SUPREME COURT OF QUEENSLAND

CITATION:	*Bryna Pty Ltd & Anor v Wallerstein; Wallerstein v Bryna Pty Ltd & Ors* [2014] QSC 29
PARTIES:	**In proceeding 5338/2007:** **BRYNA PTY LTD** ACN 009 988 292 (first plaintiff/first defendant by counterclaim) **NEW IMAGE PHOTOGRAPHICS PTY LTD** ACN 010 823 042 (second plaintiff/second defendant by counterclaim) **v** **JOHN WALLERSTEIN** (defendant/plaintiff by counterclaim) **In proceeding 2150/2009:** **JOHN WALLERSTEIN** (plaintiff) **v** **BRYNA PTY LTD** ACN 009 988 292 (first defendant) **NEW IMAGE PHOTOGRAPHICS PTY LTD** ACN 010 823 042 (second defendant) **BRYAN CHARLES BEDINGTON ON HIS BEHALF AND AS EXECUTOR AND TRUSTEE OF THE WILL OF WILLAMINA BEDINGTON, DECEASED** (third defendant)
FILE NOS:	SC No 5338 of 2007 SC No 2150 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 March 2014
DELIVERED AT:	Brisbane
HEARING DATES:	18-22 November 2013; 25-29 November 2013; 2 December 2013
JUDGE:	Chief Justice
ORDERS:	**1. I publish this record of my findings.** **2. I adjourn the further hearing of the proceedings to a date to be fixed.** **3. If the parties seek any further necessary finding of fact, then that should be done via e-mail to my**

Associate.

4. **In the event that the parties agree on the judgments resulting from these findings and any additional findings, draft judgments should be e-mailed to my Associate by both Counsel, and I will make those judgments without the need for further appearances, and notify the parties accordingly.**
5. **If the parties do not agree on the judgments, the matter will be relisted for further consideration.**
6. **Costs are reserved.**

CATCHWORDS: ESTOPPEL – ESTOPPEL BY CONDUCT – PROPRIETARY ESTOPPEL – the plaintiff in the second proceeding ("Wallerstein") was employed by the first ("Bryna") and second ("New Image") defendant companies in various capacities over several decades – Wallerstein's mother ("Ina") was in a de facto relationship with and subsequently married the third defendant ("Bedington"), who controlled Bryna and New Image – Ina worked for and was at certain times a director of Bryna – the shareholdings in Bryna changed over the years, including the issue of a then one-third share to Ina and a later issue of 52 shares to Bedington with Ina's consent – the object of the issue of the further 52 shares was to strengthen Bedington's control of the company – Ina wanted to avoid her share of Bryna going to Wallerstein's wife, with whom she had a difficult relationship – Ina left her share in Bryna by will to Wallerstein – Bedington had left two-fifths of his Bryna shares in an earlier will to Wallerstein and Wallerstein's children, but subsequently excluded Wallerstein – Ina told Bedington he could vary his will as circumstances changed – Ina created certain documents to bolster Bedington's position should the share issues be challenged in future – Bedington controlled Bryna at all times and regarded it as his business, having established it before he had met Ina – whether, by their conduct, Ina and Bedington intentionally engendered in Wallerstein an expectation that he would succeed to a one-half interest in Bryna by working for Bryna rather than completing his tertiary studies or working elsewhere, having regard to his status as Ina's only child, his having provided bank guarantees for Bryna, the adequacy of his remuneration and other matters

CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – AUTHORITY OF AGENTS – CONSTRUCTION AND EXTENT OF AUTHORITY – AUTHORITY CREATED BY OTHER MEANS – OTHER CASES – Bryna and New Image alleged that Wallerstein, who acted as financial controller, had appropriated company money for his own benefit without authority – Wallerstein alleged that a series of conversations with Bedington and Ina had authorised the transactions, including the payment of

private expenses such as school fees and overseas holidays – the records of certain transactions, such as deposits to his loan account or reimbursement claims, were limited to entries made by Wallerstein with no independent supporting documentation – whether Wallerstein's receipt and use of company funds to pay private expenses was authorised – whether the reimbursements and loan account repayments alleged by Wallerstein were supported by the evidence

EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATION OR BREACH – WHAT CONSTITUTES – Wallerstein alleged that his employment with Bryna and/or New Image was wrongfully terminated by Bedington – Wallerstein had spoken of an intention to leave the company in any event – there were conflicting accounts of the events preceding Wallerstein's departure – whether Wallerstein was constructively dismissed, dismissed for cause due to a justifying ground or left of his own accord

Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10, considered
Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359; [1931] ALR 194, considered
Western Excavating ECC Ltd v Sharp [1978] 1 QB 761, cited

COUNSEL: P Looney QC, with P J McCafferty, for the plaintiffs/defendants
C J Fitzpatrick for the defendant/plaintiff

SOLICITORS: P M Lee & Co for the plaintiffs/defendants
Aitken Whyte Lawyers for the defendant/plaintiff

[1] **CHIEF JUSTICE:** These two proceedings have been heard together on the e-trial basis. The claims and cross-claims arise out of Mr Wallerstein's relationship with the companies Bryna Pty Ltd ("Bryna") and New Image Photographics Pty Ltd ("New Image").

Uncontroversial factual matters

[2] Bryna was incorporated on 9 February 1977. Mr Bedington was, and remains, its permanent governing director. Another director was Williamina Downs ("Ina"). Ina resigned as a director on 23 June 1987. For the previous five years, she had been the accountant and company secretary of Bryna, which traded as New Image Photographics and Art. Ina then moved into other employment. Ina died on 16 October 1996. She had been diagnosed with incurable bone cancer the preceding December.

[3] On 1 July 1988 Bryna's business was transferred to New Image. New Image became the trading entity. Mr Bedington and Mr Wallerstein became directors of New Image, and each held one share in New Image, although not beneficially. (Bryna is now the legal and beneficial owner of those shares.) From 1982, Mr Wallerstein was a full-time employee of the business, progressing from office manager and group computer programmer to the position of financial controller.

[4] Mr Wallerstein was Ina's son, born on 3 July 1961 when Ina was in a separate earlier relationship. Ina and Mr Bedington were in a subsequent de facto relationship from December 1974 until August 1996 when they married. Ina had returned to work part-time for New Image in 1994. She was reappointed as a director of Bryna on 28 March 1996.

[5] There were initially two issued shares in Bryna. Mr Bedington owned one and the other was held for him by another company. That company later transferred the share to him, on 17 November 1998. On 24 May 1982, a third share was issued, to Ina.

[6] Mr Wallerstein became a director of Bryna on 23 June 1987, replacing Ina upon her resignation. Ina was reappointed as a director of Bryna on 28 March 1996. Mr Wallerstein ceased being a director of both companies on 7 July 2006.

[7] In the afternoon of 26 April 1996, a meeting of Bryna directors, attended by Mr Bedington and Ina, resolved to issue a further 50 shares to Mr Bedington. They were allotted that day and later paid for ($50). Mr Bedington paid the money to Mr Wallerstein. The resolution was effectively confirmed and endorsed at a further meeting of directors on 17 May 1996, and Ina endorsed the minutes of that meeting: "This share transaction is made with my full knowledge and consent".

[8] This meant that Mr Bedington's shareholding rose to 52, and Ina held one share.

[9] Mr Bedington gave evidence that in discussion with Ina before the share issue, and when he and Ina were aware of the terminal cancer diagnosis, it was his suggestion to Ina that he take an additional 50 shares, and that Ina bequeath her share to Mr Wallerstein. He said Ina wanted to be appointed as director, which occurred on 28 March 1996, with Mr Wallerstein also present, because she wanted to be involved in the issue of the 50 shares to Mr Bedington. Ina indicated to Mr Bedington, after

the share issue, that she wanted him to retain control of the company, and that if having succeeded to his share Mr Wallerstein wished to sell it, the company would be in a position to buy it back for approximately $170,000 (reflecting Ina's assessment of the value of one fifty-third share in the company). The matter had proceeded on the basis, expressed by Mr Bedington, that Bryna needed two directors and two shareholders. That related to Ina's initially expressed view that she should transfer her share to Mr Bedington, which would have left him as sole shareholder. The object of the additional share issue was to cement Mr Bedington's ownership and control as Ina approached the end of her life.

[10] Mrs Jenny Power gave evidence, which I accepted, that Ina said she had wanted to avoid her share going to Mr Wallerstein's wife Julie, if something happened to Mr Wallerstein, and that she did not want Julie to end up with a controlling interest in the company. That was why her shareholding had been diluted in 1996.

[11] Mr Wallerstein said that in April 1996 Ina told him of the share issue, explaining that it was done to protect the business assets in case Julie and he separated, so that the assets would not have to be sold "to pay out Julie's entitlement". I accept this occurred. I have difficulty concluding one way or the other whether Mr Wallerstein was present at the meeting of 28 March when Ina was appointed a director, or invited to the meeting of 26 April when the share issue was resolved upon. The true position does not I think bear critically or even materially upon the resolution of the case.

[12] Ina subsequently on 9 June 1996 signed a document generated by Biggs and Biggs (solicitors) and told Mr Bedington to the effect that she did so on the basis it might one day bolster his position were the share issue challenged. She gave the document to him for safekeeping. This document read:

> "TO WHOM IT MAY CONCERN
>
> Should there ever arise a question as to the ownership and disposition of my shares in the corporation Bryna Pty Ltd I make the following explanatory comments:-
>
> The company has been built up by the efforts of Bryan Bedington and myself. It is our vision and efforts that have made the company what it is. It is my desire that the company be managed and controlled by those who built the company as long as they are able to

> do so and that they share in the profits generated by the business of the company.
>
> It is my further desire that there be continuity of management and control of the company with one of the founding directors continuing in the position of manager during any period of change of shareholding.
>
> In accord with these desires, I have during my lifetime consented to the issue of a majority shareholding in Bryna Pty Ltd to Bryan Bedington. My remaining share in the company will pass according to the provisions of my Will. I declare that these share issues and provision have been made by me as a result of free personal decision and have not been made under any duress nor has any undue influence been brought to bear upon me to make such transfers and provision."

[13] Mr Bedington's evidence was that he at all times controlled the business. He established it before forming any relationship with Ina. Prior to the incorporation of Bryna, he conducted the business as a sole trader. He said that he regarded it as his business, being developed by him and Ina as his partner in order to build up a "nest egg" for retirement. He rejected a suggestion that it was a "family business". That is generally consistent with Ina's statement set out above. There is also the evidence of the in-house accountants, Mr Butterworth and Mr Fiechtner, which I accepted, confirming that vis-à-vis Mr Wallerstein, Mr Bedington was very much the person who controlled the operation. Mr Wallerstein confirmed in his evidence that it was Mr Bedington who made all strategic decisions: his business card described him as "Managing Director".

The credibility of Mr Bedington and Mr Wallerstein

[14] This is not a case where I found one credible and the other not credible. Each gave evidence in an apparently straight-forward manner. With minor exceptions, for example his denial of saying "This means you will get nothing" (see para [23]), I accepted Mr Bedington's evidence as honest and reliable. As will become apparent, my concern about aspects of Mr Wallerstein's evidence bore on its accuracy rather than its honesty. In the end, where there was divergence between the two bodies of evidence, I found the recollection of Mr Bedington to be the more reliable.

[15] I turn now to the first of the three categories of claim falling for determination.

The claim to a 50 per cent beneficial interest in the shares

[16] In proceeding 2150/2009, Mr Wallerstein claims a declaration that from 16 October 1996, the date of Ina's death, he became entitled to a 50 per cent beneficial interest in the issued shares in Bryna, with Mr Bedington being entitled to the other half; and a declaration that Mr Bedington and each of the companies hold in trust for Mr Wallerstein, one half of the profits of the New Image business from 5 December 2006 to judgment.

[17] Mr Wallerstein's interest in the shareholding crystallized on Ina's death. By her last will dated 26 September 1996, she left her share in Bryna to Mr Wallerstein, with comparatively small legacies to others. Her share in the company was her major asset.

[18] Mr Bedington executed a will on 19 September 1996. Under that will, 11 of his Bryna shares were to go to each of Mr Wallerstein and Mr Bedington's daughter Tamara (not a child of Ina), with 10 shares to each of the family friend and employee Susan Field, collectively Mr Bedington's grandchildren, and collectively Mr Wallerstein's children, being Ina's grandchildren. Allowing also for the provision as to residue, Mr Bedington contemplated a roughly equal five-way division of his estate.

[19] Mr Bedington's evidence was that he and Ina discussed the wills (after the share issue), Ina describing his as "a good starting point", and saying that as the years progressed, he could consider changing it, for example to exclude any grandchild who turned to drugs. Ina's relationship with Mr Wallerstein's wife Julie was less than uniformly good after Julie and her husband's separation in 1994. Mrs Anne Little, Mr Wallerstein's aunt, gave evidence which I accepted that Ina expressed concern over that separation, in relation to her access to the grandchildren if Julie went elsewhere, and as to Julie's gaining anything from the estate. On Mr Bedington's evidence, Ina was insistent that Mrs Wallerstein should not benefit from his estate or be employed in the company.

[20] Mr Wallerstein's claim to beneficial ownership of 50 per cent of the Bryna shares is based on an expectation (cf. *Giumelli v Giumelli* (1999) 196 CLR 101), alleged to arise – speaking for the moment very broadly (and incompletely) – from his being Ina's only son, their treatment of the business as a "family business", various

statements attributed to Ina including that the purpose of the additional share issue was to protect the business against any adverse property settlement claim which might be brought by Mrs Wallerstein in the event that the marriage broke down (it had been unstable during Ina's lifetime, including a separation in 1993-1994), and the substantial benefit allowed Mr Wallerstein and his family interests under Mr Bedington's will. (The claim was much more comprehensively advanced, as will appear from the extract from the pleading which I set out below.)

[21] In relation to the last of those factual matters, Mr Bedington's evidence was that while Mr Wallerstein was made aware of the additional share issue, he was not told of the content of Mr Bedington's will of 19 September 1996.

[22] On 7 September 2006, Mr Bedington made a new will. That will makes no provision for Mr Wallerstein. Mr Bedington said that he had changed his will in September 2006 because by then he knew that Mr Wallerstein "had taken significant amounts of money from the company", and the revised will was an interim measure until the issue about the taking of the money could be resolved.

[23] It is convenient to mention here that I accepted Julie Wallerstein's evidence that at a party in July 1996 Mr Bedington said to her, in the context of his engagement to marry Ina, "This means you will get nothing." It was an unpleasant thing to say. But I do not see any significance in it, relevant to the disposition of these claims, beyond its consistency with Ina's concern, communicated to Mr Bedington, that Julie should not benefit from the estate.

[24] I was prepared to accept that evidence notwithstanding her taxation deceit in 1992 and 1993 – lodging tax returns on the basis she was employed, when she was not, to reduce Mr Wallerstein's tax liability – a deception which she candidly admitted under cross-examination. I considered she was an open and straightforward witness.

The pleaded basis for equitable claim

[25] It is convenient to set out here those parts of the further amended statement of claim pleading the basis for this claim, albeit the extract I need quote is lengthy:

> "14. Ina knew that the plaintiff was dependent on his employment in the New Image business to support himself and his family, her grandchildren being the only other major

beneficiaries under her Will, apart from the plaintiff and the third defendant.

Particulars

A. Ina knew the plaintiff had dedicated his working life to the business of the first and second defendants.

B. Ina was aware that he had given up his university studies to work for the first and second defendants.

C. In her later stages of illness in 1996, Ina said words to the effect that she wished the plaintiff had had the opportunity to work in a corporate environment, believing the plaintiff would have been successful in a large organisation following his studies.

D. Ina knew that the Plaintiff did not derive income from other sources outside the business and that the Plaintiff did not seek employment outside the business.

15. On or about 17 May 1996, the third defendant knowing of Ina's illness, and desiring to protect the New Image business against the threat from the plaintiff's wife, caused 50 new shares in the first defendant to be allotted to him for a nominal consideration, the effect of which was, on the face of the first defendant's Share Register, to dilute Ina's interest in the first defendant from 50% to approximately 2% ('the new share allotment').

Particulars

The plaintiff repeats and relies on the particulars at paragraph 11 above.

16. After the new share allotment, the plaintiff's inheritance under Ina's Will was of no substantial worth. Prior to the new share allotment the inheritance was worth some millions of dollars.

Particulars

The worth of some millions of dollars is based on half the value of the first and second defendant's business.

17. Ina and the third defendant agreed, at a place currently unknown to the plaintiff, in contemplation of Ina's death, on or about 17 May 1996 and in consideration of Ina approving the new share allotment that the third defendant would appoint the plaintiff joint heir under the third defendant's

Will and would, following Ina's death, treat the plaintiff as if he (the plaintiff) had succeeded to Ina's equal beneficial interest in the first defendant.

18. Subsequently, the third defendant's Will dated 16 September 1996 did make the plaintiff and the Plaintiff's children his joint heir (together with the third defendant's daughter, her children and Susan Ann Field) and, following Ina's death until the events below, the plaintiff was afforded an approximately equal beneficial interest in the first defendant by the third defendant.

19. By reason of the following facts, matters and circumstances, the plaintiff had, and retains, a reasonable expectancy of succeeding to an equal beneficial interest in the first defendant.

Particulars

(a) The plaintiff was Ina's only child;

(b) From its inception and subsequently, throughout its operation, each of the third defendant and Ina described the New Image business (including in the presence and hearing of each other and the plaintiff) on a daily basis in discussions, meetings and communications between the plaintiff, Ina and/or the third defendant and in the context of discussing the business of the first and second defendants, as '*the business'*, '*our business'* or '*the family business*';

(c) In early 1995 the plaintiff, in conversation with Ina in the backyard of the plaintiff's Jimboomba residence, commented on the disparity in his (the plaintiff's) remuneration from employment by the first defendant compared to that of another of the first defendant's executives (Ian Rogers) to which Ina responded: '*I know it's hard but you know we always keep the money in the business … rewards come to those who wait*';

(d) Shortly after it occurred, Ina told the plaintiff that the sole purpose of the new share allotment was to protect the New Image business against the threat from the plaintiff's wife;

Particulars

The words used by Ina were to the effect that the sole purpose of the new share allotment was to protect the New Image business against the

consequences of an adverse property settlement claim directed to the business by the plaintiff's wife, in the event that there was a final separation occurring after the plaintiff had taken Ina's equal beneficial interest in the business.

(e) In or about 1996, Ina told the plaintiff that she had '*left everything*' to him;

Particulars

Ina said these words to the plaintiff just following 17 May 1996 at Ina's home at Kangaroo Point.

(f) From 16 September 1996 the plaintiff was a beneficiary under the third defendant's Will with an approximately half interest in the third defendant's estate pursuant to an agreement made on or about 17 May 1996 made between Ina and the third defendant in contemplation of her death.

20. Encouraged by, and acting on the faith of, each of the matters pleaded in paragraphs 19(a) to 19(e) hereof, the plaintiff acted to his detriment in aiding the establishment and expansion, of the New Image business.

Particulars

(a) The plaintiff devoted much of his life from 1982 until 2006 to such business, and

1. The plaintiff was unable to concentrate his time and efforts to his university studies, and as such, was not successful in some of the subjects he undertook in his final semester at University.

2. The plaintiff did not complete his university studies.

3. The plaintiff was unable to travel around Australia in 1988 with his wife (then de facto), Julie Wallerstein, but stayed to assist in running the first and second defendant's business.

4. The plaintiff was not able to pursue a career outside the first and second defendant's business or explore business opportunities with his wife.

(b) The plaintiff served the business, including *inter alia* in executive positions as its Financial Controller and Programmer, for a remuneration that was well below-market, and in fact less than that to which he was entitled under his agreed remuneration package:

Particulars

A. The plaintiff estimates he was paid at approximately 50% of market rate for the services provided by him.

B. The plaintiff's annual agreed remuneration period included:

1. Salary of between 48-53 weeks @ $1200 per week plus payment of 4 weeks' annual leave whether taken or not being a range $63,240 to $69,240 per annum.

2. Superannuation at 9% being $5,691 to $6,231 per annum.

3. Use of a motor vehicle (Holden Adventura AWD V8 or similar vehicle value of $25,000.

4. Personal benefits of 1 year of approximately $51,540 plus any income or other tax payable on such amounts. Such amount is calculated by reference to the average of the total transactions as admitted by the plaintiff on his loan account for the period (2002-2006 $257,700/5 year).

Year	**Amount**
2002	$17,271
2003	$9,629 plus $13,500 directors' fees
2004	$59,277
2005	$74,473
2006	$35,493

	Plus Somerville House payments and House Payments (referenced in the schedules of Supreme Court claim 5338 of 2007)

Particulars of agreement

C. In or about 1989, the third defendant told the plaintiff, and the plaintiff agreed, to run his personal costs and expenses and including those being incurred in the building of the plaintiff's house through the business.

D. At the business premises of the first and second defendants, in or about February 1998, the third defendant told the plaintiff and the plaintiff agreed, to draw such funds as was necessary to cover any personal costs he incurred on top of the salary paid to him and to record same and in a similar manner to the way the third defendant recorded his own personal expenses as those of the business.

(c) The plaintiff served as Director of the first and second defendants.

(d) The plaintiff pledged his own assets in order to benefit the business, including by signing personal guarantees for up to $2.1 million.

(e) By reason of his commitment to the business, the plaintiff was denied the opportunity of completing tertiary studies.

Particulars

A. In 1987 to 1988, as well as fulfilling the role of Head Office Manager, the plaintiff took on Ina's role in the business as Financial Accountant and Director of the first and second defendants.

B. In March 1988, on the resignation of Marie Jenkins, the businesses' computer

programmer, the plaintiff assumed that role.

C. Further, when Stuart Balfour's position was terminated, the plaintiff assumed his role in the lab as well as losing the assistance of Sandra Balfour who resigned, following the termination of her husband's position.

21. By reason of the plaintiff's contributions to it, as aforesaid, the New Image business:

(a) involves now the provision of private, commercial and industrial photographic services throughout all states and territories in Australia, and internationally including in Australia, New Zealand and India and previously in the USA, UK and Singapore; and

(b) is worth between $5 million and $10 million.

Particulars

A. Such assets including the land owned by the first and second defendants at Stanley Street, Wellington Road and Trafalgar Street, Woolloongabba, a unit at Kangaroo Point, the business operations of the first and second defendants including any overseas operations, the goodwill in the businesses, a plane and 2 boats, subject to any existing encumbrances.

22. The third defendant has acted unconscientiously in denying to the plaintiff his expectant equal beneficial interest in the first defendant.

Particulars

(a) On 17 May 1996, the third defendant and Ina approved the new share allotment, thereby diluting the value of Ina's shareholding in the first defendant;

(b) By her last Will dated 26 September 1996 (apart from a bequest of residue which is not presently material), Ina left the plaintiff only a modest share in the New Image business, amounting to less than a one-fiftieth beneficial interest thereof;

(c) On 7 September 2006 the third defendant excluded the plaintiff from benefit under the third defendant's Will;

(d) On 5 December 2006, the third defendant summarily terminated the plaintiff's employment with the first defendant;

Particulars

At about 3:00 pm on 5 December 2006, the third defendant took the plaintiff's keys to the premises of the first and second defendants' business and directed him to leave the first and second defendants' premises and not to return.

(e) On 21 June 2007, the third defendant caused the first defendant and on 10 October 2007 caused the second defendant to institute Supreme Court proceedings against the plaintiff with the objective of securing the plaintiff's one ordinary share in the first defendant;

(f) The plaintiff has been denied any substantial share or interest in the New Image business."

The issue

[26] The issue emerging from *Giumelli* (see, eg, pp 117, 121, 122), for the present case, is whether by their conduct, including things they said, Mr Bedington and Ina intentionally engendered in Mr Wallerstein an expectation that upon Ina's death, he would succeed to a one-half interest in Bryna; being an expectation upon which Mr Wallerstein acted, by staying with and supporting the business, where he inferentially believed he could more profitably have taken his talents elsewhere; and an expectation which was frustrated by Mr Bedington and Ina, through the additional share issue accomplished in April 1996 and Mr Bedington's new will of 7 September 2006. It was run as a case of proprietary estoppel.

Admissibility of statements by Ina

[27] There was an issue about the admissibility of statements made by Ina.

[28] The declaration sought, as to a 50 percent interest in Bryna from the death of Ina, suggests the case has a testamentary flavour, which may support the admissibility of what Ina said regardless of whether a true belief based it.

[29] Mr Looney formally objected to the evidence, but in the end I do not consider that I need rule on the objection, because I do not consider that the statements attributed to Ina establish an equity of expectation claim, or indeed an estoppel by representation case which, notwithstanding the pleaded case (and the agreed "list of issues for determination at the trial" document dated 5 November 2013), was the subject of some debate before me. I note that Mr Looney was prepared to "accommodate all of the statements…attributed to Ina within" the Bedington/Bryna case (p 12-19 l 45).

[30] I do not consider that the statements made by Ina amounted to representations that Mr Wallerstein was to receive a 50 percent interest in the business subject, in essence, to his continuing his working life with the business.

[31] I come in detail to the reasons for these conclusions a little later.

The adequacy of Mr Wallerstein's remuneration

[32] I conveniently deal first with the contention that Mr Wallerstein was paid substantially less than the "market rate for the services provided by him" – he asserts 50 percent less.

[33] The evidence bearing on this came from two sources, Ms Wiggan and Mr Glover.

[34] Ms Wiggan sought to assess the market rate remuneration, as at 2006, appropriate to the position occupied by Mr Wallerstein. Exhibit 5 shows her method, and Exhibit 6 confirms her assessment in the context of a competing assessment by Mr Glover. Ms Wiggan advanced a median bulked up salary of approximately $120,000 per annum, something less than twice the salary then paid to Mr Wallerstein. While assessments related to the position in 2006, they did not cease to be relevant because of that.

[35] I had difficulty adopting Ms Wiggan's assessment because it was based on a broader view of Mr Wallerstein's responsibilities than actually obtained. Contrary to Ms Wiggan's assumptions, for example, Mr Wallerstein was not, on the evidence I accept, correctly designated as the "second in charge" in the absence of Mr Bedington. Mr Wallerstein's responsibilities were pitched at a lower level than would apply to a 2IC. The evidence of the accountants Mr Butterworth and Mr Fiechtner persuaded me of that.

[36] In his own evidence, Mr Wallerstein pitched his role substantially below that of Mr Bedington. As he said, he did not act independently of Mr Bedington in relation to strategic decision-making. He said Mr Bedington made all strategic decisions, including marketing and investment decisions, decisions affecting the viability of the business. Mr Wallerstein's role did not extend to hiring staff who held any "significant role".

[37] Another reason why I was reluctant to accept Ms Wiggan's assessment was that it did not take into account the circumstance that the New Image business as at 2006

was flat or declining, on the evidence I accept, probably because of industry conditions where traditional photographic technology was changing. Mr Wallerstein was taken in cross-examination to financial accounts. Allowing for the present for adjustments he advanced, the business was nevertheless, in the years 2005 and 2006, making a substantial loss. See Exhibit 10. Mr Wallerstein said the business was experiencing a "significant cash shortfall" in 2005.

[38] I considered in the end that Ms Wiggan's assessment did not have adequate regard to the field or play of responsibilities to which Mr Wallerstein was subject, and the particular situation of the New Image business as at 2006.

[39] Mr Glover, on the other hand, put the market rate as at 2006 at approximately $74,000, much closer to the value of the salary package then actually being paid to Mr Wallerstein. Mr Glover accurately delineated the scope of Mr Wallerstein's position at the commencement of his paragraph headed "Remuneration summary" in Exhibit 8. He was reasonably influenced, I accept, by the circumstance that Mr Wallerstein lacked particular tertiary qualification. While Mr Glover's reference to comparable salaries was more limited than Ms Wiggan's, Mr Glover's conclusion is the more compelling because tied to a substantially more accurate delineation of Mr Wallerstein's actual employment position. Mr Glover also importantly had regard to salaries paid in industries suffering difficulty as was this one.

[40] For those reasons I preferred the assessment advanced by Mr Glover over that advanced by Ms Wiggan.

Discussion of the pleaded case

[41] I turn now to the pleaded case, as set out above. I will deal with the paragraphs one by one.

[42] As to para 14, it may be taken that Ina believed that Mr Wallerstein's employment with New Image was his source of financial support for him and his family. She knew that he had spent much of his working life in that business, and had not completed his university course. I was not satisfied however that Mr Wallerstein "gave up" university studies to work for the business, or that his lack of success at university was the result of his commitment to the business. Ina's disappointment that he had not worked in a more substantial corporate environment, if she felt and expressed such disappointment to Mr Wallerstein as he said occurred in 1996, would not really go beyond that. It would not reasonably contribute to or warrant the development or confirmation of an expectation on his part, relevant in equity, that she would compensate him for that in some way subsequently.

[43] Paragraph 15 (the additional share issue) and para 16 (the consequent diminution in the value of Ina's share) go to the factual framework, but do not themselves advance the expectation case.

[44] Paragraph 17 is I believe critical to Mr Wallerstein's case. There is no evidence of such an agreement, or evidence from which the agreement should be inferred, or that Mr Wallerstein was told there was such an agreement. (He does not suggest he was.) While it is clear that Ina and Mr Bedington agreed on the additional share issue (in April 1996, not May), there is no evidence that the agreement between them went further, and obliged Mr Bedington, upon Ina's death, to treat Mr

Wallerstein as if he had succeeded to Ina's "equal beneficial interest" in the company. In fact prior to the share issue, Ina had only a one-third interest in the company. There is no evidence that prior to the share issue, Ina told Mr Bedington of the 1982 statement to which I refer below. The share issue was a deliberate move designed to reflect the effort Mr Bedington and Ina had injected into the development of the business, and to ensure that after Ina's death, Mr Bedington remained the controller and substantial owner of it, and that involved protecting his position and that of Bryna against any possible challenge by Julie Wallerstein. That intended consolidation of Mr Bedington's position is consistent with Mr Bedington's own evidence and the note signed by Ina on 9 June 1996. In those circumstances Ina agreed to forego her 50 percent interest, in anticipation of her death, and she was entitled to take that course. She had not earlier effectively "pledged" a 50 percent interest in the company to her son. She intended that Mr Bedington beneficially own the additional 50 shares: that is consistent with their discussion, the "To whom it may concern" document, Mr Bedington's 1996 will, what Ina said to Jenny Power, and Mr Wallerstein's failure after Ina's death to assert the larger entitlement which he pursues in this proceeding.

[45] As to para 18, Mr Bedington's will of 16 September 1996 did not in fact contemplate that Mr Wallerstein would on Mr Bedington's death succeed to "an approximately equal beneficial interest" in Bryna. As mentioned earlier, the will provided for a roughly equal division five ways, among Mr Wallerstein, Mr Bedington's daughter Tamara, Susan Field, Mr Wallerstein's children and Tamara's children. Under that will, Mr Wallerstein was to receive only 11 of Mr Bedington's 52 shares, which would take his interest, including Ina's single share, to 22.6 percent. Even if one adds in the 10 for his children, he and his family would still

take only 22 of the 53 issued shares, which amounts to 41.5 percent. On the evidence of Mr Bedington which I accept, although Mr Wallerstein was aware of the share issue, Mr Wallerstein was not made aware of that September will, so that it could not have fed any such expectation as alleged, anyway. Also, Mr Bedington had not surrendered the power to vary that September will. As Ina had acknowledged, he of course could change it to deal with further circumstances which may arise, and that is what occurred in September 2006 after he had discovered what he considered were the unauthorized drawings made by Mr Wallerstein.

[46] As to para 19(b), I accepted Mr Bedington's rejection of the suggestion that he regarded it as a "family" business, as if it were to be preserved for the benefit of all members of the extended family. Mr Bedington regarded it as his business, his "nest egg" for retirement as he described it. The terms of Ina's memorandum are again relevant here. Julie Wallerstein gave evidence which I accepted, and she described her husband, Mr Bedington and Ina as a "unit" in their approach to the business. That was her perception. I should not draw particular significance from it in relation to the questions of control and equitable expectation. She regretted her husband's level of attachment to the business, and a condition of their resuming cohabitation was that he not talk to her about the business. He was devoted to the business. But it would be unsafe to infer from that alone that he had been promised a share in it.

[47] Mr Wallerstein said he assumed the business was being developed for the benefit of all family members, and on that basis devoted his working future to the business, including not seeking wage increases: it was all about keeping the funds in the

business. The question for the present, however, is whether Mr Wallerstein was driven by reasonable expectation engendered by Mr Bedington and Ina, or simply by a hope he would be treated, as he saw it, appropriately.

[48] As to 19(c) ("We always keep the money in the business – rewards come to those who wait"), if said, those vague and general words could not justify a reasonable consequent expectation that Mr Wallerstein would eventually acquire a 50 percent interest in the business.

[49] As to 19(e) (she had "left everything" to him), Ina did in fact leave Mr Wallerstein everything she owned in the company, being her sole share. Mr Wallerstein said, and I accepted, that in 1982, Ina told him that Mr Bedington held two shares in Bryna, to assure him a majority vote, and that she held one share. That is the share which came to him. Mr Wallerstein did not subsequently raise this conversation with Mr Bedington, and Ina did not repeat the statement made in 1982. He said he drew from that statement that he was to benefit from the "wealth creation" of the business. It would however be drawing too long a bow to conclude that in what she said, Ina was in 1982 promising Mr Wallerstein an undiluted one-third interest in the company on her death. I am also not satisfied that Mr Wallerstein re-cast his intended working life in reliance on any such promise, a matter to which I come below.

[50] As to 19(f), the agreement alleged as of 17 May 1996 was not established on the evidence, and it is not correct to say that under the will of 16 September 1996 Mr Wallerstein could expect a one-half interest in Mr Bedington's estate, for reasons already covered.

[51] I have dealt with the above issues one by one. Of course I appreciate it is their aggregate effect which matters. Neither alone nor in combination did they establish the equity of expectation which was advanced.

[52] I need not in detail address the allegations in paras 20 and 21 as to reliance and Mr Wallerstein's contribution to the business, save for these following observations. There is no doubt that Mr Wallerstein gave many years to the business. But I am not satisfied that explained his lack of success with his university studies. Significantly, there is no evidence he ever suggested to Ina or Mr Bedington that an expected inheritance from Ina led him to forego university in favour of the business. In 1982, when Ina talked of her shareholding, Mr Wallerstein was 20 or 21 years old and taking a 12 month break from university. He was grateful for the trainee photographer position offered by Mr Bedington. I am also not satisfied that Mr Wallerstein was paid substantially less than a market rate, and I refer to the analysis of the evidence of Ms Wiggan and Mr Glover above (albeit as to the position in 2006). It is true that Mr Wallerstein did guarantee the business in a substantial amount (guarantees, of 8 February 1999 and 25 July 2005, of Bryna's borrowings totalling $2.1 million), and that the business developed, although I am not in a position to determine its value. As to the guarantees, Mr Wallerstein accepted that the value of the Bryna assets was at least two and a half times the amounts borrowed. He did not consider he was at any particular risk. He was required to give the guarantees, as director, because the bank required it.

[53] Finally, while Mr Wallerstein undoubtedly hoped that one day he might acquire a substantial interest in the company, in the context of his relationship with Ina and Mr Bedington and his years of working for it, to warrant the declaration sought the

evidence must have established more than that. The fundamental question is whether by their conduct, including things they said, Mr Bedington and Ina intentionally engendered in Mr Wallerstein an expectation that upon Ina's death, he would succeed to a one-half interest in Bryna. In the above analysis I have addressed the matters relied on to establish the existence of that reasonable expectation, and those matters have not been apt to do so for the reasons I have expressed. The allegation of unconscionability (para 22) accordingly fails.

[54] Also, the relief sought is relevantly the declaration of a trust over shares held by Mr Bedington. They were never held by Ina. Mr Wallerstein therefore could not have expected to take them on Ina's death. It is not a case where there has been an alleged breach of trust or fiduciary duty by Ina in which Mr Bedington was knowingly involved.

[55] In the course of submissions, there was discussion about the extent of the estoppel which need be established to justify the major declaration sought. It emerged as an estoppel against Mr Bedington's, first, relying on the additional share issue to deny Mr Wallerstein a 50 percent interest in the company; and second, from changing his will from that made in 1996. When Ina made her statement to her son in 1982, she had only a one-third interest in the company. The 1996 will actually assured Mr Wallerstein only a 22.6 percent stake in the company. Mr Fitzpatrick stressed the fluidity of the equitably remedy. But we must first establish reason to apply it, and I am not satisfied, for reasons already expressed, that the basis for a declaration has been established. Mr Fitzpatrick submitted the shares bequeathed to Susan Field, who cared for Ina as she deteriorated, should be notionally added to what was to go to Mr Wallerstein. I cannot see why. Ina bequeathed her son substantially less than

a half interest, as did Mr Bedington with her knowledge. That tells against a common understanding that Ina's son was assured a one-half interest. And as I have said, this was not a situation in which they had in equity bound themselves to such a position. By their conduct, they had not reasonably engendered the expectation for which Mr Wallerstein contends, and Mr Bedington retained the usual right to vary his will, as Ina acknowledged.

[56] The claim in equity must fail.

The "transaction" claims

[57] In proceeding 5338/2007, Bryna and New Image claim from Mr Wallerstein monies allegedly appropriated to himself or for his benefit without authority. They are tabulated in the document marked "B".

[58] In broad terms, Mr Wallerstein contends that he was authorized to make the transactions, and that in the case of some of them, they were carried out in the ordinary course of the company's business.

[59] The parties spent a lot of time endeavouring to limit this exercise and present it in manageable form, and they succeeded, upon which I congratulate them.

Particulars of authorization

[60] In his opening, Mr Fitzpatrick, who appeared for Mr Wallerstein, apparently carefully particularized the basis of the alleged authorizations (pp 1-42, 1-43). I extract the relevant parts:

> "Your honour, for the record and for clarity I – if your Honour would indulge me – I restate the conversations on which my client relies in defence of the 2007 proceeding.
>
> The *first*…is the 1989 conversation…the effect of which was that my client had just moved a house onto land at Jarrah Road at Jimboomba, which required renovation. Bryan Bedington told my client that he could run the costs of the renovation through as business expenses. My client did not do so, as he had finance already available.

> *Secondly*, in July 1991, in Bryan's office…in the context of Julie Wallerstein having in June 1991 given up external work to give birth to their first child, Bryan told John to draw an extra wage in Julie's name through the payroll system.
>
> *Third*, two conversations, one between July to October 1992, and the second 30 June and 2 July 1993, in Bryan's office…in each conversation…the substance of which was that for each financial year my client was to pay himself director's fees with the intention that the amount of the fee should clear his loan account in each year.
>
> The *fourth* conversation in June of 1996: in April or May of 1994 my client had been spoken to by Ina in Bryan's presence about his use of the loan account, and told it could only be used up to a $40,000 maximum. John was faced with the renovation of a house at Fern Street, and was wishing to use company funds temporarily, but to do so would have taken the loan account over $40,000.
>
> He sought Bryan's permission to use company funds for the purpose, and was authorised to do so. $18,000 in renovation costs were incurred in that way. Initially, Bryan was told that John would repay him from the sale of the Jarrah Road property. However, he repaid him from John's share of Ina's estate – residual estate, which was $40,000 approximately. John agreed to the use of $28,000 of this sum to reduce his loan account, notwithstanding that only $18,000 had been used to fund the renovation.
>
> *There was then* the conversation in mid-February of 1998 in Bedington's office…following two weeks after Bryan's refusal of employment for Julie Wallerstein, in which Bryan said this decision should not affect you financially in any way. You can use the company's funds to pay for your personal living expenses, including overseas holidays.
>
> *Finally*…a conversation on the 16th of January 2004, again in the office… In the context of Bryan having in November 2003 asked John to arrange a spreadsheet or prepare a spreadsheet calculating a series of payments to Bryan's five grandchildren, the payments were commenced when the children started high school, and continue up to fourth year university, commencing at $50 per week per child, and increasing by $50 per annum as each child progressed. John did create the spreadsheet, and on the 16th of January 2004 came into John's office holding the spreadsheet and (Bryan) said that the money was to be paid to the children. (Bryan asked:) Is there any problems with them being put on the payroll? John said no, the only issue might be Tammy, as she runs a trust, but I'll email her. Bryan then instructed for the commencement of the payments." (my editing)

[61] In his evidence, Mr Bedington said that Mr Wallerstein was entitled only to a salary of $62,400 per annum, four weeks holiday per annum with the 17 and a half per

cent loading, superannuation and a car. He was allowed the use of a loan account but only up to "a few thousand dollars". Mr Wallerstein denied any such limitation, though he said that in May 1994 Ina, in the presence of Mr Bedington, told him that he should keep the balance of the account below $40,000. Mr Bedington said this direction was given in April 1995. In fact, prior to 31 May 1993, the loan account was kept within those bounds, that is, within a few thousand dollars (see Appendix 12, p 1 in Ex 3). Mr Bedington said that he never otherwise authorized Mr Wallerstein's use of company funds for his own benefit.

Framework of this claim as litigated

[62] As the case developed, three types of transactions were left for adjudication:

(a) where Mr Wallerstein claims reimbursement of expenses he claims to have paid and to have incurred in the course of the business, but where the record is confined to entries made by Mr Wallerstein himself, with an absence of externally generated supporting documentation, such as invoices (Mr Wallerstein gave evidence that these expenses were incurred in the course of the business of the company);

(b) where Mr Wallerstein claims to have deposited monies to the credit of his loan account, and the record is again confined to book entries made by him, with no supporting evidence, such as of the debiting of the relevant amounts to Mr Wallerstein's bank account and the corresponding crediting of the company's account (Mr Wallerstein gave evidence to the effect that he did in fact pay those amounts to the company); and

(c) where Mr Wallerstein received company funds, or used company funds to pay for private expenses, such as school fees for his children.

[63] Mr Looney QC, who appeared for Mr Bedington and the companies, informed me that his clients' response to those categories was:

(i) as to (a) and (b), while the items looked like business expenses, their fate depended on Mr Wallerstein's credit's surviving a general challenge: if I conclude he acted honestly and gave reliable evidence, then I would allow the claims notwithstanding the absence of supporting external documentation; and

(ii) as to (c), the fate of those debits depends on my findings on the question of authorization, in the context of the particulars given by Mr Fitzpatrick in his opening (see para 60 above).

Discussion of matters particularized

[64] I accepted the evidence of the forensic accountant Mr Ponsonby.

[65] Turning to Mr Fitzpatrick's particulars, as to the second matter, Mr Wallerstein said that when his wife gave up work on the birth of Renee (15 July 1991), at a time when they had a mortgage commitment of $1,000 per month, Mr Bedington allowed Mr Wallerstein to draw an extra wage in Julie's name. Mr Bedington denied instructing Mr Wallerstein to put his wife on the payroll, and said he was not aware she was being paid. Mr Wallerstein said Julie was paid $2,480 in 1991, approximately $13,000 in the year to June 1992 and approximately $14,000 in the following year. She was also allowed the use of a company car.

[66] In fact from 1 July 1993 to October 1993 when they separated, Mr Wallerstein paid himself the "wage" he said was due to her, and that continued for the few months of

the separation and thereafter. Yet his claimed arrangement with Mr Bedington was to draw "an extra wage in Julie's name", and the monies were paid to her in 1992 and 1993 (p 6-14). I considered Mr Bedington's denials more reliable than Mr Wallerstein's evidence on this matter.

[67] As to the third matter (directors' fees), Mr Bedington's evidence was that the only directors' fees in which he agreed, were allowed in 2003/4, being $13,500 to Mr Wallerstein and $14,500 to himself. This was done on accountancy advice, with the $13,500 to go in reduction of Mr Wallerstein's loan account. Mr Wallerstein said that by agreement with Mr Bedington, director's fees were also allowed to him, in diminution of his loan account for the years ended 30 June in 1992 ($5,000) and 1993 (again $5,000). Mr Wallerstein said Mr Bedington declined the fees for himself for tax reasons. The same position is recorded in the accounts of each of the two companies Bryna and New Image.

[68] As to the fourth matter (renovation expenses), Mr Bedington denied a suggestion Mr Wallerstein sought an $18,000 increase in his loan account to fund the Fern Street renovations, and said the $28,000 credit related to Mr Wallerstein's share in Ina's estate. Mr Wallerstein said that Mr Bedington approved his using company funds for the renovation expenses of $13,000 – to be repaid.

[69] As to the alleged conversation following Mr Bedington's refusal to employ Julie, which would on Mr Wallerstein's evidence amount to direct authorization, Mr Bedington denied the suggestion he told Mr Wallerstein he could use company funds to pay his living expenses, including the cost of overseas holidays.

[70] Mr Wallerstein gave evidence that Mr Bedington said, a fortnight after refusing to employ Julie, that he would not employ Julie because Ina had not wanted that (having consulted a spiritualist), but that Mr Wallerstein should feel free to draw on company funds for extra personal living expenses including overseas holidays. It was not to be a loan situation, but no other limitation was defined between them. Mr Wallerstein said he interpreted his entitlement to be that he could draw reasonable amounts in the context of his occupying a position somewhat below Mr Bedington's, allowing for Mr Bedington's own drawings.

[71] There would plainly be potential disproportion between the absence of a wage for Julie on the one hand, at the level at which wages were paid in this business, and on the other, an open ended commitment to meet living expenses, including those of overseas holidays, from company money.

[72] As to wage levels, as an example the accountant Mr Fiechtner was, over the period 1996 to 2002, paid an annual salary in the range of $42,000 to $48,000.

[73] In relation to this matter, it is significant also that on his evidence, which I accepted, Mr Fiechtner was astute to separate out Mr Bedington's personal expenditure from expenses incurred on company business, with only the latter being met by the company. (Mr Wallerstein disputed this.) One would query why the parties would agree on a very different approach to Mr Wallerstein's entitlements, especially where the attitude to Julie Wallerstein was somewhat patchy, if I may put it that way.

[74] Also, at that time (February 1998), the business was not substantially profitable. The "operating profit" in the year to June 1998 was only approximately $84,000,

against a "turnover" of $5.6 million. In the 1996 year, there had been a loss of $134,998 before tax, and in 1997, a profit of $63,665 before tax. This plainly bears on whether Mr Bedington would give such an unlimited commitment.

[75] Mr Wallerstein's claim to an absolute entitlement to recoup these expenses from company funds is also inconsistent with his recording the amounts to his loan account in New Image, and with the "Facility Agreement" he signed in 2003 recording an obligation to repay the loan accounts (with interest), and his e-mail to Tamara on 10 November 2006 in which he set out how he intended to discharge his loan account. See also his e-mail sent earlier that day.

[76] Mr Wallerstein's evidence that he was not obliged to make "periodic repayments" to his loan account – apart from the crediting of director's fees and credit card reimbursements (p 6-25 l 10) is inconsistent with those latter matters, and I did not accept it.

[77] Mr Wallerstein's evidence about this alleged authorization was unreliable. It was borne of a sense of entitlement he genuinely felt, stemming from his long association with the business, his being Ina's son, her failure to leave him a substantial interest in the company on her death, his continued employment thereafter without increases in his salary, and probably a degree of envy of the perceived better lifestyle of Mr Bedington and his more liberal access to company resources in his capacity as permanent governing director. But in the end, I found his claim to the entitlement based on the alleged conversation in 1998 to be improbable.

[78] As to the last matter particularized (payments to the children), Mr Bedington said that in January 2004, he told Mr Wallerstein to pay Renee the amounts due to her from the trust fund: he denied instructing that Renee be put on the payroll, implying that she be treated as if an employee. The $5,000 set aside under Ina's will for each grandchild had been invested profitably, yielding a sum sufficient to allow weekly payments to the grandchildren as they were being educated. There was no need to have recourse to company money to meet any such requirement.

[79] As to the first matter particularized, Mr Fitzpatrick did not take this up with Mr Bedington. It would fall in any case within Mr Bedington's denial of allowing Mr Wallerstein to use company funds for his own benefit except via the loan account (the balance of which of course had to be repaid, as is consistent with Mr Wallerstein's signature to the "facility agreement" in July 2003). See para 75 above. Mr Wallerstein said he debited the renovation expenses in the context in 1994 of Ina's statement that he should keep the balance below $40,000, and the debits took it only a little beyond $40,000.

[80] On Mr Bedington's evidence, which I accepted, Mr Wallerstein's receipt of company monies, and use of company monies to pay private expenses, was not authorized.

Some incidental issues

[81] There was challenge to Mr Bedington's credit on the basis of his use of an aircraft and bonus payments to Tamara and her husband. I was satisfied with his responses: he actually paid for the aircraft himself (purchased from a mortgagee) and there was nothing untoward in his use of it; and the bonuses paid to Tamara and her husband

did not elevate their reward over that paid within the company, allowing for the different natures of the enterprises. I did not consider those matters impaired Mr Bedington's credibility.

[82] I accepted the evidence of Mr Butterworth, the accountant from 2003 to 2007, which bore on Mr Wallerstein's well-developed capacity to deal with the computerized accounting system. (Mr Bedington, on the other hand, lacked those skills.) I am satisfied on the basis of that evidence that Mr Wallerstein could, if so minded, have presented unauthorized personal transactions as if they fell within his entitlements. On the other hand, he was up front about the personal nature of those entries, the school fees for example, founding a contention that any deceit would not have been so clumsily accomplished. That is partly why I am not prepared to condemn Mr Wallerstein's evidence as dishonest. But his claims being improbable, they should be rejected on the basis his evidence was unreliable, and that approach, in relation to such substantial claims, informs my general preference, in terms of reliability, for the evidence of Mr Bedington where there was conflict.

[83] In his own evidence, Mr Wallerstein said he was responsible for data entry to the Dataflex system. He was responsible for managing the system. It was possible, he said, to delete transactions or change the details of transactions.

[84] I also accepted the evidence of the earlier accountant, from 1996 to 2002, Mr Fiechtner, as to Mr Wallerstein's IT capacity. He noted that towards the end of his term with the company, Mr Wallerstein would sometimes in the one week draw the amount of his weekly salary a number of times, which he explained by the need to

meet loan repayments or school fees – which would on the face of things seem quite irregular and call for explanation.

[85] Mr Wallerstein accepted these transactions, totalling $6,000 over a five week period, occurred in August and September 2001, at a time when he needed money to meet credit card expenses. He regarded it as allowable under Mr Bedington's agreement that he draw on company funds to meet living expenses, though that raises the issue why the payments should in a sense be disguised as wages. This is again explained by what I have suggested was his "sense of entitlement".

[86] I refer now to a sum of $29,410.87, borrowings prior to 31 December 1997. The claim that the recovery of this amount is time-barred is answered by the acknowledgements constituted by Mr Wallerstein's signature (as director) to the companies' financial statements reflecting these amounts.

[87] Finally, as to "alleged reimbursement payments" totalling $25,889.38 and the "alleged Wallerstein payments" totalling $9,427, I am not satisfied Mr Wallerstein has, on the balance of probabilities, established these claims. That is because relevant documentation independently supporting the payments, which one would expect to be obtainable, has not been provided in this proceeding, and was apparently not filed with the records of the business, as one would expect to have occurred. This approach is warranted in the context of my finding as to the lack of authorization.

The wrongful termination claim

[88] In proceeding 5338/2007, Mr Wallerstein claims, by way of counterclaim, monies due as damages and otherwise consequent upon the allegedly wrongful termination without notice on 5 December 2006, by Bryna and/or New Image, of Mr

Wallerstein's employment. Mr Wallerstein alleges, by way of particulars, that at about 3pm that day, Mr Bedington took his keys and directed him to leave the business premises and not return.

[89] It is convenient to set out here something of the account given by Mr Bedington. On his evidence, the business employed accountants, Mr Fiechtner from 1996 to December 2002, and Mr Butterworth from 2003 to 2007. It was Mr Wallerstein, however, who processed payment of company money.

[90] Mr Bedington said that in May 2006 Mr Butterworth drew his attention to Mr Wallerstein's loan account as at December 2005, which stood at about $177,000. (The balance had risen from approximately $26,000 as at June 1994, and over the ensuing decade to approximately $94,000 as at 30 June 2004. Exhibit 11 shows the progress of the loan account from 1991 to 2006.) Mr Bedington had earlier instructed Mr Butterworth to carry out an audit of the company's accounts, "with special reference to seeing how (Mr Wallerstein) had been allocating funds".

[91] Mr Bedington raised the loan account issue with Mr Wallerstein later in May 2006. Mr Wallerstein then said that he intended paying the money back to the company, by various means. Mr Bedington said that he suspended Mr Wallerstein's dealing with the payment of money. Mr Bedington said that Mr Wallerstein spoke of standing in December for party pre-selection in the federal electorate of Forde, taking a couple of weeks off for that purpose in September or November, and that he intended to resign from the company in any event. He resigned as a director of both companies on 7 July 2006.

[92] Mr Bedington said that in October 2006, Mr Butterworth informed him that Mr Wallerstein had been paying his children's school fees at Somerville House from company money, and that his children were on the company's payroll. Mr Bedington said that he raised the matter with Mr Wallerstein, and said that the school fees and the money paid to the children as "wages" should be debited to a trust account (designated 148B) set up after Ina's death to allow for the $5,000 she had left each of the children by her will. When Mr Wallerstein failed subsequently to attend to that, Mr Bedington had Mr Butterworth do it, and informed Mr Wallerstein of the modification to the trust account in early November 2006.

[93] Mr Bedington said that on 5 December 2006, when Mr Wallerstein's employment ceased, he met with Mr Wallerstein and Mr Butterworth, in relation to Mr Wallerstein's teaching Mr Butterworth how to use the Dataflex query program – the accounting system used at the business. This prospect had been under consideration, in anticipation of Mr Wallerstein's leaving the company. Mr Bedington said that Mr Wallerstein said: "If you want Ron to learn the Dataflex query program, you teach him", whereupon Mr Wallerstein left the building, returning shortly afterwards to collect a computer, whereupon he gave the building keys to Mr Bedington at Mr Bedington's request. He then left, not to return.

[94] Mr Wallerstein gave a somewhat different account. He said that from early July 2006, Mr Bedington was asserting a need to reduce costs, and was suggesting that Mr Wallerstein go off the payroll and become a contractor. Mr Wallerstein replied that he could not afford that, whereupon Mr Bedington said that he had no choice. Mr Wallerstein told him that he would have to seek alternative employment. Mr Wallerstein was then contemplating seeking the pre-selection for the federal seat.

[95] As at the end of August, Mr Bedington was talking of purchasing Mr Wallerstein's share in Bryna for the value of his loan account. He was agitating for Mr Wallerstein to leave, to take over as customer services representative. Mr Wallerstein was then saying that he would be remaining with the company until December.

[96] On 10 November 2006 Mr Bedington told Mr Wallerstein that he was recasting the children's entitlements into the trust account. Mr Wallerstein objected to this.

[97] In early December, Mr Wallerstein returned after a fortnight's pre-arranged leave. He completed a software upgrade.

[98] Then on 5 December 2006, there was an acrimonious exchange over whether Mr Wallerstein was using the Internet contrary to instructions, which led to Mr Bedington telling him that he was finished. Mr Wallerstein threw his keys to Mr Bedington. Mr Wallerstein berated Mr Bedington at some length, and then left, saying that he was taking his car. He did leave, to return shortly after that to retrieve his computer. That was the end of his in-person association with Bryna.

[99] As previously noted, I accepted the evidence of Mr Butterworth, who impressed me as a completely independent witness with no apparent axe to grind, and whose evidence suggested a reliable recollection. His evidence generally supported that of Mr Bedington as to the events preceding Mr Wallerstein's departure. Mr Butterworth also recalled Mr Wallerstein saying "I'm out of here" as he left.

[100] Mr Fitzpatrick presented this as a case of constructive dismissal. Following Mr Wallerstein's criticism in January 2006 of Mr Bedington's decision to start an operation in India, and Mr Bedington's criticism of a purchase of cameras authorized in his absence by Mr Wallerstein, and some developing acrimony, Mr Bedington told Mr Wallerstein he wanted him to go off the payroll and become a contractor to the business. Mr Wallerstein said he could not afford to take that course, to which Mr Bedington said he "had no choice", and Mr Wallerstein said he would have to "seek other opportunities".

[101] Mr Wallerstein was entitled to cease employment as (accepting the evidence of Mr Bedington and Mr Butterworth) I find he did, if Mr Bedington had been guilty of "conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract" (*Western Excavating ECC Ltd v Sharp* [1978] 1 QB 761, 769 per Denning MR). In that case, Mr Wallerstein would have been entitled to treat himself as discharged from any further performance, and terminate the contract by reason of the conduct of Mr Bedington.

[102] At the time of these events, Mr Bedington had only recently learnt of the extent of Mr Wallerstein's drawings on his loan account. I am satisfied of that notwithstanding reference over the years in the companies' financial statements. I accepted Mr Bedington's explanation that he relied on the tax returns. It was in May 2006 that Mr Bedington suspended Mr Wallerstein's dealing with the payment of money. I am satisfied that would have occurred earlier had Mr Bedington earlier appreciated what was happening with the loan account.

[103] In these circumstances, and in the context of the $40,000 limit which had been imposed, Mr Bedington was entitled to dismiss Mr Wallerstein summarily, because the balance of the account was established, and Mr Wallerstein acknowledged the debt. The extent of the departure from the $40,000 limit was substantial, and Mr

Bedington was, not unreasonably, "astounded". If, in what occurred, Mr Bedington dismissed him, Mr Bedington was entitled to do so, and no question of "constructive dismissal" arises.

[104] What would arguably otherwise be a "constructive dismissal" would then amount to a dismissal for cause because of the availability of a justifying ground (cf. *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359, 377-8).

[105] But in any event, I preferred Mr Bedington's and Mr Butterworth's evidence of what occurred on the final day (5 December 2006). That Mr Wallerstein ultimately left of his own accord, as their evidence has it, sits reasonably comfortably also with his foreshadowed intention to leave the employment in about December to pursue a career in politics. He had tired of his involvement with the business, with what he saw as its inadequate financial reward.

[106] It follows that the termination of employment claim should be refused.

Directions

1. I publish this record of my findings.
2. I adjourn the further hearing of the proceedings to a date to be fixed.
3. If the parties seek any further necessary finding of fact, then that should be done via e-mail to my Associate.
4. In the event that the parties agree on the judgments resulting from these findings and any additional findings, draft judgments should be e-mailed to my Associate by both Counsel, and I will make those judgments without the need for further appearances, and notify the parties accordingly.
5. If the parties do not agree on the judgments, the matter will be relisted for further consideration.
6. Costs are reserved.

[107] I have not set time limits in relation to further steps, in part because of the unavailability of Counsel at certain times. I am confident Counsel will nevertheless ensure the final resolution of the matter occurs without undue delay.