

AUSTRALIA / JUDGMENT

Zeaiter v Zeaiter [2025] NSWSC 60

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Supreme Court

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Supreme Court

New South Wales

Medium Neutral Citation: Zeaiter v Zeaiter [2025] NSWSC 60

Hearing dates: 3-7, 10-12 February 2025

Date of orders: 19 February 2025

Decision date: 19 February 2025

Jurisdiction: Equity - Commercial List

Before: Peden J

Decision: At [222]

Catchwords: CONTRACTS — Formation — Agreement — Whether plaintiff executed deed of agreement— Where plaintiff denies signing deed — Where expert evidence from forensic document examiner is that signature is authentic — Where lay and documentary evidence is that plaintiff signed deed

CONTRACTS — Construction — Interpretation — Whether deed rescinded prior oral agreement by implication — Whether deed requires payment for goodwill

CONTRACTS — Misleading conduct under statute — Misleading or deceptive conduct — Whether deed ought to be set aside — Whether compensation should be awarded — Whether reasonable expectation of disclosure arose for defendant to disclose to plaintiff payments where plaintiff and defendant are brothers and both directors of family company — Whether plaintiff misled by proposed valuation of business — Where same conduct said to be unconscionable

VALUATION — Methods of valuation — Whether provisioning for capital gains tax appropriate — Whether valuation on asset or valuation on income approach preferable — Where valuation made for purposes of separating interests in family company

CORPORATIONS — Members' rights and remedies — Oppression — Whether failure to disclose payments or failure to make particular payments equally to shareholders oppressive — Whether plaintiff has standing as a person who has ceased to be a member of company

CORPORATIONS — Constitution — Whether alleged failure to pay distributions equally is a breach of company constitution

Legislation Cited: Australian Consumer Law ss 18, 243

Australian Securities and Investments Commission Act 2001 (Cth) s 12

Corporations Act 2001 (Cth) ss 232, 233, 234

Evidence Act 1995 (NSW) s 79

Cases Cited: Addenbrooke Pty Ltd v Duncan (No 2) [2017] FCAFC 76
Allen v Roughly (1955) 94 CLR 98
Axis Bank Ltd v Gujarat NRE India Pty Ltd [2020] NSWSC 1711
Beevers v Port Phillip Sea Pilots Pty Ltd [2007] VSC 556
Damjanovic v York Agencies Pty Ltd [2003] NSWCA 222
Davis v R [2024] NSWCCA 120
Dungowan Manly Pty Ltd v McLaughlin [2012] NSWCA 180
ET-China.com International Holdings Ltd v Cheung [2021] NSWCA 24
Hillam v Iacullo (2015) 90 NSWLR 422
Jeans v Cleary [2006] NSWSC 647
Lustre Hosiery Ltd v York (1935) 54 CLR 134
May v Walker [2024] NSWSC 612
Musa v Alzreaiawi [2021] NSWCA 12
Olson v Keefe (No 3) [2018] FCA 2001
Productivity Partners Pty Ltd v Australian Competition and Consumer Commission [2024] HCA 27
Salad Fresh Pty Ltd v P&M Quality Smallgoods Pty Ltd [2015] NSWSC 1717
Smith v Joyce (1954) 89 CLR 529
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165
Touma v Highfields Australia Pty Ltd [2024] NSWCA 160
Tzavaras v Tzavaras & Sons Pty Ltd [2023] NSWCA 168
Category: Principal judgment
Parties: Anthony Zeaiter (First Plaintiff)
Newline Property Investments Pty Ltd (Second Plaintiff)
Charbel Zeaiter (First Defendant)
Newbuild Developments (Australia) Pty Ltd (Second Defendant)
Representation: Counsel:
P Afshar and L McIntyre (Plaintiffs)
V Bedrossian SC and A Brown (Defendants)

Solicitors: Lionheart Lawyers (Plaintiffs)
Assured Legal (Defendants)
File Number(s): 2020/313381
Publication restriction: Nil

JUDGMENT

1. Anthony is Charbel Zeaiter's younger brother. Without intending any disrespect, I will refer to them by their first names.
2. From 2003, Anthony and Charbel successfully built up Newbuild Developments (Australia) Pty Ltd, a residential building construction company. They were both directors and 50% shareholders. Their father was initially a director between 2003 and 2009.

3. While a licensed builder and plumber, Charbel primarily ran the business side of Newbuild, but did attend work sites from time to time. Anthony, also a licensed builder and plumber, primarily worked on building sites. Before they formed Newbuild, they had operated New Line Plumbing Pty Ltd. Charbel had obtained his licence first, Anthony later. The main source of income for Newbuild was by tenders won for government housing contracts. However, Newbuild also developed some property that it owned.
4. In 2017, the brothers orally agreed to separate their interests in Newbuild 50:50, but Anthony has disputed what division was agreed and how and when it was to take place. While by the end of 2019 Anthony had received one company-owned property and cash of about \$6,500,000, he claimed that these receipts did not amount to 50% of the company's value, and, in these proceedings he has sought the difference. In particular, he claimed that the valuation of Newbuild ought to include a component for goodwill, which was not paid.
5. Anthony also claimed that Charbel overpaid himself from the company while they operated it together in the following sums:
 1. \$1,118,090 recorded in Newbuild's financial ledger, that was paid to New Line Plumbing and then to Charbel (New Line Plumbing Payments); and
 2. \$1,882,429 in excess payments, as set out in a spreadsheet provided by Charbel to Anthony in May 2019 (Excess Payments).
1. Charbel denied he is liable to Anthony in any way. He claimed in late 2017, after the oral agreement, Anthony signed a Deed of Agreement dated 4 December 2017, which identified the agreed sum Anthony would receive in the division, and the sum which he has in fact received.
2. Anthony denied he executed the Deed, but otherwise said the Deed was liable to be set aside because of misleading or deceptive conduct by Charbel, unbeknownst to Anthony, in paying out the New Line Plumbing Payments and the Excess Payments, and further, obtaining "dishonest" undervaluations of Newbuild's properties. Those matters were said to lead to an accountant misvaluing Newbuild in a proposal given to the brothers before the Deed was allegedly executed.
3. Anthony also claimed that the New Line Plumbing and Excess Payments were made in breach of Newbuild's constitution and amounted to oppression, triggering a remedy under s 233 Corporations Act 2001 (Cth), or were unconscionable. Based on any of these arguments, Anthony claimed 50% of those payments, namely \$1,500,259.50.
4. Most of Anthony's claims are resolved by a determination of the following issues:
 1. Was Anthony bound by the Deed and, if so, what is its effect; and
 2. Has Anthony proved he has not received money, to which he is entitled.

1. For the reasons that follow, I consider that Anthony did sign the Deed and is bound by its terms, including as to the quantum he agreed to receive in the business division. There is no reason to set aside the Deed. I am not persuaded that Anthony has proved he is entitled to more money or that Charbel engaged in any conduct that requires payment of any compensation to Anthony.

Background

1. Below is a chronology of the brothers' negotiations, the various alleged agreements, and the parties' conduct after the alleged agreements.
2. Most of the relevant events and conversations between Anthony and Charbel occurred between 2017 and 2019. In these circumstances, given the fallibility of human memory, I have placed primary weight on contemporaneous documents and objective facts: *Touma v Highfields Australia Pty Ltd* [2024] NSWCA 160 at [18] (Basten AJA, White and Adamson JJA agreeing). Further, I have tested witnesses' credibility against "context and that which was revealed objectively by contemporaneous documents": *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24 at [212] (Bell P, Bathurst CJ and Leeming JA agreeing). To the extent necessary, I have also considered the type of questions asked in cross-examination when assessing whether to accept submissions on the credibility of answers provided by witnesses: see eg *Davis v R* [2024] NSWCCA 120 at [160]-[166] (Adamson JA, Price AJA and Garling J agreeing).
3. I note at the outset that very little turns on Charbel's credibility alone, given the documentary evidence and the evidence given by other witnesses. The only matter where Charbel's evidence was somewhat relevant was in relation to the allegation that he caused himself to be overpaid out of Newbuild, as discussed further below.
4. It was not in dispute that from April 2017, the brothers discussed dividing their business interests. Anthony's counsel made much of Charbel's responses in cross-examination as to whether he had told Anthony he wanted to "split" because he did not want to work with his brother anymore in Newbuild. However, exactly what Charbel said about his motivations is not relevant to determining what was in fact agreed. The brothers did argue about business frequently, and Anthony did not question Charbel proffering their growing families as a reason to divide Newbuild. Further, there is no dispute that they agreed to separate their business interests, while intending to continue to work together through their own corporate entities.
5. At that time, they agreed that the company bookkeeper, and qualified accountant, Mr Vali Bandpay, would be the "middleman" in their negotiations. Anthony's evidence was that he told Charbel he would discuss the split with Mr Bandpay. It appears that Anthony had a good relationship with Mr Bandpay, and called him often. Shortly after, Anthony met Mr Bandpay to discuss the business split and Mr Bandpay showed Anthony some figures he had prepared about Newbuild. Mr Bandpay also informed Anthony that Charbel wanted to keep two

company properties on Range Road and give Anthony the property at Henry Kendall Street.

6. By late June 2017, Anthony's evidence was that he told Mr Bandpay:

I'm not too happy with Charlie keeping both of the bigger developments at 12 Range Road and 18-22 Range Road. I've put in just as much effort into those properties and Newbuild Developments as Charlie. But if nothing will change about how we work and split profits in the future, then I'll think about it.

...

Vali, I don't want to cause any issues with Charlie, or my mother and my siblings. I'll agree to Charlie's proposed split of the properties and half of the value of the Newbuild Developments.

1. Anthony further agreed to Mr Bandpay's proposal:

We're going to open up a company for you. When the split happens, your money and property will be transferred into this company. Like I've said before, there will be no changes to the way work is done. This new company and Newbuild Developments will continue to work together.

1. On about 27 June 2017, Charbel obtained valuations for Newbuild's properties from Mr Malcolm Craig, registered valuer:

1. 12 Range Road was valued at \$2,480,000.
2. 18-22 Range Road was valued at \$1,995,000.
3. 1 Henry Kendall Street was valued at \$1,100,000.

1. While Charbel had never met Mr Craig, he accepted that he likely had a conversation with him about the valuations to be performed. In response to questions, Charbel also provided information to Mr Craig's office about the properties. He accepted that he had provided Mr Craig with his "desired" value or range for each property. Both brothers stated that they understood the valuations were to be for "taxation purposes", without explaining what that meant.

2. On 27 June 2017, Charbel, on behalf of Newbuild, entered into two agreements with the New South Wales Land and Housing Corporation to carry out construction of housing commission housing with contract prices in the multi-million dollar range. Anthony did not claim that he did not receive appropriate payments for the work he carried out on those Newbuild projects into 2019.

3. On 29 June 2017, Mr Robert Chalmers, an accountant engaged by Newbuild, and well-known to Anthony and trusted by him at the time, sent a letter to Charbel outlining various methodologies for a "separation of assets from Newbuild ... to Anthony from Charlie". That letter included:

From information provided by Vali, it would appear that Anthony and Charbel wish to separate their financial interest in Newbuild ... in return for a financial consideration of approximately \$6.5 million. ...

As there is an asset division and both Anthony and Charlie are continuing the business, we have not made any calculations pertaining to Goodwill of the business. ...

There are a number of available options to split the assets in Newbuild ... between Anthony and Charlie, each with different tax consequences. ...

...

Proposition 3

This proposition is the most effective provided certain conditions are met. The dividend imputation system is designed to prevent double taxation of the corporate tax entity, Newbuild ... [T]he dividend declared by Newbuild ... would be a fully franked dividend. The dividend would be paid to a newly incorporated company (before 30/6/2017) with both Anthony and Charlie being shareholders. ...

...

Actions to be implemented when proceeding

- Formation or acquisition of a new corporate entity. Anthony and Charlie to acquire a 50% shareholding before 30 June 2017.
- A bank account is to be opened.
- A franked dividend is to be declared from Newbuild ... to the new company...
- The building known as 1 Henry Kendall Drive, West Gosford is to be transferred to the new company at market value but retaining the cost base.

Conclusion

Having now explained the method to transfer the assets and undertaken the payment of the dividend, we believe that significant taxation savings will take place for both you and Anthony.

1. By June 2017 the brothers had agreed that a new company would be created to assist with the business split. On 30 June 2017, Newline Property Investments Pty Ltd was incorporated with the brothers as equal shareholders and directors. Anthony accepted that this company was created so that "eventually" it would be controlled by him and Newbuild would be controlled solely by Charbel.

2. On 27 September 2017, Mr Chalmers wrote two letters that were read by Anthony shortly after they were written. The first letter was written to conveyancer, Mr Rodney Taylor, who had worked for Newbuild, but also for the brothers in their personal property purchases. It was a detailed four-page letter entitled "Demerger of Interests in Newbuild Developments (Australia) Pty Limited – A & C Zeaiter". The letter requested that Mr Taylor prepare a shareholder's agreement. It included:

It has been decided by both parties that the company's assets be valued as at 30 June 2017 and then a 50/50 division take place.

The split in assets will take place on the following basis:

- Transfer of 1 Henry Kendall Street, West Gosford to Newline Property Investments Pty Limited.
- The balance in the form of a cash payment formulated as a fully franked dividend on the "J" Class Redeemable Preference Shares currently owned by Newline Property Investments Pty Limited in Newbuild Developments (Australia) Pty Limited ...

With each party as directors and shareholders in Newbuild Developments (Australia) Pty Limited agreeing to the registration of the share transfers. As Newbuild Developments (Australia) Pty Limited is a land rich company, stamp duty would be applied to the transfer of shares from Anthony to Charlie. As this would be in the order of \$6,451,972.64 (after the transfer of 1 Henry Kendall Road, West Gosford), the duty could be as high as \$242,896.00 (a calculation is attached). Would you be so kind as to confirm this with the Office of State Revenue?

1. The second letter dated 27 September 2017 was written to the brothers and entitled "Accountant's Report Proposed Demerger/assets Split of Newbuild Developments (Australia) Pty Limited". It included:

The report has been prepared to provide shareholders for their consideration the fair value division of assets currently owned by Newbuild Developments ...

Summary of Proposals

In essence, both parties have agreed to the following proposal, that:

- The assets of Newbuild ... be valued at fair market value.
- That a valuation for the company as a whole be determined on external values being determined.
- That each shareholder be entitled to 50% of the fair market value.
- That the consideration for the one-half share to include the transfer of 1 Henry Kendall Street .. and the balance in cash as a fully franked dividend.

...

In this case, the directors have decided to apply the net asset based valuation based on market value and disregarded a valuation for Goodwill in addition to the net asset based valuation.

Information provided

The directors instructed our firm to base the valuation on:

- A set of financial statements supplied by the company accountant.
- A set of property valuations supplied by a director.

...

Anthony Zeaiter Share

The amount of entitlement for Anthony Zeaiter based on an asset split would be as follows:

...

Total Due

Less: Transfer of 1 Henry Kendall St (1,100,000.00)

Remainder Due \$6,451,972.64

...

Finally, we have not factored into the valuation a figure for Goodwill.

In view of all work being undertaken by Newbuild Developments ... under a tender basis and the intention by both shareholders to continue working together under an agreement of equal profit shares, no calculation has been factored in to the value Goodwill.

If you have any queries please phone.

1. In the proposal letter Mr Chalmers recorded his opinion of the total value of Newbuild and its properties as \$15,583,621.42. His calculations included goodwill of \$995.00, which was then deducted from the final figures.
2. On 16 October 2017, the sum of \$2,500,000 was paid by cheque from Newbuild to Newline Property.
3. On 23 October 2017, Mr Taylor created a Microsoft Word document entitled "Zeaiter agreement". On 25 October 2017, Mr Chalmers sent Mr Taylor his 27 September 2017 valuation proposal. On 15 November 2017, the Deed was printed.
4. On 28 November 2017 at 4.57pm, Anthony made a phone call to Mr Bandpay and spoke for about 24 minutes. He did not recall the conversation, but nevertheless denied having discussed signing the Deed during the call. This is discussed further below.

5. From 6.31pm until 7.45pm, Anthony made six calls to Mr Taylor. Some calls appeared to have been to voicemail as they were only three or four seconds in duration. The call at 7.45pm was 18 seconds long. At 8.24pm, Anthony called Mr Bandpay again and spoke for almost three minutes.
6. At the time, neither Anthony nor Newbuild had any property transactions on foot that might require contact with Mr Taylor. Anthony did not recall why he made those calls to Mr Bandpay or Mr Taylor. He denied the purpose of the calls was to discuss and organise signing the Deed, however, I consider that unlikely as discussed further below.
7. On 29 November 2017, Mr Taylor emailed Mr Chalmers stating "Sorry for delay. Copy of agreement attached. I will forward the signed agreement shortly".
8. The Deed relied upon by Charbel relevantly provided the following:

WHEREAS:

1. Charlie and Anthony are siblings.
 2. Charlie and Anthony are the directors and shareholders Newbuild Developments (Australia) Pty Limited ACN 103 710 865.
 3. Charlie and Anthony have agreed to divide the Assets of the Company and thence to operate separate investment companies..
- 4 The Parties have established a new company Newline Property Investments Pty Limited ACN 620 710 685 to facilitate the separation of the assets
5. Both parties have satisfied themselves the agreement is equitable

IT IS AGREED:

The split will take place as follows:

1. The property at 1 Henry Kendall Street, West Gosford will be transferred from Newbuild Developments (Australia) Pty Limited to Newline Property Investments Pty Limited.
2. The balance of Anthony's share will be paid by way of a cash transfer to Newline Property Investments Pty Limited
3. The shares held by Anthony Zeaiter in Newbuild Developments Australia Pty Limited will be transferred to Charbel Zeaiter

[The Deed omits clause 4]

5 The shares held by Charbel Zeaiter in Newline Property Investments Pty Limited will be transferred to Anthony Budwana Zeaiter

6. Anthony Budwana Zeaiter will resign as a Director of Newbuild Developments (Australia) Pty Limited

7 Charbel Zeaiter will resign as a Director of Newline Property Investments Pty Limited

8. Newbuild Developments (Australia) Pty Limited will transfer to Newline Property Investments Pty Limited the amount of \$6,451,972.64. This amount plus the units referred to in item 1 represent 50% of the current fair market value of Newbuild Developments (Australia) Pty Limited as determined in the Accountants report of 27 September 2017 and accepted by both parties.
9. The two parties will continue to work together and will establish a specific agreement for any projects on which they are both involved. The two companies will not compete with each other for a period of at least three years.
10. The two companies will not compete against each other for the same projects
11. Should there be a future dispute between the two parties it will be resolved by mediation
12. The governing law of this deed is the Law of the State of New South Wales..
1. Anthony denied he signed the two original copies of the Deed with Mr Taylor or otherwise. I have found he gave untruthful evidence and that he did sign the Deed, as dealt with further below.
2. On 13 December 2017, Mr Chalmers sent an email to DGF Morgan & Associates Pty Ltd asking for further legal documentation (emphasis added):

Dear William,

Re: Anthony Zeaiter; Charbel (Charlie) Zeaiter; Newbuild Developments (Australia) Pty Limited; Newline Property Investments Pty Limited

Background

Our clients, Anthony and Charlie, are brothers and operate a property construction company known as Newbuild Developments (Australia) Pty Limited. The company constructs home units and residential properties for the Department of Housing around the Gosford area on the Central Coast.

Both brothers have decided that they wish to pursue different interests; Anthony in land subdivision and Charlie in ongoing construction. As a consequence, they have decided to split the company's assets which includes a property, 1 Henry Kendall Street, West Gosford and cash. Our firm has done a valuation of the business which also factors in the future capital gains tax on property held but not sold.

In order to take advantage of various tax concessions by way of script for script rollover, we have had to form a new company known as, Newline Property Investments Pty Limited. Provided the shareholders remain the same in both entities, no capital gains tax will apply upon the transfer of 1 Henry Kendall Street for \$1,200,000. However, stamp duty must be paid on the transfer.

The directors of Newbuild Developments (Australia) Pty Limited on 30/6/2017 issued 1 "J" Class Redeemable Preference share to Newline Property Investments Pty Limited. This enables Newline Developments Australia Pty Limited to declare a fully franked dividend of \$2,500,000 to Newline Property Investments Pty Limited. Due to a tax offset, there is no tax in the investment company receiving the dividend. However, if Newline Property Investments Pty Limited declares a dividend to the Zeaiter Family Trust, tax would apply to the beneficiaries.

With regard to Clause 3, (4) is missing, Clause 5, 6, and 7, the dates have not yet been determined. Clearly this cannot occur at the date of the agreement as it would breach the tax concessions under script for script rollover relief.

Perhaps these clauses could be set out in a separate document requiring an ongoing discussion.

Quote

A quote is required to redo the deed on a proper footing. Perhaps the parties should also include the directors acting on behalf of the companies consenting to the split.

I have enclosed:

A letter of instruction to the solicitor/conveyancer

A copy of the document to be prepared by DGF Morgan

Please call me if you have any questions.

Regards,

Bob Chalmers

1. On or about 14 December 2017, Anthony signed the necessary documentation for stamp duty for the transfer of the Henry Kendall Street property from Newbuild to Newline Property. I note that Mr Chalmers' valuation proposal had included provision for the payment of stamp duty for the transfer.
2. In February 2018, Charbel gave Anthony a cheque for \$2,200,000 from Newline Property. Anthony's evidence was that Charbel said:

I know you're doing it tough. This will help with paying off the line of credit ... This money came from a deposit of \$2,500,000 made into Newline ... The balance of \$300,000 can be used to pay for any tax payable on the \$2,200,000 distribution.

1. Anthony used the money to offset his debt (through a line of credit) for a property purchase completed in late 2017.
2. On 17 April 2018, Charbel contacted Anthony to request he attend a meeting with Mr Chalmers to "to go through every thing". Anthony responded, "You just go yourself".

3. However, after Charbel indicated that Anthony was also required to attend, on 21 April 2018, both brothers went to Mr Chalmers' office and were handed a letter that included:

We have completed an extremely complex review of [tax issues] ...

We have now finalised the documentation and have prepared a:

- Timeline of documents to be dated; and,
- A schematic diagram of the changes and issued capital ... which complies with Australian Taxation Office capital gains tax exemptions and NSW Stamp Duty exemptions.

Would you both be so kind as to execute the various documents as prepared which are enclosed. Copies have been provided for your records.

1. Anthony's evidence was that he did not read the letter or any of the documents that he subsequently signed in the presence of Mr Chalmers, Charbel and Mr Bandpay. The documents included: amendments to Newbuild's constitution, a declaration of a dividend of \$2,500,000 (which had already been paid to Newline Property and from which Anthony had received \$2,200,000), and share transfers which would have the effect of Anthony exiting Newbuild and Charbel exiting Newline Property. Anthony stated that because some documents were not dated, they were not binding, and therefore no final agreement had been reached.
2. One substantive document signed was entitled "Agreement" and prepared by DGF Morgan & Associates, solicitors. That agreement appears to have been drafted at Mr Chalmers' request, made on 13 December 2017.
3. The Agreement contained Recital E:

Anthony and Charbel have agreed to separate the business of Newbuild with Charbel remaining as sole director of Newbuild and Anthony remaining as sole director of Newline and agreed to effectively split the assets of Newbuild between Newbuild and Newline by the transfer of certain assets and the payment of certain dividends.

1. Otherwise, the Agreement's substantive terms concerned mutual releases concerning the outgoing directors from the companies, adjustments for tax and other liabilities, and express exclusion of any restraint on the brothers competing against each other. There is no reference to any requirement to value Newbuild's assets or determine what the "certain assets" and "certain dividends".
2. Anthony claimed that Charbel or Mr Bandpay told him around that time "Nothing will change in relation to how you work. Newbuild Developments will be the face of the business and you and Charlie will split the profits made from all existing and any new jobs 50/50".

3. On or about 29 June 2018, Charbel caused Newbuild to transfer \$415,000 to Newline Property, which he indicated in a text message that day was part of \$712,000 in payments, representing Anthony's share of profit on the government building projects that were on foot. Charbel added, "Will work out Guildford [another government project] when complete ... I hope you are satisfied bro". Anthony responded, "as long as your happy, I'm happy bro ...".
4. It appears that from the end of 2018, Anthony became more dissatisfied with his working relationship with Charbel. Anthony's evidence was that he had a conversation with Mr Chalmers:

[Chalmers]: We need to sign the transfers and some other documents to finish off the split of Newbuild Developments.

Anthony: Didn't we already sign documents during our meeting on 21 April 2018?

[Chalmers]: No. We need to have a meeting and sign the transfers.

Anthony: I'm not going to sign anything anymore. I don't want to go ahead with the split when we have not finalised the value of the assets and the businesses. I have real doubts about the valuation figures. I need to see bank statements. I'm not happy and I feel ripped off.

1. In early February 2019, Anthony and Mr Chalmers engaged in email correspondence about discussion points for a meeting with Charbel. It would seem Mr Chalmers tried to list issues Anthony had raised with him. Some included (emphasis added):
 1. I want both parties to be fair with one another with a 50/50 split occurring.
 2. In order that the figures are fair and accurate, I'd like to check them after they have been prepared by Vali to ensure they are correct so that there will be no disputes.
 3. The basis of the valuation is the previous agreed sum plus $\frac{1}{2}$ of the profits from that date until the last 3 projects are finished ...
1. Anthony's email response to Mr Chalmers' list of topics sought the inclusion of:
 10. Please disclose that all progress and final payments are finalised at the 50/50 split from all outstanding projects and proof of these please...
 11. Have there been any property purchases or developments funded by Newbuild and Newbuild Projects or any other unknown companies not disclosed to either party?
1. However, Anthony's response to Mr Chalmers did not change the reference to "the previous agreed sum".
2. Mr Chalmers sensed that Anthony did "not agree with the valuation prepared for your half of the business at a particular date plus a one half share of the profits on the job and current work in progress (to be finished in March)". He suggested it be raised at the planned meeting.

3. On 8 February 2019, Anthony, Charbel and Mr Bandpay attended Mr Chalmers' office. Anthony's evidence was he said:

I don't want to continue with the split of Newbuild Developments' assets and its ownership. Charlie's behaviour has changed at work. ... I thought we were splitting the companies on the basis that we'd continue working together and that's why everything was not valued and the figures were not finalised.

1. Anthony's evidence was also that he asked for a forensic accountant to "review all the books and records". However, he never organised such an accountant. At no time did Anthony ever proffer a different figure or engage valuers or accountants in order to justify his sense of feeling "ripped off". Charbel did not deny Anthony that around that time "complained about not being paid enough money from the split of our business".
2. It is unclear what occurred between February and May 2019.
3. On 8 May 2019, Charbel sent Anthony a text message, which included:

Hi bro,

Being thinking a lot, We need to sit down and go through Newbuild books to make sure you get paid every thing you are owed. This should be very simple bro. I can get Vali to go through it and print it out and give you a copy.

If your not happy with this you can get some one to look at the books to make sure you are completely satisfied.

Newbuild will pay you the agreed amount. We need to move forward together as brothers should.

1. Attached to the text message was the below schedule of figures divided into payments to Charbel (CZ) and Anthony (AZ). It was created by Mr Bandpay with Charbel's input. Anthony claimed that the figures in the schedule ought to be read as accurate, and an admission that Charbel overpaid himself.

Date Description CZ (\$) AZ (\$)

26/09/2014 Newbuild to family trust MF 55,000.00

26/06/2015 Newbuild to family trust MF 80,000.00 Family Trust 80,000.00

26/06/2015 Newbuild to family trust 262,175.02

30/09/2015 Newbuild to family trust MF 55,000.00 Family Trust 55,000.00

15/11/2015 Newbuild newbuild 99,000.00

24/06/2016 Newbuild 120,000.00

29/06/2016 Newbuild to family trust MF 9,900.00 Family Trust 9,900.00

7/11/2016 Newbuild to family trust MF 55,000.00 Family Trust 55,000.00

14/02/2017 Newbuild to family trust 104,500.00

31/03/2017 Newbuild to family trust MF 66,000.00 Family Trust 66,000.00

Total 807,575.02 364,900.00

Essex Ave 250,000.00

5 Haven Cres 300,000.00

30/06/2017 Pioneer 591,000.00 Wallum 278,000.00

Grand Total 1,948,575.02 Grand Total 642,900.00

Newline Payments 376,754.06

Total Newline 376,754.06

Grand Total 2,325,329.08 642,900.00

Spent more 1,682,429.08

1. Anthony also pleaded that on 24 September 2015, Charbel received \$200,000 from Newbuild. Taken together with the above "Spent more" total, Anthony claimed Charbel received \$1,882,429.08 more than he did between 26 September 2014 to 30 June 2017. Anthony sought 50% of those alleged Excess Payments, namely \$941,214.54.
2. It is convenient at this point to note that Anthony also claimed that Charbel caused Newbuild to pay \$1,118,090 to New Line Plumbing and then Charbel paid that to himself or his interests. Anthony claimed half of that sum, namely \$559,045.
3. On 16 May 2019, Charbel sent Anthony a text message including:

It is also important to remember even if I have taken out more from LAHC jobs I still haven't taken out more than 60% from the company which I am entitled to under our agreement.

Still we need to bring yours up more.

Do you agree with the figures

Take your time if you want.

1. There is no evidence of Anthony's response to the schedule.
2. On 24 June 2019, \$3,766,808.71 was deposited into Newline Property's bank account. Anthony said he did not know what this was, but denied it was part of any entitlement that had already been agreed. He did not repay it.
3. On 1 July 2019, Anthony sent Charbel a text message including:

I know we have both at times made wrong decisions in our lives and have hurt each other. Its times we put everything behind us and move forward. The past should be left in the past , I can only move forward if your willing to be honest with me , I'm not talking about money ,I talking about the team effort we have lost together, that took us years to build, if you agree , we can start fresh the foundations we built , if you don't want this then we need to find a happy medium to both move on...

1. On 3 July 2019, Charbel responded including:

Your are right to move forward we have to be honest with each other. In my heart I know you and I had a agreement 60/40 many, many years ago and it was agreed after the Constitution (which it means supersedes it) and we have always Operated that way.

This was re-confirmed in 2016 at Narraweena carpark shopping centre while we were having coffee on a early Saturday morning, also last year before we commenced the 3 x LAHC projects. So moving forward we can do Range Road and Government projects. We also have to register our agreements with ASIC. We all continue working.

1. Anthony's response was:

You know what you have to do and you know what you've done wrong God would always show you trust me

1. On 11 July 2019, Charbel ceased being a director of Newline Property; Anthony was then the sole director and shareholder.
2. On 3 September 2019, sums of \$712,500.00 and \$25,002.00 were deposited into Newline Property's bank account. By then, Anthony and Newline Property had received \$7,404,310.71 in cash and the Henry Kendall Street property (valued at \$1,100,000).

Did Anthony sign the deed such that he is bound by it?

1. A person is bound by the terms of an agreement that they sign unless they can establish a vitiating factor: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [42]-[49] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
2. Where a party to a contract alleges that a signature is a forgery, the onus rests on that party to prove that his signature was indeed forged: *Damjanovic v York Agencies Pty Ltd* [2003] NSWCA 222 at [25] (James J, Meagher and Beazley JJA agreeing).
3. Whether a signature is genuine is a question of fact having regard to the evidence, both lay and expert. The Court can make its own comparison of handwriting, however, particular attention should be paid to expert evidence on the issue: *May v Walker* [2024] NSWSC 612 at [158] (Rees J). However, while important, expert evidence ought not be treated as decisive or determinative: *Jeans v Cleary* [2006] NSWSC 647 at [177] (Johnson J). Relevant direct evidence may include, inter alia, the testimony of the person whose signature is to be proved, admissible hearsay statements of that person, and the testimony of someone who

saw the document executed: In the application of Roderick Mackay Sutherland and Sule Arnautovic [2014] NSWSC 821 at [62] (Kunc J).

4. An allegation of fraud in the form of a forged signature is a serious allegation, inviting consideration of the Briginshaw principles: *Musa v Alzreaiawi* [2021] NSWCA 12 at [33] (Gleeson JA, Bell P and Macfarlan JA agreeing).
5. Anthony's evidence on oath was that he did not sign the Deed. His submission was that Charbel forged the signatures purporting to be Anthony's on the two original copies of the Deed.
6. I consider that Anthony did sign the Deed and that the parties intended to be bound by the Deed for the following reasons.

Expert evidence

1. Charbel relied on the expert opinion of Mr Stephen Dubedat, forensic document examiner. His evidence was that he considered it more likely than not that the signatures on the Deeds are Anthony's. Anthony did not rely on any expert evidence to the contrary.
2. Mr Dubebat's opinion was not undermined by any cross-examination, nor was it in any way "unsafe", as Anthony's counsel asserted. While Anthony's counsel attempted to point out features of the Deed signatures that did not look the same as other samples (such as a high "t"), Mr Dubedat was able to clearly and carefully explain why those particular features did not change his opinion. I consider Mr Dubedat was an appropriately cautious and methodical witness, who was precise in his answers. I consider his evidence credible and helpful.

Witness to signature

1. The evidence of Mr Taylor, the conveyancer, was that he witnessed Anthony's signatures on the Deed. Mr Taylor was known to both Anthony and Charbel. He had provided them conveyancing services, both in their individual and directorial capacities, over a period of 20 years. Anthony trusted him.
2. Mr Taylor's evidence was that he witnessed Anthony sign the Deed either at his Gosford office or at his home office. He explained that, while he could not recall where Anthony signed, he had a definite memory of going through the Deed with Anthony. Mr Taylor explained that he remembered the transaction, because it was unusual in his practice for the parties to a document to be brothers and for him to be acting for both parties. He was conscious of avoiding "sibling rivalry" by ensuring that they understood the document and there was no perception that the document favoured one brother over the other. Mr Taylor passionately rejected the "fanciful" suggestion in cross-examination that he never witnessed Anthony's signature, and was not shaken on his evidence.

3. I accept that the exact date on which the brothers signed the Deed was not entirely clear from the evidence. Charbel's evidence was that he thought he had signed it in early December 2017. Mr Taylor was not sure whether it was late November or early December 2017.
4. However, Mr Taylor and Charbel were confident that Charbel signed the Deed before Anthony, and Mr Taylor explained the Deed to Charbel before he signed two originals. They accepted their recollection of the date of signing was imprecise. I do not consider that detracts from their evidence.
5. The Deed document was first drafted on 23 October 2017 and printed on 15 November 2017. It would seem plausible that it was signed shortly thereafter towards the end of November, which is consistent with other evidence.
6. I also do not accept Anthony's counsel's submission that Mr Taylor's evidence is not credible because he could not have witnessed Anthony's signature after Charbel's in the way he explained because he had only sent a "draft agreement" to Mr Chalmers on 29 November 2017. I do not accept that is a fair reading of the evidence. In the email forwarding the Deed, Mr Taylor stated, "I will forward the signed agreement shortly", which expressed an expectation that signed documents existed or would exist in the near future. While there is no evidence that Mr Taylor provided anyone with a copy of the signed Deeds, there is no evidence that anyone ever requested copies before this dispute. I do not consider that detracts from Mr Taylor's clear and cogent evidence.
7. I do not accept that if, as Anthony's counsel suggested, the pages of the original Deeds were signed in a different order to that analysed by Mr Dubedat, it increases doubt as to whether Anthony signed the two original Deeds. I do not consider it critical to determine the exact manner in which the Deeds were signed, in terms of how the pages were laid out before the signatures were applied. I do not accept that because Mr Taylor could not exactly recall how he presented the pages to Anthony and Charbel to sign, his evidence of witnessing their signatures is less credible.
8. Mr Taylor would not obtain any advantage by being a party to the fraud suggested by Anthony. Such a conclusion would also require a finding that Charbel had given Mr Taylor documents to "witness" that he had forged; but that proposition was never put to Charbel and to the extent it was suggested, I reject it.
9. I accept Mr Taylor's evidence that he witnessed Anthony sign the Deed.

Witnesses to Anthony's statement that he signed the Deed

1. The brothers' mother, Mrs Josephine Zeaiter, gave evidence:

I recall that I had a conversation with Anthony one evening in late 2017 when he came home and said words to me in the following effect:

Anthony: I've just come back from seeing Rod Taylor. I signed the agreement for the split of Newbuild with Charbel today.

Me: It is good that has been dealt with and you and Charbel can move on from this fighting as brothers.

1. In cross-examination, she added that Anthony told her "I'm happy [with] what I've got".
2. In 2017, Anthony and his family were living with her, which suggests they had a close relationship at the time of the communication.
3. Anthony's counsel submitted that little reliance ought to be placed on Mrs Zeaiter's evidence, given the fallibility of her memory and that the events happened some years ago. I accept that Mrs Zeaiter's memory of dates was limited. She candidly accepted that she could not be sure that her conversation with Anthony occurred in 2017 or some later time. However, while unclear about the precise timing of events, Mrs Zeaiter distinctly recalled the above conversation with Anthony. Given what she recalled Anthony having said, the context of the conversation makes it likely that it occurred in late 2017. I do not consider her memory about precise timing to be material.
4. More important was the fact that she was not challenged on her evidence that Anthony had mentioned signing a document specifically with Mr Taylor. The only document purportedly signed with Mr Taylor was the Deed. She was not asked if she was confused and Anthony had referred to signing documents with Mr Chalmers, which would have concerned other documents signed in 2018.
5. Mrs Zeaiter confirmed that her relationship with Anthony had deteriorated soon after late 2017, that she took out apprehended violence orders against him, and she no longer has contact with him or his children. However, it was not suggested that she was prepared to give untruthful evidence against him for that reason. I accept her evidence.
6. Mr Bandpay also gave viva voce evidence about his conversation with Anthony on the day he signed the Deed, which he considered was likely 28 November 2017. He said that he took Anthony through Mr Chalmers' 27 September 2017 proposal letter and explained it to him. He was sure about his memory of that meeting at his home, because he recalled his wife asked Anthony to fix a tap. His clear memory was that Anthony told him that he would go and sign the document with Mr Taylor and that Anthony called him later and told him that he had signed it and to let Charbel know. Anthony's phone records for 28 November 2017 support Mr Bandpay's evidence about the telephone calls and Anthony contacting Mr Taylor to organise signing the Deeds on that day. I accept Mr Bandpay's evidence.

Observational evidence

1. Anthony accepted that his signature varied. He also considered one of his signatures on the Deeds was similar to his: "I wouldn't say it doesn't look nothing like it but I just know it's not my signature... It's pretty close ... I don't know. It's hard... Just that one's hard to tell if it was mine or not mine .. It's not my signature". He did not explain why he reached any of those conclusions and how he could be sure the signatures on the Deed were not his.
2. Charbel also considered the signatures to be Anthony's, in circumstances where he was very familiar with his brother's signature over the years.
3. Having looked at the many signatures of Anthony in his affidavits and other documents Anthony accepted he signed, I also consider there is a wide variety of styles. I consider the signatures on the Deed appear similar to Anthony's signature and from my observation are likely his.

Other circumstantial evidence

1. The Deed referenced the Henry Kendall Street property being transferred to Anthony, and Mr Taylor completed the paperwork for that to occur and it did occur in January 2018, approximately two months after the Deed's date.
2. Anthony accepted that the transfer duty for that property cost "real money", however, he said that it was just part of the negotiations, rather than being part performance of any agreement. I do not accept that evidence. It makes no commercial sense why the brothers would incur unnecessary costs in forming Newline Property and transferring real property, if it was possible that there would be no agreement.
3. As noted above, in late 2018 or early 2019, Anthony responded to Mr Chalmers' request to "sign ... documents to finish off the split", with "Didn't we already sign documents during our meeting on 21 April 2018?" That indicated that Anthony considered the split had been documented and finalised.
4. Further, Anthony and Mr Chalmers also exchanged emails in February 2019 where both adopted the phrase, "previous agreed sum". Both were aware of Mr Chalmers' letter of 27 September 2017 to the brothers, which included the same figure adopted in the Deed. Anthony could not explain what that phrase meant. He denied it was the sum included in the Deed. However, read as a whole, to construe "previous agreed sum" as the figure in the Deed makes sense.

2018 agreement

1. As noted above, on 13 December 2017, Mr Chalmers sent DGF Morgan & Associates an email attaching the Microsoft Word version of the Deed in identical terms to that Charbel signed. That email asked DGF Morgan to "redo the deed on a proper footing".

2. Anthony's counsel submitted that this phrase indicated that the brothers did not consider themselves bound by the Deed, because Mr Chalmers had decided it was insufficient for their purposes. I do not accept that submission.
3. When solicitor, Mr William Soo responded to Mr Chalmers' request for a quote, he included (emphasis in original):

We understand from your instructions that:

1. Charbel will transfer his 1 ordinary share in Newline to Anthony ... and in consideration of that transfer Anthony will transfer his ordinary shares ... in Newbuild to Charbel ...
2. There is a transfer of 1 Henry Kendall Street ... from Newbuild to Newline for \$1.2 million and that you are aware of the stamp duty payable on the transfer. We are not to draft any documents in relation to the transfer. We assume that the conveyancer will attend to stamp duty and will provide advice as to whether or not a valuation for the purposes of stamp duty is required given that the parties are related or associated.
3. Newbuild will declare a dividend on the "J" class redeemable preference share to Newline of \$2.5 million.
4. ... the transfer of shares in Newbuild from Anthony to Charbel will be liable to stamp duty. ... we are concerned that the transfer of the Property from Newbuild to Newline, and the transfer of shares from Anthony to Charbel will trigger the aggregation of the two dutiable transactions ... unless it can be shown that the transactions do not constitute substantially one arrangement. We note your instruction that the transfer of the shares in Newbuild from Anthony to Charbel will not occur within 12 months of the transfer of the Property and therefore those share transfers would not be aggregated with the transfer of the Property.

...

Please advise:

A. If Newline will actually pay \$1.2 million for the transfer of the Property ...

B. What will be the redemption price for the "J" class redeemable preference share held by Newline. Are we to prepare the documentation to effect the redemption and when will the redemption take place?

C. And confirm if the purchase price mentioned in your letter to the conveyancer is for the purchase of Anthony's share in Newbuild. If so, you may not be able to wait 12 months to transfer the shares or the Property as it is all part of one transaction. Please forward the "accountant's report" referred to in your letter to the conveyancer.

1. Mr Chalmers' response was not in evidence, nor was any advice given by Mr Soo to Mr Chalmers or the brothers. However, Mr Soo was clearly aware of the price in Mr Chalmers' letter, which was identical to the price in the Deed.

2. The 2018 Agreement drafted by Mr Soo did not include any reference to price, nor a mechanism for determining a price to be paid to Anthony on the split. This would appear consistent with the parties not requiring any agreement in 2018 as to the quantum of the split, because it was already agreed in the Deed.
3. I do not consider it relevant that the 2018 Agreement did not refer to the Deed expressly. There was no requirement for it to do so, particularly where their content does not overlap. Further, it did include in the recitals that the brothers "have agreed to separate the business of Newbuild ... and agreed to effectively split the assets of Newbuild ... by the transfer of certain assets and the payment of certain dividends". The use of the past tense "agreed" and the reference to "certain" payments and assets appears to corroborate the existence of the Deed that had specified what those "certain" payments and assets were.

Conclusion

1. For the above reasons, I am satisfied that both brothers signed the Deed and their signatures were witnessed by Mr Taylor. This conclusion means that Anthony's evidence was false. I consider this bears significantly on his credibility generally, with the result that where his evidence on other important topics was not corroborated by documents or another witness, I have found it difficult to accept. Further, there are other reasons why his evidence was questionable.
2. First, Anthony was adamant that a payment of \$712,500 to Newline Property in September 2019 ought not be included in the calculation of the benefits he had received from Newbuild. He claimed the payment related to work he had carried out on some Newbuild jobs, and in written submissions, suggested there was no corroborative document that supported the characterisation of the \$712,500 as a "top up payment". However, the documentary record, including Newbuild's ledger accounts and text messages between the brothers, identified a payment in 2018 of \$712,000 for jobs and then a different \$712,500 as a "top up payment" in 2019. Anthony's counsel did not submit that Anthony's evidence on this subject was credible. It was not. I consider it demonstrated a preparedness to try and recreate events, contrary to the documentary record, which I prefer.
3. Secondly, until the first day of the hearing, Anthony contended that a property at 5 Haven Crescent belonged to Newbuild and therefore Charbel ought to have included it in the calculation of the total assets of Newbuild for the purpose of the business split.
4. However, Mr Chalmers' 27 September 2017 letter did not refer to 5 Haven Crescent. Of more significance, in cross-examination Anthony conceded that he had attended the auction for that property and bought it for Charbel, not Newbuild. No explanation was given for why Anthony persisted in an assertion about the ownership of that property, that he knew was untrue. Again, this demonstrated that Anthony was taking an approach in the litigation he knew was blatantly wrong.

5. Thirdly, Anthony's evidence that he did not sign the Deed in substance included an allegation that Charbel was prepared to rely on forged signatures. That was a very serious allegation, as it amounts to an allegation of fraud. Anthony's evidence in this regard was entirely lacking. Charbel was not asked about the allegation in cross-examination. Further, Anthony did not bring forward any witness that in any way corroborated his evidence (other than in relation to it being unlikely that Anthony signed the Deed on 4 December 2017, which became irrelevant because Charbel's case was that it was signed on 28 November 2017).
6. Finally, in cross-examination, Anthony appeared to be careful to always preface any answer as if no agreement had been reached and was yet to be reached. Therefore, he would not readily agree that any steps had been taken pursuant to an agreement as to figures.
7. While only faintly submitted, I do not accept Anthony's submission that the brothers lacked an intention to be bound by the Deed. Its form was formal, as was the manner of execution. The brothers were agreeing to a very important and valuable transaction, including the transfer of a property, which I infer they understood from experience, would require a documented agreement and the payment of stamp duty.
8. For completeness, I note that Anthony's counsel relied upon the fact that neither Charbel nor his representatives referenced the existence of the Deed for some time after Anthony raised this dispute. I do not consider that important. First, prior to the involvement of lawyers, Anthony and Charbel initially sought to resolve their agreement "as brothers", rather than strictly according to their legal rights. Second, it is not uncommon for legal documents to only come to the attention of lawyers when a family dispute becomes litigious.
9. Anthony is bound by the Deed.
10. Anthony's submission was that if the Deed did bind him, it ought to be set aside, or alternatively, it still required Charbel to pay Anthony for Newbuild's goodwill.

Ought the Deed be set aside?

1. Anthony's case for avoiding the Deed focused on misleading or deceptive conduct under s 18 Australian Consumer Law or s 12DA Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). If made out, the Court could award relief under s 243(a) ACL or s 12GM(7)(a) ASIC Act as sought in the further amended summons; those provisions empower the Court to declare a contract in whole or part void.
2. Anthony submitted that the Deed ought to be set aside because Anthony was misled into entering into the Deed in the following ways:
 1. Anthony was misled by Charbel's silence about the Excess Payments and New Line Plumbing Payments and signed the Deed unaware of them. Anthony also relied upon Charbel's silence in his claim for compensation for misleading or deceptive conduct in the sum of 50% of the Excess Payments and New Line Plumbing Payments.

2. Also, Charbel had obtained the valuations of Newbuild's properties by instructing valuer Mr Craig to value them at his desired amount, which was less than they were worth and less than the value the brothers had agreed they were worth, and therefore Mr Chalmers' "proposal" letter relying on those valuations was tainted and that misled Anthony into entering into the Deed.
1. Alternatively, Anthony claimed Charbel's conduct of making the payments and obtaining the valuations was oppressive, unconscionable or in breach of Newbuild's constitution.
2. All of these arguments were strained because Anthony claimed he had not signed the Deed and therefore he cannot at the same time have considered anything misled him into signing the Deed. He gave no evidence that he was misled, and I do not accept he was. Further, these arguments depended on findings about whether the various payments were improperly made and whether the valuations were inaccurate.
3. It is therefore necessary to determine if Charbel did overpay himself the sum claimed or any other sum, which I consider below, and then consider the valuations.

Excess Payments

1. There is no evidence from Newbuild's bank accounts or books and records that demonstrates the amounts Anthony claimed were "excess"; Anthony's expert forensic accountant could not find any. Instead, Anthony placed reliance on the schedule of payments sent by Charbel to him on 16 May 2019 (reproduced above at [55]). That schedule was prepared by Mr Bandpay quickly over "one or two days" in 2019. Some of the figures in that schedule were provided by Charbel, including the references to various properties and New Line Plumbing Payments.
2. Anthony submitted those figures were admissions by Charbel that he did in fact receive the amounts specified, and that all the figures in the spreadsheet are accurate.

Figures not complete

1. I do not accept that the figures in the schedule are accurate for the following reasons.
2. The schedule is not a complete summary of the universe of payments to the brothers since Newbuild was formed in 2003. For example, the Essex Avenue property was purchased in 2005.
3. Anthony did not give any evidence about the amounts he is alleged to have received as recorded in the schedule of payments, and whether the schedule was accurate, which would be matters within his knowledge. Anthony did not bring forward evidence of a complete historical analysis of Newbuild's financial position, including by reference to its bank accounts. Therefore, I do not consider the figures a reliable reconciliation of all entitlements received by the brothers as at 30 June 2017.

Property improvements

1. Charbel's affidavit evidence was that the entries concerning the properties were made up of estimates of values of benefits from Newbuild to each of the brothers referable to properties they each owned, that related to "funds, materials and value of works" from 2005 to 2017. Charbel's evidence was that the \$200,000 paid to him on 24 September 2015 was the deposit for the Pioneer property and was therefore included in the \$591,000 figure. He was not cross-examined on that evidence, and I accept it. Therefore, Anthony's claim at most would concern the figure in the schedule of \$1,682,429, with half of that payable to Anthony.
2. However, there is otherwise no precision in the sums chosen. They appear rounded. Anthony did not give evidence about his perceived true value of the benefits each of them received, even though he was on site and also received benefits for his property.

New Line Plumbing payments

1. There were other obvious inconsistencies between the schedule and other evidence. For example, the amount listed in the spreadsheet for New Line Plumbing is \$376,754.06, which was less than the amount pleaded by Anthony, and therefore Anthony does not accept it is correct. Charbel was not cross-examined on his affidavit evidence that the entry represented an estimate by Mr Bandpay. While Charbel did allocate that sum to his benefit, Charbel had accepted that the money paid to New Line Plumbing had then been paid out to his associated entities, and the entry in the schedule was an estimate of how to rationalise a further payment to Anthony as part of a brotherly resolution.

Dividends

1. Some of the dividends recorded are not accurate. For example, the bank records disclose that Anthony was paid at least one dividend of \$147,000 that was not recorded in the schedule. Again, Anthony did not give evidence about the accuracy of the ledger as far as he was concerned. However, his counsel conceded that the identified dividend amount ought to be deducted from Anthony's entitlement, which would be on his case be $(\$1,882,429 \div 2) - \$147,000$ which equals \$794,214.50, but based on the \$200,000 being deducted would equal \$694,214.50.

Admissions by Charbel?

1. Further, I do not consider the spreadsheet amounts to admissions by Charbel for the following reasons.
2. An admission is comprised of words or conduct that "disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief": *Lustre Hosiery Ltd v York* (1935) 54 CLR 134 at 143 (Rich, Dixon, Evatt and McTiernan JJ). Whether a statement amounts to an admission "must be determined by an examination of the words used": *Smith v Joyce* (1954) 89 CLR 529 at 535 (Dixon CJ, Webb, Fullagar, Kitto and

Taylor JJ). The context in which a statement is made is also important: for example, in *Allen v Roughly* (1955) 94 CLR 98 at 142, the fact that the impugned statement was "expressed ... positively, in a statutory declaration, and on an occasion and for a purpose which required careful deliberation on the point" led Kitto J to find that the defendant had made an admission.

3. Here, Newbuild had been a small family business, with only the two brothers as shareholders. The brothers had signed a Deed and by the time of the schedule in mid-2019, Anthony had been paid almost all to which he was entitled. However, he complained that he had not received enough in the split. The spreadsheet was prepared in that informal context and where Charbel was attempting to resolve their dispute "as brothers should", rather than strictly according to their legal rights. Charbel also offered that Anthony could get someone to look at the books. Anthony's own evidence was that around that time:

I did not want to argue with Charlie while my mother and wife were present. I thought it would be best for our family if Charlie and I tried to come to an understanding.

1. I consequently consider that Charbel was attempting to resolve a family disagreement, rather than making an admission of his liability. Even if I am wrong, and the spreadsheet does amount to an admission, it is not a complete statement of all the payments and distributions over the life of the company, and therefore it does not prove Anthony's claim.
2. For completeness, I note that Anthony's counsel made much of the fact that Charbel's affidavit stated that the schedule was planned in 2018, but later said it was prepared in 2019. I do not consider it relevant that Charbel was confused on the dates. I accept Mr Bandpay's clear evidence that he prepared the schedule in 2019, which is consistent with the text messages between the brothers.

Conclusion

1. Based on the above, there is no cogent evidence, from which it can be determined whether, as at 30 June 2017, Charbel had received more benefits than those, to which he was entitled, and if he had, how much more. Anthony has not proved his claim, despite his expert having access to all Newbuild's books and records, and many matters being within Anthony's knowledge.
2. However, even if all the above is wrong, and Anthony was entitled to half of the Excess Payments, the receipt of \$712,500 must be set off against \$794,214.50, as detailed further below.

New Line Plumbing Payments

1. From March 2016, Charbel controlled New Line Plumbing, and Anthony was no longer a shareholder or director. There was no evidence about the circumstances around Anthony's departure from New Line Plumbing.

2. Charbel's evidence was that New Line Plumbing was the plumber on some of Newbuild's projects. He said that because they were related entities, Newbuild paid New Line Plumbing's costs and outgoings, including its employee related liabilities, which were then recorded in a ledger. However, profit was not paid to New Line Plumbing immediately, but was paid from time to time and recorded in the ledger.
3. Newbuild's ledger had entries for New Line Plumbing dating back to 1 July 2011. I do not doubt that New Line Plumbing carried out work for Newbuild as Charbel deposed. It appears from that ledger that Newbuild received money from projects that were attributable to New Line Plumbing's work and then payments were paid out from time to time until 31 March 2017. All of those transactions were in Newbuild's ledger when Anthony was a director and had a good relationship with Mr Bandpay and therefore could not legally be prevented from reviewing them.
4. Charbel could not recall if he discussed all the New Line Plumbing Payments with Anthony. However, I do not consider that surprising or demonstrating bad faith or dishonesty. Anthony appeared content to leave all the administration, including the finances, to Charbel and Mr Bandpay. For example, he did not see the need to attend Mr Chalmers' office to go through paperwork for the split of Newbuild in 2018. Also, when in June 2018, Charbel indicated to Anthony that he had deposited \$712,000 into Newline Property's account for works carried out by Newbuild and Newline Property and asked, "I hope you are satisfied bro", Anthony responded "as long as your happy, I'm happy bro".
5. Anthony's evidence does not directly challenge Charbel's about these payments. Anthony stated that "from [his] observations" New Line Plumbing did not perform any work for Newbuild in relation to the challenged payments. Charbel had not claimed that new work had been done and was being paid for, instead it was the profit component for past work. Anthony could have provided evidence about the work that New Line Plumbing had done, as he was on site, including overseeing, supervising and communicating with various subcontractors and tradespeople.
6. To the extent necessary, I prefer Charbel's evidence over Anthony's in respect of the existence of that work and the payments made for it.
7. As noted above, in his affidavit evidence, Anthony said in late 2017 or early 2018 that he asked Mr Bandpay for Newbuild's bank accounts and tax returns. His evidence was "to the best of [his] recollection" he did not receive them. However, I am reluctant to accept Anthony's evidence when it is uncorroborated by another witness or document. Neither Charbel, nor Mr Bandpay, was asked whether and why each did not provide Anthony with financial documentation. For those reasons, I reject Anthony's counsel's submission that it ought to be inferred that Charbel had instructed Mr Bandpay not to provide Anthony the documentation or that he was in any way prevented access and therefore could not have been aware of the payments.

8. I consider on the balance of probabilities that the New Line Plumbing Payments were legitimate business expenses of Newbuild and did not amount to payments overpaid to Charbel and underpaid to Anthony.

Reasonable expectation of disclosure of payments?

1. Even if there has been inequality in the separation of the brothers' interests in Newbuild, which is attributable to the Excess Payments and New Line Plumbing Payments, I do not consider that the circumstances gave rise to a reasonable expectation for Charbel to disclose those payments to Anthony.
2. The factors that are relevant to the question of whether such a reasonable expectation arises were summarised in *Axis Bank Ltd v Gujarat NRE India Pty Ltd* [2020] NSWSC 1711 at [269], where Sackar J stated (citations omitted):

The surrounding circumstances which bear upon whether a finding that there was a reasonable expectation to disclose ought to be made may include:

- (a) The state of knowledge of the person to whom the conduct is directed ...
 - (b) The existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business ...
 - (c) What matters of fact each party knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known ...
 - (d) The defendant's knowledge of the undisclosed fact ...
 - (e) The sophistication and experience of the parties in their respective field ...
 - (f) The relationship between the parties, for instance the existence of a common law or equitable duty to disclose (eg a fiduciary duty) ...
1. Counsel for Anthony submitted that because Anthony was financially "unsophisticated" and reposed trust in his brother, a reasonable expectation of disclosure arose. In support of this submission, Anthony's counsel contended that the Court had "seen [Anthony] in the witness box" and had "seen the level of trust that he has placed in the people around him".
 2. However, I do not consider that the evidence shows that Anthony was financially unsophisticated and dependent on Charbel. Anthony's affidavits were lengthy and engaged in detail with matters of various companies and their financial status. At no point did Anthony himself claim to lack financial sophistication. Further, Anthony was a director of Newbuild and had access to all of the information he needed to assess his position. Anthony must have been aware of all of Newbuild's projects because he worked on them. There is also evidence that he discussed subcontractors and their payments with Charbel. He must have been aware of the works carried out on his own and Charbel's properties.

3. Anthony had ready access to Mr Bandpay, and could have examined Newbuild's records for himself to discover most of the Excess Payments and New Line Plumbing Payments. He did not suggest that Mr Bandpay did not explain Newbuild's operations with him. Anthony did not give evidence that he asked Charbel to explain Newbuild's operations or allocations of funds. There was no evidence that Charbel was aware that Anthony lacked any knowledge of any fact relevant to Newbuild. Therefore, I consider he sufficiently understood Newbuild's business and its finances.
4. For completeness, I note that the decision of *Addenbrooke Pty Ltd v Duncan (No 2)* [2017] FCAFC 76, relied upon by Anthony's counsel, does not support Anthony's submission that there was a reasonable expectation of disclosure. The paragraphs of the judgment referred to by Anthony's counsel refer to general principles relevant to misleading or deceptive conduct cases where the conduct complained of is silence. None of those principles supported Anthony's claim. The omission of information can constitute misleading or deceptive conduct. This is not such a case.

Valuation certificates

1. As noted above, on 27 June 2017, Mr Craig, a registered valuer, provided to Charbel valuation certificates of Newbuild's three properties. Anthony's counsel submitted that the valuation certificates were inaccurate, because Charbel "dishonestly" gave Mr Craig his "desired" valuations, and failed to tell Mr Craig that a construction certificate had been issued in relation to the development of 18-22 Range Road.
2. Anthony submitted that the Court cannot be satisfied that the valuations are reliable, because of Charbel's misconduct. Further, Anthony asserted that Mr Chalmers' valuation of Anthony's 50% share was tainted, because it assumed or represented that the property valuations were accurate, which misled Anthony into entering into the Deed.
3. However, there is no evidence of any different value of the properties, from which it could be concluded that Mr Craig's valuations were inaccurate. Anthony's counsel accepted that his expert evidence of valuer, Mr Bird, was inadmissible. Supplemental expert evidence was not admitted because it failed to comply with s 79 Evidence Act 1995 (NSW), and its admission would have been unfairly prejudicial to Charbel, having been served on the evening of the trial.
4. Further, I do not consider it can be lightly assumed that Mr Craig had no regard to his professional obligations in certifying property values. Anthony's counsel stressed in submissions that valuation was an art and not a science. Accepting that, it is likely that Mr Craig considered that his certified valuations, even if close or the same as Charbel's desired figures, were within the range of a reasonable valuation.

5. It follows that there was also no evidence that, had Charbel told Mr Craig that a construction certificate had been issued, that the valuation would have changed. Nor is there any evidence that Mr Craig did not carry out his own investigations in that regard and take the construction certificate into account, if it was relevant to the valuation.
6. Therefore, there is no basis for accepting that the valuations are anything other than an honest opinion of Mr Craig, and represent a value that could be attributed to the properties as at 27 June 2017.
7. I do not accept that because the brothers had informally discussed and agreed on higher values that might be adopted, it follows that those agreed figures could be accepted as "valuations" that negated Mr Craig's certificates.
8. I do not accept the submission that Mr Chalmers was misled about the value of the properties. His proposed value letter of 27 September 2017 did not specify whether the valuations provided by Charbel were "independent" or accurate. However, it was apparent from Mr Chalmers' letter what specific values the valuer had attributed to the properties and then adopted by Mr Chalmers. Anthony could have seen when he read the letter that the value was not the same as those informally agreed with Charbel.
9. Further, Anthony understood Mr Chalmers' valuation letter was a "proposal". He considered Mr Chalmers' letter for about two months before he signed the Deed. He discussed the proposal with Mr Bandpay. He discussed the Deed with Mr Taylor before signing it.
10. I do not accept that Anthony was misled by the valuations he said he had not seen, nor by any statement by Charbel about their accuracy, because his evidence was he did not regard any "figures as final" since he was still negotiating. If it was necessary, I would accept Charbel's evidence that he discussed the valuations with Anthony at the time. If he was told about the valuations, he would have known they did not reflect the discussions he had had with Charbel.
11. Nevertheless, Anthony signed the Deed including Mr Chalmers' valuation based on the valuations, and told his mother he was "happy" with the amount he was receiving. He went further and signed the transfer document for the Henry Kendall Street property with Mr Taylor, which was obviously referenced in the Deed as part of the consideration he was receiving for the split. He later signed all the other documentation in April 2018.
12. The first time Anthony provided any written inkling that he was unhappy with the division of Newbuild or Mr Chalmers' proposal letter was in February 2019. I do not accept he was misled. Instead, it is likely he merely became unhappy with hindsight. However, even thereafter he accepted large amounts of cash.

13. For completeness, I note that Anthony's pleaded case was that Charbel engaged in misleading or deceptive conduct by failing "to correct the information based on which the Certificates had been issued and to seek new valuations". However, no submissions were made directly on that basis, rather than the above. For the above reasons, I reject the pleaded contention also.
14. Therefore, I do not accept that Anthony was misled by Mr Craig's valuations or the valuation in Mr Chalmers' letter.

Conclusion

1. Anthony's misleading or deceptive conduct claims that rely on the Excess Payments, New Line Plumbing Payments and valuation certificates must fail. Charbel's silence about payments, which have no proven connection with the brothers' agreement to separate their interests in Newbuild, could not and did not have had the effect of misleading Anthony into executing the Deed. Instead, Anthony further pleaded that he was misled about the Excess Payments and New Line Plumbing Payments and therefore signed the transfer of his Newbuild shares. However, because he had already signed the Deed without being misled, I do not accept that Anthony was misled later in April 2018.
2. Additionally, I note that Anthony's counsel did not refer to any authority where misleading or deceptive conduct was found to have "flowed" on in a "concrete way" from an "upstream" inaccurate valuation of a property into a proposed valuation of a business, or anything similar, that led to a person signing an agreement.
3. Consequently, Anthony is not entitled to relief to avoid the Deed, nor is he entitled to compensation reflecting 50% of the Excess Payments and New Line Plumbing Payments.
4. This renders irrelevant Charbel's argument that Anthony was not entitled to an equal distribution of profits from the operation of Newbuild, because the brothers had agreed that profits of Newbuild were to be split 60% to Charbel and 40% to Anthony.
5. I note that Mrs Zeaiter gave evidence as to the existence of such an agreement existing from about 2007. She was adamant she could recall the conversation where the brothers agreed at her kitchen table with her late husband (at the time he was a director of Newbuild) and her youngest daughter. She was not shaken in that evidence. She also stated that Charbel told her that he "never insisted on the full 60/40 split to try and keep the peace with Anthony". Mrs Zeaiter was never challenged on this account and during his cross-examination, Charbel confirmed her account. It seems that Charbel attempted to maintain a good relationship with Anthony by not holding him to his strict legal entitlements.
6. If it had been necessary to decide, I would have concluded that the 60:40 profit share agreement existed in light of the evidence of Mrs Zeaiter and Charbel, both of whose evidence I prefer to Anthony's uncorroborated evidence.

Other claims concerning Excess Payments and New Line Plumbing Payments

1. Anthony advanced three further claims in relation to the Excess Payments and New Line Plumbing Payments. Specifically, Anthony alleged that by making these payments, Charbel had:

1. breached clause 97(2) of Newbuild's constitution, which provided:

Subject to the rights, privileges and conditions attached to other classes of shares as hereinafter provided, the ordinary shares shall confer on the holders thereof the following rights and privileges: ...

- (2) to receive in common with other holders of ordinary shares all dividends, distributions, bonuses and other profits ...

1. engaged in conduct that was "oppressive to" Anthony within the meaning of s 232 Corporations Act 2001 (Cth); and

2. engaged in unconscionable conduct contrary to s 12CB ASIC Act.

1. These claims must fail, in light of my finding above (at [141]) that the New Line Plumbing Payments were made towards the legitimate business expenses of Newbuild, and in view of my conclusion that Anthony has failed to establish that the Excess Payments constituted amounts which Charbel received over and above what he was entitled to as part of the separation of Newbuild (at [132]).

2. The contention that these payments were made to Charbel's own benefit as part of the distribution of Newbuild's assets was central to Anthony's statutory and breach of constitution claims. Absent this element, the basis for claiming that the payments were captured by clause 97(2) of Newbuild's constitution, oppressive, or unconscionable disappears.

3. However, below I consider these claims, on the contingency that the Deed is not binding on the parties, and that the Excess Payments and New Line Plumbing Payments represented the difference in payments that Charlie and Anthony received as part of the agreed division of Newbuild's assets.

Breach of Newbuild's constitution

1. Anthony pleaded that the making of the Excess Payments and the New Line Plumbing Payments by Newbuild was in breach of clause 97(2) of the Newbuild constitution, because the payments were "dividends, distributions, bonuses [or] other profits" within the meaning of that clause, but were not distributed equally or "in common" as between the brothers. Anthony seeks damages equal to 50% of the Excess Payments and New Line Payments.
2. Charbel resisted this claim.

3. Anthony has not established that the \$3,000,519 represents "dividends, distributions, bonuses and other profits", which ought to have been split between the brothers pursuant to clause 97(2). It is possible that both brothers did in fact "receive in common [with each other] all dividends, distributions, bonuses and other profits", as required with by clause 97(2). The evidence does not allow a conclusion in Anthony's favour because there is no complete record of all payments during the time they were both shareholders.
4. It is consequently unnecessary to consider whether a breach of a company's constitution can sound in damages: see eg *Dungowan Manly Pty Ltd v McLaughlin* [2012] NSWCA 180 at [2]-[6] (Bathurst CJ).

Oppression

1. Anthony sought relief for 50% of the Excess Payments and New Line Plumbing Payments under s 233 Corporations Act. He alleged that the conduct of Newbuild's affairs in facilitating the separation of the brothers' interests in Newbuild was oppressive to, unfairly prejudicial to, or unfairly discriminatory against Anthony: s 232 Corporations Act.
2. Counsel for Anthony vacillated between different descriptions of the relevant oppressive conduct.
3. First, it was said the conduct was "the failure on Mr Charbel Zeaiter to disclose the fact of the [Excess Payments and New Line Plumbing Payments] in the course of the valuation exercise that was undertaken in 2017, or ... at any stage until well after ... the 21 April 2018 Agreement". However, if there was wrongful non-disclosure, which I do not accept, I do not consider such non-disclosure was commercially unfair for the same reasons expressed above at [142]-[147] as to why no reasonable expectation arose for Charbel to disclose the impugned payments. Further, it is unclear how Charbel's conduct, which was in relation to a private shareholder agreement, can be said to be part of the conduct of Newbuild's affairs: s 232(a) Corporations Act.
4. Secondly, it was said the conduct was "dealing or conducting the affairs of the company in a way that prejudiced the value of Anthony's shares as a shareholder". However, Anthony did not make clear what precise dealing was alleged to be oppressive, nor did he make clear the nature or magnitude of the prejudice to the value of Anthony's shares in Newbuild.
5. Thirdly, it was said the conduct was Charbel's "failure to pay [the Excess Payments and New Line Plumbing Payments] equally to Anthony [and] Charlie". However, as explained above at [118]-[141], I do not accept that Anthony had an entitlement to those payments.
6. For these reasons, I am not satisfied that an "objective commercial bystander would be satisfied that the affairs of [Newbuild] were being conducted unfairly" so as to enliven the court's discretion to make orders under s 233 Corporations Act: *Tzavaras v Tzavaras & Sons Pty Ltd* [2023] NSWCA 168 at [74] (Gleeson and Adamson JJA and Griffiths AJA).

7. Further, I consider that Anthony did not have standing to bring an oppression claim. He appeared to rely on s 234(c) Corporations Act, which provides that "a person who has ceased to be a member of the company" may make an application for an order under s 233 "if the application relates to the circumstances in which they ceased to be a member". Anthony's counsel did not refer to any authority where shareholders had entered into an agreement, whereby one would buy the other's shares and conduct relating to that agreement fell within s 234(c).
8. Further, Anthony's application for relief under the Corporations Act related to the Excess Payments and New Line Plumbing Payments, many of which were made two or three years before Anthony agreed to cease being a member of Newbuild in 2017. There was "no direct or substantial association" between the impugned payments and the cessation of Anthony's membership: see eg *Beevers v Port Phillip Sea Pilots Pty Ltd* [2007] VSC 556 at [313]-[315] (Dodds-Streeton J, as her Honour then was). It follows that s 234(c) Corporations Act did not confer standing upon Anthony to bring his oppression claim.

Unconscionable conduct

1. Anthony further submitted that Charbel's silence about paying the Excess Payments and New Line Plumbing Payments and the "unscrupulous and self-serving approach he took" in making those payments amounted to unconscionable conduct contrary to s 12CB ASIC Act. He relied on that provision, rather than s 21 Australian Consumer Law, because he considered that the relevant conduct occurred "in connection with ... the acquisition ... of financial services", namely, the acquisition of Anthony's shares in Newbuild.
2. Neither in the pleadings, nor in submissions, did Anthony explain with sufficient specificity why Charbel's silence was unconscionable, particularly in circumstances where Anthony (like Charbel) was also a director of Newbuild and had access to its books and records and all work on sites, such that he could have and likely did know of Newbuild's works and outgoing payments. There is no evidence that Anthony was commercially unsophisticated, such that it was beyond his ability to have made those enquiries, as noted above at [144]-[146].
3. Further, Anthony made no reference to any of the matters in s 12CC ASIC Act to substantiate his allegation that Charbel had acted contrary to the normative standard of conduct set out in s 12CB.
4. I am consequently not satisfied that Charbel's silence was "outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience": *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27 at [60] (Gageler CJ and Jagot J), [101] (Gordon J, Steward J agreeing at [282], Gleeson J agreeing at [314], Beech-Jones J agreeing at [339]). As Bromwich J observed in *Olson v Keefe (No 3)* [2018] FCA 2001 at [22], "it is not enough to plead a set of facts and a bare conclusion that, in all the circumstances, what has taken place

is unconscionable". That is precisely what Anthony has done in these proceedings. His statutory unconscionable conduct claim must fail.

Does the Deed require a payment for goodwill?

Interaction between the Deed and the brothers' prior unwritten agreement

1. It is common ground that in 2017, Anthony and Charbel entered into an unwritten agreement to divide the assets of Newbuild, or cause those assets to be divided or split equally, between them or between corporations, Newbuild and the newly formed Newline Property, that each would respectively control.
2. Charbel's pleaded case was that the Deed identified the Henry Kendall Street property and an additional cash component of \$6,451,972.64 as the consideration that would fulfil the entirety of Charbel's obligations under the prior agreement. Charbel submitted that Anthony was bound by an estoppel by deed. However, an estoppel by deed only operates in an action on the deed, and Charbel brought no such claim: see eg *Salad Fresh Pty Ltd v P&M Quality Smallgoods Pty Ltd* [2015] NSWSC 1717 at [43] (Young AJA), citing *Coface Australia v Sims Group Australia Holdings Ltd* [2013] NSWCA 418 at [93]-[97] (Ward JA, Barrett JA and Sackville AJA agreeing).
3. The true position was that the Deed rescinded, or was a novation of, the brothers' prior agreement. As Leeming JA (Basten and Ward JJA agreeing) observed in *Hillam v Iacullo* (2015) 90 NSWLR 422 at [51] and [72]:

[W]here a later contract between the same parties deals with the whole of the subject matter of the former in a way that it is inconsistent with the continued existence of the former, then it must necessarily rescind the former by implication even in the absence of express language ...

[A]n inconsistent dealing with the whole of the subject matter of the previous contract must be sufficient to impute an intention that it was at an end.

1. Here, the Deed dealt with the same subject matter as the prior agreement, being the division of the assets of Newbuild between Charbel and Anthony. It did so in a manner which was inconsistent with the continued existence of the prior agreement, because it set out the specific agreed consideration for the split, unlike the prior agreement which simply provided for an equal, but undetermined, division of Newbuild's assets between the brothers. Therefore, the Deed necessarily rescinded the prior agreement by implication.
2. This was in contrast to the April 2018 Agreement, which did not contradict the Deed in any way. Instead, it contained additional clauses not specified in the Deed.

Proper construction of the Deed

1. Anthony claimed that even if the Deed bound him, it did not provide for any consideration for Newbuild's goodwill and therefore he was entitled to further payment, as a result of the oral agreement, which was "different", in that it was an agreement to split "all assets", which must include goodwill.
2. I reject that submission for the following reasons.
3. First, as above, the Deed was the only binding agreement of the brothers concerning the consideration Anthony would receive for his Newbuild shares. In recital 5, the Deed recorded that "both parties have satisfied themselves the arrangement is equitable".
4. Secondly, all the documented negotiations between the parties were recorded in Mr Chalmers' letters, which relied on Mr Bandpay's financial records and the valuations. His letters referenced instructions of an agreement, excluding goodwill.
5. Further, Mr Chalmers' 27 September 2017 proposed valuation expressly indicated that goodwill was valued, but then excluded. Anthony accepted he read the proposed valuation before he signed the Deed.
6. The exact figure Mr Chalmers had determined was included in the Deed as an "accepted" valuation of 50% of the "current fair market value of Newbuild". The ordinary meaning of the that language was that the whole of Newbuild had been valued. I consider it would have been necessary to expressly provide for a future valuation of goodwill, had that been intended to be separate from the agreed consideration for Anthony's share.
7. Thirdly, but with less weight, I have had regard to the fact that the brothers expressed an intention to continue working on projects together through their individual corporate vehicles. Mr Chalmers expressed that goodwill was excluded because of this reason; Anthony would have obtained the benefit of Newbuild's goodwill in its future earnings on projects won partly because of its reputation. The Deed also recorded at clause 9 that "The two parties will continue to work together", even though the further agreement was to "establish a specific agreement for any projects on which they are both involved". As noted, Anthony did not claim there was a breach of the promise to work together, and he has received profit from joint projects and therefore has obtained the benefit of goodwill from Newbuild.
8. For these reasons, I consider that the proper construction of the Deed did not contemplate any future determination of a payment for goodwill. That was the very basis upon which the parties were negotiating; the Deed recorded the agreement on a total figure.
9. Further, in light of my finding that the Deed rescinded the prior agreement between the brothers, and the Deed was silent as to goodwill, there was no binding agreement that required Charbel to make any payment to Anthony for the value attributable to Newbuild's goodwill.

Conclusion

1. Anthony has not pleaded any breach of the Deed. I consider that Charbel has performed his obligations under clauses 1 and 8 of the Deed, and is not liable for any further payments.

Valuation of Newbuild

1. On the contingency that the Deed did not bind the parties, I consider the proper valuation of Newbuild as at 30 June 2017, which would be necessary for an equal division.
2. Both parties relied on expert evidence from chartered accountants. Anthony relied on the expert reports of Mr Nicholas Gaudion. Charbel relied on the expert reports of Mr Wynand Mullins.

Difference in valuation methodology – CGT issue

1. Both valuers valued Newbuild as at 30 June 2017. Mr Gaudion used a "value to owner" methodology, which Mr Mullins considered inappropriate and only appropriate in family law disputes. Mr Gaudion claimed that because the draft glossary prepared by International Valuation Standards Council in December 2020 included "value to owner", it amounted to a valid methodology here, without engaging in Mr Mullins' criticism, and without explaining why his approach was preferable. Mr Gaudion did not deny that "value to owner" was used in family law disputes. I consider Mr Gaudion's failure to explain his valuation methodology chosen, which departed from the well-known, market valuation, is a weakness of his report. On that basis, I prefer Mr Mullins' valuation approach.
2. However, the only practical difference in using Mr Gaudion's valuation methodology (instead of a market value) related to capital gains tax provisioning for Newbuild's properties.
3. Mr Gaudion did not consider that CGT provisioning was necessary. His report stated:

I am not aware of the property or properties to which [entry in company records] relates, if the property has since been sold or if not, any intention at 30 June 2017 for the properties to be sold. I am not aware of how the liability was calculated and am not aware of what concessions or tax relief provisions which may be available to the company which could affect the income tax ultimately payable in respect of any future sale of the properties, I am unable to consider the income tax implications of any future property sale(s). I am not aware of this deferred tax having been paid in subsequent years. Accordingly, I have excluded this liability.

1. In contrast, Mr Mullins included \$453,108 in provisioning for capital gains tax that would be incurred in the future by Newbuild upon the sale or transfer of the 12 Range Road and 18-22 Range Road properties. He relied upon Newbuild's financial reports, which included provisioning for this tax, but he calculated the particular figure himself and adjusted downwards the amount in the records.

2. Anthony's counsel suggested that Mr Mullins had accepted in cross-examination that if Mr Chalmers had given advice about a "roll over credit", then it would be inappropriate for the provisioning to be factored into a valuation. However, Mr Chalmers did not give such advice about any properties; he gave advice about the roll over or scrip for scrip tax benefits concerning the sale of Anthony's shares in Newbuild to Charbel. Therefore, I do not accept the submission that I ought to reject Mr Mullins' approach. There was no evidence that the Range Road properties have been sold and that capital gains tax has been paid. However, I accept Mr Mullins' opinion that as at 30 June 2017 it was appropriate to provision for that future capital gains tax for valuation purposes, as he did.

Valuation on income approach

1. Mr Gaudion valued Newbuild based on an asset approach and an income approach, the latter including goodwill.
2. Charbel's senior counsel submitted that I ought not accept any of Mr Gaudion's calculations for the following reasons:
 1. He had included valuations of Newbuild's properties that had no factual basis in the evidence.
 2. He had included a valuation of 5 Haven Crescent as an asset of Newbuild, but Anthony conceded it was not.
 3. He assumed all the Excess Payments and New Line Plumbing Payments were assets of Newbuild. In that regard, he had not been provided all of the lay evidence that provided an explanation of those payments, for example, one of Charbel's affidavits. He also made some adjustments where he thought the financial records were inconsistent with his instructions. He did not indicate that he sought further instructions where there was a factual issue; instead, he determined it himself.
 4. He accepted that he could not be certain about his final valuations if the integers he had relied upon, such as the above, were altered or deducted.
1. I therefore do not consider Mr Gaudion's valuation on the income approach reliable.
2. Mr Mullins did not include any value for goodwill, because he did not use an income approach. Therefore, there is no reliable evidence of a valuation on an income approach, including or implying goodwill as at 30 June 2017.
3. For completeness, I reject the faint submission of Anthony's counsel that the exact calculation would need to await this judgment and possibly require a further hearing, as he was unable to provide the Court with valuation figures accounting for the various combinations and permutations of Anthony's potential success. It was open to Anthony to bring forward evidence based on various factual permutations, or provide a means for the Court to come to a conclusion. He did not do so.

Valuation on asset approach

1. Mr Gaudion's valuation on an asset approach was \$21,946,000. Mr Mullins' valuation was \$15,626,000. Again, Mr Gaudion's valuations were based on facts that have not been proven, for example, the property values he adopted and included.
2. Therefore, I cannot accept Mr Gaudion's valuation.
3. Anthony's counsel did not make any submission that Mr Mullins was not a credible and careful witness. I accept his evidence. Therefore, I prefer the valuation of Mr Mullins based on the valuation certificates and exclusion of the Excess Payments and New Line Plumbing Payments, and find the asset value of Newbuild as at 30 June 2017 was \$15,626. I note this was close to Mr Chalmers valuation at \$15,583,621.42.

Effect of valuation

1. If Newbuild was valued at \$15,626,000, Anthony was entitled to half of that (including the Henry Kendall Street property), namely \$7,813,000.
2. Anthony accepted he has received the Henry Kendall Street property and also cash of \$6,691,810.71. I have found that he also received a gratuitous payment of \$712,500, making a total of \$7,404,310.71 in cash. I note that Anthony's counsel did not submit that the \$712,500 was anything other than a "top up" amount added to Anthony's receipts related to the division of Newbuild; no submission was made as to how to characterise it. I consider that Anthony received cash and a property (adopting the \$1,100,000 agreed value), totalling \$8,504,310.71. That is more than Mr Chalmers' and Mr Mullins' valuations by close to \$700,000.
3. Therefore, even if the above conclusions concerning the Deed and most of the alleged overpayments were erroneous, Anthony would not be entitled to any further sum.

Costs

1. Anthony has not been successful in establishing any of his claims. There is no reason why costs ought not follow the event.

Orders

1. For the reasons above, the appropriate orders are:
 1. Further amended summons dismissed.
 2. Plaintiffs to pay the defendants' costs of the proceedings as agreed or assessed.
 3. Grant liberty to the parties to apply for an alternative costs order within seven days of today's date, setting out the application and any evidence and submissions of no more than 3 pages upon which they rely.

4. Should such an application be made for an alternative costs order, the responding party is to provide evidence and submissions of no more than 3 pages opposing any alternative costs order within seven days of receiving the first application.
5. The Court will determine any such alternative costs application on the papers, if appropriate.

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Decision last updated: 19 February 2025

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Prepared on 26 October 2026 · Esheria