

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
GENERAL LIST

Revised
(Not) Restricted
Suitable for Publication

Case No. CI-22-01909

EQUITY TRUSTEES WEALTH SERVICES LIMITED (ACN 006 132 332)
as trustee of T H E MITCHELL TRUST

Plaintiff

V

JUNYIP PTY LTD (ACN 623 865 378) & ORS
(according to the attached schedule)

Defendants

JUDGE: Her Honour Judge A Ryan
WHERE HELD: Melbourne
DATE OF HEARING: 20-21 February and 1 March 2024
DATE OF JUDGMENT: 24 February 2025
CASE MAY BE CITED AS: Equity Trustees Wealth Services Ltd v Junyip Pty Ltd & Ors
MEDIUM NEUTRAL CITATION: [2025] VCC 133

REASONS FOR JUDGMENT

Subject: CONTRACT

Catchwords: Contract – plaintiff claiming balance of instalments of purchase price due under a share sale agreement – whether a binding oral variation of the agreement made whereby the vendor agreed to forego payment of the balance owing – reliance upon evidence from a deceased person

Legislation Cited: *Evidence Act 2008*

Cases Cited: *Jones v Dunkel* 101 CLR 298; *Plunkett v Bull* (1915) 19 CLR 544; *John Holland Pty Ltd v Kellogg Brown and Root Pty Ltd* [2015] NSWSC 451; *Moore v Aubusson* [2020] NSWSC 1466; *Watson v Foxman* (1995) 49 NSWLR 315; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Limited* [2012] NSWSC 462; *Wigan v Edwards* (1973) 1 ALR 497; *Cellarit Pty Ltd v Cawarra Holdings Pty Ltd* [2018] NSWCA 213; *Walsh, Spriggs, Nolan & Finney v Hoag & Bosch Pty Ltd* [1977] VR 178

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Ms B Slocum

Hunt & Hunt

For the Defendants

Mr M J Campbell

Eales & Mackenzie

HER HONOUR:

- 1 The plaintiff ('Equity Trustees') claims the balance of instalments of the purchase price owing under the terms of a written share sale agreement.
- 2 The share sale agreement was for the purchase and sale of shares in GT Jones (Vic) Pty Ltd ('the Company'). The Company operates a business distributing protected electrical equipment for use in mining and petrochemical industries.
- 3 The first defendant ('Junyip') and the second defendant ('Zhou') purchased the shares. The third defendant ('Zhang') is sued in her capacity as guarantor of the purchasers' obligations.
- 4 The amount claimed is \$371,950, together with interest of \$98,337.47.
- 5 The defendants deny they are indebted to the plaintiff. Their defence is that they were relieved of the obligation to pay the outstanding instalments pursuant to an alleged oral variation of the share sale agreement.
- 6 For the following reasons, I was not persuaded a binding oral variation of the share sale agreement was entered into on the terms alleged by the defendants. Consequently, Equity Trustees is entitled to judgment on its claim, together with interest to be assessed.

Background

- 7 Equity Trustees is the current trustee of T.H.E Mitchell Trust ('the trust'). The trust is a testamentary trust formed upon the death of Thomas Herbert Edward Mitchell. Mr Mitchell's son, Edward Embly Mitchell ('the deceased'), was trustee of the trust until he died on 3 December 2019.
- 8 Equity Trustees Limited was appointed executor of the deceased's estate following a grant of probate on 13 February 2020. On 28 May 2020, the Australian Securities Investment Commission ('ASIC') authorised the transfer of assets and liabilities of

Equity Trustees Limited, including its role as trustee of the trust to the plaintiff, Equity Trustees Wealth Services Limited.

- 9 Zhang is the sole director and shareholder of Junyip. Junyip holds 50 of the 100 shares issued in the Company. Zhang has been the sole director of the Company since 1 January 2018.
- 10 Zhang worked as a bookkeeper in the Company's business since 2012. Prior to this, she had worked at a factory as a process worker, being a business run by the deceased. She had known the deceased since about January 1992.
- 11 Zhou is Zhang's brother-in-law. He first met the deceased in 1990 when he worked at another business operated by the deceased. He commenced employment with the Company as a storeman in September 2016. Zhou holds the remaining 50 shares in the Company.
- 12 The deceased was the former director of the Company prior to the sale of the shares. He held all one hundred shares issued in the Company in his capacity as trustee of the trust.
- 13 Since 2014, the deceased was looking at ways to sell the Company according to the evidence given by his accountant, Mr Hilton of Accru Melbourne Pty Ltd ('Accru'). The latter had provided valuations for that purpose.¹ One offer had been received but did not proceed. By late 2017, the deceased's health was failing.
- 14 The deceased prepared a handwritten sale agreement on 8 January 2018 which recorded selling the assets of the business to Zhang and Zhou and was signed by those parties. On 23 January 2018, the deceased retained the firm of Hutchinson Legal to prepare a formal share sale agreement.

¹ Court Book ('CB') 122 and 124, valuations prepared by Accru in 2015 and 2016, respectively

- 15 In early 2018, Stahl, a principal supplier of parts to the Company, terminated its longstanding supply agreement.

Share sale agreement

- 16 The share sale agreement was executed on 5 March 2018 and backdated to 1 January 2018. The deceased (then trustee of the trust) is the vendor of the shares, Junyip and Zhou are described as the ‘purchaser’. Zhang is named as the guarantor of the purchasers’ obligations.
- 17 The relevant terms of the share sale agreement included:
- (a) completion date means “the date this Agreement is signed by all parties or such other date and time as may be agreed in writing between the Vendor and the Purchaser” (clause 1.1(f));
 - (b) the purchase prices means “the amount referred to as the Purchase Price in clause 3.1 (clause 1.1(l));
 - (c) the vendor agreed to sell and transfer, with effect from the completion date to the purchaser, and the purchaser agreed to purchase from the vendor all the right, title and interest in the shares for the purchase price on the terms and conditions set out in the agreement (clause 2.1);
 - (d) the shares were to be transferred with all benefits, rights and entitlements “on and from the completion date” (being 5 March 2018) (clause 2.2);
 - (e) the purchase price of \$606,500 was to be paid by an initial deposit of \$150,000 by 1 January 2018, a further deposit of \$50,000 by 31 May 2018, and 47 monthly instalments in the sum of \$8,650 beginning on 1 January 2018 (totalling \$406,550) (clause 3.1);
 - (f) the purchaser would be in default of payment if the monthly instalments were in arrears for three successive calendar months (clause 3.2);

- (g) completion was to occur on the completion date (clause 4.1);
- (h) the vendor was obliged at completion to deliver executed share transfers, share certificates, and any other documents necessary to vest title in the purchaser in the shares to the purchaser free from encumbrances (including retention of title); a written resignation of the deceased as a director of the Company; and an executed lease of the business premises on the terms set out in clause 5 (clauses 4.2(a)-(e));
- (i) on completion, title to, property in and risk in respect to the shares passed to the purchaser effective from the completion date (clause 4.5);
- (j) Zhang guaranteed the purchaser's obligations under the agreement upon any default in the payment of purchase price or the performance of any term (clause 8.1); and
- (k) the agreement may only be amended in writing signed by all the parties and may not be amended in any other manner (clause 10.6).

18 Between 1 February 2018 and 1 May 2018, the defendants paid \$241,450 towards the purchase price.

Meeting on 16 May 2018 – alleged oral variation

- 19 On 16 May 2018, the deceased, Zhang and Zhou attended a meeting at the Company's offices at around 11:30am. Zhang said the meeting had been arranged by the deceased and lasted for about 40 minutes to an hour. The discussion was held in English. Zhang confirmed her brother-in-law, Zhou, was at the meeting when she had this discussion with the deceased. She interpreted the discussions for Zhou due to his lack of English.
- 20 During the meeting, Zhang said the deceased noted there had been an over 20 percent drop in sales and revenue of the Company's business. She then gave

evidence the deceased said “the price is \$600,000 plus. And we’ve already paid \$240 plus. The rest he said would just give it free to me and my brother-in-law”. In response to him saying she did not have to pay any more, she said, “thank you very much”.

21 Zhang went on to say:

At the same time, what was discussed was also about the rent. And also the use of office, car, expenses, including insurance, registration, Citylink and also the phone, phone bills and the new phone; new computer and also me as a bookkeeper.

22 She gave evidence she provided bookkeeping services to the Company, to the deceased’s personal account, the Mitchell No 1 Investment Company Pty Ltd (‘Mitchell No 1’), the Mitchell Trust, Mitchell Superfund and also Mitchell’s Private Expense Income – Family Income, especially cashflow. Zhang said her hourly charge rate for people who engaged her as a bookkeeper was \$70 plus GST. She said she was going to provide these services for free to the deceased.

23 The deceased had an office at the Company’s premises at 38 Dairy Drive, Coburg North at the time the share sale agreement was executed. It was a term of the share sale agreement (clause 5) that a lease would be provided for the premises which, as it turns out, did not eventuate. The lessor of the premises was Mitchell No 1. In late November 2019, the defendants vacated the business premises in Dairy Drive, Coburg North and took up smaller leased premises.

24 Zhang gave evidence the deceased said to her at the meeting on 16 May 2018 “you don’t have to pay any rent because... the balance of the shares because the service you provide me is enough. From today you don’t owe me anything”.

25 In cross-examination, Zhang confirmed the deceased said he would give the balance to her and she said, “They say that after today, no more payments”.

- 26 Zhang agreed the car driven by the deceased was owned by Company. She claimed the deceased said to her she could waive the rent from the services she provided to him, which would be enough to offset the rent. She went on to say “yes, the car... and there was the insurance and the bookkeeper services, and the new computer, new mobile phone and such things”. Zhang agreed that these expenses paid on behalf of the deceased were paid by the Company. She also agreed that the Company’s business premises was owned by Mitchell No 1. Zhang accepted the Company paid all the deceased’s car and phone-related expenses and that the money did not come from her or her brother-in-law, Zhou.
- 27 Zhang’s attention was drawn to clause 10.6 of the share sale agreement, which provides that the agreement can only be amended in writing. She was asked, during her conversation with the deceased, whether she and the deceased agreed to waive this clause. Her response was that they relied upon the share transfer forms signed as being everything that was done in writing.
- 28 Zhou said that Zhang had interpreted two documents for him at the meeting on 16 May 2018 which he had signed. He understood a payment was no longer required as the deceased said, “after you sign you don’t have to pay the rest”. His recollection was the deceased offered to waive the outstanding amount due to the business struggling and losing clients. He went on to say it was discussed that he and Zhang would obtain an office for the deceased and provide cleaning services. The deceased had asked them to keep an eye on the office for him. In cross-examination, Zhou confirmed Zhang had interpreted the discussion for him. He did not use a phone translation service other than to use it sparingly to assist when translating with the signing of documents.
- 29 The deceased, Zhou and Zhang on behalf of Junyip executed two transfers of shares forms at the meeting on 16 May 2018. Their signatures were witnessed by a Company employee, Michelle Keating, who arrived at the meeting after they had

finished their discussions. The share transfers documents had been emailed to Zhang on 14 May 2018, by Hutchinson Legal, together with forms recording a change in the director/secretary of the Company and shareholding.

30 No file note was made of the meeting held on 16 May 2018, nor did the parties refer to the substance of the discussions held that day in any subsequent correspondence.

31 From 16 May 2018, the defendants ceased making payments to the deceased for the shares and the Company stopped paying rent for the business premises.

32 On 21 February 2019, the deceased sent an email to Hutchinson Legal noting the following:

.... please do not undertake any further work without prior express approval as already stated it is my belief that work has been invoiced and paid. Furthermore I remember last year discussing the invoices that I was receiving and was led to believe that at that time the flow of work was finished.

33 By mid-2019, the deceased's health condition had worsened and he stopped coming into the office.

34 On 18 November 2019, the deceased met briefly with Zhang for lunch.

35 A few weeks before he died, the deceased sent an email to Zhang on 24 November 2019, attaching a letter from Hutchinson Legal dated 15 July 2019 which said:

It appears to us (unless you inform us otherwise in writing) that there is nothing further to be done in this matter and your file is now to be closed.

36 On 1 July 2021, DSA Law, the plaintiff's former lawyers, sent a letter of demand to Eales & Mackenzie, the solicitors acting for the defendants.

The proceeding

37 This proceeding was commenced on 18 May 2022. Equity Trustees' claim is for the balance of the instalments due between 1 June 2018 and 1 January 2022,

which have not been paid. In addition, Equity Trustees claims the sum of \$8,650, being the first instalment due on 1 January 2018 (together totalling \$371,950).

- 38 The defendants claim the first instalment was paid. They accept the remaining instalments were not paid but say they have no obligation to do so because of an alleged oral variation to the share sale agreement.
- 39 The defendants allege the deceased agreed to vary the share sale agreement on the terms contained in paragraph 17 of their defence as follows:
- (a) the vendor would transfer the Company shares to the purchasers;
 - (b) no further payment for the shares would then be required to be made by the purchasers;
 - (c) the vendor would waive the right to receive rent for the premises from June 2018;
 - (d) the vendor would continue to use an office at the premises with administrative support as required;
 - (e) the Company would grant the vendor the possession and use of the Company-owned Holden Commodore sedan, and the Company would pay all of the vendor's vehicle-related expenses such as Citylink tolls, insurance and registration;
 - (f) the Company would grant the vendor possession and use of a Company-owned Apple iPhone Plus, and would pay the vendor's telephone invoices;
 - (g) the Company would grant to the vendor possession and use of a Company-owned Asus laptop, and would pay all related expenses, such as internet expenses; and

(h) Zhang would continue to provide bookkeeping services to the vendor and his associated entities as before but at no charge.

40 The defendants claim they performed the terms of the varied agreement and are not indebted to Equity Trustees in any sum. At trial, a list of payments was provided to the Court by agreement setting out the sums which the defendants allege they incurred in performance of the alleged oral variation.² The total sum claimed is in the order of \$25,000.

41 By way of reply, Equity Trustees denies the alleged variation and relies on clause 10.6 of the share sale agreement which provides that any variation must be writing signed by all the parties. The plaintiff also relies upon the fact that the trust's financial statements for 30 June 2018 and 2019 recorded the balance of the purchase price as owing. Further, the deceased told his accountants after 16 May 2018, that the unpaid balance was due and owing by the defendants.

Witnesses

42 The plaintiff called three witnesses, Mr Hilton, Ms Hall and Ms Coniglione (née Dodgeson). Ms Hall and Ms Coniglione are chartered accountants with Accru. This firm acted for the deceased and his related companies for many years. Ms Hall is a solicitor, who was previously employed with Hutchinson Legal, and acted for the deceased.

43 Zhang and Zhou both gave evidence. The defendants also called Mr Jeremy Ding, a salesperson working at the Company. He gave evidence about the reduction in sales at the business.

44 There were no credit issues raised regarding any of the witnesses. The plaintiff expressly disavowed any suggestion of dishonesty or fraudulent conduct on the part of Zhang or Zhou. Instead it was put to them in cross-examination that they

² See Schedule A to the Plaintiff's Closing Written Submissions

may have misunderstood what the deceased said to them at the meeting on 16 May 2018 due to difficulties in translation, which they denied.

- 45 Zhang and Zhou speak Mandarin and gave evidence through an interpreter. Zhang suffered a stroke in 2012. Her capacity to speak and understand English was adversely affected after the stroke. Prior to this, her level of English was fairly sophisticated. For example, Zhang had obtained a degree in commerce and computer science from La Trobe University in 2000.
- 46 Zhou has very limited English. He relied upon Zhang to interpret for him what was said by the deceased at the meeting on 16 May 2018, with the exception that he claimed to have heard and understood the deceased to say, “no more payments”.
- 47 The defendants argued a *Jones v Dunkel*³ inference should be drawn because the plaintiff did not call the deceased’s daughter to give evidence. It was pleaded in the Reply that the deceased told her the unpaid balance was still owing by the defendants. In closing address, counsel for the plaintiff conceded that such an inference could be drawn in the circumstances.
- 48 The parties relied upon on hearsay evidence from the deceased and served notices under s67 of the *Evidence Act* 2008. While it was accepted that questions of weight would arise with this hearsay evidence, neither party objected to its use.
- 49 The resolution of the issues in this case depend in part on the Court accepting evidence of what supposedly was said by a deceased person. The promises said to have been made by the deceased to Zhang and Zhou are all oral and there is nothing in writing. In such circumstances, the Court should apply cautious scrutiny in accepting the evidence of what has been said by a deceased person in the

³

(1959) 101 CLR 298

absence of the deceased being able to give evidence. In *Plunkett v Bull*,⁴ Isaacs J said that:⁵

It is not that the Court looks on the plaintiff's case with suspicion and as *prima facie* fraudulent, but it scrutinises the evidence very carefully to see whether it is true or untrue.

50 There must be “an actual persuasion” of the occurrence of any conversation propounded by a claimant who “seeks to rely upon spoken words as a foundation for a cause of action”.⁶

51 In a recent decision of the New South Wales Supreme Court in *Moore v Aubusson*,⁷ the Court had to consider whether representations were made by a deceased person in the nature alleged. In terms of evidence, Ward CJ in Equity said as follows:⁸

As to the assessment of the conflicting evidence, as the defendant notes, there must be ‘an actual persuasion of the occurrence of any conversation propounded by a claimant’ (the defendant referring to *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [94], per Hammerschlag J; and to the summary by Black J of the principles to which a Court should have regard in assessing the affidavit and oral evidence as set out in *In the matter of Hillsea Pty Limited* [2019] NSWSC 1152 at [16]-[22]). It is noted that these principles include the well-known observation by McLelland CJ in Eq as to the fallibility of human memory over the passage of time in *Watson v Foxman* (1995) 49 NSWLR 315 (*Watson v Foxman*) at 319; and that weight should be accorded so far as possible to ‘contemporary materials, objectively established facts and the apparent logic of events’.

52 Her Honour’s observations at paragraph 111 are also apposite:

While I accept that there is not a higher onus of proof in this regard, it is nonetheless the case that one must scrutinise carefully evidence as to oral conversations with deceased persons (see *Plunkett v Bull* (1915) 19 CLR 544 at 548-9, per Isaacs J; [1915] HCA 14), and, as in all such cases, I place relatively more weight on contemporaneous documents and the objective circumstances as a whole over the affidavit and oral evidence of those directly interested in the outcome of the litigation.

⁴ (1915) 19 CLR 544

⁵ Ibid 549

⁶ *John Holland Pty Ltd v Kellogg Brown and Root Pty Ltd* [2015] NSWSC 451, [94]

⁷ [2020] NSWSC 1466

⁸ Ibid [109]

- 53 The views expressed by McLelland CJ in *Equity in Watson v Foxman* bear repeating:⁹

... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the process of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

Issues for determination

- 54 The parties agreed on the following key issues for determination:

- (1) Did Junyip and Zhou pay the trust the first instalment of the purchase price of \$8,650 payable under the share sale agreement for the sale of the shares in the Company on 1 January 2018?
- (2) Was the credit of \$6,850 to the deceased's superannuation fund account a part payment of the first instalment?
- (3) Did the parties to the share sale agreement agree, on about 16 May 2018, to vary the terms of the agreement?
- (4) If the answer to [3] is yes, what were the terms of the alleged variation?
- (5) If the answer to [3] is yes, did the purchasers provide any consideration, or perform the varied share sale agreement?
- (6) If the answer to [3] is no, are the defendants (and/or any one or more of them) obliged to pay to the Trust the outstanding purchase price for the shares, in the amount of \$371,950?

⁹ (1995) 49 NSWLR 315, 319

(7) If the answer to [6] is yes, is the Trust entitled to interest on the amount of \$371,950 from 18 May 2022 to the date of judgment?

(8) Is any party entitled to costs? If so, on what basis?

Did Junyip and Zhou pay the trust the first instalment of the purchase price of \$8,650 payable under the agreement for the sale of the shares in the Company on 1 January 2018?

- 55 Issues 1 and 2 can be dealt with together as they relate to the treatment of a payment purportedly made under the share sale agreement.
- 56 The defendants argue that a \$6,850 payment made by the Company on 2 January 2018 into the deceased's superannuation fund, labelled as "director's fees", should be treated as part of the first instalment payable.
- 57 Zhang gave evidence that the deceased instructed her to pay \$6,850 on 2 January 2018 into the deceased's superannuation fund, as part of the purchase price. The amount represented the deceased's monthly director's fee and was paid by the Company under Zhang's direction.
- 58 Equity Trustees noted that, at the time of payment, the deceased was still a director of the Company and had not yet sold the shares to the purchasers. The payment occurred before the deceased drafted the first handwritten terms for the potential sale of the business to Zhang and Zhou, and before the initial deposit payment was made in late January 2018.¹⁰ According to the plaintiff, this suggests the payment on 1 January 2018 was a director's fee and not an instalment under the share sale agreement. While the plaintiff acknowledges the possibility of a mistake regarding this payment, it argued at trial that the payment, at best, constituted only a part payment of the first instalment.¹¹

¹⁰ It is undisputed that a payment of \$150,000 was made on 23 January 2018

¹¹ Transcript ("T") 32.45; T33.1-5

- 59 It can be accepted there is a discrepancy on the evidence about the nature of this payment. Ms Hall made notes recording her discussions with the deceased. She noted on 23 January 2018 that the purchaser wanted the start date for the sale to be 1 January 2018. On 5 March 2018, Ms Hall recorded the deceased telling her the purchaser had been paying \$8,650 a month since 1 January 2018.
- 60 The first statement of account prepared by Ms Coniglione of Accru dated 2 July 2019 recorded that an instalment was paid in January 2018 in the sum of \$8,650. The first instalment was due by 2 January 2018. The defendants did make payments to the deceased before the share sale agreement was formally executed. This payment into the deceased's superannuation fund corresponds with the date due for the first instalment. The figure is similar to the sum payable save that the first two figures are back to front – thus perhaps giving rise to a numerical error.
- 61 The deceased ceased to be a director on 1 January 2018, according to the forms signed in May 2018, which backdated his cessation as a director. Consequently, he may have decided he was not entitled to a director's fee at that time and therefore agreed to treat this sum as representing a payment from the purchasers. All of this is conjecture in the absence of evidence from the deceased. However, given a payment was due at this time and the accountants, presumably on instructions, recorded in the statement of account that the first instalment was paid, leads me to find that the sum of \$6,850 was paid in part-satisfaction of the first instalment. Such a finding is also supported by Ms Hall's evidence that the deceased told her the purchaser had been paying \$8,650 a month since 1 January 2018. Consequently, there is independent and objective evidence which would support Ms Zhang's version of events about part-payment of the first instalment.

In the circumstances, the balance of the first instalment in the sum of \$1,800 remains due and payable.¹²

Did the parties to the agreement agree, on about 16 May 2018, to vary the terms of the agreement?

- 62 Issues 3 to 6 can be dealt with together as they deal with the topic of the alleged oral variation made on 16 May 2018.

Equity Trustees' submissions

- 63 Equity Trustees says its claim is for a straightforward debt.
- 64 Prior to the execution of the share sale agreement, the purchasers had already made payments totalling \$167,300 toward the purchase price. It is undisputed that the trust received these deposit payments. Zhang testified that the Company may have made the payments rather than by the purchasers. Equity Trustees did not seek to amend its claim, as it said the source of the funds is a matter between Zhou and Junyip on one side and the Company on the other.
- 65 Equity Trustees notes the defendants claimed in their argument and at trial - though they did not plead - that the alleged oral variation emerged in the context of the Company losing a major customer, Stahl, in February 2018.
- 66 It is alleged it was a term of the alleged oral variation that the trust would waive its right to receive rent from the Company for its business premises. This allegation overlooks the fact that the registered proprietor of the premises, Mitchell No 1, was not a party to this agreement.
- 67 Furthermore, the defendants alleged that fresh consideration for the alleged oral variation, included the deceased having the benefit of possession and use of a

¹² At T51, it was said in opening that the deceased told Zhang there was no need to top up the balance of \$1,800 but Zhang did not give any evidence to this effect

vehicle, mobile phone, laptop computer, bookkeeping services, and access to the Company's business premises.

- 68 Equity Trustees notes it is well-established that the rights and obligations of parties to a contract are determined objectively based on the contract's text, context and purpose. To ascertain the meaning of commercial contract terms, one must consider how a reasonable businessperson would interpret them, taking into account the language used, the circumstances addressed, and the contract's commercial objectives.¹³ The parties' subjective intentions or understandings regarding the agreement or its variations are irrelevant.
- 69 The express terms of the share sale agreement are clear: the purchasers were to pay the purchase price for the shares, with beneficial ownership passing to them upon execution on 5 March 2018. While the trust failed to deliver the share certificates or transfers at completion, this only affected the formal registration with ASIC and may have constituted a breach. The failure did not impact the transfer of beneficial ownership. The purchasers could have compelled the trust to perform its obligations but the delivery of those documents was irrelevant to determining ownership. From 5 March 2018, the purchasers could enforce the delivery of share transfer forms and the deceased's resignation as director.
- 70 Clause 10.6 of the share sale agreement terms states that any amendments must be made in writing. However, 'no oral variation' clauses do not prevent parties from informally agreeing to vary the agreement, provided essential conditions like mutual consent, offer, acceptance and consideration are met. While such a clause is relevant in determining the parties' objective intention to vary the original agreement, it does not eliminate the possibility of oral variations.

¹³ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104

- 71 Black J summarised these principles in *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Limited* within the context of a share sale agreement:¹⁴

COQ Holdings points out that clause 22.1 of the Amended Shareholders Agreement provides that the agreement may only be varied by a document signed by or on behalf of each party. Such a provision would not exclude the effect of a subsequent implied or oral contract which varied the Amended Shareholders Agreement, if that contract were otherwise established; however, the fact that the clause exists is to be taken into account in interpreting the subsequent conduct of the parties, and it makes it more difficult to draw an inference that the parties did intend, by an oral agreement or by emails between their advisers, to vary the terms of the Amended Shareholders Agreement.

[citations omitted].

In order for such a variation agreement to have contractual effect, whether it was established by prior discussions of the parties or the exchange of emails, it would be necessary (where it was not made by deed) to show the other requirements of a valid contract, including that there must be real consideration for the agreement.

[citations omitted]

- 72 The requirements for a valid contract variation include mutual agreement by the original parties, a clear offer and acceptance, fresh consideration,¹⁵ and certainty of terms. As noted in *Cellarit Pty Ltd v Cawarra Holdings Pty Ltd*, "contractual variation requires a mutual intention to vary the existing terms and consideration".¹⁶ Additionally, in *Walsh, Spriggs, Nolan & Finney v Hoag & Bosch Pty Ltd*,¹⁷ it was emphasized that "[t]o describe an antecedent debt or liability as consideration ... is to depart from the general law of contract, where past consideration is no consideration at all".¹⁸
- 73 Zhang agreed in cross-examination there was no discussion with the deceased about waiving clause 10.6 of the agreement but claimed the documents signed on 16 May 2018 constituted a written variation.

¹⁴ [2012] NSWSC 462, [30]-[40]

¹⁵ *Wigan v Edwards* (1973) 1 ALR 497, 512

¹⁶ [2018] NSWCA 213

¹⁷ [1977] VR 178

¹⁸ *Ibid* 179

- 74 Equity Trustees submits the Court should reject the defendants' claim that the share certificates amounted to a written variation and disregard Zhang's subjective intention, focusing instead on the objective construction of the share sale agreement. These documents reflected performance of the share sale agreement. The share transfer document confirmed that beneficial title passed at completion, while the "fully paid" notation on the share certificates was irrelevant to the vendor-purchaser relationship, as it only denoted no equity owed to the Company by the shareholders.
- 75 As can be seen from the evidence from Ms Hall, the documents needed to be signed in order to formally record the transfer of the shares and the resignation of the deceased as a director. To that end, Accru had sent Zhang copies of the various document to be signed on 14 May 2018. Zhang conceded she received those documents on 14 May and that she and Zhou signed the consents to act on 14 May 2018. All of the signed documents were returned to the accountants by Zhang on 16 May 2018. The steps taken did not affect the beneficial ownership in the shares but were steps merely required under the share sale agreement which the trust had overlooked. Beneficial ownership had already passed to the purchasers upon execution of the agreement on 5 March 2018. Pausing here, I agree that this is a correct statement of the position regarding the execution of the forms signed on 16 May 2018, and these documents did not constitute a variation in writing of the share sale agreement.
- 76 Equity Trustees notes the alleged oral variation turns on discussions that have taken place between Zhang and Zhou on the one hand and the deceased on the other. As the deceased is unable to give evidence, the Court must give careful scrutiny to the evidence and put relatively more weight on contemporaneous documents on objective circumstances as a whole, over the oral evidence of those directly interested in the outcome of the litigation.

- 77 There are no contemporaneous documents produced by the defendants in respect of the meeting where the alleged variation is said to have occurred. By contrast, the plaintiff relies on the contemporaneous documents that are inconsistent with the alleged variation. These documents being:
- (a) the financial statements for the trust for the year ended 30 June 2018;
 - (b) a file note prepared by the trust's accountant and dated 12 June 2019 and prepared by Mr Hilton;
 - (c) a statement of outstanding purchase instalments prepared by Accru between 12 June and 2 July 2019, a further version of the same statement with minor amendments sent to the deceased on 2 July 2019, in respect of which Ms Coniglione gave evidence that she prepared and later amended upon instructions from the deceased; and
 - (d) the trust's financial statements for the year ended 30 June 2019, which continued to disclose the outstanding instalments owed to the trust, and in respect of which Mr Hilton gave evidence they were prepared in accordance with the deceased's instructions.
- 78 These documents were prepared by parties who have nothing to personally gain in the proceeding, being professional witnesses who were advisers to the trust.
- 79 Mr Hilton gave evidence that he discussed capital gains tax implications with the deceased on a twice yearly basis and obtained a capital gains register for the deceased and his entities, including the trust, for this purpose. He said that if he had been told there was a variation of the agreement, such that the proceeds were not payable, it would have implications from a tax perspective. Mr Hilton would have made an adjustment to the accounts to reflect a loss on the sale of the shares. This in turn would have created a loss for capital gains purposes and a corresponding tax benefit.

80 Mr Hilton also gave evidence that the deceased:

[W]as of the belief that they are still recoverable. He was embarrassed that they hadn't been recovered, and he asked us to prepare some documents to outline the current arrears.

81 Ms Hall, the solicitor, gave evidence about receiving instructions from the deceased after May 2018 to prepare a draft lease agreement for the business premises.

82 Equity Trustees referred to the limited English of both Zhang and Zhou as contrasted with the English skills of the professional witnesses. The former stood to gain personally from the outcome of the proceeding. It was said that the Court should not admit or, alternatively, give any weight to Zhou's evidence concerning what was said by the deceased at the meeting regarding the alleged variation. This was due to the fact that he had very limited English skills and often used a translation on his mobile phone to understand English words. He did not use the mobile phone translation during the meeting, and Zhang had translated the relevant statements made by the deceased to him during the meeting.

83 Contrary to the defendants' submission, the Court should place little significance on the fact that Zhang had been forwarded a copy of the letter sent to the deceased from Hutchinson Legal dated 16 July 2019, informing him that their file had been closed. The letter was merely a standard form letter sent to close legal files.

84 The defendants' case had been, in part, that the alleged variation was done in the context of a loss by the Company of a major client, Stahl. However, this termination occurred before the agreement was signed. There had been no documents discovered in relation to the Company's contract with Stahl or the impact to the Company of the termination of its relationship with Stahl. Zhang confirmed that the Company did not have a formal written agreement with Stahl and that she had no actual knowledge of the alleged verbal agreement between the Company and Stahl. The alleged exclusive distributorship did not have a fixed term. The

relationship between the Company and Stahl came to an end in February 2018, which was before the agreement was signed on 5 March 2018. Therefore, any change in the Company's fortunes prior to 5 March 2018 is irrelevant.

- 85 Mr Ding's evidence did not assist as he was only employed by the Company on a casual basis from September 2018, and on a full-time basis from 2019. He was not present when the alleged termination of the Stahl relationship occurred and could not give direct evidence of the alleged downturn. He was not qualified to proffer an opinion about the financial records of the Company and the reason for downturn in sales, revenue or profit.
- 86 Equity Trustees submitted the Court should take into account the fact that the price agreed upon was already discounted from the valuations provided by Mr Hilton. The defendants did not dispute that valuations were conducted nor that they reflected Mr Hilton's true opinion as to the value of the business as at 30 June 2015 and February 2016. Accordingly, the Court can infer that the sale of the Company to the purchasers already represented a discount on the market value of the business and that the terms were favourable to the purchasers.
- 87 In light of the language barrier, Equity Trustees submits that the Court could have no comfort that the words said were fully understood by Zhang or that the Court could have any comfort that those words were accurately translated by Zhang for Zhou's benefit.
- 88 It could be accepted the defendants may have had a conversation with the deceased on or about 16 May 2018 in relation to the Company's fortunes. However, it is open to the Court to infer that whatever was discussed, Zhang and Zhou on the one hand, and the deceased on the other, misunderstood the words used by one another. In short, the alleged variation was 'lost in translation'. The Court could not be satisfied on the balance of probabilities that the deceased said

words capable of demonstrating an objective intention on the part of the trust to waive all future payments under the agreement.

- 89 Even if it be accepted that the deceased did say words to the effect alleged by Zhang on 16 May 2018, these words could only affect the legal relationship between the parties if the required elements of an agreement to vary the agreement were made out. The plaintiff notes that this requires mutuality of parties and fresh consideration.
- 90 As to mutuality of the benefits said to flow in consideration of the alleged variation:
- (a) the Company, and not Zhou and Junyip, had been paying the deceased's expenses prior to the alleged variation (and continued to do so after the alleged variation);
 - (b) Zhang conceded the car was driven by the deceased (as opposed to the trust) and used for his personal purposes;
 - (c) Zhang conceded that the Telstra mobile phone was used by the deceased (as opposed to the trust) and used for his personal purposes;
 - (d) Zhang conceded that the bookkeeping service she provided to the deceased and other various entities included Mitchell No 1, the deceased's superannuation fund, the deceased's daughter and the trust;
 - (e) prior to the alleged variation the trust was not meeting the deceased's costs of his mobile phone and bookkeeping services – each of those were already being paid by the Company;
 - (f) it was the Company not the deceased or the trust who had been benefited from Zhang providing bookkeeping services to the deceased without charge, as the Company had paid for those services previously; and

(g) the position with the lease was that it was Mitchell No 1 who was the lessor as opposed to the deceased or the trust.

91 In regard to fresh consideration, the plaintiff noted:

(a) the Company had already paid the deceased's toll invoices in April 2018, that is after the sale of the shares and prior to the alleged variation;

(b) the nature of Zhang's bookkeeping services which she provided did not change prior to or after the alleged variation;

(c) Mr Ding gave evidence that the deceased was regularly working in the business after May 2018; and

(d) Mr Hilton gave evidence that the deceased did not declare any income for those services.

92 The Court could draw an inference that the continued attendance by the deceased at the office, and not the alleged variation, was the reason why the Company was paying the deceased's mobile phone, computer and car expenses and providing him access to the premises.

93 Contrary to the assertion made by the defendants, the plaintiff argues that any payment by the Company is not a payment by one or more of the defendants as consideration for the alleged variation. No evidence of any loan agreement between the defendants and the Company was tendered, and no dividend could or would have been paid by the Company to its shareholders in circumstances where the Company did not disclose a profit in the financial years ended 30 June 2018 and 2019.

94 Finally, in respect of performance of the alleged consideration, Zhou gave evidence she performed 20-21 hours per week of bookkeeping with a value of \$70 per hour for the deceased. However, she could not inform the Court of precisely

what work she had done beyond cash reconciliations for the deceased's investments.

Defendants' submissions

- 95 The defendants argue they are not obliged to pay outstanding instalments because of the alleged oral variation of the share sale agreement made between the deceased, Zhang, and Zhou on 16 May 2018.
- 96 The defendants submit the evidence of Zhang and Zhou should be accepted to the effect that the deceased said that they did not have to pay anything more. The defendants refer to various contextual matters which supported the variation. These include the nature of the closeness of the parties' relationship, the deceased's approaching death and Stahl's decision in early 2018 to terminate its agreement with a consequential loss of business. It was said that in this context, the alleged variation to the agreement assumes plausibility.
- 97 Another aspect relied upon is the fact that the deceased's conduct was objectively consistent with the alleged variation. There had been non-compliance with clauses 3.4 and 3.5 of the share sale agreement relating to the provision of security. This included an ability for the vendor to obtain a signed Power of Attorney from the purchaser if there was default, and register a purchase money security interest ('PMSI') in the shares. Neither of these occurred. The deceased's failure to act upon the security provisions was consistent with the tenor of the oral variation alleged, namely, that there was no payment due from the defendants and therefore nothing to secure.
- 98 It was also pointed out there had been no demands made for balance of the monies owing nor for execution of the lease. The deceased never gave instructions to his lawyers to pursue recovery. His conduct is simply inexplicable unless the alleged variation agreement was made. The deceased's solicitors wrote a letter to him on 16 July 2019 saying they were going to close their file. The deceased did

not give the solicitors any further instructions. He could easily have given instructions to the solicitors to recover the balance had it been outstanding. Instead the file was closed without further contact. Zhang's evidence was that the deceased had told her that his lawyer had prepared something from July "and he told me to keep it just in case, that it can become in handy in the future. So G.T. Jones – the sales and purchase – the – the agreement".¹⁹

99 The defendants note the deceased did not tell Mr Hilton the lease had not been executed. It was put that the deceased had allowed his accountant to falsely assume that rent was owing in respect of a lease that he had not nor would ever execute. It was also suggested, therefore, that the deceased might have been willing to allow the accountants to falsely assume that the purchase price for the shares was outstanding to avoid embarrassment and having to explain the true position. It was argued that no weight should be afforded to the deceased's signature on the financial return for the year ended 30 June 2018, given the deceased's preparedness to sign documents submitted to ASIC which were said to be untrue, in particular the backdating of the form for appointment of the directorship.²⁰

100 The defendants argue the consideration for the variation was the Company providing the deceased with the use and benefit of the Company car, together with related expenses. In addition, the Company paid for the use of a Company-owned phone, together with a laptop computer. Further, Zhang provided her services as bookkeeper free of charge. It was said that the consideration could be expressed in the following way, namely the deceased promised that he would forebear from seeking payment of the balance of the purchase price of the shares and would not seek rent in consideration of the defendants' promise to procure and make

¹⁹ T175.16-20
²⁰ T114-116; CB 583-608

payment by the Company of the deceased's expenses and the provision by Zhang of bookkeeping services free of charge.

101 It was also noted that commercially inadequate consideration is sufficient in law.²¹

102 The defendants argue the agreement as varied was performed. A list of payments made by the Company on behalf of the deceased was provided at trial.

Analysis

103 The parties accept the defendants bear the onus of proving that a binding oral variation of the share sale agreement was entered into on 16 May 2018.

104 As can be seen from the foregoing principles relating to the treatment of evidence given by a deceased person, the Court must undertake careful scrutiny of the words which are alleged to have been said, given the deceased cannot contradict what has been put.

105 The evaluation of the defendants' evidence is made more difficult due to the fact that English is not their first language. This has a bearing upon what they understood was allegedly said by the deceased to them. Additionally, both Zhang and Zhou have a direct and material interest in the outcome of the litigation.

106 In my view, not much reliance can be placed upon the evidence of Zhou in circumstances where he accepted he did not understand English and relied upon Zhang to interpret for him what was said by the deceased. Apart from saying he understood "some payment that we no longer need to pay", and he was very happy and glad about that, he had very little recollection of what was discussed at the meeting. He gave no evidence, for example, about the Company car, or its related expenses, the waiver of rent or the provision of book keeping expenses. Zhou did not give any probative evidence about the items relied upon to ground the alleged consideration for the release from payment of the balance owing. So much was

²¹ See Cheshire and Fifoot, *Law of Contract*, 10th ed, 181 at [4.12]

properly conceded by counsel for the defendants.²² All that he did remember was a discussion about keeping an office for the deceased and the latter gave Zhou a key to the office so Zhou could clean it once a week. This arrangement continued when the Company moved to its new warehouse.

- 107 Zhou's evidence is at odds with the account given by Zhang, noting Zhou agreed in cross-examination that Zhang had translated everything the deceased had said during the meeting. There is a considerable difference in the accounts given by the defendants of the discussions held that day.
- 108 Zhang was clear in her evidence that the deceased had told her that she and Zhou were no longer required to make the balance of payments. Her evidence was somewhat more equivocal about the items relied upon as being consideration for the release of the requirement to pay the outstanding instalments and the rent. This then raises the issue as to whether the terms of the alleged variation were sufficiently certain so as to be enforceable.
- 109 The tenor of Zhang's evidence was that the deceased said no more payments because of the way the business was going and they then discussed the continuation of the arrangements regarding the deceased's use of the company car and other expenses. She also offered to provide bookkeeping services for free. Assuming the deceased did say to the defendants they did not have to pay anymore, this statement was in the nature of agreeing to waive the defendants' obligation to pay the unpaid balance and rent at that time. On that point, waiver was not pleaded and counsel for the defendants stated that it was not relied upon as a defence. It may well be the deceased said at the meeting the defendants did not have to pay but that alone does not constitute a binding oral variation of the share sale agreement without more. In my view, the defendants' evidence did not establish the something more required, namely, an unequivocal acceptance by the

²² *Heydon on Contract*, Lawbook Company 2019 [5.230]

deceased of the alleged benefits proffered by the defendants in exchange for him agreeing to waive payment. Therefore, I was not satisfied that the alleged terms of the oral variation were proved due to a lack of certainty.

- 110 The other critical aspect is the requirement for consideration to be satisfied. Where there is an alleged agreement to accept less than the debt payable, it is incumbent upon the debtor to provide fresh consideration. The consideration must be substantially contemporaneous or future conduct. If the act relied upon took place in the past, it is only past consideration which is not valid consideration.²³
- 111 As noted by Equity Trustees, the trust was not the lessor of the premises upon which the Company's business was conducted. The rent was due to Mitchell No 1. The lessor is not a party to the share sale agreement which goes to the lack of mutuality identified by the plaintiff so far as the waiver of rent goes.
- 112 Ms Hall had been instructed by the deceased on 29 January 2018 that the car was worth \$10,000. It was registered to the Company and would remain with the Company with the lease due to finish in June 2019. After the sale, the deceased continued to use the car as he had done previously. As for the various other expenses, such as the phone, computer and the like, the Company had paid these amounts both before and after the execution of the share sale agreement in March 2018. The discussion held on 16 May 2018, whereby Zhang said these payments would be continued to be made by the Company, cannot be regarded as being fresh consideration, being a matter required to support the alleged oral variation. Nothing *fresh* was offered at the meeting on 16 May 2018 – instead, the status quo remained unaltered with respect to these payments.
- 113 As for the bookkeeping services provided by Zhang, these services were paid for by the Company. If, after the share sale agreement was signed, Zhang did not charge for these services, then that was a direct benefit to the Company as it no

²³ Heydon on Contract, Lawbook Co. 2019 [5.230]

longer had to pay for the services. The position for the deceased remained unchanged in that he received bookkeeping services both before and after 16 May 2018.

- 114 The Court also has to take into account the objective facts known at the time, when assessing the evidence said to be given by a deceased person. Equity Trustees relies upon the fact that the balance owing was recorded in financial documents prepared by the deceased's accountants on his instructions. The balance of the amount outstanding was included in the balance sheet for the years ended 30 June 2018 and 2019.
- 115 The deceased did not inform his accountants, nor his lawyers that he had agreed to vary the share sale agreement and forego the balance of the purchase price payable. On the contrary, the accountants prepared contemporaneous financial statements which recorded the debt as owing on the basis of instructions given to them by the deceased. The deceased did not tell his accountants the rent for the Company's premises was no longer owing.
- 116 Mr Hilton had acted for the deceased since the mid to late 1990s. The deceased's father had also been a longstanding client. Mr Hilton provided financial services to the Mitchell Group entities including the Company, and to the deceased personally. He met with the deceased at least twice a year but generally more frequently. His firm prepared a balance sheet for the year ended 30 June 2018, which recorded as a current asset the outstanding sale proceeds due to the Company in the sum of \$371,000. This formed part of the financial statements for that year which were signed by the deceased.
- 117 Mr Hilton was taken to a file note he prepared in advance of a tax planning meeting with the deceased due to occur on 12 June 2019, the purpose of which was to discuss the financial statements with the deceased. The first part of his note sets out the matters to be discussed and the second part are his notes post their

meeting. The deceased, Mr Hilton and Ms Sarah Coniglione, an employee of his firm at the time, attended the meeting on 19 June 2019. The meeting lasted one to two hours. One of the topics in his note related to the trust's rights to recover the proceeds of sale. When asked about his recollection of the meeting on this topic, Mr Hilton said:

Mr Mitchell certainly was of the belief that they were still recoverable. He was embarrassed that they hadn't been recovered, and he asked us to prepare some documents to outline the current arrears.

- 118 Mr Hilton went on to say the deceased mentioned the business had not been travelling as well and there were cashflow constraints. He did not appear comfortable with the fact that he had not been paid but it was a difficult thing to talk about. Mr Hilton thought it was a sensitive issue as the deceased was still involved in the business and there was clearly some kind of relationship with the purchasers. Accru prepared a financial statement for the trust for the year ended 30 June 2019, which recorded the same figure outstanding as the 2018 year. This document was not signed by the deceased as he died before the accounts were finalised.
- 119 Had the deceased told Mr Hilton that the purchase price was no longer recoverable, Mr Hilton said he would have made an adjustment to the 2019 accounts in that it would have reduced the asset and created a loss for capital gains tax purposes. In cross-examination, Mr Hilton said he had raised the issue of the rent in arrears and the deceased told him at the meeting on 12 June 2019 that it was collectible. This topic was recorded as one of the matters to discuss with the deceased in the note prepared by Mr Hilton ahead of their meeting.
- 120 Ms Coniglione had also looked after the deceased's financial affairs for many years. She worked alongside Mr Hilton, who is a director of Accru. Ms Coniglione had a number of dealings with Zhang, who provided various information to the accountants about the deceased's financial affairs. She could recall the meeting

with the deceased in June 2019, and that she and Mr Hilton wanted to get an understanding from the deceased about the proceeds of sale not being received. Ms Coniglione said that the deceased asked her to summarise what was owing and put together a statement of what had not been paid. It was her understanding that he was going to provide the statement to the purchaser. Ms Coniglione did prepare a statement dated 2 July 2019, which she sent to the deceased. He rang her and asked her to prepare another version which just showed what was unpaid. She then prepared a further version of the statement of account in line with his request. Both versions were addressed to Zhou, care of Junyip, and contained a payment advice form at the bottom of the account statement.

- 121 On 3 July 2019, Ms Coniglione sent an email to the deceased attaching a statement of account for rent owing to Mitchell No 1 and the revised statement of account for the outstanding sale proceeds owing to the trust. Her evidence was that the deceased had also asked her to prepare a statement of the rent owing during their meeting in June 2019 to show what was due and payable.
- 122 Ms Hall, a solicitor, was instructed by the deceased to draw up the share sale agreement. She also prepared a draft lease for 38 Dairy Drive, Coburg North, which she forwarded to the deceased on 26 September 2018. The draft lease listed Mitchell No 1 as the landlord with the Company being the tenant. Ms Hall accepted in cross-examination that she did not receive any further instructions from the deceased after this email to proceed with the preparation of any lease.
- 123 The professional witnesses' evidence is objective and given by persons who have no interest in the outcome of the litigation. The deceased did not tell any of them that he had agreed to vary the share sale agreement orally and relieve the defendants of their obligations to pay the balance of the purchase price payable or the rent due. On the contrary, the deceased told the accountants the balance of the sale proceeds were still owing, as was the rent.

- 124 On the other side of the equation, the defendants correctly note the deceased did not make any claim for payment of the amounts outstanding after the meeting of 16 May 2018. The defendants also note that the deceased took no steps to perfect his security such as a PMSI registration, as recommended by his solicitors. He did not instruct them to pursue payment and their file was closed. The defendants contend the lack of action on the part of the deceased, including the absence of any demand, supports their claim that the deceased had forgiven the debt pursuant to the oral variation.
- 125 The defendants also suggest that, as the deceased was willing to back-date documents to 1 January 2018 for the purpose of lodgement at ASIC, he showed a propensity to be careless. Consequently, his signature on the financial accounts dated 30 June 2018, which recorded the balance owing, should not be given much weight.
- 126 It is possible the deceased may not have made a demand or taken other steps because he was embarrassed to make a claim against the defendants whom he had known for a long time – or because he had forgiven the debt – or being terminally ill, the issue may not have been at the forefront of his mind. The defendant was also a wealthy man so that the debt owed may not have concerned him as much as someone with less means. The conundrum is that, in the absence of evidence from the deceased, his motivations remain unknown.
- 127 However, what is known is that the deceased told his accountants in June 2019 that the monies were outstanding and he instructed them to draw a statement of account showing the unpaid amounts. Zhang gave evidence that she did not receive a copy of the statement or any demand from the deceased for the balance of the shares or rent. Nevertheless, there is objective evidence from independent witnesses to the effect that the deceased regarded the outstanding sums as being due and payable. The financial statements for 2018 and 2019 prepared by the

accountants, on instructions from the deceased, recorded the unpaid balance as being due. Had the deceased agreed to forego the balance payable, then there would seemingly be no reason why he would not have told his accountants this was the case.

128 I consider the accountants' evidence is of considerable probative value, given there is no reason to challenge its accuracy and they are impartial witnesses. Although their evidence relates to the deceased's subsequent conduct, it is relevant and admissible on the issue of whether an oral agreement was formed in May 2018. A court can have regard to what was done later as a basis for inferring what was agreed when the contract was made or later varied.²⁴ Given their evidence, it is improbable in my view, that the deceased would have entered into an oral variation of the share sale agreement in the terms alleged.

129 Having regard to the cumulative effect of:

- (i) the inconsistency of the evidence given by the defendants regarding the discussions held on 16 May 2018 with the resulting uncertainty about the terms of the alleged oral variation;
- (ii) the lack of mutuality as identified by the plaintiff and the lack of fresh consideration passing from the purchasers in support of the oral variation;
- (iii) the objective and independent evidence of the accountants; and
- (iv) the inference to be drawn from clause 10.6 of the share sale agreement whereby the parties agreed that any amendment be in writing, -

I am not actually persuaded the deceased entered into a binding oral variation of the share sale agreement as alleged by the defendants. Consequently, the

²⁴ *Heydon on Contract*, Lawbook Co. 2019 [9.1560]

defendants have not discharged the onus placed upon them to prove the existence of a binding oral variation. Equity Trustees is therefore entitled to judgment in the sum of \$365,100, taking into the part-payment of the first instalment in the sum of \$6,850.

Interest and costs

- 130 The last two issues, namely issues 7 and 8, deal with interest and costs. Equity Trustees claims statutory interest on the debt from 1 July 2021, being the date of the letter of demand up until judgment.
- 131 I will hear from the parties regarding the form of orders to be made consequent upon these reasons, including the amount of interest payable and costs. Subject to hearing from the parties, I propose ordering the defendants pay the plaintiff's costs of and incidental to the proceeding, including any reserved costs, on the standard basis to be taxed in default of agreement.

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Certificate

I certify that these 34 pages are a true copy of the Reasons for Judgment of Her Honour Judge A Ryan delivered on 24 February 2025.

Dated: 24 February 2025

Associate to Her Honour Judge A Ryan

SCHEDULE OF PARTIES

BETWEEN

EQUITY TRUSTEES WEALTH SERVICES LIMITED
(ACN 006 132 332) as trustee of T H E MITCHELL TRUST

Plaintiff

V

JUNYIP PTY LTD (ACN 623 865 378)

First defendant

And

JAIN WEI ZHOU

Second defendant

And

JUN YI ZHANG

Third defendant