:	Flocas v Carlson
MEDIUM NEUTRAL CITATION:	[2015] VSC 221

EQUITY — Mutual wills — Whether sufficiently proved — Whether constructive trust arises — Whether *Statute of Frauds* prevents trust — Proprietary estoppel — Whether representation sufficiently proved — Whether estoppel enforceable by residuary beneficiary — *Instruments Act 1958*, s 126

SUCCESSION LAW — Testator's family maintenance — Claim by niece of deceased — Where mutual wills agreement alleged with plaintiff's father — Whether responsibility to provide — *Administration and Probate Act 1958*, s 91

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Wells with Mr P Pascoe	Campbell & Shaw
For the Defendant	Ms S Marks QC with Mr G Baker	Kelly & Chapman

HER HONOUR:

1 On 9 February 1996, Marjorie Lillian Swift ('Marjorie') and her brother Robert Charles Dawson ('Robert') executed wills. The major issue of dispute in this case concerns whether on that day Marjorie and Robert agreed that, in effect, Robert's only daughter Robyn Joyce Flocas ('the plaintiff') would ultimately be entitled to half of their jointly owned property at 40 Alfred Street Prahran ('the Alfred Street property').

A brief family history

2 Charles Bowie Dawson ('Charles') and Lillian Birdie Dawson ('Lillian') had two children, Marjorie and Robert. Their family home was the Alfred Street property. From historical title materials produced by the plaintiff, it had been the family home since at least 1941. Following Lillian's death on 18 September 1949, on 3 March 1950 Charles, Marjorie and Robert were registered as tenants in common in equal shares in the Alfred Street property.

3 Marjorie and Keith had three children, Birdie Lorraine Carlson ('Birdie'), Raymond Charles Swift ('Raymond') and Jeffrey Keith Swift ('Jeff') (collectively 'the defendants'). Robert and his wife Joyce Evelyn Dawson ('Joyce') adopted the plaintiff 10 days after she was born on 7 September 1962. Both families lived at the Alfred Street property with Charles. Joyce died on 19 October 1973. As the children grew older, they moved out, with the plaintiff, the youngest, moving out in 1985. The plaintiff gave evidence that, between her mother's death and when she left home, she did not have a warm relationship with Marjorie, and did not get along with Jeff.

4 Charles died on 8 October 1990, leaving a final will dated 9 March 1966 appointing Robert and Marjorie as executors and leaving the whole of his estate to Robert and Marjorie in equal shares. Robert and Marjorie remained in the Alfred Street property and did not seek a grant of probate or to have the title to the Alfred Street property amended.

5 The family investment properties had until that time either been held in the joint names of Charles, Robert and Marjorie or in the names of Robert and Marjorie alone. A property at 59 Carpenter Street, Brighton ('the 59 Carpenter Street property') had been held by Charles, Robert and Marjorie as tenants in common in equal shares; a property at 57 Carpenter Street, Brighton ('the 57 Carpenter Street property') was held by Robert and Marjorie as joint proprietors; and a property at 19 Cluden Street, Brighton East ('the Cluden Street property') was held by Robert and Marjorie as tenants in common.

6 Robert became ill in around 1993, and was diagnosed initially with prostate cancer and ultimately with diabetes and leukaemia. On 8 February 1996 Zenon Starnawski ('Mr Starnawski'), a solicitor, attended the Alfred Street property to take instructions from Robert for a will. Who was present at the taking of instructions, and what was said, are matters of dispute. On 9 February 1996, Robert executed his will. On that day, Marjorie also executed a will ('Marjorie's February 1996 will'). Robert died on 13 February 1996.

7 Marjorie executed a further will on 3 April 1996 ('Marjorie's April 1996 will') and obtained a grant of probate of Robert's will on 16 April 1996. Pursuant to s 17 of the *Administration and Probate Act 1958* and the chain of representation therein created, the defendants are, resultantly, the executors of Robert's will. Marjorie also sought and obtained a grant of probate of Charles' will on 20 May 1996 as the sole surviving executor.

8 On 8 March 1996, the title to 57 Carpenter Street property was altered from joint proprietorship to a tenancy in common in equal shares between Robert and Marjorie, and on 17 February 1997 Marjorie was registered on title as the sole proprietor of the Alfred Street property. The Cluden Street property and the 57 and 59 Carpenter Street properties were ultimately sold and the proceeds distributed.

9 On 6 August 2001, Marjorie executed what would be her final will ('Marjorie's August 2001 will'). Keith died on 23 July 2003.

10 Marjorie died on 27 January 2012, and the defendants obtained a grant of probate of Marjorie's August 2001 will on 23 March 2012.

The wills

Robert's 1996 will

11 Robert's will appointed Marjorie as the executrix of his estate, and the plaintiff as his alternate executrix in the event that Marjorie predeceased him or was unable or unwilling to act. The will left the residuary estate to the plaintiff. In cl 3 of that will, he provided:

> I GIVE DEVISE AND BEQUEATH my interest in the property at 40 Alfred Street Prahran more particularly described in Certificate of Title Volume 7450 Folio 976 ('the property') to my said sister MARJORIE LILLIAN SWIFT but in the event she predeceases me I GIVE DEVISE AND BEQUEATH the said property subject to cl 5 to my daughter the said ROBYN JOYCE FLOCAS.

12 In cl 5, it provided:

> I DIRECT that my Trustee holds my interest in the said property referred to in Clause 3 of this my Will UPON TRUST for sale with power to postpone such sale and to permit my brother-in-law ALAN KEITH SWIFT personally to occupy the same as a principal residence he paying all rates and taxes and other such outgoings from time to time payable in connection with the said property and keeping the same in good order and condition (excluding structural repairs) to the satisfaction of my Trustee and insured against such risks and for such amounts as my Trustee shall reasonably require with an insurance company approved by my Trustee until the distribution date which shall be the first to occur of the date upon which my Trustee forms the opinion that the said ALAN KEITH SWIFT has:
>
> (a) failed or ceased to personally occupy the said property as a principal residence;
>
> (b) failed to pay all rates taxes and other such outgoings payable from time to time in connection with the said property within a reasonable time;
>
> (c) failed to keep the said property in good order and condition (excluding structural repairs) to the satisfaction of my Trustee; or
>
> (d) failed to keep the said property insured against such risks and for such amounts as my Trustee shall reasonably require with an insurance company approved by my Trustee

> And from and after the distribution date I DIRECT my Trustee to stand possessed of the net proceeds of sale UPON TRUST for my said daughter ROBYN JOYCE FLOCAS and if she shall not be living at the distribution date then for such of the children of my said daughter ROBYN JOYCE FLOCAS as shall be living at the distribution date and if more than one in equal shares share and share alike.

Marjorie's February 1996 will

13 Marjorie's February 1996 will appointed the defendants as the executors of her estate. The residuary estate was left to her husband Keith, with a gift over to her children in equal shares.

14 In cl 3 of that will, she provided:

> SUBJECT to Clause 5 of this my Will in the event my brother ROBERT CHARLES DAWSON predeceases me I GIVE DEVISE AND BEQUEATH a one half interest in the real property at 40 Alfred Street, Prahran, more particularly described in Certificate of Title Volume 7450 Folio 976 ('the property') to my niece ROBYN JOYCE FLOCAS of 24 John Street, Oakleigh but in the further event my said niece ROBYN JOYCE FLOCAS predeceases me I GIVE DEVISE AND BEQUEATH the property to my Trustees UPON TRUST in equal shares for such of the children of my said niece ROBYN JOYCE FLOCAS as shall survive me and attain the age of Twenty-one (21) years for their own use and benefit.

15 Clause 5 then provided:

> IN THE EVENT my said brother ROBERT CHARLES DAWSON is alive at the date of my death I GIVE DEVISE AND BEQUEATH to my Trustees my half interest in the real property referred to in Clause 3 UPON TRUST for sale with power to postpone such sale and to permit my said brother ROBERT CHARLES DAWSON personally to occupy the same as a principal residence he paying all rates and taxes and other such outgoings from time to time payable in connection with the said property and keeping the same in good order and condition (excluding structural repairs) to the satisfaction of my Trustees and insured against such risks and for such amounts as my Trustee shall reasonably require with an insurance company approved by my Trustees until the distribution date which shall be the first to occur of the date upon which my Trustees form the opinion that my said brother ROBERT CHARLES DAWSON has:
>
> (a) failed or creased to personally occupy the said property as a principal residence;
>
> (b) failed to pay all rates taxes and other such outgoings payable from time to time in connection with the said property within a reasonable time;
>
> (c) failed to keep the said property in good order and condition (excluding structural repairs) to the satisfaction of my Trustees; or

(d) failed to keep the said property insured against such risks and for such amounts as my Trustees shall reasonably require with an insurance company approved by my Trustees

AND from and after the distribution date I DIRECT my Trustees to stand possessed of the net proceeds of sale UPON TRUST for my husband ALAN KEITH SWIFT but in the event he has predeceased me for such of them my said daughter BIRDIE LORRAINE CARLSON and my said sons RAYMOND CHARLES SWIFT AND JEFFREY KEITH SWIFT as shall be living at the distribution date and if more than one in equal shares between them PROVIDED THAT if any of my children predecease me leaving issue who shall survive me at the distribution date then such issue shall take and if more than one then in equal shares that the said child would have taken had the child survived me.

16 It was conceded by the plaintiff at trial that, if Marjorie had died prior to Robert, Robert would have retained a right of residence for life, and Marjorie's share of the Alfred Street property would have passed to Keith.

Marjorie's April 1996 will

17 Marjorie's April 1996 will was in substantially similar terms to her February 1996 will, save that cl 3 provided:

I GIVE DEVISE AND BEQUEATH a one half interest in the real property situated at 40 Alfred Street Prahran, more particularly described in Certificate of Title Volume 7450 Folio 976 ('the property') to my niece ROBYN JOYCE FLOCAS of 24 John Street, Oakleigh but in the event my said niece ROBYN JOYCE FLOCAS predeceases me I GIVE DEVISE AND BEQUEATH the property to my Trustees UPON TRUST in equal shares for such of the children of my said niece ROBYN JOYCE FLOCAS as shall survive me and attain the age of eighteen (18) years for their own use and benefit absolutely.

18 Robert having died, the previous cl 5 was also removed. The only other substantive difference is that Marjorie's grandchildren are to receive a one quarter share of her residuary estate.

Marjorie's August 2001 will

19 Marjorie's August 2001 will, as with the previous two wills, appointed the defendants as executors, and left the residuary estate to Keith. The gift over in the event that Keith predeceased her left her net residuary estate on trust for sale to pay 75 per cent equally to her three children and 25 per cent divided equally between such of her grandchildren as survived her and attained 25 years of age. Clause 3 of

that will left a pecuniary legacy to the plaintiff of $25,000. There was no specific gift of the property.

The estates

Robert's estate

20 In the inventory of assets and liabilities filed in support of Marjorie's application for a grant of probate of Robert's will, she deposed that his estate held the following interests in real estate:[1]

REAL ESTATE

(1)	House and land situate at 57 Carpenter Street Brighton Certificate of Title Volume 3206 Folio 195 valued at $260,000 registered in the names of deceased and Marjorie Lillian Swift as tenants in common in equal shares	
	Deceased's one half share	$130,000.00
(2)	House and land situate at 19 Cluden Street East Brighton Certificate of Title Volume 3697 Folio 214 valued at $285,000 registered in the names of deceased and Marjorie Lillian Swift as tenants in common in equal shares	
	Deceased's one half share	$142,500.00
(3)	House and land situate at 59 Carpenter Street Brighton Certificate of Title Volume 7450 Folio 976 valued at $660,000 registered in the names of Marjorie Lillian Swift Estate of Charles Bowie Dawson Deceased and the deceased	
	Deceased's one third share	$220,000.00
	Plus deceased's one half interest in the share of the Estate of Charles Bowie Dawson Deceased	$110,000.00
(4)	House and land situate at 40 Alfred Street, Prahran Certificate of Title Volume 7450 Folio 975 valued at $252,000 registered in the names of Marjorie Lillian Swift	

[1] The copy of the inventory before the Court was an unexecuted, undated copy exhibited by the plaintiff to her affidavit sworn 26 July 2013. No objection was taken to that document at trial.

	Estate of Charles Bowie Dawson Deceased and the deceased	
	Deceased's one third share	$84,000.00
	Plus deceased's one half interest in the share of the Estate of Charles Bowie Dawson Deceased	$42,000.00
	TOTAL REAL ESTATE IN VICTORIA	**$728,500.00**

21 The estate also had $958.50 in personal estate and $5,417.49 in liabilities.

Charles' estate

22 In the inventory of assets and liabilities filed 3 April 1996 in support of Marjorie's application for a grant of probate of Charles' will, she deposed that his estate held the following interests in real estate:

REAL ESTATE

(1)	House and land at 59 Carpenter Street Brighton Certificate of Title Volume 7450 Folio 976 valued at $660,000	
	Deceased's one third interest with Marjorie Lillian Swift and Estate of Robert Charles Dawson	$220,000.00
(2)	House and land at 40 Alfred Street, Prahran Certificate of Title Volume 7450 Folio 975 valued at $252,000	
	Deceased's one third interest with Marjorie Lillian Swift and Estate of Robert Charles Dawson	$84,000.00
	TOTAL REAL ESTATE IN VICTORIA	**$304,000.00**

23 The estate also had no personal estate and $1,946.00 in liabilities.

Marjorie's estate

24 In the inventory of assets and liabilities filed 14 March 2012 in support of the defendants' application for a grant of probate of Marjorie's will, they deposed that the only asset in her estate was the Alfred Street property, valued at $1,500,000. The estate had no personal estate or liabilities.

These proceedings

25 By originating motion filed 18 September 2012, the plaintiff initially sought further provision from the deceased's estate, pursuant to Part IV of the *Administration and Probate Act 1958*, of one-half of the Alfred Street property or one-half of the net proceeds of its sale.

26 In the alternative, the plaintiff sought a declaration of constructive trust over the property on the following basis:

> 24 … Marjorie requested Robert to provide in his Will that she and her husband have the right to live in that part of the [Alfred Street] property owned by Robert for life and only on the death of the survivor of them should that part of the [Alfred Street] property pass to the plaintiff.
>
> …
>
> 27 The absolute devise of Robert's interest in the [Alfred Street] property to Marjorie pursuant to clause 3 of his Will was the result of the Will-drafters [sic] clerical error or his failure to understand Robert's instructions so that the devise was the result of the Will-drafters [sic] mistake or inadvertence ('the error').
>
> …
>
> 32 … it would be unconscionable for Marjorie and, by reason of her death, the defendants as her Legal Personal Representatives, to retain the benefit of ownership of the legal and equitable title of the whole of the [Alfred Street] property.
>
> 33 … the defendants hold the [Alfred Street] property on a constructive, implied and / or resulting trust:
>
> (a) as to a one-half share as tenants in common for the plaintiff beneficially; and
>
> (b) as to the other one-half equal share as tenants in common for themselves in their capacity as Executors and Trustees of Marjorie's Will to be dealt with in accordance with the terms of Marjorie's will.

27 On 4 February 2014, Zammit AsJ ordered the plaintiff to file a statement of claim, and on 4 March 2014, made orders that the proceeding be continued as if commenced by writ. Zammit AsJ also granted the plaintiff leave substantially to amend the originating motion. The amended originating motion continues the claim under Part IV to one-half of the Alfred Street property or one-half of the net

proceeds of its sale, although the trial was conducted very much on the basis that the Part IV claim is the last arrow in the plaintiff's quiver.

28 However, under the amended originating motion, instead of relying on an error in Robert's 1996 will to establish a constructive trust, the plaintiff instead seeks to establish a constructive trust on the following basis:

> 12 … Robert and Marjorie agreed as to the disposition by will of their interest in the [Alfred Street] property as follows:
>
> (a) On the basis that Robert was the first of he and Marjorie to die:
>
> (i) in consideration of Robert executing, and not revoking, a will in which he devised to Marjorie his interest in the property as tenant in common as to one of two equal undivided shares, Marjorie agreed to execute, and not revoke, a will under which she devised one of two equal undivided shares as tenant in common of the property to the plaintiff ('Marjorie's first promise');
>
> (ii) in consideration of Marjorie executing, and not revoking, a will in which she divided one of two equal undivided shares as tenant in common in the property to the plaintiff, Robert agreed to execute and not revoke a will under which he devised his interest in the property as a tenant in common as to one of two equal undivided shares to Marjorie ('Robert's first promise'); and
>
> (b) On the basis that Marjorie was the first of she and Robert to die, and that she was also survived by her husband Alan Keith Swift ('[Keith]'):
>
> (i) in consideration of mutual promises, Marjorie agreed to execute, and not revoke, a will in which she devised her interest in the property as tenant in common as to one of two equal undivided shares, on trust for sale to permit Robert to occupy her part of the property and upon his ceasing to do so, Marjorie's interest be sold and [Keith] receive the net sale proceeds ('Marjorie's second promise').
>
> (ii) in consideration of mutual promises, Robert agreed to execute, and not revoke, a will in which he devised his interest in the property as tenant in common as to one of two equal undivided shares, on a trust for sale, to permit [Keith] to occupy his part of the property and upon [Keith] ceasing to so occupy, Robert's interest in the property be sold and the plaintiff receive the net sale proceeds ('Robert's second promise').
>
> …

32 … as and from Robert's death on 13 February 1996, Marjorie's interest in the property as to one of two equal undivided shares as tenant in common was impressed with and thereafter held by her on a constructive trust for the plaintiff.

33 Alternatively … as and from Robert's death on 13 February 1996, Marjorie's interest in the property as to one of two equal undivided shares as tenant in common was impressed with and thereafter held by her subject to a floating fiduciary obligation, which crystallised into a constructive trust on Marjorie's death on 27 January 2012.

34 … it would be unconscionable for Marjorie and, by reason of her death, the defendants as her Legal Personal Representatives, to retain the benefit of ownership of the legal and equitable title to the whole of the [Alfred Street] property.

35 Resultantly, in the circumstances, the defendants hold the [Alfred Street] property on a constructive trust:

(a) as to one of two equal undivided shares as tenants in common for the plaintiff beneficially; and

(b) as to the other one of two equal undivided shares as tenants in common for themselves in their capacity as Executors and Trustees of Marjorie's Will to be dealt with in accordance with the terms of Marjorie's Will.

29 Additionally, under the amended originating motion the plaintiff now seeks in the alternative orders for the transfer to her of a one-half interest in the Alfred Street property on the basis of one of two claims in proprietary estoppel, an estoppel in Robert's favour ('the first estoppel claim'), and an estoppel in her own favour ('the second estoppel claim').

30 The first estoppel claim, which relies on the promises set out in paragraph [12] of the amended originating motion (set out above),[2] is pleaded as follows:

36 On or about 8 February 1998, Marjorie made the first promise to Robert.

37 In reliance on Marjorie's first promise and induced thereby, Robert assumed or expected that if he performed his first promise and, consequent on his death Marjorie received a devise under his unrevoked will of an interest in one of two equal undivided shares as tenant in common in the property, she would, on her death, by unrevoked will, devise to the plaintiff an interest in one of two equal undivided shares as a tenant in common in the property ('the assumption or expectation').

38 In reliance on the assumption or expectation, Robert:

2 See above paragraph [28].

(a) abstained from making a will in which he devised to his daughter, the plaintiff, his interest in one of two equal shares as a tenant in common in the property; and

(b) made a will on 9 February 1996 in which he devised to Marjorie his interest in one of two equal undivided shares as a tenant in common in the property and thereafter abstained from revoking such will.

39 Robert acted reasonably in relying on the assumption or expectation.

40 Marjorie knew or intended that Robert would rely on the assumption or expectation and would abstain from acting in the manner set forth in paragraph [37] above.[3]

41 Robert has suffered detriment as a consequence of Marjorie's failure to act so as to fulfil the assumption or expectation.

31 The detriment is particularised as a denial of the opportunity to make an alternative will devising his interest to the plaintiff.

32 The plaintiff's right to sue upon the estoppel in Robert's favour is put on the basis that the defendants, as the present executors of Robert's will:

44 … have acted in a manner inconsistent with being ready, willing and able to assert legal rights on behalf of Robert's estate.

45 The plaintiff as the taker of the whole of the residuary estate pursuant to Robert's will says that, in the circumstances, she is thereby entitled to bring the claim based on the pleading set out in paragraphs 35 to 40 above and pursuant to which she seeks the enforcement of Marjorie's first promise and the assumption or expectation created by it.

33 Finally, the second estoppel claim is pleaded as follows:

46 … on or about 8 February 1996, Marjorie represented to the plaintiff that if her father Robert executed and did not revoke a will in which he devised to Marjorie his interest in the property as a tenant in common as to one of two equal undivided shares, she would execute, and not revoke, a will under which she devised one of two equal shares as tenant in common of the property to the plaintiff ('the representation').

…

48 In reliance on the representation and induced thereby and in the events which happened as set forth in paragraph [46] above, the plaintiff assumed or expected that Marjorie would, on her death, by unrevoked will, devise to the plaintiff an interest in one of two equal

[3] Although the amended originating motion refers to paragraph [37], I assume it is intended to refer to paragraph [38].

undivided shares as a tenant in common in the property ('the plaintiff's assumption or expectation').

49 In reliance on her assumption or expectation:

(a) between 9 and 13 February 1996, the plaintiff abstained from seeking to have her father Robert revoke his will made 9 February 1996 and, in lieu, make a will in which he gave, devised and bequeathed to the plaintiff, his only child, the whole of his real and personal estate; and

(b) after the death of her father Robert on 13 February 1996 and upon Marjorie obtaining a grant of probate of Robert's will on 16 April 1996, the plaintiff abstained from making a claim for further provision to the extent of the whole of her father's [estate] pursuant to Part IV of the Administration and Probate Act 1958. Robert[4] acted reasonably in relying on the assumption or expectation.[5]

50 Marjorie knew or intended that the plaintiff would rely on the assumption or expectation and would abstain from acting in the manner set forth in paragraph [48] above.

51 The plaintiff has suffered detriment as a consequence of Marjorie's failure to act so as to fulfil the assumption or expectation.

34 The detriment is particularised as a failure to receive a devise of a one-half interest in the Alfred Street property.

35 The defendants filed a defence on 4 April 2014 that does not admit the mutual wills agreement as set out in paragraph [12] to the amended originating motion; denies the consequent constructive trust set out in paragraphs [32]–[35]; denies the first estoppel in paragraphs [36]–[45];[6] denies the second estoppel in paragraphs [46]–[51]; and denies the plaintiff's Part IV claim.

36 The primary basis of each denial, as made clear in closing submissions, was that the Court could not be satisfied on the evidence that there was an agreement between Robert and Marjorie or that Marjorie made any representations to the plaintiff. Consequently, the mutual wills agreement, each of the estoppels, and

4 I assume that this is intended to refer to the plaintiff, Robyn.

5 I assume that this final sentence is intended to be pleaded as a separate paragraph, although nothing of significance comes from that.

6 Save for an agreement that the matters set out in paragraphs [35] to [40] be heard and determined by the Court.

the moral obligation necessary to establish a claim under Part IV, could not be established.

The application to amend the defence

37 At trial, senior counsel for the defendants sought to rely on an amended defence. Aside from a number of amendments that appeared inconsequential, the amended defence denies rather than does not admit the mutual wills agreement, and sought to raise two new arguments.

38 First, relying on s 126 of the *Instruments Act 1958*, the defendants argued:

> 5A … if there was an agreement between Robert and Marjorie to the effect alleged in paragraph 12 of the Amended Originating Motion:
>
> (a) the devise by Robert of his interest in the property as a tenant in common as to one of two equal undivided shares is a disposition of property;
>
> (b) the agreement was oral;
>
> (c) there is no memorandum or note of the agreement in writing signed by Marjorie or by a person lawfully authorised in writing by her to such an agreement, memorandum or note;
>
> (d) in the premises, the alleged agreement is unenforceable and an action must not be brought upon it.

39 Section 126(1) of the *Instruments Act 1958*, which substantially re-enacts s 4 of the *Statute of Frauds*,[7] provides:

> *An action must not be brought to charge a person* upon a special promise to answer for the debt, default or miscarriage of another person or *upon a contract for the* sale or other *disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged* or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note.[8]

40 Secondly, in response to the plaintiff's proprietary estoppel claim brought on the basis of an estoppel in Robert's favour, the defendants argued:

> 24A … the plaintiff is not entitled to bring any claim for proprietary estoppel which it is alleged Robert had, as any such claim was not transmissible to the plaintiff as the taker of his residuary estate.

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7 29 Car 2 c 3 (1677).

8 Emphasis added.

41 The only explanation raised as to why the amendment had not been previously raised was that senior counsel, who was briefed only late in the proceedings, only had an opportunity properly to consider the material in the week leading up to trial, and it was at that time that the amendments were considered necessary.

42 Counsel for the plaintiff opposed the two substantive amendments. He conceded that the two points raised no new matters of fact, only legal arguments, and that the amendments did not cause or require the plaintiff to call any new evidence or otherwise delay the proceedings. He submitted that, following *AON Risk Services v Australian National University*,[9] the delay in raising the new arguments has not been satisfactorily explained. Looking at the matter prior to the amendment, the only dispute between the parties related to issues of fact, and the amendments substantially change the case the plaintiff was required to meet.

43 Given the amendments in essence concerned legal arguments, I considered it appropriate to reserve the question as to whether the amendments should be allowed to be considered at the same time as the substantive proceeding.

44 The amended defence raised two new issues, but both were legal issues. No new evidence was called, nor was it necessary for any new evidence to be called, to respond to the amended defences. As the trial was conducted, the evidence closed on a Friday morning, and I allowed counsel until Monday morning to commence closing addresses. That allowed counsel for the plaintiff sufficient time to respond to the newly pleaded defences, including raising a number of substantive arguments in response to the *Statute of Frauds* argument to which the defendants, properly, did not object on the basis that they had not been pleaded. As a result, although the late amendment to the defence may be relevant in respect of costs, the prejudice to the plaintiff was not such that I would refuse leave to the defendants to amend their defence, and any prejudice may be dealt with by way of orders as to costs. Accordingly, I grant leave for the defendants to file the proposed amended defence and order that defence be filed forthwith.

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9 (2009) 239 CLR 175.

The evidence of the 1996 arrangement

45 As is apparent, the resolution of the constructive trust claim and each of the estoppel claims depends almost entirely on the evidence of what was said and what was agreed as between Robert, Marjorie and the plaintiff at the Alfred Street property on 8 and 9 February 1996. The two witnesses who gave evidence on the events of those two days were the plaintiff and Mr Starnawski, who also produced a number of contemporaneous documents. Although the defendants objected to the evidence-in-chief of the plaintiff on the events of February 1996 being given by affidavit, the appropriate procedure was to allow that evidence in and then allow the plaintiff to be cross-examined.

A note on Mr Starnawski's evidence

46 Mr Starnawski is the principal solicitor at the office of Adams & Garde in Moorabbin. He was an employee at a predecessor office, before becoming a principal in 1996. In February 1996, he was an employee of Maddock, Lonie & Chisholm at 11A Central Avenue, Moorabbin. Mr Starnawski, who drew both February 1996 wills, took handwritten notes throughout the giving of instructions from Robert. On returning to the office, Mr Starnawski took further notes of what had occurred, and the following week again dictated a further set of notes and had them typed. He denied dictating those further notes only on being informed of Robert's death. All three sets of notes were retained on his file, which was produced to the Court. That file contains the following contemporaneous notes:

(a) on plain, unlined A4 paper, cursory notes recording a phone call prior to Mr Starnawski's attendance ('the preliminary note');

(b) on three blue A4 sheets marked 'File Attendance Record', in black handwriting, dated '8/2', the notes Mr Starnawski took whilst taking instructions ('the first file note');[10]

(c) on two blue A4 sheets marked 'File Attendance Record', in blue handwriting, dated '8/2', the notes Mr Starnawski took on returning to the office after taking instructions ('the second file note'); and

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10 The first file note is dated in blue pen, while the rest of the note in is black pen.

(d) on three plain unlined A4 sheets, the first of which is marked 'Attendance Note by Zenon Starnawski', undated and typed, the notes Mr Starnawski dictated the following week ('the third file note').

47 Mr Starnawski gave evidence that he wrote the second file note because he:

> thought the other notes I'd written … would probably be illegible to somebody else and I thought I better … also just clarify in my mind and just write them out in the way that I normally would.

48 Mr Starnawski also gave evidence that, for straightforward matters, he would not usually subsequently type up more detailed notes, but 'in this particular case I felt the necessity of making sure that I had very comprehensive notes of what had actually taken place' and that he 'wanted to ensure and have clear in my mind exactly what had happened'. Although he did not say this, it appeared to me that Mr Starnawski realised either whilst taking instructions or shortly afterwards that what had occurred on that day might very well end in litigation, as has been the case.

49 I note also that Mr Starnawski recorded file notes for instructions for Marjorie's will and Keith's will, which I will refer to where relevant.

50 Prior to giving his evidence-in-chief, Mr Starnawski confirmed that he had recently read his file notes, but that he also recalled the events of the day in question 'very well'. His evidence generally was clear and internally consistent, and I have no doubt that his memory was for the most part accurate. The file notes were not intended to be a transcription of what occurred, but they are a record of the matters that Mr Starnawski considered important enough to write down at the time. The best evidence is that which is recorded in his file notes, and I prefer that evidence over his oral evidence to the extent the two are in conflict, which is minimal.[11]

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[11] I note that, although nothing turns on it, certain recollections appear to have been reconstructed from the file notes — he recalled arriving on 8 February at 12 noon (the file notes record that he arrived on 9 February at 12 noon) and he recalled Robert being 'propped up' in bed on 8 February, an expression used in the file note about the attendance on 9 February.

A note on the plaintiff's evidence

51 The plaintiff had no recollection of leaving Robert's bedroom and returning at any point during the giving of instructions, and as best as she was able to recall she was present the whole time, but did not deny that she may have left the room at certain points. She deposed to having seen the file notes discovered by Mr Starnawski, and confirmed that she was present in Robert's bedroom when the relevant instructions were given and that the file notes were:

> 35. … a true and accurate record of the conversation on 8 February 1996 between [Robert], [Marjorie] and Zenon Starnawski and the agreement which was reached during that conversation between [Robert] and [Marjorie] that if [Robert] died first and left his interest in the [Alfred Street] property to [Marjorie], she would leave that interest to me in her Will.

52 In cross-examination, on being taken to the file notes, the plaintiff agreed that she could not confirm everything that occurred in the file notes, as it was apparent on the face of those notes that she had not been in the room when certain things had been said. She also agreed that Marjorie had been in the room at all times that she had been in the room, and that she had never been alone with Robert and Mr Starnawski, suggesting that she had not been in the room at those times when Marjorie left the room. She also, understandably, had some difficulty reading Mr Starnawski's handwritten notes, and it was suggested in cross-examination that she could not have confirmed that they were true and accurate as she purported to do in her affidavit.

53 The originating motion initially filed in this proceeding asserts that the gift in the will leaving the Alfred Street property to Marjorie was caused by a 'clerical error' or Mr Starnawski's 'failure to understand Robert's instructions'. In cross-examination, the plaintiff explained that the error was only apparent to her when she obtained a copy of Marjorie's will and realised that she had not been left a one-half interest in the Alfred Street property, and in re-examination she clarified that her understanding of the arrangement was that once Robert, Marjorie and Keith had died, a one-half interest in the Alfred Street property was to come back to her. Whether that was by way of Marjorie's will or Robert's will seemed to me to be a

point of legal detail that the plaintiff neither understood nor was particularly concerned by.

54 That observation is also applicable to the plaintiff's evidence more broadly. I do not consider that the plaintiff lacked credibility, and nor do I consider the plaintiff to have been unreliable, but I do consider that, as the plaintiff freely admitted, the evidence she gave was her best recollection of events that happened some time earlier, when she had a young child, and only shortly before her father died. The value of her evidence is in that it confirms for the most part the events described by Mr Starnawski and his contemporaneous file notes, and in that it is clear that she left the Alfred Street property on the day in question with the impression that an arrangement had been reached whereby on Marjorie's death, she would be entitled to a one-half interest in the Alfred Street property, albeit that she may not have had a precise understanding of how that arrangement would come into effect. Where her evidence is in conflict with the rest of the evidence, I prefer Mr Starnawski's evidence and the evidence recorded in the contemporaneous file notes.

The events of 8 February 1996

55 Mr Starnawski gave evidence that in February 1996 he received a telephone call from Jeff asking him to attend the Alfred Street property to take instructions for Robert's will. Jeff told him that Robert was gravely ill and that it was urgent. The preliminary file note confirms this. The third file note records:

> On 8 February 1996 I attended at 40 Alfred Street, Prahran, on Mr Robert Charles Dawson and Mrs Marjorie Lillian Swift. Mr Dawson was gravely ill and I was advised the previous day by his nephew that he required to make a will urgently.

56 The plaintiff deposed that she was present at the Alfred Street property on 8 February 1996 when Robert gave instructions for his will:

> 5 I arrived at the residence at approximately 10.00 am after dropping off my daughter at pre-school. My aunt Marjorie … was at the residence when I arrived and [Robert] was in bed in the front room.

> 6. I went firstly into the kitchen and made myself a cup of tea and spoke to [Marjorie] who told me [Robert]was dozing and that a solicitor was due to take instructions for [Robert]'s will.

57 As the plaintiff recalled them, Marjorie's words were 'you're father's got a solicitor coming to the home today, he's going to make his will'. In cross-examination, the plaintiff gave evidence that she did not want to be present when Robert gave instructions for his will, but that Marjorie informed her that Robert wanted her in the room, so she went up to the room:

> 7. Shortly after, I went to [Robert]'s room and sat with him for a short while until the solicitor arrived at approximately 11.00 am.

58 Mr Starnawski's recollection was that he arrived around noon, and was greeted at the door by Marjorie. The plaintiff had not met Mr Starnawski previously, and did not know anything about him. She did not greet him at the door, and could not recall who did. Mr Starnawski said that, when he arrived, he was shown into Robert's bedroom by Marjorie.

59 Mr Starnawski said that the bedroom was a sparsely furnished room to the right hand side of the entry. When he arrived, Robert was awake and propped up in the bed. Mr Starnawski's evidence was that the plaintiff was not initially present, but was later asked to come into the room, and that Marjorie left shortly after showing him in but returned prior to beginning to take instructions. Although Mr Starnawski's ordinary practice was to be alone with the testator when taking instructions, both Robert and Marjorie insisted on Marjorie remaining in the room. In the second file note, he records under Marjorie's name that 'she was present throughout instructions at his wish'. The third file note records:

> On attending at the premises I took instructions from [Robert]. [Robert] had recently been at the Alfred Hospital and was suffering from kidney failure and his sister [Marjorie] indicated that doctors had advised her that he may not survive the coming weekend. In speaking with [Robert] I found him to be in very good spirits despite his obvious severe illness. I asked him whether he wanted to give me some instructions for his will in private as his sister was also in the room. He indicated that he did not mind if his sister was in the room and that there was nothing private between them in terms of their affairs and he had no objections to her remaining in the room.

60 In contrast, the plaintiff deposed that she was present when Mr Starnawski arrived:

> 8. [Marjorie] came into the room with the solicitor and she sat to one side of the room in a recliner chair. I sat in a chair near [Robert] and the solicitor stood at the foot of the bed.
>
> 9. The solicitor introduced himself as Zenon Starnawski and confirmed with [Robert] his intentions to give instructions for his will.

61 Mr Starnawski gave evidence that, prior to the plaintiff's arrival, he had asked Robert for his full name, where he was born, whether he was married, whether his wife was living, and for some details of his illness. He also asked whom he wished to be the executor of his will. That information is also recorded in the first and second pages of the first file note and the first page of the second file note. The third file note records:

> I asked him when he was born and he said he was born on 15 November 1919 and his wife died 20 years ago. He has one daughter, Robyn Joyce Flocas. He was a little unsure about the exact number of John Street, Oakleigh, but because his daughter was present in the house at the time his sister [Marjorie] obtained the information. His daughter has two children by a previous marriage, Elise aged 5 and Dean aged 3. He wished to appoint his sister as executor and failing her then his daughter Robyn.

62 He also took instructions about what Robert's assets were, starting with his half-interest in the Alfred Street property. At that point Marjorie interrupted to say that there were other properties, and on Mr Starnawski's asking for details of those properties, she left the room to produce the various titles to him. The title details are recorded on the third page of the first file note, which also has additions in blue handwriting, and there is a summary of the titles on the first page of the second file note. The third file note records:

> I asked him about what he wished to do with his estate and at that point his sister indicated that the property at 40 Alfred Street, Prahran, was the family home, that it had been owned by their mother who upon her death had left it to their father, Charles Bowie Dawson, who had left the property to both of them. She indicated that there were other properties that were involved and I asked her where the titles were. She produced titles to a property, namely [the 57 Carpenter Street property] which was in joint names. There were three other properties, namely [the Cluden Street property], which was registered in the names of [Robert] and [Marjorie] as tenants in common in equal shares, and two other properties, [the 59 Carpenter Street property] and

> [the Alfred Street property], which were registered in the names [Robert], [Marjorie] and [Charles] as tenants in common in equal shares.

63 While taking notes on the various properties, it became apparent to Mr Starnawski that some were still in Charles' name, and that probate had not been granted. He raised that with Robert and Marjorie, and explained that a grant of probate was necessary. Marjorie explained the delay by saying that they did not realise a grant was necessary. The first page of the second file note records that Mr Starnawski told them 'we need to do probate of father's will'. The third file note records:

> I indicated to both [Marjorie] and [Robert] that it would be necessary to obtain probate of their father's will as he also had an interest as tenant in common with them both in two properties. I asked [Marjorie] why there had been no application for probate and she stated that as her father had left the properties to both [her] and her brother she did not believe that probate was required. However, she now appreciates that she was unaware that the law required an application to be made to formally transfer ownership to both herself and her brother. [Robert] also understands that it would be necessary to apply for a separate grant of probate. I indicated that there was no need to make an urgent application and [Robert] who has a good sense of humour saw this as a vote of confidence in his treating doctors.

64 It also became apparent to Mr Starnawski that, while both the Alfred Street property and the majority of the investment properties were held as tenancies in common, the 57 Carpenter Street property was held as a joint tenancy (recorded in the first file note as 'in joint names'). He attempted to explain the consequences of that, and that it could be resolved by a simple transfer of land. Both Robert and Marjorie said they were happy for that to occur, and that it was 'obviously an error' that the 57 Carpenter Street property was held differently from the other properties. The third file note records:

> I asked both [Robert] and [Marjorie] why [the 57 Carpenter Street] property was in joint names, when all the other properties were registered as tenants in common in equal shares. They did not understand the significance of joint ownership and so I explained the situation to them both. [Marjorie] explained that it was not their intention when the property was purchased that it be registered in joint ownership. She said that they had indicated at the time to the solicitors who acted on their behalf … that they were purchasing the property 'fifty-fifty' and so I suggested that a transfer of land changing the nature of the holding of the property would need to be signed by them both. They both agreed that the change in the manner of holding

would reflect their original intention which was not shown correctly on the title.

65 Mr Starnawski's evidence was that he next proceeded to ask Robert how he wished to dispose of his properties, and that the plaintiff was still not in the room at that point. In contrast, the plaintiff deposed:

> 10. [Robert] confirmed his wishes to make a will and said he wanted his whole estate to go to his daughter Robyn.

66 In cross-examination, the plaintiff described that the effect of Robert's initial instructions was that 'all of Dad's shares go to me', which she explained in re-examination to mean his share in each of his and Marjorie's properties.

67 The plaintiff then deposed that, when Robert gave that instruction, Marjorie interrupted:

> 11. At that point [Marjorie] interjected and said words to the effect 'no not Alfred Street, I don't want it that way'. 'I want Alfred Street left to me and my husband so we can live there for our lifetimes and then it can go to Robyn'.
>
> 12. I was a bit stunned by that request but said nothing.

68 The plaintiff explained in cross-examination that she was not stunned that Marjorie wished to keep living in the Alfred Street property, and nor did she have a problem with that, but rather she was stunned that Marjorie had interrupted Robert making his will:

> I was stunned that she interrupted Dad making his will, that someone actually … someone is making a will and then someone butts in to say what they want, that's what I was stunned about. … I don't think it was the appropriate time for her to say something. Maybe once Dad finished …

69 Mr Starnawski's account of Marjorie's interruption was not dissimilar to the plaintiff's, although as noted his evidence was that the plaintiff was not present. When Robert indicated he wished to leave his whole estate to the plaintiff, Marjorie interrupted and said that she would 'want him to leave his interest in Alfred Street to her on the basis that she would then make a similar gift in her will of a half interest to his daughter'. He explained in cross-examination that she had said this

was because it was the family home, that she had lived there for some time with her family and brought up her family there, and she was anxious that it remain in the family. Robert was amenable to that suggestion.

70 Mr Starnawski's evidence was that at that point Marjorie left the room to bring the plaintiff into the room, and that the plaintiff was in the room when Marjorie promised to leave a one-half interest in the Alfred Street property to the plaintiff in her own will. He was challenged in cross-examination as to whether she had actually said that she would leave it in her will, or whether it was merely to go to her, and agreed that he could not recall the precise words, but that they were to the effect of what was recorded in his handwritten notes.

71 Mr Starnawski recorded those instructions in the first file note as follows:

> 1. 40 Alfred Street to Sister on understanding that in her will she will leave ½ int. to my daughter. In the event he dies before his sister o/wise to <u>daughter</u>.
>
> 2. Rest to Robyn —
> if she predeceases to children
> Elise 5
> Dean 3[12]

72 In Mr Starnawski's evidence-in-chief he was asked to read this note, which is in his handwriting, and read the word appearing between 'on' and 'that' in the first line as 'understanding'. In closing submissions, counsel for the plaintiff read that word as 'undertaking'. That difference was potentially of significance. However, nothing was made of the distinction in submissions by either party, and given the distance between the 'e' and the 't' in the handwriting, and that it is his handwriting, I accept Mr Starnawski's reading of the word.

73 In the second file note, those instructions were set out as follows:

> Re 40 Alfred — He instructed he wanted to give his interest in the property to his sister on the basis that in her will she gave half of it to his daughter

12 Underling as in original.

> Robyn. She said she would in the presence of him/the daughter + me. We discussed other alternatives but in the end that is what he wanted.[13]
>
> If she died first he would want his sisters [sic] husband to have a right to reside in the property on a trust for sale. On same basis she said she would say he cld also, if she died first.
>
> There was discussion about some trust for grandchildren but eventually all to daughter.
>
> He ill — kidney failure — urgent will required.

74 Mr Starnawski explained that by 'alternatives', he had suggested to Robert that he leave the Alfred Street property to the plaintiff but grant Marjorie a right to reside for her lifetime. Marjorie, who was present when he discussed those alternatives, pressed that it should be left to her. Mr Starnawski could not recall whether the plaintiff was in the room when those alternatives were discussed.

75 In the third file note, the instructions were again set out:

> I then began to take instructions from [Robert] as to his wishes in his will. I asked what he wished to do with his interest in Alfred Street and whether he wished to leave it to his daughter with a right to his sister and her husband to reside in the property until the survivor of them died. [Marjorie] then proposed that her brother leave his interest in the property to her as she was concerned to retain ownership of the family home and that in her will she would leave a half interest in the property at Alfred Street to [Robert]'s daughter. [Robert] accepted the proposal. [Robert] then became concerned whether his estate would pass to both Robyn and her current husband or whether his estate would just pass to his daughter. I explained that it would pass to his daughter only and if he wished we could put in a clause in the will that in the event his daughter died before him his estate would go to his grandchildren. It was at that point that his daughter was asked to come into the room to assure her father of her current matrimonial position and that there was no likelihood that her current husband would squander anything that [Robert] left to [the plaintiff]. She assured [Robert] that her husband would not get his hands on whatever [Robert] left her.

76 The plaintiff was married twice, first to Terry Breheny in 1985 (aged 23), and then to Evan Flocas in 1991. She later divorced Evan Flocas in 2000, and married Phil Scannell in 2003. She recalled her matrimonial circumstances being raised in respect of her father's will:

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13 Underlining as in original.

> 36. … I recollect speaking to my father about my then current matrimonial situation and assuring him that my husband would not get his hands on anything that my father left to me in his will.

77 In cross-examination, she explained that 'something was said about Evan because we weren't going through a very good time when Dad was dying'.

78 Mr Starnawski's recollection of that discussion was that Robert was:

> a little bit concerned … of a matrimonial problem that I suppose had existed at the time between [the plaintiff] and her husband and he wanted to be assured that … in the event that the property was received by her on Marjorie's death it wouldn't be taken or wasted or got hold of by her husband.

79 The plaintiff deposed that, following the agreement:

> 13. [Robert] then instructed the solicitor to prepare the will with that arrangement in place.
>
> 14. The solicitor then stated he would go back to his office and prepare the will as instructed and would return later to have [Robert] sign the will.

80 Mr Starnawski gave evidence that he then took instructions from Marjorie to prepare a will. Although he had not attended the Alfred Street property to take instructions from her, once the agreement was reached, he was concerned to ensure that he had prepared wills for each of them reflecting that agreement. In cross-examination, he insisted that Marjorie also realised at that point that it was necessary to make a will, and did not agree that she did not want one or that she was agitated about making one. In respect of the Alfred Street property, her instructions were that she would leave her one-half interest in the property to Keith, but that in the event that Robert predeceased her she would leave her one-half interest in the property to the plaintiff, with a gift over in the event the plaintiff predeceased her to the plaintiff's children. However, Keith was to retain a right to reside in the property until his death. It also provided that, in the event she predeceased Robert, he would retain a right to reside in the Alfred Street property until his death.

81 Those instructions are recorded in two file notes on Mr Starnawski's file in relation to Marjorie and Keith. Similarly to the first and second file notes, they

appear to have been written at the Alfred Street property (in black ink) and again on returning to the office (in blue ink). The first of those notes, in black ink, relevantly records that Keith 'should be able to live here until his death', and that half of her interest in the house 'from Robert' is to go 'to Robyn'. The second of those notes, in blue ink, relevantly records 'if brother alive on her death he have a right to reside in property paying a share of rates' and 'if brother dead at her death — she wld get the half share of his which she wld leave to the niece'.[14]

82 In respect of Marjorie's instructions, the third file note records:

> [Marjorie] and I then went to the kitchen of the house and I proceeded to obtain the remainder of the instructions for her will. She indicated that she wished more time to think about her will but I suggested to her that as her brother was to sign his will the next day and that as he was going to live [sic] his interest in the property at Alfred Street to her it was necessary that she also make a will and sign it on the same day giving a half interest in the property at 40 Alfred Street to her niece [the plaintiff]. As she had undertaken to do to her brother. She seemed agitated about that saying that there were too many events that had occurred recently preventing her from thinking clearly about all matters. I assured her that she should make a will to cover the situation and that she could review her will making other changes as required later. She agreed to that position and we arranged that I was to return the next day at around 12 noon.

83 In cross-examination, it was put to Mr Starnawski that it was unusual that the instructions would include any right of residence for Robert in the event that she predeceased Robert, as it was clear at that time that Robert would die first, and suggested that he did not receive instructions on that point on 8 February 2014. Mr Starnawski denied that, and pointed to the file note in blue ink on Marjorie's file written when he returned to the office.

84 It was only after taking those further instructions that he left the Alfred Street property and returned to his office to prepare a transfer of land, as the parties had agreed, and to prepare the wills.

85 Finally, the plaintiff deposed:

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14 Underlining as in original.

15. I left the residence shortly afterwards and no further discussion took place between [Robert] and myself or [Marjorie] and myself about [Robert]'s will.

16. I was not present at the residence when the will was signed and I do not recall seeing the signed will until well after both [Robert] and Marjorie had passed away.

The events of 9 February 1996

86 Mr Starnawski returned to the Alfred Street property the following day at, according to the third file note, around 12 noon. He could not recall whether the plaintiff was there, although other family members were. He had with him a will for Robert and a will for Marjorie, as well as the transfer of land (that was, in effect, a severance of the joint tenancy). Prior to attending, he made arrangements with Marjorie to ensure there were sufficient witnesses present. He was to be the first witness, and a neighbour, Elfriede Hoffman, was to be the second witness. She was not present when he initially arrived, so they first executed the transfer of land, which required only one witness. That transfer, executed 9 February 1996, is from Robert and Marjorie to Robert and Marjorie, and recites the consideration to be:

> The desire of the registered proprietors to change their manner of holding from joint proprietors to tenants in common in equal shares.

87 After executing the transfer, and whilst waiting for the second witness, Mr Starnawski confirmed the contents and instructions of Robert and Marjorie with each of them. Mr Starnawski's recollection was that they had to wait some one and a half to two hours for the witness. Robert's will was executed first, and then Marjorie's. In cross-examination, Mr Starnawski clarified that he dealt with Marjorie's will, including reading over it with her, separately in the kitchen.

88 The third file note records:

> [Robert]'s condition appeared to be unchanged and again appeared to be in good spirits. He asked that I read the will over to him. I read the will slowly and carefully and where required to explain points which may have been difficult. [Marjorie] was also in the room during the reading. I asked [Robert] whether he had any further questions and he replied that he was satisfied with the will and at that point I asked [Marjorie] to arrange for the witness to be present. The witness arrived and [Robert] was propped up in bed and managed to sign all pages of the will and then both myself and Mrs

> Hoffman the witness signed the will. Mrs Hoffman was unable to print her name and I at first printed her name on a file attendance record and asked her whether the printed name was the correct name. She indicated that it was correct and I proceeded to print her name on the will. I only later observed that in fact the signature on the will indicates that her name is Elfriede whereas I had written Elfrieda.

89 Although this was not mentioned in his evidence-in-chief, the third file note records that Marjorie's will was executed in the kitchen:

> We then proceeded to the kitchen where I had prior to the witness arriving spent some time in going over the will with [Marjorie] and again assuring [Marjorie] that it was necessary that as her brother had signed the will today she must also sign her will as it was important that the interest in Alfred Street be covered in view of her brother's will instructions. The will was executed as required.

90 Mr Starnawski explained in evidence-in-chief that he had reassured her by indicating that she could later the revoke that will and replace it with another, but that there needed to be a will to 'carry out her promise to her brother' in respect of the Alfred Street property.

91 Finally, although Mr Starnawski's oral evidence was that the transfer of land had been executed in the bedroom, the third file note records that, although Robert had signed it in the bedroom, Marjorie did not sign it until afterwards in the kitchen:

> I also asked her to sign the transfer of land which had previously also been signed by [Robert]. I observed that she was most unhappy about [Robert] signing the transfer regarding the joint property and told me that she would prefer that there was no change to that property and that no transfer be signed. However, I indicated to her that it was [Robert]'s instructions and her instructions the previous day that the change in manner of holding be effected and as [Robert] had not indicated that he did not wish to proceed with the change in ownership then it was necessary to complete that matter on the basis of the instructions provided earlier. I explained to her that we could not act just on her instructions alone. Although she eventually signed the transfer in the kitchen she was not happy about having to do so. I assured her that the transfer was in line with her instructions the previous day and unless the instructions were withdrawn by [Robert] the change in ownership should proceed as it was intended that the property be held as tenants in common in equal shares and not joint ownership. I drew her attention to the fact that the other properties were also held as tenants in common in equal shares and not as joint owners.

92 He gave evidence that he was surprised that Marjorie had changed her mind on this issue. In cross-examination, he agreed that, given the conflicting instructions, if

Marjorie had ultimately refused to sign the transfer he would have been in a position of conflict. He also agreed that he did not explain to her that she could choose not to go ahead with the transfer. His evidence was that he explained to her that, if she did not go ahead with the transfer, then he would have to go back to Robert and the whole arrangement, including the gift under the will, might fall apart.

93 On 9 February 1996, Mr Starnawski also took further instructions from Marjorie regarding updating her newly executed will, and for preparing a will for Keith:

> [Marjorie] then wished to discuss changes to her will to provide for her grandchildren.
>
> …
>
> During my visit at the house I took further instructions from [Marjorie] who wished to leave a quarter share of her estate to her grandchildren and I also took instructions from a will from [Keith] who indicated that in his view his brother-in-law had been putting off what should have been done quite some time ago and had these matters been attended to earlier the situation would not now be as complicated as it was.

94 He confirmed to her that she could change her will if she needed to make any future alterations, although he told her that she could not make a change in relation to the gift of the Alfred Street property. He agreed with a suggestion put to him by senior counsel for the defendants that in hindsight he should have put a non-revocation clause in the will. That concession seemed unusual. It is doubtful whether it would be possible to enforce such a clause. Senior counsel for the defendants returned to this issue in closing submissions.

Subsequent events

95 Mr Starnawski was contacted by Marjorie when Robert died shortly afterwards, and acted for her in obtaining a grant of probate. In April 1996, he received instructions from her to draft a new will, the effect of which was to alter her February will to make a further gift to her grandchildren in the event that Keith predeceased her. She did not give him any instructions to change the clause concerning the Alfred Street property.

96 A dispute later arose between the plaintiff, Marjorie and Jeff about the sale of the property on Carpenter Street in Brighton, where Jeff also owned land. It is unnecessary to set out the details of that dispute, except to say that they ultimately settled. Following that settlement, Marjorie removed her will from the custody of Mr Starnawski's firm.

The doctrine of mutual wills

97 At trial, there was some contest between the nature of the agreement that the plaintiff was required to prove, and also the particulars of what needed to be proved. The plaintiff contended that it was sufficient to prove an agreement 'enforceable in equity'.[15] The defendants contended that the agreement must be proved as a contract, or at the very least it must be proved that the parties entered in to the agreement intending to create binding legal obligations, and that the agreement sufficiently certain to be enforceable. The nature of what must be proved is also relevant to the operation of the *Statute of Frauds*, which following the late amendment was the major legal defence set up by the defendants against the claim.

98 Although the authorities referred to by the parties were of great assistance, much of the confusion as to the necessary elements of the doctrine of mutual wills arises from the older authorities on which the doctrine is based. Accordingly, I have set out those authorities, and the manner in which they have been referred to, at some length. When properly considered, those authorities illustrate in relatively clear terms the basis for the doctrine, and the criteria on which this Court must be satisfied before the relief sought by the plaintiff will be available.

***The case of* Dufour v Pereira**

99 The foundational case on mutual wills agreements is the decision of Lord Camden in *Dufour v Pereira* in 1769.[16] In that case, Rene and Camilla Ranc were

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15 Despite the fact that the agreement pleaded by the plaintiff in the amended originating motion was very much in the form of a contract: the parties agreed, in consideration for X, they would do Y.

16 (1769) Dick 419; 21 ER 332.

husband and wife. Under the will of her aunt,[17] Camilla Ranc was left considerable personal estate. On 21 November 1745 Rene and Camilla executed a will, expressed to be their 'mutual testament'. The will granted the survivor a life interest in the other's property, and arranged a scheme of distribution as between their children and grandchildren. The Rancs were French-speaking, and had previously lived in Geneva. The will may have been an attempt to circumvent civil law doctrines relating to marriage that would have effected a fixed distribution of parts of their joint property at the date of death of the first spouse to die; certainly, that was commonly why such wills were executed.[18] However, the family later moved to England. Rene died first, Camilla proved his will, took possession of his property, and later executed a new will revoking the joint will and leaving their property only to her daughter. The question arose as to whether she could validly revoke that will, and how their property should be distributed.

100 The first published report of this case is in *Juridical Arguments*, published by a barrister, Francis Hargrave, in 1799.[19] In it, he sets out the handwritten notes on which Lord Camden delivered his judgment. A later report, published in *Dickens* in 1803,[20] is to the same effect (albeit more briefly stated). It is instructive to set out the notes copied by Hargrave, as it was these notes that were relied upon in *Lord Walpole v Lord Orford*,[21] a later case to which I shall return.

101 His Lordship first determined that, despite the civilian form of the will, English law should be applied in determining how it operated:

> The novelty of the case, more than the difficulty, caused me to suspend my judgment, mutual will being unknown in this country.
>
> In this respect, the case was so new, that the counsel were driven to resort to foreign authors, where these testaments are in use. And this particularity made me think more upon the subject, in order to see, if it was indeed necessary call in this extra learning to my assistance.

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17 Who died in May 1740: *Lord Walpole v Lord Orford* (1797) 3 Ves Jun 402; 30 ER 1076.

18 Rosalind Croucher, 'Mutual Wills: Contemporary Reflections on an Old Doctrine' (2005) 29 *Melbourne University Law Review* 390, 396.

19 Francis Hargrave, *Juridical Arguments* (G G and J Robinson, Pater-Noster-Row, vol II, 1797), 306–11.

20 (1769) Dick 419; 21 ER 332.

21 (1797) 3 Ves Jun 402; 30 ER 1076.

> But I am of the opinion that this case must be decided by the law of this country.
>
> The mutual will was made here. The testators were subjects of this kingdom, and the estate devised was lodged in our own funds, so that this disposition, notwithstanding the uncommon form of the testament, must be ruled by the law of this court. And I trust, that the everlasting maxims of equity and conscience, upon which the jurisdiction of this court is built, are capacious enough, not only to comprehend this, but every other case that may happen, and that the justice of this court is co-extensive with every possible variety of human transactions.[22]

102 Having been referred to civil law authority to the effect that notwithstanding the execution of such a document, in their lifetimes joint testators may in secret make a new will, his Lordship indicated that the English law could not be so:

> The law of these countries must be very defective, and totally destitute of the principles of equity and good conscience: for nothing can be more barbarous than a law, which does permit in the very text of it one man to defraud another.
>
> The equity of this court abhors the principle.[23]

103 His Lordship then set out the principles that he saw as governing the operation of mutual wills under English law:

> A mutual will is a mutual agreement.
>
> A mutual will is a revocable act. It may be revoked by joint consent clearly [and] by one only, if he give notice, I can admit.
>
> But to affirm, that the survivor (who has deluded his partner into this will upon the faith and persuasion that he would perform his part) may legally recall his contract, either secretly during their joint lives, or after at his pleasure, I cannot allow.
>
> The mutual will is in the whole and in very part mutually upon condition, that the whole shall be the will. There is a reciprocity, that runs throughout the instrument. The property of both is put into a common fund, and every devise is the joint devise of both.
>
> This is a contract.[24]

104 The focus, for Lord Camden, was on Camilla's right to revoke the joint will, as is apparent from the following passages:

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22 Francis Hargrave, *Juridical Arguments* (G G and J Robinson, Pater-Noster-Row, vol II, 1797) 306.
23 Ibid 307.
24 Ibid 307–8.

> If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor, that the joint will shall stand. It is too late afterwards for the survivor to change his mind, because the first dier's will is then irrevocable, which would otherwise have been differently framed, if that testator had been apprised of this dissent.
>
> Thus is the first testator drawn in and seduced by the fraud of the other, to make a disposition in his favour, which but for such a false promise he would never have consented to.[25]

105 Lord Camden also considered an argument put by Camilla's daughter that the parties, knowing that wills by their very nature are revocable instruments, could not have intended a promise not to revoke:

> It was argued however, that the parties, knowing that all testaments were in their nature revocable, were aware of this consequence, and must therefore be presumed to contract upon this hazard.
>
> There cannot be a more absurd presumption than to suppose two persons, while they are contracting, to give each licence to impose upon the other.
>
> Though a will is always revocable, and the last must always be the testator's will, yet a man may so bind his assets by agreement, that his will shall be a trustee for performance of his agreement.[26]

106 According to Lord Camden, there was no relevant difference between a contract to dispose of assets by will in a certain fashion, and a contract not to revoke a will already disposing of assets. Both would be enforced, not by operation of the will, but by performance of the agreement:

> The court does not set aside the will, but makes the devisee heir or executor trustee to perform the contract.[27]

107 His Lordship then referred to three existing cases[28] to the effect that, where in return for a promise by a testator to make (or leave) a certain party as executor, that executor promised to pay certain legacies:

> This court bound the will with the promise, and raised a trust in the devisee.
>
> The act done by one is a good consideration for the performance of the other.
>
> This case stands upon the very same principles.

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25 Ibid 308–9.
26 Ibid 309.
27 Ibid.
28 Ibid 309–10.

> The parties by the mutual will do each devise, upon the engagement of the other, that he will likewise devise in a manner therein mentioned.[29]

108 His Lordship then considered how such an agreement must be proved:

> The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.
>
> This court is never deceived by the form of instruments.
>
> The actions of men here are stripped of their legal clothing, and appear in their first naked simplicity.
>
> Good faith and conscience are the rules, by which every transaction is judged by this court, and there is not an instance to be found since the jurisdiction was established, where one man has ever been released from his engagement, after the other has performed his part.[30]

109 Finally, Lord Camden conceded he may have 'given myself more trouble than was necessary',[31] concluding that by probating the mutual will, and taking the benefit under the will, Camilla was estopped from denying that the mutual will bound her.[32]

***The case of* Lord Walpole v Lord Orford**

110 The next case to consider is the decision of Lord Loughborough in *Lord Walpole v Lord Orford* in 1797.[33] In that case, George Walpole, the third Earl of Orford, was alleged to have entered into an agreement with his great-uncle Horatio,[34] the first Lord Walpole, whereby they agreed in substance to a complex series of remainders intended to ensure that, if the male line of either side of their family were to fail, their estates would remain in the family by succeeding to the surviving male line. George executed a will to that effect on 31 March 1756, and Horatio executed a

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29 Ibid 310.
30 Ibid 310–11.
31 Ibid 311.
32 Ibid.
33 (1797) 3 Ves Jun 402; 30 ER 1076.
34 The younger brother to Sir Robert Walpole, Prime Minister of Great Britain from 1721–42.

codicil amending his earlier will to the same effect, on the same day. Horatio died shortly after in January 1757.

111 On 4 December 1776, George executed a codicil that referred to his last will, being an earlier will dated 25 November 1752. The 1752 will was in almost the same in terms as the 1756 will, save that George's uncle Lord Cholmondeley, the husband of George's aunt Mary, and his male descendants ranked ahead of Horatio's descendants.[35] George died in 1791 without marrying and without his brothers leaving male heirs. Horatio's son and grandson claimed to be entitled to George's estate under the 1756 will, while George's uncles, the fourth Earl of Orford and Lord Cholmondeley, claimed under the 1776 codicil.[36]

112 Not dissimilarly to the present case, initially, the claim brought by Horatio's son and grandson was that the 1776 codicil mistakenly referred to the 1752 will, and that it should instead be read as referring to the 1756 will. That question was referred by the Lord Chancellor for trial at the Court of Common Pleas. At that trial, any evidence referring to the 1756 agreement was excluded by the parol evidence rule, a ruling upheld by the King's Bench on 7 February 1797.[37] Without any evidence to refer to other than the date included in the 1776 codicil, the jury returned a verdict in favour of the defendants.

113 Before the issue was returned to the Chancellor, Francis Hargrave was briefed to write an opinion on how Horatio's descendants might claim pursuant to the 1756 agreement. The chapter in *Juridical Arguments* is in fact the opinion written by Hargrave in May 1797, in which he advised that such a claim was likely to be successful. Although Hargrave was not briefed to argue the case, the submissions of the Solicitor-General proceeded along the lines Hargrave proposed, and relied upon Lord Camden's notes of *Dufour v Pereira*.[38] Hargrave's opinion has been referred to

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35 There were a number of other variations not relevant to the issue in the proceeding.

36 The fourth Earl of Orford was entitled to an immediate life interest under either will, but chose to propound the 1752 will. He in any case died, childless, on 2 March 1797 while the proceedings were still afoot, leaving the issue squarely to be determined between Lord Walpole and Lord Cholmondeley.

37 *Lord Walpole v Lord Orford* (1797) 3 Ves Jun 402; 30 ER 1076, 1081.

38 Ibid.

by many of the later leading authorities on mutual wills,[39] and appears to be the first occasion on which it had been argued that an agreement between two parties each to leave separate wills on certain terms had been considered. Care should taken in referring to Hargrave's opinion, as it is not a judicial decision and nor did it accurately predict the result in the case.

114 Hargrave's opinion first considered whether the evidence was sufficient, and concluded that the fact of the two wills with mirror terms, executed on the same date and signed by the same witnesses was sufficient evidence, and that the external evidence of one of those witnesses only strengthened the case. His view was that there were two grounds on which the agreement could be enforced — an equity founded upon 'compact or agreement',[40] and an equity which 'restrains persons taking a benefit of a will from acting against its provisions'.[41]

115 In respect of the revocability of the two wills, Hargrave opined:

> Both of the instruments being equally revocable, it is plain, that the contracting parties did not mean absolutely to exclude themselves from making new arrangements. Had that been their meaning, instead of mutual wills, which are in their nature revocable, they would have made mutual irrevocable deeds of settlement. On the other hand, it is in my opinion as plain, that the two contracting parties did not mean that one should have more liberty of revocation than the other. Consequently they must have intended, that during their joint lives neither should revoke secretly and clandestinely, and that after the death of one without revoking the right of revoking should cease to the other. Upon any other footing, it would have been a transaction of mutual wills, with a licence to both parties to impose upon each other at pleasure, and instead of a fair honourable and equal bargain, it would have been one of a kind the most hollow deceptive and ensnaring.[42]

116 Hargrave described the nature of the arrangement as follows:

> The earl's will and his great uncle's codicil were in effect a mutual will, as much as if they had been incorporated into one instrument. Each was made in consideration of the other, and though both were in their nature revocable, yet this was under the restriction to both parties, not to revoke so as to gain any undue advantage of each other, and consequently under an engagement by each, that during their joint lives neither should revoke without such

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39 Most notably by Dixon J in *Birmingham v Renfrew* (1937) 57 CLR 666.

40 Francis Hargrave, *Juridical Arguments* (G G and J Robinson, Pater-Noster-Row, vol II, 1797) 283.

41 Ibid.

42 Ibid 285.

notice as should give a full opportunity of mutual revocation, and that in the case of the death of either party without revoking the survivor should not revoke at all.

Such, as I conceive, was the nature of the compact of the parties, and if this be so, the case, on the ground of compact or mutual agreement, becomes very simple, and obviously falls within the compass of equitable relief …[43]

117 On the relief to be granted, Hargrave's opinion was similarly strident:

Here, therefore, the simple question is, whether a court of equity shall suffer this breach of the compact to be available, or whether, under its jurisdiction of compelling specific performance, the court shall not declare the earl's devisees deriving under a breach of contract to be mere trustees for those against whom that breach operates.[44]

…

At law the breach is remediable by action for damages … But in a case like the present, the relief of equity is what the parties affected by the breach of agreement must of course look to. As this case is, an action for damages would administer very inadequate relief to the various persons, who are and may be affected, by the Earl of Orford's non-observance of his part of the mutual will. The only complete relief for such a case is that, which equity administers, by compelling a specific performance, and by decreeing those, who have the legal estate in the great family fortune in question to make such a settlement, as shall fulfil every iota of the Earl of Orford's engagement to his great uncle.[45]

118 On the application of the *Statute of Frauds*, Hargrave said:

the earl's real representatives are equally suable with his personal, because if there was a compact, it was not only in writing signed by both parties, but under their seals and delivery. Therefore as, on the one hand, the writing, independently of its being an agreement in part executed by the late Lord Walpole's leaving his codicil unrevoked, defends the compact against all objection from the Statute of Frauds and Perjuries, so on the other hand, its being a compact from instruments sealed and delivered by the two contracting parties renders it in effect a compact by specialty. I say compact by specialty because though the instruments, so far as they operate as last wills, cannot be called deeds of covenant, yet I consider them as such, so far as they include a covenant between two contracting testators.[46]

…

Exclusive of the inadequacy of legal remedy and the difficulties which might attend attempting it, there is a strong reason for looking to equity. At law, notwithstanding its being a compact contained in writing under seal, yet, the instruments being testamentary, it might perhaps be made question, whether

43 Ibid 286.
44 Ibid.
45 Ibid 287.
46 Ibid 287–8.

> the agreement, to which they constructively amount, was strictly an engagement by specialty, that is an agreement by deed, and for that purpose it might be attempted to take advantage of the technical difference between deed and will. But in equity the form of the agreement is not regarded. Whether the instruments containing it were deeds or mere writings, were specialties or not, is immaterial. The agreement, whatever its form, is equally enforceable in equity, and those legally holding the estates, the subject of the agreement, as heirs, as devisees, or other as volunteers under the contracting party, are equally liable to a decree of specific performance.[47]
>
> …
>
> So anxious also do our courts of equity appear to have been in exacting the performance of such compacts, that even verbal promises have been enforced; the statute of frauds having been refined upon, to prevent the requisition of writing from operating; and entering into such engagements and then refusing to perform them having been classed, as a fraud upon the testator or other party influenced in his conduct by the particular promise.[48]

119 Finally, Hargrave referred to a number of authorities in support of those arguments,[49] including the notes of Lord Camden in *Dufour v Pereira*.[50]

120 Despite Hargrave's novel argument, the case was unsuccessful before Lord Loughborough in June 1797. Significantly, Lord Loughborough did not appear to doubt the principles referred to, and endorsed *Dufour v Pereira*,[51] having appeared as counsel in that case.[52] However, the bill in equity had been framed when the intended relief had been to establish that the 1776 codicil referred to the 1756 will, rather than the 1752 will. As a result, it denied that the devisees of the 1752 will could take, did not seek to impose a constructive trust, and perhaps most significantly, pleaded only that the parties were bound 'in honour' by the agreement rather than in law, as the agreement was only relied upon as extrinsic evidence of George's intentions in executing the 1776 codicil.

121 Lord Loughborough doubted that the relief sought could be within the bill, but nevertheless went on to distinguish *Dufour v Pereira*:

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47 Ibid 288.
48 Ibid 289.
49 Ibid 290–311.
50 Ibid 303–11.
51 *Lord Walpole v Lord Orford* (1797) 3 Ves Jun 402; 30 ER 1076, 1081.
52 Ibid 1084.

> That case is in most of the circumstances, and certainly in the form of the bill, the very opposite of this. The bill stated an agreement in writing contained in an instrument conceived in the form of a will of persons not conversant in the laws of this kingdom … an agreement perfectly defined with minuteness upon all cases, that could be supposed to occur. The bill prayed performance, and in consequence of the agreement it was intended, that all the effects, that existed, were specifically bound.
>
> …
>
> There was no probate of [the mutual will] as [Camilla's] will, but on the contrary, the will, she made, was proved. Therefore the Court considered it not as her testament but as a contract with her husband for valuable consideration, under which she acted for sixteen or seventeen years, that she had taken the benefit of it for her whole life. Therefore she had accepted the terms, and had bound herself to the conditions, under which all the property was given by the will of her husband.[53]

122 His Lordship was not satisfied that the agreement was established on the evidence, and found that, to the extent that there was such an agreement, it could not have been intended to be legally binding and was not sufficiently certain:

> As to the extent of it, it does not exist any where so that I can see, what they agreed to, but the fact of some agreement is to be implied from the contemporary execution of the two instruments and the other circumstances. From the coexistence of the instruments and the execution at the same time I do infer, that they had agreed to make, the one a codicil, the other a will. I conclude with the bill, that both considered it an honourable engagement. I cannot direct the execution of an honourable engagement, that leaves the party to dispose, as he pleases, which rests upon nicer points, than a Court of Justice can decide upon.[54]
>
> …
>
> Choosing to do it by will, it is a wide conclusion for me to draw, that if the parties had been express in their agreement, it would have been in terms to make it finally binding upon each and irrevocable. But for this Court to execute an agreement it is always necessary that the terms should be clear. Here it is uncertain, whether they meant it to amount to a legal obligation. There is no evidence, nothing, upon which I can obtain a clear and defined solution of that, and I lay it down as a general proposition, to which I know no limitation, that all agreements in order to be executed in this Court must be certain and defined.[55]
>
> …
>
> There is a great uncertainty with regard to the terms and extent of the agreement, and particularly, whether it was meant to be absolutely binding,

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53 Ibid 1083.
54 Ibid 1084.
55 Ibid 1085.

> or was, as the instruments purport, and the bill states, that it should rest upon honour.[56]

123 Finally, his Lordship considered the application of the *Statute of Frauds*. The Attorney-General, Scott, later Lord Eldon, had argued that the *Statute of Frauds* 'is at an end' if it were not to apply,[57] while the Solicitor-General, Mitford, argued that '[t]his is not a case of part performance only; though that would do: but here the agreement is executed'.[58] Lord Loughborough doubted, without concluding, whether the agreement would sufficiently satisfy the *Statute of Frauds*.[59]

The subsequent decisions in the English probate courts

124 The manner in which mutual wills should be considered arose most often in the following century in the English probate courts (the ecclesiastical courts at Doctors' Commons and, following the *Court of Probate Act 1857*, the Court of Probate and its successor in the High Court of Judicature, the Probate Division). Although promises concerning testamentary dispositions were also considered elsewhere, few decisions considered mutual testamentary obligations.

125 The first of these is *Hobson v Blackburn*.[60] On 2 September 1794, prior to the decision in *Lord Walpole v Lord Orford*, three siblings (Joshua, Martha and Susannah Hobson) executed a joint document leaving, on death, the residuary of each of their estates to the longest surviving of them unmarried, and on their death to their other four siblings. Joshua died in October 1796. Martha executed a new will on 30 November 1820 and died in December 1820. The executors of the mutual will sought probate of that will, and the beneficiaries of the later will sought letters of administration with that later will annexed. The only issue between the parties was whether the effect of the mutual will made it irrevocable.

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56 Ibid.
57 Ibid 1080.
58 Ibid 1081.
59 Ibid 1085.
60 (1822) 1 Add 274; 162 ER 96.

126 Sir John Nicholl, in the Prerogative Court of Canterbury, gave a short judgment reported as follows:

> I have no hesitation whatever in rejecting the allegation[61] propounding the mutual, or conjoint, will, as that of the party deceased in this cause, on the principle that an instrument of this nature is unknown to the testamentary law of this country; or, in other words, that it is unknown, as a will, to the law of this country at all. It may, for aught that I know, be valid as a compact — it may be operative, in equity, to the extent of making the devisees of the will trustees for performing the deceased's part of the compact. But these are considerations wholly foreign to this Court, which looks to the instrument entitled to probate as the deceased's will, and to that only. The allegation plainly proceeds upon a notion of the irrevocability of the instrument which it propounds as the will of the deceased. Why this very circumstance destroys its essence as a will, and converts it into a contract; a species of instrument over which this Court has no jurisdiction.[62]

127 Although both *Dufour v Pereira* and *Lord Walpole v Lord Orford* were acknowledged and referred to by the Privy Council in *Denyssen v Mostert*,[63] that case concerned the Roman-Dutch law applicable in South Africa. The mutual wills principles were substantially considered by Gorell Barnes P in *Stone v Hoskins*,[64] a case in the Probate Division of the English High Court. In that case, it was the party to the agreement who had changed her will who had died first, rather than the survivor. The survivor, the husband of the deceased, opposed a grant of probate of the altered will, on the basis of the agreement. After referring to *Dufour v Pereira* and *Lord Walpole v Lord Orford*, the President said:

> It appear to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because, by the death of the other party, the will of that party and the arrangement have become irrevocable, but that case is entirely different from the present, where the first person to die has not stood by the bargain and her 'mutual' will has in consequence not become irrevocable. The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death. I cannot see that the cases cited support the proposition for which the

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61 An 'allegation' was the name given to the initiating document filed in an application for probate.
62 (1822) 1 Add 274; 162 ER 96, 97–8.
63 (1871–73) LR 4 PC 236.
64 [1905] P 194.

> defendant contends, with the result that he must, I think, fail to obtain the declaration he seeks.[65]

128 These principles came before the Probate Division again in *In re Heys*,[66] where a husband and wife, joint tenants of leasehold properties, executed mutual wills and, following the husband's death, the wife executed a new will in favour of the plaintiffs. The defendants, beneficiaries under the wife's original will, sought first that probate be denied to the second will on the basis that it breached the agreement, and secondly that, if probate were granted, there be a declaration that the executors hold the estate on trust for the beneficiaries of the wife's original will.[67] The plaintiffs contended first that any agreement was not established and secondly that even if established mutual wills 'are and have been treated as contracts' and could not prevent probate being granted of the later will.[68]

129 Sir Samuel Evans, the then President of the Probate Division, was satisfied at the hearing on the basis of the evidence of the solicitor who drew the mutual wills that 'there was a clear arrangement … that those wills were to be irrevocable if nothing happened in the lifetime of either'[69] and further that 'nothing did happen'.[70] His Lordship reserved the question of the effect of that conclusion.

130 On delivering judgment, his Lordship considered that an agreement to make mutual wills did not have the effect of preventing a grant of probate of the later will:

> The function of this Court as a Court of Probate is to ascertain and pronounce what is the last will, or what are the testamentary documents constituting the law will, of a testator, which is or are entitled to be admitted to probate.[71]
>
> …
>
> A will in this country is by its very nature and in its very essence a revocable instrument. It is revocable either by law, as in the case of a subsequent marriage, or by the act of the testator. … So *Swinburn*, in treating of cases

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65 Ibid 197 (Sir Gorell Barnes, President).
66 [1914] P 192.
67 Ibid 195.
68 Ibid, header. See also 196: 'The term "mutual wills" has been used … to describe documents of a testamentary character made as a result of some agreement or arrangement between husband and wife, or other persons…'
69 Ibid 194.
70 Ibid.
71 Ibid 196.

> where express clauses derogatory of the power of making future testaments are found, lays down that such testaments are avoided by testaments of a later date, precisely as if they contained no such derogatory clauses …[72]

131 His Lordship then referred to the judgment of Sir John Nicholl in *Hobson v Blackburn* referred to above,[73] and a passage from Lord Camden's notes in *Dufour v Pereira* cited in Hargrave's *Juridical Arguments* to the effect that a mutual wills agreement would not cause a later will to be 'set aside',[74] and concluded that the will was revocable.

132 On the declaration of trust sought by the plaintiffs, Evans P concluded that while 'theoretically' he had jurisdiction to make such a declaration under the Judicature Acts, 'this Court is in practice a Court of Probate and not of construction. … Contracts and trusts are beyond and outside my jurisdiction in probate matters'.[75] His Lordship instead pronounced in favour of the later will and left the parties 'to pursue their remedies in the other Division'.[76] Some 40 years after the Judicature Acts, the legacy of the divided English courts continued to rule from the grave.[77]

133 A case in the correct division was brought in 1925 in *In re Oldham*.[78] In that case, Astbury J in the Chancery Division also considered an alleged agreement between husband and wife. His Honour first considered whether the evidence supported the finding of an agreement to make mutual wills. The plaintiff specifically argued that, outside of the fact of the wills, no such arrangement needed to be proved, an argument Astbury J rejected:

> In order to enforce the trust for which the plaintiff contends I must be satisfied that its terms are certain and unequivocal and such as in the circumstances I am bound to give effect to. What is the evidence of that? Of course it is a strong thing that these two parties came together, agreed to make their wills in identical terms and in fact so made them.. But that does not go nearly far enough. If spouses intended to do what the plaintiff

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72 Ibid 197.
73 Ibid 197–8.
74 Ibid 199.
75 Ibid 200.
76 Ibid.
77 Adapting Maitland: F W Maitland, *Equity: Also the Forms of Action at Common Law* (Cambridge University Press, 1909) 296.
78 [1925] 1 Ch 75.

> suggests, it is difficult to see why the mutual wills gave the survivor an absolute interest in the whole of the property of the one who died first.[79]
>
> …
>
> The defendants rightly say that the fact that the two wills were made in identical terms does not necessarily connote any agreement beyond that of so making them, and then point out that there is no evidence on which I ought to hold that there was an agreement that the trust in the mutual will should in all circumstances be irrevocable by the survivor who took the benefit.
>
> Putting it shortly, I have no sufficient means for deciding with certainty what, among many possible inferences, is the sole inference that ought to be drawn from the circumstances of this case.[80]

134 Astbury J's particular concern was that it was equally likely that the making of the wills merely indicated that the couple trusted each another, rather than that they intended legally to bind each another.[81] His Honour thought it significant that, instead of granting a life interest, as had been granted in *Dufour v Pereira*,[82] an absolute interest had been granted.[83]

The High Court and the Privy Council decisions

135 The principles to be drawn from the preceding cases were most authoritatively considered between 1925 and 1936 in a series of decisions by the High Court and the Privy Council, culminating in the landmark decision of *Birmingham v Renfrew*.[84] Although that case is the most recent of the three considered, it followed only shortly after they were decided and does not purport to disapprove of anything said in the earlier decisions, and I consider it of most assistance to read the three decisions in concert.

136 In *Hudson v Gray*,[85] a husband and wife, Lawrence and Margaret Hargrave, descendants of Francis Hargrave,[86] in 1879 settled certain property upon trust with each receiving under the deed a power of appointment. Lawrence's power of

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79 Ibid 87.
80 Ibid 88–9.
81 Ibid 88.
82 (1769) Dick 419; 21 ER 332.
83 *In re Oldham* [1925] 1 Ch 75, 88.
84 (1936) 57 CLR 666.
85 (1927) 39 CLR 473.
86 *Gray v Perpetual Trustee Co* [1928] AC 391, 392 n 2.

appointment was absolute, and Margaret's was with the consent of her husband during his lifetime and absolute after his death. In 1914 they allegedly entered into mutual wills, in which Lawrence exercised his power of appointment, leaving a life interest to Margaret, and Margaret agreed not to exercise hers after his death. Lawrence then died in 1915, and in 1923 Margaret executed a further will revoking her former will and exercising her power of appointment in favour of her daughter, Margaret Hudson. The executor of Lawrence's will, and administrator with the will annexed of Margaret's will, Perpetual Trustee Co, applied to the Supreme Court of New South Wales by originating summons to determine whether Margaret's exercise of her power was valid.

137 At first instance, Harvey CJ in Eq determined that the plaintiff held the property under the 1879 settlement on the same trusts as it would have been held had Margaret's 1914 will not been revoked.[87] His Honour found there was not sufficient evidence to find a contract, and that were the matter to be decided afresh:

> there would be in my opinion much force in the contention that there is no middle position between a positive contract to make a will in stipulated terms for valuable consideration giving rise to a remedy in damages if the obligation is not carried out and a mere *nudum pactum* giving rise to no obligations.[88]

138 His Honour ultimately determined that *Dufour v Pereira*:[89]

> Appears to establish that where mutual wills are made by two persons as the result of some understanding or arrangement between the parties it need not amount to a binding contract in order to give rise to equities under certain circumstances.[90]

139 On appeal to the High Court, Margaret Hudson argued that only if the agreement amounted to a contract would the agreement be enforceable, while the beneficiaries of Lawrence's will argued that an arrangement not necessarily enforceable as a contract was sufficient.[91] Knox CJ agreed with Harvey CJ in Eq that

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87 *Perpetual Trustee Co Ltd v Hudson* (1926) 26 SR 615, 618.
88 Ibid 617.
89 (1769) Dick 419; 21 ER 332.
90 *Perpetual Trustee Co Ltd v Hudson* (1926) 26 SR 615, 617.
91 *Hudson v Gray* (1927) 39 CLR 473, 479–80.

an arrangement was sufficient and established;[92] Isaacs J held that a contract was required and that the evidence supported such a contract, but that specific performance was not available as a remedy;[93] Higgins J held that a contract was required but that it had not been proved;[94] Rich J determined the case in accordance with now obsolete principles concerning married women;[95] and Starke J considered that a trust was required and that the evidence did not support such a trust.[96] In the result, the appeal was allowed.

140 On appeal to the Privy Council, Haldane VC on behalf of the Board advised His Majesty:

> Their Lordships are in agreement with Harvey J and the other learned judges in Australia who have held that no binding contract was established by the evidence. What they have to consider is the proposition as to the effect in equity laid down by Harvey J as stated.[97]

141 Their Lordships went on to dismiss the appeal, holding somewhat elusively that without 'a definite agreement there can no more be a trust in equity than a right to damages at law',[98] but failing further to elaborate on whether a mutual will 'trust' might be founded in equity on something less than a contract at law.

142 The issue arose again in two decisions of the High Court only a few short years apart, *Horton v Jones*[99] and *Birmingham v Renfrew*.[100] *Horton v Jones* did not involve promises for 'mutual wills' in the strict sense, but rather a promise to leave certain property by will. It does not therefore consider the application of the *Dufour v Pereira* authorities. In that sense, it is more similar to some of the older authorities, referred to by Lord Camden in *Dufour v Pereira*[101] and by Hargrave in *Juridical Arguments*,[102] in which only one party to the agreement undertook to leave property

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92 Ibid 481.
93 Ibid 490–2.
94 Ibid 499–501.
95 Ibid 504–11.
96 Ibid 513–14.
97 *Gray v Perpetual Trustee Co* [1928] AC 391, 399.
98 Ibid 400.
99 (1935) 53 CLR 475.
100 (1937) 57 CLR 666.
101 (1769) Dick 419; 21 ER 332.
102 Francis Hargrave, *Juridical Arguments* (G G and J Robinson, Pater-Noster-Row, vol II, 1797).

by will. However, it remains instructive, particularly in relation to the application of the *Statute of Frauds*.

143 *Horton v Jones* concerned an alleged oral agreement in 1928 by Jones to leave Horton 'my fortune', which he specified included his four-sevenths interest under his deceased father's will, in return for Horton looking after him for the rest of his life. Jones died in 1931 leaving nothing to her under his will. An action in *assumpsit* was brought before the Supreme Court of New South Wales, where it was non-suited by James J before a jury because, although there was evidence of a contract as alleged, the contract related to land and was therefore required by the *Statute of Frauds* to be in writing.[103]

144 In a motion for a new trial before the Full Court, it was not disputed that there was evidence of intention to enter into a binding contract, but it was submitted first that the terms were too vague, and secondly that the *Statute of Frauds* prevented the contract from being enforced. Jordan CJ (with whom Halse Rogers J and Markell AJ agreed) did not consider the contract too uncertain, but did consider that, as Jones' deceased father's estate consisted predominantly of mortgage interests, the agreement fell within s 54A of the *Conveyancing Act 1919* (NSW).[104] On appeal to the High Court, the same grounds were argued. Rich and Dixon JJ considered that, as at the time of the agreement Jones' deceased father's estate involved an interest in land, the contract was unenforceable.[105] Starke J considered that the contract was too vague, not in 'the language of obligation or contract',[106] and, further, that it was unenforceable as it involved land.[107] Evatt and McTiernan JJ considered that the evidence of Horton was not reasonably capable of proving a contract.[108]

145 The mutual wills doctrine fell more squarely for consideration in *Birmingham v Renfrew*,[109] the most significant decision since *Dufour v Pereira* that I have been able to

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103 *Horton v Jones* (1935) 53 CLR 475, header.
104 *Horton v Jones* (1934) 34 SR (NSW) 359.
105 *Horton v Jones* (1935) 53 CLR 475, 484.
106 Ibid 489.
107 Ibid 490.
108 Ibid 492.
109 (1936) 57 CLR 666.

locate actually to uphold a claim under the mutual wills doctrine. Grace Russell in her will executed 31 March 1932 left her estate to her husband Joseph Russell, allegedly in return for Joseph leaving by his will, executed the same day, the residue of her estate that he stood possessed of equally between the plaintiffs. Grace died on 26 July 1932. On 11 March 1935, Joseph executed a new will leaving his estate equally between the defendants, and died on 20 March 1935. The plaintiffs sought specific performance of the agreement in the first instance and damages for breach of the agreement in the alternative.

146 Gavan Duffy J in this Court found in favour of the plaintiffs and decreed specific performance.[110] He relied upon not only the documents themselves, but also the evidence of what Grace and Joseph had said to one of the plaintiffs, and of the solicitor who had prepared both wills. He distinguished *Horton v Jones* on the basis that the promise sought to be enforced, Joseph's, related to what remained of Grace's residue at his death, which may or may not have included property.[111] He noted in obiter that, although no question of part performance was raised on the pleadings, where Grace had performed her side of the bargain, equity may intervene to enforce the contract even if s 128 of the *Instruments Act 1928* applied.[112] He also determined that the beneficiaries were entitled to sue, entertaining notions of the promise being held on trust but declining to determine specifically the basis of their rights.[113] Finally, his Honour determined specific performance to be the appropriate remedy.[114]

147 On appeal to the High Court, both the appellants and the respondents characterised the agreement as a contract, and contested the fact of the agreement, the enforceability of the agreement, the right of the plaintiffs to sue and the appropriate remedy.

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110 *Renfrew v Birmingham* [1937] VLR 180.
111 Ibid 187–8.
112 Ibid 188.
113 Ibid 189.
114 Ibid.

148 Latham CJ refused to concern himself with 'the difficulties in legal theory which the simultaneous recognition of these principles involve',[115] considering the case before him to fall squarely into the principles enunciated by Lord Camden in *Dufour v Pereira*.[116] In respect of the *Statute of Frauds*, a statute that 'has been in force for over 200 years and has perhaps been more explained or, as many would say, explained away, by judicial decisions than any other statute',[117] his Honour considered the statute inapplicable as the terms of the agreement did not expressly or necessarily refer to land.[118]

149 Dixon J quoted extensively from Hargrave's *Juridical Arguments*,[119] noting that 'the principles upon which Hargrave bases his argument have passed into modern law'.[120] In a judgment that on its face considers the agreement enforceable as a contract, his Honour summarised the principles as follows:

> It has long been established that a contract between persons to make corresponding wills give rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will.[121]

150 Dixon J also confronted an unusual aspect of the doctrine, being the floating nature of the obligation:

> The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity

115 *Birmingham v Renfrew* (1937) 57 CLR 666, 676.
116 Ibid 677.
117 Ibid.
118 Ibid 678.
119 Ibid 683–5.
120 Ibid 686.
121 Ibid 683.

> that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallize into a trust. No doubt gifts and settlements, *inter vivos*, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, *inter vivos*, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged.[122]

151 Dixon J then distinguished *Horton v Jones*, as the interest did not relate to a specific fund including an interest in land.[123] His Honour concluded that the agreement did not fall within s 128 of the *Instruments Act 1928*.

152 Evatt J accepted the law as stated by Latham CJ and Dixon J, and considered the only issue on appeal to be one of the evidence supporting the agreement, upholding the findings of Gavan Duffy J allowing for his Honour's findings as to the credit of the plaintiffs.[124]

A subsequent English decision: **In re Cleaver**

153 Although it would be laborious, and I consider unhelpful, to refer exhaustively to the decisions subsequently considering or applying these principles in England, New Zealand and Canada, I mention the decision of *In re Cleaver*[125] for four reasons: it was expressly referred to by the parties; it considers *Birmingham v Renfrew* in great detail; it is referred to in a number of later Australian decisions; and, while I do not in any manner seek to disapprove of the decision, a number of expressions used by the learned judge in that case, taken out of context, can in my view cloud otherwise relatively clear conceptual skies.

154 An elderly couple married in October 1967 and executed substantially identical wills in December 1967, in 1970, and on 7 February 1974. The husband died on 27 February 1975, leaving his entire estate to the wife. On 2 June 1975, the wife executed a new will in almost identical terms to her previous will, save that it reflected her husband's recent demise. On 30 May 1978, the wife died, after

122 Ibid 689.
123 Ibid 691.
124 Ibid 694.
125 [1981] 2 All ER 1018; [1981] 1 WLR 939.

executing a final will on 23 June 1977. The wife's later will removed, amongst other things, a gift of one third of the residue to the husband's two youngest children. By writ issued in the Chancery Division, the two youngest children sought a declaration that the beneficiaries of the later will held the estate on trust to give effect to the 7 February 1974 will.

155 Nourse J, considering a number of the earlier decisions already referred to, summarised their effect as follows:

> It is therefore clear that there must be a definite agreement between the makers of the two wills; that that must be established by evidence; that the fact that there are mutual wills to the same effect is a relevant circumstance to be taken into account, although not enough of itself; and that the whole of the evidence must be looked at.[126]

156 His Honour then endorsed and quoted extensively from the judgment of Dixon J in *Birmingham v Renfrew*. In Nourse J's view, the doctrine of mutual wills is:

> only one example of a wider category of cases, for example secret trusts, in which a court of equity will intervene to impose a constructive trust. … The principle of all these cases is that a court of equity will not permit a person to whom property is transferred by gift, but on the faith of an agreement or clear understanding that it is to be dealt with in a particular way for the benefit of a third person, to deal with that property inconsistently with the agreement or understanding. If he attempts to do so after having received the benefit of the gift equity will intervene by imposing a constructive trust on the property which is the subject matter of the agreement or understanding.[127]

157 In describing the remedial effect of the agreement, his Honour did not intend in some fashion to relax the standard of agreement that must be proved, but appeared to consider the central question as whether three 'certainties' had been satisfied:

> I would emphasise that the agreement or understanding must be such as to impose on the donee a legally binding obligation to deal with the property in the particular way and that the other two certainties, namely, those as to the subject matter of the trust and the persons intended to benefit under it, are as essential to this species of trust as they are to any other.[128]

158 His Honour ultimately concluded that the agreement was satisfactorily established, considering the repeated identical wills, a number of conversations in

126 Ibid 945.
127 Ibid 947.
128 Ibid.

evidence, and placing significant weight on the fact that, only months after the husband's death, the wife had executed a will substantially reflecting the alleged agreement.[129]

Subsequent Australian decisions

159 Although it is not possible to refer to all of the subsequent Australian decisions, the following decisions are significant because they depart from an earlier decision; are binding upon this Court; or ought to be followed unless the Court is convinced they are plainly wrong either because they are decisions of an intermediate appellate court in another state or because they contain seriously considered dicta of the High Court on this issue.[130]

160 In *Bigg v Queensland Trustees*,[131] a husband and wife each with two children from previous marriages agreed on their marriage to execute wills leaving the whole of their estate to the other, on the basis that on the survivor's death their joint estate would be divided evenly between the four children. On 11 June 1976 each executed a will to that effect. Unbeknownst to the husband, the wife executed a series of further wills leaving the husband with only a life interest in her estate, and the rest to her children. During their lifetime, they lived in her unit, his property having been sold and invested. For taxation reasons, some of his investments were in his name, some in joint names, and some in her name. The wife died first on 3 August 1988, leaving a last will dated 2 October 1987. The husband sought a declaration that the estate was held on trust for him, and alternatively sought damages for breach of contract.

161 McPherson J considered that the agreement required to be established was a contract:

> What matters is proof that the parties made an agreement to execute their wills in that form and that, expressly or by implication, they contracted not to revoke them. It is the contract rather than the form of the wills that attracts

129 Ibid 948–9.

130 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–1 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

131 [1990] 2 Qd R 11.

> relief at law or in equity. … The aggrieved party must seek his remedy for this breach of contract not in a court of probate but in a court of law or equity.[132]

162 His Honour first considered whether, on the evidence of the plaintiff husband, the 'contract to make and not to revoke mutual wills has been established',[133] whether by 'strict proof of an express contract to that effect' or one 'implied or inferred from the fact that the parties agreed to execute mutual or corresponding wills'.[134] His Honour then referred to the authorities above, noting that 'it nevertheless is in relation to the precise terms of such a contract that the major difficulty is encountered'.[135]

163 The 'precise term' that gave his Honour the most difficulty was whether the contract was revocable without notice in their joint lifetime, as the wife had indeed done. His Honour ultimately disagreed with the decision of Gorell Barnes P in *Stone v Hoskins*,[136] partly on principle and partly by distinguishing the case:

> It is no doubt because the necessary notice of revocation is no longer capable of being given by either party after one of them has died that it is considered also to be inequitable to permit the survivor to revoke after the death of the other party. But it is, I think with respect, not correct to say that that is the sole ground for equitable intervention, or that it disappears because, in a case like the present, the survivor has discovered after the death of the other party that during joint lives he or she revoked his or her mutual will without notice to the survivor. … It is possible to conceive of cases in which prejudice may in fact result to the survivor by reason of his not having been given notice of revocation before the death. Because no such notice was given to him, he may, for example, have continued to arrange his affairs and dispose of his assets on the assumption that the mutual wills and the contract not to revoke them continued to operate.[137]

164 Because the husband had transferred assets into their joint names and into her name on the assumption that the assets in her name would come into their joint estate on her death, McPherson J considered there to be sufficient prejudice to justify

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132 Ibid 13.
133 Ibid 14.
134 Ibid.
135 Ibid.
136 [1905] P 194.
137 *Bigg v Queensland Trustees* [1990] 2 Qd R 11, 16.

a finding that 'those who benefit from her estate must be held to the agreement that she made'.[138]

165 The decision of the New South Wales Court of Appeal in *Baird v Smee* also concerned a husband and wife each with two children of a previous marriage.[139] They executed mirror wills leaving to the other absolutely, with a gift over to the two families equally. The husband died first, and his estate vested in his wife. She executed a later will leaving the whole of her estate only to her children. The husband's children brought proceedings 'seeking to enforce a constructive trust arising from an alleged contract'. Neither Mason P,[140] Handley JA,[141] nor Giles JA[142] doubted that the appellants had to show that the couple entered into a contract, or that the major issue was whether there was sufficient proof of their contract. Indeed, Handley JA unambiguously declared 'the need to prove a legally binding contract has always been insisted upon in these cases'[143] and Giles JA similarly considered that the doctrine 'is founded on finding a binding contract'.[144] On the evidence (the fact of the mirror wills, inconclusive notes from the drafting solicitor, and a number of post-contractual statements by the husband) the Court was unanimous in dismissing the appeal on the basis that no contract was established on the balance of probabilities.

166 The principles were most recently authoritatively considered by the Victorian Court of Appeal in *Osborne v Osborne*.[145] In that case, Winifred and Frederick Osborne allegedly agreed on 24 March 1985 to make mutual wills leaving their whole estate equally to their two sons and executed identical wills that day. Winifred died in July 1985. Their only major asset, a unit in Glen Iris, was held as joint tenants and so on her death passed by operation of law to Frederick. In 1995, Frederick executed a deed of family arrangement with his then wife, Daisy,

138 Ibid 17.
139 *Baird v Smee* [2000] NSWCA 253.
140 Ibid [8]–[9].
141 Ibid [26]–[27].
142 Ibid [65]-[66].
143 Ibid [26].
144 Ibid [65].
145 [2001] VSCA 228.

transferring the unit to her in consideration for her granting him a life interest and agreeing to leave the unit to one of Frederick's two sons and three of his grandchildren. Frederick also executed a will leaving his estate to the same son and grandchildren.

167 The excluded son, Ray, brought an action in this Court seeking a declaration that Daisy held the unit on trust for him and his brother. Harper J, the trial judge, was not satisfied that the agreement was established on the evidence. His Honour considered that Winifred's will leaving her estate to her sons, and her decision to leave their property as a joint tenancy, were readily explicable by virtue of their relationship, not by any agreement.[146] His Honour carefully considered many of the decisions referred to above, especially the emphasis on the 'heavy burden of proof' and the 'great need for caution' in accepting the evidence in such cases,[147] and the need to establish more than mere identical wills.

168 On appeal to the Court of Appeal, the appellant sought to argue that Harper J had imposed too high a burden of proof, and had misdirected himself by requiring an 'enforceable contract' rather than an 'agreement or understanding enforceable in equity'.[148] Winneke P (with whom Buchanan and Vincent JJA agreed) rejected both grounds, holding that Harper J had not applied an inappropriate standard of proof but had regard to the commonly expressed principles:

> that there are some civil cases where the strength of the evidence necessary to establish a fact on the balance of probabilities may vary according to the nature of what is sought to be proved.[149]

169 In respect of the claim that Harper J had been mistaken in requiring proof of a contract, Winneke P said:

> The next criticism made of his Honour's reasons was founded upon a submission that his Honour had misled himself, and imposed too high a 'ceiling' for the appellant, by requiring the appellant to satisfy him that the testator and testatrix had entered into an 'enforceable contract' rather than an 'agreement or understanding' enforceable in equity. It was put that mutual

146 *Osborne v Osborne* [2000] VSC 95, [22].
147 Ibid [13], [20].
148 *Osborne v Osborne* [2001] VSCA 228, [17].
149 Ibid [12]. See *Briginshaw v Briginshaw* (1938) 60 CLR 336.

wills are enforced in equity and that equity merely requires a definite agreement, arrangement or understanding between the testators. In particular, attention was drawn to passages in his Honour's judgment in which he had said:

> The plaintiff must prove a contract, to which each of his parents was a party, that each would make a will which, during their joint lives would not be revoked without notice to the other; and after the death of the first to die, would not be revoked by the survivor. It is true that the plaintiff sues not on a contract but upon a trust. But 'without such a definite agreement there can be no more a trust in equity than a right to damages at law'.

In making this statement, his Honour was drawing a contrast between what the plaintiff was required to establish, and what he had termed a 'loose arrangement' or 'honourable engagement'. His Honour, as I have already said, went on to conclude that, in his opinion, the evidence 'came nowhere near establishing the contract which is pleaded'. The appellant's counsel, nevertheless, contended that it was not necessary for his client to prove a 'contract' and referred to such authorities as *In re Gardner* where the court spoke of 'taking the property in accordance with and upon an undertaking to abide by the wishes of the testatrix' and *In re Cleaver* where Nourse, J. spoke of 'an agreement or understanding' imposing 'a legally binding obligation'.

There is, in my opinion, nothing in this point. His Honour well understood, as his reasons demonstrate, that what the appellant had to establish was the existence of a legal obligation of a nature which equity would enforce. Whether one calls it a 'contract', 'an agreement', 'an undertaking' or 'legally enforceable promise' is merely a matter of nomenclature.[150]

…

It is, of course, true that any such contract cannot defeat the operation of the *Wills Act 1958* nor, perhaps, be defeated by the operation of the *Statute of Frauds*. Nevertheless, it is apparent from the authorities that equity will not intervene unless the plaintiff can establish, upon clear evidence, that a testator has bound himself to an obligation (whether one calls it contract, agreement, promise or otherwise) not to revoke his will, and in such terms as to render it enforceable in equity. There is nothing in the reasons of his Honour which suggests to me that he has misdirected himself in this regard.[151]

170 Significantly, although Harper J plainly required the parties 'prove a contract',[152] Winneke P did not consider his Honour to have erred. It is misleading to draw only the words 'legal obligation of a nature which equity would enforce' from the above passage without examining the context, including the result of the appeal.

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150 *Osborne v Osborne* [2001] VSCA 228, [17].
151 Ibid [18].
152 *Osborne v Osborne* [2000] VSC 95 [20].

171 *Barns v Barns*,[153] a decision of the High Court in 2003, concerns the effect of a mutual wills agreement on the various testator's family maintenance legislative regimes, rather than the nature of the agreement itself. In that case, a husband, wife and son agreed, by deed, to leave their whole estate to the son on trust for the survivor and, if there was no survivor, to the son absolutely. Their daughter sought further provision from the husband's estate on his death, and the son and wife argued that, as the husband was obliged under the deed to leave his estate to his son on trust for his wife, there was no estate against which the daughter could claim. Only Callinan J dissented from the decision of the rest of the Court that the husband could not exclude the testator's family maintenance legislation by such a contract.

172 In argument, the Court considered and rejected an argument that the effect of the deed was that on his death the deceased was not the beneficial owner of his property. Gleeson CJ said:

> That argument, which appeared in some respects to confuse the position of the deceased with that of the … survivor, fails. The relevant principles are set out in the judgment of Dixon J in *Birmingham v Renfrew*. He spoke of the doctrines of equity affecting the conscience of the survivor in a case of mutual wills. They give rise to what he called a floating obligation, suspended during the lifetime of the survivor, which descends upon the assets of the survivor at the death of the survivor and then crystallises into a trust.[154]
>
> …
>
> Up to and at the time of his death the deceased was the legal and beneficial owner of his assets; those assets passed to [the son], as executor; and [the wife] will in due course of administration become entitled to them under the deceased's will. That was the very method by which, in the deed, it was contemplated that [the wife] would acquire them. The deed provided for devolution by will. The deceased did not transfer his assets to the second respondent during his lifetime.[155]

173 Gleeson CJ held that the question to be determined was ultimately decided by what was agreed in the deed. The deceased agreed to leave certain things by will, which he had done as agreed. The will was then subject to the testator's family

153 (2003) 214 CLR 169.
154 Ibid 183.
155 Ibid.

maintenance legislation, but that is irrelevant to whether the deceased had complied with his contractual obligations.

174 Gummow and Hayne JJ also made a number of apposite remarks. Although noting that 'none of these issues arises in the present case', their Honours observed:

> Undoubtedly numerous issues of law still arise in cases where parties seek a remedy in respect of failure to perform an obligation to make a will in a particular form and leave it unrevoked, whether with a specific bequest or devise or otherwise. That which is propounded as a 'contract' may, on consideration of the evidence, be no more than a family understanding or representation of intention which lacks binding effect. … If there otherwise be a contract, nevertheless its terms may be too uncertain. … The oral contract [may be] unenforceable being a contract for sale or other disposition of land to which the Statute of Frauds applied. Further issues may arise respecting the doctrine of part-performance and proprietary estoppel.[156]

175 They also considered the interaction between contract and trust:

> Undoubtedly, whilst the nature and content of trust and contract are distinct, there is no dichotomy between them. Thus, as Mason and Deane JJ pointed out in *Gosper v Sawyer*:
>
> > The trust, particularly the resulting and constructive trust, represents one of the most important means of protecting parties in a contractual relationship and of vindicating contractual rights.[157]

176 After referring to a number of authorities concerning the essentially remedial nature of the trust, their Honours then turned specifically to the doctrine of mutual wills, identifying a number of relevant propositions:

> (i) it is the disposition of the property by the first party under a will in the agreed form and upon the faith of the survivor carrying out the obligation of the contract which attracts the intervention of equity in favour of the survivor;
>
> (ii) that intervention is by the imposition of a trust of a particular character;
>
> (iii) the subject matter is 'the property passing [to the survivor] under the will of the party first dying';
>
> (iv) that which passes to the survivor is identified after due administration by the legal personal representative whereupon 'the dispositions of the will become operative';

156 Ibid 196.
157 Ibid 197.

(v) there is a 'floating obligation' over that property which has passed to the survivor; it is suspended during the lifetime of the survivor and crystallises into a trust upon the assets of the survivor at death.[158]

177 Their Honours also referred to the appropriate remedies, noting without further considering cases where it had been questioned that specific performance would necessarily be the appropriate remedy.[159] Ultimately, like Gleeson CJ, they concluded that an agreement to leave by will necessarily contemplates that the property passing under the will is subject to laws affecting testamentary succession.[160]

The principles

178 From the above cases, in my view, the following principles govern the proof and operation of the agreement alleged by the plaintiff in this case.

The agreement must be a contract

179 I know of only three agreements enforceable as an agreement at law or in equity: an agreement under seal, a contract, and a trust. Certainly, by way of estoppel, equity may have the effect of enforcing promises between parties, but it does not do so on the basis of an agreement, but on the basis of an unconscionable departure from a representation. It would be odd if in the esoteric doctrine of mutual wills there were a special category of agreements not amounting to contracts that were enforceable at equity. The doctrine of mutual wills overlaps the jurisdictions inherited from the common law, chancery and ecclesiastical courts: the common law of *assumpsit*, now the modern law of contract, governs the existence of an agreement; the probate law prevents the enforcement of the precise terms of that contract by admitting the last will to probate; and the remedies once provided by the Chancellor circumvent the probate law by imposing a constructive trust on the legal personal representative. The mere fact that equitable remedies such as a decree for specific performance or a declaration of constructive trust are the devices used to give effect

158 Ibid 199.
159 Ibid 201–2.
160 Ibid 208.

to the agreement does not take the elements of the agreement that needs to be proved into an alternate equitable universe.

180 The structure of the basic promise in a mutual wills agreement (from A to B for C) closely resembles an express trust, but there are a number of obstacles that stand in the way of the majority of such promises being enforced as trusts, primarily relating to when and whether the property said to be the subject of the trust can be ascertained. The cases concerning promises to dispose of property by will, although closely related, must distinguish between those concerning:

(a) promises supported by consideration, and gratuitous gifts;

(b) promises in respect of property that is immediately ascertainable at the time of the promise, and promises in respect of property only ascertainable on the death of the promisor;

(c) promises where the consideration by the promisee is to be performed before the death of the promisor, and those where the consideration by the promise is to be performed after the death of the promisor and is revocable until that time; and

(d) in respect of a mutual wills agreement (as opposed to a mere promise to leave property by will), promises where the gift to be left under the survivor's will is of certain property, and where it is only ascertainable on the survivor's death (such as a share of the residue).

181 The distinctions are important for the basis of the relief sought. Where the promise is unsupported by consideration, it cannot be enforceable as a contract. A party seeking to enforce that promise must either seek their remedy in estoppel, or establish that the promise amounts to the settlement of the property on an express trust. On the other hand, where the property is not ascertainable at the time of the promise (for example, a promise to leave a share of residue), and the party seeking relief only knows what the promise amounts to on the death of the promisor, they cannot seek to establish an express trust arising immediately from the promise (for lack of certainty of object), and must instead rely on contract or estoppel. Similarly,

where the consideration flowing from the promise is to occur after the promisor's death, for example by a promise to be performed in their own will, and the agreement is revocable until the promisor's death, I cannot see how some form of revocable express trust could arise immediately upon the promise. Finally, although I shall return to Dixon J's 'floating obligation', where the survivor's promise is to leave unascertained property, but has absolute ownership and rights of disposal *inter vivos*, it seems to me that only contract can provide a remedy, because it cannot be said that the promisor's intention is for the property to be held on trust. The observations by Gleeson CJ in *Barns v Barns* that the deceased has beneficial ownership of the property at his death seem to support that observation.[161]

182 These considerations do not appear to have been at the forefront of Nourse J's mind in *In re Cleaver*[162] when considering whether the agreement satisfied the 'two certainties' of an express trust, given the gift in question concerned a gift of residue.[163] There are perhaps complex questions of jurisprudential theory at play in this doctrine, concerning the relationship between express and constructive trusts; the extent to which a contractual agreement may also impose fiduciary obligations;[164] and the circumstances in which a contractual promise may instead be held on trust.[165] As Gummow and Hayne JJ observed in *Barns v Barns*,[166] there is no dichotomy between the law of contract and the law of trusts, and the trust is, as Deane J said in *Muschinski v Dodds*,[167] essentially remedial in its origins. None of those questions need be considered for the resolution of this case, however. The plaintiff here has pleaded an agreement, not an express trust, and the cases I have referred to show that the standard of agreement necessary to be established is a contract.

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161 Ibid 175.
162 [1981] 2 All ER 1018; [1981] 1 WLR 939.
163 Ibid 947.
164 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 71.
165 *Trident General Insurance Co Ltd v McNiece Bros Proprietary Ltd* (1988) 165 CLR 107, 145–6 (Deane J).
166 *Barns v Barns* (2003) 214 CLR 169, 197.
167 (1985) 160 CLR 583, 613.

183 Lord Camden, in *Dufour v Pereira*,[168] after rejecting a submission that novel concepts drawn from civil law should be applied, declared 'this is a contract'.[169] Lord Camden expressly declined to enforce the agreement by reference to civil law principles, preferring instead to bring his analysis within the accepted principles of the common law.[170] Lord Loughborough in *Lord Walpole v Lord Orford* referred to the notion of a mere 'honourable engagement' not to distinguish between some intermediate equitable standard of agreement and a contract but because that was the agreement the parties had pleaded.[171] The Privy Council was not satisfied in *Hudson v Gray* that an agreement that did not amount to a contract could be enforced as a mutual wills agreement,[172] and both counsel and the bench in the High Court in *Birmingham v Renfrew* seem to have assumed that a contract was required.[173] The New South Wales Court of Appeal unanimously required a contract to be established in *Baird v Smee*,[174] and although Winneke P in *Osborne v Osborne* dismissed the nomenclature as irrelevant,[175] his Honour upheld Harper J's judgment, which expressly required the plaintiff to prove a contract.[176] Indeed, Winneke P's judgment highlights that what is important is not what the agreement is called, but whether the particular elements prescribed by contract law of consideration, certainty and intention to be bound are sufficiently established.

The agreement must be for valuable consideration

184 Although referred to in both *Dufour v Pereira* and *Lord Walpole v Lord Orford*, the issue of valuable consideration rarely arises in cases relating to mutual wills. Mostly, this appears to be because *quid pro quo* is inherent in the nature of a *mutual* wills agreement, whereby both parties agree to certain testamentary dispositions. Consistently with the stated law in those two foundational decisions, an agreement

168 (1769) Dick 419; 21 ER 332.
169 Francis Hargrave, *Juridical Arguments* (G G and J Robinson, Pater-Noster-Row, vol II, 1797) 308.
170 Ibid 309–11.
171 (1797) 3 Ves Jun 402; 30 ER 1076, 1084.
172 *Gray v Perpetual Trustee Co Ltd* [1928] AC 391.
173 *Birmingham v Renfrew* (1937) 57 CLR 666, 682–3.
174 [2001] NSWCA 253, [24], [26].
175 *Osborne v Osborne* [2001] VSCA 228, [17]–[18].
176 Ibid.

by one party to leave certain property by will is a promise that will only be enforceable where the other party also provides valuable consideration, whether that be by also leaving certain property under their will or otherwise. Promises unsupported by consideration are not promises enforceable as agreements unless they amount to a declaration of express trust, although where they occasion detrimental reliance, such that it would be unconscionable to depart from them, they may form the basis for promissory or proprietary estoppel.

The agreement must be sufficiently certain

185 A number of decisions, including *Lord Walpole v Lord Orford* and *In re Oldham*, rest at least in part on the difficulty faced by the Court in identifying with any specificity what it is that the mutual testators had agreed. As noted, that is entirely consistent with the substantive requirements for finding a contract before such a contract can be enforced. In mutual wills cases, the requirement for certainty is all the more significant in light of the principles of evidence most famously laid down in *Briginshaw v Briginshaw*,[177] a decision argued and determined less than a year after *Birmingham v Renfrew*.[178] Those principles, now embodied in s 140 of the *Evidence Act 2008*, require the Court to take into consideration the nature of the subject matter of the proceeding, including the fact that in the overwhelming majority of mutual wills decisions the two persons said to have made the agreement are not available to give evidence, and including the gravity of an allegation that a person may have agreed to leave property in a certain manner by will only to depart from that agreement when the counterparty dies.

The agreement must be intended to be legally binding

186 This requirement is clearly stated in the authorities, and has been the major issue between the parties in the majority of the decisions referred to above. Closely tied with the requirement of sufficient certainty, it also arises from the fact that most mutual wills are between husband and wife, in circumstances where there is a

177 (1938) 60 CLR 336.
178 *Birmingham v Renfrew* (1937) 57 CLR 666.

degree of mutual reliance and trust that the law is reluctant to interfere with. Although each case will rest on its own facts, including the particular relationship between the two testators, as a general rule it may be said that the mere fact of two wills with corresponding obligations being entered into at the same time, prepared by the same lawyers and witnessed by the same people will not, of itself, be sufficient to establish an intention to be legally bound by that arrangement. Persons in receipt of legal advice are presumed to know or have been told that wills are revocable instruments. Nevertheless, that general rule may be displaced where there is other evidence that the parties intended to come to a binding agreement.

The agreement is not revocable after the death of one of the parties

187 The precise terms of the agreement are a matter for the parties, and terms may only be implied in accordance with the usual principles for the implication of terms in a contract. Nevertheless, in the circumstances of an agreement to leave mutual wills, it may be readily inferred that the agreement will not be revocable after the death of one of the parties unless a contrary intention can be found in the terms of the contract. More accurately, although the particular will executed in performance of the agreement may remain revocable, because a will is an inherently revocable instrument, the substantive disposition agreed to must be given effect to in the last will of the surviving party upon death. Although McPherson J in *Bigg v Queensland Trustees* held otherwise,[179] his Honour distinguished the general rule on the basis that the husband had transferred properties into his wife's name on the assumption that they would form a part of their mutual estate. As a general rule, it may also be said that such an agreement will be revocable on notice to the other party during their joint lifetimes, although again that will depend on the terms of the agreement ascertained from the circumstances generally.

179 [1990] 2 Qd R 11, 15–16.

The agreement cannot prevent a grant of probate of a later will executed in breach of the agreement

188 As is made absolutely clear in the early English probate decisions, the power of a court of probate to admit a will to probate is a public power that cannot be restrained or controlled by the agreement of the parties, and the right to revoke a will and execute a later will prior to death similarly cannot be curtailed. That result is no reflection of the terms of the agreement but rather the dictates of the law of probate. The consequence of that result is that any contract, if unfulfilled, necessarily must be enforced by imposing some obligation on the deceased's estate that is not apparent from the terms of their later inconsistent will, normally in the form of a constructive trust.

The agreement is specifically enforceable

189 Whether the remedy of specific performance is available to compel performance of the contract must be considered in light of the well established principles on the availability of that remedy. However, it is apparent from the authorities that, in the case of mutual wills, something akin to a presumption arises that the agreement will be specifically enforceable against the personal representative and beneficiaries of the property passed by will inconsistently with the agreement. I see no reason why, as a matter of principle, there could not be circumstances where the remedy of contractual damages rather than specific enforcement would not be a sufficient remedy for the harm suffered,[180] especially for promises to leave monetary sums rather than specific property, and for promises to leave property by will in return for consideration performed in the testator's lifetime.

The agreement may be enforced by a third party beneficiary

190 It is not suggested in this case that the agreement is not enforceable by the plaintiff, and it is therefore strictly unnecessary for me to say anything about this issue. Nevertheless, it represents perhaps the biggest inconsistency between the doctrine of contract and the doctrine of mutual will agreements. The most obvious

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[180] Where the agreement involves the disposition of real property, however, the law is generally prepared to grant the land promised, rather than a monetary equivalent.

explanation is perhaps that the doctrine of privity did not emerge in final form until 1861,[181] nearly a century after *Dufour v Pereira* was decided, and judges applying the mutual wills decisions after that time did not consider (and were not asked to decide) how a strict doctrine of privity might restrict *Dufour v Pereira*. A more sophisticated explanation may be to consider the interaction between contract and trust principles, allowing the third party beneficiary to enforce the promise held on trust for them by the testator,[182] or as Dixon J postulated in *Birmingham v Renfrew*, to enforce the constructive trust arising as a remedial device,[183] while a more practical explanation may be to consider the capacity of beneficiaries to sue in place of personal representatives who refuse to sue in dereliction of their duty. Whichever of these explanations is accurate (if any), I think it is clear that the whole weight of authority supports the capacity of the disappointed third party beneficiary to sue to enforce the contract in these circumstances, irrespective of the doctrine of privity.

If it concerns land, the agreement is unenforceable under the Statute of Frauds *unless an exception applies*

191 Although the *Statute of Frauds* may have been 'explained away … by judicial decisions [more] than any other statute', and, it seems, especially so in the area of mutual wills, on the authorities referred to the Statute does apply on its face, unless an exception applies. Very few of the authorities referred to have any clear ratio on this point, as mutual wills agreement have been successfully established so rarely that courts have not had to consider the application of the Statute on many occasions. Nevertheless, it has been considered in the alternative, or distinguished, in almost all of the major decisions referred to. Although Dixon J in *Birmingham v Renfrew* quoted, with apparent approval, Francis Hargrave's description of the courts of equity being 'so anxious' to enforce mutual wills agreements that the *Statute of Frauds* had been 'refined upon',[184] it must be remembered that Hargrave's opinion on that issue was not endorsed by Lord Loughborough, who considered that

181 *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762.
182 *Trident General Insurance Co Ltd v McNiece Bros Proprietary Ltd* (1988) 165 CLR 107.
183 *Birmingham v Renfrew* (1937) 57 CLR 666, 683.
184 Ibid, 683–4.

the statute in all likelihood did apply.[185] *Horton v Jones*,[186] which was not doubted but was distinguished in *Birmingham v Renfrew*,[187] is authority for the proposition that the *Statute of Frauds* does indeed apply, albeit that only Dixon and Rich JJ expressly held that to be the case. On the facts of the present case, the mutual wills agreement relates specifically only to an interest in the Alfred Street property, and it will be necessary for the plaintiff to establish an exception to the Statute in order to enforce the agreement.

192 Finally, there is to my mind an aspect of this doctrine that remains unsatisfactorily unsettled, but need not be resolved for the purposes of this case. It concerns the 'floating obligation' suggested by Dixon J that is said to crystallise on the death of the survivor. It is plain that the property the subject of the promise is not held on trust during the survivor's lifetime, and the survivor is entitled to retain the income and dispose of the capital if they so choose. The extent, and nature of an obligation not to dispose of the property *inter vivos* by a gift 'calculated to defeat the intention of the compact' seems to me to be difficult to articulate.[188] Although it may be readily ascertainable in circumstances where the survivor deliberately disposes of the property in their lifetime in order to avoid the terms of the agreement, it may be more difficult where the disposition is outside the survivor's control due to bankruptcy or mental incapacity. The only comment I would venture is that such an obligation is more readily accommodated if, as I consider, the mutual wills agreement is a contract, and the floating obligation is an obligation that must be determined by reference to the express and implied terms of that contract. A court can confidently apply established principles concerning the incorporation, implication and interpretation of contractual terms in deciding the extent of that floating obligation and whether it has been breached in the circumstances of the case. If, on the other hand, the mutual wills agreement is a unique equitable beast, the nature of Dixon J's floating obligation will be far more difficult to discern. But in

185 *Lord Walpole v Lord Orford* (1797) 3 Ves Jun 402; 30 ER 1076, 1085.
186 (1935) 53 CLR 475.
187 (1937) 57 CLR 666.
188 Ibid 689 (Dixon J).

any case, there is no allegation that Marjorie disposed of the Alfred Street property prior to her death, and the property, including the half interest allegedly promised, forms part[189] of her estate.

Has the doctrine of mutual wills been satisfied?

193 On the basis of the above principles, in this proceeding the issues in contest are whether the agreement is sufficiently certain and intended to be legally binding. The agreement is for valuable consideration (an absolute interest in the property during Marjorie's lifetime) and was not revoked. The defendants do not contest the remedy sought by the plaintiff, and nor do they contest the plaintiff's entitlement to sue upon the agreement.

194 Before determining those points, I set out again the agreement as pleaded:

> In consideration of Robert executing, and not revoking, a will in which he devised to Marjorie his interest in the property as tenant in common as to one of two equal undivided shares, Marjorie agreed to execute, and not revoke, a will under which she devised one of two equal undivided shares as tenant in common of the property to the plaintiff, and in consideration of Marjorie executing, and not revoking, a will in which she divided one of two equal undivided shares a tenant in common in the property to the plaintiff, Robert agreed to execute and not revoke a will under which he devised his interest in the property as a tenant in common as to one of two equal undivided shares to Marjorie.

Is the agreement established on the evidence with sufficient certainty?

195 The plaintiff acknowledged that the mere resemblance and reciprocity in the terms of Robert's will and Marjorie's February 1996 will are not, without more, sufficient to establish the existence of the agreement, and relied upon Robert's will, Marjorie's two wills, the plaintiff's evidence by affidavit and in cross-examination, Mr Starnawski's evidence, and Mr Starnawski's file notes.

196 The defendants, not having sought to lead evidence contradicting that relied upon by the plaintiff, submitted that the evidence did not establish the agreement with requisite certainty or that Marjorie held the requisite intention to be legally

189 Indeed, the whole of.

bound. Specifically, while accepting that both the plaintiff and Mr Starnawski were honest witnesses, the defendants submitted:

(a) the plaintiff's evidence contradicted the evidence of Mr Starnawski, contradicted her initial originating motion filed in this proceeding, was of events that occurred some 18 years ago, and she was unable to say with any precision what the exact words used by Robert or Marjorie were;

(b) Mr Starnawski's evidence at times contradicted his own file notes as to the order events occurred or who instigated a particular line of conversation, and involved elements of reconstruction from his file notes; and

(c) the file notes themselves were insufficiently detailed, and those notes compiled the following week were not a contemporaneous record but also involved some elements of reconstruction and conclusion.

197 The plaintiff also relied upon the evidence of Mr Starnawski, given in cross-examination, of Marjorie's mental state, including her resistance to signing documents and general agitation about the agreement said to have been reached.

198 In respect of the plaintiff's evidence, as I have noted, I agree with the defendants' submission that it was inexact, and would not rely upon her to give evidence of the words used by Robert and Marjorie with any confidence. Her evidence establishes only her impression as to the effect of the alleged agreement, which was that Marjorie would be entitled to the Alfred Street property in her lifetime, and the plaintiff would be entitled to a half interest thereafter. The original originating motion filed in this proceeding, rather than undermining that evidence, in fact confirms the plaintiff's impression of her entitlement, being an entitlement to a half interest on Marjorie's death. It is entirely explicable that a person without legal training would not understand how that agreement was to be put into effect. The defendants conceded that the plaintiff was someone who would not have a sophisticated understanding of the various legal phrases discussed, and also conceded that there is no doubt the plaintiff was left with the understanding that she would get a half interest in the Alfred Street property on Marjorie's death.

199 To the extent that the plaintiff gave evidence about being present in the room for the whole time that Robert gave instructions, she accepted that it was possible she may not have been. The plaintiff's evidence about Marjorie interrupting Robert may be accurate, or it may be a reconstruction from the plaintiff's reading of Mr Starnawski's file notes, which portray a similar incident. Again, all I can accept from the plaintiff's evidence on that point is her impression that Marjorie's lifetime entitlement to the Alfred Street property was Marjorie's suggestion, rather than Robert's, and that upon Marjorie's death she would receive a half interest.

200 Mr Starnawski's evidence was substantially similar to the events portrayed in his file notes, which is unsurprising given he had familiarised himself with those notes. I do not accept that Mr Starnawski contradicted his own oral evidence, other than when the phrasing of questions in cross-examination by counsel led him astray, such as in asking whether he, or Robert, or Marjorie, had suggested leaving the interest in the Alfred Street property to the plaintiff with a right for Marjorie to reside. His recollection as to whether the plaintiff was in the room for various events was somewhat vaguer than the rest of his evidence, and is not confirmed by the content of his file notes. He was able to recall that the plaintiff was in the room when Robert and Marjorie first made the alleged agreement, or else when that agreement was expressly confirmed.

201 The best evidence of the alleged agreement is plainly the file notes taken by Mr Starnawski both at the Alfred Street property and subsequently. The first file note, transcribed in Robert's bedroom while taking instructions, is unimpeachably the most reliable record of what took place that day. That file note undeniably records that the gift of the Alfred Street property was on the 'understanding that in her will she will leave ½ int. to my daughter'. The second and third file notes, while only summaries of what occurred written after the fact, are much better evidence than the understandably incomplete recollections of the plaintiff and Mr Starnawski some 18 years later.

202 On the basis of that evidence, I have no hesitation in determining that the agreement is sufficiently certain. It is in plain terms, and leaves no doubt. Marjorie was to receive the half interest in the Alfred Street property that Robert owned, on the understanding that in her last will she would leave a half interest in that property to the plaintiff. To the extent that it is uncertain whether they might revoke the agreement in their joint lifetimes, or whether Marjorie may dispose of the Alfred Street property in her lifetime, those terms are not sought to be invoked or relied upon in this proceeding and I do not need to consider them.

Was the agreement intended by the parties to be legally binding?

203 The plaintiff submitted that the words in the file notes — 'on the understanding', 'she said she would in the presence of him, the daughter and me', Robert 'agreed with the proposal', 'as she had undertaken to do' — were sufficient to impart an unambiguous promise that was intended to be legally binding. The plaintiff also relied on Marjorie's conduct in giving instructions for and executing a will that gave effect to the alleged agreement at the same time as Robert, and after his death executing a will that was also in accordance with the agreement, submitting that such evidence was in effect a form of post-contractual admission by Marjorie that she was so bound.

204 I would not place great weight in the particular form of words used in the file notes, whether that be 'understanding', 'undertaking', 'leave', 'dispose' or otherwise. Those words are the words of Mr Starnawski, a lawyer, taking instructions for the will of Robert and Marjorie, and inevitably would reflect his own manner of expression. I would place some weight, although not great weight, on Marjorie's subsequent conduct in executing her two wills that are consistent with the alleged agreement, including one executed after her brother's death. It is apparent that, even after he had died, she gave some force, whether legal or moral, to what she had said.

205 The defendants submitted first that the relationship between Marjorie and Robert as brother and sister, who were close, who shared everything, who were elderly and

had spent a lifetime living together in the same house, told against a legally binding obligation. The defendants submitted secondly that Marjorie's conduct when executing her will and the transfer of land, and her discussions with Mr Starnawski outside of the bedroom, showed that she did not intend to be legally bound.

206 It is true that in relationships of confidence, such as between a brother and sister who are close, it may be considered more unlikely that a contract was intended than between joint parties to a commercial venture. However, in this case, the agreement was discussed in a legal context, in the presence of a lawyer who was preparing testamentary documents and a transfer of land, whilst explaining the legal effect of title documents that the parties produced to him. Robert and Marjorie were not having informal discussions about how they might, on an informal basis, agree to administer a joint estate — they were establishing a legal framework to dispose of a series of jointly held assets between their respective families. Plainly, they recognised that, although they had held joint assets throughout their lifetimes, after their death their separate families would not and could not continue to operate in that relationship, and their assets would have to be separated, sold and distributed. Neither would contemplate forcing the other out of a family home they had lived in since the 1940s. Robert's illness forced them to confront the legal status of their holdings, and how it would be administered and disposed of. Their closeness does not in the circumstances prevent a finding of legal intent.

207 I find it difficult to see the relevance of Marjorie's reluctance when not in Robert's presence. The law of contract regulates transactions between parties considered objectively, not subjectively. The existence of a secret, subjective, contrary intention cannot defeat a contract. It may be that, subjectively and actually, Marjorie was reluctant to be legally bound to a promise to leave the Alfred Street property to the plaintiff. It may be that her agitation in giving instructions for a will and executing the will and transfer documents is sufficient evidence of that. But on the evidence, none of that was before Robert. Her objective intention must be ascertained by what she said and conveyed to him. It would make a mockery of contract law if parties,

having made an express agreement, could void that agreement by expressing the opinion, immediately after leaving the room, that they did not wish to be bound by that agreement.

208 There is another reason to reject the assertion that Marjorie's reluctance showed that she did not wish to be legally bound. It might equally be said that her reservations in signing the will and the transfer of land affirmed a belief that by doing so she would become legally bound. Indeed, there would be little reason for hesitation if she believed herself only to be binding herself in honour.

209 I also consider that her agitation may have other readily available explanations. Her brother was on his deathbed. She was contemplating how their joint assets might be held after his death. In the space of a few short hours, she was without warning required to give instructions for a will, to be executed the following day. Even as she executed it, she was concerned about how she should distribute her estate, and what share her husband, children and grandchildren should receive. It would be natural to have hesitations in that circumstance, that had little to do with her intention to be legally bound to her promise to her brother to safeguard his half interest in the family home for his daughter.

210 Finally, the defendants also noted that there was no evidence that Robert was aware that Marjorie also made a will that same day, as the discussions and execution of that will happened outside of his bedroom. They conceded that whether Marjorie made a will or not would not prevent a claim being made by the plaintiff against Marjorie's intestate estate. In my view, whether Robert knew Marjorie made a will that same day is not of great weight. While Mr Starnawski was plainly concerned to have the whole arrangement in place immediately, it was apparent to everyone involved that it was Robert who would die shortly, and there was no reason to expect that Marjorie was likely to pass away any time soon. Even if Robert did not think that Marjorie was making a will immediately, there would be no reason for him to doubt that she intended to do so prior to her death, as she had said she would.

211 In the result, I consider that, although Robert and Marjorie may have trusted one another, they did not contemplate that a transaction of this significance would be regulated only by that trust. They intended all of the arrangements entered into with the assistance and advice of Mr Starnawski, including the mutual wills agreement, to be legally binding.

The exceptions to the *Statute of Frauds*

212 The plaintiff relied upon a number of exceptions said to apply to the *Statute of Frauds*:

(a) the *Statute of Frauds* cannot be used to as a cloak for fraud, and the breach of a mutual wills agreement is a form of equitable fraud;

(b) the will itself could constitute a memorandum in writing sufficient to satisfy the *Statute of Frauds*; and

(c) the doctrine of part performance prevents the defendants from relying upon the *Statute of Frauds* to deny the mutual wills agreement.

Equitable fraud

213 The plaintiff submitted that the well-known maxim that equity will not permit the *Statute of Frauds* to be used as an instrument of fraud applied to prevent the statute from being used to deny a mutual wills agreement. A breach of an equitable mutual wills agreement is a form of equitable fraud, in that, because the last to die has received property based on a promise to leave certain property in a certain way by will, he or she cannot dispose of it upon death as if it were his or her own absolutely. This submission, in substance, again alleges that the *Statute of Frauds* is generally not applicable to mutual wills agreements.

214 In *Schweitzer v Schweitzer*,[190] a father and son purchased a property in Moonee Ponds in 1973 on a 50/50 basis. Although initially registered in the son's name, it was transferred to the father's name in 1984 when the son married. In 2005, concerned to protect his interest in the property, the son procured the father to sign a

190 [2012] VSCA 260.

statutory declaration acknowledging that the son had a half interest in the property. At the time, the father was suffering from dementia.

215 The trial judge found it unnecessary to consider whether the later document satisfied the requirements of the *Statute of Frauds*, as the case fell 'squarely within the well-known maxim that equity will not permit the *Statute of Frauds* to be used as an instrument of fraud'.[191] Specifically, the judge considered that 'a clearly established category of case' to which the exception applied is 'a transfer of land on trust where the transferee knows that the land was transferred on trust'.[192] Nettle JA, with whom Tate JA and Ferguson AJA agreed, affirmed the finding of the trial judge.

216 In *Hubbard v Mason*,[193] Ronald Hubbard and Bill Mason lived together from 1973 until Ronald Hubbard's death in 1987. In 1983, both Ronald and Bill executed wills leaving their respective half interests in their unit in Croydon Park to one another. Following Ronald Hubbard's death in 1987, Bill Mason executed a will leaving the whole of his estate to Ronald Hubbard's grandchildren. Those grandchildren sought to establish that this will could not be revoked by reason of a mutual wills agreement. They did not rely on any written agreement.

217 Santow J held that the *Statute of Frauds* does not apply to a mutual wills agreement as it is an 'institutional constructive trust', and that even if it would otherwise fall within the statute, the survivor 'is not to be allowed to use the statute as a cloak to conceal lack of absolute ownership'.[194] His Honour was satisfied in the circumstances that the agreement was established, and the lack of writing was 'no impediment to that result'.[195]

218 The defendants submitted that the plaintiff's submission could not be sustained in light of the long line of authorities that consider and apply or distinguish the *Statute of Frauds*. If a breach of the mutual wills agreement always amounted to

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191 *Schweitzer v Schweitzer* [2010] VSC 543, [17] (Cavanough J).
192 Ibid [18].
193 (Unreported, New South Wales, 9 December 1997, Santow J).
194 Ibid.
195 Ibid.

equitable fraud, why was it necessary to consider whether the statute applied in *Dufour v Perera*, *Lord Walpole v Lord Orford*, *Horton v Jones* and *Birmingham v Renfrew*?

Sufficient memorandum

219 The plaintiff next submitted that Marjorie's will themselves could constitute a memorandum in writing signed by the person charged sufficient to satisfy the Statute. Both Marjorie's February and April wills leave a half interest in the Alfred Street property to the plaintiff on Marjorie's death, the very term said to have been agreed.

220 In *Schaefer v Schumann*,[196] Edward Seery left a codicil to his will by which he devised a property at Chipping Norton to his housekeeper, in exchange for which she agreed to remain as his housekeeper until her death. The testator's four daughters sought further provision under the will, and argued that the codicil could not be an enforceable contract taking the property out of the Court's jurisdiction to award further provision.

221 Counsel for the respondent[197] submitted that the codicil could not be a sufficient memorandum of contract, because it did not indicate the existence of any contract, nor did it expressly or impliedly state any consideration. The Privy Council advised[198] that it would be 'somewhat unreal to draw a hard and fast line' between the discussion in which the agreement was alleged and the execution of the codicil some two days later, and were not prepared to differ from the conclusion reached by Street J that the codicil constituted a sufficient memorandum.

222 In *Flinn v Flinn*,[199] Gillard J rejected a defence based on the *Statute of Frauds*, determining that the mutual wills themselves were a sufficient memorandum. On appeal Brooking JA, with whom Charles and Batt JJA agreed, did not consider

196 [1972] 1 All ER 621.
197 Later Lord Browne-Wilkinson.
198 Lord Cross of Chelsea, delivering judgment on behalf of Lord Wilberforce, Lord Parker of Waddington and Lord Hodson, Lord Simon of Glaisdale dissenting.
199 (Unreported, Supreme Court of Victoria, Gillard J, 17 December 1997).

whether the agreement satisfied the *Statute of Frauds*, and instead found[200] the agreement to be too uncertain to be enforced.

223 The defendants accepted that the testamentary documents agreed to be executed can themselves evidence the contract, but submitted that Marjorie's wills in this case were not sufficient. Although both the February and April wills leave a half interest in the Alfred Street property to the plaintiff, they do not do so by reference to any agreement. They also leave a gift over to the plaintiff's children in the event that the plaintiff predecease Marjorie, when there is no evidence that such a gift over was ever agreed or discussed.

Part performance

224 Finally, the plaintiff submitted that Marjorie's conduct amounts to unequivocal and sufficient acts of part performance of the agreement so that in equity she cannot rely upon the *Statute of Frauds* to deny the agreement, relying on the following conduct:

(a) Marjorie was aware and allowed Robert to execute his will leaving her a half interest in the Alfred Street property;

(b) Marjorie agreed to execute and executed the February 1996 will leaving a half interest in the Alfred Street property to the plaintiff 'in family circumstances where such provision would not otherwise have been an expected or natural disposition for an aunt to make for her niece';

(c) Marjorie executed the February 1996 will only after Robert had given instructions for a will leaving a half interest in the Alfred Street property to her, where she had not previously intended to make a will that day; and

(d) Marjorie executed a further will in April 1996, which remained unrevoked until August 2001, that also left a half interest in the Alfred Street property to the plaintiff.

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200 [1999] 3 VR 712.

225 The defendants submitted that the conduct of Marjorie relied upon by the plaintiff could not amount to performance, because in simple terms 'if something is done and then undone it cannot be part performance'. The agreement was for Marjorie to execute and leave unrevoked a will leaving a half interest in the Alfred Street property to the plaintiff. If she executed such a will but then revoked it, that could not on the defendants' submission be part performance, which must be an act that goes towards the agreement having been carried out.

226 The defendants relied on *Thwaites v Ryan*.[201] In that case, Thomas Ryan lived with Geoffrey Atkins and supported him from 1970 until 1981, claiming that he did so under an agreement by which Atkins would leave him his house. Atkins executed a will in 1971 leaving his residuary estate to Ryan and his wife, but in 1981 he made a fresh will leaving the residuary estate to his niece. Counsel for Ryan submitted that the *Statute of Frauds* did not apply because the agreement had been partly performed.

227 Fullagar J considered the law of part performance applicable Victoria, holding that:

> one must first seek to find such a performance as must imply a contract, and then proceed to ascertain the general nature of such contract as the performance implies, and then to compare that result, if one gets to it, with the general nature of the contract pleaded.[202]

228 His Honour, with whom Young CJ and Starke J agreed, held in the circumstances that Ryan's conduct was more readily explicable by the breakdown of his marriage than his relationship with Atkins. His Honour expressly considered that it was the 'conduct of Ryan' that must establish on the balance of probabilities the existence of a contract.

229 At trial, I raised with the parties that my understanding of the doctrine of part performance was somewhat different to that which had been submitted, and that it was Robert's conduct rather than Marjorie's that was relevant. Counsel for the

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201 [1984] VR 65.
202 Ibid 77.

defendants submitted that could not be accurate, as it was Marjorie who is required under the statute to have signed a memorandum of the contract, but that, if it was accurate, the mere fact that Robert chose to leave a gift to his sister under his will did not amount to part performance in any case. Counsel for the plaintiffs, in reply, submitted that contrary to his initial submission, it was the conduct both of Marjorie and of Robert that was relevant to part performance, and that when taken together the signing of each of their wills reflecting the alleged terms plainly amounted to sufficient part performance.

Does this agreement fall within an exception to the *Statute of Frauds*?

Equitable fraud

230 In my opinion, there is no principle that the *Statute of Frauds* is generally inapplicable to mutual wills agreements. That the statute must be given prima facie effect where an agreement falls within its provisions is clearly demonstrated in *Horton v Jones* and *Birmingham v Renfrew*. There is, however, a jurisdiction in equity preventing a defendant from relying on the *Statute of Frauds* where it is sought to be used as a cloak for fraud. But the plaintiff must point to circumstances that justify equity's intervention in preventing the defendant from setting up the statute. Examples are where a contructive trust is imposed or where the doctrine of part performance applies.[203]

231 In *Jacobs' Law of Trusts in Australia*, the writers take the view, following Dixon J's judgment in *Birmingham v Renfrew*, that a constructive trust arises when the first party performs his part of the agreement by dying leaving his will unrevoked.[204] The equitable fraud justifying the intervention of equity is practised when the first party dies with his will unrevoked, having relied on the survivor's promise by

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203 N C Seddon, R A Bigwood and M P Ellinghaus (eds), *Cheshire and Fifoot: Law of Contract* (LexisNexis Butterworths, 10th ed, 2012)

204 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 294.

depriving himself of the opportunity to make alternative testamentary arrangements.[205]

232 The writers state that, because the duties imposed on the survivor are a constructive trust, they do not fall within the writing requirements of s 7 of the *Statute of Frauds*.[206] Although a contract out of which a trust has grown might be rendered unenforceable by s 4 of the *Statute of Frauds*,[207] the writers hold the view that:

> if the contract would otherwise fall within the statute, this should not bar the enforcement of the constructive trust. The survivor who takes the assets of the first to die but denies any obligation in respect of them is using the statute as a cloak to conceal a lack of absolute ownership.[208]

233 According to the writers, this was relied on as an alternative ground in *Birmingham v Renfrew*.[209]

234 In the present circumstances, I consider that the defendants are prevented from relying on the *Statute of Frauds* to deny the existence of a beneficial interest on the part of the plaintiff. The statute may not be used to conceal a lack of absolute ownership. As Robert has left his interest in Alfred Street to Marjorie by will, and has died with that will unrevoked in reliance on Marjorie's promise to leave that interest to the plaintiff, it would be unconscionable for the defendants to deny the interest thereby created.

Sufficient memorandum

235 I am not satisfied that Marjorie's two 1996 wills constitute a sufficient memorandum so as to satisfy the requirements of s 126 of the *Instruments Act 1958*. Primarily, this is because, as the defendants submitted, those wills do not evidence any agreement at all. Rather, they evidence a gift from Marjorie to the plaintiff. They do not refer to that gift as being pursuant to an agreement, and nor do they

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205 Ibid 296.
206 *Property Law Act 1958*, s 53.
207 *Instruments Act 1958*, s 128.
208 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 297.
209 (1937) 57 CLR 666, 690 (Dixon J).

even refer to the fact of a half interest in the Alfred Street property being given by Robert to Marjorie.

236 Whether a written document constitutes a sufficient memorandum will be a question of fact in each case, relying on the words of the document and the agreement said to be alleged. Nevertheless, to hold in the present circumstances that the two wills, without reference to the existence of the agreement or the consideration for the agreement, constitute a sufficient memorandum would be to ignore an entire history of decided cases requiring more than merely the wills alone.

Part performance

237 I was, and remain, somewhat puzzled about the manner in which part performance was argued by the plaintiff, and responded to by the defendant, at trial. A partial explanation may be that, the *Statute of Frauds* only having been raised by the defendants by way of the late amendment to the defence, the plaintiff did not in fact plead the acts of part performance relied upon and so proper consideration was not given to the principles. Whatever the explanation may be, I consider the authorities are entirely plain that it is Robert's conduct, as the party seeking to rely on an agreement that does not comply with s 4 of the *Statute of Frauds*, that is relevant in determining whether the contract has been partly performed.

238 In *Maddison v Alderson*,[210] the defendant alleged that, in exchange for her serving as his housekeeper, he would make a will leaving her a life estate in the land. The deceased did in fact make such a will, but it was not properly executed. The defendant took possession of the title deeds to the property and was sued by the deceased's brother, who was entitled on an intestacy to the property. The defendant pleaded the agreement by defence, and argued that as she had performed her side of the bargain the *Statute of Frauds* did not apply.

239 On appeal to the House of Lords, the Lord Chancellor explained that:

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210 (1880) 5 Ex D 293.

> in a suit founded on such part performance, the defendant is really "charged' upon the equities resulting from the acts done in execution of the contract. … If such equities were excluded, injustice of a kind of which the statute cannot be thought to have had in contemplation would follow.[211]

240 The House of Lords found that the housekeeper's conduct was not in itself evidence of a contract, because it was explicable, without supposing any contract, and because, if it was a contract to be accepted by conduct, her alleged acts of part performance preceded the formation of the contract.

241 The very case relied upon by the defendants, *Thwaites v Ryan*, makes it unequivocally clear that it is the party seeking to rely on the agreement who must have sufficiently partly performed.[212]

242 As far back as *Lord Walpole v Lord Orford*, the Solicitor-General argued that the contract had not just been partly performed, but in fact had been wholly performed by Horatio,[213] who had executed a will pursuant to the agreement and died a short time thereafter. That argument was not considered by Lord Loughborough, who mentioned the *Statute of Frauds* only in passing, having already concluded that a legally binding agreement had not been established. The doctrine was mentioned tantalisingly by Gummow and Hayne JJ in *Barns v Barns*,[214] who did not go on to provide any guidance on how it might apply.

243 Robert's conduct in the present case is more readily explicable by reference to the mutual wills agreement pleaded by the plaintiff. The Alfred Street property was, from 1949, registered by way of a tenancy in common, and left by Charles equally between Marjorie and Robert. Robert otherwise left his property to the plaintiff. Robert's 1996 will is executed in terms that substantially mirror Marjorie's February 1996 will, and is more readily explicable if there was an agreement in place between Robert and Marjorie that their respective estates were to continue down each line of the family, rather than being intermingled. If Robert had executed that will without

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211 (1883) 8 App Cas 467, 475.
212 [1984] VR 65.
213 *Lord Walpole v Lord Orford* (1797) (1797) 3 Ves Jun 402; 30 ER 1076, 1081.
214 *Barns v Barns* (2003) 214 CLR 169, 196.

an agreement being in place, knowing that he was on his deathbed, that could only be explained if he wished gratuitously to benefit Marjorie's side of the family without protecting his daughter's interest. The better, and more probable, explanation is that he was acting under an agreement that protected Marjorie and Keith's residence during their lifetimes, and protected his daughter's share of his estate once Marjorie and Keith passed away.

244 If am wrong in finding that it is Robert's conduct, not Marjorie's conduct, that is relevant, I consider that Marjorie's conduct only strengthens my finding that the contract has been partly performed. Marjorie not only executed a will that mirrored Robert's, but she did so at the same time as Robert, in circumstances where she had not otherwise made plans to execute a will, and again executed a will with a similar clause a short time after Robert's death. The most probable explanation of that conduct, considered objectively, is not that she did so gratuitously to benefit Robert, who was on his deathbed, and the plaintiff, but rather that she did so in performing her side of an agreement that ensured she and Keith could remain in the family home until their deaths.

245 Furthermore, in my view, Robert has not merely partly performed the contract; in executing his February 1996 will leaving a half interest in the Alfred Street property to Marjorie, and dying shortly thereafter with that will unrevoked, he has wholly performed his side of the bargain. To my mind there could not be a more complete example of part performance than that. Robert's performance is not only complete, but it is irreversibly so — having died, he can never choose to leave his interest in the Alfred Street property another way. Robert has done everything necessary for Marjorie to obtain the full benefit of their agreement, and Marjorie, having received and accepted that benefit, cannot now rely upon the *Statute of Frauds* to defeat Robert's interest in the agreement.

The principles of proprietary estoppel

246 In *Sykes v Equity Trustees*,[215] Warren J considered the application of the principles of estoppel in the context of an alleged mutual wills agreement in circumstances where the plaintiff was self-represented. Her Honour was not satisfied that relief on the basis of equitable estoppel could be made out. Her Honour adopted[216] the principles set out by Brennan J in *Waltons Stores (Interstate) Ltd v Maher*,[217] where his Honour said:

> A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction of the promisor were not to fulfil the promise.[218]

247 In *Harrison v Harrison*,[219] Kaye J considered the principles of proprietary estoppel in the context of representations to leave property by will. After observing that it was not necessary to dwell on the principles at length, his Honour noted that, although there have been some suggestions that the principles of common law estoppel, promissory estoppel and proprietary estoppel should now be combined, that question has not yet been settled. Insofar as a distinction remains, his Honour identified two differences:

> First, in the case of promissory estoppel, the relief fashioned by the court is principally directed to redressing the detriment arising from the change of position made by the promissor in reliance on the promise. On the other hand, where a case of proprietary estoppel is made out, the promisee is prima facie entitled to have the promissor held to the promise. Secondly, while, as I have stated, it is still an open question, whether the doctrine of promissory estoppel constitutes a foundation of legal rights independently of any other cause of action, on the other hand, where the elements of proprietary estoppel are made out, a court of equity will intervene, without considering whether the estoppel itself is an adjunct to another established cause of action.[220]

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215 [1999] VSC 218.
216 Ibid [33].
217 (1998) 164 CLR 387.
218 Ibid 424.
219 [2011] VSC 459.
220 Ibid [370] (citations omitted).

248 Finally, his Honour identified the following requirements that the plaintiff must establish,[221] which I have adapted to the facts of the present case:

(a) That Marjorie made to Robert a promise that she would confer on the plaintiff an interest in property.

(b) That Robert acted in reliance on that promise in abstaining from making a will in which he devised to the plaintiff his interest in the Alfred Street property, and in making a will in which he devised to Marjorie his interest in the Alfred Street property and thereafter refrained from revoking such a will.

(c) Robert acted reasonably in so relying on the promise made to him by Marjorie.

(d) Marjorie knew or intended that Robert would rely on Marjorie's promise and would thereby act in the manner referred to above.

(e) That Robert has suffered detriment as a consequence of Marjorie's failure to adhere to her promise.

249 That formulation is reflected in the plaintiff's pleaded claim in paragraphs [36]–[41] of the amended originating motion.

250 Any alleged representation must be in clear terms before it can found an estoppel.[222]

251 I note that, in the proprietary estoppel cases of which I am aware, the defendant must represent that they will confer an interest in property on the person claiming the estoppel, and I know of no case where the representation was to confer a property interest on a third party. Nevertheless, no objection to that form of estoppel was taken by the defendants at trial.

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221 Ibid [371].

222 *Legione v Hateley* (1983) 152 CLR 406.

Has the first estoppel been established?

252 I have already decided that, on or about 8 February 1996, Marjorie made a promise to Robert.[223] The content of this promise was that, if Robert devised his interest in the Alfred Street property to her (assuming he predeceased her), she would devise the same interest to the plaintiff upon her death. This express promise was witnessed by Mr Starnawski who drafted the mutual wills for the siblings and possibly by the plaintiff herself.

253 I am satisfied that Robert devised his interest in the Alfred Street property to Marjorie in reliance on this promise. I accept the evidence contained in Mr Starnawski's file note that it was Robert's broad intention that the plaintiff would receive his share in the Alfred Street property. The question was the manner in which that disposition was to be effected: either by leaving his share to the plaintiff directly, or by leaving it to Marjorie, who would in turn leave the share to the plaintiff. In choosing the latter option, Robert exposed himself to the risk that Marjorie would not honour her promise to leave his share to the plaintiff by her will.

254 I consider that it was reasonable for Robert so to rely on Marjorie's promise to devise his share to the plaintiff. In the circumstances of the contemplated arrangement, Marjorie knew that Robert would rely on this promise, for, in the absence of such an assurance, Robert would have devised his share to the plaintiff directly. Marjorie's promise thereby induced Robert to act in the way that he did.

255 The relevant detriment is that which would flow from Marjorie's departure from her promise in reliance upon which Robert devised his interest in the Alfred Street property to her.[224] The detriment against which the law seeks to give protection in this case, if Marjorie were allowed to resile from her promise, is that Robert's half interest in the Alfred Street property would not pass to the plaintiff in accordance with his wishes.

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223 See above paragraph [202].

224 See *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.

256 In cases of proprietary estoppel, the prima facie relief will be that the promisor is held to her promise.[225] In the present circumstances, I see no reason why the relief should not be an entitlement to the enforcement of the promise. In this case, justice will not be done to the plaintiff by a remedy short of the enforcement of the promise to transfer to her Robert's interest in the Alfred Street property.

Is the plaintiff entitled to enforce the first estoppel?

257 The defendants submitted that the plaintiff is not entitled to bring any claim for proprietary estoppel which it is alleged Robert had, as any such claim was not transmissible to the plaintiff as the taker of his residuary estate. They say that the plaintiff does not have standing to bring a claim in estoppel given the nature of the remedy sought. The defendants claim that the estoppel was personal to Robert as the detriment suffered was the opportunity to make an alternative will, which is not a remedy available to a beneficiary,[226] and, the plaintiff does not fall within a 'class' of persons to whom the representation was made and thus cannot claim the benefit of estoppel.[227]

258 The plaintiffs, on the other hand, contend that, in circumstances where the defendants are not ready, willing and able to assert rights on behalf of Robert's estate, the plaintiff is entitled to bring the claim in estoppel in their place as the taker of the whole residuary estate under Robert's will.[228]

259 Marjorie was the executor appointed by Robert's will. She died on 27 January 2012. Her final will was dated 6 August 2001. The defendants are her instituted and proving executors to whom probate was granted on 23 March 2012. On this basis, pursuant to s 17 of the *Administration and Probate Act 1958* and the chain of representation therein created, the defendants are, resultantly, the executors of Robert's will dated 9 February 1996.

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225 *Harrison v Harrison* [2011] VSC 459, [370]. See *Giumelli v Giumelli* (1999) 196 CLR 101; *Sidhu v Van Dyke* (2014) 251 CLR 505.

226 *Re Atkinson* [1971] VR 613.

227 *Mackley v Nutting* [1949] 2 KB 55; *Whitmore v Lambert* [1955] 2 All ER 147.

228 *Re Atkinson* [1971] VR 613.

260 The plaintiff was the residuary beneficiary of Robert's will. The defendants, as executors of Robert's final will, have acted inconsistently in denying the plaintiff's claim to enforce the promise. Executors must be ready, willing and able to assert legal rights on behalf of Robert's estate and, in failing to do so, the plaintiff (as the only beneficiary remaining and one who is adversely affected) has standing to bring the claim in their place.[229] Accordingly, the defendants are estopped from denying the agreement between Robert and Marjorie and, as executors of Marjorie's estate, they must give effect to the expectation that was created in Robert by Marjorie's promise and transfer the interest in the Alfred Street property to the plaintiff.

Has the second estoppel been established?

261 The plaintiff further or alternatively contends that she can rely on the representation made out by Marjorie to her that she would devise the interest in the Alfred Street property to her if Robert executed and did not revoke a will in which he devised to Marjorie his interest in the Alfred Street property.

262 As outlined above, the essential elements must be satisfied for a claim in estoppel to be made and I again adapt these principles to the facts of the case:

(a) That Marjorie made a promise to the plaintiff that she would devise Robert's interest in the Alfred Street property to her if her father Robert executed and did not revoke a will in which he devised his interest in the Alfred Street property to Marjorie.

(b) That the plaintiff acted in reliance on that promise in refraining from asking her father to make another will to devise his interest in the Alfred Street property to her instead of Marjorie and/or abstaining from bringing a Part IV claim against her father's estate after Marjorie was granted probate of Robert's will.

(c) That the plaintiff acted reasonably in relying on the promise made to her by Marjorie.

(d) That Marjorie knew or intended that the plaintiff would rely on her promise and would thereby act in the manner referred to above.

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229 Ibid.

(e) That the plaintiff suffered a detriment as a consequence of Marjorie's failure to adhere to her promise.

263 The solicitor's evidence backs up the fact that a representation was made regarding the transfer of the proprietary interest; however, it is not clear if this representation was made while the plaintiff was in the room.

264 The plaintiff's original application contends that Robert left his interest in the property to the plaintiff but gave Marjorie and her husband a life interest. Given her difficulties in remembering the content of the promise (if any) made to her by Marjorie, it was not reasonable of her to rely on any supposed promise made to her.

265 The plaintiff was not a party to the agreement so it would not be reasonable for her to rely on any representation that Marjorie made to her, if such a representation were made to the plaintiff directly.

266 It is difficult to establish that any detriment was suffered by the plaintiff in reliance on the alleged promise made by Marjorie to her. The plaintiff contends that she suffered a detriment in that she did not have the opportunity to ask her father to change his will and/or she did not have the opportunity to bring a claim for further provision under the Part IV of the *Administration and Probate Act 1958*. This detriment is hypothetical in the sense that the Court cannot speculate on what the outcome would have been had she brought a claim as any potential claim that would have been made has not been adjudicated on the merits.

267 Accordingly, the plaintiff's claim for the second estoppel fails.

The plaintiff's claim under Part IV

268 The plaintiff pleads in the alternative that, having regard to the acts, facts, matters and circumstances set out in the preceding claims and the matters deposed to her in affidavit sworn 26 July 2013, she is a person to whom Marjorie had a responsibility to make adequate provision for within the meaning of s 91 of the *Administration and Probate Act 1958* and that she failed to do so. In essence, the

plaintiff claims that adequate provision would constitute the transfer of Robert's interest in the Alfred Street property in line with the promise that Marjorie made to Robert; this promise forming the basis of the moral duty that Marjorie supposedly owes to the plaintiff. The plaintiff deposes as to her supposed 'need' for proper maintenance on the basis that she still supports her two children who live at home with her and her current husband as well as the fact that she is not employed and does home duties.

269 The defendants claims that the plaintiff is not entitled to recover under this provision. They plead this on the basis that the plaintiff is the niece of the deceased, that she was not dependent on the deceased and that she has not demonstrated any particular financial need.

The principles to be considered in an application under Part IV

270 As in any application for further provision pursuant to s 91 of the *Administration and Probate Act 1958*, the Court must determine three questions:

(a) Did the deceased, at the date of her death, have a responsibility to make provision for the proper maintenance and support of the plaintiffs?

(b) If so, did the deceased, in the distribution of her estate effected by her will, make adequate provision for the proper maintenance and support of the plaintiffs?

(c) If not, what is the amount of provision (if any) that the Court should order?

271 There is a breadth of case law that deals with applications under s 91 of the *Administration and Probate Act 1958*.[230] While the plaintiff did not rely on any cases in the amended originating motion, in reality all precedents are but examples of how the courts have dealt with the issue of further provision in pt IV claims in the context of the well-known principles applicable in this jurisdiction having regard to the facts and circumstances of each individual case. Most successful claims are brought by those in a 'standard' close familial relationship; for example, a child, a domestic partner or step-child. It is a rare case that non-familial applicants are successful in

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[230] See, eg, *Collicoat v McMillan* [1999] 3 VR 803; *Blair v Blair* [2004] VSCA 149; *Lee v Hearn* [2005] VSCA 127; *Forsyth v Sinclair* [2010] VSCA 250; *Keating v Jensen* [2014] VSC 433.

their claims; success is often founded on proving an *in loco parentis* relationship between the deceased and the plaintiff or establishing that there was some sort of dependency on the deceased.

272 The plaintiff is the adopted niece of the deceased. There are two recent cases that deal with applicants who were a niece or nephew of the deceased. In *Iwasivka v State Trustees Limited*,[231] Hansen J found that the deceased did have a responsibility to make provision for the applicant, who was a niece of the deceased by marriage. His Honour considered it significant that the applicant had lived in the household of the deceased and the deceased's husband during her formative years and was treated as their child.[232] The familial nature of the relationship between the deceased and the applicant continued into the applicant's adult years and all parties acknowledged the nature of the relationship publicly.[233] The recognition of an *in loco parentis* relationship was coupled with the fact that the applicant was in financial need and that there were no competing claims on the intestate estate as the deceased was childless.[234] Thus, the Court found that the deceased did have a moral responsibility to provide for the applicant. Conversely, in *Jackson v Newns*,[235] Mukhtar AsJ found that, although the deceased and his nephew had formed a strong bond during the nephew's childhood and the nephew had spent a significant amount of time with the deceased, this did not mean that the deceased had a moral obligation to provide for him. His Honour characterised the relationship as that of a mentor rather than a de-facto parent and noted that the law 'does not transform a great relationship into … a moral responsibility to provide'.[236]

273 At the time of this application, the relevant provision did not include a list of or classes of eligible applicants, so the Court must determine the eligibility of applicants on a case-by-case basis. In doing so, the Court must have regard to the 12 matters set out in s 91(4) of the *Administration and Probate Act 1958*. These matters are

231 [2005] VSC 323.
232 Ibid [22]–[30].
233 Ibid [42], [44], [69]–[75].
234 Ibid [78]–[83].
235 [2011] VSC 32.
236 Ibid [59].

also used by the Court to determine the quantum of any further provision to be made, if any.

The factors the Court is required to consider under Part IV

(e) Any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship

274 The plaintiff is Marjorie's adopted niece, although there is no suggestion that the fact of the plaintiff's adoption has any bearing on Marjorie's moral responsibilities. The defendants submitted, properly, that the mere fact of being a niece is not enough to create an obligation to provide.[237] Some form of dependency,[238] or a relationship akin to mother and daughter, would be necessary if the plaintiff were to rely only upon the nature of the relationship.[239]

275 Their relationship during the plaintiff's childhood was necessarily much closer than the ordinary relationship between an aunt and a niece, because they lived in the same house. There is conflicting evidence as to whether, following the death of the plaintiff's mother in 1973, Marjorie filled a surrogate maternal role in any sense. In any case, the plaintiff left home in 1985, nearly 30 years ago, and their relationship since then has not been any closer than that of aunt and niece. If anything, it appears that since Robert's death, and certainly since the resolution of their dispute in respect of the Brighton properties, they have not been close.

(f) Any obligations or responsibilities of the deceased's person to the applicant, any other applicant and the beneficiaries of the estate

276 Marjorie did not have any obligations or responsibilities towards the plaintiff, and the only other obligations are to her children and grandchildren. As her children are adults, her obligations towards them are limited save for the ordinary obligations and responsibilities carried in a parental relationship, and the primary persons responsible for her grandchildren are their parents.

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237 Ibid; *Corbett v State Trustees Ltd* [2010] VSC 481, [78].

238 *Morgan v Public Trustee* [1999] NSWSC 1112; *Pata v Vumbaca* [2002] NSWSC 167.

239 *Iwasika v State Trustees* [2005] VSC 323.

(g) The size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject

277 The only asset in the estate is the Alfred Street property, valued at $1,500,000. The estate is unencumbered by any charges or liabilities.

(h) The financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future

278 The defendants characterised the plaintiff's financial position as 'relatively comfortable'. The plaintiff owns the house that she lives in with her current husband. While it is encumbered by a mortgage, she has significant equity in the property. She is currently engaged in house duties and there is no evidence that she has sought other employment; it appears that she relies on the income of her second husband as well as the distributions received under her father's will. The plaintiff and her husband support two adult children; however, the children are both of an age to seek full-time employment and become independent of their parents. The plaintiff does not describe herself as being in a situation of financial need in the manner that the Court has previously found to be a relevant factor in determining whether the deceased had a moral obligation to make provision to the applicant. For example, in *Iwasika v State Trustees*, the applicant's circumstances were that she had poor health, no significant assets or savings, relied on a welfare benefit and had little chance of being able to improve her position by, for example, finding employment.[240]

279 Marjorie's children, the executors, did not put their own circumstances in issue.

(i) Any physical, mental or intellectual disability of any applicant or any beneficiary of the estate

280 The plaintiff and the beneficiaries of the estate do not have any relevant disabilities.

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240 *Iwasika v State Trustees Limited* [2005 VSC 323, [79]–[82].

(j) The age of the applicant

281 The plaintiff is 52 years old and has been independent for some 30 years.

(k) Any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased

282 There is no evidence to suggest that the plaintiff has personally contributed to building up the estate or to Marjorie or Marjorie's family's welfare.

(l) Any benefits previously given by the deceased person to any applicant or to any beneficiary

283 There is no evidence to suggest that there were any significant benefits distributed to the applicant or the beneficiaries of the deceased's will during her lifetime save for the distributions from properties held as tenants in common by Robert and Marjorie that were sold and distributed according to Robert's will.

(m) Whether the applicant was being maintained by the deceased person before that person's death, either wholly or partly, and, where the court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility

284 After she left home in 1985, the plaintiff has not been maintained by Marjorie.

(n) The liability of any other person to maintain the applicant

285 The plaintiff is currently married to Phil Scannell, her second husband. The plaintiff does home duties and thus likely relies on him to some extent for day-to-day expenses although the property in which they live is registered in her name alone.

(o) The character and conduct of the applicant or any other person

286 Nothing in the character or conduct of the plaintiff was suggested to be either disentitling conduct or conduct which would entitle her to further provision.

(p) Any other matter the Court considers relevant

287 As the plaintiff submitted, under this category, the Court is entitled to exercise:

> a wide discretion to look beyond the specific statutory matters which are set out in the immediately preceding sub-paragraphs for the purpose of determining if the jurisdictional requirement has been satisfied and, where relevant, bringing into consideration the testator's moral obligation to the claimant.[241]

288 Amongst the factors that the Court may consider under this heading include the source of the assets in Marjorie's estate. Although subsection (k) is limited to the plaintiff's contribution to Marjorie's estate, under subsection (p) the Court may consider that, because a half share in the Alfred Street property passed to Marjorie from Robert, Marjorie's moral obligation to the plaintiff is enhanced.[242] The genesis of the assets in the estate must be approached 'holistically and historically'.[243]

289 The plaintiff submitted that such an approach should be followed in the present case, arguing that Marjorie's estate comprised a full freehold interest in the Alfred Street property only because Robert had passed to her the other half under his will, effectively at the expense of his own daughter. Moreover, the property had been in the family since at least the 1940s, and was the only asset of the 'family' estate not to be divided jointly between the family lines. That lineage is significant. Marjorie having exhausted her own personal use of that property on her death, she had a moral responsibility to return it to Robert's line of the family, being the plaintiff.

290 The plaintiff also submitted that under this heading Robert's belief that the property would ultimately pass to the plaintiff creates or contributes towards establishing a moral responsibility in Marjorie to provide that interest to the plaintiff. To my mind, this submission must be treated with care. As is apparent from the preceding analysis, there are in law detailed existing principles for the enforcement of agreements and representations, and I would be hesitant to conclude that the testator's family maintenance regime could have been intended to supplant those principles where agreements or representations binding only in a moral sense could be enforced notwithstanding their legal shortcomings.

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241 *Blair v Blair* [2004] VSCA 149, [13].
242 See *McKenzie v Topp* [2004] VSC 90, [57]–[58].
243 *James v Day* [2004] VSC 290, [35].

291 The defendants accepted that a promise to leave property by will may be relevant to Marjorie's moral responsibilities, but submitted that it was not sufficient,[244] and that it is necessary to establish a need for further provision to enliven the moral responsibilities entailed in the promise.[245]

Has the plaintiff's claim under Part IV been established?

292 The resolution of the plaintiff's claim must necessarily turn on the same evidence considered earlier in respect of the mutual wills agreement and the two estoppels. Without that agreement, and without the fact of Robert's half interest in the Alfred Street property passing to Marjorie, it is abundantly clear that, on the ordinary application of the factors set out in s 91(e)–(o), the plaintiff could have no claim. The relationship between Marjorie, as the plaintiff's aunt, and the plaintiff does not justify the recognition of a moral obligation to provide. That relationship is no closer, perhaps less close, than ordinary relationships between aunt and niece; indeed, it was markedly distant in recent years. There was no evidence that the plaintiff depended on her aunt in any way.

293 Further, it only becomes necessary for the Court to consider the claim under Part IV if the plaintiff has failed under the mutual wills agreement claim and each of the two estoppel claims. That is also significant. Were those claims to fail on the basis of a lack of proper evidence, for example, that may have a different bearing on the Part IV claim than if those claims were to fail on purely legal bases, such as the application of the *Statute of Frauds* or the inability of the plaintiff to enforce the first estoppel. I venture that observation only to demonstrate that, in considering a claim in the further alternative, the task of a trial judge can become highly speculative.

294 Notwithstanding that observation, I consider that, should it be necessary to determine, the plaintiff's claim under Part IV should fail. Insofar as the plaintiff submitted that the lineage of the property might establish her claim, I agree that it may be relevant, but I do not agree that it takes Marjorie's claim to a moral

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244 Relying upon *In re Goodchild* [1997] All ER 613.
245 *MacEwan Shaw v Shaw* [2003] VSC 218, [38].

obligation. This is not a case where the whole of Robert's estate was left to Marjorie, and the plaintiff was left to wait, penniless, for Marjorie to die. The plaintiff received nearly the whole of Robert's estate, of which his half interest in the Alfred Street property formed only a small part. She was not excluded from her 'natural inheritance' insofar as such a concept exists. Rather, a small part of his estate, the part in which Marjorie lived, was given to Marjorie rather than the plaintiff. The fact of that gift in the context of the family history does not import a moral obligation under Part IV of the *Administration and Probate Act 1958* on Marjorie to pass a half interest in the Alfred Street property to the plaintiff.

295 I am not satisfied that the existence of agreement or representation to leave Robert's interest to the plaintiff by will can establish a moral responsibility on the part of Marjorie to provide for the plaintiff. The existence of a promise of this nature, if proved, may indicate what provision might be adequate in the circumstances. Such a promise might, in certain circumstances, suggest the kind of relationship that might justify an order for further provision. It cannot of itself, however, support the existence of a responsibility to make further provision. That responsibility must rest on the nature of the relationship between the deceased and the claimant and the claimant's need, not upon the existence of a promise not honoured or an assurance departed from.

Conclusion, orders, and costs

296 For the reasons I have given, I find in favour of the plaintiff's claim on the basis of the mutual wills agreement, or, in the alternative, the first estoppel. Should it be necessary to consider, I would find against the plaintiff's claim on the basis of the second estoppel and under Part IV.

297 Accordingly, I declare that the defendants as executors of the will of the deceased hold the Alfred Street property on a constructive trust as to one of two equal undivided shares as tenants in common for the plaintiff beneficially. I order that the trust so declared vest and that the defendants do all such things and execute all such

documents as are necessary to transfer to the plaintiff one of two equal undivided shares as tenant in common in the Alfred Street property.

298 I will hear the parties as to the form of those orders and also as to the costs of the proceeding, including if necessary the right of indemnity of the defendants as trustees of the estate of the deceased. Subject to anything the parties wish to say, I order that the parties agree and the plaintiff prepare a form of order to be sent to my associate by 18 June 2015. The plaintiff is to file written submissions as to the costs of the proceeding by 25 June 2015, the defendants are to file written submissions as to the costs of the proceeding by 2 July 2015, and the matter be returnable in the Probate List on 17 July 2015 for hearing of argument. Should there be disagreement as to the form of order that disagreement should also be addressed in the written submissions to be filed by each of the parties.
