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Great Expectations: Inheritance, Equity and the Family Farm

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Abstract

This article alerts farmers and those who advise them of the need for caution when making arrangements or agreements with family members regarding the future ownership and succession of the family farm. Such arrangements are frequently oral and informal. Promises are made and revised, and often unspoken 'understandings' are arrived at. This lack of legal formality gives rise to a propensity for matters to go badly and bitterly 'wrong'. Furthermore, the article draws attention to the fact that, even where formal arrangements are made, they are vulnerable to challenge and the nature of the legal and equitable doctrines applicable in such cases means the outcome of such challenges cannot be confidently predicted. It may come as a surprise to many farmers to learn that their autonomy in dealing with their land and businesses can be overridden by legally imposed obligations of morality and good conscience. The article illustrates its thesis by examining three High Court cases in which family farming agreements have been challenged. In each case, the court determined the fate of the family farm, not by reference to the farmer's intention, but by the application of succession legislation and equitable doctrines, such as equitable estoppel and unconscionable transaction. Moreover, in two of these cases, the farmer's actual intention was overridden in favour of an arrangement that better coincided with what the court considered that he ought to have done - resulting in an outcome that neither the parties nor their legal advisers could have expected.

Introduction

The Australian farming industry is still predominantly a 'family affair'. The typical farm is owned and run by a married couple in partnership (although often the partnership agreement is informal). The farm work is done by every member of the family according to their age and capacity and it is usually hoped that the farm will be passed from one generation to the next. Thus the family farm is much more than real estate, it is a shared home, heritage and livelihood. As children grow into adulthood, important decisions must be made about matters such as:

- whether children are to continue to work on the farm in adulthood, and, if so, on what basis; and
- how to accommodate the spouses and offspring of children who work on the farm.

As parents age and succession becomes an issue, other potentially divisive issues emerge. Some of these are:

- who will 'take over the farm' after Mum and Dad have died or retired;
- in light of this, how to provide fairly for the other adult children and their families;
- whether it is best to sell the farm or to expand the business by purchasing other properties to facilitate this; and
- how best to provide for the retirement of aging parents.

These decisions usually involve very valuable assets and will have a profound impact extending beyond the decision-makers to all family members. Typically, the protagonists are closely bound by strong emotional ties and long history. This is a volatile mix. Factors such as marital issues, parent-child relationship issues, in-law antipathy and sibling rivalry may affect the outcome. It is exacerbated by the fact that the family farm is more than just a family business; the land itself often has special emotional significance. Furthermore, the nature of farming is such that those adversely affected may not be able to find another home and/or job without trauma and dislocation. Thus, there is a propensity for matters to go badly and bitterly 'wrong'.

Yet, ironically, rather than being afforded greater caution and attention, the very closeness of family ties means that these matters are often dealt with informally and with insufficient caution. Agreements are frequently oral, promises are made and revised, unspoken 'understandings' are arrived at. Indeed, any request for matters to be formalised is likely to be viewed, at best, as unnecessary and, at worst, as a sign of mistrust or disloyalty. Furthermore, parties who feel aggrieved may be reluctant to voice dissent, for fear of hurting or angering those whom they love, so that matters may be far more controversial than they would outwardly appear to be.

This article highlights the need for caution in acting or advising on matters concerning the family farm, by drawing attention to three High Court cases concerning transactions pertaining to family farms. In each case, the court's decision went (or had the potential to go) in a direction never contemplated by the owners of the farm concerned. The first case, *Giumelli and Another v Giumelli*[1] ('*Giumelli'*) illustrates the legal difficulties that can arise in the running of a family farm – in particular, those which may arise when a farmer fails, during his/her lifetime, to make good his children's expectations concerning ownership of the farm. The second and third cases, *Vigolo v Bostin and Others*[2] ('*Vigolo'*) and *Bridgewater & Others v Leahy & Others* [3] ('*Bridgewater'*) concern the vexed question of succession. *Vigolo* highlights the problems that can arise when a family farming property is disposed of by will. *Bridgewater* shows that, even where a farmer attempts to circumvent such problems by disposing of the farm *inter vivos*, his/her actions may still be open to challenge on the basis of equitable doctrines, such as equitable estoppel, undue influence and unconscionable transaction.

Inter vivos* Expectations – *Giumelli

Giumelli vividly exemplifies the legal problems which can arise from an ordinary family dispute, when it takes place within a farming family. The Giumellis were typical of many Australian farming families. Giovanni and Rosa Giumelli and their three adult sons Tony, Robert and Steven, farmed in partnership under the name 'G Giumelli & Co'. However, no written partnership agreement had ever been made and the farms (an established orchard in Pickering Brook and a larger property under development in Dwellingup) were actually owned by Giovanni.

The family had to grapple with the usual issues of how best to remunerate Tony, Robert and Steven for their work on the farms, compensate them for eschewing other career opportunities and deal fairly with each of them and their families in relation to the matter of succession. As is often the case, Tony, Robert and Steven were credited with wages in the partnership books, but were not in fact paid wages. Instead, they received the necessities of life and the money stayed in the business. They each invested many years of their adult working lives working and improving farms that belonged to their father and in which they held no proprietary interest. This was done on the understanding that they would one day succeed to the family business. So great an investment made on such uncertain terms would have been inexplicably foolhardy, had it not been made in the context of the parent/child relationship.

The litigation concerned a suit brought by the Giumellis' middle son, Robert. Over the course of years, the Guimellis had made promises to Robert in relation to the farms, which were intended to and which did induce him to forego the pursuit of his individual advancement in favour of the family enterprise. Three promises, in particular, were relied upon:

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[1] *Giumelli and Another v Giumelli* (1999) 196 CLR 101.
[2] *Vigolo v Bostin & Others* (2005) 221 CLR 191.
[3] *Bridgewater & Others v Leahy & Others* (1998) 194 CLR 457.

- Firstly, when Robert was 18, Mr and Mrs Giumelli made a general promise to him that they would give him an unspecified part of the Dwellingup property. Robert was promised this land to compensate him for working without wages (especially on the Dwellingup property) and for allowing partnership money to be used on that property.
- Secondly, when Robert told his parents that he wished to marry and build a matrimonial home, his parents promised that, should he build a house on the Dwellingup property, the house and the land upon which it stood would be his. Indeed, his parents actually went with Robert to the Dwellingup property to pick out a site. In reliance on this promise, Robert worked with a builder and spent $25,000 building a three bedroom house (worth $47,000) on his father's land.
- Thirdly, Mr and Mrs Giumelli convinced Robert to reject an offer of employment made to him by his father-in-law and to remain working on the family farm by promising him an even bigger portion of the Dwellingup site. More specifically, Mr and Mrs Giumelli agreed to subdivide the Dwellingup property, so as to create a lot on its northern boundary (which would include the land on which Robert's house stood as well as a nearby orchard) and to transfer that lot to Robert. In reliance upon this undertaking, Robert stayed on and planted a new orchard on the land that he believed would one day be his.

None of these agreements constituted a binding contract. Even if it could have been argued that Robert's actions had constituted consideration, the promises were unenforceable, because they were merely verbal and had not been evidenced by any signed document.[4] Such formalities are rarely observed in dealings between family members. Nevertheless, the law requires that, in order to be enforceable, agreements concerning the creation and transfer of interests in land must be supported by some piece of signed written evidence.

Although legal enforceability was not an issue while the family was on good terms, it became important when they began to argue. Interestingly, the disagreement which set the family on a path of litigation leading all the way to the High Court had nothing to do with the land, or money or even farming. Robert chose to remarry a woman of whom his parents disapproved. Obviously, Mr and Mrs Giumelli were aware that their promises to Robert were not binding and did not feel constrained by them, because they felt free to tell their son to choose between his new partner and the land that had been promised to him. When Robert refused to abandon his plans to wed, Mr and Mrs Giumelli went back on their word and refused to make good their promises.

Looking at the matter from the parents' perspective, the land belonged to Giovanni and the promises made to Robert had been informal and legally unenforceable. Given that Robert had defied them on a family

[4] Section 4, *Statute of Frauds* 1677 (UK). The exception of part performance was not argued in this case.

matter of great emotional importance, his parents felt justified in refusing to do more than they were legally obliged to do for him. However, from Robert's perspective, he had given up any other potential career, including the offer of work from his former father-in-law, in order to work on and improve his father's land and had done so without any real remuneration. Robert's love for and trust in his parents explains why he made these choices and why he neglected to take steps to ensure that he was legally protected by insisting on the requisite documentation.

Robert sued and won. Each court which heard the matter held that it would be unjust to confine Robert to his strict legal rights. In each case, the Court's decision in favour of Robert was based on the doctrine of *equitable estoppel*.[5] That is, Mr and Mrs Giumelli were estopped (or *prevented* by equity) from asserting that their promises to Robert were unenforceable. The basis of equitable estoppel lies in the concepts of detrimental reliance and unconscionability. Essentially, the courts held that Robert had relied upon his parents' promises to such an extent that he would be detrimentally affected if those promises were not kept and that, in making the promises as they had, the Giumellis bore such responsibility for Robert's predicament that they ought not, as a matter of good conscience, be permitted to go back on their word.

There was some disagreement between the Courts about which of the promises ought to bind the Giumellis. The first instance judge, Nicholson J, was not satisfied that Robert had proven the requisite detriment in relation to the third promise. Therefore, his Honour would have held that the Giumellis were bound by only the first two promises, so that Robert would be entitled only to the house and the land upon which it stood. Whereas the Full Court of the Supreme Court and the High Court considered that the Giumellis were indeed estopped from reneging on the third promise.

However, apart from this, the chief issue upon which the courts differed was as to whether the Giumellis should be required actually to subdivide the Dwellingup farm and transfer the promised part to Robert, or whether monetary compensation for the loss of that land would suffice. Ultimately, the High Court (Gleeson CJ, McHugh, Gummow, Callinan and Kirby JJ) held that compensation would be adequate to do justice in this case. Thus, Robert was held to be entitled to payment of a sum representing the value of the promised lot.[6] Until paid, this sum was held to constitute a charge upon the Dwellingup farm.

The doctrine of equitable estoppel, as applied in *Giumelli*, clearly has broad relevance for farming families and those who advise them. Adult children commonly work on their parents' farms, with their interest lying in expectation and relying on unspoken promises or an informal understanding that the farm will be given or willed to them. Such trust is explicable only by the close family ties at work. In this context, it is

[5] For discussions of the doctrine of equitable estoppel, see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394.

[6] As at the date of the judgment and 'as determined by a Supreme Court judge …'. See the Court's orders as explained by the majority (Gleeson CJ, McHugh, Gummow and Callinan JJ) on p 126, concurred with by Kirby J on p 127 and made on p 128.

important to be aware that legally binding obligations extend beyond those imposed by contract and property law. Farmers may be legally obliged to meet their children's expectations, if they were responsible for creating those expectations and if the child has relied upon them to his/her detriment to such an extent that a court would consider it to be 'unconscionable' to do otherwise.

However, an adviser's task is made somewhat difficult by virtue of the fact that the central concept, 'unconscionability', is necessarily subjective. This makes it more difficult to predict the probable result of litigation. What is unconscionable in one person's eyes may not appear to another to be so.

Moreover, even where the circumstances of the case are such that an estoppel *is* likely to be made out, the remedial response may be difficult to foretell. It is generally accepted that the appropriate remedial response in cases of equitable estoppel is 'the minimum equity necessary' to reverse the detriment.[7] In other words, *just enough* to reverse the harm caused by the detrimental reliance. This too may be rather subjective. For instance, even though all the Courts agreed that Mr and Mrs Giumelli ought to be estopped from breaking their promises, each court took a different view as to the appropriate remedy. In this case, matters were complicated by the fact that, after Robert's departure, his brother Steven moved onto the Dwellingup property and made improvements to it – building cool rooms and planting new trees. The Full Court of the Supreme Court (Rowland, Franklyn and Ipp JJ) would have ordered the Giumellis actually to subdivide the Dwellingup block, in order to create the promised lot, whereas the High Court considered that such orders went further than was necessary to reverse the detriment suffered by Robert. Like the first instance judge, Nicholson J, the High Court held that justice would be better served by ordering them to pay Robert the monetary equivalent of the promised portion of the land.

The unpredictability of this doctrine is demonstrated by the fact that, despite being faced with the same evidence, each of these courts came to very different conclusions. Nicholson J would have seen Robert compensated only for the house and the land upon which it stood. The High Court went further and would have ordered them to compensate their son for the loss of all of the land, including that referred to in the third promise, and would have imposed a charge upon the land to secure that debt. The Full Court went furthest of all. It would have compelled Mr Giumelli actually to subdivide his farm, so as to create the block referred to in the third promise, and then transfer it to Robert.

Succession – *Vigolo* and *Bridgewater*

Giumelli concerned the legal consequences of frustrated expectations arising during the running of a family farming business. However, it is the unavoidable task of passing the farm on to the next generation, which

[7] *Crabb v Arun District Council* [1976] Ch 179, 198 (Lord Scarman), *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 404 - 405 (Mason CJ and Wilson J), 419, 423, 427 (Brennan J) and *Commonwealth v Verwayen* (1990) 170 CLR 394. 414 – 415 (Mason CJ), 429 (Brennan J).

carries the greatest risk of bitterness and division. A farmer may hope to acquire during his lifetime sufficient assets (especially land) to secure a comfortable retirement and to provide amply for all of his children. However, in many cases, assets are insufficient to satisfy the aspirations of all potential beneficiaries, so that it is inevitable that some family members will be disappointed. This problem is exacerbated where children have contributed unequally to the farming business and where there has been inadequate or conflicting communications within the family about the plan for succession. The cases that follow indicate some legal problems, which may be encountered in trying to secure the succession of the family farm.

Succession by Inheritance - *Vigolo*

Usually succession is dealt with by way of a testamentary disposition - a will. However, disappointed children may 'challenge the will' by bringing a claim under the Testator's Family Maintenance legislation (in Western Australia, the *Inheritance (Family and Dependants Provision) Act 1972* (WA)). *Vigolo* shows the impact of this statute.

Virginio Vigolo was the eldest of Lino and Rosario Vigolo's five children. When Virginio was 16 years old, he left school and commenced work on the family farm, the 'Old Coach Road Farm'. Three years later, due to a decrease in the income generated by the farm, Virginio worked part-time on the farm, and undertook additional employment, including work as a slaughterman, cleaner and labourer. When he was 21, Virginio told his father that he wanted to purchase his own farm with money that he had saved. In response, his father, who wanted all assets to be family assets, suggested that they should purchase a farm together and said that Virginio would eventually inherit it when his father died. So in June 1978, Virginio and his parents purchased a farm called the 'Albany Highway Farm'. From September of that year, the farming business of both farms was carried on by Virginio and his parents as a partnership, with profits being divided between them.

When, Virginio married in 1984, he and his wife purchased another farm with his parents at Chokerup. The income that was generated from the three family farms was applied to purchase several investment properties. In addition to his investment in the family farms, Virginio and his wife purchased a farm near Narrikup and a hairdressing business which was run by his wife.

In 1993, Virginio and his father had a falling out over Virginio's separate investments. Interestingly, Lino thought that Virginio should not amass property independently, but that any assets should be acquired on behalf of the family as a whole. Later that year, due to the breakdown in their relationship, Virginio and Lino (together with their respective spouses) entered into a Deed of Settlement, which facilitated the end of Virginio's involvement in the family farming business. Pursuant to this Deed, the Old Coach Farm was transferred over to Virginio and his wife. While Virginio's mother gave her share in the farm (valued at

$228,240) to Virginio *gratis*, Virginio was obliged to pay full market value ($571,760) for his father's interest.[8] Eleven months later, Lino made a new will, excluding Virginio and leaving his estate, worth approximately $1.9 million to his four other children – none of whom had ever worked in the family farming business.

Virginio contested the will under the Inheritance Act. He argued that he was the only one of his brothers and sisters who had worked on the family farm. In addition, he had devoted years of work to the family farming business for low wages, believing that the Old Coach Farm would eventually be his. This was due to promises made by his father on several occasions to the effect that Virginio would inherit it when his father died. However, ultimately, Virginio inherited nothing from his father. While Virginio did become the owner of that property, he did so as a purchaser (for full market value) of his father's interest, rather than as a donee. So that, in the end, despite several promises and years of hard work alongside his father, Virginio alone received nothing from his father.

Virginio was 39 years old at the time his father, Lino, died on 3 June 1997. He claimed a one fifth share of his father's estate under the *Inheritance (Family and Dependants Provision) Act 1972* (WA) ('the Act').

Section 7 of the Act provides that a child of the deceased person may bring a claim against the deceased person's estate.[9] The claim is made pursuant to section 6(1) of the Act which provides that the Supreme Court may, in its discretion, order that provision is made for the claimant if the Court is of the opinion that the will has not made 'adequate provision … for the proper maintenance, support, education or advancement in life' of the claimant.[10]

Each judgment[11] affirms the approach of Mason CJ, Deane and McHugh JJ in *Singer v Berghouse*,[12] who stated that determining claims under section 6(1) involved a 'two-stage process'.[13] Firstly, the court must consider 'whether the applicant has been left without adequate provision for his or her proper maintenance,

[8] Although, after certain sums were set off, the amount payable by Virginio and his wife at settlement was $251,737.
[9] *Inheritance (Family and Dependants Provision) Act 1972* (WA) ('Inheritance Act'), s 7(1)(c). Other persons who are entitled to bring a claim against the estate of a deceased person include the spouse or de facto partner of the deceased person (s 7(1)(a)); a former spouse or de facto partner of the deceased person who was receiving or is entitled to receive maintenance from the deceased person (s 7(1)(b)); a grandchild of the deceased person who was being wholly or partly maintained, or whose parent was being wholly or partly maintained by the deceased person (s 7(1)(d)); a parent of the deceased person (s 7(1)(e)).
[10] Note that pursuant to s 6(3) of the *Inheritance Act* the Supreme Court may attach conditions to the order. In addition, the Supreme Court may also refuse to make an order if it of the opinion that the character or conduct of the claimant, or any other ground, should 'disentitle him to the benefit of an order'.
[11] See *Vigolo v Bostin and Others* (2005) 221 CLR 191 per Gleeson CJ at 197; Gummow and Hayne JJ at 212; Callinan and Heydon JJ at 227.
[12] *Singer v Berghouse* (1994) 181 CLR 201.
[13] *Singer v Berghouse* (1994) 181 CLR 201, per Mason CJ, Deane and McHugh JJ at 208-209, quoted by Gummow and Hayne JJ in *Vigolo v Bostin and Others* (2005) 221 CLR 191 at 212.

education and advancement in life'.[14] If the answer to this question is 'yes', the court will then 'decide what provision ought to be made out of the deceased's estate for the applicant.'[15]

At the time of his father's death, Virginio and his wife had accumulated assets exceeding $2 million, and in addition, exceeding the value of assets owned by his siblings who had assets valued at $202,000, $271,000 and $216,000 (jointly with their spouses) and $70,000.[16] Due to his strong financial position, Virginio was unable to argue that financially he was left without 'adequate provision' for his 'proper maintenance' or 'support'.

Instead, Virginio argued that he had a 'moral claim' by virtue of his father's promises that the Old Coach Road Farm would eventually be his.[17] In his words:

> I believe that by reason of the promises made to me by my father which encouraged and persuaded me to live and work on the family farm and the other farming properties for very meagre 'wages', my contribution of my own savings to the purchase of the Albany Highway farm, my commitment to my father all my life until we dissolved our partnership in 1994, that I had to buy what my father had always told me would be my inheritance and the significant personal contribution I made over my lifetime towards 1994 to building up my father's estate at least equally with each of my brother and my sisters such that inadequate provision has been made for me in my father's will.[18]

Most importantly, the High Court *did* accept that moral considerations may be taken into account as part of the Court's discretion, when determining a claim under the Act. Factors in addition to the financial position of the applicant may be taken into account. As Callinan and Heydon JJ stated:

> Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors.[19]

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[14] Ibid. Mason CJ, Deane and McHugh JJ noted at 208-209, that the first stage is also called the 'jurisdictional question.'
[15] Ibid.
[16] See Gleeson CJ at 206.
[17] Virginio did not raise any claims in contract or equity by virtue of the promises made that he would inherit the Old Coach Road farm. This is possibly because, as noted by Gleeson CJ at 206, '…if any attempt had been made to base a legal or equitable entitlement on the promise, it would have been necessary to explore the assumptions on which the promise was made, such as that the business relationship would continue.'
[18] See Gummow and Hayne JJ at 209-210.
[19] See Callinan and Heydon at 231. For a further discussion of the concept of 'moral duty' in inheritance claims, see Rosalind F. Atherton and Prue Vines, *Sucession: Families, Properties and Death Text and Cases*, (2nd ed, 2003) 474-475; and Ken Mackie and Mark Burton, *Outline of Sucession*, (2nd ed, 2000) 196-198.

Ultimately, however, in this case, the High Court unanimously rejected Virginio's claim. The Court agreed with the decision of the trial judge, McLure J, who held that Virginio had been adequately compensated for his work and financial investments in the family farming business by virtue of the arrangement reached in the Deed of Settlement, and in fact, was at a significant financial advantage over his siblings by virtue of this.[20] The High Court also agreed with McLure J's finding that Virginio could not claim that he had been left without adequate provision when his financial situation was compared with that of his siblings. Overall, the High Court accepted that the father's promises that Virginio would inherit the Old Coach Road Farm were rendered ineffective by the Deed of Settlement in which it considered that Virginio had been adequately compensated.[21]

Nevertheless, although the applicant in this case was unsuccessful in his claim, the potential for claims to the family farm to be made under the *Inheritance Act* raises questions about a property owner's right to dispose of his or her property as he or she pleases. A farm owner may think that he/she has the sole discretion to deal with their property as they see fit. However, the Court's interpretation of the *Inheritance Act*, and in particular its willingness to consider arguments pertaining to the testator's 'moral obligations', suggests that it may be the court which, using its discretion under the *Inheritance Act*, has the final say as to how the farm and the assets on it will be distributed. This is confirmed in the judgment of Gleeson CJ when his Honour quoted the Attorney-General's second reading speech as follows:

> It is considered that society's attitude to the right of a man, or a woman, for that matter, to dispose of his or her property as he or she thinks fit … beyond doubt has changed. There is now a feeling that a deceased is under some moral obligation to make provision for the maintenance, education, and advancement in life of persons who in the normal course of human affairs had a close personal relationship with the deceased.[22]

A Testator's Family Maintenance claim can cause conflict between family members – particularly in a farming context, where the assets concerned are often very valuable and of great emotional significance. And at the end of day the result is difficult to predict, because it will depend on the statutory discretion of the court (in which the court takes into account many factors *other than* the testator's wishes). At end of the day, it is *the court's* (not the farmer's) idea of a fair result that will prevail. Thus, in some cases, the will may not be a reliable vehicle for succession planning. The possibility of a successful challenge may mean that the farmer cannot be sure that his wishes will be carried out. Even from the perspective of those who hope to inherit, the situation is less than ideal, because the operation of the legislation, turning as it does upon a statutory discretion and often concerning subjective notions of 'moral obligation', is so unpredictable.

[20] See for example, Gleeson CJ at 207.
[21] Id. See also Gummow and Hayne JJ at 220; Callinan and Heydon JJ at 232.
[22] Gleeson CJ at 196.

Succession by Transfer *Inter Vivos* - *Bridgewater*

In order to avoid the risk of a challenge made under Testator's Family Maintenance legislation**,** many attempt to arrange the succession of the family farm by way of *inter vivos* disposition (i.e. during their lifetime), rather than by will. However, as we shall see, even this can be problematic. Arrangements made *inter vivos* may be thwarted by equitable doctrines designed to enforce perceived moral obligations to other family members. These doctrines include: equitable estoppel, undue influence and unconscionable transaction.

The *Bridgewater v Leahy* is a cautionary tale. In this case, the High Court applied the equitable doctrine of unconscionable transaction to find that, regardless of his wishes in the matter, the farmer did not dispose of his property during his lifetime in such a way as to unfairly deprive his wife and daughters. *Bridgewater* must be considered to be a 'high water mark' case for this doctrine, and as such, it illustrates the lengths to which a court may go to see justice done.

Bill York was a grazier born and raised in Wallumbilla in Queensland. Together with his brother Sam, Bill owned four substantial properties in that area. They carried on a grazing partnership on those properties originally under the name 'York Brothers'. Bill was the elder brother and more senior partner. However, while Sam had three sons, Bill had only four daughters. As is often the case, Bill wanted to keep his landholdings in 'the family name' and so embarked upon a course of action designed to ensure that, after his death, Sam's youngest son, Neil York, would take over the properties.

This was not impulsive generosity. Neil had worked for York Brothers all of his adult life and had formed a close relationship with his uncle. Indeed, Bill regarded Neil as the son that he had never had. The trial judge described their relationship thus: 'Bill greatly admired Neil, and fully trusted him. For his part, Neil appreciated the high regard his uncle felt for him.' Ultimately, at Bill's suggestion, Neil was brought into the partnership as a one third partner, without having provided any capital contribution. Furthermore, over the years, partnership funds were used to purchase two properties that were put into Neil's name.[23] In return, Bill was enabled to move into semi-retirement. Neil took over the responsibility of doing the book-keeping and the day-to-day management of the partnership. While Bill was still an active member of the partnership, he was able to stay in his house in town and travel less frequently out to the properties.

Originally, Bill's plan to pass the farming business to Neil was set out in his will. He left his house in town, his car and about $150,000 in his bank account to his widow and the residue of his estate to his daughters in equal shares. At first glance, this might not appear to be ungenerous. However, Bill's will went on to give Neil an option to purchase all his pastoral land, livestock and machinery and his interest in the partnership,

[23] York Brothers supplied money for the purchase by Bill and Neil, as tenants in common in equal shares, of land known as 'Risby'. Later, the new partnership, Mt Leigh Pastoral Company, provided money for Neil and his wife, to purchase land known as 'Injune'.

for $200,000 ('the Option'). At the time of the making of the will the land in question was valued at $694,922. Thus, the will gave Neil an option to purchase the bulk of Bill's property at a substantial undervalue. In fact, Neil did exercise the Option, so that Bill's four daughters each received only $50,000 under their father's will.

Despite the will's generosity to Neil, there was no question as to Bill's testamentary capacity. Nor was there any suggestion of any interference, pressure or influence by Neil. It was held as matter of fact that the Option was offered on Bill's initiative and reflected 'his strongly felt personal wishes'.[24] His motivation was both love for Neil and a strong desire to ensure that his 'empire' would not be broken up upon his death, but would pass 'intact' to his 'heir'.

Had matters been left at that, Bill's daughters would have had a reasonably good chance of challenging the will under the Queensland Testator's Family Maintenance Legislation i.e. *Succession Act 1981* (Qld) ('the Succession Act'), on the basis that their father had made inadequate provision for them. However, for all practical purposes, Bill blocked that path by virtue of 'the *inter vivos* transaction'. In 1988, at Bill's request, Neil sold Injune, the property that he owned with his wife, Beryl. Bill agreed to transfer to Neil a substantial part (though not the whole) of the land included in the Option in return for the proceeds from the sale of Injune. Although it had been Neil's suggestion to 'buy Bill out' with this money, Bill had been happy with the plan. The Court held that it appeared that this approach was in line with Bill's wishes. The result was that Injune yielded $150,000, so that Bill transferred property worth $696,811 to Neil for $150,000.[25] For reasons known best to Bill York's lawyer, the transaction took the form of a sale to Neil and Beryl York for $696,811, together with a deed of forgiveness for all but $150,000.

On one hand, it might be considered that the *inter vivos* transaction made things more equitable for Bill's daughters. As residuary legatees, they would share in so much of the $150,000 as remained after Bill's death and Neil would still be obliged to pay them $200,000 for the property remaining under the Option. However, on the other hand, the effect of transferring the bulk of Bill's property to Neil *inter vivos* was that that property was removed from Bill's testamentary estate and was therefore unavailable in any action brought by Bill's daughters under the *Succession Act*. In other words, the *inter vivos* transaction removed the possibility, in relation to the bulk of Bill's property, of his plans for the succession of his land being frustrated by a *Succession Act* application.[26]

Once again, although Bill York did not seek independent advice, a doctor who examined him confirmed

[24] (1998) 194 CLR 457.
[25] Although, for reasons known best to Bill York's lawyer, the transaction took the form of a sale to Neil and Beryl York for $696,811, together with an agreement by Bill York to accept $150,000 and a deed of forgiveness for the balance of $546,811.
[26] Bill's widow and daughters did the will under the *Succession Act*, but the application was struck out for want of prosecution.

that he was 'of sound mind and capable of making decisions about his personal affairs'.[27] Moreover, the judge at first instance, de Jersey J, was satisfied that had Bill been independently advised, the result would have been the same. Furthermore, it is clear that Bill knew that his daughters were very unhappy about the *inter vivos* transaction. After having remonstrated with one of his daughters on the subject, Bill remarked to his lawyer: 'I hope I haven't got to walk home.'[28]

As was the case in *Giumelli*, *Bridgewater* demonstrates the tendency on the part of the landowner to adopt an attitude that the land is 'his to deal with as he wishes' and that he is free to ignore moral claims, such as those which might be made by his wife and children. In Bill's opinion, he had done enough for his daughters during his lifetime. From his point of view, his daughters had no legitimate claim, because they had 'married blokes and they never helped [him]', that they had 'got their own jobs' and 'never worked on the place', 'never picked up sticks'.[29]

After Bill's death, his widow and daughters challenged both the Option and the *inter vivos* transaction on the basis of the equitable doctrines of undue influence and unconscionable transaction. They were unsuccessful on both counts. On Appeal to the Court of Appeal, they pursued only the challenge to the *inter vivos* transaction. The majority (Macrossan CJ and Davies JA) dismissed the appeal. Only Fitzgerald P would have allowed the appeal and set aside both the Transfers and the Deed of Forgiveness on the basis that Neil had unconscionably taken advantage of Bill. Ultimately, however, the majority of the High Court (Gaudron, Gummow and Kirby JJ) agreed with Fitzgerald P, striking down the *inter vivos* transaction on the basis of the equitable doctrine of unconscionable transaction. They held that it was unconscionable for Neil and his wife Beryl to retain the benefit of the Deed of Forgiveness and in so doing deprive Bill's estate of the true value of a large portion of his property.

This was a most unusual application of the doctrine of unconscionable transaction. It has been held that, in order to access this doctrine, the plaintiff must first prove that he/she was in a position of special disadvantage *vis a vis* the defendant. Examples have included 'poverty and need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation, where assistance or explanation are necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis a vis* the other.'[30]

In this case, Bill York's 'special disadvantage' is not readily evident. Nor did the majority judgment analyse this matter in very great detail. Their Honours pointed out that special disadvantage need not be the result of physical frailty. In their Honours' view, any factor that renders one party subject to exploitation by

[27] (1998) 194 CLR 457, 464 and 477.
[28] (1998) 194 CLR 457, 489.
[29] (1998) 194 CLR 457, 489.
[30] *Blomley v Ryan* (1956) 99 CLR 362.

another, such that the benefit of an improvident disposition by the disadvantaged party may not in good conscience be retained, would constitute a disadvantage. They noted that the disadvantage may stem from a strong emotional dependence or attachment[31] and observed that the relationship between Bill and Neil was so close that Neil could effectively 'have whatever he wanted'.[32] Therefore, in this case, Bill's disadvantage was held to be his emotional attachment to Neil and his desire to keep the properties together under one manager.

Their Honours considered that Neil and Beryl had taken advantage of this weakness by proposing the sale and by accepting the Deed of Forgiveness. The case against Neil and Beryl was strengthened by the fact that Bill had received no independent legal advice. Thus, according to their Honours, the *inter vivos* transaction was not 'fair, just and reasonable'. Their Honours stated that the unconscionability of Neil's actions could be appreciated by considering the probable outcome had a suit been brought by Bill to set aside the Deed of Forgiveness on the basis of unconscionability. It is unlikely that Neil and Beryl could have successfully resisted any such claim. Their Honours considered that this fact put the character of the Defendants' actions into a clearer light.

Of course, had their Honours set aside the whole of the *inter vivos* transaction (i.e. *both* the Deed of Forgiveness and the Transfers) the plaintiffs would have been in a worse position, because of the Option. Neil could then have purchased all of the land for only $150,000. Therefore, in order to produce a result that was 'practically just', the court set aside only the Deed of Forgiveness, leaving the Transfers on foot. This created a vendor's lien in favour of Bill's estate, which obliged Neil and Beryl to pay the full purchase price of $696,811. That debt formed part of Bill's residuary estate and, as such, belonged to his daughters.

Once again, an equitable doctrine was used to subjugate the land owner's (Bill's) express wishes in favour of his moral obligations. Bill York had tried on two separate occasions to organise his affairs so as to ensure the succession of his property in the manner of his choice. Nevertheless, an equitable doctrine was used to undo his efforts so as to enforce what the court saw as being his moral duty to provide more generously for his wife and daughters. Interestingly, although not directly relevant, because the adequacy of Bill's will was not in dispute, the Court made a point of mentioning that Bill had been a 'remarkably frugal' man and the meager provision made for his widow and daughters. By stretching the doctrine of unconscionable transaction and fashioning the remedial response so as to achieve what was perceived to be a just result, the High Court showed its determination to use Equity as a means of ensuring that right is done by all.[33]

Conclusion

[31] As in *Louth v Diprose* (1992) 175 CLR 621.
[32] (1998) 194 CLR 457, 490.
[33] (1998) 194 CLR 457, 474.

As these three decisions demonstrate, a working knowledge merely of the common law rules of contract and property law is insufficient where dealings with family farms are concerned. Developed as they were in the realm of commerce, these laws are not best fitted for the resolution of disputes between members of a family or other close personal relationship. For this reason, equitable doctrines, such as estoppel, undue influence and unconscionable bargain and statutes, such as the *Inheritance Act*, overlay the common law rules to provide a more just outcome in these cases. Therefore, a full understanding of the legal rights pertaining to the family farm cannot be obtained without taking cognisance of such equitable and statutory rights and obligations.[34] Familiarity with the operation of these areas of law is essential. None of these cases involved unusual factual scenarios. Indeed, each case concerned the sort of dilemmas and decisions commonly faced by typical farming families. In each case, an expensive legal debacle ensued and in none of them could the outcome have been confidently predicted. The legal 'rules' were (or had the potential to be) overridden, in order to enforce a *moral* obligation recognised in Equity or by statute, with a result which was neither what the farmer wanted nor would have expected.

This raises two problems. Firstly, few farmers possess even a 'working knowledge' of statute law or equity. Most assume that, so long as theirs is the name on the title documents (i.e. he/she is the registered proprietor), the farm is theirs to deal with as they see fit. Furthermore, farmers tend to assume that the 'rules' of contract which apply when selling their produce also apply to agreements made with their family concerning the family business. Few are aware that they may have equitable and statutory obligations to members of their family. Yet those who fail to take account of these obligations in their dealings may be in for an unsettling (and expensive) surprise. Legal advice is essential far more frequently than it is commonly understood to be.

Secondly, the nature of equity is such that equitable doctrines must be applied flexibly. The same is true of the *Inheritance Act*, which rests in its application on broad judicial discretion. Put simply, these areas of law are seldom 'black and white'. This can undermine certainty, even for those who have the foresight to seek legal advice, because competent advice often must be equivocal.

There is probably no way to contrive an 'equity-proof' business or succession plan. Yet, as the cases illustrate, farmers and those who advise them ignore at their peril the farmer's legally imposed obligations of morality and good conscience. Perhaps the best that can be said is that 'to be forewarned is to be forearmed'. At the very least, lawyers advising farmers with respect to ownership and/or succession of the family farm should caution their clients against the risks associated with making 'hollow' or ill-considered promises to family members. Clients should also be apprised of the importance of taking legal advice before making decisions, promises or arrangements regarding the ownership or succession of the family

[34] To this end, it should be noted that the equitable doctrine of unconscionable bargain is now mirrored in Part IVA of the *Trade Practices Act 1976* (Cth) and the States' *Fair Trading Acts*. See for example ss 11 and 11A of the *Fair Trading Act 1987* (WA).

farm – especially if there is reason to suspect that any family member is likely to feel aggrieved by the proposed course of action. If it is understood from the outset that the farmer may be held to what *a court considers* to be his/her obligations of morality and good conscience, the plans which are made will be less likely to be undone. Perhaps even more importantly, the bitter and expensive family feuds which often ensue from disappointed expectations will be more likely to be averted.