DISTRICT COURT OF QUEENSLAND

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| CITATION: | *Rare Nominees Pty Ltd v E-Coastal Developments Pty Ltd & Ors* [2017] QDC 238 |
| PARTIES: | **RARE NOMINEES PTY LTD (ACN 094 976 833), AS TRUSTEE FOR THE MACKELLAR FAMILY SUPERANNUATION FUND**  (plaintiff)  v  **E-COASTAL DEVELOPMENTS PTY LTD (IN LIQUIDATION) (ACN 105 138 056)**  (first defendant)  and  **CHRISTOPHER JOHN EATON**  (second defendant)  and  **MODERN CITY HOLDINGS PTY LTD (ACN 122 023 803)**  (third defendant)  and  **BELINDA JANE EATON**  (fourth defendant) |
| FILE NO/S: | D4799/15 |
| DIVISION: | Civil |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 26 September 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 17, 18, 19 July 2017, first written submissions on 24 and 26 July 2017 and second written submissions on 1 and 5 September 2017 |
| JUDGE: | Dorney QC DCJ |
| ORDERS: | 1. It is ordered that E-Coastal Developments Pty Ltd is removed as a party to the proceedings. 2. It is ordered that the plaintiff’s Seventh Amended Statement of Claim, insofar as it makes allegations and seeks claims against the third defendant, is struck out. 3. Leave is refused to the plaintiff to amend its pleadings to allege any further cause of action against the second defendant. 4. It is adjudged that the second defendant pay the plaintiff the sum of $226,000.55 (inclusive of interest of $100,872.30). 5. It is adjudged that the fourth defendant have judgment against the plaintiff. 6. It is ordered that submissions on costs, if any, be filed and served by 4pm on Friday 29 September 2017. |
| CATCHWORDS: | Whether admitted joint venture relationship generated any fiduciary duties – whether it was pleaded that any fiduciary duty was cast on the sole director of the alleged fiduciary – whether any implied or express trust, or constructive trust, established – whether any equitable charge created – whether any receipt liability or accessorial liability established |
| LEGISLATION: | *Civil Proceedings Act* 2011, s 58  *Corporations Act* 2001 (Cth), s 601AD(1)  *Land Title Act* 1994 Part 9  *Uniform Civil Procedure Rules* 1999 r 69(1) |
| CASES CITED: | *Assad v Eliana Construction & Developing Group Pty Ltd* [2015] VSCA 53  *ASIC v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35  *Bahr v Nicolay (No 2)* (1988) 164 CLR 604  *Barnes v Addy* (1874) LR 9 Ch App 244  *Caduceus Enterprises International Pty Ltd v Complete Lending Pty Ltd* [2015] QDC 159  *Caple v Wilson* [2016] VSC 704  *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337  *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd & Anor* [2016] QCA 88  *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd & Anor* [2015] 1 Qd R 75  *Davan Developments Pty Ltd v HLB Mann Judd* *(SE Qld) Pty Ltd* [2017] 1 Qd R 254  *DPC Estates Pty Ltd v Grey* [1974] 1 NSWLR 443  *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 343 ALR 58  *Electricity Generation Corporation v Woodside Energy Ltd* (2014)251 CLR 640  *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89  *FTV Holdings Cairns Pty Ltd v Smith* [2014] QCA 217  *Giumelli v Giumelli* (1999) 196 CLR 101  *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609  *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41  *Jackson v Richards* [2005] NSWSC 630  *John Alexander’s Clubs Pty Ltd v White City Tennis Club Limited* (2010) 241 CLR 1  *John v James* [1991] FSR 397  *Kalls Enterprises Pty Ltd (in liq) v Baloglow & Anor* (2007) 63 ACSR 557  *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576  *King v Adams* [2016] NSWSC 1798  *Koh v Chan* (1997) 139 FLR 410  *Korda v Australian Executive Trustees (SA) Ltd* (2015) 255 CLR 62  *Maguire v Makaronis* (1997) 188 CLR 449  *Moore v Devanjul Pty Ltd (No 3)* [2012] QSC 355  *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Limited*; *Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited* (2015) 256 CLR 104  *Muschinski v Dodds* (1985) 160 CLR 583  *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141  *Palmer v Carey* [1926] AC 703; (1926) 37 CLR 545  *QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167  *Re Bruynius* [1995] 1 Qd R 492  *Rodick v Gandell* (1852) 1 De GM&G 763  *Ross River Ltd & Anor v Waveley Commercial Ltd & Ors* [2013] EWCA Civ 910  *Strategic Property Reservoir Pty Ltd v Condec Pty Ltd* [2012] VSC 634  *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 *Watson v Scott* [2016] 2 Qd R 484 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 |
| TEXTS: | *Fiduciary Reflections* Paul Finn (2014) 88 ALJ 127 *Knowing Assistance and Equitable Compensation* Jamie Glister (2016) 42 Aust Bar Rev 152  *On Equity*, Young, Croft, Smith (Thompson Reuters, 2009)  *Meagher, Gummow & Lehane’s Equity: Doctrine and Remedies* (5th ed, Butterworths LexisNexis, 2015)  *The Macquarie Dictionary* (7th ed, Macmillan Publishers Australia, 2017) |
| COUNSEL: | B A Hall for the plaintiff  C J Eaton personally for the 2nd and 4th defendants and by leave for the 3rd defendant |
| SOLICITORS: | Robinson Locke Litigation Lawyers for the plaintiff |

Introduction

# The plaintiff, Rare Nominees Pty Ltd, as Trustee for the Mackellar Family Superannuation Fund, entered into a written agreement entitled “Joint Venture Agreement” (“JVA”), in late 2006 with, among others, the nominated first defendant, E-Coastal Developments Pty Ltd (now deregistered). The second defendant, Christopher John Eaton, was the sole director, and admitted to be the controlling mind, of E-Coastal. The fourth defendant, Belinda Jane Eaton was Mr Eaton’s wife and simply a shareholder in E-Coastal. No relief is sought now against the third defendant; and it is noted that the second defendant was no longer a shareholder of it at trial.

# The JVA recited (by Recital D) that the parties agreed to enter into “a joint venture” to “facilitate the Project.” The Project was defined by Clause 1.1.16 and Part 9 of the Schedule to be the development and subdivision of the “Asset” [being land situated at Ninji, Queensland (as defined in Clause 1.1.3 and Part 7 of the Schedule)]. The parties described it in evidence as the “Ninji Project.”

# The Ninji Project progressed to completion but (for reasons later discussed) did not result in any payment under Clause 8 of the JVA by E-Coastal to Rare Nominees of any “Contributors’ Entitlements” (as defined in Clause 1.1.10).

# Because E-Coastal has now been both wound up and deregistered, Rare Nominees seeks to make claims, among the many claims set out in the Seventh Statement of Claim, against Mr Eaton and Mrs Eaton only. The remaining claims in the pleadings against those persons seek declarations against Mr Eaton that he holds “on constructive trust in favour of” Rare Nominees a sum of money and against Mrs Eaton that she holds certain land at Pullenvale, Queensland in fee simple “on constructive trust in favour of” Rare Nominees (though the written submissions seek a monetary remedy).

Issues

# At the beginning of the trial, by Exhibit 5, Rare Nominees identified what were described by it as key questions to be resolved. They included:

# whether the JVA created a trust and, or alternatively, a charge over the “Contributors’ Entitlement of Receipts” as they were received into “Mr Eaton’s hands”;

# what is the correct calculation of Rare Nominee’s Contributors’ Entitlement under the JVA (including a consideration of the issue of whether the Contributors’ Entitlement is calculable upon gross or nett Receipts of the Ninji Project); and

# were Mr Eaton and Mrs Eaton knowingly involved in any breach by E-Coastal of any identified trust “by way of their receipt of monies” from E-Coastal – and, or alternatively, were any such monies as received by Mr Eaton and Mrs Eaton “charged in favour of” Rare Nominees?

# Since I was also concerned that the plaintiff’s pleadings may have incidentally alleged a personal breach of fiduciary duty on Mr Eaton’s part, I ordered that further submissions be made on this issue in order to accord procedural fairness, since the question was not the subject of any submissions. Both the plaintiff and the defendants then contended that no personal breach by the second defendant was pleaded. Thus, I do not intend to consider the matter further, apart from one additional matter. The plaintiff has sought to amend its pleadings to allege, now, that such a duty existed. Besides the response of being far too late to allow such an amendment, any examination of the question also meets the response – as it would if agitated for the first time on appeal – that the defendants, if appraised in a timely way of such a question, would have sought to lead additional evidence directed to that question. While the plaintiff asserted that such evidence cannot be identified, or justified, given the particular aspect of looming insolvency raised in a general way at trial, I find that evidence of a more precise and considered nature would have been led about the circumstances of insolvency over that period. Such evidence as there was, was not canvassed, examined or analysed in any useful detail so as to permit a proper consideration of it on the evidence that both parties chose to rely on. There was no eye focussed on the essential factors of arguable insolvency, particularly given the factors required to successfully prove such a condition.

Background

# Mr Ross Alan Mackellar has been, at all material times, a director of Rare Nominees, a beneficiary of the trust constituted as the Mackellar Family Superannuation Fund, and the person “who (made) the decisions” for Rare Nominees (having done so with respect to all things concerned with the JVA). His wife, Mrs Ruth Elizabeth Mackellar, although one of the directors of Rare Nominees, stated that, while her husband alone ran the “affairs” of Rare Nominees, he informed her “of what’s going on.”

# Mr and Mrs Mackellar had known Mr Eaton since the late 1980s and Mr and Mrs Mackellar had been on friendly terms with Mr Eaton’s parents during relevant times.

# In 2002, some brief, but unproductive, discussions were had between Mr and Mackellar and Mr and Mrs Eaton about the development of a block of units in Ipswich, Queensland. Later, Mr and Mrs Mackellar, through Rare Nominees, became involved in a number of projects developed by E-Coastal. In addition, it is not in dispute that Mr and Mrs Mackellar loaned $100,000.00 to E-Coastal in 2006 and that such debt was repaid in August 2009. Prior to the execution by Rare Nominees of the JVA, it had received a document prepared by E-Coastal entitled “Project Report No. 1” concerning the Ninji Project and dated as July 2006. The document was conceded by all participating parties to provide, in simple terms, only a background by way of information about what was then projected to be undertaken by E-Coastal for the Ninji Project. Its effect in assisting, or not, the interpretation of the JVA will be discussed later.

JVA

# Although some of the terms of the JVA have been discussed, it is necessary to consider others.

# Recital B stated that the “Proprietor” (identified in Part 2 of the Schedule as E-Coastal) “is or will become the registered proprietor of the Asset.” The Asset was described in Part 7 of the Schedule as the relevant land at Ninji.

# Recital C stated that the Proprietor and the Contributors “wish to contribute joint venture funds to, and otherwise assist in, the Joint Venture.” And the last Recital, Recital D, stated that the parties “have agreed to enter into a joint venture to facilitate the Project.”

# When undertaking a consideration of the definitions in the definitional clause, Clause 1.1, it is accepted that they are not to be construed in isolation from the operational provisions in which they are used but that, rather, the operative provisions are to be read by inserting the definition into the provisions then being construed: see the discussion in *Watson v Scott* [2016] 2 Qd R 484 at [50]-[51]. Besides the definitions of some other terms discussed earlier, Clause 1.1 contained many more. Of particular importance was Clause 1.1.18, in which “Receipts” was defined to mean:

“All proceeds of any kind, whether of an income or capital nature, received in connection with or relating to the Project including (without limitation) the proceeds of sale of the Asset or part of it, the proceeds of any insurance policy effected pursuant to this Agreement, rental from the Asset or part of it and any deposits forfeited pursuant to any contract for the sale or rental of the asset or part of it.”

# Also, importantly, Clause 1.1.10 defined “Contributors’ Entitlements” to mean “amounts *equal to* the percentage of the Receipts set out in Part II of the Schedule” (emphasis added), in contrast, for example, to the terminology in Clause 1.1.12.Further, Clause 1.1.19 defined “Year” to mean, “as the case requires”: the period from the date of the JVA to the next 30 June; each year thereafter commencing on 1 July and ending on the next 30 June; and the period from 1 July “immediately preceding the date of termination of the Joint Venture to the date of termination”.

# Clause 2.1 stated that the Proprietors and the Contributors agreed to “associate themselves in a joint venture from the Commencement Date on the terms of this Agreement.” And, although by Clause 1.1.6 “Commencement Date” was defined to mean the date specified in Part 4 of the Schedule, no date was so specified.

# Clause 3 was headed “General Objectives.” By Clause 3.1, the general objectives of the Joint Venture were stated to be: to “protect the Contributors from the commercial risks associated with the Project”; and to “reward the parties according to their respective roles.” Clause 3.2 then stated that, to those ends, the “legal relationship of the parties under the Joint Venture shall be contractual only”: see, in particular, Clause 3.2.1.

# Clause 3.3 defined the Proprietor’s role as: to be the holder of the title to the Asset; to conduct and manage the Project and maintain Accounts; to account to the Contributors for the Contributors’ Entitlements; to enter such contracts and do such things as were necessary to undertake the Project; and to pay all outgoings in respect of the Asset. Clause 3.5 stated that the “only duties” of any Party were those set out in the JVA, and “to the extent permitted by law” duties (including “duties of a fiduciary nature”) were excluded.

# Clause 3.7 stated that the proprietor “may raise and borrow money for the purposes of the Project and may subject the Asset to securities to secure such borrowing”, but further stated that:

# the borrowing should not exceed the Maximum Borrowing Amount;

# the Contributors should not be required to guarantee or indemnify the repayment of any borrowings or any other Obligations [defined by Clause 1.1.14 to mean all the liabilities and obligations of a party (including any indemnity granted by it under the JVA)] of the Proprietor; and

# the Contributors would perform their obligations under any securities to third parties.

# Clause 3.9 dealt with the provision of the Contributions. Clause 3.9.1 stated that they did “not constitute a loan.” Clause 3.9.2 stated that they represented “risk capital”. And Clause 3.9.3 stated that they did “not raise Obligations on any other Party to repay such Contributions to the party contributing them or to pay any amount to any Party to this Agreement (other than under Clauses 6 and 8)”.

# Clause 4.1 stated that the “Proprietor will be the registered Proprietor and owner of the Asset and the Contributors will not acquire any interest in the Asset except under Clause 6.” Clause 4.3 stated that each party “will deal with its interest under this Agreement only in accordance with the terms of this Agreement and not deal with or otherwise do or omit to do anything which may adversely affect the value of the Asset, the Project, or their interests in the Joint Venture, except in accordance with the terms of this Agreement”.

# Clause 4.4 stated that, except as permitted by the JVA, “no party will during the continuation of its Obligations (whether actual, prospective or contingent) sell, give or otherwise dispose, charge or encumber in any way legal or any beneficial interest in the Asset or any other Joint Venture property”.

# Among the “Duties” dealt with in Clause 5, the JVA stated, by Clause 5.1, that the “Proprietor shall make all decisions relating to the Project and need not consult with the Contributors” and, by Clause 5.2, that the “Contributors shall not become involved in the management of the Project”.

# Clause 6.1 stated that the “Proprietor charges the Asset with due payment to the Contributors of all monies due and payable to the Contributors pursuant to this agreement and agrees to execute in favour of the Contributors a mortgage in the form reasonably determined by the Contributors’ solicitor.” Mr Mackellar admitted in evidence that he did not seek that E-Coastal execute such a mortgage. The term “charge”, in the context of the whole Clause and the other terms of the JVA, suggests a fixed equitable charge in the circumstances.

# Clause 7.1 stated that all “Project Costs will be borne and paid expeditiously by the Proprietor”.

# Concerning the Contributors’ Entitlements, Clause 8.1 stated that the “Proprietor shall pay to the Contributors the Contributors’ Entitlements.” Clause 8.3 stated that the “Contributors’ Entitlements shall be paid at least annually, the first payment being no later than three (3) months after the end of each year of the Joint Venture.” Furthermore, Clause 8.2 stated that Financial Statements [(defined by Clause 1.1.9 to mean “statements setting out receipts, entitlements of the Joint Venture to money from third parties, monies due to the Joint Venture by the parties, Project Costs (all on an accruals basis) and Contributors’ entitlements”] “shall be prepared by the parties annually or at such more frequent intervals required by the Contributors (but not more frequently than quarterly)”.

# Clause 9.2 stated that the Proprietor shall supply to the Contributors on a 6 weekly basis a “Project Update Report” and that the Report should contain certain things (which were then outlined).

# Interestingly in the circumstances as they evolved, Clause 10.1 stated that “upon the Expiry” (defined according to Clause 1.1.8 to mean the event or time described in Part 6 of the Schedule – but which was left blank), “the Proprietor shall cause the Asset to be sold to the best advantage of the Parties”.

# Clause 14 dealt with the “relationship” between the parties. Clause 14.1 stated that the “relationship between the Parties does not constitute a partnership” nor “will any Party have authority to act as agent of or otherwise for, or assume any Obligation of any other of the Joint Venture”. Clause 14.2 stated that the “Proprietor holds all the legal and beneficial interests in the Asset” and Clause 14.3 stated that the “Proprietor does not hold the Asset upon trust for the Contributors.” Clause 14.4 stated that, for “the avoidance of doubt, the nature of a Contributor’s interest in the Joint Venture” was as stated to “as follows”. What followed was that Clause 14.4.1 stated that a “Contributor is not entitled to any asset of the Joint Venture”. Further, Clause 14.4.3 stated that the “Contributor does not have any proprietary, beneficial or other interest in the Asset”. Further, Clause 14.4.4 stated that “no Contributor is entitled, either by itself or together with any other Party to this Agreement, to any beneficial interest in the Asset”. And, lastly, Clause 14.4.5 stated that “each Contributor’s interest in the Joint Venture is limited to its entitlement to receive the Contributor’s Entitlement payable by the Proprietor at the time and subject to the conditions stipulated in this Agreement”. If nothing else – though not explored in argument – those provisions would appear to exclude an argument that E-Coastal itself had indemnity or lien rights over this Asset on the basis that the Asset was vested in it as trustee, noting that “there are statutory provisions preventing indemnity exclusion if a trust were to be held to have existed”: see *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576 at 584–585 (per McPherson J, as he then was); and its consideration in *QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167 at [51] [concerning the rights of a manager (absent legal title to joint venture property) in a joint venture enterprise].

# Lastly, concerning the relationship, Clause 14.5 stated that the “Proprietor is entitled to receive all of the Receipts for its own benefit.”

# Clause 15.1 stated that “nothing” in the JVA “will be deemed to restrict in any way the freedom of any Party to conduct as it sees fit any business whatever (except in this Joint Venture) in any place without any accountability to the others.”

# In the Schedule, besides Parts already mentioned, Part 5 stated that each contribution by the nominated contributors was to be in the sum of $70,000.00. In Part 11, “the percentage set out” in it was 3.448%.

# **Credibility of witnesses**

# In general terms, all witnesses who were called to give evidence (other than Mr Eaton) attempted, in their own diverse ways, to answer credibly the substance of the questions put to them. Even for Mr Eaton, despite the valid criticisms made by the plaintiff of him concerning the import of the evidence that he gave, particularly concerning his admission that he lied about how far the Project had developed even though persistently asked about it, he, mostly (though not always) gave responsive answers and only parts of his evidence (discussed later) lacked some credibility. Many recollections were of events some 10 years before in 2006/2007.

# It is nevertheless, necessary to canvass some more specific conclusions reached.

# **Mr Mackellar**

# Mr Mackellar’s evidence was straightforward, but limited. Because of his non-engagement with the management and the day-to-day finances of the Project (some generated by his “contractual exclusion”), he, necessarily, was limited in the extent of the evidence that he could give. As is noted in the plaintiff’s written submissions, the “Mackellars” had “enjoyed some success” with earlier projects involving Mr Eaton from 2004 to 2007.

# To the extent that it matters at all, Mr Mackellar’s recollection of meetings held with Mr Eaton, including who was there and what was discussed, was less complete than that recollection by Mr Eaton. Despite that, those meetings, insofar as they were face-to-face, led to no real conflict in that Mr Mackellar’s recollection that very little, if any, pertinent or accurate information was given to him by Mr Eaton was not, at least in relevant detail, contested by Mr Eaton.

# Mr Mackellar’s recollection about his enquiries of Mr Eaton concerning the Project subsequent to the end of 2007 are mostly contained in written documents, primarily emails. Consequently, there is little dispute that extensive communications initiated by Mr Mackellar yielded untruthful, or otherwise insignificant, information from Mr Eaton. The lack of early pressing inquiries of E-Coastal was explained by Mr Mackellar as resulting from him being unconcerned with regard to the progress of the Project or E-Coastal’s books of account, arising from his subjective understanding that “he” would be repaid “his” $70,000.00 “investment” and be paid a further “entitlement”. So much appeared to have been reinforced in an email sent to him by Mr Eaton on 18 December 2007, referring to both the $70,000.00 “original” investment and “the just over $50k investment”. That conclusion was incorrect – but it did explain the reason for inaction on Mr Mackellar’s part.

# I accept Mr Mackellar’s evidence that, by late 2013, he had realised that the Project Lots had long been sold, that he had lost faith in Mr Eaton, and that, moreover, demands that were made by the plaintiff were being ignored.

# Overall, there is no reason to doubt the credibility of Mr Mackellar.

# **Mrs Mackellar**

# Mrs Mackellar, while giving evidence that she was kept informed by her husband and that she authorised her husband to act for her in negotiations on behalf of the plaintiff, was able to add little more to those events which appear to have been viewed by her as partly social and partly business, particularly because she was only intermittently present when her husband had his (mostly futile) later discussions with Mr Eaton.

# As I have observed when considering Mr Mackellar’s evidence, little of significance occurred at those social/business occasions (and even less so far as the female partners were concerned).

# Overall, there is no reason to doubt the credibility of Mrs Mackellar.

# **Mr Campbell**

# Geoffrey John Campbell was a party to the JVA as a Contributor. He was a party because he purported to execute it as “trustee” for the Campbell Family Trust.

# According to Mr Campbell’s evidence, although he signed as trustee, he claimed that the trust “was never set up”. Even when cross-examined by Mr Eaton, suggesting that the trust instrument was something that he (Mr Eaton) had prepared for Mr Campbell, he was adamant that it “never got done”. It is unnecessary to make any finding with respect to this particular issue. He, like any other Contributor, paid a contribution of $70,000.00.

# Mr Campbell, like Mr Mackellar, had made enquiries from time to time seeking “an update as to how the development was proceeding.” He described this contact as happening “fairly regularly”.

# In 2010, from information given to him by Mr Eaton, his “understanding” was that there still were “blocks of land available to be sold” and the loans had not been paid off to the people who provided the loans (such that “we were just waiting for enough land to be sold to pay the financiers back, and then we would start receiving money back”).

# Like Mr Mackellar, Mr Campbell corresponded by email. Similar to Mr Mackellar, he stated that he “would get very little information back, other than a generalised email telling me that there was still land available.” There were, also, many text messages – mainly sent by him, although a few were received in reply. Thus, many which were sent by Mr Campbell generated “no response”.

# According to Mr Campbell, “roughly in 2013, from memory” he “realised that I had been basically lied to”, so he “jumped in the car” and he “drove up to the development and had a look” for himself. His oral evidence was he found that there was “no land left to sell” and that the development had “clearly been sold quite substantially before” because all of the houses were “well and truly established” and “had gardens in place.” The text messages led Mr Campbell to estimate that the approximate time that he examined the Project site and found that there was “no land for sale” was late August 2013.

# Mr Campbell was, though, able to extract some money. He received back his “investment” Contribution (being the $70,000.00 already discussed). But, as he stated, “that, to date, is all that I have received.”

# In terms of when Mr Campbell was repaid the Contribution, he had no specific recollection, though he stated that it “could have been” late 2010 when the second of the cheques was paid. He stated that he did not recall whether that second cheque had been raised on Mr Eaton’s personal account.

# In more general terms, Mr Campbell only had vague recollections apart from the emails and text messages referred. This is unsurprising, given the almost non-existent involvement he, also, had in the management of the Project. There is no reason to doubt his credibility.

# **Mrs Eaton**

# Similar to Mrs Mackellar, Mrs Eaton was content to allow her husband to manage all their joint and several financial affairs. Although the evidence was to the effect that Mrs Eaton allowed her husband unsupervised operation of companies of which she was a director (none of which was a party to this proceeding) and which involved the use by Mr Eaton of her electronic signature over several years – about which she expressed no significant concern – there is no evidence, despite an extensive cross-examination, which showed either that Mrs Eaton was involved in any administration of significance to the issues here of the affairs of E-Coastal or that she knew any details of significance of the plaintiff’s “investment” pursuant to the JVA (as explored below). In fact, the plaintiff’s submissions accept that Mrs Eaton was unaware of the details of the JVA. Thus, the fact that she knew that the Mackellars had a financial interest in E-Coastal’s “projects”, though she did not know the details, cannot support the conclusion that, for instance, she wilfully and recklessly failed to make such inquiries about the funds and the obligations that were owed to the plaintiff, as an honest and reasonable person would make, when she was a recipient of funds from E-Coastal, particularly where she was also a lender to it or creditor of it (with Mr Eaton or with him and the third defendant) in the sum of $1,095,153.07: see Exhibit “CJE36” to Mr Eaton’s affidavit.

# As for the third defendant, Modern City Holdings Pty Ltd (against whom no relief has been sought), Mrs Eaton was not a director, though she had an involvement with that company “through the boarding houses.” This was left largely unexplored.

# Mrs Eaton’s “knowledge”, as established by the evidence in this court, about E-Coastal and its business, at least insofar as it affected the JVA matters, only came from the documents that she was shown in cross-examination. But they demonstrated nothing more than she was either a recipient of, or a conduit for, information from others about which she had little, or no, recollection or that she placed, or was the named contact person for, orders to obtain quotes for signs and similar advertising boards. She also appeared to be the contact point for E-Coastal’s insurance communication with Suncorp (with which she had other insurance policies).

# Mrs Eaton also gave evidence that she “did not actually open all mail even if it was actually (sent) to me” since, if “it was a business thing, (Mr Eaton) opened all of the mail.”

# Her summary of what she did for E-Coastal was that she did some “administrative things for the company”, being such things as doing “quotes” and such things as answering phone calls “when (Mr Eaton) asked me to when he was out.”

# As for payments from E-Coastal to her, either directly indirectly, she denied any awareness of having been paid any wage by E-Coastal – a matter which Mr Eaton denied as well (giving a rational explanation for the reference to “Jpay” (or some variation of it) in the bank account entries, being repayments of “loans” made to E-Coastal) – and she had “no idea” that the payments made to the home loan account were being paid by E-Coastal as “(Mr Eaton) actually handled all of our payments and that type of thing, so I wasn’t involved in it”, although it must have been obvious that such payments must have come from some source, although it could have been connected with any one of E-Coastal’s projects or other sources of Mr Eaton’s income. Even so, it does not present as, for instance, wilfully shutting her eyes to some misapplication of funds or the existence of trusts, or even charges, in the context of the second and fourth defendants’ loans to E-Coastal, to the limited extent that she had such knowledge. Mr Eaton, for his part, asserted that he would deposit further monies into E-Coastal’s “accounts” by “way of loan” from them both, as set forth in Exhibit “CJE36”, to offset home loan payments.

# As for Mrs Eaton’s recollection of her meetings with Mr and Mrs Mackellar, she did not recall dates although she did recall that she met them “just before my third child was born, when they were here for their son’s wedding, which would have been in early September 2007.” A fourth child was born in 2009. She stated that she “wasn’t aware” that they were investors in the Ningi Project and that she was “not sure of what” Mrs Mackellar and her husband “chatted about.” In particular, Mr Eaton did not mention to her at any relevant time that E-Coastal was in financial trouble, that projects that E-Coastal was running were performing badly, or that E-Coastal was significantly in debt.

# In re-examination, Mrs Eaton identified handwriting on some of the documents to which she had been taken in cross-examination and identified each of the examples as being made to Mr Eaton. Further, she stated in answer to her husband’s questions that mail that came “would go on to (Mr Eaton’s) desk unless it was something that I knew was for me, otherwise I’d let you handle it and you could pass it across if it was something I needed to do.”

# I accept that Mrs Eaton was attempting, as best she could from her recollection, to give straightforward and honest answers. As she explained, in the relevant period she had between two and four young children who were her main concern, and so otherwise left business matters to her husband, including the payment of monies to bank accounts in which she held an interest. She was certainly not a director of E-Coastal (of which the only controlling mind was her husband).

Mr Eaton

# In his evidence at trial, Mr Eaton, while combative at times, did attempt to answer in a reasonably straightforward way most of the questions put to him. These included questions that he had lied from the time of the last sale of the Ningi Lots in 2007 (which, in a concession made in Mr Eaton’s evidence concerning his spreadsheets, was in early October 2007) up until sometime in 2013. His explanation, although not any adequate excuse, was that the financial troubles that E-Coastal experienced as a result of stressors to the different projects in which it had been involved led to serious financial difficulties for E-Coastal and that he hoped to overcome them eventually, particularly by “his” other projects (that is, those undertaken by E-Coastal) turning a profit in their own right. There were many other such projects covered in his evidence, which was a subject he raised in his own right (see, for example, Exhibit “CJE 31” to Mr Eaton’s affidavit, as well as in paragraph 18 of it), not limiting his evidence to “repayments” to himself and his wife. He also, from 2006 to 2012, worked for FKP Limited in various roles, as referred to in his affidavit.

# Mr Eaton was also relatively straightforward in his own evidence, if legally naïve, about the reasons why he removed Modern City Living as a party to the JVA even though he had placed his own signature on one counterpart and, on the same counterpart, had caused to be placed the electronic signature of his wife in completing the execution of it, for which counterpart other entities had already executed. His explanation was that no-one else but he and his wife were involved and that that permitted him to “withdraw” their participation. While it did reveal his legal ignorance, there was nothing in the evidence otherwise led at trial that shows that he had done that for any deceitful or fraudulent purpose. The reason advanced by Mr Eaton, which was not gainsaid, was that he had originally believed that Modern City Living, which was trustee for the Eaton Family Superannuation Fund, could legally make such an investment but that, before its “withdrawal”, he had received contrary advice and acted on it. The plaintiff has not argued that the JVA was legally ineffective thereby, at least as between the plaintiff and E-Coastal.

# Mr Eaton also conceded that he refused, or failed, to provide any project updates or financial reports. Again, I find that this was inexcusable, but explicable in terms of the considerable financial mess that E-Coastal had got itself into. Nonetheless, it is entirely consistent with the high likelihood that any “contractual” request for reports about, or examination of, the accounts of E-Coastal would have been rebuffed, thereby adding to any vulnerability factor in this relationship, especially where the required 6 weekly reports (pursuant to Clause 9.2) led to only one “yearly report” ever.

# While it was not in dispute that Mr Eaton was the “controlling mind” of E-Coastal – and the third defendant (at relevant times) – and while I find that substantial sums were paid, directly or indirectly, from E-Coastal to both Mr and Mrs Eaton and to corporate entities which either, or both, were involved or which he also controlled, calculations made on the evidence presented to me (which was not in any significant way undermined, generally or with respect to the spreadsheets and Exhibits to the Eaton’s affidavit, by the extensive cross-examination of Mr Eaton) do not show, for instance, payments to such entities were in excess of payments, including loans, made by them to E-Coastal. But it is unusual that all such loans, and repayments, were (as applicable) unsecured, undocumented and unrecorded (apart from bank statements), at least in any document tendered in evidence. Such sums could not have been on any interpretation “Project Costs”. Further, there is no proof that they were a constituent part of the “Maximum Borrowing Amounts”. They, therefore, had nothing directly relational to do with the JVA and the Project. As just examined, while there were significant payments made by E-Coastal to the home loan mortgage account for the property owned by Mrs Eaton alone (see Tab 8 in Exhibit 3), there was no evidence that such sums were ever, on balance, in excess of moneys otherwise advanced by either Mr Eaton or Mrs Eaton, or both, or at the direction of one, at least, as loans or payments to E-Coastal. Exhibit “CJE45A” to Mr Eaton’s affidavit (an amalgam of several other Exhibits) shows more limited sums paid directly to Mr and Mrs Eaton. As for the sum of $155,000.00 paid by E-Coastal to the third defendant on 4 December 2007, Mr Eaton gave a cogent explanation of his pre-payment of sufficient deposits allowing that sum, in particular, to be paid: see paras [227]-[229] of that affidavit. There is also Mr Eaton’s concession that money was advanced to Modern City on the basis that, since E-Coastal owed the Eatons money, it was simply a repayment of that money at their discretion. Nonetheless, what a complete review of all of those payments (insofar as they have been identified to me) shows is that E-Coastal, under the control of the second defendant, used significant funds of E-Coastal to pay for matters outside the ambit of the development costs of the JVA (even though “loans” were made which assisted such payments to occur) or in preference (such as “repaying” personal loans to the Eatons) to making any payment to the plaintiff to which it was entitled. This can be noted from the state of the two major accounts of E-Coastal (with NAB and Suncorp), not only from October 2007 to October 2008 but also especially thereafter, right up to the “demand” by the plaintiff of 8 March 2014, in circumstances though, in the later years when the payments to the plaintiff had still not been made, where the balance in the accounts had deteriorated (see: Exhibit 3, Tab 6) and entities other than the plaintiff were being preferred (see: T:3-43 and T:3-46) until the liquidation ensued. I accept that Mr Eaton believed that he was entitled to exercise control in that way, but he was mistaken (as I will address later). But what is clear, from the voluminous financial documentation, and the schedules and spreadsheets prepared from it by the defendants (which, again, were not substantially weakened in their conclusions by cross-examination or other evidence), was both that E-Coastal “could have paid” the entitlements as they fell due, since E-Coastal had sufficient funds for a very significant time up to 2013 (see Exhibit “CJE45A” to Mr Eaton’s affidavit and statements in evidence by Mr Eaton at T:2-105 and T:3-44), and that the non-payment was to discharge other, including non-JVA, obligations, in the “hope” that other projects conducted by E-Coastal would become “profitable.” As for the Development Management Fee (variously put at $143,556 or $143,557), the defendants produced no journal entry designating payment (possibly because of the destruction of E-Coastal’s books of account and personal journals and notes, as attested to by Mr Eaton), though Mr Eaton stated that it had not been based on accruals (since E-Coastal’s accounts were said by him to be on a “cash” basis, even though the Project Costs, by Clause 1.1.9 were on an “accrual basis”) but that, at least, it would “just be posted” and would be “income” for E-Coastal - but he could not recall when. Various Exhibits to Mr Eaton’s affidavit do not help: for example, see “CJE44”. Because this Fee was not an express term of the written JVA and because no evidence was led as to how it could be an implied term (for example, by custom or usage), it was contended by the defendant to be an item of what E-Coastal, as Proprietor, believed that it was itself entitled to under the JVA, by way of the entitlement given under Clause 14.5 and as a Project Cost (under Clause 1.1.17 and Part 10 of the Schedule). Despite no argument being presented about the effect of Clause 7.1 in its reference to “all Project costs” being “borne and paid” by E-Coastal, I do not interpret the Fee (in the full JVA context here) as a development “cost” of the Project but, rather as a “benefit” under the JVA to which E-Coastal was entitled as part of E-Coastal’s “benefit” under Clause 14.5, especially when the plaintiff presented no contrary argument. In doing so, because of the lack of any evidence about its “payment” to E-Coastal, I find that, despite the second defendant’s adamant assertion of the right of E-Coastal to it and his acceptance that in some way it was received, it must mean that for that “benefit” it is not open to be accepted that it was preferred as a payment over the plaintiff’s entitlement (at least before the time preferential payments became liable to be recoverable in the liquidation). In any event, its timing is so uncertain that it has no utility in supporting any relevant satisfaction about its “receipt” by E-Coastal as a preferencing over the plaintiff’s interests.

# I do accept that Mr Eaton had a distorted legal understanding of such matters as the binding nature of executed agreements and the obligation to seek authorisation for the use of his wife’s electronic signature. Also, I do accept that it has been proved that he was the controlling mind in exercising total control over E-Coastal’s moneys, because of his belief (accepted by me, though incorrect in legal analysis) in E-Coastal’s exclusively contractual power under the JVA, which he contended that E-Coastal had. But, as analysed later, that is not of itself a prerequisite for E-Coastal to be in breach of fiduciary duties, if such a duty is otherwise established: see *Brendan Wilfred King v Robert Lawrence Adams and 14 Others* [2016] NSWSC 1798 at [44]. I accept that his control was directed to stabilising the worsening financial position of E-Coastal with its several projects (including this Project). What is important in determining whether any “design” is established concerning the avoidance of paying the plaintiff’s “entitlement” under Clause 8 of the JVA includes the following: his concessions about lying; his acknowledgment of his refusal to cause E-Coastal to meet its contractual obligations (both about reporting and about paying debts that had arisen); and the person-to-person “trust” (that had previously existed between him and Mr Mackellar and Mr Campbell) being significantly betrayed by his actions. There is no doubt that the summary of information (contained in the various documents and spreadsheets) was presented by Mr Eaton at trial to paint the best picture of E-Coastal’s financial dealings. But I do not find that Mr Eaton deliberately used E-Coastal to hive off some private wealth. Nevertheless, with respect to whether he believed at all relevant times that an “entitlement” had accrued under the JVA concerning the plaintiff, I do not accept that at any material time Mr Eaton did not understand that the obligation was owed. This is despite his protestations to the contrary, since I find that he would not have procrastinated and, then, lied if no entitlement was triggered. Any purported change in his belief later on, as he attested to in his evidence, I therefore do not accept (because it simply provided a convenient expression of a denial of any entitlement). Similarly, I do not accept that he believed that the true interpretation of the JVA did limit the “Contributors’ Entitlements” to some form of nett return from the Project, because any, even perfunctory, examination of the projected figures known to Mr Eaton showed, on that basis, a lower return than the non-refundable “investment” of $70,000.00, particularly in circumstances where Modern City Living, if it remained as a Contributor, would have invested $70,000.00 for a return of less than that investment figure.

# **Interpretation of JVA**

# Very recently, the High Court in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12 once again considered the principles applicable to the construction and interpretation of commercial contracts. A plurality of the majority, Kiefel, Bell and Gaudron JJ, held that it is “well established” that “the terms of a commercial contract are to be understood objectively, by what a reasonable business person would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract”: at [7] citing an extract from *Electricity Generation Corporation v Woodside Energy Ltd* (2014)251 CLR 640. As they went on to further state, in “a practical sense, this requires that the reasonable business person be placed in the position of the parties” and that it is “from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it”: also at [16]. Further, they stated that, “as was pointed out” in the joint judgment in *Electricity Generation Corporation*,“the court is entitled to approach the task of construction… on the basis that the parties intended to produce a commercial result, one which makes commercial sense” and that it “goes without saying that this requires that the construction to be placed upon (the relevant clause) be consistent with the commercial object of the agreement”: at [17].

# Although expressed in a dissent, Nettle J, relying upon other High Court cases, stated the undeniable timing principle that it is necessary to construe relevant clauses “objectively by reference to what a reasonable person in the position of the contracting parties would have understood to be the meaning of its language when read in light of the document as a whole and the surrounding circumstances known to the parties at the time of the transaction”: at [73].

# In this proceeding, the parties did not attempt to canvass in any extensive way what the “relevant circumstances” were. Despite that, there remains the problem of ambiguity in a few of the expressions used in the relevant clauses of the JVA and, perhaps most importantly, of what is meant by the definitional term “Receipts” in its context. It can be noted that the terms of the JVA resulted from the use of a “modified” version of an agreement used by E-Coastal for the Elimbah Development.

# What was admitted into evidence was the document (referred to earlier) entitled “Project Report No. 1” of July 2006. Neither party sought to rely upon it to resolve ambiguity, even within the confines of was expressed by Bell and Gageler JJ in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Limited*; *Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited* (2015) 256 CLR 104. As expressed there, the question of whether ambiguity must be shown before the court interpreting the contract can have regard to background circumstances is to be determined on the basis that *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 “remains binding authority”: at [119]. Accordingly, as Bell and Gageler JJ went on to observe, the parties there agreed, consistently with numerous recent statements of principle in the High Court, that “the proper interpretation of each of those terms is to be determined by reference to what reasonable business persons having all the background knowledge then reasonably available to the parties would have understood those terms to have meant”, as at the relevant date of the agreement: at [120].

# That Project Report was, as is conceded by both parties, not directly of assistance in interpreting the terms of the JVA. Nevertheless, it does show that the relevant land, described in the JVA as the “Asset”, was purchased with a Development Approval and an Operational Works Approval in place (see Section 3.1) and it does show that the Asset was to be subdivided for sale into lots designated as Lots 17 to 35 (inclusive). That is consistent with the extended definition of the “Project” in Part 9 of the JVA. Although the defendants attempted to use the financial table in Section 6.1 of that Report as of utility providing the relevant objective background, I have rejected its use for that purpose, at least to the extent to which it might be contended to be useful as an interpretive tool. It was not disputed that the settlement for the purchase of the Asset was on 5 May 2006.

# Aided in that clear way, the “Project” did involve the subdivision and eventual sale of the subdivided “Asset”. Hence, apart from its disposal if the project should not have proceeded, the “Asset” references in Clause 10.1 became redundant. Therefore, Clause 6, even if it created a floating charge over the subdivided Lots upon their registration (which is doubtful given the language used), once sold to the relevant purchasers of the Lots who would have taken *bona fide* and without notice (on the inferences to be drawn from such evidence as was led at trial) and for which transactions they, on the evidence at trial, gave adequate consideration, the indefeasibility provisions contained in Part 9, Division 2, Sub-division B of the *Land Title Act* 1994 would have rendered any “charge” over the “Asset” to be nugatory in the limited circumstances disclosed to the Court. In the commercial circumstances that reasonable business persons would have faced, it is difficult to envisage what Clause 6 sought to achieve other than to give each Contributor a right to have a registered mortgage executed in favour of that entity which would not only have been required to have been discharged at the time of registration of the subdivision, but also, in the meantime to have (under Clause 6.4) such a security potentially required to be postponed, thereby modifying the ordinary rules of priority. Taken with Clause 14.5, reasonable business persons cannot be held to have agreed that monies characterised as “Receipts” were to constitute a fund which was to be separately charged, at least without some more explicit indication from the JVA itself. All those events would have happened (on any interpretation of the JVA) before any “due payment” to the Contributors of “all monies due and payable” would have arisen. In the end, little in this case can turn on what Clause 6 effected, as utilised.

# Turning, then, to the interpretation of “Receipts”. First, it was defined in Clause 1.1.18 (in the terms already canvassed). Secondly, given the definition of “Asset” and what was known objectively to both parties, there would never have been actual “proceeds of sale” of the Asset because, once a subdivision was registered, it would have ceased to exist as the defined Asset, yet not have been converted into monetary proceeds. Thirdly, since there has not been any identified proceeds of any insurance policy, since there has been no evidence of “rental from the Asset”, and since there has been no evidence of any deposits “forfeited”, the remaining parts of the definition then leave for consideration the meaning of “all proceeds of any kind, whether of an income or capital nature, received in connection with or relating to the Project”.

# The word “Receipts” is then mentioned in Clause 14.5. Objectively, in a commercial setting, that makes sense in entitling the legal entity – which had the obligations cast on it as the “Proprietor” by Clause 3 – to use, on receipt, such Receipts “for its own benefit.” Necessarily, it still needs to be considered whether it meant that a totally unrestricted use of such funds was open, or whether there was an additional effect by reason of a fiduciary relationship, or whether equitable principles had application otherwise.

# The last, and important, reference to Receipts appeared in Part 11. This stated the “Entitlement” of each “Contributor”. But it did so only in the context of the terms of the definition in Clause 1.1.10.

# So what does 3.448% “of Receipts” mean? For a start, the amounts were restricted to being “received.” Thus, it must be decided whether, as the plaintiff submits, “received” covers all “gross receipts” of the Project. I accept that, contrary to the defendants’ submissions, it cannot be limited to either the existence of a nett profit (as it would be totally contrary to the import of Clause 8 of the JVA which, on any interpretation, could oblige a payment at a time before any net profit might be ascertainable) and it cannot be limited to an amount of $835,719.69 (as deposed to by Mr Eaton in his trial affidavit, at paragraphs 86-88) because, although that sum is the total of what was deposited into NAB A/C 564 276 459 and Suncorp A/C 034 2589 of E-Coastal, the defendants’ own spreadsheet (Exhibit 23) shows “Net Receipts” of $2,926,012.96. As for the defendants’ argument that certain receipts paid directly to third party institutional and mezzanine lenders escape the ambit of Receipts, it fails because of the definitional requirement which had no reference to such a restricted meaning of “Receipts” by the Proprietor personally but rather stated that they be “in connection with or relating to” the Project – and this included GST liabilities.

# It is not conclusive in the circumstances of this case simply to rely upon a dictionary definition such as *The Macquarie Dictionary* (7th ed, Macmillan Publishers Australia, 2017), stating that proceeds are that which “result or accrue”. This, as has often been repeated, was a commercial relationship. That demands that the reasonable expectation of each of the business parties needs to be carefully analysed. To that end, the fact that E-Coastal was limited to a “Maximum Borrowing Amount” does not particularly assist either, because although it limited in one way the “expense” by limiting the sums to be borrowed, it did not affect the interest rate to the be charged by lenders. Also, it does not assist in indicating what potential amount each Contributor would have been entitled to on the basis of the investment of “risk capital”, apart from the conclusion that the business parties expected some return on the “investment” of $70,000.00, particularly if the adverse “risks” (such as those associated with limited sales of the Lots) did not eventuate and especially in circumstances where Clause 3.1 stated that one of the general objectives was to be to “protect the Contributors from the commercial risks associated with the Project.”

# The key to the interpretive puzzle may well be the statement in Clause 14.5 that E-Coastal, as Proprietor, “is entitled to *receive* *all* of the Receipts for its own benefit” (emphasis added). Although this was also addressed in the provisions concerning the relationship between the parties, it reinforces the emphasis on “receiving” as a broad concept and, consequently, covers not only funds paid into those two designated accounts, but also funds paid “to” E-Coastal from the purchasers of the Lots. Quite obviously, for commercial purposes, the amounts that were paid at settlement by the various purchasers of the subdivided Lots must be the obvious sums to be Receipts (less the deductions made for the usual adjustments at settlement, it not being established at the trial that such adjustments did not affect the actual sums paid by the Lot purchasers which then became the Receipts), because additional deductions such as sales’ commissions extracted from each purchaser’s payment and the legal fees extracted prior to the balance of monies being sent to E-Coastal, or at its direction, would have resulted from E-Coastal’s instruction to its Solicitors to so deal with those “Receipts” for those post-settlement purposes. This is consistent, also, with the reference to forfeited deposits, which can only be the full sum so forfeited, in Clause 1.1.18.

# There is, necessarily, a related consideration of how that sounds in monetary terms. From the above analysis, “Receipts” would have been in the sum of $3,588,900.00 minus the “adjustments” of $1,507.57, yielding $3,587,392.43. Each Contributor, entitled to amounts equal to 3.488%, was therefore, at least contractually, entitled to the sum of $125,128.25.

# **JVC and express trust creation?**

# The Queensland Court of Appeal in *Davan Developments Pty Ltd v HLB Mann Judd* *(SE Qld) Pty Ltd* [2017] Qd R 254 considered the imputation of an intention to create an express trust. Philip McMurdo JA, with whom Gotterson and Morrison JJA agreed, noted that the High Court in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, by Mason CJ and Dawson J, held “that there should be no general reluctance by courts to infer that parties have created an express trust”: at [23]. But later, in *Korda v Australian Executive Trustees (SA) Ltd* (2015) 255 CLR 62, French CJ, as noted by Philip McMurdo JA, “warned” that a “trust is not to be inferred simply because a court thinks it is an appropriate means to protecting or creating an interest”: at [11].

# Also in *Korda*, French CJ noted that:

# the question whether an express trust exists must always be answered by reference to intention;

# an express trust cannot be created unless the person or persons creating it can be taken to have intended to do so;

# absent an explicit declaration of such an intention, the court must determine whether intention is to be imputed; and

# any imputation is to be by reference to the language of the documents, or oral dealings, having regard to the nature of the transactions and the circumstances determining the relationship between the parties;

# : at [3].

# Further, Gageler J held that the “absence of a contractual intention that money be held in a separate fund must surely be fatal to the imputation of a contractual intention to create a trust over that money”: at [111].

# As *Davan Developments* also stressed, the intention to constitute a trust must be clear and, by reference to Keane J in *Korda* (at [205]), the Court specifically noted the “need for clarity” as to “the intention to create a trust and its subject matter”, it being of particular importance “in a commercial context where acceptance of an assertion that assets are held in trust is apt to defeat the interests of creditors of the putative trustee”: at [24]. Although relevant to the particular facts in *Davan Developments*, it is instructive that it was found that, absent a trust, the relationship between the parties, in their participation in the particular investment, “would not have been impracticable”: at [31]. The same can be said for the present case.

# The plaintiff contends that the trust in question here arose when each of the settlement sums were first received by E-Coastal upon the sale of each subdivided Lot so as to constitute “Receipts” within the meaning of the JVA.

# Before turning to those parts of the JVA which might contain relevant references favouring a trust, it is necessary to refer to those provisions which are arguably to the contrary.

# First, and importantly, Clause 3.2.1 stated that the “legal relationship” of the parties “shall be contractual only”. Secondly, Clause 3.3 defined the role, amongst other things, of E-Coastal as “the holder of title” to the Asset. Also in Clause 3.3, although Clause 3.3.3 stated that the Proprietor’s role was to “(a)ccount” to the Contributors for the Contributor’s entitlements, a trust intention is not necessarily imputed because there is an obligation to account. Thirdly, Clause 3.5 stated that the “only duties” of any party are those set out in the JVA and that, “(t)o the extent permitted by law”, “any duties imposed by statute, common law or rules of equity… are excluded.” While, obviously, statutory and other duties may still be applicable, an important aspect is “intention”. Fourthly, Clause 4.1 stated that the Proprietor would be “the registered proprietor and owner” of the Asset and that the Contributors “will not acquire any interest in the Asset except under Clause 6”. Clause 6.1, as discussed earlier, appears to have had little scope for effect subsequent to the registration of the various Lots (as a consequence of the subdivision of the Asset). Fifthly, Clause 14, which dealt expressly with the relationship between the parties, contained several important references. Clause 14.1 stated that the relevant relationship “does not constitute a partnership”, nor would any party “have authority to act as agent of or otherwise for, or assume any Obligation of any other or the Joint Venture.” While the wording is infelicitous, it tends against the notion of the creation of a trust by imputed intention. Clause 14.3 expressly stated that the Proprietor did not hold the Asset “upon trust for” the Contributors and that it “holds all the legal and beneficial interest in the Asset”. But perhaps more importantly against the possible imputation of a trust intention, Clause 14.4.1 stated that, for the “avoidance of doubt”, the nature of a Contributor’s interest is that “the Contributor is not entitled to any asset” of the joint venture. Clause 14.4.3, as part of Clause 14.4, stated that the Contributor did not have any proprietary, beneficial or other interest in the Asset: see, also, Clause 14.4.4. Perhaps the most important part of Clause 14 - besides Clause 14.5 which stated that the Proprietor “is entitled to receive all of the Receipts for its own benefit” – is Clause 14.4.5, which stated that each Contributor’s interest “is limited to its entitlement *to receive* the Contributor’s Entitlement payable by the Proprietor at the time and subject to the conditions stipulated” in the JVA (emphasis added).

# For the plaintiff’s part, what it points to is the objective in Clause 3 to “protect” the Contributors from “commercial risks” and to reward the parties according to their roles, noting that the plaintiff was to advance joint venture funds as “risk capital” and not “a loan”: see, in particular, Clauses 3.1 and 3.9. But any contention – such as that advanced generally by the plaintiff concerning the JVA - that there were “conflicting” provisions in the JVA only tends to undermine the establishment of “certainty” of object, subject matter and intention for a trust.

# In such circumstances, a close analysis of the provisions of the JVA does not demonstrate that the “Receipts” once received by E-Coastal, as Proprietor, were held “on trust for” the Contributors such that that trustee “could do nothing else with it” other than pay the Contributors’ entitlements. Clause 15.1, a non-restricting provision, showed that E-Coastal was entitled to conduct other business (subject to the JVA and any fiduciary obligations) where mixed funds might well eventuate, absent, as here, any contrary requirement.

# Accordingly, I am unable to conclude by reference to the language of the JVA, having regard to the nature of the JVA and the circumstances attending the joint venture relationship, that the necessary clarity is present for the inference of an imputed express trust.

# **JVA and fiduciary relationship?**

# The Court of Appeal of the Supreme Court of Victoria in *Assad v Eliana Construction & Developing Group Pty Ltd* [2015] VSCA 53 observed that “there is no generally accepted checklist by reference to which it can be determined whether or not a joint venture involves a fiduciary relationship” between the joint venturers, noting that “the most that can be said” is that “whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties would to have undertaken”: at [54]. Usefully, in *King v Adams* [2016] NSWSC 1798 Sackar J noted that the character and purpose of the relationship “lies at the core” of the determination which is established through an analysis of the express agreement, “the course of dealings between them”, and the relevant circumstances surrounding their relationship: at [39].

# A detailed investigation of the nature of fiduciary relationships was undertaken by the High Court in *John Alexander’s Clubs Pty Ltd v White City Tennis Club Limited* (2010) 241 CLR 1. The joint judgment of French CJ, Gummow, Hayne, Heydon and Kiefel JJ, by reference to *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 [per Mason J (as he then was)] noted that the “critical feature” was “that the fiduciary undertakes or agrees to act *for or on behalf of* or *in the interests of* another person in the exercise of a *power* or *discretion* which will affect the interests of that other person in a legal or practical sense” and from this power or discretion “comes the duty to exercise it in the interests of the person to whom it is owed”: at 34 [86]. The Court then noted, by reference to Justice Lehane (writing extra-judicially), two points relevant to that feature. The first was that phrases such as “for or on behalf of” and “in the interests of” another person “must be understood in a reasonably strict sense, lest the criterion they formulate becomes circular”: at 35 [88]. Specifically referable to Justice Lehane’s first point (and referable directly to the issues here) is the question: when is a contractual stipulation inserted for the benefit of one party a right to act “solely in the interests of” the party for whose benefit it was inserted?: at 35 [89].

# *John Alexander’s Clubs* then noted that Justice Lehane’s second point was that the reason why commercial transactions falling outside the accepted traditional categories of fiduciary relationship “often do not give rise to fiduciary duties” is not that they are “commercial” in nature, but that “they do not meet the criteria for characterisation as fiduciary in nature” at 35 [90]. Consistently with that, the Court referred to a further extract from Mason J in *Hospital Products* to the effect that where the contract provides the foundation of a fiduciary relationship, “it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties”, noting that the “fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them”: at 36 [91]. That extract from Mason J went on to determine that the “fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction”: also at 36 [91].

# Both the facts of *John Alexander’s Clubs* and the survey of the facts, in that case, of *Hospital Products* [at least insofar as Mason J (in dissent) analysed them in the circumstances] show howthe different factual backgrounds can have a significant effect on the outcome. In particular, with respect to *John Alexander’s Clubs*, the High Court referred to such matters as: non-reliance on representations; not being overborne by some greater strength; not depending on the alleged fiduciary to carry out dealings of which the alleged beneficiary of those obligations was necessarily ignorant; not trusting the alleged fiduciary to do anything; and being open about any breach of contract: at 33-34 [82]-[83]. Later, it canvassed such further matters as being in constant contact; both parties operating in a small part of Australia; the alleged fiduciary being in an excellent position to observe the changing scene and protect its interests; and, even if the alleged fiduciary was in a position to deal secretly or misleadingly with the other parties, it was not alleged to have done so: at 36-37 [93].

# As Greenwood J in *Oliver Hume SEQ Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 observed about Mason J’s analysis, he had held that, although the fiduciary’s capacity to make decisions and take action in some matters by reference to its “own interests” was inconsistent with the existence of a “general fiduciary relationship”, that circumstance did not “exclude the existence of a more limited fiduciary relationship for it is well settled that a person may be a fiduciary in some activities but not in others”: at [251].With respect to Mason J’s “limited” fiduciary obligation “finding” in *Hospital Products*, there were facts such as: vulnerability created by entrusting the Australian distributor with the protection, promotion and custodianship of its product’s goodwill in Australia; the US entity being a remote principal lacking the capacity to observe what was happening half a world away; the alleged fiduciaries being the only persons in contact with the Australian market; and the alleged fiduciaries being in a position to take every opportunity to enrich themselves at the other’s expense: at 36-37 [93].

# Another important point arising out of *John Alexander’s Clubs* was a reference by the High Court to the characterisation of the alleged breach of duty (dealt with when considering the “new construction argument” that had been newly raised in the High Court) that, if that argument was correct, the “breach of duty would not primarily be a breach of fiduciary duty or an equitable fraud or an item of unconscionable conduct, but a breach of a contractual covenant”: at 38 [97]. The High Court went on to state that “to impose a constructive trust for a breach of contract would be, if not an impossible step, at least a very unusual and extreme one”: at 38 [97].

# In rejecting “vulnerability”, *John Alexander’s Clubs* referred to specific factual matters such as: not relying on representations; not being overborne by some greater strength possessed by the other party; and not depending on the other party to carry out dealings of which the “vulnerable” party was necessarily ignorant. It was held that such things meant, for that case, that the “only vulnerability” was that which “any contracting party has to breach by another”, and that the “only reliance” was “that which any contracting party has on performance by another”: at 33-34 [82]-[83].

# Because of the difficulties in this case in finding where the less than bright line lies between the existence of a fiduciary relationship and not, it is helpful to have recourse to a recent article by Professor (formerly Federal Court Justice) Paul Finn, “*Fiduciary Reflections*” (2014) 88 ALJ 127. The author first notes the following propositions, at 139:

it is obviously not enough that one is in an ascendant position over another (as such is the invariable prerequisite for the unconscionability principle);

it is obviously not enough that one has the practical capacity to influence the other (as representations are often made and information is often supplied – or not supplied – with the object of, and in fact, influencing a host of contractual dealings);

it is obviously not enough that the other party is in a position of vulnerability (as such is the almost inevitable state, in greater or lesser degree, for most parties in contractual relationships);

it is obviously not enough that some degree of trust and confidence is there (as these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings);

it is obviously not enough that there is a dependence by one party upon the other; and

elements of all of the above may be present in a dealing without a relationship being in any way fiduciary, as something more is needed.

# The learned author then goes on to propose that what must be shown is that the “actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his or her interests in and for the purposes of the relationship”: also 139. As he then notes, “ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement”: also 139. He added that the critical matter in the end is the role, or function, that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other’s affairs or so align that party with the protection or advancement of that other’s interest that the foundation exists for the “fiduciary expectation”: also 139.

# The plaintiff contends that its position as a Contributor investing “risk capital” and the position of trust and confidence that the JVA placed in E-Coastal, as Proprietor, both in terms of the management of the development and the management of the plaintiff’s investment, meant that it was vulnerable, that it had no means to satisfy itself about matters, and that the other parties were totally dependent on E-Coastal to honour its obligations to them. Expressed in other words, the contention was for a foundation that a fiduciary expectation existed. The evidence given by Mr Mackellar, while undoubtedly expressing exasperation about his inability to obtain accurate, truthful information, occurred later in time than the entry into of the JVA and only occurred when there were reasons to believe that the Project was far more developed than Mr Eaton was indicating. That, necessarily, is not conclusive (since the course of later dealings between them, through their controlling minds, is also relevant).

# At the time of entry into the JVA, the import of Mr Mackellar’s evidence was that he, on behalf of the plaintiff, was simply involved in investing. He had had reasonably successful investments involving Mr Eaton’s entities previously. From the evidence, he was not concerned about strict adherence to the reporting obligations of the JVA, particularly where the only real risk, as he saw it, though significant in itself, was the loss of the original contribution of $70,000.00. This was in circumstances where any objective appreciation of the proposed Ninji Project as envisaged by the JVA did not suggest such a loss in any way. It should be noted that the JVA did protect the plaintiff from “the commercial risks associated with the Project” and expressly did provide that the Contributors were not to become involved in the management of the Project (thereby avoiding risking their personal exposure to liability). Additionally, that left all project costs to be borne by E-Coastal alone. But, while the plaintiff did contractually concede to E-Coastal the conduct and management of the project, it was not otherwise precluded from inquiring. Clause 9 required meetings and interim reporting by E-Coastal to the plaintiff and Clause 13 allowed each party to have access to “books of account, information, accounts, registers and records or storage media” of whatever kind and/or other documents which related to the “JVA” or anything done or to the done under “the JVA” *and* “to take extracts or copies”. The plaintiff, on the evidence, did not seek to take advantage of those rights.

# The plaintiff contends that aspects of Clause 3 did not preclude the existence of fiduciary duties because, for instance, Clause 3.3.3 imposed an obligation to “account”. Did “account”, in that context, convey the obligation of E-Coastal to do more than calculate and pay that Entitlement as it became due from time to time, where Clause 3.5 on its face sought to preclude the JVA being subjected to any specific fiduciary duty? On its very terms though, Clause 3.5 expressly acknowledged that it only applied to “the extent permitted by law.” An important consideration in determining the ambit and consequential effect of that “exclusion” lies in the analysis of Professor Finn of *ASIC v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35. There, a letter of retainer provided expressly that the engagement was “… not in any other capacity including as a fiduciary.” It was held to be effective. But Professor Finn argues that, while it “may have been a genuine statement of intention”, as “an effective statement, I consider it probably was not”, because “as a matter of characterisation, it appears to have mis-described the factual relationship created”: at (2014) 88 ALJ 127, 143. He then suggested that “the courts should be slow indeed to give their blessing to a blanket denial of fiduciary responsibility in a relationship which manifestly would otherwise be fiduciary”: also at 143. Where, as here, the JVA did not “explicitly and unequivocally” authorise the use of a potential fiduciary’s position, opportunity or knowledge “for its own benefit or gain”, a clause such as Clause 3.5 (even in the context of Clause 3.2.1) should be characterised as ineffective in the context of the JVA and the relationship generated from it (where a limited fiduciary relationship arose from the circumstances that occurred), such that a significant imbalance of knowledge (and the possible exploitation of it) resulted. Although Clause 14.1 purported to negate the assumption of any additional obligation, apart from what the JVA otherwise stated, it is acknowledged that no one aspect is conclusive. As discussed in *Strategic Property Reservoir Pty Ltd v Condec Pty Ltd* [2012] VSC 634 at [164], while clauses such as clauses 20.1 and 20.2 are general in their expression, they can, if there are other indicators of a fiduciary kind, be used in aid of that conclusion.

# Further, in determining whether or not fiduciary obligations arose at the time of the JVA, or even later (by emerging circumstances such as *John Alexander’s Clubs* explored), to what extent did Mr Eaton’s later behaviour as the controlling mind of E-Coastal [including lying about the state of the Project and preferring payments to be made otherwise legitimately (in the absence of contrary fiduciary or trust obligations) to other legal entities over those which were the subject of other obligations undertaken by E-Coastal outside the terms of the JVA] necessarily have meant that the plaintiff was relevantly vulnerable or disadvantaged?

# Some assistance can be obtained from considering two further cases. The first is *Caple v Wilson* [2016] VSC 704. Robson J, sitting in the Commercial Court, found that, though contested, there was a joint venture: at [118]. He then considered whether any fiduciary relationship existed. In conjunction with dealing with the contention (regarding specific land on which units were to be “created by the development of land” and which, when created, were held by a company controlled by one joint venturer) that a trust existed, Robson J did not accept that the trust was proved but, nevertheless, did find that, since that joint venturer effectively controlled that company and since the relevant JVA required that person to apply such assets “solely to produce a profit for the joint venture”, he was under a “fiduciary duty to not permit the use of those assets other than for the purpose of the joint venture”: at [131]-[133].

# The second case was one relied upon in *Caple*, though for moulding the relief granted. It was *Ross River Ltd & Anor v Waveley Commercial Ltd & Ors* [2013] EWCA Civ 910. There, similar arguments to here concerning the joint venture being set up and conducted “on purely a contractual basis” were raised: at [30]. The primary judge’s finding that a fiduciary relationship existed was upheld: at [61]. There was a “side” agreement; but it did not disturb the fundamental findings. The primary judge had found that, under the relevant JVA, one party “had complete control over the operation of the joint venture” at a time when it was “to receive the proceeds of (the) disposals” of interests in a developed “supermarket site”: at [39]. It was also to incur the expenditure, pay the sums due, and to “account” (for specified profits): at [39]. In particular, Clause 10.5 “appeared to contemplate that (the developer) was not entitled to pay itself out of the revenues of the development before it accounted”: at [39]. The other party “had no control over most if not all of those matters”: at [39]. Importantly, it was held at first instance that the other party “had to trust” the controlling party and its relevant director both as to the operation and accounting: at [39].

# *Ross River* noted that besides the fiduciary obligation to act in good faith, it was correct for the primary judge to find also that a duty was owed not to allow a conflict between its own interests and its fiduciary duty to the other party: at [40]-[41]. The content of that latter obligation was “to act in good faith in relation to the… entitlement to receive (its defined benefit) and not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of the (other party’s) entitlement to receive (its benefit)”: at [41]. Not relevant to this case (as it was not pleaded), there was also a finding by the primary judge that the influential shadow director did owe a fiduciary duty correlating to that owed by the company that he directed: at [44]. That was upheld on appeal, especially since that director was “entirely in control”: at [60]. More generally, the Court of Appeal concluded that *John v James* [1991] FSR 397 (examined by the Court) showed “a clear and instructive example of a transaction in the nature of a joint venture where the relevant assets belong legally and beneficially to one party, whose task it is to exploit them, but they are to be exploited for the common benefit of both parties and where fiduciary duties arose from the situation despite the fact that the operator had its own personal interest in the exploitation to which it was entitled to have regard”: at [53]-[55]. After considering several other cases as well, it was held that they were relevant in setting out the principles, and as examples of their application: at [62].

# As to the ambit of such fiduciary duties, *Ross River* held that, while it was not a breach to pay an expense which was properly payable, the fiduciary duty threw the “burden” on the fiduciary to “justify any payment in any case where there was any doubt as to whether it was properly made”: at [64]. Concerning such payments, the Court of Appeal held that the correct analysis was that the operator/fiduciary was “not entitled to pay sums to itself, for its own benefit or to connected persons (not being proper development expenses)” in advance of payment; or, alternatively expressed, the fiduciary duty “did not permit (the operator) to make payment out of the joint venture revenues [in advance of any payment to (the other joint venturer) of its entitlement…] other than proper payments of development expenses…, and, secondly, required (the operator and its liable director) to justify any payment made, in the event of dispute”: at [96]-[98]. Necessarily, any such onus can be only an evidential one here. Although the Court of Appeal interpreted Clause 10.5 to require payment to the other joint venturer in preference to itself, it is clear that it was not on that basis alone that both the duty and the breach were determined. As it stated, “the main part of (the beneficiary’s) case, certainly if measured in financial terms, was not that (the fiduciary) had paid itself its own share too early, but also that it had paid a substantial part of the beneficiary’s share, which was a breach of a more fundamental obligation than that of Clause 10.5”: at [92]. If a fiduciary duty is to be imposed here, it would be in terms of the alternative expression of the formulation in *Ross River*. Such would be in accord with the pleadings here.

# Overall, the case here against E-Coastal is a finely balanced one where there are strong contractual arguments met by strong fiduciary arguments. The contractual arguments have been canvassed (particularly in the analysis of the “trust” arguments). But what is the weight to be ascribed to the fiduciary arguments? First, there was trust placed in E-Coastal by the plaintiff, in the context of previous successful dealings arranged by both dominant directors and by reason of the initial ongoing behaviour by Mr Eaton. Secondly, the rights to inspect and to require information under the JVA were rendered nugatory in circumstances where Mr Eaton, as the controlling mind of E-Coastal, decided to lie and deny, thereby adding to the vulnerability of the plaintiff which was otherwise excluded from the project’s operation, especially in circumstances where its controlling mind had been United States since 1998 and was known to Mr Eaton to make yearly visits only. Thirdly, although the right to be paid the entitlement under Clause 8 was not expressly premised on a priority, it existed in the circumstances of the JVA and the ongoing dealings in a way which gave rise to the entity in almost total control to determine if it would “elect” to discharge that obligation when it arose each time, being a time when the entitlement should have been paid, and where it was able to conceal the circumstances which constituted the trigger for the right to sue. Fourthly, the purpose behind the contribution was to achieve an entitlement protected from “commercial risks”.

# Consequently, these factors lead to a conclusion that it was an appropriate expectation on the plaintiff’s part that E-Coastal would, in and for the purposes of the relationship, not prefer its own interests when they were in conflict with that duty as formulated as the alternatively expressed one in *Ross River*. Hence, the acts which preferenced the payment of the non-development sums of the Project where Mr Eaton, as the controlling mind, decided that such competing claims on E-Coastal’s overall funds should have preference over the discharge of that “entitlement” obligation to the plaintiff under the JVA, constituted a breach of E-Coastal’s fiduciary duty not to use the assets of the joint venture for non-development purposes in preference to the rights of the plaintiff. That and other non-JVA development expenses were made in circumstances where the defendants’ own evidence showed that there were sums available to E-Coastal over a lengthy period of time where those available funds (even in those bank accounts of most direct relevance here) exceeded the relevant entitlement obligations. That prevailed when each of the two entitlements for the plaintiff arose for payment. It is not relevant, on this conclusion, that the balance of money “lent” generally to E-Coastal by Mr and Mrs Eaton equalled or exceeded the payments to them, or made for their benefit, from E-Coastal, especially where there were other E-Coastal “accounts” (see, for example, Exhibit “CJE45” and paragraph 220 to Mr Eaton’s affidavit) from which sums were, inferentially, paid, in this case, to Mrs Eaton. As well, E-Coastal used the two identified accounts with Suncorp and NAB (as revealed in Exhibit 7) to “receive income” and “pay out costs” “associated with these *other* projects” (emphasis added): see paragraphs 135 to 139 (inclusive) and “CJE31” of Mr Eaton’s affidavit. Additionally, it does not matter whether the second defendant believed, in error, that E-Coastal had 15 months from each settlement for each Lot before the “entitlement” was triggered, because the payments made by E-Coastal still preferred non-JVA obligations over JVA obligations such as the fiduciary obligation as determined and, in any event, were never paid by E-Coastal.

# **JVA, and trust from identification of a fund?**

# What has been referred to as the *Palmer v Carey* principle was discussed by the Queensland Court of Appeal in *FTV Holdings Cairns Pty Ltd v Smith* [2014] QCA 217. There, Fraser JA, with whom Holmes JA (as she then was) and Ann Lyons J (as she then was) agreed, explained that in *Palmer v Carey* [1926] AC 703 (at 706) the Privy Council approved a statement in *Rodick v Gandell* (citation omitted) that “an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debt or fund to which the order refers”: at [42]. As explained in that case by Fraser JA, the borrowers in that case “did not merely promise that they would fund payment of the… debt from the proceeds of the sale of the house*…* (but) agreed to appropriate the proceeds of sale to the (other party) to the extent necessary to discharge the (other party’s debt)”: also [42]. As Fraser JA went on to further observe, a contract to create a charge on the proceeds of a sale to secure payment of a specific debt “may itself amount to an equitable assignment” (quoting relevant authority): at [44].

# It was to *FTV Holdings Cairns* that McGill SC DCJ referred in *Caduceus Enterprises International Pty Ltd v Complete Lending Pty Ltd* [2015] QDC 159. McGill SC DCJ relied upon *FTV Holdings Cairns* as citing, with approval, an earlier decision of the Queensland Court of Appeal in *Re Bruynius* [1995] 1 Qd R 492at [44]. The facts of *Re Bruynius* were explained in traditionally neutral terms by Fitzgerald P as “an engagement by A to B that A will pay to D, as trustee for A and B, money received by A in payment of a debt from C”: at 493. In the joint judgment of Pincus JA and Derrington J, it was summarised as “a promise… to pay to the solicitors the sum then due to (the promisor) under the Act, when received”: at 499. In *Jackson v Richards* [2005] NSWSC 630, White J noted that “there must be a specific fund from which the debt owing is to be paid”: at [18]. He added that, “for such a charge to be created by an agreement to pay a debt out of a fund to come to the debtor, the parties must have agreed that the debtor would keep the fund separate from his other assets:” at [19]. This last statement was amplified by reference to non-qualifying arrangements such as: an intention or assumption that the defendant could add the identified moneys to other assets (e.g. by crediting them to an existing bank account); or that they could be used to reduce an overdraft; or that they could be used to discharge other debts: at [20]. Such non-qualifications would cover the JVA rights and obligations here. As summarised in the learned text *Meagher, Gummow & Lehane’s Equity: Doctrine and Remedies* (5th ed, Butterworths LexisNexis, 2015), it is necessary for this principle to apply to specify a specific fund, adding that a “notice directing a debtor to pay X is an effective assignment only if it identifies the *fund* out of which the payment is to be made” (emphasis added). In support, it cites, among other authorities, *Palmer v Carey* and *Re Bruynius*.

# In the JVA in this case, while it has been contended that Part 11 of the Schedule designated an “entitlement” to be specifically payable from the “Receipts”, that contention is contrary to the definition of “Contributors’ Entitlements” in Clause 1.1.10, which simply states that such an entitlement “means amounts *equal to* the percentage of the Receipts set out in Part 11 of the Schedule” (as I have already emphasised). The provision itself, in its JVA context, does not change that construction of the definition.

# No resort to Clause 6.1 can avail the plaintiff here. As earlier analysed, any such fixed charge becomes legally ineffective once the designated “Asset” ceases to exist, which was indisputably the primary object of the Ninji Project. That Asset was never sold, though it was converted to registered Lots. When so converted, it was not the original land; and, moreover, considerable money would have been spent to engineer the conversion, much of which far exceeded any potential Contributors’ Entitlement. Given the explicit terms of Clause 6.1, it is difficult to accept that reasonable business persons would have agreed that the Receipts constituted either an identifiable separate fund or were to be any trust concern. Any concern that Clause 4.4 might impact on that conclusion is allayed by reference to that restriction being subject to permission to do so “by” the JVA. “Other” Joint Venture property has not been identified; but, if it were to be identified as the Lots, they were “known” to be required to be sold also. Even if the “property” the subject of the charge were to have become converted by subdivision into the Lots, it is not arguable that the “proceeds” from the sale of those Lots were consequently so charged, because Clause 14.5 is explicitly to the contrary, as in Clause 14.4.1. The power to create a mortgage permitted by Clause 6.1 was deliberately not followed up by the plaintiff and Clause 3.7 expressly empowered E-Coastal to “subject the Asset to securities” to “secure” authorised borrowing.

# Thus, there is nothing that has been identified that leads to the application of any principle having the effect that a charge was created over the actual Receipts and that an equitable assignment, at least to the extent of the plaintiff’s “debt”, occurred.

# **JVA and constructive trust?**

# From the plaintiff’s written submissions, what appears to be now contended for here on this issue is a remedial constructive trust to be declared as having been created over the Receipts.

# Putting to one side, for the moment, the issues of both fiduciary duties and the creation of a trust whereby a benefit has been obtained in breach of equitable obligations, a constructive trust here seems to be based upon “an unconscionable denial of a beneficial interest in property to which a person would otherwise have a legal right to deal with”, relying upon *Koh v Chan* (1997) 139 FLR 410. As explained by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583, “where there are express or implied contractual provisions specially dealing with the consequences of failure of the joint relationship or endeavour, they will ordinarily apply in law and equity to regulate the rights and duties of the parties….”: at 618. Here, there was no such “failure”; and there were “contractual duties.” Unconscionability is not a basis for relief “in some loose sense where all principles are at large”: see *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 (at 324, per the plurality of Gleeson CJ, McHugh, Gummow, Hayne, and Heydon JJ). The pages of the judgment in *Koh* which were relied upon only deal with the effect of an identifiable arguable illegality as operative in denying an assertion of a beneficial interest: see, for instance, at 428. At 429, putting the circumstances of that case in question at its highest, it was not thought “proper” to “uphold the plea of illegality so as to defeat the plaintiff’s claim”.

# Therefore, given the factual matters discussed in the consideration of the issues of fiduciary duties and other equitable obligations, I reject this alternative submission of a constructive trust being imposed “contrary to the intention of the parties”, as contended for the plaintiff in its written submissions.

Receipt liability and Accessorial liability?

# As it has been found that there are fiduciary breaches committed by E-Coastal (although no application of other principles of equity such as that the Receipts were impressed with a trust in favour of the plaintiff), it is necessary to consider whether any liability flows through to Mr Eaton and, then, whether any liability flows through to Mrs Eaton. The plaintiff’s trial pleadings and initial written submissions limit the consideration of their liability to the issues of receipt liability and accessorial liability. Although expressed more discursively than for the second defendant, the allegations against the fourth defendant for these issues mirrors the former. Therefore, focussing on the allegations against the second defendant for accessorial liability, the plaintiff has pleaded, perhaps in an ungainly way, the knowledge of “an honest and reasonable person” (vis-à-vis the second defendant), a “breach of fiduciary duty” by E-Coastal, and the second defendant’s “knowing participation” in that breach of fiduciary duty. In *Farah*, it was held that, concerning being “liable as knowing participants in a dishonest and fraudulent design”, such an allegation had the seriousness “which means that it ought to have been pleaded and particularised”: at 162 [170]. The defendants have taken no issue in their submissions about such pleadings’ possible inadequacy or the possible exclusion of the relevant principles of equity. Hence, I intend to consider these issues based on the evidence led about them at trial.

# Recently, the Queensland Court of Appeal in *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd & Anor* [2016] QCA 88, through the judgment of Atkinson J, with whom Margaret McMurdo P and Mullins J agreed, noted that the principles of this liability generally are those set out in *Barnes v Addy* (1874) LR 9 Ch App 244: at [43]. Atkinson J then quoted a passage from Lord Selbourne LC in that case about the rule: also at [43]. It explained that:

# the responsibility imposed on a trustee may be extended in equity to others who are not properly trustees;

# that extension applies to such others as are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui* *que trust;*

# on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, even though they may be transactions of which a Court of Equity may disprove; and

# should those strangers receive and become chargeable with some part of the trust property, or should they assist with knowledge in a dishonest and fraudulent design on the part of the trustees, they may be made constructive trustees.

# When the High Court considered that form of liability in *Farah Constructions,* as noted by Atkinson J (at [44]), the Court held that the form of liability referred to in the first part of latter part of that explanation of the rule is often called the “first limb” of *Barnes v Addy* and that the form of liability referred to in the second part of it is often referred to as the “second limb.” Further, the Court stated that it had become common to describe the first limb as involving “knowing receipt” and the second limb as involving “knowing assistance”, even though Lord Selbourne LC did not use the expression “knowing receipt.” The Court then remarked that Lord Selbourne LC’s expression was “receive and become chargeable”, with the consequence that persons who receive trust property “become chargeable if it is established that they received it with notice of the trust.”

# As examined in *Comgroup Supplies*,“knowledge” is essential to both limbs: at [46]. In terms of what knowledge is sufficient, as Atkinson J remarked about *Farah Constructions,* the High Court examined the kinds of knowledge that were a requisite for the second limb to apply. Those categories of knowledge are:

# actual knowledge;

# wilfully shutting one’s eyes to the obvious;

# wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make; and

# knowledge of circumstances which would indicate the facts to an honest and reasonable person.

# As *Comgroup Supplies* went on to note, to become liable for second limb knowing assistance, the respondents must therefore “at least have had the knowledge of circumstances which would indicate the facts to an honest and reasonable person”, with that test being “objective”: at [48].

# With respect to the first limb, *Comgroup Supplies* observed that the test for “knowledge” is “similar to that for knowing assistance”, relying upon statements in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [268]–[270]: at [52].

# A very detailed examination of the *Barnes v Addy* principles was undertaken by Jackson J in *Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd & Anor* [2015] 1 Qd R 75. As considered by Jackson J, before *Farah* the first limb liability had been assumed, but rarely if at all decided, to extend to a breach of fiduciary duty by a company director involved with a misapplication of that company’s property, it being noted that *Farah* was decided on that assumption too: at 87 [64]. But, as noted by Jackson J, “the High Court made it clear that it was assuming, not deciding, that question.” It is noted that the footnote to the High Court’s discussion of “assumption” referred expressly to the judgment of Jacobs P in *DPC Estates Pty Ltd v Grey* [1974] 1 NSWLR 443 at 459-460 which is referable to property received from a fiduciary in breach “by a stranger”. And it was in a more recent decision of the New South Wales Court of Appeal, referred to by Jackson J (and noted below), that consideration was given to the basis of that extension, being that “a director is treated as if a trustee of the funds or property of the company under his control” if so misapplied in that way: at 87 [64].

# But it is not the director’s duty owed to E-Coastal that is the subject of the present consideration. It, like *Farah,* is concerned with the effects (within the ambit of the pleadings) of the controlling director causing the fiduciary company to breach its fiduciary duty owed to the third party (in *Farah*, Say-Dee). As observed by Giles JA in *Kalls Enterprises Pty Ltd (in liq) v Baloglow & Anor* (2007) 63 ACSR 557 with whom, on this point, Ipp JA and Basten JJA agreed, in *Farah* the court “was not concerned with breach of a director’s fiduciary duty owed to the company” (adding, generally, that any questioning at [113] of liability for knowing receipt from a non-trustee fiduciary was not directed to that situation”): at 587 [153].

# In turning to second limb liability, *Cornerstone* dealt with the outcome where it is not alleged - and one might add “or proved” - that there was any actual dishonesty or any actual fraudulent design: at 94 [88]. As Jackson J went on to confirm, there is no formulation of second limb liability “without the integer of dishonest and fraudulent design”: at 94 [89]. Jackson J further held that, therefore, there “must be a transgression of ordinary standards of honest behaviour to engage second limb *Barnes v Addy* liability”: at 94 [92]. It can be added that it is not necessary to say anything else by way of elaboration save to confirm that it is “not necessary to demonstrate that the person thought about what those standards were”: see *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at [124].

# With respect to the second limb’s connection with a breach of fiduciary duty in that case, Jackson J held that, even if there was a breach there, there “was no dishonest and fraudulent design”: at 95 [94] – [95]. That, of course, was directed to the assisting party. It must apply equally where the fiduciary breach affects a recognised beneficiary of the breaching company, as *Farah* had held.

# On the basis that such a breach of fiduciary duty as determined permits the application of the principles of first limb liability, then the kind of analysis conducted by McGill SC in *Caduceus* can be followed for Mr Eaton. There, the second defendant (though it was a corporate entity) received the relevant sums. As the judgment noted, “notice” (that is, knowledge of the facts which would put an honest and reasonable person on inquiry) is sufficient, which was established on the evidence there: at [64]. Thus, at least for the sums Mr Eaton designated as sums that he received himself (though he contested both some sources and the characterisation contended for by the plaintiff), being $34,455.00 (where it is irrelevant that some of those receipts were from E-Coastal accounts other than the primary NAB and Suncorp accounts referable to this Project in circumstances where the spreadsheet prepared by Mr Eaton shows payments by purchasers of Lots on and from 8 May 2007 “to” E-Coastal), he would have received those with “notice”. (That figure is ascertained from a detailed examination of all relevant bank accounts, the nature of the entries in those and the “explanation” contained in “Annexure A” to the defendants’ Further Amended Defence, as well as Mr Eaton’s affidavit and, in particular, Exhibit “CJE43”. It excludes, for instance, the second amount of $3,200.00 in mid-September 2007 but includes the $3,200.00 on 17 July 2008 because of the Annexure “A” entry for it). But this is not a case of the second defendant being the alter ego of E-Coastal – which provided an alternative basis for recovery in *Caduceus* (at [67]) – but the reverse. E-Coastal’s position is different from *Ross River* to the extent to which the breaching fiduciary allocated specific funds from the development funds to satisfy its profit sharing in the arrangement between the parties, so preferring its interest over the beneficiary’s interest. The Development Fee (earlier discussed) cannot qualify for any preference in that way, if only because of the lack of evidence that it was allocated in some way to E-Coastal’s benefit. I acknowledge the criticism of Jackson J in *Cornerstone* of attempts to undermine the separate corporate legal personality principle accepted in *Saloman* (citation omitted), by treating both as the same legal personality (at [96]-[101]), although the issue here is what extension of such liability, if any, can apply to the receipts by the separate legal entity, Mrs Eaton (apart from possible first limb liability as a separate liability). Because Mrs Eaton left entirely to Mr Eaton the choices and decisions of how E-Coastal was to pay Mrs Eaton – in circumstances where she conceded she did not know how and when such payments were made, for example, to meet mortgage obligations over the residence owned by her but in which both resided at relevant times – the recipient liability of “receipt” and “chargeability” might, arguably, be held to extend to payments to Mrs Eaton where Mr Eaton as the controlling mind of the giver directed payments to his wife’s accounts without notifying her but with him having notice of the obligations owed to the plaintiff and, therefore, the misapplication of those payments in fiduciary obligation terms. From Exhibit “CJE45” to Mr Eaton’s affidavit, those payments after 8 May 2007 [allowing for the deduction of $134,460.00 (as otherwise explained as a loan directly from NAB)] totalled $107,000.00. As for those sums not paid from either the acknowledged NAB 56-427-6459 account or the acknowledge Suncorp 034202589 account, the deposits in both the NAB 86-658-7033 account and the Suncorp 75-071-2306 account referable to “E-Coastal Dev. P” have not been explained at all by the defendants in any way so to exclude, on the relevant standard of proof, E-Coastal as the relevant source of funds to her, especially since the matter is not one of the payment to her of “trust” monies, but, rather, payments in breach of a fiduciary duty owed by E-Coastal more generally. All these accounts have been put into evidence as being authentic, accurate and relevant. The addition of those sums received by both Mr and Mrs Eaton yields a figure in excess of the fiduciary related obligation of E-Coastal to the plaintiff of $125,128.25. But any attribution here is more removed than “lifting the corporate veil” and, accordingly, such receipts by Mrs Eaton fall outside first limb liability of Mr Eaton alone on accepted principles: see *Farah* at 145 [121] in its discussion of propositions to which it was argued the law ought to “conform”, and the rejection of any change that “abandons the requirement for receipt of property, and… alters the notice test.”

# As for second limb liability, Mr Eaton’s actions can be determined to involve such liability only if “dishonest and fraudulent design” is established. Acknowledging the necessary application of the assessment required by *Briginshaw* – as discussed in *Farah Constructions* at 162 [170] – I find that he was a “knowing participant” in a “dishonest and fraudulent design.” First, Mr Eaton’s participation was necessary to generate a breach of fiduciary duty by E-Coastal. Secondly, in determining any “design” about what E-Coastal did, Mr Eaton was the sole factor in the ongoing efforts to deceive the plaintiff as to the existence of facts which would have been sufficient to trigger the right to claim for and, if necessary, sue for the entitlement. Thirdly, the payments from E-Coastal that he caused to be made, undoubtedly, at least for his and his wife’s benefit (if not for the third defendant and others – even if only later on) were tied to the breaches of the fiduciary obligations found to have existed. Fourthly, Mr Eaton took deliberate steps to, at first, delay and then, later, obstruct the plaintiff’s efforts to seek recovery of its entitlements whilst deliberately paying, besides development costs of the Project, other sums to himself and Mrs Eaton (which could never have been Project Costs), as well as the debts of other projects for which E-Coastal had primary responsibility (revealed in paragraphs 135-139 of Mr Eaton’s affidavit, Exhibit “CJE31”, and answers in cross-examination to the effect that, as E-Coastal did any business, he “used those accounts to pay whatever the expenses were”, without segregating the funds in any way). In combination, they show the dishonesty and fraud necessary in equity to be found to be a knowing assistant to E-Coastal’s breaches of fiduciary duty. From the analyses done about those sums (see para [125] of these Reasons), they exceed the total entitlement (identified in para [133] of these Reasons) of $125,128.25.

# Turning then to Mrs Eaton, following the path traversed in *Caduceus* (at [63]), I am not persuaded that Mrs Eaton did not honestly believe that the plaintiff had no claim upon the monies she was receiving and I am not persuaded that no reasonable person in her position could have held that view or that she “wilfully and recklessly” failed to make such inquiries as an honest and reasonable person would make. Thus, insofar as second limb liability is to be considered for Mrs Eaton, I am not satisfied, necessarily bearing in mind the nature of this serious allegation, that there was any dishonest and fraudulent design on her part, given the analysis that I have undertaken of what “knowledge” she had and the circumstances in which she found herself. To adopt the “most recent formulation” from *Farah*, on the evidence there is nothing to show that Mrs Eaton had “consciousness of those elements of the transactions which make participation transgress ordinary standards of honest behaviour”: at 161 [165]. It is just not possible in this case to bring her within any of the four categories, even that of “wilfully shutting one’s eyes to the obvious”. As well, as to first limb liability for Mrs Eaton, although she was the recipient of those identified sums (discussed earlier), I find (as also discussed earlier) that she did not have any relevant “notice” (as Mr Eaton did).

Causation

# *Maguire v Makaronis* (1996-1997) 188 CLR 449 discussed causation referable to breaches of fiduciary duty. In particular, in a consideration of the “personal remedy” of compensation for that which the plaintiff has lost by the fiduciary acting in breach of duty – and likewise where that which is sought is a “proprietary remedy” of a constructive trust – “there directly arises a need to specify criteria for a sufficient connection (or ‘causation’) between breach of duty and… the loss sustained…”: at 468. Here, the relevant connection between breach and loss is that, by a combination of intentional delay and preferencing of interest over duty by relevant extra-JVA payments, the plaintiff has been denied the opportunity to recover, contractually, its Contributor’s Entitlements. Even though no recovery can be had against E-Coastal, receipt liability and accessorial liability depends on this fiduciary breach and, therefore, the same causative aspects are relevant because the relevant payments by E-Coastal began after E-Coastal was first paid “Receipts” and after larger sums than those paid out had been paid into the primary NAB accounts for the Project. With respect to the second defendant’s accessorial liability, in light of the nature of control he had over E-Coastal, he as “a knowing assistant” can be held liable for the consequences on the underlying fiduciary’s breach. No problem of the kind canvassed in the article of Associate Professor Jamie Glister “Knowing Assistance and Equitable Compensation” (2016) 42 Aust Bar Rev 153, regarding limiting it to the consequences of the assistance only, arises where the control is so complete, as here.

Claims for “compensation” rather than a constructive trust

# As discussed in *Giumelli v Giumelli* (1999) 196 CLR 101, where a party does not establish – or, in this case, claim – “an immediate right to positive equitable relief as understood in the same sense that a right to recover damages may be seen as consequent upon a breach of contract”, before a constructive trust is imposed the court should first decide whether, having regard to the issues in litigation, there is “an appropriate remedy which falls short of the imposition of a trust”: at 113 [9]-[10]. In that decision, what was granted was the fixing of a money sum: at 125 [51].

# There is no identified property in this case on which such a constructive trust could be imposed. Nevertheless, that is not necessarily an impediment; and the court does have regard to the wishes of the claimant: see “On Equity” (Young, Croft, Smith) (Thompson Reuters) at [7.390]. And because the plaintiff’s written submissions seek a compensatory monetary remedy only, it is appropriate to grant it here in such circumstances.

Date of “Entitlement”

# The initial “year”, under the definition of it in Clause 1.1.19, ended on 30 June 2007. There was no “date” of the JVA specified and it was common ground that any relevant execution by these parties was late 2006. Then, the next year ended on 30 June 2008. By Clause 8.3, the obligation to pay “at least” annually required the first payment to be “no later than” 3 months after the end of the relevant “year.” There was a clear differentiation between the requirement for an annual payment and when that payment was to be made. And there was nothing to exclude an interpretation that successive obligations to pay could arise.

# Excluding Lots 21 and 22, Lots 17 to 33 (inclusive) generated “Receipts” from 8 May 2007 up to 15 May 2007. Hence, E-Coastal had an obligation to pay by 30 September 2007 with respect to those particular Lots. As far as the remaining four Lots (Lots 21, 22, 34 and 35), they were all finally settled, by the latest, by 5 October 2007 (where it is clear from other evidence that “5/12/07” in the spreadsheet exhibit should be “5/10/07”).

# The relevant calculations can be made after accounting for the respective “adjustments” extracted from Mr Eaton’s spreadsheets. Thus, the 2007 sum was $95,833.96 and the 2008 sum was $29,294.29. Those sums, in total, are $125,128.25.

# The remaining contractual amounts were, hence, required to be paid by 30 September 2008, since, although the further Receipts were received before 30 September 2007, the interpretation of “annually” precluded those so received after 30 June 2007 from that first annual obligation.

Dates from which interest should run

# Mr Eaton accepted that, “for the period of October 2007 through to late 2010”, E-Coastal “could’ve paid out the Contributors entitlements on Ninji but” the second defendant “applied the moneys” that were “available to E-Coastal to other purposes.”

# From the above analysis of trigger dates, it can be found that by October 2008 E-Coastal was in breach of its contractual duty concerning *all* entitlements due to the plaintiff. As *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 propounded, the appropriate remedy in equity (and, in particular the quantum of any pecuniary remedy) falls for determination at trial with the “full benefit of hindsight”: at [35]-[36]. Though that was directed to the remedy, the same approach should attend the question of interest, at least as to timing.

# The plaintiff has sought interest from 4 October 2007 on the full sum. But that offends the fact that the “balance” did not become due until the following 12 months expired. Given the nature of the breaches in this case, I will allow interest (pursuant to s 58 of the *Civil Proceedings Act* 2011) on the separate sums from, respectively, 1 October 2007 and 1 October 2008. No claim has been made for “interest in equity”: see the discussion in *Caple* at [220]-[228]. Applying, as the plaintiff’s submissions did, the “default interest” rate, the respective interest calculations yield $75,501.82 and $21,370.48, respectively.

Deregistration of E-Coastal

# As examined by McMeekin J in *Moore v Devanjul Pty Ltd (No 3)* [2012] QSC 355, upon deregistration, the former corporate entity ceases to exist: see s 601AD(1) of the *Corporations Act* 2001 (Commonwealth). As he then noted, it is “not possible to have a non-existent entity as a party to the proceedings”: at [62]. Accordingly, it was decided there that it was necessary that it “be removed as a party”, relying on r 69(1) of the *UCPR* to do so: at [63].

# In the orders that I will make I will effect that removal.

Summary

# Although I am satisfied to the requisite standard that E-Coastal had a fiduciary duty which it owed to the plaintiff and breached that duty in its conflict, preferring other interests over the interests of the plaintiff in payment of its entitlement under the JVA, because no remedy is now available against the non-existent entity, it leaves the sole liability on this issue to be against the second defendant, on the basis of being a “knowing recipient” and, or alternatively, a “knowing assistant” (for a larger sum). I am not satisfied that any trust – apart from a contended constructive trust (arising from the second defendant’s receipt and accessorial liability) for which an election to receive equitable compensation has been made – either can be inferred or was created. I am not satisfied that any equitable charge or other obligation arose. I am not satisfied that any receipt liability or accessorial liability has been proved against Mrs Eaton.

# Accordingly, I intend to give the following judgments and make the following orders:

## It is ordered that E-Coastal Developments Pty Ltd is removed as a party to the proceedings;

## It is ordered that the plaintiff’s Seventh Amended Statement of Claim, insofar as it makes allegations and seeks claims against the third defendant, is struck out;

## Leave is refused to the plaintiff to amend its pleadings to allege any further cause of action against the second defendant;

## It is adjudged that the second defendant pay the plaintiff the sum of $226,000.55 (inclusive of interest of $100,872.30);

## It is adjudged that the fourth defendant have judgment against the plaintiff;

## It is ordered that submissions on costs, if any, be filed and served by 4pm on Friday 29 September 2017.