Supreme Court of New South Wales

Legal Minds Pty Ltd t/as Legal Minds v Ebsworth [2022] NSWSC 1420 (20 October 2022)

Last Updated: 20 October 2022

Supreme Court
New South Wales

Case Name:	Legal Minds Pty Ltd t/as Legal Minds v Ebsworth
Medium Neutral Citation:	[2022] NSWSC 1420
Hearing Date(s):	10-11 October 2022
Decision Date:	20 October 2022
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Judgment for the defendant. (2) Subject to a written application, together with written submissions and evidence in support, being made to my Associate within 7 days for a different order, order the plaintiff to pay the defendant's costs of the proceedings.
Catchwords:	OCCUPATIONS — Legal practitioners — Solicitors — Costs agreement — enforcement of costs agreement through forced sale of property CONTRACTS — Construction — Interpretation — whether documents created caveatable interest EQUITY — Fiduciary duties — Fiduciary relationships — Solicitor and client — whether solicitor acted in breach of fiduciary duty — conflict of interest CONTRACTS — Unjust contracts — Contracts Review Act 1980 (NSW) — consideration of factors relevant to determination that contract is unjust
Legislation Cited:	Civil Procedure Act 2005 (NSW) Contracts Review Act 1980 (NSW), s 9 Conveyancing Act 1919 (NSW), s 111 Evidence Act 1995 (NSW), ss 64, 91 Legal Profession Act 2004 (NSW), ss 331, 332, 333 Legal Profession Uniform Law 2014 (NSW), s 277

Real Property Act 1900 (NSW), ss 3, 57, 80A

Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited: Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation [1983] 1 NSWLR 1

Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424; [2004] HCA 28

Avco Financial Services Ltd v Commonwealth Bank of Australia (1989) 17 NSWLR 679

Bofinger v Kingsway Group Ltd (2009) 239 CLR 269; [2009] HCA 44

Break Fast Investments v Rigby Cooke [2021] VSC 398

Commercial Banking Co of Sydney Ltd v Pollard [1983] 1 NSWLR 74

Dare v Pulham (1982) 148 CLR 658; [1982] HCA 70

Jameson Global Investments Pty Ltd v Byron Bay Land Development Pty Ltd [2019] NSWSC 729

Keppel v Wheeler [1927] 1 KB 577

Residential Housing Corporation v Esber (2011) 80 NSWLR 69; [2011] NSWCA 25

Roberts v Investwell Pty Ltd (in liq) [2012] NSWCA 134

Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR; [1988] HCA 11

Wentworth v Rogers (2006) 66 NSWLR 474; [2006] NSWCA 145

Category: Principal judgment

Parties: Legal Minds Pty Ltd t/as Legal Minds (Plaintiff)

Marion Ebsworth (Defendant)

Representation: Counsel:

D Eardley (Plaintiff)

I King (Defendant)

Solicitors:

Legal Minds (Plaintiff)

Lisa Stone (Defendant)

File Number(s): 2021/354483

JUDGMENT

Introduction

1. The plaintiff, Legal Minds Pty Ltd t/as Legal Minds, through its principal Chris Serow, carries on legal practice in Armidale. Mr Serow is the sole director and secretary of the plaintiff. He acted as the solicitor for Marion Ebsworth, the defendant. The plaintiff seeks an order for possession of Ms Ebsworth's home in Narrawallee, a town on the South Coast of New South Wales (the property), pursuant to a registered charge to secure payment of legal fees incurred not only by Ms Ebsworth but also by her sister, Gaye Davies, for whom Mr Serow also acted. Alternatively, it seeks an order for judicial sale of the property. It also seeks judgment in the sum of $288,874.05 plus interest

(comprising $47,183.80 for legal fees incurred by Ms Ebsworth and $241,690.25 for legal fees incurred by Ms Davies).

2. Ms Ebsworth resists the claim for relief on various bases which include that:

> (1) on their true construction, neither the costs agreement nor the document entitled "Charge" (the alleged charge) made Ms Ebsworth liable to the plaintiff for Ms Davies' legal costs or secured Ms Ebsworth's indebtedness to the plaintiff;
> (2) the plaintiff was not entitled to bring proceedings against Ms Ebsworth for legal fees with respect to services provided to Ms Davies as it had not complied with the notice requirements in s 333 of the *Legal Profession Act 2004* (NSW) (the 2004 Act);
>
> (3) Mr Serow breached the fiduciary duties which he owed to Ms Ebsworth as her solicitor and acted in an unconscionable fashion such that the costs agreement ought not be enforced; and
>
> (4) the alleged charge or the costs agreement, or both of them, were unjust contracts within the meaning of the *Contracts Review Act 1980* (NSW) and ought be set aside, either in whole or in part, or not further enforced.

3. I note for completeness that the further amended defence did not, in terms, plead the *Contracts Review Act*, although Ms King, who appeared on behalf of Ms Ebsworth, confirmed, in answer to my question, that she relied on it. I required her to plead it if she wanted to rely on it. Mr Eardley, fairly, indicated that he would not oppose the amendment if it was confined to the substratum of facts that was already pleaded. A draft amended pleading was prepared by Ms King in the course of the luncheon adjournment on the first day. When the Court resumed, Mr Eardley indicated that he neither consented to, nor opposed, the amendment. On that basis, I granted leave to Ms Ebsworth to file a second further amended defence. In his final submissions, Mr Eardley addressed each of the matters listed in s 9(2) of the *Contracts Review Act*. These matters, accordingly, will be addressed when I come to consider the availability and strength of a defence under that Act in the present case.

4. Although the plaintiff and Mr Serow have separate legal personalities, the plaintiff acted only through Mr Serow. Thus, I will refer to the plaintiff as "it" and Mr Serow as "he" but whether I refer to one or the other will depend on the context.

The facts

5. Ms Ebsworth was born in December 1939. She left school in 1955, after having completed the Intermediate Certificate. After she left school, she worked as a sales assistant in Sydney, first in a chemist and later in a gift shop. In January 1958, when Ms Ebsworth was 18, her sister, Ms Davies, was born. Ms Ebsworth and Ms Davies also had a brother, Ronald Davies, whose age does not appear from the evidence.

6. Ms Ebsworth married and, in December 1961, shortly before she turned 22, gave birth to a daughter. When she was 23 and her daughter was about two, Ms Ebsworth obtained a divorce on the grounds of her husband's mental cruelty. She and her daughter moved back to her mother's house.

7. As there was no single mother pension, Ms Ebsworth had to return to work. She obtained employment at the lottery office in Sydney, writing lottery tickets and balancing the money at the end of each day. She would process written applications that came in the post and then send the tickets to the purchaser.

8. At the age of 26, Ms Ebsworth remarried. Her husband, Barry Ebsworth, had served in the Korea and Malaya conflicts. There was a period during which Ms Ebsworth did not undertake paid work. Subsequently, when Ms Ebsworth's daughter was about 15, Ms Ebsworth's husband obtained a second job at the races (horses, dogs and trots). She worked with him part-time for about two nights a week as their employer had a policy of allowing wives to work with their husbands.

9. In about October 1989, Ms Ebsworth's mother died. Two weeks later, her husband died of a "silent coronary" while he was talking to her. His death entitled her to a war widow's pension. At some stage, Ms Ebsworth moved to Narrawallee to live.

10. When Ms Davies' two sons were young, they would go and stay with Ms Ebsworth in the school holidays. According to Ms Davies, the boys looked at Ms Ebsworth as a "grandmother figure because [of] the age difference [between Ms Ebsworth and Ms Davies] and because she spent so much time with them." According to Ms Davies, Ms Ebsworth wanted Ms Davies and her two children to move to Narrawallee so that she would have family there.

11. In the 1990's, Ms Davies and her family moved to Narrawallee to be near Ms Ebsworth. Ms Davies and her then de facto partner were involved in real estate businesses conducted through companies, including those known as M & M Realty Pty Ltd (M & M) trading as Ray White (Engadine) and SGM

Realty Pty Ltd (SGM), the ACN of which was 057 311 609. SGM was registered in August 1992. Its original directors and shareholders were Ms Davies and her then de facto partner.

12. In about 1998, SGM purchased real property in Normandy Street, Narrawallee for $195,000 (the Normandy Street property).

13. In 2000, SGM changed its name to ACN 057 311 609 Pty Ltd (ACN Pty Ltd).

14. Mr Serow was admitted as a solicitor in 2003. He established the plaintiff firm in September 2009 and has been acting as its principal ever since.

15. Ms Ebsworth's daughter died in 2009. The death of her daughter caused Ms Ebsworth, who was then about 70, to suffer from stress and stomach problems. She also experienced difficulty breathing. She became so ill that, in the immediate aftermath of her daughter's death, she stayed with Ms Davies and spent about a fortnight in bed. At times, the stress causes her to become confused. Her general practitioner suggested that she take anti-depressants but she refused. As her daughter died intestate, Ms Ebsworth was involved in Family Court proceedings concerning her daughter's property. Ms Ebsworth also met the mortgage payments on her late daughter's property. Ms Ebsworth's grandchildren were cared for by the Department of Community Services as Ms Ebsworth was not in a state to look after them.

16. After Ms Ebsworth recovered from the immediate shock of her daughter's death, she returned home to Narrawallee.

17. Ms Davies and her de facto partner separated, which led to the real estate businesses being divided between them. In about December 2011, Ms Davies and her former de facto partner entered into an agreement styled "Binding Financial Agreement", to which Ms Ebsworth was also a party. The agreement contained a recital to the effect that ACN Pty Ltd owned the Normandy Street property. Ultimately, in about 2012, Ms Davies came to reside in that property. She still lived there at the time of the hearing and would like to live there for the rest of her life.

18. Ms Davies and the companies associated with her businesses entered into loan agreements with ANZ bank (ANZ). In about 2011, in order to keep her own house in Narrawallee, she obtained from Ms Ebsworth a guarantee in favour of ANZ of the monies which Ms Davies, M & M and SGM owed to ANZ. The guarantee was capped at $200,000. Ms Ebsworth also granted to ANZ a registered mortgage over the property, which was otherwise unencumbered. Mr Serow later became aware that a certificate of independent advice had been signed by a solicitor in respect of advice given to Ms Ebsworth before she executed the guarantee and mortgage documents.

19. Ms Ebsworth understood that she had guaranteed payment of Ms Davies' debts but that the guarantee was capped at $200,000, as appears from the following exchange in her cross-examination:

> "Q. Now you were worried in about 2011 that Gaye would lose her house, weren't you?
> A. Yes, in the very beginning yeah.
>
> Q. And you wanted to lend her - and you indeed did lend her money to help her, didn't you?
>
> A. Yes I, I had an agreement with ANZ Bank and - for 200,000 against my house that I still live in and that was the only thing I was involved in from the very beginning, I had nothing to do with Chris [Mr Serow] or anybody else."

20. On 19 August 2013, liquidators were appointed to M & M and SGM. They ascertained from M & M's balance sheet as at 30 June 2013 that there was a loan account in the sum of $515,413.64 which recorded the amount which Ms Davies owed M & M. The liquidators raised the amount owing under the loan account with Ms Davies and Mr Serow, who told them to hold off recovery action until the legal proceedings between Ms Davies, ANZ and Ms Davies' former de facto partner (which I understand to be a reference to the Family Court proceedings) "were progressed". From time to time, the liquidators demanded that Ms Davies repay the loan account, including on 28 November 2017 (see below).

21. It would appear that Ms Davies' first contact with Mr Serow occurred in about September 2014 when her accountant, Grahame Sharpe, referred her to Mr Serow to consider various legal issues concerning the Binding Financial Agreement prepared by her former solicitor. One of the salespeople in the real estate office at Engadine had recommended Mr Sharpe.

22. In 2015, Ms Davies commenced proceedings in the Family Court against her former de facto partner and ANZ (the Family Court proceedings) seeking orders setting aside the loan agreements, guarantee and mortgage and the Binding Financial Agreement, which she alleged she had been under pressure to sign. Ms Ebsworth was joined as the sixth respondent to those proceedings as she was a party to that agreement. The plaintiff was the solicitor on the record for Ms Davies (the

applicant), Ms Ebsworth (the sixth respondent) and persons formerly associated with Ms Davies (the fifth respondent).

23. On 10 April 2015, ANZ commenced proceedings 2015/106627 in this Court seeking judgment against Ms Ebsworth (who was named as the first defendant) under the guarantee as well as possession of the property (the ANZ proceedings). ANZ also sued Ms Davies under the loan agreements. The plaintiff acted on behalf of both Ms Davies and Ms Ebsworth in the ANZ proceedings.

24. Mr Serow's evidence was that he did not consider that there was a conflict of interest arising from the circumstance that he was acting for both Ms Davies and Ms Ebsworth. He said:

> "Both parties were about to lose their houses and both parties referred to me in relation to potential proceedings that hadn't been brought for initial advice and I was asked to represent both of them as defendants in the ANZ proceedings."

25. On 18 June 2015, Mr Serow, on behalf of Ms Ebsworth and Ms Davies, filed a notice of motion in this Court seeking an order that the ANZ proceedings be transferred to the Family Court. At that stage, he had not met Ms Ebsworth and had no costs agreement with her.

26. On 1 July 2015, the Legal Profession Uniform Law 2014 (NSW) (the Uniform Law) commenced. The former legislation, the 2004 Act, was repealed but continued to apply in respect of legal services provided before the commencement of the Uniform Law.

27. On 2 July 2015, there was a conference in Sydney in the chambers of Bridie Nolan, a barrister whom Mr Serow had briefed to appear on behalf of Ms Davies and Ms Ebsworth in the ANZ proceedings. Ms Nolan, Mr Serow, Ms Ebsworth and Ms Davies were in attendance. The conference was taped and transcribed, at Ms Nolan's request. The transcript indicated that the conference lasted for almost three hours (173 minutes). This was one of the rare occasions on which Mr Serow saw Ms Ebsworth in person. The transcript of the conference was tendered by the plaintiff in its case. Much of the background set out above, including that relating to Ms Ebsworth's background, derives from this transcript. The transcript was admitted as it was not objected to. It is also admissible as to statements made by Ms Ebsworth, Ms Davies and Mr Serow, each of whom all gave evidence in the present proceedings: s 64 of the *Evidence Act 1995* (NSW).

28. From reading the transcript of the conference, I formed the impression that Ms Davies' commercial knowledge and understanding was far more sophisticated than that of her sister, Ms Ebsworth. Ms Davies would, on several occasions, answer questions on Ms Ebsworth's behalf or prompt her to answer in a particular way. Further, Ms Ebsworth appeared to tire during the meeting. Towards the end of the meeting when documents were shown to her, she said:

> "I'm not really sure about anything, to tell you the truth, I really can't remember."

29. When a document (which was not identified in the transcript), was shown to Ms Ebsworth, Ms Nolan asked her whether she remembered the document, Ms Ebsworth said:

> "I must have, because that's definitely my signature."

30. As a consequence of what he learned at the conference, Mr Serow knew that Ms Ebsworth was 75 years old, a war widow, and that her education was sufficient for her to read and write but that she was not sophisticated and was easily led and influenced by Ms Davies who was significantly younger and more worldly. He knew that the property was Ms Ebsworth's single main asset and that its only encumbrance was the mortgage to ANZ, which secured a debt of $200,000.

31. I accept Ms Ebsworth's evidence that she had three or four meetings with Mr Serow in Sydney, including this conference, and one meeting on the South Coast (referred to below) when he came to attend to the wills of Ms Ebsworth, Ms Davies and their brother.

32. On about 15 July 2015, defences and cross-claims were filed in the ANZ proceedings: first, a cross-claim by Ms Ebsworth and Ms Davies alleging that the loan agreements and guarantee were void; second, a cross-claim by Ms Davies against her former solicitor in negligence; and third, a cross-claim by Ms Ebsworth against her former solicitor in negligence. Ms Ebsworth and Ms Davies relied on the *Contracts Review Act* in their defences and cross-claims.

33. The application for transfer filed by the plaintiff was heard by Hall J on 14 August 2015, who reserved his decision.

34. On 15 September 2015, Mr Serow filed an amended initiating application in the Family Court. The parties to the Family Court proceedings were as follows.

Party	Name	Solicitor acting	Description in document
Applicant	Ms Davies	Plaintiff	De facto partner/ pensioner
First respondent	XXX		De facto partner/ Franchise manager
Second respondent	ANZ		Financial institution/ Bank
Third respondent	Messrs Quinn and Vardy		Liquidators
Fourth respondent	SGM Realty Pty Ltd		Investment company
Fifth respondent	ACN Pty Ltd	Plaintiff	Investment company
Sixth respondent	Ms Ebsworth	Plaintiff	Applicant's sister/ war veteran widow pensioner

35. The amended initiating application was listed for a return date on 14 October 2015 at 11am.

36. On 2 October 2015, Hall J refused the application for transfer. In the reasons, his Honour set out the background to the ANZ proceedings and the proceedings that were already on foot in the Family Court. Although I did not understand these matters to be in dispute, his Honour's findings are not evidence in these proceedings: s 91 of the *Evidence Act*.

37. There was a teleconference between Mr Serow (in Armidale), Ms Ebsworth and Ms Davies (in Narrawallee) at some time between 2 October 2015 and 7 October 2015.

38. Because Mr Serow practised in Armidale and Ms Ebsworth and Ms Davies lived on the South Coast, he communicated with them by letter and by phone. In the case of Ms Davies, his usual practice was to email correspondence to Ms Davies' email address. Where documents needed to be signed, Ms Davies would print out the documents before signing them and returning them by post to Mr Serow. As Ms Ebsworth did not have an email address, Mr Serow's usual practice, when sending documents to Ms Ebsworth, was to send them to Ms Davies' email address. Ms Davies would then print them out and arrange for Ms Ebsworth to sign them. On occasions, Mr Serow would send documents to Ms Ebsworth by Express Post. In such cases, it would appear that the tracking sticker would be applied to Mr Serow's copy of the correspondence. Where there is no such sticker on the letter in question, I infer that it was sent by email, rather than by post.

39. On 7 October 2015, Mr Serow wrote to Ms Ebsworth in the following terms:

> "Dear Marion,
>
> **RE: MARION NORMA EBSWORTH ats ANZ BANKING GROUP LIMITED & ORS**
>
> **SUPREME COURT OF NSW No. 2015/00106627 - POSSESSION OF LAND**
>
> **FAMILY COURT OF AUSTRALIA No. NCC1896/15 - DECLARATIONS & SET ASIDE BFA**
>
> We confirm that we have continued to act for you in accordance with your Instructions in relation to both the current proceedings before the Supreme Court of NSW in relation to an application by ANZ Banking Group Limited to take possession of your home at [XXXX] Narrawallee and also in relation to proceedings before the Family Court of Australia (presently in Newcastle) in relation to an application to set aside the Financial Agreement entered into between your sister Gaye Daphne Davies and her former partner [XXX].
>
> We confirm our recent teleconference at which time we advised you as to the outcome of the Notice of Motion filed In the Supreme Court of NSW on behalf of you and Gaye to transfer those proceedings to the Family Court of Australia using the accrued jurisdiction of the Family Court. Judgment was handed down on Friday 2 October 2016 by Judge Hall. In his reasons for the decision, Judge Hall concluded that the proceedings initiated by ANZ Bank for possession of your land would not transfer to the Family Court. We enclose a copy of the decision.
>
> The matter will be heard for directions in Sydney on Thursday 8 October 2015. We intend to make an application to reopen the matter for reconsideration of other evidence not taken into account for Judge Hall [sic] to determine if this would change his decision. If it does not then proceedings will continue in both the Supreme Court of NSW and the Family Court of Australia (either In Newcastle or Sydney).
>
> As discussed with you we have retained Bridie Nolan of Counsel and Paul Menzies QC in Sydney and Michael Bateman of Counsel in Newcastle (jointly referred to as 'Counsel'). Counsel is comprised of expertise in both commercial and family law matters.
>
> In accordance with our obligations under the *Legal Profession Uniform Law (NSW) 2014*, we enclose, in duplicate, our *Costs Disclosure/Costs Agreement* for your consideration, execution on

the last page and bottom of each other page and return of one executed copy to us in the enclosed pre-addressed Express post envelope.

As indicated to you our costs Agreement requires your acceptance to grant to us a caveat over your home at [XXXX] Narrawallee as security for costs for both you and Gaye. We would register the caveat on return of the executed Costs Agreement. If we are ultimately successful in the current litigation it is expected that a costs order would be granted in your favour and costs paid by other parties. If you are unsuccessful, you would be likely to lose your home to ANZ Banking Group. Our caveat would entitle us to apply to receive payment of any outstanding costs owing to us out of the proceeds of any sale of your home.

Please obtain your own independent legal advice before signing the Costs Agreement or contact us if you require clarification.

The Costs Agreement relates to both the Supreme Court of NSW proceedings and also in relation to the Amended Application of Final Orders filed by Gaye in the Family Court of Australia which, among other things, also seeks declarations for the guarantee you provided to ANZ Banking Group to be set aside. We enclose a copy of that Application. We also enclose a copy of the Notice of Address for Service that we filed on your behalf today.

We thank you for your continued instructions and await return of the duly executed Costs Disclosure / Costs Agreement.

Yours faithfully

Legal Minds

[Signature]

Christopher K C Serow

Principal, Solicitor Director, Notary Public

Encl."

40. As referred to in the letter, a costs disclosure document and costs agreement was enclosed with the letter, which I infer was sent by email to Ms Ebsworth. The costs disclosure document included the following:

"You may seek independent legal advice before agreeing to the costs agreement proposed."

41. The costs agreement included the following clauses:

"**1. The work we will carry out**
Take instructions from you; in relation to all matters in relation and incidental to current proceedings before the Supreme Court of NSW and the Family Court of Australia including but not limited to all reading, correspondence, telephone calls, briefing Counsel and Senior Counsel and mediation and Court appearances and matters incidental and as otherwise Instructed by you. We note that you have unconditionally and irrevocably agreed to indemnify your sister, Gaye Daphne Davies in relation to all and any costs and disbursements she may incur in relation to her retainer with us in proceedings before both the Family Court of Australia matter number NCC1896/15 and proceedings before the Supreme Court of NSW matter number 2015/106627 and that you have agreed to provide to us by consent the grant of a caveatable interest in relation to your property located at [XXXX] Narrawallee in the State of NSW being the whole of the land contained in folio identifier 18/736008 as security for costs in these proceedings.

...

15. Security for costs

Before we commence work on your matter, we require you to provide us with security for our legal costs and disbursements and the payment of any interest on unpaid legal costs. You agree to sign all documents and do all things that may be required by us to give security for our costs including but not limited to any security interest we may require pursuant to the *Personal Property Security Act* in relation to any chattels, shares or other property in your name and registration of any caveat, levy or charge over any real estate you may own or inheritance you may receive. You will in any event consent to us lodging a caveat over property known and situate at [XXXX], Narrawallee in the State of New South Wales 2539 and you acknowledge and accept that this costs agreement will suffice as

> evidence of the interest that you have given to us in that parcel of land which is also your personal residence and improvements contained in folio identifier 18/736008. If you fall to provide this security or pay our fees when due, we may refuse or cease to act.
>
> **16. Acceptance**
>
> Before acceptance of this offer you are entitled to negotiate these terms. If you do not return the signed agreement or negotiate the terms but instruct us to commence work, that will be taken to be an acceptance of this offer and costs will be charged in accordance with this agreement and a caveat lodged for security for costs."

42. These clauses are relied on by the plaintiff to support its claim for possession of the property. The costs agreement also included an estimate of fees of $130,000-$160,000.

43. I accept Ms Davies' and Ms Ebsworth's evidence that neither appreciated that Mr Serow would try to obtain payment from Ms Ebsworth for legal services provided to Ms Davies. I accept that Ms Ebsworth signed documents which she was asked to sign by Mr Serow because she trusted him. Although she appreciated that he was acting for her in the ANZ proceedings, she had no idea that he was otherwise purporting to act for her or that he claimed that she was liable for her sister's legal fees. She did not appreciate that she was a party to the Family Court proceedings.

44. On 14 October 2015, Ms Ebsworth signed a copy of the costs agreement. She did not obtain independent legal advice about the costs agreement. Her signature appears to have been witnessed but it is not clear by whom it was witnessed. Ms Ebsworth did not appreciate from the terms of the cost agreement that it gave the plaintiff a right to sell the property if she did not pay his fees or that Mr Serow would contend that that was its effect.

45. In cross-examination, but not in his affidavit, Mr Serow gave evidence that he advised Ms Ebsworth orally to obtain independent legal advice before she signed the costs agreement, as appears from the following passage:

> "Q. But you didn't insist, say for example, upon a certificate of independent legal advice?
> A. I didn't insist. I, I encouraged her to. I said to her, 'This is pretty serious proceedings,' and I asked her to make sure she was very clear on what she was signing, because she'd had a guarantee with the ANZ Bank and she was asked to guarantee her sister's loans. And the reason for that was Gaye Davies was impecunious."

46. I do not accept this evidence. I consider that Mr Serow came to appreciate in the course of the present proceedings that there was a risk that his including a sentence in his letter informing Ms Ebsworth that she "may seek independent legal advice" would be regarded as insufficient to discharge the fiduciary duties which he owed to her. Had he said something to that effect, I consider that it would have been included in his affidavit evidence and that there would be a file note to support it. Further, the objective probabilities do not favour his having made any such statement. The commercial purpose of the so-called "indemnity" in the costs agreement was to ensure that he would be paid in circumstances where his primary client, Ms Davies, was, as he recognised in his answer, impecunious. He was also aware of the additional debt in the order of $500,000 from the loan account referred to above, which had not been paid. Further, he said in his oral evidence that he did not regard himself as being in a position of conflict by acting for both Ms Davies and Ms Ebsworth.

47. On 3 November 2016, there was a mediation of the ANZ proceedings which did not resolve the proceedings.

48. At 10.17am on 9 November 2016, Mr Serow sent the alleged charge by email to Ms Davies' email address. The email said:

> "Dear Gaye and Marion,
> **RE: MARION EBSWORTH & ACN 057 311 609 PTY LTD – EXECUTION OF CHARGES PURSUANT TO COSTS AGREEMENT AND CAVEAT**
>
> We **attach** copies of Charges for your respective execution and return.
>
> Marion will need to have her execution witnessed by a JP or solicitor however, Gaye can sign as the Sole Director on her charge for ACN 057 311 609 Pty Ltd.
>
> Once executed on the front page in the spaced provided please return both original copies of the Charges to us by express post.
>
> Kind regards
>
> Chris"

49. The alleged charge comprised the coversheet issued by the Land Titles Office for a charge. It identified the property, the "charger" (Ms Ebsworth) and the chargee (the plaintiff). It provided:

> "[Ms Ebsworth] being the registered proprietor of an estate in fee simple in the land charged covenants with the chargee that the provisions set out in annexure "A" hereto/memorandum No. **N/A** filed pursuant to section 80A of the Real Property Act 1900 are incorporated in this charge and for the purposes of securing the payment of the **LEGAL COSTS** referred to in the annexure charges all the above estate for the benefit of the chargee, the payment to be made at the times and in the manner set out in the annexure."
> [Emphasis added to indicate what was added to the standard form.]

50. It can be seen by the use of the abbreviation "N/A" (not applicable) that the plaintiff chose not to incorporate the standard terms of a charge filed pursuant to s 80A of the *Real Property Act 1900* (NSW), but rather, chose to rely on the costs agreement, which was annexure "A" to the alleged charge

51. On 9 November 2016, Maria Mitchell, the Centre Manager of the Ulladulla and Districts Community Resources Centre (the Centre) sent by email to Mr Serow the alleged charge which had been executed by Ms Ebsworth at the Centre. As the executed charge was not dated, Mr Serow inserted the date, 9 November 2016. I infer that Ms Ebsworth and Ms Davies took the alleged charge (and the charge which Ms Davies had received) which she had received from Mr Serow to the Centre because Ms Mitchell was a Justice of the Peace and could witness her signature. Mr Serow was aware that the sisters would travel together to obtain a witness to their signatures. He knew that Ms Davies did not drive and that Ms Ebsworth would drive her to the Centre. It was not suggested that Ms Ebsworth received any legal advice about the effect of the alleged charge. I accept that she signed it because she trusted Mr Serow and thought that he was acting in her interests. It is not clear when the charge was lodged for registration but it was "relodged" (according to the stamp it bears) on 22 January 2018 and registered on 2 February 2018.

52. On 17 July 2017, the Family Court dismissed the amended initiating application and any response and made directions regarding costs. The basis of the Family Court's decision was that it had no jurisdiction over Ms Davies and her de facto husband and therefore no jurisdiction to adjudicate on the Binding Financial Agreement. Justice Rees (of the Family Court) was critical of the plaintiff for commencing the proceedings (as referred to below).

53. On 26 July 2017, the ANZ proceedings settled at an informal settlement conference. I accept Ms Ebsworth's evidence that, at about this time, Mr Serow rang her and said, "The bank wants you off their books, they've done the wrong thing by you and being a war widow makes a difference." When she asked him how much ANZ would pay her, he said, "I can't tell you because I've got to take my fees out. When I come to do the wills, I'll bring the deeds. I will have to keep the money." He also said, "I'll give you an itemised account when I come to do the wills." Mr Serow visited Narrawallee to witness the wills in April 2018 (as referred to below).

54. As a result of the settlement, a deed dated 8 August 2017 was entered into by the parties to the proceedings which resulted in some of the cross-defendants paying money to ANZ and to the plaintiff's trust account. I accept Ms Ebsworth's evidence as follows:

> "I thought [Mr Serow] was working for us and I trusted him. I signed whatever he told me to sign. No one explained that I would be paying [Ms Davies'] legal fees. I thought he was just doing the bank case and when he was finished with me, I was out of it."

55. In other words, Ms Ebsworth knew that Mr Serow was acting for her in the ANZ proceedings and understood that she was liable to pay his fees for acting for her in the ANZ proceedings. However, she did not appreciate that Mr Serow claimed that she was liable for all the legal fees Ms Davies incurred in the ANZ proceedings or the Family Court proceedings, or that he claimed that the property was charged with that amount and that he would be entitled to sell the property if she did not pay her sister's legal fees.

56. On 14 August 2017, the Family Court heard argument on costs. The Court reserved its decision.

57. On 17 August 2017, a deed of settlement was entered into between ANZ, Ms Davies, the companies through which the real estate business had been conducted (including ACN Pty Ltd) and their liquidators (the 2017 deed of settlement). The recitals recorded that ACN Pty Ltd was the registered proprietor of the Normandy Street property (in which Ms Davies then resided, and still does, as at the date of hearing). Clause 3 of the 2017 deed of settlement provided:

> "3. Settlement Payments

> 3.1 In consideration of the Settlement Payment of $50,000.00, the Liquidators will sign all documents and do all things to transfer the single ordinary share owned by SGM Realty in ACN to Davies (or her nominee).
>
> ...
>
> 3.3 On receipt of the Settlement Payment, the Liquidators will have no claim or registrable interest in ACN or any shares in ACN."

58. The effect of the deed of settlement was that Ms Davies regained the Normandy property (of which ACN Pty Ltd was the registered proprietor) by becoming the sole shareholder of ACN Pty Ltd. Up until that time, Ms Davies could not charge the Normandy property because it was owned by a company, the single share of which was owned by SGM, which was then in liquidation.

59. On 28 August 2017, the Family Court ordered Ms Davies to pay the costs of some of the respondents (not including Ms Ebsworth) on an indemnity basis for a specified period. Directions were made regarding an application for an order that Ms Davies' solicitor (the plaintiff) be liable to pay the costs personally.

60. On 14 September 2017, Mr Serow caused G'Davies Pty Ltd to be registered. He and Mr Sharpe were its directors and secretaries. Of the three shares, one was held by Mr Serow, one by Mr Sharpe and the third by Ms Ebsworth. The shares were each held beneficially. Ms Davies was not a shareholder of G'Davies Pty Ltd. The registered office of G'Davies Pty Ltd was the plaintiff's office in Armidale.

61. On 14 September 2017, Mr Serow arranged for a discretionary family trust to be created of which G'Davies Pty Ltd was the trustee. The settlor of the trust was a paralegal employed by the plaintiff at the time. The trust deed defined "Beneficiary" as Ms Davies or anyone who was a Secondary Beneficiary who the trustee declared to be a Primary Beneficiary. The definition of Secondary Beneficiary included any relative of the Primary Beneficiary and anyone appointed by the trustee. The creation of a discretionary trust was entirely Mr Serow's idea. I accept that Ms Davies did not understand what it was or its purpose and, indeed, believed that G'Davies Pty Ltd was herself.

62. Mr Serow explained in his affidavit evidence that the trust was established to enable G'Davies Pty Ltd to receive a single share in ACN Pty Ltd pursuant to the 2017 deed of settlement referred to above. Mr Serow arranged for Ms Davies to nominate G'Davies Pty Ltd as the transferee of the single share in ACN Pty Ltd. It was the plaintiff's case (as put to Ms Davies in cross-examination) that Mr Serow put in place the trust structure to protect Ms Davies "because of various litigation [she] had in the past" (which I take to be a reference to the amount of over $500,000 outstanding on the loan account, which the liquidators of M & M were seeking to recover). Ms Davies' response to the proposition was as follows:

> "I don't know. I don't think it was ever explained to me very clearly. I thought that the house was going to be put into my name, Gaye Daphne Davies. I didn't know it was going to be G'Davies, or whatever he called it. He just went ahead and did that."

63. On 14 September 2017, Ms Ebsworth signed an application for one ordinary share in G'Davies Pty Ltd. Her signature was witnessed by Ms Mitchell. I accept that she had no idea of what she was signing or of the purpose of the application. Ms Ebsworth had no understanding of what the trust involved or how it would affect her, if at all.

64. On 14 October 2017, the Australian and Securities Investments Commission (ASIC) database recorded that G'Davies Pty Ltd held the single share in ACN Pty Ltd but that it was not held beneficially.

65. On 2 November 2017, Mr Serow applied to the Land Titles Office to change the name of the registered proprietor of the Normandy property from SGM to ACN Pty Ltd. He made a statutory declaration in support of the application. The application was granted and was reflected in a new certificate of title which was issued on 27 February 2018.

66. On 28 November 2017, the liquidators of M & M wrote to Ms Davies referring to the amount outstanding in her loan account with M & M. They said, of present relevance:

> "We refer to our appointment as Joint and Several Liquidators of the Company, on 19 August 2013.
> A review of the Company's records indicates a loan account totalling $515,413.64 remains outstanding to the Company. A copy of the Balance Sheet of the Company as at June 2013 is attached for your ease of reference that highlights the debit loan balance.
>
> We have previously demanded repayment of this loan account from you but were requested by both you and your legal adviser (Chris Serow of Legal Minds in Armidale) to hold off from taking further

recovery proceedings until such a time as legal proceedings involving ANZ, you and your ex-husband and S.G.M were progressed.

We are aware these proceedings are now substantially advanced or completed and as such, repeat the demands made in earlier correspondence."

67. The liquidators demanded that Ms Davies pay the amount of $515,413.64 within 14 days.
68. On 2 March 2018, the plaintiff, on behalf of Ms Davies, sought a review of Rees J's decision of 28 August 2017. Justice Rees dismissed that application on 2 March 2018.
69. At about this time, Mr Serow rang Ms Ebsworth and asked her to put money in his account. He asked her how much she had in the bank, to which she replied, $15,000. He said that he needed money that day. She told him that if she put in $10,000, it would only leave her with $5,000. Ms Ebsworth thought that it was strange that he was asking for money because she knew that the ANZ proceedings were over.
70. On 26 April 2018, Mr Serow travelled to the Normandy Street property and met with Ms Ebsworth, Ms Davies and their brother, Mr Davies, to witness the execution of wills, appointment of enduring guardianship and enduring power of attorney which they had instructed him to prepare. The evidence does not reveal any other occasion when Mr Serow travelled to see Ms Ebsworth or Ms Davies in the area in which they lived.
71. On 30 May 2018, Mr Serow wrote a lengthy letter to Ms Davies about the judgment of Rees J, to which he attached numerous documents (which did not form part of the tender in these proceedings). He said in part:

"We draw your attention to paragraphs 122 and 123 of the Reasons for Judgment, Her Honour [Rees J] stated:

'122. It is clear that no enquiry was made before the application was filed by those advising the applicant about whether the applicant and the first respondent had 'opted in' to the provisions of the Family Law Act so as to bring themselves within the provisions of that Act which permit separated de facto spouses to enter into a binding financial agreement.

123. I am satisfied that the actions of the applicant, or perhaps more accurately, those advising her, come within the exception referred to by Sheppard J [Colgate Palmolive Co v Cussons Pty Ltd [1993] FCA 536; (1993) 118 ALR 248] constituting as they do both wilful disregard of clearly established law and the undue prolongation of a case by groundless contentions.'

With reference to the above, the Orders and Reasons for Judgment place the writer and your legal representatives in a position where we would have a direct conflict of interest with you. Specifically, we are required to make submissions In relation to the question as to our conduct, and, as to whether we should indemnify you or pay any costs of other parties to the proceedings on an indemnity basis."

72. The letter concluded as follows:

"Your Written Confirmation and Instructions
109. Although we have discussed the above issues extensively with you by telephone we request on behalf of Ms Nolan, Mr Bateman, Mr Menzies QC, the writer and the legal team at Legal Minds, confirmation In writing, as to whether or not you continue to give your informed consent to waiving any conflict of interest for us to proceed in relation to matters before the Family Court of Australia, the Supreme Court of NSW and proposed judicial review before the High Court of Australia.

110. If it is your position that you are not agreeable to waive any conflict of interest we have with you, we will need to file a *Notice of Ceasing to Act* and you should consider alternative legal representation to conclude or progress these proceedings.

111. We encourage and press that you ensure that you have obtained independent legal and financial advice before making your decision.

We request that you please confirm by return after you have carefully considered this letter and obtained independent advice as to whether you require us to proceed or cease to act for you."

73. On 24 August 2018, Ms Davies confirmed that she did not want Mr Serow to act for her. On 29 August 2018, the plaintiff filed a notice of ceasing to act for Ms Davies and Ms Ebsworth in the Family Court proceedings.

74. In 2018, the plaintiff rendered invoices to Ms Ebsworth for work he had performed on her behalf in the ANZ proceedings as set out in the following table (in order of invoice number).

Invoice number	Date of invoice	Period of work covered by invoice	Amount of invoice (incl GST)
8130	11 January 2018	2 March 2017-11 January 2018	$627.50
8312	30 November 2018	12 December 2017-14 February 2018	$480.60
8599	17 September 2018	31 October 2016-17 September 2018	$46,075.70

75. The evidence does not reveal why the invoice numbers do not follow date order or why the periods of the invoices overlap. These costs have not been assessed.

76. On 17 September 2018, Mark Davidson, solicitor, sent a letter by email to Mr Serow to inform him that Mr Davidson was now acting for Ms Davies, ACN Pty Ltd, one of Ms Davies' companies, and Ms Ebsworth. Mr Davidson asked for the Supreme Court and Family Court files, other documents relating to his clients and invoices rendered to his clients to be forwarded to him. As the table above sets out, on the same day, Mr Serow issued an invoice to Ms Ebsworth for $46,075.70. Enclosed with the letter was a direction to Mr Serow to forward the documents to Mr Davidson. The direction was signed by Ms Ebsworth and Ms Davies (on her own behalf and on behalf of ACN Pty Ltd).

77. On 2 October 2018, the plaintiff registered its charge over the Normandy property.

78. On 13 December 2018, Rees J (in the Family Court) made orders which included the following:

> "That [the plaintiff] indemnify Ms Davies in relation to any costs incurred in proceedings NCC 1896 of 2015."

79. The reason for the order was her Honour's finding that "[t]he actions of [the plaintiff] were 'inexcusable and such as to merit reproof' ...". Although the order did not refer to Ms Ebsworth, there would appear to be no reason why Ms Ebsworth ought to be liable for costs incurred in the Family Court proceedings (if any were invoiced to her).

80. On 27 March 2019, Mr Serow wrote to Mr Davidson in the following terms:

> "Dear Sirs,
> RE: MARION NORMA EBSWORTH
>
> We refer to your letter dated 19 March 2019 and Ms Ebsworth's authority dated 8 March 2019.
>
> We enclose [a] copy of our registered charge over Ms Ebsworth's property at [XXXX], Narrawallee.
>
> The charge is registered pursuant to clause 15 of our costs agreement with Ms Ebsworth dated 14 October 2015 as security for all costs and disbursements that remain unpaid in both the proceedings brought against her by ANZ Bank in the New South Wales Supreme Court and the matters before the Family Court.
>
> Until we have recovered all costs and disbursements and barrister fees we continue to exercise a lien over all of Ms Ebsworth's documents including but not limited to the Certificate of Title.
>
> Yours faithfully
>
> Legal Minds"

81. On 7 May 2019, Ms Davies applied for an assessment of the plaintiff's legal costs concerning the matters in which Mr Serow had acted for her: the Family Court proceedings, the ANZ proceedings (which included cross-claims brought by Ms Davies against her former advisers) and an action in this Court against her former de facto partner.

82. In the assessment, the total costs claimed were $1,270,061.34. Ms Davies alleged that she had already paid a total of $578,216.15. The plaintiff's trust account statement recorded that $425,000 had been paid. In his reasons for decision dated 23 September 2019, the assessor accepted that $425,000 had been paid. Having regard to payments made (of $425,000) and the liability of the plaintiff to pay the costs of the assessment, the assessor found that Ms Davies was liable to pay $73,426.67 to the plaintiff. This decision reflected a deduction in the claimed costs from $805,283.90 to $575,470. In his reasons, the costs assessor noted that disbursements for barristers, amounting to a total of $423,780.44, had not been included in the invoices rendered to Ms Davies. Thus, this sum

was not included in the original assessment, although the assessor found that these amounts were fair and reasonable. The costs assessor directed the plaintiff to deliver tax invoices to Ms Davies for these disbursements. This occurred on 2 March 2020 (see below).

83. I note that there is no reference in the costs assessor's reasons to the order of the Family Court made on 13 December 2018 that the plaintiff indemnify Ms Davies for costs incurred in the Family Court proceedings (referred to above). It would appear from the absence of reference that he was not made aware of it.

84. On 13 December 2019, Mr Davidson lodged a complaint against Mr Serow with the Office of the NSW Legal Services Commissioner (the OLSC) which alleged that he:

> (1) grossly overcharged;
> (2) acted in a conflict of interest;
>
> (3) breached his fiduciary duty;
>
> (4) acted without his clients' instructions or authority;
>
> (5) lodged caveats over each of their homes and refused to remove them; and
>
> (6) failed to disclose his costs.

85. On 2 March 2020, the plaintiff created the following invoices addressed to Ms Davies, following the direction of the costs assessor referred to above.

Invoice number	**Provider of legal services**	**Date of barrister's invoice**	**Amount of invoice (incl GST)**
9415	Ms Nolan	10 May 2019	$17,890.40
9417	Ms Nolan	illegible	$96,426
9418	Ms Nolan	3 July 2015, 18 August 2015 and 8 December 2015	$153,550.94
9419	Paul Menzies QC	Illegible	$90,563
9436	Ms Nolan	Illegible	$65,440.10
		TOTAL	$423,780.44

86. On 4 March 2020, Mr Serow sent two letters by express post to Ms Ebsworth in the following terms:

> "Dear Marion,
> **RE: LEGAL MINDS PTY LTD ATS GAYE DAVIES**
>
> **COSTS ASSESSMENT NSWSC NO. 2019/00142626**
>
> We refer to our costs agreement with you dated 14 October 2015.
>
> We **enclose** copy of further correspondence issued to Ms Gaye Davies today for your records.
>
> ..."

87. The plaintiff enclosed with one of these letters, a letter to Ms Davies, enclosing the tax invoices addressed to Ms Davies referred to above. In this letter, Mr Serow acknowledged that part of the invoices had already been paid and that a balance of $79,824.15 was outstanding, payment of which was required. The tax invoices addressed to Ms Davies included the following "NOTES":

> "Notification of Clients' Rights: You may request an itemised bill from us after receiving a bill that is not itemised or it partially itemised within 60 days after that bill was given to you. In the event of a dispute in relation to legal costs you may seek assistance from the NSW Commissioner or have the costs assessed.
> ...
>
> An application for costs assessment must be made within 12 months after the bill was given to you, or the request for payment was made to you, the third-party payer or other law practice; or the legal costs were paid if neither a bill nor a request was made."

88. The plaintiff enclosed with the other of these letters, a letter to Ms Davies, enclosing the tax invoices addressed to Ms Davies relating to disbursements referred to above. In this letter, Mr Serow

acknowledged that part of the invoices had already been paid and that a balance of $161,866 was outstanding, payment of which was required. An identical version of the "NOTES" was attached to this invoice.

89. On 17 March 2020, Mr Davidson wrote to Mr Serow informing him that both Ms Davies and Ms Ebsworth denied liability for the payment of invoice 9417 on the basis that it purported to charge fees for work done in the Family Court proceedings, for which the plaintiff was liable, having regard to the order made by Rees J on 13 December 2018. He also sought that the charges be removed from the titles of the property and the Normandy Street property as they secured costs incurred in the Family Court proceedings.

90. On 23 April 2020, the OLSC waived the time requirement for the complaints submitted by Ms Davies and Ms Ebsworth concerning Mr Serow. He closed the allegations in (1), (5) and (6) (see above), which relate to costs, on the basis that there had already been a costs assessment of Ms Davies' costs.

91. Ultimately, on 10 November 2020, the OLSC closed the complaint pursuant to s 277(1)(h) of the Uniform Law on the basis that it required no further investigation. The principal basis for the decision was that in correspondence, Mr Serow had suggested that Ms Davies and Ms Ebsworth obtain independent legal advice. Mr Eardley, who appeared for the plaintiff in these proceedings, acknowledged that I was not bound by the OLSC's decision.

92. On 1 June 2021, the plaintiff wrote to Ms Ebsworth. The letter was sent to her by express post and enclosed what purported to be a default notice pursuant to s 57(2)(b) of the *Real Property Act* and s 111(2)(b) of the *Conveyancing Act 1919* (NSW). In the letter, Mr Serow referred to the alleged charge and asserted that it had the effect of "providing security for legal costs and disbursements". The letter demanded the sum of $313,218.73 (comprising $288,674.05 and interest of $24,344.68) to be paid by 30 June 2021 or within 30 days of receipt of the express post letter, whichever was the later. The tracking record indicated that this letter was delivered to Ms Ebsworth's address on 3 June 2021. When Ms Ebsworth received this document, she did not understand why she had received it. It made her very worried and anxious.

93. On 20 November 2021, the costs assessor issued a supplementary certificate for the barristers' fees which he had found, in the original assessment, to be fair and reasonable but which were not included in the original assessment as the plaintiff had not rendered invoices to Ms Davies. In supplementary reasons, dated 20 November 2021, the costs assessor recorded that Ms Davies had made total payments of these sums in an amount of $182,180.19, leaving an amount of $241,890.25 outstanding. A supplementary certificate was issued in this amount.

94. On 22 November 2021, the supplementary certificate was registered as a judgment of the District Court in favour of the plaintiff against Ms Davies.

95. On 10 December 2021, Mr Serow caused a title search of the property to be conducted. It recorded that Ms Ebsworth was still the sole registered proprietor and that the only notification, apart from reservations in the Crown grant, was the alleged charge, which had been registered on 2 February 2018.

96. On 14 December 2021, Mr Serow commenced the present proceedings on behalf of the plaintiff. It was common ground that the property, which was unencumbered except by the alleged charge, was worth considerably more than the debt claimed by the plaintiff.

97. I also understood it to be common ground, having regard to Mr Eardley's concession to that effect, that over $600,000 was paid by or on behalf of Ms Ebsworth and Ms Davies to the plaintiff for legal fees.

Ms Ebsworth's understanding of the circumstances and the documents she signed

98. A large part of Ms Ebsworth's understanding of the relevant circumstances appears from the following passage from her cross-examination:

> "Q. And I'm not being critical but did you know that the ANZ Bank was suing your sister?
> A. No. Not the ANZ, no. The ANZ was me and they paid some money out that was supposed to come to me from Chris but I don't know anything about how much it was or what happened to the money.
>
> Q. And did you know that your sister was involved, and correct me if I'm wrong, in proceedings in the Family Court against her former partner?
>
> A. Yes but I don't know anything about it. I knew there was something going on but I don't know anything about that Family Court at all.

Q. Do you recall being a party to proceeding in the family law matter?

A. Sorry what was that again?

Q. Do you remember being involved in the family law matter?

A. No, never, no.

Q. You don't recall being a respondent in those proceedings?

A. No.

Q. Now you were worried in about 2011 that Gaye [Ms Davies] would lose her house, weren't you?

A. Yes, in the very beginning yeah.

Q. And you wanted to lend her - and you indeed did lend her money to help her, didn't you?

A. Yes I, I had an agreement with the ANZ Bank and - for 200,000 against my house that I still live in and that was the only thing I was involved in from the very beginning, I had nothing to do with Chris [Mr Serow] or anybody else.

Q. When you say you had nothing to do with Chris, did you ever meet with Chris?

A. Did I sorry?

Q. Did you ever meet with Chris Serow?

A. Yes I have, yes, about three, maybe four times. But I don't know how I got involved in the Family Law Court because I had nothing to do with it and I don't know anything about it.

Q. Now you now back in 2015 Chris was acting for your sister as her solicitor, don't you?

A. Yes.

Q. Back in 2015 you wanted to help your sister, didn't you?

A. Not in 2015, it was 2011 and the only agreement I had was with the ANZ Bank.

Q. I just want you to focus on 2015 for the time being. You recall that you wanted Chris Serow who I'll call Chris, to act for you as a solicitor, you remember that?

A. Not, not to do with the Family Court no.

Q. No I'm just asking you about retaining Chris Serow. You remember you wanted him to act for you, do you remember that?

A. In the - when Gaye first went to Chris I didn't think I had anything to do with the Family Law Court, just the ANZ Bank only. ..."

99. Ms Ebsworth denied that Mr Serow had told her orally to obtain independent legal advice. She said further, "I didn't see a solicitor. I didn't know I had to."

100. I consider the effect of Ms Ebsworth's evidence (including the passage extracted above), in the context of other evidence, to be as follows:

(1) in 2011, Ms Ebsworth was concerned about her sister and, in order to help her, agreed to provide security to ANZ up to a limit of $200,000, which she knew was secured over the property, being her own residence;

(2) when ANZ commenced proceedings in 2015, she knew that she was a party to the proceedings and that Mr Serow was acting for her in the proceedings;

(3) when the ANZ proceedings settled, she expected that she would be paid some money but she did not receive any money from those proceedings and did not know what had happened to the money which was supposed to be paid by others to resolve the proceedings;

(4) Ms Ebsworth did not appreciate that the money paid by the cross-defendants to resolve the ANZ proceedings was applied by Mr Serow in payment of his fees for legal services provided to Ms Ebsworth and Ms Davies;

(5) Ms Ebsworth knew that Ms Davies was involved in proceedings in the Family Court relating to her former de facto partner and that Mr Serow was acting for Ms Davies in those proceedings;

(6) Ms Ebsworth did not appreciate that she was a party to the Family Court proceedings and did not appreciate that Mr Serow purported to act for her in those proceedings as well. As far as she was concerned, the Family Court proceedings had nothing to do with her;

(7) although Ms Ebsworth signed the costs agreement dated 7 October 2015, she did not recall reading it but signed it because Mr Serow asked her to sign it and she trusted him;

(8) Mr Serow did not tell her orally to seek independent legal advice;

(9) at no stage did Mr Serow explain the effect of the costs agreement or the charge to Ms Ebsworth;

(10) Ms Ebsworth did not seek independent legal advice before signing either of these documents and did not realise that there was any reason for her to do so; and

(11) had Ms Ebsworth appreciated that the effect of the costs agreement and charge would be that she could lose the property and therefore her home, she would not have signed these documents because the consequence would be that she would have nowhere to live.

101. I accept Ms Ebsworth's evidence. I reject Mr Eardley's submission that she was unreliable. Although her memory for detail and documents was not good, she readily accepted that she had provided security to ANZ over the property in 2011 because she was concerned about Ms Davies and was firm about her involvement in the ANZ proceedings and her non-involvement in the Family Court proceedings (which was understandable since she was not a party to the relationship and could reasonably have believed that the Family Court proceedings did not concern her since it related to the de facto relationship between Ms Davies and her former partner).

Credibility of witnesses

102. As referred to above, Mr Serow, Ms Ebsworth, Ms Davies and Ms Stone (Ms Ebsworth's solicitor in these proceedings) were required for cross-examination.

Ms Ebsworth

103. Ms Ebsworth was clearly stressed when giving oral evidence. At her request, I allowed her to give evidence via audio-visual link from her home. Ms Stone was available to help her access the court book electronically. However, her distress was so marked that I informed Mr Eardley that he need not put propositions to Ms Ebsworth where it was clear from the pleadings and the affidavit evidence filed that the matters were in issue: *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1 at 16D-F, 26F (Hunt J).

104. Some of Ms Ebsworth's answers were affected by stress. However, others were given in a straightforward way and I accept them. For example, it was put to Ms Ebsworth that the Normandy property was "held in a discretionary trust", to which she responded, "I don't understand, sorry." She acknowledged that she knew that, in 2015, Mr Serow was acting for both her and Ms Davies. When she was asked whether she was happy for that to occur, she answered:

> "Yes, I didn't know any different."

105. I accept these answers as being the truthful answers of a witness whose understanding of the world does not extend to relatively sophisticated legal concepts such as discretionary trusts and conflicts of interest.

106. Ms Ebsworth confirmed that she had had a stroke in 2021 and another stroke some time after she swore her affidavit on 10 June 2022. She also said that she had no diagnosis of dementia or brain clots and that she had had recent tests which confirmed the absence of those conditions.

107. When Mr Eardley started to cross-examine Ms Ebsworth about the ANZ proceedings, she said that she could not concentrate and apologised. She explained that it was "just nervous tension or something." Despite her obvious nerves, the effect of Ms Ebsworth's evidence was, in the context of other evidence, clear, as set out above.

108. Mr Eardley was critical of Ms Ebsworth for denying matters from her second further amended defence when he put them to her in cross-examination. However, the particular allegation related to the costs agreement. Ms Ebsworth, in oral evidence, said that she would not have signed such a document had she understood it, but accepted that she had signed it. This is a nuance which does not impugn her credibility. Furthermore, the content of pleadings is a matter for which legal practitioners are responsible. Although they are bound by their instructions, the decision whether to admit or deny a paragraph, where such a decision does not involve a purely factual allegation, is a

forensic one. During Ms Ebsworth's cross-examination, Mr Eardley sought an order that the second further amended defence be verified by Ms Ebsworth. I refused his application. I consider the pleading to be in accordance with Ms Ebsworth's evidence. Further, I considered that requiring her to verify a pleading would not only lack utility in the present case, but also tend to exacerbate her obvious stress and distress occasioned by the litigation and by the need to be cross-examined.

109. There are, however, aspects of Ms Ebsworth's evidence which I do not accept. Mr Eardley put a number of propositions to her, to which she acceded, including the following:

> "Q. When you're given legal documents, it's your usual practice to read them, isn't it?
> A. Yes."

110. If by "reading", she meant "understanding", this evidence was inconsistent with her other evidence which I accept that she signed whatever Mr Serow asked her to sign because she trusted him. Even if Ms Ebsworth tried to read a document such as the costs agreement or the alleged charge, she would not have understood it, in part because of the language in which it was expressed, which is addressed further below.

111. In accepting Ms Ebsworth's evidence, I have taken into account that Mr Eardley was not able to cross-examine her as freely as he might have wished to, given her distress.

Mr Serow

112. Mr Serow gave his evidence in a straightforward manner. There was nothing about his demeanour which would cause me to doubt his evidence. For the reasons given above, I do not accept his evidence that he told Ms Ebsworth orally that she should get independent legal advice. I accept his evidence that he did not consider that he was in a position of conflict although, for the reasons set out later, I regard his assessment as being incorrect.

The pleadings

113. Mr Eardley was critical of the form of the defences filed on behalf of Ms Ebsworth. In particular, he complained that the defences did not address the paragraphs of the statement of claim and indicate the extent to which each paragraph was admitted, denied or not admitted. However, he confirmed that he understood the defence case from the pleading and, on the first day of the hearing, did not oppose the filing of the second amended defence, which included (as Annexure A) a table, which indicated whether particular paragraphs in the plaintiff's pleading were admitted or denied. In addition, Ms King offered to indicate, from the Bar table, the defence response to each of the paragraphs in the amended statement of claim (which was filed on the first day of the hearing). Ms King proceeded to respond to each paragraph from the bar table in order to remedy any deficiency in the pleading.

114. Ms King informed me that she had come into the matter as a result of the Bar Association's Pro Bono Scheme and her involvement post-dated the filing of the defence. She accepted that the various iterations of the defence were in a "relatively unorthodox form", but submitted that they were sufficient to indicate what was in issue.

115. When criticisms of a pleading are made on the first day of a two-day hearing, it is difficult to refine pleadings or bring them into conformity with the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) without losing valuable hearing time. I was grateful for the concession made by Mr Eardley that he understood the defence case, notwithstanding the form of the pleading. I am obliged, by Part 6 of the *Civil Procedure Act 2005* (NSW), to make rulings and conduct a hearing to facilitate the just, quick and cheap determination of the real issues in the proceedings. As I was satisfied that the parties and the Court could identify the issues between the parties, I allowed the pleadings to be filed in their amended form on 10 October 2022.

116. To the extent to which there was any departure from the pleadings, this can be accommodated within the principles expressed in *Dare v Pulham* (1982) 148 CLR 658 at 664 (Murphy, Wilson, Brennan, Deane and Dawson JJ); [1982] HCA 70. For example, although the claim for relief did not particularise matters relied upon by reference to s 9(2) of the *Contracts Review Act*, Mr Eardley addressed each of those paragraphs in his submissions.

Liability

Construction of the costs agreement and the alleged charge

117. Mr Eardley contended that cl 1 of the costs agreement was clearly intended to:

(1) create an indemnity in favour of Mr Serow for legal costs incurred by either of Ms Ebsworth or Ms Davies; and

(2) to entitle the plaintiff to lodge a caveat over the property to secure such costs.

118. He contended that cl 15 of the costs agreement was sufficient to amount to the provision of a security interest over the property in favour of the plaintiff.

119. Mr Eardley contended that the alleged charge, when read with the costs agreement, was sufficient to charge the property with the payment of any costs owing to the plaintiff by either or both of Ms Ebsworth and Ms Davies.

120. Mr Eardley submitted that the plaintiff's primary case was that it had a valid registered charge over the property which entitled it to judgment for the full amount claimed and an order for possession. In the alternative, he submitted that the plaintiff had an equitable charge which entitled it to an order for judicial sale of the property. In the further alternative, he submitted that the plaintiff had a secured interest for the amount of the costs referable to Ms Ebsworth's matter. Further, and in the alternative, he submitted that the plaintiff was entitled to judgment for a monetary amount which was either the full amount claimed or the lesser sum, being the amount referable solely to Ms Ebsworth's costs. He also indicated that, if a judgment for an unsecured debt was obtained, the plaintiff proposed to issue a bankruptcy notice to recover the debt from Ms Ebsworth.

121. Ms King submitted that there were several reasons, in addition to the defences (considered separately below), why the plaintiff's claim ought fail.

122. Ms King contended that the wording of cl 1, if it created an indemnity at all, created an indemnity in favour of Ms Davies: that is, Ms Davies was liable to pay the plaintiff but Ms Ebsworth would be liable to pay to Ms Davies the amount of the legal costs which she had paid the plaintiff. As Ms Davies was party neither to the costs agreement nor the proceedings, any purported "right" conferred on her was unenforceable and illusory. Accordingly, Ms King submitted that the plaintiff had no right to judgment against Ms Ebsworth for any amount which constituted legal fees for services provided to Ms Davies.

Relevant principles

123. A contract of guarantee (in relation to the payment of money) is, generally, a contract whereby a third party (the guarantor) promises both the debtor (often referred to as the principal debtor) and the creditor, that he or she will pay the debt, on default by the debtor. Thus, if the "principal debtor" defaults, a creditor can recover damages from the guarantor for breach of the principal debtor's promise to pay or otherwise perform. However, the creditor generally sues the guarantor for the money sum which the debtor has failed to pay. In contracts of guarantee, the guarantor's liability is a secondary liability because it arises only on the debtor's default.

124. A contract of guarantee is to be distinguished from a contract of indemnity. In a contract of indemnity, the third party (the indemnifier) agrees to pay the creditor, irrespective of the debtor's default. Thus the third party owes a principal obligation to the creditor: see, generally, *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 254 (Mason CJ); [1988] HCA 11 and *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; [2004] HCA 28 (*Andar*) at [23] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

125. The question whether a contract is a contract of a guarantee or indemnity is a question of construction. A doubt as to the construction of a guarantee or indemnity is to be resolved in favour of the guarantor or indemnifier: *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269*;* [2009] HCA 44 at [53] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); and *Andar* at [23].

Does cl 1 of the costs agreement create an indemnity in favour of the plaintiff

126. Clause 1, set out above, in terms, provides that Ms Ebsworth is to indemnify Ms Davies in relation to any costs and disbursements she may incur in relation to the Family Court proceedings and the ANZ proceedings. Thus, Ms Ebsworth is the indemnifier and Ms Davies is the person who has a right to be indemnified. There is no reference to the plaintiff in the sentence of cl 1 which purports to create the indemnity. It is reasonable to infer that the plaintiff did not intend this clause to mean what it says since Ms Davies was not a party to the costs agreement between Ms Ebsworth and the plaintiff and could not therefore sue on any indemnity provided for in its terms. Further, it would appear from the stance taken by the plaintiff in these proceedings that the plaintiff wanted an indemnity from Ms Ebsworth (since he knew that Ms Davies had no capacity to pay her legal fees for the ANZ proceedings and the Family Court proceedings).

127. However, as referred to above, a doubt as to the construction of an indemnity is to be resolved in favour of the indemnifier who, in this case, is Ms Ebsworth. In these circumstances, I do not consider

that cl 1 ought be construed as creating an indemnity in favour of the plaintiff in respect of Ms Davies' legal costs.

The effect of the order made by the Family Court on 13 December 2018

128. If, contrary to my finding above, the effect of the costs agreement was that Ms Ebsworth was liable for Ms Davies' legal fees, it would be necessary to address the effect of the order made by the Family Court on 13 December 2018 which required the plaintiff to indemnify Ms Davies in relation to any costs incurred in the Family Court proceedings.

129. The indemnity principle, in this context, provides that the costs to be paid by the indemnifier (Ms Ebsworth) cannot exceed the amount that Ms Davies is liable to pay the plaintiff: see, in the context of proceedings, *Wentworth v Rogers* (2006) 66 NSWLR 474; [2006] NSWCA 145 at [46]- [48] (Santow JA) and [102] (Basten JA). Thus, if Ms Davies has no obligation to pay the plaintiff, Ms Ebsworth will have no obligation to pay her. The effect of the order made on 13 December 2018 is that Ms Davies has no obligation to pay the plaintiff for legal services provided in connection with the Family Court proceedings. Thus, even if Ms Ebsworth was liable to indemnify the plaintiff, her liability would not extend to any of the costs incurred by Ms Davies in the Family Court proceedings.

Does cl 15 of the costs agreement create a security interest in the property

130. Clause 15 provides that the plaintiff has a right to require Ms Ebsworth to provide security for legal costs and disbursements and interest on unpaid legal costs. Ms Ebsworth accepted that the effect of cl 15 of the costs agreement was to oblige her to provide security to the plaintiff for legal services performed on her behalf and to agree to a caveat being lodged on the property. The consequences of non-compliance with the provision of security or non-payment of fees was expressed to be that the plaintiff "may refuse or cease to act".

131. An equitable charge requires that the property of the chargor (Ms Ebsworth) be appropriated to the chargee (the plaintiff) for payment of a debt and the chargee has a present right to sell it to enforce payment of the debt: *Roberts v Investwell Pty Ltd (in liq)* [2012] NSWCA 134 (*Roberts*) at [26] (Bathurst CJ, Beazley JA and Tobias AJA agreeing).

132. I accept Ms King's submission that cl 15 does not create a present charge (or other security) on the property and therefore does not, of itself and without more, confer on the plaintiff a present right to have the property made available for the payment of her unpaid legal costs. In these circumstances, the costs agreement is insufficient to create an equitable charge,

133. The circumstance that Ms Ebsworth has promised, in cl 15, to consent to the lodgement of a caveat does not have the effect of converting the lodgement of a document which is ineffective to create an interest in land into a caveatable interest.

Does the alleged charge create a security interest in the property

134. Mr Eardley argued that, even if the costs agreement was insufficient to create an equitable charge, the alleged charge created a legal (registered) charge over the property to secure the monies owed to the plaintiff by Ms Ebsworth.

135. To address this argument, it is necessary to consider the terms of the alleged charge. As referred to above, the alleged charge comprised a single cover sheet and the costs agreement, which was annexed to the cover sheet. I have found that the costs agreement does not create an equitable charge because it does not confer a present right on the plaintiff to enforce the debt against the property. The further question arises whether the words on the cover sheet are sufficient to do so.

136. I consider that, notwithstanding the deficiencies in the costs agreement, it is sufficient to create an obligation on the part of Ms Ebsworth to pay the plaintiff for legal services rendered by it on her behalf. Further, I consider that the words in the alleged charge "and for the purposes of securing the payment of the LEGAL COSTS referred to in the annexure charges all the above estate for the benefit of the charge, the payment to be made at the times and in the manner set out in the annexure" are sufficient to create a present entitlement in the plaintiff to have the property made available for the payment of the debt (created by the costs agreement). Thus, on the analysis in *Roberts*, the alleged charge is sufficient to create an equitable charge for the legal fees owed by Ms Ebsworth to the plaintiff for which the costs agreement provides. Whether the plaintiff is entitled to enforce that charge will be addressed later in these reasons. Mr Eardley accepted, consistently with *Residential Housing Corporation v Esber* (2011) 80 NSWLR 69; [2011] NSWCA 25 at [58] (Campbell JA, Macfarlan JA agreeing), that the statutory mechanisms for sale in the *Real Property Act* and the *Conveyancing Act* did not apply to an equitable charge.

137. Mr Eardley also contended that the alleged charge constitutes a legal charge because it was registered. Ms King argued that the charge was not a legal charge because it did not fall within the definition of charge in s 3 of the *Real Property* Act and therefore does not have the benefit of the statutory power of sale in s 58 of the *Real Property Act* or s 111 of the *Conveyancing Act*.

138. Section 3 of the *Real Property Act* includes the following relevant definitions:

> "***Charge***—Any charge on land created for the purpose of securing the payment of an annuity, rent-charge or sum of money other than a debt.
> ***Chargee***—The proprietor of a charge.
>
> ***Charger***—The proprietor of land or of an estate or interest in land that is subject to a charge.
>
> ...
>
> ***Mortgage***—Any charge on land ... created merely for securing the payment of a debt."

139. I accept Ms King's submission that the alleged charge is not a charge within the meaning of the *Real Property Act* and therefore cannot be registered as such. In these circumstances, the alleged charge, though registered, is not a legal charge. Thus, s 58 of the *Real Property Act* does not apply: *Avco Financial Services Ltd v Commonwealth Bank of Australia* (1989) 17 NSWLR 679 at 682F-G (Young J), approved in *Residential Housing Corporation v Esber* at [49] (Campbell JA, Macfarlan JA agreeing).

140. Section 111 of the *Conveyancing Act* refers to a charge under the *Real Property Act*. Thus, the power of sale provided for in s 111 does not apply to the alleged charge. Further, s 111(2)(a1) prohibits a charge from exercising a power of sale unless the charger has defaulted in paying a judgment to which the charge relates. There is no judgment against Ms Ebsworth for unpaid legal costs. Thus, the precondition in s 111(2)(a1) has not been fulfilled.

Defences

Non-compliance with s 331 of the 2004 Act

141. Section 331 of the 2004 Act relevantly provides that a law practice must not commence legal proceedings to recover legal costs from a person until at least 30 days after a person has been given a bill in accordance with ss 332 and 333. Section 333 provides that the bill must include a written statement setting out the person's rights, including a right to a costs assessment. The 2004 Act applied because the plaintiff's retainer from Ms Ebsworth commenced prior to 1 July 2015 (although there was no costs agreement or personal contact between them prior to that date). I accept Ms King's alternative submission that the plaintiff did not comply with s 331 in that it did not inform Ms Ebsworth of her rights, as a third party payer (as the plaintiff contended her to be), to seek an assessment of those costs. Thus, to the extent that the plaintiff claimed that Ms Ebsworth was liable for fees for legal services provided to Ms Davies, the proceedings ought not to have been brought.

142. It is not necessary to say more about this submission in circumstances where I have accepted that the costs agreement did not, on its proper construction, impose a liability on Ms Ebsworth for fees for legal services provided to Ms Davies.

Alleged breach of fiduciary duty

143. Mr Eardley accepted that both the costs agreement and the alleged charge were improvident agreements from Ms Ebsworth's point of view. I have made findings which are set out above that Mr Serow put himself in a position of conflict by acting for Ms Ebsworth as well as Ms Davies and seeking to obtain a security over Ms Ebsworth's property in circumstances where he knew of her limited understanding of commercial transactions and little capacity to pay his fees other than by resort to the property. There was plainly a conflict between Ms Ebsworth's status as a guarantor and mortgagor on the one hand and Ms Davies' status as a borrower on the other. Ms Davies had obtained loans for the purposes of her real estate businesses, from which Ms Ebsworth derived no financial benefit.

144. His conduct in endeavouring to make Ms Ebsworth liable for Ms Davies' fees was particularly heinous but it can be put to one side as I have found, for the reasons given above, that his attempt was unsuccessful.

145. Although Mr Serow gave evidence that he was not in a position of conflict, the correctness of this assessment was only faintly defended by Mr Eardley. Mr Eardley submitted that Ms Ebsworth had "waived" the conflict by choosing not to seek independent advice and therefore ought be held to the strict terms of the costs agreement and alleged charge.

146. For present purposes, the relevant principles, which are well established, can be summarised briefly. A client can consent to his or her lawyer being jointly represented with another client having a potentially adverse interest. However, such consent must be informed consent. Thus, only a client who fully understands the nature and existence of the conflict and its potential consequences can give consent. In most, if not all, circumstances, it will be necessary for such a client to obtain independent legal advice in order to give informed consent to joint representation with another party who has potentially opposing interests.

147. As reflected in my findings above, although Ms Ebsworth knew that Mr Serow was acting for herself and her sister, she was not aware of the conflict, had no idea of its potential ramifications and did not seek independent legal advice (because, as she put it, she did not know that she had to). Further, the circumstance that Mr Serow failed to recognise that he was in a position of conflict meant that the nature, extent and potential consequences of the conflict were never explored by him. In these circumstances, Ms Ebsworth did not give consent, much less informed consent, to Mr Serow acting for herself and her sister.

148. The following passage from the judgment of Macauley J in *Break Fast Investments v Rigby Cooke* [2021] VSC 398 at [220] is apposite to the present case:

> "A solicitor placing a client in a situation of such potential risk must ensure that the client is in a position to make a free and informed decision about the matter that is the subject of the retainer. If in those circumstances, the solicitor does not recommend independent legal advice, a heavy burden lies upon the solicitor to demonstrate that he or she has done everything to protect the interests of the client and to ensure that the client is aware of every circumstance that might be relevant to making choices on the matter at hand."
> [Footnotes omitted.]

149. There is no cross-claim in the present case. Thus, the breach of fiduciary duty is relied on only as a defence to the plaintiff's claim for his legal fees. A beneficiary whose fiduciary has breached a fiduciary duty in this way is entitled to refuse to pay the fiduciary for the service rendered. If the breach of fiduciary duty goes to the whole contract (as in the present case), this operates as a complete defence: *Keppel v Wheeler* [1927] 1 KB 577 at 592 (Atkin LJ) cited with approval in *Jameson Global Investments Pty Ltd v Byron Bay Land Development Pty Ltd* [2019] NSWSC 729 at [75] (Ball J). Mr Serow's conduct in the present case involved a serious breach of his fiduciary duty to Ms Ebsworth. By choosing to act for her, in addition to acting for her impecunious sister, he sought to put himself in a significantly better financial position than if he had avoided the conflict and acted solely for Ms Davies. He failed to recognise the conflict and therefore failed to disclose it. Ms Ebsworth, is, accordingly, entitled to judgment on the plaintiff's claim.

Alleged equitable set-off

150. Ms King argued that Ms Ebsworth was entitled to a legal and equitable set off by reason of the transfer of the Normandy property to G'Davies Pty Ltd, of which Mr Serow held one out of three shares. As G'Davies Pty Ltd holds the property as trustee for a discretionary trust, of which Mr Serow is not presently a beneficiary, it is difficult to see how an equitable or legal set off would arise. It is not necessary to address this argument further, since I have found, for the reasons given above, that Ms Ebsworth is not liable for legal fees incurred by Ms Davies.

The Contracts Review Act defence

151. The findings I have made above are sufficient to dispose of the matter. However, as it is my obligation as trial judge to set out all relevant findings of fact, it is necessary for me to address the defence raised by Ms Ebsworth under the *Contracts Review Act*. This defence only arises if I am found to be in error in my conclusion that the costs agreement did not make Ms Ebsworth liable for Ms Davies' costs or that the alleged charge charged the property with the debt arising from Ms Ebsworth's liability for her own costs.

152. Mr Eardley relied on the costs disclosure document and, in particular, the statement extracted above that the recipient "may seek independent legal advice before agreeing to the costs agreement disclosed." He also submitted that, although the costs agreement and alleged charge were improvident from Ms Ebsworth's point of view, "Ms Davies didn't have the ability to fund her litigation. She was impecunious, and Ms Ebsworth came to her sister's assistance."

153. Mr Eardley submitted that, insofar as there was a conflict in Mr Serow acting for Ms Ebsworth and Ms Davies, Ms Ebsworth "waived" the conflict by not seeking independent advice although she was told that she could have obtained independent legal advice.

The circumstances at the time the costs agreement was entered into

154. The costs agreement was entered into on 14 October 2015. At that time, the circumstances relating to the contract included the following of which Mr Serow (and therefore the plaintiff) was aware:

(1) the personal circumstances of Ms Ebsworth and Ms Davies and their respective capacities and relationship (reflected in my findings above), based, in part on the conference with them in July 2015;
(2) the property was subject to a mortgage to ANZ to secure the guarantee, which was limited to $200,000 and, accordingly, there was significant equity in the property which was otherwise unencumbered;

(3) the Normandy property was owned by ACN Pty Ltd, the single share in which was owned by a company in liquidation and therefore was not available to pay Ms Davies' other creditors (including the plaintiff) and could not be used as security unless and until there was a settlement with the liquidators (which did not occur until 17 August 2017);

(4) Ms Ebsworth was a party to the ANZ proceedings but the cross-claim against her former solicitors had good prospects of success and that, if the ANZ proceedings resolved, the mortgage over the property was likely to be discharged and the guarantee set aside;

(5) Mr Serow had not explained the costs agreement to Ms Ebsworth and had not told her that she was, effectively, funding her sister's litigation in the Family Court as Ms Davies did not own the Normandy property and was impecunious since she was unable to repay the loan account to M & M which was in excess of $500,000;

(6) Ms Ebsworth had not asked any questions of Mr Serow regarding the costs agreement and had not sought to negotiate any of its terms; and

(7) the costs agreement was improvident as far as Ms Ebsworth was concerned.

155. Additional circumstances of which Mr Serow was not necessarily aware at the time of the costs agreement, but which were either reasonably foreseeable or of which he ought to have known, included the following:

(1) Ms Ebsworth did not appreciate that, by signing the costs agreement, she would render herself liable for Ms Davies' legal fees in addition to her own and that, if the charge were valid and effective, the plaintiff could move to sell her house to repay the debt;
(2) Mr Serow was in a position of conflict in acting for both Ms Ebsworth and Ms Davies in the ANZ proceedings and in the Family Court proceedings, which could only be resolved by informed consent, which had neither been sought nor was forthcoming; and

(3) there was also a conflict between Mr Serow's interest in ensuring that he was paid (by obtaining security over the property) and his duties towards Ms Ebsworth, who did not appreciate the matters referred to in (1) above.

The matters in s 9(2) of the Contracts Review Act relating to the costs agreement

156. Mr Eardley accepted that there was inevitably an inequality of bargaining power between a solicitor and an unsophisticated client (as he accepted Ms Ebsworth was). I infer that there was no negotiation of the terms of the costs agreement since Ms Ebsworth signed the document in the form in which it was sent to her. It was not practicable for her to negotiate the terms of the costs agreement because she lacked the ability to do so. Having placed her trust in Mr Serow, she was prepared to sign the costs agreement without reading or understanding it. I regard Ms Ebsworth as being a person who was not reasonably able to protect her interests because of her age and the state of her health (which affected her mental capacity through stress and depression). Her economic circumstances are set out above. Her income was limited to her war widow's pension and her only substantial asset was the property.
157. The costs agreement was not in plain English and was not clearly worded. Its headings were inapt. For example, cl 1, which the plaintiff contended created an indemnity, was entitled, "The work we will carry out". The word "indemnity" was not used in its common meaning. While Ms Ebsworth had some understanding of the concepts of guarantee and mortgage (having executed a limited guarantee in favour of ANZ and granted a mortgage to ANZ to secure borrowings to Ms Davies, limited to $200,000), she did not understand the terms indemnity or charge.

158. No independent advice was sought or obtained by Ms Ebsworth, who did not realise that it was in her interests to get such advice. The provisions of the costs agreement and their legal and practical effect were not explained to Ms Ebsworth by Ms Serow or anyone else.

159. I consider that Mr Serow engaged in unfair tactics with Ms Ebsworth by seeking to obtain security over the property in circumstances where he had no reason to believe that she was prepared to jeopardise her home to pay her sister's legal fees. He knew that Ms Davies was impecunious, if not insolvent, and would be bankrupted if the liquidators insisted on recovery of the loan account. He exploited Ms Ebsworth's trust by having her sign the costs agreement when he knew that she would sign it because she trusted him. He had no reason to believe that she would have signed the costs agreement had she known the risk she was running. The sending of the documents to Ms Davies' email address was another aspect of the unfairness because it was a method which was apt to indicate to Ms Ebsworth that she need not be concerned about what she was signing because these documents were formalities, rather than significant documents which could jeopardise her home.

160. In substance, Mr Serow was putting Ms Ebsworth in a position where it was likely that, in order to be paid, he would have to enforce Ms Davies' debt for legal costs against the property and that Ms Ebsworth would lose her home and her main asset.

161. I do not regard the situation with ANZ as analogous. In that case, Ms Ebsworth appreciated that she was giving a limited guarantee secured by a mortgage to help her sister. In the case of the costs agreement with the plaintiff, her only appreciation was that she would have to pay her own costs for work Mr Serow performed for her in the ANZ proceedings.

The matters in s 9(2) of the Contracts Review Act relating to the alleged charge

162. The matters referred to above are also relevant to the consideration of the alleged charge, since the alleged charge incorporates the costs agreement.

163. The further matters which concern the alleged charge are that the document which purports to create the charge contains none of the terms which one would expect to see in a charge, such as that, upon default, the charged property can be sold. The only indication that there is a charge is in the heading of the document and the wording in the standard form (extracted above).

Conclusion

164. For the reasons given above, I am satisfied that the costs agreement, in so far as it purported to impose on Ms Ebsworth a liability for Ms Davies' costs and the alleged charge, in so far as it charged the property, were unjust contracts.

165. The *Contracts Review Act* has been pleaded as a defence to the plaintiff's claim and not as a cross-claim: see *Commercial Banking Co of Sydney Ltd v Pollard* [1983] 1 NSWLR 74 at 78 (Rogers J). The consequence of the pleading is that the most the plaintiff can get from my finding that the costs agreement and the alleged charge are, to the extent referred to above, unjust, is judgment in her favour on the plaintiff's claim.

166. Ms Eardley accepted that Ms Ebsworth and Ms Davies had paid $605,000 to the plaintiff in legal costs. I infer that a substantial portion of these costs were related to the Family Court proceedings which were, as the Family Court found, misconceived and which resulted in an order that the plaintiff indemnify Ms Davies for her legal costs. Although such an order was not made in favour of Ms Ebsworth, it may be that, at that stage, she took no active part in the proceedings. Indeed, I accept her evidence that she did not even know that she was a party to the Family Court proceedings. While it would not be unjust (subject to the considerations of breach of fiduciary duty set out above) to require Ms Ebsworth to pay the plaintiff for legal services he rendered to her, I consider it to be likely, if not inevitable, that she has already done so, and more. Whatever accounting the plaintiff has done to retain an amount outstanding of $47,183.80 referable to legal costs incurred by Ms Ebsworth is not clear.

167. In these circumstances, I propose to grant relief to Ms Ebsworth under s 7(1)(a) of the *Contracts Review Act* by deciding to refuse to enforce the costs agreement against her. In these circumstances, if the plaintiff were otherwise entitled to judgment (contrary to my findings set out above), he would not be entitled to judgment.

Costs

168. The parties accepted that the appropriate course with respect to costs was that I ought make an order in accordance with the general rule that costs follow the event: UCPR, r 42.1. However they requested that I also make provision for an application for a different order in the event that any offers have been made which will affect the position on costs.

Orders

169. For the reasons given above, I make the following orders:

(1) Judgment for the defendant.
(2) Subject to a written application, together with written submissions and evidence in support, being made to my Associate within 7 days for a different order, order the plaintiff to pay the defendant's costs of the proceedings.

****