SUPREME COURT OF QUEENSLAND

CITATION:	*Fulmer v Thompson & Ors* [2017] QSC 119
PARTIES:	**PETER JOHN FULMER** (Plaintiff) **v** **GRAHAME LIONEL THOMPSON** (First Defendant) **SHANE THOMPSON** (Second Defendant) **CAYSAND NO. 24 PTY LTD ACN 010 615 586** (Third Defendant) **CAYSAND NO. 25 PTY LTD ACN 117 364 511** (Fourth Defendant)
FILE NO/S:	No 431 of 2012
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	12 June 2017
DELIVERED AT:	Cairns
HEARING DATE:	20, 21, 22, 23 and 24 February 2017
JUDGE:	Henry J
ORDERS:	**1. Judgment for the plaintiff.** **2. Counterclaim dismissed.** **3. The plaintiff will file and serve a list of the orders he seeks by 4 pm on 7 July 2017.** **4. I will hear the parties at 9.15am on 14 July 2017 as to appropriate further orders.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the parties entered into an oral agreement for business purposes – where the parties entered into a subsequent Heads of Agreement – where parties' agreement required a 'target sum' to be met by the plaintiff – whether or not 'target sum' had been met INTERPRETATION – ADMISSIBILITY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS – MATTERS PARTICULARLY RELATING TO CONTRACT – IN GENERAL – RELEVANT PRINCIPLES – where the parties entered into an oral agreement for business purposes – where the parties entered into a subsequent Heads of

Agreement – whether or not the Heads of Agreement constitutes the entirety of the agreement

Lewison, L and Hughes, D The Interpretation of Contracts in Australia 1st ed Thomson Reuters, Sydney 2012

Helicopter Sales Pty Ltd v Rotorwork Pty Ltd (1974) 132 CLR 1, distinguished
Johnson v American Home Assurance Company (1998) 192 CLR 266, applied
Phosphate Co-operative Co v Shears (No 3) [1989] VR 665, cited

COUNSEL:	M T Hickey for the plaintiff M A Jonsson QC for the first, second and third defendants
SOLICITORS:	B & G Law for the plaintiff Preston Law for the first, second and third defendants

Introduction

[1] The plaintiff seeks orders including specific performance and damages for breach of a contract by which he acquired an interest in a vehicle sales business.

[2] The plaintiff's interest in the business was to crystallise once a profit target was reached. The owners of the business admitted on 20 January 2010 that the target sum had been met. They thereafter failed to honour their end of the bargain.

[3] Before me they argued the target sum had not been met, notwithstanding their 2010 admission to the contrary. It was an unconvincing attempt to avoid liability.

The players

[4] The plaintiff, Mr Fulmer, an experienced car salesman, commenced work on contract to a used vehicle sales business trading as Australian Motors in about 2003.[1] Drawing on his extensive contacts in the motor vehicle industry, Mr Fulmer would acquire a range of vehicles for potential acquisition and sale by Australian Motors. He would receive payment from Australian Motors for those which it chose to acquire and on-sell and would sell the balance himself.[2] He would earn at least $150,000 to $200,000 per annum performing that work.[3]

[5] Australian Motors was owned by the third defendant, Caysand No 24 Pty Ltd ("Caysand 24"). The first and second defendants, Grahame and Shane Thompson, are the directors and sole shareholders of Caysand 24.[4]

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1 T1-24 L25.
2 T1-25.
3 T1-26 L7.
4 The first, second and third defendants will be referred to as "the defendants", the fourth defendant having played no active

[6] The defendants' accountants were, and apparently still are, HQB Chartered Accountants, a Coffs Harbour based accounting firm. One of HQB's partners, Gregory Hardy, was the responsible partner for HQB's provision of services to Caysand 24 during the relevant era. However, there were occasions when Mr Hardy was on leave and another HQB partner, Ian Hogbin, was involved in HQB's provision of accountancy services to Caysand 24.

The initial oral agreement

[7] In 2005 a used car salesman, Neville Hyde, a mutual friend of Mr Fulmer and Grahame Thompson, wanted to sell his car yard. This prompted discussions between Mr Fulmer and Grahame Thompson about going into a retail operation in Townsville together.[5] Shane and Grahame Thompson and their brother Clay subsequently became involved in those discussions.[6] Mr Fulmer testified it was decided he and Clay Thompson would buy into the whole of the Australian Motors business, inclusive of its Cairns operations.[7] Grahame and Shane Thompson initially proposed this should occur by Mr Fulmer and Clay Thompson buying into Caysand 24.[8]

[8] Towards the end of 2005 at Australian Motors in Cairns, Mr Fulmer met further with Grahame, Shane and Clay Thompson, along with accountant Greg Hardy, to further discuss the setting-up of the business.[9] Mr Fulmer recalled it was at this meeting he was told he could not buy into Caysand 24 because he would acquire benefits relating to taxation and property which he would not be entitled to and that therefore a new company, Caysand 25 Pty Ltd ("Caysand 25"), would be used to set up the business.[10]

[9] Evidence on this topic was also adduced from Mr Fulmer's accountant, Mr Coutts of Coutts Redington Chartered Accountants, a Townsville based accounting firm. He confirmed the use of a new company was discussed some time during 2006 when Mr Coutts personally made inquiries of the defendants' accountant, Mr Hardy, about why no shares had been transferred to Mr Fulmer.[11] He was told there were significant problems surrounding the issuing of shares because of capital gains tax and "the assumption of imputation credits which Peter would become entitled to if the shares were issued in Caysand 24".[12]

[10] Those issues appear to have been the justification for setting up Caysand 25; to allow Mr Fulmer to acquire shares without the supposed complications arising if those shares were issued directly from Caysand 24.

[11] Mr Fulmer testified it was agreed at the meeting in 2005 that he and Clay Thompson would contribute $550,000 each in return for a 30% shareholding each in Caysand 25,

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role in the proceeding.

5 T1-26 L27.

6 T1-26 LL4-6 – T1-27 L1.

7 T1-27 L11.

8 T1-27 L30.

9 T1-27 L36 – T1-28 L10.

10 T1-28 L23.

11 T2-22 LL10-20.

12 T2-22 LL10-15.

leaving Grahame and Shane Thompson with shareholdings of 20% each.[13] It was agreed the contribution of $550,000 each was to be paid by an "up front" deposit of $150,000[14] with the balance, $400,000, to be paid from profits generated.[15]

The oral agreement is implemented

[12] In April 2006 Mr Fulmer paid a total of $150,000 pursuant to the oral agreement with Grahame and Shane Thompson that such a payment would be a part-payment deposit to be deducted from the purchase price of $550,000.[16] Mr Fulmer obtained that money by way of a loan from Suncorp Metway. He testified it was paid in two direct-deposit amounts of $90,000 and $60,000 to Caysand 24.[17] He notified Grahame Thompson and Hilary Caligaris, the accounts manager of Australian Motors, of the fact he had made the payment.[18] Mr Fulmer recalled he was told by Grahame and Shane Thompson and the accountant Greg Hardy that the profits to which he would be notionally entitled would be applied to pay off the balance of the purchase price.[19]

[13] Mr Fulmer was actually a signatore to a lease entered into in July 2006 for the rental of Neville Hyde's business premises to Caysand 25.[20] The commencement date of the lease was 1 January 2006 and Mr Fulmer's recollection is that Australian Motors began trading from that rental premises from the outset of 2006.[21] Mr Fulmer and Clay Thompson began working there from then, it having been arranged with Grahame and Shane Thompson that they would each receive $80,000 a year remuneration.[22] This was a significant reduction in Mr Fulmer's usual income; a sacrifice he made in order to buy into the business.[23] Mr Fulmer's understanding in that era was that he was working for Caysand 24.[24]

[14] Caysand 24 acquired a boat sale business called Boat Scene in Cairns in 2007.[25] Mr Fulmer's recollection was that the purchase price for the business was $350,000. He moved with his wife Jennifer and two children to Cairns in order to run that business after its acquisition in mid-2007.[26]

The Heads of Agreement

[15] Despite the significance of the initial agreement by which Mr Fulmer and Clay Thompson bought into the business, there appears to have been no written agreement entered into until Mr Fulmer entered into a document styled Heads of Agreement[27] on 16 June 2008,

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13 T1-28 LL24-37.
14 T1-32 L16.
15 T1-28 L43.
16 T1-31 LL11-25.
17 T1-31 L12.
18 T1-31 L40 – T1-32 L10.
19 T1-32 L36.
20 Ex 2.
21 T1-30 L14.
22 T1-30 LL34-39.
23 T2-3 L36.
24 T1-31 L2, T1-32 L23.
25 T1-32 L47.
26 T1-35.
27 Ex 1 Vol 1 Tab 1.

seemingly executing it in his own right and for and on behalf of Caysand 25.[28] The other parties to the Heads of Agreement are named as Grahame Thompson, Shane Thompson, Clay Thompson, Caysand 24 and Caysand 25.

[16] The Heads of Agreement had taken two and a half years to finalise.[29] It was prepared by O'Reilly Stevens Bovey Lawyers, the defendants' then solicitors. Mr Fulmer had no solicitor acting for him.[30] Mr Fulmer said he did not seek legal advice due to the "very strong working relationship" and high level of trust between him and the Thompson family.[31]

[17] The Heads of Agreement provided, inter alia:

"**PREAMBLE**

…

B Caysand 24 conducts business in the automotive and recreational boating industries and … has ten separate *profit centres* (departments) comprising:

Australian Motors – Cairns
Australian Motors – Townsville
Innisfail Motor Village (Australian Motors – Innisfail)
The Car Buying Factory
The Wholesale Department
The Reconditioning Department
The Finance Department
Administration
Caravans
Boat Scene

which are hereinafter collectively referred to as "the business".

C Grahame, Shane, Clay and Peter agreed that as from 1 January 2006 they would conduct the business together for a period of years with the view to them acquiring the business from Caysand 24 on 31 December 2010; and for this purpose the corporate vehicle to be used for the acquisition of the business from Caysand 24 will be Caysand 25, the shares in which will be owned by Grahame, Shane, Clay and Peter in the following proportions:

Grahame	20,000
Shane	20,000

[28] T1-37 L28.
[29] T2-7 L41.
[30] T1-37 L40.
[31] T2-7 L1; T2-7 L45.

Clay	30,000
Peter	30,000
TOTAL	**100,000**

D This Deed evidences the terms of the agreement reached between the parties with respect to the conduct of the business for the period commencing the 1st day of January 2006 and terminating on the completion date; and the transfer of the business to Caysand 25 on the completion date.

IT IS AGREED

PART 1 MANAGEMENT, PROFITS & REMUNERATION

1.1 Peter and Clay shall be responsible for the management of the business (in consultation with Grahame and Shane) and they will each be entitled to a gross remuneration of $80,000 per annum (plus compulsory superannuation) which will be paid to them in accordance with their directions, or such other amounts agreed between the Parties from time to time.

…

1.4 Grahame and Shane shall jointly retain ultimate financial control of Caysand 24 and they agree that Hilary Caligaris, in her capacity as the employed "financial controller", shall be directed to supervise the financial control of all departments referred to in paragraph B of the Preamble. … Grahame and Shane shall jointly instruct all other employees of Caysand 24 to report to Hilary within ten days of the end of each month with respect to sales, purchases of stock, purchases of plant and equipment and stock levels, the purpose being to enable the parties to gain an accurate understanding of the performance of all departments and the financial standing of Caysand 24 from time to time.

1.5 The parties agree that an amount equal to the gross remuneration paid to Peter and Clay will be deducted from net profits which would otherwise be distributed to them (in the proportions stated in paragraph C of the Preamble, which reflects their future shareholdings in Caysand 25) and that the residue of the net profits which would otherwise be distributed to Clay and Peter shall be retained by Caysand 24 as consideration for the transfer of the business pursuant to Part 2.

PART 2 TRANSFER OF BUSINESS

2.1 On the completion date, Caysand 24 will transfer its legal and beneficial interest in the business (excluding stock and real estate) unencumbered to Caysand 25. The completion date is the date which is sixty (60) days after the target referred to in clause 2.2 is reached.

2.2 Notwithstanding any other provision in this Agreement, the transfer of the business shall not take place until the profit retained by Caysand 24 pursuant to clause 1.5 reaches the target of $1,100,000 ("the target sum"). …

PART 3 INTEREST

3.1 With respect to the target sum referred to in clause 2.2, Clay and Peter shall pay interest calculated as follows:

(1) on the sum of $747,805.84 (representing the acquisition of the Boat Scene business, its relocation to the Mulgrave Road premises and renovations and improvements to those premises), 10% per annum as from the 12th day of July 2007 until the completion date with annual rests;

(2) with respect to the balance of the target sum, being $352,194.16, interest shall not be payable for the three year period commencing on the 16th day of January 2006 to the 31st day of December 2008, but thereafter interest shall be payable on the balance at the rate of 10% per annum as from the 1st day of January 2009 until the completion date.

…

PART 7 INDEMNITY

7.1 The parties acknowledge that the acquisition of the business *Boat Scene*, which occurred in July 2007, was financed by the shareholders of Caysand 24, Grahame and Shane.

7.2 In recognition of the circumstances set forth in clause 7.1, Peter and Clay shall jointly and severally indemnify Caysand 24 and they shall keep the company indemnified against any trading losses which occur with respect to the operation of the *Boat Scene Profit Centre* prior to the completion date.

7.3 Clause 7.2 creates a right of action against Peter and Clay which Caysand 24 may take, subject to it taking the following steps:

(1) with respect to any financial year prior to the completion date, if the *Boat Scene Profit Centre* makes a loss as reported by Caysand 24's financial controller, Caysand 24 shall report the loss to the company's accountants for verification; and if the

> loss is certified as correct by the company's accountants, this shall be prima facie evidence that the loss has been sustained ("the loss");
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> (2) the loss shall be recoverable as a debt due and owing by Peter and Clay to Caysand 24, and Caysand 24 may serve a formal demand for payment of the debt on Peter and Clay or either of them ("the demand");
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> …
>
> (4) the demand must require Peter and Clay or either of them to reimburse Caysand 24 for the amount of the loss which occurred in the relevant calendar quarter;
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> …" (emphasis added)

[18] Despite not being signed until 2008, by which time Boat Scene had been acquired, the Heads of Agreement purported to evidence the terms of an agreement for a period commencing 1 January 2006, that is, before the acquisition of Boat Scene.[32] Mr Fulmer was unable to assist with how Part 7 of the Agreement, going to the inclusion of an indemnity relating to the operation of Boat Scene, came about.[33] On his account, however, Grahame Thompson told him (subsequent to the Agreement being entered into) that he did not agree with the clause's inclusion.[34] On Mr Fulmer's account this resulted in agreement being reached in a meeting in 2009 or 2010 between the parties to the effect that he and Clay Thompson were not to be held responsible in relation to the indemnity.[35]

[19] Notwithstanding the long time it took after the initial oral agreement for the Heads of Agreement to be drafted and executed, it did not record that Mr Fulmer and Clay Thompson had each already paid $150,000 pursuant to the oral agreement which the Heads of Agreement purported to evidence. This was likely a drafting oversight for there was no challenge to Mr Fulmer's evidence of the oral agreement under which it was paid. Furthermore, even after the Heads of Agreement was entered into, Caysand 24's own records continued to record and count the contribution in reduction of the target sum referred to in the Heads of Agreement.[36]

Boat Scene apparently runs profitably

[20] A decision was taken to try and sell the Boat Scene business in either 2008 or 2009.[37] Mr Fulmer testified that on the profit and loss statements he had seen from time to time during Boat Scene's operation it ran at a profit.[38] According to Boat Scene's business profile questionnaire prepared for its potential sale by Chase Manhattan Business Brokers, the business was profitable.[39] That document's executive summary shows Boat Scene's net

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32 T2-7 LL35-40.
33 T1-41 L13.
34 T1-41 L22.
35 T1-41 L29.
36 Ex 1 Vol 3 Tab B.
37 T1-42 L38.
38 T1-43 L23.
39 T1-44, Ex 1 Vol 3 Tab K.

profit from financials in 2008 was $446,038, a figure appearing in Caysand 24's profit and loss statements enclosed with the exhibited questionnaire.[40]

[21] In a similar vein, an REIQ business information statement to Coates Real Estate, who were later engaged to sell Boat Scene, contained financial information also suggesting the business was profitable.[41] The information was emailed from Greg Hardy, Caysand 24's accountant, to Grahame Thompson who in turn emailed it to Mr Fulmer on 23 July 2010. A part of the business information statement headed "Required for business appraisal" contained entries recording net profit in 2008 as $88,600, in 2009 as $365,956 and in 2010 as $371,235. On the same page an adjusted net profit calculation recorded a net profit in 2008 as $337,131, in 2009 as $571,877 and in 2010 as $514,291.[42] This was consistent with Caysand 24's annexed profit and loss statement and revenue account.[43]

[22] Mr Fulmer understood that in the end result Boat Scene sold in December 2011 for $100,000 but he was not consulted about or involved in that sale.[44]

24 October 2008 email – the target sum approaches

[23] On 24 October 2008, HQB accountant Ian Hogbin sent an email to Grahame Thompson after a discussion between them the day before.[45] The email's content indicated the point in time when the target sum would be reached was rapidly approaching. It said, inter alia:

> "Following our discussion yesterday, I detail as follows:
> **Heads of Agreement**
> You have advised/confirmed the following:
>
> 1. Peter and Clays wage (CL 1.1) is not to be treated as expense of the company in calculating the net profit …
> 4. The $1.1M (cl 2.2) retention amount is the total price required. <u>The initial contribution of $150G each by Peter and Clay is to be reduced off the $1.1M</u> …
> 6. The annual interest calculation at c. 3.1 is to be reduced by any prior years contribution/retention
> 7. Whilst Caysand disputes the $250G amount to Boatscene, such amount is to be reduced off the amount that interest (cl 3.1) is calculated upon.
> 8. <u>It is likely the retention amount (cl 2.2) will be achieved in current year based upon the above advices</u>, as $1.1M(4) less $300G(4), less $250G(7) is net $550G. Likely profits to date are $1.8M, less tax say at least retained balance $99G by 60% interest covers the net. Once accounts finalised, we will prepare the actual calculation and forward to you for consideration. The impact of the Boatscene claim upon the calculation will need further

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40 Ex 1 Vol 3 Tab K p 1455.
41 T1-47.
42 Ex 1 Vol 3 Tab L p 1470.
43 Ex 1 Vol 3 Tab 2 pp 1471-1474.
44 T1-49 LL13-20.
45 Ex 10.

> consideration, if in fact the retention amount is reached before that matter is settled …"[46] (emphasis added)

[24] This clarified that wages paid to Peter Fulmer and Clay Thompson were not to be treated as an expense of the company in calculating the net profit and that the 1.1 million retention amount was to be reduced by the initial contributions of $150,000 each from Peter Fulmer and Clay Thompson. Mr Hogbin agreed in cross-examination that this is what was advised and confirmed by Grahame Thompson when he met with him the day prior to that email being sent.[47]

[25] The email included the statement, "It's likely that the retention amount will be achieved in the current year…". Mr Hogbin testified that opinion was probably his own, based on his numbers because Mr Thompson would not necessarily have had the numbers at his fingertips.[48] Mr Hogbin testified the accuracy of this opinion depended on consideration of "an impact of Boat Scene" and the preparation of the final accounts.[49]

[26] Of the email's assertion beginning, "Likely profits to date are $1.8M", Mr Hogbin accepted in cross-examination that "likely" meant more probable than not,[50] and that this was his opinion on 24 October 2008.[51] Furthermore, he accepted that this opinion was generally consistent with what was communicated to Mr Fulmer by email from Mr Hardy a few months later.[52]

18 February 2009 email – the target sum is only $93,812 away

[27] On 18 February 2009 Greg Hardy of HQB emailed Mr Fulmer and Clay Thompson a document dated 17 February 2009 styled "Heads of Agreement calculation – draft, summary profit and loss statement for the period ended 31 December 2008" ("February 2009 profit and loss statement").[53] This document also indicated the target sum would soon be met.

[28] The February 2009 profit and loss statement's columns spanned January-June 2006, July-June 2006/2007, July-June 2007/2008 and July-December 2008. The document's calculations made allowance for an amount of $1,100,000 recorded against the words "target amount". That amount progressively reduced across each column. Its reduction included, in the opening column for Jan-June 2006, an amount of negative $300,000 described immediately under the words "target amount" as "less initial contribution".[54] This is powerful evidence of the parties' agreement the target amount was to be reduced by the earlier made contributions of $150,000 each by Mr Fulmer and Clay Thompson.

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46 Ex 10.
47 T2-75 LL46-47.
48 T2-76 LL13-14.
49 T2-76 LL20-23.
50 T2-76 LL43-44.
51 T2-76 L45.
52 T2-83 LL5-7.
53 Ex 1 Vol 3 Tab B pp 1104-06.
54 Ex 1 Vol 3 Tab B p 1105.

[29] The February 2009 profit and loss statement identified the "total amount remaining" as $93,812. The financial progress recorded by it was consistent with Mr Fulmer's own expectations of how the business had been progressing from 2006 to 2008.[55] He discussed the information contained in it with Grahame Thompson as well as Clay Thompson. Grahame Thompson was happy with the progress made.[56] He said nothing to suggest any surprise that the target sum was so close to being achieved.[57]

[30] The February 2009 profit and loss statement reflected such positive progress towards the target sum that it would become problematic for the defendants' case at trial without some credible identification and explanation of error within it. When Mr Hogbin testified, he claimed that in preparing his evidence he did not even discuss the 2009 calculation with Mr Hardy.[58] Mr Hogbin emphasised the heading of the February 2009 profit and loss statement included the word "draft" and said, "I don't accept that it's right because we're still having trouble today working out what the correct calculation of the heads is".[59] He also asserted, without being specific, that the document used erroneous information and involved errors in the interpretation of the Heads of Agreement. These unspecific explanations were all the more unpersuasive coming from a witness whose earlier email of 24 October 2008 also noted positive progress towards the target sum and who conceded he and Mr Hardy had conferred upon the issue in that era.[60]

[31] Another explanation advanced by Mr Hogbin related to there having been an overstatement of Boat Scene's figures because of an incorrect statement of stock,[61] a topic returned to below at [88].

[32] The only other explanations proffered by Mr Hogbin went to doubts he had allegedly developed about whether the document dealt properly with the status of the $150,000 deposit, the inclusion of interest and the treatment of wages and depreciation.[62] He said he could not remember when such uncertainties had come upon him,[63] but it is obvious from the ensuing history of this case that the assertion of uncertainty about such matters was only motivated by the decision to attempt to defend the claim.

20 January 2010 Meeting – defendants admit the target sum has been reached

[33] On 20 January 2010 Mr Fulmer and his accountant Mr Coutts met with Grahame, Shane and Clay Thompson, their parents Ron and Beth Thompson, Caysand 24's financial controller Hilary Caligaris and Ian Hogbin and Greg Hardy of HQB, the accountancy firm acting for Caysand 24. [64] Mr Fulmer and Mr Coutts both testified that at that meeting they were informed the target sum had been met and it would be necessary to arrange the transfer of the business from Caysand 24 to Caysand 25.[65]

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55 T1-53 L8.
56 T1-52 L44, T1-54 L4.
57 T1-54 L12.
58 T3-3 L1.
59 T2-78 L14.
60 T2-83 LL9 & 38.
61 T2-84 L1.
62 T3-44 LL7-25.
63 T3-44 L38.
64 T2-22 LL24-46.
65 T1-55 L44 – T1-56 L36.

[34] Mr Coutts' recollection was it was Mr Hardy who had said the target sum had been reached, that "there were no further impediments to the transaction continuing" and that they would return to Mr Coutts and Mr Fulmer with an agenda to implement the transaction.[66] Mr Coutts recalled that Mr Hogbin did not contradict Mr Hardy's assertion the target sum had been reached.[67] Mr Coutts was not surprised by the announcement, as it appeared to him to be consistent with previous discussions regarding the target sums in previous meetings, including a meeting in 2009 between Peter Fulmer and Greg Hardy, at which he was present,[68] and emails,[69] presumably including the 18 February 2009 email referred to above.

[35] Mr Fulmer was certain it was a representative of Caysand 24's side who had said the target sum had been reached. He was not sure which of them it was but thought it may have been said by Ian Hogbin. In any event there was no disagreement with that announcement by anyone else at the meeting. Nor was it suggested at the 20 January 2010 meeting that difficulties had been encountered in interpreting the Heads of Agreement[70] in making the assessment that the target sum had been reached.[71]

[36] The only other meeting attendee called to give evidence was the defendants' accountant from HQB, Mr Hogbin. He was, remarkably, the sole defence witness.

[37] Mr Hogbin, seemed curiously vague as to whether he had been present at the meeting. He claimed to have no recollection, and no written records, of that meeting, although he does have minutes pertaining to a meeting with Mr Fulmer and the Thompson family on 19 January 2010.[72] He refreshed his memory from what he called "notes"[73] but which was actually an email of 22 January that referred to a meeting of 20 January that made no note of Peter Fulmer or Bruce Coutts being in attendance.[74] Mr Hogbin accepted in cross-examination it was possible there had been two meetings that day, one in the morning without Mr Fulmer and Mr Coutts, and one in the afternoon with Mr Fulmer and Mr Coutts.[75]

[38] I accept the unchallenged and credible evidence of Mr Fulmer and Mr Coutts about the meeting of 20 January 2010, including their evidence that Mr Hogbin was present.

[39] This meeting occurred in a context where Caysand 24 and its external accountants had been tracking progress towards the target sum. It occurred at a time by which, in light of the February 2009 profit and loss statement, it would have been expected the target sum had been met. It is obvious from the evidence of Mr Fulmer and Mr Coutts that this meeting's purpose was to discuss that the target sum had been met. It was a meeting attended by Caysand 24's directors, its financial controller and two partners from its

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66 T2-23 LL3-7.
67 T2-23 LL10-11.
68 T2-23 LL35-40.
69 T2-23 LL13-16.
70 T2-40 LL12-15.
71 T2-40 L15.
72 T3-16 LL19-24.
73 Ex 11 (Consisting of an email dated 22 January 2010).
74 T2-87 LL30-33.
75 T2-89 LL37-40; Ex 11.

external accountants. Against this background it is obvious the announcement the target sum had been reached was a considered decision.

[40] The email of 22 January 2010, from which Mr Hogbin purportedly refreshed his memory, provides additional powerful support for my conclusion that the announcement two days earlier was the product of a properly considered decision by Caysand 24.

[41] The email of 22 January 2010 recorded the meeting's attendees and what was resolved in these terms:

> "Meeting 20 January 2010
> Attendees. Shane, Grahame, Ron, Beth, Hilary, Ian & Greg
>
> Discussion re Heads of Agreement
> Resolved
>
> - Intent is that Peter and Clay run Aussie Motors, Townsville and Wholesale (the business) via Caysand 25.
> - Boatscene is splitting the available time of Peter to run the business (cars).
> - Plan is to sell Boatscene, by say 30 June, if not see if business can be broken up and move to close down by end of lease.
> - Lease ends think Feb 2011, with 1 * 2 year option.
> - Caysand 25 would start up following achievement of Boatscene sale/closedown
> - Discussed with Peter and Clay. They agree with plan to sell Boatscene
> - Need for confidentiality discussed
> - Resolved that going forward, Boatscene accounting queries to be directed to Peter instead of Hilary
> - Financial figures of Caysand, and draft start up balance sheet to be provided to Clay and Peter
> - Discussion re funding of Stock. Caysand 24 prepared to fund up to $3M stock, similar to a GE finance arrangement. Such finance for a 10 year period. Should Caysand wish to self fund stock, would need personal borrowings so that Grahame and Shane don't take all the risk."[76]

[42] While none of the above resolutions specifically referred to the target sum having been reached it is obvious from their content that it had been and the way forward in consequence thereof was being planned.

[43] The email then went on to list so called "Draft Points prepared by Ian Hogbin for proposed agreement between Grahame, Shane, Clay and Peter". The points listed deal with a variety of logistical arrangements for the obvious purpose of implementing the transfer of Caysand 24's business to Caysand 25 consistently with the agreement. This is consistent with Mr Coutt's recollection that at the meeting two days earlier Mr Hardy had said they would return with an agenda to implement the transaction. That such

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[76] Ex 11.

arrangements were thought necessary is further confirmation the decision announced on 20 January 2010 that the agreement's target sum had been met was a well-considered decision.

[44] There is no doubt it was an agent of Caysand 24 who made the announcement at the meeting of 20 January. I readily infer the announcement was made on behalf of and with the authority of Caysand 24, so that it was an express admission by Caysand 24 that the target sum had been met. Further, given the significance of the announcement to the interests of Caysand 24 and Grahame and Shane Thompson, I readily infer the absence of disagreement from them was an implied admission – an admission by conduct – that, as announced, the target sum had been reached.

Avoidance by the defendants

[45] Despite the announcement made at the meeting of 20 January 2010 there was no transition of the business to Caysand 25. The ensuing conduct of Caysand 24 and its agents involved delay, obfuscation and a demonstrable intention not to honour the agreement.

[46] In 2011 Mr Fulmer, on advice from his accountant, sought evidence that the $12,000 tax deduction sought for interest he was paying on the $150,000 loan he had taken out to make his contribution in April 2006 was indeed related to interest on a loan for that purpose.[77] Mr Fulmer spoke with Grahame Thompson seeking evidence of the ownership acquired by Mr Fulmer in the business, but Mr Thompson would not provide it. A discussion ensued in which Mr Fulmer explained he needed the information because he could not otherwise claim the interest on the loan as a tax deduction.[78] Mr Thompson intimated that instead of giving him the evidence requested Caysand 24 would pay Mr Fulmer the $12,000 interest.

[47] In mid-2011 Mr Fulmer met with Ian Hogbin, Greg Hardy, Grahame Thompson and possibly Shane Thompson. Mr Fulmer was advised at that meeting that he would receive the $12,000 which would leave the parties "square" because the target sum had not been met.[79] Such a payment was subsequently made to Mr Fulmer.[80] The assertion the target sum had not been met obviously contradicted their admission that the target sum had been met. However, when Mr Fulmer asked them about that reversal no explanation was forthcoming.[81]

[48] The absence of explanation is significant. If there existed a genuine basis to assert they had been wrong in January 2010 in announcing the target sum had been met, this was the time for persons behaving genuinely to inform the unfortunate Mr Fulmer what that basis was. It speaks volumes against the credibility of the defence case that the directors and accountants chose to stonewall Mr Fulmer rather than explaining that and how they had previously erred in calculating the target sum. By the meeting's close Mr Fulmer was

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77 T1-57 L41.
78 T1-58 L19.
79 T1-60 L24 – T1-61 L20.
80 T1-58 L28.
81 T1-61 LL27-47.

simply told he should keep doing what he was doing and they would have their reports up to date by the end of the year.[82]

[49] Mr Fulmer had ceased working for Boat Scene in April 2011, returning to the car sales aspect of Australian Motors' business.[83]

[50] At some point prior to 1 January 2012 Mr Fulmer was contacted by Neville Hyde, the owner of the premises which Caysand 25 had been leasing.[84] Mr Hyde told Mr Fulmer that a new lease for the rental of Mr Hyde's business premises had been signed. This lease was set to commence 1 January 2012. Significantly to Mr Fulmer, and evidently to Mr Hyde, this lease named Caysand No 24 as lessee, not Caysand 25.[85]

[51] Mr Fulmer continued working for Caysand 24 until February 2012 when HQB's Greg Hardy and Ian Hogbin delivered a letter of redundancy to him.[86] This was another occasion which Mr Hogbin claimed he could not recall but he did not dispute Mr Fulmer's recollection.[87] Mr Fulmer testified he was "gobsmacked" and "very upset" upon receipt of this letter.[88] According to Mr Fulmer, he told Mr Hardy and Mr Hogbin that he wanted to see Grahame and Shane Thompson, however this request was refused. Mr Fulmer recalled that after Ian Hogbin left the conversation, Greg Hardy told him, "If it's any consolation, Grahame does not agree with what's going on."[89]

[52] Shortly thereafter Mr Fulmer was approached by Shane Thompson with an offer that Shane Thompson would fund a wholesale operation in Wellington Street.[90] Shane Thompson suggested that Mr Fulmer could use his own solicitor to draw up an agreement to that effect, so that Mr Fulmer would be "happy" with the way it was drawn up.[91] Mr Fulmer gave evidence the $150,000 contribution that he had previously made was the source of "ongoing discussions" in this negotiation.[92] Mr Fulmer recalled this negotiation was after the redundancy and on one occasion involved a meeting with Ian Hogbin at Preston Law, Caysand 24's solicitors.[93]

[53] In any event, the dispute did not settle and Mr Fulmer eventually filed his claim.

The defence case

[54] The defendants chose to resist the claim by raising issues about what their own Heads of Agreement meant and purportedly conducting calculations afresh to argue the target sum still has not been met. They also filed a counterclaim seeking indemnification pursuant

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82 T1-61 LL15-44.
83 T1-49 L45.
84 T1-59 L22.
85 Ex 3.
86 T1-62.
87 T3-14 L10.
88 T1-63 LL3-5.
89 T1-63 LL14-15.
90 T1-63 LL19-23.
91 T1-63 L23.
92 T1-63 LL26-28.
93 T1-63 LL31-32.

to clause 7.2 for what their accountant Mr Hogbin belatedly certified were trading losses by Boat Scene.

The general problem with the defence case

[55] The defendants' case was completely at odds with the evidence of Caysand 24's admission against interest on 20 January 2010 that the target sum had been met. How were the defendants to deal with this significant evidentiary and forensic hurdle?

[56] If the evidence there had been an admission was untrue, they could have challenged it and contradicted it with evidence from others who were present at the meeting. That did not occur. Clearly the admission was made. Moreover, as I have already found, it resulted from a well-considered decision.

[57] If, after the event, the defendants had realised they had made a mistake and the admission was the product of error in their source financial information, in calculations and or in interpretation of the agreement, they could have done two things. Firstly, they could have told Mr Fulmer. They did not do that. Instead they stonewalled him. Secondly, they could at trial have adduced evidence from the person or persons who made the error, explaining how the error occurred. They did not do that either.

[58] In the end result, the only way left for the defendants to attempt to deal with the obstacle of the admission of 20 January 2010 was to divert attention and detract from its probative force in two ways. The first, was to cultivate issues of interpretation about the agreement to detract from the weight attributable to their admission. The second was to evidence and analyse Caysand 24's financial records to sustain fresh calculations demonstrating that in fact the target sum had not and has not been met.

[59] That is what the defendants tried to do. But there were problems with the proof and reliability of the evidence and analysis of Caysand 24's financial records and disagreements about calculation methodologies. The former is best illustrated by reviewing what occurred in the adducing of expert evidence. I will do that first. I will then deal with the latter by discussing eight calculation methodology issues on which the experts disagreed. That exercise will demonstrate that the admission of 2010 was likely not infected with errors of interpretation or methodology of the kind later cultivated, thus confirming it is proper to regard it as an admission against interest.

Expert Evidence

[60] On 3 October 2014 I ordered by consent that each party was at liberty to appoint their own expert accounting witness.

[61] The plaintiff chose to appoint Coutts Redington's Bruce Coutts, who had been Mr Fulmer's accountant during the era in question. The defendants chose to appoint HQB's Ian Hogbin, who had been one of Caysand 24's accountants during the era in question. Both men have been mentioned above in the context of their roles as witnesses to relevant events and, in Mr Hogbin's case, active involvement in those events.

[62] There may be benefits and disadvantages in enlisting a professional person with pre-existing involvement as a witness to relevant matters in a case to testify as an expert witness in the case about more broad ranging matters. The most obvious disadvantage is the risk that a pre-existing professional allegiance to a party may compromise the degree of independence and objectivity with which the expert approaches the task, resulting in evidence so tainted by partisanship as to lack credibility and reliability. That risk did not manifest itself in respect of Mr Coutts but it did with Mr Hogbin.

[63] Mr Hogbin's credibility for the defendants' purpose of arguing the target sum had not been met carried the handicap that he had been an accountant on the defendants' team when it made the considered but allegedly erroneous decision to admit the target sum had been reached on 20 January 2010. Unless he could provide a compelling explanation for how such an error occurred on his watch this was a significant encumbrance upon his credibility. It was not the only such encumbrance.

[64] It emerged at trial that Mr Hogbin had actively strategised with the defendants' solicitor, working on how to placate and deter Mr Fulmer from pursuing a case and how to shape the financial calculations to avoid liability in meeting such a case.

[65] Reference to some emails amply illustrates his involvement in the machinations of developing a defence. On 19 January 2012 HQB's Greg Hardy emailed Mr Hogbin after meeting with Caysand 24's solicitor. The email, tendered without objection, asserted that the Heads of Agreement was "an unenforceable piece of shit and not worth wasting any more time on" but highlighted that the retention of Mr Fulmer's $150,000 contribution would be unfair enrichment. Mr Hardy relayed a suggestion:

> "[T]hat Caysand repay the amount and squeeze some advantage out of it by repaying (say) $30K every 6 months if Peter meets his targets. Caysand puts the golden handcuffs on him for a couple of years and Peter has a secure job.
>
> A simple three page deed would kill the HOA and enshrine the above.
>
> If Shane and Grahame want to get heavy they can set off benefits (rent, cars etc) provided to Peter against the deposit (or loan?), pay him the reduced amount (if any) and piss him off."[94]

The email went on to assert it was believed "that Peter is still under bankruptcy threat and cash is king for him".

[66] This email appears to have prompted an email by Mr Hogbin to Caysand 24's solicitor, also on 19 January 2012. Mr Hogbin noted the comments from Mr Hardy's email and said:

> "My concern is that if Peter did want to make a stir, the H of A, together with the $150G deposit, and the level of profits generated over the period of the agreement, (which means after wages they have earned some $1.5M before tax towards the sum) that life could become uncomfortable for Caysand before any resolution. Your quote from Greg's email would indicate that there is no risk that that could happen?

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[94] Ex 12 p 2.

> I attach a summary work sheet of how the numbers pan out – I guess I'd rather hear you make that comment after you have had the benefit of understanding the magnitude of the numbers.
>
> I confirm that the $150,000 from Peter – he paid interest on it, whilst receiving no return.
>
> Prior to reading comments attributed to you, I was of the mind that Caysand would need to pay Peter something more than $150,000 – to at least cover his interest costs, and perhaps to settle to pay something extra seeing as notwithstanding Boatscene losses, they have nearly delivered the number."[95] (emphasis added)

[67] It will be recalled that Mr Fulmer was made redundant the following month when handed a letter by Mr Hogbin and Mr Hardy.

[68] On 21 September 2012 Mr Hogbin emailed Caysand 24's solicitor, apparently in the wake of a discussion with him and an email from him. Mr Hogbin's email outlined and analysed three different scenarios calculating amounts by reference to different presumptions resulting in different monetary outcomes. The email concluded:

> "Consider the above scenarios, and let me know where the focus should be and I'll tidy it up, recheck sums and get it back to you."[96] (emphasis added)

[69] The claim was eventually filed on 14 November 2012. The defendants were obviously anticipating that possibility earlier in the month. On 3 November 2012 Mr Hogbin emailed Caysand 24's solicitor saying, inter alia:

> "I am concerned if this matter ever gets to court, and there is any debate regarding actual detailed numbers/calculations, then the Judge could well find it all too complicated and instead pick a number. In particular I am mindful should Fulmer want to start arguing the actual level of losses in Boatscene!
>
> I attach the heads conundrums – comments before I head up on the 14th would be appreciated.
>
> **Target sum**
>
> …The agreement was in construction for a period of time before Boatscene was purchased. Preamble C refers to 1 January 2006.
>
> Boatscene acquired 12 July 2007.
>
> Agreement dated 16 June 2008
>
> It has been advised to me by the directors that Boatscene cost needs to be added to the $1.1M – i.e. the $1.1M price was determined before Boatscene was purchased, and subsequent drafting of the heads failed to adjust the price. Fulmers claim refers to oral contract amount of $550,000 determined in late 2005, thus supporting directors' position. Boatscene at that time was not a consideration.

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95 Ex 12 p 2.
96 Ex 13.

Relying upon Fulmer's claim purchase price of $550,000, and contrary to the Heads of Agreement, the target sum should be $1.1M PLUS cost of Boatscene purchase.

$150,000 Peters component

As mentioned, such amount is not detailed in the heads. …

Similar to discussion above re target sum, what was agreed about the $150,000?

In the absence of any supporting documentation, I believe the $150,000 is a loan, and is not to be included in calculation of the $1.1M.

Should it be a loan, do we need to calculate interest thereon? …

$150,000 Clay's component

Such was never made by Clay, but rather a transfer from Beth. Do we treat this as a reduction from target sum, or restate as a loan from Beth?

Boatscene losses

…Does the construct mean that the Boatscene losses (adopt $1.5M for discussion) are separately claimable, and that the target sum calculation would not include the Boatscene losses? If so, can the action for Boatscene loss amount be used to reduce the target sum achieved (until claim for Boatscene loss is paid)

Some losses were incurred subsequent to Peter Fulmer's involvement – can these be auctioned (sic) against him and Clay?

…**Taxation**

The Heads makes no mentions of tax. Thankfully Fulmer's claim refers to after tax. Company tax rate is 30%, but the real cost to shareholders is 46.5% to get the money out of the company. Which tax rate do I adopt? …"[97] (emphasis added)

[70] On 4 December 2012 Mr Hogbin sent the solicitor for Caysand 24 a further email referring to a discussion earlier that day and attaching two further spreadsheets "for consideration".[98] The email indicated that models had been prepared on the basis of legal opinion that interest pursuant to clause 3.1 "should be a cost reduced from profits retained figure, rather than a separate charge". The email continued:

"I would like some confirmation as follows:

1. With respect to clause 3.1(2), I have only calculated interest if balance still to earn is >$747,806. However, the clause refers to balance of target sum being $352,194. Do I calculate 10% of this amount until completion date, rather than any relation to balance of target sum (It is agreed clause 3.1(1) has no reduction).

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97 Ex 16 and Ex 1 Vol 2 Tab 4.
98 Ex 14.

2. With respect to tax impact, I believe we should net the amount of tax on the following

   a. If we use gross figures then Caysand should have declared interest income in its tax returns – such hasn't happened.

   b. If the argument is that the interest is an increase to the target sum, and the target sum is reduced by after tax profits retained, then interest charge should also be after tax. In that way we use all after tax, which means it is a calculation as part of the formula, rather than an actual interest charge. …" (emphasis added)

[71] The latter email was evidently sent at a time when the pleading of the defence and counterclaim, filed on 30 January 2013, was under consideration and Mr Hogbin was finalising calculations to be used therein.

[72] These examples clearly demonstrate Mr Hogbin was actively and intimately involved in shaping the defence of the case, progressively consulting and seeking feedback from the defendants' solicitor about what approach ought be adopted to give the opinion desired by the defendants.

[73] The defendants' use of an expert they knew would give them the "evidence" they wanted presumably had the secondary benefit of saving money but it came at a different price for their case – a lack of credibility.

[74] I stress there is no impropriety in the solicitors of a business liaising with the accountants of the business to ascertain whether there are reasonable prospects of defending a potential or actual claim. In so doing they may properly identify legal interpretations and accounting methodologies which might usefully be adopted in defence of such a claim. Indeed, such a process may well be essential to informing a solicitor what instructions ought be given to an expert accountant sought to be retained for the purpose of providing an expert report to be tendered in evidence and to give evidence. However, where the accountant retained for that latter purpose is not merely an accountant with some historical involvement in the case as a witness, but has also been actively involved in shaping the defence of the case the witness will not have the starting advantage of credible objectivity ordinarily associated with professionals. See for example *Phosphate Co-operative Co v Shears (No 3)* [1989] VR 665, 686.

[75] That is not to say such an "expert" witness may not gain credibility by dent of the quality of the expert's report, the quality of the expert's testimony and the quality of other supporting evidence. But it is a very tall order and it did not happen with Mr Hogbin. His testimony had an obviously partisan quality and no supporting evidence was forthcoming.

[76] Mr Hogbin authored an expert report dated 5 April 2015.[99] The report contained no comprehensible narrative style discussion or analysis of the process undertaken and left the reader to try and infer what had been done largely from the content of assumptions,

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[99] Ex 1 Vol 1 Tab 3.

calculations and conclusions listed in tabular style annexures. Nor did it clearly identify all of the source material upon which it was based. To the extent it did it is noteworthy it included reference to a variety of information and calculations provided by persons who did not give evidence. There was no evidence from Caysand 24 as to whether such information and calculations derived from original source materials maintained in the normal course by Caysand 24.

[77] The 285 pages of annexures, setting aside miscellaneous documents and tabular calculations, were various special purpose financial statements in the form of profit and loss, revenue account and balance sheet statements compiled by HQB. Those documents were on their face qualified by compilation reports indicating the directors of Caysand 24 were responsible for the information contained therein. The directors were not called as witnesses. The qualification also indicated there had been no verification or validation procedures carried out by HQB and that the statements should not be relied upon without audit or review. In short, Mr Hogbin's report appeared to be founded on a mirage of hearsay figures unaccompanied by any meaningful attempt to identify and prove the relevant source documents of Caysand 24. None of Caysand 24's source financial records were included in Mr Hogbin's annexures and no-one from Caysand 24 was called as a witness.

[78] Arguably the most remarkable absentee was Ms Caligaris, Caysand 24's financial controller. It will be recalled that pursuant to clause 1.4 of the Heads of Agreement it was she who was to supervise the financial control of all departments, she to whom all employees were to report within 10 days of the end of each month with respect to sales, purchases of stock, purchases of plant and equipment and stock levels, "the purpose being to enable the parties to gain an accurate understanding of the performance of all departments in the financial standing of Caysand 24 from time to time". So pivotal was her role in monitoring financial information relevant to the Heads of Agreement that clause 7.3(1) of the Indemnity section of the agreement designated her as the person required to report a loss, if any, made by the Boat Scene profit centre. I infer from her unexplained absence as a witness that her evidence and such relevant source financial information from Caysand 24 as she could have produced and explained would not have assisted the defendants' case.

[79] There might be cases where the source of data annexed to expert reports has not itself been proved or admitted but which may nonetheless be inferred to be admitted from the conduct of the case. Such an inference might, for example, arise from an apparently common ground treatment of documents in evidence on one basis as also admissible pursuant to s 92 *Evidence Act 1977* (Qld). The plaintiff's counsel's conduct of the case implied no such common ground, indeed it is likely had s 92 been relied upon that he would have argued s 92(1) raised a need, not overcome by the terms of s 92(2), for the defendants to call Caysand 24's financial controller Ms Caligaris as a witness.

[80] In any event the mere successful tender without objection of an expert report containing annexed documents cannot of itself possibly sustain the inference that the source of the data in those documents is thereby proved or admitted. Without more, such annexed documents serve not as evidence of the truth of their content but only as evidence of the information the expert assumed to be fact.

[81] Mr Coutts, whom I found a credible witness, authored an expert report of 15 May 2015.[100] Unlike Mr Hogbin's report, Mr Coutts' report contained comprehensive and comprehensible analysis. Mr Coutts' report noted he had been provided with a substantial amount of disclosed information. His report annexed over 900 pages, some of which appear on their face to be financial records of Caysand 24. In the course of closing submissions when the defendants' counsel sought to meet my repeated enquiries about where the evidence of a source of financial fact could be found I was often taken to these annexures. However, for reasons just explained, those annexures did not become evidence of the truth of their content merely by reason of their presence in an exhibited expert report.

[82] Mr Coutts' report opined the target amount was reached as early as 30 June 2009 and, allowing for "unexplained adjustments", no later than 30 June 2011. Elaborating on the issue of unexplained adjustments he noted:

> "The question of whether the Target amount has been met has been made problematic by the production of financial statements and spread sheets by way of disclosure by the Defendants, which appear to have been altered from the original financial statements."[101] (emphasis added)

[83] His report later analysed adjustments in annexures to an email by Mr Hogbin to the defendants' solicitor of 11 June 2013. It is instructive to pause and consider that email and Mr Hogbin's testimony about it.

[84] In the 11 June 2013 email Mr Hogbin explained, inter alia, that he had prepared an "amended Heads calculation" and described some changes as "favourable" and "unfavourable".[102] Mr Hogbin also annexed a document headed "Peter Fulmer Discovery", saying:

> "I attach copy of notes of review I had undertaken between Caysand monthly accounts, and HQB finished reports. These notes are merely for discussion purposes between you and I. The purpose of them is to understand reasons for variations and be comfortable with same before such questions may arise from Fulmer."

[85] Mr Hogbin could not assist with why the document was titled Peter Fulmer Discovery, other to say a member of his staff wrote it.[103] As to that document Mr Hogbin noted in it:

> "We have compared the financial information provided by Caysand No 24 with the financial information provided at the time of doing the accounts."[104]

In cross-examination of Mr Hogbin it was suggested the above meant there were two separate sources of information. Mr Hogbin responded affirmatively, saying:

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[100] Ex1 Vol 1 Tab 4 p316
[101] Ex 1 Vol 2 Tab 4 p 323.
[102] Ex 1 Vol 2 Tab 4 p 706.
[103] T3-5 LL1-4.
[104] Ex 1 Vol 2 Tab 4 p 707.

> "Being the management accounts of Caysand No 24 and the published accounts prepared by HQB."[105]

He confirmed the document's above reference to the financial information provided by Caysand 24 was its management accounts provided by Ms Caligaris, who he said "processes all the transactions in the organisation" – further confirming Ms Caligaris's central importance.[106]

[86] Mr Hogbin also noted in the Peter Fulmer Discovery document:

> "We then compared the financial information provided by Caysand No 24 Pty Ltd with the published accounts, as it affects the Heads of Agreement departments, for each financial year. (negative amounts below mean the published accounts have a reduction in the profit compared to the financials provided by Caysand)."[107] (emphasis added)

Beneath that were a variety of negative amounts recorded, giving rise to an enormous reduction in profit. Thus the HQB drafted documents reduced the profit which was apparent in the financial records of Caysand 24.

[87] One of the downward adjustments was of approximately $1.2 million for 2009. Mr Hogbin testified there were circumstances requiring this:

> "[B]eing the Boatscene stock had to be written down, being interest charges on the Boatscene were brought in to account."[108]

[88] He explained the Boat Scene accounting system, the Amwin system, was a separate system to the other accounting system used by Caysand 24[109] and the adjustment arose because what had been recorded at the management level was incorrect.[110] On his account there had been errors in the Boat Scene system for a year before they were discovered.[111] Mr Fulmer confirmed there had been an issue with the Amwin software system used by Boat Scene and that it was addressed in the latter part of 2009. Consistently with that, Mr Hogbin's recollection was that the problem was identified in December 2009.[112] Its effect is therefore unlikely to have been overlooked in arriving at the considered decision to announce on 20 January 2010 that the target sum had been met.

[89] After analysing the monetary consequences of Mr Hogbin's exercise Mr Coutts noted:

> "[T]he retrospective adjustments as set out in the 11 June 2013 Hogbin Email have resulted in a reduction of the profit of the Business, by the sum of approximately $2.57 million."

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105 T3-6 L22.
106 T3-5 L43, T3-6 L22.
107 Ex 1 Vol 2 Tab 4 p 707.
108 T3-7 L33.
109 T3-10 LL39-44.
110 T3-7 LL38.
111 T3-10 LL46-47.
112 T2-85 L4, T3-13 L35.

[90] When cross-examined about his adjustment process Mr Hogbin asserted, quite unconvincingly, "There is absolutely no retrospectivity in respect of any of this".[113] It was put to Mr Hogbin that the purpose of preparing an amended heads calculation in liaison with the defendants' solicitor was to "try to find a way to reduce what was otherwise the apparent profit".[114] As much seems obvious. Mr Hogbin disagreed, proffering the non-sensical assertion that the amended calculations were "not made to the published accounts, they were to deliver the published accounts"[115] in the "normal course of events in preparing each annual set of figures".[116]

[91] The experts authored a so-called Order Conclave joint report dated 22 December 2015.[117] The joint report annexed "Hogbin Model A",[118] a combination of calculation models by Mr Hogbin which provided various financial outcomes depending upon how the court determined various matters of disputed methodology in calculating the target sum.

[92] The report noted the experts had agreed on the calculations in the model.[119] This was an agreement as to the accuracy of the calculations, not as to the reliability and correct selection of source data used in the calculations. The distinction is important, for in defending the case the defendants tended to blur the two concepts.

[93] That Mr Coutts continued to have reservations at the time of the joint report about the reliability and correct selection of source data used in the calculations was made clear by his observations therein, which included:

(a) in respect of interest calculations in respect of administration charges – "How these were calculated remain unexplained";[120]

(b) in respect of a further adjustment for purchases of plant and equipment – "This additional claim … has not been mentioned in any previous correspondence";[121]

(c) in respect of a 2010 stock adjustment – "I refer to the stock adjustment I made as a result of disclosure of other stock lists. … Discussions with experts acting for the defendants resulted in an explanation that the lists that had been disclosed were daily stock lists and not the end of year stock lists. I still have concerns regarding the value of stock as disclosed in the original financial statements";[122]

(d) in respect of the removal of the profit and loss of the Caysand 24 division called Caysand C – "Caysand C divisional profit and loss is not a separate business unit but is an administrative cost and income centre… arguments that it does not form part of the business are not logically sound as it is

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113 T3-4 L4 (referring to Ex 1 Vol 2 Tab 4 pp 707-710).
114 T3-4 LL30-32; T3-4 LL34-37.
115 T3-4 LL41-43.
116 T3-4 LL45-46.
117 Ex 1 Vol 1 Tab 5.
118 The most current version of that model, effective 24 November 2016, being at Ex 1 Vol 1 Tab 8.
119 Ex 1 Vol 1 Tab 5 p 351.
120 Ex 1 Vol 1 Tab 5 p 357.
121 Ex 1 Vol 1 Tab 5 p 359.
122 Ex 1 Vol 1 Tab 5 p 360.

comprised of charges arising from the operation of the car yard operations";[123]

(e) in respect of records relating to Mr Fulmer's pay – "I have some doubts over the accuracy of these records";[124]

(f) in respect of an increase from previous models in Clay Thompson's pay – "In another adjustment of late invention in the Model A report, Clay's wages have been increased";[125]

(g) in respect of variations in pay figures for the purposes of the case compared to tax purposes – "Once again I raise the issue as to why wages being claimed as adjustments in The Model A report are materially different to the statutory reporting".[126]

[94] Further documentary expressions of expert opinion tendered in evidence were contained in letters by Mr Coutts of 21 November 2016 and 9 January 2017.[127] The letter of 21 November was a response to an updated version of Mr Hogbin's Model A[128] effective 30 June 2016 and dated 17 October 2016. In the letter of 21 November Mr Coutts sought clarification about some calculations and affirmed the accuracy of some other calculations, assuming the data used could be taken to be correct "on face value". Those related to some 2015 and 2016 financial statements. Mr Coutts explained in cross-examination that while he had no reason to doubt those particular statements he had added the qualification about taking those documents at face value "because of concerns over earlier years financial statements which appear to have changed somewhat".[129] As he explained in re-examination, he held particular concerns about the 2008 and 2009 financial statements in that the 2009 financial statement's comparative reference to the 2008 financial numbers and the 2008 financial statement's actual numbers for 2008 "are quite vastly different sets of numbers".[130] He testified, "that tends to suggest that there's been a retrospective reimagining of the accounts".[131]

[95] Mr Hogbin responded to the 21 November letter with some further calculations by letter of 24 November 2016.[132] Mr Coutts later letter of 9 January 2017 went to some miscellaneous calculation matters but involved no concession about the underlying accuracy of the source data used for the calculations. It was put to Mr Coutts in cross-examination that much of his disagreement with Mr Hogbin had fallen away but he accepted only that certain points of disagreement had fallen away.[133] Mr Coutts was cross-examined about his apparent acceptance in this letter of the accuracy of Mr Hogbin's upward adjustment calculation of Clay Thompson's wages, based on the calculations Mr Hogbin had provided. He testified that acceptance assumed the wages reported in the financials were correct.[134] He acknowledged he had no reason to doubt that

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123 Ex 1 Vol 1 Tab 5 p 362.
124 Ex 1 Vol 1 Tab 5 p 367.
125 Ex 1 Vol 1 Tab 5 p 368.
126 Ex 1 Vol 1 Tab 5 p 368.
127 Ex 1 Vol 1 Tabs 9 & 11.
128 Ex 1 Vol 1 Tab 8.
129 T2-28 L43.
130 T2-45 L44 – T2-46 L7.
131 T2-46 L11.
132 Ex 1 Vol 1 Tab 10.
133 T2-36 L37.
134 T2-36 L7.

information[135] but as he had explained in his earlier reporting and re-emphasised in testimony he does not know if the information provided is correct.[136]

[96] The distinction between the accuracy of calculations and the information used was again touched upon when Mr Coutts was asked about the updated Hogbin Model A model in respect of Boat Scene losses.[137] Mr Coutts again emphasised his caveat about the accuracy of information used for calculation, noting two "widely variant sets of financials" were disclosed in respect of Boat Scene, making it impossible for him to come up with an alternate calculation.[138]

[97] The significance of the distinction was further emphasised in re-examination when Mr Coutts explained he could only work with the data disclosed by the defendants.[139] He pointed out the financial statements are an amalgam of a vast number of transactions and a vast number of journals prepared by the accounting staff concerned, both internal and external.[140] Doubtless this is why Mr Hogbin was to later explain the reason for variations in the published financial statements could not be tracked by reference to those accounts but would be shown in journal entries and ledger transactions.[141]

[98] Even if, contrary to my earlier expressed findings, the financial statements and financial calculations prepared by HQB could be regarded by me as evidence of the truth of their content, I would regard them as unreliable and give them no weight as such evidence. That is because the information they contain involved significant adjustments, explained by a partisan accountant, without proper proof of the source material from Caysand 24, in a case where it was long ago admitted by Caysand 24, when being aided by the same accountant, that the target sum was met.

The eight methodology issues on which the experts disagreed

[99] The defendants strived to frame the resolution of this case as turning upon eight discrete issues of methodology relevant to their fresh calculation of the target sum, issues about which the experts differed. In effect the defendants tried to confine the resolution of the case to the methodology end of a fresh target sum calculation so that the court merely needed to decide each of the eight methodology issues and apply the combination of decisions arrived at to the relevant calculation model drawn from the combination of calculation models provided in adjusted Hogbin Model A.[142]

[100] Such an approach pre-supposed I would overlook the significance of the defendants' past admission the target sum had been reached and overlook the lack of proof and reliability

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[135] T2-36 L10.
[136] T2-37 L17.
[137] Ex 9.
[138] T2-44 LL25-36.
[139] T2-46 LL5-16.
[140] T2-47 L13.
[141] T3-48 L32.
[142] My reasons render the entire approach of selecting the proposed calculation models inappropriate. However, it may assist the parties to note that, to the extent my ensuing findings may imply answers to the models' questions, it is reasonable to conclude they align most closely with the model configured answer designations YNNYYN per model number 26 (Vol 1 Tab 8 p 544) and YN per models 65 and 68 (Ex 9).

of the data used in the fresh calculation exercises. I do not overlook those matters in now turning to the eight methodology issues.

[101] The eight issues are:

a. the inventories surcharge issue;

b. the depreciation issue;

c. the purchases of plant and equipment issue;

d. the stock valuation issue;

e. the income tax issue;

f. the income splitting issue;

g. the prior payment issue; and

h. the Boat Scene issue.

The inventories surcharge issue

[102] The inventories surcharge methodology issue relates to how clause 3.3 of the Heads of Agreement is to be interpreted. Part of clause 3 is quoted above. The balance of clause 3 and clause 4 relevantly state:

> "3.2 It is agreed that, with the exception of the interest payable by Clay and Peter pursuant to clause 3.1 and the surcharge referred to in clause 3.3, interest will not be payable by the parties with respect to any money owing by one party to the other under this Deed or any financial arrangement contemplated by the parties hereunder.
>
> 3.3 At the end of each financial year, when calculating the net profit earned by the business, the parties acknowledge and agree that an adjustment will be made in favour of Caysand24 for interest expenses calculated at 10% per annum on the daily dollar value of inventory of stock-in-trade. …
>
> **PART 4 STOCK**
>
> 4.1 Within seven days of the completion date Caysand24 shall sell its entire inventory of stock at public auction and Caysand25 shall be at liberty to bid for the stock."

[103] What is clause 3.3's adjustment "in favour of" Caysand 24? What is to be added to or reduced from in order to "favour" Caysand 24 with an adjustment for interest expenses?

[104] In interpreting this clause it is relevant to note that clause 4.1 of the Heads of Agreement reveals by implication that Caysand 24 owned the stock of the business.

[105] The plaintiff contends the clause is ambiguous as to whether the adjustment referred to ought result in an increase or decrease of the calculated net profit. Given that alleged

ambiguity and because it was Caysand 24's lawyers who prepared the Heads of Agreement, the plaintiff submits the clause ought be construed *contra proferentem*, against the party who prepared it.[143] While the clause is not well drafted, I cannot conclude it is ambiguous on the particular point of concern. The plaintiff's argument in effect is that the clause confers an interest benefit on the company, thus reducing the cost of interest charged and increasing net profit but that seems to conflate the company with the business. Given the clause specifically relates to the calculation of net profit earned by the business, not the company, it is hard to see how increasing the net profit of the business on account of notional interest on stock owned by the company is an adjustment favouring the company.

[106] The clause appears to identify what is a notional cost of the business, borne by the company, that is interest on stock-in-trade owned by the company provided for the business to profit from. The adjustment to be made in favour of Caysand 24 is logically an adjustment which assumes the profit of the business is reduced so as to notionally compensate in favour of the company for it bearing the cost of funding stock-in-trade to the benefit of the business.

[107] That interpretation, which is the interpretation contended for by the defendants, appears to be the same interpretation the defendants were applying in the era culminating in the admission of 20 January 2010. As much may be inferred by reason of the content of the February 2009 profit and loss statement.[144] At the second page of that calculation there appears an entry styled, "cl 3.3 Less Interest on Caysand Stock, 10%". This entry appears along with a number of other entries identifying starting figures attributable to the combined total profit of the various departments of Caysand 24 calculated on the previous page. It is one of a series of entries commencing with the word "Add" or the word "Less" indicating whether the entry will result in a reduction, viz "Less", or an increase, viz "Add", to the profits per accounts calculation carried over from the previous page. That the clause 3.3 entry is endorsed "Less", indicating a reduction, is powerful evidence that in this era clause 3.3 was being correctly interpreted as requiring a reduction, not an increase, in the calculation of net profit.

[108] I am conscious in reaching that conclusion that the periodic columns in respect of the entry "Less Interest on Caysand Stock" record a $0 figure. At first blush, that suggests there was an error and the reduction was overlooked. However, at the base of the same page appear a series of notes, the second one of which reads: "Interest charge on vehicle stock as per cl 3.3 included in accounts." The accounts to which that entry refers are clearly the "profit per accounts" listings in the previous page, giving rise to the combined total profit of what that page describes as "PROFIT – Heads of Agreement Departments". That description is obviously a reference to the profit centres of the business being acquired under the agreement. The logical inference arising therefore is that in that era clause 3.3's interest charge on vehicle stock was included as a reduction in calculating net profit earned by the business on a department by department basis. Such an approach is consistent with the interpretation of the agreement urged by the defendants and favoured by me.

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[143] *Johnson v American Home Assurance Company* (1998) 192 CLR 266, 274.
[144] Ex 1 Vol 3 Tab B pp 1104-06.

[109] If that is what was being done earlier in the era culminating in the admission it is reasonable to infer the same methodology was applied by Caysand 24 in electing to make the eventual admission. That is, I infer the defendants did not apply an erroneous interpretation of clause 3.3 in concluding by 20 January 2010 that the target sum had been met.

[110] For the defendants to now argue that the application of such an interpretation ought give rise to a materially different result, the defendants might have demonstrated error in the detail of inventory of stock-in-trade used in the lead-up to the admission of 20 January 2010. This they have not done. Alternatively, they could have proved Caysand 24's inventory of stock-in-trade along with Caysand 24's other source records evidencing in combination what the net profit earned by the business was. This they have not done. It is noteworthy in this context that when Mr Coutts sought an explanation from Mr Hogbin of how the stock related calculation was made Mr Hogbin reported it was "made by the company financial Controller based upon daily stock levels, at 10% interest rate".[145] He confirmed that was a reference to Ms Caligaris,[146] the significance of whose absence as a witness has already been noted.

[111] On the whole of the evidence I am satisfied there was no error in the application of clause 3.3 to the defendants' assessment of its financial position culminating in its admission of 20 January 2010 that the target sum had been met.

The depreciation issue

[112] The depreciation interpretation issue goes to whether, pursuant to the Heads of Agreement, depreciation ought be charged to the company's business divisions so that the calculation of profit is adjusted to allow for depreciation.

[113] The Heads of Agreement is silent as to whether the calculation of profit, necessarily required by the agreement in order to ascertain whether the target sum has been met, ought be adjusted for depreciation. The February 2009 profit and loss statement makes no specific reference to depreciation either. It is not possible to discern whether its calculation of profit per department was adjusted to allow for depreciation, but it seems unlikely given the nature of the business arrangement which was the subject of the Heads of Agreement.

[114] The defendants submitted, effectively adopting an opinion expressed by Mr Hogbin in the joint expert report,[147] that the calculation of profit ought incorporate accrual based accounting principles, including depreciation. Reference was made to Australian Accounting Standards Board Standard 116 Property Plant and Equipment paragraph 50 which provides that the depreciable amount of an asset should be allocated on a systematic basis over its useful life.[148]

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145 Vol 1 Tab 5 p 358.
146 T3-14 L41.
147 Ex 1 Vol 1 Tab 5 pp 359-360.
148 No copy of this Standard was in evidence but it is readily accessible in the Australian Government's Federal Register of Legislation.

[115] Mr Coutts' report opined that the reference to profit in the Heads of Agreement should be treated as a reference to cash profit and not accounting profit. He explained:

> "This is because a notional sum, such as depreciation, cannot be retained at the benefit of the company. It is purely a tax adjustment. … Following normal accounting procedures it is evident that nominal amounts can never be applied to debt as they are non-cash adjustments and it is normal business practice to remove depreciation and other non-cash adjustments for the purpose of calculating business valuations in a sale."[149]

[116] He opined in a similar vein in the joint report:

> "In any business purchase, depreciation is disregarded as a non-cash expense in determining maintainable profit, as it does not affect the cash available to the business, but rather is an allocation of a prior period expenditure which is a tax adjustment for plant and equipment. As these amounts are to be retained by the company in satisfaction of vendor finance of $1,100,000 the true amount applied to the vendor finance should be the profit before depreciation."[150]

[117] Having regard to the ordinary practice in respect of the purchase of businesses, as well as the nature of the agreement under consideration, I readily conclude that depreciation should not be regarded as included in the calculation of net profit pursuant to the agreement. There is no evidence to suggest that any error about this issue infected Caysand 24's 2010 admission the target sum had been met.

The purchases of plant and equipment issue

[118] The interpretation point relating to purchases of plant and equipment is said to arise out of the second sentence of clause 2.2 of the Heads of Agreement:

> "If Clay, Shane, Grahame and Peter acquire a new business, effectively creating a new *profit centre* or department, or otherwise increases the value of the company's assets, the target sum will be increased by the amount determined by the company's accountants to reflect the increase in value."

[119] Mr Hogbin did not stumble upon an argument as to how this clause might benefit his clients' case until around the time of the conclave for the joint report. He opined:

> "[T]hat a further adjustment is necessary per clause 2.2 of the contract dated 16 June 2008 which states: … "or otherwise increases the value of the company's assets, the target sum will be increased by the amount determined by the company's accountants to reflect the increase in value". Therefore any subsequent purchases of new plant and equipment that exceed depreciation charges are to be added to the target sum. This results in addition to the inclusion of depreciation of $252,228, an increasing adjustment of $291,501 to the target sum as detailed in annexure D. In effect, the company has

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[149] Ex 1 Vol 1 Tab 4 p 337.
[150] Ex 1 Tab 5 p 358.

> acquired $543,729 assets over the period that will be part of the business transferred to Caysand 25."[151]

[120] Annexure D merely lists periodic columns of figures against the entry "Property, plant and equipment" and against other entries under the sub-heading "Less assets not part of Heads" under which are descriptions which appear to relate to real estate and a racehorse. It is plainly not a source document, not evidence of its content and counsel were unable to identify any more detailed supporting information about the assets or who purchased them.[152] However, the obvious implication of annexure D is that the property, plant and equipment referred to therein was property, plant and equipment acquired by Caysand 24, that is, by the company – a point to which I will shortly return. Mr Hogbin confirmed that is what he intended annexure D to represent, in responding to an opinion expressed by Mr Coutts.

[121] Mr Coutts opined:

> "With respect to Mr Hogbin's opinion, this position is incorrect, as the purchases of plant and equipment have been made using company funds therefore, while the value of assets have increased, the company's retained earnings have sustained an identical decrease. This makes the transaction a fiscal nullity. Under no circumstances, could it be considered that "Clay, Shane, Grahame and Peter" have increased "the value of the company assets". On this basis there is no justification for Mr Hogbin's eleventh hour adjustment for $291,501."[153]

[122] Mr Hogbin opined in response:

> "We note that Coutts argues that the additional assets were purchased out of company funds and therefore a nullity, however I contend that company funds were not part of the business as defined in preamble B as per normal business sale practice."[154]

[123] The above quoted response of Mr Coutts makes it clear that the property, plant and equipment referred to in annexure D is intended to refer to property, plant and equipment purchased by the company.

[124] The point that it was the business of the company not the company itself which was purportedly acquired per the terms of the Heads of Agreement, was at times conflated, even in the wording of the Heads of Agreement itself. For example, the very clause in question refers to the potential acquisition of a new business, effectively creating a new profit centre or department, but does not stipulate that such a business, profit centre or department ought be part of the business as effectively defined by clause B of the preamble of the Heads of Agreement.[155]

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[151] Ex1 Vol Tab 5 p 360.
[152] T4-35 L4 – T4-36 L47.
[153] Ex 1 Vol 1 Tab 5 p 359.
[154] Ex 1 Vol 1 Tab 5 p 360.
[155] In another example, the first sentence of the same clause refers to the target sum being profit retained not by the business but by Caysand 24.

[125] It might be thought that if the company increased the value of its assets as contemplated in clause 2.2, the question of whether the target sum ought be commensurately increased would turn, consistently with the object of the Heads of Agreement, upon whether those assets were to be treated as assets of the business being purchased. It is difficult to see why the target sum would be increased on account of increases in value of assets not being acquired under the agreement. Importantly, the second sentence of clause 2.2 does not, as Mr Hogbin seemed to think it did, refer to acquisitions by the company. Rather it refers to acquisitions or increases in the value of company assets by "Clay, Shane, Grahame and Peter".

[126] There is no evidence that the second sentence of clause 2.2 has any relevance in the present dispute because there is no evidence that "Clay, Shane, Grahame and Peter" acquired a new business or otherwise increased the value of the company's assets. There is no evidence to support an increase of the target sum because of increases in written down value of plant and equipment.

The stock valuation issue

[127] The stock valuation issue involves no particular point of interpretation about the meaning of the Heads of Agreement. It only arises in connection with the methodology adopted by Mr Hogbin once he set about trying to avoid the conclusion that the target sum has been met. It will be recalled his email of 11 June 2013 contained his purported amended Heads of Agreement calculations, along with a brief review of the adjustments made. That review, in referring to stock, observed:

> "Note that Caysand records stock at full cost.
> (For taxation purposes, stock is recorded at lower of market and net realisable value.)"[156]

[128] Mr Coutts took issue with this in his report of 15 May 2015 wherein he noted the plaintiff's solicitors had requested disclosure of stock lists and he noted material variations to earlier listed stock values. He concluded there was "evidence of material understatement of stock figures in the financial statements, which in effect reduces the profit of the business".[157] In his calculations he averaged the difference in 2009 and 2010 to arrive at an average adjustment of $221,751.43 and applied an adjustment of that amount to the 2010 year. He opined such an adjustment was only required for the one year because it would have a non-reversing corrective effect. It was explained by him in cross-examination as alleviating the uncertainty about the value of stock disclosed in the financial statements.[158]

[129] In the joint report Mr Coutts noted he still had concerns regarding the value of stock as disclosed in the original financial statements. He went on to explain that stock should be recorded at the cost it was purchased for without adjustments under tax law. He explained:

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[156] Ex 1 Vol 2 Tab 4 p 209.
[157] Ex 1 Vol 1 Tab 4 p 330.
[158] T2-30 L21.

> "[F]or accounting purposes, in determining profit, the closing stock should be valued at cost unless there is some compelling reason to adopt net realisable value. There is evidence in the stock lists that there appears to be a consistent policy of write down of stock from cost. This would only be a valid exercise if it was likely that the item would be sold for a loss. As the business has been trading profitably for a significant period of years it is unlikely that there is a consistent pattern of stock sales at loss."[159]

[130] I agree with Mr Coutts' inference. Mr Coutts explained he had only made the adjustment in respect of one year on the basis that the understatement would not be replicated in the fourth periods.

[131] Mr Hogbin, in the joint report, disputed Mr Coutts' approach. He noted the effect of a stock adjustment is reversed in the following year when the closing stock for the previous year becomes the opening stock for the current year and thus inferred that the proposed adjustment had to have been premised on an assumption that stock is overstated "right until the end of the period in question" of which there was no evidence.

[132] Were it necessary to decide this point I would favour Mr Coutts' approach as an appropriate counter to a likely invalid write down exercise. However, the dispute is an academic one. There has been no evidence advanced to conclude that the process giving rise to the admission of 20 January 2010 involved a profit calculation rendered erroneous by errors in respect of stock adjustments. It follows this issue can only be of relevance to the defendants' attempt to now prove, contrary to that which was admitted in 2010, that the target sum has not been met. As already explained, that attempt ultimately involved no more than an expert advancing his conclusions without the evidentiary foundation for them being properly proved.

The income tax issue

[133] The income tax issue involves a dispute of methodology arising from the common ground position that the calculation of profit should allow for tax. Mr Hogbin contends the tax actually paid by the company should not be used to determine profit and rather it should be a notional sum calculated as "30% of 'the business' adjusted profit".[160] He contends in the alternative that the actual tax paid is to be taken into account. His rationale for fixing upon a notional tax expense in respect of the profit of the business is presumably motivated to some extent by his understanding that other less profitable units of the company's operation, not part of the business, contributed an overall tax saving to the company.

[134] Mr Coutts on the other hand contends that the actual tax paid by the company is the tax that should be taken into account. In this context, pursuant to clause 1.5, it was the company, not a discrete business arm of the company, which was to retain profit. He explained in evidence:

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[159] Ex1 Vol 1 Tab 5 pp 360,361.
[160] Ex 1 Vol 1 Tab 5 p 9.

> "[I]f you're referring to amounts retained to the company, clearly the tax paid is what is subtracted from the company coffers, not some notional sum which may or may not represent sums which are paid by the company."[161]

[135] Mr Coutts' approach has superficial attraction but does not rest well with Head of Agreement clause 1.5 which refers to "the residue of the net profits". That reference carries the implication that the exercise of calculating profit, i.e. taking into account variables such as tax, will already have occurred before it is notionally retained by the company. Mr Hogbin's approach is preferable because it is more consistent with the agreement.

[136] Mr Hogbin's evidence is silent as to whether his favoured approach was the approach taken back in the era culminating in the admission that the target sum had been reached. However there is good reason to infer that his methodology was the methodology applied back in the era culminating in the admission of 20 January 2010 that the target sum had been met.

[137] The February 2009 profit and loss statement calculated the profit of the company's departments that are the subject of the Heads of Agreement, arriving in each periodic column at the calculation of "net profit before tax". It then expressly reduced the amount by a figure described as "less taxation on calculated profit 30%" to then give rise to the "profit per agreement". On the face of it, the approach urged by Mr Hogbin in respect of the present issue was the approach taken by his accountancy firm in the lead-up to the admission.

[138] It is reasonable to infer there would not have been a departure from this approach in the process culminating in the decision to announce the target sum had been met, particularly bearing in mind Mr Hogbin was involved in that process.

The income splitting issue

[139] It will be recalled clause 1.1 of the Heads of Agreement provided Mr Fulmer and Clay Thompson were each "entitled to a gross remuneration of $80,000 per annum (plus compulsory superannuation) which will be paid to them in accordance with their directions, or such other amounts agreed between the parties from time to time". Pursuant to clause 1.5 "an amount equal to the gross remuneration paid to them was to be deducted from net profits otherwise distributed to them".

[140] The issue as between the experts is what benefits ought come within the description of gross remuneration paid? It might be thought the answer was well known to Caysand 24 when it was remunerating each man but there are said to be two factual complications. The first is that at one stage Mr Fulmer's remuneration was split with some paid to his wife and the balance paid to him. The second is that after Mr Fulmer and his family moved to Cairns for him to work at Boat Scene, Caysand 24 provided them with rent free accommodation.

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[161] T2-26 L18.

[141] The language of the agreement's reference to remuneration "paid" to Mr Fulmer and Mr Thompson and it being an "amount" bespeaks a remuneration of designated monetary worth. There would need to be some material evidence of part of the designated monetary worth of the remuneration being substituted, not added to, by the value of a fringe benefit before a fringe benefit could be regarded as coming within the remuneration the agreement refers to. As will be seen there is no such evidence.

[142] As to income splitting in respect of the remuneration of Mr Fulmer and Mr Thompson, if part of the designated monetary worth of the remuneration was not "paid to them in accordance with their directions" as clause 1.1 requires, then it would not be their remuneration. However, the clause's reference "to them" does not in context literally require payment direct to them. If one of them directed part of their remuneration be paid to them by being paid to another such as a spouse it would be paid to them as part of their remuneration. However, where, as here, there is evidence the spouse was in fact working for the company, there would need to be evidence of the terms of such a direction by Mr Fulmer or Mr Thompson in order to retrospectively redesignate part of a wage paid to a spouse as remuneration paid under the agreement. There is no adequate evidence thereof.

[143] The evidence about each of these complications, raised in cross-examination with Mr Fulmer, is vague at best. He agreed his remuneration of $80,000 per annum was increased to $100,000 per annum.[162] He did not know if when paid $80,000 per annum he was paid $40,000 and his wife was paid $40,000. When asked whether when paid $100,000 per annum it was split $60,000 and $40,000 as between he and his wife he said he believed there was some wage splitting happening which he thought was happening across the board but that he had nothing to do with it.[163] However, he also testified his wife, Jennifer, actually worked for the Boat Scene business,[164] after moving to Cairns, through to the end of 2011 when she was made redundant.[165]

[144] He acknowledged it had been thought her wages ought be $50,000 per annum and that their combined entitlement of $150,000 per annum was paid to them split as $70,000 and $80,000.[166]

[145] As to the rent aspect, it was put to Mr Fulmer in cross examination that Caysand 24 "began to pay rent" on the residence his family occupied to which he responded:

> "It was initially agreed to do that when I first moved to Cairns as part of the deal with moving up here, initially."[167]

[146] It appears from the joint report that Mr Hogbin's calculations count at least some of Mrs Fulmer's wages as well as the fringe benefit of free rental as included in Mr Fulmer's remuneration.[168] Mr Coutts, who disagrees with both inclusions, notes there is no evidence in such PAYG summaries as could be obtained of the inclusion of any reportable

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[162] T2-12 L43.
[163] T2-12 L46 – T2-13 L2.
[164] T2-13 L7.
[165] T1-36 LL5-19.
[166] T2-13 LL15-23 (also see exhibit 5, received with qualification at T2-14).
[167] T2-12 L38.
[168] Ex 1 Vol 1 Tab 5 p 353.

fringe benefits amounts as required by legislation.[169] He also alludes to having been told rent had been paid in lieu of payments of wages for some years to Mrs Fulmer.[170] This hearsay information has not been proved but equally no evidence of the detail of what was actually occurring has been adduced by the defendants. Mr Coutts draws attention to this in his comments in the joint report highlighting limitations in the information disclosed in respect of remuneration, complaining of the absence of complete disclosure of PAYG summaries and the provision of payroll or ledger reports which he is concerned are inaccurate.[171]

[147] Once again there is inadequate evidence of the information relied upon for the purposes of the calculation models advanced. The defendants' counsel, implicitly conceding the absence of adequate objective records, submitted:

> "93. This is also an area in which Mr Hogbin's, and his firm's, role as the accountants for the Defendants would have given them a distinct advantage in performing the quantitative task involved in determining whether or not the '*target sum*' has been reached, within the meaning and for the purposes of clause 2.2 of the Heads of Agreement.
>
> 94. Mr Hogbin's assessment should be preferred for that reason, alone.
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> 95. Mr Hogbin's role as the Defendants' accountant could also, here, be expected to have assisted him in making the evaluative, impressionistic judgments necessary to identify and apportion that part of the remuneration received by the Plaintiff's spouse, Ms Jenny Fulmer, that might be attributed as remuneration paid to her at the direction or request of the Plaintiff under and in accordance with clause 1.1 of the Heads of Agreement."

[148] I am unable to accept Mr Hogbin's familiarity with Caysand 24's business can substitute an absence of evidence in support of his calculations. However, the point raised by those submissions shows why there is good reason to infer that Caysands 24's admission of 20 January 2010, made when Mr Hogbin was one of the HQB partners assisting Caysand 24, was most unlikely to be infected with error in respect of the present issue.

[149] The February 2009 profit and loss statement allows for the adding back of wages in the "adjusted total profit", which is consistent with the agreement's approach of characterising that remuneration as having been funded from net profit (per the first part of clause 1.5), and then deducts wages from the "percentage entitlement", which is consistent with the agreement's approach of including the remuneration amount in Mr Fulmer's and Clay Thompson's apportioned profit share entitlement (per the second part of clause 1.5).[172] None of the wages amounts recorded in those calculations appear improbable. The calculation shows an apparently properly considered approach to allowing for remuneration in determining progress towards the target sum. It supports the inference remuneration was likely taken into correct account when Caysand 24 admitted the target sum had been reached.

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[169] Ex 1 Vol 1 Tab 5 p 368.
[170] Ex1 Vol 1 Tab 5 p 368.
[171] Ex 1 Vol 1 Tab 5 p 367.
[172] Ex 1 Vol 3 Tab B p 1106.

The prior payment issue

[150] As explained at [19] above the Heads of Agreement failed to refer to the earlier deposit of $150,000 made pursuant to the oral agreement. The defendants, ever avoidant, contend that payment should not be counted as a contribution towards the target amount for the purpose of calculating whether the target amount has been reached.

[151] The defendants pleaded that under the oral agreement the payment of $150,000 to be made both by Mr Fulmer and Clay Thompson was "a single non-refundable amount…described, variously as 'hurt money' or as a 'commitment fee', and which would not form part of…the agreed purchase price".[173]

[152] Mr Fulmer gave uncontradicted evidence that such terms were never discussed with him.[174] He testified if the $150,000 payment had been characterised in those terms he would not have entered into the agreement at all.[175] His uncontradicted evidence of the oral agreement, which I accept, is that it was to be a deposit on his $550,000 share of the $1.1 million purchase price, leaving him owing a further $400,000 on that price, to be paid from profits generated.

[153] Mr Fulmer agreed in cross-examination that he had paid the $150,000 well before the creation of the signed Heads of Agreement.[176] During cross-examination Mr Fulmer was taken to various clauses in the Heads of Agreement and asked why those clauses did not reflect that the $150,000 payments (by Mr Fulmer and Clay Thompson) were to be deducted from the purchase price of $1.1million. It was acknowledged by Mr Fulmer that this was not reflected in the wording of clause 2.1 and clause 3.1 of the Heads of Agreement.[177] However, Mr Fulmer's testified, "It was always understood that the 150,000 I paid would come off the target sum".[178] He is plainly correct in that understanding, an understanding obviously shared in by the defendants.[179]

[154] Mr Hogbin accepted that in Caysand 24's records the $150,000 payment had been deducted from the amount owing on the target sum.[180] It is noteworthy that, well after the Heads of Agreement had been entered into, the email sent by Mr Hogbin to Mr Thompson on 24 October 2008, mentioned that the $1.1million amount referred to in clause 2.2 of the Heads of Agreement, is to be reduced by the initial contribution of Peter Fulmer and Clay Thompson in the figure of $150,000 each. [181] Mr Hogbin agreed this is what had been advised and confirmed by Mr Thompson at their meeting the day prior to that email being sent.[182]

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[173] Amended Defence and Counterclaim [2(a)(iii)].
[174] T2-4 LL1-9.
[175] T2-4 LL10-35.
[176] T2-8 LL28-29.
[177] T2-10 L5 to T2-11 L20.
[178] T2-10 L35; T2-11 LL19-20.
[179] To remove doubt, I give no weight to Mr Hogbin's belated, partisan characterisation of the payment as a loan.
[180] T2-73 LL3-6.
[181] Ex 10.
[182] T2-73 LL25-27.

[155] Even more recently the February 2009 profit and loss statement showed the "initial contribution" amount of $300,000 (obviously the total of the contributions made by Mr Fulmer and Clay Thompson) as deducted from the target amount.[183]

[156] Against this background I infer Caysand 24 did count Mr Fulmer's $150,000 payment in reduction of the target amount in concluding by 20 January 2010 that the target sum had been reached. I do not conflate the significance of that fact with deciding if they were correct to do so, subsequent conduct not ordinarily being useful in the determination of a contract's meaning.[184] Its significance is that if the $150,000 did count towards the target sum under the agreement then it was properly allowed for by Caysand 24 in its admission.

[157] The defendants submit the $150,000 deposit should not be deducted from the target sum because the deposit was not mentioned in the Heads of Agreement and the Heads of Agreement's provision for the calculation of the target sum does not carry an inferential reference to it. The plaintiff deals with this not by seeking rectification to correct a mistake of omission. Rather he pleads the parties in executing the deed containing the Heads of Agreement "varied the Oral Contract to the extent the terms of the Deed are inconsistent with the terms of the Oral Contract".[185]

[158] Implicit in this is an argument that the Heads of Agreement does not constitute the entirety of the agreement. Importantly the Heads of Agreement is not expressed as containing or evidencing the entire agreement. Rather, at recital D, the Deed is said to evidence the terms of the agreement reached between the parties "with respect to the conduct of the business … and the transfer of the business on the completion date". The agreement there referred to is obviously the agreement referred to earlier in recital C, which is obviously a reference to the oral agreement. Significantly though, recital D records an intention to evidence not the whole of that agreement but only those terms "with respect to" the conduct and transfer of the business.

[159] The oral agreement for the payment of the $150,000 towards the respective $550,000 contributions to the $1.1 million purchase price is referable more to consideration than the conduct and transfer of the business. Against this background, while some clauses of the Heads of Agreement are obviously relevant to consideration, their presence does not compel the conclusion they cover the field in evidencing what was agreed as to consideration.[186] Thus the inclusion of the essentially vendor financed payment scheme contemplated by clause 1.5 and 2.2 is not inconsistent with the continued existence of that part of the oral agreement which also provided for a $150,000 purchaser financed contribution towards the target sum.

[160] The defendants also submitted there was inconsistency with clause 3.1. There is no inconsistency. Clause 3.1(1) is expressly linked to an acquisition which had not even occurred at the time of the oral agreement. Moreover clause 3.1(2) only requires interest be paid from 2009 on the unpaid balance of a component of the purchase price which is greater than the $300,000 deposit total of present concern.

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[183] Ex 1 Vol 3 Tab B p 1105.

[184] Lewison, L and Hughes, D The Interpretation of Contracts in Australia 1st ed Thomson Reuters, Sydney 2012 pp 122-130.

[185] Statement of Claim [22(b)]. The alternatives in [22(a) and (c)] were not pursued – T5-36.

[186] Cf *Helicopter Sales Pty Ltd v Rotorwork Pty Ltd* (1974) 132 CLR 1,12. Such reasoning, rejected here, sometimes attracts the maxim *expressum facit cessare tacitum.*

[161] The oral agreement's provision for the $150,000 contribution and its application in reduction of the target sum persists. The target sum referred to by the Heads of Agreement should therefore be taken to have been reduced by the respective payments of $150,000 each.

The Boat Scene issue

[162] There are two issues remaining of relevance to Boat Scene – its inventory surcharge and the indemnity. They have some connection but are simplest dealt with in turn.

[163] The first issue has largely been dealt with in the above analysis of the inventories surcharge issue. It will be recalled from that analysis that the defendants' argument, with which I agreed, is that Heads of Agreement clause 3.3 contemplates an adjustment, calculated as interest on value of stock in trade, which favours Caysand 24 as a reduction from the profit of the business so as to notionally compensate the company for it bearing the cost of funding stock-in-trade to the benefit of the business.

[164] The point appears to have been argued separately in its application to Boat Scene on the basis it bears upon the potential indemnity referred to in clause 7. The argument appears to be that the adjustment reduction of Boat Scene's profit per clause 3.3 may occur even where no net profit has been earned after the adjustment so that it should also work as an adjustment increasing the quantum of loss so as to inflate any trading loss mentioned in clause 7.

[165] The argument is academic given the conclusion I will shortly articulate as to whether Boat Scene incurred a trading loss. However, I would not regard clause 3.3 as having the reach contended for by the defendants. In part that is because the term "trading losses", used in clause 7, is not suggestive of non-trading losses, that is to say, notional losses. More particularly though, it is because clause 3.3 is worded as operating when calculating "net profit", not "net profit or loss", let alone "trading losses".

[166] In my above analysis of the inventories surcharge issue I noted the February 2009 profit and loss statement did include a reduction pursuant to clause 3.3 in respect of Caysand Stock. I note that document appears to deal with Boat Scene stock separately. However, it also does so in a way consistent with clause 3.3. Under the heading "PROFIT – Heads of Agreement Departments" is included the entry "cl 3.3 Less Interest on Boatscene Advances 10%" against which in the periodic columns reductions appear from the era after Boat Scene was acquired. Note 3 at the base of the page explains the description "Interest on Boatscene Advances" relates to the "Interest Charge on Boatscene stock as per cl 3.3".

[167] This supports the conclusion that the subsequent admission the target sum was met was not infected with error in the application of clause 3.3.

[168] As to the other Boat Scene issue, the indemnity, there has been a belated attempt to contend there were trading losses, giving rise to a counterclaim founded upon the operation of clause 7.

[169] It will be recalled clause 7.2 requires Mr Fulmer and Clay Thomson to jointly and severally indemnify Caysand 24 against any trading losses occurring with respect to Boat Scene prior to the completion date – that date being 60 days after the target sum is reached. Clause 7.2 relevantly provides:

> "Clause 7.2 creates a right of action against Peter and Clay which Caysand 24 may take, subject to it taking the following steps:
>
> > (1) with respect to any financial year prior to the completion date, if the *Boat Scene Profit Centre* makes a loss as reported by Caysand 24's financial controller, Caysand 24 shall report the loss to the company's accountants for verification; and if the loss is certified as correct by the company's accountants, this shall be prima facie evidence that the loss has been sustained ("the loss")." (emphasis added)

[170] While clause 7.2(1) provides the accountant's certificate is prima facie evidence of the loss it also requires two steps to be taken: Caysand 24's financial controller must report the loss and Caysand 24 must report the loss to its accountants. The express inclusion of those two steps compels the conclusion that the need for them to be taken is not dispensed with merely by the issuing of the accountant's certificate. Indeed, the loss to be referred to in the accountant's certificate must necessarily be "the loss" reported in the two steps.

[171] An accountants certificate was purportedly issued in the present case. Remarkably that did not occur until after the filing of the present claim. Mr Hogbin wrote:

> "We refer to the said Agreement and in particular clause 7.2 relating to Indemnity of Boatscene Profit Centre.
>
> I certify the following to be based upon the financial records of Caysand No 24 Pty Limited.
>
> | | | |
> |---|---|---|
> | Trading result of Boatscene Profit Centre for the period July 2007 to 31 October 2012 is | | $(1,844,749) |
> | Loss | | |
> | Add back Capital Loss on sale of Boatscene | | 268,397 |
> | Adjusted Loss from trading | | (1,576,352) |
> | Amount of this loss that is offset by trading profit of other profit centre's | 60% | 945,811 |
> | Amount due in accordance with the indemnity | | $ (630,541)"[187] |

[172] The certificate does not indicate that the loss to which it refers is a loss of the kind referred to in clause 7.3(1), that is, a loss as reported by the financial controller and reported by Caysand 24 to the company's accountants. It merely certifies the loss it mentions is based upon the financial records of Caysand 24. That is not "the loss" referred to in clause 7.3(1). On the face of it, all that has occurred is that Mr Hogbin has concluded there has been a loss based upon Caysand 24's financial records. Whether or not he genuinely reached such a conclusion in his own right it was necessary for him to certify as correct a loss which the company had actually reported to him, of a loss actually reported by its financial controller. The certificate does not on its terms relate to such a reported loss nor

[187] Ex 6.

is there evidence of such reporting. The certificate is not a certificate issued in accordance with clause 7.3(1) and is therefore not prima facie evidence of its content. The counterclaim must therefore fail.[188]

[173] Even if the certificate was prima facie evidence I would in any event reject it as outweighed by other evidence compelling the inference that in fact there was not a trading loss sustained by Boat Scene. As outlined at paragraphs [20] and [21] Caysand 24 provided information to Chase Manhattan Business Brokers and Coates Real Estate, during the relevant era, indicating the business was running profitably. Moreover, in the February 2009 profit and loss statement the entries against Boat Scene's four accounts in the "Profits per accounts" section shows when they are viewed collectively that Boat Scene was profitable.[189] Further, it was implicit in the considered decision to announce on 20 February 2010 the target sum had been met that there had been no intervening reversal of fortune in respect of Boat Scene.

[174] Once again the defendants' case confronts the dilemma that to displace the conclusion flowing from the admission against interest of 20 January 2010 it was incumbent on them to properly prove that they had actually made a big mistake about the true financial position of their own company and that in reality Boat Scene did incur trading losses and the target sum had not been met. That did not occur.

[175] The counterclaim must fail.

Completion date 21 March 2010

[176] I conclude consistently with the admission of 20 January 2010 that by 20 January 2010 the target sum had been met. Given the content of the above discussed emails preceding it the probability is the target sum had been met prior to then. However, since it is impossible to be precise about that, I find the target sum was met on 20 January 2010. It follows I find the completion date was 60 days after that, namely 21 March 2010.

Remedies

[177] The plaintiff has succeeded in establishing his entitlement pursuant to the agreement. He has been wrongly deprived of the benefits of his entitlement pursuant to the agreement since 21 March 2010 and judgment should be given for him.

[178] The plaintiff sought a wide variety of remedies beyond specific performance, including damages, declarations, compensation, and an account of profits. Whether the foundation for some of the remedies has been made out is in issue and has been the subject of submissions. However, the need for me to articulate conclusions about some of them may fall away in the wake of the parties' consideration of the conclusions I have reached.

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[188] It is therefore unnecessary to also discuss the apparent failure of the served demand to comply with the curious terms of clause 7.3(4) by requiring the reimbursing of "the amount of the loss which occurred in the relevant calendar quarter".

[189] Ex 1 Vol 3 Tab B p 1105.

[179] It appears inevitable the plaintiff will now need to elect between at least some of the remedies sought. Further there may be utility in allowing the parties to determine whether any common ground exists as to the preferred remedy or remedies.

[180] The appropriate course is to allow the parties some modest time to review their position (if more is reasonably required they can seek it) and then hear further from them as to the appropriate orders for relief.

[181] While costs should follow the event I will await the further disposition of the matter before articulating an order as to costs.

Orders

[182] My orders are:

1. Judgment for the plaintiff.

2. Counterclaim dismissed.

3. The plaintiff will file and serve a list of the orders he seeks by 4 pm on 7 July 2017.

4. I will hear the parties at 9.15am on 14 July 2017 as to appropriate further orders.